

ORAL ARGUMENT NOT YET SCHEDULED  
No. 22-1097

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

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ALI HAMZA AHMAD SULIMAN AL BAHLUL,  
Petitioner,

v.

UNITED STATES OF AMERICA,  
Respondent.

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ON PETITION FOR REVIEW FROM A DECISION OF  
THE COURT OF MILITARY COMMISSION REVIEW  
CASE NO. CMCR-21-003

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BRIEF FOR CONCERNED MUSICIANS AS *AMICUS CURIAE*  
IN SUPPORT OF PETITIONER

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

Pursuant to D.C. Circuit Rule 28(a)(1), *amicus curiae* submits this certificate as to parties, rulings, and related cases.

### A. Parties and *Amici*

Except for the following, all parties, intervenors, and amici appearing in this court are listed in the Brief for Petitioner: *Amicus curiae* Concerned Musicians, consisting of Robert del Naja and his musical collective *Massive Attack*, Henry Shearer, and Roger Waters.

### B. Rulings under Review

References to the decision at issue appear in the Brief for Petitioner Ali Hamza Ahmad Suliman al Bahlul.

### C. Related Cases

Related cases are listed in the Brief for Petitioner Ali Hamza Ahmad Suliman al Bahlul.

**RULE 26.1 DISCLOSURE STATEMENT**

*Amicus* Concerned Musicians and its member *Massive Attack* have no parent corporations, and no publicly held corporations own any of their stock.

**CERTIFICATE OF COUNSEL REGARDING AUTHORITY TO FILE**

Pursuant to FRAP 29(a)(2), all parties to the litigation have consented to the filing of this *amicus* brief.

Pursuant to D.C. Circuit Rule 29(d), counsel for *amicus curiae* Concerned Musicians certifies that *amicus* is not aware of any other non-governmental *amicus* brief addressing the subject of this brief.

**CERTIFICATE REGARDING AUTHORSHIP AND FINANCIAL  
CONTRIBUTIONS**

*Amicus curiae* certifies pursuant to FRAP 29(a)(4)(E) that:

- (i) No party's counsel authored the brief in whole or in part;
- (ii) No party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and
- (iii) No person—other than the *amicus curiae*, its members, or its counsel—contributed money that was intended to fund preparing or submitting this brief.

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## INTEREST OF AMICUS

The members of *Amicus* are all musicians who have a particular link to the abuse of prisoners in Guantánamo Bay and in other secretive U.S. prisons. The members of *Amicus* are as follows:<sup>1</sup>

1. **Robert del Naja & *Massive Attack***: *Massive Attack* is an English trip hop collective formed in 1988 in Bristol. In 2008, they curated the Southbank *Meltdown*, focusing heavily on the recently released evidence of the torture of UK resident Binyam Mohamed. In 2010 they worked with the Audio Laboratory at Cambridge University on *Saturday Come Slow*, an exploration of the manner in which music was used to abuse prisoners in Guantánamo Bay.<sup>2</sup>

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<sup>1</sup> *Amicus* understands that people may have very different political views and hence this brief brings together musicians on one clearly defined issue: that music should not be used to torture. *Amicus* is aware of many other musicians whose work has either been used in the abuse, or who have composed on the subject, who have been unable formally to join the brief. Often this can be a result of contractual issues with corporate entities with whom they have business relationships, but this does not mean the individual musicians are not very sympathetic to the questions in this brief. The members of *Amicus* are able legitimately to represent the interests of individuals far beyond the numbers listed here.

<sup>2</sup> See <https://www.youtube.com/watch?v=XCjRpe07AKk> (accessed Nov. 21, 2022).



2. **Harry Shearer:** is a musician, actor, and comedian. He is well known for his role as bassist Derek Smalls in *This is Spinal Tap* and (using this *alter ego*) recently authored an OpEd in the New York Post titled “*One Louder*” about the use of music to abuse prisoners—the reference being to the *Spinal Tap* amplifier that went up to 11. He has written a number of songs concerning Guantánamo Bay and the abuse of prisoners, including *Who is Yoo?*, *Waterboardin’ USA* and *We Tortured some Folk*.
3. **Roger Waters:** in 1965, he co-founded the progressive rock band *Pink Floyd*, in which he variously served as the bassist, lyricist, vocalist and conceptual leader until his departure in 1983. For the past 40 years, he has continued to inject political and human rights issues into his music, sometimes influenced by issues of war, inspired in part by the death of his father during the Battle of Anzio in Italy in 1944. A trenchant critic of torture and of Guantánamo, his recent song *Picture That* asks the audience to consider the misery of prisoners there.

The purpose of their intervention is to provide an insight into how this abuse is tainting American society and culture well beyond even the

horrific acts of torture themselves. *Amicus* also raises a strenuous objection to the abuse of art by U.S. authorities (in the course of abusing human beings), which *Amicus* deems contrary to the basic norms of civilized society.

## STATEMENT OF FACTS

The strange world that is Guantánamo Bay came into its current iteration in January 2002. Since then, insofar as it is relevant to the issue before this Court, the members of *Amicus* (and others) have described many of the reasons why statements extracted by abuse cannot be viewed as voluntary.

