

Center for the Victims of Torture

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

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Public Facing Advocacy Writing

by [Scott Roehm](#)

May 6, 2019

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Its time for everyone to admit that the Guantanamo military commissions have failed.

That's what Steve Vladeck wrote last month in a [characteristically excellent post](#) discussing the D.C. Circuit's recent decision in *In re Al-Nashiri III*. Of course, unless and until either the executive branch or Congress acknowledges the same and decides to do something about it, the commissions will drag on. And as they do, the shadow of CIA torture to which Steve correctly ascribes (at least in part) the commissions' painful struggles to date will darken, further complicating any efforts to achieve justice.

Take Majid Khan, for example. After pleading guilty before the commissions in 2012, he has been cooperating with the government and is scheduled for a sentencing hearing in July. On May 1, he filed a motion that puts the legacy of CIA torture and the question of accountability squarely before Army Judge Col. Douglas Watkins. How Judge Watkins resolves the motion will say a lot about whether the commissions can ever grapple seriously and fairly with these issues.

Specifically, Khan argues that pursuant to the Due Process clause of the Constitution, [Article 13 of the Uniform Code of Military Justice](#) (UCMJ), and longstanding support in the common law for the presumption of innocence and prohibition on pre-trial punishment, his sentence should be reduced on the basis of the torture to which the CIA subjected him during his three and a half years in CIA custody, plus additional abuses he alleges after his transfer to Guantanamo. UCMJ Article 13 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.

It is well-established in military courts-martial practice that the remedy for a violation of Article 13 can include administrative credit against the defendant's sentence for any time during which he was subjected to the type of punishment, penalty, or conditions of confinement that the provision prohibits. According to Rule 305 of the [Rules of Courts-martial](#), which are considered persuasive authority in the commissions, [s]uch credit shall be computed at the rate of 1 day credit for each day of confinement served as a result of such noncompliance. However, [t]he military judge may order additional credit for each day of pretrial confinement that involves an abuse of discretion or unusually harsh circumstances.

There is a threshold question whether Article 13 applies to the military commissions. In a 2008 ruling on Mohammed Jawad's motion to dismiss charges against him because of the torture he suffered at Guantanamo, Army Judge Col. Stephen Henley appears to have determined that it does, at least in concept:

It is beyond peradventure that a Military Commission may dismiss charges because of abusive treatment of the Accused. However, when other remedies are available to adequately address the wrong, dismissal should be the last of an escalating list of options. Here, the Commission finds other remedies are available to adequately address the wrong inflicted upon the Accused, including, but not limited to, *sentence credit towards any approved period of confinement*, excluding statements and any evidence derived from the abusive treatment, and prohibiting persons who may have been involved in any improper actions against the Accused from testifying at trial.

(emphasis added).

There is no question that Khan was tortured. According to the [Senate Intelligence Committee's study of CIA's detention and interrogation program](#), he was subjected to, among other abuses: sleep deprivation, nudity, and dietary manipulation; rectal feeding, in which the CIA pureed Khan's lunch tray, consisting of hummus, pasta with sauce, nuts, and raisins, and pumped it into his intestines through a tube forced into his rectum against his will; and immers[ion] in a tub that was filled with ice and water.

In support of Khan's request to apply Article 13 and reduce his sentence accordingly, the Center for Victims of Torture filed [an amicus brief](#) joined by former Navy General Counsel Alberto Mora, former NCIS Deputy Assistant Director for Counterterrorism Mark Fallon,

former U.N. Special Rapporteur on Torture Juan Mendez, Dr. Sondra Crosby, retired Brig. Gen. Stephen Xenakis, MD, the Rev. Ron Stief, and Prof. Claire Finkelstein. The brief argues that Judge Watkins must evaluate the motion in the context of U.S. anti-torture obligations, including Khans right to an effective remedy, and it emphasizes whats at stake for the military commissions:

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

Mr. Khan undisputedly a torture victim is entitled to all of the remedial measures [mandated by Article 14 of the Convention Against Torture], and the United States is legally required to provide him with them. And yet, Mr. Khan is asking the Court for something much more modest: a meaningful acknowledgment of the horrors to which he was subjected through the application to his sentencing of a well-established principle of military law. But while the request represents only a fraction of the redress Mr. Khan is owed, the stakes for the Court are difficult to overstate. This is the first time that a military commission must decide whether to provide a measure of reparation for a CIA torture victim. It is a watershed moment: will the military commissions take any steps to honor the United States legal and moral anti-torture obligations when violations occurred in the CIAs RDI program? Will this Court treat Mr. Khan the way the United States would demand that an enemy force treat one of our own service members under similar circumstances?

If the Court is unwilling or unable to impose on the government even the minimal degree of accountability Mr. Khan seeks, its failure to do so will validate the views of those who believe that the military commissions are simply an instrumentality of the executive branch that tortured Mr. Khan designed to sweep its crimes under the rug. It will frustrate efforts to undo the strategic costs that the United States has paid for our governments use of torture, from the chilling effect on allies willingness to share intelligence to the license it has given authoritarian regimes and other oppressors to disregard their responsibilities to prevent and penalize torture. And it will further erode both the United States reputation as a standard-bearer for human rights, and our judicial systems reputation for fairness and independence.

The brief goes on to describe the salutary effects of recognizing that Khan has been punished within the meaning of UCMJ Article 13 and adjusting his sentence accordingly, including facilitating his ability to heal from the deep psychological and physical wounds of his torture rehabilitation process that, [as I have explained in a previous post](#), is not and cannot be available at Guantanamo.

Perhaps by now it goes without saying, but almost two decades removed from the United States decision to build a torture program, there has been precious little accountability for the government officials who authorized and implemented it, and even less by way of redress for victims. Khans motion is an opportunity to take a small but meaningful step in the other direction. For the military commissions in particular, its a chance to demonstrate that, at least in one instance, in one case, they can be more than the cascade of fiascos that they have come to represent.

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