

**IN THE UNITED STATES COURT OF APPEALS FOR THE
ARMED FORCES**

UNITED STATES,

Appellee,

v.

KEANU D.W. ORTIZ,
Airman First Class, USAF

Appellant.

APPENDIX TO BRIEF OF
AMICUS CURIAE THE MILITARY
COMMISSIONS DEFENSE
ORGANIZATION IN SUPPORT OF
NEITHER PARTY

USCA Dkt. No. 16-0671/AF

Crim. App. No. 38839

THE HONORABLE, THE JUDGES OF THE UNITED STATES COURT OF
APPEALS FOR THE ARMED FORCES

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Chapter 9

DEFENSE COUNSEL

9-1. DETAIL OF DEFENSE COUNSEL

Every accused shall have a qualified military defense counsel detailed to the accused at government expense during every stage of the proceedings. Should the military judge approve the request of an accused to represent himself, detailed defense counsel may act as standby counsel at the direction of the military judge. Should the accused retain civilian counsel, a military defense counsel shall remain detailed to the accused.

a. *Chief Defense Counsel.*

1. The Chief Defense Counsel shall be a judge advocate of any United States armed force and shall be designated by the Secretary of Defense or his designee. The Chief Defense Counsel shall report directly to the Deputy General Counsel (Personnel and Health Policy) of the DoD.

2. The Chief Defense Counsel shall supervise all defense activities and the efforts of detailed defense counsel and other office personnel and resources pursuant to the M.C.A. and the M.M.C., ensure proper supervision and management of all personnel and resources assigned to the Office of the Chief Defense Counsel (OCDC), and facilitate the proper representation of all accused referred to trial before a military commission appointed pursuant to the M.C.A. In cases where a conflict of interest between or among accused precludes the Chief Defense Counsel from supervising the efforts of a detailed defense counsel, such supervisory authority may be exercised by another individual who is designated by the Chief Defense Counsel.

3. The Chief Defense Counsel shall ensure that all personnel assigned to the OCDC review and attest that they understand, and will comply with, the M.C.A., the M.M.C., this Regulation, all Supplementary Regulations and Instructions issued in accordance therewith, and the orders of the commission. Furthermore, the Chief Defense Counsel shall regulate the conduct of detailed defense counsel as deemed necessary, consistent with the aforementioned legal authorities as well as subordinate instructions and regulations. The Chief Defense Counsel also shall ensure that military counsel who remain detailed when an accused is represented by civilian counsel are familiar with the provisions and restrictions contained in MC Form 9-2, Affidavit and Agreement By Civilian Defense Counsel, and are prepared to assist civilian defense counsel in complying with that agreement.

4. The Chief Defense Counsel shall detail a judge advocate of any United States armed force, who is assigned to or performing duty with the OCDC, to perform the duties of the detailed defense counsel as set forth in R.M.C. 502(d)(7). The Chief Defense Counsel shall also detail other personnel or, as approved by the Convening Authority, employ civilian personnel and any other personnel to provide administrative and other support

services. The Chief Defense Counsel may not detail himself to perform the duties of detailed defense counsel.

5. The Chief Defense Counsel may, when appropriate, detail an additional judge advocate or qualified civilian attorney performing duty with the OCDC, as assistant detailed defense counsel to assist in performing the duties of the detailed defense counsel.

6. *Learned Counsel.* In any case in which trial counsel makes a recommendation to the Convening Authority pursuant to R.M.C. 307(d) that a charge be referred to a capital military commission, the accused has the right to be represented by at least one additional counsel who is learned in applicable law relating to capital cases. *See* R.M.C. 506(b). If a charge transmitted by trial counsel to the convening authority is a charge for which the death penalty is authorized, the Convening Authority may not refer the charge as a capital offense unless the provisions regarding learned counsel in Rule 506(b) have been met. *See* R.M.C. 601(d)(2).

A. The Chief Defense Counsel shall notify the Convening Authority in writing as to whether it is practicable to detail a military or civilian attorney assigned to, or employed by, the OCDC as learned counsel in a particular case. This notice shall be made by the Chief Defense Counsel within 14 business days of receiving notice that charges be referred to a capital military commission

B. If it is practicable to detail a military or civilian attorney assigned to, or employed by, the OCDC as learned counsel, the Chief Defense Counsel shall detail such counsel within 30 business days of receiving notice that charges may be referred to a capital military commission. Once learned counsel has been detailed, the Chief Defense Counsel shall inform the Convening Authority accordingly.

C. If it is not practicable to detail an attorney assigned to, or employed by, the OCDC, the Chief Defense Counsel shall select a member of the civilian pool, or other civilian counsel not yet a member of the civilian defense pool, who has the appropriate qualifications as outside learned counsel and forward a request for approval of funding for this counsel to the Convening Authority. This request for the approval of funding for outside learned counsel shall be made within 45 business days of receiving notice that charges may be referred to a capital military commission. This request shall include all the completed and executed applications, forms, and other materials as required by the government in order to qualify the selected outside learned counsel pursuant to R.M.C. 502(d)(3) and Chapter 9-5 of this Regulation, including:

i. A memorandum from the Chief Defense Counsel indicating that the outside counsel has been properly admitted as a member of the pool of civilian defense counsel (if applicable) under Chapter 9-5c. of this Regulation, or is eligible for the same, and that the outside counsel has executed and submitted the Affidavit and Agreement (Figure 9.2) and the Non-disclosure Agreement (Figure 9.3) required for civilian defense counsel; and

ii. Proof that the outside civilian counsel possesses a current security clearance at the level required for the case to which he is to be assigned, or a statement by the Chief Defense Counsel that the outside civilian counsel has executed and submitted an application for Security Clearance, SF-86, and other necessary documents. If after selected learned counsel has complied with all the requirements set forth by the government, and the government determines the selected outside learned counsel is not eligible for access to information classified at the level necessary for the trial of the case to which such counsel is to be assigned, the Chief Defense Counsel shall, within 45 business days of receiving notice of such ineligibility of the selected outside learned counsel, select another member of the civilian pool, or other civilian counsel not yet a member of the civilian defense pool, as outside learned counsel, and shall comply with the rules set forth in this Regulation pertaining to selection of same.

D. The Convening Authority shall approve the Chief Defense Counsel's reasonable request for the appointment of qualified outside learned counsel.

E. If the Chief Defense Counsel is unable to forward this request for the approval of funding for outside learned counsel within 45 business days of receiving notice that charges may be referred to a capital military commission, the Chief Defense Counsel shall make a written request for additional time, and shall state the reasons for making the request. The Convening Authority shall grant the Chief Defense Counsel's reasonable request for additional time, and may recommend up to three outside learned counsel to the Chief Defense Counsel for consideration. The Chief Defense Counsel may consider these candidates as well as any others he or she may have identified.

F. The Convening Authority is authorized to identify and appoint outside learned counsel (regardless of whether they are yet members of the civilian defense pool), to include military counsel, if the Chief Defense Counsel fails, within 45 business days of receiving notice that charges may be referred to a capital military commission, to submit a written request for additional time, if the Chief Defense Counsel's request for additional time is unreasonable, or if the Chief Defense Counsel fails to identify and appoint outside learned counsel within the period of time granted by the Convening Authority in response to the Chief Defense Counsel's request for additional time.

G. Outside learned counsel shall be retained and compensated in a manner consistent with the procedures employed by federal courts under 18 U.S.C. §§ 3005 and 3006A. The applicable hourly rate for the appointment of qualified outside learned counsel shall be the maximum hourly rate for federal capital prosecutions, as provided by the Administrative Office of the United States Courts. Consistent with practice in federal courts, the military judge shall review payment for reasonable requests for attorney's fees and expenses submitted by outside learned counsel, keeping in mind the complexity of capital cases and validate the request for the Convening Authority to make the reasonable payment of those funds. For representation relating to an appeal in the U.S. Court of Military Commission Review, the Chief Judge of that Court shall review and validate the payment of all reasonable fee and expense requests. Fee and expense requests shall be submitted to the military judge in a manner consistent with 18 U.S.C. § 3006A(d)(5) and

each claim shall be supported by a sworn written statement specifying the time expended, services rendered, and the fees and expenses incurred in the performance of representation services. If outside learned counsel request payment prior to detailing of a military judge, payment for reasonable requests for attorney's fees and expenses shall be approved by the Convening Authority.

H. Outside learned counsel shall have access to OCDC Defense paralegals, interpreters, analysts, investigators, supplies, and other resources. Outside learned counsel shall not be entitled to reimbursement for expenses associated with the hiring of interpreters, analysts, or investigators.

I. When appointed outside learned counsel is approved for travel by the Chief Defense Counsel, the Office of the Convening Authority shall issue invitational travel orders.

J. Consistent with 18 U.S.C. § 3006A(d)(4), information regarding validated requests for payment of services to outside learned counsel shall be made available to the public. The military commission shall redact any detailed information on the payment voucher provided by defense counsel to justify the expense to the military commission and make public only the amounts approved for payment to the outside learned counsel. Upon completion of the trial, the military commission shall, consistent with 18 U.S.C. § 3006A(d)(4)(C), make available an unredacted copy of the expense voucher.

K. It is the responsibility of the Chief Defense Counsel to ensure that outside learned counsel are adhering to the provisions of the M.C.A., M.M.C and this Regulation.

7. The Chief Defense Counsel may structure the OCDC to include subordinate supervising attorneys who may incur confidentiality obligations in the context of fulfilling their supervisory responsibilities with regard to defense counsel.

8. The Chief Defense Counsel shall take appropriate measures to preclude defense counsel conflicts of interest arising from the representation of accused before military commissions. The Chief Defense Counsel shall be provided sufficient information (potentially including classified information, to the extent authorized by the M.C.A., M.M.C. and this Regulation) to fulfill this responsibility.

9. The Chief Defense Counsel shall take appropriate measures to ensure that each detailed defense counsel is capable of zealous representation and unencumbered by any conflict of interest. In this regard, the Chief Defense Counsel shall monitor the activities of all defense counsel (detailed and civilian) and take appropriate measures to ensure that defense counsel remain unencumbered by conflicts of interest. *See also* Chapter 10.

10. The Chief Defense Counsel shall ensure that when an accused proceeds *pro se* a detailed defense counsel is assigned to the case. Detailed defense counsel may act as standby counsel at the direction of the military judge

11. The Chief Defense Counsel shall administer all requests for individual military defense counsel requested in accordance with Chapter 9-2 of this chapter. The Chief Defense Counsel shall determine the availability of such counsel in accordance with 10 U.S.C. § 949a(b)(2)(C)(i), R.M.C. 506(c), and this Regulation.

12. The Chief Defense Counsel shall administer the civilian defense counsel pool, screening all requests for qualification and making qualification determinations and recommendations in accordance with Chapter 9-5(b), and ensuring appropriate notification to an accused of civilian attorneys available to represent an accused before a military commission.