### 1. The Abuses Suffered by Appellant, Charted in Music.

All Guantánamo prisoners' trauma begins in a faraway country when they are turned over – perhaps 86 percent of the time sold for a bounty<sup>3</sup> – to the U.S. Normally the prisoners suffered violence where they were first detained, which in Appellant's case was the border with

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<sup>3</sup> Denbeaux, Mark, Denbeaux, Joshua W. & Gregorek, John Walter, Report on Guantanamo Detainees: A Profile of 517 Detainees Through Analysis of Department of Defense Data (February 2006), Seton Hall Public Law Research Paper No. 46, available at SSRN: <https://ssrn.com/abstract=885659> or <http://dx.doi.org/10.2139/ssrn.885659>.

Pakistan as he tried to leave Afghanistan. He was held by local forces for ten days, and then for two weeks from December 26, 2001, in Kandahar Air Force Base<sup>4</sup> under notoriously harsh conditions. Appellant arrived in Guantánamo Bay on January 11, 2002, when the base was at its most raw – the new arrivals held in Camp X-Ray outdoor cages surrounded by guard towers.

Appellant came to Cuba via the process called “extraordinary rendition” as Roger Waters describes in *Picture That*:

*Wish you were here in Guantánamo Bay:  
Picture a seat on a private plane,  
Picture your feet nailed to the floor;  
Picture a crew who are clearly insane,  
Picture no windows, picture no doors...<sup>5</sup>*

In 2008, *Massive Attack* projected prisoner statements above the River Thames describing the various forms of torture along with what band member Rob Del Naja described as “an alternative travel guide to the

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<sup>4</sup> See New York Times Guantánamo Docket, *JTF-GTMO Assessment for Ali Al Bahlul* at 4 (Nov. 15, 2007), available at <https://int.nyt.com/data/documenttools/82835-isn-39-ali-hamza-ahmad-suliman-al-bahlul-jtf/4d141c6705ba3f6b/full.pdf> (accessed Nov. 4, 2022).

<sup>5</sup> See <https://www.youtube.com/watch?v=99cIUjPYqDE> (accessed Nov. 4, 2022).

world based on your rendition map which shows how terrorist suspects have been flown across the globe.”<sup>6</sup>

The rendition process was intended to be part of breaking the prisoner’s spirit. In addition to hooding and shackling, prisoners were forced to use the toilet with soldiers of both genders watching, a profound trauma to a conservative Muslim. Thus, rendition came replete with its own torture, as described by Misery Index in *Black Sites*:

Leviathan devours all...  
Nameless agents haunt the shadow world  
Stateless numbers plan clandestine deeds  
To the ranks of the long disappeared  
They become your whole reality, your silencer, your lonely  
God  
And across the Styx you'll ride,  
When torture angels come to take you home  
Simulated death endured, rope tears into wrists  
Swollen head in blackened hood, blinded blistered face  
Hang upright puking blood, routine torture test  
As minions of the State have their way with you  
Beaten, drugged, broken limbs  
Burned, drowned, dissidents  
The work of death, carried out, in all our names... again  
*"Rendition is not a problem" (until it's you).*<sup>7</sup>

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<sup>6</sup> See <https://massiveattack.ie/scans/observer-feature-for-meltdown-festival> (accessed Nov. 4, 2022).

<sup>7</sup> See <https://genius.com/Misery-index-black-sites-lyrics> (accessed Nov. 4, 2022).

Appellant found himself on the other side of the world. It is lost on nobody that Guantánamo was selected because it was thought – before *Rasul v. Bush*, 542 U.S. 466 (2004) – to be beyond the boundaries of the law, a legal black hole, as Dave Peirce writes in *Will you Christians and Jews*:

The USA welcomes young Islamic tourists  
To waterboard down on Guantanamo Bay  
*Conveniently outside its judicial boundaries*  
Together at the pleasure of the torturers' play.<sup>8</sup>

Guantánamo was, at a basic level, intended to cause suffering to the prisoner, as Pete Townshend (of *The Who*) writes in *Ball & Chain*:

That pretty piece of Cuba  
*Designed to cause men pain*  
Oh, when you light up in Cuba  
You won't feel the same again.<sup>9</sup>

Some of the rendition experience was replicated by conditions at Guantánamo. For example, *en route* to interrogation the same shackling

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<sup>8</sup> See <https://www.youtube.com/watch?v=5mg5k1wUJ2c> (accessed Nov. 4, 2022).

<sup>9</sup> See <https://www.youtube.com/watch?v=qWGqcX-QXEw> (accessed Nov. 4, 2022); See also David Rovics, *After We Torture Our Prisoners* (“[w]hen you torture my brother at gunpoint ... his head [in] a canvass sack”), <https://www.youtube.com/watch?v=TN7Lv0PR4Q8> (accessed Nov. 4, 2022).

and hooding would be used. As the band Judas Priest recall in *Screaming for Vengeance*:

We are screaming, screaming for vengeance  
The world is a manacled place  
Screaming, screaming for vengeance  
The world is defiled in disgrace  
*Tie a blindfold all around your head*  
*Spin you 'round in the torture before the dread*  
*And then you're pushed and shoved into every corner...*<sup>10</sup>

There are many ways in which the abuses in Guantánamo rapidly became iconic, as with Xiu Xiu's tune, *Guantánamo Canto*, inspired by the wheeling of prisoners to their interrogation, "Confess, tied to a stretcher."<sup>11</sup>

Meanwhile, many prisoners have described how the use of deception, where the prisoner thought that someone else (perhaps a loved one) was being tortured, was among the most psychologically damaging. This is one subject of The Nightwatchman's song, *King of Hell*:

*I'm gonna find out what the screaming's about*  
*On the other side of that door...*<sup>12</sup>

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<sup>10</sup> See <https://genius.com/Judas-priest-screaming-for-vengeance-lyrics> (accessed Nov. 22, 2022).

