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

BRIEF AMICUS CURIAE OF PHYSICIANS FOR HUMAN RIGHTS, INC. IN SUPPORT OF PETITION FOR CERTIORARI

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INTEREST OF *AMICUS CURIAE*[1]

Amicus Physicians for Human Rights, Inc. is a not-for-profit Section 501(c)(3) corporation based in New York, New York, whose physicians, scientists, and other professionals investigate and document the medical consequences of human rights violations, and advocate for reform.[2] Torture and its medical consequences are a particular focus of its research and advocacy. In 1999, *Amicus* co-authored the international standard for the medical documentation of torture and ill-treatment ("Istanbul Protocol").[3] Among those consequences are the torture survivor's profound medical and psychological injuries experienced when earlier trauma is revisited. *Id.* ¶¶146–149. This petition arises from a severe

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[1] The parties have consented to *Amicus*' filing this brief, and their letters of consent have been filed with the Clerk. No party or party's counsel authored this brief, in whole or in part, or contributed money intended to fund preparing or submitting this brief. No person other than *Amicus* and its counsel contributed money intended to fund preparing or submitting this brief.

[2] In 1997, *Amicus* shared the Nobel Peace Prize as part of the Steering Committee of the International Campaign to Ban Land Mines. Physicians for Human Rights, *The Campaign to Ban Landmines*, http://physiciansforhumanrights.org/about/impact/campaign-to-ban-landmines.html?referrer=https://www.google.com/ (last visited May 25, 2017).

[3] Office of the UN High Commissioner for Human Rights, *Istanbul Protocol: Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Professional Training Series No.8/Rev.1 (2004), http://physiciansforhumanrights.org/issues/torture/international-torture.html.

example of that harm. *Amicus* writes to address how the ruling of the Court of Appeals in *In re al-Nashiri*, 835 F.3d 110 (D.C. Cir. 2016), would likely cause Petitioner to re-experience significant psychological harm based on the infliction of previous severe physical and mental pain and suffering. Its expertise will assist the Court in understanding the adverse medical and psychological consequences of the Court of Appeals' ruling requiring post-conviction review, and thus, repetitive proceedings.

Amicus investigates and documents acts of torture around the world, examines torture victims medically, and reports on the consequences of torture on those individuals, as well as on institutions and society. *Amicus* also trains health professionals to become independent, qualified experts capable of assessing forensic medical evidence of alleged torture.

Amicus has published numerous studies that address the impact of torture on victims, perpetrators, and institutions, including:

- *Truth Matters: Accountability for CIA Psychological Torture* (2015).[4]
- *Doing Harm: Health Professionals' Central Role in the CIA Torture Program* (2014).[5]
- *Buried Alive: Solitary Confinement in the US Detention System* (2013).[6]

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[4]https://s3.amazonaws.com/PHR_Reports/truth-matters.pdf.

[5]http://s3.amazonaws.com/PHR_Reports/doing-harm-health-professionals-central-role-in-the-cia-torture-program.pdf.

- *Punishment Before Justice: Indefinite Detention in the US* (2011).[7]
- *Experiments in Torture: Evidence of Human Subject Research and Experimentation in the "Enhanced" Interrogation Program* (2010).[8]
- *Aiding Torture: Health Professionals' Ethics and Human Rights Violations Revealed in the May 2004 CIA Inspector General's Report* (2009) ("*Aiding Torture*").[9]
- *Broken Laws, Broken Lives: Medical Evidence of Torture by US Personnel and Its Impact* (2008) ("*Broken Laws*").[10]
- *Leave No Marks: Enhanced Interrogation Techniques and the Risk of Criminality* (2007) ("*No Marks*").[11]
- *Break Them Down: Systematic Use of Psychological Torture by US Forces* (2005).[12]

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[6]http://s3.amazonaws.com/PHR_Reports/Solitary-Confinement-April-2013-full.pdf.

[7]http://s3.amazonaws.com/PHR_Reports/indefinite-detention-june2011.pdf.

[8]http://s3.amazonaws.com/PHR_Reports/Experiments_in_Torture.pdf.

