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the Muslims, perhaps with the help, directly or indirectly, of American dollars; then, post-Soviet Afghanistan, where he ran al-Qaeda logistics and recruitment, directing aspiring jihadists to the various training camps, placing them in cells after they'd been trained. The man has been captured now, fished to a safe house in Faisalabad, gravely wounded by three shots from an AK-47. He is rushed to the Faisalabad hospital, then to the military hospital at Lahore. When he opens his eyes he finds at his bedside an American, John Kiriakou of the CIA.

I asked him in Arabic what his name was. And he shook his head. And I asked him again in Arabic. And then he answered me in English. And he said that he would not speak to me in God's language. And then I said, "That's okay. We know who you are."

And then he asked me to smother him with a pillow. And I said, "No, no. We have plans for you."

Kiriakou and the "small group of CIA and FBI people who just kept 24/7 eyes on him" knew that in Abu Zubaydah they had "the biggest fish that we had caught. We knew he was full of information... and we wanted to get it." According to Kiriakou, on a table in the house where they found him "Abu Zubaydah and two other men were building a bomb. The soldering [iron] was still hot. And they had plans for a school on the table..." The plans, Kiriakou told ABC News correspondent Brian Ross, were for the British school in Lahore. Their prisoner, they knew, was "very current. On top of the current threat information."

With the help of the American trauma surgeon, Abu Zubaydah's captors nursed him back to health. He was moved at least twice, first, reportedly, to Thailand; then, he believes, to Afghanistan, probably Bagram. In a safe house in Thailand the interrogation began:

I woke up, naked, strapped to a bed. In a very white room. The room measured approximately 13 feet by 13 feet. The room had three solid walls, with the fourth wall consisting of metal bars separating it from a larger room. I am not sure how long I remained in the bed. After some time, I think it was several days, but can't remember exactly, I was transferred to a chair where I was kept, shackled by [my] hands and feet for what I think was the next 2 to 3 weeks. During this time I developed blisters on the underside of my legs due to the constant sitting. I was only allowed to get up from the chair to go [to] the toilet, which consisted of a bucket. Water for cleaning myself was provided in a plastic bottle.

*From "CIA—Abu Zubaydah, Interview with John Kiriakou." This is the rough and undated transcript of a video interview conducted by Brian Ross of ABC News, apparently in December 2007, available at abcnews.go.com. Quotations from this document have been edited very slightly for clarity. See also Richard L. Esposito and Brian Ross, "Coming in from the Cold: CIA Spy Calls Waterboarding Necessary But Torture," ABC News, December 10, 2007.

April 5, 2008

I was given no solid food during the first two or three weeks, while sitting on the chair. I was only given Ensure [a nutrient supplement] and water to drink. At first the Ensure made me vomit, but this became less with time.

The cell and room were air-conditioned and were very cold. Very loud, shouting type music was constantly playing. It kept repeating about every fifteen minutes twenty-four hours a day. Sometimes the music stopped and was replaced by a loud hissing or crackling noise.

The guards were American, but wore masks to conceal their faces. My interrogators did not wear masks.

During this first two to three week period I was questioned for about one to two hours each day. American interrogators would come to the room and speak to me through the bars of the cell. During the questioning the music was switched off, but was then put back on again afterwards. I could not sleep at all for the first two to three weeks. If I started to fall asleep one of the guards would come and spray water in my face.

A naked man chained in a small, very cold, very white room is for several days strapped to a bed, then for several weeks shackled to a chair, bathed unceasingly in white light, bombarded constantly with loud sound, deprived of food, and whenever, despite cold, light, noise, hunger, the hours and days force his eyelids down, cold water is sprayed in his face to force them up.

One can translate these procedures into terms of art: "Change of Scenery Down," "Removal of Clothing," "Use of Stress Positions," "Dietary Manipulation," "Environmental Manipulation," "Sleep Adjustment," "Isolation," "Sleep Deprivation," "Use of Noise to Induce Stress." All these terms and many others can be found, for example, in documents associated with the debate about interrogation and "counter-resistance" carried on by Pentagon and Justice Department officials beginning in 2002. Here, however, we find a different standard: the Working Group says, for example, that "Sleep Deprivation" is "not to exceed 4 days in succession," that "Dietary Manipulation" should include "no intended deprivation of food or water," that "removal of clothing," while "creating a feeling of helplessness and dependence," must be "monitored to ensure the environmental conditions are such that this technique does not injure the detainee." Here we are in a different place.

But what place? Abu Zubaydah was not only the "biggest fish that we had caught" but the first big fish. According

*See "Working Group Report on Detainee Interrogations in the Global War on Terrorism: Assessment of Legal, Historical, Policy, and Operational Considerations," April 4, 2002, in Mark Daniel, *Torture and Truth: America, Abu Ghraib, and the War on Terror* (New York: Review Books, 2004), pp. 120–122. A great many of these documents, collected in this book and elsewhere, were leaked in the wake of the publication of the Abu Ghraib photographs, and have been public since late spring or early summer of 2004.

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to Kirilov, Zubaydah, as he recovered, had "wanted to talk about current events. He told us a couple of times that he had nothing personal against the United States.... He said that 9/11 was necessary. That although he didn't think that there would be such a massive loss of life, his view was that 9/11 was supposed to be a wake-up call to the United States."

In those initial weeks of hearing, before the white room and the chair and the light, Zubaydah seems to have talked freely with his captors, and during this time, according to news reports, FBI agents began to question him using "standard interview techniques," ensuring that he was belted and his bandages changed, urging improved medical care, and trying to "convince him they knew details of his activities." (They showed him, for example, a "box of blank audiotapes which they said contained recordings of his phone conversations, but were actually empty.") According to this account, Abu Zubaydah, in the initial days before the white room, "began to provide intelligence insights into Al Qaeda."³²

Or did he? "How Good Is Abu Zubaydah's Information?" asked a Newsweek Web exclusive on April 22, 2002, less than a month after his capture. The extreme secrecy and isolation in which Abu Zubaydah was being held, at a location unknown to him and to all but a tiny handful of government officials, did not prevent his "information" being leaked from that unknown place directly into the American press—in the case, apparently, of a bureaucratic struggle between the FBI and the CIA. Even Americans who were not following closely the battling leaks from Zubaydah's interrogation would have found their lives affected, whether they knew it or not, by what was happening in that faraway white room; for about the same time the Bush administration saw fit to issue two "domestic terrorism warnings," derived from Abu Zubaydah's "tips"—about "possible attacks on banks or financial institutions in the Northeastern United States" and possible "attacks on US supermarkets and shopping malls." As Newsweek learned from a "senior US official," presumably from the FBI—whose "standard interview techniques" had produced that information and the "domestic terrorism warnings" based on it—the prisoner was "providing detailed information for the 'fight against terrorism.'" At the same time, however, "US intelligence sources"—presumably CIA—"wonder whether he's trying to mislead investigators or frighten the American public."³³

For his part, John Kirilov, the CIA man, told ABC News that in those early weeks Zubaydah was "willing to talk about philosophy, [but] he was unwilling to give us any actionable intelligence." The CIA official had the "sensitive classified discussion signed by [redacted] giving them authority to 'capture, detain and interrogate terrorism suspects,'" and Zubaydah was "a test case for an evolving new role.... in which the agency was to act as jailer

and interrogator of terrorism suspects." Eventually a team from the CIA's Counterterrorism Center was "sent in from Langley" and the FBI interrogators were withdrawn.

