

ARTICLE I, ARTICLE III COURTS, AND MILITARY COMMISSIONS

CAAF CLE & Training Program

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PRESENTATION OUTLINE

ARTICLE I, ARTICLE III COURTS & MILITARY COMMISSIONS

- I. **Article III and the Guantánamo Commissions**
 - Const'l Justifications for Military Commissions
 - How the Guantánamo Commissions Differ
 - The *al Bahlul* Litigation, Thus Far...
 - Why This Matters Beyond Guantánamo
- II. **The Commissions' Other Implications...**
 - Mandamus and the All Writs Act
 - The Appointment of Military Judges
 - *Councilman* Abstention

MILITARY COMMISSIONS

ARTICLE I, ARTICLE III COURTS & MILITARY COMMISSIONS

- Historically (prior to 2006), were *ad hoc*, irregular courts deployed in three situations:
 - (1) To serve as courts of general (civilian & military) jurisdiction in areas under military occupation;
 - (2) To serve as courts of general (civilian & military) jurisdiction in areas properly under martial law;
 - (3) To provide a forum for the prosecution of enemy soldiers for violations of the laws of war (“war crimes”), even when / where civilian courts were open and functioning.

EX PARTE MILLIGAN (1866)

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- During the Civil War, President Lincoln convened military commissions in areas under martial law (along the front lines) *and* not (such as Indiana). *Milligan* raised the constitutionality of the latter...
 - (1) Writing for a unanimous Court, Justice Davis held such non-martial law commissions to be unlawful, because they violated Milligan's jury-trial rights.
 - (2) In a (rare) four-Justice concurrence, C.J. Chase agreed that *unilateral* commissions were unlawful, but reserved the possibility that Congress *could* authorize such commissions in appropriate circumstances.

EX PARTE QUIRIN (1942)

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- During World War II, FDR convenes mil. comm'ns to try eight Nazi saboteurs (one of whom was a U.S. citizen) captured after they entered the U.S. to engage in industrial sabotage (and were betrayed...)
- For a unanimous Court, C.J. Stone upholds the comm'ns, distinguishing *Milligan* on two grounds:
 - (1) Congress, through Article 15 of the Articles of War, had authorized the commissions; and
 - (2) The jury-trial rights at issue in *Milligan* did not apply to “offenses committed by enemy belligerents against the law of war.”

ARTICLE 15 (10 U.S.C. § 821)

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- “The provisions of this chapter conferring jurisdiction upon courts-martial **do not deprive military commissions**, provost courts, or other military tribunals of concurrent jurisdiction with respect to **offenders or offenses that by statute or by the law of war may be tried by military commissions**, provost courts, or other military tribunals.”

QUESTIONS AFTER *QUIRIN*

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- (1) Does Article 15 really provide substantive *authorization* for commissions?
- (2) What is the source of the exception to jury-trial for “offenses committed by enemy belligerents against the law of war”?
- (3) Can Congress invest military commissions with jurisdiction over offenses that are *not* “against the law of war”?
- (4) What’s left of *Milligan*?

MIL. COMM'NS AFTER 9/11, I

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- After 9/11, President Bush, purporting to rely upon *Quirin*, creates military commissions to try non-citizen enemy combatants at Guantánamo.
- Authority for the commissions is tied to Art. 21 (former Art. 15) and the President's inherent constitutional authority as Commander in Chief.
- The commissions are given jurisdiction over some offenses (like inchoate conspiracy) that are not clearly established international war crimes.
- The commissions are also given procedural and evidentiary rules that depart from courts-martial.

HAMDAN V. RUMSFELD (2006)

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- In *Hamdan*, the Supreme Court holds that the commissions are unlawful, for three reasons:
 - (1) A four-Justice plurality holds that Art. 21 doesn't authorize trials of non-international war crimes;
 - (2) A majority holds that the deviations from court-martial rules violates Article 36 of the UCMJ; and
 - (3) A majority holds that the trials violate Common Article 3 of the Geneva Conventions, because they are not the "regularly constituted courts" required for trials of enemy belligerents.

