UNITED STATES COURT OF APPEALS
***for the* District of Columbia Circuit**

In re: Encep Nurjaman, *Petitioner*	)	Case No. 23-1294
	)	Dated: October 24, 2023

PETITION FOR A WRIT OF MANDAMUS AND PROHIBITION TO THE MILITARY COMMISSION CONVENED BY CONVENING ORDER # 21-01

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

I. PARTIES AND *AMICI* APPEARING BELOW

This writ is filed pursuant to this Court's supervisory jurisdiction over the military commission created by Convening Order #21-01 (Jan. 21, 2021), reproduced in the attachments at [A1-A20]. The parties below are:

1. Encep Nurjaman, *Defendant-Accused*
2. Mohammed Nazir Bin Lep, *Defendant-Accused*
3. Mohammed Farik Bin Amin, *Defendant-Accused*
4. United States of America

II. PARTIES AND *AMICI* APPEARING IN THIS COURT

1. Encep Nurjaman, *Petitioner*
2. United States of America, *Respondent*
3. Amici: Brock Chisholm, Sondra Crosby, David Luban and Stephen Xenakis

III. RULINGS UNDER REVIEW

The rulings of the military commission and Court of Military Commission Review denying the relief sought in this petition are reproduced in the attachments to this petition at A1-60:

1. *In re Encep Nurjaman*, --- F.Supp.3d --- (USCMCR, June 13, 2023) (Page A1)
2. *United States v. Encep Nurjaman*, AE 0032.010 (TJ) Defense Motion to Dismiss Due to *Prosecution Use of Prohibited Evidence Obtained by Torture* (October 6, 2022) (Page A52)

IV. RELATED CASES

This case has not previously been filed with this court. Petitioner filed a petition for mandamus in the Court of Military Commissions Review (CMCR) below. The CMCR opinion in that action is styled *In re Encep Nurjaman*, CMCR 22-001 (June 23, 2023).

Dated: October 24,2023

By: /s/ Adam Thurschwell
Counsel for Petitioner

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Convention Against Torture ..... CAT

Court for Military Commissions Review ..... CMCR

International Commission of the Red Cross ..... ICRC

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INTRODUCTION

Mandamus is a "drastic and extraordinary remedy reserved for really extraordinary causes." *Cheney v. U.S. District Court*, 542 US 367, 380 (2004) (cleaned up). This is such an extraordinary cause. The Government now agrees that torture-obtained evidence is categorically inadmissible at all stages of a military commission proceeding. That interpretation is the only one consistent with Congress's criminalization of torture, 18 U.S.C. § 2340A; the only one consistent with the United States' obligations under international agreements to which it is party, s*ee e.g.* United Nations Convention Against Torture[1]; and the only one consistent with every declaration by the President or Executive Branch agency to have addressed the issue.[2] Yet in the decisions below, first the military judge and then the Court for Military Commissions Review ("CMCR") held that evidence obtained by torture *is* admissible in pretrial commission proceedings.

This issue is not new to the Court. Last year, the same issue was presented in *In re al-Nashiri*, 47 F.4th 820 (D.C. Cir. 2022). Upon reaching this Court, the Government reversed its earlier position that pretrial use was permitted; pledged

[1] United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, U.N. GAOR, 39th Sess., Supp. No. 51, at 197, U.N. Doc. A/39/51 (1984).

[2] *See e.g.* Statement from President Biden on International Day in Support of Victims of Torture, June 26, 2023 (the United States seeks to "continue to ensure that torture remains prohibited in all of its forms, without exception.").

that it would henceforth not use evidence obtained by torture at any stage of any military proceeding; and further promised that it would scour the record below and voluntarily withdraw any evidence found to be torture-derived, without further action by this Court. *Id.* at 825. Expressly based on these promises, the Court held that Abd al-Nashiri's argument was moot (1) because of the Government's assurance that it would not offer such evidence again in any commission proceeding, and (2) because the Government had "withdrawn the statements identified to have been made under torture" from consideration by the military commission below. *Id.*

Here, regardless of whether the Government repeats its earlier promise and satisfies the first condition, it cannot satisfy the second, because torture-related evidence was already put before the Convening Authority ("CA") and considered in support of Petitioner's referral. Nor can this Court any longer rely on the Government's promise even if it repeats it here. Notwithstanding any good-faith promises by the current prosecution team, with the holding below the CMCR has authorized the use of torture-obtained evidence in every pretrial proceeding in every current and future military commission case *as a matter of law*.

Accordingly, nothing short of a holding that evidence derived from torture *may never be used for any purpose at any phase of a military commission* can ensure that this issue will not again come before this Court.

JURISDICTION

This Court has supervisory jurisdiction over all military commissions created under the Military Commissions Act of 2009, Pub. L. No. 111-84 (2009). 10 U.S.C. § 950g. This Court can issue all writs necessary and appropriate in aid of that jurisdiction pursuant to 28 U.S.C. § 1651.

RELIEF SOUGHT

Petitioner, Encep Nurjaman, requests that this Court issue a writ of mandamus and prohibition vacating Convening Order #21-01 (Jan. 21, 2021).

ISSUES PRESENTED

I. Do 10 U.S.C. § 948r and the Due Process Clause of the Fifth Amendment categorically prohibit the admission of evidence derived from torture at all stages of a criminal proceeding under the Military Commissions Act of 2009, including referral?

