No. 23-1072

In the Supreme Court of the United States

ALI HAMZA AL BAHLUL, PETITIONER,
v.
UNITED STATES, RESPONDENT

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

BRIEF OF *AMICI CURIAE* CENTER FOR ETHICS AND THE RULE OF LAW (CERL) AT THE UNIVERSITY OF PENNSYLVANIA & THE NATIONAL INSTITUTE OF MILITARY JUSTICE IN SUPPORT OF PETITIONER

ALBERTO MORA
U. Penn. CERL
Exec. Board
8322 Woodlea
Mill Road
McLean, VA 22102

BRENNER M. FISSELL
Counsel of Record
FRANKLIN D. ROSENBLATT
Nat. Inst. of Mil. Justice
408 Saint David's Ave
Wayne, PA 19087
(518) 231-8532
brenner.fissell@gmail.com

Counsel for Amici Curiae

May 2, 2024

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

Treatises

Amici curiae Center for Ethics and the Rule of Law (CERL) at the University of Pennsylvania & National Institute of Military Justice (NIMJ) respectfully submit this brief pursuant to Supreme Court Rule 37 in support of Petitioner.[1]

INTEREST OF AMICUS CURIAE

The Center for Ethics and the Rule of Law (CERL) seeks to promote ethics and the rule of law in national security by encouraging interdisciplinary exchange among expert academics, policymakers, and practitioners on pressing national security concerns for the purpose of advancing the rule of law. CERL advances this aim by hosting conferences, public symposia, and lectures, as well as publishing collected volumes on specialized topics in national security, along with policy papers, blog posts and filing periodic amicus briefs. CERL has particular expertise in the areas of the Law of Armed Conflict (LOAC), professional ethics, presidential war powers, and the Guantánamo Bay detention facility. In 2022, CERL published a lengthy and highly acclaimed report entitled

---

[1] Notice pursuant to Sup. Ct. R. 37.2 was given to both parties more than 10 days prior to filing this brief. No party or counsel for a party helped to draft this brief, and no party or counsel to a party made a monetary contribution to fund the filing of this brief. Sup. Ct. R. 37.6. Counsel for amici also wishes to note that while Petitioner's Counsel, Michel Paradis, is also currently the General Counsel of NIMJ, he was ethically screened from NIMJ's decision to support Petitioner as amicus in this case.

Beyond Guantánamo: Restoring the Rule of Law to the Law of War.[2] CERL is led by Prof. Claire Finkelstein, Algernon Biddle Professor of Law & Philosophy at the University of Pennsylvania—an internationally recognized expert on national security law and ethics. CERL therefore has a compelling interest in ensuring impartial adjudication of national security cases such as this one.

The National Institute of Military Justice (NIMJ) is a District of Columbia nonprofit corporation founded in 1991 by Eugene R. Fidell—the country's leading expert in military justice. NIMJ members include law professors, military law practitioners, former U.S. military judge advocates, and leaders of think tanks and non-profits. Its overall purpose is to advance the fair administration of military justice in the Armed Forces of the United States, which in turn contributes to the national security of the United States. NIMJ takes an active interest in the entire field of military justice and has frequently weighed in on issues relating to the military commissions.

SUMMARY OF THE ARGUMENT

The rule of law in the United States depends critically on the impartiality of the judges that preside over both state and federal

---

[2] BEYOND GUANTÁNAMO: RESTORING THE RULE OF LAW TO THE LAW OF WAR, available at <https://www.penncerl.org/files/beyond-Guantánamo-restoring-the-rule-of-law-to-the-law-of-war/>.

courts, as well as confidence on the part of all participants in the process that this impartiality will be defended and maintained at the highest levels of the justice system. Where Article III judges are concerned, this impartiality is largely self-enforcing: federal judges determine on their own whether their prior contacts with the case or with participants in the case render them unable to carry out their roles with the impartiality and neutrality the law requires.

