No. 16-8966

IN THE

Supreme Court of the United States

ABD AL-RAHIM AL-NASHIRI,

Petitioner,

v.

DONALD J. TRUMP, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF *AMICI CURIAE* RETIRED MILITARY ADMIRALS AND GENERALS, ET AL. IN SUPPORT OF PETITIONER

Of Counsel
HUMAN RIGHTS FIRST

DAVID B. TOSCANO
Counsel of Record
SHARON KATZ
TYSON D. KENNEDY
ELIZABETH A. TIPPETT
DAVIS POLK & WARDWELL LLP
450 Lexington Avenue
New York, New York 10017
(212) 450-4000
David.Toscano@DavisPolk.com

Counsel for Amici Curiae

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

INTEREST OF *AMICI CURIAE*[1]

Amici Curiae are retired Admirals and Generals of the United States Armed Forces. They include officers who have served in senior commanding positions during war and as senior judge advocates. *Amici Curiae* know matters of war and national security. Collectively, they have served for over 310 years in locations all around the world.

Since the terrorist attacks of 9/11, they have advocated that the detention, interrogation, and trial of suspected terrorists must comply with applicable international and domestic law so as to uphold American values, preserve the legitimacy of counterterrorism operations, and ensure that American service members are afforded the protections to which they are entitled in current and future conflicts.

Amici Curiae have an interest in ensuring that counterterrorism policies pursued by the military conform to the rule of law, in maintaining the integrity of the judicial system, and in protecting the safety of American soldiers and citizens. They also have an interest in ensuring that military justice is held in high regard, that military commissions and the laws of war are appropriately limited to situations of armed conflict, and that the scope of armed conflict and the laws of war are not expanded beyond what is legally permitted. These interests are directly implicated in this case, which involves serious questions regarding

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[1] No counsel for any party has authored this brief in whole or in part, and no person other than the *amici curiae* and their counsel made any monetary contribution intended to fund the preparation or submission of this brief. All counsel of record for all parties received notice of the intent to file this brief ten or more days before its filing, and all parties have consented to its filing.

the scope and application of the laws of war and military commissions.

This amicus brief is filed in support of the petition for writ of certiorari filed by Abd al-Rahim al-Nashiri to stress for the Court how allowing the executive branch to subject detainees to military trials of questionable legality will endanger U.S. service-members and hinder the effectiveness and legitimacy of U.S. counterterrorism.

Amici Curiae are:

Lieutenant General Robert G. Gard, Jr., USA (Ret.): Lieutenant General Gard currently serves as a consultant on international security and education and serves on the national advisory board at the Center for Arm Control and Non-Proliferation. He was President of the Monterey Institute of International Studies and director of the Johns Hopkins University Bologna (Italy) Center. He retired from the U.S. Army as a lieutenant general in 1981. His assignments during his 31-year military career included Assistant to the Secretary of Defense and President of the National Defense University. He earned a Ph.D. in Political Economy and Government from Harvard University.

Rear Admiral Don Guter, JAGC, USN (Ret.): Rear Admiral Guter served in the U.S. Navy for 32 years, concluding his career as the Navy's Judge Advocate General from 2000 to 2002. Rear Admiral Guter currently serves as President and Dean of the South Texas College of Law Houston, in Houston, Texas.

Rear Admiral John D. Hutson, JAGC, USN (Ret.): Rear Admiral John D. Hutson served in the U.S. Navy from 1973 to 2000. He was the Navy's Judge Advocate General from 1997 to 2000. From 2000 to 2011 Rear Admiral Hutson served as Dean and President of the

University of New Hampshire School of Law in Concord, New Hampshire.

Major General Michael R. Lehnert, USMC (Ret.): Major General Lehnert served as Commanding General, Marine Corps Installations West and graduated from Central Michigan University with an undergraduate degree in History, the U.S. Army Advanced Engineer School at Fort Belvoir, Virginia, the Armed Forces Staff College, and the Naval War College. He has served as Commander of Joint Task Group Bulkeley (JTF 160) at Guantanamo Bay, Marine Wing Support Group 27 at Cherry Point, North Carolina, and Joint Task Force 160 at Guantanamo Bay, which constructed and operated the detention facilities for Taliban and Al Qaeda detainees. Major General Lehnert also served as Commander, Marine Logistics Command for Operation Iraqi Freedom, and was assigned as Chief of Staff, U.S. Southern Command.

