No. 16-1307

In The
Supreme Court of the United States

ALI HAMZA AHMAD SULIMAN AL BAHLUL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The District Of Columbia**

BRIEF OF PROFESSOR JENS DAVID OHLIN AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST

Amicus curiae Jens David Ohlin is a professor of law at Cornell Law School and an expert on international law, criminal law, and the laws of war.[1] His teaching, research, and publishing focuses on these topics. *Amicus* Ohlin has an interest in promoting the correct application of international law generally in the domestic legal system. More specifically, *amicus* has an interest in the proper functioning of military commissions and the exercise of their jurisdiction, which is limited to the adjudication of allegations of violations of the international laws of war.

This case involves the appeal of a defendant who was charged with, *inter alia*, the crime of conspiracy before a U.S. military commission. *Amicus* has written numerous articles about the crime of conspiracy under domestic criminal law, international criminal law, and the law of war, and therefore has a unique and special interest in the fate of conspiracy as a triable offense before military commissions exercising their jurisdiction to try offenses against the law of war. *Amicus* has an interest in the correct interpretation of the "law of war" as a creature not of domestic law but rather of international law, consistent with prior Supreme Court

[1] Pursuant to Supreme Court Rule 37.6, I note that no part of this brief was authored by counsel for any party, and no person or entity other than *amicus curiae* and Cornell Law School made any monetary contribution to the preparation or submission of the brief. All parties were given timely notice of intent to file this *amicus* brief. This brief is filed with the written consent of all parties pursuant to this Court's Rule 37.2(a). Copies of the requisite consent letters have been filed with the Clerk.

precedents, the structure of the law of war, and the history of the field going back to the natural-law era.

SUMMARY OF ARGUMENT

In this case, petitioner Al Bahlul was convicted of multiple offenses before a military commission, including conspiracy, solicitation, and material support for terrorism. *See United States v. Al Bahlul*, 820 F. Supp. 2d 1141, 1167, 1183 (U.S.C.M.C.R. 2011). On appeal, the U.S. Court of Appeals for the D.C. Circuit vacated the convictions for solicitation and material support. *Al Bahlul v. United States*, 767 F.3d 1, 5 (D.C. Cir. 2014). The sole remaining charge at issue in this litigation is Bahlul's conviction for conspiracy.

In *Hamdan*, Justice Stevens's four-vote plurality opinion concluded that a stand-alone conspiracy charge was not prosecutable at a military commission because it was not a violation of international law. *Hamdan v. Rumsfeld*, 548 U.S. 557, 604 (2006). In this case, however, the U.S. government has not relied on the classification of conspiracy as an international law offense. Instead, the government maintains that military commissions have jurisdiction to adjudicate the charge of inchoate conspiracy, despite the incongruity between that criminal offense and international law.

In proceedings below, counsel for the U.S. government has advanced various arguments for why military commissions have jurisdiction to try conspiracy – a domestic offense – even though the Supreme Court

has made clear in prior decisions that the jurisdiction of military commissions is limited to the adjudication of violations of the law of war. These arguments all rely on the implausible suggestion that the "law of war" straddles the divide between international and domestic law, and that there exists a little-known domestic body of law called the American common law of war. According to the government, conspiracy is consistent with this newly re-discovered American law of war because the offence is entrenched in the common law, the legal culture of the United States, and Civil War commission practice.

This domestic "law of war" argument is problematic for multiple reasons. Although prior cases in this Court and elsewhere include references to something called the "common law of war," *see, e.g.*, *Quirin*, 317 U.S. 1, at 34, it would be legally and historically inaccurate to conclude that this phrase refers to a domestic body of law. Rather, an analysis of every mention of this phrase over the last 200 years demonstrates that the "common law of war" refers to international law – a law "common" to all mankind.

Determining the proper scope of the "law of war" in this context – i.e., whether it is international or domestic – has large implications for establishing the outer contours of the jurisdiction of military commissions. Given that military commissions operate outside of Article III, without the right to a jury trial protected by the Fifth and Sixth Amendments, the resolution of this case is essential for demarcating the proper boundaries between a civilian system of criminal

justice and a military system for prosecuting detainees captured pursuant to the laws of war. For these reasons, it is imperative for this Court to grant certiorari to resolve this fundamental federal question pursuant to Rule 10(c).

