

<p><b>UNITED STATES</b></p> <p><b>v.</b></p> <p><b>MAJID KHAN</b></p> <p><b>BEFORE A MILITARY COMMISSION CONVENED PURSUANT TO THE MILITARY COMMISSIONS ACT OF 2009</b></p>	<p><b>AE 033A</b></p> <p><i>Amicus Brief filed by S. Scott Roehm on behalf of the Center for Victims of Torture, Sondra Crosby, Claire Finkelstein, Mark Fallon, Juan Mendez, Alberto Mora, Ron Stief, and Stephen Xenakis</i></p> <p><i>May 1, 2019</i></p>
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1. My name is Stephen Scott Roehm. I certify I am licensed to practice before the State of New York. I further certify:

a. I am not a party to any Commission case in any capacity, I do not have an attorney-client relationship with any person whose case has been referred to a Military Commission, I am not currently nor am I seeking to be habeas counsel for any such person, and I am not currently nor am I seeking to be next-friend for such person.

b. I certify my good faith belief as a licensed attorney that the law in the attached brief is accurately stated, I have read and verified the accuracy of all points of law cited in the brief, and I am not aware of any contrary authority not cited to in the brief or substantially addressed by the contrary authority cited to in the brief.

I am filing this brief on behalf of the following:<sup>1</sup>

Sondra Crosby, MD is an Associate Professor of Medicine, Boston University School of Medicine, and Director of Medical Care at the Boston Center for Refugee Health and Human Rights.

<sup>1</sup> More detailed biographies for Dr. Crosby, Mr. Fallon, Ms. Finkelstein, Mr. Mendez, Mr. Mora, Rev. Stief, Dr. Xenakis, and the Center for Victims of Torture are available at Appendix A.

Mark Fallon is a former NCIS Deputy Assistant Director for Counterterrorism, Senior Executive at the Department of Homeland Security, and leader of the USS Cole Task Force.

Claire Finkelstein is the Algernon Biddle Professor of Law and Professor of Philosophy, as well as the Director of the Center for Ethics and the Rule of Law, at the University of Pennsylvania Law School.

Juan Mendez is the Professor of Human Rights Law in Residence at Washington College of Law, American University, and former United Nations Special Rapporteur on Torture.

Alberto Mora is a Senior Fellow at the Harvard Kennedy School's Carr Center for Human Rights Policy, the American Bar Association's Director of Global Programs, and former General Counsel of the Department of the Navy.

The Rev. Ron Stief is an ordained minister in the United Church of Christ and the Executive Director of the National Religious Campaign Against Torture, an interfaith organization of more than 325 religious organizations committed to ending U.S.-sponsored torture

Brig. Gen. (Ret.) Stephen Xenakis, MD is a board-certified psychiatrist and retired Army Brigadier General.

The Center for Victims of Torture (CVT) is the oldest and largest torture survivor rehabilitation center in the United States and one of the two largest in the world.

## **2. Issue Presented.**

Viewed narrowly, the issue presented by Mr. Khan's motion is whether Article 13 of the Uniform Code of Military Justice (UCMJ) applies to the military commissions. Should the Court determine that it does, Mr. Khan seeks administrative credit against his sentence for the time periods during which the United States subjected him to torture and other forms of cruel,

inhuman and degrading treatment—a remedy that the military commissions have previously recognized is available to victims like Mr. Khan. *See* Ruling on Defense Motion to Dismiss—Torture of the Detainee (AE084) at 5-6 & n.7, *United States v. Jawad* (Sept. 24, 2008) (D-008).

Understood in its proper context, the issue presented by Mr. Khan's motion is whether the military commissions will grapple seriously and fairly with the United States' legacy of torture.

On November 12, 2014, the United States appeared before the United Nations Committee against Torture (CAT Committee)—as is required periodically of all States party to the U.N. Convention against Torture (CAT)—to discuss its treaty compliance report from the previous year. In his opening remarks, the Assistant Secretary of State for Democracy, Human Rights and Labor described succinctly what is at stake in Mr. Khan's case:

A little more than ten years ago, our government was employing interrogation methods that, as President Obama has said, any fair minded person would believe were torture. At the same time, the test for any nation committed to this Convention and to the rule of law is not whether it ever makes mistakes, but whether and how it corrects them.

