No. 16-8966

IN THE
Supreme Court of the United States

ABD AL-RAHIM AL-NASHIRI,
Petitioner,
v.
DONALD J. TRUMP, *et al.*,
Respondents.

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

BRIEF OF ALBERTO MORA, FORMER GENERAL COUNSEL, U.S. DEPARTMENT OF THE NAVY, AS *AMICUS CURIAE* IN SUPPORT OF THE PETITIONER

ALBERTO MORA
CARR CENTER FOR HUMAN RIGHTS POLICY
HARVARD KENNEDY SCHOOL
79 John F. Kennedy St.
Cambridge, MA 02138
(617) 496-9308
alberto_mora@hks.harvard.edu

GEORGE M. CLARKE
Counsel of Record
BAKER & MCKENZIE LLP
815 Connecticut Ave NW
Washington, DC 20006
(202) 452-7000
george.clarke@bakermckenzie.com

Additional counsel listed on inside cover

LEGAL PRINTERS LLC, Washington DC • 202-747-2400 • legalprinters.com

BAHER AZMY
CENTER FOR
CONSTITUTIONAL RIGHTS
666 Broadway, 7th Floor
New York, NY 10012
(212) 614-6427

Counsel for Amicus Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

CONSTITUTIONAL PROVISIONS

STATUTES

TABLE OF AUTHORITIES
(continued)

Page(s)

OTHER AUTHORITIES

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES (continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

INTEREST OF *AMICUS CURIAE*[1]

Alberto Mora is a Senior Fellow with the Carr Center for Human Rights Policy at the Harvard Kennedy School in Cambridge, Massachusetts. He served as General Counsel of the Department of the Navy from 2001 to 2006. Mr. Mora's experiences formerly as a State Department Foreign Service Officer and currently as a Senior Fellow at Harvard's Carr Center for Human Rights Policy, where he is teaching and conducting research on the public policy consequences of the use of torture as a weapon of war, make him particularly qualified to aid the Court in its consideration of the interplay of human rights, law, foreign policy, and national security strategy. Mr. Mora is co-author of the essay, *The Strategic Costs of Torture: How "Enhanced Interrogation" Hurt America*, which appeared in the September/October 2016 issue of Foreign Affairs.

With his background and his eye-witness view of executive misconduct vis-à-vis the Bush administration's torture program, Mr. Mora

---

[1] Pursuant to this Court's Rule 37.2(a), counsel of record for both parties received timely notice of *amicus curiae's* intent to file this brief; letters of consent from both parties to the filing of this brief have been submitted to the Clerk. Pursuant to this Court's Rule 37.6, *amicus* states that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amicus*, its members, or its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

possesses a unique perspective on the application of law to military affairs and national security strategy in the post-September 11, 2001 era. He is also representative of many current and former senior civilian political appointees and military officials who believe that protecting human dignity by respecting the right to be free from cruelty, even in wartime, is legally required and a critical national security objective. His principled opposition to the abuse of military prisoners in Guantanamo is a matter of public record.

SUMMARY OF ARGUMENT

In violation of law and our deepest values, in 2002 the Bush administration designed, adopted, and implemented a policy of state torture. Petitioner Abd Al-Rahim Al-Nashiri is one of its victims. As courts of equity entrusted with the protection of the Great Writ, Article III courts are supposed to be a check on the Executive Branch—the branch of government that tortured Al-Nashiri and that now unlawfully detains and tries him through a military commission. Yet, the lower court deferred its own review to that of this Executive instrumentality. This despite the fact that in its decade's long operation that commission has done nothing but cover up Al-Nashiri's torture, deny him basic fair trial rights (including the right to confront his torturers), and prepare to execute him before the truth regarding his treatment can be discovered.

The import of the lower court's decision was that the Judicial Branch should, without consideration of the Executive Branch's torture of Al-Nashiri, defer practically indefinitely to the military instrumentality of the branch that tortured Al-

Nashiri, that has successfully fought to avoid accountability for that torture, and that is now led by a pro-torture President.

The facts and circumstances of Al-Nashiri's torture compel an independent Article III court to promptly exercise its broad and equitable habeas jurisdiction over Al-Nashiri and address the serious questions raised in his petition regarding the jurisdiction and effectiveness of the military commission purporting to try him. Without that prompt intervention, the meaningful protection of the Great Writ promised by this Court in *Boumediene* will be rendered impotent against the abhorrent and flagrant violations of human dignity inflicted upon Al-Nashiri.