Judges making that determination in a given case, however, are obligated to apply 28 U.S.C. § 455, which sets forth the conditions under which federal judges must recuse due to conflicts of interest. In this brief, Amici argue that Petitioner was deprived of a fair hearing on his substantive claim due to the failure of Judge Katsas to recuse himself, despite the fact that Judge Katsas was a government attorney on the side of the prosecution in a closely related matter pertaining to the legality of the government's case against Petitioner and the legality of his detention by the U.S. government at Guantánamo Bay. Amici argue that particularly in the case of the review of a military commission ruling, it is critical for the Article III reviewing court to be punctilious in its professional ethics in order to attempt to overcome the profound distrust and skepticism parties to the case as well as members of the public possess with regard to the commission system. Plagued by doubts abouts about its fundamental fairness and legitimacy, the military commission system in Guantánamo struggles to resolve fundamental points of process such as whether confessions

that arguably constitute "fruit of the poisonous tree" are admissible as evidence of guilt at a commissions trial or whether the defendants in the military commissions have a right to due process of law. And because in many cases there is no clearly established procedure or rules of evidence, the commission judges must make their own evidentiary rules at the same time that they judge the evidence presented.

Any failure to live up to the highest standards of integrity and fidelity to the law in the case of a reviewing judge will further cast the possibly tenuous status of the legal rulings in the commission and will undermine faith in the outcome of the commissions.

Amici also urge this Court to grant Petitioner's request for certiorari to consider the novel questions regarding 28 U.S.C. §455 that no court has squarely attempted to resolve. Section 455(a) suggestions that a judge must recuse at any time at which the impartiality of his or her judgment "could be reasonably questioned." This standard is easily met in this case. What is less clear is the suggestion that Judge Katsas' earlier participation in Petitioner Bahlul's case constituted an entirely separate proceeding and that therefore Judge Katsas need not recuse on the bases §455(b). We reject this line of thought.

Amici further reject the suggestion that invoking §455(a) as a more generalized conflict of interest provision would implicate the interpretation of §455(b) such that the latter, more specific provision would no longer apply.

Amici maintain that both subsections (a) and (b) can apply independently to a given case and that the applicability of the former does not detract from the applicability of the latter.

ARGUMENT

I. THIS PETITION TURNS ON FUNDAMENTAL MATTERS OF JUDICIAL ETHICS NEVER BEFORE CONSIDERED BY THIS COURT

As is well known to this Court, Judge Katsas served as a high-ranking DOJ official tasked with miliary commission litigation between 2001 and 2009. Opinion of Katsas, J. On Motion to Disqualify, *Bahlul v. United States*, No. 22-1097 (D.C. Cir., Mar. 10, 2023). Among other matters, he was counsel for the government in the case of this very Petitioner with regard to a habeas petition relating to Petitioner's current confinement and process before the military commission. Gregory Katsas, Declaration, *In re Guantánamo Bay Detainee Litigation,* No. 08-442 (D.D.C., August 28, 2008). That earlier petition was filed by Petitioner in 2005, Petition for Writs of Habeas Corpus, Supplemental Petition of Ali Hamza Ahmad Suliman Bahlool for Writ of Habeas Corpus and Complaint for Injunctive, Declaratory and Other Relief, *Al Jayfi v. Bush*, No. 05-cv-2104 (D.D.C. Dec. 14, 2005), ECF No. 12, on the ground that Petitioner had been the subject of "continued, intensive, and enhanced interrogation . . ." Pet's

Br. at 12. As detailed by Petitioner, Judge Katsas has been a vocal supporter of the sort of "enhanced interrogation" techniques Petitioner claims were used on him and which have now generally come to be associated with torture. *Id.*

Petitioner timely filed a motion to recuse with respect to Judge Katsas which the latter rejected, citing both 28 U.S.C. §455(a) and §455(b)(3) as grounds for recusal. *See* Pet. Br. at 18. The former provision requires disqualification in any proceeding where the judge's "impartiality might reasonably be questioned." 28 U.S.C. §455(a). The latter requires recusal "when [the judge] has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy." 28 U.S.C. §455(b)(3).