Opening Statement, Tom Malinowski, Assistant Secretary Democracy Human Rights and Labor, U.S. Department of State, Committee against Torture, November 12-13, 2014 – Geneva.

To date, the United States has largely failed that test. The Department of Justice declined to prosecute anyone complicit in torture during the CIA's former rendition, detention and interrogation (RDI) program, including in cases where detainees were killed. The executive branch has refused to acknowledge, much less apologize to, individual victims. No RDI program detainee has received compensation. And the overwhelming majority of information about abuses the CIA perpetrated, and their myriad consequences, remains secret.

There is a widespread perception not just that the military commissions will continue this trend, but that they were established precisely for that purpose—to circumvent accountability for the United States’ use of torture. Mr. Khan’s motion to apply to the military commissions UCMJ Article 13 is an opportunity for this Court both to demonstrate otherwise and to guard against future abuses. Amici urge the Court to seize the opportunity and grant the motion.

### 3. Statement of Facts.

According to the 2014 Senate Select Committee on Intelligence Study of the CIA’s Detention and Interrogation Program (Senate Report or Report),<sup>2</sup> Mr. Khan “was subjected by the CIA to sleep deprivation, nudity, and dietary manipulation,” *id.* at 77 n.409; shackled to the ceiling for long periods of time, *id.* at 77 n.410, 89 n.497; and likely “immersed in a tub that was filled with ice and water.” *Id.* at 89 n.497, 104 n.610, 105 & n.615. Mr. Khan was also subjected, without evidence of medical necessity and apparently as an additional means of behavioral control, to involuntary “rectal feeding” and “rectal hydration.” *Id.* at 100 & n.584. More specifically, the CIA “pureed” Mr. Khan’s “‘lunch tray’, consisting of hummus, pasta with sauce, nuts, and raisins,” and pumped it into his intestines through a tube forced into his rectum against his will. *Id.* at 115. Additional sessions of “rectal feeding” and “hydration” followed. *Id.* at 100 & n.584, 115 n.680.

Beyond the abuses that the Senate Report describes—which are limited to those actually documented by the CIA, since the Report is based entirely on internal CIA records—Mr. Khan credibly alleges other forms of torture and cruel treatment. For example, he says that “interrogators poured ice water on his genitals, twice videotaped him naked and repeatedly touched his ‘private parts,’” and that interrogators, “some of whom smelled of alcohol, also

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<sup>2</sup> Available at <https://www.intelligence.senate.gov/sites/default/files/documents/CRPT-113s rpt288.pdf> (“SSCI CIA Report”) (last accessed April 29, 2019).

threatened to beat him with a hammer, baseball bats, sticks and leather belts.” David Rhode, *Exclusive: Detainee alleges CIA sexual abuse, torture beyond Senate findings*, Reuters, June 2, 2015.

The consequences for Mr. Khan were devastating, though not surprising. Beginning one year into his captivity and for the next three and a half years until his transfer to Guantanamo, Mr. Khan “engaged in a series of hunger strikes and attempts at self-mutilation that required significant attention from CIA detention site personnel.” Senate Report at 114. The acts of self-harm included “attempting to cut his wrist on two occasions, an attempt to chew into his arm at the inner elbow, an attempt to cut a vein in the top of his foot, and an attempt to cut into his skin at the elbow joint using a filed toothbrush.” *Id.* at 115.

#### 4. The law.

Article 13 of the UCMJ is the principal law governing the narrow question before the Court. It provides:

No person, while being held for trial, may be subjected to punishment or penalty other than arrest or confinement upon the charges pending against him, nor shall the arrest or confinement imposed upon him be any more rigorous than the circumstances required to insure his presence, but he may be subjected to minor punishment during that period for infractions of discipline.

