Argument Not Yet Scheduled
No. 21-1208

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

IN RE: ABD AL-RAHIM HUSSEIN MUHAMMED AL-NASHIRI,

Petitioner.

ON PETITION FOR WRIT OF MANDAMUS TO THE UNITED STATES COURT OF MILITARY COMMISSION REVIEW

BRIEF OF THE CENTER FOR VICTIMS OF TORTURE, CLAIRE FINKELSTEIN, DAVID GLAZIER, KAREN J. GREENBERG, JONATHAN HAFETZ, LISA HAJJAR, KATHERINE HAWKINS, GAIL HELT, SANFORD V. LEVINSON, DAVID LUBAN, ELISA MASSIMINO, JUAN MÉNDEZ, ALBERTO MORA, MANFRED NOWAK, JOHN T. PARRY, GABOR RONA, AND JEREMY WALDRON AS AMICI CURIAE IN SUPPORT OF PETITION FOR A WRIT OF MANDAMUS

John S. Summers
Andrew M. Erdlen*
Alexander J. Egerváry*
Michael J. Masciandaro*
HANGLEY ARONCHICK SEGAL PUDLIN & SCHILLER
One Logan Square, 27th Floor
Philadelphia, PA 19103
(215) 568-6200
jsummers@hangley.com
aerdlen@hangley.com
aegervary@hangley.com
mmasciandaro@hangley.com

Counsel for Amici
*Bar application pending

Dated: November 24, 2021

CERTIFICATE OF PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), undersigned counsel for amici curiae certify as follows:

A. Parties and Amici. Except for the following, all parties, intervenors, and amici appearing before this Court, and the trial court, are listed in the Petition for Writ of Mandamus:

a. The Center for Victims of Torture;

b. Claire Finkelstein;

c. David Glazier;

d. Karen J. Greenberg;

e. Jonathan Hafetz;

f. Lisa Hajjar;

g. Katherine Hawkins;

h. Gail Helt;

i. Sanford V. Levinson;

j. David Luban;

k. Elisa Massimino;

l. Juan Méndez;

m. Alberto Mora;

n. Manfred Nowak;

o. John T. Parry;

p. Gabor Rona;

q. Jeremy Waldron

r. Philippa Webb;

s. Dr. Rosana Gaciandia;

t. King's College London, King's Legal Clinic.

B. Rulings Under Review. An accurate reference to the rulings under review in this appeal appears in the Petition for Writ of Mandamus.

C. Related Cases. An accurate statement of related cases appears in the Petition for Writ of Mandamus.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and Circuit Rule 26.1, amicus curiae The Center for Victims of Torture hereby submits this corporate disclosure statement.

The Center for Victims of Torture ("CVT") is a non-profit, non-governmental organization incorporated under Minnesota law. CVT's general nature and purpose is to heal the wounds of torture on individuals, their families, and their communities, and to prevent and stop torture worldwide. CVT has no parent corporation, and no publicly held company has 10% or greater ownership in CVT.

CERTIFICATION PURSUANT TO CIRCUIT RULE 29(d)

Pursuant to Circuit Rule 29(d), amici and their counsel certify that a separate brief is necessary to provide the perspective of individuals and nongovernmental entities who are experts in the prohibition of torture—including providing rehabilitation services to survivors of torture—and who seek to prevent the use of torture worldwide.

