

MEMORANDUM FOR THE CONVENING AUTHORITY

SUBJ: DEFENSE'S SUBMISSIONS AGAINST REFERRAL OF CHARGES OR A CAPITAL REFERRAL ICO *UNITED STATES V. AL-NASHIRI*

Introduction¹

Circumstances and perhaps history have placed you as the sole decision maker regarding whether to authorize the United States to pursue charges, or capital charges, against Mr. Al-Nashiri. This is a historically significant decision. It could be the first capital referral under the 2009 Military Commission regime and it is being watched carefully by much of the world. Unfortunately, you are being asked to make this decision at a time when the defendant and his counsel have been deprived of the fundamental information that would allow meaningful defense input into this decision. This in turn deprives you of the ability to adequately weigh whether all of the facts of the case justify bringing the full power of the United States to bear in an effort to prosecute (and kill) Mr. Al-Nashiri. In the absence of meaningful defense input, your decision can hardly be the considered judgment that leads to the reliability sought in a potentially capital case. In the absence of defense input, you are deprived of the information that would allow you to fairly judge whether Mr. Al-Nashiri should face any trial, much less a capital trial.

Circumstances have placed you as a decision maker whose judgment will be reviewed by much of the world. As the vote of the European Parliament demonstrates,² your decision is being carefully watched. It is being watched for one reason—the world wonders whether the United States will continue to be an example of how fair trials are conducted or whether it will descend further down the path of expedient and secret justice that Military Commissions have come to represent. You are uniquely positioned to either make a bureaucratically safe decision, which will confirm to the world that the United States renders second class justice to the men imprisoned in Guantanamo, or a heroic decision, which demonstrates that the United States rejects expediency and secrecy, especially in a potential capital prosecution.

I.

The Submission Process is Not Constitutionally Adequate for a Capital Case.

In the instant case, unlike federal capital defendants and accused service members facing the death penalty, the defense has not received any meaningful discovery prior to the decision as to whether capital charges should be pursued. In federal court, the defendant and his counsel would have had access to all of his written or oral statements including, but not limited to, statements made to investigators and/or law enforcement and/or other governmental agents; access to all physical evidence; the results of any scientific testing done by the government during the investigation; all of the client's medical records created during his incarceration; and, all

¹ All information in the defense's submission was obtained from officially released and unclassified documents or statements. The citations in this submission reflect this fact. Nothing in this submission was obtained or derived from classified information.

² See Parliamentary Assembly Written Declaration No. 483, dated June 22, 2011 (Attachment A).

interrogation reports and other records of his incarceration.³ The accused would have been provided the opportunity of a preliminary mitigation investigation lasting months, not days. Experts agree that discovery and a preliminary mitigation investigation are minimally necessary for a meaningful presentation to the prosecution about why a case should not be authorized as a capital case. Alternatively, at courts-martial, an accused would be able to obtain valuable discovery and evidence to rebut the government's basis for the charges at an Article 32, UCMJ, hearing.

Other than some partial medical records from Guantanamo, Mr. Al-Nashiri and his counsel have been denied discovery from the prosecution. The defense is unable to even discern what evidence supports the prosecution's allegations, much less provide you with evidence that rebuts the prosecution's *prima facie* case. Accordingly, the defense cannot make any principled showing of the weaknesses in the prosecution's case. Equally, if not more importantly, we are left without much needed mitigation evidence from which to produce an adequate submission. For instance, a black hole surrounds the facts and circumstances of Mr. Al-Nashiri's lengthy detention with the CIA, including the mental and physical effects that his confinement had or currently has on him. Without crucial information such as this, the defense cannot present to you meaningful submissions against a capital referral. The prosecution has this information and it is withholding it from Mr. Al-Nashiri. It is also withholding Mr. Al-Nashiri's own medical and incarceration records from him for all the years he was imprisoned by the CIA. The defense has repeatedly requested these records.

Further, other systemic flaws result from the peculiar structure of the referral process and these flaws undermine its legitimacy. Among these systemic flaws is that the Convening Authority, in deciding what resources the defense obtains, consults *ex parte* with the prosecutor. At the same time, defense requests for resources cannot be submitted *ex parte*. This results in a significant imbalance that has undermined even the limited efforts the defense could make and has apparently prevented your office from providing resources in a timely manner. For example, the defendant requested appointment of Ms. Lisa Rickert as the defense mitigation specialist. Both the need for Ms. Rickert and her qualifications had to be shared with the prosecution, something that would never be required in a prosecution in federal court.⁴ The defense requested Ms. Rickert's appointment on May 6, 2011. She was not approved until May 31, 2011. The delay in her appointment was caused in large part by the prosecution's desire to vet Ms. Rickert and apparent objections to her appointment. The delay in Ms. Rickert's appointment left inadequate time to conduct even a cursory mitigation investigation. It is therefore clear that the Military Commissions structure and the refusal of your office to allow *ex parte* requests for assistance coupled with the ability of the prosecution to delay prompt action on the request for resources precludes adequate resourcing of the defense at least at this stage of the proceedings.

Consider the difference between this procedure and that in capital cases in federal court. In the *Ghailani* case, which was tried in the United States District Court for the Southern District of New York, the court authorized the defense to employ a mitigation specialist and additional investigators (without any input from the prosecution) and the defense received extensive

³ See Federal Rule of Criminal Procedure, Rule 16.

⁴ See *Ake v. Oklahoma*, 470 U.S. 68, 82-83 (1985) (defendant makes *ex parte* request for expert); see also 18 U.S.C.A. § 3006A ("Counsel for a person who is financially unable to obtain investigative, expert, or other services necessary for adequate representation may request them in an *ex parte* application.").

discovery and had several months to complete their pre-authorization investigation. As a result of having a full record before him, the attorney general was able to conclude that Mr. Ghailani should not face capital punishment.

Also compare this case with the case involving Maj. Hasan. There, approximately eighteen months elapsed between the swearing of charges and the referral decision. During that time Maj. Hasan had extensive discovery through the Article 32 process as well as an extensive mitigation investigation.

Mr. Al-Nashiri's defense has not been afforded a reasonable period of time to prepare adequate submissions. The government has detained Mr. Al-Nashiri for almost ten years. During this time, it has had a number of years to perfect its case against him.⁵ But Mr. Al-Nashiri was given only two and a half months to prepare his case against a capital referral. Given the enormity of the case, the seriousness of the allegations, the lack of discovery and mitigation investigation and the amount of time the government has had, this short period is unreasonable.

Nevertheless, despite the untenable situation involving the defense's lack of access to discovery and resources, the defense provides the following submission for your consideration. However, by proceeding, the defense does not waive the claim that the referral process is constitutionally flawed. Therefore, if the case is referred we will argue that any decision to refer or seek death is unconstitutional and legally flawed.

II.