We had these trained interrogators who were sent to his location to use the enhanced techniques as necessary to get him to open up, and to report some threat information.... These enhanced techniques included everything from what was called an attention shake, where you grab the person by their lapels and shake them, all the way up to the other end, which is waterboarding.

They began, apparently, by shackling him to the chair, and applying light, noise, and water to keep him awake. After two or three weeks of this Abu Zubaydah, still naked and shackled, was allowed to lie on the bare floor and to "sleep a little." He was also given solid food—rice—for the first time. Eventually a doctor, a woman, came and examined him, and "asked why I was still naked." The next day he was "provided with orange clothes to wear." The following day, however, "guards came into my cell. They told me to stand up and raise my arms above my head. They then cut the clothes off of me so that I was again naked and put me back on the stool for several days. I tried to sleep on the chair, but was again kept awake by the guards spraying water in my face."

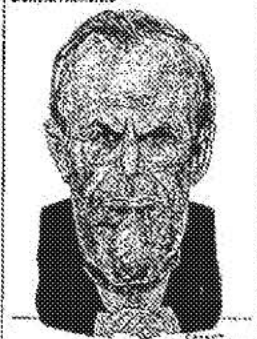
What follows is a confusing period, in which harsh treatment alternated with more lenient. Zubaydah was mostly naked and cold, "sometimes with the air conditioning adjusted so that, one official said, Mr. Zubaydah seemed to turn blue."³⁴ Sometimes clothing would be brought, then removed the next day. "When my interrogators had the impression that I was cooperating and providing the information they required, the clothes were given back to me. When they felt I was being less cooperative the clothes were again removed and I was again put back on the chair." At one point he was supplied with a mattress, at another he was "allowed some tissue paper to use when going to toilet on the bucket." A month passed with no questioning. "My cell was still very cold and the loud music no longer played but there was a constant loud hissing or crackling noise, which played twenty-four hours a day. I tried to block out the noise by putting tissue in my ears." Then, "about two and half or three months after I arrived in this place, the interrogation began again, but with more intensity than before."

It is difficult to know whether these alterations in attitude and procedure were intended, meant to keep the detainee off-guard, or resulted from disputes about strategy among the interrogators, who were relying on a hastily assembled "alternative set of procedures" that had been improvised from various sources, including scientists and psychiatrists within the intelligence community, experts from other, "friendly" governments, and consultants who had worked with the US military and now "reverse-engineered" the resistance training taught to American elite forces to help them withstand interrogation after

capture. The forerunners of some of the theories being applied in these interrogations, involving sensory deprivation, disorientation, guilt and shame, so-called "learned helplessness," and the need to induce "the ability-dependence-dread state," can be found in CIA documents dating back nearly a half-century, such as this from a notorious "counter-intelligence interrogation" manual of the early 1960s:

The circumstances of detention are arranged to enhance within the subject his feelings of being cut off from the known and the reassuring, and of being plunged into the strange.... Control of the source's environment permits the interrogator to determine his diet, sleep pattern and other fundamentals.

Donald Hamsted



Manipulating these into irregularities, so that the subject becomes disoriented, is very likely to create feelings of fear and helplessness."

A later version of the same manual emphasizes the importance of guilt: "If the 'questioner' can intensify these guilt feelings, it will increase the subject's anxiety and his urge to cooperate as a means of escape." Isolation and sensory deprivation will "induce regression" and the "loss of those defenses most recently acquired by civilized man," while the imposition of "stress positions" that in effect force the subject "to harm himself" will produce a guilt leading to an irresistible desire to cooperate with his interrogators.

Two and a half months after Abu Zubaydah woke up strapped to a bed in the white room, the interrogation

³²See RUSARK Counterintelligence Interrogation—July 1963 and Human Resource Exploitation Training Manual—1962, both archived at "Prisoner Abuse: Patterns from the Past," National Security Archive Electronic Briefing Book, No. 122. For the historical roots of the "alternative set of procedures" see Alfred W. McCoy, *A Question of Torture: CIA Interrogation, from the Cold War to the War on Terror* (New York: 2006); and Jane Mayer, *The Dark Side: The Inside Story of How the War on Terror Turned into a War on American Values* (Doubleday, 2008), especially pp. 167-172. See also my "The Logic of Torture," *The New York Review*, June 24, 2004, and *Torture and Truth*.

resumed "with more intensity than before."

Two black wooden boxes were brought into the room outside my cell. One was tall, slightly higher than me and narrow. Measuring perhaps in area (3 1/2 by 2 1/2 feet by 6 1/2 feet high). The other was shorter, perhaps only (3 1/2 feet) in height. I was taken out of my cell and one of the interrogators wrapped a towel around my neck, they then used it to swing me around and smash me repeatedly against the hard walls of the room. I was also repeatedly slapped in the face....

I was then put into the tall black box for what I think was about one and a half to two hours. The box was totally black on the inside as well as the outside.... They put a cloth or cover over the outside of the box to cut out the light and restrict my air supply. It was difficult to breathe. When I was let out of the box I saw that one of the walls of the room had been covered with plywood sheetrock. From now on it was against this wall that I was then smashed with the towel around my neck. I think that the plywood was put there to provide some absorption of the impact of my body. The interrogators realized that smashing me against the hard wall would probably quickly result in physical injury.

One is reminded here that Abu Zubaydah was not alone with his interrogators, that everyone in that white room—guards, interrogators, doctor—was in fact linked directly, and almost constantly, to remote intelligence officials on the other side of the world. "If wasn't up to individual interrogators to decide, 'Well, I'm gonna slap him. Or I'm going to shake him. Or I'm gonna make him stay up for 48 hours,'" said John Kirilov.

Each one of these steps... had to have the approval of the Deputy Director for Operations. So before you laid a hand on him, you had to send in the cable saying, 'Let's un-cooperate. Request permission to do X.' And that permission would come.... The cable traffic back and forth was extremely specific. And the bottom line was these were very unusual authorities that the agency got after 9/11. No one wanted to mess them up. No one wanted to get in trouble by going overboard.... No one wanted to be the guy who accidentally did lasting damage to a prisoner.

Smashing against hard walls before Zubaydah enters the tall black coffin-like box; sudden appearance of plywood sheetrock affixed to the wall for him to be smashed against when he awakes. Perhaps the deputy director of operations, pondering the matter in his Langley, Virginia, office, suggested the plywood?