13. The Chief Defense Counsel shall administer the selection of learned counsel, screening all requests for qualification and determining which military and civilian counsel assigned to, or employed by, the OCDC and members of the civilian defense pool are qualified to serve as learned counsel pursuant to the standards set out in Chapters 9-1(b)(1)(C) and 9-5. The Convening Authority shall determine the compensation of learned counsel selected from the civilian defense pool in a manner consistent with that employed by federal courts under 18 U.S.C. § 3005 and § 3006A.

14. The Chief Defense Counsel shall ensure that all detailed defense counsel and civilian defense counsel who are to perform duties in relation to a military commission have taken an oath to perform their duties faithfully.

15. The Chief Defense Counsel shall ensure that all personnel under the supervision of the OCDC possess the appropriate security clearances.

16. The Chief Defense Counsel may appoint one or more deputies to assist him in his duties as Chief Defense Counsel.

17. The Chief Defense Counsel shall establish, within the OCDC, a section dedicated to providing appellate representation for the accused on appeal, to include appellate representation by counsel learned in the law applicable to capital cases for cases in which the appellant has been sentenced to death, and shall establish procedures for the appointment of appellate counsel to represent an accused before the United States Court of Military Commission Review, the United States Court of Appeals for the District of Columbia Circuit, and the United States Supreme Court. Appellate defense counsel shall meet the requirements for counsel appearing before military commissions.

b. *Detailed defense counsel.*

1. *Qualifications of detailed defense counsel.*

A. Ordinarily, only persons certified under 10 U.S.C. § 827(b) (Article 27(b) of the U.C.M.J.) as competent to perform duties as counsel in courts-martial by the Judge Advocate General of the armed force of which the counsel is a member may be detailed as defense counsel in a military commission. However, a civilian who is a member of the bar

of a Federal court or the highest court of a State or the District of Columbia and is otherwise qualified by means of training and has attained the requisite security clearance pursuant to regulation issued under DoD DIRECTIVE 5200.R-2 may also serve as defense counsel. Both detailed defense counsel and civilian defense counsel must be eligible for access to information classified at the level SECRET or higher, as required, in accordance with the procedures prescribed in Chapter 18 of this Regulation, and have signed the appropriate non-disclosure agreement(s) (Form 4414, SF 312, and/or DD Form 1847, *see* Figure 9.3), and an agreement to comply with all applicable regulations or instructions for counsel, including any rules or orders of the commission pertaining to conduct during the course of the proceedings.

B. The Chief Defense Counsel may detail, in addition to military defense counsel, a DoD civilian attorney performing duties with the OCDC, as an assistant defense counsel.

C. A counsel learned in the applicable law relating to capital cases is an attorney (i) who is a military or civilian counsel assigned to, or employed by, the OCDC, or a civilian counsel qualified for membership in the civilian defense pool pursuant to Chapter 9-5; and (ii) whose background, knowledge and/or experience would enable him or her to properly represent an accused in a capital case, with due consideration of the seriousness of the possible penalty and the unique and complex nature of the litigation. A counsel who meets the requirements of 18 U.S.C. § 3005 qualifies as learned counsel under this section.

D. Each prospective detailed defense counsel shall identify to the Chief Defense Counsel each jurisdiction wherein the prospective detailed defense counsel is licensed to practice law. Consistent with R.M.C. 109(b)(3)(D), the Chief Defense Counsel will review the licensing bar association rules of each prospective detailed defense counsel, and verify that such bar association rules cannot reasonably be foreseen as an impediment to that counsel's adherence to the rules of professional responsibility expressly applicable to trials by military commission under Chapter 10. Only after this review is a candidate eligible for service in the OCDC.

E. Detailed defense counsel must be determined to be eligible for access to information classified at the level SECRET or higher, as required, in accordance with the procedures prescribed in Chapter 18 of this Regulation; and have signed a Non-Disclosure Agreement (Form 4414) and an agreement to comply with all applicable regulations or instructions for counsel, including any rules or orders of the commission for conduct during the course of the proceedings.

2. Duties of detailed defense counsel.

A. Express duties of the detailed defense counsel are articulated in 10 U.S.C. §949c(b), and R.M.C. 502(d)(7) Discussion. The detailed defense counsel shall defend the accused zealously within the bounds of the law without regard to personal opinion as to the guilt of the accused.

B. Detailed defense counsel shall comply with the procedures accorded the accused pursuant to 10 U.S.C. §§ 948a – 948d, the M.M.C. and this Regulation.

C. Detailed defense counsel shall serve as standby counsel should the military judge approve an accused's request to represent himself *pro se*. Detailed defense counsel shall serve as associate counsel, should the accused retain civilian counsel of his own choosing under Chapter 9-5 of this Regulation.

D. Detailed defense counsel shall have primary responsibility to prevent any conflicts of interest related to the handling of the cases to which he or she is detailed.

E. Detailed defense counsel shall fulfill all responsibilities set forth in the M.C.A., M.M.C., this Regulation, and those assigned by the Chief Defense Counsel.

F. At all times, detailed defense counsel must strictly comply with 10 U.S.C. §§ 949p-1 – 949p-7, R.M.C. 701, and Mil. Comm. R. Evid. 505, and Chapter 18 of this Regulation, to ensure that they do not disclose classified and protected information to any person not authorized to receive such information.

G. All requests for the declassification of classified materials intended to be used by the Defense in a military commission shall be in writing, and submitted, through trial counsel, to the DoD Security Classification/Declassification Review Team, when the materials originate with DoD, or to the original classification authority of any non-DoD federal departments or agencies. *See* 10 U.S.C. § 949p-1(c). Requests for further declassification of classified materials, or for reconsideration of a declassification decision, shall be in writing, and submitted, through trial counsel, to the DoD Security Classification/Declassification Review Team, when the materials originate with DoD, or to the original classification authority of any pertinent non-DoD federal department or agency. *See* 10 U.S.C. § 949p-1(c).

9-2. REQUEST FOR INDIVIDUAL MILITARY COUNSEL

An accused may be represented by a military counsel of his own selection, if reasonably available. *See* 10 U.S.C. § 949a(b)(2)(C)(i).

a. An accused must request, either through detailed defense counsel, on the record, or directly to the Chief Defense Counsel, the desire to be represented by a specific military counsel. To be a valid request, the accused must provide the name of a specific military attorney at the time of the request, and acknowledge his understanding of the requirements for requests for individual military counsel (IMC).

b. Once in receipt of a valid request from an accused for IMC counsel, the Chief Defense Counsel shall determine if the requested military attorney is reasonably available.

1. A military attorney is not reasonably available unless assigned to the Office of Military Commissions, OCMC, at the time of the request. If the requested military attorney

Chapter 25

THE UNITED STATES COURT OF MILITARY COMMISSION REVIEW (USCMCR)

25-1. GENERAL

This chapter implements 10 U.S.C. §§ 949b, 950c and 950f.

25-2. THE USCMCR

a. *The court.* The USCMCR is established by 10 U.S.C. § 950f. A USCMCR judge must either be serving or have served as an appellate military judge on a service's Court of Criminal Appeals (CCA) who meets the qualifications set forth in 10 U.S.C. § 950f(b)(2) or must have been appointed to the USCMCR by the President, by and with the advice and consent of the Senate.

b. *Qualifications.*

1. Appellate military judges. As required by Chapter 47A of Title 10 U.S.C. § 948j(b), an appellate military judge serving on the USCMCR "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 article 26 of the Uniform Code of Military Justice as a military judge of general courts-martial by the Judge Advocate General of the armed force of which such military judge is a member."

2. Other appellate judges. The President may appoint other appellate judges to the USCMCR under 10 U.S.C. § 950f(3).

3. Disqualification. No person may serve on the USCMCR as an appellate judge in any case in which that person acted as a military judge, counsel or reviewing officer.

c. *Selection of appellate military judges to serve on the USCMCR.* Each Judge Advocate General will nominate four appellate military judges for assignment as appellate judges on the USCMCR. All nominees must be currently certified as appellate military judges. Each nominee must be detailed as an appellate judge to one of the service Courts of Criminal Appeals (CCAs) at the time of nomination, but need not be so detailed to a service CCA while subsequently serving on the USCMCR. Nominees may be retired-retained officers. Of these nominees and any appointees under 10 U.S.C. § 950f(b)(3), the Secretary of Defense will assign no fewer than three appellate judges to the USCMCR. Each appellate military judge assigned to the USCMCR shall remain assigned to the Court unless reassigned, retired or separated from active duty pursuant to 10 U.S.C. § 949b(b)(4). When a service Judge Advocate General proposes reassignment of an appellate military judge serving on the USCMCR, the service Judge Advocate General will nominate a replacement appellate military judge for duty on the USCMCR. Appellate military judges serving on the

USCMCR may perform other military or legal duties, but USCMCR duties should take priority over all other duties. Once assigned as an appellate military judge serving on the USCMCR, at the discretion of the Secretary of Defense or his designee, a judge may continue to serve on the USCMCR so long as the judge remains in a judicial billet within his or her service and whose duties are not otherwise in conflict with continued service on the USCMCR. Additionally, officers assigned as USCMCR appellate military judges may continue to serve on the USCMCR at the discretion of the Secretary of Defense in a retired-retained status.

d. *Chief Judge and Deputy Chief Judge.* The Secretary of Defense, or designee, will designate from among those individuals nominated by the Judge Advocates General and from among others qualified to serve as appellate military judges, individuals to serve as the Chief Judge and Deputy Chief Judge of the USCMCR. The Chief Judge will serve for a term of two years and may be reappointed in the discretion of the Secretary or designee. The Deputy Chief Judge may exercise all the authority of the Chief Judge, subject to any restrictions imposed by the Chief Judge. The Chief Judge and Deputy Chief Judge may perform other military or legal duties; however, USCMCR duties should take priority over all other duties.

e. *Panels.* Except when the Court votes to consider a case *en banc*, the USCMCR shall consist of panels of not less than three appellate military judges. Judges will be assigned to the panels by the Chief Judge or his or her designee. Cases will be assigned to the panels by the Chief Judge or his or her designee. A majority of the judges must agree in a vote to consider a case *en banc*. The vote of any appellate military judge who has been reassigned under Chapter 25-2(f)(1)(3) and (4), or is beginning retirement leave within 90 days of the voting (*see* Chapter 25-2(f)(2)), or the vote of a civilian judge who has resigned or has been relieved of duty, will not be counted in a vote for *en banc* consideration. Furthermore, a judge who has been reassigned or retired shall not sit as part of the *en banc* panel.

f. *Reassignment of appellate military judges.* Pursuant to 10 U.S.C. § 949b(b)(4), no appellate military judge may be reassigned to other duties except under the circumstances set forth in section 949b(b)(4) and this chapter.

1. If the appellate military judge voluntarily requests reassignment, the request must be submitted to the Secretary of Defense, or his designee, via the appropriate Judge Advocate General. The Judge Advocate General shall forward the request along with a written recommendation as to disposition of the request to the Secretary of Defense or his designee. The Secretary of Defense, or his designee, will determine whether or not to approve the request and notify the appellate military judge via the appropriate Judge Advocate General. No appellate military judge may be reassigned under this provision until after the Secretary of Defense or his designee has approved reassignment.

