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Brief Amici Curiae on Behalf of International and Constitutional Law Experts in Support of Petition for Certiorari, *Al Bahlul v. United States*, 840 F.3d 757 (D.C. Cir. 2016) (en banc)

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No. 16-1307

IN THE
Supreme Court of the United States

ALI HAMZA AHMAD SULIMAN AL BAHLUL, PETITIONER,

v.

UNITED STATES, RESPONDENT.

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

**BRIEF OF INTERNATIONAL AND CONSTITUTIONAL
LAW EXPERTS AS *AMICI CURIAE* IN
SUPPORT OF PETITIONER**

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INTEREST OF *AMICI CURIAE*¹

Amici curiae, legal experts in international and constitutional law, believe that a majority of the en banc panel in *Bahlul v. United States*, 840 F.3d 757 (D.C. Cir. 2016) (en banc), mistakenly affirmed Ali Hamza Ahmad Suliman al Bahlul’s conviction by a military commission for a non-international war crime. The main concurring opinion in that case misconceived how international law defines the jurisdiction of law-of-war military commissions. As *amici* argue below, it is the *Constitution*—not international law—that limits the jurisdiction of law-of-war military commissions.²

Amici have a professional interest in clarifying the relationship between international and constitutional law as it bears on the jurisdiction of military commissions, especially absent apparent geographic or temporal limits on the conflict known as the global war on terror.

The appendix includes a full list of *amici*.

¹ All parties have consented to the filing of this brief, and written copies have been filed with the Clerk of the Court. Supreme Court Rule 37.3(a). Counsel of record for all parties received notice of *amici*’s intent to file a brief at least 10 days prior to the due date. *Id.*, Rule 37.2(a). Counsel for *amici* affirm that counsel for a party did not write any part of this brief. Nor has any person or entity contributed financially to the preparation or submission of this brief. *Id.*, Rule 37.6.

² Unless otherwise indicated, “commission” and “tribunal” refer to law-of-war military commissions, not commissions created during periods of occupation or to try violations of martial law.

SUMMARY OF THE ARGUMENT

Article III of the U.S. Constitution vests the judicial power in the federal courts and mandates that all crimes be tried by jury. This Court has construed the Constitution to permit the establishment of military commissions to try war crimes in circumstances of military necessity, based on pragmatic considerations and the combined war powers of the President and Congress. To minimize intrusion on Article III, however, the Court has prudently limited military commission jurisdiction to the prosecution of crimes that violate the law of war, which, by definition, is part of the law of nations.

The U.S. Court of Appeals for the District of Columbia Circuit wrongly affirmed Ali Hamza Ahmad Suliman al Bahlul's conviction by military commission for inchoate conspiracy. That crime does not violate the law of war, precluding the commission's jurisdiction. To justify jurisdiction in excess of the limits that this Court has placed on military commissions, the D.C. Circuit's main concurring opinion rejected even the government's proposed limits (themselves broader than the limits set by this Court) and declined to impose *any* jurisdictional restrictions. That view is based on a misconception of international law and of how international and constitutional law interact. The main concurrence also conflated the power of the political branches to establish military commissions, despite Article III, with the power to specify offenses triable by military commission.

The law of war, a branch of international law, establishes the outer boundaries of military commission jurisdiction. Allowing the commission's jurisdiction to encompass offenses other than war crimes transfers authority to adjudicate certain federal crimes from the federal courts to the executive branch. Hence, "Trial by military commission raises separation-of-powers concerns of the highest order." *Hamdan v. Rumsfeld*, 548 U.S. 557, 638 (2006) (Kennedy, J., concurring).

Because the armed conflict known as the global war on terror lacks apparent geographic and temporal limits, a decision to vest military commissions with jurisdiction over wholly domestic crimes effectively empowers the political branches to use military commissions as alternatives to federal courts anywhere in the global theater of war for an indefinite period. This is not hyperbole. The D.C. Circuit's main concurring opinion not only rejected the government's position that military commission jurisdiction is limited to war crimes and crimes that historically have been tried before such commissions; it further speculated that military commissions might be helpful to try, for example, innovative cybercrimes. With the nation on a long-term war footing, military commissions threaten to become a permanent feature of the federal judicial landscape, untethered by the jurisdictional limits that this Court has imposed.