II. May the admission of evidence in violation of this prohibition ever be treated as harmless error?

STATEMENT OF FACTS

A. Petitioner's Seizure and Confinement.

Petitioner Encep Nurjaman is a citizen of Indonesia. In August 2003, Thai and United States security forces apprehended Petitioner in Thailand on suspicion

of funding terrorist activities.[3] Shortly thereafter, he was remanded to Central Intelligence Agency ("CIA") custody. Subsequently, Petitioner was "almost immediately subjected to the CIA's enhanced interrogation techniques." Petitioner remained in CIA custody for more than three years, during which time the CIA held him incommunicado at various black sites and tortured him.[4]

On September 4, 2006, Petitioner was transferred to the custody of the U.S. military on Guantanamo Bay, alongside thirteen other so-called High Value Detainees. After his transfer, Petitioner remained in solitary confinement for more than ten years, and he remained under the operational control of the CIA for some time after his relocation.[5]

B. Petitioner's Torture by the United States.

Petitioner has been continuously detained by the CIA and Department of Defense for more than twenty years.[6] It was not until June 2017, more than ten

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[3] The Senate Intelligence Committee Report on Torture: Committee Study of the Central Intelligence Agency's Detention and Interrogation Program, Senate Report (https://www.intelligence.senate.gov/sites/default/files/documents/CRPT-113srpt288.pdf) ("Torture Report") at 311, 109.

[4] Torture Report at xiii, xxvii n.8, 76, 77 & n.409, 160 n.7, 310-11, 392 n.2211; *see also* Int'l Comm. of the Red Cross ("ICRC") Report on the Treatment of Fourteen "High Value Detainees" in CIA Custody, Feb. 2007 ("ICRC Report"). The Government does not contest that Petitioner was subjected to torture within the meaning of 10 U.S.C. § 948r(a) in the black sites. *See* ICRC Report at 5, 11, 12, 17, 19-20, 20, 22.

[5] Torture Report at 310-11, 160.

[6] Torture Report at 310-11, 392 n.2211.

years after his transfer to Guantanamo Bay and nearly fourteen years after he was taken into custody, that he was first charged. (A127)

The CA referred his case for trial on January 21, 2021. Along with the charge sheet, the Government provided the CA with a "referral binder" that consisted of some of the evidence the Government intended to present if Petitioner were referred for trial.

One binder document, labeled "Tab D – 911 Commission Report, Chp 5, Al Qaida Aims," is a photocopy of chapter 5.1 of the 9/11 Commission Report. Chapter 5 was titled "Al Qaeda Aims at the American Homeland," and subchapter 5.1 was titled "Terrorist Entrepreneurs" and included profiles of Khalid Sheik Mohammed, Petitioner, and Abd al Rahim al Nashiri. The 9/11 Commission report was used in support of at least one element of every charge and for two elements of three of the charges.

The Report chapter reproduced in the binder was based on twenty-three intelligence interrogation reports regarding Petitioner and other detainees conducted by the CIA using torture and other cruel, inhuman, and degrading treatment. Petitioner was subjected to torture "almost immediately" upon his transfer to CIA custody.[7] He remained in CIA custody for more than three years.[8]

[7] Torture Report at 309-10.
[8] Torture Report at 160 n.7, 310-11, 392 n.2211.

His treatment was so offensive that one of his interrogators told him that he could never go to court because "we can never let the world know what I have done to you."[9]

Petitioner described his torture during interviews with ICRC representatives in 2007.[10] Interrogators subjected Petitioner to prolonged stress standing for days at a time with his wrists shackled above his head, during which time he was stripped naked and forced to urinate and defecate on himself. At one point, medical personnel intervened to prevent the further use of the stress standing position while telling Petitioner, "I look after your body only because we need you for information."[11]

Early in his CIA detention, interrogators beat Petitioner and placed a thick collar around his neck, which they used to slam his head against the wall. Later, interrogators showed him the collar during sessions and threatened to repeat that treatment. Throughout his detention, the CIA deprived Petitioner of basic

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[9] Torture Report xiii, xxvii, n.8. Four of the five interrogations of Petitioner mentioned in the 9/11 Commission Report occurred in the weeks immediately prior to the CIA interrogator making this admission.

[10] ICRC Report. The Torture Report explains that "[t]he Committee found the ICRC [R]eport to be largely consistent with information contained in CIA interrogation records." Torture Report at 161; *see also* Torture Report at 77 & n.409 (noting that Mr. Nurjaman was one of "at least six detainees [who] were stripped and shackled nude, placed in the standing position for sleep deprivation, or subjected to other CIA enhanced interrogation techniques prior to being questioned by an interrogator in 2003").

[11] ICRC Report at 11, 20, 22.

necessities. The CIA held him in solitary confinement and deprived him of access to open air, solid food, exercise, and appropriate hygiene facilities and basic hygiene items. The CIA also restricted his access to the Quran.[12]

The Torture Report also provides detail about some of the methods used by the CIA. "Sensory Dislocation" included shaving detainees' heads and faces and exposing them to loud music in white rooms with white lights and keeping them "unclothed and subjected to uncomfortably cool temperatures," all while shackling them "hand and foot with arms outstretched over [their] head (with [their] feet firmly on the floor and not allowed to support [their] weight with [their] arms"). This would take place prior to questioning, regardless of any cooperation the detainee had already provided. Other actions included "near constant interrogations, as well as continued sensory deprivation, a liquid diet, and sleep deprivation." Detainees were subjected to the "attention grasp, walling, the facial hold, the facial slap . . . the abdominal slap, cramped confinement, wall standing, stress positions, sleep deprivation beyond 72 hours, and the waterboard, as appropriate."[13]

On January 21, 2021, 471 days after receiving the charges, the CA referred Petitioner for trial by a military commission.

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[12] ICRC Report at 12, 17, 19-20.
[13] Torture Report 77.

