

[ORAL ARGUMENT NOT YET SCHEDULED]

No. 18-5297

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

ABDUL RAZAK ALI,
Petitioner-Appellant,

v.

DONALD J. TRUMP, et al.,
Respondent-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

**BRIEF OF *AMICI CURIAE* TOFIQ NASSER AWAD AL BIHANI (ISN 893)
AND ABDUL LATIF NASSER (ISN 244) SUPPORTING APPELLANT**

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**CERTIFICATE AS TO PARTIES,
RULINGS, AND RELATED CASES**

Pursuant to D.C. Circuit Rule 28(a)(1), the undersigned hereby states:

A. Parties and Amici. To *amici's* knowledge, all parties, intervenors, and *amici* appearing in this Court are listed in the Brief for Appellant in this case, No. 18-5297, other than Tofiq Nasser Awad Al Bihani (ISN 893) and Abdul Latif Nasser (ISN 244) filing this brief as *amici* in support of Appellant and the other *amici* filing briefs this same day.

B. Rulings Under Review. To *amici's* knowledge, references to the ruling at issue appear in the Brief for Appellant in this case, No. 18-5297.

C. Related Cases. To *amici's* knowledge, references to any related cases appear in the Brief for Appellant in this case, No. 18-5297.

TABLE OF CONTENTS

| | Page |
|---|-------------|
| CERTIFICATES AS TO PARTIES, RULINGS AND RELATED CASES | i |
| TABLE OF CONTENTS..... | ii |
| TABLE OF AUTHORITIES..... | iii |
| GLOSSARY | vii |
| IDENTITY AND INTERESTS OF AMICI CURIAE..... | 1 |
| RULE 29 STATEMENT | 4 |
| SUMMARY OF ARGUMENT | 5 |
| ARGUMENT..... | 9 |
| I. The Executive Branch Cleared Al Bihani and Nasser For Transfer. . . | 9 |
| A. Al Bihani was Unanimously Cleared by the GTMO Task Force..... | 9 |
| B. Nasser was Cleared Through the PRB Process..... | 10 |
| II. The Continued Detention of Al Bihani and Nasser Demonstrates How the Failure to Apply the Due Process Clause to Guantánamo Detainees Leads to Absurd, Arbitrary, and Unconscionable Results..... | 12 |
| A. The Executive Branch Has Failed to Transfer Al Bihani and Nasser and Does Not Currently Intend to Transfer Them..... | 12 |
| B. The Government’s Continued Detention of Al Bihani and Nasser Serve No Legitimate Purpose..... | 20 |
| CONCLUSION..... | 25 |
| CERTIFICATE OF COMPLIANCE WITH RULES 29(A) AND 32(A) | 26 |
| CERTIFICATE OF SERVICE | 27 |

TABLE OF AUTHORITIES

| Cases | Page(s) |
|---|-------------------|
| <i>Al-Bihani et al. v. Trump et al.</i> , 1:04-cv-01194 (UNA), (D.D.C. Feb. 16, 2018) (Dkt. No. 1126) | 20 |
| <i>Al-Bihani v. Obama</i> , 2010 U.S. Dist. LEXIS 107590 (D.D.C., Sept. 22, 2010) | 1 |
| <i>Ali v. Trump</i> , 2019 U.S. App. LEXIS 5284 (D.C. Cir. Feb. 22, 2019) (Tatel, J., concurring) | 5 |
| <i>Boumediene v. Bush</i> , 553 U.S. 723 (2008) | 7 |
| <i>Cty. of Sacramento v. Lewis</i> , 523 U.S. 833 (1998) | 7 |
| <i>Foucha v. Louisiana</i> , 504 U.S. 71 (1992) | 5, 20, 21, 24 |
| <i>In Re Guantánamo Bay Detainee Litigation</i> , No. 08-mc-442 (TFH) (D.D.C. Mar. 13, 2009) | 21 |
| <i>Hamdi v. Rumsfeld</i> , 542 U.S. 507 (2004) | 5, 21, 22, 23, 24 |
| <i>Jackson v. Indiana</i> , 406 U.S. 715,738 (1972) | 5, 21 |
| <i>James Madison Project, et al. v. Dep't of Justice, et al.</i> , Civ. No. 1:17-cv-00144-APM (D.D.C. Nov. 13, 2017) | 18 |
| <i>Jones v. United States</i> , 463 U.S. 354 (1983) | 5, 20 |
| <i>Nasser v. Obama</i> , 05-cv-00764 (CKK) (D.D.C. July 29, 2009) | 2 |
| <i>Nasser v. Obama</i> , 05-cv-0764 (CKK), (D.D.C. Aug. 18, 2017) | 18 |

