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MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY, CUBA

UNITED STATES OF AMERICA v. MAJID SHOUKAT KHAN	AE033 (U) Defense Motion for Pretrial Punishment Credit and Other Related Relief May 1, 2019

1. (U) Timeliness

(U) This motion is timely filed pursuant to the amended litigation and trial scheduling order dated March 26, 2019 (AE016GG).

2. (U) Relief Sought

(U) Majid Khan, by and through his undersigned counsel, respectfully requests that the Military Judge grant this motion and order that he is entitled to meaningful relief for the illegal pretrial punishment that he suffered for more than three years in CIA detention between the time of his capture in March 2003 and his transfer to Guantanamo in September 2006, and for more than five years between the time he arrived at Guantanamo and his guilty plea in February 2012.

a. (U) Mr. Khan requests that the Military Judge grant him administrative credit equivalent to *no less than half of his approved sentence* as a comprehensive, prophylactic remedy for the war crimes of torture, anal rape, sexual assault, intentionally causing serious bodily injury, and other cruel, inhuman, and degrading treatment that Mr. Khan suffered at the hands of U.S. agents while in official detention resulting from the offenses for which he was subsequently charged and pled guilty. He requests this relief in addition to the day-for-day confinement credit to which he is entitled from the date of his guilty plea on February 29, 2012, and notwithstanding

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any clemency determination by the Convening Authority. Mr. Khan also requests that the Military Judge grant such other relief as may be necessary and appropriate to ensure an effective remedy for nearly a decade of illegal pretrial punishment, which violated due process and offended the presumption of innocence.

b. (U) Mr. Khan requests that the Military Judge schedule an evidentiary hearing to receive evidence in support of this motion, including Mr. Khan's own testimony, the testimony of his government-funded experts, and the testimony of other witnesses who may be produced in response to his pending motion to compel production of witnesses. *See* AE030. Mr. Khan has attached to this motion more than twenty pages of declassified information and two classified declarations previously filed in his habeas corpus case, *Khan v. Obama*, No. 06-cv-1690 (D.D.C.), which was dismissed without prejudice pursuant to the terms of his plea agreement in April 2013. *See* Attachments C, D, E. He has also attached an unclassified FBI memorandum from his military commission referral binder, *see* Attachment F, and the declassified executive summary of the Senate Select Committee on Intelligence's report on the CIA torture program ("SSCI report"), which was publicly disclosed in December 2014. *See* Attachment G.[1] These materials provide a detailed proffer of what Mr. Khan and the other witnesses would testify about regarding the torture

[1] (U) Because of continuing, substantial uncertainty concerning the scope of redactions that may be required by the Military Judge's ruling in AE030E, including with respect to information that is unclassified and officially acknowledged by the government, the Defense is unable to attach the SSCI report to this motion until its motion for reconsideration of AE030E is fully resolved. *See* AE030I. In abundance of caution, the Defense instead includes a placeholder for the SSCI report as Attachment G, and will move for leave to substitute the SSCI report as Attachment G when reconsideration of AE030E is concluded. In the meantime, the SSCI report is available online at https://www.intelligence.senate.gov/sites/default/files/publications/CRPT-113srpt288.pdf.

and other unlawful punishment that he suffered in CIA detention and later at Guantanamo, and why he should be entitled to pretrial punishment credit.

c. (U) Mr. Khan requests that the Military Judge permit him to supplement or amend the instant motion after his pending motion for reconsideration of AE030E is fully resolved.[2] As explained in Mr. Khan's motion for reconsideration of AE030E, concerning his motion to compel production of witnesses, Mr. Khan is effectively barred from presenting factual and legal arguments to the Military Judge—even in a classified filing—that are relevant and necessary to the Military Judge's consideration of Mr. Khan's instant request for pretrial punishment credit. *See* AE030I. Indeed, because AE030E creates significant confusion and uncertainty about what information in the Defense's possession may or may not be presented to the Military Judge even in a classified filing, and even where such information is unclassified and already in the public domain, the Defense is compelled to withhold from the instant motion important information that it would otherwise have submitted in support of Mr. Khan's request for pretrial punishment credit. The information withheld includes specifically, and without limitation, information concerning the anticipated testimony of witnesses that Mr. Khan has requested in his motion to compel, *see* AE030, and the information redacted from the two declarations accompanying this motion, *see* Attachments D and E, that were filed by Mr. Khan's *pro bono* civilian defense counsel in his prior habeas corpus case more than a decade ago without any redactions. *See* AE030I. The Defense is also forced to limit its legal arguments in support of this motion for fear of unintentionally violating

[2] (U) In his motion for reconsideration, Mr. Khan requested an extension of the deadline for filing his pretrial punishment motion. The Military Judge did not issue a ruling on that aspect of the reconsideration motion prior to the deadline set forth in AE016GG for filing substantive and evidentiary law motions. Mr. Khan therefore filed this motion in accordance with the May 1, 2019 deadline set forth in AE016GG.

AE030E. Perhaps most importantly, by virtue of the limitations that AE030E imposes on the Defense, the Defense is prevented even from making an appropriate record of the information that it is required to withhold in support of the instant motion.

d. (U) Mr. Khan requests that the Military Judge consider the amicus brief submitted by the Center for Victims of Torture *et al.*, and the amicus letter from former Department of Justice officials in support of this motion. *See* Attachments H, I.

3. (U) **Overview**

(U) Majid Khan is the only high-value detainee at Guantanamo who has pled guilty and agreed to cooperate with the government. After many years of providing substantial assistance to the government in the investigation and prosecution of others, he is presently scheduled to be sentenced in July 2019. His pretrial agreement provides for a maximum approved sentence "not to exceed 19 years" of imprisonment with credit for time served from the date of his guilty plea in February 2012. AE012, ¶ 8; AE013, ¶ 3. Separate and apart from this ceiling on his sentence or an eventual clemency submission to the Convening Authority, Mr. Khan requests that the Military Judge grant him administrative credit to be applied against his approved sentence in order to ensure an effective remedy for the pretrial punishment that he indisputably suffered between the time of his capture and his guilty plea.

(U) There is no serious dispute that a military judge may award pretrial punishment credit in these military commissions, including administrative credit applied against an approved sentence in order to account for torture and abuse suffered by an accused at Guantanamo. Indeed, there is prior military commission precedent for the very same relief that Mr. Khan requests in this motion. In September 2008, in the case of *United States v. Mohammed Jawad*, the military judge,

COL Stephen R. Henley, USA, held that "[i]t is beyond peradventure that a Military Commission may dismiss charges because of abusive treatment of the Accused [detainee at Guantanamo]." 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) (citing R.M.C. 907(b), R.C.M. 907(b), and *United States v. Fulton*, 55 M.J. 88 (C.A.A.F. 2001)), *available at* https://bit.ly/2GJb15l. Judge Henley further held that the Commission is empowered to order other forms of remedial relief to "adequately address the wrong inflicted upon the Accused, including but not limited to, sentenc[ing] credit towards any approved period of confinement." *Id.* In addition, Judge Henley held that "[a]ny degrading treatment carries a presumption it was imposed as a punitive not preventative measure"; found that prior to being charged by military commission the accused, Mr. Jawad, had suffered "abusive conduct and cruel and inhuman treatment" because he had been subjected to sleep deprivation as well as excessive temperatures and other environmental conditions, 30 days of physical isolation, and other abuse; and ruled that the appropriate remedy would be applied as dictated by further developments in that case.[3] Such treatment is unquestionably unlawful, and warranted relief, but it pales in comparison to the horrors that Mr. Khan suffered in CIA detention and at Guantanamo. *See id.* at 2-3, 4-5.[4]

[3] ~~(U)~~ Judge Henley later suppressed Mr. Jawad's coerced confessions based on his post-capture treatment, and Mr. Jawad was released from Guantanamo in August 2009, pursuant to a federal court order granting his petition for a writ of habeas corpus. *See Jawad v. Gates*, 832 F.3d 364 (D.C. Cir. 2016) (discussing procedural history).

[4] ~~(U)~~ Like Mr. Khan, who attempted suicide and acts of self-mutilation on several occasions due to his abusive treatment, Judge Henley noted that Mr. Jawad had attempted suicide in December 2003. *See id.* at 1.

(U) Because Mr. Khan is the first detainee who was subjected to the CIA torture program to proceed to sentencing before a military commission at Guantanamo, he is also the first former CIA detainee to request pretrial punishment credit for the torture and other unlawful abuse that he indisputably suffered at the hands of U.S. agents while in official detention resulting from the offenses for which he was subsequently charged and pled guilty. Indeed, although arising nearly two decades after the attacks of September 11th, more than a decade after military commission charges were first announced against other former CIA detainees with whom Mr. Khan pled guilty to conspiring, and a decade after the CIA torture program was shut down, Mr. Khan's case presents a matter of first impression and substantial importance in the military commissions concerning whether or to what extent the commissions will account for the indisputable torture and other unlawful abuse of accused former CIA detainees such as Mr. Khan.

(U) As explained in the amicus brief submitted by the Center for Victims of Torture, the Military Judge must decide whether this Commission, like Judge Henley, will provide some measure of accountability and redress for a defendant appearing before the court, who no one seriously disputes was a victim of monstrous crimes committed by U.S. agents pursuant to a ruthless program of state-sanctioned torture. Put another way, the Military Judge must decide whether the Commission will take the necessary and appropriate steps to honor the United States's legal and moral obligations prohibiting torture and other cruel, inhuman and degrading treatment, and its commitment to due process and the rule of law, as well as to deter future acts of torture by agents of the United States. Will the Military Judge afford Mr. Khan the same remedy for torture and other unlawful punishment that the U.S. military would undoubtedly demand that an enemy force afford to one of our own service members if prosecuted and sentenced under circumstances

similar to Mr. Khan's? Or, if the Commission fails to provide even the relatively minimal degree of relief that Mr. Khan requests in this motion, will its failure to do so validate the views of those who believe that the military commissions are simply an instrumentality of the Executive Branch that tortured Mr. Khan, specifically designed and implemented to cover up and excuse those crimes?

(U) These are the principal questions raised by this motion. For there is no serious dispute that Mr. Khan was tortured and suffered other illegal pretrial punishment both in CIA detention and at Guantanamo before his guilty plea. As noted in his prior filings, and as described in the various attachments to this motion, Mr. Khan was subjected to torture in CIA detention that included, for example and without limitation, beatings, waterboarding, anal rape, sexual assault, and other horrific acts at the hands of U.S. agents. *See also, e.g.*, David Rohde, *Exclusive: Detainee Alleges CIA Sexual Abuse, Torture Beyond Senate Findings*, Reuters, June 2, 2015; J. Wells Dixon, *The Torture of Majid Khan*, Al Jazeera, June 22, 2015. Mr. Khan's treatment was so abysmal that when it was finally revealed in connection with the public disclosure of the SSCI report, the former CIA general counsel and the Justice Department attorney who authored many of the infamous memoranda authorizing the CIA torture program each stated that such abuses were not authorized and likely constituted torture. *See, e.g.*, Conor Friedersdorf, *John Yoo, If the Torture Report Is True, CIA Officers Are at Legal Risk*, The Atlantic, Dec.16, 2014; *Even Torture Memo Author John Yoo Thinks Rectal Feeding Was Illegal*, Reuters, Dec. 14, 2014; Shadee Ashtari, *Former CIA General Counsel John Rizzo Admits CIA Carried Out Unauthorized 'Torture'*, Huffington Post, Dec. 10, 2014; *see also* David Cole, *Taking Responsibility for Torture*, The New Yorker, Dec. 9, 2014 (discussing unauthorized CIA torture techniques).

(U) The CIA also notably made no effort in its response to the SSCI report to justify or defend its treatment of Mr. Khan, including in particular his "rectal feeding"—a grotesque procedure in which his "'lunch tray,' consisting of hummus, pasta with sauce, nuts, and raisins was 'pureed' and rectally infused"—that plainly constitutes anal rape under U.S. law. *See* Attachment G, at n.584; *see also, e.g.*, 18 U.S.C. § 2441(d)(1)(G) (defining war crime of rape to include forcible penetration of the anal opening of a victim with any foreign object). Rather, senior CIA officials denied knowledge of such incidents entirely. *See, e.g.*, Kimberly Dozier, *CIA Interrogation Chief: 'Rectal Feeding,' Broken Limbs Are News to Me*, The Daily Beast, Dec. 11, 2014.