<sup>11</sup> See <https://genius.com/Xiu-xiu-guantanamo-canto-lyrics> (accessed Nov. 4, 2022).

<sup>12</sup> See <https://genius.com/The-nightwatchman-the-king-of-hell-lyrics> (accessed Nov. 4, 2022).

In reality, as David Rovics described it in *Guantánamo Bay*, for years Appellant would not see his family, and only have the barest, highly-censored, communications with them on ICRC postcards.<sup>13</sup>

The sign it said welcome to the US of A  
In the Republic of Cuba, Guantanamo Bay  
Past the barbed wire fence and the field of mines  
*You can see the men who left their families behind*  
To burn 'neath the sun to be tortured and killed  
Where their stomachs are empty and their spirits are grilled  
If you're looking for freedom this is the price you must pay  
It's written in blood on Guantanamo Bay.<sup>14</sup>

Polly “P.J.” Harvey wrote a song entitled *Shaker Aamer*, named for a British resident held at Guantanamo, encapsulating the way in which his humanity faded away along with his mind and body:

I can't think straight, I write, I stop  
Your friend Shaker Aamer, lost:  
The guards just do what they're told;  
The doctors just what they're told.<sup>15</sup>

Far from eliciting sympathy, even the suicides by the prisoners were portrayed not as desperation but as a form of ‘asymmetrical warfare,’

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<sup>13</sup> Even after more than a decade they would only be allowed the occasional Skype call.

<sup>14</sup> See <https://genius.com/David-rovics-guantanamo-bay-lyrics> (accessed Nov. 4, 2022).

<sup>15</sup> See <https://www.theguardian.com/music/audio/2013/aug/03/pj-harvey-shaker-aamer-song-audio> (accessed Nov. 4, 2022).

intentional self-harm, as in *Guantanamo Canto* by Xiu Xiu: “Your suicide is politics? Nay, misery...”<sup>16</sup> There were 350 such incidents in 2003, with 150 examples of detainees attempting to hang themselves,<sup>17</sup> and at least seven ‘successful’ suicides.

As David Rovics depicted it in *There is a Cage*:

Wherever you find them, it's a tell-tale sign  
Of a society's precipitous decline  
When the people in power feel they must resort  
To conditions too confined to be sanctioned by the court  
*They keep prisoners in them for hours, days, weeks  
As long as required for the end they seek*  
No marks left on the victim, what a perfect crime  
No evidence of torture after all that time.<sup>18</sup>

This element of nihilism similarly inspired Zain Bhikha in his song *Guantánamo Bay*:

And so ends all romantic notions  
Discard due process, and redesign justice  
Detained by decree, starved of humanity  
Unaccused and untried, unconvicted ... unjustified.

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<sup>16</sup> See <https://genius.com/Xiu-xiu-guantanamo-canto-lyrics> (accessed Nov. 4, 2022).

<sup>17</sup> Associated Press, *23 Detainees Attempted Suicide in Protest at Base, Military says* (Jan. 25. 2005).

<sup>18</sup> See <https://davidrovics.bandcamp.com/track/there-is-a-cage> (accessed Nov. 4, 2022).



And the lost souls of Guantanamo Bay  
Guantanamo Bay.<sup>19</sup>

There was the pressure to inform as State Radio relate in their song

*Guantánamo*:

Hear you sold your friend  
Got a good price at the local store  
You know he could've turned you in  
Could have been you on the concrete floor  
Jefferson roll over and tell ol' Stalin the news  
They got 'em looked up in the Castroland  
Redefining abuse in shades of grey.

\* \* \*

Still the years they go by,  
No charge of trial date;  
You're accused of whatever you confess to,  
Until then you won't see the light of day

There must be another way  
There must be another way...<sup>20</sup>

*Head Crusher*, by Megadeath, approaches the issue of whether, once the prisoner has said something in Guantánamo under threat, he can meaningfully recant:

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<sup>19</sup> See <https://www.youtube.com/watch?v=FqDJBdTyY-4> (accessed Nov. 4, 2022).

<sup>20</sup> See <https://genius.com/State-radio-guantanamo-lyrics> (accessed Nov. 4, 2022).

Beaten, broken, in bloody rags  
Adding insult to injury, he recants  
But it's much too late, now let the torture begin<sup>21</sup>

Of course he cannot.

The term “Kafka-esque” found a great deal of use in connection with the prison, and detention of prisoners effectively incommunicado for years without rights was addressed at greater length by The Divine Comedy in *Guantánamo*:

They haven't departed  
They haven't gone home  
The trials haven't started  
No evidence shown  
They don't get no visits  
They don't get no calls  
And nobody tells them  
Nothing at all

The headphones and the blindfolds  
The days and the weeks  
The overalls of orange  
The manacled feet  
A Kafka-esque nightmare  
A legal black hole  
A corner of Cuba  
Named Guantanamo<sup>22</sup>

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<sup>21</sup> See <https://www.youtube.com/watch?v=XurU3TPHjzY> (accessed Nov. 4, 2022).

<sup>22</sup> See <https://genius.com/The-divine-comedy-guantanamo-lyrics> (accessed Nov. 4, 2022).

And ultimately one of the most pernicious aspects of this sorry saga is that the Bush Administration attempted to preclude legal oversight of these crimes by having two lawyers write contorted legal memoranda attempting to redefine torture. This is encapsulated in Harry Shearer's song *Who is Yoo*.<sup>23</sup>

All these laws and treaties,  
You want something new,  
This war may last forever,  
You'd need to turn the screw,  
He's teaching law at Berkeley he'll drop the other shoe,  
The Bill of Rights expired,  
The one who knows is Yoo.

