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

REPLY BRIEF FOR PETITIONER

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REPLY

I. This Court should decide whether a new abstention doctrine should be created for military commission habeas cases.

After fifteen years in federal custody without judicial review, all petitioner seeks is the opportunity to claim, as habeas petitioners have done for centuries, that the Executive Branch violated the law when it effectively removed his capital prosecution from a federal district court in New York to a military commission in Guantanamo. The basis of that legal claim is a federal statute that states that an offense is "*triable … only* if the offense is committed in the context of and associated with hostilities." 10 U.S.C. 950p(c) (emphasis added). For crimes committed outside the context of hostilities, therefore, Congress has imposed "an explicit statutory … guarantee that trial [before a military commission] will not occur." *Midland Asphalt v. United States*, 489 U.S. 794, 801 (1989). Hearing that category of claim pre-trial has been at the core of habeas corpus since at least 1641. And both the majority and the dissent below agreed that the merits of petitioner's claim are substantial.

This Court should grant certiorari because the majority below foreclosed a timely decision on the merits of petitioner's claim by creating a new, federal common law abstention doctrine on the model of *Younger v. Harris*, 401 U.S. 37 (1971). App. 20-23. This Court has repeatedly held that the creation of such judge-made doctrines is disfavored. *Sprint v. Jacobs*, 134 S.Ct. 584, 591 (2013); *cf. Wheeldin v. Wheeler*, 373 U.S. 647, 651 (1963). And before new abstention doctrines have been allowed to enter the law, this Court has always been the one to ensure

that the policy rationales favoring their creation are sufficiently compelling to outweigh the resulting diminishment of the federal judiciary's authority.

Respondent makes no argument for why this Court should shirk that traditional responsibility here. Instead, it simply tracks the majority's opinion below as to why a new abstention doctrine should be created. The substance of that argument boils down to two policy claims. *First*, it claims that crafting such a doctrine furthers Congress' implicit judgment that judicial review should be limited to post-trial appeals. Br. in Opp. 14. *Second*, it claims that the military commission's trial procedures are facially adequate. *Ibid*.

Neither of these policy arguments is substantial. Respondent made both in *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006), including the same heavy emphasis it places on the D.C. Circuit's statutory jurisdiction over post-trial military commission appeals. *Hamdan v. Rumsfeld*, Case No. 05-184, Brief for Respondents 12-15 (Feb. 23, 2006).[1] This Court rejected those arguments then and should do so again now. Neither warrants the creation of an abstention doctrine that would foreclose a core habeas corpus claim.

1. Respondent asserts that it is undisputed that the Military Commissions Act "reflects the political Branches' considered judgment … that Article III courts should defer review until after military commission proceedings

[1] The only relevant difference between then and now for abstention purposes is that the D.C. Circuit's appellate jurisdiction is now mandatory in all cases, where formerly it was discretionary if the sentence imposed was less than ten years.

have completed." Br. in Opp. 17. But this fundamental point is very much disputed and is not supported by the majority opinion below. The majority concluded that the statutory provision for post-trial appeal, taken alone, should be construed as having "*implicitly instructed* that judicial review should not take place before that system has completed its work." App. 27 (emphasis added).

It is doubtful whether that inference about the political branches' implicit judgment creates sufficiently strong inter-branch comity interests to warrant the judicial creation of a common law abstention doctrine. *Hamdan*, 548 U.S. at 583; *cf. Wheeldin*, 373 U.S. at 651-52. But critically, it gets Congress' judgment backwards. Initially, Congress enacted a provision expressly instructing the courts to treat post-trial appeals as the "sole basis for review of military commission procedures and actions," 10 U.S.C. 950j(b) (2006), a provision the Congressional Research Service described as ensuring that "[o]ther review by a civilian court, including review on petition of habeas corpus, is expressly prohibited." *The Military Commissions Act of 2009: Overview and Legal Issues*, R41163, at 51 (Aug. 4, 2014), *archived at* https://perma.cc/6W57-MPTN. Congress, however, repealed 950j(b) in 2009 to ensure that "[o]ther review by a civilian court, including review on petition of habeas corpus, is no longer expressly prohibited." *Ibid*.