ARGUMENT

I. THE SUPREME COURT IN *EX PARTE QUIRIN* LIMITED THE JURISDICTION OF MILITARY COMMISSIONS TO OFFENSES UNDER THE INTERNATIONAL LAW OF WAR.

This court, in *Ex parte Quirin*, was tasked with deciding the fate of Nazi saboteurs who landed off the coast of the United States and proceeded inland in clandestine fashion, without uniforms, with orders to commit violent acts against American installations. This Court upheld their convictions at a military commission, which this Court held had jurisdiction to prosecute offenses against the law of war. *See Ex parte Quirin*, 317 U.S. 1, 25 (1942).

This court's decision in *Quirin* is replete with comments that make clear that the Court understood the law of war to be an international body of law. The court noted that by "universal agreement and practice," the law of war "draws a distinction between the armed forces and the peaceful populations of belligerent nations, and also between those who are lawful and unlawful combatants." *Id.* at 30-31. Universal agreement

and practice constitute the raw materials from which international law – especially customary international law – is formulated. *See Paquete Habana*, 175 U.S. 677, 708 (1900). In this case, the practice of nations involved in armed conflict has established the applicable rules regarding detention (and immunity for privileged combatants) that shall apply under the law of war.

More specifically, regarding the specific charges levied against the defendants in *Quirin*, this court noted that "[t]his precept of the law of war has been so recognized in practice both here and abroad, and has so generally been accepted as valid by authorities on international law that we think it must be regarded as a rule or principle of the law of war recognized by this Government by its enactment of the Fifteenth Article of War." *Quirin*, 317 U.S. at 35. Here again, this Court made clear that the law of war is a creature of international law, not domestic law, and that the applicable rule penalizing the conduct of the defendants was formed, not simply by the sovereign prerogative of the U.S. government, but more properly by the community of nations that had deemed the conduct impermissible. Moreover, Congress, instead of defining the law of war itself by statute, simply incorporated it by reference in the Articles of War, thus leaving to the Supreme Court to determine whether the charges in the *Quirin* case were violations of the law of war as a branch of international law.

Although this Court determined that the charges of spying and sabotage in *Quirin* were violations of the law of war, many commentators have, in the ensuing

years, questioned that conclusion. Specifically, many have suggested that spying is a violation of domestic law but not international law. For example, the eminent law of war expert Richard Baxter, in the years after *Quirin*, suggested that this Court had confused conduct which violates the international law of war with unprivileged conduct which violates domestic law. *See* Richard Baxter, *So-Called 'Unprivileged Belligerency': Spies, Guerrillas, and Saboteurs*, *in Humanizing the Laws of War: Selected Writings of Richard Baxter* 37, 44 (Detlev F. Vagts et al. eds., 2013). In other words, a spy who does not wear a military uniform is not entitled to the lawful combatant's privilege of immunity and therefore can be prosecuted for his violation of domestic criminal law. But this unprivileged violation of domestic law should not be confused with a violation of the law of war under international law.

The point here is that even if this Court erroneously classified spying as an offense under one body of law as opposed to another, the general background assumption of the *Quirin* court was clear and provides guidance for today's Supreme Court. The *Quirin* court upheld the charges and the jurisdiction of the military commission because it believed that spying violated a body of international law. In this way, the court was clear that it viewed the jurisdiction of the military commissions as circumscribed by a body of law whose content was developed by the international community. It would be perverse to conclude that military commissions have jurisdiction over domestic law of war offenses just because the *Quirin* court upheld a

conviction for spying, given this court's repeated references to international law in that opinion.

The *Quirin* decision nonetheless includes a stray reference to the "common law of war," a confusing phrase that at first glance might suggest that military commissions could use a common-law power to interpret and apply the law of war with a distinctively American flavor. In the government's telling, this process is analogous to a New York court developing the common law of contracts or the common law of torts in a way that fundamentally diverges from how the courts of Massachusetts or Pennsylvania understand them.