It is the position of Amici that the failure of Judge Katsas to recuse under these circumstances constitutes a violation of the clear terms of §455(a) and (b)(3), but, had he been a private practice attorney instead of a judge, would have been a violation of the code of professional ethics for lawyers. Rule 1.11(a)(2) of the ABA Model Rules of Professional Responsibility forbids a lawyer who has previously worked for the government from representing a client "in connection with a matter in which the lawyer participated

personally and substantially as a public officer or employee, unless the appropriate government agency gives its informed consent, confirmed in writing, to the representation." According to Rule 1.11(e), the term "matter" is defined broadly to include "any judicial or other proceeding, application, request for a ruling or other determination, contract, claim controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties . . . ." ABA MODEL R. OF PROF. RESP. 1.11(e).

Having served as a lawyer for the government in any matter connected with Bahlul arising out of the same set of facts and involving the same charges, Rule 1.11 bars Judge Katsas from serving as a private attorney in any regard whatsoever in the present case. That means that neither the government nor Petitioner could hire Judge Katsas to work on its legal team as a private attorney in connection with this case. Why should the judge reviewing the case be permitted to be more conflicted than the attorneys appearing on behalf of one of the parties in that case? Surely a neutral arbiter should be able to provide greater impartiality and certainty as to his role in a given case than a partisan advocate for one of the parties.

Yet in his opinion, Judge Katsas rejected the §455(a) argument out of hand, stating that "Section 455(a) is a more general 'catch-all' provision, so we should not lightly use it to shift

the lines specifically drawn in section 455(b)." Opinion of Katsas, J. On Motion to Disqualify, *Bahlul v. United States*, No. 22-1097 (D.C. Cir., Mar. 10, 2023). He goes on to say: "At most, that should occur only in 'rare and extraordinary circumstances' which are not present here." *Id.* at *6.

With regard to the §455(b) claim, Judge Katsas asserts that the habeas matter in which he served as prosecutor, namely *Al Jayfi v. Bush,* filed on behalf of Bahlul and five other Guantánamo detainees, was a separate proceeding from the current case. *See Al Jayfi*, No. 05-cv-2104 (D.D.C. Dec. 14, 2005), ECF No. 12. That case, he notes, involved a challenge to Bahlul's preventive detention as an enemy combatant alongside that of other detainees. This case, Judge Katsas maintains, "involves detention imposed as punishment for a criminal conviction," and is therefore an entirely different matter under §455(b). Judge Katsas therefore believes he was not precluded from participation. Judge Katsas arrived at this surprising conclusion, despite the fact that the case involved the same parties with regard to the same underlying facts and the same incarceration in Guantánamo based on the same charges.

We respectfully disagree, both with the characterization of §455(a) and its relationship to §455(b), especially as it applies to the instant case.

With regard to §455(a), it is not a far stretch to say that the impartiality of a judge who has previously represented one of the parties in a matter connected with the ongoing challenges to the defendant's criminal charges, legal process and incarceration "might reasonably be questioned." This would supply an independent basis for thinking that Judge Katsas must recuse from the present matter, even if one were to accept the understanding of §455(b) to the present matter provided by Judge Katsas, namely that the habeas petition and the current application are separate "proceedings."

By way of comparison, consider the case of Abraham Sofaer, who served as Legal Advisor to the U.S. Department of State, and later undertook to represent the government of Libya with respect to the bombing of Pan American Flight 103 over Lockerbie, Scotland. In the State Department, Sofaer had personally and substantially taken part in the U.S. government's investigation of the bombing as well as in diplomatic and legal activities related to that event. The case went to the District of Columbia based on a Professional Responsibility report directing bar counsel to issue an admonishment of Sofaer for activities that contravened Rule 1.11(a). Most notably, the court rejected Sofaer's argument that his involvement was too infrequent or informal to violate the ethics rule, but the court said:

> The "substantially related" test by its terms, however, is meant to induce a

> former government lawyer considering a representation to err well on the side of caution. Respondent did not do so.

In re Sofaer, 728 A.2d 625, 628 (D.C. 1999).

