

**Testimony of  
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Military Commissions Defense Organization, Department of Defense  
before the  
Senate Judiciary Committee  
7 December 2021**

Although a principle so basic to our system of laws should go without saying, criminal justice is a shared responsibility. Yet in this case, save for al-Nashiri's defense counsel, all elements of the military commission system -- from the prosecution team to the Justice Department to the [Court of Military Commissions Review] to the judge himself - failed to live up to that responsibility."

-- *In re Al-Nashiri*, 921 F.3d 224, 239-40 (D.C. Cir. 2019)

Mr. Khan has been held without the basic due process under the U.S. Constitution. Specifically, he was held without charge or legal representation for nine years until 2012, and held without final sentencing until October 2021. Although designated an "alien unprivileged enemy belligerent," and not technically afforded the rights of U.S. citizens, the complete disregard for the foundational concepts upon which the Constitution was founded is an affront to American values and concept of Justice.

-- Clemency letter signed by 7 of 8 senior officers on Majid Khan sentencing panel

## INTRODUCTION

I thank Chair Durbin and the Members of the Senate Judiciary Committee for inviting me to testify today. I emphasize at the outset that I am testifying solely as the Chief Defense Counsel of the Military Commissions Defense Organization and not on behalf of any accused, as I am prevented by regulation from representing any individual charged in the military commissions. Moreover, to be clear, the views I am about to express do not reflect the views of the United States, the Department of Defense, or any other Department of Defense agency.

My views do reflect, however, 32 years of service in the United States Marine Corps, first as a supply and logistics officer and later as a judge advocate, including service as a defense counsel, a prosecutor and a military judge. I will retire in December of this year after six and one-half years as Chief Defense Counsel for the Military Commissions.

The title of this hearing is "Closing Guantanamo: Ending 20 Years of Injustice." Because the scope of my authority is limited to oversight of the military commissions defense function and not to detention operations more generally, I cannot and do not address the issue of "Closing Guantanamo." After over half a decade of service as Chief Defense Counsel, however,

I am well-positioned to address the subtitle, “Ending 20 Years of Injustice.” In a word, the only path to ending injustice in the military commissions – for the accused detainees, for the country, and above all for the victims of 9/11 and the other crimes currently on trial in Guantanamo – is to bring these military commission proceedings to as rapid a conclusion as possible. Notice I do not say “as just a conclusion as possible.” It is too late in the process for the current military commissions to do justice for anyone. The best that can be hoped for at this point, more than 20 years after the crimes were committed, is to bring this sordid chapter of American history to an end. And that end can only come through a negotiated resolution of the cases.

Whatever the original intentions, no one today can seriously argue that the military commissions in Guantanamo have been anything but a failed experiment. To date, in their almost 20 years of existence under four different Presidents, the military commissions have produced one final conviction. Let me repeat that – as we sit here today, the failed experiment called the Guantanamo military commissions has produced one final finding of guilt. To be sure, there have been eight convictions, six of them by plea bargain. (I do not include my own summary and unlawful conviction for contempt of court after refusing to testify about privileged communications, which was subsequently overturned by a federal judge.) Of these, three convictions have been overturned in their entirety and three remain on appeal. The two remaining convictions are of government cooperators with no motive to challenge their own plea bargains – the Al-Darbi case, which is the only one that is actually final – and the Khan case, which has not yet completed the post-trial process.

Worse yet, while the few defendants convicted by military commission have all been at most “bit players” in terrorism crimes, the trials of the men charged with the 9/11 attacks and other major acts of terrorism (the attack on the U.S.S. Cole, the Bali bombings) have languished with no trial date in sight. The 9/11 conspiracy was originally charged in 2008, almost fourteen years ago, and as yet there is no date set to try that case. That the military commissions have been unable to bring the men charged with the worst criminal act in United States history to trial 20 years after the fact (and 14 years after they were first charged) is alone enough to prove that the system has failed.