Indeed, in appellate proceedings below in Bahlul's case, the government has seized on this "common law of war" language to suggest that military commissions have jurisdiction to adjudicate charges under two flavors of the law of war, one international and the other domestic. *See* Brief for the United States, *Al Bahlul v. United States*, 2015 WL 6689466 (D.C. Cir. 2015), at 45 (erroneously defining the common law of war as "the practice of our own military authorities before the adoption of the Constitution, and during the Mexican and Civil Wars");[2] Brief for the United States, *Al Bahlul v. United States*, 2012 WL 1743629 (D.C. Cir. 2012), at 28 ("The United States has termed this body of law a domestic 'common law of war,' but whatever

[2] Although the quoted phrase appears in the *Quirin* decision, it is not the definition of the "common law of war" nor does it appear in close proximity to the phrase.

terminology is employed, it has long been clear that a class of wartime offenses exists that national authorities may criminalize and punish as a matter of domestic law."). Under this view, military commissions have the authority to develop, through their common-law power, a set of domestic norms regarding what conduct is, and is not, a punishable offense during an armed conduct.

This view is conceptually infirm for two basic reasons. First, the law of war by necessity must be an international body of law, for it seeks to bind all parties to an armed conflict with legal norms that apply transnationally and globally. Talking of a domestic law of war makes just as much sense as talking of a "domestic law of physics." *See* Peter Margulies, *Defining, Punishing, and Membership in the Community of Nations: Material Support and Conspiracy Charges in Military Commissions*, 36 Fordham Int'l L.J. 1, 5 (2013). The guiding principle behind the law of war is to "protect civilian populations and prisoners of war from brutality. . . ." *Application of Yamashita*, 327 U.S. 1, 15 (1946). *See also* Geoffrey S. Corn & Eric Talbot Jensen, *Untying the Gordian Knot: A Proposal for Determining Applicability of the Laws of War to the War on Terror*, 81 Temp. L. Rev. 787, 799 (2008) ("ultimate purpose of the drafters of the Geneva Conventions was to prevent "law avoidance"), *cited in N.Y. Times Co. v. U.S. Dep't of Justice*, 756 F.3d 100, 140 (2d Cir. 2014).

These goals cannot be successfully advanced if the law of war is subject to radical localism, each nation articulating and developing for itself a set of insular

rules regarding the practice of warfare. Rather, the law of war is designed as a system of reciprocal constraints, based on treaty and custom, and embodying the wide and transnational agreement that both of those sources of law require. *See* J.D. Ohlin, *The Assault on International Law* 47 (2015). A domestic law of war is thus no "law of war" at all because it accomplishes none of the tasks assigned to it by belligerents of an armed conflict or by the world community. In the government's rendering of the law of war, the concept has degenerated into something that can only be called "enemy criminal law," i.e., the rules that govern the prosecution and punishment of enemy belligerents before domestic tribunals.

The government has supported its interpretation of the common law of war by citing passages from Colonel Winthrop's influential treatise on military law, which includes references to domestic offenses. *See* Brief for Respondent, *supra*, 2012 WL 1743629, at 25-29. It is true that Winthrop refers to the "acts and orders of the military power," which would include the prior decisions of military commissions, but he also unambiguously defines the "law of war" as "that branch of International Law which prescribes the rights and obligations of belligerents, or – more broadly – those principles and usages which, in time of war, define the status and relations not only of enemies – whether or not in arms – but also of persons under military government or martial law and persons simply resident or being upon the theatre of war, and which authorizes

their trial and punishment when offenders." *See* 2 William Winthrop, *Military Law and Precedents* 1203 (1886). None of this suggests that the law of war constitutes a branch of U.S. law that authorizes prosecution for domestic crimes. Rather, it suggests that international law is often *applied* by domestic courts – a reasonable intuition given the relative paucity of international fora for adjudication. Courts can and should look to domestic precedents to decipher the *content* of the international law of war, but in doing so must balance those domestic precedents against the classic sources of international law.[3] This methodology should not be used to transform the law of war into a provincial affair, and the gestalt of Winthrop's treatise is respect for, rather than divergence from, international law.

Second, as will be explained in the next section, the "common law of war" refers to the rules of international law that apply during non-international armed conflicts and apply to non-state actors because the rules are "common" to all mankind.

[3] For example, it is commonplace for a federal court, tasked with deciding a question of international law, to look to relevant precedents in the federal court *in addition to* treaties, customary international law, the decisions of international tribunals, i.e. the classic sources of international law.

II. REFERENCES TO THE "COMMON LAW OF WAR" IN THE LIEBER CODE AND THE LINCOLN ASSASSINS TRIAL DO NOT REFER TO A DOMESTIC BODY OF LAW.