[9]http://s3.amazonaws.com/PHR_Reports/aiding-torture-2009.pdf.

[10]http://s3.amazonaws.com/PHR_Reports/BrokenLaws_14.pdf.

[11]http://s3.amazonaws.com/PHR_Reports/leave-no-marks.pdf.

[12]http://s3.amazonaws.com/PHR_Reports/break-them-down.pdf.

- *Interrogations, Torture and Ill Treatment: Legal Requirements and Health Consequences* (2004).[13]

SUMMARY OF ARGUMENT

In 2015, the Department of Defense appointed a physician to examine the Petitioner, Abd al-Rahim al-Nashiri, at the Guantanamo Bay detention facility. Class.App.125 (Declaration of Sondra S. Crosby, M.D.).[14] Dr. Crosby found a diminutive prisoner then in his thirteenth year of imprisonment. She had examined more than a thousand survivors of torture in Iraq, Kazakhstan, Jordan, Turkey, Darfur, and other places. *Id.* at 124. Yet in her "many years of experience treating torture victims from around the world," she wrote, "*[Petitioner] presents as one of the most severely traumatized individuals I have ever seen.*" *Id.* at 125 (emphasis added).

That trauma was the product of years of torture. The government that inflicted it on Petitioner now prosecutes him. To be sure, Petitioner stands accused of grave charges—among them that he conspired to murder seventeen U.S. sailors aboard the U.S.S. Cole in Aden Harbor, Yemen, in 2000. *Al-Nashiri*, 835 F.3d at 113. But the myriad processes of any criminal prosecution—of preparation, pretrial proceedings, confrontation, evidence, and here, of a jurisdictional challenge—are now infected by the government's prior abuses: a course of misconduct

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[13]http://s3.amazonaws.com/PHR_Reports/iraq-consequences-of-torture-2004.pdf.

[14] *Amicus* has access only to the unclassified version of the Classified Appendix. In accordance with that document's internal pagination, *Amicus* cites to it here as "Class.App."

barbaric in its detail and chilling in its length and brutality.[15]

Petitioner claims that he is not accused of a war crime, and thus may not be tried by commission. The Court of Appeals held that he may pursue this defense only after conviction—by commission in Guantanamo. *Amicus* writes to address the special medical and psychological burdens raised by that ruling. Two are paramount, and each is entirely of the government's making.

In part I of the Argument, *Amicus* shows that post-conviction review would risk imposing on the victim of the government's own torture the trauma of reliving that torture not once, but twice: first before the military commission, and then, if his jurisdictional challenge succeeds, in the district court.

In part II, *Amicus* shows that trial of this Petitioner by an executive-branch tribunal at the Guantanamo Bay prison raises a special risk of psychological damage. Trial in military surroundings, at one of the places where Petitioner was abused, under a volatile and unpredictable process, is highly likely to inflict new and profound damage.

Each of these harms is acute. Each was created entirely by the government's own misconduct. Each is unnecessary, and may be avoided by reviewing the jurisdictional issue now.

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[15] *See generally* Petition for Writ of Certiorari, *Al-Nashiri v. Donald J. Trump*, No. 16-8966, at 6–11 (U.S. May 5, 2017) ("Pet'n"). The government does not dispute the facts of the abuse, all of which are evidenced by government sources.

In part III of the Argument, *Amicus* points out that cases involving executive-branch torture are of special concern, warranting this Court's review, since they inevitably color the administration of justice by the judicial branch.

As Petitioner's brief shows, this is a case of exceptional importance to the separation of powers, raising a federal question that should be settled by this Court. *See* Supr. Ct. R. 10(c); Pet'n 21–33. But it is also a case of exceptional medical importance. The procedural questions presented arrive wrapped in a record of systematic physical and emotional abuse, which renders the circumstances as extraordinary as they are "deeply troubling." *See Al-Nashiri*, 835 F.3d at 129. Unfortunately, in deciding how and when the judicial branch would review the commission's jurisdiction, the Court of Appeals authorized what amounts to a re-infliction of medical injury. That is one reason the dissenting judge below thought *habeas* review so important, and why this Court should now grant the petition.