The Torture and Cruel, Inhuman and Degrading Treatment of Mr. Al-Nashiri By The Government Should Preclude Charges From Being Referred

The United States does not condone torture. This country has a long history of upholding human rights and the fair treatment of its prisoners. As evidence of this stance, the United States signed the Convention Against Torture (CAT), which outlaws the use of torture and cruel, inhuman and degrading treatment or punishment.⁶ Torture is also a crime under United States domestic law. *See* 18 U.S.C. §2340A.⁷ This commitment was recently re-affirmed through the

⁵ Although the charges against Mr. Al-Nashiri were dismissed in 2009, the Secretary of Defense specifically ordered the prosecution to continue to investigate its case. *See* Attachment F (prosecutions withdrawal request).

⁶ United States Reservations, Declarations and Understandings to the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment done at New York, December 10, 1984, 1465 U.N.T.S. 85, G.A. Res. 39/46, 39th Sess., U.N. GAOR Supp. No. 51 at 197, U.N. Doc. A/39/51 (1984).

⁷ As it pertains to §2340A, the definition of torture is:

- (1) "torture" means an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control;
- (2) "severe mental pain or suffering" means the prolonged mental harm caused by or resulting from—
 - (A) the intentional infliction or threatened infliction of severe physical pain or suffering;
 - (B) the administration or application, or threatened administration or application, of mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality;
 - (C) the threat of imminent death; or

passage of the Detainee Treatment Act of 2005 (DTA), which prohibits the infliction of cruel, inhuman and degrading treatment or punishment on any person in United States custody.⁸ Indeed, one of President Obama's very first acts in office was to revoke Executive Order 13440 and decree that anyone in the custody of the United States anywhere in the world would have their individual dignity respected and be free of abuse, torture, cruel inhuman and degrading treatment.⁹ Furthermore, it has always been a fundamental belief in the United States military to treat those in its custody humanely. It is embedded in its rules and regulations.¹⁰ And it is embedded in its culture. When determining how to treat prisoners captured after the Battle of Trenton, General George Washington issued a simple order: "Treat them with humanity."¹¹ In the present day, this belief was best illustrated by the long line of Judge Advocate Generals who have objected to the ill treatment of detainees.¹²

The government has admitted to waterboarding Mr. Al-Nashiri¹³ and subjecting him to verbal and physical threats to his life and threats to the safety of his family.¹⁴ Both set of acts constitute torture. Furthermore, his detention in CIA custody amounted to cruel, inhuman and degrading treatment. Because of this abusive treatment, charges should not be referred in this case.

Waterboarding is Torture. Historically, the act of waterboarding has been classified as torture. The State Department has criticized other countries for engaging in techniques of torture, such as near drowning.¹⁵ Previously, the Ninth Circuit held that a plaintiff subjected to waterboarding by the Filipino military had a cause of action for torture.¹⁶ The United States also

(D) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind-altering substances or other procedures calculated to disrupt profoundly the senses or personality...

18 U.S.C. §2340.

⁸ Detainee Treatment Act of 2005 (H.R. 2863, Title X). In this section, the term "cruel, inhuman, or degrading treatment or punishment" means the cruel, unusual, and inhumane treatment or punishment prohibited by the Fifth, Eighth, and Fourteenth Amendments to the Constitution of the United States, as defined in the United States Reservations, Declarations and Understandings to the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment done at New York, December 10, 1984.

⁹ Executive Order 13,491, Ensuring Lawful Interrogations, 74 Fed. Reg. 4893 (Jan. 22, 2009).

¹⁰ See, e.g., Common Article 3, Geneva Conventions (protects against cruel treatment and torture and outrages upon personal dignity, in particular humiliating and degrading treatment); Army Field Manual 2-22.3, ¶5-74 (provides that all captured personnel, regardless of status, shall be treated humanely).

¹¹ <http://www.npr.org/templates/story/story.php?storyId=5011464>.

¹² http://articles.cnn.com/2008-06-17/politics/detainee.hearings_1_interrogation-william-j-haynes-military-lawyers?_s=PM:POLITICS.

¹³ Office of Inspector General, Central Intelligence Agency, *Special Review Counterterrorism Detention and Interrogation Activities*, May 7, 2004 (CIA IG Report) at 90 (Attachment B).

¹⁴ Id. at 41-43.

¹⁵ Bureau of Democracy, Human Rights, and Labor, U.S. Dept. of State, Country Reports on Human Rights Practices-2006 (2007), available at <http://www.state.gov/g/drl/rls/hrrpt/>.

¹⁶ *Hilao v. Marco*, 103 F.3d 789, 790 (9th Cir. 1996).

has prosecuted waterboarding as a war crime. In 1947, the United States prosecuted a Japanese military officer for using a form of waterboarding on an American civilian.¹⁷ The United States prosecuted and convicted a Japanese convening authority, a prosecutor and a military judge for complicity in torture by virtue of their participation in a military commission of American flyers who had been waterboarded by Japanese intelligence.¹⁸ More recently, police officers in Texas were criminally prosecuted in federal court for waterboarding suspects.¹⁹

Both the President²⁰ and the Attorney General²¹ of the United States have stated that waterboarding is torture. A number of retired Generals and Admirals,²² including former Judge Advocate Generals,²³ have emphatically stated that waterboarding is torture. In testimony before the Senate Judiciary Committee in 2006, you and the Judge Advocate Generals for the Army and Air Force and the Staff Judge Advocate for the Commandant of the Marine Corps were asked to submit written responses to questions regarding the use of a wet towel and dripping water to induce the misperception of drowning (i.e., waterboarding). In response, the group unanimously agreed that such conduct is inhumane and illegal and would constitute a violation of international law, to include Common Article 3 of the 1949 Geneva Conventions.²⁴

Threats to the Life and to the Life of Others Constitute Torture: Under federal law²⁵ and the Military Commission Act,²⁶ torture includes either threats of imminent death or the threat that another person will imminently be subjected to death or severe physical pain or suffering. In this case, both events occurred when government officials interrogated Mr. Al-Nashiri. On or about January 2003, a government official chambered a bullet in a handgun to frighten Mr. Al-Nashiri.

¹⁷ Walter Pincus, *Waterboarding Historically Controversial: In 1947, the U.S. Called It a War Crime; in 1968, It Reportedly Caused an Investigation*, Wash Post, Oct. 5, 2006 at A17.

¹⁸ *United States v. Sawada, et al.*, 5 L. Rep. of the Trials of War Criminals 1 (1948).

¹⁹ *United States, v. Parker*, Cr H-83-66 (S.D. Tex.). After conviction the defendant was sentenced to ten years imprisonment.

²⁰ Evan MacAskill, *Obama: 'I believe waterboarding was torture, and it was a mistake'*, guardian.co.uk, April 30, 2009, available at <http://www.guardian.co.uk/world/2009/apr/30/obama-waterboarding-mistake>.