The phrase "common law of war" is an obscure reference that has fallen out of regular usage among both international legal scholars and military lawyers. However, the phrase appears repeatedly in the Lieber Code, which was drafted by Francis Lieber at the request of President Lincoln. *See* General Orders No. 100: Instructions for the Government of Armies of the United States in the Field (Apr. 24, 1863). For example, Article 13 defines the outer limits of military jurisdiction when it notes that "military offenses which do not come within the statute must be tried and punished under the common law of war." The phrase also appears in Article 19, which declares that commanders should inform the enemy of their intent to attack except when surprise is a military necessity; in the latter situations "it is no infraction of the common law of war to omit thus to inform the enemy." *Id.* Article 101 notes that deception is consistent with "honorable warfare," although the "common law of war" permits capital punishment for "clandestine or treacherous attempts to injure an enemy. . . ." Finally, Article 103 stipulates that spies and traitors need not be exchanged "according to the common law of war," and presumably may be prosecuted instead.

Given the repeated references to the common law of war in the Lieber Code, one might be left with the impression that the phrase was in common usage

during the 19th Century and that its fall into obscurity is a 20th Century phenomenon. But this would be a hasty conclusion. The phrase "common law of war" had already fallen into relative obscurity by the 19th Century. It was used by the government in the indictment of the Lincoln conspirators, but its reference even then was met with confusion about its meaning.

For example, General Ewing, who defended Samuel A. Mudd against accusations of complicity in the Lincoln assassination, noted that the government referred to the common law of war in its indictment of his client. *See* Thomas Ewing, *Argument of General Ewing on the Law and Evidence in the Case of Dr. Samuel A. Mudd*, *reprinted in* Samuel A. Mudd, *The Life of Samuel A. Mudd* 60 (1906). Ewing's objection was not just that the invocation of the common law of war in the indictment was inappropriate, but more importantly that the phrase was basically meaningless:

> *May it please the Court*: If it be determined to take jurisdiction here it then becomes a question very important to some of these parties – a question of life and death – whether you will punish only offenses created and declared by law, or whether you will make and declare the past acts of the accused to be crimes, which acts the law never heretofore declared criminal; attach to them the penalty of death, or such penalty as may seem meet to you; adapt the evidence to the crime and the crime to the evidence, and thus convict and punish. This, I greatly fear, may be the purpose, especially since the Judge-Advocate

> said, in reply to my inquiries, that he would expect to convict "under the common law of war." This is a term unknown to our language . . . wholly undefined and incapable of definition. It is, in short just what the Judge-Advocate chooses to make of it. It may create a fictitious crime, and attach to it arbitrary and extreme punishment, and who shall gainstay it? The laws of war – namely, our Articles of War – and the habitual practice and mode of proceeding under them, are familiar to us all, but I know nothing, and never heard or read of a common law of war, as a code or system under which military courts or commissions in this country can take and exercise jurisdiction not give them by express legal enactment or constitutional grant.

Id.

Given the preceding examples, it seems clear that the invocation of the phrase "common law of war" in the Lieber Code was not an accidental turn of phrase, but rather had a technical meaning for Lieber that the government now ignores.

III. THE COMMON LAW OF WAR REFERS TO THE LAW OF WAR APPLICABLE IN NON-INTERNATIONAL ARMED CONFLICTS, RATHER THAN A DOMESTIC BODY OF LAW.

Although the common law of war had a technical meaning which was lost on most lawyers in the 19th Century, its historical meaning can be unearthed by

looking well beyond the Civil War era. *See* Jens David Ohlin, *The Common Law of War*, 58 William & Mary L. Rev. 493 (2016).

Lieber used the phrase "common law of war" so often in his code because it was drafted for – and applied – during a civil war. In the 19th Century, as now, the international legal rules governing the conduct of warfare varied depending on whether the war was an international or internal conflict.[4] Since the Civil War was an internal conflict, the body of law governing it was less restrictive than the body of law governing an international armed conflict. *See* Constantin von der Groeben, *Transnational Conflicts and International Law* 79 (2013). Usage of the phrase "common law of war" prior to Lieber establishes that the phrase was meant to apply to these non-international armed conflicts because the common law of war was common to all mankind. Rather than referring to a local form of law (domestic law), the phrase referred to the exact opposite – a rendering of international law that could be applied even to non-state actors, who were not formally subject to international legal regulation in the same manner as nation-states.