2. If the appellate military judge retires or otherwise separates from the armed forces, the Judge Advocate General of the service of which the retiring or separating judge is a member shall promptly nominate a replacement appellate military judge. The appellate

military judge who is retiring or separating shall promptly notify the Chief Judge of the USCMCR of his or her decision to retire or separate from the armed forces.

3. Notwithstanding paragraph 1 above, the Secretary of Defense may reassign appellate military judges based on military necessity in consultation with the appropriate Judge Advocate General and any applicable service rotation regulations.

4. The Secretary of Defense may withdraw an appellate military judge from the USCMCR for cause in accordance with Chapter 47A of Title 10 U.S.C. § 949b(b)(4)(D) and the Uniform Code of Military Justice.

g. *Designation of General Counsel.* The General Counsel of the DoD is designated as the approval authority for requests for reassignment made pursuant to Chapter 25-2(f)(1).

h. *Departure of other appellate judges.* If a judge appointed to the USCMCR pursuant to 10 U.S.C. § 950f(b)(2) departs from the USCMCR for any reason, the Chief Judge shall notify the Secretary of Defense or his designee. If the departing judge is not replaced by the President, the Secretary of Defense may assign an additional appellate military judge from nominations previously received from the Judge Advocates General or, if necessary, request additional nominations.

i. *Scope of review.* For cases reviewed under 10 U.S.C. § 950f, the USCMCR may act only with respect to the findings and sentence as approved by the Convening Authority. The Court may affirm only such findings of guilty and the sentence, or such part or amount of the sentence, as the Court finds correct in law and fact and determines, on the basis of the entire record, should be approved. In considering the record, the Court may weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact, recognizing that the military commission saw and heard the witnesses. *See* 10 U.S.C. § 950f(d).

25-3. RULES OF APPELLATE PROCEDURE

The Chief Judge of the USCMCR, in consultation with other members of the USCMCR, shall issue rules of practice and procedure for appellate review by the USCMCR consistent with the M.C.A., the M.M.C., and this Regulation.

25-4. CLERK OF COURT, UNITED STATES COURT OF MILITARY COMMISSION REVIEW

The General Counsel of the DoD shall appoint the Clerk of Court, the Deputy Clerk of Court, and all Assistant Clerks of Court. The Chief of the Office of Court Administration, Office of Military Commissions, will forward all records of trial to the Clerk of Court of the USCMCR. The Clerk of Court, USCMCR, receives records of trial, appeals by the United States, petitions for a new trial in pending cases, withdrawals of appeals and other appellate matters forwarded to the Court and acts in a ministerial capacity for the Court. The Clerk of Court will assist the Chief Judge in the overall administration of the Court and in the

UNITED STATES COURT OF MILITARY COMMISSION REVIEW

BEFORE:

POLLARD, PRESIDING Judge

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UNITED STATES OF AMERICA

v.

OMAR AHMED KHADR

CMCR 13-005

November 13, 2015

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Colonel Peter E. Brownback, JA, U.S. Army and Colonel Patrick J. Parrish, JA, U.S. Army, military commission judges.

Samuel T. Morison and Major Justin Swick, USAF, Office of the Chief Defense Counsel, and Dennis Edney, Law Society of Alberta, Canada, on motions for Appellant Omar Ahmed Khadr.

Brigadier General Mark S. Martins, U.S. Army; and Danielle S. Tarin, on motions for Appellee United States Government.

OPINION AND ORDER

Opinion filed by POLLARD, *Presiding Judge*.

POLLARD, *Presiding Judge*; On December 10, 2014, and March 19, 2015, Appellant Omar Ahmed Khadr filed motions to disqualify me from hearing his appeal that is pending before our Court.¹ Both motions are denied.

¹ Khadr filed two prior motions on August 5, 2014, and August 20, 2014, asking me to recuse myself. The prior motions were denied on October 17, 2014. *See Khadr v. United States*, 62 F. Supp. 3d 1314 (USCMCR 2014).

The Motions

Khadr makes two interrelated arguments in his current motions. First, he claims that the civilian judges on our Court have voluntarily abandoned their status as principal officers of the United States and subordinated themselves to the Secretary of Defense because the Department of Defense designated the civilian judges Highly Qualified Experts (HQE) pursuant to 5 U.S.C. § 9903 in order to pay them for time spent on Court matters. The essence of this argument is that the manner in which the Department chose to pay the civilian judges makes them subject to the Secretary's control and this vitiates their independence as Article I judges.

Khadr's second argument contends that I placed my financial interests over service to the Court by seeking and accepting an employment relationship with the United States that permits me to continue a private practice of law, albeit with some limitations. Khadr says that to protect the income that I earn from private practice I might favor private duties over court responsibilities. From this, he concludes that I have a financial conflict of interest that requires disqualification. He also argues that because of this, my impartiality can be questioned and this, too, requires disqualification. Khadr offers no factual record to support his arguments.

Discussion

Under the Court's rules, recusal and disqualification motions are addressed to the judge whose recusal or disqualification is sought for "a final decision." *See* Rule 24(b), USCMCR Rules of Practice. The grounds for recusal and disqualification are found in Rule 24(a), which incorporates Canon 3C, Code of Conduct for United States Judges as adopted by the Judicial Conference of the United States, and 28 U.S.C. § 455. The disqualification grounds in Canon 3C are substantively the same as found in § 455 and include when the judge's impartiality might reasonably be questioned, bias, prior involvement as an attorney or financial interest in the matter before the court. Disqualification for impartiality or bias is required if established in fact or appearance. The other grounds are fact-based circumstances. *See Khadr v. United States*, 62 F. Supp. 3d 1314, 1317-18 (USCMCR 2014).

There is no general ground for disqualification for a conflict of interest in § 455. Rather, the criteria for disqualification based on a conflict is set forth in § 455(b)(2) – (5), and includes a financial interest in the outcome of the dispute before the court or a prior participation in the dispute. Khadr cites no authority for a broader application of the conflict of interest criteria for disqualification. However, a judge should be vigilant for circumstances when a conflict not

delineated in § 455(b) might raise recusal considerations under Rule 24(a) because there are “circumstances considered sufficient to require such action.”

While Khadr frames his motion as one for disqualification, his argument that my “impartiality might reasonably be questioned” is a conclusion that he attempts to draw from an alleged financial conflict of interest and several factors related to my employment as a civilian judge that he contends creates an appearance of impropriety. Thus, at most, the predicate arguments implicate recusal, the resolution of which is left to the Court’s sound discretion. In any event, the standard for review for disqualification and recusal is the same.

It is for “judges [to] determine [an] appearance of impropriety . . . by examining the record facts and the law, and then deciding whether a reasonable person knowing and understanding all the relevant facts would recuse the judge.” *In re Drexel Burnham Lambert Inc.*, 861 F.2d 1307, 1313 (2d Cir.1988). A “judge is as much obliged not to recuse himself when it is not called for as he is obliged to when it is.” *Id.*, 861 F.2d at 1312. Further, the motion must be decided based on whether the movant has established grounds for disqualification or recusal “as judged by an objective standard.” In doing so, the Court need not accept every fact that the movant alleges as true. *See United States v. Heldt*, 668 F.2d 1238, 1271 (D.C. Cir. 1981).

Finally, “[i]n its determination of the motion, the court ‘must begin its analysis of the allegations supporting such a request with a presumption against disqualification.’ *Cobell [v. Norton]*, 237 F. Supp. 2d [71, 78 (D.D.C. 2003)] (citations omitted). In order to overcome the presumption, the moving party must demonstrate by clear and convincing evidence that disqualification is required by Section 455(a). *Id.* at 78–79 . . .” *Cotton v. Washington Metro. Area Transit Auth.*, 264 F. Supp. 2d 39, 42 (D.D.C. 2003).

Special Government Employee and Highly Qualified Expert Status Does Not Require Disqualification or Recusal

Our Court in its present form was created by the Military Commissions Act of 2009, Pub. L. No. 111-84, 123 Stat. 2574 (2009), 10 U.S.C. § 950f. That act created “a court of record to be known as the “United States Court of Military Commission Review” . . . [f]or the purpose of reviewing decisions of military commissions under this chapter . . .” § 950f(a). The judges of the Court are comprised of appellate military judges assigned to the Court by the Secretary of Defense and civilians appointed by the President, by and with the advice and consent of the Senate. § 950f (b). However, the statute is silent

concerning issues of tenure, compensation and removal.² Compare with 10 U.S.C. §§ 941 *et seq.*, regarding the Court of Appeals for the Armed Forces.

Section 950f further says nothing regarding whether the civilian judgeships are full time or part-time positions. The historic and current caseload of the Court, however, does not require the judges to devote all of their time to the Court's work. The military judges, who are drawn from the Service Courts of Criminal Appeals, continue to serve as judges on those courts, subject to their duties on our Court.

Khadr's arguments are rooted in statutory silence regarding compensation for the Court's civilian judges.³ The civilian judges who served on the two predecessor courts, *see Khadr*, 62 F. Supp. 3d at 1316, were employees of the Department of Defense. Thus, the Department determined their employment status and compensation. Beginning in 2004 those judges "were designated [by the Department] as Special Government Employees (SGE) . . . and paid as HQEs", *see* March 19, 2015 Motion, Attachment at 1.

Our Court, an Article I Court, is housed for administrative purposes in the Department of Defense. Thus, among other things, the Department has the responsibility to fund the Court's operations. This includes paying the civilian judges who were appointed under the Military Commissions Act of 2009, 10 U.S.C. § 950f. In the absence of any statutory directive, it was left to the Department to determine the manner in which those judges, who serve on a part-time as-needed basis, would be compensated for their work. The Department then decided to continue the practice of designing the civilian judges as SGEs and to pay us as HQEs.

Khadr argues that "as a condition of [my] appointment to the court, [I] requested the Secretary of Defense to designate [me] as a 'special Government employee' in order to permit [me] to continue [my] private law practice simultaneously with [my] judicial service." December 10 Motion at 2, citing *Khadr*, 62 F. Supp. 3d at 1316, 1320. The citations do not support this assertion. Moreover, contrary to Khadr's contention, I did not request to be

² The civilian judges also do not receive any of the usual benefits provided other Federal employees, e.g., sick and vacation time, health insurance or retirement benefits.

³ Congress, of course, could cure this apparent oversight. More than a year ago, our then Chief Judge, Colonel Eric Krause, submitted a request to the Department of Defense asking it to seek legislation that would, among other things, specify the manner in which civilian judges would be paid, and the level of their compensation. The request remains pending within the Department.

designated an HQE or SGE, nor did I ever discuss this with anyone in the Executive Branch during the nomination or confirmation process.

The conversations that I did have were about the part-time nature of the position and that I could and would continue to practice law if appointed to the judgeship. I made note of this in one of the many forms that I was required to complete as part of the vetting process: “The position for which I am being considered is a part-time judicial position. It is my understanding that, subject to conflict of interest rules, I may continue to practice law at my current law firm if confirmed by the Senate.”

