No. 16-8966

In the
Supreme Court of the United States

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Abd al-Rahim al-Nashiri,
*Petitioner*,

v.

Donald J. Trump,
President of the United States, *et al.,*
*Respondents.*

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

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# BRIEF AMICUS CURIAE FOR THE NATIONAL COALITION TO PROTECT CIVIL FREEDOMS IN SUPPORT OF PETITIONER

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## STATEMENT OF INTEREST OF AMICUS CURIAE[1]

The National Coalition to Protect Civil Freedoms ("NCPCF") is a coalition of 18 organizations (about half Muslim and half non-Muslim) dedicated to the preservation of our civil freedoms, particularly in the so-called "War on Terror." NCPCF focuses on three areas in which civil rights have significantly eroded since 9/11: prevention of discrimination and Islamophobia; prevention of abuse of prisoners; and prevention of preemptive prosecutions (defined as the use of pretext charges, unfair sting operations, and generally prosecutions based on governmental suspicion of the target's ideology). NCPCF represents the interests of Muslims and others targeted by the government based on their religion, race, country of origin, or ideology.

The Guantanamo Bay military commissions represent an extreme example of so-called "War on Terror" abuses in the United States's attempt to use of military tribunals to try Muslims outside the protections of the Constitution, Convention Against Torture, and Geneva Conventions.

This *amicus* brief is filed with the written consent of all parties.

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[1] *Amicus* gave timely notice to all parties, who consented to the filing of this brief. No part of this brief was authored by counsel for any party, and no person or entity other than the National Coalition to Protect Civil Freedoms, its members, or its counsel made any monetary contribution to the preparation or submission of the brief.

## STATEMENT OF THE CASE

A Department of Defense civilian employed for the purpose, known as the "Convening Authority," has charged Abd al-Rahim al-Nashiri with involvement in the attack on the *U.S.S. Cole*. Under the Military Commissions Act of 2009, the referral purports to authorize trial and the death penalty by a military commission.

The 2000 attack on the U.S.S. Cole occurred in a time of peace and in a country which, at the time, was not the object of U.S. hostilities. Drawing upon the traditional view that military commissions *only* have jurisdiction over war crimes that have been committed in a period of hostilities, al-Nashiri has challenged the jurisdiction of the military commission through every available procedural vehicle. *See In re al-Nashiri*, 835 F.3d 110, 116 (D.C. Cir. 2016); *see also al-Nashiri v. McDonald*, 741 F.3d 1002 (9th Cir. 2013).

On appeal of denial of *habeas corpus* and an original petition for *mandamus*, the United States Court of Appeals for the District of Columbia Circuit affirmed the District Court's refusal to consider *habeas* and separately denied *mandamus*. The D.C. Circuit extended the *habeas* abstention doctrine in *Schlesinger v. Councilman*, 420 U.S. 738 (1975), to military commissions because of the "*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." *Al-Nashiri*, 835 F.3d at 119 (emphases in original).

Following the denial of a petition for rehearing, al-Nashiri filed a petition for *certiorari* in this Court. This Court docketed the petition on 1 May 2017.

## SUMMARY OF ARGUMENT

The United States Military Commissions at Guantanamo Bay operate inconsistently with basic American principles of justice, including the rights to counsel and to present a defense through witnesses, cross-examination, and favorable evidence.

The court below extended *Councilman* abstention to military commissions on the assumption of "*adequacy* of the alternative system in protecting the rights of defendants," including the right to counsel, the right to exculpatory evidence, the right to compulsory process, and the right to an impartial and independent tribunal. *In re al-Nashiri*, 835 F.3d 110, 121 (D.C. Cir. 2016) (emphasis in original). These assumptions reflect a false sense of confidence in the military commissions process.

In reality, the military commissions limit the access of its defendants to counsel of choice and to a privileged relationship with the counsel they do have. Rather than guarantee production of exculpatory evidence, the military commissions have acknowledged and on one occasion even overseen its destruction. The military commissions provide the government—but not the defense—the power to subpoena witnesses. And the military commissions concentrate prosecutorial and judicial power in a single civilian Convening Authority, including the power to choose the venire.

