UNITED STATES COURT OF APPEALS
FOR DISTRICT OF COLUMBIA CIRCUIT

JUL 21 2017

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No. 17-1179

UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT

IN RE KHALID SHAIKH MOHAMMAD and ALI ABDUL-AZIZ ALI, aka AMMAR AL BALUCHI,
Petitioners

4-LD

On Petition for a Writ of Mandamus and Prohibition to Disqualify Judges Burton and Herring from Serving in Petitioners' Case in the United States Court of Military Commission Review

ORIGINAL

PETITION FOR A WRIT OF MANDAMUS AND PROHIBITION

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CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

A. PARTIES AND AMICI APPEARING BELOW

The parties who appeared before the United States Court of Military Commission Review were:

1. Khalid Shaikh Mohammad, Appellee
2. Ali Abdul-Aziz Ali, also known as Ammar al Baluchi, Appellee
3. Walid Muhammad Salih Mubarek bin 'Attash, Appellee
4. Ramzi bin al Shibh, Appellee
5. Mustafa Ahmed Adam al Hawsawi, Appellee
6. United States of America, Appellant

B. PARTIES AND AMICI APPEARING IN THIS COURT

1. Khalid Shaikh Mohammad, Petitioner
2. Ali Abdul-Aziz Ali, AKA Ammar al Baluchi, Petitioner
3. The Honorable Paulette V. Burton, LTC, U.S. Army, Respondent
4. The Honorable James W. Herring, Jr., COL, U.S. Army, Respondent
5. United States of America, Respondent

C. RULINGS UNDER REVIEW

This case involves a petition for a writ of mandamus and prohibition to disqualify judges serving in violation of 10 U.S.C. § 973(b) and the Commander-in-Chief clause of the U.S. Constitution, to vacate the rulings below, and to abate until a properly constituted court is convened. In particular, it seeks review of the

Order and Opinion dated June 21, 2017 in the United States Court of Military Commission Review ("USCMCR") denying Petitioner's Motion to disqualify judges serving in violation of 10 U.S.C. § 973(b) and the Commander-in-Chief clause of the U.S. Constitution, *App. at A4*, and the Order and Opinion granting the government's appeal, thereby reinstating the charges that the Military Judge held to be barred by the statute of limitations under the Ex Post Facto clause of the U.S. Constitution, in an opinion issued June 29, 2017, *App. at A23*. In response to the USCMCR's opinion, the Military Judge reinstated the charges in an Order issued July 5, 2017 *App. at A52*.

D. RELATED CASES

This case is related to *In Re Khalid Shaikh Mohammad*, No. 17-1156, filed in the United States Court of Appeals for the District of Columbia Circuit on June 15, 2017 seeking recusal of Judge Silliman.[1]

Dated: July 21, 2017

By: //s// Rita Radostitz
Rita J. Radostitz
Counsel for Petitioner Mohammad

By: //s//
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Counsel for Petitioner Al Baluchi

[1] The Order of the USCMCR denying the recusal of Judge Silliman was issued June 6, 2017. The Order of the USCMCR denying the disqualifying of Judges Burton and Herring was issued June 21, 2017.

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TABLE OF AUTHORITIES

*Authorities upon which Petitioners chiefly rely are marked with an asterisk.

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GLOSSARY OF TERMS

USCMCR ..... United States Court of Military Commission Review

2009 Act ..... Military Commissions Act of 2009

STATEMENT OF JURISDICTION

This Court has exclusive supervisory jurisdiction over the USCMCR pursuant to 10 U.S.C. § 950g. Pursuant to the All Writs Act, 28 U.S.C. § 1651, this Court has jurisdiction to issue all writs necessary and appropriate in aid of that jurisdiction. This Court has held that mandamus is available to review certain USCMCR interlocutory matters. *In re al-Nashiri*, 791 F.3d 71, 76 (D.C. Cir. 2015); *see also In re Khadr*, 823 F.3d 92, 97 n.2 (D.C. Cir. 2016).

ISSUES PRESENTED

I. Whether a writ of mandamus or prohibition is an appropriate vehicle to remedy the harm caused by a court that is not properly constituted, where, as here, the judges of that court have a clear conflict of interest regarding the decision.

II. Whether 10 U.S.C. §973(b), which forbids military officers from simultaneously holding a "civil office," is violated by the appointment of a military officer to serve as a judge on the USCMCR pursuant to 10 U.S.C. §950f(b)(3).

III. Whether the Commander in Chief clause of the Constitution precludes the appointment of a military officer to the USCMCR.

SUMMARY OF ARGUMENT

Petitioner asks this Court to issue a writ of mandamus vacating the order issued by the USCMCR, and proscribing the Hon. Presiding Judge Burton and the Hon. Judge Herring from serving as judges on the USCMCR in the appeal brought by the United States seeking review of a ruling of a military commission as long as they retain their status as appellate military judges, *App. at A4*. Petitioners further request that the USCMCR's Opinion and Order reversing and remanding the Military Commission Judge's decision to dismiss Charges III and V, issued on June 29, 2017, be vacated.

Members of the military have long been precluded from holding a separate civil office. Judges of the USCMCR who have been appointed after being nominated by the President and confirmed by the Senate to an Article I court are, by definition, holding a civil office. Mandamus is an appropriate remedy where, as here, the underlying issue is one as to which the lower court judges have a conflict of interest. Waiting until after a trial on the merits is not in the interests of judicial economy. Further, granting mandamus relief now supports the preservation of this Court's jurisdiction.

STATEMENT OF FACTS

A. Procedural History

Petitioner, Khalid Shaikh Mohammad ("Mr. Mohammad") and Petitioner Ali Abdul-Aziz Ali, also known as Ammar al Baluchi ("Mr. al Baluchi") are two of five co-defendants in a joint capital military commission at Guantanamo Bay, Cuba, on charges of planning and carrying out the attacks of September 11, 2001.

Mr. Mohammad was arrested in Rawalpindi, Pakistan, on March 1, 2003, detained *incommunicado,* and tortured for some 3½ years in overseas detention facilities known as "black sites," which were operated by the United States Central Intelligence Agency ("CIA"). Mr. Mohammad was transferred to Naval Station Guantanamo Bay, Cuba in September 2006. He was not permitted access to counsel from the time of his arrest until early 2008.

Mr. al Baluchi was arrested in Karachi, Pakistan, on April 29, 2003, detained incommunicado, and tortured for 3½ years in black sites by CIA and third party officials. Mr. al Baluchi was transferred to Naval Station Guantanamo Bay, Cuba, in September 2006. He was also denied access to counsel from the time of his arrest in 2003 until early 2008.

Capital charges against Mr. Mohammad, Mr. al Baluchi and their three co-defendants were referred to a military commission at Guantanamo Bay on May 9,

2008. In January 2009, President Obama announced his decision to close the detention facility at Guantanamo Bay and the military commission system in operation there. The pending capital charges against Mr. Mohammad and Mr. al Baluchi were dismissed without prejudice in 2010. Attorney General Eric Holder announced his intention to transfer Mr. Mohammad, Mr. al Baluchi and their co-defendants for prosecution in the United States District Court for the Southern District of New York. Thereafter, President Obama reversed this decision and a second military commission prosecution was initiated in 2011.

In May 2012, Mr. Mohammad, Mr. al Baluchi and the other three co-defendants were arraigned again, on eight charges, six of which are capital. On April 7, 2017, the military commission granted a motion filed by Mr. al Baluchi, joined by Mr. Mohammad, and dismissed the only two pending non-capital charges on the ground that prosecution of these charges was barred by applicable statutes of limitation and the Ex Post Facto Clause.

The government filed an interlocutory appeal of the dismissal to the USCMCR on April 12, 2017. Mr. Mohammad, joined by Mr. al Baluchi, filed a number of motions in the USCMCR challenging its composition. On June 6, 2017 the USCMCR issued an Order denying the recusal of Judge Scott Silliman.[2] On

[2] On June 15, 2017, counsel for Mr. Mohammad filed a petition for writ of mandamus before this Court, requesting the reversal of that order and requiring

June 21, 2017, the USCMCR issued an Order denying Mr. Mohammad's Motion to Disqualify Judges Serving in Violation of §973(b) and the Commander–in-Chief Clause of the U.S. Constitution and to Abate Until a Properly Constituted Court is Convened. *App. at A4*. On June 28, 2017, the USCMCR issued its decision on the merits of the government's appeal. The USCMCR reversed the military commission, and reinstated the two non-capital charges that had been dismissed by the military commission as violations of the statute of limitations and the Ex Post Facto clause. *App. at A23*. On July 5, 2017 the Military Commission reinstated the charges pursuant to the USCMCR decision. *App. at A52*. The filing of this Writ followed.

B. Assignment and Appointment of Judges to the United States Court of Military Commission Review pursuant to 10 U.S.C. § 950.

The Military Commissions Act of 2009 ("2009 Act") established the USCMCR as an Article I appellate court for military commissions. 10 U.S.C. § 950f(a). Congress provided two mechanisms for placing judges on this court. First, the Secretary of Defense "may assign persons who are appellate military judges." 10 U.S.C. § 950f(b)(2). Alternatively, the "President may appoint, by and with the

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recusal of Judge Silliman for actual or apparent bias. On June 21, 2017 Mr. Mohammad moved this Court to stay all further proceedings in the USCMCR pending resolution of the issue of recusal. This Court issued a *per curiam* order on June 23, 2017 requiring responsive briefing. Oral argument on the Writ is presently scheduled for August 2, 2017.

advice and consent of the Senate, additional judges." 10 U.S.C. § 950f(b)(3). Both Judge Burton and Judge Herring became members of the USCMCR after being assigned by then Secretary of Defense Ash Carter pursuant to 10 U.S.C. § 950f(b)(2), and both were sworn as military appellate judges on September 23, 2015. *App. at 53-55*.

In response to this Circuit's expression of concern over the constitutionality of assigned military officers serving on the USCMCR, military judges were first nominated and confirmed under the § 950f(b)(3) appointment mechanism in 2016. *See In re Al- Nashiri*, 791 F.3d 71 (D.C. Cir. 2015). *See also United States v. Ortiz*, 2017 CAAF LEXIS 288 (C.A.A.F. April 17, 2017).

Specifically, in this case, after nomination by President Obama and confirmation by the Senate, Lieutenant Colonel Paulette Vance Burton and Colonel James Wilson Herring, Jr. were each appointed to the USCMCR in the spring of 2016. The exact language of the appointment states:

> THE FOLLOWING NAMED OFFICERS FOR APPOINTMENT IN THE GRADES INDICATED IN THE UNITED STATES ARMY AS APPELLATE MILITARY JUDGES ON THE UNITED STATES COURT OF MILITARY COMMISSION REVIEW UNDER TITLE 10 U.S.C. SECTION 950F(B)(3). IN ACCORDANCE WITH THEIR CONTINUED STATUS AS APPELLATE MILITARY JUDGES PURSUANT TO THEIR ASSIGNMENT BY THE SECRETARY OF DEFENSE AND UNDER 10 U.S.C. SECTION 950F(B)(2), WHILE SERVING ON THE UNITED STATES COURT OF MILITARY COMMISSION REVIEW, ALL UNLAWFUL INFLUENCE PROHIBITIONS REMAIN UNDER 10 U.S.C. SECTION 949B(B):

LARSS G. CELTNIEKS Colonel
JAMES W. HERRING JR. Colonel
PAULETTE V. BURTON Lieutenant Colonel

See 162 CONG. REC. S2 600 (daily ed., April 28, 2016). *App at 56.*

Both LTC Burton and COL Herring have long-serving military careers, and both have simultaneously served as Associate Judges with the United States Army Court of Criminal Appeals since July 2015. *App. at A53-55.*

REASONS FOR GRANTING THE WRIT

I. A writ of mandamus or prohibition is an appropriate vehicle to remedy the harm caused by a court that is not properly constituted, where, as here, the judges of that court have a clear conflict of interest in the decision.

This Court has jurisdiction pursuant to the All Writs Act, 28 U.S.C.§1651(a), to issue "all writs necessary or appropriate in aid of [our] jurisdiction[]." *In re Al-Nashiri*, 791 F.3d 71, 75 (2015). In addition, because the 2009 Act gives this Court exclusive jurisdiction to determine the validity of a final judgment of a military commission, it has jurisdiction to "issue a writ of mandamus now to protect the exercise of our appellate jurisdiction later." *Id.* at 76.

Mr. Mohammad and Mr. al Baluchi seek the protection of a writ of mandamus to prevent the irreparable harm of having their case decided by a panel that includes judges operating under a conflict of interest and in direct violation of 10 U.S.C. §973(b). In seeking that relief, they meet all the relevant conditions this Court has identified as governing mandamus to the USCMCR in military

commission cases.[3]

In *Al-Nashiri*, addressing the availability of mandamus relief against actions of the USCMCR, this Court held that the "traditional prerequisites for mandamus relief" are:

> First, the party seeking issuance of the writ must have no other adequate means to attain the relief he desires....Second, the petitioner must satisfy the burden of showing that his right to issuance of the writ is clear and indisputable. Third, even if the first two prerequisites have been met, the issuing court, in the exercise of its discretion, must be satisfied that the writ is appropriate under the circumstances. *Cheney v. United States Dist. Court*, 542 U.S. 367, 380-81 (2004) (citations, brackets and quotation marks omitted).

Al-Nashiri, 791 F.3d at 78.

As this Court noted in *Cobell v. Norton*, 334 F.3d 1128, 1139 (D.C. Cir. 2003) "[a]lthough this court does not seem to have ruled upon the propriety of seeking the recusal of a judicial officer by petition for a writ of mandamus, every circuit to have addressed the issue has found it proper." *Cobell*, 334 F.3d at 1139.

Last year, this Court confirmed that "mandamus is appropriate when an interlocutory order would cause an 'irreparable' injury that would otherwise 'go unredressed'" such as "'the existence of actual or apparent bias' by the judge." *In re Khadr*, 823 F.3d at 97 n.2. When the judges in question have an actual or apparent conflict of interest, the standard should be no different. Courts have

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[3] As noted above, because the USCMCR has now issued a ruling on the merits of the appeal, vacatur of that Order is necessary to protect this Court's jurisdiction.

treated judicial bias and conflicts of interest in the same fashion. Whether we call the underlining issue in this case a judicial bias, or a conflict of interest, the military judges stand to be negatively affected financially, personally, and professionally if they are dismissed from the USCMCR.

It has been "clear and indisputable" to the Supreme Court for at least 90 years that litigants of every stripe – both civil and criminal – have a fundamental constitutional entitlement to have their rights adjudicated by disinterested and impartial judges. The Court has repeatedly said that "Every procedure which would offer a possible temptation to the average man as a judge … not to hold the balance nice, clear and true between the State and the accused denies the latter due process of law." *In re Murchison*, 349 U.S. 133, 136 (1955) (quoting *Tumey v. State of Ohio*, 273 U.S. 510, 532 (1927)).

The Supreme Court has thus applied the "stringent rule" announced in *Tumey* "in a variety of settings, demonstrating the powerful and independent constitutional interest in a fair adjudicative procedure." *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 243 (1980) (collecting cases). Indeed, this Court has held that the participation of a single disqualified member of a multi-member adjudicatory tribunal is sufficient to deprive a litigant of due process and taint any subsequent decision. *Cinderella Career & Finishing Schools, Inc. v. FTC*, 425 F.2d 583, 592 (D.C. Cir. 1970) ("Litigants are entitled to an impartial tribunal whether it consists

of one man or twenty and there is no way which we know of whereby the influence of one upon the others can be quantitatively measured." (*citations omitted*)). Judges Burton and Herring when acting as military judges on the USCMCR clearly have a conflict of interest when deciding any issue regarding the legitimacy of their appointment to the court.

The inquiry is an objective one. The inquiry does not end with a determination whether the judge is actually, subjectively biased, but must also ask whether the average judge in his or her position is 'likely' to be neutral, or whether there is an unconstitutional 'potential for bias.'" *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 881 (2009).

In *Cheney v. United States District Court*, 542 U.S. 367 (2004), the Supreme Court laid out a three part test for when the circuits should issue writs of mandamus, an element of which was that the "right to issuance of the writ is 'clear and indisputable.'" *Id.* at 381 (quotations omitted). This has resulted in division across the circuits over whether the legal merits of a mandamus petition may be addressed when it presents questions of first impression.

This Circuit holds that by "right to the issuance of the writ" the Supreme Court meant that the legal merits of petitioner's claim must be "clear and indisputable" at the pleading stage. Hence, petitioners must cite "cases in which a federal court has held that, in a matter involving like issues and comparable

circumstances," they are entitled to relief. *Doe v. Exxon*, 473 F.3d 345, 355 (D .C. Cir. 2007). Consequently, the legal merits of a petitioner's claim are reviewed only to the extent they are unambiguously determined by controlling precedent.

However, this Court's unduly restrictive view of its mandamus jurisdiction as set out in *al Nashiri*, is at odds with other circuits and the All Writs Act. This Circuit has staked out a uniquely restrictive interpretation of the standard of review in mandamus cases that has effectively foreclosed mandamus for almost all claims arising from the 2009 Act, thereby effectively gutting the review that Congress intended. This is at odds with the Second Circuit, which held that cases "are sometimes more appropriate candidates for mandamus when they have raised a legal issue of first impression in this circuit." *Balintulo v. Daimler*, 727 F.3d 174, 187 n.18 (2d Cir. 2013). *See also SEC v. Rajaratnam*, 622 F.3d 159 (2d Cir. 2010).

The most "traditional use" of mandamus has been to keep an inferior tribunal within the "lawful exercise of its prescribed jurisdiction." *Roche v. Evaporated Milk Assn*. 319 U.S. 21, 26 (1943). That function cannot be served if a question regarding the appropriateness of the appointment of the judges of the court is rendered unreviewable by the bare need to apply settled legal rules to the novel facts of a given case. *Cf. Hope v. Pelzer*, 536 U.S. 730, 739 (2002). "Otherwise, the appellate jurisdiction could be defeated and the purpose of the

statute authorizing the writ thwarted by unauthorized action of the district court obstructing the appeal." *Roche* 319 U.S. at 26. (citations omitted.)

Consequently, because Judges Burton and Herring plainly and objectively have personal, professional, and financial interests in the outcome of the Motion to Disqualify, they should have been, and are disqualified to decide that motion.[4] To be clear, Petitioners are not asserting that Judges Burton and Herring are inherently biased, or have a conflict of interest in all matters that might come before the USCMCR. Rather, Petitioners assert that the judges have a conflict of interest with regard to this specific motion, challenging their status as military officers serving as judges appointed to a civil office, and arguing that this status renders them unable to make an unbiased determination of this issue.[5]

Mandamus is crucial here to address the existence of the actual conflict of

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[4] Although Petitioners did not request recusal of Judges Burton and Herring in the USCMCR, the affirmative obligation of every judge to recuse him or herself from any action in which impartiality might be reasonably questioned supports this actual or potential conflict as a reason that a writ of mandamus is appropriate. *See* USCMCR Rule of Practice 25; Rule for Military Commissions 902; 28 U.S. Code § 455; the Code of Judicial Conduct for United States Judges, Canon 3C as adopted by the Judicial Conference of the United States.

[5] As noted above, in the language of the appointment, both Judge Burton and Herring were appointed to the USCMCR, but the appointment noted "their continued status as appellate military judges." The significance of this appointment language is obvious – in attempting to fix the Appointments Clause issue identified by the Court in *al Nashiri*, Congress created more, rather than less, confusion about the actual status of members of the military serving on the USCMCR.

interest of Judges Burton and Herring, and to address the important issue of whether military judges appointed to the USCMCR are in violation of 10 U.S.C. §973(b)(2)(A)(ii). Clear judicial conflict of interest is an example of an issue requiring mandamus review because there is no adequate alternative means of relief. Because this is an issue that impacts every appeal from the Military Commissions to the USCMCR, this Court's decision now – rather than years from now after trial and direct appeal – is imperative to protect judicial resources and maintain public confidence in the military commissions system. Furthermore, it is essential to supporting the constitutional underpinnings of the statue, which is designed to ensure that military members do not hold civil offices.

II. Judges Burton and Herring are military officers and as such are prohibited from serving in a civil office.

Since shortly after the Civil War, Congress has generally prohibited active duty military officers from holding a second non-military position within the Executive Branch. *See Act of July 15, 1870*, ch 294 §18, 16 Stat. 315, 319. Although subsequent measures have carved out a handful of express exceptions to this dual office-holding ban, the general prohibition remains in force. *See* 10 U.S.C. §973(b). Importantly, those carve-outs are expressed somewhere in the statute or in another statute. The USCMCR asserts in their order denying the motion that "the phrase 'otherwise authorized by law' in 10 U.S.C. § 973(b) need

not be mentioned in the appointment statute to be effective." *App at A10.* However, there must be some authorization in law, and here, there is not.

More than an antiquated technical provision, the dual-office holding ban is designed "to assure civilian preeminence in government, i.e., to prevent the military establishment from insinuating itself into the civil branch of government and thereby growing 'paramount' to it." *Riddle v. Warner*, 522 F.2d 882, 884 (9th Cir. 1975).

