UNCLASSIFIED//FOR PUBLIC RELEASE

No. ________

In The
Supreme Court of the United States

Filed with Classified
Information Security Officer
CISO [illegible]
Date 1-17-17

ABD AL-RAHIM AL-NASHIRI,

Petitioner,

v.

BARACK OBAMA, *et al.,*

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

RICHARD KAMMEN
KAMMEN & MOUDY
135 N. Pennsylvania St., #1175
Indianapolis, IN 46204

NANCY HOLLANDER*
FREEDMAN BOYD HOLLANDER
GOLDBERG URIAS & WARD P.A.
20 First Plaza, Suite 700
Albuquerque, NM 87102

MICHEL PARADIS
Counsel of Record
LCDR JENNIFER POLLIO, USN, JAGC
ROSA ELIDES
MARY SPEARS
KRISTINA HON
U.S. DEPARTMENT OF DEFENSE
MILITARY COMMISSION DEFENSE
ORGANIZATION
1620 Defense Pentagon
Washington, DC 20301
1.703.696.9490 x115
michel.paradis@osd.mil

Counsel for Petitioner

UNCLASSIFIED//FOR PUBLIC RELEASE

~~(U)~~ QUESTIONS PRESENTED

~~(U)~~ *Capital Case.* Nine years ago, petitioner was charged with capital crimes before a military commission in Guantanamo. Petitioner challenged the Department of Defense's statutory and constitutional authority to convene this commission via a petition for a writ of a habeas corpus and a petition for a writ of mandamus. Though the petitions challenged the very authority of the commission to proceed with trial, a divided panel of the D.C. Circuit held that such challenges may only be brought after a trial has already occurred. Petitioner's trial date is not yet scheduled and the earliest any post-conviction appeal in the D.C. Circuit is projected to occur is 2024. This raises three interrelated questions:

1. ~~(U)~~ Did the majority err in extending the abstention doctrine associated with *Schlessinger v. Councilman*, 420 U.S. 738 (1975), to trial by military commission, when doing so foreclosed a core habeas corpus claim?

2. ~~(U)~~ Is the "extraordinary circumstance" exception to abstention met where a capital defendant can show that trial will cause irreparable injuries that flow directly from respondents' own misconduct and, in particular, respondents' decision to subject him to years of "physical, psychological, and sexual torture"?

3. ~~(U)~~ The circuits are divided over whether questions of first impression are reviewable when raised via a petition for a writ of mandamus. Is the D.C. Circuit's uniquely restrictive standard, whereby any "open question" of law is categorically unreviewable via mandamus, inconsistent with the All Writs Act?

~~(U)~~ LIST OF PARTIES

~~(U)~~ All parties do not appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

Abd Al-Rahim Al-Nashiri, petitioner;

Barack Hussein Obama, President of the United States;

Ashton Carter, Secretary, Department of Defense;

Robert Work, Acting Convening Authority, Department of Defense, Office of Military Commissions;

Joseph Biden, Vice President of the United States;

John Kerry, Secretary, Department of State;

John Brennan, Director, Central Intelligence Agency;

CAPT David Culpepper, USN, Commander of U.S. Naval Station Guantanamo

RADM Peter J. Clarke, USN, Commander of Joint Task Force Guantanamo;

John Doe, *et al., persons acting under actual or apparent authority, or color of law, of foreign nations*

~~(U)~~ CORPORATE DISCLOSURE STATEMENT

~~(U)~~ No corporations are parties, and there are no parent companies or publicly held companies owning any corporation's stock.

~~(U)~~ TABLE OF CONTENTS

~~(U)~~ Table of authorities vi

~~(U)~~ Constitutional and statutory provisions involved ix

~~(U)~~ Petition for writ of certiorari 1

~~(U)~~ Opinions below 1

~~(U)~~ Jurisdiction 1

~~(U)~~ Preliminary statement 1

~~(U)~~ Statement of the case 6

~~(U)~~ Reasons for granting the petition 21

I. ~~(U)~~ Habeas corpus must remain available when a petitioner raises a substantial challenge to a military commission's jurisdiction 21

II. ~~(U)~~ Abstention should not apply when a capital trial is of doubtful legality and will cause irreparable injuries that are the result of extreme government misconduct 29

III. ~~(U)~~ The majority's unduly restrictive view of its mandamus jurisdiction is at odds with other circuits and the All Writs Act 33

~~(U)~~ Conclusion 38

~~(U)~~ APPENDIX (App.):

In re: Al-Nashiri, Case Nos. 15-1023 & 15-5020, slip op. (D.C. Cir., Aug. 30, 2016) 1-78

Al-Nashiri v. Obama, et al., Case No. 08-1207, Memorandum Opinion and Order (D.D.C., Dec. 29, 2014) 79-88

United States v. Al-Nashiri, Order AE104F (Jan. 15, 2013) 89-96

In re: Al-Nashiri, Case Nos. 15-1023 & 15-5020, Per Curiam Order (D.C. Cir., Oct. 19, 2016) 97

Al-Nashiri v. Obama, et al., Case No. 08-1207, Supplemental Petition for a Writ of Habeas Corpus (D.D.C., Apr. 21, 2014) 98-117

~~(U)~~ CLASSIFIED APPENDIX (Class.App.):

The contents of the Classified Appendix have been filed under seal.

~~(U)~~ TABLE OF AUTHORITIES

Cases

Abelesz v. Erste Group Bank, 695 F.3d 655 (7th Cir. 2012) 35
Baker v. Carr, 369 U.S. 186 (1962) 23
Balintulo v. Daimler AG, 727 F.3d 174 (2d Cir. 2013) 34
Boumediene v. Bush, 553 U.S. 723 (2008) 28, 29
CFTC v. Schor, 478 U.S. 833 (1986) 24
Cheney v. United States District Court, 542 U.S. 367 (2004) 34
Doe v. Exxon, 473 F.3d 345 (D.C. Cir. 2007) 34
Ex parte Milligan, 4 Wall. 2 (1866) 21
Ex parte Quirin, 317 U.S. 1 (1942) 22, 25
Fay v. Noia, 372 U.S. 391 (1963) 32
Grisham v. Hagan, 361 U.S. 278 (1960) 32
Hamdan v. Rumsfeld, 548 U.S. 557 (2006) 3, 6, 22, 23, 25, 26, 29
Hope v. Pelzer, 536 U.S. 730 (2002) 36
Huffman v. Pursue, 420 U.S. 592 (1975) 25
In re Antrobus, 519 F.3d 1123 (10th Cir. 2011) 35
In re Coffman, 766 F.3d 1246 (11th Cir. 2014) 35
In re Khadr, 823 F.3d 92 (D.C. Cir. 2016) 35
In re Life Investors Ins. Co. of America, 589 F.3d 319 (6th Cir. 2009) 35
In re Van Dusen, 654 F.3d 838 (9th Cir. 2011) 35
In re Volkswagen, 545 F.3d 304 (5th Cir. 2008) 35
In re Wilson, 451 F.3d 161 (3d Cir. 2006) 35
In re Yamashita, 327 U.S. 1 (1946) 22
Johnson v. Eisentrager, 339 U.S. 763 (1950) 22
Kugler v. Helfant, 421 U.S. 117 (1979) 4, 32, 33
Lake Carriers' Ass'n v. MacMullan, 406 U.S. 498 (1972) 25
McCarthy v. Madigan, 503 U.S. 140 (1992) 26
Nevada v. Hicks, 533 U.S. 353 (2004) 33
Precision Instrument Mfg. Co. v. Automotive Maint. Mach. Co., 324 U.S. 806 (1945) 33