On November 6, 2021, amicus The Center for Victims of Torture ("CVT") sought the consent of Respondent United States of America to participate as amicus curiae in this matter. Counsel for Respondent stated that the government takes no position on CVT's request. On November 24, 2021, other amici sought the consent of Respondent United States of America to join CVT's brief. Counsel for Respondent stated that the government takes no position on such request.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

GLOSSARY

CAT	United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984
CAT Committee	United Nations Committee against Torture
CVT	The Center for Victims of Torture
MCA	Military Commissions Act of 2009, Pub. L. 111-84, 123 Stat. 2574, 10 U.S.C. § 948a, *et seq*.
Section 948r(a)	10 U.S.C. § 948(a)
UCMJ	Uniform Code of Military Justice

INTEREST OF AMICI AND STATEMENT OF AUTHORSHIP

Amici are the following nongovernmental organizations and individuals, with deep expertise on the prohibition of torture, who seek to help the Court better understand the harms caused by torture-derived evidence, including its effect on the American legal system:[1]

The Center for Victims of Torture is the oldest and largest torture survivor rehabilitation center in the U.S. (https://www.cvt.org);

Claire Finkelstein, Algernon Biddle Professor of Law and Professor of Philosophy, University of Pennsylvania Carey Law School;

David Glazier, Professor of Law, Loyola Law School; retired U.S. Navy surface warfare officer;

Karen J. Greenberg, Director, Center on National Security, Fordham Law School;

Jonathan Hafetz, Professor of Law, Seton Hall University School of Law;

---

[1] Pursuant to Circuit Rule 29(a)(4)(E), no counsel for a party authored the brief in whole or in part. No party or a party's counsel contributed money that was intended to fund preparing or submitting this brief. No person—other than the amici curiae, their members, or their counsel—contributed money that was intended to fund preparing or submitting the brief.

Lisa Hajjar, Professor of Sociology, University of California, Santa Barbara;

Katherine Hawkins, Senior Legal Analyst, Project On Government Oversight; former investigator, Constitution Project Task Force on Detainee Treatment;

Gail Helt, former intelligence officer, CIA; Director, Security and Intelligence Studies Program, King University, Bristol, TN;

Sanford V. Levinson, W. St. John Garwood and W. St. John Garwood, Jr. Centennial Chair in Law, Professor of Government, University of Texas Law School;

David Luban, University Professor and Professor of Law, Georgetown University Law Center;

Elisa Massimino, Visiting Professor of Law and Executive Director, Human Rights Institute, Georgetown University Law Center;

Juan Méndez, former UN Special Rapporteur on Torture (2010-2016);

Alberto Mora, former General Counsel of the Navy (2001-2006);

Manfred Nowak, Secretary General of the Global Campus of Human Rights (Venice) and Professor of International Human Rights at Vienna University; former UN Special Rapporteur on Torture (2004-2010);

John T. Parry, Associate Dean of Faculty and Edward Brunet Professor of Law, Lewis & Clark Law School;

Gabor Rona, Professor of Practice, Cardozo Law School; former Legal Advisor, International Committee of the Red Cross;

Jeremy Waldron, University Professor, New York University School of Law.

INTRODUCTION AND SUMMARY OF ARGUMENT

There can be no doubt that torture-derived evidence is inadmissible in any American legal proceeding—at any time, for any purpose, except against alleged torturers. After Petitioner's counsel learned that prosecutors in this case had relied upon Petitioner's torture-derived statements in a discovery proceeding before the military commission judge, the prosecutors scrambled to withdraw those statements, but did not disclaim the authority to use such evidence again in similar circumstances. Instead, they argued that, as a matter of law, torture-derived evidence is admissible to resolve "interlocutory questions" such as discovery disputes. The military commission judge agreed.

Respectfully, prosecutors and the military commission judge are wrong, and grant of Petitioner's extraordinary writ is necessary for myriad reasons. Amici focus here on the prosecutors' and the military commission judge's implausible interpretation of a statute that the United States has long assured the international community means *precisely what Petitioner says its means*, and the grave consequences that would flow from endorsing their interpretation.

The Court should resolve this issue now to provide clarity across the remaining active military commission cases, which have been ongoing in

different forms since 2008—with many opportunities but no resolution of whether and when torture-derived evidence is admissible—and are still in pre-trial proceedings. Absent the Court's intervention, defendants will face substantial risk of future rights violations—about which, in some instances, they may never know because the government routinely makes *ex parte* submissions in these cases.