This Court should grant the petition for *certiorari* to authorize the federal courts to remedy the serious flaws in the military commission, as this

Court did in *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

## ARGUMENT

### CONTRARY TO THE ASSUMPTION OF THE COURT BELOW, THE GUANTANAMO BAY MILITARY COMMISSIONS DO NOT ADEQUATELY PROTECT THE RIGHTS TO COUNSEL, EXCULPATORY EVIDENCE, COMPULSORY PROCESS, OR A FAIR TRIBUNAL.

The decision below is founded on a fundamental misunderstanding of the nature of the Guantanamo Bay military commissions. In practice—and often even in theory—the military commissions operate inconsistently with basic American principles of justice, including the rights to counsel and to present a defense through witnesses, cross-examination, and favorable evidence.

The court below extended *Councilman* abstention to military commissions on the assumption of "*adequacy* of the alternative system in protecting the rights of defendants." *In re al-Nashiri*, 835 F.3d 110, 121 (D.C. Cir. 2016) (emphasis in original). The court below reasoned that, "Al-Nashiri's trial before a military commission will include a number of significant procedural and evidentiary safeguards. Among other things, he will have the right to be represented by counsel, *10 U.S.C.* § 949c, be presumed innocent, *id.* § 949l, obtain and offer exculpatory evidence, *id.* § 949j, call witnesses on his behalf, *id.*, and challenge for cause any of the members of the military commission and the military judge, *id.* § 949f." 835 F.3d at 123. These assumptions, based on the Military Commissions Act of 2009 (M.C.A.) but not the Rules for Military Commission

(R.M.C.) or their implementation, reflect a false sense of confidence in the military commissions process.

*Amicus* writes to fill a gap in the pleadings perceived by the court below. According to the court below, "Al-Nashiri does not argue before us that any evidentiary or procedural defects will prevent the military commission and various appellate bodies from fully adjudicating his defense that his conduct occurred outside the context of hostilities." *Al-Nashiri*, 835 F.3d at 123. If true, the pleadings below do this Court a disservice by failing to identify the serious defects in the Guantanamo Bay military commissions.

Before reviewing the defects of the military commissions system, this Court should note that the Central Intelligence Agency, as well as the Department of Defense, was involved in the detention of al-Nashiri and other Guantanamo Bay prisoners. "After the 14 CIA detainees arrived at the U.S. military base at Guantanamo Bay, they were housed in a separate building from other U.S. military detainees and remained under the operational control of the CIA." Executive Summary, Senate Select Committee on Intelligence, Committee Study of the Central Intelligence Agency's Detention and Interrogation Program 160 (2014), available at https://www.feinstein.senate.gov/public/_cache/files/7/c/7c85429a-ec38-4bb5-968f-289799bf6d0e/D87288C34A6D9FF736F9459ABCF83210.sscistudy1.pdf. This "operational control" may

explain many of the more bizarre failings of the military commissions system.[2]

*Right to counsel*

Although military commission defendants do have the right to be represented by counsel, *al-Nashiri*, 835 F.3d at 123 (citing 10 U.S.C. § 949c), the military commissions have been plagued by serious threats to that right. These threats include the forced loss of military counsel, breaches of confidentiality, and criminal and administrative investigations into the actions of defense counsel in representing their clients. These issues have arisen in both the trial of al-Nashiri and the other capital military commission hearings, *United States v. Khalid Shaikh Mohammad* ("*9/11 Case*").

Fundamentally, military authorities have implemented policies which drastically interfere with the right to counsel. Guantanamo Bay prisoners cannot communicate with the outside world, and have no ability to recruit or interview attorneys of their choice. *See* Order, Privileged Written Communications, *al-Nashiri*, available at http://www.mc.mil/Portals/0/pdfs/alNashiri2/Al%20Nashiri%20II%20(AE027K).pdf. Citizenship

[2] As one recent example, the military commission recently ruled that it does not have authority to remove the "High-Value Detainee" label the CIA placed on some prisoners to justify the use of *incommunicado* detention and "Enhanced Interrogation Techniques." *See* Ruling, Mr. Ali's Motion to Remove Designation as "High-Value Detainee," *9/11 Case*, available at http://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20(AE448G(RULING)).pdf. The military commissions, after a substantial delay, post most pleadings on a government-run website.

requirements restrict prisoners from obtaining counsel from their own countries or cultural backgrounds. *See* 10 U.S.C. § 949c(b)(3)(A). Moreover, prisoners have limited access to their attorneys which puts a strain on both lawyer and prisoner in terms of travel to and from Guantanamo, and travel to and from interview locations.