Nor is it the (undeniable) talents and perseverance of the MCDO’s defense counsel that are responsible for delaying these trials. In fact, the statistics tell a very different story. In contrast to the military commissions, over the same 20-year period, federal prosecutors of alleged terrorists have obtained *almost 700* convictions, including of one defendant who was originally charged in the commissions and of many other high-profile terrorists as well.

The accused and the public are all victims of the military commissions’ failure to bring these cases to trial. The original victims of the crimes themselves have waited 20 years in vain to see justice done. Nor is this only a matter of just punishment; like the public at large, the victims cannot know all the facts of their relatives’ fate until the public airing that trial provides. Yet *none* of the active military commission cases have trial dates set; indeed, trial is further away today than it was when I joined the MCDO in 2015.

Justice delayed is justice denied. But the injustice meted out by the Guantanamo military commissions to the defendants, public, and victims extends far beyond mere delay. These delays are the direct result of government decisions that have corrupted the process from its outset, and that make *any* just or satisfying future outcomes of commission cases – in the form of legitimate convictions and fair sentences -- unlikely if not impossible. Allowing the military commissions to proceed in their current form will thus result at very best in many more years of agonizing delay, and at worst in verdicts that – following those years of delay -- are overturned on appeal. To be blunt, the government is gambling with the victims’ real need to achieve closure in some form. That is unconscionable.

The decision to torture the defendants undermines the validity of verdicts and sentences.

At the heart of the commissions’ problems is their original sin, torture. The United States chose to secretly detain and torture the men it now seeks to punish. From the beginning, justice was an afterthought. As a CIA interrogator told a detainee, “[you will] never go to court, because ‘we can never let the world know what I have done to you.’”<sup>1</sup> When the cases did land in court (or military commission), the government was well aware of the consequences of the black-site and other Guantanamo abuse. The chief prosecutor who was serving when the CIA’s so-called “high value detainees” arrived at GTMO has since said, “Rather than bolstering the prosecution’s case, allegations of abuse required further investigation and might leave the prosecution in a weaker position.”<sup>2</sup> He was correct. Torture impacts and undermines every aspect of these prosecutions.

More specifically, the government’s fear that the truth will become public is what has most undermined the commission processes. Proving the details of the defendants’ torture is crucial to their ability to make a defense to the charges and – especially for the capital defendants – to obtain a fair sentence. The government has obstructed access to this proof in a multitude of ways, from limiting their discovery of documents relevant to their own treatment (despite the fact that defense counsel have the same security clearances as the prosecutors) to attempting to take control of the defense investigation of their clients’ torture (including, at one point, threatening defense counsel with prosecution).<sup>3</sup> In some cases, the government has provided more complete information to the general public under the Freedom of Information Act than the prosecution has provided to commission defendants in discovery.<sup>4</sup> Fear of revealing the truth has led to vast swathes of litigation conducted *ex parte* (that is, in secret without the participation of the defense) by the government – 227 *ex parte* pleadings in the 9/11 case alone – in a manner completely foreign to our system of adversarial criminal justice. The Senate Select Committee on Intelligence Report on the CIA Rendition, Detention and Interrogation Program (SSCI Report) remains entirely classified with the exception of the heavily redacted Executive

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<sup>1</sup> Senate Select Committee on Intelligence Report on the CIA Rendition, Detention and Interrogation Program, Forward (released with redactions 9 December 2014), at 4, citing internal CIA documents.

<sup>2</sup> Morris D. Davis, *Historical Perspective on Guantanamo Bay: The Arrival of the High Value Detainees*, 42 Case W. Res. J. Int’l L. 115 (2009), available at: <http://scholarlycommons.law.case.edu/jil/vol42/iss1/5>.