Reid v. Covert, 354 U.S. 1 (1957) 2, 23, 27, 32
Roche v. Evaporated Milk Assn., 319 U.S. 21 (1943) 36
Schlessinger v. Councilman, 420 U.S. 738 (1975) 17, 25, 28
SEC v. Rajaratnam, 622 F.3d 159 (2d Cir. 2010) 34
Sprint Communications v. Jacobs, 134 S.Ct. 584 (2013) 25, 29
Stern v. Marshall, 131 S.Ct. 2594 (2011) 26
The Protector, 12 Wall. 700 (1871) 19, 36
Toth v. Quarles, 350 U.S. 11 (1955) 27, 29
Younger v. Harris, 401 U.S. 37 (1973) 25

U.S. Code

10 U.S.C. 948a 15
10 U.S.C. 948b 15
10 U.S.C. 950p 2, 15, 22, 26
50 U.S.C. 1541 16

Congressional materials

Authorization for the Use of Military Force, 115 Stat. 224 (2001) 16
Jennifer K. Elsea & Richard F. Grimmett, Cong. Research Serv., RL31133, *Declarations of War and Authorizations for the Use of Military Force: Historical Background and Legal Implications* (2011) 37
Military Commissions Act of 2009, 123 Stat. 2190 (2009) 15, 22
War Powers Resolution, 87 Stat. 555 (1973) 16

Executive materials

Chief Prosecutor Mark Martins, Remarks at Guantanamo Bay (Apr. 13, 2014) 3
Letter to Congressional Leaders Reporting on Efforts in the Global War on Terrorism, 39 Wkly. Comp. Pres. Doc. 1247 (Sept. 19, 2003) 17

UNCLASSIFIED//FOR PUBLIC RELEASE

Letter to Congressional Leaders Reporting on the Deployment of United States Forces in Response to the Attack on the USS COLE, 36 Wkly. Comp. Pres. Doc. 2482 (Oct. 14, 2000) 16

Letter to the Speaker of the House of Representatives and the President Pro Tempore of the Senate, 37 Wkly. Comp. Pres. Doc. 1447 (Oct. 9, 2001) 17

Remarks of the Attorney General, *Attorney General Announces Forum Decisions for Guantanamo Detainees* (Nov. 13, 2009) 3

The President's Radio Address, 36 Wkly. Comp. Pres. Doc. 2464 (Oct. 14, 2000) 16

United States v. Mohammed, et al., AE144 (Jul. 13, 2009) 5

Misc.

Act for the Abolition of the Court of Star Chamber, 17 Car. I. c. 10 § 6 (1641) 3

Hon. Patricia M. Wald, *Forward to the Military Commission Reporter*, 12 Green Bag 2d 449 (2009) 29

UNCLASSIFIED//FOR PUBLIC RELEASE

~~(U)~~ CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

~~(U)~~ Article I § 9, cl. 2 of the United States Constitution states:

> The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

~~(U)~~ Article III § 2, cl. 3 of the United States Constitution states:

> The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the state where the said crimes shall have been committed; but when not committed within any state, the trial shall be at such place or places as the Congress may by law have directed

~~(U)~~ The All Writs Act, 28 U.S.C. 1651, states:

> (a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.
>
> (b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction.

~~(U)~~ The Military Commissions Act of 2009, 123 Stat. 2190 (2009), states, in

pertinent part:

> 10 U.S.C. 948a(9) – The term "hostilities" means any conflict subject to the laws of war.
>
> 10 U.S.C. 948h(b) – The President is authorized to establish military commissions under this chapter for offenses triable by military commission as provided in this chapter.
>
> 10 U.S.C. 950p(b)(3) – An offense specified in this subchapter is triable by military commission under this chapter only if the offense is committed in the context of and associated with hostilities.
>
> 10 U.S.C. 950g(a) – Except as provided in subsection (b), the United States Court of Appeals for the District of Columbia Circuit shall have exclusive jurisdiction to determine the validity of a final judgment rendered by a military commission (as approved by the convening authority and, where applicable, as affirmed or set aside as incorrect in law by the United States Court of Military Commission Review) under this chapter.

~~(U)~~ PETITION FOR WRIT OF CERTIORARI

~~(U)~~ Petitioner, Abd Al-Rahim Al-Nashiri, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

~~(U)~~ OPINIONS BELOW

~~(U)~~ The opinion of the United States Court of Appeals (App. 1-78) is published at 835 F.3d 110. The decision of the district court (App. 79-88) is published as *Al-Nashiri v. Obama*, 76 F.Supp.3d 218.

~~(U)~~ JURISDICTION

~~(U)~~ The United States Court of Appeals for the District of Columbia Circuit issued its opinion and judgment in this case on August 30, 2016 and denied a timely petition for rehearing on October 19, 2016. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

~~(U)~~ PRELIMINARY STATEMENT

~~(U)~~ Petitioner has been held in U.S. custody without trial or habeas review since 2002. He is not a member of the armed forces. He was not captured on a battlefield. And respondents' allegations against him all occurred at times when and places where the sitting president determined that "America is not at war." These allegations have formed the basis of an indictment in the Southern District of New York since 2003. Yet since 2006 respondents have held him as an "enemy combatant" in Guantanamo and since 2008 they have subjected him to the fits and

starts of the military commission system on capital charges related to these very same allegations.

~~(U)~~ Petitioner sought habeas corpus, as individuals have done for centuries, challenging the Department of Defense's authority to effectively remove his capital prosecution from a federal district court to a military commission in Guantanamo. He relied on 150 years of this Court's precedents and the express terms of the 2009 Act, which states that an offense "is triable by military commission under this chapter only if the offense is committed in the context of and associated with hostilities." 10 U.S.C. 950p(c).

~~(U)~~ Rather than decide that threshold issue – whether the offenses charged were committed in an "area where active hostilities were under way at the time [the accused] committed [his] offenses," *Reid v. Covert*, 354 U.S. 1, 34 (1957) (plurality op.) – the majority below ruled, over dissent, that the federal courts must abstain. Irrespective of any other equitable consideration, the majority concluded that the federal courts must defer to the prosecutorial prerogatives of the Department of Defense, which now may determine in its sole discretion when the courts of law must relinquish their jurisdiction over capital trials for everything but the disposition of post-conviction appeals. If left to stand, many of the most basic jurisdictional questions relating to the use of these military commissions will remain unreviewable for another decade. And this Court will have condoned one of the greatest abdications of judicial power in this nation's history.

~~(U)~~ Since at least the Act for the Abolition of the Court of Star Chamber, 17 Car. I. c. 10 § 6 (1641), habeas corpus has been the indispensable means by which the courts of law have guarded their criminal jurisdiction against unlawful encroachment by special executive tribunals. This Court has consistently reaffirmed the importance of habeas in policing the jurisdiction of military tribunals – and military commissions in particular – at the earliest opportunity. This case asks if these centuries of precedent remain good law.

~~(U)~~ The principal reason why certiorari is warranted is because the current military commissions system poses an unprecedented threat to the integrity of the federal judiciary. Far from their traditional use as an *ad hoc* battlefield expedient, *Hamdan v. Rumsfeld*, 548 U.S. 557, 590 (2006), the military commission system in Guantanamo has become a permanent, civilian-administered adjunct to the judicial system that openly competes for the district courts' jurisdiction over high-profile federal crimes.

~~(U)~~ The military commission system's Chief Prosecutor has advertised that they offer, not a tool of necessity on the battlefield, but a "pragmatic choice" for the "prosecutors and counter-terror professionals in our interagency community[.]" Chief Prosecutor Mark Martins, Remarks at Guantanamo Bay (Apr. 13, 2014). The former Attorney General likewise acknowledged that "many cases could be prosecuted in either federal courts or military commissions[.]" Remarks of the Attorney General, Attorney General Announces Forum Decisions for Guantanamo Detainees (Nov. 13, 2009). The modern military commission, he explained, simply

offers civilian prosecutors the option to make "case by case decisions" about which forum is more favorable based on factors such as the likelihood that a military judge will admit evidence that a federal judge would not. *Ibid.* Regardless of whether such a bifurcated federal criminal justice system is wise, habeas corpus is the only means by which to ensure that it proceeds within the limits that Congress itself has imposed and that this Court has long held the Constitution to require.