(U) The evidence in support of this motion also establishes that Mr. Khan suffered additional unlawful treatment at Guantanamo prior to his guilty plea, including, for example and without limitation, abusive treatment, punitive conditions of confinement, and due process violations such as a denial of his requests for access to his counsel *for an entire year*. To be clear, almost from the moment when he arrived in Guantanamo in September 2006, Mr. Khan was represented by counsel, knew that he had counsel, and repeatedly requested access to his counsel, but was told by U.S. law enforcement and military officials—wrongly as a matter of law—that he was not entitled to counsel access because he had *not yet* been charged with any offenses. *See* Attachment F, at 2-3, 10, 11. These officials denied him access to his counsel while attempting to elicit confessions from him to construct a military commissions case against him that they hoped would be free of the taint of his CIA torture[5]—a sustained effort that continued without success at

[5] (U) Among other things, as part of this effort the U.S. government informed the court in Mr. Khan's habeas case that "[t]he importance of the [CIA torture] program to national security interests cannot be overstated," because "[i]nformation obtained through the program has provided

least until the time that Mr. Khan and his counsel approached federal prosecutors in New York about his willingness to plead guilty and cooperate as a way to atone for his own conduct. As a consequence of his inability to meet with his counsel, Mr. Khan went on a hunger strike to protest the government's refusal to allow him access to his counsel, and also threatened additional acts of self-harm, including self-mutilation and suicide, for which he was punished severely. *See id.* In addition, as noted above, Mr. Khan also suffered other unlawful abuse at Guantanamo, which is documented in the attachments to this motion, and as to which certain witnesses would testify to more fully at an evidentiary hearing on this motion, if permitted.

~~(U)~~ It is therefore not surprising that the Prosecution and the Convening Authority strongly oppose Mr. Khan's efforts to obtain pretrial punishment credit. As Mr. Khan has addressed in his recent filings, the government contends that Mr. Khan is not entitled to pretrial punishment credit because "Article 13 of the UCMJ and Rule for Court-Martial 305, pertaining to pretrial punishment, do not apply to Mr. Khan." AE030, at 25. The government goes so far as to threaten to try to withdraw from Mr. Khan's plea agreement if he merely files a motion requesting pretrial punishment credit—a meritless threat with no legal basis that he has obviously rejected. *See id.* at 25-27. The government is wrong both in its assumption that longstanding courts-martial practice is irrelevant to the issue of pretrial punishment credit in the military commissions, and in its

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the United States with one of the most useful tools in combating terrorist threats to the national security," and "[i]t has shed light on probable targets and likely methods for attacks on the United States, has led to the disruption of terrorist plots against the United States and its allies, and has gathered information that has played a role in the capture and questioning of senior Al Qaeda operatives." Resp'ts' Mem. Opp'n to Pet'rs' Mot. for Emergency Access to Counsel at 3, *Khan v. Bush*, 16-cv-1690 (RBW) (D.D.C. Oct. 26, 2006) (dkt. 6) (citing unclassified CIA declaration attached thereto as Ex. 1). Those representations were later revealed to be demonstrably false. *Compare* Attachment G (SSCI report at 2-19 (findings and conclusions)).

assumption that Mr. Khan's entitlement to such credit arises solely from Article 13 and R.C.M. 305 in courts-martial practice. Neither is true.

(U) As explained in Judge Henley's ruling in the *Jawad* case, a military commissions judge at Guantanamo has authority to grant the very same relief that Mr. Khan requests in the instant motion: "[i]t is beyond peradventure" that a military commission judge may grant credit against an approved sentence to remedy "abusive treatment of the Accused." Judge Henley determined that authority is implied by the authority of a military judge to impose the more severe remedy of dismissing charges against an accused pursuant to R.M.C. 907(b), R.C.M. 907(b), and *United States v. Fulton*, 55 M.J. 88 (C.A.A.F. 2001). Indeed, the availability of pretrial punishment credit in the military commissions, and the Military Judge's authority to grant it based on the facts and circumstances of this case, is rooted in the fundamental right of all defendants to due process of law. This includes not only due process as protected by the Fifth Amendment to the Constitution, but also as recognized throughout the evolution of common law that predates the Founding, as well as pursuant to military law, custom and practice.

(U) Nothing in the Military Commissions Act, the Manual for Military Commissions, or Mr. Khan's plea agreement alters this conclusion; certainly, no authority forecloses Mr. Khan's entitlement to pretrial punishment credit. To the contrary, although this Commission may be a court of limited jurisdiction, it is still a court, and as such the Military Judge has both inherent and statutory authority to grant the requested relief. The Military Judge should exercise that discretion and grant the relief requested by Mr. Khan.

4. (U) **Burden of Proof**

(U) The moving party must demonstrate by a preponderance of the evidence that the requested relief is warranted. *See* R.M.C. 905(c); RC 3.8.

5. (U) Facts

(U) Mr. Khan was captured in Karachi, Pakistan in March 2003 and disappeared into secret CIA detention. In September 2006, he was transferred to Guantanamo, where he has remained to date. Throughout the period of his detention and prior to his guilty plea in February 2012, Mr. Khan was subjected virtually to nonstop torture, other cruel, inhuman and degrading treatment, and other abuse. The details of Mr. Khan's abuse are set forth above, in his prior filings, and in the attachments to this motion. Additional details would also be provided by Mr. Khan's own testimony at an evidentiary hearing on this motion, and by the testimony of other witnesses—including, again, witnesses whose anticipated testimony is relevant and necessary to the Military Judge's legal ruling on this motion, but which cannot be described even in classified form because of the restrictions imposed on the Defense by AE030E. Among other things, the Defense would produce further evidence to show that the torture and other unlawful abuse that Mr. Khan suffered was specifically intended to punish him physically and psychologically for his offenses, and that the punitive nature of his treatment can otherwise be proven by circumstantial evidence of the nature and severity of what happened to him. The Defense would also establish that the punishment Mr. Khan endured occurred while he was held for trial.

(U) Mr. Khan's government-funded torture expert would testify at an evidentiary hearing in support of this motion that Mr. Khan's treatment between the time of his capture and the time of his guilty plea served only one purpose—to punish him severely for the offenses with which he subsequently was charged and pled guilty. The expert would testify that the horrors that Mr. Khan

suffered bear no rational relationship to legitimate interrogation methods or intelligence-gathering purposes. To the contrary, they were methods that constituted torture, which were reverse-engineered from the U.S. military's SERE program, which, ironically, was created to train captured U.S. service members to overcome torture and abuse at the hands of enemy regimes that do not respect the laws of war. The expert would further testify that Mr. Khan's treatment was based on purported psychological principles of "learned helplessness" designed to make Mr. Khan completely compliant with his interrogators such that he would confess to whatever allegations were placed before him *even if untrue*. Indeed, as the SSCI report states specifically, Mr. Khan was tortured despite the fact that he initially cooperated after his capture in March 2003.

~~(U)~~ Mr. Khan's government-funded medical expert likewise would testify at a hearing on his motion that there is no medial reason or efficacy for the torture that Mr. Khan endured—including specifically, and without limitation, rectal feeding, which constitutes anal rape, and which, as noted above, the CIA makes no effort to defend on any basis. The medical expert would also be expected to testify that Mr. Khan has suffered and continues to suffer severe, permanent physical and psychological harm from his torture and abuse prior to his guilty plea.

~~(U)~~ It also bears repeating that as a matter of law there is no legitimate government purpose or justification for torture, other cruel, inhuman or degrading treatment, or other abuse to which Mr. Khan was subjected. Torture is a grave crime under U.S. and international law. *See* 18 U.S.C. §§ 2340-2340A; 18 U.S.C. § 2441; 10 U.S.C. § 950t(11)-(14). It is prohibited at all times and in all circumstances without exception; it is a *jus cogens* peremptory norm of international law. *See* Attachment H (amicus brief submitted on behalf of the Center for Victims of Torture *et al.*); United Nations Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment

or Punishment ("CAT"), art. 2, Dec. 10, 1984, 23 I.L.M. 1027, 1465 U.N.T.S. 85; *Sosa v. Alvarez-Machain*, 542 U.S. 692, 732 (2004) ("[T]he torturer has become—like the pirate and slave trader before him—*hostis humani generis*, an enemy of all mankind.") (quoting *Filartiga v. Pena-Irala*, 630 F.2d 876, 890 (2d Cir. 1980)).

(U) All of the severe punishment that Mr. Khan suffered occurred against the backdrop of his military commission case. As noted above, and as explained in the attachments to his motion, including the SSCI report, Mr. Khan was captured, detained and tortured in official U.S. custody in connection with the very same offenses with which he was eventually charged and pled guilty before this Commission. Indeed, as the anticipated testimony of certain witnesses in this case would establish, if the Defense were permitted to call them or otherwise use certain information already in the Defense's possession without violating AE030E, Mr. Khan was initially captured and detained, and later transferred to Guantanamo, so that he could be charged and tried by military commission albeit without revealing publicly what had happened to him, where it happened, and who was responsible for his torture and other unlawful abuse. They would explain that these military commissions were set up to ensure that former CIA detainees like Mr. Khan were detained without meaningful access to the outside world, and, contrary to our obligations under international law, to protect and shield their torturers from accountability for the war crimes they committed against the detainees.[6]

(U) It is helpful to recall that at the time of Mr. Khan's initial capture in 2003, President Bush had signed an executive order providing that suspected members of Al Qaeda like Mr. Khan

[6] (U) *See, e.g.*, CAT arts. 4-7 (requiring investigation and prosecution of torturers); *id.* art. 14 (requiring states to provide a right to redress for torture victims).

can be detained, and if tried would be only be tried before military commissions. *See* Exec. Order, Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 (Nov. 13, 2001). Mr. Khan was also later transferred to Guantanamo in September 2006 for the express purpose of trying him by military commission.[7]

(U) The president's remarks confirming the existence of the CIA torture program also confirm that Mr. Khan and the other former CIA prisoners were transferred to Guantanamo for the specific purpose of prosecuting them by military commission:

- (U) "So we intend to prosecute these men, as appropriate, for their crimes."
- (U) "So today, I'm sending Congress legislation to specifically authorize the creation of military commissions to try terrorists for war crimes. . . . The procedures in the bill I am sending to Congress today reflect the reality that we are a nation at war, and that it's essential for us to use all reliable evidence to bring these people to justice."
- (U) "Soon after the war on terror began, I authorized a system of military commissions to try foreign terrorists accused of war crimes."
- (U) "So I'm announcing today that Khalid Sheikh Mohammed, Abu Zubaydah, Ramzi bin al-Shibh, and 11 other terrorists in CIA custody [including Mr. Khan] have been transferred to the United States Naval Base at Guantanamo Bay. . . . As soon as Congress acts to authorize the military commissions I have proposed, the men our intelligence officials believe orchestrated the deaths of nearly 3,000 Americans on September the 11th, 2001, can face Justice."
- (U) "We'll also seek to prosecute those believed to be responsible for the attack on the USS Cole, and an operative believed to be involved in the bombings of the American embassies in Kenya and Tanzania. With these

[7] (U) At the time of his transfer, the Supreme Court had recently invalidated the then-existing military commissions system as unlawful. *See Hamdan v. Rumsfeld*, 548 U.S. 557 (2006). Consequently, the president had requested that Congress enact new legislation to permit the trial of Mr. Khan and others transferred to Guantanamo from CIA detention to be tried by military commission. Those efforts resulted in enactment of the Military Commissions Act of 2006, which was later superseded by the Military Commissions Act of 2009.

> prosecutions, we will send a clear message to those who kill Americans: No longer—how long it takes, we will find you and we will bring you to justice."
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> * (U) "As we move forward with the prosecutions, we will continue to urge nations across the world to take back their nationals at Guantanamo who will not be prosecuted by our military commissions. America has no interest in being the world's jailer. . . . We will continue working to transfer individuals held at Guantanamo, and ask other countries to work with us in this process. And we will move toward the day when we can eventually close the detention facility at Guantanamo Bay."

See Office of the Press Sec'y, *President Discusses Creation of Military Commissions to Try Suspected Terrorists*, The White House, Sept 6, 2006, *available at* https://bit.ly/2XLGae3.