²¹ Carrie Johnson, *Waterboarding Is Torture, Holder Tells Senators*, Wash Post, Nov. 16, 2009, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/01/15/AR2009011500267.html>.

²² The list of retired General Officers includes: General Joseph Hoar, USMC (Ret.); General David M. Maddox, USA (Ret.); Lieutenant General Robert G. Gard Jr., USA (Ret.); Lieutenant General Charles Otstott, USA (Ret.); Lieutenant General Harry E. Soyster, USA (Ret.); Major General Paul D. Eaton, USA (Ret.) Rear Admiral Don Guter, JAGC, USN (Ret.); Rear Admiral John D. Hutson, JAGC, USN (Ret.); Major General Walter L. Stewart, Jr., USA (Ret.); Brigadier General James P. Cullen, USA (Ret.); Brigadier General David R. Irvine, USA (Ret.); Brigadier General Murray G. Sagsveen, USA (Ret.); Brigadier General Stephen N. Xenakis, USA (Ret.), available at <http://www.humanrightsfirst.org/2010/06/03/National-Security-Experts-Slam-President-Bush-for-Endorsing-Torture/>.

²³ Letter from Major General John L. Fugh, USA (Ret.), Rear Admiral Don Guter, USN (Ret.), Rear Admiral John D. Hutson, USN (Ret.), Brigadier General David M. Brahms, USMC (Ret.) to Senator Patrick J. Leahy, dated November 2, 2007 (Attachment C).

²⁴ *Id.*

²⁵ See 18 U.S.C. §2340.

²⁶ See 10 U.S.C. § 950t(11).

Shortly afterwards, the same official entered Mr. Al-Nashiri's cell—while he was naked and hooded—and threatened him by turning on a power drill where he could hear it:

28 December 2002 and 1 January 2003, the debriefer used an unloaded semi-automatic handgun as a prop to frighten Al-Nashiri into disclosing information.⁴⁴ After discussing this plan with [REDACTED] the debriefer entered the cell where Al-Nashiri sat shackled and racked the handgun once or twice close to Al-Nashiri's head.⁴⁵ On what was probably the same day, the debriefer used a power drill to frighten Al-Nashiri. With [REDACTED] consent, the debriefer entered the detainee's cell and revved the drill while the detainee stood naked and hooded. The debriefer did not touch Al-Nashiri with the power drill.

93. (S//NF) The [REDACTED] and debriefer did not request authorization or report the use of these unauthorized techniques to Headquarters. However, in January 2003, newly arrived TDY officers [REDACTED] who had learned of these incidents reported them to Headquarters. OIG investigated and referred its findings to the Criminal Division of DoJ. On 11 September 2003, DoJ declined to prosecute and turned these matters over to CIA for disposition. These incidents are the subject of a separate OIG Report of Investigation.⁴⁶

Furthermore, the same government official threatened Mr. Al-Nashiri's family by stating, "We could get your mother in here" and "We can bring your family in here," or words to that effect.²⁷ The purpose of this threat was to make Mr. Al-Nashiri believe that the official intended to detain Mr. Al-Nashiri's female relatives and have them sexually abused in front of Mr. Al-Nashiri.²⁸

Threats

94. (TS) [REDACTED] During another incident [REDACTED] the same Headquarters debriefer, according to a [REDACTED] who was present, threatened Al-Nashiri by saying that if he did not talk, "We could get your mother in here," and, "We can bring your family in here." The [REDACTED] debriefer reportedly wanted Al-Nashiri to infer, for psychological reasons, that the debriefer might be [REDACTED] intelligence officer based on his Arabic dialect, and that Al-Nashiri was in [REDACTED] custody because it was widely believed in Middle East circles that [REDACTED] interrogation technique involves

²⁷ CIA IG Report, *Supra* note 13, at 42-43.

²⁸ *Id.*

sexually abusing female relatives in front of the detainee. The debriefer denied threatening Al-Nashiri through his family. The debriefer also said he did not explain who he was or where he was from when talking with Al-Nashiri. The debriefer said he never said he was [REDACTED] intelligence officer but let Al-Nashiri draw his own conclusions.

Detention in CIA Program Constitutes Torture and Cruel, Inhuman and Degrading Treatment or Punishment. In addition to the waterboarding and threats to his life and family, Mr. Al-Nashiri was subjected to cruel, inhuman and degrading treatment while in CIA custody. He was placed in injurious stress positions during interrogations.²⁹ In fact, during one stress position, there was concern that his arms had been dislocated from his shoulders. He was “reportedly lifted off the floor by his arms while his arms were bound behind his back with a belt.”³⁰ Also, interrogators would use a stiff brush on Mr. Al-Nashiri’s body in order to “bathe” him with the intent to induce pain³¹ and would stand on his shackles which resulted in cuts and bruises.³²

Furthermore, according to the CIA, the HVD detention program was deliberately designed to induce a state of “learned helplessness and dependence” in detainees by the application of *physical and psychological pressure* to facilitate interrogation:

Effective interrogation is based on the concept of using both *physical and psychological pressures in a comprehensive, systematic, and cumulative manner* to influence HVD behavior, to overcome a detainee’s resistance posture. The goal of interrogation is to *create a state of learned helplessness and dependence* conducive to the collection of intelligence in a predictable, reliable, and *sustainable* manner.³³

“Learned helplessness” can be described as a phenomenon “in which exposure to a series of unforeseen adverse situations gives rise to a sense of helplessness or an inability to cope with or devise ways to escape such situations, even when escape is possible.”³⁴ While researchers debate the theoretical mechanisms for learned helplessness, the basic phenomenon is recognized as one in which uncontrollable trauma debilitates a subject’s ability to cope with adversity, impacting the subject’s motivation to escape, ability to learn coping mechanisms, and emotional reaction to aversive events.³⁵ Early experiments involved dogs made passive and hopeless in the face of

²⁹ *Id.* at 44.

³⁰ *Id.*

³¹ *Id.* (The stiff brush was described as “the kind of brush one uses in a bath to remove stubborn dirt.”).

³² *Id.*

³³ *CIA Background Paper on Combined Techniques (2004)* at 1 (emphasis added)(Attachment D).

³⁴ The American Heritage Stedman's Medical Dictionary. Houghton Mifflin Company (Sept. 22, 2009) *available at* [http://dictionary.reference.com/browse/learned helplessness](http://dictionary.reference.com/browse/learned%20helplessness) (last accessed Oct. 1, 2009).