The principal policy consideration upon which respondent so heavily relies, therefore, is based on a mistaken – indeed inverted – implication of Congressional intent. Congress' decision to repeal 950j(b) should not be judicially nullified by the creation of a new abstention doctrine. *Cf. Hamdan*, 548 U.S. at 579-80.

2. Respondent asserts that the procedural adequacy of the military commission system should be determined by how it looks on paper. Br. in Opp. 22-23. It does not matter, in other words, how fair, predictable, or regular it is in reality. But all respondent offers in support of this legal fiction is an out-of-context quote from *Schlesinger v. Councilman*, 420 U.S. 738 (1975), this Court's decision creating an abstention doctrine for courts-martial. In that case, this Court concluded that "it must be assumed that the military court system will vindicate servicemen's constitutional rights." *Id*. at 758. But no one could reasonably dispute – nor did dispute – the proven regularity of the court-martial system a quarter century after Congress enacted the Uniform Code of Military Justice.

Lest there be any confusion, Br. in Opp. 27, petitioner disputes, and has disputed at every opportunity, the military commission system's ability to fully and fairly adjudicate this case. The military commission system is not only irregular, it is dysfunctional. That is in large part because so many of its fundamental jurisdictional issues remained unresolved. And over just the past nine months, the time since petitioner filed his petition, this dysfunction has continued to get worse.

For example, the defense's attorney-client meeting spaces have been repeatedly subject to improper monitoring. This has included, in the past, microphones hidden in smoke detectors. Brief of Amicus Curiae National Coalition to Protect Civil Freedoms, at 11 (May 31, 2017). On June 14, 2017, the Chief Defense Counsel, Brig. Gen. John Baker, USMC, issued a memorandum, the details of which are classified, notifying defense counsel that he recently came into the

possession of new information and as a result, recommended that counsel not meet in the attorney-client meeting spaces due to the risk of improper monitoring. Prosecutors initially represented to the military commission that the general's concerns did not affect the spaces in which petitioner meets with his counsel. But petitioner's counsel then [redacted] contradicting the prosecution's assurances. As of this filing, this issue remains unresolved and promises to tie up the proceedings for the remainder of the year. Adding to the difficulty, petitioner's defense counsel are presently prohibited from informing him of the general's concerns or the facts underlying those concerns because the information is classified and the military judge has no authority to permit disclosure to someone without a clearance. Order, AE369OO (Jul. 7, 2017).

Another issue that has consistently disrupted petitioner's attorney-client relationships is the administrative turnover of his defense counsel. Class. App. 128. This past spring, his longstanding military counsel was again transferred to other duties, meaning that a majority of his defense team is now comprised of attorneys with no prior experience on the case. This has and continues to have a "significantly deleterious effect" on petitioner's ability to defend himself. Class. App. 128.

The past nine months have also seen the causes of delay, big and small, continue to grow, such that trial is currently not expected to begin until at least 2020. While respondent suggests that petitioner's defense counsel are responsible for this delay, Br. in Opp. 23-24, most of it has been caused by the prosecution's inability to obtain bureaucratic approval to provide discovery to petitioner's defense

counsel. Trans. 6499-11 (Sept. 9, 2016), *archived at* https://perma.cc/3PVG-LDHB. And on September 1, 2017, the prosecution admitted that it cannot meet its discovery obligations until at least the middle of 2018, five years after the initial discovery orders. Gov't Resp., AE203S (Sept. 1, 2017).

Then there are the quixotic logistics of Guantanamo, including multiple, competing chains-of-command over the base and its operations that prevent the military judges from exercising meaningful control over the proceedings. In July, for example, a change to transportation logistics forced the military judges to travel in improperly close quarters with the trial participants, news media, and victim family members. This led to a bureaucratic standoff that was only resolved after the military judges abated all proceedings in protest. Order, AE379B (Jul. 17, 2017). This followed an earlier initiative to coerce the military judges into moving the cases faster by sequestering them in Guantanamo. Order, AE332U (Mar. 4, 2014). Even the military judge's orders for routine testing, such as an order for an MRI to determine whether petitioner's intellectual disabilities are the result of organic brain damage, continue to be ignored for years. Order, AE277H (Sept. 29, 2014).