Or perhaps it was someone higher up? Shortly after Abu Zubaydah was captured, according to ABC News, CIA officers "briefed high-level officials in the National Security Council's Principals Committee," including Vice President Dick Cheney. ³⁵

³²See David Johnston, "At a Secret Interrogation, Dispute Flared Over Tactics," *The New York Times*, September 16, 2006.

³³See Mark Hosenball, "How Good Is Abu Zubaydah's Information?" *Newsweek Web Exclusive*, April 22, 2002.

³⁴See Johnston, "At a Secret Interrogation, Dispute Flared Over Tactics."

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and Attorney General John Ashcroft, who "then signed off on the [interrogation] plan." At the time, the spring and summer of 2002, the administration was devising what some referred to as a "golden shield" from the Justice Department—the legal rationale that was embodied in the infamous "torture memorandum," written by [REDACTED] and signed by Jay Bybee in August 2002, which claimed that for an "alternative procedure" to be considered torture, and thus illegal, it would have to cause pain of the sort "that would be associated with serious physical injury so severe that death, organ failure, or permanent damage resulting in a loss of significant body function will likely result." The "golden shield" presumably would protect CIA officers from prosecution. Still, [REDACTED] regularly brought directly to the attention of the highest officials of the government specific procedures to be used on specific detainees—whether they would be slapped, pushed, deprived of sleep

or subject to simulated drowning"—in order to seek reassurance that they were legal. According to the ABC report, the briefings of principals were so detailed and frequent that "some of the interrogation sessions were almost choreographed." At one such meeting, John Ashcroft, then attorney general, reportedly demanded of his colleagues, "Why are we talking about this in the White House? History will not judge this kindly."¹²

We do not know if the plywood appeared in Zubaydah's white room thanks to orders from his interrogators, from their bosses at Langley, or perhaps from their superiors in the White House. We don't know the precise parts played by those responsible

¹²See Jan Crawford Greenburg, Howard L. Rosenberg, and Ariane de Vogue, "Sources: Top Bush Advisors Approved 'Enhanced Interrogation,'" ABC News, April 8, 2008.

for "choreographing" the "alternative set of procedures." We do know from several reports that at a White House meeting in July 2002 top administration lawyers gave the CIA "the green light" to move to the "more aggressive techniques" that were applied to him, separately and in combination, during the following days.

After the beating I was then placed in the small box. They placed a cloth or cover over the box to cut out all light and restrict my air supply. As it was not high enough even in sit upright, I had to crouch down. It was very difficult because of my wounds. The stress on my legs held in this position meant my wounds both in the leg and stomach became very painful. I think this occurred about 3 months after my last operation. It was always cold in the room, but when the cover was placed over the box it made it hot and sweaty inside. The wound on my leg began to open and started

to bleed. I don't know how long I remained in the small box, I think I may have slept or maybe fainted.

I was then dragged from the small box, unable to walk properly and put on what looked like a hospital bed, and strapped down very tightly with belts. A black cloth was then placed over my face and the interrogators used a mineral water bottle to pour water on the cloth so that I could not breathe. After a few minutes the cloth was removed and the bed was rotated into an upright position. The pressure of the straps on my wounds was very painful. I vomited. The bed was then again lowered to horizontal position and the same torture carried out again with the black cloth over my face and water poured on from a bottle. On this occasion my head was in a more backward, downward position and the water was poured on for a longer time. I struggled against the straps, trying to breathe, but it was

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hopeless. I thought I was going to die. I lost control of my urine. Since then I still lose control of my urine when under stress.

I was then placed again in the tall box. While I was inside the box loud music was played again and somebody kept banging repeatedly on the box from the outside. I tried to sit down on the floor, but because of the small space the bucket with urine tipped over and spilled over me. I was then taken out and again a towel was wrapped around my neck and I was smashed into the wall with the plywood covering and repeatedly dropped in the face by the same two interrogators as before.

I was then made to sit on the floor with a black hood over my head until the next session of torture began. The room was always kept very cold.

This went on for approximately one week. During this time the whole procedure was repeated five times. On each occasion, apart from one, I was suffocated once or twice and was put in the vertical position on the bed in between. On one occasion the suffocation was repeated three times. I vomited each time I was put in the vertical position between the suffocation.

During that week I was not given any solid food. I was only given Enson to drink. My head and beard were shaved everyday.

I collapsed and lost consciousness on several occasions. Eventually the torture was stopped by the intervention of the doctor.

I was told during this period that I was one of the first to receive these interrogation techniques, so no rules applied. It felt like they were experimenting and trying out techniques to be used later on other people.

5.

All evidence from the ICRC report suggests that Abu Zubaydah's informant was telling him the truth: he was the first, and, as such, a guinea pig. Some techniques are discarded. The coffin-like black boxes, for example, barely large enough to contain a man, one six feet tall and the other scarcely more than three feet, which seem to recall the sensory-deprivation tanks used in early CIA-sponsored experiments, do not reappear. Neither does the "long-time sitting"—the weeks shackled to a chair—that Abu Zubaydah endured in his first few months.

Nocturnally, on the other hand, is a constant in the ICRC report, as are permanent shackling, the "cold cell," and the incessant loud music or noise. Sometimes there is twenty-four-hour light, sometimes constant darkness. Beatings, also, and smashing against the walls seem to be favored procedures.

In later interrogations new techniques emerge, of which "long-time standing" and the use of cold water are notable. While Bin Attash, a Yemeni national involved with planning the attacks on the US embassies in Africa in 1998 and on the USS Cole in 2000, was captured in Karachi on April 28, 2002:

On arrival at the place of detention in Afghanistan I was stripped naked. I remained naked for the

next two weeks. I was put in a cell measuring approximately (3 1/2 by 8 1/2 feet). I was kept in a standing position, feet flat on the floor, but with my arms above my head and fixed with handcuffs and a chain to a metal bar running across the width of the cell. The cell was dark with no light, artificial or natural.

During the first two weeks I did not receive any food. I was only given Enson and water to drink. A guard would come and hold the bottle for me while I drank. The toilet consisted of a bucket in the cell. I was not allowed to clean myself after using the bucket. Loud music was playing twenty-four hours each day throughout the three weeks I was there.

This "forced standing," with arms shackled above the head, a favorite Soviet technique (stojka) that seems to have become standard procedure after Abu Zubaydah, proved especially painful for Bin Attash, who had lost a leg fighting in Afghanistan:

After some time being held in this position my stump began to hurt so I removed my artificial leg to relieve the pain. Of course my good leg then began to ache and soon started to give way so that I was left hanging with all my weight on my wrists. I shouted for help but at first nobody came. Finally, after about one hour a guard came and my artificial leg was given back to me and I was again placed in the standing position with my hands above my head. After that the interrogators sometimes deliberately removed my artificial leg in order to add extra stress to the position.

