you probably aren’t doing your job,” said one official who has supervised the capture and transfer of Guantanamo detainees. “And we want to be promoting a year of zero tolerance on this.” This was the whole problem for a long time with the CIA.

This lengthy article, by Dante Prato and Andrew Sullivan, appeared in the Washington Post on November 19, 2009, after months of the capture of Abu Zubaydah. A similarity lengthy report followed a few months later on the front page of The New York Times’ Investigations Questioning Torture Suspects in a Dark and Secret World. The title, aggressive one of the officials quoted—“We don’t kid ourselves. In some of their cases, we don’t even bother to ask questions” and “torture is the only way to get the truth out of them” —in only a few months might well require such techniques that sound out of the question.

So there are two sides and secrets. And when, on a bright sunny day two years ago, before the fifth anniversary of the September 11 attacks, the President of the United States stepped onto the East Rises of the White House and informed the high officials, diplomats, and specially-trained September 12 but when officials gathered in secret before that he had already instructed the United States government to begin the dark and secret universe to hold and interrogate captured terror suspects, or, in the President’s words, “a new and professional way.

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the Russians, perhaps with the help, directly or indirectly, of American soldiers. Then, post-Soviet Afghanistan, where he ran al-Qaeda logistics and recruitment, directing supply shipments to the various theaters of war, and training and placing them in battle after they’d been trained.

The men he recruited and instructed, and his colleagues, went to Faisalabad, a city surrounded by the Taliban, and then to the military hospital at Lahore. When he spied them, he took off at top speed, an American soldier. He was the last of the CIA.

I asked him in Arabic what his name was. And he shook his head. 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 you get me.”

And then he asked me to remember him with a name. And I said, “We, no, we have heard of you.”

Khalilzad, and the “small group” of CIA and ISI people who just left but were still on the ground knew that Ali, Zidan, they had the “original fish” that they had caught. We knew, we were fully informed, and we wanted to get it.

According to Khalilzad, on a table in the house where they found Ali, Zidan, and two other men, was a building model. The building was still intact, and they had plans for a school on the map. The plans, Khalilzad told ABC News correspondent Brian Ross, were for the English school in Lahore. Khalilzad, they knew, was “very current.”

With the help of the American in Pakistan, Ali, Zidan’s captors turned him back to health. He was indicted at least twice, first, reportedly to Thailand, then he was believed, to Afghanistan, probably by the US, in a safe house, and/or, the interrogation began.

I woke up, naked, strapped to a bed, in a very small room. The room measured approximately 10 feet by 10 feet. This room is small, with the four walls containing of metal bars separating it from a larger room. I am not sure how long I remained in this bed. After some time, I think it was several days, but I don’t remember exactly. I was transferred to a cell where I was kept, shackled by [name] and held for what I think was the rest of my stay. During this time I developed hallucinations on the wall, and these were due to the conduct of my torture.

I was given no solid food during the first time or two weeks. While sitting on the chair, I was only given water (a mustard-saturated) and told to drink. After the first time, I was given coffee, but this became less time.

The cell and room were air-conditioned and were very cold. Very little, if any, of the music was conducted. I felt running about every five minutes, twenty-four hours a day. Sometimes, the music stopped and was replaced by a loud rapping or scratching noise.

I was asked if I was being tortured, and I said, “No.” The guards went on their way.

After I was transferred to the cell, I was questioned for one to two hours each day. I was then told that the Americans would come to the room and speak to me through the bars of the cell. During the questioning, the music was turned off, and I was then put back on again afterward. I could not stop, as for the first time until three weeks. It started to fall asleep one of the guards would come and simply put me in my cell.

I was asked if I was a Muslim, and I said, “No.” The guards went on their way.

One can translate these procedures into a series of acts: “Change of Sensory Environment,” “Harassment of Clothing,” “Use of Stress Positions,” “Catastrophic Substitution,” “Unpredictable Manipulation,” “Sleep Deprivation,” “Isolation,” “Full Body Immersion,” “Use of Noise to Induce Stress.”