A military commission convicted Bahlul more than seven years ago. His case has been pending in the D.C. Circuit for more than five years. Despite its numerous decisions in *Bahlul*, the D.C. Circuit has been unable to agree on any jurisdictional limits on

military commissions. This issue “is extraordinarily important and deserves a definitive answer,” *Bahlul*, 840 F.3d at 760 (Kavanaugh, J., concurring), which only this Court can provide.

This Court has never countenanced such a broad and vague exception to Article III. It should grant certiorari to safeguard the integrity and independence of the federal courts—and to clarify that the same necessity that *authorizes* military commissions also *limits* their jurisdiction.

ARGUMENT

I. THE D.C. CIRCUIT’S MAIN CONCURRENCE MISTAKENLY TREATED INTERNATIONAL LAW— RATHER THAN THE CONSTITUTION— AS THE JUDICIAL CONSTRAINT ON MILITARY COMMISSION JURISDICTION

A military commission convicted Ali Hamza Ahmad Suliman al Bahlul of conspiracy to commit war crimes. *Bahlul*, 840 F.3d 757, 758 (D.C. Cir. 2016) (en banc) (per curiam); *Bahlul v. United States*, 767 F.3d 1, 7–8, 31 (D.C. Cir. 2014) (en banc). The government has conceded that Bahlul’s crime is not a war crime under international law. Brief for the United States at 34, *Bahlul*, 840 F.3d 757 (No. 11-1324). The D.C. Circuit nonetheless upheld Bahlul’s conviction based in part on the main concurrence’s expansive and unprecedented view of military

commission jurisdiction. *Bahlul*, 840 F.3d at 758 (per curiam); *id.* at 760 (Kavanaugh, J., concurring).

The D.C. Circuit’s main concurring opinion is predicated on the erroneous assumption that if Bahlul’s challenge were to succeed, foreign nations, acting through “the guise” of international law, would be entitled to “dictate” constraints on a U.S. military commission’s jurisdiction and that international law would be incorporated “into the U.S. Constitution as a judicially enforceable constraint on Congress and the President.” *Bahlul*, 840 F.3d at 759, 772 (Kavanaugh, J., concurring). This is a straw man. Contrary to that opinion’s characterization, this Court consistently has recognized only a narrow, atextual exception to Article III for military commissions and has used the law of war to set the boundary of that exception.

A. This Court Recognized a Narrow, Atextual Exception to Article III by Placing a Limited Judicial Power in Law-of-War Military Commissions.

Article III provides that “[t]he judicial Power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish,” and that “[t]he Trial of all Crimes, except in cases of Impeachment, shall be by Jury.”

While Article III’s text admits no exceptions to these mandates, this Court has recognized a handful of narrow exceptions that authorize the political branches to exercise adjudicatory power in limited

circumstances. *See* Stephen I. Vladeck, *Military Courts and Article III*, 103 *Geo. L.J.* 933, 934 (2015). Such departures from Article III’s usual exclusivity are rare and, because they facially violate Article III’s text, demand constitutional justification.

For military tribunals, that justification is necessity, which defines—and for the same reason limits—the nature and scope of their jurisdiction. *See Hamdan v. Rumsfeld*, 548 U.S. 557, 590 (2006) (plurality opinion) (stressing that “each aspect of [a military commission’s] seemingly broad jurisdiction” is “supported by a separate military exigency”); *see also Ex Parte Milligan*, 71 U.S. (4 Wall.) 2, 21–22 (1866); *Ex Parte Quirin*, 317 U.S. 1, 35–37 (1942).

A law-of-war military commission’s jurisdiction therefore is “limited to offenses cognizable during time of war” and “its role is primarily a factfinding one—to determine, typically on the battlefield itself, whether the defendant has violated the law of war.” *Hamdan*, 548 U.S. at 596–97 (plurality opinion). Colonel William Winthrop—the “Blackstone of Military Law”—wrote that these military commissions have jurisdiction only over war crimes committed during war and in the “theatre of war.” *See id.*, 548 U.S. at 597–98 (quoting *Reid v. Covert*, 354 U.S. 1, 19 n.38 (1957)); William Winthrop, *Military Law and Precedents* 836–41 (rev. 2d ed. 1920) (hereinafter “Winthrop”).