MIL. COMM'NS AFTER 9/11, II

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- Congress responds by passing the MCA, which:
 - (1) Strips habeas jurisdiction over Guantánamo (the provision that was invalidated in *Boumediene*);
 - (2) Expressly authorizes military commissions;
 - (3) Authorizes procedural and evidentiary rules that differ from courts-martial;
 - (4) Delineates over two-dozen specific offenses that can be tried by the commissions, including several (conspiracy, material support) not recognized as international war crimes;

MIL. COMM'NS AFTER 9/11, II

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- (5) Asserts that the MCA “does not establish new crimes that did not exist before its enactment, but rather codifies those crimes for trial by military commission.” As such, the new provisions “do not preclude trial for crimes that occurred before the date of the enactment of this chapter”; and
- (6) Creates new intermediate Article I **Court of Military Commission Review** (CMCR) to hear appeals of final mil. comm’n judgments (& certain interlocutory appeals by the government), with appellate review of the CMCR in the D.C. Circuit.

AL BAHLUL V. UNITED STATES

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- Δ convicted of conspiracy, material support, & solicitation. Raises five const'l challenges:
- (1) The **Ex Post Facto Clause** of Article I;
- (2) The **Define & Punish Clause** of Article I (insofar as the offenses are not violations of int'l law);
- (3) **Article III** (insofar as the offenses fall outside the exception articulated in **Quirin**); and
- (4) **Equal Protection** (insofar as MCA only applies to "*alien*" unprivileged enemy belligerents).
- (5) **The First Amendment** (prosecuted for speech).

AL BAHLUL I (D.C. CIR. 2014) (eb)

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- In *al Bahlul I*, en banc D.C. Cir. holds, 4-3, that Δ forfeited ex post facto claim (by failing to assert it at trial), and so “plain error” review applies. On merits:
 - (1) Unanimous court holds that conviction for material support and solicitation were “plain error”; no reasonable basis for concluding that such offenses were triable by military comm’ns prior to MCA; but
 - (2) 2-4-1 court holds that conspiracy conviction was not violation of Ex Post Facto Clause (with majority relying upon it not being “plain error”) because of somewhat more equivocal historical evidence re: conspiracy as an offense triable by commissions.

AL BAHLUL II (D.C. CIR. 2015)

ARTICLE I, ARTICLE III COURTS & MILITARY COMMISSIONS

- En banc court remands remaining challenges (Art. I, Art. III, and equal protection) to three-judge panel, which rules, 2-1, in *al Bahlul II* that:
 - (1) De novo review applies to al Bahlul's Article III objection to the commission's jurisdiction; and
 - (2) The MCA *violates* Article III insofar as it authorizes trials for inchoate conspiracy, an offense that is *not* a violation of the int'l laws of war, and therefore falls outside of the exception recognized in *Quirin*.
- Judge Henderson dissents on both counts...
- D.C. Cir. goes en banc to reconsider both holdings.

AL BAHLUL II: JUDGE ROGERS

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- “The Supreme Court’s reason in *Quirin* for recognizing an exception to Article III – that international law of war offenses did not entail a right to trial by jury at common law – does not apply to conspiracy as a standalone offense. . . . Although the Court had no occasion to speak more broadly about whether other offenses came within the Article III exception, its reasoning precludes an Article III exception for conspiracy, which did entail a right to trial by jury at common law.” [792 F.3d 1, 9 (D.C. Cir. 2015)]

AL BAHLUL II: JUDGE ROGERS

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- “The reasoning in *Quirin* also counsels against expanding the exception beyond international law of war offenses. Stating that ‘[f]rom the very beginning of its history th[e] Court has recognized and applied the law of war as [being] part of the law of nations,’ the Court explained that some offenses may not be triable by military commission because ‘they are not recognized by our courts as violations of the law of war.’ No subsequent Supreme Court holding suggests that law of war military commissions may exercise jurisdiction over offenses not recognized by the ‘law of war’ as defined in *Quirin*.” (*Id.* at 9–10)

AL BAHLUL II: JUDGE ROGERS

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- Rogers then rejects USG's alternative arguments that:
 - (1) The Court in *Quirin* itself recognized JX over non-war crimes, such as sabotage; and
 - (2) Historical practice demonstrates that U.S. military commissions have tried conspiracy as an inchoate offense.
- **Bottom line**: “The government has failed to identify a sufficiently settled historical practice for this court to conclude that the inchoate conspiracy offense of which Bahlul was convicted falls within the Art. III exception for law of war military commissions.” (22)

AL BAHLUL II: JUDGE HENDERSON

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- Opens by arguing that the Article III claim was also forfeitable (and was forfeited), so plain error should apply.
- Then provides substantial defense of Congress's Article I power to define offenses against the law of nations that have not yet received universal recognition within the international community, like inchoate conspiracy.