Uniform Code of Military Justice, Article 13: Punishment Prohibited Before Trial.<sup>3</sup> In 2008, Mohammed Jawad moved his military commission to dismiss charges against him as a consequence of torture to which he was subjected while at Guantanamo. *See Ruling on Defense Motion to Dismiss—Torture of the Detainee (AE084) at 5-6 & n.7, United States v. Jawad* (Sept. 24, 2008) (D-008) (“This Commission finds that, under the circumstances, subjecting this Accused to the ‘frequent flyer’ program from May 7-20, 2004 constitutes abusive conduct and

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<sup>3</sup> Available at <http://www.ucmj.us/sub-chapter-2-apprehension-and-restraint/813-article-13-punishment-prohibited-before-trial> (last accessed April 29, 2019).

cruel and inhuman treatment. Further, it came at least two months after the JTF-GTMO commander had ordered the program stopped. Its continuation was not simple negligence but flagrant misbehavior....”). Judge Stephen Henley denied the motion, reasoning that dismissal should be the option of last resort and that “other remedies are available,” including “sentence credit towards any approved period of confinement.” *Id.* at 5-6.

In assessing the application of Article 13 to Mr. Khan’s case, the Court must consider both Judge Henley’s decision as well as a broader body of applicable law that is foundational to our legal system. Specifically, the right to be free from state-sanctioned cruelty, which is recognized in our Constitution, state constitutions, numerous state and federal statutes, international treaties, and customary international laws. Brief of Alberto Mora as Amicus Curiae in Support of Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit at 5, *Al-Nashiri v. Trump*, No. 16-8966 (Sup. Ct. May 31, 2017).<sup>4</sup> “This right is possessed by—and the prohibitions against torture apply to—everyone, everywhere, and at all times, both in peace and in war.” *Id.* (citing *Filartiga v. Pena-Irala*, 630 F.2d 876, 884 (2d Cir. 1980) (“[O]fficial torture is now prohibited by the law of nations. The prohibition is clear and unambiguous, and admits of no distinction between treatment of aliens and citizens.”)); *see also*, CAT art. 2 (“No exceptional circumstances whatsoever, whether a state

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<sup>4</sup> *See, e.g.*, U.S. Const. amend. VIII; Cal. Const. art. I, § 17; Fla. Const. art. I, § 17; 42 U.S.C. § 2000dd(a) (2016); 51 Pa.C.S. § 5801 (2016); *Wilkerson v. Utah*, 99 U.S. 130, 136 (1879); United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85 (CAT); Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 75 U.N.T.S. 287; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 75 U.N.T.S. 135; International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171; and European Convention for the Protection of Human Rights and Fundamental Freedoms, European Treaty Series No. 5 (1968). Mr. Mora’s amicus brief is available at [https://ccrjustice.org/sites/default/files/attach/2017/06/2017-05-31%2016-8966%20Amicus%20Alberto%20Mora\\_0.pdf](https://ccrjustice.org/sites/default/files/attach/2017/06/2017-05-31%2016-8966%20Amicus%20Alberto%20Mora_0.pdf) (last accessed April 29, 2019).

of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.”). As such, “the torturer has become like the pirate and slave trader before him *hostis humani generis*, an enemy of all mankind.” *Filartiga*, 630 F.2d at 890.

As a State party to CAT, the United States has embraced and reinforced obligations to prevent acts of torture; to investigate, prosecute and punish its perpetrators; to exclude evidence obtained under torture; and to refuse to send a person to a place where he or she would be at risk of being tortured (non-refoulement). It has also assumed responsibility for “ensur[ing] in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible.” The CAT Committee has made clear that this includes restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition. General Comment No. 3 of the Committee against Torture at 2 (November 19, 2012) (*hereinafter* General Comment No. 3).<sup>5</sup>

Mr. Khan’s right to an effective remedy and the United States’ obligation to provide one are as central to our system of laws as is the prohibition on torture itself. Indeed, for a victim of torture, the former is what gives the latter meaning. Chief Justice Marshall recognized this basic legal maxim—where there is a right, there must be a remedy—more than 200 years ago in *Marbury v. Madison*, and warned of the consequences that would attend failure to fulfill it: “The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.” 5 U.S. 1 (Cranch) 137, 163 (1803).