(U) Also worthy of this Court's review is the primacy the majority placed on the mere possibility of a post-conviction appeal in order to justify abstention at the expense of all other equitable considerations. This is irreconcilable with this Court's precedents and the special function habeas corpus serves. Even the most established abstention doctrines yield in "extraordinary circumstances," when there is "an extraordinarily pressing need for immediate federal equitable relief[.]" *Kugler v. Helfant*, 421 U.S. 117, 124-25 (1979). Over the past fourteen years, respondents have subjected petitioner to years of "physical, psychological, and sexual torture." Class.App. 125. As Judge Tatel concluded in dissent, if there ever was a case where equity overcame whatever "inter-branch comity" concerns might otherwise motivate abstention, it is this case. App. 76.

(U) Finally, respondents have argued that the exclusive avenue for pre-trial review should be petitions for writs of mandamus to the D.C. Circuit. The D.C. Circuit has foreclosed that review, however, because circuit law holds that any "open question" of first impression is categorically unreviewable via mandamus. The D.C. Circuit has consequently declined to decide the merits of *every* mandamus

petition to come up from the military commissions precisely because the system's novelty makes every question one of first impression.

~~(U)~~ The D.C. Circuit's stringent approach splits with half of the circuits, which expressly favor questions of first impression for mandamus review. It is also at odds with the Ninth Circuit, which disfavors but does not foreclose mandamus review over such questions. Only the D.C. Circuit and, possibly, the Seventh Circuit categorically deny mandamus review on this ground. If habeas is to be foreclosed, this Court should resolve whether mandamus remains available for questions of first impression, particularly where a petitioner invokes the writ's traditional purpose in confining a lower court to the "lawful exercise of its prescribed jurisdiction[.]" *Roche v. Evaporated Milk Assn.*, 319 U.S. 21, 26 (1943).

~~(U)~~ Petitioner's sole claim is that a disinterested judge should review whether the Department of Defense has properly defined the scope and existence of hostilities in which the United States is engaged before it can remove a capital case from a federal district court. There is no good reason to defer judicial review over such questions any longer. The lack of timely judicial oversight since *Hamdan* has allowed this novel system to devolve into dysfunction. The cases pending at the pre-trial stage – such as this one – have languished for nearly a decade with no prospect of trial. And in the words of the second of the three military judges to have presided over the September 11th trial in the past nine years, the military commissions are a "system in which uncertainty is the norm and the rules appear random and indiscriminate." *United States v. Mohammed, et al.*, AE144, at 3 (Jul. 13, 2009) .

The prospect of post-conviction appeal, touted by the majority below as justifying abstention, has not proven itself a meaningful substitute for habeas corpus.

~~(U)~~ This case comes to this Court on an uncontested factual record. It poses questions that are systemically important. And it offers this Court its first and likely last opportunity for the next decade to provide guidance on how this novel tribunal system fits within the federal judicial establishment. As this Court recognized in *Hamdan*, everyone benefits from "knowing in advance whether [the accused] may be tried by a military commission that arguably is without any basis in law." 548 U.S. at 589. If respondents prevail on the merits, the cloud hanging over this case will be lifted. If wrong, they will avoid the waste of a futile capital trial and retain the option of prosecuting petitioner in a court of law. No principle of equity or sound judicial administration counsels leaving such significant doubts to fester for another decade.

~~(U)~~ STATEMENT OF THE CASE

1. ~~(U)~~ Petitioner was seized by local authorities in Dubai in late 2002 and transferred to the custody of the Central Intelligence Agency (CIA). App. 105. For the next four years, he was held incommunicado in secret "black sites" as part of the CIA's Rendition Detention and Interrogation (RDI) Program. During this time, CIA agents subjected petitioner to the most extreme forms of torture and abuse in which our country has ever engaged.

~~(U)~~ The objective of the RDI Program was to induce "learned helplessness" on "the theory that the detainees might become passive and depressed in response to

adverse or uncontrollable events, and would thus cooperate and provide information." Class.App. 14. Dr. Martin Seligman introduced the concept following experiments in which dogs subjected to random electric shocks "learned" to become helpless and avoided leaving their cages altogether. Class.App. 125.

~~(TS/~~ [redacted] ~~NF)~~ The first black site in which respondents held petitioner, codenamed COBALT, was described by one agent as "good for interrogations because it is the closest thing he has seen to a dungeon[.]" Class.App. 16. Detainees at COBALT "'literally looked like a dog that had been kenneled.' When the doors to their cells were opened, 'they cowered.'" *Ibid.* The site operated in total darkness and the guards wore headlamps. Class.App 15, 3. Detainees were kept naked, shackled to the wall, and given buckets for their waste. *Ibid.* On one occasion, petitioner was forced to keep his hands on the wall and denied food for three days. Class.App. 144. To induce sleep deprivation, detainees were shackled to a bar on the ceiling, forcing them to stand with their arms above their heads. Class.App. 15. [redacted] Class.App. 199.

~~(TS/~~ [redacted] ~~NF)~~ Petitioner's time in the RDI Program lasted four years and [redacted] While the RDI Program's use of torture is generally described in terms of "techniques," that term is misleading. These "techniques" were not applied in isolation, only during interrogation, or with intervals of relative safety. Instead,

they are more accurately described as aspects of an all-encompassing environment designed to induce helplessness by means of physical, psychological, and sexual torture.

~~(TS/~~ [redacted] ~~NF)~~ Perhaps the most notorious means of physical torture used against petitioner was the waterboard. This required petitioner to be strapped to a slanted board, pictured on pages 4-5 of the Classified Appendix. Because he was a "really small guy," petitioner is reported to have nearly fallen off the waterboard. Class.App. 240. A rag was placed over his forehead and eyes and water poured into his mouth and nose until he began to choke and aspirate. The rag was then lowered, suffocating him with the water still in his throat, sinuses, and lungs. Eventually, the rag was lifted and the water expurgated, allowing him to "take 3-4 breaths" before the process was repeated. Class.App. 261.

~~(TS/~~ [redacted] ~~NF)~~ Agents also bound petitioner's body into positions of extreme stress. On at least one occasion, they placed a broomstick behind petitioner's knees as he knelt and then forced his body backwards, pulling his knee joints apart until he "started to scream." Class.App. 244–45. On another occasion, agents cinched petitioner's elbows behind his back and hoisted him up to the ceiling, causing onlookers to fear that they dislocated his shoulders. Class.App. 180, 245–46. On still other occasions, petitioner was [redacted] and deprived of sleep for days on end. Class.App. 144, 199.

~~(TS/~~ [redacted] ~~/NF)~~ The standing stress position was also employed when agents stored petitioner for days in a coffin in between interrogations. Class.App. 8-9. This coffin is often termed the "large box." *Ibid.* At other times, agents locked petitioner into the "small box," which is the approximate size of an office safe and [redacted] When the lid was locked, the interior became completely dark, the air stagnant, and petitioner forced into a squatting fetal position that caused his extremities to swell. Class.App. 279.

~~(TS/~~ [redacted] ~~/NF)~~ Nearly every "interview" at several locations involved "walling." This involved agents rolling a towel around petitioner's neck with which to swing him into a plywood wall. Class.App. 10. Walling was used so consistently that "the rolled-up towel ... [became] an object that evoked fear." Class.App. 250, 253. "The interrogator would enter the room and slowly and gently run the rolled towel over the . . . detainee's head . . . spending several minutes adjusting it." Class.App. 250–51. This routine triggered a Pavlovian response wherein the towel became "an omen of what might happen next, [thereby] elicit[ing] a conditioned fear response." *Ibid.* [redacted]

~~(TS/~~ [redacted] ~~/NF)~~ The physical means of torture were thus designed to amplify their psychological aspects. One agent's stated aim was to

create dependence with "various degrees of mild punishment" coupled with "some 'minute rewards.'" Class.App. 35. This "mild punishment" included convincing petitioner, while hooded, naked, and shackled to the ceiling, that he was about to be shot. Class.App. 174–75. The agent racked a handgun "once or twice" near petitioner's head, Class.App. 178, and then removed petitioner's hood so he could see the handgun pointed at him. Class.App. 175. When petitioner began to cry, the agent exchanged the handgun for a power drill that was revved to heighten the effect. Class.App. 149.