At its earliest, the notion of a common law of war dates to Emmerich de Vattel. *See* Howard Jones, *Union in Peril: The Crisis over British Intervention in the Civil*

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[4] In today's legal landscape, the rules regarding international and non-international armed conflicts are converging, but even now the overlap is not complete and substantial divergence remains.

War 235 n.22 (1992). Vattel's canonical work in international law developed a rich system for classifying armed conflicts, distinguishing between international conflicts between sovereigns and a variety of terms for sub-international conflicts within the state. Vattel noted that when:

> A civil war breaks the bands of society and government, or at least suspends their force and effect: it produces in the nation two independent parties, who consider each other as enemies, and acknowledge no common judge. Those two parties, therefore, must necessarily be considered as thenceforward constituting, at least for a time, two separate bodies, two distinct societies. Though one of the parties may have been to blame in breaking the unity of the state and resisting the lawful authority, they are not the less divided in fact. Besides, who shall judge them? [W]ho shall pronounce on which side the right or the wrong lies? On earth they have no common superior. They stand therefore in precisely the same predicament as two nations, who engage in a contest, and, being unable to come to an agreement, have recourse to arms.

See Emmerich de Vattel, *The Law of Nations; or Principles of The Law of Nature, Applied to The Conduct and Affairs of Nations and Sovereigns* 426-27 (Joseph Chitty ed., Philadelphia, T. & J. W. Johnson, Law Booksellers 1844).

So the question for Vattel, as well as others in the natural law era, was what law bound the parties to a

non-international armed conflict? The answer, according to Vattel, was that "the common laws of war, – those maxims of humanity, moderation, and honour, which we have already detailed in the course of this work, – ought to be observed by both parties in every civil war." *Id.*

This notion of a common law of war – that applied to all parties even in civil wars – was not unknown to jurists of a prior era. Indeed, this Court endorsed Vattel's common law of war in the *Prize Cases*, when the Court applied the international rules for vessel capture. *See The Brig Amy Warwick (The Prize Cases)*, 67 U.S. (2 Black) 635, 673 (1862) ("[A] civil war such as that now waged between the Northern and Southern States is properly conducted according to the human regulations of public law as regards capture on the ocean."). During the war, Lincoln blockaded southern ports, an action that was only lawful if the administration recognized the Confederacy as a belligerent engaged in an armed conflict and therefore subject to the proper treatment accorded a belligerent party. The Supreme Court recognized that international capture rules applied to the war, even though the conflict with the Confederacy was an internal rather than an international conflict. *Id.* at 674 (noting that residents of the southern states were "liable to be treated as enemies, though not foreigners"); *id.* at 667 (noting that the existence of the civil war was "a fact in our domestic history which the Court is bound to notice and to know"). To determine the appropriate rule for a civil war, this Court looked to natural law as articulated by

the common law of war, as the Court noted when it quoted Vattel for the proposition that "it is very evident that the common laws of war – those maxims of humanity, moderation, and honor – ought to be observed by both parties in every civil war." *Id.* (quoting Vattel, *supra*, at 425).

Similarly, in *Dulany v. Wells*, a plaintiff sued in Maryland to demand payment of a debt pursuant to a bond instrument. 3 H. & McH. 20, 20-24 (Md. Gen. 1790), *rev'd* (June 1795). The question for the General Court of Maryland was whether the Civil War, and the resulting creation of a new nation, extinguished the defendant's obligation to repay a private debt owed to a British subject. According to the Maryland court, the obligation endured through the separation of the newly created United States of America, even the war was "different from the usual case of war between two different nations." *Id.* at 80. Belligerents in a civil war were bound by the common law of war:

> That a civil war breaks the bonds of society and government, or at least suspends their force and effect, produces in the nation two independent parties, considering each other as enemies, and acknowledging no common judge. That these two parties are in the case of two nations at war. That the common laws of war are to be observed on both sides. That while subjects who take arms against their sovereign acknowledge his authority, the effects of war as to the acquisition of property do not take place; but when they cease to acknowledge the authority of the sovereign,

> and the nation is divided into two parts, absolutely independent, and acknowledging no common superior, the state is dissolved, and the war betwixt the two parties in every respect is the same with that of a public war between two different nations.

Id. at 74.

