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

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Public Facing Advocacy Writing

by [Scott Roehm](#)

November 4, 2021

[Department of Justice \(DOJ\)](#), [Guantanamo](#), [Majid Khan](#), [Military Commissions](#), [SSCI Torture Report](#), [torture](#)

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I traveled to the Guantanamo Bay prison late last week to watch the long-awaited military commission sentencing hearing in *United States v. Khan*. What unfolded over those two days was extraordinary. There were historic moments; all-too-familiar, but no less outrageous, prosecutorial transgressions; and a military commission judge who reached his wits end with the government. From a broader policy perspective, the hearing affirmed that plea agreements are the only realistic path to resolving the cases of charged men, and so an essential tool in any meaningful effort to close Guantanamo.

*A note on sourcing: Consistent with a [problem](#) endemic across military commission cases, as of this writing the transcript from the October 28-29 hearing in *United States v. Khan* has not yet been posted on the military commissions website. As such, anything quoted below not otherwise sourced is from my own notes, and confirmed with a colleague who also attended the hearings.*

A Stark Reminder of Impunity for Torture

I have a story that I have waited almost two decades to tell, so I want to thank you for taking the time to listen to my statement. For the next two hours, Majid Khan [spoke](#) to a panel of military jurors, and to his family—especially his father and sister, who had hugged their son and brother that morning for the first time in nineteen years and sat just feet away in the [spectator gallery](#), visibly suffering through the horror of what they heard.

Mr. Khan described brutality and its effects even beyond the heinous acts detailed in the executive summary of the Senate Intelligence Committee's 2014 [oversight study](#) of the CIA torture program. Torture inflicted by medical personnel stood out. He explained that he was raped by CIA medics under the guise of both rectal feeding and rectal rehydration, the latter using a green garden hose, with one end connected to a faucet and the other forcibly inserted into his rectum. He remembered a man he named the torture doctor sharpening the tubes [used to force feed him] and putting hot sauce on the tip right in front of me before forcing them into his nose and down his throat.

During one of the rapes, Mr. Khan asked the medic why he was doing this and [the medic] whispered with viciousness: You're a fucking terrorist. He begged for help when the torture doctor came to examine him. Instead, the torture doctor pointed with his hooked thumbs to the outside and then made a hanging motion with his arms to wordlessly instruct the guards to return him to interrogation.

Mr. Khan offered to show the panel the many physical scars from his torture; recalled at one point hallucinating, seeing a cow, a giant lizard; and recounted multiple attempts at self-harm.

This was the first time that a CIA torture program survivor has been permitted to describe openly, in any forum, what he endured. For Mr. Khan, he should have been able to do so no later than 2007 (he was sent to Guantanamo in September 2006) as evidence in the prosecution of his torturers; but of course, no such prosecutions ever occurred. It was a stark and poignant reminder of the degree of impunity perpetrators have enjoyed, and lack of accountability for U.S. torture more broadly. Even regarding basic transparency, Mr. Khan was allowed to tell his story only because he cooperated with the government and bargained for the ability to provide this testimony.

The government has never so much as apologized to him. Mr. Khan, by contrast, opened his testimony by saying: To those who tortured me, I forgive you all of you.

In a [statement](#) released after the hearing, Mr. Khan's family spoke of their extraordinary and indescribable pain from hearing directly from Majid the horrible treatment he received by U.S. government officials. We hope that just as Majid has been held accountable for his actions, so too one day will the U.S. officials who tortured him.

Prosecutorial Transgressions that Disregard the Presidents Policies and Commitments

Unfortunately, government litigators in Guantanamo-related cases [taking positions](#) inconsistent with President Biden's [commitment](#) to

fundamental human rights and human dignity has been a recurring theme. Mr. Khans case has a [history](#) of the same which once resulted in the military judge [sanctioning](#) the government and it continued at his sentencing hearing.

One instance arose during the selection of jurors, called panel members in the commission system. That process includes a pre-trial questionnaire designed to help assess potential members qualifications to sit on the panel. Potential members can then be subject to voir dire at the hearing in person questioning by the prosecution and defense in a further attempt to ensure a fair and impartial panel, much like the civilian criminal justice system. When voir dire concludes, each side can strike one potential member from consideration for any non-discriminatory reason, and need not explain its reasoning (known as a peremptory challenge). Both sides have an unlimited number of for cause challenges, where they can move to dismiss a potential member for a variety of reasons including bias, prejudice, or prior knowledge that would affect their impartiality but the decision rests with the judge.