³⁵ See J. Bruce Overmier, *On Learned Helplessness, Integrative Physiological & Behavioral Science*, January-March 2002, Vol. 37, No. 1, 4-8, *available at*

painful treatment over which they had no control.³⁶ Researchers also initiated experiments “to show that it was indeed the *uncontrollability* of the aversive events that was critical” to the phenomenon.³⁷

Experts have long considered “psychological techniques to break down the individual,” including accentuating feelings of helplessness, among forms of abuse that can amount to torture or other forms of cruel, inhuman or degrading treatment.³⁸ “One of the central aims of torture is to reduce an individual to a position of extreme helplessness and distress that can lead to a deterioration of cognitive, emotional and behavioral functions.”³⁹ “Techniques that are highly unpredictable or involve a high degree of uncontrollability are associated with higher degrees of distress than those techniques in which the victim feels that he or she has some degree of control over the level of pain and suffering that is inflicted.”⁴⁰

To achieve “learned helplessness”, CIA officers planned to reduce a detainee to “a baseline, dependent state”:⁴¹

Establishing this state is important to demonstrate to the HVD that he has no control over basic human needs. The baseline state also creates in the detainee a mindset in which he learns to perceive and value his personal welfare, comfort, and immediate needs more than the information he is protecting.⁴²

<http://bc7pt8jy6n.search.serialssolutions.com/?sid=EBSCO:Academic+Search+Complete&genre=article&title=Integrative+Physiological+%26+Behavioral+Science&atitle=On+Learned+Helplessness.&author=Overmier%2c+J.+Bruce&authors=Overmier%2c+J.+Bruce&date=20020101&volume=37&issue=1&spage=4&issn=1053881X> (last accessed May 5, 2010) (hereinafter “On Learned Helplessness (2002)”).

³⁶ *Id.* Follow-on research has explored connections to such biological consequences as anorexia, decreased sensitivity to pain, vulnerability to psychosomatic disorders, super-sensitivity to the depletion of certain powerful neurotransmitters, and reduced immune competence. See J. Bruce Overmier, *Richard L. Solomon and Learned Helplessness, Integrative Physiological & Behavioral Science*, Oct/Dec 1996, Vol. 31, Issue 4, p331-337, available at <http://web.ebscohost.com/ehost/detail?vid=2&hid=112&sid=c10bd969-c8b6-4cd7-b84f-233a223839ea%40sessionmgr111&bdata=JnNpdGU9ZWhvc3QtGIZlZQ%3d%3d#db=a9h&AN=9701174991> (last accessed May 5, 2020). Researchers have also explored the relationship between learned helplessness and fear, and between learned helplessness and depression. *Id.*

³⁷ See *On Learned Helplessness (2002)* (emphasis in original).

³⁸ *The Manual on Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (The Istanbul Protocol)*, at 29. The Istanbul Protocol contains international guidelines on the assessment of individuals who allege torture and ill treatment, the investigation of cases of alleged torture, and on reporting the findings of such investigations to the judiciary and any other bodies. *The Istanbul Protocol* became a United Nations official document in 1999 and is published by the Office of the UN High Commissioner for Human Rights in its Professional Training Series.

³⁹ *Id.* at 45.

⁴⁰ Physicians for Human Rights, *Break Them Down: Systematic Use of Psychological Torture by US Forces* (May 2005) available at <http://physiciansforhumanrights.org/library/documents/reports/break-them-down-the.pdf>, at 71.

⁴¹ *CIA Background Paper on Combined Techniques (2004)*, *Supra* note 33, at 4.

⁴² *Id.*

Each detainee was to be intentionally subjected to treatment and conditions designed specifically to “psychologically ‘dislocate’ [him], maximize his feeling of vulnerability and helplessness, and reduce or eliminate his will to resist [CIA] efforts to obtain critical intelligence.”⁴³ Detainees were intentionally subjected to mental and physical pain and suffering as part of this process.

Past Precedent for Not Referring Charges When There is Proof of Torture. In the military commissions, significant precedent exists for not referring charges against a detainee who has been tortured. Your predecessor, Judge Susan Crawford, did not refer charges against Mohammed Al-Qahtani for his direct role in the September 11th Attacks because he was tortured. Judge Crawford stated, “His treatment met the legal definition of torture. And that’s why I did not refer the case[.]”⁴⁴ Here, the government’s treatment of Mr. Al-Nashiri undoubtedly meets the legal definition of torture and cruel, inhuman and degrading treatment. Judge Crawford was able to review the interrogation records and other documents of Mr. Al-Qahtani’s abuse before making her referral decision. In this case, we assume that the CIA has not provided those records to you. Even without the cooperation of the CIA, sufficient evidence has been publicly released to prove that Mr. Al-Nashiri was tortured.

By torturing Mr. Al-Nashiri and subjecting him to cruel, inhuman and degrading treatment, the United States has forfeited its right to try him and certainly to kill him. Through the infliction of physical and psychological abuse, the government has essentially already killed the man it seized almost ten years ago. In essence, the United States has lost its moral authority to seek the death penalty. Accordingly, you should not refer charges—or authorize the death penalty—against Mr. Al-Nashiri.

III.

The Ten Years of Unreasonable Delay in Bringing Mr. Al-Nashiri to Trial Precludes the Referral of Charges

Mr. Al-Nashiri was seized in Dubai in October 2002⁴⁵ and was in the custody of the CIA (United States) by November 2002.⁴⁶ Four years later, in September 2006,⁴⁷ he was transferred

⁴³ *OMS Guidelines (Dec. 2004)*, at 8.

⁴⁴ Bob Woodward, *Detainee Tortured, Says U.S. Official*, Wash Post, Jan. 14, 2009 at A1 (Attachment E).

⁴⁵ Transcript of Combatant Status Review Tribunal at 7.

⁴⁶ CIA IG Report, *Supra* note 13, at 4.

⁴⁷ President George W. Bush, Transcript of President Bush’s Remarks, “Speech from the East Room of the White House,” 6 September 2006. *Available at* <http://georgewbushwhitehouse.archives.gov/news/releases/2006/09/20060906-3.html> (“a small number of suspected terrorist leaders and operatives captured during the war have been held and questioned outside the United States in a separate program operated by the Central Intelligence Agency. . . . This group includes individuals believed to be the key architects of the September the 11th attacks and attacks on the USS Cole.”). The U.S. government subsequently claimed that Mr. Al Nashiri was suspected in the USS Cole bombing.

from CIA custody to Guantanamo Bay, Cuba. Almost two years later, the prosecution swore capital offenses against him and on December 19, 2008, Judge Crawford referred those charges for trial. Prior to arraignment and before the prosecution provided any discovery, the prosecution moved to withdraw charges and Judge Crawford granted that request on February 5, 2009.

It has been over ten years since the bombing of the USS COLE and almost nine years since the government seized Mr. Al-Nashiri. The government had custody of Mr. Al-Nashiri within two years after the USS COLE bombing and could have brought him to trial within a reasonable period after those events. In fact, an indictment was filed in case number S12 98 Cr. 1023 in the United States District Court for the Southern District of New York in 2003, that named Mr. Al-Nashiri as an unindicted co-conspirator in the attack on the USS COLE. Instead of trying him, however, the government chose to illegally keep him hidden in CIA custody. Furthermore, even after Mr. Al-Nashiri arrived in Guantanamo Bay in 2006, the government chose to delay the filing of any charges by almost two more years. And after charges were initially brought in 2008, the government withdrew those charges and held Mr. Al-Nashiri's case in suspended animation for an additional two years.

