



MEMORANDUM

November 26, 2019

To: Pacific Council for International Policy

From: Mark B. Helm

RE: Hearings held November 19-21, 2019 in Majid Khan proceedings at Guantanamo Bay

This summarizes the proceedings held November 19-21, 2019 in the pre-sentencing proceedings at Guantanamo Bay for Majid Khan, who has pleaded guilty to various terrorism-related crimes. I attended as the NGO representative for the Pacific Council on International Policy. For reasons set forth below, the public proceedings were less extensive than had been expected, and I was actually able to attend only two full or partial afternoon sessions. Nonetheless, there was full argument on a motion that could be consequential not only for Mr. Khan's sentencing but for that of other Commission defendants.

Three matters had been set for hearing. (They are discussed below, not in the order in which they were heard.)

Pretrial punishment credit

One matter heard was the latest in a trilogy of motions that the defense has filed in furtherance of their efforts to use Mr. Khan's torture during his detention as a basis for reducing his sentence. The prior two motions were efforts to compel production of evidence regarding torture and to gain access to witnesses of his torture. The present motion sought to receive a credit that reduced Mr. Khan's sentence to reflect pretrial punishment he received in the form of torture.

Under the Military Commission scheme, the sentence will be imposed by the panel that hears evidence at the sentencing phase (and would have decided the guilt phase had there been one). The Convening Authority then approves or modifies the sentence, and it expressly has the power to consider mitigating factors or exercise clemency.

Under the Pretrial Agreement ("PTA") that implemented Mr. Khan's guilty plea, the parties agreed that the panel members would be instructed to impose a sentence not less than 25 years nor more than 40 years (for offenses that otherwise would carry maximum sentences of life imprisonment). (PTA ¶ 8.) It further provides, however, that the maximum sentence



approved by the Convening Authority would not exceed 25 years. (PTA App. A ¶ 1.) (Although this makes the panel's sentencing decision functionally pointless, I understand that it is either an artifact of the Commission scheme and/or a symbolic gesture the Government desired.) And the PTA then provides that, if the Convening Authority concludes that Mr. Khan has provided full cooperation to prosecutors, the Convening Authority would reduce the sentence further to result in a sentence no longer than 19 years. (*Id.* ¶ 3.)

As noted, Khan's present motion seeks to reduce the final approved sentence by half of the approved sentence amount as a credit to account for the pretrial punishment he received by way of torture. (AE 033.)¹ The Commission asked the parties to assume for purposes of the public proceeding that "very bad" things had happened to Mr. Khan, to prevent any discussion at this public hearing of the particular allegations. The Defense asserted at argument that it was established beyond doubt that torture occurred, and the Government did not contest that assertion.

The Commission seemed unpersuaded by the Government's contention that credit was precluded by the prohibitions in PTA App. A ¶ 4 and in R.M.C. 1001(g). The Commission appeared receptive to the Defense's argument that these provisions dealt with credit for pretrial confinement, under *United States v. Allen*, 17 M.J. 126 (C.M.A. 1984), not credit for pretrial punishment.

The Defense argued extensively that torture was unlawful and that the Commission had the inherent power (if not duty) to provide a meaningful remedy. The Government argued that a remedy was provided because the Convening Authority could consider evidence of torture in mitigation of the sentence or as a basis for exercising clemency—and that no additional remedy was authorized or required.

Defense counsel announced at the start of the hearing that Mr. Khan wished to address the Commission directly. The Commission stated that it thought this was a terrible idea and asked Defense counsel whether Mr. Khan had been advised that it was. Mr. Dixon said that Mr. Khan had been given "appropriate advice."

Ultimately, at the end of the discussion of the pretrial punishment motion, Mr. Dixon advised that Mr. Khan no longer wanted to make a substantive statement but still wanted to address the Commission. The Commission relented.

¹ The motion remains sealed and unavailable on the Military Commission website, but the relief it seeks is ascertainable from the Government's opposition and the Defendant's reply, which are available, and from the public argument held on the motion.



Mr. Khan stated, in reasonably good English, that he had wanted to speak to the Commission “man to man, heart to heart” about the motion, but that he thought his counsel Mr. Dixon had done a “good job” on the argument. For that reason, he no longer thought it necessary to provide the commentary he previously had wanted to give. But he stated that he wanted to reserve the possibility of speaking directly to the Commission at a future time. The Commission stated that it would give any such request due consideration when made.

The Commission took the matter under submission. The outcome of this motion could be significant not only for Mr. Khan’s case but for others who face charges before the Commission and claim they were tortured.