(U) Few if any of the president's predictions or promises have been realized. *See, e.g., In re Al-Nashiri*, No. 18-1279, ___ F.3d ___, 2019 WL 1601994, at *7 (D.C. Cir. Apr. 16, 2019). But there is no dispute that Mr. Khan and the other detainees were transferred to Guantanamo for the specific purpose of obtaining "clean" confessions from them untainted by CIA torture, and trying them before a military commission. [redacted]

(U) As noted above, it was in this context that Mr. Khan was transferred to Guantanamo in September 2006, and denied access to his counsel for more than a year while the government attempted to reconstruct a prosecution case against him untainted by his torture. But his pretrial punishment did not end upon his arrival at Guantanamo. To the contrary, as explained above and in the attachments to this motion, and as would be more fully developed through witness testimony at an evidentiary hearing, Mr. Khan's pretrial punishment continued until the time of his guilty plea in 2012. It is that punishment—occurring in CIA detention as well as at Guantanamo, each continuing for a period of several years—for which Mr. Khan now seeks a broad, prophylactic

remedy in the form of administrative credit against his approved sentence. The Military Judge should exercise its discretion to grant that credit to remedy Mr. Khan's pretrial punishment, honor the United States's legal and moral obligations with respect to the prohibition on torture and other cruel, inhuman and degrading treatment, and its commitment to due process and the rule of law, as well as to deter future acts of torture. The Military Judge should afford Mr. Khan the same relief that the U.S. military would undoubtedly demand that an enemy force afford one of our own service members under similar circumstances.

6. (U) Law and Argument

I. (U) Punishment of Detainees Like Mr. Khan Prior to Conviction Is Prohibited by the Fifth and Eighth Amendments to the Constitution, and the Common Law

A. (U) The Prohibition on Punishment Prior to Conviction

(U) The punishment of detainees such as Mr. Khan prior to their conviction for offenses beyond a reasonable doubt is prohibited as a matter of well-settled law. In *Bell v. Wolfish*, 441 U.S. 520, 535 (1979), the Supreme Court held that "under the Due Process Clause, a detainee may not be punished prior to an adjudication of guilt in accordance with due process of law." The Court further held that the government may detain an individual subject to restrictions and conditions at a detention facility in order to ensure his eventual appearance at trial, but only so long as "those conditions and restrictions do not amount to punishment, or otherwise violate the Constitution." *Id.* at 536-37; *see also Graham v. Connor*, 490 U.S. 386, 395 n.10 (1989) ("[T]he Due Process Clause protects a pretrial detainee from the use of excessive force that amounts to punishment.").

(U) Indeed, the fundamental prohibition on the punishment of detainees prior to conviction was recognized at common law; it predates the Founding and ratification of the Constitution. The

Due Process Clause was originally intended to "preserve[ ] from deprivation without due process [ ] the right generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men." *Ingraham v. Wright*, 430 U.S. 651, 672-73 (1977). "Among the historic liberties so protected was a right to be free from *and to obtain judicial relief*, for unjustified intrusions on personal security." *Id.* at 673 (emphasis added) (citing 1 W. Blackstone, Commentaries *134 and the 39th Article of the Magna Carta). As William Blackstone observed more than two centuries ago, in the "dubious interval" between capture, detention and trial "a prisoner ought to be used with the utmost humanity; and neither be loaded with needless fetters, or subjected to other hardships than such as are absolutely requisite for the purpose of confinement only." 4 W. Blackstone, Commentaries *300. Due process of law "always [has] been thought to encompass freedom from bodily restraint and punishment." *Ingraham*, 430 U.S. at 673-74. "It is fundamental that the state cannot hold and physically punish an individual except in accordance with due process of law." *Id.* at 674.

(U) In determining whether particular restrictions or conditions of detention amount to punishment in violation of the Constitution, the Supreme Court has held that "[a] court must decide whether the disability is imposed for the purpose of punishment or whether it is but an incident of some other legitimate governmental purpose." *Bell*, 441 U.S. at 538.

(U) The Court has explained that

> [a]bsent a showing of an expressed intent to punish on the part of detention facility officials, that determination generally will turn on whether an alternative purpose to which the restriction may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned to it. Thus, if a particular condition or restriction of pretrial detention is reasonably related to a legitimate governmental objective, it does not, without more, amount to "punishment." Conversely, if a restriction or condition is not reasonably related to a legitimate goal—if it is arbitrary or purposeless—a court permissibly may infer

> that the purpose of the governmental action is punishment that may not constitutionally be inflicted upon detainees *qua* detainees.

Id. at 538-39 (quoting *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963), and other authorities; quotation marks and alterations omitted); *see also United States v. Salerno*, 481 U.S. 739, 747 (1987). The Court concluded that "[c]ourts must be mindful that these inquiries spring from constitutional requirements and that judicial answers to them must reflect that fact rather than a court's idea of how best to operate a detention facility." *Bell*, 441 U.S. at 539.

~~(U)~~ The Supreme Court has also held that the test for determining whether a pretrial detainee was punished in violation of due process is objective, and does not turn on whether those who inflicted the punishment—in Mr. Khan's case, torture—were subjectively aware that their use of force was unreasonable or unlawful. *See Kingsley v. Hendrickson*, 135 S. Ct. 2466, 2473-74 (2015) (citing *Bell*).

~~(U)~~ The Supreme Court has further clarified that "[r]etribution and deterrence are not legitimate nonpunitive government objectives." *Bell*, 441 U.S. at 539 n.20. The Court has also stated specifically that where the government "load[ed] a detainee with chains and shackles and [threw] him in a dungeon . . . it would be difficult to conceive of a situation where conditions so harsh, employed to achieve objectives that could be accomplished in so many alternative and less harsh methods, would not support a conclusion that the purpose for which they were imposed was to punish." *Id.*[8] Indeed, the Supreme Court has recognized that some forms of pretrial punishments may be so severe as to be labeled criminal punishment and thereby implicate not only

[8] ~~(U)~~ *Compare* SSCI report at 4 (summarizing deplorable conditions of confinement in CIA detention facilities, and noting that the chief of interrogations even described one facility as a "dungeon" and "itself an enhanced interrogation technique").

due process but also the Eighth Amendment prohibition on cruel and unusual punishment. *See Ingraham*, 430 U.S. at 669 n.37. Because the torture inflicted on Mr. Khan is prohibited in all circumstances without exception, *see supra* at 12-13 (citing CAT), and surely rises to the level of criminal punishment, the Eighth Amendment is also implicated here and warrants the imposition of a meaningful remedy at sentencing for Mr. Khan's punishment prior to conviction. *See Ingraham*, 430 U.S. at 665 (explaining that the Eighth Amendment was included in the Bill of Rights because the drafters "feared the imposition of torture and other cruel punishments"); *id.* 670 (Eighth Amendment prohibits "unnecessary and wanton infliction of pain").[9]

B. (U) The Authority of Courts to Remedy Punishment Prior to Conviction

(U) There is also no serious dispute that courts have authority to provide a meaningful remedy for pretrial punishment that violates due process or the prohibition on cruel and unusual punishment, including dismissal of charges or other lesser sanctions. Indeed, once a due process liberty interest is implicated, the question becomes what process is due, and courts must look to common law remedies. *See Ingraham*, 430 U.S. at 674-75. The authority of courts to fashion meaningful relief for due process violations is especially clear where, as in Mr. Khan's case, the detainee was tortured or otherwise subjected to treatment so severe as to "shock the conscience." *See Rochin v. California*, 342 U.S. 165, 169 (1952) ("Regard for the requirements of the Due Process Clause inescapably imposes upon this Court an exercise of judgment upon the whole course of the proceedings . . . to ascertain whether they offend those canons of decency and fairness which express the notions of justice . . . . These standards of justice are not authoritatively

[9] (U) The Eighth Amendment prohibition on cruel and unusual punishment is specifically incorporated in the Military Commissions Act. *See* 10 U.S.C. § 949s.

formulated anywhere as though they were specifics. Due process of law is a summarized constitutional guarantee of respect for those personal immunities which . . . are 'so rooted in the traditions and conscience of our people as to be ranked as fundamental,' or are 'implicit in the concept of ordered liberty.'") (quoting *Malinski v. New York*, 324 U.S. 401, 416-417 (1945); *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934); *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)); *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992) (explaining that the Due Process Clause "contains a substantive component that bars certain arbitrary, wrongful government actions"); *United States v. Russell*, 411 U.S. 423, 431-32 (1973) ("we may someday be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction"); *Palko*, 302 U.S. at 326 (due process requires "the need to give protection against torture, physical or mental").

(U) Courts also have authority to inquire into a detainee's pretrial torture because it threatens to taint and degrade the judicial proceedings. *See Miller v. Fenton*, 474 U.S. 104, 109 (1985) ("This Court has long held that certain interrogation techniques, either in isolation or as applied to the unique characteristics of a particular suspect, are so offensive to a civilized system of justice that they must be condemned under the Due Process Clause . . . ."); *Brown v. Mississippi*, 297 U.S. 278, 286 (1936) (torture is "revolting to the sense of justice")[10]; *Rochin*, 342 U.S. at 173-74 ("[T]o sanction [such] brutal conduct 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.");

[10] (U) Many of the early substantive due process cases in the Supreme Court like *Brown* address the use of torture techniques similar to those used on CIA detainees such as Mr. Khan, including hangings, beatings, and other forms of physical and psychological torture.

United States v, Abu Ali, 395 F. Supp. 2d 338, 379 (E.D. Va. 2005) ("[T]orture of any kind is legally and morally unacceptable, and the judicial system of the United States will not permit the taint of torture in its judicial proceedings."); *see also Rogers v. Richmond*, 365 U.S. 534, 541 (1961) ("ours is an accusatorial and not an inquisitorial system").

(U) Even courts of limited jurisdiction such as this Commission have inherent authority to fashion appropriate relief for pretrial punishment that violates the Constitution. Indeed, although this Commission's authority may be limited, and military commission jurisprudence may not contain a breadth of reasoned opinions addressing, for example, which bodies of substantive law are binding on the commissions, this is nonetheless a court of the United States and as such it necessarily has full authority to act within the areas of jurisdiction assigned to it by Congress under the Military Commissions Act. Indeed, all courts have inherent authority to act upon persons brought within their jurisdiction, and to issue orders in aid of that jurisdiction in order to achieve the ends of justice. *See* All Writs Act, 28 U.S.C. § 1651; *United States v. N.Y. Tel. Co.*, 434 U.S. 159, 172-73 (1977) (All Writs Act is a "legislatively approved source of procedural instruments designed to achieve the rational ends of law," and the court may use such writs in aid of its jurisdiction "when the use of such historic aids is calculated in its sound judgment to achieve the ends of justice entrusted to it") (alterations omitted); *cf. also* 28 U.S.C. § 2243 (habeas court may dispose of case "as law and justice require"). Such is the very principle recognized by Judge Henley in the *Jawad* case, which cited the Commission's indisputable authority to dismiss charges as a basis for providing a remedy for unlawful pretrial punishment of an accused. *See also infra* Part II.

(U) Moreover, in the federal court system, judges have discretion to award sentencing credit for pretrial punishment under the federal sentencing guidelines. *See* U.S.S.C. § 5K2.0 (permitting downward departures from the sentencing guidelines for punishment not otherwise accounted for in the guidelines); *see also* Attachment I (letter from former Department of Justice officials addressing Section 5K2.0). Indeed, federal courts have routinely awarded sentencing credit for conduct similar to—or far less egregious than—the torture and abuse inflicted on Mr. Khan. *See, e.g., United States v. Rodriquez*, 214 F. Supp. 2d 1239 (defendant raped by prison guard); *United States v. Clough*, 360 F.3d 967 (9th Cir. 2004) (defendant suffered significant physical and psychological injuries from arrest and detention); *United States v. Noriega*, 40 F. Supp. 2d 1378 (S.D. Fla. 1999) (prolonged segregated confinement); *McClary v. Kelly*, 4 F. Supp. 2d 195 (prolonged deprivation of social and environmental stimulation).

II. (U) Punishment of Detainees Like Mr. Khan Prior to Conviction Is Prohibited by Military Law, Custom and Practice

(U) In the military system, the prohibition on pretrial punishment is recognized both as a matter of due process and as a matter of statute. *See United States v. King*, 61 M.J. 225, 227 (C.A.A.F. 2005); *United States v. McCarthy*, 47 M.J. 162, 164 (C.A.A.F. 1997). The statutory prohibition on pretrial punishment is set forth in Article 13 of the Uniform Code of Military Justice, which 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.

10 U.S.C. § 813. Article 13 not only prohibits pretrial punishment but also ensures the presumption of innocence. *See United States v. Heard*, 3 M.J. 14, 20 (C.M.A. 1977).[11] Article 13's prohibition on pretrial punishment "is conceptually the same as those constitutionally required by the Due Process Clause of the Constitution," and the test for establishing unlawful punishment is the same. *United States v. James*, 28 M.J. 214, 215-16 (C.M.A. 1989); *United States v. Palmiter*, 20 M.J. 90 (C.M.A. 1985).