The Court should leave no doubt that the government can never use torture-derived evidence in any phase of a proceeding (except against alleged torturers), and that military commission judges can never consider such evidence. If any orders in this case were predicated on pleadings or arguments that involved torture-derived evidence, the Court should vacate them.

ARGUMENT

I. SECTION 948r(a) PROHIBITS THE USE OF STATEMENTS OBTAINED BY TORTURE AT ANY TIME, FOR ANY PURPOSE, EXCEPT AGAINST PERSONS ACCUSED OF TORTURE

Federal law clearly prohibits the use of statements obtained by torture in a military commission for *any* purpose, except against a person accused of torture.

A. The Plain Meaning of Section 948r(a) and the Structure of the MCA Demonstrate That the Military Commission Judge Erred

"No statement obtained by the use of torture . . . shall be admissible in a military commission under this chapter." 10 U.S.C. § 948r(a) ("Section 948r(a)"). There can be no dispute that "no" means none: Not just *some* statements, but *all* statements are inadmissible. There is also no dispute that Petitioner's statements were derived from torture. *See* Unclassified Petition for a Writ of Mandamus and Prohibition, Nov. 18, 2021, at 34 (citing AE 353Y, at 5).

Section 948r(a) next provides that no torture-derived statement "shall be admissible in a military commission." Those terms are not qualified. There is no reference to a phase of a proceeding before a military commission—not trial, not sentencing. Rather, the provision sweeps broadly by referring to the tribunal itself: the evidence shall not be

admitted "in a military commission." That means Petitioner's statements are forbidden from being admitted *in the military commission*, at any stage on any issue—whether interlocutory or not—in the military commission's jurisdiction. Pretrial hearings and motions are no less part of a "military commission" than trial proceedings. The Rules for Military Commissions are explicit about this. *See* R.M.C. 803(a) (A military judge may "*call the military commission into session without the presence of members for the purpose of* [resolving pretrial motions]." (emphasis added)).

The only basis, then, for limiting Section 948r(a)'s prohibition is the word "admissible." But that term is not limited to trial proceedings. *See Admissible*, Black's Law Dictionary (11th ed. 2019) ("Capable of being legally admitted; allowable; permissible."); *Admissibility*, Black's Law Dictionary (11th ed. 2019) ("The quality, state, or condition of being allowed to be entered into evidence in a hearing, trial, or other official proceeding.").

The government's interpretation is not a textual analysis of Section 948r(a), because it ignores what Section 948r(a) actually says. Instead, the government posits that no torture-derived statement "shall be admissible in a military commission *at trial*." Had Congress wanted to add those two words it could have, but it did not. *See* Antonin Scalia & Bryan A. Garner,

Reading Law: The Interpretation of Legal Texts 93 (2012) [hereinafter, Scalia & Garner] ("Nothing is to be added to what the text states or reasonably implies . . . The principle that a matter not covered is not covered is so obvious that it seems absurd to write it.").

This entire controversy should have been resolved on the basis of the four preceding paragraphs.[2] The terms of Section 948r(a) are clear and unambiguous, and there is no basis for departing from them.

Finally, the placement of Section 948r within the MCA[3] confirms that the torture ban applies to pre-trial, interlocutory issues. *See Bailey v. United States*, 516 U.S. 137, 145–46 (1995) (when construing a statute, the court may consider placement of terms in statutory scheme); Scalia & Garner, at 221 ("The title and headings are permissible indicators of meaning."). The fact that Congress chose to include Section 948r(a) in the MCA subchapter titled "Pre-Trial Procedure" demonstrates that the Section applies to "pre-trial" discovery proceedings. Had Congress intended to

---

[2] This Court need look only to the plain meaning of the text to resolve this issue. *See Babb v. Wilkie*, 140 S. Ct. 1168, 1177 (2020) ("[W]here, as here, the words of a statute are unambiguous, the judicial inquiry is complete." (alteration and internal quotation marks omitted)); *accord* Scalia & Garner, at 56.