| | |
|--|------------|
| <i>Nasser v. Obama</i> , No. 05-cv-00764 (CKK) (D.D.C. Jan. 13, 2017)..... | 17 |
| <i>Nasser v. Trump</i> , No. 04-cv-1194 (TFH) (D.D.C. July 11, 2018)..... | 23 |
| <i>O’Connor v. Donaldson</i> , 422 U.S. 563 (1975) | 20 |
| <i>United States v. Salerno</i> , 481 U.S. 739 (1987) | 20, 21, 23 |
| <i>Zadvydas v. Davis</i> , 533 U.S. 678 (2001) | 5 |
| Statutes, Regulations and Rules | |
| 28 U.S.C. §§ 2241 and 2243..... | 17 |
| Authorization to Use Military Force of Sept. 14, 2001 Pub. L. 107-40, 115 Stat. 224 | vii |
| Exec. Order 13823 § 2(a), 83 Fed. Reg. 4831 (Jan. 30, 2018)..... | 18 |
| Exec. Order 13823 § 3(a), 83 Fed. Reg. at 4832..... | 19 |
| Exec. Order No. 13492 § 2(d), 74 Fed. Reg. 4897, 4898 (Jan. 22, 2009)..... | 9 |
| Exec. Order No. 13492 § 4(c)(2), 74 Fed. Reg. 4897, 4899 (Jan. 22, 2009)..... | 13 |
| Exec. Order No. 13567 § 1, 76 Fed. Reg. 13277, 13277 (Mar. 7, 2011)..... | 11 |
| Exec. Order No. 13567 § 4(a), 76 Fed. Reg. 13277, 13279 (Mar. 7, 2011)..... | 13 |
| D.C. Circuit Rule 29(a)..... | 4 |
| D.C. Circuit Rule 29(d) | 4 |
| Fed. R. App. P. 29(a) | 26 |
| Fed. R. App. P. 29(a)(4)(E)..... | 4 |

| | |
|---|----|
| Fed. R. App. P. 29(a)..... | 26 |
| Fed. R. App. P. 32(a)..... | 26 |
| Fed. R. App. P. 32(f)..... | 26 |
| National Defense Authorization Act for Fiscal Year 2016, Pub. L. No. 114-92, § 1034(a)(1), 129 Stat. 726, 969 (2015) (2016 NDAA)..... | 17 |

Other Authorities

| | |
|---|--------|
| ASSOCIATED PRESS (May 31, 2005), <i>available at</i> http://nbcnews.to/2CIOvZS | 2 |
| Donald J. Trump (@realDonaldTrump), Twitter (Jan. 3, 2017 9:20 AM), <i>available at</i> https://twitter.com/realDonaldTrump/status/816333480409833472 ;..... | 18 |
| David Welna, <i>Trump Has Vowed to Fill Guantánamo With Bad Dudes—But Who?</i> , NPR (Nov. 14, 2016), <i>available at</i> http://n.pr/2CNr01T | 18, 24 |
| Donald Trump, Sparks, NV, YOUTUBE (Feb. 23, 2016), <i>available at</i> https://www.youtube.com/watch?v=3zEubx_2uOc | 18 |
| Final Report of the Guantánamo Review Task Force (Jan. 22, 2010), <i>available at</i> http://bit.ly/2CzdwTq ;..... | 2, 10 |
| <i>The Guantánamo Docket: 40 Current Detainees</i> , N.Y. TIMES (accessed May 20, 2019), <i>available at</i> https://www.nytimes.com/interactive/projects/guantanamo/detaines/current | 6 |
| <i>The Guantánamo Docket: The Detainees</i> , N.Y. TIMES (accessed May 20, 2019), <i>available at</i> https://www.nytimes.com/interactive/projects/guantanamo/detaines | 6 |
| <i>Guantánamo Docket: Timeline: 2016</i> , N.Y. TIMES (accessed May 20, 2019), <i>available at</i> https://www.nytimes.com/interactive/projects/guantanamo/timeline/2016 | 16 |

| | |
|---|--------|
| <i>The Guantánamo Docket: Transferred to Morocco</i> , N.Y. TIMES (accessed May 20, 2019), available at https://www.nytimes.com/interactive/projects/guantanamo/transfer-countries/morocco | 17 |
| Guantanamo Review Dispositions (Jan. 22, 2010), available at https://www.dni.gov/files/documents/FOIA/DF-2015-00110.pdf | 2, 10 |
| Missy Ryan & Julie Tate, <i>The Trump era has stranded these five men at Guantanamo Bay</i> , THE WASHINGTON POST (Jan. 22, 2017), available at https://www.washingtonpost.com/news/checkpoint/wp/2017/01/22/the-trump-era-has-stranded-these-five-men-at-guantanamo-bay/?utm_term=.81f59659e445 ;..... | 6 |
| <i>Opening Statement House Foreign Affairs Committee Hearing on Guantanamo Bay</i> (Mar. 23, 2016) | 13, 14 |
| Senate Select Comm. on Intelligence, Committee Study of the Central Intelligence Agency’s Detention and Interrogation Program (Dec. 3, 2014) | 1 |
| Unclassified Summary of Final Determination, ISN 244, July 11, 2016, available at http://www.prs.mil/Portals/60/Documents/ISN244/20160711_U_I_SN244_FINAL_DETERMINATION_PUBLIC.pdf | 3, 11 |

GLOSSARY

- AUMF:** Authorization to Use Military Force of Sept. 14, 2001, Pub. L. 107-40, 115 Stat. 224.
- CIA:** Central Intelligence Agency.
- Guantánamo:** The detention camp at the United States Naval Station at Guantánamo Bay, Cuba.
- GTMO Task Force:** The Guantánamo Review Task Force was created by Executive Order 13492 on January 22, 2009 “to effect the appropriate disposition of individuals currently detained by the Department of Defense at the Guantánamo Bay Naval Base.”
- ISN:** Internment Serial Number is an identification number assigned to captives who come under control of the United States Department of Defense during armed conflicts.
- PRB:** The Periodic Review Board was created by Executive Order 13567 on March 10, 2011 “to establish, as a discretionary matter, a process to review on a periodic basis the executive branch’s continued, discretionary exercise of existing detention authority in individual cases” with regard to individuals held at Guantánamo.