<sup>3</sup> *United States v. Mohammad, et al.*, Unofficial/Unauthenticated Tr. at 19151-52 (1 March 2018)

<sup>4</sup> Carol Rosenberg, *Some Sept. 11 Trial Secrets May Not Be Secrets Anymore*, New York Times, 5 November 2021, available at <https://www.nytimes.com/2021/11/05/us/politics/guantanamo-torture-foia-cia.html>; Margo Williams, *Lawyers for Accused 9/11 Plotters Say Government Withheld Public Information*, The Intercept, 28 November 2021, available at <https://theintercept.com/2021/11/28/9-11-trial-guantanamo-cia-cables-foia/>.

Summary issued nearly a decade ago. Again, despite the defense counsel having the necessary clearances to review it and a very pressing need-to-know (that is, the need to keep their clients from execution), they have not been allowed access to it. The government's reliance on classified discovery in these cases is unprecedented in federal courts (or, indeed, in military courts). But any convictions and sentences in these cases will be reviewed eventually by those same federal courts.

Apart from its unjustifiable over-classification, the government's reliance on evidence related to torture has led it to adopt positions – such as arguing for the admissibility of torture-derived evidence in pretrial proceedings, a position sanctioned by the military judge in at least one of the cases<sup>5</sup> -- that put all of its convictions at risk. And that reliance carries with it huge risks with respect to a multitude of other legal issues that could lead to reversal, including most prominently the admissibility of the so-called “clean-team statements” taken by FBI agents after the defendants' transfer out of the black sites to Guantanamo. The foundations of any guilty verdicts and capital sentences obtained in the current military commissions are thus being built on quicksand.

#### Government intrusions on the sanctity of the attorney-client relationship

But torture is not the only underlying systemic barrier to justice in the military commissions. From their outset, the legitimacy of commission prosecutions has also been severely undermined by repeated gross violations of defense counsels' relationship with their clients.

As you know, criminal defendants are guaranteed the right to the effective assistance of counsel, and the right to effective assistance includes the right of *private consultation* with counsel.<sup>6</sup> The purpose of the attorney-client privilege, the Supreme Court has said, “is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice.”<sup>7</sup>

The stark reality at Guantanamo is that the defendants have no reason to trust their lawyers or think they can speak with them in confidence. MCDO lawyers have told their clients that no one will read their privileged materials, that no member of their defense team will violate the attorney-client privilege, and that no one will overhear their privileged communications. Nevertheless, over and over again after giving their clients these assurances, another government intrusion is revealed.

This problem has been endemic to all of the prosecutions. In 2011, Joint Task Force Guantanamo (JTF; the command responsible for the custody of detainees in Guantanamo) seized, copied, and translated all written material in all detainees' possession. This included documents very clearly marked as attorney-client privileged.<sup>8</sup> Incredibly, this seizure of privilege materials was done *after consultation with the Joint Task Force's lawyers*. The

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<sup>5</sup> *United States v. Al-Nashiri*, AE 353AA (18 May 2021).

<sup>6</sup> *Coplion v. United States*, 191 F.2d 749, 757 (D.C. Cir. 1951).

<sup>7</sup> *Upjohn v. United States*, 449 U.S. 383, 389 (1981).

<sup>8</sup> *United States v. Mohammad, et al.*, Unofficial/Unauthenticated Tr. at 3910-46.

military judge who first addressed this search and seizure concluded that it “infringe[d] on the attorney-client privilege.”<sup>9</sup> The government promised not to further engage in such conduct, but intrusions continued unabated. In January 2013, during a 9/11 hearing, an intelligence agency shut down live courtroom proceedings without the knowledge or assent of the judge. The ensuing investigation revealed that the same agency had the ability to listen to courtroom attorney-client conversations through the microphones placed on defense tables. A month later, in February 2013, a MCDO attorney became suspicious of what JTF had told him was a smoke detector mounted on the ceiling of an attorney-client meeting room in Guantanamo. After Googling the manufacturer information that he had observed, he discovered that the company did not make smoke detectors, but instead made microphones disguised as smoke detectors. These hidden listening devices turned out to exist in all attorney-client meetings rooms where commission defendants meet with defense counsel. When the issue was litigated, the government once again promised not to infringe on the attorney-client privilege in the future.