At one point during al-Nashiri's pre-trial proceedings, the Chief Defense Counsel prohibited legal communication from counsel to Al-Nashiri because military authorities claimed the right to read legal mail. *See, e.g.*, Defense Reply to Government Response to Defense Motion to Bar JTF-GTMO from Interfering with the Defendant's Right to Confidential Legal Mail, *al-Nashiri,* available at http://www.mc.mil/Portals/0/pdfs/alNashiri2/Al%20Nashiri%20II%20(AE027B).pdf. The right to counsel is also impeded by the prohibition by military on telephone calls—even over secure lines—between so-called "High Value Detainees" like al-Nashiri and their counsel. *See Military Judge Order on Joint Defense Motion for Telephonic Access for Effective Assistance of Counsel*, *9/11 Case*, not yet available publicly.

The statutory requirement of military counsel, 10 U.S.C. § 948k(a), and ordinary military rotations result in disruption of attorney-client relationships. Al-Nashiri lost one attorney over his objection when CDR Brian Mizer, U.S. Navy, separated from active duty. *See* Ruling, Defense Motion to Abate Pending the Restoration of Commander Brian Mizer to the Defense Team, *al-Nashiri*, available at http://www.mc.mil/Portals/0/pdfs/alNashiri2/Al%20N

ashiri%20II%20(AE348L).pdf. MAJ Jason Wright was forced to resign from the United States Army, terminating his representation. *See* Notice of Governmental Directed Severance of the Attorney-Client Relationship, *9/11 Case*, available at http://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20(AE283(KSM)).pdf. Other counsel has had to transition from military to civilian status to continue to represent the military commissions defendants. *See* Order on Emergency Defense Motion to Compel Appointment of Military Learned Counsel as Civilian Learned Counsel, *9/11 Case*, available at http://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20(AE193C(KSM%20et%20al)).pdf

The security clearance requirements for defense counsel also interfere with ordinary formation and termination of attorney-client relationships in the military commissions context. The military commissions require that all counsel for so-called "High-Value Detainees" like al-Nashiri hold TOP SECRET// SECURE COMPARTMENTED INFORMATION//CODEWORD clearances. When new military or civilian counsel seek to represent a defendant, the clearance process often takes a year or longer. Despite a total breakdown in communication lasting more than a year, the lack of alternative cleared counsel in the *9/11 Case* has led the military commission to refuse to replace the counsel of Walid bin 'Atash, even when the government argued in favor of bin 'Atash's right to terminate an attorney-client relationship. *See* Ruling, Request by Mr. bin 'Atash to Sever and Replace Attorneys on His Defense Team, *9/11 Case*, available at

http://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20(AE380VV).pdf.

At their perceived convenience, however, the military commissions have sometimes proceeded without statutorily required counsel. 10 U.S.C. § 949a(b)(2)(C)(ii). In January 2017, the military commission in the *9/11 Case* held a deposition and a closed hearing addressing classified evidence while bin 'Atash's learned counsel was absent for medical reasons. *9/11 Case* Transcript 14514 (Jan. 25, 2017), available at http://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20(TRANS25Jan2017-AM1).pdf.

*Threats to confidentiality*

Actual and threatened breaches of confidentiality have also threatened the statutorily-required assistance of counsel. This Court has "readily acknowledge[d] the importance of the attorney-client privilege, which 'is one of the oldest recognized privileges for confidential communications.'" *Mohawk Indus. v. Carpenter*, 558 U.S. 100, 108 (2009) (quoting *Swidler & Berlin v. United States*, 524 U.S. 399, 403 (1998)).