"National security" is no reason to postpone this review. The Executive Branch's use of torture against Al-Nashiri among hundreds of others in the past two decades has significantly damaged the national security interests of the United States. The danger of further damage is evidenced by President Trump's consistent and unabashed support of torture. Accordingly, any reasonable consideration of our national security interests compels intervention by an independent Article III court instead of deference to the instrumentality of the Executive Branch that tortured Al-Nashiri.

ARGUMENT

I. EQUITY REBELS AGAINST THE NOTION THAT A VICTIM OF EXECUTIVE BRANCH TORTURE SHOULD BE TRIED BY AN INSTRUMENTALITY OF THE TORTURER.

The Bush administration's adoption of state-sponsored torture as a weapon of war inflicted an injury on our nation and caused lasting damage to the fundamental principle upon which it was founded: that every individual, "even the vilest criminal remains a human being possessed of common human dignity." *Furman v. Georgia,* 408 U.S. 238, 273 (1972) (Brennan, J., concurring) (discussing the Cruel and Unusual Punishments Clause). By torturing Al-Nashiri, the United States treated him as a non-human.[2] Judicial intervention is required now to ensure that Al-Nashiri's torture is treated with the utmost judicial gravity and is not exacerbated by another decade in the military commission system.

A. The Abhorrent And Flagrant Violations Of Human Dignity Suffered by Al-Nashiri Compel Intervention.

At its core, our system of laws is designed to shield rights essential to the human dignity of each

---

[2] The "true significance" of the constitutional prohibition against cruel treatment, writes Justice Brennan in *Furman*, is not only that pain is inflicted on a human being, but that to allow cruelty is to "treat members of the human race as non-humans, as objects to be toyed with and discarded." 408 U.S. at 272-273.

person, including the inalienable right to be free from cruelty. Since the Founding, this right has been recognized by a panoply of laws, including our Constitution, state constitutions, numerous state and federal statutes, international treaties, and customary international laws—many of which came into being in no small measure through American efforts.[3]

The right to be free from cruelty has been observed to be an archetypal right, one that severs the concepts of "law" and the "rule of law" from the authorized use of state brutality—even when the state is at its most powerful and the individual most vulnerable. *See, e.g.*, Jeremy Waldron, *Torture and Positive Law: Jurisprudence for the White House*, 105 Colum. L. Rev. 1681, 1739-1743 (2005). This right is possessed by—and the prohibitions against torture apply to—everyone, everywhere, and at all times, both in peace and in war. *Filartiga v. Pena-Irala*, 630 F.2d 876, 884 (2d Cir. 1980) ("[O]fficial torture is now prohibited by the law of nations. The prohibition

---

[3] *See, e.g.*, U.S. Const. amend. VIII; Cal. Const. art. I, § 17; Fla. Const. art. I, § 17; 42 U.S.C. § 2000dd(a) (2016); 51 Pa.C.S. § 5801 (2016); *Wilkerson v. Utah*, 99 U.S. 130, 136 (1879); United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 75 U.N.T.S. 287; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 75 U.N.T.S. 135; International Covenant of Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171; and European Convention for the Protection of Human Rights and Fundamental Freedoms, European Treaty Series No. 5 (1968).

is clear and unambiguous, and admits of no distinction between treatment of aliens and citizens."); *Brown v. Plata*, 563 U.S. 493, 511 (2011) (recognizing the essential human dignity rights of those incarcerated, and finding that Article III courts must step in where the government has failed to protect that dignity).

Of those violations of human dignity that exist, torture is enumerated as an "evil of most immediate concern." *Estelle v. Gamble*, 429 U.S. 97, 103 (1976); *see Sosa v. Alvarez-Machain*, 542 U.S. 692, 732 (2004) (citing *Filartiga v. Pena*, 630 F.2d 876, 890 (2d Cir. 1980) ("[T]he torturer has become—like the pirate and slave trader before him—*hostis humani generis*, an enemy of all mankind.")). Torture is now, and has always been, abhorrent to the law of our nation and the laws of all nations. *Gregg v. Georgia*, 428 U.S. 153, 171 (1976) ("Thus the Clause forbidding 'cruel and unusual' punishments 'is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice.'") (*quoting Weems v. U.S.*, 217 U.S. 349, 378 (1910)). The universal prohibition against torture requires that our courts treat it with the utmost attention as a grave violation of national interest, *see Kiobel v. Royal Dutch Petro. Co.*, 133 S. Ct. 1659, 1674, 569 U.S. __ (2013), particularly when that torture is committed under the "color of official authority" of the U.S. Government. *See Filartiga*, 630 F.2d at 878 (2d Cir. 1980); *see also* S. Rpt. No. 113-288, S. Sel. Comm. on Intelligence, Committee Study of the Central Intelligence Agency's Detention and Interrogation Program (Dec. 9, 2014) (hereinafter "SSCI Unclassified Report"), *available at*

http://www.feinstein.senate.gov/public/_cache/files/a/9/a992171e-fd27-47bb-8917-5ebe98c72764/7889A5C19ACFE837C78C2192B0876B90.sscistudyfindingsandconclusions.pdf (last accessed May 31, 2017).[4]

