UNITED STATES
COURT OF MILITARY COMMISSION REVIEW

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

BEFORE:

BURTON, PRESIDING Judge
HERRING, SILLIMAN, Judges

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

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

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

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

Facts

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

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

10 U.S.C. § 948j(b) states:

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

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

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

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

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

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

Discussion

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

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

> (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--
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> (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
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> (iii) that is a position in the Executive Schedule under sections 5312 through 5317 of title 5 [5 USCS §§ 5312-5317].
>
> (B) An officer to whom this subsection applies may hold or exercise the functions of a civil office in the Government of the United States that is not described in subparagraph (A) when assigned or detailed to that office or to perform those functions.
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> * * *
>
> (5) Nothing in this subsection shall be construed to invalidate any action undertaken by an officer in furtherance of assigned official duties.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[7] *See id.*

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

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

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

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

Appellee Mohammad Motion 11-14.

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

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

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

10 U.S.C. § 949b(b)(4).

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

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

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

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

Conclusion

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

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

O R D E R

Therefore, it is hereby

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

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

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

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

FOR THE COURT:

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

UNITED STATES
COURT OF MILITARY COMMISSION REVIEW

UNITED STATES,	)	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 outsized brief; denying on October 6, 2014, appellee's motion to recuse the two military judges on the panel, alleging they were assigned to the USCMCR in violation of the Appointments Clause, U.S. Const. art. II, § 2, cl. 2, and could not be freely removed in violation of the Commander-in-Chief Clause, *id.* cl. 1; denying on October 6, 2014, appellee's motion to "terminate the devolution of its judicial responsibilities onto the Clerk of Court."; denying on October 10, 2014, appellee's motion to dismiss the appeal as untimely; and granting on October 20, 2014, appellant's motion to attach documents to the appendix accompanying its brief.

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

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

[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

Appendix A

CONGRESS.GOV Legislation Congressional Record Committees Members

BACK TO RESULTS

PN1219 — Martin T. Mitchell — Air Force

114th Congress (2015-2016)

NOMINATION Hide Overview

Confirmed on 04/28/2016.

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

To be Colonel
Martin T. Mitchell

Organization
Air Force

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

Date Received from President
03/14/2016

Committee
Senate Armed Services

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

Sort by Newest to Oldest GO

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

Appendix A

CONGRESS.GOV Legislation Congressional Record Committees Members

BACK TO RESULTS

PN1224 — Donald C. King — Navy

114th Congress (2015-2016)

NOMINATION Hide Overview

Confirmed on 04/28/2016.

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

To be Captain
Donald C. King

Organization
Navy

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

Date Received from President
03/14/2016

Committee
Senate Armed Services

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

Sort by Newest to Oldest GO

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

UNITED STATES
COURT OF MILITARY COMMISSION REVIEW

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

BEFORE:

POLLARD, PRESIDING Judge
WARD, WEBER, Judges

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

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

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

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

It is hereby,

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

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

FOR THE COURT:

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

UNITED STATES OF AMERICA	)	IN THE UNITED STATES COURT OF MILITARY COMMISSION REVIEW
Appellant,	)	
	)	APPELLANT'S OPPOSITION TO APPELLEE MOHAMMAD'S MOTION FOR STAY OF PROCEEDINGS
v.	)	
KHALID SHAIKH MOHAMMAD,	)	
	)	U.S.C.M.C.R. Case No. 17-002
WALID MUHAMMAD SALIH MUBARAK BIN 'ATTASH,	)	Arraigned at Guantanamo Bay, Cuba on May 5, 2012
RAMZI BINALSHIBH,	)	
	)	Before a Military Commission convened by Vice Admiral (ret.) Bruce E. MacDonald, USN
ALI ABDUL AZIZ ALI,	)	
and	)	
	)	Presiding Military Judge Colonel James L. Pohl, USA
MUSTAFA AHMED ADAM AL HAWSAWI	)	
Appellees.	)	DATE: June 19, 2017

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES COURT OF MILITARY COMMISSION REVIEW

Appellant United States of America, pursuant to Rule 21(c)(1) of this Court's Rules of Practice, opposes Appellees' Motion for a Stay of Proceedings (hereinafter "Motion") filed on June 14, 2017 at 9:37 a.m. This opposition is timely filed.