ARGUMENT

I. BECAUSE EXECUTIVE BRANCH MISCONDUCT MAKES RE-TRAUMATIZ-ATION AN INEVITABLE CONSEQUENCE OF *ANY* TRIAL, APPELLATE REVIEW SHOULD BE DEPLOYED TO AVOID THE RISK OF REPEATED RE-TRAUMATIZATION.

The Court of Appeals framed the dispute below as though it were routine and procedural—whether the important jurisdictional questions raised by Petitioner's challenge could be raised only on post-conviction review. *Al-Nashiri*, 835 F.3d at 122; *see also Schlesinger v. Councilman*, 420 U.S. 738 (1975).

In doing so, it ignored the medical context of the case, which shows that the circumstances here are indeed "extraordinary." Torture is extraordinary by definition, both unlawful[16] and abhorrent to our system of justice.[17] Its effects upon on victims and on institutions are profound. *See generally Aiding Torture*, *supra*, at 4–5 (unethical practices by medical professionals); *Broken Laws*, *supra*, at 89–93 (for individuals, acute and long-term physical and psychological suffering; post-traumatic stress disorder ("PTSD")); *id.* at 95–111 (for government agencies, unlawful conduct and calls for reparations); *No Marks*, *supra*, at 33–35 (for government agencies, charges of intentional misconduct); *see also generally* Joshua E.S. Phillips, NONE OF US WERE LIKE THIS BEFORE (2012) (institutional pressure on soldiers to keep silent regarding torture; lasting psychological harm to soldiers ordered to carry out torture, including PTSD and suicidality). The consequences of systematically cruel abuse do not raise mere "anxiety [and] inconvenience," *see Councilman*, 420 U.S. at 755, but a psychological deficit so severe that a leading torture expert had rarely seen its equal, Class.App.125. There is nothing "usual" about what

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[16] *See* 18 U.S.C. § 2340 (criminalizing torture committed outside the United States); *Wilkerson v. Utah*, 99 U.S. 130, 136 (1878) ("[P]unishments of torture . . . and all others in the same line of unnecessary cruelty, are forbidden [by the Eighth Amendment.]").

[17] *See Application of Yamashita*, 327 U.S. 1, 29 (1946) ("[T]orture [is] foremost among the outright violations of the laws of war and of the conscience of a civilized world."); *Filartiga v. Pena-Irala*, 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.").

the government did to this Petitioner, nor about what any trial will do again. The point now is not to redo it twice.

A. Petitioner's Torture Was Extreme, and Its Consequences Are Severe.

The torture was excruciating. On the government's evidence, Petitioner was sealed in a coffin box, and sometimes forced to crouch in a fetal position in a smaller box. Pet'n 9. He was hoisted by the elbows from a ceiling mount; water boarded to the point of unconsciousness and likely cardiac arrest; subjected to mock execution; sodomized; and broomsticked.[18] *Id.* at 8, 10. He was held in the perpetually-dark COBALT site, which one observer likened to a dungeon. *Id.* at 7. Another said COBALT prisoners "looked like kenneled dogs." *Id.* The program was adapted from canine experimentation to evoke the "learned helplessness" of an animal subjected to random electric shocks. *Id.* at 6–7. From COBALT he was transferred over the next several years to a number of other black sites where the torture continued relentlessly. *See Al-Nashiri*, 835 F.3d at 141–42 (Tatel, J., dissenting). At one point, the torture of Petitioner became so heinous that the CIA's Chief of Interrogations threatened to resign if further torture was ordered. Pet'n 11. He forecast a "train wreak [sic] waiting to happen." *Id.*

The long-term consequences are severe. The train wreck happened. The government reduced to the basal state of a tortured animal the man whom it

[18] This process involved placing a broomstick behind Petitioner's knees as he knelt and then forcing his body backwards, pulling his knee joints apart. Pet'n 8.