Testimony of Mr. Reismeier Postponed For Late Production of Documents

The Defense has sought disqualification of Mr. Christian L. Reismeier of the Convening Authority on the ground that he has an impermissible conflict of interest arising from prior work with prosecutors and on prosecution-related issues. (AE 040.) In AE 040C dated October 21, 2019, the Commission ordered that Mr. Reismeier be made available on November 19, 2019 for testimony. Two days before the hearing, however, the Government turned over to the Commission 1000 pages of documents, which were then supplied to the Defense 90 minutes before the hearing.

The Commission granted the Defense’s request that Mr. Reismeier’s testimony be postponed to give the Defense time to review the documents and investigate any facts they contained. The timing of the testimony will be the subject of a future scheduling order.

The Defense also contended that the Commission should order disqualification as a remedy for the late production. The Commission ordered supplemental briefing on that issue, on a schedule to be determined.

Protocol for Contacting and Interviewing Covert CIA Witnesses

The third matter heard was the Government’s request for a protective order setting forth a procedure by which the Defense could approach and interview witnesses with information about Mr. Khan’s torture. (AE 039.) This was in response to the Commission’s order in AE 030V to “provide the Defense a methodology whereby members of the Defense can reasonably initiate contact with [certain] witnesses in order to gauge their amenability to participate in in-person or telephonic interviews.”

The Government proposed that the Defense could initiate contact on its own with current or former CIA employees or contractors whose identities were not classified and who either had no involvement with the CIA’s Rendition, Detention and Interrogation (“RDI”)



program or whose involvement was not classified. For covert CIA personnel, the Government proposed that initial contact with a requested witness be made by the FBI or the Department of Defense Terrorism Criminal Investigation Unit. The requested witness would be given a letter written by the Government advising that the witness could agree but was not required to be interviewed. The Defense also had the option of providing a sealed letter of its own that would be delivered to the witness at the same time.

If a requested witness agreed to be interviewed, the Government's protective order also contained a list of permitted topics that the Defense could discuss: the individual's interactions with Mr. Khan while in the CIA RDI program; Khan's conditions of confinement while in that program; statements Khan made during interrogation; circumstances of his transfer between or among different locations (without revealing the locations themselves); positive recognition or adverse actions the individual received as a result of his or her involvement in the RDI program; and the individual's training. It also listed some topics that were off-limits.

The Government argued that these procedures were reasonably designed to protect against unauthorized disclosure of classified information.

The Defense argued that it should be permitted to make the first contact with the requested witness. It feared that the Government would use the opportunity of its first contact to discourage the witness from agreeing to be interviewed. It argued that it needed the opportunity to have a real conversation with the witness, without a prior discouraging overture by the Government, so it could establish rapport and make a case for why the witness should agree to be interviewed.

The Defense also objected that the Government's listing of permitted subjects for any interview that took place was unduly narrow. For example, it claimed it should be able to discuss any information the witness observed or learned about the torture of Mr. Khan, even if the witness did not participate directly.

The Defense, however, did not offer its own protocol for the conduct of any interview that might take place if the witness agreed to speak with the Defense. Rather, it was proposing at this time that it be able to discuss with the witnesses only the question whether the witness would agree to be interviewed. When pressed by the Commission on why it did not offer a protocol for any substantive interview of a willing witness that might take place, the Defense explained that the prior order requested a protocol merely for gauging "their amenability to participate in in-person or telephonic interviews," not for conducting such interviews should the witness be amenable.

The Commission did not express much opinion on the question of which side should make the first contact. It did, however, express considerable annoyance with the Defense's



failure to provide a protocol for the actual conduct of interviews of persons who agreed to be interviewed. It stated that deferring that decision would only delay matters and that it could not conceive why the Defense would want to do that.

The Commission took the matter under submission.

Additional matters

Additional matters were discussed, including the Commission's clarification of a prior statement regarding an order that Defense motion AE 030 to compel the production of witnesses be redacted to conceal the names of certain witnesses. (AE 030E.) The order stated that the original unredacted filing would be "maintained by the Government in an appropriate facility." (*Id.* ¶ 8.e.) The Defense later argued that this improperly ceded control of a court filing to the prosecution, an adverse party.

The Commission clarified that the original filing was in the possession of the Court Administrator, and that the Commission, not the prosecution, controlled who had access to the document. The Commission stated that its assertion that the document was maintained by the "Government" was an unfortunate choice of words.