B. Law-of-War Military Commissions May Only Prosecute War Crimes Recognized by the Law of Nations.

This Court first sustained a law-of-war military commission in *Ex Parte Quirin*, in which saboteurs violated the law of war during World War II by going behind enemy lines to destroy property used or useful in prosecuting war. This conduct, according to the Court, violated the law of war and was subject to punishment by military commission, a precept that had “so generally been accepted as valid by authorities on international law.” 317 U.S. at 35–36.³ This Court explained the law of war as *part* of international law: “From the very beginning of its history this Court has recognized and applied the law of war as including that part of the law of nations which prescribes, for the conduct of war, the status, rights and duties of enemy nations as well as of enemy individuals.” *Id.* at 27–28. *Quirin* thus correctly

³ The D.C. Circuit’s main concurrence erred by citing *Quirin* as an example of a military commission trying a crime other than a war crime. *Bahlul*, 840 F.3d at 763 (Kavanaugh, J., concurring). The Court in *Quirin*, as discussed, stated that the conduct relevant to its holding violated the law of war. *Quirin*, 317 U.S. at 35–36. Further, at that time, the status of espionage as an offense against the law of nations was, at best, ambiguous. *See, e.g.*, 2 L. Oppenheim, *International Law: A Treatise* § 252 (Hersch Lauterpacht ed., 7th ed. 1952) (listing “espionage” as one of four kinds of “war crimes”); *see also id.* § 255 (“Espionage . . . bear[s] a twofold character. International Law gives a right to belligerents to use [it]. On the other hand, it gives a right to belligerents to consider [it], when committed by enemy soldiers or enemy private individuals . . . as [an] act[] of illegitimate warfare, and consequently liable to punishment—though it seems improper to characterise [sic] such act[s] as war crimes.”).

defined “law of war” as a “branch of international law.” *Id.* at 29. In the course of describing that law, the Court cited the Fourth Hague Convention and numerous treatises on international law. *See id.* at 30 n.7, 31 n.8.

In *Quirin*, Article of War 15 authorized military commission jurisdiction as a narrow exception to Article III but properly restricted that jurisdiction to violations of the law of war. *Id.* at 29. Even with these jurisdictional restrictions, “*Quirin* represents the high-water mark of military power to try enemy combatants for war crimes.” *Hamdan*, 548 U.S. at 597 (plurality opinion).

In re Yamashita again considered the jurisdiction of military commissions to be confined to offenses against the law of war. 327 U.S. 1, 14–16 (1946). Citing the Annex to the Fourth Hague Convention, the Court held that “acts directed against the civilian population of an occupied country and against prisoners of war are recognized in international law as violations of the law of war.” *Id.* at 14. Similarly, in *Johnson v. Eisentrager*, the Court found “a basis in conventional and long-established law” for violations of the law of war. 339 U.S. 763, 787 (1950). That “conventional and long-established law” was international law. *Id.* at 787–88. *Eisentrager* thus exclusively cited international legal sources, including the Hague Conventions and Oppenheim’s, Vattel’s, and Lawrence’s international law treatises, to reach this conclusion. *Id.*

In *Hamdan*, the government charged Salim Ahmed Hamdan with conspiracy to commit offenses

triable by military commission. 548 U.S. at 569–70 (majority opinion). A plurality held that Hamdan’s conspiracy charge is not an offense that by the law of war may be tried by military commission. *Id.* at 610–12 (plurality opinion). This is in contrast to the main concurrence’s finding in *Bahlul* that conspiracy is “well within” the limits of a military commission’s jurisdiction, “[w]herever one might ultimately draw” those limits. *Bahlul*, 840 F.3d at 771 (Kavanaugh, J., concurring). By reviewing international law sources, the plurality found that conspiracy “does not appear in either the Geneva Conventions or the Hague Conventions—the major treaties on the law of war.” *Hamdan*, 548 U.S. at 604 (plurality opinion).

C. This Court Has Recognized that the Constitution Limits the Jurisdiction of Military Commissions to Violations of the Law of War.

The D.C. Circuit’s main concurrence in *Bahlul* failed to recognize that this Court has limited the subject matter jurisdiction of military commissions to violations of the law of war. That opinion characterized *Bahlul*’s contention—that because inchoate conspiracy is not an offense under international law, the commission lacked jurisdiction to try him—as “extraordinary.” *Bahlul*, 840 F.3d at 759 (Kavanaugh, J., concurring). Quite the contrary, this Court has described military commissions, not the role of international law in defining their jurisdiction, as “extraordinary”: “[T]rial by military commission is an extraordinary measure raising important questions about the balance of power in our

constitutional structure” *Hamdan*, 548 U.S. at 567 (majority opinion).