Thereafter, on a Sunday in 2014, shortly after church, two members of the FBI appeared at the home of a MCDO staff member. After some conversation (what interrogators call “rapport-building”), the FBI agents asked the MCDO staff member to reveal privileged information about the case he was working on, as well as other pending military commission cases. The FBI agents were successful in persuading the MCDO staff member to sign a contract to become a confidential informant against the MCDO. The informant then provided the government with a treasure trove of privileged materials.

Subsequently, during a February 2015 hearing, one of the 9/11 accused announced that he recognized the court interpreter sitting at his defense table from one of the black sites where he was interrogated and tortured. The shocking revelation that a government-provided defense interpreter may have been involved in the torture program led to well over a year’s delay in the proceedings while hearings were cancelled and court-ordered investigations were conducted. As is the case with the other issues, litigation on this incident is far from over.

There are other incidents of this type; however, I am going to skip over them to May of 2017, when prosecutors in two cases (*al-Nashiri* and *Hadi al-Iraqi*) filed classified notices informing the presiding judges and the defense teams in those cases of certain classified information. As a result of those filings, I recommended to all MCDO defense counsel that they discontinue attorney-client meetings with their clients until they could “know with certainty that improper monitoring of such meetings is not occurring.” At the time this meant no attorney-client communication at all, other than short, heavily screened letters, because defense counsel were not permitted telephone communication with their clients at Guantanamo Bay. (Since that time the government has provided supposedly secure limited video teleconferencing with clients; at least one defense team that made use of that channel reported that uninvited third parties intruded on that call as well.)

Shortly after my recommendation to defense counsel, the government admitted that some attorney-client communications had been “unintentionally overheard” at GTMO, but claimed that none of the active cases were impacted.<sup>10</sup> All of this put counsel in a tremendously difficult

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<sup>9</sup> *United States v. al-Nashiri*, Unofficial/Unauthenticated Tr. at 168.

<sup>10</sup> *United States v. al-Iraqi*, Unofficial/Unauthenticated Tr. at 1369-70

situation. Do they meet with their clients in a situation where their supervisor has recommended they not do so, where there could be secret monitoring of their conversations with their client? That might be the only ethical option from the defense counsel's perspective – but in order to stop meeting with a client, counsel would have to give him some kind of explanation. Accordingly, because virtually all of these facts were classified at the time, and because, unlike their counsel, the defendants had no security clearances, defense counsel had the choice of meeting with their clients in a situation in which they might be monitored *but* the client could not be informed of that fact, or refusing to meet with the clients without being able to explain why they were refusing.

Finally, in March of 2018 government publicly admitted there were hidden “legacy” microphones in the location where Mr. al-Nashiri, the accused in the USS COLE case, met with his lawyers<sup>11</sup> -- indeed, as we subsequently learned, there were more than one.<sup>12</sup> Mr. al-Nashiri's counsel had in fact discovered one such “legacy microphone” there previously, but for reasons already mentioned were unable to inform their client of the fact. When they asked for a hearing about the issue, the judge denied it. When they asked the judge for special permission to do tell the client about the microphone, he refused that as well.

This left Mr. al-Nashiri's counsel in an ethical quandary that eventually resulted in their withdrawal from his case and, in my own case, a conviction and sentence for contempt of court after I refused (on grounds of privilege) to testify about the discussions leading up to their withdrawal. (That conviction was subsequently overturned as illegal by a federal judge.) By the way, it's four years later and the litigation surrounding these microphones is still on-going – a two-week (and entirely classified) evidentiary hearing on the issue occurred in September of this year in the *Al-Nashiri* case. The military judge has not yet issued any decisions or findings on the matter.

I go into this level of detail not for its own sake – although these stories should horrify any lawyer who has ever believed she could hold confidential conversations with her client – but to emphasize that they are all a matter of record in all of the cases. Eventually a reviewing federal court will have to decide whether these repeated violations, all of which were followed by repeated denials of wrongdoing followed by repeated admissions followed by repeated promises that the intrusions would never happen again, undermine confidence that the defendants received a fair trial.