Who is Yoo?  
Catch him if you can,  
Tortured Memo man,  
Who is Yoo?  
He just banned the ban,  
Tortured memo man.

Forgotten in the discussion of 'torture' are the 'lesser' abuses: the UN does not stop at torture—as made clear in the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* ("CAT").<sup>24</sup> Historically, moreover, this country has

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<sup>23</sup> The lyrics are transcribed from the song.

<sup>24</sup> *Adopted and opened for signature, ratification and accession by United Nations General Assembly resolution 39/46 of Dec. 10, 1984, Treaty Doc. No. 100-20, 1465 U.N.T.S. 85.*

developed the rule of law to apply to statements be rendered *involuntary* by threats or promises that fall far short even of “Cruel, Inhuman or Degrading Treatment.”

There has been a great quantity of music composed about torture and rendition by the U.S. since 9/11 – searing and condemnatory in one form or another. There has been little condemnation of torture in the courts, and virtually no analysis of the pernicious impact on ‘legal voluntariness’ of the broad range of abuses.

Musicians have played an essential role in prompting a dialogue about national conscience; here, music is ironically used as a tool of mistreatment. It is past time for this to meet the condemnation it merits.

## **2. Music Used to Torture**

One of the relatively novel forms of abuse used on prisoners was the use of extremely loud music which thundered day and night. This inspired *Massive Attack* in their curation of the South Bank *Meltdown* Festival in 2008 to focus on what had been done to detainee Binyam Mohamed:

During his time in the U.S. “secret prison system” [Guantánamo Detainee ISN 1458] Binyam [Mohamed] experienced a varied menu of torture techniques which grimly illustrate what happens when the “gloves come off”

and legal safeguards are thrown out of the window. During his almost seven-years in U.S. prisons, his suffering included beatings, being slashed with razors, having loaded guns put to his chest and being hung up for a week at a time. But it was “torture music” that Binyam found hardest to bear.

\* \* \*

Torture music is not “torture-lite,” despite being designed to “leave no marks.” The method has a history and a science. The CIA realized, through psychological experiments in the 1950s and 60s that you could break down a person’s identity and trigger psychosis through sensory deprivation and overload. Recognizing its seriousness, the United Nations (U.N.) and European Court of Human Rights (ECHR) have already outlawed the use of music in this fashion. The U.N. called it torture and the ECHR, cruel and inhuman treatment. However U.S. forces have continued to use this method.<sup>25</sup>

When it comes to Guantánamo Bay, many reports come from former prisoners. Appellant arrived in Cuba early in the piece – on January 11, 2002, the day the prison officially opened. The Tipton Three (Shafiq Rasul, Asif Iqbal, and Rhuheel Ahmed) were young British citizens who arrived shortly after Appellant, to be subjected to endless replays of “a dance version of Eminem” as well as “loud rock or heavy metal music.”<sup>26</sup>

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<sup>25</sup> ACLU, *Torture Music Leaves No Marks, But Destroys Minds* (June 17, 2009), available at <https://www.aclu.org/news/speakeasy/torture-music-leaves-no-marks-destroys-minds> (accessed Nov. 4, 2022).

<sup>26</sup> *Statement by the ‘Tipton Three’*, at 67, 77 (July 23, 2004). Iqbal arrived in Guantánamo on January 14, 2002, Rasul on February 10, and Ahmed on February 11, 2002.

Rasul and Iqbal wrote to the Senate Armed Services Committee in May of 2004 describing “loud music played that was itself a form of torture.”<sup>27</sup>

Another British national, Tarek Dergoul (who arrived in Guantánamo May 2, 2002), described how “[t]hey played US music very loud during interrogations,”<sup>28</sup> where they also mocked his religion. The loud music was both physically and culturally jarring. For example, “Deicide’s ‘*F\*\*\* Your God*’ was named as ranking pretty high on the favorites list for torture, and it’s pretty obvious why.”<sup>29</sup>

The Swede Mehdi Ghezali (who arrived in Guantánamo on January 17, 2002) describes various scenes:

Ghezali has described to Amnesty International the pain of “short shackling” in interrogations: “There was a ring attached to the floor. They chained your hands and feet to this ring. You had to sit chained with your arms between your legs from underneath. In this way, they could let you sit for hours.”... He said that during interrogations rap and heavy

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<sup>27</sup> Amnesty International, *United States of America, Human dignity denied Torture and accountability in the ‘war on terror’*, at 35 (October 27, 2004), available at <http://web.amnesty.org/library/index/engamr511452004> (“AI Report”).

<sup>28</sup> AI Report, *supra* note 27, at 37.

<sup>29</sup> Debra Kelly, *Songs That Were Used To Torture Prisoners* (July 21, 2022), available at <https://www.grunge.com/109853/songs-used-torture-prisoners/> (accessed Nov. 21, 2022) (“Kelly, *Songs that were used to Torture*”).

metal music was played loud, or sometimes loud un-tuned radio noise, which was "very unpleasant".<sup>30</sup>

The *New Statesman* reported various prisoners alleging that interrogators used Aerosmith, Eminem, Don McLean (“*American Pie*”), Bruce Springsteen (“*Born in the USA*”), Tupac Shakur, Meat Loaf, and Barney's theme song.<sup>31</sup> Endless repetition at earsplitting volume was intended to disorient and abuse its victims.