Thus, the service of a commissioned officer in the principal office of USCMCR judge pursuant to § 950f(b)(3) is statutorily barred by 10 U.S.C. § 973(b). Section 973(b) is a longstanding feature of military law that explicitly forbids dual office holding by military officers, including any "civil office … that requires an appointment by the President by and with the advice and consent of the Senate." *Id.* This is "a statutory expression of the incompatibility inherent in the holding of a civil office – state or federal – by an army officer on the active list." *Public Health Service Officers – Extent of Assimilation with Army Officers*, 20 Comp. Gen. 885, 888 (1941); 1941 U.S. Comp. Gen. LEXIS 170.

When enacted in 1870, the statute did not define "civil office," but instead relied on its meaning in the common law, which encompassed any federal officer who served during good behavior. Following Joseph Story's analysis of the term at common law, the statute covered the "most important civil officers," including

those "connected with the administration of justice [and] the collection of the revenue." *Joseph Story, 3 Commentaries on the Constitution* § 1530 (1833).

The phrase "civil office" was understood by way of "contrast to the term 'military office.' An 'officer of the Army,' holding, as he does, the latter, is to be inhibited from holding also the former. The two are antithetical; their duties are, if not inconsistent, at any rate, widely different, and there is to be no point where they include or overlap each other." *Acceptance of Office in National Guard of a State by Officer on Active List of the Regular Army*, 29 U.S. Op. Att'y. Gen. 298, 299 (1912); 1912 U.S. AG LEXIS 63. The distinguishing elements that define a military office are familiar: "Rank, title, pay, and retirement are the indicia of military, not civil, office." *Smith v. United States*, 26 Ct.Cl. 143, 147 (Ct.Cl. 1891). Accordingly, if a government position does not require a commission in the uniformed service (i.e., if it can be held by a civilian), then it is a civil office. This concept has been long established. *See e.g. Winchell v. United States*, 28 Ct.Cl. 30, 35 (Ct.Cl. 1892). The 2009 Act clearly authorizes civilians to serve on the USCMCR. Thus, the judicial position constitutes a civil office.

Despite this clearly established precedent, in its Order, the USCMCR found § 973 inapplicable on the ground that the role of a USCMCR judge is a "military function," *App. at A8*, and therefore held that it is not a "civil office." This holding is inconsistent with the language of the Court of Appeals for the Armed Forces in

Ortiz: "Thus, the prohibitions in the statute are aimed at the holding of "civil office" (here, civil office requiring presidential appointment with Senate advice and consent) rather than the performance of assigned military duty. Section 973 might prohibit Judge Mitchell from holding office at the USCMCR—a question that is not before us." *Ortiz* at 5-6.

The "military function" of the officeholder's duties is irrelevant to the question of whether an office is civil or military. *Army Officer Accepting Temporary Civilian Employment*, 25 Comp. Gen. 377, 381 (1945); 1945 U.S. Comp. Gen. LEXIS 251 ("The statute makes the two positions incompatible as a matter of law, without qualification and without regard to any showing of compatibility in fact by reason of leave of absence, or otherwise, with respect to a particular officer and a particular position."). For example, the Supreme Court concluded that the Secretary of War held a "civil office," despite its military functions and place within the chain-of-command, because the Secretary "is a civil officer with civil duties to perform, as much so as the head of any other of the executive departments." *United States v. Burns*, 79 U.S. 246, 252 (1870). Similarly, the Attorney General opined that General William Tecumseh Sherman could not even temporarily serve as acting Secretary of War "because it is a civil office." *Acting Secretary of War*, 14 U.S. Op. Att'y. Gen. 200 (1873); 1873 U.S. AG LEXIS 48. Just as the Secretary of War was not a military office, the positions

on the USCMCR are not military offices. By the nature of how judges find their way to the bench, through appointments by the President and confirmations by the Senate, they are civil offices. Because there is no carved out exception for a military officer to hold this position in accordance with 10 U.S.C. § 973, they are civil offices, and not to be held by military officers.

When Congress creates exceptions to § 973 that make both military officers and civilians eligible for the same office, such as the Director of the CIA, it expressly provides for that special case. 10 U.S.C. § 528(e); *see also Memorandum for the General Counsel, General Services Administration, from John M. Harmon, Assistant Attorney General, Office of Legal Counsel*, 3 Op. OLC. 148, 150 (1979), 1979 OLC LEXIS 24 ("Where Congress wishes to permit a military officer to occupy a civilian position on an acting basis without forfeiting his commission, it has done so *explicitly*."); *Dwan v. Kerig, Compatibility of Military and Other Public Employment*, 1 Mil. L. Rev. 21, 85 (1958) (collecting offices for which military officers are statutorily eligible for dual appointments.) If no exception is made specifically authorizing a military officer to be appointed to an office, then it is a civil office.

To the extent there was any doubt about what dual office holding § 973 prohibited, Congress removed it in 1983. *Department of Defense Authorization Act of 1984*, 97 Stat 655, § 1002 (1983) (Appendix at 6). One of Congress' principal

concerns in amending § 973 was that "the term 'civil office' presently used in section 973(b) is not clearly defined in that statute." S. Rep. No. 98-174, at 232 (1983). In response to an interpretation of "civil office" that foreclosed what had been a common military assignment, Congress allowed military officers to be "assigned" to certain civil offices as part of their military duties in § 973(a), but preserved § 973(b)'s basic purpose to "prohibit [active duty] officers from holding any elective office in the federal government, *any federal office requiring appointment by the President with the advice and consent of the Senate*, and any position in the executive schedule." *Id.* at 233 (emphasis added). This prohibition was noted by The Court of Appeals for the Armed Forces when it recently recognized, "[t]he prohibition in § 973(b)(2)(A)(ii) may indeed affect Colonel Mitchell's status as a judge of the USCMCR, but that is not for us to decide." *Ortiz, Ibid.*

Further, this Court has opined that the position of USCMCR judge under § 950f(b)(3) is unambiguously and exclusively a civil office. *Khadr*, 823 F.3d at 96 (holding that the determinative issue is the means by which the President "appoint[s] civilians to serve as judges on the Court."). According to § 950f(b)(2) and this Court's reading of that section, military judges are to be assigned by the Secretary of Defense. *Id.* (However, as this court has noted in *al Nashiri*, § 950f(b)(2) also may violate the Appointments Clause. In an attempt to avoid that

issue, military judges have been appointed under § 950f(b)(3) which does not allow for military appointments.) The position of USCMCR judge lacks any provision for "rank, title, pay, and retirement." It is a principal office on an Article I court, solely concerned with the "administration of justice," that has all three elements of a "civil office" at common law. It is a federal office that requires Presidential appointment and Senate confirmation. And it is an office to which civilians can and have been appointed. Hence, § 973(b) categorically prohibits a military officer from holding an "appointment" to the office of USCMCR judge.

In its Order, the USCMCR found:

> USCMCR military appellate judicial positions occupied by commissioned officers qualified under 10 U.S.C. §§ 826, 948j(b), and 950f(b)(2) initially assigned by the Secretary of Defense under 10 U.S.C. § 950f(b)(2), nominated by the President, confirmed by the Senate, and appointed by the President as "an Appellate Military Judge" under 10 U.S.C. § 950f(b)(3) to the USCMCR does not violate the civil office provision in 10 U.S.C. § 973(b). Military commissions are a traditional military function, and Presiding Judge Burton's and Judge Herring's service as military appellate judges is "authorized by law."

App at A13.

However, the political branches have long embraced "a very liberal interpretation of the phrase 'civil office,'" *Army Officer Holding Civil Office*, 18 OP. ATT'Y GEN. 11, 12 (1884), as a generic term originally meant simply to exempt an officer's subsequent promotion (and concomitant re-appointment as a military officer). Thus, if a civilian can hold the position and there is no expressed

exception, then it is a "civil office" for purposes of § 973(b)(2)(A)(ii). *See id.* Indeed, the breadth of the term "civil office" is exactly why Congress in 1983 added three narrowing conditions to § 973(b)—including the pertinent requirement here, i.e., that the second position require "an appointment by the President by and with the advice and consent of the Senate." 10 U.S.C. § 973(b)(2)(A)(ii); *see also Whether a Military Officer May Continue on Terminal Leave After He Is Appointed to a Federal Civilian Position Covered by 10 U.S.C. § 973(b)(2)(A)*, 40 OP. O.L.C. 1, 9–10 (Aug. 2, 2016) (describing the motivation and purpose of the 1983 amendments to § 973(b)).

Any doubt that USCMCR judges hold a "civil office" is conclusively settled by the 2009 amendments to the Military Commissions Act, which reconstituted that body as an Article I "court of record." 10 U.S.C. § 950f(a); *see also In re Khadr*, 823 F.3d 92, 96 (D.C. Cir. 2016). *As in Freytag v. C.I.R.*, 501 U.S. 868 (1991), "the clear intent of Congress [was] to transform" the USCMCR from an entity wholly within the Executive Branch "into an Article I legislative court," *id.* at 888, the judges of which hold a quintessential "civil office." *See, e.g., Winchell v. United States*, 28 Ct. Cl. 30, 35 (1892).

Nor is military officers' service as judges on the USCMCR "otherwise authorized by law." Congress added that language in 1956 to reflect that "other laws enacted after the date of enactment of [5 U.S.C. § 5534a] authorize the

performance of the functions of certain civil offices." 10 U.S.C. § 3544 (1958) (Historical and Revision Notes). What these other laws all have in common is clear and unambiguous indicia of Congress's intent to override the dual-office holding ban. *See, e.g., id.* § 528 (expressly allowing appointment of certain military officers to positions within the CIA or the Office of the Director of National Intelligence). *See generally DwanV.. Kerig, Compatibility of Military and Other Public Employment*, 1 MIL. L. REV. 21, 85 (1958) (collecting examples.)

In contrast, the 2009 Act says nothing whatsoever about appointing military officers, as such, to serve in a "civil office" as USCMCR judges. Indeed, the only language in § 950f that even appears to reference military officers is the authority provided to the Secretary of Defense to "*assign* persons who are appellate military judges to be judges on the [USCMCR]." 10 U.S.C. § 950f(b)(2) (emphasis added). Neither the text nor history of this provision provides the clear statement required to satisfy § 973(b).

The USCMCR denied Mr. Mohammad's Motion to Disqualify on the belief that "a USCMCR appellate military judge position is not a 'civil office.'" *App. at A5*. The USCMCR relies on the fact that the military commissions serve a military function. However, historical analysis makes it clear that the military function of an office is not what makes it a military or civilian office. *See Army Officer Accepting Temporary Civilian Employment*, 25 Comp. Gen. 377, 381 (1945); 1945

U.S. Comp. Gen. LEXIS 251; *Burns*, 79 U.S. at 252; and, *Acting Secretary of War*, 14 U.S. Op. Att'y. Gen. 200 (1873); 1873 U.S. AG LEXIS 48.

The USCMCR incorrectly uses 10 U.S.C. § 950f(b)(2) as a work-around for an exception to § 973(b). *App.at A10*. This reasoning, however, fails because Judge Burton and Judge Herring were appointed by the President and confirmed by the Senate (in violation of § 973(b)) not assigned, the measure called for in § 950f(b)(2). Consequently, Judges Burton and Herring did not properly join the USCMCR as military officers.

Interestingly, the USCMCR knew that there was a potential issue with the legitimacy of the military judge assignments to the court. This Court had suggested that these issues may be resolved, "by re-nominating and re-confirming the military judges to be *CMCR judges*." *al Nashiri*, 791 F.3d at 88 (emphasis added). While that may have solved an issue with the Appointment Clause, as argued by Mr. al Nashiri, it does not address the violation of § 973(b) which is now raised before this Court. The fact that § 973(b) was violated when the military judges were appointed by the President and confirmed by the Senate is clear and indisputable. Accordingly, the USCMCR's finding is not supported by overwhelming authority, and should not control here.

III. Service by a military officer as an appointed judge on the USCMCR violates the Commander-in-Chief clause.

The Constitution makes the President "Commander in Chief of the Army and Navy of the United States." U.S. Const., art. II, § 2, cl. 1. This clause "vest[s] in the President the supreme command over all the military forces." *United States v. Sweeny*, 157 U.S. 281, 284 (1895). By necessity this includes the power to instruct every member of the armed forces what to do and when. *Fleming v. Page*, 9 How. 603, 615 (1850) ("As commander in chief, [the President] is authorized to direct the movements of the naval and military forces placed by law at his command, and to employ them in the manner he may deem most effectual[.]" This applies with equal weight to officers serving in professional capacities. *Brown v. Gilnes*, 444 U.S. 348, 357 n. 14 (1980) ("[M]embers of the Armed Services, wherever they are assigned, may be transferred to combat duty or called to deal with civil disorder or natural disaster.") There simply is no such thing as "independence" from the chain-of-command for commissioned military officers. *Martin v. Mott*, 12 Wheat. 19, 30-31 (1827).[6] This traditional understanding of the President's constitutional

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[6] *See also El-Shifa Pharm. Indus. Co. v. United States*, 607 F.3d 836, 858-59 (D.C. Cir. 2010) (Kavanaugh, J., concurring) ("In the national security realm … courts have generally accepted that the President possesses exclusive, preclusive power under the Commander-in-Chief Clause … to command troop

authority over the military goes back to the Founding and has never been seriously questioned.[7] Indeed, even skeptics of presidential power concede that it would be unconstitutional to "insulate [a military] officer from presidential direction or removal." David Barron & Martin Lederman, *The Commander-in-Chief at Its Lowest Ebb: A Constitutional History*, 121 Harv. L. Rev. 941, 1103-04 (2008). To the contrary, service members must follow – on pain of death in wartime – every order that is not manifestly criminal, regardless of whether their superior had good

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movements during a congressionally authorized war."); *Swaim v. United States*, 28 Ct.Cl.173, 221 (Ct.Cl. 1893), *affirmed* 165 U.S. 553 (1897)) ("[T]he President is always the commander in chief . . . It is true that the Constitution has conferred upon Congress the exclusive power 'to make rules for the government and regulation of the land and naval forces;' but the two powers are distinct; neither can trench upon the other . . . Congress can not in the disguise of 'rules for the government' of the Army impair the authority of the President as commander in chief . . . . A military officer can not be invested with greater authority by Congress than the commander in chief.") (internal punctuation removed); *Memorial of Captain Meigs*, 9 U.S. Op. Att'y. Gen. 462, 468 (1860); 1860 U.S. AG LEXIS 23.

[7] In the pre-ratification period, Congress exercised the commander-in-chief power. The Second Continental Congress appointed George Washington to be "General and Commander in chief of the army of the United Colonies." 2 J. Cont. Cong. 96 (1775) (Ap. 45). This delegation authorized him to "require all Officers and Soldiers, under [his] command, to be obedient to [his] orders, and diligent in the exercise of their several duties," subject to "such orders and directions" as he might "receive from this, or a future, Congress." *Id.* The Articles of Confederation also reserved to Congress the power of "appointing all officers" in the land and naval forces and "directing their operations." Art. of Conf., Art. IX. The Framers made a considered decision to give these powers to the President.

reasons, bad reasons, or no reason at all for issuing it. 10 U.S.C. § 890(2). And the basic premise of the military establishment's constitutional design is presidential direction and supervision of that chain-of-command. *United States v. Ezell*, 6 M.J. 307, 316 (C.M.A. 1979) ("[A]s Commander in Chief of the Armed Services under Article II of the Constitution, the President has powers … to deploy troops and assign duties as he deems necessary.").

Accepting an appointment as a federal appellate judge on an independent Article I court of record is constitutionally incompatible with the status of a serving commissioned officer. Judges appointed to the USCMCR under § 950f(b)(3) cannot be reassigned or otherwise removed from the USCMCR for any reason other than good cause. This level of tenure protection, only slightly below the "good behavior" tenure of an Article III judge, is irreconcilable with the President's constitutional authority as Commander-in-Chief.

Even if Congress had contemplated the "appointment" of military officers to the principal office of USCMCR Judge – which is inconsistent with the scheme of 10 U.S.C. § 950f – the good cause tenure that accompanies such an appointment would be an unconstitutional encroachment on the President's ability to direct and supervise the duties of those in the chain-of-command. *Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2095 (2015)) ("[W]hen a Presidential power is 'exclusive,' it 'disabl[es] the Congress from acting upon the subject.") (*citation*

omitted); *Relation of the President to the Executive Departments*, 7 U.S. Op. Att'y. Gen. 453, 464 (1955); 1855 U.S. AG LEXIS 35 ("No act of Congress … can … authorize or create any military officer not subordinate to the President."). Unsurprisingly, there is no precedent for military officers simultaneously serving as principal officers with the attendant tenure protections from the chain-of-command. *Orloff v. Willoughby*, 345 U.S. 83, 94 (1953) (failing to find a single "case where this Court has assumed to revise duty orders as to one lawfully in the service."). It is probably no coincidence that 10 U.S.C. § 973(b), discussed above, has long been a bar to military members' simultaneous holding of civil offices that could prevent the reassignment by their military chain of command.

CONCLUSION

For the reasons provided above, this Court should grant the writ of mandamus and prohibition to disqualify judges serving in violation of 10 U.S.C. § 973(b) and the Commander-in-Chief clause of the U.S. Constitution, to vacate the ruling below, and to abate until a properly constituted court is convened.

Respectfully submitted,

//s//
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CERTIFICATE OF SERVICE

I hereby certify that on July 21, 2017, copies of the foregoing Petition for a Writ of Mandamus and Prohibition to the United States Court of Military Commission Review were served by hand delivery and electronic mail to:

1. The Hon. Paulette V. Burton, LTC, U.S. Army, and
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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT

In accordance with the requirements of Fed. R. App. P. 21(d), this document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this Petition was composed using Microsoft Word 2013 in 14-point Times New Roman font, a proportionally spaced font. The word count is 6616 words, excluding cover page; table of contents; tables of authorities; statutes, regulations and rules; certificates of counsel; signature blocks and the appendix.

Rita J. Radostitz
Counsel for Mr. Mohammad

APPENDIX

TABLE OF CONTENTS

Statutes, Regulations and Rules

10 U.S.C. § 950f (excerpt)

(a) Establishment.—There is a court of record to be known as the "United States Court of Military Commission Review" (in this section referred to as the "Court"). The Court shall consist of one or more panels, each composed of not less than three judges on the Court. For the purpose of reviewing decisions of military commissions under this chapter, the Court may sit in panels or as a whole, in accordance with rules prescribed by the Secretary of Defense.

(b) Judges.—(1) Judges on the Court shall be assigned or appointed in a manner consistent with the provisions of this subsection.

(2) The Secretary of Defense may assign persons who are appellate military judges to be judges on the Court. Any judge so assigned shall be a commissioned officer of the armed forces, and shall meet the qualifications for military judges prescribed by section 948j(b) of this title.

(3) The President may appoint, by and with the advice and consent of the Senate, additional judges to the United States Court of Military Commission Review.

(4) No person may serve as a judge on the Court in any case in which that person acted as a military judge, counsel, or reviewing official.

10 U.S.C. § 950g (excerpt)

(a) Exclusive Appellate Jurisdiction.—Except as provided in subsection (b), the United States Court of Appeals for the District of Columbia Circuit shall have exclusive jurisdiction to determine the validity of a final judgment rendered by a military commission (as approved by the convening authority and, where applicable, as affirmed or set aside as incorrect in law by the United States Court of Military Commission Review) under this chapter.

(b) Exhaustion of Other Appeals.—The United States Court of Appeals for the District of Columbia Circuit may not review a final judgment described in subsection (a) until all other appeals under this chapter have been waived or exhausted.

10 U.S.C. § 973 (excerpt)

(a) No officer of an armed force on active duty may accept employment if that employment requires him to be separated from his organization, branch, or unit, or interferes with the performance of his military duties.

(b)(1) This subsection applies—

(A) to a regular officer of an armed force on the active-duty list (and a regular officer of the Coast Guard on the active duty promotion list);

(B) to a retired regular officer of an armed force serving on active duty under a call or order to active duty for a period in excess of 270 days; and

(C) to a reserve officer of an armed force serving on active duty under a call or order to active duty for a period in excess of 270 days.

(2)(A) Except as otherwise authorized by law, an officer to whom this subsection applies may not hold, or exercise the functions of, a civil office in the Government of the United States—

(i) that is an elective office;

(ii) that requires an appointment by the President by and with the advice and consent of the Senate; or

(iii) that is a position in the Executive Schedule under sections 5312 through 5317 of title 5.

(B) An officer to whom this subsection applies may hold or exercise the functions of a civil office in the Government of the United States that is not described in subparagraph (A) when assigned or detailed to that office or to perform those functions.