All these terms and many others are subject to debate. For example, in a document that the authors describe as “a detailed guide to interrogation and physical restraint” carried out by the Peres Group and Justice Department officials in December 2003, the torture is described in terms that are not consistent with the definition given in the previous paragraph. For example, the “ computed feeling of helplessness and dependence” that the authors describe is not consistent with the torture described in the previous paragraph.

But what was the true picture? Ali, Zidan, was not only the “most significant target caught” but the first big fish.}

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The findings and conclusions of this document have been edited to provide clarity. The statements of the author are based on a confidential interview conducted by Brian Ross of ABC News, and are not representative of the views of the CIA.

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April 8, 2002

Page 361 of 404
as Kristiney, Zubaydah, as his renovated, had wanted to talk, most urgently, of the time he had nothing to say about the United States... He said that he felt like it was all a dream... Although he didn’t think that there would be such a response, he requested a meeting with the FBI, a clear sign that he didn’t want to be a wake-up call to the United States.

The few weeks of torture, before the white room and the salt and the light, Zubaydah seemed to have secretly been suffering from a sleep disorder that might have contributed to his physical and mental strain. It was a condition that medical professionals found in some detainees, and it seemed to be a common finding in the sleep studies conducted on Zubaydah.

Zubaydah had been trained in interrogation techniques and had experience working with the Central Intelligence Agency. He had been interrogated by several agents, and he had listened to their questions and answers. He had been told that he would be transferred to a different facility, and he had been waiting for that transfer.

He was already exhausted, and the novelty of the situation was wearing off. He had already experienced all the torture techniques he had been trained in, and he was ready to move on. He had already been in the white room for several days, and he was tired of it. He had heard the same questions over and over again, and he was ready to be transferred to a different facility.

Zubaydah was sitting in a chair, looking out the window. He was alone, and he was thinking about his family. He had a wife and two children, and he was worried about them. He had been separated from them for several days, and he was missing them.

He was ready to move on. He was ready to leave the white room. He was ready to start a new life. He was ready to start a new chapter in his life. He was ready to start a new page in his book.
and Attorney General John Ashcroft, since they signed off on the post-9/11 interrogation plans. At the time, the spring and summer of 2002, the administration was debating how to “balance” the “golden shield” from the Justice Department—the legal rationale that was embodied in the infamous “torture torture” memorandum written by [Redacted] and signed by [Redacted] in August 2002, which claimed that for an “alternate procedure” to be considered legal, it would have to cause pain of the sort “that would be associated with serious physical injury or death, organ failure, or permanent damage resulting in serious disability or death.”

We do not know if the physical ap- pearance of Zubaydah, while captive, raised concerns on the part of his interrogators, that the “golden shield” would be violated if any other torture procedures were used to obtain information. The concern was that his physical condition was such that any other torture procedures would be deemed illegal.

In the end, after the president and his advisors decided on the “alternative procedures,” the CIA was directed to “begin implementing the procedures.”

On April 12, 2002, Zubaydah was moved from the White House to a CIA black site in Afghanistan. He was then interrogated by a CIA team, which was led by [Redacted] and included [Redacted] as well as [Redacted]. The team was directed to use the “alternative procedures” to obtain information from Zubaydah.

During the interrogation, Zubaydah was subjected to a variety of torture techniques, including sleep deprivation, sensory deprivation, and stress positions. He was deprived of sleep for extended periods of time, and subject to prolonged isolation in a dark, cold, and unlit room.

The interrogators used a technique called “waterboarding” on Zubaydah, which involved filling his mouth and nose with water. This was done repeatedly, and the water was poured down his throat. Zubaydah was also subjected to “inversion” techniques, in which he was forced to lie on his back with his head down into a metal box or chair, and then hung upside down for extended periods of time. He was also subjected to “prone” and “sitting” positions, and was forced to stand for hours with his hands and legs restrained.

Throughout the interrogation, Zubaydah was subjected to intense psychological pressure. The interrogators used a variety of techniques to try to break his will, including threats, intimidation, and the use ofacial pain. Zubaydah was also subjected to a variety of other torture techniques, including the use of electric shock, sleep deprivation, and sensory deprivation.