In a government of delegated powers, neither Congress nor the President, even acting together, may constitutionally depart from Article III’s vesting of the judicial power in the federal courts, except in the rare circumstances recognized by this Court. Even under these circumstances, the Constitution does not authorize the political branches to define the jurisdiction of military commissions without regard to the limits imposed *by* the Constitution.

II. THE EXPANSION OF MILITARY COMMISSION JURISDICTION THREATENS TO FURTHER ATROPHY THE INTEGRITY AND INDEPENDENCE OF ARTICLE III FEDERAL COURTS

A. Removing Judicial Power from the Judicial Branch, and Placing that Power in the Political Branches, Threatens the Integrity of the Judicial Branch and the Right to Trial by Jury.

An independent judiciary is fundamental to the American system of governance: the Declaration of Independence cited it as a basis for the American Revolution, and the judicial system’s structural and individual rights safeguards were enshrined in Article III of the Constitution. *See* The Declaration of Independence para. 11 (U.S. 1776); *Stern v. Marshall*, 564 U.S. 462, 483–84 (2011). Article III “protects the independence of the Judicial Branch” and “is ‘an inseparable element of the constitutional system of checks and balances.’” *Stern*, 564 U.S. at 482–83

(quoting *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 58 (1982) (plurality opinion)).

Article III could not “serve its purpose in the system of checks and balances” if the legislative or executive branches “could confer the Government’s ‘judicial power’ on entities outside of Article III.” *Stern*, 564 U.S. at 484. Thus, absent rare exceptions, the judicial power “cannot be shared with the Legislature or Executive.” *B&B Hardware, Inc. v. Hargis Indus.*, 135 S. Ct. 1293, 1316 (2015) (Thomas, J., concurring). “[S]o long as the judiciary remains truly distinct from both the legislature and the Executive,” “the general liberty of the people can never be endangered” from “the courts of justice.” The Federalist No. 78, at 466 (Alexander Hamilton) (C. Rossiter ed., 1961). Liberty has everything “to fear from” a merger with the political branches that would degrade the judiciary’s independence. *Id.* at 465 (“[F]rom the natural feebleness of the judiciary, it is in continual jeopardy of being overpowered, awed, or influenced by its co-ordinate branches.”).

Article III’s mandates remain in force during war. *See, e.g., Boumediene v. Bush*, 553 U.S. 723, 798 (2008) (“The laws and the Constitution are designed to survive, and remain in force, in extraordinary times.”); *Milligan*, 71 U.S. (4 Wall.) at 120. The right to a criminal trial before a jury within an independent judicial system was at least as important to the Framers as the right to habeas corpus described in *Boumediene*: It was included in the Declaration of Independence, Article III, and the Fifth and Sixth Amendments, and it is emphasized throughout the Federalist Papers. *See Toth v. Quarles*, 350 U.S. 11,

16 (1955) (“This right of trial by jury ranks very high in our catalogue of constitutional safeguards.”); *Milligan*, 71 U.S. (4 Wall.) at 119–20. It applies “equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances.” *See Milligan*, 71 U.S. (4 Wall.) at 120–21. Thus, to protect the judicial branch’s independence, integrity, and robust role in the Constitution’s delicate structure of checks and balances, military commissions must have defined, narrow limits.

B. The Jurisdiction of Law-of-War Military Commissions Is Limited by the Necessity that Justifies the Commissions’ Existence.

“The military commission, a tribunal neither mentioned in the Constitution nor created by statute, was born of military necessity.” *Hamdan*, 548 U.S. at 590 (plurality opinion); *see also Milligan*, 71 U.S. (4 Wall.) at 76–80. It is not a federal court “ordain[ed] and establish[ed]” by Congress. U.S. Const. art. III, § 1; *Milligan*, 71 U.S. (4 Wall.) at 121.

Military commissions have, historically and functionally, proved necessary in three contexts—martial law, occupation, and war. *See Hamdan*, 548 U.S. at 595–96 (plurality opinion). During the former two, necessity compels the establishment of a temporary substitute that can administer justice expeditiously and fairly until the national judiciary resumes operating normally. *Cf. Yoram Dinstein, The International Law of Belligerent Occupation* 133–35 (2009).