~~(TS/~~ ~~NF)~~

~~(TS/~~ ~~NF)~~ Less common, but perhaps most damaging, was the sexual torture. For example, , petitioner was subjected to "rectal feeding." Class.App. 205. There is also evidence that petitioner was forcibly sodomized, possibly under

the pretext of a cavity search that was done with "excessive force." Class.App. 66. He was also repeatedly "bathe[d]" with a stiff brush of the type "used in a bath to remove stubborn dirt," Class.App. 180, which would be raked across petitioner's "ass and balls and then his mouth." Class.App. 247.

~~(U)~~ In early 2003, some agents protested internally that "the wheels had come off" of the RDI Program, Class.App. 249, and that petitioner's torture was "a train wreak [sic] waiting to happen[.]" Class.App. 184. The CIA's Chief of Interrogations threatened to resign and wrote a cable reporting "serious reservations with the continued use of enhanced techniques with [petitioner] and its long term impact on him. . . . [C]ontinued enhanced methods may push [petitioner] over the edge psychologically." Class.App. 187. Headquarters, however, ordered petitioner to be tortured further regardless. Class.App. 38. After this, records become "increasingly summarized [in] form, providing little on how or when the techniques were applied during an interrogation." Class.App. 30. Most summaries of interrogation petitioner's counsel have received simply say that an "aggressive interview" occurred.

~~(TS/~~ ~~NF)~~

(TS/ /NF)

(TS/ /NF)

(TS/ /NF)

~~(TS/~~ ~~NF)~~ The RDI Program quickly achieved its desired effect: petitioner broke down psychologically. He developed a phobia of water and, when showering, kept the water pressure low. Class.App. 158. For approximately one year after being publicly transferred from the RDI Program to Guantanamo in 2006, he avoided leaving his cell altogether. *Ibid.*

~~(TS/~~ ~~NF)~~ Aggravating these circumstances are petitioner's documented mental limitations. Petitioner, for example, failed to graduate high school until twenty-five. Class.App. 171. And from early in his confinement, government agents noted signs of mental disability, which made petitioner particularly vulnerable to abuse. Soon after his seizure, one report described his

Class.App. 327. Class.App. 269, and proven inability to adapt to unanticipated events. Class.App. 241. And the CIA's Deputy Director of Operations responsible for the RDI Program concluded that petitioner's observed mental function contradicted earlier preconceptions that he was the "mastermind" of the USS COLE bombing: "'Mastermind' was not an apt description of al-Nashiri. One of our interrogators described him to me as 'the dumbest terrorist I have ever met.'" Class.App. 238.

~~(TS/ NF)~~ In late 2012, military commission prosecutors requested a competency board evaluate petitioner. It found that petitioner presented with nightmares that invoked being chained, naked, and waterboarded, and that he continues to suffer from Post-Traumatic Stress Disorder and Major Depressive Disorder. Class.App. 158, 161-64. This diagnosis was corroborated by Dr. Sondra Crosby. Class.App. 125. She found that petitioner "suffers from [untreated] post-traumatic stress disorder[,]" with its concomitant hypervigilance, flashbacks, sleep disorders, and nightmares. Class.App. 125, 228. He also has "[m]ultiple other physical complaints, headaches, chest pain, joint pain, stomach pain." Class.App. 228. In particular, he has "persistent and chronic anal-rectal complaints, difficulty defecating, bleeding, hemorrhoids, [and] pain with sitting"– symptoms "very common in survivors of sexual assault." Class.App. 233–34. While

long-lasting effects from torture would be expected, she found that factors unique to Guantanamo and the military commission system exacerbate petitioner's symptoms. Class.App. 126.

2. (U) Respondents have never alleged petitioner's involvement in the September 11th attacks, the war in Afghanistan, or any other hostilities. In September 2006, however, respondents brought petitioner [redacted] Guantanamo to be held as a so-called "enemy combatant." App. 105. In 2008, the Department of Defense ordered petitioner to stand trial before a military commission in Guantanamo for his alleged involvement in the plot to bomb the USS COLE in Yemen in October 2000 and a plot to bomb a French oil tanker in Yemen in 2002. *Ibid.* These charges carry the death penalty and largely mirror a capital indictment in which petitioner was named an unindicted co-conspirator that has been pending in the Southern District of New York since 2003. *Ibid.*

(U) Petitioner has consistently protested the legality of his trial by military commission as unconstitutional and as *ultra vires* of the Military Commissions Act of 2009, 123 Stat. 2190 (2009) (2009 Act). Specifically, the 2009 Act authorizes the Department of Defense to convene military commissions to try "offenses triable by military commission as provided in this chapter." 10 U.S.C. 948b(b). The 2009 Act then circumscribes that authority such that an "offense specified in this subchapter is triable by military commission under this chapter only if the offense is committed in the context of and associated with hostilities." 10 U.S.C. 950p(c). "Hostilities" is defined as a "conflict subject to the laws of war." 10 U.S.C. 948a(9).

~~(U)~~ Based on the uncontroverted public record, all the allegations against petitioner took place before the first recognition of any hostilities in Yemen in September 2003. This includes the period surrounding the bombing of the USS COLE in October 2000, when President Clinton declined to invoke the law of war and insisted instead that the country remained at peace:

> [E]ven when America is not at war, the men and women of our military risk their lives every day ... No one should think for a moment that the strength of our military is less important in times of peace, because the strength of our military is a major reason we are at peace.

The President's Radio Address, 36 Wkly. Comp. Pres. Doc. 2464 (Oct. 14, 2000). The President further reported to Congress that additional U.S. personnel were deployed to Yemen "solely for the purpose of assisting in on-site security." *Letter to Congressional Leaders Reporting on the Deployment of United States Forces in Response to the Attack on the USS COLE,* 36 Wkly. Comp. Pres. Doc. 2482 (Oct. 14, 2000). The FBI led the investigation, which resulted in the grand jury indictment in the Southern District of New York in 2003. App. 105.

~~(U)~~ After the attacks of September 11, 2001, Congress passed the Authorization for the Use of Military Force (AUMF), 115 Stat. 224 (codified at 50 U.S.C. 1541, *note*). The AUMF authorized the President "to use all necessary and appropriate force against those nations, organizations, or persons" responsible for the September 11th attack. *Id.* §2(a). The AUMF supplements the War Powers Resolution, 87 Stat. 555 (1973) (codified at 50 U.S.C. 1541, *et seq.*). *Id.* §2(b)(1). When drawing upon the AUMF to recognize hostilities in specific places, the President has done so via War Powers Resolution reports. *See, e.g., Letter to the*

Speaker of the House of Representatives and the President Pro Tempore of the Senate, 37 Wkly. Comp. Pres. Doc. 1447 (Oct. 9, 2001) (hostilities in Afghanistan).

~~(U)~~ The President did not extend the AUMF's war-making authorities to Yemen until September 19, 2003, nearly a year after petitioner was in custody. *Letter to Congressional Leaders Reporting on Efforts in the Global War on Terrorism*, 39 Wkly. Comp. Pres. Doc. 1247 (Sept. 19, 2003). This was the first public act designating Yemen a theater of hostilities.

3. ~~(U)~~ Petitioner has objected to his trial by military commission through every appropriate procedural vehicle. At every turn, the merits of his claim – the fundamental questions of when and where America is at war – have been avoided and deferred.