[3] Military Commissions Act of 2009, Pub. L. 111-84, 123 Stat. 2574 ("MCA"), *codified*, 10 U.S.C. § 948a, *et seq*.

limit Section 948r(a) to admissibility only at trial the Section would instead have been included in the next MCA subchapter, entitled "Trial Procedure."

B. The Military Commission Judge's Decision Is Fatally Flawed

The military commission judge's opinion concludes:

> [A] plain reading of 10 U.S.C. Section 948r, when considered [1] in context with other provisions of the M.C.A., as well as relevant provisions of the [2] Uniform Code of Military Justice (UCMJ) and the [3] Military Rules of Evidence (M.R.E.) clearly suggests that the phrase 'admissible in a military commission' refers to the admissibility of evidence during the trial on the merits or during presentencing proceedings.

United States v. Abd al Rahim Hussayn Muhammad al Nashiri, AE 353AA, Ruling, May 18, 2021 ("Opinion"), at 3.

Four errors in that conclusion confirm Section 948r(a)'s express requirement that statements obtained by torture are inadmissible in a military commission for any purpose at any time other than against an alleged torturer.

1. <u>Error One</u>: The Opinion ignores the plain meaning of Section 948r(a)'s terms

The opinion does not conduct any of the analysis above; it addresses neither the plain meaning of the phrase "admissible in a military commission," nor that the provision is expressly unqualified, nor that the

provision is placed in the "Pre-Trial Procedure" subchapter. The ruling is clearly and indisputably erroneous.

2. Error Two: The Opinion's comparison of Section 948r(a) and 948r(c) impermissibly ignores the terms of those subsections

The opinion observes: "The provisions in 10 U.S.C. § 948r use the terms 'admissible in a military commission' in subsection (a) with respect to statements obtained by use of torture and 'admitted in evidence' in subsection (c) in reference to the potential exclusion of 'other statements of the accused." Opinion at 3. The opinion then concludes: "There is no reason to believe that Congress intended to use those similar and related terms within the same provision of the statute to refer to substantially different procedures." *Id.*

In fact, there is every reason to believe that Congress intended those significantly different phrases to have different meanings. Subsection (a), relating to the admissibility of torture-derived statements, unqualifiedly refers to admission of the statements *in the tribunal*. It does not say when, or for what, or how. That is the point: the language is open ended so as to be expansive in prohibiting admission of torture-derived statements. Subsection (c), by contrast, concerns a different category of statements:

"other statements of an accused." It does not relate to statements derived from torture.

Because the two subsections refer to different types of statements and to different uses of those statements (admissibility at all vs. admissibility as evidence), the opinion is incoherent in drawing any parallel supporting its conclusion.[4]

3. Error Three: The Opinion's reliance on the MCA's hearsay rules ignores that those rules expressly govern trial proceedings and therefore cannot narrow Section 948r(a)'s use of "admissible"

The opinion relies on 10 U.S.C. § 949a(b)(3)(D), which specifies that "[h]earsay evidence not otherwise admissible under the *rules of evidence applicable in trial* by general courts-martial may be admitted *in a trial* by military commission" (emphases added). The opinion says this provision "suggests that the term 'admissible' is intended to refer to admitting evidence at trial, not to the consideration of evidence by a military judge on an interlocutory issue." Opinion at 4.

---

[4] The opinion's statement is also circular in that it infers Congressional intent solely from the conclusion it seeks to reach, backed by no other authority.

This analysis is irrelevant to the question before the Court. By its terms, the hearsay rule governs use of a statement "in a trial," whereas this Court is tasked with interpreting Section 948r(a), which does not contain the words "in a trial." If anything, the absence of those words is all the more glaring when considered in light of the hearsay rule.