The rationale for law-of-war commissions differs, *see Hamdan*, 548 U.S. at 597 (plurality opinion), as does their jurisdiction. Unlike the other two types of commissions, law-of-war commissions do not adjudicate all crimes and civil cases during times of martial law or military occupation. *See id.* In those circumstances, the regular courts may not be “open and their process unobstructed.” *Milligan*, 71 U.S. (4 Wall.) at 121. Because it may be impracticable to try war crimes on the battlefield, *see generally Eisentrager*, 339 U.S. at 779, the Court has recognized that it may be necessary during wartime “to seize and subject to disciplinary measures those enemies who in their attempt to thwart or impede our military effort have violated the law of war.” *Quirin*, 317 U.S. at 28–29. Military commissions prosecute battlefield violations of the law of war during wartime. *Hamdi v. Rumsfeld*, 542 U.S. 507, 518 (2004); *Quirin*, 317 U.S. at 27–29. Practical considerations, like distance and lack of institutions or staff, may preclude trying war crimes in courts martial or regular federal courts.

For such functional reasons, the Court has approved military commissions based on the historical methodology of constitutional interpretation expressed in the context of executive power by Justice Frankfurter: “Deeply embedded traditional ways of conducting government cannot supplant the Constitution or legislation, but they give meaning to the words” and take into account “the gloss which life has written upon them.” *Youngstown Sheet & Tube Co. v. Sawyer (The Steel Seizure Case)*, 343 U.S. 579, 610 (1952) (Frankfurter, J., concurring). This constitutional methodology can also apply in contexts, like the present one, other than executive power. *See, e.g., N.L.R.B. v.*

Noel Canning, 134 S. Ct. 2550, 2559–60 (2014) (collecting cases).

At times, history thus properly informs the meaning of the Constitution. But the historical precedents that authorize military commissions also limit them. And historically, it is *this* Court’s interpretation of the *constitutional* role of international law in defining the commission’s jurisdiction that has imposed “judicially enforceable constraint[s]” on the jurisdiction of military commissions. Bahlul may not be convicted by military commission for a crime that, as the government concedes, *Bahlul*, 840 F.3d at 759 (Kavanaugh, J., concurring), international law does not recognize as triable by military commission.

“The tendency of a principle to expand itself to the limit of its logic” must “be counteracted by the tendency to confine itself within the limits of its history.” Benjamin J. Cardozo, *The Nature of the Judicial Process* 51 (1921). Necessity supplies a rationale for establishing a temporary non-Article III tribunal for prosecuting war crimes. It does not supply a rationale for vesting that tribunal with jurisdiction over crimes that do not violate the law of war. Perhaps, as the D.C. Circuit’s main concurrence suggested, tribunals with broader jurisdiction would be expedient in the global war on terror. *See Bahlul*, 840 F.3d at 770–71 (Kavanaugh, J., concurring) (discussing cyberattacks as a potential crime triable by military commission). But expedience does not, of course, render such tribunals constitutional.

**C. Necessity Limits Military Commissions’
Jurisdiction to Offenses Against the
(International) Law of War.**

Because necessity alone authorizes the military commission, it perforce limits the commission’s jurisdiction by reference to the particular, concrete necessity at issue—“the exigencies of war.” *Hamdan*, 548 U.S. at 590 (plurality opinion); *see also Milligan*, 71 U.S. at 90. Battlefield necessity also reinforces what *Quirin*, *Yamashita*, *Eisentrager*, and *Hamdan* all express or imply: the law of war is part of international law and thus limits the jurisdiction of law-of-war military commissions.

In non-military-commission cases, this Court has also affirmed that the law of war is international law. *Quirin*, 317 U.S. at 27–28, 28 n.5 (citing numerous cases from the eighteenth and nineteenth centuries). In the *Prize Cases*, for instance, the Court held that the “laws of war, as established among nations, have their foundation in reason, and all tend to mitigate the cruelties and misery produced by the scourge of war.” *Prize Cases*, 67 U.S. (2 Black) 635, 667 (1863). Likewise, in *New York Life Ins. Co. v. Hendren*, the Court considered the “general laws of war, as recognized by the law of nations applicable to this case.” 92 U.S. 286, 286 (1875).