The Prize Cases and *Dulany* clearly demonstrate that the common law of war is a surrogate for the law of nations applicable during non-international conflicts.[5] In short, early American judicial precedents teach us that the common law of war is not, as the government claims in Bahlul's case, a domestic version of the law of war. Rather, the common law of war, properly understood, was always understood as the limited subset of rules of international law that applied during civil wars, or what lawyers today refer to as "non-international armed conflicts." This interpretation is also consistent with the purpose of the law of war as a common body of law that regulates all parties to an armed conflict through a system of mutual constraints. Consequently, the ancient references to the "common law of war" that the Government has cited in the courts below lend no support to the government's assertion that military commissions have the authority to prosecute domestic offences pursuant to an American common law of war. The argument is based on a misleading

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[5] *Dulany* is not cited here for the value of its holding on the matter of the debt obligation, which was reversed on appeal. The case is cited for evidence of the historical usage, and meaning, of the phrase "common law of war."

interpretation and understanding of this admittedly obscure concept.

The major deficit of the government's interpretation is that it relies on the wrong aspect of the common law. The phrase "common law" has many different meanings depending on the context. Sometimes it refers to the power of individual judges to interpret and apply the law as they see fit. *See*, *e.g.*, Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in A Matter of Interpretation: Federal Courts and the Law* 10 (Amy Gutmann ed., 1997). At other times, it refers to unwritten law as opposed to statutory law. Neither of these understandings is relevant for interpreting the phrase "common law of war." To decode the phrase, one must look to the third understanding of the common law, which is the law that is common to the entire realm (and distinct from purely local law). *See* 2 John Hudson, *The Oxford History of the Laws of England* 853 (2012). It is precisely this understanding of the term that is picked up by the notion of a "common law of war" – a set of norms that are so basic and imperative that they apply universally regardless of the status of the parties to the armed conflict. This shows that references to a "common law of war" mean the *opposite* of what the government suggests. The phrase refers to the universality of the law of war rather than local exceptionalism.

IV. THIS COURT SHOULD GRANT CERTIORARI TO CLARIFY THE SCOPE OF MILITARY COMMISSION JURISDICTION OVER LAW OF WAR OFFENSES.

This case has wider implications that extend far beyond the fate of one single military commission defendant. Since this country's founding, the legislative and judicial branches have regulated the authority of the executive branch to subject individuals to prosecution and punishment before military commission. *See, e.g.*, *Ex parte Milligan*, 71 U.S. 2, 141 (1866). Left unchecked, the power to subject individuals to military justice has the potential to erode the protections embodied not only in the Fifth and Sixth Amendments but also Article III's commitment to adjudication by judges protected by life tenure.

The confusion over the proper understanding of the law of war is precisely the type of federal question that demands this Court's attention. If the lack of clarity is not resolved, the executive branch will be free to continue prosecuting other domestic offenses – not just conspiracy – before military commissions. Doing so will further erode the legitimacy of the civilian justice system and risk the unparalleled expansion of a system of military justice for enemy combatants that ought to be reserved for violations of international, not domestic, law. Moreover, if the government's position is not challenged, other nations will be encouraged to develop their own domestic common law of war to the detriment of U.S. servicemembers serving overseas on hostile territory. *See* Recent Case, *Ex Post Facto*

Clause – Guantánamo Prosecutions – D.C. Circuit Reinterprets Military Commissions Act of 2006 to Allow Retroactive Prosecution of Conspiracy to Commit War Crimes. – Al Bahlul v. United States, 128 Harv. L. Rev. 2040, 2047 (2015). Seventy-five years ago, during World War II, this Court in *Quirin* articulated its vision for military commission jurisdiction, based on offenses against the international laws of war. Now it should enforce that vision in the context of a 21st Century armed conflict against a non-state actor.

Finally, this federal issue calls for greater judicial intervention rather than excessive judicial deference. Although the judicial branch has sometimes articulated a desire to defer to the executive branch during times of war, this Court has steadfastly maintained that "a state of war is not a blank check for the President" because the Constitution "most assuredly envisions a role for all three branches when individual liberties are at stake." *Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004). This sentiment is especially pertinent for this case, which deals with nothing less than the executive power to subject individuals to military, rather than civilian, justice.

CONCLUSION

For the foregoing reasons, the Supreme Court should grant certiorari to establish proper boundaries for the exercise of jurisdiction at military commissions.

Respectfully submitted,

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