Binyam Mohamed described Eminem’s “*White America*” being played at him at excruciating volume 24 hours a day for twenty days. Since the song is 5:25 long, this translates to roughly 5300 times. Mr. Mohamed and Appellant spent much time together, discussing in bewilderment the abuses inflicted by the U.S.

Whatever one makes of detainee accounts, many descriptions of prisoner abuse in Guantánamo have come from observers rather than detainees. *The New York Times* reports:

One regular procedure that was described by people who worked at Camp Delta, the main prison facility at the naval base in Cuba, was making uncooperative prisoners strip to their underwear, having them sit in a chair while shackled hand and foot to a bolt in the floor, and forcing them to endure

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<sup>30</sup> AI Report, *supra* note 27, at 16.

<sup>31</sup> Clive A. Stafford Smith, *Torture by Music*, at 1, *New Statesman* (Nov. 6, 2006), available at <http://www.newstatesman.com/200611060029>.

strobe lights and screamingly loud rock and rap music played through two close loudspeakers, while the air-conditioning was turned up to maximum levels, said one military official who witnessed the procedure.<sup>32</sup>

The music included songs by Limp Bizkit, Rage Against the Machine, and Eminem.<sup>33</sup>

The *Washington Post* writes that FBI observers in Guantánamo observed the use of music:

In an e-mail dated Aug. 16, 2004, an agent from the FBI's inspection division reported observing a detainee sitting in an interview room at Guantánamo Bay's Camp Delta 'with an Israeli flag draped around him, loud music being played and a strobe light flashing.'<sup>34</sup>

In another e-mail, an FBI agent recounts at least three instances of detainees shackled with "extremely loud rap music" surrounding them.<sup>35</sup>

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<sup>32</sup> Neil A. Lewis, *Broad Use of Harsh Tactics Is Described at Cuba Base*, New York Times (October 17, 2004), available at <http://select.nytimes.com/search/restricted/article?res=FA0613F83E5E0C748DDDA90994DC404482> ("Lewis, *Harsh Tactics*").

<sup>33</sup> Lewis, *supra* note 32, *Harsh Tactics*.

<sup>34</sup> Dan Eggen & R. Jeffrey Smith, *FBI Agents Allege Abuse of Detainees at Guantanamo Bay* (Dec. 21, 2004), available at <http://www.washingtonpost.com/ac2/wp-dyn/A14936-2004Dec20?language=printer> ("Eggen & Smith, *FBI Agents Allege Abuse*").

<sup>35</sup> Eggen & Smith, *supra* note 34, *FBI Agents Allege Abuse*.



The New York Times identifies some of the music and added reports of other types of sounds being used as abuse:

Military officials who participated in the practices said in October [2004] that prisoners had been tormented by being chained to a low chair for hours with bright flashing lights in their eyes and audio tapes played loudly next to their ears, including songs by Lil' Kim and Rage Against the Machine and rap performances by Eminem.

In a recent interview, another former official added new details, saying that many interrogators used a different audio tape on prisoners, a mix of babies crying and the television commercial for Meow Mix in which the jingle consists of repetition of the word "meow."<sup>36</sup>

Some material comes from official records that were once, but are no longer, classified. With respect to Detainee Mohammed al-Qahtani (who arrived on February 13, 2002), *Time* magazine published the entire log covering November 23, 2002 to January 11, 2003. The Pentagon used music on al-Qahtani<sup>37</sup> including at least some by Christina Aguilera.<sup>38</sup> In

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<sup>36</sup> Lewis, *Harsh Methods at Guantánamo*, New York Times (January 1, 2005), available at <http://select.nytimes.com/search/restricted/article?res=F20A11FC3E5D0C728CDDA80894DD404482>.

<sup>37</sup> Adam Zagorin & Michael Duffy, *Inside The Interrogation Of Detainee 063. Exclusive: To Get The "20th Hijacker" To Talk, The U.S. Used A Wide Range Of Tactics. A Secret Log Reveals The First Documented View Of How Gitmo Really Works*, Time Magazine (June 12, 2005), available at <http://www.time.com/time/magazine/printout/0,8816,1071284,00.html> ("Zagorin & Duffy, *Detainee 063*").

<sup>38</sup> Zagorin & Duffy, *supra* note 38, *Detainee 063*.

the log the word "music" appears 52 times.<sup>39</sup> While the log generally isn't specific about what other songs are used, it shows the frequent, daily use of music to help extract information from the detainee. Meanwhile, a former translator separately identified other music used on al-Qahtani:

Erik Saar, a former Gitmo translator, describes in his book *Inside the Wire* how Qahtani "was subjected to strobe lights; a loud, insistent tape of cats meowing (from a cat food commercial) interspersed with babies crying; and deafening loud music--one song blasted at him constantly was Drowning Pool's thumping, nihilistic metal rant 'Bodies.'<sup>40</sup>

Guantánamo often appears immune to irony:

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<sup>39</sup> See, e.g., Center for the Study of Human Rights in the Americas, *Interrogation Log of al-Qahtani (Complete, 23 Nov. 2002 – 11 Jan. 2003)*, available at <https://humanrights.ucdavis.edu/projects/the-guantanamo-testimonials-project/testimonies/testimony-of-an-interrogation-log/interrogation-log-of-mohammed-al-qahtani-complete> (accessed Nov. 9, 2022) (“Detainee begins to chant. SGT R says, “If you continue to chant, I’ll turn on the music” Detainee stops chanting.”; “Detainee was hooded and taken back to primary interrogation booth. Loud music was played and the “devil in the smoke” theme was run.”; “Christina Aguilera music played.”; “Detainee was told to stand and loud music was played to keep detainee awake. Was told he can go to sleep when he tells the truth.”; “Detainee was subjected to white noise (music) waiting for his IV’s to be completed.”; “A variety of musical selections was played to agitate the detainee.”; “Upon entering booth, lead changed white noise music and hung pictures of swimsuit models around his neck. Detainee was left in booth listening to white noise . . . he began to cry quietly at this point”).