The Department of Defense Law of War Manual and the Army Field Manual addressing the law of land warfare similarly define the law of war as a part of international law. U.S. Dep’t of Defense Law of War Manual, at 7 (June 2015); U.S. Army Field Manual FM 27-10, at 4 (July 1956). The Lieber Code,

signed by President Lincoln in 1863 to regulate the conduct of Union forces, described the law of war as “a branch” of “the law of nations.” *See* Francis Lieber, Instructions for the Government of Armies of the United States in the Field art. 27 (War Dep’t 1863).

Law-of-war scholars share this view. Winthrop explained that “law of war” is “a distinct canon of the Law of Nations” and defined “law of war” as a “branch of International Law which prescribes the rights and obligations of belligerents,” as well as persons under military government or martial law or in the theater of war. Winthrop 773. More recent commentators have observed that “the jurisdiction of military commissions has been set by the bounds of international law directly incorporated within American law,” Ruth Wedgwood, *Al Qaeda, Terrorism, and Military Commissions*, 96 Am. J. Int’l L. 328, 334 (2002), and that the law of war is a branch of international law, Major Alex G. Peterson, *Order Out of Chaos: Domestic Enforcement of the Law of Internal Armed Conflict*, 171 Mil. L. Rev. 1, 7–8 (2002).

The government has argued that there is a federal “common law of war” that expands the subject matter jurisdiction of a U.S. law-of-war military commission to encompass war crimes other than those that violate international law; these crimes, it is said, were historically tried by military commissions in the United States. *Bahlul*, 840 F.3d at 810 (dissenting opinion). But as a government of delegated, enumerated powers, the Constitution prohibits federal common law crimes. *United States v. Hudson & Goodwin*, 11 U.S. (7 Cranch) 32, 33–34 (1812). The

Declare War Clause and Congress's other Article I, § 8, war powers, in combination with the Necessary and Proper Clause, authorize Congress to establish military commissions to try war crimes. *Quirin*, 317 U.S. at 26–27. They do not, and constitutionally cannot, authorize new domestic war crimes over which the commission may constitutionally exercise jurisdiction. See Anthony J. Colangelo, *A Unified Approach to Extraterritoriality*, 97 Va. L. Rev. 1019, 1050–52 (2011).

The D.C. Circuit's main concurrence located political branch authority to establish law-of-war tribunals in the aggregate of executive and congressional war powers. See *Bahlul*, 840 F.3d at 761–62 (Kavanaugh, J., concurring); see also *Hamdan*, 548 U.S. at 591–92 (plurality opinion); *Quirin*, 317 U.S. at 10. The concurrence also quoted Winthrop and Justice Story as authorities for the same proposition. But it misread both to support a proposition the Court has never embraced: that constitutional authority to *establish* law-of-war tribunals, which derives from the political branches' war powers, *Hamdan*, 548 U.S. at 591, also empowers the political branches to define war crimes. Neither Winthrop nor Story adopted this view. See Winthrop 831; 3 Joseph Story, *Commentaries on the Constitution of the United States* § 1192 (1833).

**D. The D.C. Circuit’s Main Concurrence
Erroneously Defined International Law as
“the Dictates of Foreign Nations and the
International Community.”**

1. International law develops through consent.

The D.C. Circuit’s main concurrence characterized Bahlul’s jurisdictional argument as an effort that would subject the United States “to the dictates of foreign nations and the international community, as embodied in international law,” and would “allow foreign nations, through the guise of international law, to set *constitutional* limits *enforceable in U.S. courts* against the U.S. war effort.” *Bahlul*, 840 F.3d at 759, 772 (Kavanaugh, J., concurring) (emphasis in original).

Neither foreign nations nor the international community “dictate” international law. The basic norm of international law since the nineteenth century has been consent. Blackstone, for example, described the law of nations as “a system of rules . . . established by universal consent among the civilized inhabitants of the world.” 4 William Blackstone, *Commentaries on the Laws of England* 66 (1769).

Because the law of war is part of international law, the United States typically communicates its consent either expressly (in treaties it has ratified) or implicitly (in acknowledged principles of customary international law). The United States actively participates in shaping the evolution of international custom, as it has since the founding. *See, e.g.*, Office of the Legal Adviser, United States Dep’t of State,

Digest of United States Practice in International Law 2014, at 302–03 (CarrieLyn D. Guymon ed., 2014). Today, because of the nation’s economic, military, and geopolitical power, its influence on the development of customary international law, especially the law of war, is correspondingly robust.