~~(U)~~ Far from creating a new or exclusive prohibition on pretrial punishment, Article 13 was first enacted by Congress as an amendment to Article of War 16 in order to clarify and confirm the long-standing rule of military custom and practice that detainees may not be subject to punishment prior to conviction. Article 13 was proposed as part of the Elston Act, which became law as part of the Selective Service Act, Pub. L. No. 80-759, § 212, 62 Stat. 604, 630 (1948), *available at* https://www.loc.gov/rr/frd/Military_Law/Morgan-Papers/Vol-I_PL-759.pdf. The provision was specifically derived from then-"present Army and Navy practice." H.R. 2498, A Bill to Unify, Consolidate, Revise, and Codify the Articles of War, the Articles for the Government of the Navy, and the Disciplinary Laws of the Coast Guard, and to Enact and Establish a Uniform Code of Military Justice: Hearing Before a Subcomm. on Comm. of Armed Servs., 81 Cong. 916-17 (1949); *see United States v. Bayhand*, 21 C.M.R. 84 (C.M.A. 1956) (discussing legislative history of Article 13 and Congress's intent to clarify and confirm existing prohibitions on

[11] ~~(U)~~ Although not mentioned specifically in the Constitution, Supreme Court precedent has made clear that "[t]he principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law." *Taylor v. Kentucky*, 436 U.S. 478, 484 (1978) (quoting *Coffin v. United States*, 156 U.S. 432, 453 (1895)). The presumption is rooted in the requirements of due process. *See id.* at 485-86.

punishment of detainees); *United States v. Palmiter*, 20 M.J. 90 (C.M.A. 1985) (same). Indeed, Article 13 merely restated what was written into the Articles of War and widely recognized as a fundamental principle of military custom and practice that had existed for centuries. *See* W. Winthrop, *Military Law and Precedents* 124 (2d ed. 1920) ("A prisoner is to be presumed to be innocent till [sic] duly convicted and till [sic] thus convicted, he cannot legally be punished as if he were guilty or probably so."); *id.* at 125 n.95 (citing *Steere v. Field*, 2 (Mason) 486, 516 (1822) (stating that "[b]y the ancient common law" prisoners may not be subject to punishment)); *id.* at 444 ("[O]ur law recognizes no military punishments . . . other than such as may be duly imposed by sentence upon trial and conviction.").

(U) Article 13 likewise does not dictate or otherwise provide explicit authority for military judges to grant relief for illegal pretrial punishment. *Article 13 is silent on the issue of remedies for pretrial punishment.* Rather, like federal district courts, military courts have routinely invoked their "inherent authority" to fashion appropriate relief for violations of Article 13 and other pretrial punishment violations. *United States v. Gregory*, 21 M.J. 952, 958 n.15 (C.M.R. 1986); *United States v. Suzuki*, 14 M.J. 491, 493 (C.M.R. 1983) (holding that "where pretrial confinement is illegal for several reasons and the military judge concludes the circumstances require a more appropriate remedy, a one-for-one day credit is not mandated" to address "unusually harsh circumstances").[12] Nor are military judges limited to providing remedies for violations of Article

[12] (U) *Suzuki* was decided more than a decade before R.M.C. 305(k) was amended in the 1998 Manual for Courts-Martial to authorize military judges explicitly to order more than day-for-day credit to remedy "an abuse of discretion or unusually harsh circumstances." In any event, military precedent is clear that pretrial punishment credit is not limited to the relief afforded by R.C.M. 305(k). *See Gregory*, 21 M.J. at 958 n.14 (explaining that R.C.M. 305(k) credit is "not broad enough in scope to cover all such instances" of illegal pretrial confinement); *United States v. Zarbatany*, 70 M.J. 169, 170 (C.A.A.F. 2011) ("Nor has this Court's case law interpreted R.C.M.

13 involving illegal pretrial *confinement*; as in the *Jawad* case or in Mr. Khan's case, they may fashion appropriate remedies for other forms of pretrial *punishment*. *See, e.g., United States v. Combs*, 47 M.J. 330, 333 (C.A.A.F. 1997) ("Article 13 on its face is not limited to pretrial confines, but instead applies to servicemembers 'held for trial,'" including "arrestees who were not yet in pretrial confinement."); *United States v. Washington*, 42 M.J. 547 (C.A.A.F. 1995) (holding no contact orders and duty reassignment violated Article 13); *United States v. Cruz*, 25 M.J. 326, 333 (1987) (ordering resentencing where public denunciation of defendant violated Article 13).

(U) The point is that Article 13 is neither an explicit or exclusive source of authority for, nor a limitation on, the authority of military judges to provide relief for unlawful pretrial punishment. Military judges instead have broad discretion to fashion remedies in order to ensure that relief is effective and meaningful, and sufficient to deter future violations. *See United States v. Zarbatany*, 70 M.J. 169, 170 (C.A.A.F. 2011) ("Article 13 . . . does not preclude forms of relief other than confinement credit. . . . relief can range from dismissal of the charges, to confinement credit or to the setting aside of a punitive discharge. Where relief is available, meaningful relief must be given for violations of Article 13."); *id.* at 175; *United States v. Larner*, 1 M.J. 371 (C.M.A. 1976) (military judge may award administrative credit against approved sentence where that is "the only legal and full adequate remedy for" unlawful pretrial punishment). "[T]he question of what relief is due to remedy a violation, if any, requires a contextual judgment, rather than the pro forma application of formulaic rules. Whether meaningful relief has been granted and should be granted will depend on factors such as the nature of the Article 13, UCMJ, violations,

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305(k) as exclusively delineating the form of relief lawfully available for violations of Article 13.").

the harm suffered by the appellant, and whether the relief sought is disproportionate to the harm suffered or in light of the offenses for which the appellant was convicted." *Zarbatany*, 70 M.J. at 176-77. Such determinations are made by military judges exercising their sound discretion.

III. (U) Mr. Khan Is Entitled to Meaningful Relief for Illegal Pretrial Punishment He Suffered in CIA Detention and at Guantanamo Prior to His Guilty Plea

(U) Applying the foregoing principles in the context of this case, Mr. Khan should be entitled to meaningful relief for the illegal pretrial punishment that he suffered for more than three years in CIA detention between the time of his capture in March 2003 and his transfer to Guantanamo in September 2006, and for more than five years between the time he arrived at Guantanamo and his guilty plea in February 2012. The Military Judge should exercise discretion and grant Mr. Khan administrative credit equivalent to no less than half of his approved sentence as a comprehensive, prophylactic remedy for the horrific treatment that Mr. Khan suffered at the hands of U.S. agents while in official detention resulting from the offenses with which he was subsequently charged and pled guilty. He requests this relief in addition to the day-for-day confinement credit to which he is entitled from the date of his guilty plea on February 29, 2012, and notwithstanding any clemency determination by the Convening Authority.

(U) Judicial relief is particularly appropriate in Mr. Khan's case because it involves the infliction of severe physical and psychological punishment for a period of years that is not seriously disputed. Indeed, as the attachments to this motion illustrate, and as witness testimony will further confirm, if permitted, this case involves direct evidence of intent to punish Mr. Khan. It involves statements by Mr. Khan's torturers such as, "We're going to beat you up, son," "I'm

going to fix your attitude problem," and "Son, we're going to take care of you. We are going to send you to a place you cannot imagine." Attachment C (declassified habeas information). It also involves acts of torture such as anal rape that the government makes absolutely no effort to justify or defend. In addition, this case involves other horrific acts of torture and abuse that provide undeniable circumstantial evidence of intent to punish Mr. Khan. Such evidence is plainly sufficient to establish punishment. As noted above, the Defense will also establish, if permitted, that the punishment inflicted on Mr. Khan occurred while he was held for trial. Cf. 18 U.S.C. 3585(b) (defendant is entitled to credit for "any time he has spent in official detention" prior to sentencing).

(U) Moreover, as illustrated by the *Jawad* case, and as otherwise set forth above, the Military Judge has broad discretion to fashion appropriate relief to ensure a meaningful and effective remedy for Mr. Khan's torture. In this case, given the unique circumstances of Mr. Khan's guilty plea and status as an active, ongoing cooperating witness for the government, the only effective remedy for his punishment is a comprehensive, prophylactic remedy of administrative credit equivalent to no less than half of his approved sentence—a remedy that, Mr. Khan respectfully submits, is relatively modest by comparison to the horrors he endured for a period of years as well as the lasting, damaging impact of that ordeal.[13] Such a remedy is further

[13] (U) For example, alternate remedies such as those contemplated by Judge Henley in the *Jawad* case, including the suppression of evidence or barring witness testimony, would not provide any practical relief for Mr. Khan or serve as a deterrent to future acts of torture in the unique context of this case. In addition, as many of the cases cited in this brief reflect, victims of pretrial punishment often seek civil damages for violation of their due process rights. In Mr. Khan's case, however, the remedy of credit against his approved sentence is particularly important because he is barred by statute (and his plea agreement) from seeking damages from those U.S. officials who are responsible for his torture. *See* 28 U.S.C. § 2241(e)(2) (stripping federal courts of jurisdiction to consider civil claims "relating to any aspect of the detention, transfer, treatment, trial, or

consistent with our obligations under the Geneva Conventions. *See* Geneva Convention (III) Relative to the Treatment of Prisoners of War, art. 87, Aug. 12, 1949, [1955] 6 U.S.T. 3316 ("[C]ourts or authorities of the Detaining Power . . . shall be at liberty to reduce the penalty provided for the violation of which the prisoner of war is accused, and shall therefore not be bound to apply the minimum penalty prescribed."); Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, art. 118, Aug. 12, 1949, 6 U.S.T. 3516 (same involving non-POWs).

(U) There is also nothing in the Military Commissions Act, the Manual for Military Commissions, or Mr. Khan's plea agreement that precludes the Military Judge from granting the relief requested by this motion. None makes reference to, let alone precludes, imposition of a meaningful judicial remedy for pretrial punishment. Nor could they given this Court's inherent authority and the fundamental right to such relief where warranted based on the facts and circumstances of a particular case.

(U) The Prosecution and the Convening Authority evidently believe that Mr. Khan may not claim pretrial punishment credit because Article 13 and R.C.M. 305(k) are not referenced specifically in the Military Commission Act or the Manual for Military Commissions. But as discussed at length above, Article 13 and R.C.M. 305(k) are neither coterminous nor do they

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conditions of confinement of an alien who is or was detained by the United States and has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination"). Nor, of course, was Mr. Khan in a position at any point to seek bail in order to mitigate his pretrial punishment. *Cf. Salerno*, 481 U.S. at 753 ("[A] primary function of bail is to safeguard the courts' role in adjudicating the guilty or innocence of the defendants."). Thus, absent sentencing credit for his torture, he will be effectively without judicial review of the deprivation of his due process rights, which would be unconstitutional in its own right. *See Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 329, 331 (1816) (Article III demands some federal court review—whether original or appellate—over all federal question claims).

provide an exclusive source of rights for a detainee or authority for a military judge to remedy pretrial punishment. The right of detainees to be free from pretrial punishment and of judges to remedy such punishment is fundamental and deeply rooted in the common law, predating both the Constitution and enactment of Article 13 and R.C.M. 305(k). Nor in any event have those provisions been specifically exempted from the military commission procedures; the procedures are merely silent, which suggests that those authorities remain persuasive. *See* 10 U.S.C. § 948b(c) ("[P]rocedures for military commissions . . . are based upon the procedures for trial by general courts-martial," and judicial interpretation and application of courts-martial rules is "instructive" in commissions); *id.* § 949a(a) (unless specifically excepted, "procedures and rules of evidence applicable in trials by general courts-martial of the United States shall apply in trials by military commission"); *United States v. Khadr*, 717 F. Supp. 2d 1215, 1236 & n.35 (CMCR 2007) (Congress intended "that military commissions mirror [ ] firmly rooted [historical courts-martial] practice to the maximum extent practicable").