C. The Proceedings Below.

On March 14, 2022, Petitioner filed a motion to dismiss in the military commission proceedings based on the CA's consideration of evidence obtained by torture in making his referral decision. On October 6, 2022, the presiding military judge denied Petitioner's motion to dismiss, holding that 10 U.S.C. § 948r(a) does not apply to the referral stage. (A60) The military judge acknowledged that the Government had represented to this Court in *Al-Nashiri*, 47 F.4th 820 (D.C. Cir. 2022) ("*Al-Nashiri IV*"), that "§ 948r(a) applies to all stages of a military commission case," including pretrial proceedings. However, because the Government's position at the time of Petitioner's referral was that § 948r(a) did *not* apply to pretrial proceedings, he held that its earlier interpretation governed.[14]

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[14] That is, the military judge held in effect that it is the province of the Office of the Chief Prosecutor, not the judiciary, to say what the law is. *See Marbury v. Madison*, 1 Cranch (5 U.S.) 137, 177 (1803) ("[I]t is emphatically the province and duty of the judicial department to say what the law is."). The military judge reasoned that because *the Government interpreted* § 948r to permit pretrial use at the time of referral, pretrial use was *in fact* authorized by the statute:

> The Government's current position is that § 948r(a) applies to all stages of a military commission case. It is important to note the Government position at the time of referral was that § 948r(a) applied "only to the trial and sentencing phases of a military commission and not to pretrial proceedings." Therefore, at the time of the referral, the inclusion of the 9/11 Commission Report in the referral binder was not in violation of § 948r(a). (A57) (footnote omitted).

The CMCR agreed and adopted this analysis. (A40) (noting that "at the time of petitioner's referral, the government's stated position was that torture-derived

(A57) He further held that, even assuming the inclusion of the 9/11 Commission Report violated § 948r(a), the charging decision was valid based on other, untainted evidence in the record. (A59)

On November 22, 2022, Petitioner filed a petition with CMCR seeking a writ of mandamus vacating the military commission ruling and directing the military judge to dismiss the referral. The Government opposed, noting that the parties "are united in recognition that 'torture of any kind is legally and morally unacceptable, and that the judicial system of the United States will not permit the taint of torture in its judicial proceedings,'" but arguing again that the Government's use of such evidence was merely cumulative to other evidence before the Convening Authority. (A166, A184-89)

On June 23, 2023, the CMCR denied Petitioner's petition. The CMCR affirmed that § 948r(a) only prohibits the use of statements obtained by torture at trial and not at pretrial stages. (A39-40) It further held that, even if the use of the 9/11 Commission Report violated § 948r(a), Petitioner's due process rights were not violated and any error was "harmless beyond a reasonable doubt" because there was sufficient untainted evidence in the referral binder to support the charges.

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evidence could be used during motions (and presumably during all other pretrial points in the commission process).").

(A40-47) In so ruling, the CMCR relied exclusively on witness statements, so-called Letterhead Memoranda ("LHM") obtained by the FBI, that the Government "claims . . . were not obtained by the use of torture."[15] (A12)

REASONS FOR GRANTING THE WRIT

Issuance of a writ of mandamus turns on three factors: First, Petitioner must show that he has "no other adequate means to attain the relief he desires"; "[s]econd, the petitioner must [show] that his right to issuance of the writ is clear and indisputable"; and "third, . . . the issuing court . . . must be satisfied that the writ is appropriate under the circumstances." *Cheney*, 542 U.S. at 380-81 (cleaned up).

Clear and indisputable right: In Section I *infra*, we demonstrate that Petitioner's right to the issuance of the writ is clear and indisputable.

Other adequate means of relief: Petitioner has none. We show below that the use of torture-obtained evidence is a "structural defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself."[16] In a system where so many of the witnesses and so much of the evidence is directly or indirectly derived from torture, the taint created by the admissibility of torture-obtained evidence metastasizes in a manner that is invisible at trial and

[15] *But see* A65-114 (*United States v. Al-Nashiri*, AE 467CCC (Mil. Comm. Aug. 18, 2023)), *and* Section II.C., *infra*.
[16] *Arizona v. Fulminante*, 499 U.S. 279, 310 (1991).

on direct appeal. *See e.g.* Section II.C. Under these extraordinary conditions, direct appeal is not an adequate means of vindicating Petitioner's right to trial untainted by the Government's torture program.

Appropriate under the circumstances: Issuance of the writ is eminently appropriate – indeed, necessary – under the circumstances. The legacy of the torture program is not only the physical, mental and legal harm to Petitioner, but fundamental harm to the criminal justice system itself. *See* Section II.B. Moreover, the public has an interest in seeing justice done untainted by "[t]he rack and torture chamber."[17] Finally, because Petitioner's requested relief is simply an order vacating the current referral without prejudice, the Government's legitimate interest in a (torture-free) prosecution is preserved.[18]

I. IT IS CLEAR AND INDISPUTABLE THAT EVIDENCE OBTAINED BY TORTURE IS INADMISSIBLE AT ALL PHASES OF A MILITARY COMMISSION PROSECUTION, INCLUDING REFERRAL

A. 10 U.S.C. § 948r bars the use of evidence obtained by torture to decide whether an accused should be referred for trial

This is an issue that appeared to have been settled in *Al-Nashiri IV*.[19] The Court there held that the Government's unqualified representations during

[17] *Brown v. Mississippi*, 297 U.S. 278, 285-86 (1936).
[18] *See e.g. Rose v. Mitchell*, 443 U.S. 545, 557-58 (1978) ("Here, however, reversal does not render a defendant 'immune from prosecution,' nor is a subsequent reindictment and reprosecution 'barred altogether.'").
[19] *In re al-Nashiri*, at 820.

argument that "it will not seek to introduce any evidence obtained by the torture of Al-Nashiri or any third party in any stage of the proceedings" and that it had "also reviewed the ex parte record and withdrawn the only other two statements it uncovered as having been obtained through the use of torture" mooted al-Nashiri's claim that torture evidence was barred "at any stage of the proceedings."[20] Based on those representations, this Court concluded that "there is no reasonable expectation that the alleged violation will recur," and that in these circumstances al-Nashiri had alleged "no remaining case or controversy."[21]