Further, in a March 8, 2012 email to the Department asking about the organization of the Court, I wrote: “Who is the Ethics Officer? I would like to make sure that from day one I conform to the ethical obligations for one who is a part-time judge but still a practicing attorney.” In response a few days later, I was provided with some general information regarding Special Government Employees and told that the judges on the predecessor court had been designated SGEs.

Khadr argues that the Department’s decision to pay the civilian judges as HQEs undermines their independence as judges. He contends that this makes the civilian judges subordinate employees of the Secretary of Defense, and that they are subject to discharge at his discretion. Khadr, however, misses the point between a civilian judge’s independence and authority to act as a judge and how the Department has determined to pay them. Our authority to act as judges comes from our appointment, as principal officers, to the Court by the President with the advice and consent of the Senate pursuant to 10 U.S.C. §950f(b)(3). The Secretary has no control over our judicial duties or conduct. He may not review our decisions, nor may he discharge us at his discretion. *See Khadr*, 62 F. Supp. 3d at 1319-20. Moreover, he is barred by law from attempting “to coerce or, by any unauthorized means, influence” the judges on the Court. *See* 10 U.S.C. § 949b(b)(1).

Accordingly, the manner in which the Department decided to pay the civilian judges does not erode their judicial independence, nor can it be construed as the judges, voluntarily or otherwise, subordinating themselves to the Secretary or abandoning their status as principal officers.

There Is No Financial Conflict of Interest

Khadr correctly points out that to continue as an HQE a civilian judge cannot work more than 130 days in a 365-day cycle. If a judge exceeds that limit, he or she must become a full-time Federal employee to continue their judicial work. The judge also would lose his or her SGE status, and could no

longer work in the private sector as permitted with some restrictions without violating 18 U.S.C. § 203(c). Khadr then argues that this creates a financial conflict because it is in my interest to work fewer than 130 days as a judge during the 365-day cycle so that I may continue to practice law. Khadr contends that this inures to his detriment because if there is a conflict between devoting time to my judicial duties or my practice, I will give priority to my practice in order to enhance my private remuneration. *See* December 10, 2014 Motion at 7-8 and March 19, 2015 Motion at 3-7. Khadr claims that in addition to a financial conflict of interest, this creates an appearance of impropriety, and both disqualify me from serving as a judge in this case.

There are multiple problems with Khadr’s argument. The financial conflict of interest that he attempts to identify is not predicated on “a financial interest in the subject matter in controversy or . . . any other interest that could be substantially affected by the outcome of the proceeding.” § 455(b)(4). Thus, the premise of his argument is meritless. Even if that were not so, the construct is hypothetical.

The premise is grounded on the allocation of time, and assumes that I would devote insufficient time to judicial duties because another endeavor is favored. Time management issues exist in all walks of life. Moreover, there could be more than one endeavor, which may or may not involve compensation, that also competes for a judge’s time. Thus, the foundation of Khadr’s argument – a *common potential* for neglect of duty – does not create a conflict of interest, an appearance of impropriety, or any other circumstances that might implicate disqualification or recusal.

Moreover, Khadr offers no proof that I either have been faced with choosing between public and private duties, or that I have shirked my public duties. He simply speculates that I would favor my private interest to the detriment of my public duties if ever required to choose between the two. Conjecture, hypothesis, and speculation, however, are not bases for disqualification or recusal. *See United States v. Cooley*, 1 F.3d 985, 993 (10th Cir. 1993) (collecting cases).

Khadr’s Other Arguments Have No Merit

Khadr also offers seven “facts” that he says support his argument that an objective observer might reasonably question my impartiality. *See* March 19, 2015 Motion at 5-6. Most are complaints directed at the panel before which his appeal is pending regarding procedural matters concerning his appeal. Others repeat arguments made previously. Only a few require comment.

Khadr contends, as noted, that I was aware of the financial significance of an SGE status and “took pains” to make sure that I received that designation so that I could continue to practice law. As discussed above, this is simply untrue.

Next, Khadr points out that his appeal has been held in abeyance since March 2014, and argues that this was done to minimize the number of days that I must work as a judge to keep below the 130-day limit. However, Khadr fails to acknowledge that *the panel* has held his appeal in abeyance while awaiting the final adjudication of a case that most likely “may have a material bearing on the disposition” of a significant portion of his appeal. *See* abeyance orders dated March 7, 2014, July 11, 2014, and October 27, 2015, and *Al Bahlul v. United States*, No. 11-1324, 2015 WL 3687457 (D.C. Cir. June 12, 2015), rehearing en banc granted and order vacated, September 25, 2015.

Khadr further contends that my opinion denying his prior recusal motions “justified the appropriateness of [my] SGE status by stating that USCMCR judgeships are ‘part-time, as needed position[s],’ but points to no authority for that conclusion.” He also claims that the opinion did “not explain what makes [the Court] the only such [Article I] court all of whose judges are part-time.” *See* March 19, 2015 Motion at 5. There are three responses to these related statements. Each is well known or readily knowable.

First, since 2007 this Court has published less than a dozen opinions. Second, the Military Appellate Judges assigned to our Court are drawn from the Service Courts of Criminal Appeals, and all continue to serve as judges on those courts. Civilian judges who served on the predecessor courts were part-time judges who also held full-time private employment. The same can be said for the current civilian judges. Finally, statutes that created the other Article I courts explicitly provided for the creation of full-time judgeships and addressed tenure, compensation and retirement benefits. The statute that created our Court does not, nor does it provide any other indicia that a civilian judge appointed to the Court must be a full-time government employee.⁴ *Compare* 10 U.S.C. § 950f *with, e.g.*, 28 U.S.C. §§ 171 *et seq.* (Court of Federal Claims) and 10 U.S.C. §§ 941 *et seq.* (Court of Appeals for the Armed Forces).

In sum, the factual contentions upon which Khadr relies do not, individually or collectively, suffice under any standard, let alone one requiring clear and convincing evidence, to cause an objective observer to question my impartiality and, hence, require disqualification or recusal.

⁴ This does not mean that a civilian judge could not assume full-time employment status if the circumstances warranted it. If that were to occur, there are different rules and limitations that would apply to the judge.

Conclusion

Khadr's motions present no facts that raise even a colorable argument that a financial conflict of interest exists, the civilian judges have surrendered their principal officer status, or the manner in which the Department of Defense chose to pay the civilian judges raises an appearance of impropriety that comes within the criteria for disqualification or recusal. Accordingly, Khadr has failed to establish a basis for disqualification or recusal. Therefore,

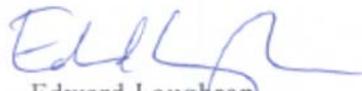
IT IS HEREBY ORDERED that

The abeyance order dated October 27, 2015, is lifted to the extent necessary to resolve the motions addressed by this Opinion and Order.

IT IS FURTHER ORDERED that

Appellant Khadr's December 10, 2014, and March 19, 2015 motions seeking to disqualify Presiding Judge Pollard from hearing Khadr's appeal pending before the Court are DENIED.

FOR THE COURT:



Edward Loughran
Assistant Clerk of Court,
U.S. Court of Military Commission Review

**SEC. 1034. AMENDMENTS RELATING TO THE MILITARY COMMISSIONS
ACT OF 2009.**

(a) **REFERENCE TO HOW CHARGES ARE MADE.**—Section 949a(b)(2)(C) of title 10, United States Code, is amended by striking “preferred” in clauses (i) and (ii) and inserting “sworn”.

(b) **JUDGES OF UNITED STATES COURT OF MILITARY COMMISSION REVIEW.**—Section 949b(b) of such title is amended—

(1) in paragraph (1)(A), by striking “a military appellate judge or other duly appointed judge under this chapter on” and inserting “a judge on”;

(2) in paragraph (2), by striking “a military appellate judge on” and inserting “a judge on”; and

(3) in paragraph (3)(B), by striking “an appellate military judge or a duly appointed appellate judge on” and inserting “a judge on”.

(c) **PANELS OF UNITED STATES COURT OF MILITARY COMMISSION REVIEW.**—Section 950f(a) of such title is amended by striking “appellate military judges” in the second sentence and inserting “judges on the Court”.

(d) **REVIEW OF FINAL JUDGMENTS BY UNITED STATES COURT OF APPEALS FOR THE D.C. CIRCUIT.**—

(1) **CLARIFICATION OF MATTER SUBJECT TO REVIEW.**—Subsection (a) of section 950g of such title is amended by inserting “as affirmed or set aside as incorrect in law by” after “where applicable,”.

(2) **CLARIFICATION ON TIME FOR SEEKING REVIEW.**—Subsection (c) of such section is amended—

(A) in the matter preceding paragraph (1), by striking “by the accused” and all that follows through “which—” and inserting “in the Court of Appeals—”;

(B) in paragraph (1)—

(i) by inserting “not later than 20 days after the date on which” after “(1)”; and

(ii) by striking “on the accused or on defense counsel” and inserting “on the parties”; and

(C) in paragraph (2)—

- (i) by inserting “if” after “(2)”; and
- (ii) by inserting before the period the following:
“, not later than 20 days after the date on which such notice is submitted”.

STATEMENT OF FACTS

I. AFTER APPELLANT FILES ITS FIRST INTERLOCUTORY APPEAL, THE PARTIES FILE—AND THE COURT RULES ON—MOTIONS SEEKING VARIOUS FORMS OF RELIEF

On September 19, 2014, Appellant filed its first notice of appeal in *United States v. Al Nashiri*, appealing from the Military Commission’s dismissal of the charges and specifications stemming from the MV *Limburg* bombing. On September 23, 2014, Appellee Abd Al Rahim Hussayn Muhammad Al Nashiri moved to dismiss the appeal as untimely. On September 25, 2014, he moved to recuse the two military judges on the panel, alleging they were assigned to the U.S.C.M.C.R. 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. On September 26, 2014, he also moved the Court to “terminate the devolution of its judicial responsibilities onto the Clerk of Court.” Mot. for Appropriate Relief regarding the Court’s Improper Delegation of Its Statutory Obligations (Sept. 26, 2014). On September 24, 2014, Appellant moved for leave to file an outsized brief. On September 30, 2014, Appellant also moved to attach documents to the appendix accompanying its brief. The Court ruled on all the motions, granting only the motion to file an outsized brief and the motion to attach documents.¹

II. APPELLEE PETITIONS THE D.C. CIRCUIT FOR EXTRAORDINARY RELIEF, ALLEGING AN APPOINTMENTS CLAUSE VIOLATION; THE D.C. CIRCUIT STAYS THE U.S.C.M.C.R. PROCEEDINGS

After the Court denied his recusal motion, Appellee petitioned the United States Court of Appeals for the District of Columbia Circuit to issue a writ of mandamus and prohibition disqualifying the military judges on his U.S.C.M.C.R. panel. As in the U.S.C.M.C.R., Appellee alleged that the military judges are assigned to the U.S.C.M.C.R. in violation of the Appointments Clause and cannot be freely removed in violation of the Commander-in-Chief Clause of the

¹ Order (Sept. 25, 2014) (granting Appellant’s motion for leave to file an outsized brief); Order (Oct. 6, 2014) (denying Appellee’s motions asking the military judges to recuse themselves and asking the Court to stop delegating its statutory obligations to the Clerk); Published Opinion of the Court (Oct. 10, 2014) (denying Appellee’s motion to dismiss the appeal as untimely); Order (Oct. 20, 2014) (granting Appellant’s motion to attach documents to its appendix).