Given the gruesome and unlawful acts of the Executive Branch in torturing Al-Nashiri, the lower court erred in refusing to exercise its equitable powers to review the military commission's jurisdiction over Al-Nashiri and the Executive Branch's control over him. The essence of the lower court's legal theory was that deferring to the military commission was appropriate to allow that process to continue, and any error could be fixed by post-conviction appeal. *In re Al-Nashiri*, 835 F.3d 110, 124 (D.C. Cir. 2016). But this decision subordinates the full and fair inquiry, rooted in common law equitable principles, that habeas promises to all petitioners who seek the Great Writ. It fails to consider the fundamental inequity of allowing a commission overseen by Al-Nashiri's torturers to continue indefinitely, likely for many more years, and perhaps without jurisdiction, and divests the Judiciary of its rightful power to protect

---

[4] At least one international court has already concluded that the enhanced interrogation techniques used upon Al-Nashiri constituted torture. *Al-Nashiri v. Poland*, App. No. 28761/11, Eur. Ct. H.R. (2015) European Court of Human Rights, *available at* hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=001-146044&filename=001-146044.pdf (last accessed May 31, 2017). This torture was committed "in violation of U.S. law, treaty obligations, and [American] values." SSCI Unclassified Report at 2.

the fundamental rights of all men. It also overlooks the severe harm that continued military commission proceedings will cause Al-Nashiri.

This harm is not an abstract concern to Al-Nashiri, whose torture the Government has never disputed:

> He was not allowed to sleep, was regularly beaten, and hung by his hands . . . subjected to loud continuous noise, isolation, and dietary manipulation . . . fed on an alternating schedule of one meal on one day and two meals the next day . . . kept naked, shackled to the wall, and given buckets for their waste . . . forced to keep his hands on the wall and not given food for three days . . . shackled to a bar on the ceiling, forcing them to stand with their arms above their heads . . . kept continually naked and the temperature was kept, in his words, "cold as ice cream" . . . "waterboarded" . . . being tied to a slanted table, with his feet elevated. A rag was then placed over his forehead and eyes, and water poured into his mouth and nose, inducing choking and water aspiration. The rag was then lowered, suffocating him with water still in his throat and sinuses. Eventually, the rag was lifted, allowing him to "take 3-4 breaths" before the process was repeated . . . kept continually hooded, shackled, and naked. He was regularly strung up on the wall overnight. Al-Nashiri was regularly forced into "stress positions" prompting a Physician's Assistant to express concern that Al-Nashiri's arms might be

> dislocated. . . . There is also evidence Al-Nashiri was, in fact, forcibly sodomized.[5]

In re Al-Nashiri, 835 F.3d at 141-142 (Tatel, J., dissenting).

In spite of this reality, the lower court did not address, even in cursory fashion, Al-Nashiri's torture in its decision to defer review. Rather, it subordinated its broad, equitable habeas jurisdiction to abstention principles despite Al-Nashiri raising strong arguments that the military commission does not have jurisdiction over him, that post-conviction appeal does not remedy the systemic impact of a failure to address jurisdiction now, and that the military commission system convened to try him for alleged offenses that occurred nearly 20 years ago may take another 10 years to conclude. Petition at 20-24.

If this Court likewise defers to the Executive and declines to review the lower court's decision, then the Judicial Branch will not only have weakened its well-established and jealously-guarded habeas jurisdiction but also abrogated its responsibility to

---

[5] Al-Nashiri's rape in CIA custody is particularly horrifying, but sadly not unique. *See* Carol Rosenberg, *'Sodomized' Guantánamo captive to undergo rectal surgery*, Miami Herald (Oct. 11, 2016), http://www.miamiherald.com/news/nation-world/world/americas/guantanamo/article107451907.html (9/11 defendant Mustafa al-Hawsawi alleges he was sodomized while in CIA custody); David Rohde, *Exclusive: Detainee Alleges CIA Sexual Abuse, Torture Beyond Senate Findings*, Reuters (Jun. 2, 2015), http://www.reuters.com/article/us-usa-torture-khan-idUSKBN0OI1TW20150602 (Majid Khan alleges rape in CIA custody).

treat state-sponsored torture as an abhorrent violation of U.S. law, international laws, and American values. No Article III court will have given a full and honest consideration to the equities of Al-Nashiri's case on a timely basis as required by habeas courts since before the Founding. And the Judicial Branch will have demonstrated that, while abhorrent, Executive-Branch-sponsored torture of prisoners in U.S. custody is just not abhorrent enough to forgo deference for yet another decade.