28 U.S.C. § 455 (excerpt)

(a) Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(2) Where in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

(3) Where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy;

(d) For the purposes of this section the following words or phrases shall have the meaning indicated:

(1) "proceeding" includes pretrial, trial, appellate review, or other stages of litigation;

28 U.S.C. § 1651 (excerpt)

The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

UNITED STATES
COURT OF MILITARY COMMISSION REVIEW

United States, Appellant v. Khalid Shaikh Mohammad Walid Muhammad Salih Mubarek Bin 'Attash Ramzi Bin al Shibh Ali Abdul-Aziz Ali AKA Ammar al Baluchi, and Mustafa Ahmed Adam al Hawsawi, Appellee	)	ORDER MOTION TO DISQUALIFY JUDGES SERVING IN VIOLATION OF 10 U.S.C. § 973(b) AND THE COMMANDER-IN-CHIEF CLAUSE OF THE U.S. CONSTITUTION AND TO ABATE UNTIL A PROPERLY CONSTITUTED COURT IS CONVENED USCMCR Case No. 17-002 June 21, 2017

BEFORE:

BURTON, PRESIDING Judge
HERRING, SILLIMAN, Judges

On May 8, 2017, Appellee Mohammad moved this Court to disqualify Presiding Judge Burton and Judge Herring from the panel designated to decide this appeal on the grounds that their service on the U.S. Court of Military Commission Review (USCMCR) is in violation of 10 U.S.C. § 973(b) and the Commander-in-Chief Clause of Article II Section 2 of the U.S. Constitution. Appellee Mohammad Motion 1, 14. Appellee Mohammad argued their service on the USCMCR violated the Fifth and Eighth Amendments to the U.S. Constitution. Appellee Mohammad Motion 1.[1] Appellee Mohammad moved "to

[1] In addition, Appellee Mohammad contended that Appellee Mohammad's panel was not properly constituted because 10 U.S.C. 950f(a) required a minimum of *three military* appellate judges on a panel. (emphasis added) Appellee Mohammad Motion 9-11. On

abate these proceedings until a properly constituted Court is convened." *Id.* 1, 14. All co-Appellees joined Appellee Mohammad in this motion. On May 15, 2017, Appellant opposed the motion for disqualification and abatement.

Our Court has previously ruled a USCMCR appellate military judge position is not a "civil office" prohibited under 10 U.S.C. § 973(b). *See Order United States v. Al-Nashiri*, No. 14-001 (USCMCR May 18, 2016) (App. A). USCMCR military appellate judges are "authorized by law" and therefore they are not subject to the civil-office prohibition. *Id.* Our Court has also previously decided that assignment of military appellate judges to the USCMCR does not violate the Commander-in-Chief Clause of Article II Section 2 of the U.S. Constitution. *United States v. Khadr*, No. 13-005 (USCMCR Oct. 17, 2014) (App. B). We revisit those issues in this Order, and we arrive at the same holding.

Facts

The Military Commissions Act of 2009 ("2009 M.C.A."), section 950f(a) states, "*Establishment.*—There is a Court of record to be known as the [USCMCR] . . . . The Court shall consist of one or more panels, each composed of not less than three judges on the Court." 10 U.S.C. § 950f(a). The 2009 M.C.A. provided for two ways to assign or appoint judges to the USCMCR:

> (b) *Judges.* (1) Judges on the Court shall be assigned or appointed in a manner consistent with the provisions of this subsection.
>
> (2) The Secretary of Defense may assign persons who are appellate military judges to be judges on the Court. Any judge so assigned shall be a commissioned officer of the armed forces, and shall meet the qualifications for military judges prescribed by section 948j(b) of this title.
>
> (3) The President may appoint, by and with the advice and consent of the Senate, additional judges to the United States Court of Military Commission Review.

10 U.S.C. § 948j(b) states:

> (b) *Eligibility.* A military judge shall be a commissioned officer of the armed forces who is a member of the bar of a Federal court, or a member of the bar of the highest court of a State, and who is certified to be qualified for duty under section 826 of this title [10 USCS § 826] (article 26 of the Uniform Code of Military Justice) as a military judge of general

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December 31, 2011, Congress substituted "judges on the Court" for "appellate military judges" in 10 U.S.C. § 950f(a). P.L. 112-81, Div. A, Title X, Subtitle D, § 1034(c), 125 Stat. 1573 (Dec. 31, 2011). The December 31, 2011 statutory substitution resolved this issue, and this issue will not receive additional discussion in this Order.

> courts-martial by the Judge Advocate General of the armed force of which such military judge is a member.

On September 10, 2015, Secretary of Defense Ashton B. Carter appointed Lieutenant Colonel Burton and Colonel Herring, who are judges on the Army Court of Criminal Appeals, to the USCMCR under his authority in 10 U.S.C. § 950f(b)(2). Appellee Mohammad App. Tab 1. On September 23, 2015, they were sworn as USCMCR military appellate judges. Appellee Mohammad Motion 2 n.1 (citing Appellee Mohammad App. Tab. 1).

The Court of Appeals for the District of Columbia Circuit considered an Appointments Clause challenge to the Secretary of Defense's assignment of military judges from their Service Courts of Criminal Appeals to sit as USCMCR judges on Al-Nashiri's panel. *In re Al-Nashiri*, 791 F.3d 71, 84 n.7 (D.C. Cir. 2015) The Court said the President could nominate, and the Senate could confirm the military judges to be USCMCR judges to "put to rest any Appointments Clause questions regarding the CMCR's military judges." *Id.* at 86.

In response to the *Al-Nashiri* decision, President Obama nominated Lieutenant Colonel Burton and Colonel Herring to the USCMCR, and on March 14, 2016, the Senate received the President's nominations. 162 Cong. Rec. S1474 (daily ed. Mar. 14, 2016). *See also United States v. Ortiz*, 2017 CAAF LEXIS 288 (C.A.A.F. Apr. 17, 2017); *United States v. Dalmazzi*, 76 M.J. 1, 2 (C.A.A.F. 2016). On April 28, 2016, the Senate confirmed them to be judges of the USCMCR. *See id.* (citing 162 Cong. Rec. S2600 (daily ed., Apr. 28, 2016)). On May 25, 2016, President Obama signed their commissions appointing each of them to be "an Appellate Military Judge of the United States Court of Military Commission Review." *See id.*

Discussion

Title 10 U.S.C. § 973 restricts specified officers on active duty from performance of civil functions, and § 973 states:

> (a) No officer of an armed force on active duty may accept employment if that employment requires him to be separated from his organization, branch, or unit, or interferes with the performance of his military duties.
>
> (b) (1) This subsection applies--
> (A) to a regular officer of an armed force on the active-duty list (and a regular officer of the Coast Guard on the active duty promotion list);
>
> * * *

> (2) (A) *Except as otherwise authorized by law*, an officer to whom this subsection applies may not hold, or exercise the functions of, a civil office in the Government of the United States--
>
> (i) that is an elective office;
>
> (ii) *that requires an appointment by the President by and with the advice and consent of the Senate*; or
>
> (iii) that is a position in the Executive Schedule under sections 5312 through 5317 of title 5 [5 USCS §§ 5312-5317].
>
> (B) An officer to whom this subsection applies may hold or exercise the functions of a civil office in the Government of the United States that is not described in subparagraph (A) when assigned or detailed to that office or to perform those functions.
>
> * * *
>
> (5) Nothing in this subsection shall be construed to invalidate any action undertaken by an officer in furtherance of assigned official duties.

10 U.S.C. § 973 (emphasis added). In 1975, the Ninth Circuit considered whether a Navy officer's appointment as a California state notary caused him to lose his commission under 10 U.S.C. § 973. *Riddle v. Warner*, 522 F.2d 882 (9th Cir. 1975). In *Riddle*, the court assessed the legislative history of the statute and several opinions of the Attorney General and observed:

> The current version of [10 U.S.C. § 973] had its genesis in an 1870 enactment. *See* Act of July 15, 1870, ch. 294, § 518, 16 Stat. 319. The legislative history is sparse; there appears to be no direct illumination of the problem. A comment by the chairman of the reporting committee, however, shows that a principal concern of the bill's proponents was to assure civilian preeminence in government, i.e., to prevent the military establishment from insinuating itself into the civil branch of government and thereby growing "paramount" to it. *See* Cong. Globe, 41st Cong. 2d Sess. App. 150 (1870). Early comment on the statute suggests that the Congress was also interested in assuring the efficiency of the military by preventing military personnel from assuming other official duties that would substantially interfere with their performance as military officers. *See, e.g.*, 13 Op. Att'y Gen. 310, 311 (1870) (position of Philadelphia Parks Commissioner determined to be a "civil office"); 15 Op. Att'y Gen. 551, 553 (1876) (position as trustees of the Cincinnati Southern Railway determined to be a "civil office"); 35 Op. Att'y Gen. 187, 190 (1927) (position as head of Louisiana State University determined to be a "civil office").

Id. at 884 (noting state court had determined commission of state notary public was a nullity under state law, and holding 10 U.S.C. § 973 was not violated because Riddle was already a notary as a Navy Judge Advocate under 10 U.S.C. § 836(a)) (internal footnote omitted).

The term "civil office" in 10 U.S.C. § 973(b) is not defined in the statute; however, it was understood by way of "contrast to the term 'military office.' An 'officer of the Army,' holding, as he does, the latter, is to be inhibited from holding also the former. The two are antithetical; their duties are, if not inconsistent, at any rate, widely different, and there is to be no point where they include or overlap each other."[2] An appointment statute that includes military "[r]ank, title, pay, and retirement are the indicia of military, not civil, office." *See Smith v. United States*, 26 Ct. Cl. 143, 147 (Ct. Cl. 1891). Presiding Judge Burton and Judge Herring's appointments on the USCMCR meet the Court of Claims tests because officers meeting the military judge requirements of 10 U.S.C. § 836 are all field grade officers, sitting military judges on the Service Courts of Criminal Appeals, and eligible for military retirement upon completion of the requisite number of years of military service. *See* 10 U.S.C. §§ 836, 948j(b), and 950f(b)(2). *See also, e.g., Winchell v. United States*, 28 Ct. Cl. 30, 35 (Ct. Cl. 1892). It does not matter that the President has seen fit to appoint and the Senate confirm civilians to the USCMCR because Congress expressly provided for civilians on the USCMCR under 10 U.S.C. § 950f(b)(3). *See In re Khadr*, 823 F.3d 92, 96 (D.C. Cir. 2016).

Congress has established a requirement for military officers to be additionally appointed by the President and confirmed by the Senate, beyond that included in their promotions to their rank, to certain specified positions, including:

> the Chairman and Vice Chairman of the Joint Chiefs of Staff, 10 U.S.C. §§ 152, 154; the Chief and Vice Chief of Naval Operations, §§ 5033, 5035; the Commandant and Assistant Commandant of the Marine Corps, §§ 5043, 5044; the Surgeons General of the Army, Navy, and Air Force, §§ 3036, 5137, 8036; the Chief of Naval Personnel, § 5141; the Chief of Chaplains, § 5142; and the Judge Advocates General of the Army, Navy, and Air Force, §§ 3037, 5148, 8037.

See Weiss v. United States, 510 U.S. 163, 171 (1994). None of the statutory provisions requiring Presidential appointment and Senate confirmation of commissioned officers to these positions specify the inapplicability of 10 U.S.C. § 973. *See* 10 U.S.C. §§ 152, 154, 3036, 3037, 5033, 5035, 5043, 5044, 5137, 5141, 5142, 5148, 8036, 8037. There have not been any challenges of their appointments under 10 U.S.C. § 973 in the courts.

Military commissions are a traditional military function. U.S. military commissions or similar military tribunals have been used to prosecute offenses against the law of war since the Revolutionary War.[3] There were 4,271

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[2] *Acceptance of Office in National Guard of a State by Officer on Active List of the Regular Army*, 29 U.S. Op. Att'y. Gen. 298, 299 (1912); 1912 U.S. AG LEXIS 63 at *3.

[3] *See Hamdan v. Rumsfeld*, 548 U.S. 557, 590 (2006); *Ex parte Quirin*, 317 U.S. 1, 31 n. 9 (1942) (indicating in 1780 British Major Andre was tried by a "Board of General Officers"

documented military commission trials during the Civil War and another 1,435 during Reconstruction.[4] In the wake of World War II, the U.S. military acted as a leading proponent of and participant in thousands of war crimes trials in Germany and the Far East for violations of the law of war.[5]

In *Quirin*, the Supreme Court addressed the authority of the President to try by military commission cases of the Nazi saboteurs captured on U.S. soil and accused of violations of the law of war as follows:

> Congress has explicitly provided, so far as it may constitutionally do so, that military tribunals shall have jurisdiction to try offenders or offenses against the law of war in appropriate cases. . . . By his Order creating the present Commission [the President] has undertaken to exercise the authority conferred upon him by Congress, and also such authority as the Constitution itself gives the Commander in Chief, to direct the performance of those functions which may constitutionally be performed by the military arm of the nation in time of war. . . *An important incident to the conduct of war is the adoption of measures by the military command* not only to repel and defeat the enemy, but to seize and *subject to disciplinary measures those enemies who in their attempt to thwart or impede our military effort have violated the law of war.*

Ex parte Quirin, 317 U.S. 1, 28-29 (1942) (emphasis added; internal footnote omitted). The word "military" is used in the 2009 M.C.A. more than 450 times. It is beyond dispute that military commissions are primarily a military function with a direct connection to the law of war. There is no evidence that Congress intended to limit service on the USCMCR to civilians, especially in light of the specific declaration in 10 U.S.C. § 950f(b)(2) that military appellate judges could be appointed to the USCMCR.

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for spying), *see also* George Davis, *A Treatise on the Military Law of the United States* 308 n.1 (rev. 3d ed. 1915) (indicating British Major Andre's tribunal was "in fact a military commission."). *See also United States v. Hamdan*, 801 F. Supp. 2d 1247, 1294-1310 (USCMCR 2011), *rev'd on other grounds*, *Hamdan v. United States*, 696 F.3d 1238 (D.C. Cir. 2012) (describing military commissions from the Revolutionary War through the post-World War II trials).

[4] David Glazier, *The Laws of War: Past, Present, and Future: Precedents Lost: The Neglected History of the Military Commission*, 46 Va. J. Int'l L. 5, 40 n. 223 (2005) (citing Mark E. Neely, Jr., *The Fate of Liberty: Abraham Lincoln and Civil Liberties* 168-73, 176-77 (1991)).

[5] *See* Telford Taylor, *Final Report to the Secretary of the Army on the Nuernberg War Crimes Trial Under Control Council Law No. 10*, at 1, 234-35 (1949), https://www.loc.gov/rr/frd/Military_Law/pdf/NT_final-report.pdf. *See also* International Criminal Court website, Link-Allied Tribunals of the Far East, Link-United States of America, Link-Yokohama Trials, is the Internet location for numerous trials of Japanese war criminals by the Eighth U.S. Army, https://www.legal-tools.org/en/browse/; *In re Yamashita*, 327 U.S. at 1 (1946).

The Department of Justice, Office of Legal Counsel observed that the phrase "otherwise authorized by law" in 10 U.S.C. § 973(b) need not be mentioned in the appointment statute to be effective.[6] The appointment statute does not, for example, need to indicate that the position to which a military officer is appointed in the appointment statute is an exception to the prohibition in 10 U.S.C. § 973.[7] Moreover, § 973's "'otherwise authorized by law' clause also does not list specific statutes authorizing active duty officers to hold particular civilian offices."[8]

In addition, 10 U.S.C. § 950f(b)(2), currently applying to only three military appellate judges assigned to the USCMCR, is more specific than 10 U.S.C. § 973(b)(2)(A)(ii) (currently over 1,000 Presidential appointments with Senate confirmation (PAS)),[9] and 10 U.S.C. § 950f was more recently amended than 10 U.S.C. § 973.[10]

Commander-in-Chief Clause of the U.S. Constitution

Appellee Mohammad explained his argument challenging the appointments of Presiding Judge Burton and Judge Herring as follows:

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[6] *See Whether a Military Officer May Continue on Terminal Leave After He Is Appointed to a Federal Civilian Position Covered by 10 U.S.C. § 973(b)(2)(A)*, 40 OP. O.L.C. 1, 2016 OLC LEXIS 3, *6-*7, *10-*11 (Mar. 24, 2016) (2016 OLC Opinion) (holding military commissioned officers are "authorized by law" to hold civilian offices while on terminal leave even though that "position was covered by [10 U.S.C.] section 973(b)(2)(A).").

[7] *See id.*

[8] *Id.* at *10 (citations omitted).

[9] There are about 1,212 Presidential appointments with Senate confirmation (PAS) and the PAS includes "[c]abinet secretaries and their deputies, the heads of most independent agencies, and ambassadors." Zach Piaker, Center for Presidential Transition, Partnership for Public Service website (Mar. 16, 2016), http://presidentialtransition.org/blog/posts/160316_help-wanted-4000-appointees.php. *See* Christopher M. Davis and Michael Greene, *Presidential Appointee Positions Requiring Senate Confirmation and Committees Handling Nominations*, Congressional Research Service RL30959 (May 3, 2017); Henry B. Hogue and Maeve P. Carey, *Appointment and Confirmation of Executive Branch Leadership: An Overview*, Congressional Research Service R44083 (June 22, 2015) (noting the PAS process involved more than 1,000 in Executive Branch alone). *See also, e.g., United States v. Burns*, 79 U.S. 246, 252 (1871) (concluding the Secretary of War held a "civil office," because the Secretary "is a civil officer with civil duties to perform, as much so as the head of any other of the executive departments."). *See also* 2016 OLC Opinion, *supra* n. 6, at *11-*13 (discussing "rule of relative specificity").

[10] *See* P.L. 112-81, Div A, Title X, Subtitle D, § 1034(c), 125 Stat. 1573 (Dec. 31, 2011) (most recent amendment of 10 U.S.C. § 950f); P.L. 108-136, Div A, Title V, Subtitle D[E], § 545, 117 Stat. 1479 (Nov. 24, 2003) (most recent amendment of 10 U.S.C. § 973). *See also United States v. Estate of Romani*, 523 U.S. 517, 532-33 (1998) (later, more specific statute governs); *Tenn. Gas Pipeline Co. v. FERC*, 626 F.2d 1020, 1022 (D.C. Cir. 1980) (citations omitted).

> Accepting an appointment as a federal appellate judge on an independent Article I court of record is constitutionally incompatible with the status of a serving commissioned officer. Judges appointed to the USCMCR under § 950f(b)(3) cannot be reassigned or otherwise removed from the USCMCR for any reason other than good cause. This level of tenure protection, only slightly below the "good behavior" tenure of an Article III judge, is irreconcilable with the President's constitutional authority as Commander-in-Chief and therefore cannot stand.
>
> * * *
>
> Even if Congress had contemplated the "appointment" of military officers to the principal office of USCMCR judge – which is inconsistent with the scheme of 10 U.S.C. § 950f – the good cause tenure that accompanies such an appointment would be an unconstitutional encroachment on the President's ability to direct and supervise the duties of those in the chain-of-command. *Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2095 (2015)) ("[W]hen a Presidential power is 'exclusive,' it 'disabl[es] the Congress from acting upon the subject.") (citation omitted); *Relation of the President to the Executive Departments*, 7 U.S. Op. Att'y. Gen. 453, 464 (1955); 1855 U.S. AG LEXIS 35 ("No act of Congress . . . can . . . authorize or create any military officer not subordinate to the President."). Unsurprisingly, there is no precedent for military officers simultaneously serving as principal officers with the attendant tenure protections for the chain-of command. *Orloff v. Willoughby*, 345 U.S. 83, 94 (1953) (failing to find a single "case where this Court has assumed to revise duty orders as to one lawfully in the service."). It is probably no coincidence that 10 U.S.C. § 973(b), discussed above, has long been a bar to military members' simultaneous holding of civil offices that could prevent the reassignment by their military chain of command.

Appellee Mohammad Motion 11-14.

The 2009 M.C.A. § 949b(b)(4) provides the reassignment limitations for USCMCR military appellate judges:

> (4) No appellate military judge on the United States Court of Military Commission Review may be reassigned to other duties, except under circumstances as follows:
>
> (A) The appellate military judge voluntarily requests to be reassigned to other duties and the Secretary of Defense, or the designee of the Secretary, in consultation with the Judge Advocate General of the armed force of which the appellate military judge is a member, approves such reassignment.

> (B) The appellate military judge retires or otherwise separates from the armed forces.
>
> (C) The appellate military judge is reassigned to other duties by the Secretary of Defense, or the designee of the Secretary, in consultation with the Judge Advocate General of the armed force of which the appellate military judge is a member, based on military necessity and such reassignment is consistent with service rotation regulations (to the extent such regulations are applicable).
>
> (D) The appellate military judge is withdrawn by the Secretary of Defense, or the designee of the Secretary, in consultation with the Judge Advocate General of the armed force of which the appellate military judge is a member, for good cause consistent with applicable procedures under chapter 47 of this title (the Uniform Code of Military Justice).

10 U.S.C. § 949b(b)(4).

The reassignment limitations in 10 U.S.C. § 949b(b)(4) along with other provisions in the 2009 M.C.A. are designed to ensure that the USCMCR is free from improper influence. Congress has an important role in ensuring Appellees' military commission is protected from improper influence, and one way of doing that is to limit reassignment of appellate military judges. Congress's important role is specifically defined in the U.S. Constitution. The preamble of the Constitution "provides for the common defence." To implement that goal, the Constitution sets forth the powers of Congress as follows:

> [T]he Constitution gives to Congress the power to "provide for the common Defence," Art. I, § 8, cl. 1; "To raise and support Armies," "To provide and maintain a Navy," Art. I, § 8, cl. 12, 13; and "To make Rules for the Government and Regulation of the land and naval Forces," Art. I, § 8, cl. 14. . . . And finally, the Constitution authorizes Congress "To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." Art. I, § 8, cl. 18.
>
> .