This Court therefore need only look at what has transpired since January to see that the military commissions still bear "insufficient conceptual similarity to state courts to warrant invocation of abstention principles." *Hamdan*, 548 U.S. at 588. If the military commission process was truly capable of "fairly and fully adjudicating" petitioner's case, Br. in Opp. 27, respondent never explains why it has been incapable of doing so in the nine years since petitioner was first charged.

3. As Judge Tatel argued below in dissent, neither of respondent's policy arguments make a convincing case for the judicial creation of a new abstention doctrine. App. 60-63. And, even if credited, the case they make is not so overwhelmingly clear that this Court should allow such a consequential new doctrine to be established by the divided circuit court opinion below, particularly where the effect would be to strip the district courts of jurisdiction over claims that fall within the constitutional core of habeas corpus. Pet. 28-29.

Respondent attempts to persuade this Court, based on an analogy to the court-martial system, that habeas is not improperly foreclosed because under the abstention doctrine it proposes, military commission defendants would still be able to collaterally attack personal jurisdiction pre-trial. Br. in Opp. 20.[2] For the reasons stated in the petition, such a broad abstention doctrine would still require a significant break with history. Pet. 23. It is also difficult to see how such a doctrine could be implemented coherently or how it would advance inter-branch comity.

Unlike courts-martial, where jurisdiction is based on the defendant's legal status as a service-member, military commission jurisdiction is defined by the nature of the offense. *Ex parte Quirin*, 317 U.S. 1, 28-30 (1942). Personal jurisdiction over so-called "alien unprivileged belligerents" is accordingly not defined in terms of any legal status that can be ascertained by reference to the

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[2] Contrary to respondent's claim, petitioner has consistently disputed the existence of personal jurisdiction both on the merits and because, even if the allegations against him are true, those allegations fail to state that he did anything sufficiently in the context of and associated with hostilities to make him a "belligerent."

public rolls. It is defined by a prosecutor's allegations that the defendant is guilty of perpetrating some act in the context of hostilities that was sufficient to make him or her a "belligerent." 10 U.S.C. 948a(7). Simply as a practical matter, pre-trial habeas litigation over personal jurisdiction is therefore far more likely to be disruptive than the traditional litigation over subject-matter jurisdiction, insofar as a habeas court would have to conduct something close to a full-blown trial on the merits to determine whether the petitioner is, in fact, a belligerent.[3]

Military commissions' place within the federal judicial system is also nothing like that of courts-martial or, for that matter, State courts or tribal courts. These military commissions serve no interest in home rule. As explained in the petition, they are just an alternative federal forum, used when "prosecutors and counter-terror professionals in our interagency community" determine that litigating in a district court might be less advantageous. Pet. 3. They are, in short, the kind of prerogative court that has required close judicial gatekeeping since 1641. *Ibid*.

If the Article III courts do not perform their duty to supervise their use, this dysfunctional alternative to the federal district courts will become permanent and the Executive Branch will have the unilateral discretion to provide second-class justice to those it disfavors or wishes to hold indefinitely. The relief petitioner seeks is minimal, it furthers judicial economy, and it is constitutionally necessary. This

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[3] Similarly, respondent and the majority both assert that habeas claims alleging that military commissions are "procedurally deficient" qualify for collateral attack. App. 50. But it is difficult to imagine a more fertile ground for disruptive litigation than arguments over procedural deficiencies.

Court should grant certiorari to ensure that resources are not wasted, that petitioner is not illegally abused again, and that this novel criminal justice system operates within the limits Congress has established.

II. This Court should determine whether torture constitutes an extraordinary circumstance.

Respondent largely avoids the second question presented: Does torture create extraordinary circumstances sufficient to overcome whatever equitable considerations might favor abstention? And that is understandable. The undisputed facts of this case are grisly.

Respondent's records, which formed the basis of petitioner's statement of the case, show that it tortured petitioner over the course of four years to reduce him to a psychological state of "learned helplessness," an effort designed to emulate experiments from the 1960s conducted on dogs. Pet. 6-15. It continued to do so despite respondent's own agents describing petitioner as cooperative. Class. App. 33. It continued to do so despite petitioner's apparent intellectual limitations. Class. App. 238. It continued to do so even after being warned that torturing him further was both futile and likely to "push [him] over the edge psychologically." Class. App. 187. And it did so for nothing. As a 2004 CIA assessment found, torturing petitioner yielded "essentially no actionable information." Class. App. 39.