B. The Lower Courts Failed to Accord The Required Equitable Weight to Al-Nashiri's Torture And To The Unnecessary Judicial Ordeal That The Military Commission Process Represents.

Habeas courts have broad equitable authority to dispose of cases as justice requires, and to fashion appropriate relief based on the facts and circumstances of particular cases to remedy all manners of unlawful detention. *See* 28 U.S.C. §§ 2241, 2243. This power predates the Founding and certainly comprehends the power to ensure that claims brought against or by victims of Executive Branch torture are independently, fairly, and rapidly adjudicated.

Since the 17th Century, courts in England and America with authority to dispose of habeas corpus petitions have applied equitable principles. *See Sanders v. United States*, 373 U.S. 1, 17 (1963); *Boumediene v. Bush*, 553 U.S. 723, 780 (2008) (citing *Schlup v. Delo*, 513 U.S. 298, 319 (1995)). "[C]ommon-law habeas corpus was, above all, an

adaptable remedy. Its precise application and scope changed depending upon the circumstances." *Boumediene*, 553 U.S. at 779; *Jones v. Cunningham*, 371 U.S. 236, 243 (1963) (habeas is not a "static, narrow, formalistic remedy; its scope has grown to achieve its grand purpose").

In exercising their jurisdiction, courts have equitable discretion to correct a miscarriage of justice. *See McClesky v. Zant*, 499 U.S. 467, 502 (1991). Habeas courts have not hesitated to use this discretion to fill perceived gaps in a statutory scheme, place a central focus on justice rather than law, and impose flexible, pragmatic remedies. *See Brecht v. Abrahamson*, 507 U.S. 619, 633 (1993); *Holland v. Florida*, 560 U.S. 631, 646 (2010) ("[W]e will not construe a statute to displace courts' traditional equitable authority absent the clearest command.") (internal quotation marks omitted); *see also Boumediene*, 553 U.S. at 780 (common-law habeas courts often did not follow black-letter rules so as to afford greater protection in cases of non-criminal detention). "The very nature of the writ demands that it be administered with the initiative and flexibility essential to insure that miscarriages of justice within its reach are surfaced and corrected." *Harris v. Nelson*, 394 U.S. 286, 291 (1969). *See generally* PAUL D. HALLIDAY, HABEAS CORPUS: FROM ENGLAND TO EMPIRE 87 (2010) ("Ensuring that errors were corrected and 'justice should be done' . . . was the point of the prerogative writs."); *id.* ("There was and is another word for this vast authority to do justice, even in the absence of previously existing rules or remedies: equity."); *id.* at 102 ("The key to making judgments about infinitely

variable circumstances was the consideration of details about why, when, how and by whom people were imprisoned.").

Courts reviewing a habeas petition thus have broad authority to fashion appropriate relief and enter any form of order where the requested relief directly compels or indirectly "affects" or hastens the petitioner's release from custody. *See Preiser v. Rodriguez*, 411 U.S. 475, 487 (1973) (noting that habeas courts have the "power to fashion appropriate relief other than immediate release."); *Carafas v. LaVallee*, 391 U.S. 234, 239 (1968) (emphasizing that habeas "does not limit the relief that may be granted to discharge of the applicant from physical custody. Its mandate is broad with respect to the relief that may be granted."); *Brownwell v. Tom We Shung*, 352 U.S. 180, 181 (1956) (non-citizen may test legality of inadmissibility determination in declaratory judgment action or through habeas); *see also Chatman-Bey v. Thornburgh*, 864 F.2d 804, 809 (D.C. Cir. 1988) (holding that habeas is available for petitioner even though he is "not laying claim to immediate release or release in the near future"); *Bourke v. Hawk-Sawyer*, 269 F.3d 1072, 1074 (D.C. Cir. 2001) (holding that habeas is appropriate remedy for petitioner seeking to challenge his eligibility for a sentence reduction). *See generally* PAUL D. HALLIDAY, HABEAS CORPUS: FROM ENGLAND TO EMPIRE 101 (2010) (common law habeas judgments "did not just happen; they were made. Judges, not rules, made them. . . . By negotiating settlements, by constraining—sometimes undermining—the statutes or customs on which

other magistrates acted, and by chastising those who wrongfully detained others, the justices defined what counted as jurisdiction and what counted as liberties.").

