

Challenging the Convening Authority at Guantánamo Bay

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Sketch: Janet Hamlin

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Majid Shoukat Khan is the sole high-value cooperator currently in military custody at Guantánamo Bay. In February 2020, he and his attorneys argued a motion aimed at disqualifying the Convening Authority overseeing Khan’s case, retired Admiral Christian Reismeier. I watched from the gallery as Khan’s defense team examined Reismeier and used these hearings as part of a larger effort to seek some accountability for the torture that Khan experienced while in U.S. custody.

Khan is one of 14 “high-value detainees” who was transferred to the naval base’s maximum-security prison in 2006. He has been charged at the military commissions with war crimes, including murder, attempted murder, and conspiracy to commit murder in violation of the Laws of War.

Khan was born in Pakistan and came to the United States in 1996 with his family, spending his teen years in a suburb outside of Baltimore, Maryland, and graduating from high school in 1999. He collaborated with accused 9/11 mastermind Khalid Sheikh Mohammed (KSM) to act as a courier in the 2003 Jakarta Marriott bombing, and to plan attacks on gas stations in the United States and serve as a suicide bomber in an unrealized plot to assassinate former Pakistani President Pervez Musharraf. In 2003, Khan was captured in Pakistan and renditioned to the CIA black site network.

Khan's subsequent three-year tour of the black sites yielded particularly harrowing accounts of the government's "enhanced interrogation techniques." According to his attorneys, Khan endured the worst of the government's torture program. He was subjected to waterboarding, sleep deprivation, being tied in stress positions, and exposed to extreme temperature in the nude. Khan attempted suicide multiple times, including attempts to cut his wrists with a filed down toothbrush and chew through his own arteries.

After being held for nine years without charge, Khan entered into a plea agreement in 2012, pleading guilty in exchange for a reduced sentence; instead of the maximum 25 years, Khan's sentence is now capped at 19. As part of the plea deal, Khan turned state's evidence, agreeing to cooperate with the government to testify against KSM in the 9/11 trial scheduled to begin in 2021.

During a series of hunger strikes in 2004, Khan was subjected to multiple sessions of "rectal feeding," whereby his lunch, consisting of hummus, pasta, sauce, nuts, and raisins, was pureed and rectally infused into his intestines. His name is mentioned over 200 times in the Senate Intelligence Committee's report on the CIA's detention and interrogation program, also known as the Torture Report.

Khan's case is salient for a number of reasons. Chief among them is the fact that Khan is the sole high-value cooperator at Guantánamo Bay. After being held for nine years without charge, Khan entered into a plea agreement in 2012, pleading guilty in exchange for a reduced sentence; instead of the maximum 25 years, Khan's sentence is now capped at 19.

As part of the plea deal, Khan turned state's evidence, agreeing to cooperate with the government to testify against KSM in the 9/11 trial scheduled to begin in 2021. Khan's own sentencing trial date is currently pending. Khan is the first detainee who was subjected to the CIA torture program to proceed to sentencing before a military commission at Guantánamo Bay. In May 2019, Khan filed a motion for pre-trial punishment credit, seeking to mitigate his sentence based on the unlawful abuse and torture that he suffered while in CIA custody.

As the first former CIA prisoner to seek pre-trial punishment credit, Khan's case is headed toward a pivotal moment in the decades-long War on Terror: the opportunity to hold the government responsible for its torture program. Activists have long argued that

the government's refusal to hold federal agents accountable for their treatment of detainees is essentially de facto amnesty and complicity for torture and human rights abuses.

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By presenting evidence of Khan's abuse, the military commissions would be grappling for the first time with some level of accountability or atonement for torture. Not surprisingly, the government has contested this motion, challenging the defense team's attempts to call witnesses and put on evidence.

Against this backdrop, the hearings at the end of February were held for the purpose of hearing the defense's motion to disqualify Reismeier as the Convening Authority. The Convening Authority is the official who oversees the military commissions process and has unique powers with no analogue in the civilian justice system.