Respondent claims that it nevertheless remains entitled to assert the equitable defense of abstention, and to avoid all meaningful judicial review of its conduct toward petitioner for the foreseeable future, because these undisputed facts do not constitute extraordinary circumstances. For respondent, abstention only

yields to extraordinary circumstances in situations that "*both* [1] present the threat of great and immediate injury that would be irreparable and [2] render the alternative tribunal incapable of fairly and fully adjudicating the federal issues before it." Br. in Opp. 11 (original emphasis; quotations omitted).

Respondent is wrong on the facts and the law. *First*, as Judge Tatel explained below, the irreparable injuries petitioner faces are extraordinary and unrebutted. App. 75. *Second*, the military commission is incapable of "fairly and fully adjudicating the federal issues before it" because it often proceeds in secret, it permits evidence derived from torture, and it operates with such irregularity that petitioner "has no way of differentiating this from the government's prior deliberate attempts to destabilize his personality." Class. App. 126-27.

As Judge Tatel also described, respondent's narrow view of the extraordinary circumstances exception does not accurately state the law. App. 76-78. To be sure, the law regarding the extraordinary circumstances exception is underdeveloped; that is one of the main reasons petitioner has asked this Court to take this case. Pet. 32-33. But whatever this Court ultimately determines the contours of the law to be, respondent's blinkered vision of the extraordinary circumstances exception cannot be correct.

Abstention is an equitable defense against suit. *Sprint*, 134 S.Ct. at 591; *see also Ohio Civil Rights Comm'n v. Dayton Christian School*, 477 U.S. 619, 626 (1986). And like any equitable defense, the party asserting it must have clean hands. *Precision Instrument Mfg. Co. v. Auto. Maint. Mach. Co.*, 324 U.S. 806, 814

(1945). Respondent's hands, however, are stained by "physical, psychological, and sexual torture." Class. App. 125. And respondent's desire to conceal that stain was one of its stated reasons for bringing charges against petitioner in Guantanamo rather than the Southern District of New York. Attorney General Announces Forum Decisions for Guantanamo Detainees (Nov. 13, 2009), *archived at* https://perma.cc/R4AK-U43H.

Respondent claims that the doctrine of unclean hands is inapplicable here because it only applies in the narrow circumstance where the prosecuting attorney or the tribunal itself is tainted by misconduct. Br. in Opp. 27. For one thing, this is not true. *See Dombrowski v. Pfister*, 380 U.S. 479, 482-92 (1965). For another, respondent's military commission is, in fact, tainted by respondent's misconduct. Guantanamo itself was a black site. Class. App. 126. And as detailed at pages 4-5, *supra*, and in the amicus brief of the National Coalition to Protect Civil Freedoms, respondent allows the very governmental agency whose mission it was to torture petitioner to interfere with the proceedings and withhold evidence about his torture.

This is not "a criminal proceeding brought lawfully and in good faith" in the service of a separate sovereign, like the States, or a separate society, like the military services. *Younger*, 401 U.S. at 47-49. Instead, this Court confronts "the federal executive branch's assertion that it should get the first crack at deciding [petitioner]'s substantial constitutional and statutory challenges to a military commission's authority to try him even though [he] may, because of the executive branch's past actions, suffer severe and permanent injuries from the exercise of its

jurisdiction." App. 78 (Tatel, J. dissenting). This Court should grant certiorari because torture should disqualify any party from seeking the privileges of equity.

III. This Court should resolve the circuit split over the standard of review applicable to writs of mandamus.

Petitioner sought relief via mandamus because the military commission trying his case exceeded the "lawful exercise of its prescribed jurisdiction" by proceeding on charges that Congress determined are not "triable by military commissions." *Roche v. Evaporated Milk*, 319 U.S. 21, 26 (1943). That is a traditional use of mandamus, which is recognized in military law. *See*, *e.g.*, *Zamora v. Woodson*, 42 C.M.R. 5, 6 (C.M.A. 1970) (granting mandamus because the Vietnam War did not constitute a "time of war" for the purpose of extending military jurisdiction over non-service-members).