~~(U)~~ The Manual for Military Commissions has attempted to limit the availability of pretrial confinement credit, but pretrial *confinement* credit and pretrial *punishment* credit are not the same, even if pretrial punishment is often manifested in the form of unlawful confinement. *See Coyne v. Commander, 21st Theater Army Area Command*, 47 M.J. 626 (A. Ct. Crim. App. 1997). Rule 1001 of the Manual for Military Commissions contains two provisions that purport to limit pretrial confinement credit. The Discussion following Rule 1001(c) states that "[w]hile no credit is given for pretrial detention, the defense may raise the nature and length of pretrial detention as a matter in mitigation." Rule 1001(g) also states that "[t]he physical custody of alien enemy belligerents captured during hostilities does not constitute pretrial confinement for purposes of sentencing and

the military judge shall not grant credit for pretrial detention." Each provision, emphasizing "confinement" or "detention," but not punishment, was added to the 2010 version of the Manual; neither appeared in the 2007 version that immediately preceded the 2010 version. These provisions were added to the 2010 version of the Manual in response to the sentencing of detainee Salim Hamdan before the military commission, and, specifically, because the military judge in that case afforded him pretrial confinement credit for time he had spent in law-of-war detention prior to his trial and conviction, which made him almost immediately eligible for release. The Secretary of Defense, apparently deeming that result unacceptable, changed the Manual to limit the availability of similar pretrial confinement credit afforded to other detainees who may be convicted by commission. *See* Carol Rosenberg, *Key Issues Unanswered by Guantanamo Tribunals Manual*, McClatchy, April 28, 2010 (2010 manual "appear[s] to strip war court judges of the authority to grant credit for time served in U.S. military custody in Afghanistan and Guantanamo before a trial. That appeared to be a reaction to the case of Salim Hamdan, who was convicted of providing material support for terror by working as Osama bin Laden's driver and sometime bodyguard. . . [and who was granted] credit for some time served, and his jury sentenced him to just 5 ½ months more at Guantanamo in 2008.").

(U) By contrast, again, no similar efforts have been made to amend the Manual in order to restrict the availability of pretrial punishment credit. Nor, at least as applied to Mr. Khan, could such changes have been implemented without violating the Ex Post Facto Clause of the Constitution. *See Al Bahlul v. United States*, 767 F.3d 1, 18 (D.C. Cir. 2014) (en banc) (noting that government concedes Ex Post Facto Clause applies at Guantanamo). For certainly at the time of Mr. Khan's offense conduct, and likewise at the time he was transferred to Guantanamo for

trial, there were no restrictions on the availability of pretrial punishment credit. As such, if the aforementioned changes to Rule 1001 in the 2010 version of the Manual (which have been carried through to the current version of the Manual) could somehow be understood to limit the availability of pretrial punishment credit—which they cannot—as a matter of law the Military Judge would be required to apply the earlier 2007 version of the Manual to Mr. Khan because it would be less punitive, resulting in an effectively lighter sentence with the availability of pretrial punishment credit. *See Peugh v. United States*, 569 U.S. 530 (2013) (holding that sentencing a defendant to a longer term, under guidelines promulgated after the commission of the criminal acts, violates the Ex Post Facto Clause).

~~(U)~~ Finally, while Mr. Khan's plea agreement contains a provision waiving his "right to assert any claim for day-for-day credit against [his] sentence to confinement based on any capture, detention or confinement" prior to the date of his guilty plea was accepted, AE013, ¶ 5, that provision neither speaks to the issue of punishment nor the specific nature of the comprehensive, prophylactic relief that Mr. Khan requests here. The only references in Mr. Khan's plea agreement to his unlawful punishment concern his right to present an extenuation and mitigation case in connection with his sentencing. *See* AE012, ¶ 26, AE013, ¶ 4; *see also* R.M.C. 1001(c). There is certainly no basis to argue that he waived his right to request pretrial punishment credit pursuant to his plea agreement. Indeed, "it should be noted that a prisoner cannot 'waive' his Article 13 protections prior to trial because no one can consent to be treated in an illegal manner." *United States v. Palmiter*, 20 M.J. 90 (C.M.A. 1985); *United States v. Washington*, 42 M.J. 547, 562 (C.A.A.F. 1995) (referencing "nonwaivable nature of Article 13").

7. ~~(U)~~ **Conclusion**

(U) The motion should be granted.

8. (U) **Oral Argument**

(U) The Defense requests oral argument and an evidentiary hearing.

9. (U) **Witnesses and Evidence**

(U) Mr. Khan requests that the Military Judge schedule an evidentiary hearing to receive further evidence in support of this motion, including Mr. Khan's own testimony, the testimony of his government-funded experts, and the testimony of other witnesses identified in his pending motion to compel. *See* AE030. Mr. Khan also requests permission to supplement or amend this motion after his motion for reconsideration of AE030E is fully resolved. *See* AE030I.

10. (U) **Certificate of Conference**

(U) The parties have conferred. The Prosecution objects to the requested relief.

11. (U) **Additional Information**

(U) The Defense has no additional information to present at this time.

12. (U) **List of Attachments**

A. (U) Certificate of Service, dated May 1, 2019.

B. (U) Proposed Orders.

C. (U) Declassified Habeas Information.

D. (U) CLASSIFIED Declaration #1.

E. (U) CLASSIFIED Declaration #2.

[redacted]

G. (U) SSCI Report.

H. (U) Amicus Brief on Behalf of the Center for Victims of Torture *et al.*

I. [redacted] (U) Amicus Letter of Former Department of Justice Officials.

Respectfully submitted,

//s//

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~~(U)~~ Attachment A

~~(U)~~ CERTIFICATE OF SERVICE

~~(U)~~ I certify that on this 1st of May 2019, I caused AE033, Defense Motion for Pretrial Punishment Credit and Other Related Relief, to be filed with the Military Commissions Trial Judiciary and arranged for service with all counsel of record.

//s//
Jared A. Hernandez
Detailed Defense Counsel
Lieutenant Commander, JAGC, U.S. Navy

(U) Attachment B

[redacted]

MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY, CUBA

UNITED STATES OF AMERICA v. MAJID SHOUKAT KHAN	AE ___ [Proposed Order #1] Defense Motion for Pretrial Punishment Credit and Other Related Relief May ___, 2019

Defendant Majid Khan's motion for pretrial punishment credit and other related relief (AE033) is hereby GRANTED as follows:

1. The Military Judge ORDERS that Mr. Khan shall be and hereby is granted administrative credit equivalent to no less than half of his approved sentence as a comprehensive, prophylactic remedy for pretrial punishment that he suffered while in official detention resulting from the offenses for which he was subsequently charged and pled guilty.

2. The Military Judge further ORDERS that such pretrial punishment credit shall be applied in addition to the day-for-day confinement credit to which Mr. Khan shall be entitled from the date of his guilty plea on February 29, 2012, and notwithstanding any clemency determination by the Convening Authority.

SO ORDERED, this ___ day of May 2019.

_____
Military Judge

[redacted]

MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY, CUBA

UNITED STATES OF AMERICA v. MAJID SHOUKAT KHAN	AE ___ [Proposed Order #2] Defense Motion for Pretrial Punishment Credit and Other Related Relief May ___, 2019

Defendant Majid Khan's motion for pretrial punishment credit and other related relief (AE033) is hereby GRANTED IN PART as follows:

1. The Military Judge ORDERS that an evidentiary hearing shall be conducted at a date and time to be set by further order of the Military Judge following the final resolution of Mr. Khan's motion for reconsideration of AE030E. *See* AE030I. The parties may present at the hearing evidence and testimony concerning Mr. Khan's motion for pretrial punishment credit.

2. The Military Judge further ORDERS that Mr. Khan may supplement or amend his motion for pretrial punishment credit after his motion for reconsideration of AE030E is resolved.

3. The Military Judge further ORDERS that the Commission will consider the amicus brief and amicus letter included as Attachments H and I in support of Mr. Khan's motion for pretrial punishment credit.

SO ORDERED, this ___ day of May 2019.

PROPOSED ORDER #1 / DEFENSE / 20190501

_____
Military Judge

(U) Attachment C

~~TOP SECRET//[redacted]//NOFORN~~

~~(U)~~ Attachment D

(U) Attachment E

EXHIBIT A

THE NEW YORKER

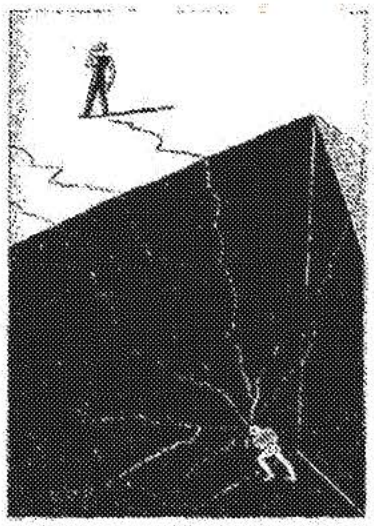
A REPORTER AT LARGE

THE BLACK SITES

A rare look inside the C.I.A.'s secret interrogation program.

by Jane Mayer

AUGUST 13, 2007



In March, Mariane Pearl, the widow of the murdered *Wall Street Journal* reporter Daniel Pearl, received a phone call from Alberto Gonzales, the Attorney General. At the time, Gonzales's role in the controversial dismissal of eight United States Attorneys had just been exposed, and the story was becoming a scandal in Washington. Gonzales informed Pearl that the Justice Department was about to announce some good news: a terrorist in U.S. custody—Khalid Sheikh Mohammed, the Al Qaeda leader who was the primary architect of the September 11th attacks—had confessed to killing her husband. (Pearl was abducted and beheaded five and a half years ago in Pakistan, by unidentified Islamic militants.) The Administration planned to release a transcript in which Mohammed boasted, "I decapitated with my blessed right hand the head of the American Jew Daniel Pearl in the city of Karachi, Pakistan. For those who would like to confirm, there are pictures of me on the Internet holding his head."

Pearl was taken aback. In 2003, she had received a call from [redacted] who was then [redacted] informing her of the same news. But [redacted]'s revelation had been secret. Gonzales's announcement seemed like a publicity stunt. Pearl asked him if he had proof that Mohammed's confession was truthful; Gonzales claimed to have corroborating evidence but wouldn't share it. "It's not enough for officials to call me and say they believe it," Pearl said. "You need evidence." (Gonzales did not respond to requests for comment.)

The circumstances surrounding the confession of Mohammed, whom law-enforcement officials refer to as K.S.M., were perplexing. He had no lawyer. After his capture in Pakistan, in March of 2003, the Central Intelligence Agency had detained him in undisclosed locations for more than two years; last fall, he was transferred to military custody in Guantánamo Bay, Cuba. There were no named witnesses to his initial confession, and no solid information about what form of interrogation might have prodded him to talk, although reports had been published, in the *Times* and elsewhere, suggesting that C.I.A. officers had tortured him. At a hearing held at Guantánamo, Mohammed said that his testimony was freely given, but he also indicated that he had been abused by the C.I.A. (The Pentagon had classified as "top secret" a statement he had written detailing the alleged mistreatment.) And although Mohammed said that there were photographs confirming his guilt, U.S. authorities had found none. Instead, they had a copy of the video that had been released on the Internet, which showed the killer's arms but offered no other clues to his identity.

Further confusing matters, a Pakistani named Ahmed Omar Saeed Sheikh had already been convicted of the abduction and murder, in 2002. A British-educated terrorist who had a history of staging kidnappings, he had been sentenced to death in Pakistan for the crime. But the Pakistani government, not known for its leniency, had stayed his execution. Indeed, hearings on the matter had been delayed a remarkable number of times—at least thirty—possibly because of his reported ties to the Pakistani intelligence service, which may have helped free him after he was imprisoned for terrorist activities in India. Mohammed's confession would delay the execution further, since, under

Pakistani law, any new evidence is grounds for appeal.

A surprising number of people close to the case are dubious of Mohammed's confession. A longtime friend of Pearl's, the former *Journal* reporter Asra Nomani, said, "The release of the confession came right in the midst of the U.S. Attorney scandal. There was a drumbeat for Gonzales's resignation. It seemed like a calculated strategy to change the subject. Why now? They'd had the confession for years." Mariane and Daniel Pearl were staying in Nomani's Karachi house at the time of his murder, and Nomani has followed the case meticulously; this fall, she plans to teach a course on the topic at Georgetown University. She said, "I don't think this confession resolves the case. You can't have justice from one person's confession, especially under such unusual circumstances. To me, it's not convincing." She added, "I called all the investigators. They weren't just skeptical—they didn't believe it."

Special Agent Randall Bennett, the head of security for the U.S. consulate in Karachi when Pearl was killed—and whose lead role investigating the murder was featured in the recent film "A Mighty Heart"—said that he has interviewed all the convicted accomplices who are now in custody in Pakistan, and that none of them named Mohammed as playing a role. "K.S.M.'s name never came up," he said. Robert Baer, a former C.I.A. officer, said, "My old colleagues say with one-hundred-per-cent certainty that it was not K.S.M. who killed Pearl." A government official involved in the case said, "The fear is that K.S.M. is covering up for others, and that these people will be released." And Judea Pearl, Daniel's father, said, "Something is fishy. There are a lot of unanswered questions. K.S.M. can say he killed Jesus—he has nothing to lose."