For example, the Convening Authority decides whether charges reach trial, and they approve pre-trial agreements between the prosecution and the defense. And most importantly for Khan's case, they review the findings of the military commission at the end of the process, which means they can grant sentencing clemency or mitigation, as well as decide whether or not Khan has appropriately cooperated with the government pursuant to his plea deal.

The defense team's motion to disqualify Reismeier was premised on a spate of alleged conflicts of interest, including Reismeier's involvement in the drafting of the Military Commissions Act of 2009; his "inelastic attitude" towards pre-trial punishment credit, which Reismeier testified he did not believe was available to Khan under the Uniform Code of Military Justice; his role in *U.S. v. Bahlul* as a signatory to an amicus brief that argued that the charge of conspiracy, which Khan has been charged with, should be a triable offense in the military commissions; and his firm alignment with the Office of the Chief Prosecutor, including an appearance problem stemming from Reismeier's close relationship with Chief Prosecutor General Mark Martins.

There is no counterpart to the Convening Authority in civilian courts, where the functions of prosecutors and jurists are more distinct, therefore creating less lag in the system over conflicts concerns. Federal Article III courts are better equipped to litigate and adjudicate these terrorism cases than the military commissions.

During direct examination, defense counsel questioned Reismeyer about an email from Martins to Reismeyer that sentimentally read, “You are such a friend, Chris, and when this marathon ends, there will be time and opportunity for me to show you how much you have meant to me.”

In response, the prosecution argued that the defense did not meet its burden of proof and that the standard that they sought to apply was appropriate for military judges, and not the Convening Authority. Military Judge Colonel Douglas Watkins, who presided over the hearings, was troubled by the narrow lens that the prosecution employed in responding to the defense’s discovery requests.

In particular, Judge Watkins scolded the prosecution: “It concerns me that there’s a United States Navy email account [] out there, that may contain material that’s responsive. And it’s not my job to tell you how to make sausage, but I have no indication that you even looked at that, or at those agency records that were specifically requested by defense.”

The hearing concluded with limited arguments about an *ex parte* filing by the prosecution. The defense was not privy to the filing, and surmised that it was related to permitting a device in the courtroom that would allow other government intelligence agencies to listen in on the proceedings, as had occurred in the 9/11 proceedings just weeks prior. Judge Watkins stated that he would deliberate on the motions and recessed the hearings.

As Khan stated at his plea hearing, “I’m making a leap of faith here, sir. That is all I can do.” In a deeply flawed judicial system, that leap is a big one.

The issue of Reismeyer’s impartiality is not new at the military commissions. He has already recused himself in the pending cases of Abd al-Rahim al-Nashiri, the accused USS *Cole* bomber, and Ali al-Bahlul, an al-Qaeda operative. And Walid bin Attash, one of the 9/11 defendants, filed a similar motion to disqualify Reismeyer in July 2019. Perhaps the larger issue, however, is not Reismeyer’s impartiality per se, but the role of the Convening Authority altogether.

Vested with both quasi-prosecutorial and quasi-judicial powers, the role of the Convening Authority is inherently fraught with conflicts of interest. There is no counterpart to the Convening Authority in civilian courts, where the functions of prosecutors and jurists are more distinct, therefore creating less lag in the system over conflicts concerns. The current string of Reismeyer recusals and motions to disqualify him is more evidence that federal Article III courts are better equipped to litigate and adjudicate these terrorism cases than the military commissions.

Two days after the hearings concluded, Khan turned 40 years old. He had been arrested at the age of 23, tortured for over three years, and held without charge for nine years. Even if he fully cooperates and serves out a maximum 19-year sentence, the government reserves the right to indefinitely continue his detention as a “law of war

detainee.” As Khan stated at his plea hearing, “I’m making a leap of faith here, sir. That is all I can do.” In a deeply flawed judicial system, that leap is a big one.

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