now prosecutes, with the result that any trial will trigger a damaging return to that state. Dr. Crosby averred that Petitioner suffers from complex PTSD as a result of extreme physical, psychological, and sexual torture." Class.App.125. He was driven to "learned helplessness" by "torture that was unusually cruel and designed to break him." *Id.* 125. Her physical examination of the patient showed what *Amicus*' research has seen repeatedly—that his experiences had "fractured his trust in humanity, which has damaged his ability to interact with all humans, including counsel." *Id.* at 126; *see also Broken Laws*, *supra*, at 89–93 (avoidance, emotional numbing, severe anxiety). Further abuse then damaged a pre-existing mental frailty: "the physical and mental health care afforded to [Petitioner at Guantanamo] are woefully inadequate to his medical needs." Class.App.126 This mistreatment left Petitioner without "the tools necessary to self-regulate his emotional responses to triggering events." *Id.* at 126–27.

To recall torture is to experience it anew. Survivors "may be re-traumatized and overwhelmed by memories and as a result, affect or mobilize strong defenses that result in withdrawal and affective flattening," as well as "fear, mistrust, and forced submission." Istanbul Protocol ¶¶ 269, 271. Individuals like Petitioner who suffer from PTSD experience "both generalized hyperarousal and physiological emergency reactions to specific reminders" of their trauma. Bessel A. van der Kolk, *The Body Keeps the Score: Memory and the Evolving Psychobiology of Posttraumatic Stress*, 1 HARV. REV. PSYCHIATRY 253, 254 (1994); *see also Broken Laws*, *supra*, at 91–92 (PTSD and major depressive disorder as sequelae of torture, with related flashbacks, intrusive memories,

anxiety, chest pains, sleep difficulties, irritability); Istanbul Protocol ¶¶241–49 (describing common psychological responses to torture, including difficulties with memory). The cumulative effect of Petitoner's multiple re-traumatization would interfere with his capacity to participate in his case. Flashbacks, intrusive recollections, avoidance behaviors, difficulties with memory, sleep disturbances, anxiety, depression, psychosomatic symptoms including physical pain—all likely consequences in Petitioner's case—would significantly interfere with his capacity to participate in his case.

B. Any Adjudicative Process Will Likely Trigger Re-traumatization of Petitioner.

Here, Petitioner's re-traumatization to some degree is extremely likely in any trial-like scenario. *See* Class.App.125–27. As Dr. Crosby concluded, "[t]he procedures and circumstances of [Petitioner's] conditions of confinement and military trial process are sources of triggering events" that are extremely likely to result in such re-traumatization, and inadequate medical care at Guantanamo has left Petitioner with no defenses to such events. Class.App.126–27. The evidence at trial likely will cause Petitioner to relive his old trauma and suffer trauma anew. *Id.* This, in turn, is likely to precipitate extreme emotional suffering. *See* Istanbul Protocol ¶ 264. In torture survivors like Petitioner, specific reminders of torture, including emotionally laden imagery, can elicit "significant conditioned autonomic responses—for example, increases in heart rate, skin conductance, and blood pressure." Van der Kolk, *supra*, at 254.

Among the triggers highly likely to force Petitioner to relive his experiences are the following:

The attorney-client relation generally. Brutal and systematic torture "has [] damaged [Petitioner's] ability to interact with others, including counsel." Class.App.126. "Without realizing it, anyone, including defense counsel, "may do or say things that seem benign . . . , but which are profoundly and disproportionately upsetting to [Petitioner]." *Id.* at 126–27. When, as is true here, counsel is "a member of the majority culture and ethnicity," there may result a "dynamic of inequality [that] may reinforce the perceived and real imbalance of power and may increase the potential sense of fear, mistrust, and forced submission" in the torture victim." Istanbul Protocol ¶269. This has had and will continue to have "a significantly deleterious effect on his ability to cope with circumstances and undermines his ability to trust others who claim to be helping him." Class.App.128.