In January 2013, a military officer revealed that the attorney-client meeting cells (known as "Echo 2") possessed surreptitious monitoring devices disguised as smoke detectors. *9/11 Case* T. 1807 (Feb. 11, 2013), available at http://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20(TRANS13February2013-PM1).pdf. In April 2013, information technology turned over half a

million emails, including internal defense emails, to the prosecution. *9/11 Case* T. 5255 (Aug. 23, 2013), available at http://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20(TRANS23August2013-PM2).pdf. Moreover, there are repeated issues of JTF-GTMO seizing privileged communication, reading them, translating them, and absorbing the contents therein. *9/11 Case* T. 10252 (Feb. 17, 2016); *id.* at 13426-502 (Oct. 11, 2016) available at http://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20(TRANS17Feb2016-AM1).pdf.

Finally, criminal and administrative investigations into defense counsel for their representation have frustrated the purposes of § 949c's assurance of counsel. The Federal Bureau of Investigation brought the *9/11 Case* to a virtual halt in 2013 when it attempted to recruit a member of Ramzi bin al Shibh's defense team as an informant in an ongoing criminal investigation. *9/11 Case* T. 7804 (Apr. 15, 2014), available at http://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20(TRANS15April2014-AM).pdf. The Chief Prosecutor appointed a Special Trial Counsel to handle litigation on this issue. *9/11 Case* T. 7839 (Apr. 17, 2014), available at http://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20((TRANS17April2014-AM).pdf. The FBI already had another informant on the defense team actively sharing information, and the investigation ended only when the United States Attorney for the Northern District of Illinois declined prosecution of defense counsel. *9/11 Case* T. 8681, 8742, 8760 (Oct. 25, 2015), available at

http://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20(TRANS25Oct2015)-AM2.pdf.

In February 2015, a defendant in the *9/11 Case* stated that he recognized a new defense interpreter from a Central Intelligence Agency black site, and the government later acknowledged the interpreter had been employed by the CIA. *9/11 Case* T. 8248 (Feb. 9, 2015), available at http://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20(TRANS9Feb2015)-AM.pdf; *id.* 8266 (Feb. 11, 2015). The government has still not explained the presence of the former CIA interpreter, despite pending litigation. *See* Unclassified Notice, Defense Motion for Deposition of Witness Known as "The Former CIA Interpreter Utilized by Mr. bin al Shibh's Defense Team," *9/11 Case*, available at http://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20(AE350C(AAA)).pdf.

Most recently, the Chief Prosecutor appointed a new Special Trial Counsel to litigate allegations that defense counsel, during the course of their representation, accessed information on the Secret Internet Protocol Router Network (SIPRNet) beyond their authorization. *9/11 Case* T. 14151 (Dec. 6, 2016), available at http://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20(TRANS6Dec2016-AM1).pdf. The Special Trial Counsel has claimed that, because the military commission has not acted to its satisfaction, it has the power to pursue investigations and seek to accomplish its goals through other, less overt means. *9/11 Case* T. 14159-89 (Dec. 6, 2016), available at

http://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20(TRANS6Dec2016-AM1).pdf.

Despite the diligence of military and civilian defense counsel, the serious problems in the military commissions mean that al-Nashiri does not receive the same guarantees of effective representation present in a federal court or courts-martial.

*Exculpatory evidence*

The M.C.A. provides for the disclosure of exculpatory evidence to the defense "as soon as practicable." 10 U.S.C. § 949j(b). Citing classification restrictions on disclosing details of the torture of al-Nashiri and others, the prosecution has relied on 10 U.S.C. § 949p-4 to delay, deny, and degrade the production of discovery to the defense. *See, e.g.*, *9/11 Case* T. 10112 (Dec. 11, 2015), available at http://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20(TRANS11Dec2015-PM1).pdf.

Recently, the *al-Nashiri* military judge formally reprimanded the prosecution for their discovery practices. The military judge lamented that, "we're five and a half, six years into this process, and down here we haven't figure out yet how to transmit [basic discovery like medical records] to the defense." *al-Nashiri* T. 7985, *available at* http://www.mc.mil/Portals/0/pdfs/alNashiri2/Al%20Nashiri%20II%20(TRANS6Mar2017-PM1).pdf.