~~(U)~~ In the military commission, the presiding military judge presumed the validity of petitioner's trial because the Department of Defense brought the prosecution without being personally countermanded by the President. App. 89. And when petitioner raised his claim via habeas corpus, respondents cross-moved to hold petitioner's habeas case in abeyance based on the abstention doctrine articulated in *Schlessinger v. Councilman*, 420 U.S. 738 (1975). Respondents further protested that habeas should be denied because "if any Court were to have jurisdiction over petitioner's challenge, it would be the D.C. Circuit on mandamus in relation to its exclusive [appellate] jurisdiction." *Al-Nashiri v. Obama, et al.*, Case No. 08-1207, Resp. Opp., at 9 n.7 (D.D.C. May 15, 2014). The district court granted respondents' cross-motion. App. 79.

~~(U)~~ Petitioner appealed to the D.C. Circuit and, following respondents' suggestion, simultaneously raised his claim via a petition for a writ of mandamus. App. 10-11. On August 30, 2016, a divided panel of the D.C. Circuit affirmed the district court's abatement of proceedings and denied petitioner's petition for a writ of mandamus. Judge Tatel dissented. In reaching both results, the majority declined to decide the legal merits of petitioner's challenge.

~~(U)~~ With respect to habeas, the majority affirmed the extension of "the principles announced in *Councilman* to Al-Nashiri's case." App. 15. While acknowledging that this Court has never extended abstention doctrines to military commissions, the majority determined that it was appropriate to extend *Councilman* because of the facial "*adequacy* of the alternative system in protecting the rights of defendants and the *importance* of the interest served by allowing that system to proceed uninterrupted by federal courts." App. 21 (original emphasis). With respect to "adequacy," the majority refused to "evaluate the on-the-ground performance" of the military commissions, but instead looked to the facial similarity of the military commissions' post-trial review mechanisms with those of the court-martial system. With respect to "importance," the majority deferred to the judgment of the political branches "that the ordinary federal court process was not suitable for trying certain enemy belligerents." App. 28. Because the statute provided for no pre-trial Article III review, the Circuit reasoned the political branches implicitly determined that judicial review should be exclusively post-conviction. App. 27.

~~(U)~~ The majority then concluded that no exception to abstention was warranted. App. 37. Though petitioner has been in U.S. custody since 2002 and has faced capital charges before a military commission in Guantanamo since 2008, the majority ruled that this did not constitute unreasonable delay warranting judicial intervention. App. 51. The majority also ruled that the irreparable injuries petitioner faces because of torture did not qualify for the "extraordinary circumstances" exception because he could not show that they rendered the military commission biased. App. 37.

~~(U)~~ The majority then denied the petition for a writ of mandamus "because [petitioner] has not met the high bar of showing a 'clear and indisputable' right to issuance of the writ." App. 55. Petitioner argued that the political branches' determination of dates of hostilities' beginning in Yemen in September 2003 was dispositive based on this Court's decisions in cases like *The Protector*, 12 Wall. 700 (1871). App. 59. Respondents argued that the existence of hostilities should be determined by the military officers assigned to serve as the military commission's "jury" as a question of fact "based on the totality of the circumstances." App. 56. The majority concluded that it need not decide because "whether hostilities against al Qaeda existed at the time of Al-Nashiri's alleged offenses, and whether Al-Nashiri's conduct in Yemen took place in the context of those hostilities, are open questions. And open questions are the antithesis of the 'clear and indisputable' right needed for mandamus relief." App. 58 (quotations omitted).

~~(U)~~ Judge Tatel would have remanded the case to proceed on the merits via habeas corpus. Abstention, he reasoned, was not justified by "one of the primary considerations—perhaps the *primary* consideration—underlying *Councilman*'s abstention doctrine," namely, "the importance of avoiding judicial interference in the military's unique relationship with its service[-]members[.]" App. 61 (original emphasis). In addition, the military commissions' checkered history and "the absence of a well-developed body of law about their use further counsels against abstention." App. 63.

~~(U)~~ Judge Tatel further contended that abstention was inappropriate under "the unique and troubling circumstances of this case." App. 63. Chief among his concerns was the fact that "the government subjected [petitioner] to years of brutal detention and interrogation tactics that left him in a compromised physical and psychological state *and* that the harms he has already suffered will be exacerbated – perhaps permanently – by the government's prosecution of him in a military commission." App. 65 (original emphasis). Judge Tatel concluded that such harms – if demonstrated – would likely warrant an exception even to *Younger* abstention and outweighed the "inter-branch comity" concerns the majority relied upon to foreclose judicial review via habeas corpus. App. 76.

~~(U)~~ Petitioner filed a motion for panel rehearing, which was denied on October 19, 2016. App. 97. This petition followed.

(U) REASONS FOR GRANTING THE PETITION

I. (U) Habeas corpus must remain available when a petitioner raises a substantial challenge to a military commission's jurisdiction.

(U) Petitioner challenged respondents' legal authority to try him by military commission because, as a matter of constitutional law and express statutory limitation, the offenses with which he was charged were not triable by military commission in the first place. This is the same question posed 150 years ago: "ha[s] this tribunal the *legal* power and authority to try and punish [him]"? *Ex parte Milligan*, 4 Wall. 2, 118 (1866) (original emphasis). Reviewing such claims before trial occurs has been a core function of habeas corpus for centuries and the majority below offered no compelling reason to foreclose that review now.

(U) Instead, the majority held that abstention was required even for such threshold legal challenges because the military commission system is now delineated by statute and includes post-conviction appeals in the D.C. Circuit. But that is the main reason this Court should grant certiorari. While purporting to create "military commissions," the 2009 Act has, in truth, created a novel and permanent system of rump criminal courts that operate free from the most basic requirements of Article III. Under the majority's decision below, civilians in the "interagency community" now have the unilateral authority to remove capital prosecutions from the federal courts to this system on a "case-by-case" basis. The judiciary must abstain from evaluating the basic legality of those decisions unless and until this system yields a conviction subject to appellate review. And it must continue to abstain even where that review is unlikely to occur for another decade.

(U) This profound marginalization of the judiciary is new in our history. If such a system is to exist and to operate so free from meaningful judicial oversight, this Court should take responsibility for the drastic shift in the separation of powers that such a regime entails. Alternatively, this Court should grant certiorari to reaffirm that when faced with a "substantial argument that the military commission lacks authority to try him," *Hamdan*, 548 U.S. at 589 n.20, the judiciary cannot abdicate its Article III duty to prevent capital trials from being unlawfully diverted from the courts of law.

1. (U) Petitioner's challenge to his trial by military commission could not be more fundamental nor more straightforward. The 2009 Act permits the Department of Defense to try a case in a military commission "only if the offense is committed in the context of and associated with hostilities," 10 U.S.C. 950p(c). This has been a precondition for military jurisdiction over non-service-members for at least 150 years. *Johnson v. Eisentrager*, 339 U.S. 763, 786 (1950); *In re Yamashita*, 327 U.S. 1, 12 (1946); *Ex parte Quirin*, 317 U.S. 1, 35 (1942); *see also Hamdan*, 548 U.S. at 597 (plurality op.) (the existence of hostilities at both the time and place of the offense is one of "four preconditions for exercise of jurisdiction by a tribunal of the type convened to try [petitioner]."); *id*. at 693 (Thomas, J., dissenting) (agreeing that "the (1) time and (2) place of the offense" a military commission seeks to try are "prerequisites for their use").

(U) Every court, including this Court, to rule on the scope of hostilities over the past fifteen years has looked to "the political departments' determination of

dates of hostilities' beginning." *Baker v. Carr*, 369 U.S. 186, 214 (1962) . In practice, that has meant the authority conferred by the AUMF and the President's invocation of AUMF authority to recognize foreign battlefields. *See, e.g.*, *Hamdan*, 548 U.S. at 594 (assuming "that the AUMF activated the President's war powers ... and that those powers include the authority to convene military commissions in appropriate circumstances"). Applying that same rule here, hostilities did not exist in Yemen until September 2003, well after petitioner is alleged to have committed any crime and a year after he was in custody. The most fundamental precondition for military jurisdiction over petitioner's case, therefore, is absent.