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hopes, I thought I was going to die a hot, sweaty death of my own. I
then began to remember the fact that Ali had
fought a real war, and somehow kept coming back to
me. I felt as though I was watching a movie, and I
began to feel a sense of detachment.
I was then placed against the wall, my hands and
feet were tied, and I was left there for what seemed
to be an eternity. I was then blindfolded and
placed in a small cell, where I was left for several
hours. I do not remember what happened next,
but I do remember feeling a sense of relief when I
was finally released.

I then made my way back to the
field, where I saw Ali and some other
people who were also being held captive.

I asked Ali what had happened,
and he told me that he had
been captured by the Soviet forces.

I asked him how he was able
to escape, and he told me that he had
managed to escape by digging a
hole in the ground and crawling
through it.

I asked him how he was able
to survive, and he told me that he
had managed to find food and
water by digging a well in a nearby
field.

I asked him how he had
managed to escape, and he told me
that he had managed to dig a
tunnel underneath the
prison. He then continued to
tell me about his
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threatened with death, in fact, I was told that they would not allow me to go, but that I would be brought to the verge of death and back again.”

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 standing in this position. This resulted in all my weight being applied to the point on my back and back, my back, my back, my back, my back, my back, my back.

For interrogation, Mohammad was taken to a different room. The sessions last for as long as eight hours and as short as five.

The number of people present varied greatly from one day to another. Either interrogators, including generals, were also sometimes present. A declarant was usually alone present. I was prevented from being accompanied by a lawyer or anyone else. The interrogators were all part of the security forces. Mohammad was also not allowed to see anyone else during the interrogations.

As with Zubiadas, the harshest sections of interrogation involved the

"alternative set of procedures" of torture and inhumane, degrading treatment or punishment used in sequence and in combination, as techniques intensifying the effects of the others.

The barracks became worse and I had to face being402 eaten alive by guards while I was still on my feet. The worst day was when I was brought back to a room by one of the interrogators. My head was pressed against the wall so hard that it started to bleed. Cold water was poured over my head. Then we were replaced with other interrogators. Finally I was taken for a session of nonstop beating. The beatings on this day were finally stopped by the intervention of the doctor. I was allowed to stand for about one hour and then put back in my cell standing with my hands shackled above my head.

Reading the CIA report, one becomes eventually somewhat aware of the "alternative set of procedures" as they are described by the court and health services officials. Against this background, the description of Mary’s life of the detainees in the black sites, in which interrogations seem to be a sort of purgatory, is often an unending and unjustifiable torture, becomes more striking. Here again is Mohammad.

After each session of torture I was put in a cell and washed and then put on my feet and told to be ready for the next session. However, this took place in a room where the beds were not made up, and I was never asked to keep myself tidy. I was not allowed to clean myself either.

During the first month I was not provided with any food apart from six occasions as a result of my detention with or without permission. I was given Enzyme to drink every 4 hours. If I said something that my mouth was force-fed by the guard and it was put down my throat by force.

At the time of my arrest I weighed 10 kg. After one month in custody I weighed 82 kg. I was not given any clothes for the first month. Artificial light was on for 24 hours a day, but I never saw sunlight.

7. How is this a measure of punishment?

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 Filed with TJ
 1 May 2019

UNCLASSIFIED//FOR PUBLIC RELEASE

Appellate Exhibit 033 (Khan)
Page 365 of 404
Torture in effect reclassifies this last rights issue in special operations. Torture redefines terrorism, redefines what it means to fight war. The use of torture had already degraded the intelligence gathered from captured suspects. It had a chilling effect on the ability of interrogators to produce information. It undermined the trust and confidence of the_Array of escaped prisoners. It also had a profound impact on the psychological and emotional well-being of the interrogators themselves.
tends to as many as eighty-two videos recordings that had been made of the interrogation of the two men and had been delivered to the

AlaZubaydah. Whether or not the pictures were taken to ascertain that they were alive or to ascertain their identity, or for any other reason,

it is hard to say. But they were delivered to the government in pursuance of a court order. The pictures showed the two men in a variety of positions,

including some that appeared to be restraints. The government has not released these pictures to the public. They are classified as top secret.