#### Other problems: conflicts of interest and constitutional flaws in the system.

Along with the impact of torture and government violations of the attorney-client privilege, a reviewing court in these cases will have to address the many other problems that have bedeviled the commissions since their very beginning.

Conflicts of interest and unlawful influence over the system by political actors are among the more egregious examples of these problems. In February 2018, for example, the military

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<sup>11</sup> *United States v. Nashiri*, Gov't Opp. to Mot. to Dismiss at 5-6 (C.M.C.R., Cause No. 18-002)

<sup>12</sup> *United States v. Nashiri*, Gov't Opp. to Mot. to Dismiss at 6 (C.M.C.R., Cause No. 18-002)

commissions Convening Authority was fired, along with his chief legal and policy advisor.<sup>13</sup> After the firing, pursuant to an order from a judge in Guantanamo, the Secretary of Defense and his staff submitted an eleven-page declaration attempting to justify the decision to dismiss the Convening Authority and his staff. But the former Convening Authority provided a different declaration explaining that he had no idea why he had been suddenly removed, that he had not been approached or warned about poor performance prior to being fired, and that he was forced to conclude that his firing had something to do with the decisions he had made as convening authority. If an appellate court were to believe the former Convening Authority's explanation rather than the Secretary of Defense's, it could overturn guilty verdicts on the grounds that the Secretary had unlawfully influenced the course of the case.

Nor is that an isolated example. More than one Convening Authority has been disqualified or forced to resign by conflicts of interest adverse to the defense. For example, after the Department of Defense appointed a victim of the 9/11 attack as Convening Authority, he was quickly disqualified by a military judge following a defense motion to recuse. And the conflict of yet another former Convening Authority is still impacting the commissions today. After resigning the position because of his professional and personal relationship with the Chief Prosecutor, this former Convening Authority was simply appointed to another position within the Office of Military Commissions – Director of the Office of Military Commissions – that previously had been held simultaneously by the individual serving as Convening Authority. Among the duties of this conflicted Director – who holds that position today – is decision making over the resources allocated to the defense teams. It is unthinkable, for example, that a federal judge with responsibility for defense funding decisions under the Criminal Justice Act would be so conflicted with the defense that she had had to resign another position because of that conflict. Yet that is the current norm in the military commissions.

Our judges do not fare much better in the area of conflicts of interest. A judge in the Court of Military Commissions Review (CMCR), the intermediate appellate court which first reviews military commission decisions, was disqualified from a case by the DC Circuit for the CMCR judge's obvious bias towards the accused. A trial judge detailed to the 9/11 case recused himself after only a few weeks on the case due to a connection to a victim. In the worst judicial examples, two former military judges were found to have been secretly applying to work for the Department of Justice while presiding over Commission cases -- ethical violations that no federal judge would have entertained for even a moment. The consequence of that unethical conduct: years and years of their rulings were set aside or subject to reconsideration, setting both cases back by years. Perhaps most tellingly, the Circuit issued a stunning rebuke to the government and to the military commissions system as a whole in one of these decisions: "Although a principle so basic to our system of laws should go without saying," the Court wrote, "criminal justice is a shared responsibility. Yet in this case, save for al-Nashiri's defense counsel, all elements of the military commission system -- from the prosecution team to the Justice

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<sup>13</sup> The Convening Authority is the Department of Defense civilian employee who oversees the military commissions and is responsible for, among other things, deciding whether charges should go to trial and whether the government should seek the death penalty, negotiating plea deals, and making funding decisions on defense expert requests (like district court judges do under the Criminal Justice Act in the federal system).