4. Error Four: The Opinion's reliance on the phrase "received in evidence" in the Military Rules of Evidence is unsupportable

The opinion relies on the 2008 version of Military Rule of Evidence 304(a), which governs courts-martial and states that "an involuntary statement or any derivative evidence therefrom may not be received in evidence against an accused who made the statement." Manual for Courts-Martial, United States (2008); *see* Opinion at 5. The opinion's syllogism is: (a) Courts-Martial Rule of Evidence 304(a) is limited to statements "received in evidence" at trial; (b) Congress intended to incorporate the 2008 courts-martial version of Rule 304(a) into the 2009 Military Commissions Act's statutory prohibition; ergo (c) Section 948r(a) is limited to excluding torture-derived evidence being received into evidence at trial.

This logic is fatally flawed. First, there is no basis for (b)—the notion that Congress intended to condition the scope of Section 948r(a) on courts-martial Rule of Evidence 304(a). The opinion cites no authority and

provides no support for this proposition; nor does it explain why a *regulation* promulgated under one statute (the UCMJ) should control the interpretation of *an entirely different* statute (the MCA). Second, and again, the entire argument ignores the plain meaning of Section 948r(a) and the fact that Congress chose broad language to exclude torture-derived statements.

II. THE UNITED STATES GOVERNMENT HAS REPEATEDLY EMPHASIZED ITS COMMITMENT TO THE CATEGORICAL PROHIBITION OF TORTURE

The prosecutors' arguments in this case contradict public declarations that the United States government has made, repeatedly and in a variety of fora, affirming the government's unequivocal commitment to the prohibition of torture and the exclusion of torture-derived statements from military commissions. Indeed, on multiple occasions, the United States has embraced precisely the same interpretation of Section 948r(a) that Petitioner advances here.

Specifically, the United States' most recent periodic report to the United Nations Committee against Torture ("CAT Committee")—the body of independent experts that monitors implementation of CAT—submitted on September 24, 2021, states:

> As noted in ¶¶ 51 and 156 of our 2013 CAT Report, [Section 948r(a)] prohibits admission of any

> statement obtained by the use of torture or by cruel, inhuman, or degrading treatment . . . *in a military commission proceeding*, except against a person accused of torture . . . . *No other exception to this prohibition on admissibility of such statements is permitted in the rules governing admission of hearsay evidence or otherwise*. . . . Evidence obtained through torture is inadmissible in civilian courts by longstanding precedent, *Brown v. Mississippi* . . . and progeny.

See U.S. Department of State, Submission to the Committee against Torture of the Sixth Periodic Report on the International Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Sept. 24, 2021) ("2021 CAT Report"), at ¶ 146 (emphasis added), https://www.aclu.org/sites/default/files/field_document/21.09.24_usa_cat_report_on_6th_periodic_report.pdf. The United States included this same promise in its 2013 CAT Report. *See* U.S. Department of State Bureau of Democracy, Human Rights, and Labor, Periodic Report of the United States of America to the United Nations Committee Against Torture (Aug. 5, 2013) at ¶ 156, https://2009-2017.state.gov/documents/organization/213267.pdf.

In other words, both years before the dispute currently before the Court arose, and again just prior to Mr. Al-Nashiri petitioning this Court, the United States assured the international community that Section 948r(a)

prohibits the use of torture-derived evidence in every instance, save for against alleged torturers.

That common-sense reading is necessary to satisfy Article 15 of CAT, which mandates that states "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."[5] By extension, it is necessary to give effect to public commitments the United States has made—both during Joe Biden's vice-presidency and since he became President—regarding the prohibition of torture.

In official statements issued in 2009,[6] 2010,[7] and 2011[8] celebrating International Day in Support of Victims of Torture, President Obama

---

[5] CAT art. 15 (emphasis added).

[6] The White House, Statement by President Barack Obama on United Nations International Day in Support of Torture Victims (June 26, 2009) ("2009 Torture Statement"), https://obamawhitehouse.archives.gov/the-press-office/statement-president-barack-obama-united-nations-international-day-support-torture-v.