Preparation. Defense counsel cannot represent his client without seeking information from him, a process that represents, to the damaged client, a form of interrogation. *See* Pet'n 30; Istanbul Protocol ¶147 ("The presence of psychological sequelae in torture survivors, particularly . . . PTSD, may cause the torture survivor to fear experiencing a re-enactment of his or her torture experience during [an] interview[.]"). Trial counsel's preparations will entail discussion of points upon which his interrogators previously tortured him, including his background, his affiliations, and his movements. Any of these points may trigger a return to trauma. Istanbul Protocol ¶¶147, 149. Counsel must also confront the torture itself in order to confront government evidence. These subjects can be direct triggers. The Istanbul Protocol advises clinicians on the delicacy of interviewing torture survivors, noting that "[t]he in-

terview process may remind the survivor of interrogation during torture." *Id.* ¶¶264, 267. Unless undertaken with utmost care by a specialist whom a torture victim trusts, the mere posing of a question may evoke "strong negative feelings" such as "rage, revulsion, helplessness, confusion, panic, or hatred." *Id.* ¶¶264–65, 267 ("Mistrust, fear, shame, rage, and guilt are among the typical reactions that torture survivors experience, particularly when being asked to recount or remember details of their trauma."). Given the psychological pressures involved with any questioning, "survivors may be re-traumatized and overwhelmed by memories and, as a result, affect or mobilize strong defenses that result in profound withdrawal and affective flattening during examination or interview." *Id.* ¶271.

Trial testimony. Should Petitioner choose to testify in his own defense, he will be questioned in open court, before and then by government agents during direct and cross-examination. The triggering factors above would be sharpened in such an event. *See* Class.App.127; Istanbul Protocol ¶269.

Closed proceedings. Petitioner's trial will involve classified information, and thus numerous closed sessions are forecast, and indeed have already occurred. *See* Pet'n 31; Class.App.128. Petitioner's periodic exclusion from the proceedings while the commission is in closed session will exacerbate his sense of instability and helplessness. Class.App.128; *see also* Istanbul Protocol ¶¶265, 267. Petitioner's general awareness that closed sessions involve discussion of his torture is likely to provoke acute distress. Class.App.128.

Presence at Hearing. The presentation of evidence at trial that triggers memories of torture is

unavoidable. Whether torture is discussed in controversies over admissibility, or in cross-examination of government witnesses, or whether subjects on which Petitioner was interrogated under torture are described, the proceedings are certain to be laden with imagery that would re-traumatize Petitioner. *See* Pet'n 31; *see also* Istanbul Protocol ¶¶147, 149, 265; Van der Kolk, *supra*, at 254.

C. The Government's Approach Risks Doubling the Harm to Petitioner.

A course of review that risks re-trial will potentially double the severe harm inflicted.

Below, Petitioner asked for *habeas* review and a determination that the military commission had no jurisdiction over his case. That review would most likely result in a single re-traumatization. (Were Petitioner successful, he would be tried in an Article III court. If he failed, the commission would proceed.) The Court of Appeals' approach raises considerable risk of Petitioner's enduring the process twice, first in the commission, and then, after post-conviction review, in an Article III court on remand. This is not a case where a petitioner is threatened with nothing more than the usual "cost, anxiety, and inconvenience of having to defend against a single criminal prosecution." *Councilman*, 420 U.S. at 755.

The government's central argument for abstention, drawn from jurisdictional disputes in courts martial, rests on inter-branch comity concerns. *Al-Nashiri*, 835 F.3d at 116–17, 124. Ordinarily the judicial branch would not intrude, mid-trial, in an executive-branch court martial. But no comity is due to the executive branch for process problems created

entirely by its own torture.[19] Abstention is a "basic doctrine of equity jurisprudence," *Sprint Commc'ns v. Jacobs*, 134 S. Ct. 584, 591 (2013), and the government has no equitable claim to deference where its conduct was so profoundly violent. *Amicus* does not suggest that Petitioner may escape from a day of reckoning, but the manner of that reckoning is at issue now. As any government prosecution will likely retrigger harm caused unlawfully by the government, the Court should take *certiorari* of this case to ensure that the process does so minimally.