The unreasonable delay in this case is entirely attributable to deliberate decisions by the government. Regardless of the government's stated reason for the delay, it is clear that Mr. Al-Nashiri's ability to defend himself in a capital trial has been irreparably harmed. During the past ten years much evidence has been compromised by the passage of time. To say the least, human memory is too fragile to be reliable after ten years. Witnesses have died or are no longer available. The memories of available witnesses have certainly deteriorated. And as noted below, political changes and upheaval in Yemen and other countries make the collection of evidence now difficult, if not impossible. Mr. Al-Nashiri should not be saddled with the tremendous burden of defending himself at a capital trial in an unfair environment created by government inaction, and the government should not be rewarded for its delay. Mr. Al-Nashiri's right to a speedy trial has been violated⁴⁸ and referral for trial will violate his rights as guaranteed by the Fifth, Sixth and Eighth amendments to the Constitution of the United States of America. Accordingly, charges—or the death penalty—should not be referred or authorized in this case.

III.

A Capital Conviction and Sentence at a Military Commission Will Not Likely Survive Judicial Review

When the government seeks to take a person's life, our laws—both military and civilian—demand that the accused be afforded special protections and a heightened level of review before such a final action can take place. In essence, as the United States Supreme Court has repeatedly held, death is different. And the idea that death is different “reflects the unique severity and irrevocable nature of capital punishment, [and] infuses the legal process with special

⁴⁸ *Barker v. Wingo*, 407 U.S. 514 (1972).

protections to insure a fair and reliable verdict and capital sentence[.]”⁴⁹ The important point is that the judicial system must be able to promote a reliable verdict and sentence.⁵⁰

Here, the circumstances surrounding a capital trial for Mr. Al-Nashiri make it impossible for a reliable verdict and sentence to withstand constitutional scrutiny. While we recognize that it may not be within the scope of your duties to examine the military commissions’ structure as applied to a capital case, there are numerous reasons why, as written, the Military Commissions Act and the Rules for Military Commission are unconstitutional under current Supreme Court precedent. For example, the military commission rules allow for the admission of hearsay statements⁵¹ and derivative evidence obtained from torture or cruel, inhuman and degrading treatment⁵² at a capital trial. The selection of potential members of a capital military commission by this office is unlikely to comply with Supreme Court precedent. Aggravators are not properly defined in MCA or in the Rules for Military Commissions. And the aggravators that are contained within the rules and the statute are unconstitutionally imprecise and vague.

The abysmal appellate history of capital courts-martial is a good indicator of things to come. On appeal, there is an eighty percent reversal rate for capital courts-martial.⁵³ Furthermore, these capital courts-martial are not resolved in a timely manner. The only service member with an approved death sentence was charged and convicted in 1988,⁵⁴ and his case is still on appeal.⁵⁵

The foregoing is further evidence that the commissions are an untried and untested system with many unanswered questions. In the context of death penalty practice, you are being asked to roll the dice. Unless the Supreme Court carves out a military commission exception to current law, a capital prosecution is unlikely to survive appellate review, even if it should be successful at trial.

Ultimately, it is an unwise use of resources to seek a sentence unlikely to be upheld. As noted in a recent review of federal death penalty practice, a capital trial can cost up to seven

⁴⁹ *Loving v. United States*, 62 M.J. 235, 236 (C.A.A.F. 2006).

⁵⁰ The Supreme Court has repeatedly emphasized that because of the exceptional and irrevocable nature of the death penalty, the Eighth Amendment requires “extraordinary measures” to ensure the reliability of decisions regarding both guilt and punishment in a capital trial. *Eddings v. Oklahoma*, 455 U.S. 104 (1982); see also *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976); *Gardner v. Florida*, 430 U.S. 349, 357-58 (1977); *Lockett v. Ohio*, 438 U.S. 586, 604 (1978); *Beck v. Alabama*, 447 U.S. 625, 637-38 (1980).

⁵¹ Military Commission Rules of Evidence 803.

⁵² Military Commission Rules of Evidence 304(a)(5)(allows for the admission of such statements if the evidence would have been obtained otherwise or if it is “consistent with the interest of justice.”).

⁵³ The eight reversed cases were *United States v. Dock*, 35 M.J. 627(A.C.M.R. 1992); *United States v. Murphy*, 50 M.J. 4 (C.A.A.F. 1998); *United States v. Thomas*, 46 M.J. 311 (C.A.A.F. 1997); *United States v. Simoy*, 50 M.J. 1 (C.A.A.F. 1998); *United States v. Curtis*, 46 M.J. 129 (C.A.A.F. 1997); *United States v. Kreutzer*, 59 M.J. 773 (A. Ct. Crim. App. 2004); *United States v. Quintanilla*, 60 M.J. 852 (N-M. Ct. Crim. App. 2005); *United States v. Walker*, 66 M.J. 721 (N-M. Ct. Crim. App. 2008).

⁵⁴ *United States v. Gray*, 51 M.J. 1, 49 (1999).

⁵⁵ *Gray v. Gray*, Case No. 08-3289-RDR (D. Kan.) (Petition for Writ of Habeas Corpus).

times more than the average case and require an enormous amount of manpower and resources.⁵⁶ Notably, this study looked at typical federal capital cases. Mr. Al-Nashiri's case is vastly different and more complex than the usual federal death penalty case—it reaches into many countries and spans many years of work. Therefore the cost in time and money to prosecute it as a capital case would be immense.

The public and Mr. Al-Nashiri have now waited ten years for the proceedings to commence. To wait several more years, and perhaps decades, while seeking a sentence unlikely to be implemented seems both misleading and cruel. Alternatively, a non-capital referral to a military commission—where no matter what the outcome will likely result in the defendant's indefinite detention—will provide the certainty that ultimately benefits the public.⁵⁷

IV.

The Situation in Yemen Makes it Impossible for Mr. Al-Nashiri to Defend the Charges Against Him and to Receive a Fair Trial

Yemen is in the midst of political chaos and on the verge of civil war. Daily news reports detail the increased incidence of violence and civil unrest. On 25 May 2011, the United States Department of State issued a travel warning urging U.S. citizens to refrain from travel into the country.⁵⁸ According to the State Department, “[t]he security threat in Yemen is extremely high. There is ongoing civil unrest throughout the country and large-scale protest in major cities. Violent clashes are taking place in Sana’a and may escalate without notice.”⁵⁹ The warning also included expressed concern of the possibility of attacks against U.S. citizens and suggested that those present in Yemen “depart while commercial transportation is still available.”⁶⁰

The state of affairs in Yemen presents multi-layered difficulties in Mr. Al-Nashiri's ability to mount a defense, which calls into serious question whether Mr. Al-Nashiri can receive a fair trial at this time. First, should the charges be referred to trial, the current and ongoing political tension in Yemen make it impractical and unsafe for the defense to conduct its own fact finding investigation, which includes the basic requirement of visiting the crime scene and other alleged locations of interest, as well as attempts to obtain further exculpatory evidence.