With this broad habeas power, Article III courts have both the opportunity and duty to ensure that the gravest violations of liberty receive the urgent and independent judicial inquiry our Constitution promises. *Fay v. Noia*, 372 U.S. 391, 438 (1963). Equitable habeas power "comes in from the outside, not in subordination to the proceedings, and although every form may have been preserved opens the inquiry whether they have been more than an empty shell." *Frank v. Mangum*, 237 U.S. 309, 346 (1915) (Holmes, J., dissenting) (cited in *Boumediene v. Bush*, 553 U.S. 723, 785 (2008)).

Against this backdrop, reviewing a claim of unlawful executive detention without any serious scrutiny of the underlying facts of detention, as occurred below, renders the habeas process inadequate to test the legality of detention and undermines the Writ. *See also Boumediene v. Bush*, 553 U.S. at 794-795 (2008) ("While some delay in fashioning new procedures is unavoidable, the costs of delay can no longer be borne by those who are held in custody. The detainees in these cases are entitled to a prompt habeas corpus hearing."). To effectuate their mandate, Article III courts must give a full and honest consideration of equities in any decision that might subordinate habeas review in favor of another proceeding. These "equities" include the detaining authority's conduct—here, Al-Nashiri's torture. *Fay*, 372 U.S. at 438.

Yet despite this mandate, the lower court erroneously subordinated Al-Nashiri's habeas petition in deference to the very branch of government the writ of habeas corpus was developed to check. In doing so, the lower court betrayed the purpose and import of the Great Writ's function, telling Al-Nashiri that habeas must wait while his trial proceeds in a military commission that, ultimately, may lack jurisdiction. The only certainty that may be ascribed to the lower court's decision is that, if allowed to stand, it will unnecessarily prolong Al-Nashiri's ordeal.

C. Granting Equitable Deference To The Executive Is Unwarranted Given the Executive's Conduct in Torturing Al-Nashiri.

Al-Nashiri's writ of habeas corpus not only presents a serious challenge of the military commission's jurisdiction to try a man accused of ostensible war crimes pre-dating the September 11th attacks; it is also permeated by the most unlawful and gruesome acts in which our Government has ever engaged. It is in this context that any potential for Judicial Branch deference to the Executive's military commission – itself an equitable consideration, not a legal one – must be analyzed.

The Constitution commits Article III courts to exercise their habeas power as justice requires and to do so promptly to ensure violations are not left to fester in the hands of unlawful Executive authority. *See Braden v. 30th Jud. Cir. Ct. of Ky.*, 410 U.S. 484, 490 (1973) (noting interests of prisoner and society in "preserv[ing] the writ of habeas corpus as a swift and imperative remedy in all cases of illegal

restraint or confinement") (internal quotation marks omitted); *see also*, *e.g.*, *Yong v. INS*, 208 F.3d 1116, 1120 (9th Cir. 2000) ("[H]abeas proceedings implicate special considerations that place unique limits on a district court's authority to stay a case in the interests of judicial economy."); *Ruby v. United States*, 341 F.2d 585, 587 (9th Cir. 1965) ("One who seeks to invoke the extraordinary, summary and emergency remedy of habeas corpus must be content to have his petition or application treated as just that and not something else."); *Van Buskirk v. Wilkinson*, 216 F.2d 735, 737-38 (9th Cir. 1954) ("[The Writ] is a speedy remedy, entitled by statute to special, preferential consideration to insure expeditious hearing and determination.").

This has been so since the beginning of our nation. The writ of habeas corpus has long existed as "an indispensable mechanism for monitoring the separation of powers," which "must not be subject to manipulation by those whose power it is designed to restrain." *Boumediene*, 553 U.S. at 764. After all, the very purpose of the writ is to require judicial inquiry into "the legality of Executive detention." *INS* v. *St. Cyr,* 533 U.S. 289, 301 (2001); *Brown* v. *Allen,* 344 U.S. 443, 533 (1953) (Jackson, J., concurring in result) ("The historic purpose of the writ has been to relieve detention by executive authorities without judicial trial"); *Shaughnessy v. United States ex rel. Mezei,* 345 U.S. 206, 218-219 (1953) (Black, J., dissenting) (describing the writ's long-standing historical purpose to preserve pledged liberties from Executive restraint).