IDENTITY AND INTERESTS OF *AMICI CURIAE*

Tofiq Nasser Awad Al Bihani (ISN 893) and Abdul Latif Nasser (ISN 244) are presently detained at Guantánamo despite having been cleared for transfer by the U.S. government. All of the U.S. military, intelligence, and law enforcement agencies with a stake in the detentions at Guantánamo have unanimously concluded that there is no national security-related reason to continue to hold them, but they are still there.

Al Bihani, a citizen of Yemen, was born and raised in Saudi Arabia. Around late 2001 or early 2002, Al Bihani was apprehended in Iran, outside of any active combat zone, on suspicion that he was affiliated with the terrorist organization Al-Qaeda.¹ He was ultimately transferred to the custody of U.S. forces.² Al Bihani was held at U.S. government facilities abroad, including the CIA Detention Site COBALT, a CIA “black site,” where he was subjected to torture that was neither approved by the Department of Justice nor authorized by CIA Headquarters.³ On or about February 2003, Al Bihani was transferred to Guantánamo, where he has remained imprisoned for over 16 years.⁴ Al Bihani, now in his mid-forties, was

¹ See *Al-Bihani v. Obama*, 2010 U.S. Dist. LEXIS 107590, at *26 (D.D.C., Sept. 22, 2010).

² *Id.*

³ See Senate Select Comm. on Intelligence, Committee Study of the Central Intelligence Agency’s Detention and Interrogation Program, at 101-02 (Dec. 3, 2014).

⁴ See *Al-Bihani*, 2010 U.S. Dist. LEXIS 107590 at *26.

never charged with, much less convicted of, a crime. The government cleared Al Bihani for transfer out of Guantánamo in 2010⁵—*more than nine years ago*—but the U.S. government continues to detain him.

Nasser is a fifty-four-year-old citizen of Morocco. Captured in Afghanistan by Northern Alliance forces in December 2001, Nasser was sold for a bounty to the U.S. military based on allegations that he was a terrorist⁶ and subsequently transferred to U.S. custody in January 2002.⁷ Like Al Bihani, Nasser was then rendered to a series of U.S.-controlled black sites and tortured for several months before being transferred to Guantánamo. Earlier this month—May 3rd—marked Nasser’s seventeenth year in U.S. custody at Guantánamo where he, also, has never been charged with a crime.

In July 2016, a six-agency review board approved Nasser for transfer home to Morocco. Despite the review board’s express recommendation that Nasser

⁵ See Final Report of the Guantánamo Review Task Force (Jan. 22, 2010), available at <http://bit.ly/2CzdwTq>; Guantanamo Review Dispositions 15 (Jan. 22, 2010), available at <https://www.dni.gov/files/documents/FOIA/DF-2015-00110.pdf>.

⁶ *Guantánamo Inmates Say They Were ‘Sold,’* ASSOCIATED PRESS (May 31, 2005), available at <http://nbcnews.to/2CIOvZS>.

⁷ Resp’ts’ Factual Return at 12, *Nasser v. Obama*, 05-cv-00764 (CKK) (D.D.C. July 29, 2009) (Dkt. No. 170-2).

return to Morocco,⁸ and Morocco's repeated requests for his return, Nasser continues to live out his days in a Guantánamo cell.

In 2016 and 2017, the Obama administration was set to transfer these men out of Guantánamo so that they could finally re-begin their lives. At the eleventh hour, for reasons apparently unrelated to their status as cleared detainees, the government failed to transfer them. Since that time, the Trump administration has not demonstrated any intent whatsoever to transfer them.

The unfortunate and unique circumstances of these two similarly-situated men provide broader context for the Court to consider as it answers the important question of whether and how the Due Process Clause applies to Guantánamo detainees.

In full disclosure, Al Bihani and Nasser are petitioners in the joint habeas corpus challenge of their detention filed on January 11, 2018, which is nearly identical to the one from which this appeal arose. Their case was assigned to Senior U.S. District Judge Thomas F. Hogan,⁹ and has not yet been decided. Thus, they do have a strong stake in the outcome of the Court's decision.

⁸ *See* Unclassified Summary of Final Determination, ISN 244, July 11, 2016, *available at*

http://www.prs.mil/Portals/60/Documents/ISN244/20160711_U_ISN244_FINAL_DETERMINATION_PUBLIC.pdf.

⁹ Al Bihani's docket number is 05-cv-2386 (RBW). Nasser's docket number is 05-cv-764 (CKK).

RULE 29 STATEMENT

Pursuant to D.C. Circuit Rule 29(a), undersigned counsel for *amici curiae* represents that all parties have been sent notice of the filing of this brief and have consented to the filing. No counsel for a party authored this brief in whole or in part. No party, counsel for a party, or any person other than the *amici curiae*, its members, or its counsel, contributed money that was intended to fund the preparation or submission of this brief. *See* Fed. R. App. P. 29(a)(4)(E).

Pursuant to D.C. Circuit Rule 29(d), undersigned counsel for *amici curiae* certifies that a separate brief is necessary. *Amici* are currently detainees at Guantánamo who have a distinct interest because the government cleared them for transfer but continues to detain them for reasons unrelated to their clearance. *Amici* are personally knowledgeable regarding the lack of procedure currently in place at Guantánamo and are uniquely positioned to provide the Court with insight on the impact of this failure. Given these distinct interests, undersigned counsel certify that filing a joint brief with other *amici* would not be practicable.