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<sup>5</sup> Available at [https://www2.ohchr.org/english/bodies/cat/docs/gc/cat-c-gc-3\\_en.pdf](https://www2.ohchr.org/english/bodies/cat/docs/gc/cat-c-gc-3_en.pdf) (last accessed April 29, 2019).

**5. Argument.**For Purposes of Sentencing, Mr. Khan's Torture Should at a Minimum be Accorded the Same Treatment as Unlawful "Punishment" Under UCMJ Article 13.

Article 13 of the UCMJ prohibits punishing or penalizing any person being held before trial, or subjecting him to pretrial confinement "more rigorous than the circumstances require to insure his presence..." There can be no serious dispute that, *at least* with respect to Mr. Khan's time in CIA custody—from his capture in March 2003 until his transfer to Guantanamo in September 2006—the torture and cruel treatment to which the government subjected him violated this prohibition. If being chained to a ceiling naked for extended periods, being raped by object, and being subjected to other abuses so horrendous that they induce suicide attempts, does not constitute both "punishment" and unnecessarily "rigorous" confinement it is difficult to fathom what would.

The Military Commissions' Legitimacy Turns on Their Willingness and Ability to Hold the Government at Least Minimally Accountable for Torture.

Mr. Khan—undisputedly a torture victim—is entitled to all of the remedial measures described above, and the United States is legally required to provide him with them. And yet, Mr. Khan is asking the Court for something much more modest: a meaningful acknowledgment of the horrors to which he was subjected through the application to his sentencing of a well-established principle of military law. But while the request represents only a fraction of the redress Mr. Khan is owed, the stakes for the Court are difficult to overstate. This is the first time that a military commission must decide whether to provide a measure of reparation for a CIA torture victim. It is a watershed moment: will the military commissions take any steps to honor the United States' legal and moral anti-torture obligations when violations occurred in the CIA's



RDI program? Will this Court treat Mr. Khan the way the United States would demand that an enemy force treat one of our own service members under similar circumstances?

If the Court is unwilling or unable to impose on the government even the minimal degree of accountability Mr. Khan seeks, its failure to do so will validate the views of those who believe that the military commissions are simply an instrumentality of the executive branch that tortured Mr. Khan designed to sweep its crimes under the rug. It will frustrate efforts to undo the strategic costs that the United States has paid for our government's use of torture, from the chilling effect on allies' willingness to share intelligence to the license it has given authoritarian regimes and other oppressors to disregard their responsibilities to prevent and penalize torture. *See* Douglas A. Johnson, Alberto Mora, & Averell Schmidt, Harvard Kennedy School, Carr Center for Human Rights Policy, *The Strategic Costs of Torture: How "Enhanced Interrogation" Hurt America*, Foreign Affairs (Sept./Oct. 2016); *"If the US tortures, why can't we do it?" – UN expert says moral high ground must be recovered*, United Nations Office of the High Commissioner for Human Rights, Dec. 11, 2014 (Juan E. Mendez, U.N. Special Rapporteur on Torture: "I travel to parts of the world in my capacity of United Nations Special Rapporteur on torture and I can attest to the fact that many states either implicitly or explicitly tell you: 'Why look at us? If the US tortures, why can't we do it?'"). And it will further erode both the United States' reputation as a standard-bearer for human rights, and our judicial system's reputation for fairness and independence.

By contrast, recognizing that Mr. Khan has been punished within the meaning of UCMJ Article 13 and adjusting his sentence accordingly would have two salutary effects beyond sending a powerful message about the objectivity of the military commissions. First, it would put all government officials on notice that torture and cruel treatment have tangible consequences.

Accountability often serves as a deterrent, and in this case would further incentivize against a return to one of the darker chapters in our country's history.