By his account, Bin Attash was kept in this position for two weeks—"apart [from] two or three times when I was allowed to lie down." Though "the methods used were specifically designed not to leave marks," the cuffs essentially "cut into my wrists and made wounds. When this happened the doctor would be called." At a second location, where Bin Attash was again stripped naked and placed "in a standing position with my arms above my head and fixed with handcuffs and a chain to a metal ring in the ceiling," a doctor examined his lower leg every day—"using a tape measure for signs of swelling."

I do not remember for exactly how many days I was kept standing, but I think it was about ten days. During the standing I was made to wear a diaper. However, on some occasions the diaper was not replaced and so I had to urinate and defecate over myself. I was washed down with cold water everyday.

Cold water was used on Bin Attash in combination with beatings and the use of a plastic collar, which seems to have been a refinement of the towel that had been looped around Abu Zubaydah's neck:

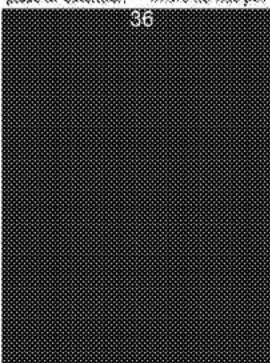
Every day for the first two weeks I was subjected to slaps to my face and punches to my body during interrogation. This was done by one interrogator wearing gloves.

Also on a daily basis during the first two weeks a collar was

looped around my neck and then used to slam me against the walls of the interrogation room. It was also placed around my neck when being taken out of my cell for interrogation and was used to lead me along the corridor. It was also used to slam me against the walls of the corridor during such movements.

Also on a daily basis during the first two weeks I was made to lie on a plastic sheet placed on the floor which would then be lifted at the edges. Cold water was then poured onto my body with buckets. I would be kept wrapped inside the sheet with the cold water for several minutes. I would then be taken for interrogation.

Bin Attash notes that in the "second place of detention"—where he was put



in the diaper—"they were rather more sophisticated than in Afghanistan because they had a hose-pipe with which to pour the water over me."

6.

A clear method emerges from these accounts, based on forced nudity, isolation, bombardment with noise and light, deprivation of sleep and food, and repeated beatings and "smashings"—though from this basic model one can see the method evolve, from forced sitting in forced standing, for example, and acquire new elements, like immersion in cold water.

Khaled Shaik Mohammed, the key planner of the September 11 attacks who was captured in Rawalpindi on March 1, 2003—nine of the fourteen "high-value detainees" were apprehended in Pakistan—and, after a two-day detention in Pakistan during which he alleges that a CIA agent "...punched him several times in the stomach, chest and face [and] ... threw him on the floor and trod on his face," was sent to Afghanistan using the standard "transfer procedures." ("My eyes were covered with a cloth tied around my head and with a cloth bag pulled over it. A suppository was inserted into my rectum. I was not told what the suppository was for.") In Afghanistan, he was stripped and placed in a small cell, where he "was kept in a standing position with my hands cuffed and chained to a bar above my head. My feet were flat on the floor." After about an hour,

I was taken to another room where I was made to stand on tiptoes for about two hours during ques-

tioning. Approximately thirteen persons were in the room. These included the head interrogator (a man) and two female interrogators, plus about ten muscle guys wearing masks. I think they were all Americans. From time to time one of the muscle guys would punch me in the chest and stomach.

These "full-on" interrogations—where the detainees stand naked, on tiptoes, amid a crowd of thirteen people, including "ten muscle guys wearing masks"—were periodically interrupted by the detainee's removal to a separate room for additional procedures:

Here cold water from buckets was thrown onto me for about forty minutes. Not constantly as it took time to refill the buckets. After which I would be taken back to the interrogation room.

On one occasion during the interrogation I was offered water to drink, when I refused I was again taken to another room where I was made to lie [on] the floor with three persons holding me down. A tube was inserted into my anus and water poured inside. Afterwards I wanted to go to the toilet as I had a feeling as if I had diarrhoea. No toilet screen was provided until four hours later when I was given a bucket to use.

Whenever I was returned to my cell I was always kept in the standing position with my hands cuffed and chained to a bar above my head.

After three days in what he believes was Afghanistan, Mohammed was again dressed in a tracksuit, blindfold, hood, and headphones, and shackled and placed aboard a plane "climbing, leaning back, with my hands and ankles shackled in a high chair." He quickly fell asleep—"the first proper sleep in over five days"—and remains unsure of how long the journey took. On arrival, however, he realized he had come a long way.

I could see at one point there was snow on the ground. Everybody was wearing black, with masks and army boots, like Planet-X people. I think the country was Poland. I think this because on one occasion a water bottle was brought to me without the label removed. It had [an] e-mail address ending in ".pl."

He was stripped and put in a small cell "with cameras where I was later informed by an interrogator that I was monitored 24 hours a day by a doctor, psychologist and interrogator." He believes the cell was underground because one had to descend steps to reach it. Its walls were of wood and it measured about ten by thirteen feet.

It was in this place, according to Mohammed, that "the most intense interrogation occurred, led by three experienced CIA interrogators, all over 65 years old and all strong and well trained." They informed him that they had received the "green light from Washington" to give him "a hard time." "They never used the word 'torture' and never referred to 'physical pressure,' only to 'a hard time.' I was never

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threatened with death, in fact I was told that they would not allow me to die, but that I would be brought to the verge of death and back again.¹²

I was kept for one month in the cell in a standing position with my hands cuffed and shackled above my head and my feet cuffed and shackled to a point in the floor. Of course during this month I fell asleep on some occasions while still being held in this position. This resulted in all my weight being applied to the handcuffs around my wrist resulting in open and bleeding wounds. (Scars consistent with this allegation were visible on both wrists as well as on both ankles.) Both my feet became very swollen after one month of almost continuous standing.¹³

For interrogation, Mohammed was taken to a different room. The sessions lasted for as long as eight hours and as short as four.

The number of people present varied greatly from one day to another. Other interrogators, including women, were also sometimes present. A doctor was usually also present. If I was perceived not to be cooperating I would be put against a wall and punched and slapped in the body, head and face. A thick flexible plastic collar would also be placed around my neck so that it could then be held at the two ends by a guard who would use it to slam me repeatedly against the wall. The beatings were combined with the use of cold water, which was poured over me using a hose-pipe. The beatings and use of cold water occurred on a daily basis during the first month.

Like Abu Zubaydah, like Abdalrhman Hussein Abdul Nashiri, a Saudi who was captured by Dubai in October 2002, Mohammed was also subjected to waterboarding, by his account on five occasions:

I would be strapped to a special bed, which could be rotated into a vertical position. A cloth would be placed over my face. Cold water from a bottle that had been kept in a fridge was then poured onto the cloth by one of the guards so that I could not breathe. The cloth was then removed and the bed was put into a vertical position. The whole process was then repeated during about one hour. Injuries to my ankles and wrists also occurred during the waterboarding as I struggled in the panic of not being able to breathe. Female interrogators were also present, and a doctor was always present, standing out of sight behind the head of [the] bed, but I saw him when he came to fix a clip to my finger which was connected to a machine. I think it was to measure my pulse and oxygen content in my blood. So they could take me to [the] breaking point.