SUMMARY OF ARGUMENT

The Supreme Court has echoed numerous times that freedom from physical detention “is the most elemental of liberty interests,” and “has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action.” *Hamdi v. Rumsfeld*, 542 U.S. 507, 529 (2004) (quoting *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992)); *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001) (“Freedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that Clause protects.”). For that reason, the Due Process Clause provides that noncriminal detention must serve a legitimate purpose to be valid. *See Jones v. United States*, 463 U.S. 354, 368 (1983) (“The Due Process Clause ‘requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is [detained].’”) (quoting *Jackson v. Indiana*, 406 U.S. 715, 738 (1972)). In prior proceedings in this case, two members of this Court rightly acknowledged that “[a]t the heart of this appeal lies a question undoubtedly of exceptional importance: whether the procedural protections of the Fifth Amendment’s Due Process Clause extend to persons detained at the Guantánamo Bay Naval Base.” *Ali v. Trump*, 2019 U.S. App. LEXIS 5284, at *2 (D.C. Cir. Feb. 22, 2019) (per curium) (Tatel, J., concurring).

The implications of depriving Guantánamo detainees of due process protections are no better illuminated than by the cases of Al Bihani and Nasser. At its peak, the government held nearly 800 detainees at Guantánamo, while today only 40 remain.¹⁰ Al Bihani and Nasser are part of a unique and unfortunate subclass. They are two of the five¹¹ individuals the government continues to detain even though they were cleared for transfer years ago. This means that they have not been and will not be charged with any crimes, that the government determined that they do not pose a significant national security threat to the United States, and that no more “procedure” awaits them in Guantánamo as they continue to rot away the rest of their lives.

After being cleared for transfer, the Executive branch made arrangements to transfer Al Bihani and Nasser to Saudi Arabia and Morocco, respectively, where they could resettle and live out the remainder of their lives peacefully. However, for reasons unknown, the government ultimately did not transfer them. Indeed, the

¹⁰ *The Guantánamo Docket: The Detainees*, N.Y. TIMES, (accessed May 20, 2019), available at <https://www.nytimes.com/interactive/projects/guantanamo/detainees>.

¹¹ The three other cleared detainees are Sufyian Barhoumi (ISN 694), Ridah Bin Saleh al Yazidi (ISN 38), and Muieen al-Din Jamal al-Din al-Sattar (ISN 309). Missy Ryan & Julie Tate, *The Trump era has stranded these five men at Guantánamo Bay*, THE WASHINGTON POST, (Jan. 22, 2017), available at https://www.washingtonpost.com/news/checkpoint/wp/2017/01/22/the-trump-era-has-stranded-these-five-men-at-guantanamo-bay/?utm_term=.81f59659e445; *The Guantánamo Docket: 40 Current Detainees*, N.Y. TIMES, (accessed May 20, 2019), available at <https://www.nytimes.com/interactive/projects/guantanamo/detainees/current>.

Executive branch now brazenly refuses to do anything to effectuate their transfers, thereby continuing to hold them captive for no legitimate purpose and in violation of law-of-war principles and fundamental notions of due process.

The fates of Al Bihani and Nasser result from nothing more than arbitrary government action, or in this case, deliberate inaction, which leaves them with no process whatsoever. Their continued detention demonstrates how deferring to the whims of the political branches in such a situation leads to absurd, arbitrary, and unconscionable results. The only way for such results to be avoided is for the Court to apply reasonable procedural and substantive due process safeguards to Guantánamo. *See Cty. of Sacramento v. Lewis*, 523 U.S. 833, 845-46 (1998) (“We have emphasized time and again that the touchstone of due process is protection of the individual against arbitrary action of government, whether the fault lies in a denial of fundamental procedural fairness, or in the exercise of power without any reasonable justification in the service of a legitimate governmental objective”) (internal quotation marks and citations omitted).

With each passing day, Guantánamo becomes an increasingly forgotten place. *See Boumediene v. Bush*, 553 U.S. 723, 744 (2008) (“confinement of the person, by secretly hurrying him to jail, where his sufferings are unknown or forgotten, is a less public, a less striking, and therefore a *more dangerous engine* of arbitrary government”) (citing *The Federalist* No. 84) (internal quotation marks

and citations omitted) (emphasis in original). Therefore, it is imperative for the Court to understand fully the implications of failing to apply the Due Process Clause to Guantánamo detainees prior to making its decision.

ARGUMENT

I. The Executive Branch Cleared Al Bihani and Nasser For Transfer.

Both Al Bihani and Nasser were cleared through interagency processes established by the Executive branch to review and assess the status of detainees held at Guantánamo. Al Bihani was cleared for transfer by the Guantánamo Review Task Force (“GTMO Task Force”) around January 2010, while Nasser was cleared for transfer through the Periodic Review Board (“PRB”) in July 2015. This meant that Al Bihani and Nasser would not be charged with any crimes and could be transferred out of Guantánamo to their home country or a third country, subject to appropriate security measures. With respect to each detainee, the review processes by the GTMO Task Force and the PRB both involved a review of the facts by national security professionals, a threat and security assessment, and a unanimous decision on the disposition of each detainee by senior leaders of the relevant U.S. military, intelligence, and law enforcement agencies.

A. Al Bihani was Unanimously Cleared by the GTMO Task Force.

The Executive branch established the GTMO Task Force in 2009 with the mission of evaluating whether each Guantánamo detainee’s “continued detention is in the national security and foreign policy interests of the United States.”¹² The GTMO Task Force consisted of representatives from the Department of Justice,

¹² See Exec. Order No. 13492 § 2(d), 74 Fed. Reg. 4897, 4898 (Jan. 22, 2009).

Department of Defense, Department of State, Department of Homeland Security, the Office of the Director of National Intelligence, and the Joint Chiefs of Staff. The GTMO Task Force examined the status of each Guantánamo detainee and recommended whether to (i) transfer the detainee, (ii) continue his detention, or (iii) prosecute him. Unanimous determinations were made for each detainee.