(U) Petitioner must have a meaningful avenue of pre-trial review of the Department's compliance with this precondition. The hostilities precondition serves an essential gatekeeping function and habeas is the traditional means by which the judiciary has kept the gate. In fact, this Court has already granted pre-trial habeas relief on this very ground, reasoning that military tribunals may only try non-service-members for offenses committed in "area[s] where active hostilities were under way at the time [the accused] committed their offenses." *Reid*, 354 U.S. at 34 (plurality op.). Otherwise, such crimes are "*triable only* by a jury in a court of law." *Id.* at 29 (emphasis added). This precondition is not a precondition if no court can confirm that it has been met before a capital case is removed from judicial control.

2. (U) The majority below concluded that habeas could be foreclosed because of the prospect of post-conviction appeal. App. 27. The past decade, however, has shown that the vitality of post-conviction review can easily be

thwarted through delay and plea bargaining. Faced with no meaningful avenue for pre-trial review, eight of the ten convictions to come out of the military commission system have been the result of plea bargains. Even if this Court looks past this system's lax procedural rules and indeterminate sentencing regime, it has no speedy trial requirements. Individuals face decades of legal limbo before judicial review is even hypothetically available. In this very case, the record shows that any post-conviction appeal in the D.C. Circuit is unlikely to occur until *at least* 2024.

~~(U)~~ Post-conviction review also fails to correct for the constitutional harm that habeas guards against. Article III's judicial trial requirements are not simply protections for a defendant's rights, but structural safeguards for the separation of powers. *CFTC v. Schor*, 478 U.S. 833, 850-51 (1986). If a defendant waives appeal pursuant to a plea deal or even if a defendant is acquitted, an illegally convened military commission still violates Article III and "emasculates" the federal judiciary's role in adjudicating high-profile criminal cases. *Ibid.* Without the check of pre-trial habeas, that wrong is made permanently unreviewable in most cases.

~~(U)~~ The majority's acceptance of such a diminished judicial role breaks with a long and uninterrupted line of precedent refusing to extend abstention doctrines to military commissions specifically and novel assertions of military jurisdiction generally. Far from abstention, military commission jurisdiction has historically demanded close judicial supervision. In *Quirin*, this Court convened a special term to reaffirm that habeas was available to decide whether "the Constitution and laws of the United States constitutionally enacted forbid [petitioner's] trial by military

commission" and specifically whether "the Commission has jurisdiction to try the charge preferred against petitioners." 317 U.S. at 25. And this Court reaffirmed that holding when it reviewed the military commissions in Guantanamo via pre-trial habeas. *Hamdan*, 548 U.S. at 588.

~~(U)~~ The majority's break with this precedent also betrays a more general error in its extension of abstention doctrines here. This Court has repeatedly held that the starting point for any abstention doctrine is tradition. *Huffman v. Pursue*, 420 U.S. 592, 600 (1975). There is a "longstanding public policy against federal court interference" with a State's criminal courts. *Younger v. Harris*, 401 U.S. 37, 43 (1973). Courts also have a long history of refusing to intervene when service-members are brought before military disciplinary proceedings. *Councilman*, 420 U.S. at 758. The absence of such a tradition, by contrast, is normally fatal to the invocation of abstention principles and should have been equally fatal here. *Sprint Communications v. Jacobs*, 134 S.Ct. 584, 588 (2013).

~~(U)~~ Moreover, every recognized abstention doctrine is justified by "narrowly limited" considerations of comity that "justify the delay and expense to which application of the abstention doctrine inevitably gives rise." *Lake Carriers' Ass'n v. MacMullan*, 406 U.S. 498, 509 (1972) (internal formatting omitted). As the majority below acknowledged, none of the traditional bases for comity are present here. App. 33-34. There is no danger to "our federalism," *Younger*, 401 U.S. at 44, or of unwarranted judicial interference with the military's "respect for duty and a discipline without counterpart in civilian life." *Councilman*, 420 U.S. at 757.

Petitioner was not even captured on a foreign battlefield. He was seized in a world financial capital by local authorities and taken into the custody of a civilian agency. Nothing about this case confers the presumption of military jurisdiction that the petitioner's status as a service-member created in *Councilman*. *Id.* at 759-60.

~~(U)~~The majority failed to identify any policy reason to abstain beyond the need for "inter-branch comity" that governs the judicial evaluation of every activity undertaken by Congress or the Executive under color of law. App. 27-28. At most, such generic deference implicates ordinary principles of exhaustion, not preclusive abstention doctrines. *See McCarthy v. Madigan*, 503 U.S. 140, 144 (1992). But even that deference is unwarranted here, where the claim is that the political branches have created a non-judicial forum that supplants the federal courts' constitutional jurisdiction. *See Stern v. Marshall*, 564 U.S. 462, 502-03 (2011). Even the most established abstention doctrines do not apply when a tribunal is proceeding "*ultra vires* and thus lacks jurisdiction." *Hamdan*, 548 U.S. at 589 n.20. In such cases, the policy interests that ordinarily compel judicial comity are absent, if not reversed.

~~(U)~~The majority below acknowledged this rule, but interpreted it to require petitioner to demonstrate that the military commissions were "so procedurally deficient that they are wholly *ultra vires*." App. 50. This simply misunderstands the phrase "*ultra vires*," which ordinarily has nothing to do with procedure. Petitioner's only claim is that the Department of Defense has "exceed[ed] limits that certain statutes, duly enacted by Congress" – to wit, 10 U.S.C. 950p(c) – "have placed on [its] authority to convene military courts." *Hamdan*, 548 U.S. at 636 (Kennedy, J.,

concurring). That is the very definition of *ultra vires*. And whatever else that term could mean, it is difficult to conceive of a more *ultra vires* prosecution than a war crimes tribunal prosecuting a crime that the President himself determined occurred when "America [was] not at war."

~~(U)~~The majority's decision to abstain was therefore not based on this Court's precedents on when abstention doctrines apply. It was based on the view that *Councilman* does not simply bar service-members from circumventing the military's disciplinary system. In the majority's view, it commands judicial deference to any quasi-judicial proceedings undertaken under military auspices writ large.

~~(U)~~Giving *Councilman* such an extraordinary preclusive effect contradicts numerous decisions of this Court holding that "the business of soldiers is to fight and prepare to fight wars, not to try civilians for their alleged crimes." *Reid*, 354 U.S. at 35 (plurality op.); *see also Toth v. Quarles*, 350 U.S. 11, 17 (1955). And it has already set a troubling precedent. The majority's decision prompted at least one district court to order briefing on whether it must abstain from deciding a case involving a civilian American journalist, who challenged a military prosecutor's demand for his records on First Amendment grounds. *Boal v. United States*, Case No. 16-cv-05407-GHK-GJS, Dkt. #30 (C.D.Cal., Sept. 8, 2016). At a minimum, this Court needs to clarify that *Councilman* is limited to situations where "[t]here is no question that [petitioner] is subject to military authority and in proper cases to disciplinary sanctions levied through the military justice system." *Councilman*, 420

U.S. at 759-60. Otherwise, the majority's decision below portends a new era of presumptive military authority that the federal courts are powerless to supervise.

3. ~~(U)~~ Finally, this Court's grant of certiorari is again needed to restore habeas corpus. In *Boumediene v. Bush*, 553 U.S. 723, 780 (2008), this Court recognized habeas corpus' traditional role in affording pre-trial judicial review over whether the offenses charged before a military tribunal are triable by the military in the first place. Yet, the majority below held that abstention was required, regardless of whether there were "suitable alternative processes in place to protect against the arbitrary exercise of governmental power." *Id.* at 794. In the majority's view, it was not only compelled to "assume" that petitioner had an adequate alternative to habeas corpus based upon the mere possibility of a post-conviction appeal, but it was also precluded from "determin[ing] whether pretrial intervention is warranted by examining the on-the-ground performance of the system that Congress and the Executive have established." App. 27.