In this case, the CMCR acknowledged the Government's *Al-Nashiri IV* concessions and this Court's express reliance on them. (A37-38) Nevertheless, it held that because Petitioner had "not advanced any theory . . . for concluding that the government's position before the D.C. Circuit in *Al-Nashiri IV* is the law *in this case*" (A39) (emphasis original), the *Al-Nashiri IV* holding had no bearing on its decision.[22] Accordingly, Petitioner had not demonstrated a clear and indisputable right to relief. (A40)

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[20] *Al-Nashiri IV*, at 825.
[21] *Id*.
[22] *Id*. The CMCR also suggested that the Government's promise never again to use torture evidence would only be enforceable in Mr. Al-Nashiri's case. (A39) As of the date that the Court issued its opinion in *Al-Nashiri IV* (Sept. 2, 2022), however, the Government itself understood its commitment to the Court as applying "at any stage of a military commission proceeding *against any party*." Peter S. Hyun, Acting Ass't Atty. Gen., Letter to Sens. Richard J. Durbin and Patrick Leahy, July 18, 2022, at 1 (emphasis added)

The precise scope of the CMCR's interpretation of § 948r(a) is unclear.[23] What is clear, however, is its holding that statements extracted by torture were a proper basis to charge and refer Petitioner to trial. Accordingly, by virtue of its superior jurisdiction over military commission trials, evidence extracted by torture is now a proper and legal basis for charges in all current and future commission proceedings. In so ruling, the CMCR has virtually invited the Government to continue to base charges against detainees on statements they made while being tortured, notwithstanding the categorical language this Court employed in *Al-Nashiri IV*.

Regardless of *Al-Nashiri IV*, the CMCR's interpretation of § 948r(a) is clearly and indisputably wrong on the merits. Section 948r(a) provides:

> No statement obtained by the use of torture or by cruel, inhuman, or degrading treatment (as defined by section 1003 of the Detainee Treatment Act of 2005 (42 U.S.C. 2000dd)), whether or not under color of law, shall be admissible in a military commission under this chapter, except against a person accused of torture or such treatment as evidence that the statement was made.

(https://www.judiciary.senate.gov/imo/media/doc/2022.07.18-OUT-Durbin-Leahy-Military%20Mistreatment.pdf).

[23] *Compare* A39 (section titled "'Admissible in a military commission' Refers to Evidence at Trial") *and* A39 ("We agree with the military judge's interpretation of the word 'admissible' in 10 U.S.C. § 948r(a)."), *with* A40 ("An at least equally plausible reading . . . is that evidence obtained by the use of torture or torture-derived evidence may not be introduced in a military commission, which encompasses motions practice, trial on the merits, and presentencing proceedings.").

On its face, the statute includes one express exception ("except against a person accused of torture or such treatment as evidence that the statement was made"); otherwise, the prohibition is couched in absolute terms. That is unsurprising, because both the exception and absolute prohibition are drawn from the Convention Against Torture (CAT),[24] with which Congress was fully familiar, having ratified it in 1994. The CAT could not be clearer that outside of that exception, the prohibition admits "[n]o exceptional circumstances whatsoever."[25] "Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent."[26] No such intent is manifest in this case.[27]

Nor is there anything about the justifications for the absolute prohibition – torture's inherent evil and inhumanity; its perversion of the justice system's moral

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[24] United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Art. 15), Dec. 10, 1984, 1465 U.N.T.S. 85 ("CAT"). Other international law authorities are to the same effect. *See generally* Amal Clooney & Philippa Webb, *The Right to a Fair Trial in Int'l Law* (2020), at 650 n.330. As a general matter, "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains." *Murray v. The Schooner Charming Betsy*, 2 Cranch (6 U.S.) 64, 118 (1804) (Marshall, C.J.).

[25] CAT, art. 2(2).

[26] *Andrus v. Glover Constr.*, 446 U.S. 608, 616–17 (1980).

[27] Outside of military commission practice, the Executive Branch has never deviated from its absolute rejection of torture. *See e.g.* Statement from Pres. Biden on Int'l Day in Support of Victims of Torture, June 26, 2023 (the United States seeks to "continue to ensure that torture remains prohibited in all of its forms, without exception.").

basis; its deterrence of gross government misconduct; and its distorting effect on the practical functioning of such a system, among others – that suggests that the charging and referral phase of the process should be distinguished from any other phase for these purposes. It is no less offensive to legalize torture as a valid basis for charging crimes than it is to legalize it as a means of collecting evidence in support of the Government's case on the merits. In sum, it is neither "plausible," "rational" nor "direct" (A40) to believe that Congress intended to exclude the referral stage of commission proceedings alone from the scope of the otherwise absolute bar on the use of torture.

After initially agreeing with the military judges and CMCR that § 948r(a) applied only to trial on the merits,[28] the Government has conceded that the ban applies at every stage of the proceedings. The military judges and CMCR, however, have not. To date the Government's strategy has been to keep its hands at least superficially clean of the morally, politically and legally repugnant embrace of torture without undermining its litigation successes. With the CMCR's holding below, however, it has become apparent that Government's high-wire casuistry – promising never to use torture on one hand while on the other refusing to take a position on the legality of its use – is no longer a tenable position. If the Government in fact stands by its professed abhorrence of torture, it will now join

[28] *Al-Nashiri IV*, at 824-25.

Petitioner's request that this Court hold as a matter of law that evidence obtained by torture may not be used at any stage of any military commission proceeding for any purpose.

B. The Due Process Clause bars the use of evidence obtained by torture at every stage of a commission proceeding

Although the Court can avoid the constitutional issue if it decides this case on statutory grounds, it is also clear that Petitioner's Due Process rights extend to suppression of his statements from his commission proceeding.