The Executive Branch tortured Al-Nashiri and, having thus acted in bad faith towards him, now

appears before this Court with unclean hands. Such conduct requires that the Judicial Branch exercise meaningful habeas review of the detention of Al-Nashiri. Our Founding Fathers, men who had lived under a tyrannical Executive, constitutionally prescribed the writ's protection to ensure that no man's liberty could be curtailed by a government's unlawful acts. Rather, the protection of liberty was entrusted to an independent judiciary. *Boumediene*, 553 U.S. at 739. A fundamental precept of that liberty was the Great Writ. *Id.* But to give the writ the effectiveness our Constitution guarantees, "[t]he habeas court must have sufficient authority to conduct a meaningful review of both the cause for detention and the Executive's power to detain." *Id.* at 782. This power to "meaningfully review" is even more imperative when the authority to detain and try arises by order of the Executive Branch, is carried out by its agents (*i.e.*, the military commission), and the legality and propriety of that authority is seriously challenged.

Under such circumstances, the Judicial Branch must not defer to the Executive Branch whether to give it more time, more leeway, or more flexibility. If the torture of a man by the Executive Branch is insufficient to compel judicial intervention rather than deference, then the protection of habeas review is rendered a nullity, and the lessons taught by our Founding Fathers and enshrined in the Constitutional protection of habeas corpus have been lost.

D. Deference To National Security Interests Counsels In Favor Of Intervention Rather Than Inaction.

The U.S. Government's use of torture, including the CIA program that first instituted it, greatly damaged our national security interests. *See, e.g.*, SSCI Unclassified Report at 2. It incited extremism in the Middle East, hindered cooperation with allies in the wars in Afghanistan and Iraq, and undermined diplomatic efforts. Although the exact number of its victims is unknown, it appears that hundreds of individuals were abused as a consequence, including individuals who were wholly innocent of any improper activity. SSCI Unclassified Report at 12.

In 2004, reports surfaced that U.S. soldiers had tortured prisoners at Abu Ghraib, a prison twenty miles west of Baghdad with nearly 3,800 detainees.[6] The revelations of what occurred at Abu Ghraib, along with allegations of abuse of military prisoners in Guantanamo, spurred foreign extremists to join insurgents in Afghanistan and Iraq.[7]

During the spring of 2006, a group of high-ranking U.S. national security and foreign policy

---

[6] *Iraq Prison Abuse Scandal Fast Facts*, CNN (Apr. 10, 2017), http://www.cnn.com/2013/10/30/world/meast/iraq-prison-abuse-scandal-fast-facts/.

[7] *See, e.g.*, Declan Walsh, *WikiLeaks cables: Saudi Arabia wants military rule in Pakistan*, Guardian Newspaper (Dec. 1, 2010, 5:00 AM), https://www.theguardian.com/world/2010/dec/01/saudis-distrust-pakistan-embassy-cables.

officials gathered in Kuwait to discuss how to stem the flow of foreign fighters into Iraq. In a report of the meeting, it was observed that the "single most important motivating factor" generating enemy foreign fighter inflows into Iraq was the abuse of detainees in U.S. captivity. Douglas A. Johnson, Alberto Mora, & Averell Schmidt, Harvard Kennedy School, Carr Center for Human Rights Policy, *The Strategic Costs of Torture: How "Enhanced Interrogation" Hurt America* at 123 (hereinafter "Carr Center for Human Rights Policy, *Costs of Torture*"). A Saudi official echoed this sentiment, when he concurred with the Obama administration's decision not to release photos of Abu Ghraib, because when the scandal first broke, Saudi authorities allegedly arrested 250 people attempting to leave the country to join extremist groups. *Id.*

The torture revelations also made it harder for the United States to recruit Iraqi allies. Part of the U.S. Army's strategy in Iraq included persuading locals to side with U.S. soldiers rather than insurgents.[8] After the photographs of detainee abuse at Abu Ghraib emerged, however, many Iraqis no longer saw the United States as trustworthy, and they rejected requests for help. Carr Center for Human Rights Policy, *Costs of Torture* at 124. As General Stanley McChrystal, the former head of the U.S. Joint Special Operations Command, acknowledged in a 2013 interview, "The thing that

---

[8] *See generally* David Rohde, *Anthropologists help U.S. Army in Afghanistan and Iraq*, N.Y. Times (Oct. 4, 2007), *available at* http://www.nytimes.com/2007/10/04/world/asia/04iht-afghan.4.7755039.html (last accessed May 31, 2017).

hurt us more than anything else in the war in Iraq was Abu Ghraib. . . . The Iraqi people . . . felt it was proof positive that the Americans were doing exactly what Saddam Hussein had done—that it was proof [that] everything they thought bad about the Americans was true." *Id.* at 124-125.

At the same time that the United States' use of torture was inspiring extremists in the Middle East, it was also undermining counterterrorism cooperation between Washington and its allies. *See, e.g.*, SSCI Unclassified Report at 16 ("The CIA's Detention and Interrogation Program created tensions with U.S. partners and allies, leading to formal demarches to the United States, and damaging and complicating bilateral intelligence relationships.").