The discovery process in the other military commissions is no better. As the *9/11 Case* military judge recently noted, "in a normal court-martial case, 95 percent of discovery is done at the arraignment," *9/11 Case* T. 15226 (Mar. 22, 2017), *available at*

http://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20(TRANS22Mar2017-PM2).pdf. The *9/11 Case* arraignment took place on May 5, 2012. The prosecution in the *9/11 Case* did not even begin the process for most CIA discovery until December 2015, and recently established a target date of September 30, 2017, to provide torture-related discovery to the defense. *9/11 Case* Tr. 15452 (Mar. 24, 2017), *available at* http://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20(TRANS24Mar2017-AM2).pdf.

Separate from process, however, is the government destruction of exculpatory evidence that the D.C. Circuit claimed was available to military commission defendants. The government appears to be following a strategy of destroying evidence in an attempt to avoid producing it to the defense.

As one example, a senior CIA official ordered destruction of video recordings of al-Nashiri's brutal interrogations. In May 2005, the Eastern District of Virginia ordered the preservation of video recordings of detainee interrogations in connection with *United States v. Zacarias Moussaoui*. *See Abdullah v. Bush*, 534 F. Supp. 2d 22, 23 (D.D.C. 2008). Six months later, Jose Rodriguez, Director of the National Clandestine Service, ordered his subordinates in the CIA to destroy the recordings of al-Nashiri. Jose A. Rodriguez, Jr. with Bill Harlow, *Hard Measures* 193 (2012). The military commission has set a hearing for those involved in the destruction to testify about the destruction. Order, *Al-Nashiri*, *available at* http://www.mc.mil/Portals/0/pdfs/alNashiri2/Al%20Nashiri%20II%20(AE354G).pdf.

As another example affecting both the *al-Nashiri* and *9/11 Cases*, the prosecution secretly coordinated the destruction of a CIA black site during the pending of a public military commission preservation order. The prosecution initially sought an order for decommissioning of a CIA black site in both cases. *See, e.g.*, Motion to Recuse Military Judge and the Current Prosecution team and for Further Appropriate Relief, *9/11 Case*, available at http://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20(AE425(KSM)).pdf. The *9/11 Case* defense sought and obtained an order for preservation of the black site. Order, *9/11 Case*, available at http://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20(AE080G).pdf. The prosecution obtained an *ex parte* order for destruction of the black site, then apparently destroyed the black site without informing the defense while the preservation order was in effect and while numerous defense motions regarding the black site were pending. *See* Ruling, Motion to Compel Discovery or in the Alternative to Abate and Dismiss, *9/11 Case*, available at http://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20(AE425T(KSM%20AAA)(RULING)).pdf. The defense has requested a hearing regarding the secret destruction process, but the military commission has not yet acted on the motion. *See* Mr. Mohammad's Motion to Recuse Military Judge and the Current Prosecution Team and for Further Appropriate Relief, *9/11 Case, available at* http://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20(AE080G).pdf.

*Compulsory process*

Despite the promise of 10 U.S.C. § 949j, a military commission defendant like al-Nashiri does not actually have the authority to compel the attendance of witnesses on his behalf. Despite the importance of this right to the basic presentation of a defense, *Washington v. Texas*, 388 U.S. 14, 19 (1967), the prosecution has control over all witnesses in a Guantanamo Bay military commission.

Section 949j provides in relevant part that, "The opportunity to obtain witnesses and other evidence shall be comparable to the opportunity available to a criminal defendant in a court of the United States under article III of the Constitution." But in his regulation, the Secretary of Defense provided that only the government and the military judge have authority to issue a subpoena. R.M.C. 703(e)(2)(C). The defense must provide a summary of proposed testimony to the prosecution and ask the prosecution to produce the witness. R.M.C. 703(c)(2)(A). The prosecution, on the other hand, produces whatever witnesses it chooses without providing notice to the defense.

The unilateral control that the prosecution possesses over witnesses denies defendants the right to a compulsory process in several ways. Initially, the government claims the right to redact witness information from medical records, FBI 302s, confinement records, and other basic discovery to prevent the defense from seeking to interview and obtain witnesses. Once the defense has identified relevant witnesses, the prosecution can simply decline to produce the requested witnesses, and has done so dozens of times in *al-Nashiri* and the *9/11*

*Case*. The government even claims authority to reject witnesses willing to testify voluntarily by video-teleconference. *See* Government Motion Seeking to Clarify and Amend Military Commission Trial Conduct Order AE036D Regarding Government-Funded Production of Defense Witnesses and Use of Government Video Teleconference Equipment, available at http://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20(AE036E).pdf. Because the process of asking the military judge to compel the government to obtain a witness can take months or years, the military commission frequently rules without needed factual bases to avoid the inconvenience of calling the witness to testify.