<sup>40</sup> Moustafa Bayoumi, *Disco Inferno*, *The Nation* (Dec. 26, 2005), available at <http://www.thenation.com/doc/20051226/bayoumi> (“Bayoumi, *Disco Inferno*”).

In 2017, Guantánamo Bay officials were busy booking entertainment for July 4. Yes, really. Among the scheduled acts was Drowning Pool, but even the name-redacted officials who were emailing back and forth thought this might not be the best idea. The emails — made public by the Freedom of Information Act — talked about how their live appearance at the base might be seen as being in poor taste, considering their song had been playing on a constant loop for 10 days while interrogators questioned Mohamedou Ould Slahi.<sup>41</sup>

The *Nation* offers some other examples from the play list:

In Guantánamo Bay, Eminem, Britney Spears, Limp Bizkit, Rage Against the Machine, Metallica (again) and Bruce Springsteen ("Born in the USA") have been played at mind-numbing volumes, sometimes for stretches of up to fourteen hours, at detainees.<sup>42</sup>

One FBI agent assigned to Guantánamo writes that he observed techniques “not associated with the FBI,” noting in particular:

I occasionally saw sleep deprivation interviews with strobe lights and two different kinds of loud music. I asked one of the interrogators what they were doing they [sic] said that it would take approximately four days to break someone doing an interrogation 15 hours on with the lights and music and four hours off. The sleep deprivation and the lights and the alternating beats of music would wear the detainee down.<sup>43</sup>

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<sup>41</sup> Kelly, *supra* note 29, *Songs that were used to Torture*.

<sup>42</sup> Bayoumi, *supra* note 40, *Disco Inferno*.

<sup>43</sup> Denbaugh M., Hafetz J. & Denbaugh J., *Guantánamo: America's Battle Lab*, Seton Hall Univ. Law, at 28, available at <https://law.shu.edu/policy-research/upload/guantanamo-americas-battle-lab-january-2015.pdf> (accessed Nov. 23, 2022).

In reality, this reflected a systematic, pseudo-scientific approach to the use of music as torture in Guantánamo Bay.

Quite rightly, musicians – including Tom Morello of Rage Against the Machine - have expressed horror that their work was being used in this way:

Guantánamo may be Dick Cheney's idea of America, but it's not mine. The fact that music I helped create was used in crimes against humanity sickens me...<sup>44</sup>

The work of different artists was used around the world including Aerosmith,<sup>45</sup> and rap music by Tupac Shakur.<sup>46</sup> Ali Shalal Qaissi, whose image appears in one of the infamous hooded photographs from Abu Ghraib, spoke of being "bombarded with a looped sample of David Gray's 'Babylon.' It was so loud, he said, 'I thought my head would burst.'"<sup>47</sup>

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<sup>44</sup> AFP, *US bands blast use of music in Guantanamo interrogations* (Oct. 22, 2009), available at <https://web.archive.org/web/20091025152431/http://news.yahoo.com/s/afp/usattacksguantanamomusicprisoners> (accessed Nov. 11, 2022).

<sup>45</sup> Phil Hirschhorn, *Pentagon IDs Suspected terror Accomplice: Detainee's lawyer denies accusation, alleges torture*, CNN.com (Dec. 10, 2005), available at <http://www.cnn.com/2005/LAW/12/09/padilla.accomplice/index.html> ("Hirschhorn, *Pentagon ID's Suspected Accomplice*").

<sup>46</sup> Hirschhorn, *supra* note 45, *Pentagon ID's Suspected Accomplice*.

<sup>47</sup> Bayoumi, *supra* note 40, *Disco Inferno*.

Often heavy metal music like AC/DC "*Hell's Bells*" and "*Shoot to Thrill*," along with Metallica's "*Enter Sandman*"<sup>48</sup> was used. In 2003, Sergeant Mark Hadsell openly declared to reporters that his favorites were Drowning Pool's "*Bodies*" and Metallica's "*Enter Sandman*," while the Sesame Street theme song and songs from the Barney TV show were also in the repertoire.<sup>49</sup>

All this – particularly material from Iraq – is relevant to Guantánamo as well since General Miller and others specifically spread the contagion between Cuba and Iraq as he transferred from one theater to the other. He declared he was there to “GTMO-ize Iraq,” which ended in sadly predictable fashion at Abu Ghraib. The use of shared playlists is evident from the training given to guards:

Songs from "Barney" and "Sesame Street" were high on the repeat list, and when one U.S. operative talked to Newsweek (via the BBC), he claimed part of their training was listening to Barney's "I Love You" song for a 45-minute, continuous

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<sup>48</sup> Lane DeGregory, *Soldiers take on insurgents with a musical vengeance, cranking up the volume to distress the enemy. The choice of tunes might surprise*, St. Petersburg Times (Nov. 21, 2004); Moustafa Bayoumi, *Disco Inferno*, The Nation (Dec. 26, 2005), available at <http://www.thenation.com/doc/20051226/bayoumi>.