If it applies in Guantanamo at all, the Due Process Clause bars the use of torture-derived evidence at every stage of a commission proceeding.[29] While pretrial fact-finding is generally not subject to the rules of evidence, the prohibition on using evidence obtained by torture is not a technical rule of evidence.[30] Rather, "[t]he use of coerced confessions, whether true or false, is forbidden because the method used to extract them offends constitutional principles."[31] Thus, "[a] coerced confession is offensive to basic standards of justice . . . because declarations procured by torture are not premises from which a civilized forum will

[29] *See e.g. Rochin v. California*, 342 U.S. 165, 172 (1952) (review of criminal cases under the Due Process Clause extends to "the whole course of the proceedings . . . resulting in a conviction . . . .").
[30] Wright & Miller, 21A Fed. Prac. & Proc. Evid. § 5055 (2d ed.) ("Rule 104 cannot override the prohibitions on coerced confessions.").
[31] *Lego v. Twomey*, 404 U.S. 477, 484–85 (1972).

infer guilt."[32] Hence in *Brown*, the Supreme Court ruled that the use of evidence obtained by torture was not "mere error[]" or a "mere question of state practice," but instead was "a wrong so fundamental that it made the whole proceeding a mere pretense of a trial and rendered the conviction and sentence wholly void."[33]

This Court recently declined to determine the full scope of Due Process Clause protections at Guantanamo Bay.[34] However, it squarely rejected the proposition that "the Due Process Clause does not apply to noncitizens at Guantanamo,"[35] and recognized that the scope of the Clause's application is governed by the Supreme Court's "impracticable or anomalous" analysis in *Boumediene v. Bush*.[36] In her concurrence, Judge Pillard applied the *Boumediene* analysis to provide general guidance about the Clause's scope at Guantanamo, concluding that "[i]t would be no more impracticable to apply the Due Process Clause than the Suspension or *Ex Post Facto* Clause in this context."[37]

Similarly, if it is not "impracticable or anomalous" to enforce Petitioner's right to initiate separate judicial proceedings on United States territory before a federal judge in a different system of justice, geographically far removed from his

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[32] *Lyons v. Oklahoma*, 322 U.S. 596, 605 (1944).
[33] *Brown*, 297 U.S. at 286–87.
[34] *Al-Hela v. Biden*, 66 F.4th 217, 227–28 (2023) (*en banc*).
[35] *Id.* at 227.
[36] *Boumediene v. Bush*, 553 U.S. 723 (2008); *Al-Hela*, 66 F.4th at 220–21.
[37] *Al-Hela*, 66 F.4th at 248.

place of detention and military commission proceeding – that is, if it is not impracticable or anomalous to enforce Petitioner's rights under the Suspension Clause – then it is not "impracticable or anomalous" to require the Government to refrain from torturing detainees and using the fruits of that torture to prosecute them (arguably the most fundamental due process right of all).

In sum, if Petitioner has any due process rights at all in Guantanamo Bay – as the *Al-Hela* majority appears to have held, although it found no need to specify them – then he has the right to suppress statements extracted by torture.

II. THE HARMLESS-ERROR PRINCIPLE DOES NOT APPLY TO EVIDENCE DERIVED FROM TORTURE

The Supreme Court has long "recognized that most constitutional errors can be harmless," while at the same time holding that some violations can never be deemed harmless "even though there may be no reasonable doubt that the defendant is guilty and would be convicted absent the trial error."[38] The use of torture is never "harmless," either in the strictly legal sense of *Chapman v. California* or the broader sense of the fundamental values grounding American systems of justice.

[38] *Fulminante*, 499 U.S. at 306, 294; *see also Chapman* 386 U.S. at 23.

A. Use of evidence obtained by torture is a structural defect in the proceeding, not a mere trial error

It is an undisputed fact that Petitioner was tortured by the United States government for years, deliberately and systematically. Thus the CMCR's harmless-error[39] holding amounts to the claim that a legitimate judicial system can turn a blind eye to the systematic use of torture so long as doing so would not materially affect the decision in a particular case.

The CMCR's analysis flies in the face of the Supreme Court cases making it clear that some government conduct will not be condoned regardless of its effect on the ultimate outcome. In particular, the Supreme Court has drawn the line between "trial errors" (which may be treated as harmless errors) and "structural defects" (which may not).[40] That line is crossed at the point where government conduct "strikes at the fundamental values of our judicial system and our society as a whole."[41]

There are few constitutional violations, if any, that so pervasively "undermine[] the structural integrity of the criminal tribunal itself"[42] and the tribunal's fundamental legitimacy as the use of torture to obtain a conviction. Nor is there government conduct that more forcefully "strikes at the fundamental values

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[39] *Chapman v. California*, 386 U.S. 18 (1967).
[40] *Fulminante*, 499 U.S. at 309.
[41] *Rose v. Mitchell*, 443 U.S. 545, 556 (1978).
[42] *Vasquez v. Hillery*, 474 U.S. 254, 263-4 (1986).

of our judicial system and our society as a whole" or – as the Court expressed it in *Fulminante* – that "transcends the criminal process"[43] so much as torture.

The Supreme Court's refusal to apply harmless-error analysis for certain constitutional violations has appeared most starkly in cases, such as this one, in which the constitutional violation occurs during the charging process. In *Vasquez v. Hillery*,[44] the Court held that racial discrimination in the composition of a grand jury requires automatic reversal, *even where the guilt of the defendant was proved at trial beyond a reasonable doubt on the basis of an error- and discrimination-free record*.[45]

The use of torture-induced evidence is no less "pernicious in the administration of justice"[46] than racial discrimination, nor is it any less "at war with our basic concepts of a democratic society and a representative government."[47] Nor, until now, has the Government suggested otherwise. The fact that officially sanctioned torture so uniquely "offends [a] principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental"[48] is what differentiates it from other serious errors and superficially

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[43] *Fulminante*, 499 U.S. at 311.
[44] *Vasquez*, 474 U.S. at 254.
[45] *Id.* at 260-264. *See also Strauder v. West Virginia*, 100 U.S. 303 (1880); *Rose*, 443 U.S. at 556-7; *see generally Vasquez*, 474 U.S. at 261 (collecting cases).
[46] *Rose*, 443 U.S. at 555.
[47] *Id*. at 556.
[48] *Brown*, 297 U.S. at 285.