The lack of compulsory process in the military commissions intersects with violations of the complementary right to confront and cross-examine witnesses. *See Crawford v. Washington*, 501 U.S. 36 (2004). Title 10 U.S.C. § 949a(b)(3)(D) and R.M.C. 803(b) give the government the right to introduce any form of hearsay evidence on a basic showing of relevance.

In the *9/11 Case*, the government intends to avoid the entire defense inquiry into its seizure, exploitation, and custody of physical evidence between 2002 and 2007 by the simple expedient of explaining evidence collection and custody through testimonial hearsay.[3]

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[3] In the *9/11 Case*, for example, the government has given notice that,

The government prevents the defendants from calling relevant witnesses themselves by hiding their identities and denying the defense the right to call witnesses. For example, the government, without judicial approval, has withheld the identifying information of almost every medical provider who have treated al-Nashiri and other prisoners Defense Motion to Compel Production of Complete, Unredacted Medical Records, http://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20(AE330(AAA)).pdf.

Similar government control extends to the process of obtaining defense expert witnesses. In a federal court, 18 U.S.C. § 3006A(e) prohibits government involvement in a defendant's request for

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> [t]he Prosecution has identified 244 items of real and documentary evidence it intends to utilize affirmatively in its case-in-chief that were found and seized at the scene where [defendants were captured or locations were searched] * * * In seeking their admission into evidence, the Prosecution will be requesting within an [*ex parte*] M.C.R.E. 505 filing that the Military Judge approve a substituted evidentiary foundation with respect to these materials. That foundation will rely, in part, upon witness testimony that will include hearsay within the parameters of M.C.R.E. 803(b)(2).

Government Notice of Intent to Offer Certain Items of Corroborated, Lawfully Obtained, Probative, and Reliable Hearsay Evidence Where the Declarants Are Unavailable, Hostilities Pose Unique Circumstances, and Admission Is in the Interests of Justice, Pursuant to the M.C.A., 10 U.S.C. § 949a(B)(3)(D), and M.C.R.E. 803(b)(1), available at http://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20(AE472).pdf.

a government-funded expert. *See, e.g.*, *United States v. Greschner*, 802 F.2d 373, 379 (10th Cir. 1986). R.M.C. 703(d), however, requires the defense to provide "notice" to the government of their expert requests, which the military commission has sometimes interpreted to mean a copy of the request itself. *See* Supplemental Trial Conduct Order, *9/11 Case*, available at http://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20(AE036L).pdf.

*Panel challenges*

The court below erroneously relied on the statutory authority to challenge the members of the military commission and therefore overlooked the fundamental flaws of the overall system. The Guantanamo Bay military commissions lack the judicial independence which characterize a trustworthy system of justice.

Initially, the military commissions have abandoned the separation-of-powers, which characterize American justice outside of the special case of the armed services. Every non-defendant participant in the military commissions—prosecution, defense, military judge, panel—is employed or supervised by the Department of Defense. The chain of command of the Convening Authority, Chief Prosecutor, and the Chief Defense Counsel merge at the DOD General Counsel, well below Cabinet level. In most cases (although not at

the moment), the Legal Advisor to the Convening Authority supervises the Chief Prosecutor.[4]

This concentration of power in the Executive branch has already resulted in unlawful influence, "the mortal enemy of military justice." *United States v. Douglas*, 68 M.J. 349, 355 (C.A.A.F. 2010). In early 2015, the Convening Authority convinced the Deputy Secretary of Defense to force military commission judges to move to Guantanamo Bay in an attempt to speed up the military commissions process. The military judges abated the military commissions in response to the unlawful influence, and the Convening Authority resigned. Ruling, *9/11 Case*, available at http://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20(AE343C).pdf. In 2017, however, the Secretary of Defense appointed the same Deputy Secretary of Defense who exerted the unlawful influence as the new Convening Authority. *9/11 Case* T. 15028 (21 Mar. 2017), available at http://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20(TRANS21Mar2017-PM2).pdf.