As part of this deliberation, the GTMO Task Force placed thirty Yemeni detainees in a category designated as “conditional detention.” This designation meant that those detainees could not be sent back to Yemen at that time because the security environment in Yemen made it unsafe to do so. However, they could be transferred—subject to appropriate security measures—to third countries in the meantime or returned to Yemen in the future if the security situation there improved (which it has not). When the GTMO Task Force concluded its process in January 2010, Al Bihani was among this group of Yemenis.¹³

B. Nasser was Cleared Through the PRB Process.

The Executive branch created the PRB in 2011, for the purpose of establishing an ongoing, interagency process to review whether continued detention of those not cleared by the GTMO Task Force and not charged or

¹³ See Final Report of the Guantánamo Review Task Force (Jan. 22, 2010), available at <http://bit.ly/2CzdwTq>; Guantanamo Review Dispositions 15 (Jan. 22, 2010), available at <https://www.dni.gov/files/documents/FOIA/DF-2015-00110.pdf>.

convicted remains necessary.¹⁴ Similar to the GTMO Task Force, the PRB consists of representatives of six agencies—the Departments of Defense, Homeland Security, Justice, and State, the Joint Chiefs of Staff, and the Office of the Director of National Intelligence. A decision by the PRB to clear a detainee for transfer requires the unanimous consensus of all six agency representatives. In its determinations, the PRB’s standard for “[c]ontinued law of war detention” is based on whether detention “is necessary to protect against a significant threat to the security of the United States.”¹⁵

On July 11, 2016, the PRB unanimously cleared Nasser for transfer and recommended he be sent to his home country Morocco.¹⁶ The PRB concluded “that continued law of war detention of [Nasser] is no longer necessary to protect against a continuing significant threat to the security of the United States.”¹⁷ The PRB highlighted, among other factors, that Nasser was well-behaved, engaged in educational efforts at Guantánamo through “classes and self-study,” and had

¹⁴ See Exec. Order No. 13567 § 1, 76 Fed. Reg. 13277, 13277 (Mar. 7, 2011). Accordingly, a GTMO Task Force cleared detainee—such as Al Bihani—is ineligible for and does not need a PRB. Likewise, a PRB cleared detainee—like Nasser—is ineligible for and does not need another PRB.

¹⁵ *Id.* at § 2.

¹⁶ See Unclassified Summary of Final Determination, ISN 244, July 11, 2016, available at

http://www.prs.mil/Portals/60/Documents/ISN244/20160711_U_ISN244_FINAL_DETERMINATION_PUBLIC.pdf.

¹⁷ *Id.*

support available from his family upon transfer in terms of economic opportunities.¹⁸

II. The Continued Detention of Al Bihani and Nasser Demonstrates How the Failure to Apply the Due Process Clause to Guantánamo Detainees Leads to Absurd, Arbitrary, and Unconscionable Results.

After Al Bihani and Nasser were cleared for transfer, the U.S. government began the process of making arrangements to have them transferred to Saudi Arabia and Morocco, respectively. They each went through exit protocols in anticipation of their transfer flights. Unfortunately, due to reasons apparently unrelated to the determinations regarding their individual eligibility for transfer, Al Bihani and Nasser were not transferred and instead were returned to their cells where they have continued to remain without any clear or cogent explanation. Al Bihani was cleared over nine years ago; Nasser was cleared more than three years ago. Absent judicial intervention, the current Trump administration has evidenced no intent to transfer them.

A. The Executive Branch Has Failed to Transfer Al Bihani and Nasser and Does Not Currently Intend to Transfer Them.

Upon determining that a detainee should be transferred, the Executive branch—principally, the State Department in coordination with the Defense Department and other relevant agencies—was to identify countries that would accept and resettle these detainees and negotiate agreements with such countries to

¹⁸ *Id.*

effectuate transfers and resettlements and ensure appropriate security measures were implemented.¹⁹ In an opening statement to the House Committee on Foreign Affairs on March 23, 2016, then-U.S. Special Envoy for Guantánamo Closure Lee S. Wolosky detailed the process for transferring detainees:

The Department of State leads negotiations with foreign governments about the possible transfer of one or more Guantanamo detainees but we are joined in our efforts by colleagues from the Departments of Defense, Justice, and Homeland Security, as well as those in the intelligence community and on the Joint Staff. Often these negotiations occur in two steps: first, the U.S. government seeks a high-level political commitment that the potential receiving country is willing to resettle or repatriate the detainee or detainees and to impose various security measures intended to substantially mitigate the threat the detainee or detainees may pose after their transfer; second, we engage in working-level meetings with the entities responsible for implementing these measures. While the higher level meetings offer the U.S. government the opportunity to convey our expectations and assesses our potential partner's political will, the working-level meetings offer the opportunity, among other things, to share best practices from previous detainee transfers, and tailor integration and security measures to specific circumstances under consideration.²⁰

¹⁹ See Exec. Order No. 13492 § 4(c)(2), 74 Fed. Reg. 4897, 4899 (Jan. 22, 2009) (“The Secretary of Defense, the Secretary of State, and, as appropriate, other Review participants shall work to effect promptly the release or transfer of all individuals for whom release or transfer is possible.”); Exec. Order No. 13567 § 4(a), 76 Fed. Reg. 13277, 13279 (Mar. 7, 2011) (“the Secretaries of State and Defense shall be responsible for ensuring that vigorous efforts are undertaken to identify a suitable transfer location”).