[7] The American Presidency Project, Statement on the United Nations International Day in Support of Victims of Torture (June 26, 2010), https://www.presidency.ucsb.edu/documents/statement-the-united-nations-international-day-support-victims-torture-0.

[8] The American Presidency Project, Statement on the International Day in Support of Victims of Torture (June 24, 2011) ("2011 Torture

recalled the United States' leading role in drafting CAT; affirmed that "[t]orture violates United States and international law as well as human dignity," *see* 2009 Torture Statement; and promised that "the United States will prohibit torture without exception or equivocation," *see* 2011 Torture Statement.

On November 12, 2014, the Assistant Secretary of State for Democracy, Human Rights and Labor testified before the CAT Committee that the "prohibition of torture and cruel treatment is part of our Constitution, and it binds our federal government and all 50 of our states. We believe that torture, and cruel, inhuman, and degrading treatment and punishment are forbidden in all places, at all times, with no exceptions."[9] The Obama/Biden administration made similar commitments in its formal written submissions to the CAT Committee in 2013 and 2015.

President Biden has followed the same approach. Earlier this year, invoking the late Senator John McCain, the President "reaffirm[ed] the

---

Statement"), https://www.presidency.ucsb.edu/documents/statement-the-international-day-support-victims-torture.

[9] U.S. Mission to International Organizations in Geneva, Assistant Secretary Malinowski: Torture Is Forbidden in All Places, at All Times, With No Exceptions (Nov. 12, 2014), https://geneva.usmission.gov/2014/11/12/assistant-secretary-malinowski-torture-is-forbidden-in-all-places-at-all-times-with-no-exceptions.

United States' unequivocal ban on torture and opposition to all forms of inhumane treatment." The President emphasized that "torture . . . is prohibited universally, and violates U.S. and international law."[10] He also "pledge[d] the full efforts of the United States to eradicate torture in all its forms."[11]

Three months later, the United States' periodic report to the CAT Committee expanded on President Biden's statements:

> The United States has long recognized that the prohibition of torture is a peremptory norm of international law, from which no derogation is permitted, reflecting the condemnation of torture by the international community of States as a whole. . . . To this end, the United States is committed to performing its obligations under the Convention.[12]

Against this backdrop, one would have assumed that when the prosecutors' use of torture-derived evidence came to light—and generated public controversy so severe that it appears to have led to the resignation of

---

[10] The White House, Statement by President Joseph R. Biden, Jr. on International Day in Support of Victims of Torture (June 26, 2021), https://www.whitehouse.gov/briefing-room/statements-releases/2021/06/26/statement-by-president-joseph-r-biden-jr-on-international-day-in-support-of-victims-of-torture.

[11] *Id.*

[12] 2021 CAT Report at ¶ 2 (citations omitted).

the military commission Chief Prosecutor[13]—the United States would have taken every opportunity to disavow the prosecutors' position, including joining Petitioner in a request to vacate the military commission judge's ruling.[14] Its failure to do so raises the stakes in this matter and further necessitates this Court's intervention.

III. VALIDATION OF THE USE OF TORTURE-DERIVED EVIDENCE WOULD HAVE SIGNIFICANT, FAR-REACHING CONSEQUENCES

Unless this Court grants the Petition, the military commission judge's ruling may encourage the use of torture-derived evidence, with grave consequences.

The prohibition against the use of torture-derived statements preserves the integrity of our justice system. Long ago, in *Brown v. Mississippi*, 297 U.S. 278 (1936), the Supreme Court declared the

---

[13] Carol Rosenberg, *Chief Guantánamo Prosecutor Retiring Before Sept. 11 Trial Begins*, N.Y. Times (July 12, 2021), https://www.nytimes.com/2021/07/09/us/politics/chief-guantanamo-prosecutor-retiring.html.