~~(U)~~ This holding alone demands review. Habeas deals in substance not appearance. *Boumediene*, 553 U.S. at 785. In *Boumediene*, this Court refused to rely upon "a remote hypothetical" of how the Combatant Status Review Tribunal (CSRT) process might proceed, but instead looked to actual practice, which had shown it incapable of providing timely or meaningful judicial review. *Id.* at 790.

~~(U)~~ Judged by their on-the-ground performance, the military commissions perform no better than the CSRTs. They proceed largely via summary orders. And as the decision on the issue at the center of this case demonstrates, written opinions

do little more than invoke random assortments of legal doctrines to justify the Executive's charging decision. App. 89; *see also* Hon. Patricia M. Wald, *Forward to the Military Commission Reporter*, 12 Green Bag 2d 449, 454 (2009) (expressing alarm at the failure of "the presiding judges [to] explain the bases of their rulings apart from mere citation to the Act or the rules."). While such deference "to the will of the executive department which appoints, supervises and ultimately controls them" is to be expected from a military tribunal, *Toth*, 350 U.S. at 17, that is precisely why habeas corpus is necessary. *Hamdan*, 548 U.S. at 587.

~~(U)~~ And because the military commissions have no speedy trial requirements, the majority's decision below has cut a rule-swallowing loophole into the detention-related habeas corpus guarantee of *Boumediene*. If left to stand, the Executive now has the power to indefinitely detain individuals free from judicial oversight by the mere act of bringing them before a military commission. This is not a hypothetical concern. Petitioner was seized in 2002. Even if this Court looks past the denial of a "meaningful access to a judicial forum for a period of [fourteen] years," *Boumediene*, 553 U.S. at 772, the Department of Defense has been lumbering through the motions of prosecuting him for over eight years with no end in sight. Such extraordinary delay is inimical to habeas corpus. *Id.* at 794.

II. ~~(U)~~ Abstention should not apply when a capital trial is of doubtful legality and will cause irreparable injuries that are the result of extreme government misconduct.

~~(U)~~ Abstention, like habeas corpus, is governed by principles of equity. It is a "basic doctrine of equity jurisprudence," *Sprint*, 134 S.Ct. at 591, that presumes the

harms a defendant may suffer from a single prosecution are incidental to an otherwise regular trial process that the prosecuting power is pursuing with clean hands. *Younger*, 401 U.S. at 41. This Court has therefore recognized exceptions to even the most settled abstention doctrines when that equitable balance is called into doubt. The "extraordinary circumstances" exception ensures that the federal courts remain open whenever there is "an extraordinarily pressing need for immediate federal equitable relief[.]" *Kulger*, 421 U.S. at 124-25

~~(TS/ NF)~~ By any reasonable measure, the circumstances of this case are extraordinary. The irreparable injuries petitioner faces if put through the motions of a gratuitous death penalty trial in Guantanamo are the direct result of respondents' unclean hands. Respondents subjected petitioner to years of torture and humiliation intended to induce "learned helplessness" and succeeded in doing so. Given that Guantanamo was itself a "black site," petitioner is routinely presented with psychological triggers that cause him "intense anxiety, dissociation, and painful flashbacks." Class.App. 126. Class.App. 328. Combined with the continuing requirement that petitioner be chained to the floor at all times, meeting with his attorneys replicates the most salient routines of the RDI Program.

~~(TS/ /NF)~~ A full-blown capital trial before a military commission magnifies the impact of those triggers exponentially. The "ever-

changing rules and procedures" exceed petitioner's capacity to comprehend because he "has no way of differentiating this from the government's prior deliberate attempts to destabilize his personality." Class.App. 127. This was demonstrated on one occasion when a floor safe, the approximate size of the "small box," appeared in the courtroom. Seeing this item produced such a strong reaction that petitioner's attorneys had to persuade the judge to relocate it before petitioner could calm down enough to discuss the proceedings with his counsel. Class.App. 326.

~~(U)~~ On numerous other occasions, the military judge has involuntarily excluded petitioner from proceedings because his treatment in the RDI Program was being discussed. *Cf.* Hamdan, 548 U.S. at 641. This exclusion causes petitioner intense anxiety, which is exacerbated by the fact that his attorneys are forbidden from even discussing these hearings with him. Class.App. 128. Given such circumstances, Dr. Crosby predicts that Petitioner is likely to decompensate fully during his trial. *Ibid.*

~~(U)~~ That this is a capital case only compounds these harms. A capital trial imposes psychological hardships that are "different in kind" from a non-capital proceeding, given that the ultimate objective is to determine whether petitioner should live or die. *See Gregg v. Georgia*, 428 U.S. 153, 188 (1976) (plurality op.). The "random and indiscriminate" character of these proceedings and their location in a "black site" amplify these hardships with an atmosphere of menacing uncertainty that is "exponentially more harmful" than a regular trial. Class.App. 128.

(U) If nothing else, this Court has consistently recognized that capital trials force defendants to make "grisly choices" that distort their trial strategy in ways that cannot be sufficiently corrected by post-conviction review. *See Fay v. Noia*, 372 U.S. 391, 439 (1963). This Court has therefore held that the military trial of capital crimes raises special concerns warranting habeas review to ensure the military is proceeding within the bounds of its authority. *Grisham v. Hagan*, 361 U.S. 278, 280 (1960); *Reid*, 354 U.S. at 77 (Harlan, J., concurring) ("So far as capital cases are concerned, ... the law is especially sensitive to demands for that procedural fairness which inheres in a civilian trial where the judge and trier of fact are not responsive to the command of the convening authority."). Here, the petitioner is being forced to make those grisly choices in the full knowledge that if he ultimately prevails on this or any other jurisdictional issue via post-conviction appeal, he faces re-trial in the Southern District of New York.

(U) The panel below divided over whether these facts, taken together, qualified for the extraordinary circumstances exception largely because this Court has never explained how a lower court should evaluate the "extraordinariness" of a petitioner's circumstances. *See Kugler*, 421 U.S. at 125. Even though the likelihood of these irreparable injuries was conceded, even though they are the direct, foreseeable, and intended consequence of respondents' own misconduct, and even though the majority found them "deeply troubling," it denied review because no precedent from this Court held that such harms were "extraordinary" in the legal sense. App. 39-49. Based on the same facts and doctrinal uncertainty, Judge Tatel

drew the opposite conclusion, reasoning that if the harms petitioner potentially faces "do not qualify as such, it would be hard to imagine any that would." App. 75.

~~(U)~~ This Court should grant certiorari to provide the lower courts guidance on how to evaluate claims of "extraordinary circumstances." At a minimum, this Court should clarify that the extraordinary circumstances exception is met when a petitioner's irreparable injuries flow directly from respondents' misconduct and will be avoided if petitioner prevails on the merits of his claim. This is consistent with abstention's status as an equitable defense against suit. It is also consistent with the other recognized exceptions for prosecutorial bad faith, which deprive a prosecuting power the benefit of abstention because of its unclean hands. *Kugler*, 421 U.S. at 124; *see also Nevada v. Hicks*, 533 U.S. 353, 369 (2004) (even where a doctrinally established exception is "technically inapplicable," abstention should yield where "the reasoning behind it is not"). Indeed, under the extraordinary circumstances presented here, it would be anomalous for respondents to escape meaningful judicial review via the "door of equity." *Precision Instrument Mfg. Co. v. Automotive Maint. Mach. Co.*, 324 U.S. 806, 814 (1945).

III. ~~(U)~~ The majority's unduly restrictive view of its mandamus jurisdiction is at odds with other circuits and the All Writs Act.

~~(U)~~ Below, respondents argued that the exclusive avenue for interlocutory review of a military commission's jurisdiction should be via petitions for writs of mandamus to the D.C. Circuit. The D.C. Circuit, however, has staked out a uniquely restrictive interpretation of the standard of review in mandamus cases that has effectively foreclosed mandamus for such claims.