Constitution. *In re Al-Nashiri*, 791 F.3d 71, 75 (D.C. Cir. 2015). On November 12, 2014, the D.C. Circuit stayed proceedings before the U.S.C.M.C.R. Order, *In re Al-Nashiri*, No. 14-1203 (D.C. Cir. Nov. 12, 2014), ECF No. 1521946. While the D.C. Circuit considered Appellee’s writ petition, Appellant filed a second notice of appeal on March 27, 2015. Appellant challenged the Military Commission’s ruling excluding evidence that is substantial proof of a fact material in the proceeding, in particular evidence relevant to the act-evincing-wanton-disregard element of the Terrorism charge. Appellee asked the U.S.C.M.C.R. to suspend the briefing schedule for this interlocutory appeal. Appellant consented to suspending the briefing schedule until the D.C. Circuit lifted the stay of the U.S.C.M.C.R. proceedings.

III. THE D.C. CIRCUIT DENIES THE PETITION BUT CONCLUDES THE GOVERNMENT COULD ANSWER ANY APPOINTMENTS CLAUSE CHALLENGES TO THE U.S.C.M.C.R. BY RE-NOMINATING AND RE-CONFIRMING THE MILITARY JUDGES AS U.S.C.M.C.R. JUDGES

On June 23, 2015, the D.C. Circuit denied the petition and dissolved the stay. *In re Al-Nashiri*, 791 F.3d at 86; Order, *In re Al-Nashiri*, No. 14-1203 (D.C. Cir. June 23, 2015), ECF No. 1559091. The court reasoned it would be inappropriate to issue the writ because Appellee’s challenge “raise[d] several questions of first impression” and Appellee “can adequately raise his constitutional challenges on appeal from final judgment.” *In re Al-Nashiri*, 791 F.3d at 73, 85; *see also id.* at 82-86. In doing so, the D.C. Circuit did not resolve questions raised by the Appointments Clause challenge, but it concluded that “the President and the Senate could decide to put to rest any Appointments Clause questions regarding the CMCR’s military judges . . . by re-nominating and re-confirming the military judges to be *CMCR judges*.” *Id.* at 86. According to the D.C. Circuit, “[t]aking these steps—whether or not they are constitutionally required—would answer any Appointments Clause challenge to the CMCR.” *Id.*

IV. THE U.S.C.M.C.R. STAYED THE PROCEEDINGS AS APPELLANT SOUGHT RE-NOMINATION AND RE-CONFIRMATION OF THE MILITARY JUDGES AS U.S.C.M.C.R. JUDGES

While not conceding that these steps were constitutionally required, Appellant moved this Court to stay the proceedings as it explored options for re-nomination and re-confirmation of the military judges as U.S.C.M.C.R. judges. Unopposed Motion to Stay the Proceedings (June 26, 2015). The Court granted the motion and ordered Appellant to apprise the Court of its efforts and to “file a motion every 30 days, providing the status of this action and whether the parties request continuation of the suspension of litigation.” Corrected Order 2 (June 26, 2015). In accordance with this order, every 30 days Appellant has apprised the Court of its efforts and moved the Court to continue the stay to permit the re-nomination and re-confirmation process to continue. Appellee did not oppose continuing a stay of the proceedings. This Court has granted Appellant’s motions to continue the stay.²

ARGUMENT

I. THE COURT SHOULD LIFT THE STAY BECAUSE THE RE-NOMINATION AND RE-CONFIRMATION PROCESS IS COMPLETE

The Court has granted Appellant’s motions to continue the stay to permit the re-nomination and re-confirmation process to continue. On September 18, 2015, Appellant informed the Court that the Secretary of Defense assigned the incoming military judges to be U.S.C.M.C.R. judges under 10 U.S.C. § 950f and that the Secretary recommended the President nominate those judges—in addition to the judges already serving on the Court—for appointment and confirmation as U.S.C.M.C.R. judges. On April 1, 2016, Appellant notified the Court that, on March 14, 2016, the President had transmitted the nominations as military judges on the U.S.C.M.C.R. of six servicemembers to the Senate Armed Services Committee for the Senate’s advice and consent.

² Order (July 25, 2015); Order (Aug. 25, 2015); Order (Sept. 23, 2015); Order (Oct. 20, 2015); Order (Nov. 17, 2015); Order (Dec. 15, 2015); Order (Jan. 8, 2016); Order (Feb. 8, 2016); Order (Mar. 5, 2016); Order (Apr. 1, 2016).

Appellant now notifies the Court that on April 28, 2016, the Senate confirmed five of the six military judges as U.S.C.M.C.R. judges: Colonel Martin T. Mitchell,³ Captain Donald C. King,⁴ Colonel Larss G. Celtnieks,⁵ Colonel James W. Herring, Jr.,⁶ and Lieutenant Colonel Paulette V. Burton.⁷ The re-nomination and re-confirmation process for these military judges is complete. The Court therefore should lift the stay and resume the proceedings for both interlocutory appeals. The briefing cycle for the first interlocutory appeal is also complete, and Appellant is prepared to file its opening brief for the second interlocutory appeal as soon as the Court lifts the stay.

II. THE COURT SHOULD REVIEW ANEW THE EXISTING BRIEFING ON THE ISSUES THE PRIOR PANEL'S ORDERS ADDRESSED AND INDEPENDENTLY CONCLUDE APPELLANT'S ARGUMENTS SHOULD PREVAIL

Appellant respectfully requests that, after lifting the stay, the Court review anew the existing briefing on the issues that the prior panel's orders addressed and independently conclude

³ See 162 Cong. Rec. S1474 (daily ed. Mar. 14, 2016) (nominating Colonel Martin T. Mitchell, U.S. Air Force, to be an appellate military judge on the United States Court of Military Commission Review); 162 Cong. Rec. S2599-600 (daily ed. Apr. 28, 2016) (confirming Colonel Martin T. Mitchell, U.S. Air Force, as an appellate military judge on the United States Court of Military Commission Review).

⁴ See 162 Cong. Rec. S1474 (daily ed. Mar. 14, 2016) (nominating Captain Donald C. King, U.S. Navy, to be an appellate military judge on the United States Court of Military Commission Review); 162 Cong. Rec. S2599-600 (daily ed. Apr. 28, 2016) (confirming Captain Donald C. King, U.S. Navy, as an appellate military judge on the United States Court of Military Commission Review).

⁵ See 162 Cong. Rec. S1474 (daily ed. Mar. 14, 2016) (nominating Colonel Larss G. Celtnieks, U.S. Army, to be an appellate military judge on the United States Court of Military Commission Review); 162 Cong. Rec. S2599-600 (daily ed. Apr. 28, 2016) (confirming Colonel Larss G. Celtnieks, U.S. Army, as an appellate military judge on the United States Court of Military Commission Review).

⁶ See 162 Cong. Rec. S1474 (daily ed. Mar. 14, 2016) (nominating Colonel James W. Herring, Jr., U.S. Army, to be an appellate military judge on the United States Court of Military Commission Review); 162 Cong. Rec. S2599-600 (daily ed. Apr. 28, 2016) (confirming Colonel James W. Herring, Jr., U.S. Army, as an appellate military judge on the United States Court of Military Commission Review).

⁷ See 162 Cong. Rec. S1474 (daily ed. Mar. 14, 2016) (nominating Lieutenant Colonel Paulette V. Burton, U.S. Army, to be an appellate military judge on the United States Court of Military Commission Review); 162 Cong. Rec. S2599-600 (daily ed. Apr. 28, 2016) (confirming Lieutenant Colonel Paulette V. Burton, U.S. Army, as an appellate military judge on the United States Court of Military Commission Review).

that Appellant's arguments should prevail. In particular, the Court should review anew the existing briefing on Appellee's motion to dismiss the appeal as untimely, Mot. to Dismiss Gov't Appeal for Lack of Jurisdiction (Sept. 23, 2014); Appellee's motion asking the Court to "terminate devolution of its judicial responsibilities onto the Clerk of Court," Mot. for Appropriate Relief Regarding the Court's Improper Delegation of Its Statutory Obligations (Sept. 26, 2014); Appellant's motion to file an oversized brief, Mot. to File Oversized Br. (Sept. 24, 2014); and Appellant's motion to attach documents in the Appendix, Mot. to Attach Documents in the Appellant's App. (Sept. 30, 2014).

Reviewing anew the existing briefing allows the Court to conduct an independent, de novo evaluation of the merits. As the United States Court of Appeals for the District of Columbia Circuit explained in *Intercollegiate Broadcasting System, Inc. v. Copyright Royalty Board*, 796 F.3d 111 (D.C. Cir. 2015), a decision is valid when "a properly appointed official" who is "seized with the full authority" of his or her office "has the power to conduct an independent evaluation of the merits and does so." *Id.* at 117, 124. In explaining this point, the court rejected the argument that properly appointed decisionmakers must accept new submissions or risk having orders of the properly appointed decisionmakers tainted by objections to the appointment of their predecessors. *Id.* at 117, 119-20. Where the properly appointed decisionmaking body has "the full authority to make its own determination," it may choose to do so by conducting a de novo review of the existing record. *See id.* at 120. Reviewing anew the existing briefing also conserves the resources of this Court and the parties and avoids undue delay in further proceedings in this case.

For the foregoing reasons, this Court should review anew the existing briefing on the issues that the prior panel's orders addressed and independently conclude that Appellant's arguments should prevail.

Respectfully submitted,

 //s//

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was sent to counsel for Appellee by electronic mail on April 29, 2016.

//s//

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**UNITED STATES
COURT OF MILITARY COMMISSION REVIEW**

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

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**.

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**.

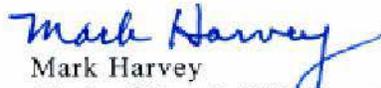
ORDERED that orders our Court previously decided are **AFFIRMED**.

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

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

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.

[BACK TO RESULTS](#)

PN1224 — Donald C. King — Navy

114th Congress (2015-2016)

NOMINATION [Hide Overview](#)

Confirmed on 04/28/2016.

<p>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):</p> <p>To be Captain Donald C. King</p> <p>Organization Navy</p>	<p>Latest Action 04/28/2016 - Confirmed by the Senate by Voice Vote.</p> <p>Date Received from President 03/14/2016</p> <p>Committee Senate Armed Services</p>
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Actions: PN1224 — 114th Congress (2015-2016)

Sort by 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.

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.

“(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.”

(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—

(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.

5 USC
5312-5317.

Regulations.