Consider also the case of Judge Vance Spath, who was seeking a position as a federal immigration judge while simultaneously presiding over the *Al-Nashiri* case in the military commissions. *In re Al-Nashiri*, 921 F.3d 224 (D.C. Cir. 2019). Judge Tatel, writing for a panel of the D.C. Circuit, observed that "Spath's job application . . . cast an intolerable cloud of partiality over his subsequent judicial conduct" in Al-Nashiri's case. *Id.* at 238. In identifying Judge Spath's serious conflict of interest and failure to recuse himself from a case in which his personal interests conflicted with his professional duty of impartiality, the D.C. Circuit ended up vacating two years of pretrial orders over which Judge Spath had presided. *Id.* at 240.

Former government employees who leave the executive branch have a mandatory two-year waiting period before engaging in knowing communications relating to particular matters "in which the person participated personally and substantially as such officer or employee" before "any officer or employee of any department, agency, court, or court-martial of the United States or the District of Columbia, on behalf of any other person . . ." 18 U.S.C. § 207. Violations of this provision are punishable for up to one year imprisonment, with five years imprisonment for

a willful violation. 18 U.S.C. § 216. Judge Katsas does not fit the circumstances to which 18 U.S.C. § 207 applies, given that he is not appearing before the court as a litigant or a party. Nevertheless, as with Model Rule of Professional Responsibility 1.11, it is sensible to assume that a judge should have at least the impartiality and commitment to ethical conduct with regard to potential conflicts of interest that the parties that appear before him are expected to maintain. A former prosecutor or defense attorney that had represented Petitioner before the commissions would not be permitted to appear as a private party before Judge Katsas in the instant matter, on pain of serious criminal sanctions. Why then should the presiding judge have more leeway than the partisan advocates who appear before the court, when he as neutral arbiter must be all the more above reproach?

The impact of upholding Judge Katsas's decision would reverberate far beyond the military tribunals. His narrow interpretation of § 455 would permit former AUSAs—many of whom become District Judges—to sit on proceedings that are collateral to those they participated in while prosecutors. State prosecutors who become state judges may do the same, leading to a potential avalanche of Due Process claims by defendants should the narrow interpretation Judge Katsas proposes prevail. *See Williams v. Pennsylvania*, 579 U.S. 1, 2 (2016) ("A constitutionally intolerable probability of bias exists when the same person

serves as both accuser and adjudicator in a case.").

Judge Katsas' prior role in the military commissions, along with his enthusiastic endorsement of illegal and discredited methods of interrogation create profound concerns about the propriety of his decision to remain on the three-judge panel that heard Petitioner's case.

II. MILITARY PROSECUTIONS REQUIRE SCRUPULOUS ATTENTION TO JUDICIAL IMPARTIALITY

The foregoing observations should be placed in the particular context of Petitioner's case: a military prosecution. The impartiality of judges in military justice has long played a central role in ensuring that Article II courts like the commissions are governed by the rule of law. As the U.S. Court of Appeals for the Armed Forces (CAAF) wrote in the death penalty case of the Fort Hood Shooter:

> In the military justice system, where charges are necessarily brought by the commander against subordinates and where…the convening authority is responsible for selecting the [jurors], military judges serve as the independent check on the integrity of the court-martial process. *The validity of this system depends on the impartiality of military judges in fact and in appearance*.

Hasan v. Gross, 71 M.J. 416, 419 (C.A.A.F. 2012) (emphasis added).

That independence is equally important where review by Article III judges of military proceedings must occur. Just as the military chain of command is headed by a civilian commander-in-chief, so too must federal civilian courts serve as final arbiters for cases in the military justice system. In the absence of assurance that judges reviewing military cases are unconflicted, the benefits of having such outside review of military decision making by a neutral arbiter would be forfeit.

It is telling that many of the most significant federal court opinions regarding the procedural fairness of military trials have involved claims regarding the bias of judges. *See Bergdahl v. United States*, No. CV 21-418 (RBW), 2023 WL 4743707, at *1 (D.D.C. July 25, 2023) (court-martial judge applying to be DOJ immigration judge while using court-martial rulings as writing sample); *In re Al-Nashiri*, 921 F.3d 224, 226 (D.C. Cir. 2019) (same); *In re Mohammad*, 866 F.3d 473, 474 (D.C. Cir. 2017) (Guantánamo appellate judge disqualified due to prior statements regarding accused's guilt).