Major General Margaret H. Woodward, USAF (Ret.): Major General Woodward served in the U.S. Air Force for 32 years, having flown in nineteen named operations. She commanded the 17th Air Force, serving as the Combined Forces Air Component Commander, the first female to do so in Air Force history, during the U.N.-sanctioned 2011 military intervention in Libya. She holds a B.S. in aerospace engineering from Arizona State University, a Master's degree in aviation science from Embry-Riddle Aeronautical University, and a Master's degree in national security strategy from the National War College.

Brigadier General David M. Brahms, USMC (Ret.): Brigadier General Brahms served in the Marine Corps from 1963 to 1988. He served as the Marine Corps' Senior Legal Adviser from 1983 until his retirement in 1988. Brigadier General Brahms currently practices

law in Carlsbad, California, and sits on the board of directors of the Judge Advocates Association.

Brigadier General Stephen A. Cheney, USMC (Ret.): Brigadier General Steve Cheney is the Chief Executive Officer of the American Security Project and a member of the Department of State's International Security Advisory Board. He is a graduate of the U.S. Naval Academy and has over 30 years of experience as a Marine. His career included a wide variety of command and staff positions with the operating forces and the supporting establishment. His primary specialty was artillery, but he focused extensively on entry-level training, commanding at every echelon at both Marine Corps Recruit Depots, to include being the Commanding General at Parris Island. He served several years in Japan and has traveled extensively throughout the Middle East and Asia. Following retirement from the Marines, he became the Chief Operating Officer for Business Executives for National Security ("BENS"), in Washington, D.C., and most recently was President/CEO of the Marine Military Academy in Harlingen, Texas.

Brigadier General James P. Cullen, USA (Ret.): Brigadier General Cullen is a retired from the United States Army Reserve Judge Advocate General's Corps and last served as the Chief Judge (IMA) of the U.S. Army Court of Criminal Appeals. He currently practices law in New York City.

Brigadier General Leif H. Hendrickson, USMC (Ret.): Brigadier General Hendrickson served as the Commanding General, Marine Corps Base, Quantico, as President of the Marine Corps University and as Commanding General, Education Command. He graduated from the U.S. Naval Academy in 1973 and

served thirty years in the Marine Corps, amassing over 5,000 hours.

Brigadier General David R. Irvine, USA (Ret.): Brigadier General Irvine enlisted in the 96th Infantry Division, United States Army Reserve, in 1962. He received a direct commission in 1967 as a strategic intelligence officer. He maintained a faculty assignment for 18 years with the Sixth U.S. Army Intelligence School, and taught prisoner of war interrogation and military law for several hundred soldiers, Marines, and airmen. He retired in 2002, and his last assignment was Deputy Commander for the 96th Regional Readiness Command. Brigadier General Irvine is an attorney and practices law in Salt Lake City, Utah. He served four terms as a Republican legislator in the Utah House of Representatives, has served as a congressional chief of staff, and served as a commissioner on the Utah Public Utilities Commission.

Brigadier General O'Meara, USA (Ret.): Brigadier General O'Meara served in the United States Army and is a combat veteran of the war in Vietnam. After his service in Vietnam, he joined the Judge Advocate General's Corps. He retired from the United States Army in 2002, after 35 years of service. He is the Director of the Division of Global Affairs at Rutgers University. He serves as Adjunct Faculty with the Defense Institute of International Legal Studies where he has taught rule of law, governance, and peacekeeping subjects in such diverse locations as El Salvador, Peru, Cambodia, Rwanda, the Philippines, Chad, Sierra Leone, Guinea, Ukraine, Moldova, and Iraq. He is a qualified Emergency Medical Technician and served at the World Trade Center Site in the months after 9/11.