In May 2019, the government released a statement indicating that it had reviewed the interrogation of the two men. The statement did not identify

the men, nor did it mention the pictures. The statement did state that the interrogation of the two men had been conducted in accordance with

international law and had been done in a manner that was consistent with the principles of the Geneva Conventions.

14. Physical Control: The government's control over the two men was exercised through physical force. The government has not released any

information about the extent of this force or the specific techniques used. However, it is known that the two men were subjected to a variety of

physical and psychological stressors, including sleep deprivation, sensory deprivation, and other forms of torture.

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15. Psychological Control: The government's control over the two men was exercised through psychological manipulation. The government has not

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(U) Attachment G
SENATE SELECT COMMITTEE ON INTELLIGENCE
COMMITTEE STUDY OF THE CENTRAL INTELLIGENCE AGENCY'S
DETENTION AND INTERROGATION PROGRAM

Executive Summary, Declassified December 2014

(U) Attachment H
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:

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

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

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

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

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

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

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

2. Issue Presented.

Viewed narrowly, the issue presented by Mr. Khan’s motion is whether Article 13 of the Uniform Code of Military Justice (UCMJ) applies to the military commissions. Should the Court determine that it does, Mr. Khan seeks administrative credit against his sentence for the time periods during which the United States subjected him to torture and other forms of cruel,
inhuman and degrading treatment—a remedy that the military commissions have previously recognized is available to victims like Mr. Khan. See Ruling on Defense Motion to Dismiss—Torture of the Detainee (AE084) at 5-6 & n.7, United States v. Jawad (Sept. 24, 2008) (D-008).

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

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

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


To date, the United States has largely failed that test. The Department of Justice declined to prosecute anyone complicit in torture during the CIA’s former rendition, detention and interrogation (RDI) program, including in cases where detainees were killed. The executive branch has refused to acknowledge, much less apologize to, individual victims. No RDI program detainee has received compensation. And the overwhelming majority of information about abuses the CIA perpetrated, and their myriad consequences, remains secret.
There is a widespread perception not just that the military commissions will continue this trend, but that they were established precisely for that purpose—to circumvent accountability for the United States’ use of torture. Mr. Khan’s motion to apply to the military commissions UCMJ Article 13 is an opportunity for this Court both to demonstrate otherwise and to guard against future abuses. Amici urge the Court to seize the opportunity and grant the motion.


According to the 2014 Senate Select Committee on Intelligence Study of the CIA’s Detention and Interrogation Program (Senate Report or Report), 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 “puréeed” Mr. Khan’s “‘lunch tray’, consisting of hummus, pasta with sauce, nuts, and raisins,” and pumped it into his intestines through a tube forced into his rectum against his will. Id. at 115. Additional sessions of “rectal feeding” and “hydration” followed. Id. at 100 & n.584, 115 n.680.

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

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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. 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

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

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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/ger/cat-c-gc-3_en.pdf (last accessed April 29, 2019).
5. Argument.

For Purposes of Sentencing, Mr. Khan’s Torture Should at a Minimum be Accrued the Same Treatment as Unlawful “Punishment” Under UCMJ Article 13.

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

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

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

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

By contrast, recognizing that Mr. Khan has been punished within the meaning of UCMJ Article 13 and adjusting his sentence accordingly would have two salutary effects beyond sending a powerful message about the objectivity of the military commissions. First, it would put all government officials on notice that torture and cruel treatment have tangible consequences.
Accountability often serves as a deterrent, and in this case would further incentivize against a return to one of the darker chapters in our country’s history.

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

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


By their nature, detention settings can almost never meet these requirements. Either law enforcement or the military has complete control over all aspects of detainees’ lives. The presence of uniformed personnel and guns, being handcuffed and shackled, institutional surroundings and other detention experiences are acutely triggering, bringing the original torture experience back to mind. Id. at 13. At Guantanamo, detainees remain held captive by the government responsible for their torture, in a setting both replete with common triggers of PTSD symptoms and that will forever be synonymous with torture. Id. at 17.
In other words, Mr. Khan will almost certainly continue to suffer the aftereffects of his torture until he is released from custody. Awarding him administrative credit against his sentence pursuant to UCMJ Article 13 would be a threshold step toward enforcing Mr. Khan’s right to receive, and the United States’ obligation to provide, “as full rehabilitation as possible.” CAT art. 14; General Comment No. 3.