²⁰ *Opening Statement House Foreign Affairs Committee Hearing on Guantanamo Bay*, at *4 (Mar. 23, 2016) (statement of Department of State Special Envoy for Guantanamo Closure Lee S. Wolosky).

Ambassador Wolosky further explained:

At the same time, U.S. agencies update the assessment of the potential transferee, drawing upon all reasonably available information on a detainee in possession of the United States. It also develops an assessment of the potential receiving country's capabilities. During this process, we provide our foreign partners with the [intelligence community's] updated assessment of the detainees under discussion and offer them the opportunity to travel to Guantanamo to interview potential transferees. Throughout all of this, we are working to ensure that we achieve a security framework that, applied to specific individuals under consideration for transfer, satisfies or exceeds the statutory requirements for transfers, including that the receiving government has taken or will take steps to substantially mitigate the threat posed by those individuals.²¹

As explained by Ambassador Wolosky, the process for arranging transfers involved extensive coordination among agencies and thoughtful, thorough, and sensitive diplomacy. In the years after the GTMO Task Force designated Al Bihani and 29 other Yemeni detainees for conditional detention, the Executive branch began making diplomatic arrangements for the transfer of these detainees to third countries, given that the security situation in Yemen had degraded substantially. One by one, those cleared by the GTMO Task Force (and later the PRB) were released and resettled. This included all of the Yemeni detainees designated for conditional detention by the GTMO Task Force—all but Al Bihani.

During 2015 and 2016, the Department of State submitted requests for information to Al Bihani's counsel in connection with identifying a third country

²¹ *Id.*

to which to transfer Al Bihani. Although Al Bihani is a citizen of Yemen, he was born in Saudi Arabia and grew up there. To this day, most of his family continues to reside there. Thus, the State Department sought information regarding, but not limited to, Al Bihani's family connections to Saudi Arabia, contact information for his family in Saudi Arabia, and details regarding Al Bihani's intentions following his release. In response to the State Department requests, Al Bihani's counsel provided background and contact information regarding Al Bihani's family in Saudi Arabia. His counsel also emphasized Al Bihani's desire to reunite with his family and begin a new life as well as his family's ability and willingness to support Al Bihani's resettlement into society.

In April 2016, the Saudi Arabian government agreed to receive and resettle Al Bihani, along with nine other detainees who had been cleared for transfer, and each of the ten were informed in kind. So certain were the plans that Al Bihani be among the ten men to board the plane to Saudi Arabia, that his prison doctor took it upon himself to provide Al Bihani with pain medication in an effort to make what would surely be a long and uncomfortable flight for a man with a history of serious back problems (caused mainly from his torture at a CIA black site), slightly more bearable. The flight came and went without him. Despite persistent inquiries from Al Bihani's counsel, the Obama administration never indicated any reason why Al

Bihani was not transferred, or why he should not be transferred just like every other cleared Yemeni.

Al Bihani has not only languished in a prison that long ago determined it need not keep him, but he has watched 51 other men board planes home since that 2016 Saudi flight. He had mentally prepared himself to leave only to have those hopes crushed. He describes the dangling of his freedom and the continued uncertainty of his fate as a form of enduring psychological torture that is in some ways less bearable than the physical torture he previously suffered. Today, he continues to ask why he remains and when, if ever, he will be released.

On an unknown date following Nasser's clearance on July 11, 2016, the State Department sent a diplomatic note to the government of Morocco regarding security assurances relevant to Nasser's transfer. As the months passed and record numbers of detainees were being transferred out of the prison (48 in the Obama administration's final year alone²²), Nasser naturally considered his impending transfer home a foregone conclusion, going as far as to give away his most prized possessions—his books—to fellow detainees.

By November, the State Department adhered to their certainty of his return to Morocco—a country with which the United States has historically had good

²² See *The Guantánamo Docket: Timeline: 2016*, N.Y. TIMES, (accessed May 20, 2019), available at <https://www.nytimes.com/interactive/projects/guantanamo/timeline/2016>.

relations and to which it has never hesitated to repatriate detainees.²³ By late December, the State Department officials with whom Nasser's counsel had been in daily contact stopped returning phone calls.

On January 13, 2017, Nasser's counsel (in conjunction with counsel for a second detainee, Sufiyan Barhoumi) filed an Emergency Motion for an Order Effecting Release, arguing that the Court should order his release pursuant to 28 U.S.C. §§ 2241 and 2243, and the Court's equitable habeas powers, because Nasser's detention was arbitrary and violated U.S. and international law.²⁴ It was only through this litigation that Nasser learned that Morocco had responded affirmatively to the United States, agreeing to receive him, on December 28, 2016—eight days into the 30-day congressional notice period required by a provision of the National Defense Authorization Act.²⁵ Nevertheless, as the government conceded in that very same litigation, “because of the timing of this response, which was less than 30 days before the Secretary of Defense would leave office, the Secretary of Defense did not make a final decision regarding the transfer

²³ Morocco has readily accepted 13 former detainees, 12 of whom were Moroccan nationals. *See The Guantánamo Docket: Transferred to Morocco*, N.Y. TIMES, (accessed May 20, 2019), *available at* <https://www.nytimes.com/interactive/projects/guantanamo/transfer-countries/morocco>.

²⁴ Pet'r's Emer. Mot. for Order Effecting Release, *Nasser v. Obama*, No. 05-cv-00764 (CKK) (D.D.C. Jan. 13, 2017) (Dkt. No. 257).