Mariane Pearl, who is relying on the Bush Administration to bring justice in her husband's case, spoke carefully about the investigation. "You need a procedure that will get the truth," she said. "An intelligence agency is not supposed to be above the law."

Mohammed's interrogation was part of a secret C.I.A. program, initiated after September 11th, in which terrorist suspects such as Mohammed were detained in "black sites"—secret prisons outside the United States—and subjected to unusually harsh treatment. The program was effectively suspended last fall, when [redacted] 34 announced that he was emptying the C.I.A.'s prisons and transferring the detainees to military custody in Guantánamo. This move followed a Supreme Court ruling, Hamdan v. Rumsfeld, which found that all detainees—including those held by the C.I.A.—had to be treated in a manner consistent with the Geneva Conventions. These treaties, adopted in 1949, bar cruel treatment, degradation, and torture. In late July, the White House issued an executive order promising that the C.I.A. would adjust its methods in order to meet the Geneva standards. At the same time, Bush's order pointedly did not disavow the use of "enhanced interrogation techniques" that would likely be found illegal if used by officials inside the United States. The executive order means that the agency can once again hold foreign terror suspects indefinitely, and without charges, in black sites, without notifying their families or local authorities, or offering access to legal counsel.

The C.I.A.'s [redacted] 37 has said that the program, which is designed to extract intelligence from suspects quickly, is an "irreplaceable" tool for combatting terrorism. And [redacted] 34 has said that "this program has given us information that has saved innocent lives, by helping us stop new attacks." He claims that it has contributed to the disruption of at least ten serious Al Qaeda plots since September 11th, three of them inside the United States.

According to the Bush Administration, Mohammed divulged information of tremendous value during his detention. He is said to have helped point the way to the capture of Hambali, the Indonesian terrorist responsible for the 2002 bombings of night clubs in Bali. He also provided information on an Al Qaeda leader in England. Michael Sheehan, a former counterterrorism official at the State Department, said, "K.S.M. is the poster boy for using tough but legal tactics. He's the reason these techniques exist. You can save lives with the kind of information he could give up." Yet Mohammed's confessions may also have muddled some key investigations. Perhaps under duress, he claimed involvement in thirty-one criminal plots—an improbable number, even for a high-level terrorist. Critics say that Mohammed's case illustrates the cost of the C.I.A.'s desire for swift intelligence. Colonel Dwight Sullivan, the top defense lawyer at the Pentagon's Office of Military Commissions, which is expected eventually to try Mohammed for war crimes, called his serial confessions "a textbook example of why we shouldn't allow coercive methods."

The Bush Administration has gone to great lengths to keep secret the treatment of the hundred or so "high-value detainees" whom the C.I.A. has confined, at one point or another, since September 11th. The program has been extraordinarily "compartmentalized," in the nomenclature of the intelligence world. By design, there has been virtually

no access for outsiders to the C.I.A.'s prisoners. The utter isolation of these detainees has been described as essential to America's national security. The Justice Department argued this point explicitly last November, in the case of a Baltimore-area resident named Majid Khan, who was held for more than three years by the C.I.A. Khan, the government said, had to be prohibited from access to a lawyer specifically because he might describe the "alternative interrogation methods" that the agency had used when questioning him. These methods amounted to a state secret, the government argued, and disclosure of them could "reasonably be expected to cause extremely grave damage." (The case has not yet been decided.)

Given this level of secrecy, the public and all but a few members of Congress who have been sworn to silence have had to take on faith [redacted] 34 's assurances that the C.I.A.'s internment program has been humane and legal, and has yielded crucial intelligence. Representative Alcee Hastings, a Democratic member of the House Select Committee on Intelligence, said, "We talk to the authorities about these detainees, but, of course, they're not going to come out and tell us that they beat the living daylights out of someone." He recalled learning in 2003 that Mohammed had been captured. "It was good news," he said. "So I tried to find out: Where is this guy? And how is he being treated?" For more than three years, Hastings said, "I could never pinpoint anything." Finally, he received some classified briefings on the Mohammed interrogation. Hastings said that he "can't go into details" about what he found out, but, speaking of Mohammed's treatment, he said that even if it wasn't torture, as the Administration claims, "it ain't right, either. Something went wrong."

Since the drafting of the Geneva Conventions, the International Committee of the Red Cross has played a special role in safeguarding the rights of prisoners of war. For decades, governments have allowed officials from the organization to report on the treatment of detainees, to insure that standards set by international treaties are being maintained. The Red Cross, however, was unable to get access to the C.I.A.'s prisoners for five years. Finally, last year, Red Cross officials were allowed to interview fifteen detainees, after they had been transferred to Guantánamo. One of the prisoners was Khalid Sheikh Mohammed. What the Red Cross learned has been kept from the public. The committee believes that its continued access to prisoners worldwide is contingent upon confidentiality, and therefore it addresses violations privately with the authorities directly responsible for prisoner treatment and detention. For this reason, Simon Schorno, a Red Cross spokesman in Washington, said, "The I.C.R.C. does not comment on its findings publicly. Its work is confidential."

The public-affairs office at the C.I.A. and officials at the congressional intelligence-oversight committees would not even acknowledge the existence of the report. Among the few people who are believed to have seen it are [redacted] 35 [redacted] 35 now the Secretary of State; Stephen Hadley, the national-security adviser; John Bellinger III, [redacted] 37 [redacted] 37 and John Rizzo, the agency's acting general counsel. Some members of the Senate and House intelligence-oversight committees are also believed to have had limited access to the report.

Confidentiality may be particularly stringent in this case. Congressional and other Washington sources familiar with the report said that it harshly criticized the C.I.A.'s practices. One of the sources said that the Red Cross described the agency's detention and interrogation methods as tantamount to torture, and declared that American officials responsible for the abusive treatment could have committed serious crimes. The source said the report warned that these officials may have committed "grave breaches" of the Geneva Conventions, and may have violated the U.S. Torture Act, which Congress passed in 1994. The conclusions of the Red Cross, which is known for its credibility and caution, could have potentially devastating legal ramifications.

Concern about the legality of the C.I.A.'s program reached a previously unreported breaking point last week when Senator Ron Wyden, a Democrat on the intelligence committee, quietly put a "hold" on the confirmation of John Rizzo, who as acting general counsel was deeply involved in establishing the agency's interrogation and detention policies. Wyden's maneuver essentially stops the nomination from going forward. "I question if there's been adequate legal oversight," Wyden told me. He said that after studying a classified addendum to [redacted] 34 's new executive order, which specifies permissible treatment of detainees, "I am not convinced that all of these techniques are either effective or legal. I don't want to see well-intentioned C.I.A. officers breaking the law because of shaky legal guidance."

A former C.I.A. officer, who supports the agency's detention and interrogation policies, said he worried that, if the full story of the C.I.A. program ever surfaced, agency personnel could face criminal prosecution. Within the agency, he said, there is a "high level of anxiety about political retribution" for the interrogation program. If congressional hearings begin, he said, "several guys expect to be thrown under the bus." He noted that a number of C.I.A. officers

have taken out professional liability insurance, to help with potential legal fees.

Paul Gimigliano, a spokesman for the C.I.A., denied any legal impropriety, stressing that "the agency's terrorist-detention program has been implemented lawfully. And torture is illegal under U.S. law. The people who have been part of this important effort are well-trained, seasoned professionals." This spring, the Associated Press published an article quoting the chairman of the House intelligence committee, Silvestre Reyes, who said that 37 the C.I.A. 37 "vehemently denied" the Red Cross's conclusions. A U.S. official dismissed the Red Cross report as a mere compilation of allegations made by terrorists. And 43 of the C.I.A.'s 43 43 said that "the C.I.A.'s interrogations were nothing like Abu Ghraib or Guantánamo. They were very, very regimented. Very meticulous." He said, "The program is very careful. It's completely legal."

Accurately or not, Bush Administration officials have described the prisoner abuses at Abu Ghraib and Guantánamo as the unauthorized actions of ill-trained personnel, eleven of whom have been convicted of crimes. By contrast, the treatment of high-value detainees has been directly, and repeatedly, approved by 34 The program is monitored closely by C.I.A. lawyers, and supervised by the agency's director and his subordinates at the Counterterrorism Center. While Mohammed was being held by the agency, detailed dossiers on the treatment of detainees were regularly available to the former 36 according to informed sources inside and outside the agency. Through a spokesperson, 36 denied making day-to-day decisions about the treatment of individual detainees. But, according to a former agency official, "Every single plan is drawn up by interrogators, and then submitted for approval to the highest possible level—meaning the director of the C.I.A. Any change in the plan—even if an extra day of a certain treatment was added—was signed off by the C.I.A. director."

On September 17, 2001, 34 signed a secret Presidential finding authorizing the C.I.A. to create paramilitary teams to hunt, capture, detain, or kill designated terrorists almost anywhere in the world. Yet the C.I.A. had virtually no trained interrogators. A former C.I.A. officer involved in fighting terrorism said that, at first, the agency was crippled by its lack of expertise. "It began right away, in Afghanistan, on the fly," he recalled. "They invented the program of interrogation with people who had no understanding of Al Qaeda or the Arab world." The former officer said that the pressure from the White House, in particular from Vice-President Dick Cheney, was intense: "They were pushing us: 'Get information! Do *not* let us get hit again!' " In the scramble, he said, he searched the C.I.A.'s archives, to see what interrogation techniques had worked in the past. He was particularly impressed with the Phoenix Program, from the Vietnam War. Critics, including military historians, have described it as a program of state-sanctioned torture and murder. A Pentagon-contract study found that, between 1970 and 1971, ninety-seven per cent of the Vietcong targeted by the Phoenix Program were of negligible importance. But, after September 11th, some C.I.A. officials viewed the program as a useful model. A. B. Krongard, who was the executive director of the C.I.A. from 2001 to 2004, said that the agency turned to "everyone we could, including our friends in Arab cultures," for interrogation advice, among them those in Egypt, Jordan, and Saudi Arabia, all of which the State Department regularly criticizes for human-rights abuses.

The C.I.A. knew even less about running prisons than it did about hostile interrogations. Tyler Drumheller, a former chief of European operations at the C.I.A., and the author of a recent book, "On the Brink: How the White House Compromised U.S. Intelligence," said, "The agency had no experience in detention. Never. But they insisted on arresting and detaining people in this program. It was a mistake, in my opinion. You can't mix intelligence and police work. But the White House was really pushing. They wanted someone to do it. So the C.I.A. said, 'We'll try.' George Tenet came out of politics, not intelligence. His whole modus operandi was to please the principal. We got stuck with all sorts of things. This is really the legacy of a director who never said no to anybody."

Many officials inside the C.I.A. had misgivings. "A lot of us knew this would be a can of worms," the former officer said. "We warned them, It's going to become an atrocious mess." The problem from the start, he said, was that no one had thought through what he called "the disposal plan." He continued, "What are you going to *do* with these people? The utility of someone like K.S.M. is, at most, six months to a year. You exhaust them. Then what? It would have been better if we had executed them."

The C.I.A. program's first important detainee was Abu Zubaydah, a top Al Qaeda operative, who was captured by Pakistani forces in March of 2002. Lacking in-house specialists on interrogation, the agency hired a group of outside contractors, who implemented a regime of techniques that one well-informed former adviser to the American intelligence community described as "a 'Clockwork Orange' kind of approach." The experts were retired military

psychologists, and their backgrounds were in training Special Forces soldiers how to survive torture, should they ever be captured by enemy states. The program, known as SERE—an acronym for Survival, Evasion, Resistance, and Escape—was created at the end of the Korean War. It subjected trainees to simulated torture, including waterboarding (simulated drowning), sleep deprivation, isolation, exposure to temperature extremes, enclosure in tiny spaces, bombardment with agonizing sounds, and religious and sexual humiliation. The SERE program was designed strictly for defense against torture regimes, but the C.I.A.'s new team used its expertise to help interrogators inflict abuse. "They were very arrogant, and pro-torture," a European official knowledgeable about the program said. "They sought to render the detainees vulnerable—to break down all of their senses. It takes a psychologist trained in this to understand these rupturing experiences."

