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Majid Khan: Anatomy of a Terrorist's Plea Bargain

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The first Guantanamo detainee to have been in CIA custody (a so-called high-value detainee, or HVD) pleaded guilty yesterday before a military commission judge in a courtroom on the U.S. Naval Base in Guantanamo Bay. In exchange for a cap on his confinement related to his military commissions case, Majid Khan agreed to testify truthfully in future military commissions cases, including against the 9/11 co-conspirators. The historic plea, which the military judge accepted, is a significant milestone in the war against terrorism and likely foreshadows cases to come.

Who Is Khan and What Did He Do? According to the military commissions charges against Khan and the stipulation of fact,¹ Khan was living in Baltimore and working in northern Virginia at Electronic Data Systems (EDS) when the 9/11

attacks occurred. After the 9/11 attacks, Khan, who had graduated from Owings Mills High School in Baltimore, traveled to Karachi, Pakistan, to “explore the possibility of entering Afghanistan and understanding jihad from close terrorist associates.”²

Once in Pakistan, an unnamed co-conspirator introduced Khan to Khalid Sheikh Mohammed (KSM), the mastermind of the 9/11 attacks. Khan told KSM that his family owned gas stations in the United States, and they discussed a plot to blow up underground gasoline storage tanks at gas stations in the United States and poison water reservoirs. KSM ordered Khan to attend training on explosive device detonators and timers and then return to Baltimore in furtherance of the conspiracy.

Khan worked at his family gas station in Baltimore for about five months in 2002 until KSM ordered him to return to Pakistan, which he did. Over the next few months, Khan worked closely with KSM. He attempted to assassinate Pakistani President Pervez Musharraf by wearing an explosive vest and lying in wait at a mosque. At the behest of KSM, he clandestinely transferred \$50,000 to Jemaah Islamiyah and al-Qaeda

associates, who in turn used some of that money and other funds to carry out the terrorist attack on the J.W. Marriott in Jakarta, Indonesia. That attack in August 2003 resulted in 11 dead and at least 81 wounded.

Khan also discussed with KSM a plan to return to the United States and serve as an al-Qaeda sleeper agent and to recruit others to form a new cell to conduct domestic terrorism operations.

According to the stipulation of fact, that did not happen, because “he was thwarted only by his capture.”³

As a result of “irrefutable and lawfully obtained evidence,”⁴ Khan pleaded guilty to five charges: conspiracy, murder in violation of the laws of war, attempted murder in violation of the laws of war, material support for terrorism, and spying.

Khan's Plea Bargain. All fair criminal justice systems include, and indeed count on, plea bargains. Military commissions are no different. To date, there have been six military commissions cases at Guantanamo since 9/11. Of those six cases, four defendants pleaded guilty.

However, the terms of Khan's plea were creative and unique compared to the four other pleas.⁵ Here, the plea required Khan to testify truthfully against fellow HVDs in

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exchange for a benefit, the major one being a known cap on criminal confinement.

Against whom he is expected to testify, the number of cases in which he is expected to cooperate, and the “truth” of his testimony is not known at this time. However, it is reasonable to assume that both sides, including the accused, have a relatively clear understanding of what that means in practice.

In exchange for pleading guilty to all five charges, where he faced a maximum possible sentence of life, and testifying against others, his sentence will be capped at 25 years from the date of his guilty plea (February 29, 2012).

If he provides full and truthful cooperation and substantial assistance, the Convening Authority (the entity that “owns” military commissions cases) agrees to a sentence of not more than 19 years from February 29, 2012.

In standard courts-martial, it is common for an accused to ask the court at sentencing for confinement “credit” because of unique circumstances related to his pre-trial treatment. A military judge has the authority to give the accused day-for-day confinement credit in certain circumstances. Those credits reduce

the actual time of any confinement adjudged by the judge or jury.

Khan was held in CIA custody from 2003 to 2006, when he was brought to Guantanamo. Knowing that Khan might well ask the judge for day-for-day confinement credit for his confinement and/or treatment at the hands of the CIA, the government insisted and Khan agreed not to ask the sentencing judge for confinement credit related to his CIA time.

The actual sentencing proceeding, to be held before a panel of military officers, will be delayed for four years,⁶ ostensibly to give the government time to bring other HVDs to trial and utilize Khan’s testimony against them. Per the terms of the deal, sentencing will begin the week of February 29, 2016.

At that hearing, where the government will argue its case in aggravation and the defense its case in mitigation, both sides have agreed that the defense cannot ask for less than 25 years, and the government cannot ask for more than 40 years confinement. The jury (called “members”) will not be told of the unique arrangement with the Convening Authority, just as members are not told of a sentence cap agreement with the Convening Authority in standard

courts-martial. That means that the members must sentence Khan to any term not less than 25 years or more than 40 years, but that the Convening Authority will have the ultimate say depending on whether Khan cooperates fully.