10 USC 973 note.

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:

10 USC 2107,
2107a.

"(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

S. REP. 98-174, S. Rep. No. 174, 98TH Cong., 1ST Sess. 1983, 1983 U.S.C.C.A.N. 1081, 1983 WL 25328
(Leg.Hist.)

P.L. 98-94, DEPARTMENT OF DEFENSE AUTHORIZATION ACT 1984
SEE PAGE 97 STAT. 614

SENATE REPORT (ARMED SERVICES COMMITTEE) NO. 98-174, JULY
5, 1983 (TO ACCOMPANY S. 675)

HOUSE REPORT (ARMED SERVICES COMMITTEE) NO. 98-107, MAY 11,
1983 (TO ACCOMPANY H.R. 2969)

SENATE CONFERENCE REPORT NO. 98-213, AUG. 15, 1983 (TO
ACCOMPANY S. 675)

HOUSE CONFERENCE REPORT NO. 98-352, SEPT. 12, 1983 (TO
ACCOMPANY S. 675)

CONG. RECORD VOL. 129 (1983)

DATES OF CONSIDERATION AND PASSAGE

SENATE JULY 26, SEPTEMBER 13, 1983

HOUSE JULY 26, 29, SEPTEMBER 15, 1983

THE SENATE BILL WAS PASSED IN LIEU OF THE HOUSE BILL.

THE SENATE REPORT (THIS PAGE) AND THE HOUSE CONFERENCE
REPORT (PAGE 1160) ARE SET OUT.

(CONSULT NOTE FOLLOWING TEXT FOR INFORMATION ABOUT OMITTED MATERIAL. EACH
COMMITTEE REPORT IS A SEPARATE DOCUMENT ON WESTLAW.)

SENATE REPORT NO. 98-174

JULY 5, 1983

SEC. 187. AUTHORITY OF MILITARY COMMISSIONED OFFICERS TO PERFORM FUNCTIONS OF CERTAIN CIVIL OFFICES

SECTION 973(B) OF TITLE 10, U.S.C. PRECLUDES OFFICERS WITH REGULAR COMMISSIONS FROM HOLDING OR EXERCISING THE FUNCTIONS OF A CIVIL OFFICE BY ELECTION OR APPOINTMENT IN THE FEDERAL GOVERNMENT OR THE GOVERNMENT OF A STATE, EXCEPT AS OTHERWISE AUTHORIZED BY LAW. THIS LIMITATION DATES FROM THE POST-CIVIL WAR PERIOD AND REFLECTS THE AMERICAN TRADITION OF SEPARATING CIVILIAN AND MILITARY FUNCTIONS IN A MANNER THAT ASSURES CIVILIAN SUPREMACY IN THE CONDUCT OF GOVERNMENTAL AFFAIRS.

THE TERM 'CIVIL OFFICE' PRESENTLY USED IN SECTION 973(B) IS NOT CLEARLY DEFINED IN THAT STATUTE AND, AS A RESULT, MILITARY OFFICERS OVER THE YEARS HAVE BEEN PERMITTED TO PERFORM THE FUNCTIONS OF OFFICES OUTSIDE THE DEPARTMENT OF DEFENSE WHEN THOSE FUNCTIONS WERE NOT INCONSISTENT WITH AND WERE IN FURTHERANCE OF THEIR MILITARY DUTIES. BY SPECIFIC AGREEMENT, SINCE 1942 MILITARY ATTORNEYS HAVE BEEN AUTHORIZED BY UNITED STATES ATTORNEYS TO PROSECUTE BEFORE FEDERAL CIVILIAN COURTS PETTY OFFENSES COMMITTED ON MILITARY INSTALLATIONS. IN 1982, MORE THAN 70,000 SUCH OFFENSES WERE PROSECUTED BY MILITARY ATTORNEYS PERFORMING AS SPECIAL UNITED STATES ATTORNEYS BEFORE UNITED STATES MAGISTRATES. ADDITIONALLY, AS OF THE PRESENT TIME, MILITARY ATTORNEYS ARE PROVIDING THE SOLE, THE LEAD, OR A SIGNIFICANT PORTION OF THE LEGAL REPRESENTATION OF THE UNITED STATES IN 1,061 CIVIL CASES IN LITIGATION. IN THE GREAT MAJORITY OF SUCH CASES, THE MILITARY ATTORNEYS HAVE BEEN APPOINTED SPECIAL ASSISTANT *233 **1123 UNITED STATES ATTORNEYS PURSUANT TO THE AUTHORITY OF THE ATTORNEY GENERAL CONTAINED IN SECTION 543 OF TITLE 28, UNITED

STATES CODE.

MILITARY ATTORNEYS ARE USED TO PROSECUTE PETTY OFFENSES BEFORE UNITED STATES MAGISTRATES BECAUSE OF THE HEAVY WORKLOAD OF UNITED STATES ATTORNEYS AND THE RELATIVELY LOW PRIORITY WHICH UNITED STATES ATTORNEYS MUST AFFORD THESE CASES. MILITARY ATTORNEYS ARE UTILIZED PRIMARILY IN CIVIL LITIGATION CASES IN WHICH THE DEPARTMENT OF DEFENSE OR ONE OF THE MILITARY DEPARTMENTS IS THE PRIMARY PLAINTIFF OR DEFENDANT AND THE SPECIAL EXPERTISE OF A MILITARY OFFICER-ATTORNEY IS VITAL.

THE COMMITTEE HAS BEEN ADVISED BY THE DEPARTMENT OF DEFENSE THAT THE ASSISTANT ATTORNEY GENERAL, OFFICE OF LEGAL COUNSEL OF THE DEPARTMENT OF JUSTICE, HAS RECENTLY ISSUED AN OPINION THAT THE PRACTICE OF APPOINTING MILITARY COMMISSIONED OFFICERS AS SPECIAL ASSISTANT UNITED STATES ATTORNEYS IS NOW CONSIDERED TO OFFEND THE PROHIBITIONS OF SECTION 973(B) OF TITLE 10, UNITED STATES CODE. HOWEVER, THAT SAME OPINION SUGGESTS THAT LEGISLATION BE SOUGHT TO AMEND SECTION 973(B) TO PERMIT THE CONTINUATION OF THIS LONGSTANDING AND SUCCESSFUL PRACTICE. THE DEPARTMENT OF DEFENSE HAS REQUESTED SUCH LEGISLATION.

THEREFORE, THE COMMITTEE RECOMMENDS A PROVISION TO AMEND SECTION 973(B) OF TITLE 10 TO PERMIT THE CONTINUATION OF THIS PRACTICE OF UTILIZING MILITARY ATTORNEYS AS SPECIAL ASSISTANT UNITED STATES ATTORNEYS. THE COMMITTEE PROVISION WOULD COMPLETELY REWRITE SECTION 973(B) TO CONFORM THE LANGUAGE OF THAT SECTION TO THE INTERPRETATION HAVING PREVIOUSLY BEEN GIVEN BY THE EXECUTIVE BRANCH TO THE EXISTING SECTION. THIS PROVISION DOES NOT SANCTION OR ENDORSE ANY USE OF MILITARY ATTORNEYS BEYOND THAT PERMITTED UNDER THAT INTERPRETATION. SECTION 973(B), AS AMENDED, WOULD BE MADE APPLICABLE TO REGULAR OFFICERS AND TO OFFICERS HOLDING RESERVE COMMISSIONS WHO ARE SERVING ON ACTIVE DUTY FOR A PERIOD OF 180 DAYS OR MORE. RESERVE COMMISSIONED OFFICERS ARE INCLUDED TO MAKE THE SECTION CONSISTENT WITH THE DEFENSE OFFICER PERSONNEL MANAGEMENT ACT'S CONCEPT OF INTEGRATING RESERVISTS IN TO THE CAREER FORCE.

FURTHERMORE, AS AMENDED, SECTION 973(B) WOULD PROHIBIT THE COVERED CLASS OF 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 DESCRIBED IN SECTIONS 5312 THROUGH 5317 OF TITLE 5, U.S.C. UNLESS OTHERWISE AUTHORIZED BY LAW. OFFICERS WOULD NOT BE PERMITTED TO HOLD OR EXERCISE THE FUNCTIONS OF A CIVIL OFFICE IN THE GOVERNMENT OF A STATE, THE DISTRICT OF COLUMBIA, OR ANY TERRITORY, POSSESSION, OR COMMONWEALTH OF THE UNITED STATES, OR POLITICAL SUBDIVISIONS THEREOF. THE SECTION AS AMENDED WOULD PERMIT A MILITARY OFFICER TO HOLD OR EXERCISE THE FUNCTIONS OF A FEDERAL CIVIL OFFICE WHICH IS NOT SPECIFICALLY PROHIBITED IF THE OFFICER IS ASSIGNED OR DETAILED TO THAT OFFICE OR TO PERFORM THOSE FUNCTIONS. THE SECRETARY OF DEFENSE, AND THE SECRETARY OF TRANSPORTATION WITH RESPECT TO THE COAST GUARD WHEN IT IS NOT OPERATING AS A SERVICE IN THE NAVY, WOULD PRESCRIBE REGULATIONS TO CARRY OUT THE PROVISION.

FINALLY, THE COMMITTEE PROVISION WOULD ENSURE THAT NO ACTS PREVIOUSLY PERFORMED BY MILITARY OFFICERS IN FURTHERANCE OF THEIR ASSIGNED DUTIES TO PERFORM CIVIL OFFICE FUNCTIONS WOULD BE INVALIDATED IN LIGHT OF THE RECENT JUSTICE DEPARTMENT OPINION AND TO INSURE *234 **1124 THAT NO SUCH ACTS WOULD AFFECT THE MILITARY COMMISSIONS OF SUCH OFFICERS.



DEPARTMENT OF THE NAVY
OFFICE OF THE JUDGE ADVOCATE GENERAL
1322 PATTERSON AVENUE SE SUITE 3000
WASHINGTON NAVY YARD DC 20374-5066

IN REPLY REFER TO

JAGINST 5815
Code 51
SEP 08 2010

JAG INSTRUCTION 5815

Subj: NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS

Ref: (a) Uniform Code of Military Justice, 10 U.S.C. §§ 866-873
(b) ABA Code of Judicial Conduct
(c) JAGINST 5400.1 (series)
(d) JAGINST 1150.2 (series)
(e) JAGINST 5817.1 (series)

1. Purpose. To set forth the mission, structure and function of the Navy-Marine Corps Court of Criminal Appeals (NMCCA) in accordance with reference (a), and to implement the provisions of references (b) through (e) regarding the court.