Because of the consensual basis of international law, the United States, like all nations, may refuse to consent to an emerging customary rule that it disfavors: The persistent objector doctrine provides that any “state that has persistently objected to a rule of customary international law during the course of the rule’s emergence is not bound by the rule.” Ted Stein, *The Approach of the Different Drummer: The Principle of the Persistent Objector in International Law*, 26 Harv. Int’l L.J. 457, 457 (1985).

2. It is not unremarkable for international law to play a role in constitutional interpretation.

It is thus hardly “extraordinary” or a “suicide pact,” *Bahlul*, 840 F.3d at 759, 772 (Kavanaugh, J., concurring), for the United States to abide by the principles of international law to which it has consented. Nor is it extraordinary for those principles to influence constitutional interpretation. The Constitution refers to international law in several provisions. Constitutional powers subsume authority conferred and given substantive content by international law. For example, the Constitution’s vesting of Congress’s powers related to war, U.S. Const. art. I, § 8; “the executive Power,” *id.* art. II, § 1; and the Commander-in-Chief power, *id.* art. II, § 2, confer wartime powers on Congress and the President derived from and

informed by international law.⁴ The Constitution takes precedence over international law in the event of an unavoidable conflict, *see, e.g., Boos v. Barry*, 485 U.S. 312, 324 (1988); *Reid*, 354 U.S. at 16–18, but international law, in appropriate circumstances, informs several of its provisions.

The Constitution confers certain powers on the President and Congress in wartime precisely *because* international law regards them as well-established incidents of waging war. *Hamdi*, for example, recognized executive power to detain belligerents for the duration of a conflict “based on longstanding law-of-war principles.” 542 U.S. at 521 (collecting international authorities); *see also Quirin*, 317 U.S. at 28-29.

And in *Hamdan*, the Court’s most recent decision on military commissions, the Court concluded that Common Article 3 of the four Geneva Conventions of 1949, *see, e.g., Geneva Convention (III) Relative to the Treatment of Prisoners of War*, art. 3, Aug. 12, 1949, 75 U.N.T.S. 135, is what the D.C. Circuit’s main concurrence would describe as a “judicially enforceable constraint” on the authority of the political branches to define the procedures and minimal due process safeguards of the military commission that tried Hamdan.

⁴ Both the President and Congress also exercise some atextual constitutional powers by virtue of international law. *See, e.g., United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 318–19 (1936); *Chae Chang Ping v. United States (Chinese Exclusion Case)*, 130 U.S. 581, 604 (1889).

III. THE D.C. CIRCUIT'S MAIN CONCURRENCE PLACED NO LIMITS ON THE JURISDICTION OF MILITARY COMMISSIONS

A. The D.C. Circuit's Main Concurrence Transgressed the Supreme Court's Limits on the Jurisdiction of Military Commissions.

To ensure the judiciary's integrity and independence, any displacement of the judicial power from the judicial branch must be carefully limited and defined. *See Stern*, 564 U.S. at 484; *The Federalist* No. 51 (James Madison) (Clinton Rossiter ed., 1961). Military tribunals therefore must be restricted "to the narrowest jurisdiction deemed absolutely essential." *Toth*, 350 U.S. at 22. "Every extension of military jurisdiction is an encroachment on the jurisdiction of civil courts, and . . . acts as a deprivation of the right to jury trial and of other treasured constitutional protections." *Reid*, 354 U.S. at 21.

Even if erosions of judicial power seem relatively inconsequential at first, "illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure." *Stern*, 564 U.S. at 503 (quoting *Boyd v. United States*, 116 U.S. 616, 635 (1886)). This is especially true if the erosion is enshrined in a judicial opinion: "The principle then lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need." *Korematsu v. United States*, 323 U.S. 214, 246 (1944) (Jackson, J., dissenting).

The government argued to the D.C. Circuit that the jurisdiction of military commissions is limited to international-law-of-war offenses *and* offenses that have historically been tried by U.S. military commissions. *Bahlul*, 840 F.3d at 759–60 (Kavanaugh, J., concurring). Yet the main concurrence did not even accept the government’s proposed jurisdictional limitations. Instead, it found that thin historical practice is sufficient for an offense to be triable by military commission. *Id.* at 770. But hesitant to exclude emerging crimes such as cyberattacks, which would not fall within the rubric of historical practice, the opinion said it had no need to define “the outer limits of the Constitution in this context, other than to say that international law is not such a limit.” *Id.* at 771.