Councilman considered "the propriety of equitable intervention in pending court-martial proceedings." *Id.* at 757. The Court upheld post-conviction review of a court martial's jurisdiction where a petitioner could "show no harm other than that attendant to resolution of his case in the military court system." *Id.* at 758. The Court drew on the principle that "equitable intervention into pending state criminal proceedings" is not warranted "unless the harm sought to be averted is 'both great and immediate,' [and] of a kind that 'cannot be eliminated by . . . defense against a single criminal prosecution.'" *Id.* at 756 (quoting *Fenner v. Boykin*, 271 U.S. 240, 243 (1926)). "The Court thus left open the possibility that cases might arise in which extraordinary circumstances would outweigh the equity and comity principles underlying abstention." *Al-Nashiri*, 835

[19] That the government's current counsel played no personal part in Petitioner's historical abuse is of no moment. They act today for the executive branch that did abuse Petitioner.

F.3d at 140 (Tatel, J., dissenting).[20] Here, the executive set out to accomplish the psychological injuries that now so greatly vex the process. Class.App.125. In doing so, it lost any equitable standing to complain of the consequences to its prosecution.

In short, potentially repetitive trials create a risk of an extraordinary character. Re-traumatization is not an ordinary-course consequence of "resolution in the military court system," *Councilman*, 420 U.S. at 758, and the threat to Petitioner's well-being is precisely the kind that *can* "be eliminated by . . . defense against a single criminal prosecution." *Id.* at 756 (citation omitted). The Court should grant review to direct that the judicial branch settle the jurisdictional question now.

II. A MILITARY COMMISSION AT GUANTANAMO RISKS UNIQUE HARMS TO PETITIONER.

The process problem is not simply that the government's approach raises risks of repetitive retraumatization. For this Petitioner, any Guantanamo proceeding will be uniquely harmful, a consequence entirely of the government's previous misconduct. *See generally* Class.App.126–27. Thus if Petitioner may not lawfully be held to answer the charges against him in an executive-branch prison,

[20] Even if the risk of repetitive trials were remote—and with significant law-of-war questions raised, the risk is not remote here, *see* Pet'n 21–33—the severity of the psychological impact would counsel against undertaking *any* risk. The executive's misconduct was so egregious that it should bear the entire burden of any merely-procedural disruption caused by that misconduct.

then in light of the executive's prior abuses, the courts should say so before, not after such a proceeding is convened.

A. The Executive's Mistreatment of Petitioner Leaves Him Incapable of Coping with the Military Proceedings.

CIA's secret sites abroad were not the only places where Petitioner was tortured. Guantanamo itself was the location of some of his abuse. Class.App.126. Dr. Crosby opined that Petitioner might experience a complete breakdown if forced to undergo trial before the military commission in the same place, and "that his decompensation will have a permanently disabling effect on his personality and his capacity to cooperate meaningfully with his attorneys" in the future. Class.App.128. She identified the fits and starts of the novel military process at Guantanamo as an independent source of retraumatization. *Id.* at 127. Through "torture that was unusually cruel and designed to break him," the executive branch continued to induce "learned helplessness." *Id.* at 125. "A key strategy of the CIA's RDI program was to keep the detention facility's policies and procedures unpredictable in order to induce helplessness." *Id.* at 127. The *ad-hoc* application of a new statute by oft-changing personnel and revolving detention staff have compounded these problems. *Id.* Dr. Crosby found that the commission process itself was a "principal driver" of Petitioner's PTSD, because of its highly fluid and unpredictable rules regarding the handling of hearings and issues presented. *Id.* at 127; *see also Nashiri*, 835 F.3d at 143 (Tatel, J., dissenting). Military judges themselves have confessed that they lack power to ameliorate the conditions of Petitioner's detention.

Class.App.127. In another case, disruption of the trial process might fall within *Councilman's* "ordinary" anxieties and inefficiencies, but here they are a proximate cause of new harm.