Quirin, 317 U.S. at 26. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 643 (1952) (Jackson, J., concurring). The USCMCR appellate judges are not the only entity where Congress has addressed assignments and reassignments. Congress has enacted several statutes limiting assignments of military officers. *See, e.g.*, 10 U.S.C. § 154(a)(3) (defining tour length of Vice Chairman of Joint Chiefs of Staff); *id.* at §§ 661, 664, 668 (defining the qualifications, duration, and standards for tours of officers in joint duty assignments); *id.* at § 671 (prohibiting assignment overseas on land before completing entry-level training); *id.* at § 1161 (limiting the President's authority to drop an officer from the rolls for misconduct); *id.* at § 3033 (limiting the time

an officer may serve as Chief of Staff of the Army). *See also, e.g., Clinton v. Goldsmith*, 526 U.S. 529, 532, 540 (1999) (reversing CAAF decision under the All Writs Act to enjoin the President and other officials from dropping Goldsmith from the Air Force rolls under 10 U.S.C. § 1161).

Conclusion

We affirm our previous decision that USCMCR military appellate judicial positions occupied by commissioned officers qualified under 10 U.S.C. §§ 826, 948j(b), and 950f(b)(2) initially assigned by the Secretary of Defense under 10 U.S.C. § 950f(b)(2), nominated by the President, confirmed by the Senate, and appointed by the President as "an Appellate Military Judge" under 10 U.S.C. § 950f(b)(3) to the USCMCR does not violate the civil office provision in 10 U.S.C. § 973(b). Military commissions are a traditional military function, and Presiding Judge Burton's and Judge Herring's service as military appellate judges is "authorized by law."

The limitation on the President's removal or reassignment authority in the 2009 M.C.A. § 949b(b)(4) does not violate the Constitution's Commander-in-Chief Clause. Appellee Mohammad's Motion does not establish disqualification of Presiding Judge Burton and Judge Herring. Accordingly, there is no basis to abate these proceedings.

O R D E R

Therefore, it is hereby

ORDERED that Appellee Mohammad's motion does not establish a basis to disqualify Presiding Judge Burton and Judge Herring, and his motion to disqualify them is DENIED. It is further

ORDERED that Appellee Mohammad's motion does not establish a basis to require three military appellate judges to be assigned to Appellee's panel, and his motion to require three military appellate judges to be assigned to his panel is DENIED. It is further

ORDERED that Appellee Mohammad's motion that this Court declare the limitation in the 2009 M.C.A. § 949b(b)(4) on the President's authority to reassign appellate military judges to be a violation of the Constitution's Commander-in-Chief clause is DENIED. It is further

ORDERED that Appellee Mohammad's motion to abate his appeal is DENIED.

FOR THE COURT:

Mark Harvey
Clerk of Court, U.S. Court of Military Commission Review

UNITED STATES
COURT OF MILITARY COMMISSION REVIEW

UNITED STATES, Appellant v. ABD AL RAHIM HUSSAYN MUHAMMAD AL-NASHIRI, Appellee	)	ORDER LIFTING STAY AFFIRMING PRIOR ORDERS DENYING DISQUALIFICATION AND RECUSAL MOTIONS SETTING ORAL ARGUMENT CMCR Case No. 14-001 May 18, 2016

BEFORE:

MITCHELL, PRESIDING Judge
KING, SILLIMAN Judges

On October 15, 2014, appellant requested oral argument. On October 16, 2014, appellee replied and did not object to oral argument. Oral argument was scheduled for November 13, 2014.

On October 14, 2014, appellee filed a petition for a writ of mandamus and prohibition in the Court of Appeals for the District of Columbia Circuit asking that court to order the disqualification of Judges Weber and Ward, the two military judges then on the panel assigned to hear the appeal. Appellee contended their assignment by the Secretary of Defense to our court violates the Commander-in-Chief Clause and the Appointments Clause of the U.S. Constitution. *See* Appellee's Pet. for Writ of Mandamus & Prohibition, *In re Al-Nashiri*, No. 14-1203 (D.C. Cir. Oct. 14, 2014).

On the eve of the oral argument, the Court of Appeals for the District of Columbia Circuit granted a stay in the proceedings for the purpose of giving it sufficient opportunity to consider appellee's mandamus petition. Order, *In re Al-Nashiri*, No. 14-1203 (D.C. Cir. Nov. 12, 2014).

On June 23, 2015, the Court of Appeals for the District of Columbia Circuit denied the appellee's mandamus petition, remanded the case back to our court, and lifted that Court's stay. *In re Al-Nashiri*, 791 F.3d 71 (D.C. Cir. 2015); Order, *In re Al-Nashiri*, No. 14-1203 (D.C. Cir. June 23, 2015).

On June 26, 2015, we granted the requests to hold this case in abeyance pending possible presidential nomination and Senate confirmation of the military appellate judges. *See In re Al-Nashiri*, 791 F.3d at 86 (suggesting such nomination and confirmation would "put to rest any Appointments Clause questions"). On March 14, 2016, the Senate received the nominations of Judges Mitchell and King to our court.[1] The Senate confirmed Judges Mitchell and King on April 28, 2016,[2] and they were sworn as USCMCR judges on May 2, 2016.

On April 29, 2016, appellant requested that we lift the stay and reaffirm our previous orders. Our court issued several procedural orders involving stays, extensions, recusals, and assignment of judges as well as the following substantive orders: granting on September 25, 2014, appellant's motion for leave to file an outsized brief; denying on October 6, 2014, appellee's motion to recuse the two military judges on the panel, alleging they were assigned to the USCMCR in violation of the Appointments Clause, U.S. Const. art. II, § 2, cl. 2, and could not be freely removed in violation of the Commander-in-Chief Clause, *id.* cl. 1; denying on October 6, 2014, appellee's motion to "terminate the devolution of its judicial responsibilities onto the Clerk of Court."; denying on October 10, 2014, appellee's motion to dismiss the appeal as untimely; and granting on October 20, 2014, appellant's motion to attach documents to the appendix accompanying its brief.

On April 30, 2016, appellee filed an unopposed request for an extension until May 16, 2016, to respond to appellant's motion, and we approved the extension request.

On May 16, 2016, we received appellee's response. Appellee moved to continue the stay; to disqualify the military judges, Judges Mitchell and King; and to recuse Judges Mitchell and King from deciding the disqualification motion. As one of several alternatives to disqualification, Appellee seeks an order "confirming Col Mitchell and CAPT King's newfound civilian status[.]" Appellee cites 16 Cong. Rec. 2599 (daily ed. Apr. 28, 2016)[3] and 10 U.S.C. 973(b) as the basis for disqualification. Appellee's reading of Cong. Rec. 2599 is taken out of context. PN 1219 and 1224 contain the complete description of

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[1] *See* 162 CONG. REC. S1474 (daily ed. Mar. 14, 2016) (indicating receipt of President's nominations of Colonel Martin T. Mitchell, U.S. Air Force, and Captain Donald C. King, U.S. Navy, as appellate military judges on the United States Court of Military Commission Review).

[2] U.S. Cong., Nominations of 114th Cong., PN 1219, https://www.congress.gov/nomination/114th-congress/1219 (Judge Mitchell), and PN 1224, https://www.congress.gov/nomination/114th-congress/1224 (Judge King). (Encl. 1, 2)

[3] The language of the 16 Cong. Rec. 2599 (daily ed. Apr. 28, 2016) is that the Senate confirmed the "Air Force nomination of Martin T. Mitchell, to be colonel" and "Navy nomination to Donald C. King, to be Captain." It mirrors the closing phrase of PN 1219 and 1224.

the nomination and confirmation process. Moreover, the Senate previously confirmed Judge Mitchell to Colonel, and Judge King to Captain more than two years ago. On April 28, 2016, the Senate confirmed Judges Mitchell and King as appellate military judges in accordance with the Secretary of Defense's recommendation and the President's nomination. *See* note 2, *supra*.

Appellee's reading of Cong. Rec. 2599 is taken out of context. PN 1219 and 1224 contain the complete description of the nomination and confirmation process.

Title 10 U.S.C. § 973(b)(2)(A) provides, "Except as otherwise authorized by law, an officer to whom this subsection applies may not hold, or exercise the functions of, a civil office in the Government of the United States-- . . . (ii) that requires an appointment by the President by and with the advice and consent of the Senate." Appellate military judges are specifically authorized by law under 10 U.S.C. § 950f(b)(2), and 10 U.S.C. § 973(b)(2) does not prohibit Judges Mitchell and King from acting as appellate military judges.[4] Title 10 U.S.C. §§ 950f(b)(2) and 973(b)(2) do not define the term "civil office", and there is no evidence that Congress intended commissioned officers appointed as appellate military judges to the Court of Military Commission Review to occupy a civil office.[5] The 2009 Military Commissions Act states, "The Court shall consist of one or more panels, each composed of not less than three appellate military judges." 10 U.S.C. § 950f(a). Military commissions are used "to try alien unprivileged enemy belligerents for violations of the law of war and other offenses triable by military commission." 10 U.S.C. § 948b(a). Disposition of violations of the law of war by military commissions is a classic military function and Judges Mitchell and King do not occupy a "civil office" when serving as appellate military judges on the Court of Military Commission Review.

Therefore, it is hereby

ORDERED that appellant's April 29, 2016 request to lift our stay of litigation of appellant's appeals, which were initially filed on September 19, 2014 and March 27, 2015, is **GRANTED**.

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[4] Title 10 U.S.C. § 950f(b)(2) states, "The Secretary of Defense may assign persons who are appellate military judges to be judges on the Court. Any judge so assigned shall be a commissioned officer of the armed forces, and shall meet the qualifications for military judges prescribed by section 948j(b) of this title."

[5] *See* Department of Defense Directive Number 1344.10, Political Activities by Members of the Armed Forces (Feb. 19, 2008) Section E2.3. (defining "civil office" as "A non-military office involving the exercise of the powers or authority of civil government, to include elective and appointed office in the U.S. Government, a U.S. territory or possession, State, county, municipality, or official subdivision thereof. This term does not include a non-elective position as a regular or reserve member of civilian law enforcement, fire, or rescue squad.").

ORDERED that appellant's motion that we reconsider the orders our Court previously decided in this case is **GRANTED**.

ORDERED that orders our Court previously decided are **AFFIRMED**.

ORDERED that Judges Mitchell and King have considered appellee's May 16, 2016 motion to recuse. Judges Mitchell and King have declined to recuse themselves. The motion to recuse is **DENIED**.

ORDERED that appellee's May 16, 2016 motion to disqualify Colonel Mitchell and Captain King is **DENIED**.

ORDERED that oral argument will be heard at 10:00 a.m. Eastern Time on June 2, 2016, in Courtroom 201, United States Court of Appeals for the Federal Circuit, 717 Madison Place, NW, Washington, DC.

FOR THE COURT:

Mark Harvey
Clerk of Court, U.S. Court of Military Commission Review

Appendix A

CONGRESS.GOV | Legislation | Congressional Record | Committees | Members

BACK TO RESULTS

PN1219 — Martin T. Mitchell — Air Force

114th Congress (2015-2016)

NOMINATION — Hide Overview

Confirmed on 04/28/2016.

Description
The following named officer for appointment in the grade indicated in the United States Air Force as an appellate military judge on the United States Court of Military Commission Review under title 10 U.S.C. section 950f(b)(3). In accordance with their continued status as an appellate military judge pursuant to their assignment by the Secretary of Defense and under 10 U.S.C. section 950f(b)(2), while serving on the United States Court of Military Commission Review, all unlawful influence prohibitions remain under 10 U.S.C. section 949b(b).

To be Colonel
Martin T. Mitchell

Organization
Air Force

Latest Action
04/28/2016 - Confirmed by the Senate by Voice Vote.

Date Received from President
03/14/2016

Committee
Senate Armed Services

Actions: PN1219 — 114th Congress (2015-2016)

Sort by Newest to Oldest GO

Date	Senate Actions
04/28/2016	Confirmed by the Senate by Voice Vote.
04/26/2016	Placed on Senate Executive Calendar. Calendar No. DESK.
04/26/2016	Reported by Senator McCain, Committee on Armed Services, without printed report.
03/14/2016	Received in the Senate and referred to the Committee on Armed Services.

Appendix A

CONGRESS.GOV Legislation Congressional Record Committees Members

BACK TO RESULTS

PN1224 — Donald C. King — Navy

114th Congress (2015-2016)

NOMINATION Hide Overview

Confirmed on 04/28/2016.

Description
The following named officer for appointment in the grade indicated in the United States Navy as an appellate military judge on the United States Court of Military Commission Review under title 10 U.S.C. section 950f(b)(3). In accordance with their continued status as an appellate military judge pursuant to their assignment by the Secretary of Defense and under 10 U.S.C. section 950f(b)(2), while serving on the United States Court of Military Commission Review, all unlawful influence prohibitions remain under 10 U.S.C. section 949b(b):

To be Captain
Donald C. King

Organization
Navy

Latest Action
04/28/2016 - Confirmed by the Senate by Voice Vote.

Date Received from President
03/14/2016

Committee
Senate Armed Services

Actions: PN1224 — 114th Congress (2015-2016)

Sort by Newest to Oldest GO

Date	Senate Actions
04/28/2016	Confirmed by the Senate by Voice Vote.
04/26/2016	Placed on Senate Executive Calendar. Calendar No. DESK.
04/26/2016	Reported by Senator McCain, Committee on Armed Services, without printed report.
03/14/2016	Received in the Senate and referred to the Committee on Armed Services.

Appendix B

UNITED STATES
COURT OF MILITARY COMMISSION REVIEW

OMAR AHMED KHADR,	)	
	)	ORDER
Appellant	)	
	)	RECUSAL OF JUDGES
v.	)	WARD AND WEBER
	)	
UNITED STATES,	)	CMCR Case No. 13-005
	)	
Appellee	)	October 17, 2014

BEFORE:

POLLARD, PRESIDING Judge
WARD, WEBER, Judges

On August 15, 2014, appellant moved Judges Ward and Weber to recuse themselves from his case because "Congress's effort to insulate the military officers assigned to the Court from the President's authority as Commander-in-Chief violates [Constitutional notions of] separation of powers." Appellant's Motion to Recuse Judges Ward and Weber 1. Alternatively, appellant argues that "the Secretary of Defense's assignment of active duty military officers to serve as principal officers on an independent Article I court violates the Appointments Clause," U.S. Const., art. II, § 2, cl. 2. *Id.* Appellee opposes the motion, asserting that "even if appellate military judges assigned to duty on the [U.S. Court of Military Commission Review (USCMCR)] are principal officers, they have already been appointed in accordance with the Appointments Clause as commissioned officers," and that USCMCR appellate judges "are properly considered inferior officers" because the Secretary of Defense has statutory authority to assign and reassign them to other duties. Response to Motion to Recuse Judges Ward and Weber 1-2. Additionally, appellee opposes the motion because it asserts 10 U.S.C. § 949b(b)(4), setting forth the circumstances under which appellate military judges assigned to the USCMCR may be reassigned to other duties, does not encroach "upon the Commander in Chief's ability to use military resources to protect the national interest." *Id.* at 2.

The appointments of Judges Ward and Weber to the USCMCR and their continued service on the USCMCR are lawful and consistent with the Appointments Clause, the Military Commissions Act of 2009, 10 U.S.C. §§ 948a

et. seq., and Constitutional principles of separation of powers. Concerning appellant's separation of powers challenge, 10 U.S.C. § 949b(b)(4) permits appellate military judges on the USCMCR to be reassigned to other duties based on military necessity, consistent with applicable service rotation regulations. Concerning appellant's Appointments Clause challenge, the Supreme Court in *Weiss v. United States*, 510 U.S. 163 (1994) rejected a requirement for military officers assigned to the service Court of Criminal Appeals to receive another appointment, noting that "[a]ll of the military judges involved in these cases, however, were already commissioned officers when they were assigned to serve as judges, and thus they had already been appointed by the President with the advice and consent of the Senate." *Id.* at 170. Therefore, military judges on those courts did not require another appointment. *Id.* at 176. *See also Edmond v. United States*, 520 U.S. 651, 654 (1997) (noting that *Weiss* upheld the judicial assignments of military judges "because each of the military judges had been previously appointed by the President as a commissioned military officer, and was serving on active duty under that commission at the time he was assigned to a military court."). We find *Weiss* applicable here.

Accordingly, Judges Ward and Weber decline to recuse themselves from appellant's case.

It is hereby,

ORDERED that the abeyance order dated July 11, 2014 is lifted to the extent necessary to resolve the motion addressed by this Order regarding the request that Judges Ward and Weber recuse themselves from appellant's case.

ORDERED that appellant's motion that Judges Ward and Weber recuse themselves from appellant's case is **DENIED**.

FOR THE COURT:

Mark Harvey
Clerk of Court, U.S. Court of Military Commission Review

UNITED STATES COURT OF MILITARY COMMISSION REVIEW

BEFORE THE COURT
BURTON, CHIEF JUDGE, SILLIMAN, DEPUTY CHIEF JUDGE, AND HERRING, Appellate Judge

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UNITED STATES OF AMERICA,
APPELLANT

v.

KHALID SHAIKH MOHAMMAD, WALID MUHAMMAD SALIH MUBAREK BIN 'ATTASH, RAMZI BIN AL SHIBH, ALI ABDUL-AZIZ ALI AKA AMMAR AL BALUCHI, AND MUSTAFA AHMED ADAM AL HAWSAWI,
APPELLEES

CMCR 17-002

June 29, 2017

Colonel James L. Pohl, JA, U.S. Army, Military Commission Judge.

Brigadier General Mark S. Martins, U.S. Army, and *Michael J. O'Sullivan* on the briefs for Appellant.

James G. Connell, III, Alka Pradhan, Lieutenant Colonel Sterling R. Thomas, U.S. Air Force, *Major Raashid S. Williams,* JA, U.S. Army, and *Major Jason Wareham*, U.S. Marine Corps on the brief for Appellee Ali Abdul-Aziz Ali AKA Ammar al Baluchi.

David Z. Nevin, Gary D. Sowards, Major Derek A. Poteet, U.S. Marine Corps, and *Rita Radostitz* on the brief for Appellee Khalid Shaikh Mohammad.

Cheryl T. Bormann, Edwin A. Perry, Major Matthew H. Seeger, JA, U.S. Army, and *Captain Brian D. Brady*, U.S. Air Force, on the brief for Appellee Walid Muhammad Salih Mubarek bin 'Atash.

James P. Harrington, Alaina M. Wichner, and *Major Christopher R. Lanks*, U.S. Air Force, on the brief for Appellee Ramzi Bin al Shibh.

Watler B. Ruiz, Sean M. Gleason, Suzanne M. Lachelier, and *Joseph D. Wilkinson II*, for Appellee Mustafa Ahmed Adam al Hawsawi.

PUBLISHED OPINION OF THE COURT

Opinion filed by BURTON, Chief Judge.

BURTON, Presiding Judge:

This interlocutory appeal arises from the Military Commission Judge's decision to "terminate[] proceedings of the military commission with respect to a charge or specification" under 10 U.S.C. § 950d(a)(1). *See* Manual for Military Commissions (2012) (M.M.C), Rule for Military Commissions (R.M.C.) 908(a)(1). The Military Commission Judge dismissed Charges III and V because he ruled that the charges were barred by the statute of limitations in Article 43, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 943 and the Ex Post Facto Clause of the U.S. Constitution. We disagree and hold that Article 43 is not applicable to military commissions authorized by the Military Commissions Act (M.C.A.).[1] Title 10 U.S.C. 950t contains the unlimited statute of limitation that governs Appellees' military commission, and an unlimited statute of limitations has been in effect for U.S. military commissions for offenses occurring during hostilities since the war crimes trials of the late 1940s. Prosecution of Charges III and V does not violate the Ex Post Facto Clause.

Statement of the Case

On May 31, 2011, Appellees were charged for their alleged involvement in the attacks on the World Trade Center and the Pentagon on September 11, 2001, resulting in the deaths of 2,976 people. Appellant App. 39-53. On April 4, 2012, the Convening Authority referred to trial by a "capital military commission" the following seven charges:

> (I) conspiracy to commit offenses triable by a military commission, to wit, attacking civilians, attacking civilian objects, intentionally causing serious bodily injury, murder in violation of the law of war, destruction of property in violation of the law of war, hijacking or hazarding a vessel or aircraft, and terrorism, *id.* § 950t(29); (II) attacking civilians, *id.* § 950t(2); (III) attacking civilian objects, *id.* § 950t(3); (IV) murder in violation of the law of war, *id.* § 950t(15); (V) destruction of property in violation of the law of war, *id.* § 950t(16); (VI) hijacking or hazarding a vessel or aircraft, *id.* § 950t(23); and (VII) terrorism, *id.* § 950t(24).