Brigadier General Stephen N. Xenakis, USA (Ret.): Dr. Xenakis served 28 years in the United States Army as a medical corps officer. He held a wide variety of assignments as a clinical psychiatrist, staff officer, and senior commander including Commanding General of the Southeast Army Regional Medical Command. Dr. Xenakis has published widely on medical ethics, military medicine, and the treatment of detainees. Dr. Xenakis has an active clinical and consulting practice and currently is working on the clinical applications of quantitative electroencephalography to brain injury and other neurobehavioral conditions. He has conducted extensive research on the effects of abusive interrogation practices.

INTRODUCTION

This case is about ensuring the legality and legitimacy of the U.S. military's counterterrorism mission, including proceedings before military commissions. The jurisdiction of military commissions is circumscribed, and the exclusive jurisdiction of civilian courts of non-wartime offenses is preserved, by the U.S. Constitution, the Military Commissions Act, and international law. Limiting military commissions to their lawfully authorized jurisdiction protects the reputation of our country and its military for adherence to the rule of law.

Conversely, closing Article III courts to threshold challenges to a military commission's jurisdiction, and allowing a military prosecution of dubious legality to proceed, detracts from that reputation. It also increases the risk to our men and women in uniform and hinders the ability of this country to effectively combat terrorism. Those harms cannot later be undone by post-conviction federal court review. It is critical to address the legality of this military prosecution now.

SUMMARY OF ARGUMENT

The executive branch is attempting to use a military commission, rather than the readily available federal courts, to try Petitioner for involvement in the bombing of the USS *Cole* in 2000 and attempted bombing in 2002 of a French oil tanker off the coast of Yemen.

For conduct related to these bombings to be triable by military commission, it must have occurred in the context of an armed conflict governed by the laws of war. An "international armed conflict" is triggered by any use of armed force between two or more nation states. A "non-international armed conflict" between non-state armed groups, or between such groups and a state, must meet more stringent requirements. As war crimes tribunals have held in case after case, fighting involving such groups triggers the laws of war only when the groups are sufficiently organized to function as parties to an armed conflict and the armed clashes between them are prolonged and intense.

At the time of bombing and attempted bombing at issue here, the United States was not in an armed conflict in Yemen, raising serious questions about the legality of the military commission convened to prosecute Petitioner for law of war violations. Allowing a military commission of such questionable legality to proceed without first resolving this critical question will cause irreversible harm by putting U.S. servicemembers at greater risk and undermining the legitimacy and effectiveness of U.S. counterterrorism efforts.

ARGUMENT

I. The existence of an armed conflict at the time of the charged conduct is critical to the legitimacy and legality of subjecting Petitioner to trial by military commission.

The Military Commissions Act of 2009 (the "Act") defines the jurisdiction of military commissions. Under the Act, military commissions have jurisdiction to try persons for offenses under certain provisions of the Uniform Code of Military Justice, which apply only to U.S. servicemembers, or under the law of war.[2] Similarly, the Act provides that an offense may be tried by military commission "only if the offense is committed in the context of and associated with hostilities," where "hostilities" is defined as "any conflict subject to the laws of war."[3] It is well established that the law of war applies only when an armed conflict exists.[4]

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[2] *See* 10 U.S.C. § 948d.

[3] 10 U.S.C. §§ 948a(9), 948b(a), 950p(c).

[4] *See* Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 2, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter First Convention]; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea art. 2, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter Second Convention]; Geneva Convention Relative to the Treatment of Prisoners of War art. 2, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Third Convention]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 2, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Fourth Convention]. These articles are collectively referred to as "Common Article 2." *See also* First Convention, art 3; Second Convention, art. 3; Third Convention, art. 3; Fourth Convention, art. 3. These articles are collectively referred to as "Common Article 3."

As a result, the existence of an armed conflict at the time of the charged conduct is critical to the legitimacy and legality of subjecting Petitioner to trial by military commission.