A typical adult who had not been abused might be able to deal with uncertainty and changing circumstances. *See* Class.App.127. As a result of his severe trauma, Petitioner is not such an adult. He is unable to differentiate between benign changes in surroundings and procedure and the government's past efforts to destabilize his personality. *Id.* That he is charged with capital offenses exacerbates the anxiety. *Id.* ("Given that the military is seeking the death penalty against him, the *ad hoc* nature of the proceedings causes [Petitioner] profound anxiety.").

The opacity of the process is a complicating factor. Defense counsel's inability to discuss with Petitioner what transpires in closed session, or to give him reasonable expectations of what might transpire in the *ad hoc* procedure increases his anxiety, damages his relationship with counsel, and impairs his ability to assist the defense. *Id.* at 127–28; *see also* Istanbul Protocol ¶¶263–65 (structure, explanation, advance preparation, and trust influence interactions between torture survivors and clinicians). Dr. Crosby predicts that trial before the military commission at Guantanamo will lead to a serious and permanent breakdown of Petitioner's ability to cope with stress and to cooperate with counsel. *Id.* at 128.

B. Military Commission Procedure on Admission of Coerced Evidence and Related Litigation Exacerbate the Threat of Re-traumatization.

The military commission's evidentiary rules do not bar evidence *derived from* statements coerced

through torture, and therefore the commission presents a special threat of re-traumatization. *See* Mil. R. Evid. 304(a)(1). Rule 304(a)(1) bars only the admission of the actual statements given under torture. Evidence derived from a statement made under torture is admissible if "(i) the evidence would have been obtained even if the statement had not been made; or (ii) use of such evidence would otherwise be consistent with the interests of justice." Rule 304(a)(5). Proceedings involving the offer of derivative statements are highly likely to occur in commission proceedings and to stimulate episodes and symptoms of PTSD. *See* Van der Kolk, *supra*, at 254.

In a military commission, Petitioner will face two situations likely to differ substantially from a federal trial. *First*, because there is no *per se* bar on coerced or torture-derived evidence, the government may rely, for example, on "clean team" interrogations. These are interrogations using ordinary law enforcement methods—without giving *Miranda* warnings—conducted shortly after statements are extracted through torture. *See* Morris D. Davis, *Historical Perspective on Guantanamo Bay: The Arrival of the High Value Detainees*, 42 CASE W. RES. J. INT'L L. 115, 118 (2009) (describing use of clean teams). Rule 304(a)(2)(b)(ii) provides that a statement of the accused is admissible if "voluntarily made." The clean team questions on the same subjects that were probed during torture. *Id.* at 122–23.

Among the evidence that the government may offer at trial are statements made by Petitioner when he was interviewed by the Federal Bureau of investigation when he arrived at Guantanamo in 2006 from the black sites abroad. The offer of that evi-

dence, and defense counsel's efforts to exclude it would likely be triggers. *See* Van der Kolk, *supra*, at 254. For every confession or statement against interest offered by the prosecution, defense counsel would have to demonstrate the taint from the torture in two steps: first in a pretrial motion and then again during the trial. Before the military commission, Petitioner may witness an adversarial hearing on the facts, circumstances, and effects of his torture, while the reliability of his later statements is evaluated.

Second, because Rule 304 excludes only a defendant's own statements, the prosecution may introduce statements of other detainees obtained while they were being tortured. Any challenge to this evidence will raise issues related to the declarants' torture, likely triggering the Petitioner's own traumatic memories. *Amicus* understands that defense counsel is already dealing with this issue with respect to deposition testimony of another detainee that the government wishes to introduce. Litigation of the dispute will involve graphic testimony and photographs of subjects familiar to Petitioner, which are highly likely to inflict significant and unnecessary psychological harm with the potential for permanent psychological debility, in addition to undermining his capacity to participate in his defense.

In short, a trial at Guantanamo, where Petitioner was tortured, where he received and receives inadequate care, and where reminders of the experience surround him, is all but certain to traumatize him again. Class.App.126; *see also Al-Nashiri*, 835 F.3d at 143 (Tatel, J., dissenting). That prospective harm is once again entirely of the government's making. It should not be risked unless the jurisdic-

tion of the commission is first determined to be proper.