In recognition of this, Congress created an appellate review structure for military commission cases that ensured they would be subject to appellate review by an Article III court, rather than by the proposed alternatively, namely the CAAF, which is an Article I court. *Compare Speech of Bennie G. Thompson of*

Mississippi, 158 Cong. Rec. E901-03, 158 Cong. Rec. E901-03, E902 ("Reformed military commissions are fully integrated within our federal framework of criminal justice, *are overseen by our Article III appellate courts*, and are severely confined to their law of war jurisdiction."), *with The Department of Defense Rules for Military Commissions: Analysis of Procedural Rules and Comparison with Proposed Legislation and the Uniform Code of Military Justice*, CONGRESSIONAL RESEARCH SERVICE (Sept. 25, 2006), at *38 (proposal for CAAF to review), *and* 152 Cong. Rec. S10309-02, S10315, 2006 WL 2771452 (Levin Amendment to 2006 Act) ("An appeal under this section shall be forwarded, by means specified in regulations prescribed the Secretary of Defense, directly to the United States Court of Appeals for the Armed Forces").

Similarly, Congress recently extended certiorari review to all cases of military courts-martial, providing universal access to Article III judicial review on direct appeal. NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2024, PL 118-31 § 533, December 22, 2023, 137 Stat 136.

The importance of safeguarding Article III review and the integrity of the judges who conduct such review is rooted in the concern for judicial independence. Article III judges bring a "guarantee of an impartial and independent federal adjudication." *Commodity Futures Trading Commn. v. Schor*, 478 U.S. 833, 848 (1986).

The value of impartiality is recognized internationally in the *Decaux Principles* regarding military tribunals, adopted by the U.N. Commission on Human Rights. DRAFT PRINCIPLES GOVERNING THE ADMINISTRATION OF JUSTICE THROUGH MILITARY TRIBUNALS, U.N. Doc. E/CN.4/2006/58 at 4 (2006). Principle No. 13 establishes the "Right to a competent, independent and impartial tribunal":

> The organization and operation of military courts should fully ensure the right of everyone to a competent, independent and impartial tribunal at every stage of legal proceedings from initial investigation to trial.

While this case involves a civilian court review of a military tribunal, international human rights law to which the United States is a party reflects the same requirement of independence and impartiality. Art. 14, INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, Dec. 9, 1966, 999 U.N.T.S. 171 (ratified June 8, 1992) ("In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.").

The D.C. Circuit panel, of which Judge Katsas was a member, provided a crucial level of civilian, Article III review. The benefit of such review is to inject a structural guarantee of independence and lack of bias into what is

otherwise a military-driven prosecution. The failure of Judge Katsas to recuse when he has a duty to do so in light of a manifest conflict of interest and possible personal subject matter bias suggests that the Article III appellate review of the commission system entirely fails to serve its purpose.

The failure to observe the recusal statute in a Guantánamo case, moreover, is not a trivial error or even just an error that affects the fundamental fairness of the proceedings for Petitioner. Lack of fundamental justice and a robust, impartial review of military commission proceedings is a defect that places the legitimacy of the entire military commission system at risk.

The history of the military commissions in Guantánamo Bay suggests a system driven by results-oriented adjudication, specious legal reasoning, and lack of a genuine commitment to the rule of law and fundamental fairness. From the shameful history of the use of torture, along with cruel and degrading treatment, in violation of both domestic and international law, to the indefinite detention for many years of numerous defendants without charge, there is a long history of detainee abuse at Guantánamo and at other former "black sites" run by the United States military, in conjunction with the CIA, around the globe involving conduct that should shock the conscience of law-respecting member of the legal community. *See* BEYOND GUANTÁNAMO:

RESTORING THE RULE OF LAW TO THE LAW OF WAR, UNIV. OF PENN. CERL (2022).