Under the laws of war, there are two types of conflict that can occur: international armed conflicts described in Common Article 2 of the Geneva Conventions and non-international armed conflicts described in Common Article 3. International armed conflicts are those in which two or more states oppose one another.[5] Non-international armed conflicts, on the other hand, occur between non-governmental armed groups and either state forces or other non-governmental armed groups.[6]

The requirements for triggering these two categories of conflict are different. Any resort to armed force *between states* triggers a Common Article 2 international armed conflict subject to the entire corpus of the law of armed conflict,[7] regardless of the

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[5] Int'l Comm. of the Red Cross, *How is the Term "Armed Conflict" Defined in International Humanitarian Law?*, ICRC Opinion Paper at 1 (Mar. 2008) [hereinafter ICRC Opinion Paper].

[6] ICRC Opinion Paper, *supra* note 5, at 1; Jelena Pejic, *The Protective Scope of Common Article 3: More Than Meets the Eye*, 93 Int'l Rev. of the Red Cross 189, 191 (2011) ("Despite the lack of a legal definition, it is widely accepted that non-international armed conflicts governed by Common Article 3 are those waged between state armed forces and non-state armed groups or between such groups themselves.").

[7] *See, e.g.*, ICRC Opinion Paper, *supra* note 5, at 2 ("The International Criminal Tribunal for the former Yugoslavia (ICTY) proposed a general definition of international armed conflict. In the Tadic case, the Tribunal stated that '*an armed conflict exists whenever there is a resort to armed force between States*.' This definition has been adopted by other international bodies since

intensity or duration of the fighting or the number of casualties with minor exceptions for border skirmishes and the like.[8] By contrast, non-international armed conflicts occur when fighting between states and non-state armed groups or between such groups crosses the line from civil disturbance or criminal activity to armed conflict.[9] Two criteria are widely considered to be required under Common Article 3 for distinguishing non-international armed conflict from internal disturbances, tensions, or criminal activity that remains below the threshold: groups that are sufficiently organized to function as parties to an armed conflict

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then." (footnote omitted) (quoting *Prosecutor v. Tadić*, Case No. IT-94-1, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995))).

[8] Jean Pictet, Commentary, *I Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* 32 (Jean S. Pictet ed., 1952); *see also* ICRC Opinion Paper, *supra* note 5, at 1–2; Sylvain Vité, *Typology of Armed Conflicts in International Humanitarian Law: Legal Concepts and Actual Situations*, 91 Int'l Rev. of the Red Cross 69, 72 (2009) ("[T]he level of intensity required for a conflict to be subject to the law of international armed conflict is very low. . . . It is, however, not necessary for the conflict to extend over time or for it to create a certain number of victims. In other words, an international armed conflict exists, as recalled by the ICTY, 'whenever there is a resort to armed force between States.'") (internal footnotes omitted).

[9] ICRC Opinion Paper, *supra* note 5, at 1; Pejic, *supra* note 6, at 191 ("Despite the lack of a legal definition, it is widely accepted that non-international armed conflicts governed by Common Article 3 are those waged between state armed forces and non-state armed groups or between such groups themselves.").

and armed clashes between these groups that are prolonged and intense.[10]

Aside from being rooted in the text of Common Article 3 itself, the organization and intensity elements were found to be essential characteristics of non-international armed conflict by the International Law Association after an extensive review of relevant treaty law, state practice, *opinio juris*, judicial decisions, scholarly writing, and the opinions of experts.[11]

Several indicative factors have emerged in international jurisprudence that are relevant when evaluating whether an armed group is sufficiently organized to be considered a "party" to an armed conflict.[12] These factors include the ability to comply with the law of armed conflict (even if the group chooses not to comply), a common command structure, disciplinary rules, adequate communications, a headquarters, the ability to acquire and distribute arms, joint mission

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[10] *See, e.g.*, *Tadić*, Case No. IT-94-1, ¶ 70; Pejic, *supra* note 6, at 191–93; *see also Prosecutor v. Limaj*, Case No. IT-03-66-T, Judgement, ¶ 84 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 30, 2005); *Prosecutor v. Rutaganda*, Case No. ICTR-96-3-T, Judgement and Sentence, ¶ 93 (Int'l Crim. Trib. for Rwanda Dec. 6, 1999); Int'l L. Ass'n, Int'l Law Ass'n Use of Force Comm., *Final Report on the Meaning of Armed Conflict in International Law* 21, 30 (2010) [hereinafter ILA Report]; ICRC Opinion Paper, *supra* note 5, at 3.