Department to the [Court of Military Commissions Review] to the judge himself -- failed to live up to that responsibility.”<sup>14</sup>

The preceding examples of defects in the commissions system should not be taken as exhaustive – there are literally so many significant grounds for potential reversible error that it is impossible to list them all. Let me just highlight a few. A provision of the Military Commissions Act permits the government to introduce hearsay in evidence against a commission accused under circumstances that Justice Scalia expressly held violated the Sixth Amendment’s Confrontation Clause,<sup>15</sup> and in fact the government has stated its intention to introduce *116 such hearsay statements* against one of the capital defendants under this provision. Legal issues that are critical to all of the cases remain undecided, including whether Guantanamo detainees have any due process rights at all and whether evidence derived by torture may ever be introduced in a military commission.<sup>16</sup> The prosecution has informed the defense in the 9/11 case of its intention to introduce private and confidential letters from defendants to their family members sent under the auspices of the International Committee of the Red Cross (ICRC) against the defendants at their criminal trials, in flagrant violation of the international norms under which the ICRC operates. Apart from the fact that individual appointed Convening Authorities have been plagued by personal conflicts of interest, the position of Convening Authority itself combines prosecutorial duties (like deciding whether to seek the death penalty) with its quasi-judicial role – a structure that violate the Fifth Amendment due process clause.<sup>17</sup> And there are many more such examples. Some of these fundamental flaws have been decided against the defendants by military judges; some remain open questions. All, however, will eventually be reviewed by federal judges who take a different view of due process than many military judges do.

To return to my original point, it is on the basis of this record, with these sorts of due process errors baked in, that an appeals court (in fact, the D.C. Circuit) will decide whether the military commissions defendants received a fair trial, or whether their sentences – including any sentences of death – can be allowed to stand. Even if the proceedings were otherwise fair – which they manifestly have not been – or if the defendants had not been tortured cruelly by the United States – which they were, that is a slender reed on which to hang the victims’ and public’s interest in seeing these historic cases come to a final conclusion. And neither the victims nor the public at large will know the answer to that question for many years to come, until the defendants finally come to trial and go through the direct and habeas corpus appeals to which they are entitled.<sup>18</sup>

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<sup>14</sup> *In re Al-Nashiri*, 921 F.3d 224, 239-40 (D.C. Cir. 2019).

<sup>15</sup> Compare *Crawford v. Washington*, 541 U.S. 36 (2004) (“reliability” and “interests of justice” insufficient to make testimonial hearsay statements admissible under the Confrontation Clause) with 10 U.S.C. § 949a(b)(3)(D) (testimonial hearsay admissible if it is sufficiently reliable and serves the interests of justice).

<sup>16</sup> *Al-Hela v. Biden*, No. 19-5079 (D.C. Cir. 2021) (en banc appeal pending) (applicability of the due process clause); *In re Al-Nashiri*, No. 21-1208 (D.C. Cir. 2021) (mandamus petition pending) (admissibility of evidence derived from torture).

<sup>17</sup> *Williams v. Pennsylvania*, 579 U.S. \_\_\_, 136 S. Ct. 1899 (2016).

<sup>18</sup> Notably, the military’s record on capital appeals is not strong, with more than eighty percent of military death sentences having been overturned, commuted or otherwise reversed. Indeed of the 55 defendants brought to capital courts-martial since the instatement of the military’s current capital sentencing regime in 1984, none have been executed, and only four remain on military death row

Finally, the recent sentencing hearing in the case of *United States v. Majid Khan* offers a preview of the likely outcome of the remaining military commission cases -- in particular the capital cases. On October 28, 2021, having pleaded guilty to conspiring with Khalid Sheikh Mohammad and others to commit various terrorist acts, Majid Khan was sentenced. First, however, he was allowed to describe his torture at the hands of the CIA.