The military commissions structure also violates the principle of separation of judicial and prosecutorial powers. *See In re Murchison*, 349 U.S. 133, 136 (1955). The Convening Authority—a principal officer not appointed by the President or confirmed by the Senate—exercises both

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[4] The Chief Prosecutor (when O-7 or above) reports to the Deputy General Counsel (Legal Counsel). Regulation for Trial by Military Commission ("R.T.M.C.") § 8-6(b)(1). The Chief Defense Counsel reports to the Deputy General Counsel (Personnel and Health Policy). R.T.M.C. § 9-1(a)(1).

prosecutorial and judicial powers. The Convening Authority determines whether to prosecute, Regulation for Trial by Military Commission §§ 2-3(a), 4-1(b), whether to seek the death penalty, *id.* § 4-3(a), whether to grant witness immunity, *id.* § 15-1(b), and whether to enter a plea agreement, *id.* § 12-1. At the same time, the Convening Authority details panel members, 10 U.S.C. § 948i(b), supervises the record, *id.* § 948l, and conducts the first level of judicial review of the trial, *id.* §§ 950b, 950i(d). The unique military aspects of the court-martial process which might justify this dual role in other contexts, *Curry v. Secretary of the Army*, 595 F.2d 873, 878 (D.C. Cir. 1979), simply have no parallel in military commissions.

In the most bizarre event of the military commissions to date, an unidentified intelligence agency monitoring the *9/11 Case* military commission remotely interrupted the proceedings.[5] The military judge "note[d] for the record that the 40-second delay was initiated, not by me." *9/11 Case* T. 1445 (Jan. 28, 2013), available at http://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20(TRANS28January2013-PM1).pdf. He fumed, "if some external body is turning the commission off under their own view of what things ought to be, with no reasonable explanation, * * * then we are going to have a little meeting about who turns that light on or off." *Id.* at 1446. The military judge quickly dropped

[5] The event was sufficiently strange that it attracted the attention of comedian Stephen Colbert. *See* The Colbert Report, *Khalid Sheikh Mohammed's Trial at Gitmo*, Feb. 27, 2013, available at http://www.cc.com/video-clips/9mtjmn/the-colbert-report-khalid-sheikh-mohammed-s-trial-at-gitmo.

the issue, however, and the details never became public.

In short, the D.C. Circuit's assumptions concerning the regularity of proceedings in the Guantanamo Bay military commissions were unjustified. Congressional fiat notwithstanding, the Guantanamo Bay military commissions are no more "regularly constituted" now than they were in 2006. *See Hamdan v. Rumsfeld*, 548 U.S. 557, 631-33 (2006).

*The need for review*

The court below held that *Councilman* required pretrial deference to a system which does not even recognize the Constitution as binding authority,[6] much less comply with constitutional standards. This holding is effectively impervious to challenge outside this Court, as only the D.C. Circuit can hear challenges to military commissions issues. *See Al-Nashiri v. McDonald*, 741 F. 3d at 1007. No Circuit split can ever develop, and this issue will never be more mature than it is now. This Court should act to authorize the federal courts to remedy a seriously flawed alternative justice system, as it did in *Hamdan*.

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[6] The military commissions have consistently refused to hold themselves bound by the Constitution. As the *9/11 Case* military commission wrote in a decision currently on interlocutory government appeal, "the applicability of most provisions of the Constitution to these proceedings remains ill-defined." Ruling, Defense Motion to Dismiss Charges III and V as Barred by the Statute of Limitations, *9/11 Case*, available at http://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20(AE251J(RULING)).pdf.

*Amicus* has identified numerous structural, regulatory, and implementation problems that will prevent defendants in the military commissions from receiving a fair trial. The court below concluded that, "at least where a defendant identifies no such defect," the military commission was adequate for *Councilman* purposes. *Al-Nashiri*, 835 F.3d at 123. The defects are real, and this Court should grant review to allow the lower courts to begin to correct them.

## CONCLUSION

For the foregoing reasons, this Court should grant the Petition for *Certiorari*.

Respectfully submitted,

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