similar violations during the charging process, which are evaluated under the harmless-error standard.[49]

Fulminante in particular illustrates how torture differs from other constitutional violations. Like Fulminante, Petitioner was subject to government conduct that rendered his statements involuntary. The cases' similarity ends there, however. Fulminante was coerced into confessing by a fellow inmate who, acting as a government agent, offered to protect him from other prisoners if Fulminante told him the full truth about the murder he had committed. Only after that offer of protection did Fulminante confess to the crime, which five Justices held to be an implicit threat that made the confession involuntary.[50]

The wide moral, political, and legal gulf that separates systematic government torture from "credible threats of violence" by individual government agents constitutes the difference between torture and "ordinary" coercion. Torture "strikes at the fundamental values of our judicial system and our society as a whole"[51] in a manner and to a degree that run-of-the-mill police coercion, no matter how deplorable, does not.[52] Introduction of a statement extracted by an

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[49] *Fulminante*, 499 U.S. at 310-12.
[50] *Id*. at 283
[51] *Rose*, 443 U.S. at 556.
[52] Indeed, the difference between torture and ordinary unconstitutional coercion is enshrined in the Military Commissions Act itself. *Compare* 10 U.S.C. § 948r(a), *with* 948r(c), (d); *see also e.g.* Military Commission Rule of Evidence, Rule 304.

individual act of police brutality may indeed be an isolatable "trial error" that may sometimes be disregarded in light of the other evidence in the case.[53] That fact has no bearing, however, on the systemic distortions that result from a government-sanctioned, government-organized policy of deliberate torture, nor does it have any bearing on the legal treatment appropriate for a genuinely "structural defect" of this type.

Officially sanctioned torture "affect[s] the framework within which the trial proceeds, rather than simply [being] an error in the trial process itself."[54] Petitioner's torture was part of a government-approved plan to extract information from individuals by pain and fear, designed to break down their personalities to make them more compliant with the torturer's demands and suggestions.[55] Statements given under torture have long been recognized as inherently unreliable.[56] Torture also makes its victims' memories unreliable, obstructs their ability to articulate the memories that remain, and otherwise causes psychological

[53] *But see Fulminante*, 499 U.S. at 295-302 (although harmless error applies to coerced confessions, Fulminante's confession was not harmless).
[54] *Id.* at 310.
[55] Luban & Newell, *Personality Disruption as Mental Torture: The CIA, Interrogational Abuse, and the U.S. Torture Act*, 108 Geo. L.J. 333, 376-77 (2023).
[56] *Jackson v. Denno*, 378 U.S. 368, 385-86 (1964).

disorders that directly disturb an accused's cognition, motivation and ability to engage in his own defense.[57]

Perhaps most significant, just because it was systematically carried out on *all* the detainees rendered to the black sites and many others at Guantanamo as well, the torture program affected not only Petitioner but other key witnesses in his case, including Petitioner's two former co-defendants, both of whom recently pleaded guilty and are expected to testify against him.[58]

Torture-obtained statements' multifaceted unreliability is compounded ten-fold by the fact that the Military Commissions Act does not automatically exclude hearsay statements from black-site witnesses, hearsay that could not be admitted in federal court.[59] Finally, notwithstanding the Government's representation that they "were not obtained by the use of torture" (A12), some of the statements relied upon by the CMCR in its opinion may themselves be suppressible "fruit of the poisonous tree" derived from statements extracted by torture in the black sites or at

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[57] *See e.g.* International Classification of Diseases 11th Revision (ICD-11) for Mortality and Morbidity Statistics (1/2023), § 6B41 (describing sequelae of complex post-traumatic stress disorder that "develop following exposure to an event or series of events of an extremely threatening or horrific nature, most commonly prolonged or repetitive events from which escape is difficult or impossible (e.g. torture, . . .")) (icd.who.int/browse11/l-m/en#/http://id.who.int/icd/entity/585833559) (last visited Oct. 15, 2023).
[58] A115-120 (notice of Bin Lep severance)); A121-26 (Bin Amin severance).
[59] *Compare* 10 U.S.C. § 949a(b)(3)(D) (hearsay admissible based in part on "the indicia of reliability within the statement itself") *with Crawford v. Washington*, 541 U.S. 36 (2004) (reliability not relevant to admissibility of testimonial hearsay).

Guantanamo.[60] The systematic nature of the CIA's torture program spreads "unreliability" throughout the trial record.

B. Treating evidence obtained by torture as harmless "destroys the appearance of justice and thereby casts doubt on the integrity of the judicial process"[61]

There is another critical sense in which treating officially-sanctioned Government torture as harmless error "undermines the structural integrity of the criminal tribunal itself."[62] To license courts to disregard Government conduct that is indisputably torture in the course of convicting (or charging) a criminal accused "would be to afford brutality the cloak of law. . . . Nothing would be more calculated to discredit law and thereby to brutalize the temper of a society."[63]

The integrity of a criminal proceeding rests on more than the reliability of its fact-finding procedures; it rests on the perception that those procedures are themselves legitimate and consistent with society's fundamental values. The absolute prohibition of torture is prominent among those values. Indeed, the Supreme Court has traced the Anglo-American concept of "due process of law" to the "the popular hatred and abhorrence of illegal confinement, torture and extortion of confessions":

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[60] *See* Section II.C., *infra*.
[61] *Vasquez*, 474 U.S. at 270.
[62] *Vasquez*, 474 U.S. at 263-64.
[63] *Rochin*, 342 U.S. at 173-74.