[11] ILA Report, *supra* note 10, at 3.

[12] For a detailed analysis regarding the task of defining the organization requirement, see Peter Margulies, *Networks in Non-International Armed Conflicts: Crossing Borders and Defining "Organized Armed Group,"* 89 Int'l L. Stud. 54 (2013).

planning and execution, ability to coordinate troop movements, and the ability to negotiate agreements.[13]

International tribunals have considered a number of factors when assessing whether a situation of violence meets the intensity threshold for non-armed conflict:

> These indicative factors include the number, duration and intensity of individual confrontations; the type of weapons and other military equipment used; the number and calibre of munitions fired; the number of persons and type of forces partaking in the fighting; the number of casualties; the extent of material destruction; and the number of civilians fleeing combat zones. The involvement of the UN Security Council may also be a reflection of the intensity of the conflict.[14]

Crossing this legal threshold for non-international armed conflict triggers wartime rules, with significant legal consequences. Virtually no one thought, and the United States never claimed, that at the time of the charged offenses the United States was in an armed conflict in Yemen governed by the extraordinary rules

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[13] *See, e.g.*, Jean Pictet, Commentary, *IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War* 35–36 (Oscar M. Uhler et al. eds., 1958); Pejic, *supra* note 6, at 192 (citing *Limaj*, Case No. IT-03-66-T, ¶ 90; *Prosecutor v. Haradinaj*, Case No. IT-04-84-T, Judgement, ¶ 60 (Int'l Crim. Trib. for the Former Yugoslavia Apr. 3, 2008)); ICRC Opinion Paper, *supra* note 5, at 3 ("[T]hese forces have to be under a certain command structure and have the capacity to sustain military operations.") (citing *Limaj*, Case No. IT-03-66-T, ¶¶ 94–134; Dietrich Schindler, *The Different Types of Armed Conflicts According to the Geneva Conventions and Protocols*, 163 Recueil de Cours 121, 147 (1979)).

[14] *Haradinaj*, Case No. IT-04-84-T, ¶ 49; *see also* Pejic, *supra* note 6, at 192–93.

of war. It was only in the context of the executive branch's later attempts to try Petitioner via military tribunal that it began to retroactively claim that there had been an armed conflict.

These circumstances raise serious questions about the legitimacy and legality of the military commission convened to prosecute Petitioner for law of war violations. Allowing a military commission of such questionable legality to proceed without first resolving this critical question will cause irreversible harm by putting U.S. servicemembers at greater risk and undermining the legitimacy and effectiveness of U.S. counterterrorism efforts.

II. Subjecting petitioner to a military commission trial of doubtful legality undermines U.S. national security interests by putting U.S. servicemembers at greater risk and undermining U.S. counterterrorism efforts.

Trying the Petitioner before a military commission instead of a federal court without a clear ruling on whether the commission has legal authority to try Petitioner would undermine the United States' national security interests in two critical ways. First, subjecting a detainee to a military tribunal whose legality is in question would put U.S. servicemembers at greater risk of mistreatment at the hands of others. Second, proceeding with a trial whose legitimacy and legality is in question would hinder counterterrorism efforts by jeopardizing cooperation and intelligence sharing from allies and local populations and by fueling terrorist recruitment and propaganda efforts.

A. Subjecting detainees to military commission trials of doubtful legality puts U.S. servicemembers and other U.S. nationals abroad at greater risk.

When America is perceived to be violating domestic or international law—such as the Geneva Conventions—it can make other states and non-state actors more likely to mistreat U.S. servicemembers and other Americans in any number of ways: worse treatment of American prisoners-of-war, the increased use of aggressive interrogation tactics against captured Americans, decreased support for and increased opposition to American military operations, or even—as here—the trial of Americans in improper or illegitimate forums with reduced procedural protections.