As a result of this history, it will not surprise any member of this Court that these military commissions are regarded by many as irretrievably tainted. *Id.* To this day, the military commissions at Guantánamo continue to struggle with fundamental legal questions that arise as a result of this egregious history—questions relating to the admissible of certain kinds of evidence or the fairness of the proceedings in the absence of robust constitutional rights for the defendants, once again made salient because of the history of torture and abuse. It is a history that is by now well known, as detailed in the 2014 Senate Select Intelligence Committee Report. *See generally* United States S. Rep. No. 288, 113th Cong., 2d Sess. As Justice Gorsuch said in his dissent in the case of *U.S. v. Husayn, aka Abu Zubaydah, et. al.*, 595 U.S. 195 (2022) in explaining his reasons for rejecting the government's invocation of the State Secret's privilege:

> Zubaydah seeks information about his torture at the hands of the CIA. The events in question took place two decades ago. They have long been declassified. Official reports have been published, books written, and movies made about them. Still, the government seeks to have this suit dismissed on the ground it implicates a state secret—and today the

> Court acquiesces in that request. Ending this suit may shield the government from some further modest measure of embarrassment. But respectfully, we should not pretend it will safeguard any secret.

Id. at *1.

Justice Gorsuch, in short, recognized the profound distortion that could occur when legal doctrine is driven by the effort to obscure embarrassing or illegal conduct on the part of the government–in this case the shameful history of the CIA-led torture program in the years immediately following 9/11. With profound and lingering suspicions about the degree of governmental coverup relating to that program, and the motivations behind the legal decisions summarily made by judges in the commission system, a thorough, dispassionate review of major decisions made by judges in the commission system seems essential if the commissions can be regarded as possessing any degree of legitimacy whatsoever.

III. PROSECUTIONS OF WARTIME ENEMIES PRESENT HEIGHTENED RISKS OF BIAS

If the need for independent and impartial judges is heightened in a military context, that need is ever more apparent in the context of military prosecutions of one's enemies. The problems of a command-driven adjudication are complicated by the natural antipathy

prosecutors are likely to feel towards a wartime enemy alleged to have committed war crimes or otherwise violated the Law of Armed Conflict (LOAC). While domestic military jurisprudence has at times displayed a paternalistic concern for the rights of the accused U.S. servicemember, see Eugene Fidell et. al, GUIDE TO THE RULES OF PRACTICE AND PROCEDURE FOR THE U.S. COURT OF APPEALS FOR THE ARMED FORCES 1 (2024), the reverse is true where foreign enemies are concerned. As Justice Jackson famously observed in his opening statement at the Nuremburg trials: "That four great nations, flushed with victory *and stung with injury*, stay the hands of vengeance and voluntarily submit their captive enemies to the judgement of the law, is one of the most significant tributes that Power has ever paid to Reason." A. TUSA, THE NUREMBERG TRIAL 155 (1st Am. Ed.1984) (emphasis added). Jackson's remarks ring particularly true in application to the early days of the military commissions after 9/11, when a desire for vengeance loomed large. Those were the days, after all, in which Secretary of Defense Donald Rumsfeld is alleged to have instructed DoD General Counsel William Haynes to tell interrogators to "take the gloves off." Andrew Cockburn, *How Donald Rumsfeld Micromanaged Torture*, COUNTERPUNCH (July 2, 2021).

To combat this impulse to embrace brutality in the wake of an attack like 9/11, it is critical that military prosecutions for wartime

offenses adhere scrupulously to internationally recognized standards of accountability and fair play. Efforts to conduct prosecutions during an armed conflict or after the cessation of hostilities are subject to reciprocity, creating a need to base both the substantive and the procedural norms for conducting prosecutions on as objective and impartial a foundation as possible. The best way for a country to seek to vindicate the law of war, then, is to model for its enemy how it hopes its own soldiers will be treated. Otherwise, "No one should be surprised that when one State 'pushes the envelope' of international law others will seek to fill that space in the future." Geoff Corn & Claire Finkelstein, *Russia is Threatening to Treat Foreign Fighters as War Criminals: Can Countries Not Party to Hostilities Protect Their Citizens?*, SMERCONISH.COM (Mar. 16, 2022).