> From the popular hatred and abhorrence of illegal confinement, torture and extortion of confessions of violations of the 'law of the land' evolved the fundamental idea that no man's life, liberty or property be forfeited as criminal punishment for violation of that law until there had been a charge fairly made and fairly tried in a public tribunal free of prejudice, passion, excitement and tyrannical power. Thus, as assurance against ancient evils, our country, in order to preserve 'the blessings of liberty', wrote into its basic law the requirement, among others, that the forfeiture of the lives, liberties or property of people accused of crime can only follow if procedural safeguards of due process have been obeyed.[64]

The Due Process Clause is one constitutional provision rooted in the abhorrence of torture; the Cruel and Unusual Punishments Clause is another.[65] And the anti-torture principle has even deeper roots going back at least to the English common law judges' rejection of Continental civil code jurisdictions' employment of torture as a legitimate means of obtaining evidence.[66] "In the heritage of Anglo-American

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[64] *Chambers v. Florida*, 309 U.S. 227, 236-37 (1949); s*ee also Brown*, 297 U.S. at 285-86 ("The rack and torture chamber may not be substituted for the witness stand.").

[65] *See Ingraham v. Wright*, 430 U.S. 651, 665-66 (1977):

> The Americans who adopted the language of this part of the English Bill of Rights in framing their own State and Federal Constitutions 100 years later feared the imposition of torture and other cruel punishments not only by judges acting beyond their lawful authority, but also by legislatures engaged in making the laws by which judicial authority would be measured.

[66] *See* John H. Langbein, TORTURE AND THE LAW OF PROOF: EUROPE AND ENGLAND IN THE ANCIEN RÉGIME (1977) (contrasting English jurists' repudiation of torture with its institutionalization in the Continent's Roman Law Codes).

law, there is a long tradition of rejecting torture and of regarding it as alien to our jurisprudence."[67]

Until its recent acceptance in the military commission system, torture has mostly played the role of rhetorical foil to the judiciary's enlightened understanding of due process and legitimate criminal processes. In this regard, Justice Black's opinion in *Ashcraft v. Tennessee* is representative:

> There have been, and are now, certain foreign nations with governments dedicated to an opposite policy: governments which convict individuals with testimony obtained by police organizations possessed of an unrestrained power to seize persons suspected of crimes against the state, hold them in secret custody, and wring from them confessions by physical or mental torture. So long as the Constitution remains the basic law of our Republic, America will not have that kind of government.[68]

In these decisions, torture serves as the line that government conduct cannot cross and still remain legitimate, the *ne plus ultra* of tyrannical governments' deviation from our liberal, rights-respecting democracy. Torture has thus represented the fixed touchstone against which the legitimacy of other government conduct has been measured.[69]

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[67] Jeremy Waldron, *Torture and Positive Law: Jurisprudence for the White House*, 105 Colum. L. Rev. 1681, 1719 (2005).
[68] *Ashcraft v. Tennessee*, 322 U.S. 143, 155 (1944).
[69] *McKune v. Lile*, 536 U.S. 24, 41 (2002), is exemplary in this regard: "Determining what constitutes unconstitutional compulsion involves a question of judgment: Courts must decide whether the consequences of an inmate's choice to remain silent are closer to the physical torture against which the Constitution clearly protects or the de minimis harms against which it does not."

Because of how it has functioned in judicial decision making as a marker distinguishing legitimate from illegitimate Government conduct, Jeremy Waldron has suggested that the prohibition against torture is a "legal archetype[,] emblematic of our determination to break the connection between law and brutality and to reinforce its commitment to human dignity."[70] The danger is that erosion of the absolute character of the torture prohibition leads to a parallel erosion in the confidence we have in the judicial system's ability to distinguish legitimate and illegitimate government conduct (a possibility that has haunted the military commissions system from its outset).

Categorizing the admission of evidence extracted by torture as "trial error" and treating it under the harmless-error doctrine does not, of course, necessarily imply a judicial endorsement of torture; judges can express disapproval while still holding the torture to be harmless in the cases before them. Nevertheless, the specifically legal import of the judge's decision – the finding that use of the torture evidence was legally harmless to the victim – carries an indelible message that the Government's decision in a particular case to torture an individual can be dismissed as beneath legal notice.

Petitioner submits that that message, which is the ineluctable implication of applying the harmless-error doctrine to Petitioner's treatment in the black sites, is

[70] Waldron, *Torture and Positive Law*, at 1739.

not one that this or any other court should send if it is concerned with its own integrity and legitimacy. To do so would be "to contemplate with equanimity the prospect that the rule of law will no longer hold out the clear promise of nonbrutality -- that the state, which it aims to control, will be permitted to operate toward some individuals who are wholly under its power with methods of brutality from which law itself recoils."[71] No less than denial of an accused's right to a public trial or his right to self-representation,[72] allowing a prosecution in which torture has played any role whatsoever to go forward is a fundamental "structural defect" in the judicial process that no amount of untainted evidence can wash away.

C. If the Court holds that harmless error does apply to the use of torture-obtained evidence, Petitioner reserves the right to argue on direct appeal that the use of his statements for referral was not harmless.

Under the harmless-error standard, a constitutional error is harmless only if the Government can show "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained."[73]

Assuming *arguendo* that harmless error applies here, it is impossible in principle to determine at this juncture whether in fact the CA's consideration of

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[71] Waldron, *Torture and Positive Law*, at 1743.
[72] *Fulminante*, 499 U.S. at 310 (listing constitutional violations that have been classified as "structural defects").
[73] *Chapman*, 386 U.S. at 24.

Petitioner's black-site statements was harmless. Petitioner therefore reserves the right to argue that that consideration was not harmless on direct appeal in the event he is convicted.