[14] *See, e.g.*, Carol Rosenberg, *Guantánamo Prosecutors Ask to Strike Information Gained from Torture*, N.Y. Times (Sept. 20, 2021) (chief prosecutor at Guantánamo clashed with senior administration officials who questioned his authority), https://www.nytimes.com/2021/07/17/us/politics/guantanamo-cia-torture.html.

permissive use of evidence extracted through torture not "mere error" or a "mere question of state practice," but "a wrong so fundamental that it made the whole proceeding a mere pretense of a trial." 297 U.S. at 286-7.

It is not just the torture itself but the use of its fruits in a legal process under the aegis of the Constitution and laws of the United States that "offends [a] principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Id.* at 285 (internal quotation marks omitted); *see* David Luban, *Torture, Power, and Law* 44 (2014) (observing that traditionally, torture has been "incompatible with American values. Our Bill of Rights forbids cruel and unusual punishment . . . . Americans and our government have historically condemned states that torture; we have granted asylum or refuge to those who fear it."). Failure to exclude such evidence would "sanction the brutal conduct" that led to its production and in turn "afford brutality the cloak of law." *Rochin v. California*, 342 U.S. 165, 173-74 (1952). It would draw the United States on par with those nations and governments against whom we have long and proudly distinguished ourselves. *Ashcraft v. Tennessee*, 322 U.S. 143, 155 (1944); *Chambers v. Florida*, 309 U.S. 227, 237-38 (1940).

Such harm arises from the use of torture-derived evidence at any stage of a legal proceeding. No distinction between trial and pre-trial

phases can be made without compromising the universal condemnation of torture itself. To allow torture-elicited statements in here—as the prosecutors convinced the military commission judge to do—would permit torture to "circulate through all the [Military] Commissions' business like a noxious gas." David Luban, *Torture Evidence and the Guantanamo Military Commissions*, Just Security (May 26, 2021), https://www.justsecurity.org/76640/torture-evidence-and-the-guantanamo-military-commissions. It is an argument for torture itself, an approval of torturers and the officials who sanction it—a complete perversion of American and international law.

But the harm is not just to our integrity. Giving torture a foot in the door is most dangerous because it incentivizes the practice of torture itself. As Amicus Monina has written, during the drafting of CAT, the United States recognized this important principle and pressed to maximize Article 15's deterrent effect.[15] If would-be torturers knew that any information

---

[15] Guiliana Monina, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Part I Substantive Articles, Art. 15 Non-Admissibility of Evidence Obtained by Torture*, *in* Manfred Nowak et al., eds., The United Nations Convention Against Torture and Its Optional Protocol: A Commentary 2.2 (2d ed. 2019) ("[T]he *United States* proposed that the deterrent effect of the article prohibiting the use of evidence of statements obtained through torture be maximized by providing an exception . . . allowing such statements to be used against

they extracted from torture could be used *only* to further their own accountability, they might not torture. Conversely, the military commission judge's decision encourages torture and those who seek to perpetuate it.

The importance of even the potential for deterrence cannot be overstated. Torture has profound, and often lifelong, physical and psychological consequences. It can have similarly devastating effects on survivors' family members; it can fragment and polarize communities, and reverberate through generations.

Respectfully, this Court's intervention is necessary to ensure that none of these grave consequences materializes.

---

the alleged torturer."), https://opil.ouplaw.com/view/10.1093/law/9780198846178.001.0001/law-9780198846178-chapter-17#law-9780198846178-chapter-17-note-2489.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Mandamus should be granted.

Dated: November 24, 2021

Respectfully submitted,

/s/ John S. Summers

John S. Summers
Andrew M. Erdlen*
Alexander J. Egerváry*
Michael J. Masciandaro*
HANGLEY ARONCHICK SEGAL PUDLIN & SCHILLER
One Logan Square, 27th Floor
Philadelphia, PA 19103
(215) 568-6200
jsummers@hangley.com
aerdlen@hangley.com
aegervary@hangley.com
mmasciandaro@hangley.com

*Bar application pending

Counsel for Amici