The international community widely recognizes the importance of an unbiased adjudicator in wartime prosecutions, along with a prosecutorial process that reflects and is governed by basic rule of law values. *Hamdan v. Rumsfeld*, 548 U.S. 557, 631–32 (2006) (citing Common Article 3 of the Geneva Conventions, requiring trial by a "regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples"); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts art. 75, June 8, 1977, 1125 U.N.T.S. 3

("In no circumstances whatever shall a prisoner of war be tried by a court of any kind which does not offer the essential guarantees of independence and impartiality as generally recognized."). Indeed, deprivation of the right to an impartial adjudicator is *itself* a so-called "procedural war crime." Article 3 of the Geneva Convention (III) Relative to the Treatment of Prisoners of War, Aug. 12, 1949, [1955] 6 U.S.T. 3316, 3318, T.I.A.S. No. 3364; Rachel VanLandingham, *Courtroom as War Crime: Ukraine's Military Justice Struggle*, 84 OHIO ST. L. J. 1297, 1297 (2024).

War crimes prosecutions in the 20th century demonstrate well the problems with biased adjudicators in cases of enemy combatants. A good example of this comes from the treatment of downed American pilots and airmen in Japan. *See* Kevin T. Hall, *Downed American Flyers: Forgotten Casualties of Axis Atrocities in World War II*, 4 JOURNAL OF PERPETRATOR RESEARCH 192 (2021).

The most well-known of these were the Doolittle Raiders. Those that were captured were subjected to what has been described as a "sham trial." JEANNE GUILLEMIN, HIDDEN ATROCITIES 294 (Columbia UP 2017). This trial "allowed no defense counsel or translation into English and lasted less than two hours." *Id.* The Japanese judges who conducted these proceedings were later prosecuted after the war. *Law Reports of the Trials of War Criminals*, UNITED NATIONS WAR

CRIMES COMMISSION VOL. V 1-22 (1948) (Sawada Case). The trial court concluded that the two judges were complicit in a serious deprivation of due process. *Id.* at 7. One judge in particular deserved special condemnation, Yusei Wako, who "accepted the evidence without question" and knowingly accepted false confessions as evidence. *Id*. Overall, the court held that Wako presided over a "false and fraudulent" proceeding. *Id.*

Another group of downed airmen was executed in Fukuoka in 1945 after sham legal process—also involving Yusei Wako. Timothy Lang Francis, *"To Dispose of the Prisoners"*: *The Japanese Executions of American Aircrew at Fukuoka*, 66 PACIFIC HISTORICAL REVIEW 469 (1997). The crewmembers had participated in firebombing missions of Japanese cities during the waning months of the war, but they were shot down and captured. *Id.* at 476. The lawyers deciding the fate of the prisoners suspended a proposed trial and proceeded with execution. *Id.* at 484. The legal officer who made this decision was none other than Yusei Wako. *Id.* at 482. At the Tokyo Trials, the International Military Tribunal would describe the scrapping of the trial process as motivated by "local expediency, revenge, and malice." *Id.* at 496.

These examples can be contrasted with the conduct of Justice Robert Jackson as Chief Prosecutor of the Nuremberg military tribunal. When presented with a case from the International Military Tribunal of the Far East,

he chose to recuse himself despite the lack of a factual nexus, solely on the basis of appearance:

> I do not regard myself as under a legal disqualification in these Japanese cases under the usages as to disqualification which prevail in this Court…. I have had no participation either in the basic decision to hold war crimes trials in the Orient or as to the manner in which they should be conducted. Nevertheless, I have been so identified with the subject of war crimes that, if it involved my personal preferences alone, I should not sit in this case.

Koki Hirota v. Gen. of the Army MacArthur, 335 U.S. 876, 879 (1948).

CONCLUSION

The writ of certiorari should be granted.

Respectfully submitted,

ALBERTO MORA
U. Penn. CERL Exec. Board
8322 Woodlea Mill Road
McLean, VA 22102

BRENNER M. FISSELL
Counsel of Record
Franklin Rosenblatt
Nat. Inst. of Mil. Justice
408 Saint David's Ave
Wayne, PA 19087
(518) 231-8532
brenner.fissell@gmail.com

Counsel for Amici Curiae