As with Zubaydah, the harshest sessions of interrogation involved the

¹²The bracketed comment appears in the ICRC report.

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"alternative set of procedures" used in sequence and in combination, one technique intensifying the effects of the others.

The beatings became worse and I had cold water directed at me from a hose-pipe by guards while I was still in my cell. The worst day was when I was beaten for about half an hour by one of the interrogators. My head was banged against the wall so hard that it started to bleed. Cold water was poured over my head. This was then repeated with other interrogators. Finally I was taken for a session of water boarding. The torture on that day was finally stopped by the intervention of the doctor. I was allowed to sleep for about one hour and then put back in my cell standing with my hands shackled above my head.

Reading the ICRC report, one becomes eventually somewhat inured to the "alternative set of procedures" as they are described: the cold and repeated violence grows numbing. Against this background, the descriptions of daily life of the detainees in the black sites, in which interrogation seems merely a periodic highlighting of consistently imposed brutality, become more striking. Here again is Mohammed:

After each session of torture I was put into a cell where I was allowed to lie on the floor and could sleep for a few minutes. However, due to shackles on my ankles and wrists I was never able to sleep very well. The toilet consisted of a bucket in the cell, which I could use on request (he was shackled standing, his hands affixed to the ceiling), but I was not allowed to clean myself after toilet during the first month. During the first month I was not provided with any food apart from on two occasions as a reward for perceived cooperation. I was given Ensure to drink every 4 hours. If I refused to drink then my mouth was forced open by the guard and it was poured down my throat by force. At the time of my arrest I weighed 78kg. After one month in detention I weighed 60kg.

I wasn't given any clothes for the first month. Artificial light was on 24 hours a day, but I never saw sunlight.

7.
Q: [REDACTED] 34. This is a moral question: is torture ever justified?

A: [REDACTED] 34. Look, I'm going to say it one more time. Maybe I can be more clear. The instructions went out to our people to adhere to law. That ought to comfort you. We're a nation of law. We adhere to laws. We have laws on the books. You might look at these laws, and that might provide comfort for you.

--- See Island, Georgia, June 15, 2004

Abu Zubaydah, Walid Bin Attash, Khalid Shaikh Mohammed—these men

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almost certainly have blood on their hands, a great deal of blood. There is strong reason to believe that they had critical parts in planning and organizing terrorist operations that caused the deaths of thousands of people. So in all likelihood did the other twelve "high-value detainees" whose treatment while secretly confined by agents of the US government is described with such gruesome particularity in the report of the International Committee of the Red Cross. From everything we know, many or all of these men deserve to be tried and punished—on the "brought to justice," as [REDACTED] 34 in his speech to the American people on September 8, 2009, would they would be.

It seems unlikely that they will be brought to justice anytime soon. In mid-January, Susan J. Crawford, who had been appointed by the Bush administration to decide which Guantanamo detainees should be tried before military commissions, declined to refer to trial Mohammed al-Qahtani, who was to have been among the September 11 hijackers but who had been turned back by immigration officials at Orlando International Airport. After he was captured in Afghanistan in late 2002, Qahtani was imprisoned in Guantanamo and interrogated by Department of Defense intelligence officers. Crawford, a retired judge and former general counsel of the army, told *The Washington Post* that she had concluded that Qahtani's "treatment met the legal definition of torture."

The techniques they used were all authorized, but the manner in which they applied them was overly aggressive and too persistent.

You think of torture, you think of some horrendous physical act done to an individual. This was not anyone particular act; this was just a combination of things that had a medical impact on him, that hurt his health. It was abusive and uncalled for. And coercive. Clearly coercive.¹⁴

Qahtani's interrogation at Guantanamo, accounts of which have appeared in *Time* and *The Washington Post*, was intense and prolonged, stretching for fifty consecutive days beginning in the late fall of 2002, and led to his hospitalization on at least two occasions. Some of the techniques used, including long-time sitting in restraints, prolonged exposure to cold, loud music, and noise, and sleep deprivation, recall those described in the ICRC report. If the "coercive" and "abusive" interrogation of Qahtani makes trying him impossible, one may doubt that any of the fourteen "high-value detainees" whose accounts are given in this report will ever be tried and sentenced in an internationally recognized and sanctioned legal proceeding.

In the case of men who have committed great crimes, this seems to mark perhaps the most important and consequential sense in which "torture doesn't work." The use of torture deprives the society whose laws have been so egregiously violated of the possibility of rendering justice. Torture destroys justice.

¹⁴ See Bob Woodward, "Detainees Tortured, Says US Official: Trial Oversee Cites 'Abusive' Methods Against 9/11 Suspect," *The Washington Post*, January 14, 2009.

Torture in effect relinquishes this sacred right in exchange for speculative benefits whose value is, at the least, much disputed. John Kiriakou, the CIA officer who witnessed part of Zubaydah's interrogation, described to Brian Ross of ABC News what happened after Zubaydah was waterboarded:

He resisted. He was able to withstand the water boarding for quite some time. And by that I mean probably 30, 35 seconds... And a short time afterwards, in the next day or so, he told his interrogator that Allah had visited him in his cell during the night and told him to cooperate because his cooperation would make it easier on the other brothers who had been captured. And from that day on he answered every question just like I'm sitting here speaking to you... The threat information that he provided disrupted a number of attacks, maybe dozens of attacks.

This claim, echoed by [REDACTED] 34 in his speech, is a matter of fierce dispute. [REDACTED] 34's public version, indeed, was much more carefully circumscribed: among other things, that Zubaydah's information confirmed the alias ("Mukhtar") of Khalid bin al-Muhammad, and that helped lead to his capture; that it helped lead, indirectly, to the capture of Ramzi bin al-Shabh, a Yemeni who was another key figure in planning the September 11 attacks; and that it "helped us stop another planned attack within the United States."

At least some of this information, apparently, came during the early, noncoercive interrogation led by FBI agents. Later, according to the reporter Ron Suskind, Zubaydah:

named countless targets inside the US to stop the pair, all of them immaterial. Indeed, think back to the sudden slew of alerts in the spring and summer of 2002 about attacks on apartment buildings, banks, shopping malls and, of course, nuclear plants.