Concern for the treatment of American servicemembers has been a key reason the United States has historically "been a leader in . . . bettering the humanitarian principles invoked" for the treatment of captive enemies,[15] and it has been a guiding principle in U.S. foreign policy regarding treatment of prisoners of war. Then-General Dwight D. Eisenhower was keenly aware of this in World War II, when he explained that German prisoners of war were provided the same rations as U.S. soldiers not only because of the 1929 Geneva Convention, but also because "the German[s] had some thousands of American and British prisoners and I did not want to give Hitler the excuse or justification for treating our prisoners more harshly than he was already doing."[16]

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[15] Gen. J.V. Dillon, *The Genesis of the 1949 Convention Relative to the Treatment of Prisoners of War*, 5 Miami L.Q. 40, 41 (1950).

[16] Dwight D. Eisenhower, *Crusade in Europe* 469 (1948).

Treatment of our own servicemembers and nationals was again a key concern when the United States considered ratifying the 1949 Geneva Conventions. President Eisenhower's Secretary of State, John Foster Dulles, argued forcefully that "participation [in the Geneva Conventions] is needed to . . . enable us to invoke them for the protection of our nationals."[17] The Senate agreed that "[i]f the end result [of ratification] is only to obtain for Americans caught in the maelstrom of war a treatment which is 10 percent less vicious than what they would receive without these conventions, if only a few score of lives are preserved because of the efforts at Geneva, then the patience and laborious work of all who contributed to that goal will not have been in vain."[18]

These concerns subsequently led the United States to accord additional protections to our enemies, even when we were not legally required to do so. During the Vietnam War, for example, the United States accorded captured members of the Viet Cong more protections under the Geneva Conventions than they were legally entitled to. The United States did so in part based on the belief that it would result in better treatment for captured Americans.[19]

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[17] *Geneva Conventions for the Protection of War Victims: Hearing Before the Senate Comm. on Foreign Relations*, 84th Cong. 61 (1955).

[18] Senate Comm. on Foreign Relations, *Geneva Conventions for the Protection of War Victims*, S. Rep. No. 84-9 (1955), *reprinted in* 84 Cong. Rec. 9958, 9971 (1955).

[19] Sandra L. Hodgkinson, *Detention Operations: A Strategic View*, *in* U.S. Military Operations: Law, Policy, and Practice 275, 299-300 (Geoffrey S. Coren, Rachel E. VanLandingham & Shane R. Reeves eds., 2015).

The same considerations also informed the U.S. government's decision to grant captured Somali fighters the protections of the Geneva Conventions—such as regular visits by the International Committee of the Red Cross—after the 1993 capture of U.S. Warrant Officer Michael Durant by Somali warlord Mohammed Farah Aidid, even though Somalia was not considered a state under the Conventions at the time.[20] The action was taken to ensure that Durant received similar treatment, and the strategy worked—"heavy-handed interrogations of Durant appeared to cease, the Red Cross was allowed to visit him and observe his treatment, and he was subsequently released" 11 days later.[21]

More recently, concern for how our own servicemembers will be treated was a key consideration in the dialogue surrounding the use of torture. For example, in 2006, Senators John McCain, John Warner, and Lindsey Graham opposed a push to re-interpret certain portions of the Geneva Conventions to permit aggressive interrogation tactics, not only because they believed those actions amounted to torture and are thus wrong *per se*, but also because utilizing them could lead to the mistreatment of Americans abroad. Indeed, Senator Graham suggested that American actions perceived to be illegitimate could lead foreign

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[20] *See* Paul Lewis, *The Somalia Mission: Prisoners; U.N., Urged by U.S., Refuses to Exchange Somalis*, N.Y. Times, Oct. 8, 1993, *available at* http://www.nytimes.com/1993/10/08/world/the-somalia-mission-prisoners-un-urged-by-us-refuses-to-exchange-somalis.html.