More important, the explanation of *why* it is impossible at this juncture to evaluate the harmless-error issue provides a concrete example of how the United States Government's official torture policy pervades and undermines the fact finding in the entirety of Petitioner's military commission proceeding, before and during trial. It thus demonstrates one way in which the United States' official torture policy constitutes a "structural defect[] in the constitution of the trial mechanism, which def[ies] analysis by 'harmless-error' standards."[74]

In finding that the inclusion of the statements was harmless beyond a reasonable doubt, the CMCR relied on FBI LHM taken from Petitioner and other witnesses that were also included in the referral binder. (A10-30) As was the case for Petitioner, three of those witnesses had also been tortured in black sites prior to the LHM interrogations.[75] From the dates of their FBI interviews, it is clear that three other declarants[76] were detained at Guantanamo during its early period when

[74] *Fulminante*, 499 U.S. at 310; *see generally* Section II.B. *supra*.
[75] Mohammed Bin Amin (discussed at A14); Mohammed Bin Lep (A16); and Khalid Sheikh Mohammad (A20).
[76] Faiz Abu Bakar Bafana (A22; statement dated 2002); Hashim Abbas (A25; statement dated 2004); Ja'afar Bin Mistooki (A29; statement dated 2004).

torture was routinely practiced as official policy.[77] The remaining three named LHM witnesses gave statements on dates that do not conclusively demonstrate that they were detained at Guantanamo during the 2002 through 2004 period, but they also do not disprove that possibility.[78]

The significance of the LHM declarants' circumstances stems from the fact that these LHM may themselves be subject to suppression pursuant to the general ban on the use of torture.[79] In another military commission proceeding,[80] a military judge ruled recently that FBI LHM taken from another former black site detainee were inadmissible at trial, because although "not *obtained by* torture or cruel, inhuman, and degrading treatment, they were *derived from* it." (A108).

The harmless-error doctrine presupposes that the other evidence supporting the factual finding is itself untainted and thus not subject to suppression.[81]

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[77] *See* Neal Lewis, *Red Cross Finds Detainee Abuse in Guantánamo*, New York Times, Nov. 30, 2004 (https://www.nytimes.com/2004/11/30/politics/red-cross-finds-detainee-abuse-in-guantanamo.html).

[78] Zulkifli Bin Marzuki (A13; statement taken 2009); Muhammad Rais (A27; statement taken 2006); Masran Bin Arshad (A28; statement taken 2009).

[79] Section I, *supra*.

[80] *United States v. Al-Nashiri*, AE 467CCC (Mil. Comm. 2023); *see* A65-114.

[81] *See e.g. United States v. Brooks*, 449 F.2d 1077, 1083 (D.C. Cir. 1971) ("Where the surrounding facts and evidence do not present a case of substantial doubt as to the possibility of misidentification, where there is an untainted identification testimony, where there is strong evidence independent of the testimony of resemblance witnesses showing that defendant was the offender, that combination of strengths in the Government case and weakness of the "resemblance" testimony in contributing to his convictions warrants a finding of harmless error from admission of the resemblance testimony.").

Accordingly, if – like al-Nashiri – the declarants of the LHM were subjected to torture in prior interrogations, it is non-speculative to take into account the possibility that a motion to suppress these statements would be similarly successful.[82]

Of course, the Court may require evidence in the record demonstrating that the LHM were the product of torture before excluding them from the harmless-error analysis. In that event, it should remand to the military commission for the necessary fact-finding related to the provenance of the LHM. That is, the Court should itself refrain from speculating (as the Government speculates, without support) that the LHM were "not obtained by the use of torture." (A12) Instead, Petitioner should be given the opportunity to develop the record to show that these LHM, like the LHM in *United States v. al-Nashiri*, should be excluded.

The complexity of this harmless-error analysis is a good example of the uncertainty and "reasonable doubt" that torture injects into all aspects of the commission proceedings. The Government's case against Petitioner and the other charged detainees rests on its fragile assumption that the LHM were "not obtained

[82] While the Military Commission Rules of Evidence (MCRE) treat statements obtained by torture of the defendant differently in certain respects from statements obtained by the torture of witnesses, the Due Process Clause prohibits the use of both. *Compare* MCRE 304 *with e.g. Williams v. Woodford*, 384 F.3d 567, 593–94 (9th Cir. 2002); *United States v. Gonzales*, 164 F.3d 1285, 1289 & n.1 (10th Cir. 1999); *LaFrance v. Bohlinger*, 499 F.2d 29, 34-36 (1st Cir. 1974).

by the use of torture." (A12) The Court should require the Government to prove that claim before accepting it as true.

CONCLUSION

Immediate reversal by this Court with instructions to vacate the current referral is the only adequate means of rectifying the harm done to Petitioner and to the legitimacy of the federal judicial system by the CMCR decision below. As the law now stands, the Government is free to use evidence obtained by torture in any pretrial military commission proceeding for any purpose. Nor will a Government promise to never again introduce torture evidence moot Petitioner's requested relief (as in as in *Al-Nashiri IV*), because the torture evidence is already "baked into the record" by Petitioner's tainted referral.

For the foregoing reasons, Petitioner's writ should be granted and the referral in his case vacated without prejudice.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this document complies with the type-volume limitation of Fed. R. App. P. 21(d)(1) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains 7,674 words. This document complies with the typeface and type-style requirements of Fed. R. App. P. 32(a)(5)-(6) because it has been prepared in a proportionally spaced typeface using Micorsoft 365 Office Word in Times New Roman 14-point font.

Dated: October 24, 2023

/s/ Adam Thurschwell
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CERTIFICATE OF SERVICE

I certify that on October 24, 2023, I caused this petition and its attachments to be served via electronic mail on the Respondent's counsel, pursuant to the agreement of the parties, to the following address:

Danielle Tarin
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Dated: October 24, 2023

/s/ Adam Thurschwell
Adam Thurschwell

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ADDENDUM OF STATUTES & REGULATIONS

10 U.S.C. § 948r(a) provides:

> No statement obtained by the use of torture or by cruel, inhuman, or degrading treatment (as defined by section 1003 of the Detainee Treatment Act of 2005 (42 U.S.C. 2000dd)), whether or not under color of law, shall be admissible in a military commission under this chapter, except against a person accused of torture or such treatment as evidence that the statement was made.