STATEMENT OF FACTS

On May 9, 2017, Appellee Mohammad filed a Motion for Recusal and/or Disqualification of Judge Silliman, alleging twelve instances of actual or apparent prejudice arising from public statements or writings of Judge Silliman. Mot. for Recusal and/or Disqualification of Judge Silliman at 1–5 (May 9, 2017) ("Mot. for Recusal"). Appellees Hawsawi and Bin 'Attash joined

Appellee Mohammad's Motion on May 10, 2017 and May 12, 2017, respectively.[1] In the motion, Appellees claim:

> Judge Silliman has made statements plainly demonstrating that he has concluded already, in advance of trial, that Mr. Mohammad and the other Appellees are guilty of the charges referred against them to Military Commissions, and has made other public comment that is incompatible with service as a judge on this case.
> . . .
>
> His statements show that he either has an actual bias against Mr. Mohammad and the other Appellees or he has given the appearance of a lack of impartiality.

Mot. for Recusal at 9–10. On June 6, 2017, Judge Silliman issued an order denying Appellees' motion. Order Appellee Mr. Mohammad's Mot. for Recusal and/or Disqualification of Judge Silliman (June 6, 2017) ("Order"). On June 14, 2017, Appellee Mohammad filed the Motion, asking this Court to stay further action on the Appellant's pending interlocutory appeal until the Court of Appeals for the District of Columbia Circuit acts on Appellee Mohammad's petition for a writ of mandamus.[2] On June 15, 2017, Appellee filed the petition for a writ of mandamus with the Circuit Court of Appeals. None of the other Appellees has joined the Motion.

LAW AND ARGUMENT

The Court of Appeals for the D.C. Circuit has held that a party seeking a stay must show that (1) the petitioner has a substantial likelihood of success on the merits of the petition; (2) the petitioner will suffer irreparable injury if the stay is denied; (3) the issuance of the stay will not cause substantial harm to other parties; and (4) the public interest will be served by issuance of the

[1] *See* Appellee Mustafa Ahmed Adam Al Hawsawi's Notice of Joinder to Appellee Khalid Sheikh Mohammad's Mot. for Recusal and/or Disqualification of Judge Silliman, filed on May 10, 2017; Walid Muhammad Salih Mubarak Bin 'Attash, Notice of Joinder, filed on May 12, 2017.

[2] At the time Appellee filed the present motion he had not yet filed his petition for a writ of mandamus with the Court of Appeals for the D.C. Circuit. On June 15, 2017, Appellee filed the petition.

stay. *United States v. Philip Morris, Inc.*, 314 F.3d 612, 617 (D.C. Cir. 2003) (citing *Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977)).

I. APPELLEE MOHAMMAD IS UNLIKELY TO SUCCEED ON THE MERITS OF THE PETITION FOR A WRIT OF MANDAMUS.

A writ of mandamus is a "drastic and extraordinary remedy reserved for really extraordinary causes." *Cheney v. U.S. Dist. Ct. for Dist. of Colum.*, 542 U.S. 367, 380 (2004) (internal quotations and citations omitted). In order for the writ to issue, the petitioner must have no other avenue for relief, must demonstrate that entitlement to the issuance of the writ is "clear and indisputable," and the issuing court "must be satisfied that the writ is appropriate under the circumstances." *Id*. at 380–81. In light of this standard, Appellee has failed to demonstrate that he is likely to succeed on the merits of his petition for a writ of mandamus.

The Court of Appeals for the D.C. Circuit has recognized that a writ of mandamus may be proper when there is actual or apparent bias on the part of a judge. *In re Al-Nashiri*, 791 F.3d 71, 79 (D.C. Cir. 2015). However, the court did not reduce the petitioner's burden to show that he is "clear[ly] and indisputab[ly]" entitled to the relief sought. *Id.* at 82 (citing *Cheney*, 542 U.S. at 381). In *In re Khadr*, the D.C. Circuit denied a petition for a writ of mandamus challenging the decision of a judge on the U.S.C.M.C.R. against recusal or disqualification. 823 F.3d 92, 100 (D.C. Cir. 2016). In reviewing the petitioner's four primary arguments concerning why the judge should have been disqualified from acting on the appeal, the court held that the petitioner failed to show a "clear and indisputable" right to the relief sought. *Id.* at 97. In his original motion, Appellee Mohammad failed to demonstrate that a reasonable person with knowledge of the facts would believe that the Appellee's allegations demonstrate any actual or apparent bias or prejudice.[3]

[3] For a fuller discussion of the deficiencies of Appellee's argument, see Appellant's Opposition to Appellees' Motion for Recusal and/or Disqualification, filed on May 15, 2017.