III. THE COURT SHOULD GRANT CERTIORARI IN THE EXERCISE OF ITS SUPERVISORY JURISDICTION.

Torture is not simply a crime, *see* 18 U.S.C. § 2340A; not merely condemned by the armed services, *see* U.S. Army FM 2-22.3; not an object of international denunciation alone, *see* 1948 Universal Declaration of Human Rights; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1465 UNTS 85 (1987) (ratified by the United States in 1994). Torture is abhorrent to justice in a special way. It degrades all who are touched by it: the victim, the torturer, and the institution that winks at it. *See generally* Phillips, *supra* (service members and the military); *Aiding Torture*, *supra*, at 4–5 (medical profession); *Broken Laws*, *supra*, at 89–93 (individuals); *id.* at 95–111 (government agencies); *No Marks*, *supra*, at 33–35 (same).

The case began with misconduct (and a prosecution) entirely within the executive branch, but *habeas corpus* has now brought that misconduct to the judicial branch. The executive may view its abuses as a detail of evidence law—as an ordinary course problem—but the broader question that now confronts this Court is whether torture has become ordinary to the judicial branch itself.

How the institutions of our government respond to torture shapes attitudes in the body politic. In 1776, our first President is said to have commanded his officers to permit no abuse of Hessian mercenaries captured at Trenton. *See* David Hackett Fischer, WASHINGTON CROSSING 379 (2004). That example

was a force for good at home and abroad, where our institutions continue to be influential. In the next century, Dr. Francis Lieber's *Instructions for the Government of Armies of the United States in the Field*, known as the Lieber Code, forbade the use of torture as an interrogation tactic: "[m]ilitary necessity does not admit of cruelty—that is, the infliction of suffering for the sake of suffering . . . , nor of torture to extort confessions[.]" Theodore Meron, *Francis Lieber's Code and Principles of Humanity*, 36 COLUM. J. TRANSNAT'L L. 269, 274 (1997) (quoting *Instructions for the Government of Armies of the United States in the Field*, General Orders No. 100 (Apr. 4. 1863)).

"When life or liberty is at stake, the landmark judgments of the Supreme Court of the United States, giving fresh meaning to the principles of the Bill of Rights, are studied with as much attention in New Delhi or Strasbourg as they are in Washington, D.C." Anthony Lester, *The Overseas Trade in the American Bill of Rights*, 88 COLUM. L. REV. 537, 541 (1988). But the inaction of our institutions can be just as influential. In 2006, the Public International Law & Policy Group conducted rule-of-law training for fifty judges from former Soviet Bloc countries. Referring to Abu Ghraib, the judges asked, "Are you going to be addressing the elephant in the room?" Michael. P. Sharf, *The Elephant in the Room: Torture and the War on Terror*, 37 CASE W. RES. J. INT'L L. 145, 145 (2006).

Before its decision in *Miranda v. Arizona*, 384 U.S. 436 (1966), this Court was often asked to address the consequences of abusive interrogations. Resolving a case of one such abuse, Justice Frankfurter observed that courts have a "duty of establish-

ing and maintaining civilized standards of procedure and evidence" as an inherent function of their role in supervising the judicial system and process. *McNabb v. United States*, 318 U.S. 332, 340 (1943). The petition fairly raises an example of that duty, and this Court should avoid inaction here. Exercising its supervisory jurisdiction, the Court should grant *certiorari*, as it did in *McNabb*, to "establish[] and maintain[] civilized standards of procedure and evidence." *Id.* This case concerns a jurisdictional challenge requiring judicial review. Given the record below, what matters is vigilant protection against the risk that review itself would compound torture's injuries.

This case is an appropriate vehicle for that vigilance. The Court should grant *certiorari* to condemn torture—even when practiced against one charged with terrible crimes, and to cauterize its effects—even where the procedural rule adopted might be inconvenient to the government.

CONCLUSION

The Petition for a writ of *certiorari* should be granted.

Respectfully submitted,

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