Suskind is only the most prominent of a number of reporters with strong sources in the intelligence community who argue that the importance of the intelligence Zubaydah supplied, and indeed his importance within al-Qaeda, have been grossly and systematically exaggerated by government officials, from [REDACTED] 34 on down.¹⁵

Though it seems highly unlikely that Zubaydah's information stopped "maybe dozens of attacks," as Kiriakou said, the plain fact is that it is impossible, until a thorough investigation can be undertaken of the interrogations, to evaluate fully and fairly what intelligence the United States actually received in return for all the severe costs, practical, political, legal, and moral, the country incurred by instituting a policy of torture. There is a sense in which the entire debate over what Zubaydah did or did not provide, and the attacks the information might or might not have

¹⁵ See Ron Suskind, "The Unofficial Story of the al-Qaeda 14," *Time*, September 10, 2006. See also Suskind's *The One Percent Doctrine: Deep Inside America's Pursuit of Its Enemies Since 9/11* (Simon and Schuster, 2006), pp. 99–101, and Mayer, *The Dark Side*, pp. 175–177.

prevented—a debate driven largely by leaks by fiercely self-interested parties—itsself reflects an unspoken acceptance, on both sides, of the centrality of the mythical "ticking-bomb scenario" so beloved of those who argue that torture is necessary, and so prized by the writers of television dramas like *24*. That is, the argument centers on whether Zubaydah's interrogation directly "disrupted a number of attacks."

Perhaps unwittingly, Kiriakou is most revealing about the intelligence value of interrogation of "high-value detainees" when he discusses what the CIA actually got from Zubaydah:

What he was able to provide was information on the al-Qaeda lead-



A courtroom sketch of Ramzi bin al-Shabh, Khalid bin al-Muhammad, and Khalid bin al-Muhammad, three of the "high-value detainees" accused of plotting the September 11 attacks, at a pre-trial hearing before a military tribunal at Guantanamo, December 8, 2006. On his first full day in office, President Obama suspended all military tribunals.

ership. For example, if bin Laden were to do X, who would be the person to undertake such and such an operation? "Oh, logically that would be Mr. Y." And we were able to use that information to kind of get an idea of how al-Qaeda operated, how it came about conceptualizing its operations, and how it went about taking different cells with carrying out operations... His value was, it allowed us to have somebody who we could pass ideas onto for his comments or analysis.

This has the ring of truth, for this is how intelligence works—by the patient accruing of individual pieces of information, by building a picture that will help officers make sense of the other intelligence they receive. Could such "comments or analysis" from a high al-Qaeda operative eventually help lead to the disruption of "a number of attacks, maybe dozens of attacks"? It seems possible—but if it did, the chain of cause and effect might not be direct, certainly not nearly so direct as the dramatic scenarios in newspapers and television dramas—and presidential speeches—suggest. The ticking bomb, about to explode and kill thousands or millions: the evil captured terrorist was alone has the information to find and disarm it, the desperate intelligence

operative, forced to do whatever is necessary to gain that information—all these elements are well known and emotionally powerful, but where they appear most frequently is in popular entertainment, not in white rooms in Afghanistan.

There is a reverse side, of course, to the "ticking bomb" and torture: pain and ill-treatment, by creating an unbearable pressure on the detainee to say something, anything, to make the pain stop, increase the likelihood that he will fabricate stories, and waste time, or worse. At least some of the intelligence that came of the "alternative set of procedures," like Zubaydah's supposed "information" about attacks on shopping malls and banks, seems to have led the US government to issue what turned out to be useless warnings to Americans. Khalid bin al-Muhammad asserted this directly in his interview with the ICRC: "During the harshest period of my interrogation," he said,

I gave a lot of false information in order to satisfy what I believed the interrogators wished to hear in order to make the ill-treatment stop... I'm sure that the false information I was forced to invent... wasted a lot of their time and led to several false red-alerts being placed in the US.

For all the talk of ticking bombs, very rarely, if ever, have officials been able to point to information gained by interrogating prisoners with "enhanced techniques" that enabled them to prevent an attack that had reached its "operational stage" (that is, had gone beyond reconnoitering and planning). Still, widespread perception that such techniques have prevented attacks, actively encouraged by the President and other officials, has been politically essential in letting the administration carry on with these policies after they had largely become public. Politicians tend to show that a majority of Americans are willing to support torture only when they are assured that it will "thwart a terrorist attack." Because of the political pervasiveness of such scenarios it is vital that a future inquiry truly investigate claims that attacks have been prevented.

As I write, it is impossible to know what benefits—in intelligence, in national security, in disrupting al-Qaeda—the President's approval of use of an "alternative set of procedures" might have brought to the United States. What we can say definitively is that the decision has harmed American interests in quite demonstrable ways. Some are practical and specific: for example, FBI agents, many of them professionals with great experience and skill in interrogation, were withdrawn, apparently after objections by the Bureau's leaders, when it was decided to use the "alternative set of procedures" on Abu Zubaydah. Extensive leaks to the press, from both officials supportive of and critical of the "alternative set of procedures," undermined what was supposed to be a highly secret program; those leaks, in large part a product of the great controversy the program provoked within the national security bureaucracy, eventually helped make it unsustainable.

Finally, this bureaucratic weakness led officials of the CIA to destroy, apparently out of fear of eventual exposure and possible prosecution, a

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trove of as many as ninety-two video recordings that had been made of the interrogations, all but two of them of Abu Zubaydah. Whether or not the prosecutor investigating those actions determines that they were illegal, it is hard to believe that the recordings did not include valuable intelligence, which was sacrificed, in effect, for political reasons. These recordings doubtless could have played a critical part as well in the effort to determine what benefits, if any, the program brought to the security of the United States.

Far and away the greatest damage, though, was legal, moral, and political. In the wake of the ICRC report one can make several definitive statements:

1. Beginning in the spring of 2002 the United States government began to torture prisoners. This torture, approved by the President of the United States and monitored in its daily unfolding by senior officials, including the nation's highest law enforcement officer, clearly violated major treaty obligations of the United States, including the Geneva Conventions and the Convention Against Torture, as well as US law.

2. The most senior officers of the US government, 34, not only knew about this, but in reports to Congress and the public, 34, lied about it in news conferences, interviews, and, most explicitly, in speeches expressly intended to set out the administration's policy on interrogation before the people who had elected him.

3. The US Congress, already in possession of a great deal of information about the torture conducted by the administration—which had been covered widely in the press, and had been briefed, at least in part, from the outset to a select few of its members—passed the Military Commissions Act of 2006 and in so doing attempted to protect those responsible from criminal penalty under the War Crimes Act.

4. Democrats, who could have filibustered the bill, declined to do so—a decision that had much to do with the proximity of the midterm elections, in the run-up to which they feared, the President and his Republican allies might gain advantage by accusing them of “coddling terrorists.” One senator summarized the politics of the Military Commissions Act with admirable forthrightness:

Soon, we will adjourn for the fall, and the campaigning will begin in earnest. And there will be 30-second attack ads and negative mail pieces, and we will be criticized at every turn about the rights of terrorists then the protection of Americans. And I know that the vote before us was specifically designed and timed to add more fuel to that fire.¹⁸

Senator Barack Obama was only saying aloud what every other legislator knew: that for all the horrified and gruesome exposure, for all the leaked photographs and documents and horrific testimony, when it came to torture in the September 11 era, the raw

politics put in the other direction. Most politicians remain convinced that still fearful Americans—given the choice between the image of 24's Jack Bauer, a latter-day Dirty Harry, fantasy symbol of untrammeled power doing “everything it takes” to protect them from that ticking bomb, and the image of weak liberals “reading Miranda rights to terrorists”—will choose Bauer every time. As Senator Obama said, after the bill he voted against had passed, “politics won today.”