<sup>49</sup> BBC, *Sesame Street breaks Iraqi POWs: Heavy metal music and popular American children's songs are being used by US interrogators to break the will of their captives in Iraq* (May 20, 2003), available at [http://news.bbc.co.uk/go/pr/fr/-/2/hi/middle\\_east/3042907.stm](http://news.bbc.co.uk/go/pr/fr/-/2/hi/middle_east/3042907.stm).

loop. He was quoted as saying, "I never want to have to go through that again."<sup>50</sup>

## LEGAL ARGUMENT

- I. **The kind of abuses that were routinely applied by the executive against the prisoners in Guantánamo (and other secret U.S. prisons) are of a nature that had not crossed the desks of U.S. judges for over one hundred years.**

We have to go back decades, and sometimes more than a century, to find cases from U.S. domestic law where the forms of abuse used against Appellant and other Guantánamo prisoners were last discussed. For example, if we look for examples of rendition (albeit far less significant than Appellant faced),<sup>51</sup> incommunicado detention (of a far

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<sup>50</sup> Kelly, *supra* note 29, *Songs that were used to Torture*.

<sup>51</sup> *Ward v. Texas*, 316 U.S. 547, 62 S.Ct. 1139 (1942) (involuntary statement where suspect was taken from his hometown, driven for three days from county to county, placed in a jail more than 100 miles from his home, questioned continuously, and abused).

lesser duration than here),<sup>52</sup> incessant questioning<sup>53</sup> which was prolonged (but did not last months and years as here),<sup>54</sup> we generally have to go back at least half a century. It is the same if we look for the

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<sup>52</sup> *Fikes v. Alabama*, 352 U.S. 191, 77 S.Ct. 281 (1957) (statements resulting from incarceration in isolation for a week of questioning were not voluntary, notwithstanding absence of physical brutality); *Lisenba v. California*, 314 U.S. 219, 237, 62 S.Ct. 280, 291-92, 86 L.Ed. 166 (1941) (“we think it right to add that where a prisoner held incommunicado is subjected to questioning by officers for long periods, and deprived of the advice of counsel, we shall scrutinize the record with care to determine whether, by the use of his confession, he is deprived of liberty or life through tyrannical or oppressive means.”); *Payne v. Arkansas*, 356 U.S. 560, 78 S.Ct. 844 (1958) (statement by suspect involuntary where he was held incommunicado for three days, without counsel, adviser or friend, and though members of his family tried to see him they were turned away, and he was refused permission to make even one telephone call, was denied food for long periods, and was threatened by the chief of police ‘that there would be 30 or 40 people there in a few minutes that wanted to get him,’ which statement created such fear as immediately produced the ‘confession’).

<sup>53</sup> *Turner v. Pennsylvania*, 338 U.S. 62, 69 S.Ct. 1352 (1949) (confession exacted as the result of questioning by relays of officers from four to six hours a day for five days, during which time defendant was not permitted to see friends or relatives, was involuntary as a denial of due process).

<sup>54</sup> *McNabb v. United States*, 318 U.S. 332, 342, 343, 63 S.Ct. 608, 613, 614, 87 L.Ed. 819 (1943) (“Legislation throughout the country reflects a similar belief that detention for purposes of eliciting confessions through secret, persistent, long continued interrogation violates sentiments deeply embedded in the feelings of our people.”).

denial of medical care,<sup>55</sup> or the prolonged denial of food.<sup>56</sup> If we search for cases of severe and intentional beatings most of the caselaw is over a century old.<sup>57</sup> We have to go back slightly over a century to find a reference to *Strappado*<sup>58</sup> – named by the Spanish Inquisition – which has sadly been put back into use by the United States. To find a case

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<sup>55</sup> *Ziang Sung Wan v. U.S.*, 266 U.S. 1, 45 S.Ct. 1 (1924) (confession involuntary where he was interrogated for seven days and was weak and exhausted from illness).

<sup>56</sup> *Payne v. Arkansas*, 356 U.S. 560, 78 S.Ct. 844 (1958) (statement by suspect involuntary where he was held incommunicado for three days, without counsel, adviser or friend, and though members of his family tried to see him they were turned away, and he was refused permission to make even one telephone call, was denied food for long periods, and was threatened by the chief of police ‘that there would be 30 or 40 people there in a few minutes that wanted to get him,’ which statement created such fear as immediately produced the ‘confession’); *Enoch v. Com.*, 141 Va. 411, 126 S.E. 222 (Va. 1925) (confession involuntary where defendant was denied food over two days, was exhausted, and fainted, though no threats or promises were made).

<sup>57</sup> *State v. Butts*, 349 Mo. 213, 159 S.W.2d 790, 791 (1942) (confession suppressed as involuntary when defendant was beaten and his injuries were confirmed by the jail physician); see also *Hector (A Slave) v. State*, 2 Mo. 166, 1829 WL 1770 (Mo.), 22 Am.Dec. 454 (Sept. 1829); *Lang v. State*, 178 Wis. 114, 189 N.W. 558 (Wis. 1922); *State v. Myers*, 312 Mo. 91, 278 S.W. 715 (Mo. 1925); *State v. Ellis*, 294 Mo. 269, 242 S.W. 952 (Mo. 1922); *Williams v. State*, 2 Miss.Dec. 601, 1882 WL 4347 (Miss. 1882).