2. Cancellation. JAGINST 5814.1, NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS.

3. Mission and Functions. The NMCCA is the intermediate appellate court that reviews United States Navy and Marine Corps courts-martial that fall within its jurisdiction under reference (a).

a. The NMCCA has the statutory responsibility to review all Navy and Marine Corps courts-martial resulting in a sentence of death, a punitive discharge or dismissal, or a sentence of one year or more of confinement. In addition, the NMCCA shall review all other matters over which the court determines it has jurisdiction, pursuant to reference (a), such as Government interlocutory appeals. Upon jurisdiction attaching, appellate review shall be accomplished fairly, impartially, and as expeditiously as possible, consistent with due process and fundamental fairness, and according to the law and applicable regulations.

b. Appellate review of courts-martial includes the reading of the record and allied documents in each case, including the appellate pleadings of the parties, conducting legal research necessary to promptly and correctly dispose of any issue, participating in oral arguments, and the drafting and promulgation of orders or other decisions, including summary

dispositions, unpublished and published decisions of the court, either by a panel or *en banc*, as necessary to complete appellate review. Except as set forth in paragraphs 3.c., 3.d. and 3.e., these duties of judicial office take precedence over all other activities of the NMCCA judges.

c. When so appointed by competent authority, and with the concurrence of the Judge Advocate General, the judges of the NMCCA may be made available to investigate, draft, or review cases of judicial misconduct or other matters that require the specific qualifications, expertise or experience of an appellate judge.

d. When so appointed by competent authority, the judges of the NMCCA shall also serve as appellate military judges of other Department of Defense appellate judiciaries, including the U.S. Court of Military Commission Review. Upon appointment, duty on such a Department of Defense court shall become that judge's primary duty.

e. Those appellate judges that have previously served as trial judges may be detailed by the Chief Judge of the Navy-Marine Corps Trial Judiciary to preside over a general court-martial only when determined by that Chief Judge to be necessary. ~~Such a detail must have the concurrence of the Chief Judge of NMCCA, who will concur only if such detail does not interfere with the timely appellate review of any pending case. Prior to any such detailing, both chief judges must inform the Judge Advocate General, via the Assistant Judge Advocate General, Chief Judge (AJAG-CJ), of the circumstances necessitating such a detail, and the impact on the NMCCA, including the potential for recusal of the detailed appellate judge from any future case on appeal.~~

f. Appellate judges of the NMCCA may participate in public and academic events appropriate for members of the appellate judiciary, as set forth in reference (b), including presiding over moot courts sponsored by the Army, Navy, and Air Force justice schools, civilian law schools or bar associations; Navy-sponsored recruiting events; and professional teaching, lecturing, and writing. Participation in such activities by NMCCA judges shall be as authorized by the AJAG-CJ, and only when consistent with the timely review of courts-martial.

4. Authority and Responsibility. To accomplish the mission and functions of the NMCCA, authority and responsibility are prescribed for specified personnel as follows:

SEP 0 3 2010

a. Chief Judge. The Chief Judge of the NMCCA is denominated Division Director of Code 51. Reference (c) pertains. The Chief Judge is responsible for the fair, efficient, and effective management of the court, including ensuring the fair and timely disposition of all matters pending before it. The authority of the Chief Judge extends to all management and administrative functions of the court. In addition to those duties otherwise assigned in this instruction, the Chief Judge shall:

(1) Dispose promptly of the business of the court, maintain professional competence, and adhere to the standards set forth in reference (b);

(2) Serve as Rating Official of the Clerk of Court, and the second level reviewer for all other civilian personnel of the court as required by governing civilian personnel regulations;

(3) Serve as reporting senior for active duty and contract staff attorneys, clerks and paralegals assigned to the court;

(4) Provide for the continuous professional development of NMCCA judges;

(5) Designate one judge of each panel of the court to serve as Senior Judge;

(6) Diligently discharge administrative responsibilities, maintain professional competence in judicial administration, and facilitate the performance of the administrative responsibilities of other judges and court personnel;

(7) Monitor the timeliness and productivity of the court and adjust, provide or request resources needed to maintain fair, impartial and timely disposition of all matters;

(8) Whenever the simultaneous appointment of an NMCCA judge to a collateral duty occurs, the NMCCA Chief Judge shall report to the AJAG-CJ the impact on NMCCA's ability to timely discharge its responsibilities, and shall request such additional resources as are required;

(9) Exercise administrative supervisory authority over all cases under review by the judges of the NMCCA, taking

reasonable measures consistent with reference (b) to ensure the judges of the court perform their duties timely and effectively;

(10) Report quarterly to the AJAG-CJ on the status of the court's productivity and capability as it relates to the court's current and anticipated case load; and

(11) Annually, prepare such NMCCA information as is required for the Annual Report to the ABA and the Annual Report to the Court of Appeals for the Armed Forces.

b. Senior Judge. Upon designation by the Chief Judge, the Senior Judge of a panel shall:

(1) Dispose promptly of the business of the court, maintain their professional competence, and adhere to the standards set forth in reference (b).

(2) Diligently discharge administrative responsibilities as assigned by the Chief Judge, maintain professional competence in judicial administration, and facilitate the performance of the administrative responsibilities of the assigned panel judges and court personnel;

~~(3) Exercise administrative supervisory authority over the cases assigned to panel judges, taking reasonable measures consistent with reference (b) to ensure the judges of the panel perform their duties timely and effectively;~~

(4) Monitor the timeliness and productivity of the panel, and periodically, as directed by the Chief Judge, report the status of the panel's case load and request any resource needed to maintain the fair, impartial and timely disposition of all panel matters.

c. Judges. The judges of the NMCCA shall dispose promptly of the business of the court, diligently discharge any administrative responsibilities assigned by the Chief Judge or the Senior Judge of their assigned panel, maintain their professional competence, and adhere to the standards set forth in reference (b).

d. Clerk of Court. The Clerk of Court shall supervise the day-to-day operations of the court, implement the policies and procedures of the court, issue and authenticate all court orders and decisions, manage the case-tracking database on behalf of the court, and perform such other duties as assigned by the

SEP 0 3 2010

Chief Judge. The Clerk of Court is the custodian of the seal of the court, and serves as the Rating Official of the court's civilian staff. The Clerk of Court maintains records related to the court's bar and processes applications for admission to the court's bar.

e. Senior Law Clerk. The senior law clerk shall ordinarily be an active duty judge advocate in the pay grade of O-4 or O-5 who serves as the court's principal military administrative assistant, providing general supervision and administrative support to the court and military staff. The Senior Law Clerk assists the Clerk of Court, serves as the Chief Judge's law clerk, and performs those other duties as assigned by the Chief Judge.

f. Staff Attorneys, Law Clerks, Paralegals, and Other Support Staff. Active duty staff shall perform those duties assigned by the Chief Judge. Civilian support staff, whether Department of the Navy or contract personnel, shall perform those duties assigned by their individual position description or contract.

5. Composition of the Court. The NMCCA shall be composed of one or more panels of three appellate judges. Each panel will ~~review those cases assigned to it, or the court may sit en banc~~ according to the rules of court, including any internal rules promulgated by the Chief Judge. The judges of the NMCCA shall include both Navy and Marine Corps judge advocates. Unless otherwise determined by the Judge Advocate General at least one-third of the active-duty judges, exclusive of the Chief Judge, will be former trial judges, or designated as Military Justice Litigation Career Track officers per reference (d).

6. Establishment of Branch Offices. The NMCCA shall sit at the Washington Navy Yard, Washington, D.C. As directed by the Chief Judge, a panel, or the court *en banc*, may conduct "out-reach" oral arguments at suitable locations in the community, to foster greater community understanding of the military justice process, and greater visibility of the NMCCA as a component of military justice. Additionally, in accordance with reference (a), the Judge Advocate General may establish panels in other geographic locations. Such other panels will be established by JAG NOTE or by modification of this instruction.

7. Qualification, Certification and Appointment of Judges. Appellate judges will be appointed by the Judge Advocate General consistent with the reference (e) Judicial Screening Board.

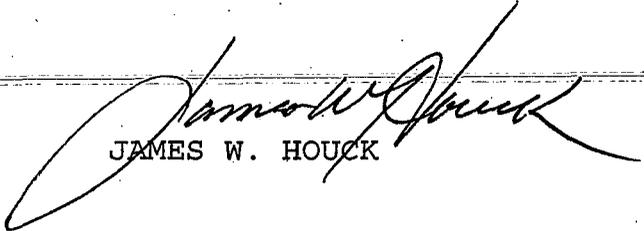
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Marine Corps judges will be appointed from judge advocates recommended by the Staff Judge Advocate to the Commandant of the Marine Corps. Appointments will not be delivered until the selected officer has successfully completed the Military Judges Course sponsored by The Judge Advocate General's Legal Center and School, U.S. Army, Charlottesville, Virginia, and certified by the Judge Advocate General.

8. Rules of Court. The Chief Judge is authorized to promulgate such rules of practice and procedure before the NMCCA as are deemed necessary or appropriate, including internal rules which are not inconsistent with the joint Courts of Criminal Appeals Rules of Practice and Procedure.

9. Training. The Chief Judge shall establish a program for the continuing professional education and development of the judges, clerks and staff of the NMCCA. An annual training plan shall be provided to the AJAG-CJ.

10. Funding. Funds available for the operation of the NMCCA shall be expended at the discretion of the Chief Judge, consistent with all regulations pertaining to the commitment and disbursement of such funds.



JAMES W. HOUCK

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SATURDAY, JUNE 17, 1775

The Congress met according to adjournment.

The committee appointed to draught a commission to the general, reported the same, which, being read by paragraphs and debated, was agreed to and is as follows:

IN CONGRESS

The delegates of the United Colonies of New Hampshire, Massachusetts bay, Rhode Island, Connecticut, New York, New Jersey, Pennsylvania, the Counties of New-Castle, Kent, and Sussex, on Delaware, Maryland, Virginia, North Carolina, and South Carolina: To George Washington, Esq.

WE, reposing special trust and confidence in your patriotism, valor, conduct, and fidelity, do, by these presents, constitute and appoint you to be General and Commander in chief, of the army of the United Colonies, and of all the forces now raised, or to be raised, by them, and of all others who shall voluntarily offer their service, and join the said Army for the Defence of American liberty, and for repelling every hostile invasion thereof: And you are hereby vested with full power and authority to act as you shall think for the good and welfare of the service.

And we do hereby strictly charge and require all Officers and Soldiers, under your command, to be obedient to your orders, and diligent in the exercise of their several duties.

And we do also enjoin and require you, to be careful in executing the great trust reposed in you, by causing strict discipline and order to be observed in the army, and that the soldiers be duly exercised, and provided with all convenient necessaries.

And you are to regulate your conduct in every respect by the rules and discipline of war, (as herewith given you,) and punctually to observe and follow such orders and directions, from time to time, as you shall receive from this, or a future Congress of these United Colonies, or committee of Congress.

This commission to continue in force, until revoked by this, or a future Congress.

By order of the Congress.¹

Dated, Philad^a June 17, 1775.

¹The original is in the Library of Congress. It was printed in the *Pennsylvania Packet*, 11 December, 1775, together with the Congress pledge and list of officers 45 of

SOCO Advisory

Department of Defense
Office of General Counsel
Standards of Conduct Office

December 16, 2002
Number 02-21

1. What Constitutes Holding a "Civil Office" by Military Personnel.

We have received several inquiries from Reservists, who have been activated, regarding the restrictions on their holding of civil offices, often elected offices, during their active duty. The following is a brief summary of the Federal law and DoD policy pertaining to the holding of civil office by military personnel:

--Regular officers, and reserve officers serving on active duty under a call or order to active duty for a period in excess of 270 days, 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). 10 U.S.C. § 973 (b).