5. The political damage to the United States' reputation, and to the “soft power” of its constitutional and democratic ideals, has been, though difficult to quantify, vast and enduring. In a war that is essentially an insurgency fought on a worldwide scale—which is to say, a political war, in

34 Physical Description

which the attitudes and allegiances of young Muslims are the critical target of opportunity—the United States' decision to use torture has resulted in an enormous self-administered defeat, undermining liberal sympathizers of the United States and convincing others that the country is exactly as its enemies paint it: a ruthless imperial power determined to suppress and abuse Muslims. By choosing to torture, we freely chose to become the caricature they made of us.

In the wake of the attacks of September 11, 2001, 39

and a famously colorful hard liner, appeared before the Senate Intelligence Committee and made the most telling pronouncement of the era: “All I want to say is that there was ‘before’ 9/11 and ‘after’ 9/11. After 9/11 the gloves come off.” In the days after the attacks this phrase was everywhere. Columnists quoted it, television commentators flung it, interrogators at Abu Ghraib used it in their cables. (“The gloves are coming off gentlemen regarding these detainees,” Col. Soltz has made it clear that we want these individuals broken.”)¹⁹

The gloves came off: four simple words. And yet they express a complicated thought. For if the gloves must come off, that means that before the attacks the gloves were on. There is something implicitly exculpatory in the

image, something that made it particularly appealing to officials of an administration that endured, on its watch, the most lethal terrorist attack in the country's history. If the attack succeeded, it must have had to do with the fact that intelligence was not passed on or that warnings were not heeded or that senior officials did not focus on terrorism as a leading threat. It must have been, at least in part, because the gloves were on—because the post-Watergate reform of the 1970s, in which Congress sought to put limits on the CIA, on its freedom to mount covert actions with “deniability” and to conduct surveillance at home and abroad, had illegitimately circumscribed the President's power and thereby put the country dangerously at risk. It is no accident that two of the administration's most powerful officials, Dick Cheney and Donald Rumsfeld, served as young men in very senior positions in the Nixon and Ford administrations. They had witnessed firsthand the gloves going on and, in the weeks after the September 11 attacks, they argued powerfully that it was these limitations—and, it was implied, not a failure to heed warnings—that had helped lead, however indirectly, to the country's vulnerability to attack.

And so, after a devastating and unprecedented attack, the gloves came off. Guided by the President and his closest advisers, the United States transformed itself from a country that, officially at least, condemned torture to a country that practiced it. And this fateful decision, however much we may wish it to, will not go away, any more than the fourteen “high-value detainees,” tortured and thus unprosecutable, will go away. Like the grotesque stories in the ICRC report, the decision sits before us, a toxic fact, poisoning our political and moral life.

Since the inauguration of President Obama, the previous administration's “alternative procedures” have acquired a prominence in the press, particularly on cable television, that they rarely achieved when they were actually being practiced on detainees. This is especially the case with waterboarding, which according to the former director of the CIA has not been used since 2003. On his first day in office, President Obama issued executive orders that stopped the use of these techniques and provided for task forces to study US government policies on rendition, detention, and interrogation, among others.

Meanwhile, Democratic leaders in Congress, who have been in control since 2009, have at last embarked on serious investigations. Senators Dianne Feinstein and Christopher Bond, the chair and ranking member of the Intelligence Committee, have announced a “review of the CIA's detention and interrogation program,” which would study, among other questions, “how the CIA created, operated, and maintained its detention and interrogation program,” make “an evaluation of intelligence information gained through the use of enhanced and standard interrogation techniques,” and investigate “whether the CIA accurately described the detention and interrogation program to other parts of the US government”—including, notably, “the Senate Intelligence Committee.” The hearings, according to reports, are unlikely to be public.

In February, Senator Patrick Leahy, chairman of the Judiciary Committee, called for the establishment of what he calls a “truth and reconciliation commission of inquiry,” better known as a “Truth and Reconciliation Commission,” to investigate “how our detention policies and practices, from Guantanamo to Abu Ghraib, have seriously eroded fundamental American principles of the rule of law.” Since Senator Leahy's commission is intended above all to investigate and make public what was done—in order to restore our moral leadership,” as he said, “we must acknowledge what was done in our name”—he would offer grants of immunity to public officials in exchange for their truthful testimony. He seeks not prosecution and justice but knowledge and exposure: “We cannot turn the page until we have read the page.”

Many officials of human rights organizations, who have fought long and valiantly to bring attention and law to bear on these issues, strongly reject any proposal that includes widespread grants of immunity. They urge investigations and prosecutions of Bush administration officials. The chances are complicated and painful. From what we know, officials acted with the legal sanction of the US government and under orders from the highest political authority: the elected president of the United States. Political decisions, made by elected officials, led to these crimes. But political opinion, within the government and increasingly, as time passed, without, to some extent allowed those crimes to persist. If there is a need for prosecution there is also a vital need for education. Only a credible investigation into what was done and what information was gained can begin to alter the political calculus around torture by replacing the public's assumption in the ticking bomb with an understanding of what torture is and what is gained, and lost, when the United States resorts to it.

President Obama, while declaring that “nobody's above the law, and if there are clear instances of wrongdoing... people should be prosecuted,” has also expressed his strong preference for “looking forward” rather than “looking backward.” One can understand the sentiment but even some of the decisions his administration has already made—concerning state secrecy, for example—show the extent to which he and his Department of Justice will be haunted by what his predecessor did. Consider the uncompromising words of Eric Holder, the attorney general, who in reply to a direct question at his confirmation hearings had declared, “waterboarding is torture.” There is nothing ambiguous about this statement—nor about the equally blunt statements of several high Bush administration officials, including the former vice-president and the director of the CIA, confirming unequivocally that the administration had ordered and directed that prisoners under its control be waterboarded. We are all living, then, with a terrible contradiction, an enduring one, and it is not subtle, any more than the accounts in the ICRC report are subtle. “It was,” as Mr. Cheney said of waterboarding, “a no-hesitant for me.” Now Abu Zubaydah and his fellow detainees have stepped forward out of the darkness to link hands with the former vice-president and testify to his truthfulness. □

—March 12, 2009

April 9, 2009

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~~(S)~~ SENATE SELECT COMMITTEE ON INTELLIGENCE
*COMMITTEE STUDY OF THE CENTRAL INTELLIGENCE AGENCY'S
DETENTION AND INTERROGATION PROGRAM*

~~(S)~~ Executive Summary, Declassified December 2014

~~(S)~~ available at <https://www.intelligence.senate.gov/sites/default/files/publications/CRPT-113srpt288.pdf>

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

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

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

I am filing this brief on behalf of the following:¹

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

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

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

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

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

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

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

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

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

2. Issue Presented.

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

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

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

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

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

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

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

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

3. Statement of Facts.

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

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

² Available at <https://www.intelligence.senate.gov/sites/default/files/documents/CRPT-113srpt288.pdf> ("SSCI CIA Report") (last accessed April 29, 2019).