[21] Neil McDonald & Scott Sullivan, *Rational Interpretation in Irrational Times: The Third Geneva Convention and the "War on Terror,"* 44 Harv. Int'l L.J. 301, 310 (2003).

countries to try Americans improperly when he questioned in *Newsweek*: "What if a CIA paramilitary guy is caught in Iran . . . ? What would our response be if the Iranian government put them on trial as a war criminal? . . . We would scream bloody murder."[22] He added that "[e]very military lawyer I've ever met believes that [adhering to international standards] is vital for the safety of our troops."[23]

Former Secretary of State Colin Powell reiterated this critical point when he cautioned in a supportive letter to McCain that failure to uphold international standards "would put our own troops at risk."[24]

Secretary of Defense James Mattis, a former general, has also spoken of "America needing to hold the moral high ground."[25] In testimony before the Senate in 2015, Secretary Mattis stated that detainees should be treated in accordance with the standards set by domestic and international law.[26] One hundred and

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[22] *See* Lionel Beehner, *The United States and the Geneva Conventions*, Council on Foreign Relations (Sept. 20, 2006), www.cfr.org/international-law/united-states-geneva-conventions/p11485; Michael Isikoff, *Q&A: Lindsey Graham on Torture*, Newsweek (Sept. 17, 2006, 8:00 PM), http://www.newsweek.com/qa-lindsey-graham-torture-109769.

[23] Isikoff, *supra* note 22.

[24] Letter from General Colin L. Powell, USA (Ret.) to Senator John McCain (Sept. 13, 2006).

[25] Sheri Fink & Helene Cooper, *Inside Trump Defense Secretary Pick's Efforts to Halt Torture*, N.Y. Times, Jan 2, 2017, *available at* https://www.nytimes.com/2017/01/02/us/politics/james-mattis-defense-secretary-trump.html.

[26] *Hearing to Receive Testimony on Global Challenges and U.S. National Security Strategy before Senate Comm. on Armed Services*, 114th Cong. 108:24–109:4 (2015) (testimony of General

seventy-six other retired generals and admirals also wrote to then-President-elect Trump earlier this year to urge compliance with domestic and international law in handling detainees held in U.S. custody. The retired generals and admirals wrote: "We have over six thousand years of combined experience in commanding and leading American men and women in war and in peace, and believe strongly in the values and ideals that our country holds dear. We know from experience that U.S. national security policies are most effective when they uphold those ideals."[27]

These same principles apply here. Demonstrating a clear commitment to fair, humane, and lawful treatment of those we detain is critical to protecting our own servicemembers from potential abuse.

B. Subjecting detainees to military commission trials of doubtful legality undermines the legitimacy and effectiveness of U.S. counterterrorism efforts.

When the legitimacy of military commission trials at Guantanamo Bay is called into question, there is a direct impact on the U.S. counterterrorism mission. Doubts about the legality of U.S. actions impair relationships with allies and partners who may then withhold crucial assistance, fuel anti-American sentiment about the legitimacy of the overall mission, and provide propaganda victories to extremist groups who exploit U.S. actions to bolster their recruitment.

James N. Mattis, USMC (Ret.), Former Commander, U.S. Central Command).

[27] Letter from Retired Generals and Admirals to Donald J. Trump, President-elect of the United States of America (Jan. 6, 2017).

National security leaders have long recognized the importance of observing international legal norms and maintaining legitimacy to U.S. national security interests. Colin Powell warned in 2006 that "[t]he world is beginning to doubt the moral basis of our fight against terrorism," and argued that failure to uphold international standards "would add to those doubts."[28]

And former Secretary of State Condoleezza Rice stated shortly after completing her term as National Security Adviser that "[w]hen we observe our treaty and other international commitments . . . other countries are more willing to cooperate with us and we have a better chance of persuading them to live up to their own commitments. And so when we respect our international legal obligations and support an international system based on the rule of law, we do the work of making the world a better place, but also a safer and more secure place for America."[29]

Similarly, in a 2010 speech, then-Legal Adviser to the Department of State Harold Hongju Koh emphasized the importance of "following universal standards, not double standards."[30] Koh noted that "by imposing constraints on government action, law legitimates and gives credibility to governmental action," affirming President Barack Obama's observation that "'[a]dhering

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[28] Letter from Colin Powell, *supra* note 24.