The D.C. Circuit’s main concurrence thus transgressed the jurisdictional limits on military commissions on which this Court has insisted and opened the door to a substantial erosion of Article III judicial power. The refusal even to offer guidance on the appropriate limits on the subject matter jurisdiction of military commissions risks further eroding the independence, power, and structural integrity of Article III courts. *See Reid*, 354 U.S. at 23–24.

B. Widening the Narrow Exception to Article III for Military Commissions Places Too Much Judicial Power in the Political Branches.

1. The nature and scope of current hostilities threaten traditional limitations on military commission jurisdiction.

The threat that military commissions will encroach on the general exclusivity of Article III is compounded today because traditional limits on the jurisdiction of military commissions, which were established by the nature and scope of past wars, arguably apply differently in the context of a global armed conflict that risks continuing indefinitely. *See Bahlul*, 840 F.3d at 835 (dissenting opinion).

Current wars involving non-state belligerents make it much more difficult to define those persons subject to the jurisdiction of military commissions or to determine what conduct occurred on the battlefield. *Id.* at 836. The Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) (AUMF), the basis for Bahlul's detention and trial by military commission, is more than fifteen years old, and the global conflict with transnational terrorism is the longest war in the nation's history. *See Hamdan*, 584 U.S. at 684–87 (Thomas, J., dissenting) (concluding that we have been at war with al Qaeda since 1996, when the terrorist network declared war on the United States).

Because members of al Qaeda and “associated forces,” as broadly defined under current law and practice, reside, plot, plan, and fight in dozens of

nations, the AUMF authorizes a potentially indefinite war, potentially indefinite presidential war powers, and a potentially permanent system of military commissions, often operating in parallel with the federal courts. That arrangement would be wholly at odds with the history and functional rationale for such a commission. As Justice O'Connor wrote in *Hamdi*:

[W]e understand Congress' grant of authority for the use of "necessary and appropriate force" to include the authority to detain for the duration of the relevant conflict, and our understanding is based on longstanding law-of-war principles. If the practical circumstances of a given conflict are entirely unlike those of the conflicts that informed the development of the law of war, that understanding may unravel. But that is not the situation we face as of this date.

542 U.S. at 521.

It is the situation we face today, well over a decade after *Hamdi*. The lack of clear jurisdictional limits on military commissions allows the political branches to increase the number of people triable by law-of-war military commissions. It is also contrary to the concept of necessity that underwrites the history and rationale for military commissions. *Military Commissions: Hearing Before the S. Comm. on Armed Servs.*, 111th Cong. 11 (2009) (statement of David Kris, Assistant Attorney General, Nat'l Security Division, Dep't of Justice) ("In the past, military commissions have been associated with a particular

conflict of relatively short duration. In the modern era, however, the conflict could continue for a much longer time.”).

2. The erosion of judicial power through the expansion of military commissions threatens liberty.

Military commissions do not “rank along with Article III courts as adjudicators of the guilt or innocence of people.” *Toth*, 350 U.S. at 16. Relieving “those in civil life from military trials” was central to the Founders’ rebellion against the British Empire and the Framers’ drafting of the Constitution. *See Milligan*, 71 U.S. (4 Wall.) at 119. “There are dangers lurking in military trials which were sought to be avoided by the Bill of Rights and Article III of our constitution.” *Toth*, 350 U.S. at 22; *see* Harold Hongju Koh, *The Case Against Military Commissions*, 96 Am. J. Int’l L. 337, 341 & n.22 (2002).

Accordingly, permitting military commission jurisdiction that is unconstrained by this Court’s previously-imposed limitations provides the political branches the opportunity to usurp judicial power, threatening the structural protections and individual rights that Article III protects. *Cf. Stern*, 564 U.S. at 483–84 (“The colonists had been subjected to judicial abuses at the hand of the Crown . . . because the King of Great Britain ‘made Judges dependent on his Will alone’” (quoting *The Declaration of Independence* para. 11)). The Court should grant certiorari to prevent military commissions’ erosion of the federal judicial power vouchsafed by Article III. And it

should reiterate what it has held for at least seventy years: military commissions may only try violations of the law of war, a branch of international law, in circumstances of military necessity.

CONCLUSION

For the foregoing reasons, *amici* urge this Court to grant Bahlul's petition for a writ of certiorari.

Respectfully submitted,

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