In Mr. Khans case, the questionnaire asked whether potential members had formed an opinion regarding the use of enhanced interrogation techniques. Several jurors were questioned at the hearing about their written responses. Their answers were unremarkable, and suggested potential members had very little knowledge of the torture program, save one.

The first juror the prosecution called for voir dire, an Army colonel, explained that he believed the United States should uphold [its] values in the treatment of people. He described EITs as counterproductive, though not necessarily illegal or immoral. He thought similarly that holding men at Guantanamo did not best serve U.S. national security interests.

The prosecution used its peremptory challenge to strike him, in a clear effort to deprive the panel of anyone who *might* believe that years of unthinkable torture should impact the severity of Khans punishment. The colonels views are uncontroversial and shared by policymakers, senior military officials, government interrogators, and swaths of others across the political spectrum. They suggest nothing about his ability to be fair or impartial.

Though not specific to torture, another potential panel member said during voir dire that he believed it necessary to exterminate[] all Islamic extremist[s] in order to keep Americans safe. For emphasis, he stated that he definitely had a bias in that regard. The prosecution did not move to strike him. (The defense did, successfully.)

A second instance related to whether the government would submit evidence to rebut Mr. Khans statement. Although not required under the applicable rules, the defense provided the government with a draft of that statement a week in advance of the hearing, at the judges request. Prosecutors agreed to do the same, if after reviewing the statement they decided they would offer rebuttal evidence. Instead, the prosecution waited until the day before the hearing to disclose that they would do so, and agreed to provide the evidence to the defense that evening but they didnt. They waited until after Mr. Khan testified, around 9:30pm the *next* night, to turn over an affidavit from the FBI agent who served as Mr. Khans handler from 2016 to 2019.

Unbeknownst to either the defense or the judge, the prosecution brought the agent to Guantanamo earlier in the week. (His presence remained secret until one of Mr. Khans lawyers, who knows the agent, spotted him outside the court complex the morning after Mr. Khan testified.) Prosecutors claimed they wanted the agent there in case he needed to adjust his affidavit if Mr. Khan deviated from the version of his statement the defense previously provided and potentially to testify. And yet, under pressure from a now furious judge, the government conceded that the agent *did not even watch Mr. Khans testimony at the hearing*. Apparently, he signed the affidavit at lunch earlier that same day, with his location noted as Kansas City (Missouri or Kansas, unclear), suggesting he was elsewhere.

While the affidavit was not made public, the parties outlined its basic substance during argument over whether it would be admitted. References were made to the affidavit including information, perhaps a significant amount, related to Khans behavior in detention.

This is precisely the sort of information that the government historically has submitted to the Periodic Review Boards to support an argument that a detainee is too dangerous to transfer. As my organization (Center for Victims of Torture) and Physicians for Human Rights have [explained previously](#), such information has no probative value of anything because, especially for torture survivors like Mr. Khan, the government has no way of knowing what behavior is a manifestation of untreated trauma.

Instead, what disclosure of the information might well have done is make it more difficult to find a transfer location for Mr. Khan, thereby needlessly creating another obstacle to [closing Guantanamo](#).

The judge who had reached a level of frustration that didnt seem possible just hours before given his exceptionally mild-mannered, polite, and self-deprecating temperament found the affidavit unduly prejudicial and lacking in probative value (it didnt rebut anything Mr. Khan said), and excluded it.

Finally, although not misconduct directly attributable to the prosecutors, the government outdid itself by attempting to redact, without explanation, a sentence and a separate word in Mr. Khans statement minutes before he took the podium. The defense had submitted Mr. Khans statement for classification review weeks prior and the original classification authority (presumably the CIA) cleared it in its entirety.

The judge responded to the governments out-of-nowhere objection with the appropriate level of deference: I dont really care. He refused to prohibit Mr. Khan from reading his full statement, and told prosecutors that if anyone in the government had issue with his decision they could take it up with him.

The Military Jurys Powerful Referendum on Torture

Although Mr. Khan has already reached a plea agreement with the government pursuant to which he is likely to receive a sentence that amounts to 10 years, running from the date he pled guilty in 2012 the Military Commissions Act requires formal sentencing nonetheless. The panel members, all senior military officers, were not told of the plea. They were charged with imposing a sentence between 25 and 40 years. They were also informed that they were permitted, though certainly not obligated, to submit a clemency letter on Mr. Khans behalf to the convening authority, who ultimately must approve any sentence that a commission panel imposes.