Furthermore, assuming that the charges are referred as capital, the inability to travel into Yemen places severe limitations on the defense's ability to develop mitigation evidence. The Supreme Court has repeatedly emphasized that the Sixth Amendment right to effective representation in a capital case demands thorough investigation and development of mitigating evidence.⁶¹ To do this, the defense must be able to complete a detailed, multigenerational social

⁵⁶ John B. Gould & Lisa Greenman, *Report to the Committee on Defender Services, Judicial Conference of the United States, Update on the Cost, Quality, and Availability of Defense Representation in Federal Death Penalty Cases* (September 2010).

⁵⁷ A trial where the defendant receives the same lengthy sentence regardless of whether he is convicted or acquitted is, we submit, contrary to accepted notions of American justice.

⁵⁸ U.S. Dept. of State, Bureau of Consular Affairs, Yemen Travel Warning (May 25, 2011).

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *See, e.g., Wiggins v. Smith*, 539 U.S. 510 (2003).

history highlighting the complexity of the client's life, identifying multiple risk factors and mitigation themes. According to the recently adopted Supplement to the ABA Guidelines, face-to-face, one-on-one interviews with those familiar with the client's life history or family history must be conducted in order to complete a reliable life history investigation.⁶² Without a fully developed and thorough life history, which simply cannot be accomplished under the current conditions in Yemen, it is impossible to determine the existence of physical injuries, ailments or other life experiences that may be compelling to your decision on referral, or to any subsequent decision by a military commission on whether to adjudge a death sentence.

It is fundamentally unfair for Mr. Al-Nashiri to face the death penalty for a crime committed in an area that is currently closed off to his counsel. The present conditions in Yemen prevent the defense from conducting the necessary investigation and examination of evidence, as well as, the important task of obtaining mitigation evidence against a death verdict—basic tasks that are crucial to a capital defense. Accordingly, charges stemming from allegations occurring in Yemen should not be referred against Mr. Al-Nashiri, or in the alternative, the death penalty should not be an authorized punishment.

V.

Destruction of Videotapes of Mr. Al-Nashiri's Torture Make a Constitutionally Legitimate Death Sentence Unlikely

As previously stated, after his capture, Mr. Al-Nashiri was detained by the CIA. Over the course of 2002, the CIA videotaped the interrogations of Mr. Al-Nashiri.⁶³ In November of 2005, “[a]ll the tapes were destroyed...on the order of Jose A. Rodriguez Jr., then the CIA's director of clandestine operations, officials said. The destruction came *after* the Justice Department had told a federal judge...that the CIA did not possess videotapes of a specific set of interrogations sought by his attorneys.”⁶⁴ However, it was not until later that the government released the fact that the CIA had destroyed a total of 92 videotapes, 12 of which included the use of “enhanced interrogation techniques.”⁶⁵ The fact that the government intentionally destroyed videotapes of CIA interrogations after purposefully misleading a federal judge demonstrates bad faith on behalf of the government.⁶⁶ As a result of this malfeasance, the defense is now left without exculpatory evidence.

Further, in the context of a capital case, the destruction of the videotapes of Mr. Al-Nashiri's interrogation is extraordinarily prejudicial. Although the contents of the videotapes are unknown by counsel, the fact that they included the use of undisclosed enhanced interrogation techniques

⁶² Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases, 36 Hofstra L. Rev. 677, 689 (2008) available at [http://law.hofstra.edu/pdf/Academics/Journals/Law Review](http://law.hofstra.edu/pdf/Academics/Journals/Law%20Review).

⁶³ See Siobham Gorman and Evan Perez, Justice Says CIA Destroyed 92 Tapes, Wall Street Journal, March 3, 2009 at A1.

⁶⁴ Dan Eggen and Joby Warrick, CIA Destroyed Videos showing Torture, Washington Post, December 7, 2007 (emphasis added).

⁶⁵ See CIA IG Report Supra, note 13 at 36.

⁶⁶ See *Arizona v. Youngblood*, 488 U.S. 51 (1988).

and were tapes of Mr. Al-Nashiri's detention in CIA custody is strong mitigation evidence.⁶⁷ As such, the government's destruction of these tapes taints any future death sentence in this case. In essence, the proceedings would lack the level of reliability necessary to support confidence in its outcome and any subsequent sentence cannot withstand constitutional scrutiny. Accordingly, charges should not be referred against Mr. Al-Nashiri, or in the alternative, the death penalty should not be an authorized punishment.

VI.

The Improper Withdrawal of Charges in 2009 by Judge Crawford Precludes the Re-referral of the Current Charges to a Military Commission

On 22 January 2009, the President issued an executive order that directed, among other things, a review of the military commission process. On 23 January 2009, the prosecution filed a motion for a 120-day continuance to postpone the scheduled arraignment for 9 February 2009 to after 22 May 2009. (Attachment F) The prosecution requested that the "continuance halt all proceedings in this matter, including but not limited to all pending motions, future motions, court proceedings and discovery disclosures." The defense did not object to a continuance, but did object to the prosecution's request that the continuance "halt all proceedings in this matter, including but not limited to all pending motions, future motions, court proceedings and discovery disclosures." On 29 January 2009, the military judge denied the prosecution's continuance request. The judge found that the delay was not reasonable and that the public interest in a speedy trial would be harmed by the delay in the arraignment.

Although the judge denied the continuance request, the charges were not immediately withdrawn. On 5 February 2009, the military judge granted the defense an opportunity to hold a motion hearing immediately after the arraignment. Later that evening, the prosecution made a written request to the CA to withdraw the charges. In its request the prosecution stated:

8. *The rulings of the Military Judge are inconsistent with the Presidential directive to halt all military commission proceedings.* The arraignment itself is a proceeding that was intended to be halted by the President. Further any hearings on the protective order or either of the two motions pending before the Military Judge that may be litigated at the time of the arraignment would likewise be proceedings that were intended to be halted.