U.S. foreign policy has long supported the advancement of international law and human rights. Doing so promotes peace, security, and the rule of law overseas; encourages the spread of democracy; and shores up popular support for American values. The use of torture demonstrably undermined these objectives, making the United States both less influential and less secure. Far from being a weapon of strength, the use of torture has proved to be a strategic liability to our national security interests. Worse, the harm caused by the use of torture has been compounded by the lack of any serious accountability for it, including the failure of the courts to consider it let alone hold those who authorized or carried it out responsible for their unlawful and immoral acts. The lower court's failure to give a full, fair, and urgent consideration of Al-Nashiri's habeas petition, in deference to alleged

national security interests, suffers this same defect. It embodies the mistaken and dangerous view that, in wartime, laws may be broken with impunity and ratifies the view that the United States, even our courts, cares neither about the protection of human dignity nor the eradication of torture.

Whether at peace or at war, this nation is a nation of laws. Those laws embody moral principles that both define our country and are a source of its strength. When the Executive Branch tortured Al-Nashiri, we injured our country as much as we injured him. The Judicial Branch, thorough the use of the writ of habeas corpus, can begin to undo the damage to both.

II. THE CLEAR AND PRESENT DANGER OF THE RETURN TO TORTURE BY THE EXECUTIVE BRANCH COMPELS TIMELY COURT INTERVENTION.

The urgency presented by this case is—most unfortunately—made all the more important by President Trump's open and notorious support for torture. He has commented that he would "absolutely" bring back waterboarding as an accepted form of interrogation,[9] that he would bring back "a hell of a lot worse than waterboarding,"[10]

---

[9] Tribune News Services, *Trump's GOP rivals attack his 'flexibility' on torture, immigration*, Chi. Tribune (Mar. 4, 2016), http://www.chicagotribune.com/news/nationworld/politics/ct-trump-torture-reversal-20160304-story.html.

[10] Patrick Healy & Jonathan Martin, *In Republican Debate, Rivals Jab at Marco Rubio to Try to Slow His Rise*, N.Y. Times (Feb. 6, 2016),

and has expressed the view that waterboarding "absolutely" worked.[11] The leaked draft of an Executive Order prepared early after the inauguration (now apparently suspended) would have reinstated the detention of terrorism suspects at "black sites" like those where the CIA detained and tortured terrorism suspects like Al-Nashiri.[12] Eight days after being sworn into office, President Trump issued a "Presidential Memorandum Plan to Defeat the Islamic State of Iraq and Syria." The memorandum directed the administration to develop a comprehensive plan that included changing U.S. policy restrictions on the use of force against ISIS that exceeded restrictions posed by international law.[13] These policies would violate international law

---

https://www.nytimes.com/2016/02/07/us/politics/republican-debate.html. *See also* Tribune News Services, *supra* note 9 ("We should go for waterboarding and we should go tougher than waterboarding."); Ben Jacobs, *Donald Trump renews support for waterboarding at Ohio rally: 'I like it a lot'*, Guardian Newspaper (Jun. 28, 2016), https://www.theguardian.com/us-news/2016/jun/28/donald-trump-ohio-rally-isis-torture-tpp-rape. ("I like [waterboarding] a lot. I don't think it's tough enough.").

[11] Arlette Saenz, *President Trump tells ABC News' David Muir he 'absolutely' thinks waterboarding works*, ABC News (Jan. 25, 2017), http://abcnews.go.com/Politics/president-trump-tells-abc-news-david-muir-absolutely/story?id=45045055.

[12] Charlie Savage, *Trump Poised to Lift Ban on C.I.A. 'Black Site' Prisons*, N.Y. Times (Jan. 25, 2017), https://www.nytimes.com/2017/01/25/us/politics/cia-detainee-prisons.html.

[13] *See* The White House, Office of the Press Secretary, *Presidential Memorandum Plan to Defeat the Islamic State of Iraq and Syria*, (Jan. 28, 2017), https://www.whitehouse.gov/the-press-office/2017/01/28/plan-

and Constitutional protections.[14] President Trump has never walked back these statements. In addition, President Trump appointed Gina Haspel, reported to be one of the supervisors of torture at a black site, as the Deputy Director of the CIA.[15] Ms. Haspel allegedly ran a black site in Thailand where suspected al-Qaida members, *including Al-Nashiri*, were tortured and waterboarded. Ms. Haspel later helped carry out an order to destroy the CIA's waterboarding videos.[16]

The President's comments clearly encourage the use of torture, signal his past approval of its use, and indicate that torture is something that he may allow again as a matter of policy. Given his authority as the Commander-in-Chief and his broad powers over

---

defeat-islamic-state-iraq (the plan to defeat ISIS "shall include … recommended changes to any United States rules of engagement and other United States policy restrictions that *exceed* the requirements of international law regarding the use of force against ISIS ….") (emphasis added).