Conclusion

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

Respectfully submitted,

S. Scott Roehm
The Center for Victims of Torture
1015 15th Street NW, Suite 600
Washington DC, 20005
(202) 822-0188
sroehm@cvt.org
Counsel for Amici Curiae
Appendix A

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

Claire Finkelstein: Ms. Finkelstein is the Algernon Biddle Professor of Law and Professor of Philosophy, as well as the Director of the Center for Ethics and the Rule of Law, at the University of Pennsylvania Law School. Her current research addresses national security law and policy, with a focus on ethical and rule of law issues that arise in that arena. In 2012, Professor Finkelstein founded Penn Law’s Center for Ethics and the Rule of Law (CERL), a non-partisan interdisciplinary institute that seeks to promote the rule of law in modern day conflict, warfare, and national security. In 2019, she was named Senior Fellow at the Foreign Policy Research Institute (FPRI). An expert in the law of armed conflict, military ethics, and national security law, Professor Finkelstein has briefed Pentagon officials, U.S. Senate staff, and JAG Corps members on various issues in national security law and practice.
Mark Fallon: Mr. Fallon is a career national security professional and international security consultant. His government service spans more than three decades with positions including NCIS Deputy Assistant Director for Counterterrorism and Senior Executive within the Department of Homeland Security. He currently serves as Chair of the International Association of Chiefs of Police IMPACT Section and as a member of a Global Steering Committee, developing universal standards for non-coercive, human rights compliant and evidence-based investigative interviewing and interrogation. Mr. Fallon’s extensive counterterrorism experience includes involvement in the investigation of Sheikh Omar Abdel Rahman (“the Blind Sheikh”), 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-Qaeda terrorist network for trials before military commissions. He was the program manager for research studies of violent extremism for the Qatar International Academy for Security Studies and served as Chair of the U.S. Government High Value Detainee Interrogation Group Research Committee.

Juan Mendez: Mr. Mendez is the Professor of Human Rights Law in Residence, Washington College of Law, American University, Washington, DC. Between 2010 and 2016, Mr. Mendez was the United Nations Special Rapporteur on Torture, and between 2004 and 2007, the Special Advisor to the Secretary-General of the UN on the Prevention of Genocide. He has also served as a member (Commissioner) of the Inter-American Commission on Human Rights of the Organization of American States between 2000 and 2003, and as its President in 2002. In addition, he was co-Chair of the International Bar Association’s Human Rights Institute in 2010-11. Since 2017 he is also a Commissioner of the International Commission of Jurists.
Alberto Mora: Mr. Mora is an attorney, a Senior Fellow at the Harvard Kennedy School’s Carr Center for Human Rights Policy, and the American Bar Association’s Director of Global Programs, where he directs the ABA’s Rule of Law Initiative and oversees the Center for Human Rights. From 2001 to 2006, he served as General Counsel of the Department of the Navy. He is serving or has served on the board of directors of Human Rights First and Freedom House. Additional federal service includes the State Department, the U.S. Information Agency, and the Broadcasting Board of Governors. In 2006, Mr. Mora received the Profile in Courage Award from the John F. Kennedy Memorial Library Foundation for his opposition to torture while serving as Navy General Counsel. He submits this brief in his personal capacity.

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

Brig. Gen. (Ret.) Stephen Xenakis, MD: Dr. Xenakis is a board-certified psychiatrist and retired Army brigadier general. He has been qualified by Federal Courts and the Office of the
Military Commissions of the Department of Defense as a psychiatric and medical expert in numerous cases of detainees at Guantanamo Naval Base and accused terrorists. He has had multiple interviews with detainees at Guantanamo, advised attorneys on their respective cases, and reviewed medical, intelligence, and military files of nearly 50 detainees and accused terrorists. The respective cases have included high-value detainees, convicted belligerents, and others awaiting release and return to their homes. He has testified in cases of accused belligerents who were captured in the theater of operations and presented with extensive records of their association with and assistance to identified terrorist organizations.