[1] The Military Commissions Act of 2006 (2006 M.C.A.), Pub. L. No. 109-366, 120 Stat. 2600, 10 U.S.C. 948a, *et. seq.*, became law on October 17, 2006. The Military Commissions Act of 2009 (2009 M.C.A.), Pub. L. No. 111-84, 123 Stat. 2574, 10 U.S.C. §§ 948a-950t, became law on October 28, 2009.

Appellant Br. 2-3 (citing Appellant App. 408-29).

On January 25, 2012, Appellees were charged with the Additional Charge "of intentionally causing serious bodily injury, 10 U.S.C. § 950t(13)," and on April 4, 2012, the Convening Authority referred the Additional Charge to trial by military commission. Appellant Br. 3 (citing Appellant App. 142-61).

On May 5, 2012, Appellees were arraigned. *Id.* They have not entered a plea to any of the charges. *Id.* On April 7, 2017, the Military Commission Judge dismissed with prejudice Charges III and V. Appellant App. 408-29.[2] Appellant timely filed an appeal from this decision.

Statement of Facts

The Military Commission Judge concluded that the five-year statute of limitations made applicable to courts-martial under Article 43, UCMJ must be applied to Charges III and V in Appellees' military commission. The Military Commission Judge observed:

> [T]his matter turns on the question of what statute of limitations—if any—applied from the time the offenses alleged in Charges III and V were committed through the passage of the M.C.A. 2006. If the offenses thereby became time-barred prior to the M.C.A. 2006's passage,[3] then, under *Stogner* [*v. California*, 539 U.S. 607, 611 (2003)], they must be dismissed.

[2] The 2009 M.C.A. § 950t(3) and (16) state:

> § 950(t) *Crimes triable by military commission*
> The following offenses shall be triable by military commission under this chapter [10 USCS §§ 948a et seq.] at any time without limitation:
>
> * * *
>
> (3) *Attacking civilian objects.* Any person subject to this chapter [10 USCS §§ 948a et seq.] who intentionally engages in an attack upon a civilian object that is not a military objective shall be punished as a military commission under this chapter [10 USCS §§ 948a et seq.] may direct.
>
> * * *
>
> (16) *Destruction of property in violation of the law of war.* Any person subject to this chapter [10 USCS §§ 948a et seq.] who intentionally destroys property belonging to another person in violation of the law of war shall punished as a military commission under this chapter [10 USCS §§ 948a et seq.] may direct.

[3] The 2006 M.C.A. § 950v(b) indefinitely extended the statute of limitations for Charges III and V, and it became law on October 17, 2006. (10 U.S.C. § 950v(b) states, "The . . . offenses shall be triable by military commission under this chapter at any time without limitation[.]"). *See Stogner v. California*, 539 U.S. 607, 618 (2003) (citations omitted) ("[E]xtension of existing limitations periods is not ex post facto 'provided,' . . . the prior limitations periods have not expired.").

Appellant App. 422-23.[4]

Distinguishing *In re Yamashita*, 327 U.S. 1, 11-12 (1946), the Military Commission Judge decided the "jurisdictional authority to convene a military commission at any time during the existence of a conflict does not necessarily foreclose the ability to establish procedural controls limiting the exercise [of] that authority" such as by imposition of statutes of limitation. Appellant App. 426.

The Military Commission Judge considered the version of Article 36, UCMJ, 10 U.S.C. § 836 (2000) in effect on September 11, 2001, to be of critical importance to his analysis. Article 36, UCMJ (2000) stated:

> **President may prescribe rules.**
>
> (a) Pretrial, trial, and post-trial procedures, including modes of proof, for cases arising under this chapter [10 USCS §§ 801 et seq.] triable in courts-martial, military commissions and other military tribunals, and procedures for courts of inquiry, may be prescribed by the President by regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with this chapter [10 USCS §§ 801 et seq.].
>
> (b) All rules and regulations made under this article shall be uniform insofar as practicable.

Quoting from *Hamdan v. Rumsfeld*, 548 U.S. 557, 620 (2006), the Military Commission Judge stated:

> Article 36 places two restrictions on the President's power to promulgate rules of procedure for courts-martial and military commissions alike. First, no procedural rule he adopts may be "contrary to or inconsistent with" the UCMJ—however practical it may seem. Second, the rules adopted must be "uniform insofar as practicable." That is, *the rules applied to military commissions must be the same as those applied to courts-martial unless such uniformity proves impracticable.*

Appellant App. 418 (emphasis added by Military Commission Judge).

The 2006 M.C.A. §§ 4(a)(2) and (3) amended the UCMJ as follows:

[4] Appellant App. 408-429 is the Military Commission Judge's April 7, 2017 ruling dismissing Charges III and V as barred by the statute of limitations in Article 43, Uniform Code of Military Justice (UCMJ). AE 251J.

(2) *Exclusion of Applicability to Chapter 47A Commissions.*—Sections 821, 828, 848, 850(a), 904, and 906 (articles 21, 28, 48, 50(a), 104, and 106) are amended by adding at the end the following new sentence: "This section does not apply to a military commission established under chapter 47A of this title."

(3) *Inapplicability of Requirements Relating to Regulations.*—Section 836 (article 36) is amended—(A) in subsection (a), by inserting ", except as provided in chapter 47A of this title," after "but which may not"; and (B) in subsection (b), by inserting before the period at the end ", except insofar as applicable to military commissions established under chapter 47A of this title".

The version of Article 43 in effect on September 11, 2001, provided as follows:

(a) A person charged with absence without leave or missing movement in time of war, or with any offense punishable by death, may be tried and punished at any time without limitation.

(b)(1) Except as otherwise provided in this section (article), a person charged with an offense is not liable to be tried by court-martial if the offense was committed more than five years before the receipt of sworn charges and specifications by an officer exercising summary court-martial jurisdiction over the command.

* * *

(c) Periods in which the accused is absent without authority or fleeing from justice shall be excluded in computing the period of limitation prescribed in this section (article).

(d) Periods in which the accused was absent from territory in which the United States has the authority to apprehend him, or in the custody of civil authorities,[5] or in the hands of the enemy, shall be excluded in computing the period of limitation prescribed in this article.

[5] There was no evidence presented on the statute of limitations motion about Appellees being "in the custody of civil authorities" at the military commission. The parties provided information about Appellees' capture by U.S. forces in their briefs. *See, e.g.*, Appellee Bin al Shibh Br. 2 ("Mr. Bin al Shibh was captured and detained in September 2002 by the hands of the United States Government in the Central Intelligence Agency's Rendition, Detention, and Interrogation Program. He was held incommunicado at undisclosed locations around the world until 2006, when he was transferred to his current location at Guantanamo Bay, Cuba."). In March 2003, Appellees Mohammad and Hawsawi were captured. Appellant Br. 6, 14. In April 2003, Appellees Bin 'Attash and Ali were captured. *Id.* (citing AE 31 at 4-5, Appellant App. 165-66). All appellees were captured outside of the United States. *Id.*

> (e) For an offense the trial of which in time of war is certified to the President by the Secretary concerned to be detrimental to the prosecution of the war or inimical to the national security, the period of limitation prescribed in this article is extended to six months after the termination of hostilities as proclaimed by the President or by a joint resolution of Congress.[6]

Because the 2006 M.C.A. § 950v(b) and 2009 M.C.A. § 950t indicate crimes triable by military commission "shall be triable by military commission under this chapter at any time without limitation," the M.M.C. does not describe how the pertinent time periods to assess the statute of limitations would be calculated. The Military Commission Judge explained that the statute of limitations for military commissions is tolled as follows:

> At court-martial, the statute of limitations tolls when preferred charges are received by the officer exercising summary-court martial convening authority over the accused. 10 U.S.C § 843(b)(1). The most analogous act under the R.M.C. is receipt of charges by the Convening Authority for disposition. *See* Regulation for Trial by Military Commission, paras. 2-3.a; 3-3; 4-3 (2011); R.M.C., Ch. IV. Accordingly, for purposes of the present matter, the Commission determines this to be the relevant date.

Appellant App. 422 at n. 74. The Military Commission Judge calculated that from September 11, 2001, the date of the alleged offenses in Charges III and V, to April 15, 2008, the date the Convening Authority received the charges totaled six years, seven months, and four days. Appellant App. 422 and n. 75.

During the litigation on the motion, the parties indicated Appellees had the burden of proof on the motion. Appellant Br. 15 n. 10 (citations omitted). After the parties presented their facts and arguments, the Military Commission Judge commented that Appellee would normally have the burden of persuasion under R.M.C. § 905(c)(1)-(2)[7] "regarding any factual issues predicate to the relief he seeks." He concluded Appellee had raised the statute of limitations; and "the burden then shift[ed] to the Government to establish that the offenses are not, in fact, time-barred." Appellant App. 411-12.

The Military Commission Judge did not inform the parties that Appellant had the burden of establishing tolling periods under Article 43(c) and 43(d), UCMJ. *See* Military Commissions Trial Judiciary Rule of Court (RC) 3.8 (2014 ed. and 2016 ed.) (requiring a party to provide notice when claiming a shift in

[6] Article 43(e), UCMJ, does not apply. The President or a joint resolution of Congress have not proclaimed termination of hostilities.

[7] Rule for Military Commission 905(c) ("(c) *Burden of proof.* (1) *Standard.* Unless otherwise provided in this Manual, the burden of proof on any factual issue the resolution of which is necessary to decide a motion shall be by a preponderance of the evidence. (2) *Assignment.* (A) Except as otherwise provided in this Manual the burden of persuasion on any factual issue the resolution of which is necessary to decide a motion shall be on the moving party. . . .").

the burden of persuasion). Appellant Br. 15 n. 10 (citing Appellant App. 1305, 1310-11)).

The Military Commission Judge relied on *Musacchio v United States*, 136 S. Ct. 709 (2016), which states, "When a defendant presses a limitations defense, the Government then bears the burden of establishing compliance with the statute of limitations by presenting evidence that the crime was committed within the limitations period or by establishing an exception to the limitations period." *Id.* at 718 (citing *United States v. Cook*, 84 U.S. 168, 179 (1872)).

The Military Commission Judge concluded:

> [T]he Commission is persuaded that, prior to passage of the M.C.A. 2006, absent effective action by the Government establishing [a] differing procedure in accordance with Article 36 of the U.C.M.J. (as construed by the *Hamdan* Court), court-martial procedure was applicable to military commissions—to include Article 43, U.C.M.J. The [customary international law (CIL)] principle cited by the Government, however well-established, cannot override the U.C.M.J.—a domestic statute. The Government has cited no authority sufficient to contravene Articles 36 and 43 of the U.C.M.J. in this regard.

Appellant App. 427.

Standard of Review

Our review of Government appeals under 10 U.S.C. § 950d(a)(1)-(3) is limited to matters of law. The application of Article 43 is a question of law and is subject to *de novo* review. *See United States v. Villanueva-Sotelo*, 515 F.3d 1234, 1237 (D.C. Cir. 2008) ("The government now appeals. Because this case presents a pure question of statutory interpretation, we review the district court's decision *de novo*.") (citation omitted); *United States v. Lopez de Victoria*, 66 M.J. 67, 73 n. 11 (C.A.A.F. 2008) (citation omitted); *United States v. Khadr*, 717 F. Supp. 2d 1215, 1220 (C.M.C.R. 2007) (citations omitted).

Ex Post Facto Clause

We agree with the parties that the Ex Post Facto Clause is applicable to analysis of the application of statute of limitations to Charges III and V.[8] Appellant Br. 23; Appellee Br. 10, 13. 55-56. In 1798, Justice Chase listed the

[8] *See Al Bahlul v. United States*, 767 F.3d 1, 18 (D.C. Cir. 2014) (en banc), *reconsidered*, 840 F.3d 757 (D.C. Cir. 2016) (en banc), *remanded for sentence reassessment*, 2015 U.S. App. LEXIS 16967 (D.C. Cir. 2016) (noting the Government's concession that the Ex Post Facto Clause applies, and stating "we will assume without deciding that the Ex Post Facto Clause applies at Guantanamo. In so doing, we are 'not to be understood as remotely intimating in any degree an opinion on the question.'").

four kinds of laws that violate the prohibition against ex post facto laws in Article 1, Section 9, Clause 3 of the U.S. Constitution.

> 1st. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action. 2d. Every law that aggravates a crime, or makes it greater than it was, when committed. 3d. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed. 4th. Every law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offence, in order to convict the offender. All these, and similar laws, are manifestly unjust and oppressive.

Calder v. Bull, 3 U.S. 386, 390-91 (1798) (opinion of Chase, J.) (1798). "[E]xtending a limitations period after the State has assured 'a man that he has become safe from its pursuit . . . seems to most of us unfair and dishonest.'" *Stogner*, 539 U.S. at 611 (citing *Falter v. United States*, 23 F.2d 420, 426 (2d Cir. 1928)). "'The statute [of limitations] is . . . an amnesty, declaring that after a certain time . . . the offender shall be at liberty to return to his country . . . and . . . may cease to preserve the proofs of his innocence.'" *Id.* at 611 (quoting F. Wharton, *Criminal Pleading and Practice* § 316, p. 210 (8th ed. 1880)). Permitting extension of the statute of limitations "risks both 'arbitrary and potentially vindictive legislation,' and erosion of the separation of powers." *Id.* (citations omitted).

In *Stogner*, the Supreme Court found that "California's law falls within the literal terms of Justice Chase's second category," and "it may fall within [the fourth] category as well." *Id.* at 615. The Court held that a state statute extending a criminal limitations period for child sex abuse violated the Ex Post Facto Clause, when applied to revive offenses that were time-barred when the statute was enacted. *Stogner*, 539 U.S. at 609-10.

Section 950v(b) of the 2006 M.C.A, and section 950t of the 2009 M.C.A. indicate crimes triable by military commission "shall be triable by military commission under this chapter at any time without limitation." President Bush and President Obama and two Congresses determined that no statute of limitations should apply to the offenses committed on September 11, 2001. *See* 10 U.S.C. § 948d (granting jurisdiction "before, on, or after" 9/11). In order to avoid an obvious ex post facto problem, two Presidents and Congress had to conclude that the M.C.A. is a codification of common law of war principles that existed on September 11, 2001. *See* President Bush's Remarks on Signing the Military Commissions Act of 2006 (Oct. 17, 2006) in Administration of George W. Bush 1833 (2006) ("When I sign this bill into law, we will use these commissions to bring justice to the men believed to have planned the attacks of September the 11th, 2001," as well as others who are alleged to have committed law of war offenses before September 11, 2001.), https://www.gpo.gov/fdsys/pkg/WCPD-2006-10-23/pdf/WCPD-2006-10-23-Pg1831.pdf.

We look to historical practice of U.S. military commissions before enactment of the M.C.A. for precedent relating to whether military commissions were limited to the statute of limitations used by courts-martial. *See Al Bahlul v. United States*, 840 F.3d 757, 764 (D.C. Cir. 2016) (en banc) (citing *Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2091 (2015) ("In separation-of-powers cases this Court has often put significant weight upon historical practice.") (internal quotation marks omitted); *NLRB v. Canning*, 134 S. Ct. 2550, 2560 (2014) ("[L]ongstanding practice of the government can inform our determination of what the law is") (internal quotation marks and citations omitted). We will also consider, in turn, whether customary international law established an unlimited statute of limitations.[9]

Civil War Era

The Supreme Court addressed war-time extension of statutes of limitations in two post-Civil War decisions. The Court held that commercial "statutes of limitations were tolled for 'the time during which the courts in the States lately in rebellion were closed to the citizens of the loyal States.'" *Stogner*, 539 U.S. at 620 (quoting *Stewart v. Kahn*, 78 U.S. 493, 503 (1871); citing *Hanger v. Abbott*, 73 U.S. 532, 539-42 (1868)). The Supreme Court in *Hanger* upheld an 1864 statute extending the statute of limitations for criminal and civil cases "for periods during which the war had made service of process impossible or courts inaccessible." *Id.* (citing *Hanger*, 73 U.S. at 541). The Court in *Stogner* suggested that the Court in *Stewart* "could have seen the [1864] statute as ratifying a pre-existing expectation of tolling due to wartime exigencies, rather than as extending limitations periods that had truly expired." *Id.* (citing *Hanger*, 73 U.S. at 541; *Stewart*, 78 U.S. at 507). "Significantly, in reviewing this civil case, the Court upheld the statute as an exercise of Congress' war powers without explicit consideration of any potential collision with the Ex Post Facto Clause." *Id.* (internal citation omitted).

In 1806, Article of War 88 included a two-year statute of limitations for criminal offenses at court-martial that would run from the date of the offense unless the accused "by reason of having absented himself, or some other manifest impediment, shall not have been amenable to justice within that period."[10] In 1874, Article of War 103 was enacted, and it included the

[9] We agree with the parties that "no enactment of Congress can be challenged on the ground that it violates customary international law." Appellee Br. 49 (quoting *Committee of United States Citizens Living in Nicaragua v. Reagan*, 859 F.2d 929, 939 (D.C. Cir. 1988) and citing *Oliva v. United States*, 433 F.3d 229, 233-34 (2d Cir. 2005); *Tag v. Rogers*, 267 F.2d 664, 666 (D.C. Cir. 1959)); Appellant Br. 39 ("clear and controlling domestic law takes precedence over international law").

[10] William Winthrop, *Military Law and Precedents* at 984 (2d ed. 1920) (1920 Winthrop) (quoting Article of War 88 (1806), Act of Apr. 10, 1806, ch. 20, 2 Stat. 359). Article of War 88 reads:

"manifest impediment" exception to the two-year statute of limitations.[11] Article of War 39 in enactments of 1916 and 1920 contained the same manifest impediment exception.[12]

On September 28, 1864, Brigadier General (BG) Joseph Holt wrote Major H. L. Burnett about whether certain offenses should be tried by military commission or courts-martial and which procedures from courts-martial should be used for military commissions. Appellant App. 953-57. BG Holt said that the 88th Article of War, *see supra* note 10, was applicable to military commissions, stating:

> Your view, that proceedings before Military Commissions should not be subject to the limitation prescribed by the 88th Article of War, in the case of a prosecution before a Court Martial, is not concurred in. It has been the uniform ruling of this Bureau that the military commission should be assimilated to the Court Martial in the rules which govern its constitution and in its forms of proceeding generally; and it is deemed most important that this correspondence should be maintained as far as possible. . . . Moreover [the inclusion of the "practice[s] of ordinary criminal courts" in military commissions] would tend to defeat the ends of the legislation of Congress, which in placing the military commission in many respects upon the same footing with the Court Martial has evidently contemplated the application to the former, *as far as practicable*,[13] of the statutory rules of procedures which prevail in the case of the latter.

Appellant App. 958-60 (emphasis added). BG Holt did not indicate the criteria for determining when the two-year statute of limitations in the 88th Article of

> No person shall be liable to be tried and punished by a general court-martial for any offense which shall appear to have been committed more than two years before the issuing of the order for such trial, unless the person, by reason of having absented himself, or such other manifest impediment, shall not have been amenable to justice within that period.

Id. at 984.

[11] *Id.* at 994 (quoting Article of War 103 (1874) in Rev. Stat. § 1342 (The American Articles of War of 1874 (2d ed. June 22, 1874). Appellant App. 17, 478. Congress amended Article of War 103 on April 11, 1890, in 26 Stat. 54 to exclude time outside the United States in cases of desertion. *See* 1920 Winthrop at 998. *See also United States v. Troxell*, 30 C.M.R. 586 (NBR 1960), *rev'd*, 12 USCMA 6, 30 CMR 6 (1960) (discussing statutes of limitations).

[12] Act of Aug. 29, 1916, ch. 418, § 3, 39 Stat. 619, 656 (1916 Articles of War). Appellant App. 479-484; Act of June 4, 1920, ch. 227, 41 Stat. 759, 794 (1920 Articles of War). Appellant App. 485-490.

[13] *See Hamdan v. Rumsfeld*, 548 U.S. 557, 622 (2006) ("Without reaching the question whether any provision of Commission Order No. 1 is strictly 'contrary to or inconsistent with' other provisions of the U.C.M.J., we conclude that the 'practicability' determination the President has made is insufficient to justify variances from the procedures governing courts-martial.") (citations omitted).

War was not "practical." The letter from BG Holt of September 1864 is the reference cited in the JAG Digests of 1880, 1895, 1901, 1912, and 1917 concerning the statute of limitations applicable to military commissions during the Civil War. Appellant App. 958-60. *See also infra* note 14.

Colonel William Winthrop, the "Blackstone of military law," *see Hamdan*, 548 U.S. at 597 (plurality opinion) (citing *Reid v. Covert*, 354 U.S. 1, 19 n. 38 (1957) (plurality opinion)), authored the 1880 and 1895 Digests of the Judge Advocate General (JAG Digests), where he indicated the court-martial "two-years limitation would properly be applied to prosecutions before" military commissions; however, this feature is not "made *essential* by statute."[14]

With regard to general courts-martial, Winthrop explains that the term, "manifest impediment,"

> refers to such conditions as the being held as a prisoner of war in the hands of the enemy, or the being imprisoned under the sentence of a civil court upon conviction of crime—during the whole or a portion of the period of limitation. More generally, the Attorney General defines this term as meaning "something akin to absence," i. e. "want of power or physical inability to bring the party charged to trial."