AL BAHLUL II: JUDGE HENDERSON

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- As for Article III, Judge Henderson agrees w/ majority that *Quirin* didn't expressly allow non-Article III military commissions to try such offenses, but argues that a functional approach to the Article III question justifies a modest expansion of *Quirin* to encompass offenses Congress can permissibly proscribe under the Article I Define and Punish Clause.

AL BAHLUL II: JUDGE HENDERSON

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- As an alternative argument, Judge Henderson also suggests that there's no Article III problem because al Bahlul does not have any right to a jury trial:
- "Even if the Criminal Jury Clause did limit mil. comm'n JX, it has no application here because Bahlul is neither a U.S. citizen nor present on U.S. soil. The Supreme Court has repeatedly held that the Constitution offers no protection to noncitizens outside the United States. This limitation on the Constitution's extraterritorial reach encompasses the right to a jury trial in a criminal case." (71)

AL BAHLUL II: JUDGE HENDERSON

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- Although she didn't cite to it (boo!), note how well such reasoning dovetails with then-Judge Erdmann's majority opinion in *United States v. Ali*, 71 M.J. 256 (C.A.A.F. 2012), upholding Article 2(a)(10) of the UCMJ as applied to the court-martial of a non-citizen private military contractor in Iraq *because* the Δ lacked jury-trial rights under the Fifth and Sixth Amendments...
- For better or worse, this underscores the rather important ways in which the Article III question overlaps between courts-martial and commissions.

AL BAHLUL II: THE AFTERMATH

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- On 9/25, the D.C. Cir. granted rehearing en banc, with argument before a 10-judge court on 12/1.
- The oral argument seemed to reveal a fractured court, with three judges appearing to believe that there is no Article III problem; three believing there is; and four who spent most of the argument looking for a narrow way to rule (perhaps by, once again, relying upon “plain error” review to avoid a broad holding one way or the other).
- Such a ruling would both (1) likely avoid SCOTUS; and (2) leave the Article III question open...

AL BAHLUL II: THE BIG STAKES

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- The far more significant issue is how the Art. III question is ultimately resolved, whether in *al Bahlul II* or elsewhere.
- Either the Constitution limits the JX of military commissions to int'l war crimes, or it doesn't.
- And if it doesn't, what *is* the limit on the JX of military commissions?
- Some looser connection to hostilities / armed conflict?
- Defendants w/o constitutional rights?
- Some combination of both?

SHAMELESS PLUG...

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- If you find the Article III question (and its potential implications for courts-martial) interesting, you might enjoy my (long) article on the history and current debate over the relationship between the military and Article III:
- **Stephen I. Vladeck, *Military Courts and Article III*, 103 GEO. L.J. 933 (2015)**, a free copy of which is available at: <https://perma.cc/H6JW-B4V6>.

OTHER FEDERAL COURTS Q's...

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- Although much of the focus, from a federal courts perspective, has been on the Article III question, there are three other interesting issues that been the subject of recent litigation:
 - (1) **The All Writs Act and / in the military commissions;**
 - (2) **The constitutionality of how military judges are appointed to the CMCR;**
 - (3) **How *Councilman* abstention applies to the military commissions.**

THE ALL WRITS ACT

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- For a time, there was doubt as to whether courts had jurisdiction to issue writs of **mandamus** in cases arising out of the commissions (because of both the narrow language of **10 U.S.C. § 950g** and the non-habeas-stripping language of **28 U.S.C. § 2241(e)(2)**).
- In *In re al-Nashiri* ("*al-Nashiri I*"), **791 F.3d 71 (D.C. Cir. 2015)**, D.C. Circuit holds that it has the power to issue a writ of mandamus to the CMCR (and, *a fortiori*, to the commissions themselves).
- What if non-parties seek such relief? Cf. *LRM v. Kastenberg*, **72 M.J. 364 (C.A.A.F. 2013)**; *Ctr. for Const'l Rights v. U.S.*, **72 M.J. 126 (C.A.A.F. 2013)**.