[14] *See* United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 75 U.N.T.S. 135; U.S. Const. art. VI, cl. 2 (binding U.S. to its treaties); U.S. Const. amend. VIII (prohibiting cruel and unusual punishments).

[15] *See* Oliver Holmes, *CIA deputy director linked to torture at Thailand black site*, Guardian Newspaper (Feb. 3, 2017), https://www.theguardian.com/us-news/2017/feb/03/cia-deputy-director-gina-haspel-linked-torture-thailand-black-site.

[16] *Id.*

courts martial[17] the armed forces,[18] and, critically, military commissions[19], the impact of his views in this case cannot be prudently underestimated or disregarded: It must be assumed that the military commission proceedings on issues related to torture could be swayed by the President's views.

From any disinterested perspective, the fairness of a military commission trying a torture victim like Al-Nashiri must be questioned when the President condones the very torture committed against him while rewarding his torturer with a position of power. At a minimum, such statements would make Al-Nashiri rationally fear that the torture could return and exacerbate his mental distress over the

---

[17] *See* U.C.M.J., Arts. 4(a), 22(a)(1), 36, 56, 142(b)(1), (c); Manual for Courts-Martial, United States (2012), at pt. I, Preamble, at I-1 and pt. II, ch. I, R. 107, at II-6.

[18] Army Regulation 600-20, *Personnel – General: Army Command Policy* ¶ 1-5*a* (Nov. 2014).

[19] This authority includes prescribing limitations to a military commission's jurisdiction; establishing a combatant status review tribunal or another competent tribunal; issuing pardons, which are grounds for a motion to dismiss to terminate further proceedings at a military commission; ordering all or part of the sentence of a military commission executed; appointing, by and with the advice and consent of the Senate, additional judges to the United States Court of Military Commission Review; and commuting a death sentence to a lesser punishment. In addition, only the President has the power to execute an order to punish by death. Manual for Military Commissions, United States (2012), pt. II, ch. II, R. 203, at II-15; ch. VII, R. 707, at II-64; ch. IX, R. 907(b)(2), at II-95; ch. XI, R. 1113(c), at II-162; ch. XII, R. 1201(b), at II-165; ch. XII, R. 1207(b), at II-168.

additional decade the lower court proposes to defer to the military commission. *See* Petition at 30.

This Court has previously made clear that abstention principles must give way where extraordinary circumstances necessitate intervention. *See Kugler v. Helfant*, 421 U.S. 117, 123-124 (1975) (a federal court may intervene where a plaintiff shows that "extraordinary circumstances" both present the threat of "great and immediate" injury and render the alternative tribunal "incapable of fairly and fully adjudicating the federal issues before it.") (quoting *Younger v. Harris*, 401 U.S. 37, 45, 53 (1971)); *In re Al-Nashiri*, 835 F.3d at 140 (Tatel, J., dissenting). Our President's whole-hearted support for illegal torture is "extraordinary," particularly in a case where the defendant is a torture victim. Indeed,

> [w]hile executive officers can declare the military reasonableness of conduct amounting to torture, it is beyond the power of even the President to declare such conduct lawful. The same is true for any other applicable legal prohibition. The fact that the President—let alone a significantly inferior executive officer—opines that certain conduct is lawful does not determine the actual lawfulness of that conduct.

Al Shimari v. CACI Premier Tech., Inc., 840 F.3d 147, 162 (4th Cir. 2016) (Floyd, J., concurring). If for no other reason then, robust federal court intervention is required in this case for the Judiciary

to protect its habeas jurisdiction against the President's blatant attack on the rule of law.

CONCLUSION

The petition should be granted.

Respectfully submitted,

ALBERTO MORA
CARR CENTER FOR
HUMAN RIGHTS POLICY
HARVARD KENNEDY
SCHOOL
79 John F. Kennedy St
Cambridge, MA 02138
(617) 496-9308
alberto_mora@
hks.harvard.edu

GEORGE M. CLARKE
Counsel of Record
BAKER & MCKENZIE LLP
815 Connecticut Ave NW
Washington, DC 20006
(202) 452-7000
george.clarke@
bakermckenzie.com

BAHER AZMY
CENTER FOR
CONSTITUTIONAL RIGHTS
666 Broadway, 7th Floor
New York, NY 10012
(212) 614-6427

Counsel for Amicus Curiae

May 31, 2017