The use of psychologists was also considered a way for C.I.A. officials to skirt measures such as the Convention Against Torture. The former adviser to the intelligence community said, "Clearly, some senior people felt they needed a theory to justify what they were doing. You can't just say, 'We want to do what Egypt's doing.' When the lawyers asked what their basis was, they could say, 'We have Ph.D.s who have these theories.' " He said that, inside the C.I.A., where a number of scientists work, there was strong internal opposition to the new techniques. "Behavioral scientists said, 'Don't even think about this!' They thought officers could be prosecuted."

Nevertheless, the SERE experts' theories were apparently put into practice with Zubaydah's interrogation. Zubaydah told the Red Cross that he was not only waterboarded, as has been previously reported; he was also kept for a prolonged period in a cage, known as a "dog box," which was so small that he could not stand. According to an eyewitness, one 63 advising on the treatment of Zubaydah, 63 argued that he needed to be reduced to a state of "learned helplessness." 63 disputes this characterization.)

Steve Kleinman, a reserve Air Force colonel and an experienced interrogator who has known 63 professionally for years, said that "learned helplessness was his whole paradigm." 63 he said, "draws a diagram showing what he says is the whole cycle. It starts with isolation. Then they eliminate the prisoners' ability to forecast the future—when their next meal is, when they can go to the bathroom. It creates dread and dependency. It was the K.G.B. model. But the K.G.B. used it to get people who had turned against the state to confess falsely. The K.G.B. wasn't after intelligence."

As the C.I.A. captured and interrogated other Al Qaeda figures, it established a protocol of psychological coercion. The program tied together many strands of the agency's secret history of Cold War-era experiments in behavioral science. (In June, the C.I.A. declassified long-held secret documents known as the Family Jewels, which shed light on C.I.A. drug experiments on rats and monkeys, and on the infamous case of Frank R. Olson, an agency employee who leaped to his death from a hotel window in 1953, nine days after he was unwittingly drugged with LSD.) The C.I.A.'s most useful research focussed on the surprisingly powerful effects of psychological manipulations, such as extreme sensory deprivation. According to Alfred McCoy, a history professor at the University of Wisconsin, in Madison, who has written a history of the C.I.A.'s experiments in coercing subjects, the agency learned that "if subjects are confined without light, odors, sound, or any fixed references of time and place, very deep breakdowns can be provoked."

Agency scientists found that in just a few hours some subjects suspended in water tanks—or confined in isolated rooms wearing blacked-out goggles and earmuffs—regressed to semi-psychotic states. Moreover, McCoy said, detainees become so desperate for human interaction that "they bond with the interrogator like a father, or like a drowning man having a lifesaver thrown at him. If you deprive people of all their senses, they'll turn to you like their daddy." McCoy added that "after the Cold War we put away these tools. There was bipartisan reform. We backed away from those dark days. Then, under the pressure of the war on terror, they didn't just bring back the old psychological techniques—they perfected them."

The C.I.A.'s interrogation program is remarkable for its mechanistic aura. "It's one of the most sophisticated, refined programs of torture ever," an outside expert familiar with the protocol said. "At every stage, there was a rigid attention to detail. Procedure was adhered to almost to the letter. There was top-down quality control, and such a set routine that you get to the point where you know what each detainee is going to say, because you've heard it before. It was almost automated. People were utterly dehumanized. People fell apart. It was the intentional and systematic infliction of great suffering masquerading as a legal process. It is just chilling."

The U.S. government first began tracking Khalid Sheikh Mohammed in 1993, shortly after his nephew Ramzi Yousef blew a gaping hole in the World Trade Center. Mohammed, officials learned, had transferred money to

Yousef. Mohammed, born in either 1964 or 1965, was raised in a religious Sunni Muslim family in Kuwait, where his family had migrated from the Baluchistan region of Pakistan. In the mid-eighties, he was trained as a mechanical engineer in the U.S., attending two colleges in North Carolina.

As a teen-ager, Mohammed had been drawn to militant, and increasingly violent, Muslim causes. He joined the Muslim Brotherhood at the age of sixteen, and, after his graduation from North Carolina Agricultural and Technical State University, in Greensboro—where he was remembered as a class clown, but religious enough to forgo meat when eating at Burger King—he signed on with the anti-Soviet jihad in Afghanistan, receiving military training and establishing ties with Islamist terrorists. By all accounts, his animus toward the U.S. was rooted in a hatred of Israel.

In 1994, Mohammed, who was impressed by Yousef's notoriety after the first World Trade Center bombing, joined him in scheming to blow up twelve U.S. jumbo jets over two days. The so-called Bojinka plot was disrupted in 1995, when Philippine police broke into an apartment that Yousef and other terrorists were sharing in Manila, which was filled with bomb-making materials. At the time of the raid, Mohammed was working in Doha, Qatar, at a government job. The following year, he narrowly escaped capture by F.B.I. officers and slipped into the global jihadist network, where he eventually joined forces with Osama bin Laden, in Afghanistan. Along the way, he married and had children.

Many journalistic accounts have presented Mohammed as a charismatic, swashbuckling figure: in the Philippines, he was said to have flown a helicopter close enough to a girlfriend's office window so that she could see him; in Pakistan, he supposedly posed as an anonymous bystander and gave interviews to news reporters about his nephew's arrest. Neither story is true. But Mohammed did seem to enjoy taunting authorities after the September 11th attacks, which, in his eventual confession, he claimed to have orchestrated "from A to Z." In April, 2002, Mohammed arranged to be interviewed on Al Jazeera by its London bureau chief, Yosri Fouda, and took personal credit for the atrocities. "I am the head of the Al Qaeda military committee," he said. "And yes, we did it." Fouda, who conducted the interview at an Al Qaeda safe house in Karachi, said that he was astounded not only by Mohammed's boasting but also by his seeming imperviousness to the danger of being caught. Mohammed permitted Al Jazeera to reveal that he was hiding out in the Karachi area. When Fouda left the apartment, Mohammed, apparently unarmed, walked him downstairs and out into the street.

In the early months of 2003, U.S. authorities reportedly paid a twenty-five-million-dollar reward for information that led to Mohammed's arrest. U.S. officials closed in on him, at 4 A.M. on March 1st, waking him up in a borrowed apartment in Rawalpindi, Pakistan. The officials hung back as Pakistani authorities handcuffed and hooded him, and took him to a safe house. Reportedly, for the first two days, Mohammed robotically recited Koranic verses and refused to divulge much more than his name. A videotape obtained by "60 Minutes" shows Mohammed at the end of this episode, complaining of a head cold; an American voice can be heard in the background. This was the last image of Mohammed to be seen by the public. By March 4th, he was in C.I.A. custody.

Captured along with Mohammed, according to some accounts, was a letter from bin Laden, which may have led officials to think that he knew where the Al Qaeda founder was hiding. If Mohammed did have this crucial information, it was time sensitive—bin Laden never stayed in one place for long—and officials needed to extract it quickly. At the time, many American intelligence officials still feared a "second wave" of Al Qaeda attacks, ratcheting the pressure further.

According to [redacted] recent memoir, [redacted] Mohammed told his captors that he wouldn't talk until he was given a lawyer in New York, where he assumed he would be taken. (He had been indicted there in connection with the Bojinka plot.) [redacted] writes, "Had that happened, I am confident that we would have obtained none of the information he had in his head about imminent threats against the American people." Opponents of the C.I.A.'s approach, however, note that Ramzi Yousef gave a voluminous confession after being read his Miranda rights. "These guys are egomaniacs," a former federal prosecutor said. "They *love* to talk!"

A complete picture of Mohammed's time in secret detention remains elusive. But a partial narrative has emerged through interviews with European and American sources in intelligence, government, and legal circles, as well as with former detainees who have been released from C.I.A. custody. People familiar with Mohammed's allegations about his interrogation, and interrogations of other high-value detainees, describe the accounts as remarkably consistent.

Soon after Mohammed's arrest, sources say, his American captors told him, "We're not going to kill you. But we're going to take you to the very brink of your death and back." He was first taken to a secret U.S.-run prison in

Afghanistan. According to a Human Rights Watch report released two years ago, there was a C.I.A.-affiliated black site in Afghanistan by 2002: an underground prison near Kabul International Airport. Distinctive for its absolute lack of light, it was referred to by detainees as the Dark Prison. Another detention facility was reportedly a former brick factory, just north of Kabul, known as the Salt Pit. The latter became infamous for the 2002 death of a detainee, reportedly from hypothermia, after prison officials stripped him naked and chained him to the floor of his concrete cell, in freezing temperatures.

In all likelihood, Mohammed was transported from Pakistan to one of the Afghan sites by a team of black-masked commandos attached to the C.I.A.'s paramilitary Special Activities Division. According to a report adopted in June by the Parliamentary Assembly of the Council of Europe, titled "Secret Detentions and Illegal Transfers of Detainees," detainees were "taken to their cells by strong people who wore black outfits, masks that covered their whole faces, and dark visors over their eyes." (Some personnel reportedly wore black clothes made from specially woven synthetic fabric that couldn't be ripped or torn.) A former member of a C.I.A. transport team has described the "takeout" of prisoners as a carefully choreographed twenty-minute routine, during which a suspect was bog-tied, stripped naked, photographed, hooded, sedated with anal suppositories, placed in diapers, and transported by plane to a secret location.

A person involved in the Council of Europe inquiry, referring to cavity searches and the frequent use of suppositories during the takeout of detainees, likened the treatment to "sodomy." He said, "It was used to absolutely strip the detainee of any dignity. It breaks down someone's sense of impenetrability. The interrogation became a process not just of getting information but of utterly subordinating the detainee through humiliation." The former C.I.A. officer confirmed that the agency frequently photographed the prisoners naked, "because it's demoralizing." The person involved in the Council of Europe inquiry said that photos were also part of the C.I.A.'s quality-control process. They were passed back to case officers for review.

A secret government document, dated December 10, 2002, detailing "SERE Interrogation Standard Operating Procedure," outlines the advantages of stripping detainees. "In addition to degradation of the detainee, stripping can be used to demonstrate the omnipotence of the captor or to debilitate the detainee." The document advises interrogators to "tear clothing from detainees by firmly pulling downward against buttoned buttons and seams. Tearing motions shall be downward to prevent pulling the detainee off balance." The memo also advocates the "Shoulder Slap," "Stomach Slap," "Hooding," "Manhandling," "Walling," and a variety of "Stress Positions," including one called "Worship the Gods."

In the process of being transported, C.I.A. detainees such as Mohammed were screened by medical experts, who checked their vital signs, took blood samples, and marked a chart with a diagram of a human body, noting scars, wounds, and other imperfections. As the person involved in the Council of Europe inquiry put it, "It's like when you hire a motor vehicle, circling where the scratches are on the rearview mirror. Each detainee was continually assessed, physically and psychologically."

According to sources, Mohammed said that, while in C.I.A. custody, he was placed in his own cell, where he remained naked for several days. He was questioned by an unusual number of female handlers, perhaps as an additional humiliation. He has alleged that he was attached to a dog leash, and yanked in such a way that he was propelled into the walls of his cell. Sources say that he also claimed to have been suspended from the ceiling by his arms, his toes barely touching the ground. The pressure on his wrists evidently became exceedingly painful.

Ramzi Kassem, who teaches at Yale Law School, said that a Yemeni client of his, Sanad al-Kazimi, who is now in Guantánamo, alleged that he had received similar treatment in the Dark Prison, the facility near Kabul. Kazimi claimed to have been suspended by his arms for long periods, causing his legs to swell painfully. "It's so traumatic, he can barely speak of it," Kassem said. "He breaks down in tears." Kazimi also claimed that, while hanging, he was beaten with electric cables.

According to sources familiar with interrogation techniques, the hanging position is designed, in part, to prevent detainees from being able to sleep. The former C.I.A. officer, who is knowledgeable about the interrogation program, explained that "sleep deprivation works. Your electrolyte balance changes. You lose all balance and ability to think rationally. Stuff comes out." Sleep deprivation has been recognized as an effective form of coercion since the Middle Ages, when it was called *tormentum insomniae*. It was also recognized for decades in the United States as an illegal form of torture. An American Bar Association report, published in 1930, which was cited in a later U.S. Supreme Court decision, said, "It has been known since 1500 at least that deprivation of sleep is the most effective torture and certain

to produce any confession desired."

Under President Bush's new executive order, C.I.A. detainees must receive the "basic necessities of life, including adequate food and water, shelter from the elements, necessary clothing, protection from extremes of heat and cold, and essential medical care." Sleep, according to the order, is not among the basic necessities.

