

Center for the Victims of Torture

Torture, Former Combatants, Political Prisoners, Terror Suspects, & Terrorists

<https://www.justsecurity.org/79382/the-biden-administrations-moment-of-truth-on-torture-evidence/>

Public Facing Advocacy Writing

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December 1, 2021

[Al-Nashiri](#), [Committee Against Torture](#), [Military Commissions](#), [Military Commissions Act](#), [torture](#)

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December 1, 2021

Abd Al-Rahim Hussein Al-Nashiri is headed to federal court to prevent the U.S. government from using torture-derived evidence in his capital prosecution before the Guantanamo military commissions. As discussed in detail in these [previous posts](#), prosecutors claimed the authority to use such evidence in certain circumstances in his case, and the military commission judge signed off.

On Oct. 15, Al-Nashiri filed a [petition](#) for a writ of mandamus in the United States Court of Appeals for the District of Columbia Circuit seeking to enjoin the government from offering, and the military commission judge from considering, torture-derived evidence. We are among a group of scholars, former United Nations Special Rapporteurs on torture, retired military and intelligence officers, and human rights advocates who filed an [amicus brief](#) in support of Al-Nashiri's petition. Our brief opens as follows:

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 Petitioners counsel learned that prosecutors in this case had relied upon his 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 Petitioners extraordinary writ is necessary for myriad reasons. Amici focus here on prosecutors and the military commission judges implausible interpretation of a statute that the United States has long assured the international community means *precisely what Petitioner says it means*, and the grave consequences that would flow from endorsing their interpretation.

The government has not yet responded to Al-Nashiri's petition, which provides an opportunity for it to course-correct for consistency with U.S. legal obligations and related public commitments.

On June 26, [President Joe Biden](#) reaffirm[ed] the United States unequivocal ban on torture and opposition to all forms of inhumane treatment; acknowledged that torture is prohibited universally, and violates U.S. and international law; and pledge[d] the full efforts of the United States to eradicate torture in all its forms. In a subsequent [submission](#) to the body that monitors compliance with the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the United States not only echoed the Presidents statements, but also explicitly rejected the argument that prosecutors made and on which the military commission judge relied to use torture-derived evidence in Al-Nashiri's case:

[T]he Military Commissions Act of 2009 (MCA 2009) prohibits admission of any statement obtained by the use of torture or by cruel, inhuman, or degrading treatment, as defined by the Detainee Treatment Act of 2005, in a military commission proceeding, except against a person accused of torture or such treatment as evidence that the statement was made. No other exception to this prohibition on admissibility of such statements is permitted in the rules governing admission of hearsay evidence or otherwise.

If the President and senior administration officials mean what they have said, the government will join in Al-Nashiri's petition rather than contest it.

[Al-Nashiri](#), [Committee Against Torture](#), [Military Commissions](#), [Military Commissions Act](#), [torture](#)

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