1920 Winthrop at 257 (internal footnotes omitted). Some contemporaries of Colonel Winthrop indicated the two-year statute of limitations for courts-martial applied to military commissions.[15] Major General Davis stated:

> The period of time within which prosecutions must be instituted at military law is fixed by the 103d Article of War, as to all military offenses except desertion in time of peace, at two years prior to issue of the order for such trial, unless the offender "by reason of having absented himself, or *of some other manifest impediment*, he shall not have been amenable to justice within that period."[16]

[14] 1895 JAG Digest 501 (emphasis in original). Appellant App. 964-65; 1880 JAG Digest 327, Appellant App. 962-63. *See also* Captain Charles Howland, 1912 JAG Digest 1070, *reprinted in* Govt. Printing Office (1917) ("In view of the analogy prevailing . . . between these bodies and courts-martial, [it has been] held . . . that the two years' limitation would properly be applied to prosecutions before [military commissions]."). Appellant App. 968-73; Major Charles McClure, 1901 JAG Digest 463 (stating same). Appellant App. 966-67. All cited JAG Digests refer to Record Books of the Bureau, vol. IX, pg. 657 (Sept. 1864). *See, e.g.*, 1912 JAG Digest 1070. Appellant App. 970. *See also, e.g.*, Military Commission Judge Decision, at 20 & n. 97, Appellant App. 427 & n. 97.

[15] *See, e.g.*, Major General George B. Davis, *A Treatise on the Military Law of the United States Together With the Practice and Procedure of Courts-Martial and Other Military Tribunals* 313 (3d ed., rev. 1915) (stating same). Appellant App. 1327-28.

[16] Major General George B. Davis, *A Treatise on the Military Law of the United States Together With the Practice and Procedure of Courts-Martial and Other Military Tribunals* 111 (2d ed., rev. 1909) (emphasis added).

Winthrop's 1895 JAG Digest listed the following established "manifest impediments" to applying the statute of limitations under Article of War 103:

> Absence from the United States as a fugitive from civil justice. Absence from the United States originally by authority but protracted by reason of detention by the authorities of the country of which the soldier was a native. Any absence from the United States during such a proportion of the interval since the commission of the offence as to leave less than two years during which the party was in this country and amenable to justice. Arrest and confinement by the civil authorities of the United States, or of a State, &c., under a charge or upon a conviction of a civil offence, where the party has not been discharged from such confinement within two years prior to the order convening the court-martial. Detention as a prisoner of war or in the compulsory service of the enemy during the interval, (a brief period only excepted,) of the absence.

Id. at 122 (internal citations omitted).

The Attorney General indicated, "'Manifest impediment,' as used in [the 88th] article, does not mean merely a want of evidence, or ignorance as to the offender or offense by the military authorities, but it means something akin to absence—*want of power, or a physical inability to bring the party charged to trial.*" 14 Op. Att'y Gen. 263 at *1 (June 30, 1873) (emphasis added).

In the 1920 version of *Military Law and Precedents*, Colonel Winthrop stated:

> In the absence of any statute or regulation governing the proceedings of military commissions, the same are commonly conducted according to the rules and forms governing courts-martial. These war-courts are indeed more summary in their action than are the courts held under the Articles of war, and, as their powers are not defined by law, their proceedings—as heretofore indicated—will not be rendered illegal by the omission of details required upon trials by courts-martial . . . But, as a general rule, and as the only quite safe and satisfactory course for the rendering of justice to both parties, a military commission will—like a court martial—permit and pass upon objections interposed to members, as indicated in the 88th Article of war, will formally arraign the prisoner, allow the attendance of counsel, entertain special pleas if any are offered, [fn 27 – Provided they are legally apposite. *Thus a plea of the statute of limitations would not be, under the terms of Art. 103.*][17] receive all the

[17] The Military Commission Judge acknowledged that Winthrop's footnote 17 "strongly impl[ied] that statutes of limitation were ordinarily considered inapplicable to military commissions at the time of that writing." Appellant App. 426. The Military Commission Judge noted:

> material evidence desired to be introduced, hear argument, find and sentence after adequate deliberation, . . . , and, while in general even less technical than a court-martial, will ordinarily and properly be governed, upon all important questions, by the established rules and principles of law and evidence.

1920 Winthrop at 841-42 (additional emphasis added, internal footnotes omitted except for footnote 27). Appellant App. 1325-26. *See also* Winthrop, Military Law, vol. II, 74-75 (1886) (stating same).

In sum, Colonel Winthrop believed that the two-year statute of limitations in Article of War 88 and subsequently in Article of War 103 did not apply to military commissions. Other prominent experts of military law believed the two-year statute of limitations in courts-martial applied "as far as practicable;"[18] however, under many scenarios in a conflict it would be impractical to apply the two-year statute of limitations. Even when the two-year statute of limitations was applied, it was not applied where there was a "manifest impediment." The existence of a "manifest impediment" was decided on a case-by-case basis, and we have not discovered any Civil War military commissions where the charges were dismissed because of a violation of the statute of limitations.

Post-World War II War Crimes Trials

Article of War 39 replaced Article of War 103, and Article of War 39, governed the statute of limitations for Army courts-martial from 1921 to 1950.[19] Article of War 39 provides:

> Art. 39. *As to Time*.-Except for desertion committed in time of war, or for mutiny or murder, no person subject to military law shall be liable to be tried or punished by a court-martial for any crime or offense committed

> [A] a single footnote, even from his well-regarded treatise, is a slender reed. Other contemporaneous sources indicate statutes of limitation were, at times, historically applied in U.S. military commissions. Furthermore, Col. Winthrop wrote his treatise antecedent to the passage of Article of War 38—which would become U.C.M.J. Article 36. Therefore, whatever Col. Winthrop's position on this question, it cannot have taken Article 36 and its pronouncement of procedural parity—which was central to Hamdan—into account.

Appellant App. 427 (internal footnotes omitted).

[18] *See* War Dept. Gen. Or. No. 69 (Oct. 15, 1846), *reprinted in Messages of the President of the United States with the Correspondence, Therewith, Communicated, Between the Secretary of War and Officers of the Government on the Subject of the Mexican War*, H.R. Exec. Doc. 60 at 1266 (1848) (explaining that every council of war, the predecessor to military commissions "will, *as far as practicable*, be governed by the same limitations, rules, principles, and procedure, including reviews, modifications, meliorations, and approval of sentence") (emphasis added). *See also* 1920 Winthrop at 835 n. 81.

[19] *See* Manual for Courts-Martial (1921 ed.) (1921 MCM), Introduction XIII-XX; App. 1, 487-92 (describing changes from the Code of 1874 to the Code of 1920, 41 Stat. 787).

> more than two years before the arraignment of such person: *Provided*, That for desertion in time of peace or for any crime or offense punishable under articles ninety-three[20] and ninety-four[21] of this code the period of limitations upon trial and punishment by court-martial shall be three years: *Provided further*, That the period of any absence of the accused from the jurisdiction of the United States, and also any period during which by reason of *some manifest impediment* the accused shall not have been amenable to military justice, shall be excluded in computing the aforesaid periods of limitation: *And provided further*, That this article shall not have the effect to authorize the trial or punishment for any crime or offense barred by the provisions of existing law.[22]

The Manual for Courts-Martial (1921 ed.) (1921 MCM), ¶ 149(2) provides:

> (2) *Limitations as to Time*.-(a) In the following cases there is no limitation as to time upon trial by court-martial (A. W. 39), viz: (1) Desertion committed in time of war; (2) Mutiny; or (3) Murder.
>
> (b) The period of limitation upon trial and punishment by court-martial shall be three (3) years in the following cases (A. W. 39), viz: (1) Desertion in time of peace; (2) Any crime or offense punishable under A. W. 93; or (3) Any crime or offense punishable under A. W. 94.
>
> (c) No person subject to military law shall be liable to be tried or punished by a court-martial for any crime or offense not enumerated in subparagraph (a) or subparagraph (b), supra, committed more than two (2) years before the arraignment of such person (A. W. 39).
>
> (d) *Computation of the period of limitation*.-The point at and from which the period of limitation is to begin to run is the date of the commission of the offense. The point at which the period of limitation is to terminate and from which said period is to be reckoned back is the date of arraignment of the accused. There must be excluded in computing this period—(1) The

[20] Article of War 93 states:

> *Various crimes*.—Any person subject to military law who commits manslaughter, mayhem, arson, burglary, housebreaking, robbery, larceny, embezzlement, perjury, forgery, sodomy assault with intent to commit any felony, assault with intent to do bodily harm with a dangerous weapon, instrument, or other object, or assault with intent to do bodily harm, shall be punished as a court-martial may direct.

Article of War 93 (quoted in 1921 MCM, App. 1, 527).

[21] Article of War 94 prohibits frauds against the United States. Article of War 94 (quoted in 1921 MCM, App. 1, 527).

[22] Article of War 39 (first, second, and fourth emphasis in original; third emphasis added) (quoted from Manual for Courts-Martial (1921 ed.) (1921 MCM), App. 1, 507).

> period of any absence of the accused from the jurisdiction of the United States; and (2) Any period during which by reason of some manifest impediment the accused shall not have been amenable to military justice.
>
> NOTES.-"Manifest impediment" means only such impediments as operate to prevent the court-martial from exercising its jurisdiction, and includes such conditions as being held as a prisoner of war in the hands of the enemy, or being imprisoned under the sentence of a civil court upon conviction of crime (*In re Davison*, 4 Fed. Rep., 510); but any concealment of the evidence of their guilt or other like fraud on their part while they remain within the jurisdiction of the United States by which the prosecution is delayed until the time the bar has run does not deprive them of the benefit of the statute. (14 Op. Atty. Gen., 268.)

1921 MCM at 118 (emphasis in original). "Manifest impediment" refers to "an impediment to the bringing of the offender to trial and punishment," such as "absence from the United States" or other circumstances "prevent[ing] the offender from being amenable to justice . . . [or] prevent[ing] the military court from exercising its jurisdiction over him; as, for instance, his being continuously a prisoner in the hands of the enemy, or of his being imprisoned under sentence of a civil court for crime, and the like.[23]

The Allies decided during World War II that war criminals would face justice for violations of the law of war.[24] The United States and Great Britain issued regulations governing the procedures for law of war trials conducted by each nation.[25] Eight countries, Australia, China, France, Netherlands, Philippines, Soviet Union, United Kingdom, and the United States conducted war crimes trials in the Far East after World War II. International Criminal Court website, https://www.legal-tools.org/en/browse/ltfolder/.

At Nuremberg, the allies decided "to establish a uniform legal basis in Germany for the prosecution of war criminals and other similar offenders, other than those dealt with by the International Military Tribunal" also known as the "IMT."[26]

[23] *In re Davison*, 4 Fed. 507, 510 (S.D. N.Y. 1880) (citing 1 Op. Att'y Gen. 383 (Jul. 25, 1820); 13 Op. Att'y Gen. 462 (June 23, 1871); 14 Op. Att'y Gen. 52 (June 12, 1872) (other citation omitted)).

[24] Charter of the International Military Tribunal, in Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, London Agreement of Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279.

[25] United Nations War Crimes Commission, *Law Reports of Trials of War Criminals*, vol. I, Annex II, "United States Law and Practice Concerning Trials of War Criminals by Military Commissions and Military Government Courts," 112-14 London (1947) (hereinafter "U.S. Trials of War Criminals").

[26] Control Council Law No. 10, *Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity*, Preamble (Dec. 20, 1945), in 3 *Official Gazette of The Control*

Control Council Law No. 10 states "In any trial or prosecution for a crime herein referred to, the accused shall not be entitled to the benefits of any statute of limitation in respect of the period from 30 January 1933 to 1 July 1945 . . . ."[27] The temporal jurisdiction of the military tribunal in Europe began with the start of the war.[28] The United States prosecuted German war criminals by Intermediate and General Military Government Courts for violations of the laws of war under Control Council No. 10 after the two-year period then specified in the statute of limitations provision applicable to courts-martial in Article 39 of the 1920 Articles of War.[29]

On October 18, 1946, the Office of Military Government (OMGUS) promulgated additional procedural rules in Military Government Ordnance No. 7 that deviated from court-martial practice.[30] Perhaps the most significant change from court-martial practice was the requirement that the fact finder for trials to "be [civilian] lawyers who have been admitted to practice, for at least five

Council for Germany 50 (Jan. 31, 1946). Also published in *Trials of War Criminals Before the Nuernberg Military Tribunals under Control Council Law No. 10*, vol. I, XVI (Oct. 1946-Apr. 1949).

[27] Control Council Law No. 10, art. II(5) ("As an example, the IMT prosecuted crimes committed in connection with the Austrian Anschluss, effectuated in March 1938." Beth Van Schaack, *The Building Blocks of Hybrid Justice*, 44 Denv. J. Int'l L. & Pol'y 169, 246 (2016) (citing *Trial of German Major War Criminals, Judgment and Sentences*, (Int'l Mil. Trib.-Nuremberg Oct. 1, 1946), 41 Am. J. Int'l L. 310, 318-21 (1947)).

[28] *See Report of the Deputy Judge Advocate for War Crimes, European Command June 1944 to July 1948* 58 (citing *United States v. Waldeck*, et. al., opinion DAJAWC, Case No. 000-50-9 (Nov. 1947); *United States v. Brust*, opinion DAJAWC, Case No. 000-Mauthausen-7 (Sept. 1947) (U.S. military tribunals could try war criminals for offenses committed after the start of World War II but before the United States entered the war because "it is axiomatic that a state, adhering to the law of war which forms a part of the law of nations, is interested in the preservation and the enforcement thereof. And this is true irrespective of when or where the crime was committed, the belligerency or non-belligerency status of the punishing power, or the nationality of the victims."), http://www.loc.gov/rr/frd/Military_Law/report-DJA-war-crimes.html.

[29] *See, e.g.*, Trials in Dachau, Germany: *United States v. Conzmann*, Case No. 000-012-1807 (Dec. 1946); *United States v. Haesiker*, Case No. 000-012-0489-001 (Oct. 16, 1947); *United States v. Hess et al.*, Case No. 000-012-1292 (Nov. 10, 1947); *United States v. Kaiser*, Case No. 000-012-2616 (Feb. 21, 1947); *United States v. Klaebe*, Case No. 000-012-2058 (June 23, 1947); *United States v. Krause*, Case No. 000-Buchenwald-42 (Feb. 27, 1948); *United States v. Kuhn*, Case No. 000-012-2804 (Mar. 21, 1947); *United States Merten et al.*, Case No. 000-012-2593 (June 13, 1947); *United States v. Ostenrieder*, Case No. 000-012-0027 (Feb. 21, 1947); *United States v. Polus*, Case No. 000-012-1160 (Dec. 1946); *United States v. Schlickau*, Case No. 000-012-2400 (Oct. 24, 1947); *United States v. Stoll*, Case No. 000-012-2313 (June 1, 1947).

[30] Telford Taylor, *Final Report to the Secretary of the Army on the Nuernberg War Crimes Trials under Control Council No. 10* (Taylor Report) 28-29 (Aug. 10, 1949) (citing Military Government Ordnance Number 7, art. IIb) (explaining panels composed of civilian judges were needed because the panels would issue judicial opinions explaining their verdicts, and "judgments by professional, civilian judges would command more prestige both within Germany and abroad," among other reasons.).

years, in the highest courts of one of the United States . . . or in the United States Supreme Court."[31]

General of the Army MacArthur, Supreme Commander of the Allied Powers, issued *Regulations Governing the Trials of Accused War Criminals* (Dec. 5, 1945), which were known as "SCAP Regulations" for military commissions war crimes trials in the Far East.[32] Those U.S. military commissions were more like the traditional Civil War military commissions than the trials in Germany. For example, the "jury" or fact finder for the Far East trials were military line officers not attorneys.[33] The Far East military commissions were subject to the review under the habeas jurisdiction of the federal courts.[34] SCAP Regulation, ¶ 2(b)(2) provides for no statute of limitations, but indicates any offense can generally be prosecuted if it occurred around or after the start of hostilities involving Japan and any of the allies:

> The offence need not have been committed after a particular date to render the responsible party or parties subject to arrest, but in general should have been committed since or in the period immediately preceding the Mukden incident of September 18th 1931.[35]

The record of Far East military commission trials under SCAP regulations contains several examples where the two-year statute of limitations under

[31] *Id.*

[32] U.S. Trials of War Criminals, *supra* note 25, at 113.

[33] *See, e.g,* Colonel Howard S. Levie Collection, Press Release of General Yamashita's Assistant Defense Counsel, Major George Guy (Nov. 7, 1945) (tried by court composed of three major generals and two brigadier generals) on file at The Judge Advocate General's Legal Center and School, U.S. Army, Charlottesville, Virginia.

[34] *See* U.S. Trials of War Criminals, *supra* note 25, at 121 (citing *Ex parte Quirin*, 317 U.S. 1 (1942); *In re Yamashita*, 327 U.S. 1 (1946); *Homma v. Patterson*, 327 U.S. 759 (1946)). More than three years elapsed between General Homma's May 6, 1942, refusal "to grant quarter to the armed forces of the United States and its allies in Manila Bay, Philippines" and the start of his trial in the Philippines in December 1945. *Id.* at 762 n. 4 (Rutledge, J., dissenting).

[35] U.S. Trials of War Criminals, *supra* note 25, at 114-15. The Department of State Historian provides a description of the Mukden Incident of 1931. *See* Office of the Department of State Historian, Milestones: *1921-1936 The Mukden Incident of 1931 and the Stimson Doctrine*, https://history.state.gov/milestones/1921-1936/mukden-incident ("On September 18, 1931, an explosion destroyed a section of railway track near the city of Mukden. The Japanese, who owned the railway, blamed Chinese nationalists for the incident and used the opportunity to retaliate and invade Manchuria. . . . Within a few short months, the Japanese Army had overrun the region, having encountered next to no resistance from an untrained Chinese Army, and it went about consolidating its control on the resource-rich area. The Japanese declared the area to be the new autonomous state of Manchukuo, though the new nation was in fact under the control of the local Japanese Army.").

Article of War 39 was not applied to cases where more than two years elapsed from the date of the offense to arraignment or trial.[36]

In 1946, the Supreme Court denied habeas relief to General Yamashita, who was Commanding General of the Fourteenth Army Group of the Imperial Japanese Army, which had exercised control over the Philippine Islands the last year of World War II. *In re Yamashita*, 327 U.S. at 5, 13. General Yamashita was charged with violations of the law of war, and he "was found guilty of the offense as charged and sentenced to death by hanging." *Id.* at 5. In *Yamashita*, the Court addressed the authority of General Styer to refer General Yamashita's charges to trial under "detailed rules and regulations which General MacArthur prescribed for the trial of war criminals." *Id.* at 10-11. The Court addressed challenges to the jurisdiction of the military commission as follows:

> The trial and punishment of enemy combatants who have committed violations of the law of war . . . . is without qualification as to the exercise of this authority so long as a state of war exists—from its declaration until peace is proclaimed. . . . We cannot say that there is no authority to convene a commission after hostilities have ended to try violations of the law of war committed before their cessation, at least until peace has been officially recognized by treaty or proclamation of the political branch of the Government. In fact, in most instances, the practical administration of the system of military justice under the law of war would fail if such authority were thought to end with the cessation of hostilities. For only after their cessation could the greater number of offenders and the principal ones be apprehended and subjected to trial.
>
> No writer on international law appears to have regarded the power of military tribunals, otherwise competent to try violations of the law of war, as terminating before the formal state of war has ended. In our own military history there have been numerous instances in which offenders were tried by military commission after the cessation of hostilities and before the proclamation of peace, for offenses against the law of war committed before the cessation of hostilities.
>
> The extent to which the power to prosecute violations of the law of war shall be exercised before peace is declared rests, not with the courts, but with the political branch of the Government, and may itself be governed by the terms of an armistice or the treaty of peace.

[36] *See, e.g.*, *United States v. Bando*, Case No. 035-2068-0001 (Aug. 15, 1947); *United States v. Ikeda*, Case No. 0035-2106 (Aug. 24, 1948); *United States v. Kondo*, Case No. 0035-0868-0001 (May 28, 1947); *United States v. Namba*, Case No. 0035-0267-0002 (July 2, 1948); *United States v. Ogasawara*, Case No. 0034-0012-0001 (Nov. 17, 1947); *United States v. Murakami*, Case No. 0035-2110-0001 (Oct. 14, 1947). International Criminal Court website, Link-Allied Tribunals of the Far East, Link-United States of America, Link-Yokohama Trials, is the Internet location for the five trials of Japanese war criminals by the Eighth U.S. Army, https://www.legal-tools.org/en/browse/.

In re Yamashita, 327 U.S. at 11-13 (internal citations and footnotes omitted).