²⁵ *See* National Defense Authorization Act for Fiscal Year 2016, Pub. L. No. 114-92, § 1034(a)(1), 129 Stat. 726, 969 (2015) (2016 NDAA).

. . . as he elected to leave that decision to his successor.”²⁶ At that point, it was widely reported that then-presidential candidate Donald Trump wanted to keep Guantánamo open and “load it up with some bad dudes.”²⁷ In effect, the former Secretary of Defense under the Obama administration, Ashton Carter, elected to punt to his successor, knowing full well that the Trump administration would hide, rather than run with, that ball.

President Trump has made clear his administration’s simple policy regarding Guantánamo detainees: “[T]here should be no further releases from Guantanamo.”²⁸ On January 30, 2018, President Trump issued an executive order that revoked the prior administration’s directive to close Guantánamo, ordered its continued operation, and endorsed its use for additional detainees.²⁹

²⁶ See Resp’ts’ Resp. to Pet’r’s Emer. Mot. for Order Effecting Release at 6-7, *Nasser v. Obama*, 05-CV-0764 (CKK), (D.D.C. Aug. 18, 2017) (Dkt. No. 259).

²⁷ See David Welna, *Trump Has Vowed to Fill Guantánamo With Bad Dudes—But Who?*, NPR (Nov. 14, 2016), available at <http://n.pr/2CNr01T>; see also Remarks of Donald Trump, Sparks, NV, YOUTUBE, (Feb. 23, 2016), available at https://www.youtube.com/watch?v=3zEubx_2uOc.

²⁸ Donald J. Trump (@realDonaldTrump), Twitter (Jan. 3, 2017 9:20 AM), available at <https://twitter.com/realDonaldTrump/status/816333480409833472>; See Defs.’ Supplemental Submission and Further Resp. to Pls.’ Post-Briefing Notices at 4, *James Madison Project, et al. v. Dep’t of Justice, et al.*, Civ. No. 1:17-cv-00144-APM (D.D.C. Nov. 13, 2017) (answering the court’s question about the official status of the President’s tweets by noting that the “government [Department of Justice] is treating the President’s statements to which plaintiffs point – whether by tweet, speech or interview – as official statements of the President of the United States.”).

²⁹ See Exec. Order 13823 § 2(a), 83 Fed. Reg. 4831 (Jan. 30, 2018).

In an action further evidencing its lack of intent to transfer any detainees, the Trump administration dissolved the State Department's Office of the Special Envoy for Guantánamo Closure (the "Guantánamo Envoy's Office"), the office that was historically responsible for arranging detainee transfers. There is no evidence that the principal functions performed by this office have been assumed by any other part of the U.S. government in any meaningful way. Indeed, since the Guantánamo Envoy's Office was dismantled, Al Bihani, Nasser, and their respective counsel have not identified anyone within the Department of State, the Department of Defense, or any other agency responsible for actively working on arranging current detainee transfers. They also are not aware of any efforts undertaken by the Trump administration to transfer Al Bihani and Nasser. While Executive Order 13823 retains the existence of the PRB process and vaguely permits the Secretary of Defense to transfer detainees "when appropriate,"³⁰ the Court cannot mistake those written pronouncements as meaningful due process. They are no process whatsoever.

In a court filing on February 16, 2018, the government stated that Al Bihani was not transferred because of "a variety of substantive concerns relevant to [Al Bihani's] circumstances, including factors not related to [Al Bihani] himself" but

³⁰ Exec. Order 13823, § 3(a), 83 Fed. Reg. at 4832.

that he “remains eligible for transfer.”³¹ Regarding Nasser, the government confirmed that “no decision has been made as to whether to proceed with this transfer.”³² Thus, Al Bihani and Nasser remain detained for reasons unrelated to their cleared status. At bottom, outside of the court system, there is no process available to address Al Bihani and Nasser’s predicament. All of their hopes lie on this Court’s decision.

B. The Government’s Continued Detention of Al Bihani and Nasser Serve No Legitimate Purpose.

It is axiomatic that that under the Fifth Amendment’s Due Process Clause non-criminal confinement, for any purpose, “constitutes a significant deprivation of liberty that requires due process protection,” and, thus, the government “must have ‘a constitutionally adequate purpose for the confinement.’” *Jones v.*, 463 U.S. at 361 (quoting *O’Connor v. Donaldson*, 422 U.S. 563, 574 (1975)); *see also Foucha*, 504 U.S. at 80 (“We have always been careful not to ‘minimize the importance and fundamental nature’ of the individual’s right to liberty.”) (quoting *United States v. Salerno*, 481 U.S. 739, 750 (1987)). The Supreme Court established long ago that, at a minimum, “due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the

³¹ Resp’ts’ Opp. to Pet’r’s Mot. for Order Granting Writ of Habeas Habeas Corpus at 16, *Al-Bihani et al. v. Trump et al.*, 1:04-cv-01194 (UNA), (D.D.C. Feb. 16, 2018) (Dkt. No. 1126).

³² *Id.*

individual is committed.” *Jackson*, 406 U.S. at 738; *Foucha*, 504 U.S. at 79 (same). To that end, courts must consider whether the purpose of the detention is to punish the detainee and, if not, whether the detention is excessive in light of the government’s purpose. *See Salerno*, 481 U.S. at 747 (“[T]he punitive/regulatory distinction turns on whether an alternative purpose to which [the restriction] may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned [to it].”) (internal citations and quotation marks omitted) (alternations in original). Thus, detention without a legitimate purpose constitutes a violation of due process. *Id.* at 752.