<sup>58</sup> *McClung v. Star-Chronicle Pub. Co.*, 274 Mo. 194, 202 S.W. 571 (Mo. 1918) (where warden of penitentiary kept convict “in rings” 14 hours a day for 20 days to compel him to confess as to where he got whisky, he used “torture” within dictionary meaning; “It is there said to have been last used in England in 1640.”).



involving second degree torture (forcing prisoners to watch or listen to the abuse of other prisoners), we must go back 156 years.<sup>59</sup>

When it comes to using music on prisoners, this is a more modern form of abuse – it could not have occurred a hundred years ago as the interrogators would have been required to rent an orchestra to play the same tune over and over. Hence Appellant’s case may boast an unfortunate record as the first where torture by music may be addressed directly by a U.S. court.

There is no doubt that the use of music was intended simply to ‘break’ Appellant. Indeed, the Guantánamo Bay Standard Operating Procedures (“SOPs”) tell their own story. See *Camp Delta Standard Operating Procedures*, Joint Task Force Guantánamo (published March 28, 2003). For example, the Behavior Management Plan describes how it is designed to “enhance and exploit the disorientation and disorganization felt by a newly arrived detainee in the interrogation

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<sup>59</sup> *State v. Lawson*, Phil.Law 47, 1866 WL 1070 (N.C. 1866) (confessions made by a prisoner, a slave, whilst witnessing torture inflicted upon another prisoner for the same offence, in order to extort confession from him, are not competent evidence).

process.” See *Camp Delta SOP 4-20*, Joint Task Force Guantánamo (published March 28, 2003).

**II. The abuses applied in these cases have undermined the U.S. in multiple ways and it is past time that the Courts make clear that this is not what America should stand for.**

As the *Wall Street Journal* put it, “[p]ersonal responsibility, along with compassionate conservatism and limited government, [was] a mainstay of Mr. Bush’s presidential campaign.”<sup>60</sup> It is not compassionate; it is not conservative; and it is not a reflection of “limited government” when the Executive Branch tortures prisoners. Similarly, it is none of these things blatantly to lie about it.<sup>61</sup>

There must be some accountability here.

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<sup>60</sup> Albert R. Hunt, *Bush Calls for Personal Responsibility ... for Others*, *Wall Street Journal* (May 4, 2000), available at <https://www.wsj.com/articles/SB957398672247230798> (accessed Nov. 8, 2022).

<sup>61</sup> Human Rights Watch, *US: Senate report Slams CIA Torture, Lies* (Dec. 10, 2014), available at <https://www.hrw.org/news/2014/12/10/us-senate-report-slams-cia-torture-lies> (accessed Nov. 21, 2022) (“The summary documents numerous misrepresentations the CIA made about the program’s effectiveness and demonstrates US officials’ knowledge that it was illegal.”), citing U.S. Senate Intelligence Committee’s report summary on the Central Intelligence Agency (CIA) detention and interrogation program.

For the most part, there is none. Harry Shearer sings in *Who is Yoo?* of the so-called “torture memos” that were created primarily by John Yoo (later appointed a Professor of Law at Berkeley) and Jay S. Bybee (later appointed a federal appellate judge on the Ninth Circuit).<sup>62</sup>

There are various ways in which this responsibility could be imposed, yet none has been thus far. *Cf.* 17 U.S.C. §110 (defining the scope of copyright infringement).<sup>63</sup> Yet it is a separate moral and legal offense to use evidence abused out of Appellant, or obtained similarly from others, against someone who continues to be held effectively

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<sup>62</sup> Andrew Cohen, *The Torture Memos, 10 Years Later*, *The Atlantic* (Feb. 6, 2012), available at <https://www.theatlantic.com/national/archive/2012/02/the-torture-memos-10-years-later/252439/> (accessed Nov. 8, 2022).

<sup>63</sup> In an interview with National Public Radio, Christopher Cerf, a writer of songs for Sesame Street since 1970 was horrified that his music was being used to torture people: “Oh my gosh, this is terrible. My music is torturing people.” Despite his strong opposition, he did think that at the very least the government should have to pay “royalties from it. ASCAP and BMI, I hope you're listening, because theoretically if the Army is playing those songs in a public place or even a semi-public place in Iraq, maybe we're entitled to a few cents and, of course, if Halliburton and Bechtel and all those guys can get paid out of the war, why shouldn't we?” *Interrogation Music*, NPR (June 7, 2003), available at <https://www.npr.org/templates/story/story.php?storyId=1290449> (accessed Nov. 21, 2022).

incommunicado,<sup>64</sup> thousands of miles from his family. Indeed, the UN

CAT has a specific answer to this suggestion:

Each State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made.

CAT Art. 15.

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<sup>64</sup> *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (rejecting the government's argument "that Hamdi's *incommunicado imprisonment* as an enemy combatant seized on the field of battle falls within the President's power as Commander in Chief under the laws and usages of war, and is in any event authorized by two statutes.") (emphasis supplied).

## CONCLUSION

This Court should not slam the prison gate on Appellant when evidence is being used in contravention of these fundamental issues. Music is said to have charms to soothe the savage beast; here human beings have been treated as beasts, and music has been corrupted and used as a sinister tool of psychological torture. As musicians, the members of *Amicus* call for the use of their art—and for all torture and other abuses—to be definitively and forever banned in the interrogation of prisoners.

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Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rules of Appellate Procedure 29(a)(5) and 32(a)(7) because the brief contains 6,291 words, excluding the parts of the brief exempt by Federal Rule of Appellate Procedure 32(f).

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## CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system on November 28, 2022.

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