Second, appropriately reducing Mr. Khan's sentence would make an enormous difference in his ability to heal. That is because while rehabilitation for torture survivors is possible, a detention setting—Guantanamo in particular—is anathema to the conditions necessary for effective care. As CVT's Director of Client Services, Dr. Andrea Northwood, has explained previously, there are four minimum requirements for effective rehabilitation for torture survivors:

1. Providing a sense of control to the victim over key features of the rehabilitation context, content, and process;
2. Restoring a felt sense of safety as it pertains to the internal physiological state and external habitat of the victim, including adequate management of pain;
3. Providing the victim with trusted human connections that are consistently available, including regular predictable access to the treatment provider(s) and regular meaningful access to other trustworthy sources of social support; and
4. The treating provider(s) must be sufficiently skilled and experienced in treating severe trauma explicitly designed and perpetrated by other human beings.

Brief for the Center for Victims of Torture as Amicus Curiae Supporting Petitioners at 11-16, *Al-Bihani v. Trump*, No. 1:09-cv-00745-RCL (D.D.C. Jan. 24, 2018).

By their nature, detention settings can almost never meet these requirements. Either law enforcement or the military has complete control over all aspects of detainees' lives. The presence of uniformed personnel and guns, being handcuffed and shackled, institutional surroundings and other detention experiences are acutely triggering, bringing the original torture experience back to mind. *Id.* at 13. At Guantanamo, detainees remain held captive by the government responsible for their torture, in a setting both replete with common triggers of PTSD symptoms and that will forever be synonymous with torture. *Id.* at 17.

In other words, Mr. Khan will almost certainly continue to suffer the aftereffects of his torture until he is released from custody. Awarding him administrative credit against his sentence pursuant to UCMJ Article 13 would be a threshold step toward enforcing Mr. Khan's right to receive, and the United States' obligation to provide, "as full rehabilitation as possible." CAT art. 14; General Comment No. 3.

**Conclusion**

For the foregoing reasons, Amici respectfully urge this Court to apply UCMJ Article 13 to Mr. Khan's case and grant him sentencing credit for violations thereof.

Respectfully submitted,



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Appendix A

Sondra Crosby, MD: Dr. Sondra Crosby is an Associate Professor of Medicine and Public Health at the Boston University Schools of Medicine and Public Health, in the Center of Health Law, Ethics, and Human Rights. She is a nationally known expert in refugee health, and for the last 20 years, her clinical practice has focused on care of refugees and asylum seekers, many who have experienced persecution. Dr. Crosby has taught and mentored Istanbul Protocol evaluation and documentation in Bishkek, Kyrgyzstan; Dushanbe, Tajikistan; Istanbul, Turkey; Reyhanli, Turkey; Almaty, Kazakhstan; Erbil, Iraq; and Amman, Jordan as a medical consultant for Physicians for Human Rights. She has lectured in the Asylum Officers Basic Training Course in Lansdowne, VA and in the Boston Asylum office, on medical forensic findings in asylum cases. Dr. Crosby has evaluated the effects of torture on Syrian refugees living in Turkey and Jordan, former detainees in U.S. detention at Guantanamo Bay, and at other sites in Iraq and Afghanistan.

Claire Finkelstein: Ms. Finkelstein is the Algernon Biddle Professor of Law and Professor of Philosophy, as well as the Director of the Center for Ethics and the Rule of Law, at the University of Pennsylvania Law School. Her current research addresses national security law and policy, with a focus on ethical and rule of law issues that arise in that arena. In 2012, Professor Finkelstein founded Penn Law's Center for Ethics and the Rule of Law (CERL), a non-partisan interdisciplinary institute that seeks to promote the rule of law in modern day conflict, warfare, and national security. In 2019, she was named Senior Fellow at the Foreign Policy Research Institute (FPRI). An expert in the law of armed conflict, military ethics, and national security law, Professor Finkelstein has briefed Pentagon officials, U.S. Senate staff, and JAG Corps members on various issues in national security law and practice.