9. It would be inefficient to complete a trial or to litigate motions under procedures and legal standards that might change. It would be inefficient and unwise to put the accused, victims, witnesses, family members, and court members through the burden of a military commission trial when rules, procedures, and forum might change. A

⁶⁷ In defining mitigation evidence, the Supreme Court has spoken in the "most expansive terms." *Tennard v. Dretke*, 542 U.S. 274, 284 (2004) (citing *McKoy v. North Carolina*, 494 U.S. 433, 440-41 (1990)); *see also Rompilla v. Beard*, 545 U.S. 374 (2005). Essentially, mitigation evidence is any evidence that can be used to justify a sentence less than death. *See, e.g.*, R.M.C.1001 and 1004 (granting the accused broad latitude in obtaining and presenting mitigation evidence).

brief delay ensures that resources are not committed to a process that the Administration might change or discard. *Finally, in the event a military commission case is later prosecuted in a federal court, previous legal proceedings, such as the presentation of evidence, decisions on discovery, or rulings on evidentiary issues and witnesses, could create impediments to prosecution in federal court.*⁶⁸

Shortly thereafter, the CA issued a cursory order withdrawing the charges against Mr. Al-Nashiri. The government withdrew the charges against Mr. Al-Nashiri in February 2009 to undermine the rulings of the military judge and to prevent Mr. Al-Nashiri from exercising his rights at a commission proceeding. This withdrawal was improper, having been made after the military judge granted Mr. Al-Nashiri an opportunity to assert his rights at the arraignment. The withdrawal also gave the government another two years to investigate its case while at the same time denying Mr. Al-Nashiri any discovery.

First, as evidenced by the timing of the prosecution's request to withdraw the charges, the withdrawal was made because the CA did not agree with the military judge's decisions. As you are no doubt aware, mere disagreement with the holdings of the proceeding has historically been deemed an improper reason for the CA to withdraw charges.⁶⁹ Second, the prosecution's request specifically stated that withdrawal is necessary to halt legal proceedings and to prevent Mr. Al-Nashiri from obtaining discovery. Hence, the withdrawal was done for the express purpose of preventing Mr. Al-Nashiri from asserting his rights at a commission and therefore it was improper.⁷⁰

Furthermore, Mr. Al-Nashiri suffers considerable prejudice from the improper withdrawal. He is now charged with three additional capital offenses relating to the *M/V Limburg* that were not alleged in 2009.⁷¹ The government could have alleged these capital offenses in 2009; instead, it chose to plead the *M/V Limburg* incident as an overt act to a sole conspiracy charge.⁷² Had Mr. Al-Nashiri been allowed to proceed to an arraignment in 2009, the government would have been prevented from adding charges.

According to Rule for Military Commission 604(b), charges that have been withdrawn for an improper purpose cannot be referred to another military commission. Therefore, charges cannot be referred to a current military commission. At the very least, the three additional capital offenses relating to the *M/V Limburg*—Charge IV, specification 2, Charge IX and Charge XI—should not be referred to a military commission.

⁶⁸ Attachment F at ¶8, 9 (emphasis added).

⁶⁹ See *United States v. Walsh*, 22 U.S.C.M.A 509, 47 C.M.R. 926 (1973) (CA withdrew charges because he did not agree with the sentences the court-martial was awarding).

⁷⁰ See Rule for Military Commission 604.

⁷¹ Those three additional capital offenses are: Charge IV, specification 2 (terrorism); Charge IX (attacking civilians) and Charge XI (hijacking or hazarding a vessel or aircraft).

⁷² See Attachment G (Copy of 2009 Charge Sheet ICO *United States v. Al-Nashiri*).

VII.

A Military Commission Does Not Have Jurisdiction Over the Alleged Offenses

Shortly after the bombing of the USS COLE, President Clinton gave a eulogy commemorating the sailors who lost their lives. In this eulogy, the Commander-in-Chief stated the following:

Their tragic loss reminds us that *even when America is not at war*, the men and women of our military still risk their lives for peace.⁷³

This statement by the sitting Commander-in-Chief describes the factual circumstances that existed before, during and after the bombing of the USS COLE on October 12, 2000 —America was not at war or engaged in any hostilities subject to the laws of war.

The Military Commissions Act of 2009 authorizes you to “establish military commissions under this chapter for offenses triable by military commission as provided in this chapter.”⁷⁴ As you are aware, the legal purposes for which military commissions can be established are narrow as both a matter of historical practice and Constitutional law. When convened outside areas under martial law or military occupation, military commissions are strictly limited to the punishment of enemy forces for violations of the laws of war committed in the context of and associated with hostilities.⁷⁵

This limitation was affirmatively recognized and enacted by Congress into the Military Commissions Act, when it mandated that “An offense specified in this subchapter is triable by military commission under this chapter only if the offense is committed in the context of and associated with hostilities.”⁷⁶ Your authority to establish a military commission for particular charges, therefore, depends upon those charges averring culpable conduct that occurred in the context of and was associated with hostilities.

The prosecution swore to eleven charges against Mr. Al-Nashiri for conduct spanning 1996-2002. The charges principally relate to three incidents that transpired in Yemen with which Mr. Al-Nashiri is alleged to have been culpably involved.

The first incident was the allegedly attempted but unsuccessful bombing of a U.S. Naval Vessel, the USS THE SULLIVANS, which had been docked in Aden, Yemen.⁷⁷ The failed attempt is alleged to have occurred on or about January 3, 2000. Neither in January 2000 nor at any time relevant to the alleged attempt on the USS THE SULLIVANS was the United States in a state of hostilities in Yemen and the alleged attempt on the USS THE SULLIVANS triggered no hostile response from the United States.

⁷³ The President's Radio Address, 36 Weekly Comp. Pres. Doc. 2464 (Oct. 14, 2000).

⁷⁴ 10 U.S.C. § 948b(b) (2009).

⁷⁵ *Ex parte Quirin*, 317 U.S. 1 (1942); *In re Yamashita*, 327 U.S. 1 (1946).

⁷⁶ 10 U.S.C. § 950p(c) (2009).

⁷⁷ The charges relating to the USS THE SULLIVANS are: Charge III (Attempted Murder in Violation of the Law of War); Charge V (Conspiracy); and Charge VIII (Attempted Destruction of Property in Violation of the Law of War).

The second incident was the bombing of the USS COLE, also in Yemen.⁷⁸ The USS COLE was bombed on October 12, 2000, and resulted in the deaths of seventeen U.S. personnel. In response to the bombing, President Clinton declined to declare a state of hostilities. Pursuant to the War Powers Resolution of 1973,⁷⁹ President Clinton notified Congress that he deployed military personnel to Aden for the sole purpose of assisting in the recovery effort.⁸⁰ This report emphasized that military personnel were armed “solely for the purpose of assisting in on-site security.” In a series of official public statements, President Clinton reiterated that he did not recognize the bombing of the USS COLE as being in the context of and associated with hostilities.⁸¹ Congress, pursuant to its war powers, took no legislative steps to either declare war in Yemen or otherwise authorize the use of military force in response to the bombing. Instead, the United States sent FBI and other law enforcement agents to investigate the bombing⁸²—actions more typical of a criminal investigation than an armed conflict.