[29] Secretary Condoleezza Rice, Remarks at Annual Meeting of the American Society of International Law (Apr. 1, 2005), *available at* https://2001-2009.state.gov/secretary/rm/2005/44159.htm.

[30] Harold Hongju Koh, Legal Adviser to U.S. Department of State, The Obama Administration and International Law (Mar. 25, 2010), *available at* https://geneva.usmission.gov/2010/04/01/obama-administration-international-law/.

to standards, international standards, strengthens those who do, and isolates those who don't.'"[31]

More recently, over three dozen former national security officials wrote to Secretary of Defense James Mattis in March 2017: "In any counterterrorism or counterinsurgency campaign, public confidence and legitimacy are critical to strategic success."[32] This is precisely why the Joint Chiefs of Staff have recognized that legitimacy "can be a decisive factor in operations"[33] and that "[t]he purpose of legitimacy is to maintain legal and moral authority in the conduct of operations." Such legitimacy "is based on the actual and perceived legality, morality, and rightness of the actions from the various perspectives of interested audiences," which include not only domestic audiences, but also "nations and organizations around the world."[34]

A perception that U.S. military commissions are unlawful or illegitimate has effects that extend far beyond the courtroom. It erodes public confidence in the counterterrorism mission itself, generating suspicion and distrust among local populations, which become less inclined to cooperate with U.S. efforts. Perceptions of illegitimacy further complicate the already delicate process of working with foreign partners on counterterrorism operations, leading allies and partner forces to refrain from providing crucial

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[31] *Id.*

[32] Letter from Former National Security Officials to James N. Mattis, Secretary of Defense (Mar. 10, 2017).

[33] Joint Publication 3-0, *Joint Operations* at A–4 (2011).

[34] *Id.*

intelligence and other forms of counterterrorism assistance that are essential to the mission.[35]

U.S. counterterrorism efforts have already suffered these negative consequences from the perceived illegitimacy of the Guantanamo Bay military commissions. Several allied countries refuse to consider extradition requests from the U.S. military based on concerns about terrorism suspects being transferred to Guantanamo for trial by military commission.[36] Indeed, key U.S. "counterterrorism partners, including the United Kingdom, Canada, Germany, and the Netherlands, refuse to provide evidence or to cooperate with extradition requests unless a suspect is to be tried in a criminal court."[37]

Subjecting detainees to military commission trials without clear legal authority undermines counterterrorism objectives by providing a powerful propaganda tool for extremist groups. Admiral Mike Mullen, former Chairman of the Joint Chiefs of Staff, has stated that Guantanamo "has been a symbol, and one which has been a recruiting symbol for those extremists and jihadists who would fight us."[38] Such groups seize on unlawful or questionable U.S. actions and the anti-American sentiment they generate to bolster the narrative that the counterterrorism mission itself is illegitimate. An unlawful military trial

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[35] *See* William Finnegan, *Taking Down Terrorists in Court*, New Yorker, May 15, 2017, *available at* http://www.newyorker.com/magazine/2017/05/15/taking-down-terrorists-in-court.

[36] *Id.*

[37] *Id.*

[38] *Transcript: Joint Chiefs of Staff Chairman Adm. Mike Mullen*, ABC News (May 24, 2009), http://abcnews.go.com/ThisWeek/story?id=7664072.

is a powerful weapon for extremist groups, further reinforcing their narrative of a hypocritical and amoral United States at war with Islam.

Clearly demonstrating the legality of military commission trials is crucial to maintaining the legitimacy of the counterterrorism mission and protection of U. S. national security. Allowing a trial of questionable legality to proceed would come at a significant strategic cost.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

Of Counsel
HUMAN RIGHTS FIRST

DAVID B. TOSCANO
Counsel of Record
SHARON KATZ
TYSON D. KENNEDY
ELIZABETH A. TIPPETT
DAVIS POLK & WARDWELL LLP
450 Lexington Avenue
New York, New York 10017
(212) 450-4000
David.Toscano@DavisPolk.com

Counsel for Amici Curiae

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