The panel returned a sentence of 26 years, accompanied unexpectedly by a [handwritten clemency letter](#) from seven of the eight members. The letter feels astonishing, but perhaps shouldn't.

The members' reasons for recommending clemency included that Khan has been held without the basic due process under the Constitution and in complete disregard for the foundational concepts upon which the Constitution was founded, a situation they described as an affront to American values and concept of justice. Their rebuke on this score is especially powerful because it runs to the current Justice Department, which [still refuses](#) to acknowledge that due process applies at Guantanamo.

The members wrote further that Mr. Khan was subjected to physical and psychological abuse well-beyond approved enhanced interrogation techniques, instead being closer to torture performed by the most abusive regimes in modern history. That conduct is a stain on the moral fiber of America, they continued. [T]he treatment of Mr. Khan in the hands of U.S. personnel should be a source of shame for the U.S. government.

This is the power of torture survivors telling their stories directly. Second-hand written accounts, movies, and the like simply cannot match what it felt like to listen to Mr. Khan's own words to watch him express with physical positioning how he was tortured, for example when he demonstrated how guards held him down in his cell and spread his legs so that the torture doctor could rape him. He paused repeatedly to take deep breaths in an effort to continue calmly amidst a flood of memory and emotion that most of us cannot begin to fathom.

It is also why government officials have fought so hard to silence these survivors. If more people were exposed to their accounts first-hand, it would be much harder to defend refusing to hold perpetrators accountable; to press [litigation positions](#) like the use of torture-derived evidence; and to justify the snail's pace at which steps toward closing Guantanamo are proceeding.

A Roadmap for Ending the Commissions

Mr. Khan's case is essentially over. By contrast, the 9/11 case, for example, now embarks on another three weeks of seemingly endless pretrial hearings. A trial, much less a conviction, is still not in sight.

Mr. Khan apologized to victims of the attack in which he played a role, and his negotiated sentence reflects at least some acknowledgement of his torture. He was able to bargain for an historic level of transparency as part of his pretrial agreement. Similarly, in the context of plea negotiations in other cases, victim family members would have the ability to work with prosecutors to require the defendants to disclose information family members have long sought, including about how and by whom crimes with which those defendants have been charged were planned and carried out. Pleas offer finality and a knowable path forward, likely common interests among many family members and accused alike.

At this point, it is unrealistic to expect that forging ahead with trials in the military commissions will produce any of the above results.

Plea deals also open up the possibility of using Article III courts. The statutory ban on transfers from Guantanamo to the United States for any purpose prohibits federal trials, but it [does not preclude](#) arraignments, pleas, judgments of conviction, and sentencing via videoconference from Guantanamo. This has long been an available option, if only the Justice Department would pursue it.

The recently appointed Acting Chief Prosecutor for the military commissions, Col. George C. Kraehe, attended portions of Khan's hearing, and presumably watched the rest from his office at Guantanamo. Assuming he did, hopefully he took away both that the prosecutors he now supervises need reminding that their job is to pursue *justice*, and that the longer the commissions run, the less likely justice will obtain for anyone.

Next Steps for Mr. Khan

As noted above, it is likely that Mr. Khan will have finished serving his sentence on February 29, 2022. The government will need to be ready to transfer him consistent with its non-refoulement obligations under the Convention against Torture immediately thereafter, just as it has with [other detainees](#) in similar positions, [including](#) under the Trump administration.

Because he was convicted, the congressionally-imposed, security-related certifications typically required for transfers do not apply in Mr. Khan's case. In other words, the government cannot delay his transfer in order to seek security guarantees.

What it can and should do is commit to providing Mr. Khan with any and all medical care and related support that he wants and needs including mental health and psychosocial services for the rest of his life. (Doing so may well have the added benefit of facilitating his transfer). The [effects of torture](#), both physical and psychological, can be profound and long-lasting. Mr. Khan's [family](#) has promise[d] to the Biden administration to give whatever support it needs as it works to resettle Majid in a safe third country where he can be reunited with his wife and daughter and begin his next chapter in peace and with opportunity. At minimum, the administration must do the same for Mr. Khan.

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All-source, public repository of congressional hearing transcripts, government agency documents, digital forensics, social media analysis, public opinion surveys, empirical research, more.

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