~~(U)~~ In *Cheney v. United States District Court*, 542 U.S. 367 (2004), this Court laid out a tripartite test for when the circuits should issue writs of mandamus, an element of which was that the "right to issuance of the writ is 'clear and indisputable'." *Id.* at 381 (quotations omitted). This has resulted in division across the circuits over whether the legal merits of a mandamus petition may be addressed when it presents questions of first impression.

~~(U)~~ The D.C. Circuit holds that by "right to the issuance of the writ" this Court meant that the legal merits of petitioner's claim must be "clear and indisputable" at the pleading stage. Hence, petitioners must cite "cases in which a federal court has held that, in a matter involving like issues and comparable circumstances," they are entitled to relief. *Doe v. Exxon*, 473 F.3d 345, 355 (D.C. Cir. 2007). Consequently, the legal merits of a petitioner's claim are reviewed only to the extent they are unambiguously determined by controlling precedent.

~~(U)~~ On the opposite end of the spectrum is the Second Circuit, which deems the "clear and indisputable" standard met on purely legal questions whenever a lower court "based its ruling on an erroneous view of the law." *SEC v. Rajaratnam*, 622 F.3d 159, 171 (2d Cir. 2010) (quotations omitted). Thus, "mandamus relief can be appropriate even when the district court's opinion resolved 'novel legal questions that were unsettled' at the time of the district court's decision." *Balintulo v. Daimler AG*, 727 F.3d 174, 187 n.18 (2d Cir. 2013). In fact, the Second Circuit holds that cases "are sometimes more appropriate candidates for mandamus when they have raised a legal issue of first impression in this circuit." *Ibid.* (quotations omitted).

~~(U)~~ Other circuits have taken divergent views. The Third Circuit requires a "clear error of law" or a "clear abuse of discretion." *In re Wilson*, 451 F.3d 161, 169 (3d Cir. 2006). The Fifth Circuit relies upon a "clear abuse of discretion" standard. *In re Volkswagen*, 545 F.3d 304, 310 (5th Cir. 2008). The Sixth and Tenth Circuits rely upon a five-factor balancing test in which one factor weighing *in favor* of review is that the petition "raises new and important problems, or legal issues of first impression." *In re Antrobus*, 519 F.3d 1123, 1130 (10th Cir. 2011); *In re Life Investors Ins. Co. of America*, 589 F.3d 319, 323 (6th Cir. 2009). The Seventh Circuit has not analyzed the question thoroughly but appears, like the D.C. Circuit, to refrain from deciding open questions altogether. *See Abelesz v. Erste Group Bank*, 695 F.3d 655, 665 (7th Cir. 2012). The Ninth Circuit requires a showing of "clear error," whereby the "absence of controlling precedent weighs strongly against a finding of clear error," but does not carry dispositive weight. *In re Van Dusen*, 654 F.3d 838, 841 (9th Cir. 2011). And while the Eleventh Circuit has not analyzed the question closely, it has in practice decided questions of first impression raised via mandamus. *See, e.g.*, *In re Coffman*, 766 F.3d 1246 (11th Cir. 2014).

~~(U)~~ Because of its uniquely stringent standard, the D.C. Circuit has declined to decide the merits of every mandamus petition to come out of the military commissions, even where a petitioner's "argument packs substantial force" and raises "a serious issue." *In re Khadr*, 823 F.3d 92, 99-100 (D.C. Cir. 2016). And it has held petitioners to this exacting standard even though the military commissions

system's very novelty ensures that every legal question is one that "[n]either [the D.C. Circuit] nor any other court of appeals has analyzed." *Ibid.*

~~(U)~~The impossible stringency of the D.C. Circuit's standard is illustrated by the majority's ruling below. On the merits, petitioner relied upon this Court's holding in *The Protector*, that "[i]t is necessary ... to refer to some public act of the political departments of the government to fix the dates ... [of] the commencement of hostilities." 12 Wall. at 700. Nevertheless, the majority reasoned that *The Protector* was distinguishable because it "spoke only of the Civil War ... *The Protector*'s reliance on a 'public act' is therefore not clearly and indisputably applicable here." App. 59. Because no Court had yet ruled on when hostilities in Yemen specifically began, the majority concluded that it remained an "open question" and "open questions are the antithesis of the 'clear and indisputable' right needed for mandamus relief." *Ibid.* (quotations omitted).

~~(U)~~The most "traditional use" of mandamus has been to keep an inferior tribunal within the "lawful exercise of its prescribed jurisdiction[.]" *Roche*, 319 U.S. at 26. That function cannot be served if a jurisdictional question is rendered unreviewable by the bare need to apply settled legal rules to the novel facts of a given case. *Cf. Hope v. Pelzer*, 536 U.S. 730, 739 (2002). This Court should therefore grant certiorari to resolve this circuit split in favor of preserving mandamus as a meaningful way of deciding such questions.

~~(U)~~Moreover, if the D.C. Circuit truly lacks the legal tools to rule with certainty on whether hostilities existed at a given time and place, that fact alone

warrants certiorari. The existence of hostilities triggers everything from the tolling of statutes of limitations to the impairment of contracts to the abrogation of treaties to the suspension of civil liberties. *See* Jennifer K. Elsea & Richard F. Grimmett, Cong. Research Serv., RL31133, *Declarations of War and Authorizations for the Use of Military Force: Historical Background and Legal Implications* (2011) (listing more than 250 authorities that come into effect during hostilities). The standard for knowing when and where America is at war is not a question that can remain "open" for decades.

(U) CONCLUSION

(U) The petition for a writ of certiorari should be granted.

Respectfully submitted,

RICHARD KAMMEN
KAMMEN & MOUDY
135 N. Pennsylvania St., #1175
Indianapolis, IN 46204

NANCY HOLLANDER*
FREEDMAN BOYD HOLLANDER GOLDBERG
URIAS & WARD P.A.
20 First Plaza, Suite 700
Albuquerque, NM 87102

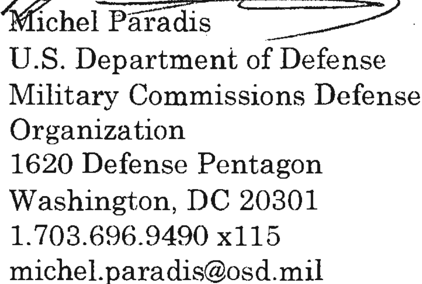
MICHEL PARADIS
Counsel of Record
LCDR JENNIFER POLLIO, USN, JAGC
ROSA ELIDES
MARY SPEARS
KRISTINA HON
U.S. DEPARTMENT OF DEFENSE
MILITARY COMMISSION DEFENSE
ORGANIZATION
1620 Defense Pentagon
Washington, DC 20301
1.703.696.9490 x115
michel.paradis@osd.mil

*Ms. Hollander has not reviewed any portion of this petition or its accompanying appendices, which are marked classified.

CERTIFICATE OF SERVICE

I hereby certify that January 17, 2017, copies of the accompanying Petition for a Writ of Certiorari and its two appendices were delivered to the Court Security Officer pursuant to the Amended Protective Order for Habeas Cases Involving Top Secret/Sensitive Compartmented Information and Procedures for Counsel Access to Detainees at the United States Naval Station in Guantanamo Bay, Cuba, in Habeas Cases Involving Top Secret/Sensitive Compartmented Information, Case Nos. 08-MC-442-TFH (Dkt. Nos. 1481 and 1496) & 08-cv-01207-RJR (Dkt. Nos. 79 & 80) (D.D.C. 9 January 2009), for service on all relevant parties.

Respectfully submitted,



Michel Paradis
U.S. Department of Defense
Military Commissions Defense Organization
1620 Defense Pentagon
Washington, DC 20301
1.703.696.9490 x115
michel.paradis@osd.mil

Counsel for Petitioner