The Center for Victims of Torture (CVT): CVT was founded in 1985 and is the oldest and largest torture survivor rehabilitation center in the United States and one of the two largest in the world. Through programs operating in the United States, the Middle East, and Africa— involving psychologists, social workers, physical therapists, physicians, psychiatrists, and nurses—CVT annually rebuilds the lives of nearly 25,000 primary and secondary survivors. CVT also provides training and technical assistance to torture treatment centers both inside and outside the United States.
(U) Attachment I
May 1, 2019

The Honorable Col. Douglas K. Watkins
Office of Military Commissions
4800 Mark Center Dr. Suite 11F09-92
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(f)(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
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.
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,

PETER W. BALDWIN
Former Assistant U.S. Attorney
U.S. Attorney’s Office, Central District of California
Former Assistant U.S. Attorney
U.S. Attorney’s Office, Eastern District of New York

RICHARD BERNE
Former Assistant U.S. Attorney
U.S. Attorney’s Office, Eastern District of New York
Former Assistant U.S. Attorney
U.S. Attorney’s Office, Northern District of California

CPT WILLIAM M. BRODSKY, RET.
Former Chief of Military Justice
U.S. Theater Army Support Command Europe at Worms, Germany
Former Assistant U.S. Attorney
U.S. Attorney’s Office, District of Columbia
Former Assistant U.S. Attorney
U.S. Attorney’s Office, Eastern District of New York

SUSAN BRUNE
Former Assistant U.S. Attorney
U.S. Attorney’s Office, Southern District of New York

ANDREW GENSER
Former Assistant U.S. Attorney, Deputy Chief, General Crimes Section
U.S. Attorney’s Office, Eastern District of New York

ILENE JAROSLAW
Former Assistant U.S. Attorney, Chief, General Crimes Section
U.S. Attorney’s Office, Eastern District of New York
BONNIE S. KLAPPER  
Former Assistant U.S. Attorney  
U.S. Attorney’s Office, Central District of California  
Former Assistant U.S. Attorney  
U.S. Attorney’s Office, Eastern District of New York  

LINDA LAKHDHIR  
Former Assistant U.S. Attorney  
U.S. Attorney’s Office, Eastern District of New York  

BRIAN MAAS  
Former Assistant U.S. Attorney, Deputy Chief, Criminal Division  
U.S. Attorney’s Office, Eastern District of New York  

TOM McFARLAND  
Former Assistant U.S. Attorney, Chief, Civil Division, Long Island Branch  
U.S. Attorney’s Office, Eastern District of New York  

TONI MELE  
Former Assistant U.S. Attorney  
U.S. Attorney’s Office, Eastern District of New York  

ROBERT M. RADICK  
Former Assistant U.S. Attorney, Deputy Chief of Public Integrity, Chief of Health Care Fraud Prosecutions  
U.S. Attorney’s Office, Eastern District of New York  

DAVID W. SHAPIRO  
Former U.S. Attorney, Chief, Criminal Division, Chief, Appeals  
U.S. Attorney’s Office, Northern District of California  
Former Assistant U.S. Attorney, Chief, Organized Crime Drug Enforcement Task Force  
U.S. Attorney’s Office, Eastern District of New York  
Former Assistant U.S. Attorney  
U.S. Attorney’s Office, District of Arizona  

VIVIAN SHEVITZ  
Former Assistant U.S. Attorney, Chief, Appeals  
U.S. Attorney’s Office, Eastern District of New York  

DANIEL SILVER  
Former Assistant U.S. Attorney, Chief, National Security & Cybercrime Section  
U.S. Attorney’s Office, Eastern District of New York
JANE SIMKIN SMITH
Former Assistant U.S. Attorney
U.S. Attorney's Office, Eastern District of New York

THOMAS P. SULLIVAN
Former U.S. Attorney
U.S. Attorney's Office, Northern District of Illinois

DANIEL E. WENNER
Former Assistant U.S. Attorney
U.S. Attorney's Office, Eastern District of New York