In addition to keeping a prisoner awake, the simple act of remaining upright can over time cause significant pain. McCoy, the historian, noted that "longtime standing" was a common K.G.B. interrogation technique. In his 2006 book, "A Question of Torture," he writes that the Soviets found that making a victim stand for eighteen to twenty-four hours can produce "excruciating pain, as ankles double in size, skin becomes tense and intensely painful, blisters erupt oozing watery serum, heart rates soar, kidneys shut down, and delusions deepen."

Mohammed is said to have described being chained naked to a metal ring in his cell wall for prolonged periods in a painful crouch. (Several other detainees who say that they were confined in the Dark Prison have described identical treatment.) He also claimed that he was kept alternately in suffocating heat and in a painfully cold room, where he was doused with ice water. The practice, which can cause hypothermia, violates the Geneva Conventions, and President Bush's new executive order arguably bans it.

Some detainees held by the C.I.A. claimed that their cells were bombarded with deafening sound twenty-fours hours a day for weeks, and even months. One detainee, Binyam Mohamed, who is now in Guantánamo, told his lawyer, Clive Stafford Smith, that speakers blared music into his cell while he was handcuffed. Detainees recalled the sound as ranging from ghoulish laughter, "like the soundtrack from a horror film," to ear-splitting rap anthems. Stafford Smith said that his client found the psychological torture more intolerable than the physical abuse that he said he had been previously subjected to in Morocco, where, he said, local intelligence agents had sliced him with a razor blade. "The C.I.A. worked people day and night for months," Stafford Smith quoted Binyam Mohamed as saying. "Plenty lost their minds. I could hear people knocking their heads against the walls and doors, screaming their heads off."

Professor Kassem said his Yemeni client, Kazimi, had told him that, during his incarceration in the Dark Prison, he attempted suicide three times, by ramming his head into the walls. "He did it until he lost consciousness," Kassem said. "Then they stitched him back up. So he did it again. The next time, he woke up, he was chained, and they'd given him tranquillizers. He asked to go to the bathroom, and then he did it again." This last time, Kazimi was given more tranquillizers, and chained in a more confining manner.

The case of [redacted] another detainee, has received wide attention. He is the [redacted] whom the C.I.A. captured in 2003 and dispatched to Afghanistan, based on erroneous intelligence; he was released in 2004, and [redacted] reportedly conceded the mistake to the German chancellor. [redacted] is considered one of the more credible sources on the black-site program, because Germany has confirmed that he has no connections to terrorism. He has also described inmates bashing their heads against the walls. Much of his account appeared on the front page of the *Times*. But, during a visit to America last fall, he became tearful as he recalled the plight of a Tanzanian in a neighboring cell. The man seemed "psychologically at the end," he said. "I could hear him ramming his head against the wall in despair. I tried to calm him down. I asked the doctor, 'Will you take care of this human being?' " But the doctor, whom [redacted] described as American, refused to help. [redacted] also said that he was told that guards had "locked the Tanzanian in a suitcase for long periods of time—a foul-smelling suitcase that made him vomit." [redacted] did not witness such abuse.)

[redacted] described his prison in Afghanistan as a filthy hole, with walls scribbled on in Pashtun and Arabic. He was given no bed, only a coarse blanket on the floor. At night, it was too cold to sleep. He said, "The water was putrid. If you took a sip, you could taste it for hours. You could smell a foul smell from it three metres away." The Salt Pit, he said, "was managed and run by the Americans. It was not a secret. They introduced themselves as Americans." He added, "When anything came up, they said they couldn't make a decision. They said, 'We will have to pass it on to Washington.' " The interrogation room at the Salt Pit, he said, was overseen by a half-dozen English-speaking masked men, who shoved him and shouted at him, saying, "You're in a country where there's no rule of law. You might be buried here."

According to two former C.I.A. officers, an interrogator of Mohammed told them that the Pakistani was kept in a cell over which a sign was placed: "The Proud Murderer of 3,000 Americans." (Another source calls this apocryphal.) One of these former officers defends the C.I.A.'s program by noting that "there was absolutely nothing done to K.S.M. that wasn't done to the interrogators themselves"—a reference to SERE-like training. Yet the Red Cross report

emphasizes that it was the simultaneous use of several techniques for extended periods that made the treatment "especially abusive." Senator Carl Levin, the chairman of the Senate Armed Services Committee, who has been a prominent critic of the Administration's embrace of harsh interrogation techniques, said that, particularly with sensory deprivation, "there's a point where it's torture. You can put someone in a refrigerator and it's torture. Everything is a matter of degree."

One day, Mohammed was apparently transferred to a specially designated prison for high-value detainees in Poland. Such transfers were so secretive, according to the report by the Council of Europe, that the C.I.A. filed dummy flight plans, indicating that the planes were heading elsewhere. Once Polish air space was entered, the Polish aviation authority would secretly shepherd the flight, leaving no public documentation. The Council of Europe report notes that the Polish authorities would file a one-way flight plan out of the country, creating a false paper trail. (The Polish government has strongly denied that any black sites were established in the country.)

No more than a dozen high-value detainees were held at the Polish black site, and none have been released from government custody; accordingly, no first-hand accounts of conditions there have emerged. But, according to well-informed sources, it was a far more high-tech facility than the prisons in Afghanistan. The cells had hydraulic doors and air-conditioning. Multiple cameras in each cell provided video surveillance of the detainees. In some ways, the circumstances were better: the detainees were given bottled water. Without confirming the existence of any black sites, Robert Grenier, the former C.I.A. counterterrorism chief, said, "The agency's techniques became less aggressive as they learned the art of interrogation," which, he added, "is an art."

Mohammed was kept in a prolonged state of sensory deprivation, during which every point of reference was erased. The Council on Europe's report describes a four-month isolation regime as typical. The prisoners had no exposure to natural light, making it impossible for them to tell if it was night or day. They interacted only with masked, silent guards. (A detainee held at what was most likely an Eastern European black site, Mohammed al-Asad, told me that white noise was piped in constantly, although during electrical outages he could hear people crying.) According to a source familiar with the Red Cross report, Khalid Sheikh Mohammed claimed that he was shackled and kept naked, except for a pair of goggles and earmuffs. (Some prisoners were kept naked for as long as forty days.) He had no idea where he was, although, at one point, he apparently glimpsed Polish writing on a water bottle.

In the C.I.A.'s program, meals were delivered sporadically, to insure that the prisoners remained temporally disoriented. The food was largely tasteless, and barely enough to live on. Mohammed, who upon his capture in Rawalpindi was photographed looking flabby and unkempt, was now described as being slim. Experts on the C.I.A. program say that the administering of food is part of its psychological arsenal. Sometimes portions were smaller than the day before, for no apparent reason. "It was all part of the conditioning," the person involved in the Council of Europe inquiry said. "It's all calibrated to develop dependency."

The inquiry source said that most of the Poland detainees were waterboarded, including Mohammed. According to the sources familiar with the Red Cross report, Mohammed claimed to have been waterboarded five times. Two former C.I.A. officers who are friends with one of Mohammed's interrogators called this bravado, insisting that he was waterboarded only once. According to one of the officers, Mohammed needed only to be shown the drowning equipment again before he "broke."

"Waterboarding works," the former officer said. "Drowning is a baseline fear. So is falling. People dream about it. It's human nature. Suffocation is a very scary thing. When you're waterboarded, you're inverted, so it exacerbates the fear. It's not painful, but it scares the shit out of you." (The former officer was waterboarded himself in a training course.) Mohammed, he claimed, "didn't resist. He sang right away. He cracked real quick." He said, "A lot of them want to talk. Their egos are unimaginable. K.S.M. was just a little doughboy. He couldn't stand toe to toe and fight it out."

The former officer said that the C.I.A. kept a doctor standing by during interrogations. He insisted that the method was safe and effective, but said that it could cause lasting psychic damage to the interrogators. During interrogations, the former agency official said, officers worked in teams, watching each other behind two-way mirrors. Even with this group support, the friend said, Mohammed's interrogator "has horrible nightmares." He went on, "When you cross over that line of darkness, it's hard to come back. You lose your soul. You can do your best to justify it, but it's well outside the norm. You can't go to that dark a place without it changing you." He said of his friend, "He's a good guy. It really haunts him. You are inflicting something really evil and horrible on somebody."

Among the few C.I.A. officials who knew the details of the detention and interrogation program, there was a tense debate about where to draw the line in terms of treatment. [redacted] 38 [redacted] 36 's former chief of staff, said, "It all comes down to individual moral barometers." Waterboarding, in particular, troubled many officials, from both a moral and a legal perspective. Until 2002, when Bush Administration lawyers asserted that waterboarding was a permissible interrogation technique for "enemy combatants," it was classified as a form of torture, and treated as a serious criminal offense. American soldiers were court-martialled for waterboarding captives as recently as the Vietnam War.

A C.I.A. source said that Mohammed was subjected to waterboarding only after interrogators determined that he was hiding information from them. But Mohammed has apparently said that, even after he started cooperating, he was waterboarded. Footnotes to the 9/11 Commission report indicate that by April 17, 2003—a month and a half after he was captured—Mohammed had already started providing substantial information on Al Qaeda. Nonetheless, according to the person involved in the Council of Europe inquiry, he was kept in isolation for years. During this time, Mohammed supplied intelligence on the history of the September 11th plot, and on the structure and operations of Al Qaeda. He also described plots still in a preliminary phase of development, such as a plan to bomb targets on America's West Coast.

Ultimately, however, Mohammed claimed responsibility for so many crimes that his testimony became to seem inherently dubious. In addition to confessing to the Pearl murder, he said that he had hatched plans to assassinate President Clinton, President Carter, and Pope John Paul II. Bruce Riedel, who was a C.I.A. analyst for twenty-nine years, and who now works at the Brookings Institution, said, "It's difficult to give credence to any particular area of this large a charge sheet that he confessed to, considering the situation he found himself in. K.S.M. has no prospect of ever seeing freedom again, so his only gratification in life is to portray himself as the James Bond of jihadism."

By 2004, there were growing calls within the C.I.A. to transfer to military custody the high-value detainees who had told interrogators what they knew, and to afford them some kind of due process. But Donald Rumsfeld, then the Defense Secretary, who had been heavily criticized for the abusive conditions at military prisons such as Abu Ghraib and Guantánamo, refused to take on the agency's detainees, a former top C.I.A. official said. "Rumsfeld's attitude was, *You've got a real problem.*" Rumsfeld, the official said, "was the third most powerful person in the U.S. government, but he only looked out for the interests of his department—not the whole Administration." (A spokesperson for Rumsfeld said that he had no comment.)

C.I.A. officials were stymied until the Supreme Court's Hamdan ruling, which prompted the Administration to send what it said were its last high-value detainees to Cuba. Robert Grenier, like many people in the C.I.A., was relieved. "There has to be some sense of due process," he said. "We can't just make people disappear." Still, he added, "The most important source of intelligence we had after 9/11 came from the interrogations of high-value detainees." And he said that Mohammed was "the most valuable of the high-value detainees, because he had operational knowledge." He went on, "I can respect people who oppose aggressive interrogations, but they should admit that their principles may be putting American lives at risk."

Yet Philip Zelikow, the executive director of the 9/11 Commission and later the State Department's top counsellor, under [redacted] 35 is not convinced that eliciting information from detainees justifies "physical torment." After leaving the government last year, he gave a speech in Houston, in which he said, "The question would not be, Did you get information that proved useful? Instead it would be, Did you get information that could have been usefully gained only from these methods?" He concluded, "My own view is that the cool, carefully considered, methodical, prolonged, and repeated subjection of captives to physical torment, and the accompanying psychological terror, is immoral."

Without more transparency, the value of the C.I.A.'s interrogation and detention program is impossible to evaluate. Setting aside the moral, ethical, and legal issues, even supporters, such as John Brennan, acknowledge that much of the information that coercion produces is unreliable. As he put it, "All these methods produced useful information, but there was also a lot that was bogus." When pressed, one former top agency official estimated that "ninety per cent of the information was unreliable." Cables carrying Mohammed's interrogation transcripts back to Washington reportedly were prefaced with the warning that "the detainee has been known to withhold information or deliberately mislead." Mohammed, like virtually all the top Al Qaeda prisoners held by the C.I.A., has claimed that, while under coercion, he lied to please his captors.

In theory, a military commission could sort out which parts of Mohammed's confession are true and which are lies, and obtain a conviction. Colonel Morris D. Davis, the chief prosecutor at the Office of Military Commissions, said that