--DoD has issued a directive regulating political activities that implements this and other laws by providing policy guidance and procedures governing all members of the Armed Forces on active duty. The directive defines civil office as all nonmilitary offices involving the exercise of the powers or authority of civil government. DoD Directive 1344.10, June 15, 1990.

--Exceptions are made for reserve officers on active duty for less than 270 days and all enlisted members, if there is no interference with the performance of military duties. In addition, all enlisted members may hold nonpartisan civil office as a notary public or member of a school board or similar local agency, and all officers may serve as members of independent school boards located exclusively on military installations.

--The directive, as a general rule, requires retirement or discharge for members elected or appointed to a prohibited civil office. However, retirement or separation is not an option during periods of national emergency, or when reservists have been called up, such as at the present. In these circumstances, the directive requires members holding a prohibited civil office to decline to serve in the civil office. Failure to do so may result in adverse administrative or disciplinary action. **The directive does not define the term "decline to serve," but DoD has interpreted it to mean the member must refuse to perform any civil functions, or otherwise to take any act in furtherance of their civil office responsibilities or duties. DoD defers to other Federal, state, and local civil authorities, as appropriate, on the question of whether members must resign from prohibited civil office or whether a leave of absence or similar arrangement while the member is on active duty is sufficient.**

-- According to the regulation, retirement or separation is also not an option and the member must decline to serve in the civil office when the member is:

--Obligated to fulfill an active duty (AD) service commitment.

--Serving or has been issued orders to serve afloat or in an area that is overseas, remote, a combat zone, or a hostile fire pay area.

--Ordered to remain on AD while the subject of an investigation or inquiry.

--Accused of an offense under the UCMJ or serving a sentence or punishment for such offense.

--Pending administrative separation action or proceedings.

--Indebted to the United States.

--In violation of an order or regulation prohibiting such member from assuming or exercising the functions of civil office.

2. End of the Year Matters.

OGE Annual Questionnaire: The Annual Office of Government Ethics Questionnaire must be completed and returned to

the Office of Government Ethics (OGE) by February 1, 2003. The Questionnaire is available at the OGE web site: www.usoge.gov.

Annual Training Plan: Each agency must prepare its written annual ethics training plan for 2003 by December 31, 2002, and retain it with its training records. (5 C.F.R. 2638.706).

Jeff Green
Senior Attorney
DoD Standards of Conduct Office

4.1.5. Activities not expressly prohibited may be contrary to the spirit and intent of this Directive. Any activity that may be reasonably viewed as directly or indirectly associating the Department of Defense or the Department of Homeland Security (in the case of the Coast Guard) or any component of these Departments with a partisan political activity or is otherwise contrary to the spirit and intention of this Directive shall be avoided.

4.2. **Nomination or Candidacy for Civil Office in the U.S. Government or State or Other Non-U.S. Government Offices**

4.2.1. Paragraph 4.2. applies to:

4.2.1.1. A civil office in the U.S. Government that:

4.2.1.1.1. Is an elective office;

4.2.1.1.2. Requires an appointment by the President; or

4.2.1.1.3. Is a position on the executive schedule under sections 5312-5317 of title 5, U.S.C. (Reference (i)).

4.2.1.2. A civil office in a State; the District of Columbia; a territory, possession, or commonwealth of the United States; or any political subdivision thereof.

4.2.2. A regular member, or a retired regular or Reserve Component member on active duty under a call or order to active duty for more than 270 days, may not be a nominee or candidate for the offices described in subparagraph 4.2.1., except when the Secretary concerned grants permission.

4.2.2.1. The Secretary concerned may NOT delegate the authority to grant or deny such permission.

4.2.2.2. Such permission shall not authorize activity while on active duty that is otherwise prohibited by other provisions of law or this Directive.

4.2.2.3. Such permission is required regardless of whether evidence of nomination or candidacy for civil office is filed prior to commencing active duty service or whether the member is an incumbent.

4.2.2.4. If a member covered by the prohibition in subparagraph 4.2.2. becomes a nominee or candidate for civil office prior to commencing active duty, then the member must request permission in writing and submit the request to the Secretary concerned before entering active duty. The member must understand that if the Secretary concerned does not grant permission, then the member must immediately decline the nomination or withdraw as a candidate.

STATUTES

10 U.S.C. §528 - Officers serving in certain intelligence positions: military status; application of distribution and strength limitations; pay and allowances

(e) Effect of Appointment.—Except as provided in subsection (a), the appointment or assignment of an officer of the armed forces to a position covered by this section shall not affect—

- (1) the status, position, rank, or grade of such officer in the armed forces; or
- (2) any emolument, perquisite, right, privilege, or benefit incident to or arising out of such status, position, rank, or grade.

10 U.S.C. §806 - Judge advocates and legal officers

(d)(1) A judge advocate who is assigned or detailed to perform the functions of a civil office in the Government of the United States under section 973(b)(2)(B) of this title may perform such duties as may be requested by the agency concerned, including representation of the United States in civil and criminal cases.

10 U.S.C. § 826 - Military judge of a general or special court-martial

(c) The military judge of a general court-martial shall be designated by the Judge Advocate General, or his designee, of the armed force of which the military judge is a member for detail in accordance with regulations prescribed under subsection (a). Unless the court-martial was convened by the President or the Secretary concerned, neither the convening authority nor any member of his staff shall prepare or review any report concerning the effectiveness, fitness, or efficiency of the military judge so detailed, which relates to his performance of duty as a military judge. A commissioned officer who is certified to be qualified for duty as a military judge of a general court-martial may perform such duties only when he is assigned and directly responsible to the Judge Advocate General, or his designee, of the armed force of which the military judge is a member and may perform duties of a judicial or nonjudicial nature other than those relating to his primary duty as a military judge of a general court-martial when such duties are assigned to him by or with the approval of that Judge Advocate General or his designee.

10 U.S.C. §866 - Review by Court of Criminal Appeals

(a) Each Judge Advocate General shall establish a Court of Criminal Appeals which shall be composed of one or more panels, and each such panel shall be composed of not less than three appellate military judges. For the purpose of reviewing court-martial cases, the court may sit in panels or as a whole in accordance with rules prescribed under subsection (f). Any decision of a panel may be reconsidered by the court sitting as a whole in accordance with such rules. Appellate military judges who are assigned to a Court of Criminal Appeals may be commissioned officers or civilians, each of whom must be a member of a bar of a Federal court or of the highest court of a State. The Judge Advocate General shall designate as chief judge one of the appellate military judges of the Court of Criminal Appeals established by him. The chief judge shall determine on which panels of the court the appellate judges assigned to the court will serve and which military judge assigned to the court will act as the senior judge on each panel.

10 U.S.C. §890 - Assaulting or willfully disobeying superior commissioned officer

Any person subject to this chapter who—

- (1) strikes his superior commissioned officer or draws or lifts up any weapon or offers any violence against him while he is in the execution of his office; or
- (2) willfully disobeys a lawful command of his superior commissioned officer;

shall be punished, if the offense is committed in time of war, by death or such other punishment as a court-martial may direct, and if the offense is committed at any other time, by such punishment, other than death, as a court-martial may direct.

10 U.S.C. §948j - Military judge of a military commission

(e) Other Duties.-A commissioned officer who is certified to be qualified for duty as a military judge of a military commission under this chapter may perform such other duties as are assigned to such officer by or with the approval of the Judge Advocate General of the armed force of which such officer is a member or the designee of such Judge Advocate General.

10 U.S.C. § 949b - Unlawfully influencing action of military commission and United States Court of Military Commission Review

(b)(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. §950f - Review by United States Court of Military Commission Review

(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 - Review by United States Court of Appeals for the District of Columbia Circuit; writ of certiorari to Supreme Court

(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.

10 U.S.C. §950h - Appellate counsel

(c) Representation of Accused.—The accused shall be represented by appellate counsel appointed under subsection (a) before the United States Court of Military Commission Review, the United States Court of Appeals for the District of Columbia Circuit, and the Supreme Court, and by civilian counsel if retained by the accused. Any such civilian counsel shall meet the qualifications under paragraph (3) of section 949c(b) of this title for civilian counsel appearing before military commissions under this chapter and shall be subject to the requirements of paragraph (7) of that section.

10 U.S.C. §973 - Duties: officers on active duty; performance of civil functions restricted

(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.

(3) Except as otherwise authorized by law, an officer to whom this subsection applies by reason of subparagraph (A) of paragraph (1) may not hold or exercise, by election or appointment, the functions of a civil office in the government of a State (or of any political subdivision of a State).

(4)(A) An officer to whom this subsection applies by reason of subparagraph (B) or (C) of paragraph (1) may not hold, by election or appointment, a civil office in the government of a State (or of any political subdivision of a State) if the holding of such office while this subsection so applies to the officer—

(i) is prohibited under the laws of that State; or

(ii) as determined by the Secretary of Defense or by the Secretary of Homeland Security with respect to the Coast Guard when it is not operating as a service in the Navy, interferes with the performance of the officer's duties as an officer of the armed forces.

(B) Except as otherwise authorized by law, while an officer referred to in subparagraph (A) is serving on active duty, the officer may not exercise the functions of a civil office held by the officer as described in that subparagraph.

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

(6) In this subsection, the term “State” includes the District of Columbia and a territory, possession, or commonwealth of the United States.

(c) An officer to whom subsection (b) applies may seek and hold nonpartisan civil office on an independent school board that is located exclusively on a military reservation.

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

10 U.S.C. §153 - Appointment of judges

The Secretary may appoint civilian employees of the department in which the Coast Guard is operating as appellate military judges, available for assignment to the Coast Guard Court of Criminal Appeals as provided for in section 866(a) of title 10.

10 U.S.C. §7441 - Status

There is hereby established, under article I of the Constitution of the United States, a court of record to be known as the United States Tax Court. The members of the Tax Court shall be the chief judge and the judges of the Tax Court.

28 U.S.C. § 171

(a) The President shall appoint, by and with the advice and consent of the Senate, sixteen judges who shall constitute a court of record known as the United States Court of Federal Claims. The court is declared to be a court established under article I of the Constitution of the United States.

28 U.S. Code § 454 - Practice of law by justices and judges

Any justice or judge appointed under the authority of the United States who engages in the practice of law is guilty of a high misdemeanor.

39 U.S.C. §7251 - Status

There is hereby established, under Article I of the Constitution of the United States, a court of record to be known as the United States Court of Appeals for Veterans Claims.

CERTIFICATE OF SERVICE AND FILING

I hereby certify that a copy of the foregoing Appendix to Brief of Amicus Curiae the Military Commissions Defense Organization was electronically mailed to the Court, to Counsel for Appellant (Major Johnathan D. Legg), and to Counsel for Appellee (Gerald R. Bruce), on 24 January 2017.

By: /s/ Philip Sundel
Philip Sundel
Counsel for *Amicus Curiae*