Mr. Khan explained that soon after his capture in Pakistan in March 2003, he cooperated with his captors, telling them everything he knew, with the hope of release. "Instead, the more I cooperated, the more I was tortured," he said.<sup>19</sup> The military jury -- who were senior military officers drawn from all branches of the military -- watched his statement with rapt attention, and when the case was done, although they had been told that they could sentence Khan to between 25 and 40 years, they imposed a sentence of 26 years -- one year over the minimum sentence. More remarkably still, they did something that had never been done in a commissions case -- they wrote a letter asking that Mr. Khan be granted clemency.<sup>20</sup>

I have appended their letter to this testimony. If the Khan jury heard his story and thereafter wrote a clemency letter on his behalf, it is difficult to believe that a sentencing jury in any of the other cases would impose a sentence of death -- at least when they are given the sentencing option of life without parole, which they will be. It is difficult to conceive of the effects on all involved -- on the members of the jury, on the victims, on the American public, and on the reputation of the United States at home and abroad -- once each of the current military commission defendants shares his equally (or even more) gruesome story to his sentencing jury, should that moment come. And it is difficult to understand why the government is gambling extraordinary resources and time on these cases to obtain fragile death sentences deeply vulnerable to appellate reversal, at least without attempting to negotiate a conclusion to those cases that will give the victims a modicum of the justice and closure they deserve.

Of course it is not my place to substitute my judgment for the defense counsel who would also have to be willing to negotiate, nor is it my place to suggest that Senators or Congresspersons offer advice to prosecutors about how to try their cases. I have been invited, however, to give my candid assessment of the topic "Closing Guantanamo: Ending 20 Years of Injustice." I have tried to give that assessment to the best of my ability, based on my experience not only as Chief Defense Counsel and (before that) a defense counsel, but as a Marine, a former prosecutor and a former military judge.

I will conclude by saying, whatever my other pessimism about the current system, I can at least assure you that as long as the military commissions remain open, MCDO lawyers will continue to be the voice for justice at Guantanamo Bay. I thank you again for your invitation and for your time.

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<sup>19</sup> Carol Rosenberg, *For the First Time in Public, a Detainee Describes Torture at C.I.A. Black Sites*, New York Times, Oct. 28, 2021, available at <https://www.nytimes.com/2021/10/28/us/politics/guantanamo-detainee-torture.html>.

<sup>20</sup> Rohini Kurup, *Military Jurors Urge Clemency for Guantanamo Detainee After Unprecedented Testimony on Torture*, LAWFARE, Nov. 1, 2021, available at <https://www.lawfareblog.com/military-jurors-urge-clemency-guantanamo-detainee-after-unprecedented-testimony-torture>.

29 Oct 21

From: Panel ICO U.S. vs. Khan  
To: Convening Authority

The panel members listed below recommend clemency in the case of Majid Shoukat Khan.

Mr. Khan committed serious crimes against the U.S. and partner nations. He has plead guilty to these crimes and taken responsibility for his actions. Further, he has expressed remorse for the impact of the victims and their families.

Clemency is recommended with the following justification:

- 1) Mr. Khan has been held without the basic due process under the U.S. Constitution. Specifically, he was held without charge or legal representation for nine years until 2012, and held without final sentencing until October 2021. Although designated an "alien unprivileged enemy belligerent," and not technically afforded the rights of U.S. citizens, the complete disregard for the foundational concepts upon which the Constitution was founded is an affront to American values and concept of Justice.
- 2) Mr. Khan was subjected to physical and psychological abuse well-beyond approved

enhanced interrogation techniques, instead being closer to torture performed by the most abusive regimes in modern history. This abuse was of no practical value in terms of intelligence, or any other tangible benefit to U.S. interests. Instead, it is a stain on the moral fiber of America; the treatment of Mr. Khan in the hands of U.S. personnel should be a source of shame for the U.S. government.

3) Mr. Khan committed his crimes as a young man reeling from the loss of his mother. A vulnerable target for extremist recruiting, he fell to influences furthering Islamic radical philosophies, just as many others have in recent years. Now at the age of 41 with a daughter he has never seen, he is remorseful and not a threat for future extremism.

It is the view of the panel members below that clemency be granted based on the points above, as well as Mr. Khan's continued cooperation with U.S. efforts in other, more critical, prosecutions.

Panel #1, Panel #8, Panel #5, Panel #9  
Panel #12, Panel #4, Panel #11