The United States did not use military commissions during the Korean War, the Vietnam War, or the Persian Gulf War. *See Hamdan,* 548 U.S. at 597 (2006) (plurality opinion) ("The last time the U.S. Armed Forces used the law-of-war military commission was during World War II."). We have no examples of military commission trials after 1948. *See Al Bahlul,* 840 F.3d at 767-68.

Customary International Law After 1968

We agree with the parties that customary international law is part of the law of the United States and supplies a rule of decision when no contrary domestic law exists. Appellant's Br. 22 & n. 21; Appellee Br. 48; Appellant Reply Br. 12. "Customary international law results from a general and consistent practice of states followed by them from a sense of legal obligation."[37] The MCM in effect on September 11, 2001, incorporated "international law." MCM (2000 ed.), pt. I, ¶ 2(b)(2) ("Subject to any applicable rule of international law or to any regulations prescribed by the President or by other competent authority, military commissions . . . shall be guided by the appropriate principles of law and rules of procedures and evidence prescribed for courts-martial." *See also* MCM (2016 ed.) pt. I, ¶ 2(b)(2) (stating same).

"[C]ustomary international law is part of the law of the United States to the limited extent that 'where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations.'"[38] The parties presented no evidence that the United States has "formally acceded to or implemented any treaty or international instrument . . . disallowing application of statutes of limitation [or agreeing to apply a specified statute of limitations] to all war crimes." *See* Appellant App. 421 (citations omitted). "While it is permissible for United States law to conflict with customary international law, where legislation is susceptible to multiple interpretations, the interpretation that does not conflict with 'the law of nations' is preferred. The Charming Betsy canon comes into play only where Congress's intent is ambiguous."[39]

The 1968 United Nations Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity,[40] entry into

[37] *Restatement of the Law (Third), Foreign Relations Law of the United States (Restatement)* § 102(2) (1987).

[38] *United States v. Yousef*, 327 F.3d 56, 92 (2d Cir. 2003) (quoting *The Paquete Habana*, 175 U.S. 677, 700 (1900)).

[39] *Id.* (citing *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804); internal footnote omitted).

[40] United Nations Convention on the Non-Applicability of Statutory Limitations to

force on November 11, 1970, in accordance with article VIII, currently has 55 parties—not including the United States—primarily because many states were concerned about the expansive definitions of war crimes.[41]

The 1998 Rome Statute established the International Criminal Court (ICC), and specifically prohibited statutes of limitation for war crimes tried before that court.[42] The Rome Statute has 139 signatories and 124 parties.[43] On December 31, 2000, the United States signed the Rome Statute of the International Criminal Court.[44] On May 6, 2002, the U.S. Government informed the Secretary-General of the United Nations "the United States does not intend to become a party to the treaty. Accordingly, the United States has no legal obligations arising from its signature on December 31, 2000."[45] Article 17 of

War Crimes and Crimes Against Humanity, 754 U.N.T.S. 73, *reprinted in* 18 I.L.M. 68 (1979), G.A. Res. 2391 (XXIII), U.N. Doc. A/7218 (1968).

[41] U.N. Treaty Collection, Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, Status as of June 21, 2017. *See* Steven Ratner, Jason Abrams, and James Bischoff, *Accountability for Human Rights Atrocities in International Law*, (3rd ed., 2009), at 158-61. Al Baluchi App. 134-38. *See Handel v. Artukovic*, 601 F. Supp. 1421, 1430 (C.D. Cal. 1985) (noting the U.S. delegation did not express any reservations about an unlimited statute of limitations. "[T]he delegation had 'urged the Committee to reconsider whether it would not be better to return to the original purpose of this item - namely, to produce a convention limited simply to non-application of statutes of limitations to war crimes and crimes against humanity.' Press Release US-UN 161 (1968), October 9, 1968. Thus, while the United States did not sign the resulting convention, it appears to recognize the principle that a statute of no limitation should be applied to the criminal prosecution of war crimes and crimes against humanity.").

[42] Rome Statute of the ICC (Rome Statute), art. 29, July 17, 1998, 2187 U.N.T.S. 90. The statute of limitations provision in the Rome statute received careful scrutiny. In 1996, the Preparatory Committee on the Establishment of an International Criminal Court submitted its first report, containing five statutory limitation proposals. Mark Klamberg (editor), *Commentary on the Law of the International Criminal Court* 305, Torkel Opsahl Academic EPublisher Brussels (2017), FICHL Publication Series No. 29, https://www.legal-tools.org/doc/ aa0e2b/pdf/ (citing 1996 Report of the Preparatory Committee on the Establishment of an International Criminal Court, U.N. GA 51st Sess. Supp. No. 22, U.N. doc. A/51/22 (1996), vol. II, art. F). Article 29 of the Rome Statute states, "*Non-applicability of statute of limitations*--The crimes within the jurisdiction of the Court shall not be subject to any statute of limitations." *Id.* "The drafters of the 1998 ICC Statute eventually adopted the proposal of the Working Group, which is contained in Article 29. The only disagreement on the statute of limitations provision can be found in the joint statement submitted by China and France in a footnote of the Working Group's Report." *Id.* at 306 (citation omitted).

[43] U.N. Treaty Collection website, ch. XVIII, Penal Matters, 10. Rome Statute of the International Criminal Court as of June 21, 2017, https://treaties.un.org/Pages/ ViewDetails.aspx?src=IND&mtdsg_no=XVIII-10&chapter= 18&lang=en.

[44] *Id.*

[45] *Id.*; *See also Doe v. Exxon Mobil Corp.*, 654 F.3d 11, 35-37 & n. 22 (D.C. Cir. 2011) (citing Letter of John R. Bolton, Under Sec'y of State for Arms Control and Int'l Sec., to Kofi Annan, Sec'y Gen. of the United Nations (May 6, 2002)).

the Rome Statute, also known as the "complementarity" provision, "provides that states have the main responsibility for the adjudication of international crimes."[46] "[M]ost states' parties that still had domestic provisions on statutes of limitation to crimes within the jurisdiction of the ICC have abolished or amended them, although not all states' parties have done so."[47]

Judge Millet of the Court of Appeals for the District of Columbia Circuit cited the Rome Statute as a source for evidence of how the offense of joint criminal enterprise showed "its settled roots in international law."[48] "The Rome Statute as evidence of customary international law has limits. The Rome Statute . . . is properly viewed in the nature of a treaty and not as customary international law." *Doe v. Exxon Mobil Corp.*, 654 F.3d 11, 35 (D.C. Cir. 2011) (citations omitted). In *Doe*, the Court of Appeals for the District of Columbia Circuit explained that the Rome Statute itself is limited authority for customary international law. Article 10 of the Rome Statute provides "that it is not to 'be interpreted as limiting or prejudicing in any way existing or developing rules of international law.' This acknowledges that the Rome Statute was not meant to affect or amend existing customary international law." *Id.* (citations omitted). The United States has not ratified the Rome Statute for reasons unrelated to the statute of limitations, and "the Rome Statute binds only those countries that have ratified it."[49] The ICC itself has recognized that the Rome Statute does not necessarily represent customary international law. *Id.* at 36-37 (citations omitted).[50] After considerable discussion, the Court concluded that the opinions of the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Court for Rwanda (ICTR), and the Nuremberg tribunals "constitute expressions of customary international law[;]" however, "[t]he Rome Statute does not constitute customary international law." *Id.* at 39.

The Second Circuit has noted that "treaties . . . may constitute evidence of a norm of customary international law only if 'an overwhelming majority of

[46] Klamberg, *supra* n. 42, at 307.

[47] *Id.* at 307-08 (discussing domestic statutory statute of limitation changes in France, Germany, and Netherlands after passage of the Rome Statute).

[48] *Al Bahlul*, 840 F.3d at 791-92 (Millett, J., concurring) (citing Rome Statute Art. 25(3)(d), July 17, 1998, 2187 U.N.T.S. 90), *see also id.* at 814-816 (Rogers, Tatel, and Pillard, JJ., dissenting) (discussing Rome Statute in the context of the crime of conspiracy).

[49] *Doe*, 654 F.3d at 35-36 (citations omitted). *See Khulumani v. Barclay Nat'l Bank Ltd.*, 504 F.3d 254, 276 & n. 9 (2d Cir. 2007) (noting that the Rome Statute of the ICC has been signed by most of the mature democracies of the world; however, the United States has not ratified it.); *see also Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 374 F. Supp. 2d 331, 339-40 (S.D.N.Y. 2005) ("[T]he United States feared 'unchecked power in the hands of the prosecutor' that could lead to 'politicized prosecution.'").

[50] *See also Restatement, supra* note 37 § 102(2); *Id.* § 102(3) ("International agreements create law for the states parties thereto and may lead to the creation of customary international law when such agreements are intended for adherence by states generally and are in fact widely accepted.").

States have ratified the treaty[51] and those States uniformly and consistently act in accordance with its principles.'"[52]

Post-1990 International Tribunals

Tribunals after 1990 set jurisdictional limits based on the start of the genocide or hostilities.[53] The ICTY and ICTR Statutes contain provisions for jurisdiction beginning at the start of hostilities or genocide amounting to a statute of limitations.[54] The ICTY Statute states, "The temporal jurisdiction of the International Tribunal shall extend to a period beginning on 1 January 1991."[55] The ICTR Statute states, "The temporal jurisdiction of the International Tribunal for Rwanda shall extend to a period beginning on 1 January 1994 and ending on 31 December 1994."[56] The "penal codes of the Former Yugoslavia and Rwanda provide for the non-applicability of statutes of limitation to international crimes."[57]

On January 16, 2002, the United Nations and the Sierra Leone Government jointly established the Special Court for Sierra Leone (SCSL) to adjudicate alleged crimes committed in Sierra Leone after November 30, 1996, the date Sierra Leone's president and the leader of Sierra Leone's Revolutionary United Front signed a peace agreement.[58] The jurisdiction of the SCSL is

[51] *See also* Harold Hongju Koh, *International Law as Part of Our Law*, 98 Am. J. Int'l L. 43, 56 (2004) (noting some commentators suggest "that the practices of other mature democracies -- not those that lag behind developmentally -- constitute the most relevant evidence of . . . the 'evolving standards of decency that mark the progress of a maturing society.'").

[52] *Khulumani*, 504 F.3d at 325 n. 11 (quoting *Flores v. S. Peru Copper Corp.*, 414 F.3d 233, 256 (2d Cir. 2003) (Cabranes, J.)).

[53] This temporal limitation is consistent with Colonel William Winthrop's description of the traditional temporal limits of military commission jurisdiction, "[T]he offense charged 'must have been committed within the period of the war'"—that is, "[n]o jurisdiction exists [for a commission] to try offenses 'committed either before or after the war.'" *Hamdan*, 548 U.S. at 597-98 (plurality opinion) (quoting 1920 Winthrop, *supra* n. 10, at 837-38).

[54] Klamberg, *supra* n. 42, at 308.

[55] Statute of the International Criminal Tribunal for the Former Yugoslavia, art. 8, U.N. Doc. S/25704 annex (May 3, 1993), adopted in S.C. Res. 827, U.N. Doc. S/RES/827 (May 25, 1993).

[56] Statute of the International Tribunal for Rwanda, art. 7, *adopted by* S.C. Res. 955, U.N. Doc. S/RES/955 (1994), *reprinted in* 33 I.L.M. 1598.

[57] Klamberg, *supra* n. 42, at 308.

[58] *See* Zachary D. Kaufman, *The Nuremberg Tribunal v. the Tokyo Tribunal: Designs, Staffs, and Operations*, 43 J. Marshall L. Rev. 753, n. 36 (2010) (citing Mar. 6, 2002 letter from the Secretary-General, to the President of the Security Council, U.N. Doc. S/2002/246 (Mar. 8, 2002) (containing, in App. II, the January 16, 2002 Agreement Between the United Nations

limited to crimes committed after November 30, 1996.[59] On June 6, 2003, the Cambodian Government and the United Nations reached an agreement, which entered into force on April 29, 2005, establishing the "Extraordinary Chambers for the Prosecution under Cambodian Law of Crimes Committed during the period of Democratic Kampuchea" to address the atrocities committed in Cambodia between April 17, 1975, and January 6, 1979, during the Khmer Rouge's reign.[60]

The parties contest whether under international law the statute of limitations for violations of the law of war is unlimited. Appellant Br. 11-12, 21-23; Appellee Br. 43-50; Appellant Reply 11-12. Various experts and scholars in international law opine that unlimited statutes of limitations do or do not constitute customary international law.[61] "In 2005, the International Committee of the Red Cross (ICRC), which carried out an extensive study on customary international humanitarian law . . . concluded in 2005 that "[s]tatutes of limitation are not applicable to war crimes."[62]

and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone)).

[59] Statute of the Special Court for Sierra Leone (SCSL), art. 1, SCSL Website, http://www.rscsl.org/Documents/scsl-statute.pdf.

[60] *See* Report of the Secretary-General on the Khmer Rouge Trials, U.N. Doc. A/60/565 (Nov. 25, 2005), U.N. Doc A/59/432/Add.1 (Nov. 29, 2004). *See also* Special Rapporteur Sean D. Murphy, *Second Report on Crimes Against Humanity to U.N. General Assembly*, U.N. Doc. A/CN.4/690 ¶ 64 & n. 238 (Jan. 21, 2016) ("Similarly, the Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia and the instruments regulating the Iraqi Supreme Criminal Tribunal and the Special Panels for Serious Crimes in East Timor all explicitly defined crimes against humanity as offences for which there was no statute of limitations."); U.N. Gen. Assembly Res., *Khmer Rouge trials* (May 22, 2003) art. 1, U.N. Doc. A/RES/57/228 B.

[61] Klamberg, *supra* n. 42, at 311 (listing articles and indicating some "contemporary scholars remain hesitant in recogni[z]ing the existence of a rule of customary international law or general principle of law and rather speak of the 'crystalli[z]ation' of such a rule. Some consider the imprescriptibility of international crimes a rule of customary international law, or even *jus cogens*."). "Imprescriptibility" refers to the inapplicability of time limits to prosecution of an offense – i.e., an "imprescriptible" offense is one that cannot ordinarily become time-barred. Ruth A. Kok, *Statutory Limitations in International Criminal Law* 14 (2007); Jan Arno Hessbrugge, *Justice Delayed, Not Denied: Statutory Limitations and Human Rights Crimes*, 43 Geo. J. Int'l L. 335, 338 (2012).

[62] Klamberg, *supra* n. 42, at 311 (citing Jean-Marie Henckaerts & Louise Doswald-Beck eds., *Customary International Humanitarian Law*, Int'l Comm. of the Red Cross, vol. II, ch. 43, § E at 614 (2005). *See Hamdan*, 548 U.S. at 619 n. 48 ("The International Committee of the Red Cross is referred to by name in several provisions of the 1949 Geneva Conventions and is the body that drafted and published the official commentary to the Conventions. Though not binding law, the commentary is, as the parties recognize, relevant in interpreting the Conventions' provisions.").

The Court of Appeals for the District of Columbia Circuit began the discussion of the applicability of international law in their analysis of whether Al Bahlul's prosecution for conspiracy was ex post facto stating:

> International law is important, and the political branches have good reason to adhere to international law when determining what offenses will be tried before U.S. military commissions. But international law has its own enforcement mechanisms. The federal courts are not roving enforcers of international law. And the federal courts are not empowered to smuggle international law into the U.S. Constitution and then wield it as a club against Congress and the President in wartime.

Al Bahlul, 840 F.3d 772-73. *See also Al-Bihani v. Obama*, 619 F.3d 1, 11 (D.C. Cir. 2010) (Kavanaugh, J., concurring) ("[C]ourts may not interfere with the President's exercise of war powers based on international-law norms that the political branches have not seen fit to enact into domestic U.S. law.").

In *Al Bahlul*, the parties agreed that conspiracy to commit war crimes was not an offense under the international laws of war at the time of Al Bahlul's offenses, *see id.* at 813 (Rogers, Tatel, Pillard, JJ., dissenting); however, the majority relied on two important military commission conspiracy cases, the trial of those charged with the assassination of President Lincoln, and more recently, the trial of the Nazi saboteurs in *Ex parte Quirin*, 317 U.S. 1 (1942) to establish that conspiracy was a preexisting offense for the purpose of the Ex Post Facto Clause. Like the majority in *Al Bahlul*, our focus must be on the statute of limitations applied in U.S. military tribunals, not on international tribunals after 1990, even though none of those tribunals limited prosecution to a specific time period after the offense.

Procedural Equivalence Insofar as Practicable Between Courts-Martial and Military Commissions

In *Hamdan*, Justice Kennedy described the limitations in Article 36(b) on the President's authority to adopt military commission procedures:

> In this provision the statute allows the President to implement and build on the UCMJ's framework by adopting procedural regulations, . . . the procedures may not be contrary to or inconsistent with the provisions of the UCMJ; and . . . "insofar as practicable" all rules and regulations under § 836 must be uniform, a requirement, as the Court points out, that indicates the rules must be the same for military commissions as for courts-martial unless such uniformity is impracticable.

Id. at 640 (Kennedy, J., concurring). The Court indicated that "[n]othing in the record before us demonstrates that it would be impracticable to apply court-martial rules in this case." *Id.* at 623 (plurality opinion). Based on the "absence of any showing of impracticability" under Article 36(b)—and the "undisputed [fact] that Commission Order No. 1 deviate[d] in many significant

respects from [court-martial] rules"—the Court concluded that Commission Order No. 1 "necessarily violates Article 36(b)." *Id.* at 624.

Hamdan directly addressed and limited the President's authority to create rules of procedure for military commissions. That decision did not address Congress's power to establish the statute of limitations. Congress clearly intended that the provisions of the 2006 and 2009 M.C.A. apply to the offenses retroactively without limitation as to time.[63]

In *Hamdan*, Justice Breyer suggested the President seek Congressional authorization for military commissions when those procedures are inconsistent with the UCMJ stating, "Indeed, Congress has denied the President the legislative authority [under Article 36, UCMJ] to create military commissions of the kind at issue here. Nothing prevents the President from returning to Congress to seek the authority he believes necessary." *Id.* at 636 (Breyer, Kennedy, Souter, Ginsburg, JJ., concurring). Shortly after the Supreme Court issued the *Hamdan* decision, the President and Congress responded to this invitation, and the 2006 M.C.A was enacted into law on October 17, 2006.[64] The 2006 M.C.A., amended Article 36, UCMJ to correct the procedural defects the Supreme Court had identified. *See* 2006 M.C.A., § 4(a)(3).

On October 28, 2009, Congress enacted the 2009 M.C.A. The 2009 M.C.A. in § 948b(c) repeated the same clarification of the scope of Article 36(b), UCMJ as follows:

> *Construction of provisions.* The procedures for military commissions set forth in this chapter are based upon the procedures for trial by general courts-martial under chapter 47 of the title (the Uniform Code of Military Justice). *Chapter 47 of this title does not, by its terms, apply to trial by military commission except as specifically provided therein or in this chapter, and many of the provisions of chapter 47 of this title are by their terms inapplicable to military commissions.*

10 U.S.C. § 948b(c)(emphasis added); *see also id.* § 948b(d)(2) ("Other provisions of chapter 47 of this title shall apply to trial by military commission under this chapter only to the extent provided by the terms of such provisions or by this chapter."). Currently, Article 36(b), UCMJ, states, "(b) All rules and regulations made under this article shall be uniform insofar as practicable, *except insofar as applicable to military commissions established under chapter 47A of this title*." 10 U.S.C. § 836(b) (emphases added).

[63] *See Al Bahlul*, 767 F.3d at 12 ("Although we presume that statutes apply only prospectively 'absent clear congressional intent' to the contrary, that presumption is overcome by the clear language of the 2006 MCA.")(citations omitted).

[64] *See Al Bahlul*, 840 F.3d at 771; *id.* at 827 (Rogers, Tatel, Pillard, JJ., dissenting); *Al Bahlul*, 767 F.3d at 13.

Presumption of Constitutionality

In our review of the constitutionality of Section 950v(b) of the 2006 M.C.A, and section 950t of the 2009 M.C.A., we are mindful of Justice Jackson's admonition: "An [action] executed by the President pursuant to an Act of Congress [is] supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635-37 (1952) (Jackson, J., concurring). Courts should "indulge the widest latitude of interpretation to sustain [the Commander in Chief's] exclusive function to command the instruments of national force, at least when turned against the outside world for the security of our society." *Youngstown*, 343 U.S. at 645 (Jackson, J., concurring).

The parties discussed extensively whether it is impractical to apply Article 43, UCMJ's five-year statute of limitations to law-of-war military commissions. Appellant Br. 27-36; Appellee Br. 37-42; Appellant Reply Br. 8-9. On September 6, 2006, President Bush sent the administration's proposed 2006 M.C.A. to Congress with this message:

> . . . The draft legislation would establish a Code of Military Commissions that tracks the courts-martial procedures of the Uniform Code of Military Justice, but that departs from those procedures where they would be impracticable or inappropriate for the trial of unlawful enemy combatants captured in the midst of an ongoing armed conflict, under circumstances far different from those typically encountered by military prosecutors. . . .