Mark Fallon: Mr. Fallon is a career national security professional and international security consultant. His government service spans more than three decades with positions including NCIS Deputy Assistant Director for Counterterrorism and Senior Executive within the Department of Homeland Security. He currently serves as Chair of the International Association of Chiefs of Police IMPACT Section and as a member of a Global Steering Committee, developing universal standards for non-coercive, human rights compliant and evidence-based investigative interviewing and interrogation. Mr. Fallon's extensive counterterrorism experience includes involvement in the investigation of Sheik Omar Abdel Rahman ("the Blind Sheik"), leading the USS Cole Task Force, and serving as the Deputy Commander of Department of Defense Criminal Investigation Task Force (CITF), responsible for investigating the al-Qaida terrorist network for trials before military commissions. He was the program manager for research studies of violent extremism for the Qatar International Academy for Security Studies and served as Chair of the U.S. Government High Value Detainee Interrogation Group Research Committee.

Juan Mendez: Mr. Mendez is the Professor of Human Rights Law in Residence, Washington College of Law, American University, Washington, DC. Between 2010 and 2016, Mr. Mendez was the United Nations Special Rapporteur on Torture, and between 2004 and 2007, the Special Advisor to the Secretary-General of the UN on the Prevention of Genocide. He has also served as a member (Commissioner) of the Inter-American Commission on Human Rights of the Organization of American States between 2000 and 2003, and as its President in 2002. In addition, he was co-Chair of the International Bar Association's Human Rights Institute in 2010-11. Since 2017 he is also a Commissioner of the International Commission of Jurists.

Alberto Mora: Mr. Mora is an attorney, a Senior Fellow at the Harvard Kennedy School's Carr Center for Human Rights Policy, and the American Bar Association's Director of Global Programs, where he directs the ABA's Rule of Law Initiative and oversees the Center for Human Rights. From 2001 to 2006, he served as General Counsel of the Department of the Navy. He is serving or has served on the board of directors of Human Rights First and Freedom House. Additional federal service includes the State Department, the U.S. Information Agency, and the Broadcasting Board of Governors. In 2006, Mr. Mora received the Profile in Courage Award from the John F. Kennedy Memorial Library Foundation for his opposition to torture while serving as Navy General Counsel. He submits this brief in his personal capacity.

Rev. Ron Stief: Rev. Stief is an ordained minister in the United Church of Christ and is the Executive Director of the National Religious Campaign Against Torture, an interfaith organization of more than 325 religious organizations committed to ending U.S.-sponsored torture. He co-chairs the Steering Committee of Shoulder to Shoulder / Standing with American Muslims Upholding American Values and is a board member of the New Evangelical Partnership for the Common Good. From 1999 to 2008, Rev. Stief was director of the Washington D.C. office of the United Church of Christ where he led advocacy for its 5,500 congregations and 1.2 million members across the country on a broad range of domestic and international issues, through both the UCC's Washington D.C. and United Nations offices. Rev. Stief has taught as an adjunct faculty member of the Pacific School of Religion and the Starr King School for the Ministry, both in Berkeley, and the McCormick Theological Seminary in Chicago.

Brig. Gen. (Ret.) Stephen Xenakis, MD: Dr. Xenakis is a board-certified psychiatrist and retired Army brigadier general. He has been qualified by Federal Courts and the Office of the

Military Commissions of the Department of Defense as a psychiatric and medical expert in numerous cases of detainees at Guantanamo Naval Base and accused terrorists. He has had multiple interviews with detainees at Guantanamo, advised attorneys on their respective cases, and reviewed medical, intelligence, and military files of nearly 50 detainees and accused terrorists. The respective cases have included high-value detainees, convicted belligerents, and others awaiting release and return to their homes. He has testified in cases of accused belligerents who were captured in the theater of operations and presented with extensive records of their association with and assistance to identified terrorist organizations.

The Center for Victims of Torture (CVT): CVT was founded in 1985 and is the oldest and largest torture survivor rehabilitation center in the United States and one of the two largest in the world. Through programs operating in the United States, the Middle East, and Africa—involving psychologists, social workers, physical therapists, physicians, psychiatrists, and nurses—CVT annually rebuilds the lives of nearly 25,000 primary and secondary survivors. CVT also provides training and technical assistance to torture treatment centers both inside and outside the United States.