In *Cheney v. United States District Court*, 542 U.S. 367 (2004), this Court laid out three conditions for when the Circuits should issue writs of mandamus, the second of which was that the "right to issuance of the writ is 'clear and indisputable'." *Id.* at 381 (quotations omitted). The majority below denied relief solely because it found that the petitioner's merits arguments failed on this second condition. It did so, however, not because petitioner is wrong on the merits of the pure question of law he raised, but because that question was an open question, and under the law of the D.C. Circuit, "open questions are the antithesis of the 'clear and indisputable' right needed for mandamus relief." App. 59 (quotations omitted).

Respondent does not dispute that the courts of appeal have taken various and conflicting approaches to determining whether a petitioner has shown a "clear and

indisputable right to relief." Is the standard for answering that question, as the D.C. Circuit holds, effectively identical to the qualified immunity standard, whereby the law itself must be clear and indisputable? Or, as other circuits hold, is it the entitlement to relief under the law that must be clear and indisputable, thereby distinguishing matters of right from matters of discretion?

Respondent also does not dispute that this case is a good vehicle for resolving this circuit split. The decision below turned solely on the standard for satisfying *Cheney*'s second condition. Had the D.C. Circuit applied the standard applied in the Second Circuit or in the Court of Appeals for the Armed Forces,[4] the threshold jurisdictional question in this case would have been resolved.

Respondent's only argument against resolving this split now appears to be its claim that the D.C. Circuit's standard is not really as strict as it appears to be. Relying on the D.C. Circuit's recent decision in *United States v. Fokker Servs. B.V.*, 818 F.3d 733 (D.C. Cir. 2016), respondent argues that "open questions of first impression" are, in fact, reviewable and that the D.C. Circuit does not require the citation of specific authority establishing petitioner's correctness on the merits. Br. in Opp. 28-29. Respondent claims that it was the existence of "substantial" arguments on both sides of the question at the center of this case that meant that

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[4] Applying the D.C. Circuit's standard also creates an anomaly within military law. The military justice system relies heavily on the use of writs to decide open questions of law and the Court of Appeals for the Armed Forces interprets the "clear and indisputable" requirement to simply mean that relief was warranted as a matter of law, as opposed to discretion. *See*, *e.g.*, *Howell v. United States*, 75 M.J. 386, 392 (C.A.A.F. 2016); *Hasan v. Gross*, 71 M.J. 416, 417 (C.A.A.F. 2012).

the merits were not "clear and indisputable," not the fact that it was an open question of first impression. Br. in Opp. 29-31.

This argument does nothing to weaken the case for certiorari. If anything, it highlights the confusion in the law that this Court needs to resolve. Other circuits issue writs in the face of substantial competing arguments; indeed, in the face of circuit splits.[5] And respondent's position here is a reversal of its position below, which was that under D.C. Circuit law, "a petitioner who raises an 'open question[]' of 'first impression' cannot obtain mandamus relief. … Because [petitioner] identifies no authority establishing that his conduct could not have been committed 'in the context of and associated with hostilities,' 10 U.S.C. § 950p(c), his petition must be denied." *In re Nashiri*, Case No. 15-1023, Brief for the United States 27 (D.C. Cir., Dec. 28, 2015), *available at* https://goo.gl/kszUAs.

To the extent the Solicitor General's Office now believes that the D.C. Circuit was wrong to accept respondent's argument for such a stringent standard below, this Court should GVR this case for "further consideration in light of the position asserted by the Acting Solicitor General." *Goffer v. West*, 519 U.S. 1052 (1997). Alternatively, this Court should grant certiorari because the law of mandamus across the circuits has become doctrinally confused and arbitrary in practice.

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[5] *See, e.g.*, *United States v. Sanchez-Gomez*, 859 F.3d 649 (9th Cir. 2017); *In re Amy Unknown*, 701 F.3d 749 (5th Cir. 2012), *rev'd on other grounds sub nom. Paroline v. United States*, 134 S.Ct. 1710 (2014); *In re Deutsche Bank*, 605 F.3d 1373 (Fed. Cir. 2010); *In re Lockheed Martin*, 503 F.3d 351 (4th Cir. 2007). The Ninth Circuit has noted its own intra-circuit conflict over the standard of review "where our sister circuits have addressed an issue, but we have not." *In re Pacific Pictures*, 679 F.3d 1121, 1126 n.2. (9th Cir. 2012).

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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