THE APPOINTMENTS CLAUSE

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- When Congress created the CMCR, it modeled it on CCAs, with provisions for both civilian judges (nominated by the President and confirmed by the Senate) and military judges (assigned the same way that military judges are assigned to the CCAs).
- **Small problem**: In *Weiss v. United States*, 510 U.S. 163 (1994), and *Edmond v. United States*, 520 U.S. 651 (1997), Supreme Court upheld military-judge appointments to CCAs because (1) they're "inferior" officers (because of CAAF); and (2) reassignment is "germane" to their original duties.

THE APPOINTMENTS CLAUSE

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- But whereas CAAF is expressly located within the Department of Defense for administrative purposes (which makes CCA judges inferior officers under *Edmond*), the D.C. Circuit is most definitely *not*, which means CMCR judges are almost certainly *principal* officers (to whom *Weiss*'s germaneness test may not apply).
- In *al-Nashiri I*, the D.C. Circuit declined to issue mandamus relief on an Appointments Clause challenge to the CMCR, but expressed serious concern about this status quo:

THE APPOINTMENTS CLAUSE

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- “Once this opinion issues, the President and the Senate could decide to put to rest any Appointments Clause questions regarding the CMCR’s military judges. They could do so by re-nominating and re-confirming the military judges to be CMCR judges. Taking these steps – whether or not they are constitutionally required – would answer any Appointments Clause challenge to the CMCR.” (791 F.3d at 86.)

THE APPOINTMENTS CLAUSE

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- “On September 10, 2015, the Secretary . . . recommended that the President nominate [incoming military] judges – in addition to the judges already serving on the Court – for appointment and confirmation as U.S.C.M.C.R. judges. The Secretary’s recommendation has been transmitted to the President for his consideration of their appointment as U.S.C.M.C.R. judges. If so appointed, their appointment is expected to proceed on to the Senate Armed Services Committee for the Senate’s advice and consent.” (General Martins, requesting extension of the stay in the CMCR in *al-Nashiri*.)

COUNCILMAN ABSTENTION

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- Finally, there's also now an important test case for the contemporary scope of *Councilman* abstention pending in the D.C. Circuit.
- In *al-Nashiri v. Obama* ("*al-Nashiri II*"), the Δ brought a habeas petition challenging whether he could be tried by a military commission for pre-9/11 conduct (to wit, the attack on the USS Cole).
- **MCA**: "An offense specified in this subchapter is triable by military commission under this chapter *only* if the offense is committed in the context of and associated with *any conflict subject to the laws of war.*"

COUNCILMAN ABSTENTION

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- The district court applied *Councilman* abstention, reasoning that Congress, by enacting the MCA, had intended civilian courts to stay their hand until a post-conviction appeal. *See 76 F. Supp. 3d 218 (D.D.C. 2014)*.
- But the three-judge D.C. Circuit panel that heard oral argument on the abstention question on February 17 (*Sentelle, Tatel, & Griffith, JJ.*) seemed deeply troubled by that reasoning, and offered four reasons why *Councilman* might not warrant abstention in Nashiri's case:

COUNCILMAN ABSTENTION

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- (1) Unlike courts-martial, the Guantánamo military commissions are trying non-servicemembers for non-military offenses, and they are not independent of, but rather directly subservient to, the Article III civilian courts);
- (2) al-Nashiri's claim is the exact kind of challenge to the subject-matter jurisdiction of a military court that the Supreme Court has consistently adjudicated (and authorized lower courts to adjudicate) in the context of collateral pre-trial review.

COUNCILMAN ABSTENTION

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- (3) Abstention is especially inappropriate in *al-Nashiri's* case because of the stay that remains in place in the CMCR (a result of the ongoing efforts to resolve the Appointments Clause issues raised in *al-Nashiri I*), the practical effect of which is to “cut[] against any argument that resolution of Petitioner’s claims . . . will somehow further delay Petitioner’s trial.”
- Seems likely that the panel will therefore reverse on abstention and send merits to district court...

IMPLICATIONS...

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- So all of this is just to suggest that, whoever has the right *answers*, the military commission litigation continues to raise really interesting questions of first impression – and ones that, depending upon how they're answered, *could* have implications for the court-martial system.

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