H. Doc. No. 109–133, Cong. Rec. H6273 (Sept. 6, 2006). The President proposed that Congress amend Article 36, UCMJ to end any uniformity requirement between courts-martial and military commissions unless specifically required. The President explained why some deviations from court-martial procedures were practical necessities for military commissions:

> (1) For more than 10 years, the al Qaeda terrorist organization has waged an unlawful war of violence and terror against the United States and its allies. Al Qaeda was involved in the bombing of the World Trade Center in New York City in 1993, the bombing of the United States Embassies in Kenya and Tanzania in 1998, and the attack on the *U.S.S. Cole* in Yemen in 2000. On September 11, 2001, al Qaeda launched the most deadly foreign attack on United States soil in history. Nineteen al Qaeda operatives hijacked four commercial aircraft and piloted them into the World Trade Center Towers in New York City and the headquarters of the United States Department of Defense at the Pentagon, and downed United Airlines Flight 93. The attack destroyed the Towers, severely damaged the Pentagon, and resulted in the deaths of approximately 3,000 innocent people.

> (2) Following the attacks on the United States on September 11th, Congress recognized the existing hostilities with al Qaeda and affiliated terrorist organizations and, by the Authorization for the Use of Military Force Joint Resolution (Public Law 107-40), recognized that "the President has authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States" and authorized the President "to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001 . . . in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons."
>
> * * *
>
> (6) The use of military commissions is particularly important in this context because other alternatives, such as the use of courts-martial, generally *are impracticable*. The terrorists with whom the United States is engaged in armed conflict have demonstrated a commitment to the destruction of the United States and its people, to the violation of the law of war, and to the abuse of American legal processes. In a time of ongoing armed conflict, it generally is *neither practicable* nor appropriate for combatants like al Qaeda terrorists to be tried before tribunals that include all of the procedures associated with courts-martial.
>
> (7) Many procedures for courts-martial would *not be practicable* in trying the unlawful enemy combatants for whom this Act provides for trial by military commission.

H. Doc. No. 109–133, § 2 (Sept. 7, 2006) (emphasis added). *See also id.* § 7 (noting "strict compliance with [rules of evidence limiting admissibility of hearsay] for evidence gathered on the battlefield *would be impracticable*, given the preeminent focus on military operations and the chaotic nature of combat.") (emphasis added).

Conclusion

The 2016 precedent of the Court of Appeals for the District of Columbia Circuit in *Al Bahlul* guides our analysis, and we look to history for precedent on whether the U.S. military has traditionally applied the court-martial statute of limitations for military commissions trying law of war offenses. After reviewing Civil War and World War II precedent to determine whether conspiracy existed as a law of war offense before passage of the 2006 M.C.A. for ex post facto purposes, the Court stated, "The bottom line here is that the history matters, the history is overwhelming, and the history devastates the joint dissent's position." *Al Bahlul*, 840 F.3d at 773.

Turning to the statute of limitations from 1806 to 1950, the court-martial statute of limitations was two years; however, the two-year limit was not applicable to courts-martial if there was a "manifest impediment" to the accused being "amenable to justice within that period." The period of hostilities may have constituted such an impediment for law of war violations tried by military commissions or as Winthrop indicates, statutes of limitations in the Articles of War may not have applied to military commissions.

The most recent examples of U.S. trials of law of war offenses were in Germany and the Far East from 1946 to 1948. In those trials, a statute of limitations defense was not permitted. Numerous examples of such law of war cases are available that would have been barred under the two-year statute of limitations under Article of War 39, if those cases were tried by court-martial.

At the time of the UCMJ's adoption in 1950, Article 43(d)'s more specific exceptions, "in the custody of civil authorities" and "in the hands of the enemy" were adopted because they were preferable to the more indefinite provision in Article of War 39 that the statute is tolled "when by reason of some manifest impediment the accused shall not have been amenable to military justice."[65] UCMJ Article 43 and its legislative history do not mention military commissions, prosecution of law of war violations, or trial of enemy combatants. We decline to read into Article 43, UCMJ, a requirement that its limitations apply to military commissions.

The 2009 M.C.A. § 949a(b) included a "practical need" statement:

> (b) *Exceptions.*—(1) In trials by military commission under this chapter, the Secretary of Defense, in consultation with the Attorney General, may make such exceptions in the applicability of the procedures and rules of evidence otherwise applicable in general courts-martial as may be required by the unique circumstances of the conduct of military and intelligence operations during hostilities or by other practical need consistent with this chapter.

10 U.S.C. § 949a(b). On August 14, 2012, the Secretary of Defense also made a practicability determination pursuant to the 2009 M.C.A. *See* M.M.C., pt. I, Preamble, ¶ 2 (2012):

> Departures from the rules of evidence and procedure applicable in trials by general courts-martial of the United States reflect the Secretary's determinations that these departures are required by the unique circumstances of the conduct of military and intelligence operations during hostilities or practical need consistent with chapter 47A, title 10,

[65] Senate Comm. on Armed Services, S. Rep. No. 486, 81st Cong., 1st Sess. (1949), *reprinted in* Index and Legislative History, *Establishing a Uniform Code of Military Justice* 19 (1950). Appellant App. 851. *See also United States v. Centeno*, 17 M.J. 642, 646-47 (N.M.C.M.R. 1983).

United States Code. Just as importantly, they provide procedural and evidentiary rules that not only comport with chapter 47A of title 10, United States Code, and ensure protection of classified information, but extend to the accused all the judicial guarantees which are recognized as indispensible by civilized peoples as required by Common Article 3 of the Geneva Conventions of 1949.

There is no historical evidence that it was practical to prosecute law of war violations in the midst of hostilities with its "preeminent focus on military operations and the chaotic nature of combat." H. Doc. No. 109–133, § 7.

During hostilities, a statute of limitations applying a time limit to prosecute law of war violations is not practicable. More time to discover and investigate offenses, identify and apprehend suspects, make assessments of the intelligence value of information, and perfect a prosecutable case is necessary in a wartime situation.

The 2009 M.C.A. § 950t statement that crimes triable by military commission "shall be triable by military commission under this chapter at any time without limitation" was a statement of the law of war in existence from 1945 to 2009. Appellees failed to overcome the presumption of constitutionality of the statute of limitations in the M.C.A. Charges III and V do not violate the Ex Post Facto Clause of the U.S. Constitution.

The Military Commission Judge's decision to dismiss Charges III and V is reversed, and the case is remanded to the Military Commission Judge for proceedings consistent with this decision.

FOR THE COURT:

Mark Harvey
Clerk of Court, U.S. Court of Military Commission Review

UNITED STATES OF AMERICA v. KHALID SHAIKH MOHAMMAD, WALID MUHAMMAD SALIH MUBARAK BIN 'ATTASH, RAMZI BINALSHIBH, ALI ABDUL AZIZ ALI, MUSTAFA AHMED ADAM AL HAWSAWI	AE 251N ORDER **Defense Motion** to Dismiss Charges III and V as Barred by the Statute of Limitations **5 July 2017**

In accordance with the 29 June 2017 opinion of the Court of Military Commission Review regarding this case (CMCR 17-002), the Commission's ruling in AE 251J[1] dismissing Charges III and V with prejudice is hereby **VACATED**. Charges III and V are **REINSTATED**.

So **ORDERED** this 5th day of July, 2017.

//s//
JAMES L. POHL
COL, JA, USA
Military Judge

[1] AE 251J, Ruling: Defense Motion to Dismiss Charges III and V as Barred by the Statute of Limitations, dated 7 April 2017.

Chief Judge Paulette V. Burton

Lieutenant Colonel Paulette V. Burton Judge assumed her current duties as an Associate Judge with the United States Army Court of Criminal Appeals in July 2015. On September 10, 2015, Secretary of Defense Ashton B. Carter appointed Judge Burton to the United States Court of Military Commission Review (USCMCR), and on September 23, 2015, she was sworn as a USCMCR appellate judge. On March 16, 2016, President Obama nominated Judge Burton to the USCMCR, and on April 28, 2016, the Senate confirmed her to be a judge of the USCMCR. On May 25, 2016, President Obama signed her commission appointing her to be "an Appellate Military Judge of the United States Court of Military Commission Review." On May 25, 2017, Secretary of Defense Jim Mattis appointed Judge Burton to be the Chief Judge of the USCMCR

Judge Burton's prior assignments include: Staff Judge Advocate, United States Army Criminal Investigation Command; Associate Judge, Army Criminal Court of Appeals; Chief, United States Army Judge Advocate Recruiting Office; Deputy Staff Judge Advocate, U.S. Army Aviation and Warfighting Center; Senior Defense Counsel, National Capital Region; Chief of Claims, 25th Infantry Division; Chief of Legal Assistance, 25th Infantry Division; Trial Defense Counsel, Yongsan, Korea; Trial Counsel, Fort Belvoir, Virginia; Chief of Claims, Fort Belvoir, Virginia; Legal Assistance Attorney, Fort Belvoir, Virginia.

Lieutenant Colonel Burton is admitted to practice before the United States Supreme Court, the Court of Appeals for the Armed Forces, the United States Army Court of Criminal Appeals, the United States Bankruptcy Court of South Carolina, and the South Carolina Supreme Court. She is a graduate of the United States Army Command and General Staff College Intermediate Level Education—Common Core (2006), the Judge Advocate Officer Graduate Course (LL.M., 2004), the Combined Arms and Service Staff College (2000), and the Judge Advocate Officer Basic Course (1994). Her civilian education includes South Carolina School of Law (JD, 1993) and Spelman College (BA, 1990), where she was a Reserve Officers Training Corps (ROTC) Distinguished Military Graduate.

Lieutenant Colonel Burton's awards include: Legion of Merit, Meritorious Service Medal (with four Oak Leaf Clusters), Army Commendation Medal (with two Oak Leaf Clusters), Army Achievement Medal, National Defense Service Medal (with Service Star), Global War on Terrorism Service Medal, Korea Defense Service Medal, Army Service Ribbon, and the Overseas Service Ribbon (with Numeral 2). She is also authorized to wear the Army Staff Identification Badge.

Colonel James W. Herring, Jr.

On September 10, 2015, Secretary of Defense Ashton B. Carter appointed Colonel James W. Herring, Jr., JA, U.S. Army, to the U. S. Court of Military Commission Review (USCMCR). He was sworn as a USCMCR military appellate judge on September 23, 2015. Colonel Herring assumed duties as Associate Judge, U.S. Army Court of Criminal Appeals, in July 2015.

Colonel Herring was born in Fayetteville, North Carolina. He received a B.A. in Peace, War and Defense from the University of North Carolina at Chapel Hill and his Juris Doctor from Campbell University School of Law. He joined the Judge Advocate General's Corps with a direct commission in 1987. He received a LLM Degree with highest honors in International and Comparative Law from George Washington University Law School in 1998. Colonel Herring is a member of the State Bar of North Carolina. He is admitted to practice before the United States Court of Appeals for the Armed Forces and the United States Supreme Court.

Colonel Herring's assignments include: Chief Circuit Judge, First Judicial Circuit, 2012-2015; Principal Deputy Legal Counsel, Office of the Chairman of the Joint Chiefs of Staff, 2010-2012; Special Counsel to the Assistant Attorney General, U.S. Department of Justice, 2009-2010; Staff Judge Advocate, 8th Theater Sustainment Command, Fort Shafter, Hawaii, 2007-2009; Staff Judge Advocate, Joint Readiness Training Center and Fort Polk, Fort Polk, Louisiana, 2005-2007; Director, Doctrine Development, U.S. Army Judge Advocate General's Legal Center and School, Charlottesville, Virginia, 2003-2005; Senior Observer/Controller, Battle Command Training Program, Fort Leavenworth, Kansas, 2001-2003; Executive Officer and Assistant Professor, U.S. Military Academy, West Point, New York, 1998-2001; Senior Defense Counsel, Fort Stewart, Georgia, 1995-1997; Administrative Law Division, Office of the Judge Advocate General, Washington, D.C., 1991-1994; Chief of Military Justice, Senior Trial Counsel and Trial Counsel, 25th Infantry Division (Light), Schofield Barracks, Hawaii, 1987-1991.

https://www.congress.gov/nomination/114th-congress/1220/all-info

Actions (4)

Date

Senate Actions

04/28/2016 Confirmed by the Senate by Voice Vote.

04/26/2016 Placed on Senate Executive Calendar. Calendar No. DESK.

04/26/2016 Reported by Senator McCain, Committee on Armed Services, without printed report.

03/14/2016 Received in the Senate and referred to the Committee on Armed Services.

Nominees (3)

THE FOLLOWING NAMED OFFICERS FOR APPOINTMENT IN THE GRADES INDICATED IN THE UNITED STATES ARMY AS APPELLATE MILITARY JUDGES ON THE UNITED STATES COURT OF MILITARY COMMISSION REVIEW UNDER TITLE 10 U.S.C. SECTION 950F(B)(3). IN ACCORDANCE WITH THEIR CONTINUED STATUS AS APPELLATE MILITARY JUDGES PURSUANT TO THEIR ASSIGNMENT BY THE SECRETARY OF DEFENSE AND UNDER 10 U.S.C. SECTION 950F(B)(2), WHILE SERVING ON THE UNITED STATES COURT OF MILITARY COMMISSION REVIEW, ALL UNLAWFUL INFLUENCE PROHIBITIONS REMAIN UNDER 10 U.S.C. SECTION 949B(B):

Nominee

Position

LARSS G. CELTNIEKS Colonel

JAMES W. HERRING JR. Colonel

PAULETTE V. BURTON Lieutenant Colonel

(B) by striking out "annulment, or legal separation," in paragraph (2) and inserting in lieu thereof "or annulment,".

10 USC 1408 note.

(4) Section 1006(e)(3) of the Uniformed Services Former Spouses' Protection Act (title X of Public Law 97-252; 96 Stat. 738) is amended by striking out "section" and all that follows and inserting in lieu thereof "section 1072 of title 10, United States Code.".

EXTENSION OF MINIMUM INCOME PROVISION FOR CERTAIN WIDOWS

SEC. 942. (a) Section 4(a)(1) of the Act entitled "An Act to amend chapter 73 of title 10, United States Code, to establish a Survivor Benefit Plan, and for other purposes", approved September 21, 1972 (10 U.S.C. 1448 note), is amended by striking out "on the effective date of this Act is, or within one calendar year after that date becomes," and inserting in lieu thereof "on September 21, 1972, was, or during the period beginning on September 22, 1972, and ending on March 20, 1974, became,".

10 USC 1448 note.

(b) Any annuity payable by reason of subsection (a) shall be payable only for months after September 1983.

CLARIFICATION OF CONTINUING RESPONSIBILITY FOR FUNDING OF CERTAIN SURVIVORS' BENEFITS

42 USC 402 note.

SEC. 943. Section 156(g)(1) of Public Law 97-377 (96 Stat. 1922) is amended—

(1) by striking out "fiscal year 1983" and inserting in lieu thereof "each fiscal year";

(2) by striking out "from the 'Retired Pay, Defense' account of the Department of Defense"; and

(3) by inserting between the first and second sentences the following: "During fiscal year 1983, transfers under this subsection shall be made from the 'Retired Pay, Defense' account of the Department of Defense. During subsequent fiscal years, such transfers shall be made from such account or from funds otherwise available to the Secretary for the purpose of the payment of such benefits and expenses.".

TITLE X—MILITARY PERSONNEL MATTERS

PART A—OFFICER PERSONNEL MANAGEMENT AND TRAINING

TEMPORARY MODIFICATION IN CERTAIN GENERAL AND FLAG OFFICER GRADE LIMITATIONS

10 USC 525 note.

SEC. 1001. (a) During fiscal year 1984, the number of officers of the Air Force authorized under section 525(b)(1) of title 10, United States Code, to be on active duty in the grade of general is increased by one.

(b) During fiscal year 1984, the number of officers of the Navy authorized under section 525(b)(2) of title 10, United States Code, to be on active duty in grades above rear admiral is increased by three. None of the additional officers in grades above rear admiral authorized by this section may be in the grade of admiral.

(c) During fiscal year 1984, a commissioned officer serving in the position of Director of the Intelligence Community Staff shall not be counted against the numbers and percentages of commissioned officers of the grade of such officer authorized for the Armed Force of

which he is a member, except that during such year only one commissioned officer of the Armed Forces occupying the position of Director of Central Intelligence or Deputy Director of Central Intelligence as provided for in section 102 of the National Security Act of 1947 (50 U.S.C. 403) or the position of Director of the Intelligence Community Staff may be exempt from such numbers and percentages at any one time.

PERFORMANCE OF CIVIL FUNCTIONS BY MILITARY OFFICERS

SEC. 1002. (a) Section 973 of title 10, United States Code, is amended by striking out subsection (b) and inserting in lieu thereof the following:

"(b)(1) This subsection applies—

"(A) to a regular officer of an armed force on the active-duty list (and a regular officer of the Coast Guard on the active duty promotion list);

"(B) to a retired regular officer of an armed force serving on active duty under a call or order to active duty for a period in excess of 180 days; and

"(C) to a reserve officer of an armed force serving on active duty under a call or order to active duty for a period in excess of 180 days.

"(2)(A) Except as otherwise authorized by law, an officer to whom this subsection applies may not hold, or exercise the functions of, a civil office in the Government of the United States—

"(i) that is an elective office;

"(ii) that requires an appointment by the President by and with the advice and consent of the Senate; or

"(iii) that is a position in the Executive Schedule under sections 5312 through 5317 of title 5.

5 USC 5312-5317.

"(B) An officer to whom this subsection applies may hold or exercise the functions of a civil office in the Government of the United States that is not described in subparagraph (A) when assigned or detailed to that office or to perform those functions.

"(3) Except as otherwise authorized by law, an officer to whom this subsection applies may not hold or exercise, by election or appointment, the functions of a civil office in the government of a State, the District of Columbia, or a territory, possession, or commonwealth of the United States (or of any political subdivision of any such government).

"(4) Nothing in this subsection shall be construed to invalidate any action undertaken by an officer in furtherance of assigned official duties.

"(c) The Secretary of Defense, and the Secretary of Transportation with respect to the Coast Guard when it is not operating in the Navy, shall prescribe regulations to implement this section.".

Regulations.

(b) Nothing in section 973(b) of title 10, United States Code, as in effect before the date of the enactment of this Act, shall be construed—

10 USC 973 note.

(1) to invalidate any action undertaken by an officer of an Armed Force in furtherance of assigned official duties; or

(2) to have terminated the military appointment of an officer of an Armed Force by reason of the acceptance of a civil office, or the exercise of its functions, by that officer in furtherance of assigned official duties.

10 USC 973 note.

(c) Nothing in section 973(b)(3) of title 10, United States Code, as added by subsection (a), shall preclude a Reserve officer to whom such section applies from holding or exercising the functions of an office described in such section for the term to which the Reserve officer was elected or appointed if, before the date of the enactment of this Act, the Reserve officer accepted appointment or election to that office in accordance with the laws and regulations in effect at the time of such appointment or election.

(d) The Act entitled "An Act to grant the consent of the United States to the Red River Compact among the States of Arkansas, Louisiana, Oklahoma, and Texas", approved December 22, 1980 (94 Stat. 3305), is amended by adding at the end thereof the following new section:

"SEC. 5. (a) The President may appoint a regular officer of the Army, Navy, Air Force, or Marine Corps who is serving on active duty as the Federal Commissioner of the Commission.

Ante, p. 655.

"(b) Notwithstanding the provisions of section 973(b) of title 10, United States Code, acceptance by a regular officer of the Army, Navy, Air Force, or Marine Corps of an appointment as the Federal Commissioner of the Commission, or the exercise of the functions of Federal Commissioner and chairman of the Commission, by such officer shall not terminate or otherwise affect such officer's appointment as a military officer.".

MODIFICATIONS TO RESERVE OFFICERS' TRAINING CORPS SCHOLARSHIP PROGRAM

SEC. 1003. (a)(1) Section 2101(3) of title 10, United States Code, is amended by striking out the period and inserting in lieu thereof "(except that, in the case of a student enrolled in an academic program which has been approved by the Secretary of the military department concerned and which requires more than four academic years for completion of baccalaureate degree requirements, including elective requirements of the Senior Reserve Officers' Training Corps course, such term includes a fifth academic year or a combination of a part of a fifth academic year and summer sessions).".

10 USC 2104.

(2) Section 2104(a) of such title is amended by inserting "at least" before "two".

10 USC 2107.

(3) Section 2107(c) of such title is amended by inserting after the first sentence the following new sentence: "In the case of a student enrolled in an academic program which has been approved by the Secretary of the military department concerned and which requires more than four academic years for completion of baccalaureate degree requirements, including elective requirements of the Senior Reserve Officers' Training Corps course, financial assistance under this section may also be provided during a fifth academic year or during a combination of a part of a fifth academic year and summer sessions.".

(4) Section 209(a) of title 37, United States Code, is amended by striking out "20" and inserting in lieu thereof "30".

(b)(1) Section 2005 of title 10, United States Code, is amended by adding at the end thereof the following new subsection:

"(f) The Secretary concerned shall require, as a condition to the Secretary providing financial assistance under section 2107 or 2107a of this title to any person, that such person enter into an agreement described in subsection (a). In addition to the requirements of

10 USC 2107, 2107a.