The Executive branch detained Al Bihani and Nasser under the AUMF. The Supreme Court has interpreted the AUMF as permitting detention as a “necessary and appropriate” use of force as long as it is consistent with long-standing law-of-war principles. *Hamdi*, 542 U.S. at 520. Indeed, the government has long acknowledged that its detention authority under the AUMF is informed and limited by law-of-war principles.³³ In the context of Guantánamo, law-of-war principles dictate that “[t]he purpose of detention is to prevent captured individuals from

³³ *See* Resp’ts’ Mem. Regarding the Gvt’s Detention Authority Relative to Detainees Held at Guantánamo Bay at 2, *In Re Guantánamo Bay Detainee Litigation*, No. 08-mc-442 (TFH) (D.D.C. Mar. 13, 2009) (Dkt. No. 1689) (“Principles derived from law-of-war rules governing international armed conflicts, therefore, must inform the interpretation of the detention authority Congress has authorized for the current armed conflict.”).

returning to the field of battle and taking up arms once again.” *Hamdi*, 542 U.S. at 518 (internal citations omitted).

In the case of Al Bihani and Nasser, the Executive branch determined that both men could be released from Guantánamo on the condition of the Executive branch securing a country in which to resettle each of them, meaning that the Executive branch determined that neither posed a significant enough of a security threat such that they would return to the battlefield. The government had even secured transfer arrangements with countries agreeing to receive and resettle them (i.e., Saudi Arabia for Al Bihani and Morocco for Nasser). Thus, the government’s actions reflect that any law-of-war purpose that may have once existed to justify Al Bihani and Nasser’s detention has now been vitiated. If there was a real risk that these men would return to the battlefield, they would not be eligible for transfer. For them, law-of-war detention is thus at an end. The government, however, has now deliberately and blatantly disregarded the determinations it made with respect to Al Bihani and Nasser, and unilaterally set aside those transfer arrangements. As already mentioned, no decision-maker exists in this administration with whom Al Bihani and Nasser could even speak to about their transfers.

As explained in section II.A., neither of the reasons the government cited for refusing to transfer Al Bihani and Nasser relate to the determinations previously made regarding their clearances. If the only legitimate purpose of detention is to

prevent captured individuals from returning to the battlefield, and the government has effectively concluded that neither detainee would return to the battlefield, continuing to detain them nonetheless serves no legitimate purpose. Accordingly, the continued detention of Al Bihani and Nasser cannot be supported by law-of-war principles, *see Hamdi*, 542 U.S. at 520, and it directly offends the Due Process Clause, which prevents noncriminal detention without a legitimate, nonpunitive purpose, *Salerno*, 481 U.S. at 747. Indeed, the government incredibly claims to have the legal authority to detain Al Bihani and Nasser for over a hundred years, as it explained to Judge Hogan in July of 2018 at oral argument in the near-identical motion to the one giving rise to this proceeding.³⁴ This cannot be the state to which our concept of fundamental due process has been reduced.

The government's historic failure and now refusal to transfer Al Bihani and Nasser despite being cleared for transfer reflect a clear example of arbitrary governmental action. Al Bihani is the lone Yemeni out of the 30 cleared for release. The others have long ago been transferred out of Guantánamo to third countries. Despite a third country—Saudi Arabia—agreeing to resettle him, he remains detained through no fault or circumstances of his making. There is otherwise nothing remarkable about Al Bihani. In a similarly arbitrary decision,

³⁴ Tr. of Oral Argument at 36-37, *Nasser v. Trump*, No. 04-cv-1194 (TFH) (D.D.C. July 11, 2018) (Dkt. No. 1148) (responding to the court's question: "So if we have the Hundred 18 Years' War in England—which was the 14th, 15th century; 19 it's a 116-year war—under your theory, the prisoners could be held for that long[?]").

Nasser was cleared for transfer to Morocco. Based on no fault of his own and the unfortunate timing of a change in U.S. presidential administrations, then-Secretary of Defense Carter decided to abdicate his responsibility to his successor, surrendering Nasser to the whims of a President who has pledged to keep Guantánamo open and “load it up with some bad dudes.”³⁵ Nasser is now effectively serving an indeterminate and potential life sentence based on the mere volition of decision-makers during an administration change. Al Bihani and Nasser are poster children for arbitrary government action. *See Foucha* 504 U.S. at 80 (“Freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action”); *see also Hamdi*, 542 U.S. at 529. These two men (as well as Appellant and the other Guantánamo detainees currently challenging their detention) find themselves here now solely because of the complete and utter lack of process over their detention. Absent the application of reasonable and judicially enforceable due process protections to Guantánamo detainees, neither Al Bihani nor Nasser has an ability or basis to challenge the government’s willful failure and unyielding refusal to transfer them. It is time for the Court to do what the government deliberately refuses to do, that is, provide them with fundamental due process.

³⁵ *See* David Welna, *Trump Has Vowed to Fill Guantánamo With Bad Dudes—But Who?*, NPR (Nov. 14, 2016), *available at* <http://n.pr/2CNr01T>.

CONCLUSION

The Court should reverse the district court decision and conclude that the Due Process Clause applies to Guantánamo detainees.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULES 29(a) AND 32(a)

In accordance with Fed. R. App. P. 29(a) and 32(a), the undersigned certifies that this brief has been prepared using Microsoft Word with Times New Roman 14 point font. Excluding the parts of the brief exempted by Fed. R. App. P. 32(f), it contains 5,572 words.

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CERTIFICATE OF SERVICE

I hereby certify that, on May 22, 2019, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia by using the Court's CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the Court's CM/ECF system.

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