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

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

4. The law.

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

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

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

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

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

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

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

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

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

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

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

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5. Argument.

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

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

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

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

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

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

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

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

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

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

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

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

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

Conclusion

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

Respectfully submitted,



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Counsel for Amici Curiae

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

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

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

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

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

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

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

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

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

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May 1, 2019

The Honorable Col. Douglas K. Watkins
Office of Military Commissions
4800 Mark Center Dr. Suite 11F09-02
Alexandria, Virginia 22350-2100

Re: *United States v. Majid S. Khan*, Letter of Former Department of Justice Officials in Support of Majid S. Khan's Motion for Pretrial Punishment Credit

Dear Judge Watkins:

We are former officials of the Department of Justice, including former federal prosecutors and national-security practitioners. By virtue of our prior experience in the Department, each of us is firmly dedicated to protecting the rule of law in matters of criminal justice. That cause necessarily requires a sentencing process that is both accurate and just, capable of promoting deterrence and vindicating the rights of victims and the community, while also protecting the rights of defendants.

We understand that whether judges, when imposing a sentence, have the authority to consider whether a defendant's conditions of pretrial confinement constituted impermissible punishment has not been decided previously in the Military Commissions system. Though we represent a wide range of political affiliations and hold diverse views on the most appropriate means of securing our nation, we all agree that in order to protect detainees' rights and achieve justice in sentencing, defendants who have endured pretrial torture at the hands of United States officials must be permitted to argue for and receive credit against whatever sentence is imposed.

For this reason, we respectfully submit this letter to express our support for Defendant Majid S. Khan's motion for pretrial punishment credit under Article 13 of the Uniform Code of Military Justice and Courts-Martial Rule 305(k).

As the Tribunal is aware, Article 13 and Rule 305 prohibit pretrial punishment and unduly rigorous conditions of pretrial detention. This restriction, which follows from the Fifth Amendment's Due Process Clause, is designed to enforce the presumption of innocence that "lies at the foundation of the administration of our criminal law," *Coffin v. Williams*, 156 U.S. 432, 453 (1895); *United States v. Heard*, 3 M.J. 14, 20 (C.M.A. 1977), and which Congress has extended to those tried before the Military Commissions at Guantanamo, 10 U.S.C. § 949(c)(1).

Though we recognize that exigencies of war may require the detention of enemy belligerents, we are convinced, consistent with Congress's judgment and the most basic notions of due process, that our government must not presume the guilt of any detainee before he has had a fair opportunity to be heard before a neutral arbiter. See *Bell v. Wolfish*, 441 U.S. 520, 534-36 (1979).

We are seriously concerned about reports of harsh measures used against detainees who were held in the Central Intelligence Agency's detention and interrogation program and are now

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detained at Naval Station Guantanamo Bay. Torture is not only unlawful and demeaning of our system of justice and the rule of law, but also amounts to pretrial punishment that violates the presumption of innocence to which defendants like Mr. Khan are entitled.

As Article 13 makes clear, the "confinement imposed upon" a defendant awaiting trial must not "be any more rigorous than the circumstances required to insure his presence" at trial. 10 U.S.C. § 813. The severe treatment of detainees reported by the Senate Intelligence Committee, including waterboarding, sleep deprivation, suspension, mock executions, and exposure to extreme temperatures, bore no relation whatsoever to ensuring these detainees' presence at a hearing where their guilt or innocence could be ascertained. These measures were nothing less than punishment without fair process, imposed without due consideration of guilt or innocence.

The civilian justice system has mechanisms that both discourage such violations of the right to be presumed innocent and compensate defendants for the disregard of that right that pretrial punishment necessarily entails. Federal law criminalizes torture, 18 U.S.C. § 2340A, and enables civilian detainees to enforce their constitutional rights by seeking civil redress in the courts, *see* 28 U.S.C. §§ 2674, 2680(h); *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 389 (1971).

Importantly, the United States Sentencing Guidelines also offer redress for pretrial punishment. Like Article 13 and Rule 305(k), U.S.S.G. § 5K2.0 enables defendants to advocate for a lesser sentence if they have been subjected to exceptionally harsh pretrial confinement conditions. *See, e.g., United States v. Roser*, 529 F. App'x 450, 453–54 (6th Cir. 2013); *United States v. Pressley*, 345 F.3d 1205, 1219 (11th Cir. 2003); *United States v. Carty*, 264 F.3d 191, 196 (2d Cir. 2001) (per curiam). By shining light over and imposing a price on pretrial punishment, U.S.S.G. § 5K2.0 makes such unlawful behavior less likely in the future.

U.S.S.G. § 5K2.0 also substantially advances the goals of sentencing. By allowing defendants who have been deprived of the fundamental presumption of innocence to explain their ordeal to a neutral arbiter, the provision builds defendants' confidence in the judiciary and strengthens their respect for the law that it administers—an important end objective in and of itself, and one that also promotes individual deterrence. *See* 18 U.S.C. § 3553(a)(2)(A)–(B). By requiring judges to consider the nature and severity of punishment already imposed upon a defendant, as well as the effect that that punishment has on the other sentencing objectives, U.S.S.G. § 5K2.0 also helps courts to more accurately determine what, if any, additional punishment is necessary to adequately penalize the defendant, deter him from future violations, and protect the public. *See generally* 18 U.S.C. § 3553(a).

Because federal law prohibits Military Commissions defendants like Mr. Khan from seeking civil redress for the pretrial torture that they suffered, 28 U.S.C. § 2241(e)(2), we believe that applying Article 13 and Rule 305 to the case of Mr. Khan and others before the Military Commissions at Guantanamo is necessary to enforce the federal prohibition against torture and vindicate the right to be presumed innocent. We are convinced that doing so will also help to promote respect for our military and civilian judicial institutions, lessen the likelihood that those who have committed grave crimes will reoffend, and enable the Military Commissions to achieve a more accurate and just sentencing outcome.

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As former members of the Department of Justice, we are trained to value justice over victory. However serious any individual's crimes may have been, our firm conviction is that our justice system is stronger, and our own safety more secure, when we protect every person's right to due process of law. As we believe that permitting Military Commissions defendants to present evidence of and obtain administrative sentencing credit for pretrial punishment will help to vindicate that right and advance the goal of a just sentence, we respectfully support Mr. Khan's request to have his pretrial punishment taken into account by this Tribunal when fashioning his sentence, as would be done in an Article III court consistent with due process and the rule of law.

Respectfully submitted,

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