That unique aspect of the plea incents Khan to testify truthfully and cooperate fully to take advantage of the possible 19-year cap, and it incents the government to bring other HVDs to trial soon to take advantage of Khan’s expected testimony.

The government also insisted that Khan temporarily dismiss his habeas petition and agree not to sue the government, including the CIA, for his capture, detention, or interrogation. These two terms are significant victories for the government and may likely be requirements in future pleas.

Another significant term of the plea is this: Khan acknowledged and agreed that the government has the legal authority, under the law of war, to hold him as an enemy combatant even after he serves his 19-year criminal sentence.

As a legal matter, the law of war allows the government to detain the enemy until the end of hostilities. There is not, and never has been,

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1. Stipulations of fact are specifically authorized in military courts-martial and military commissions and are routinely used as part of guilty pleas in both justice systems.
 2. Stipulation of Fact at 3, ¶ 11, *United States v. Majid Shoukat Khan*, at <http://www.lawfareblog.com/wp-content/uploads/2012/02/Khan-PE001-Stipulation-of-Fact.pdf> (March 1, 2012).
 3. *Ibid.*, at 4, ¶ 12.
 4. Brigadier General Mark Martins, Chief Prosecutor, Post-plea Remarks at Majid Khan’s Arraignment, February 29, 2012, at <http://www.lawfareblog.com/2012/02/majid-khan-arraignment-5-prosecution-remarks-to-the-press/> (March 1, 2012).
 5. *United States v. Majid Shoukat Khan*, Offer for Pretrial Agreement, February 13, 2012, at <http://www.lawfareblog.com/wp-content/uploads/2012/02/Khan-AE012-PTA.pdf> (March 1, 2012).
 6. In state and federal court, there is typically a delay between the entry of a guilty plea and the sentencing proceeding. Those delays range from a matter of weeks to months. In regular courts-martial, sentencing proceedings typically begin immediately after the acceptance of the guilty plea. Military commissions’ practice is modeled, for the most part, on courts-martial. A delay of four years between the entries of guilty pleas to sentencing is unusual but not unlawful.
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a requirement that the enemy be charged with a crime. Enemy combatants are detained not as punishment, but to keep them from returning to the battlefield during an ongoing conflict. Unlawful enemy combatants who have committed war crimes and are charged and convicted of those war crimes can serve their sentences and still be held after their criminal sentences have expired, assuming the armed conflict is still underway.

Whether the government will decide to hold Khan after he serves his criminal sentence is an open question.

The Significance of the Khan Plea Deal. The Khan plea is a significant milestone for military commissions. It may mark a new era—one in which we will see more cases, more trials, and generally more activity. That alone is a welcome development.

If he cooperates as expected, it should result in some other HVDs deciding to plead guilty, too. This is a common occurrence outside the context of military commissions and a healthy and welcome sign now that the Khan plea has been accepted.

For example, the New York-based Gambino crime family was toppled, in part, because an insider became a cooperator. Salvatore (“Sammy the

Bull”) Gravano was a “made member” and 1976 inductee into the Gambino crime family who had worked his way up to hold the No. 2 spot—the underboss. After his arrest along with John Gotti and Paul Locascio in December 1990 for a series of murders, racketeering, loan-sharking, tax evasion, and the like, Gravano became a government informant.

Facing a life sentence, Gravano decided to make a deal with the government and testify against Gotti and a dozen other Mafia leaders and associates. His testimony led to the convictions or guilty pleas of at least 37 Mafia figures, not the least of which were Gotti and Locascio for the murder of Gambino family boss Paul Castellano.

Despite committing 19 murders himself, Gravano received a reduced sentence of five years in exchange for his critical testimonies.

A 1994 *New York Times* editorial titled “Time Served for Sammy the Bull” said, “Because he had given much to organized crime, Salvatore Gravano had much to give the Government.”⁷

The same may be said of Khan in years to come.

The other significant aspect of this case is the increasingly obvious beneficial effect of putting Brigadier

General Mark Martins in charge of prosecutions and detailing seasoned national security prosecutors from the Department of Justice (DOJ) to military commissions cases. The Khan plea was handled by a veteran DOJ counterterrorism prosecutor who has substantial experience handling terrorism cases in federal court.

Whether Martins can recruit and attract other seasoned counterterrorism prosecutors to spearhead military commissions cases remains to be seen.

Nevertheless, the Khan plea and its unique and carefully crafted terms and conditions will likely act as a template for future cases and will, unless something goes awry, contribute to the pursuit of justice for victims of the 9/11 terrorist attacks.

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7. Editorial, “Time Served for Sammy the Bull,” *The New York Times*, September 28, 1994, at <http://www.nytimes.com/1994/09/28/opinion/time-served-for-sammy-the-bull.html> (March 1, 2012).