The third incident was the bombing of a French tanker, the *M/V Limburg*.⁸³ The bombing of the *M/V Limburg* took place on October 6, 2002, and resulted in the death of a Bulgarian crew member. President Bush deployed no U.S. military personnel to Yemen in response, made no report to Congress pursuant to the War Powers Resolution and issued no executive order otherwise indicating that either the United States or France was engaged in hostilities in Yemen. Congress equally took no legislative action pursuant to its war powers that would indicate its recognition of the bombing of the *M/V Limburg* was in the context of and associated with hostilities in which either the United States or France was involved.

With respect to the overt acts contained in Charge V (Conspiracy), all but four explicitly relate to these three incidents. The remaining four are vaguely worded so as to make it unclear whether they occurred in the context of hostilities or were associated with hostilities.⁸⁴ What is clear, however, is that two prior Presidents took the position that these incidents were not, as a matter of law, in the context of and associated with hostilities.

⁷⁸ The charges relating to the USS COLE are: Charge I (Perfidy); Charge II (Murder in Violation of the Law of War); Charge III (Attempted Murder in Violation of the Law of War); Charge IV (Terrorism); Charge V (Conspiracy); Charge VI (Intentionally Causing Serious Bodily Injury); and Charge VII (Destruction of Property in Violation of the Law of War).

⁷⁹ Pub. L. 93-148 (1973) (codified at 50 U.S.C. §§ 1541, *et seq.*)

⁸⁰ Letter to Congressional Leaders Reporting on the Deployment of United States Forces in Response to the Attack on the U.S.S. COLE., 36 Weekly Comp. Pres. Doc. 2482 (Oct. 14, 2000).

⁸¹ *See, e.g.*, The President's Radio Address, 36 Weekly Comp. Pres. Doc. 2464 (Oct. 14, 2000) (“This tragic loss should remind us all that even when America is not at war, the men and women of our military risk their lives every day in places where comforts are few and dangers are many. No one should think for a moment that the strength of our military is less important in times of peace, because the strength of our military is a major reason we are at peace.”); Remarks at a Dinner for Governor Gary Locke and Representative Jay Inslee in Seattle, 36 Weekly Comp. Pres. Doc. 2489 (Oct. 14, 2000) (“But it’s a humbling reminder that even in times of peace, freedom is not free.”).

⁸² Lawrence Wright, *The Looming Tower* 361 (2006).

⁸³ The charges relating to the *M/V Limburg* are: Charge IV (Terrorism); Charge V (Conspiracy); Charge IX (Attacking Civilians); Charge X (Attacking Civilian Objects); and Charge XI (Hazarding a Vessel).

⁸⁴ Specifically overt acts 6, 24, 25, and 26.

To provide a more recent example, the current Administration's view of what constitutes hostilities for purposes of the War Powers Act is telling. Namely, the legal advisor to the State Department, Mr. Harold Koh, recently stated to Congress that the situation in Libya does *not* constitute hostilities.⁸⁵ He specifically stated that there are four factors which demonstrate that the United States is not engaged in hostilities: (1) the military mission is limited, (2) exposure of armed forces is limited, (3) the risk of escalation is limited, and (4) the military means we are using is limited.⁸⁶ Indeed, logic dictates that if the situation in Libya is not considered hostilities, despite the fact that U.S. personnel are participating in and commanding ongoing bombing raids against the Libyan government's national military forces, then the events that occurred in and around Yemen cannot be considered to have occurred during a time of hostilities.

Congress has given you neither the authority to contravene its express limits on the purposes for which military commissions may be convened nor the authority to overrule the judgments of two prior Presidents as to the legal nature of events that occurred while each served as Commander-in-Chief. An order convening a military commission for these charges would unconstitutionally seek to circumvent the United States federal courts in an area of their exclusive jurisdiction and hold Mr. Al-Nashiri to answer for capital crimes in violation of the grand jury clause of the Fifth Amendment to the Constitution.

Conclusion

You are faced with a difficult and momentous decision. The death penalty is the most serious and controversial punishment in our land. In making your decision, you must make an individual determination of whether death should be an available punishment for this case—for this man. The United States should not be permitted to kill a man it has brutally tortured and subjected to cruel, inhuman and degrading treatment. The US government has already effectively killed the man it seized ten years ago.

Equally as important in your decision is whether this man can receive a fair and just capital trial. A death sentence should be the product of a reliable and trustworthy process or else it runs the risk of being illegitimate and tainted. Here, the totality of circumstances surrounding the case prevents Mr. Al-Nashiri from receiving such a trial. The very same government that is prosecuting him and seeking to kill him intentionally destroyed exculpatory evidence of his torture at its hands. He has been held without trial for almost ten years, and now he may be forced to defend himself when stale evidence, fading memories and the political unrest in Yemen prevent him from doing so.

Throughout the course of the last ten years the military commission process has faced many questions. One pivotal and constant question has been—what shall we condone? Shall we condone a trial that allows evidence obtained from torture? Shall we condone a trial for a detainee who has been tortured?

⁸⁵ See Attachment H, also available at http://foreign.senate.gov/imo/media/doc/Koh_Testimony.pdf.

⁸⁶ *Id.* at 7-11.

Now we are at the beginning of a new chapter and you are one of its principal authors. Your decision is between more controversy, further uncertainty, and additional extensive delay or a new course on what is just and right for our judicial system. In this case, referral implicitly condones the horrific actions of our government. Referral, especially a capital, referral places the accused in a judicial system that lacks the protections our Constitution demands for a capital trial. Accordingly, the defense respectfully requests that no charges, and certainly no capital charges, be referred against Mr. Abd al Rahim Hussaym Muhammad Al-Nashiri.

Respectfully Submitted,

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ATTACHMENTS:

- A. Parliamentary Assembly Written Declaration No. 483, dated June 22, 2011.
- B. Copy of Office of Inspector General, Central Intelligence Agency, *Special Review Counterterrorism Detention and Interrogation Activities*, May 7, 2004.
- C. Copy of Letter from Major General John L. Fugh, USA (Ret.), Rear Admiral Don Guter, USN (Ret.), Rear Admiral John D. Hutson, USN (Ret.), Brigadier General David M. Brahms, USMC (Ret.) to Senator Patrick J. Leahy, November 2, 2007.
- D. Copy of CIA Background Paper on Combined Techniques (2004).
- E. Copy of Article: Bob Woodward, *Detainee Tortured, Says U.S. Official*, Wash Post, Jan. 14, 2009 at A1.
- F. Copy of Prosecution's Request to Withdraw the Charges w/ attachments, dated 5 February 2009.
- G. Copy of 2009 Charge Sheet ICO *United States v. Al-Nashiri*.
- H. Copy of Testimony of Legal Advisor Horald Hongju Koh, U.S. Dept. of State on Libya and War Powers Before the Senate Foreign Relations Committee June 28, 2011.