Consequently, and given the significantly greater burden for a writ of mandamus, the Appellee has very little likelihood of success on the merits of his petition.

II. APPELLEE WILL NOT SUFFER IRREPARABLE HARM ABSENT ISSUANCE OF THE STAY.

In *Khadr* the court stated, "[O]ur denial of mandamus relief does not preclude Khadr from advancing these same arguments in a future appeal where the standard of review will not be so daunting." *In re Khadr*, 823 F.3d at 100. Likewise, if he is convicted, Appellee Mohammad will have the opportunity to challenge Judge Silliman's impartiality and any decision rendered by a panel of the U.S.C.M.C.R. of which he (Judge Silliman) is a member on automatic direct appeal pursuant to 10 U.S.C. § 950c(a). *See also* 10 U.S.C. § 950g. Further, as the court in *Khadr* noted, Appellee's burden for showing that Judge Silliman erred in failing to recuse himself or acknowledge his disqualification will be substantially lighter than the "clear and indisputable" standard he faces on his writ petition. *In re Khadr*, 823 F.3d at 100; *see also United States v. Sullivan*, 74 M.J. 448, 453 (C.A.A.F. 2015) (reviewing a trial judge's disqualification decision after an allegation of apparent bias for an abuse of discretion). Consequently, Appellee Mohammad has wholly failed to demonstrate any irreparable harm he would potentially suffer should Judge Silliman participate in this appeal.

III. THE ISSUANCE OF A STAY WILL CAUSE HARM TO OTHER PARTIES, NAMELY THE VICTIMS OF THE APPELLEES' HEINOUS ALLEGED CRIMES.

Appellee Mohammad claims that "all parties to the government's interlocutory appeal will be harmed" if this Court does not grant this Motion. Appellant opposes Appellee's Motion, and sees no potential harm to the government should this Court deny the Motion. Remaining in the category of "parties to the government's interlocutory appeal," therefore, are Appellee Mohammad and his co-conspirators currently pending trial by the same military commission. Appellee

Mohammad's belief that his fellow co-conspirators—alleged to be members of a violent conspiracy to kill American citizens and wantonly destroy civilian property in order to cause terror in the American populace and "plunder their money" (App. 55)—will be harmed by Judge Silliman's participation in deciding the interlocutory issues the government has raised to the U.S.C.M.C.R. is not compelling. Further, Appellee Mohammad's passing reference to judicial economy is not relevant to this factor.[4]

As a result of the heinously violent crimes described on the charge sheet, 2,976 people were killed, many more were injured. Through these crimes, al Qaeda inflicted exactly the sort of horrific devastation that tends to perpetuate hostilities and that the law of war exists to constrain. As putative parties to the military commission proceedings, the victims and their family members yearning for justice have an interest in seeing these proceedings move forward without undue delay.

IV. THE PUBLIC INTEREST COMPELS DENIAL OF THE MOTION.

Separate from the interests of victims and their family members discussed above, the public has an interest in the expeditious resolution of the Appellant's interlocutory appeal. Appellee Mohammad's allegations that Judge Silliman is prejudiced against him are not credible. As Judge Silliman noted, "[w]hen tested against *Cheney's* objective informed reasonable observer standard, there is no evidence of actual or even apparent prejudice in anything I said or wrote." Order at 15 (citing *Cheney*, 541 U.S. at 924). Expeditious proceedings serve the public's interest in timely justice. The stay Appellee seeks would frustrate that interest.

[4] Judicial economy is only potentially relevant to the public interest factor. The public interest is discussed in part four.

V. CONCLUSION.

Appellant thus opposes Appellee Mohammad's Motion for Stay of Proceedings because Appellee is not likely to succeed on the merits of the petition; because there is no danger of irreparable harm to Appellees or any other parties; because a stay would harm victims, family members, and survivors of the September 11, 2001 attacks; and because a stay is not in the public interest.

Respectfully submitted,

//s//

MARK S. MARTINS
Brigadier General, U.S. Army
Chief Prosecutor

MICHAEL J. O'SULLIVAN
Appellate Counsel for the United States
Office of the Chief Prosecutor
Office of Military Commissions
1610 Defense Pentagon
Washington, D.C. 20301-1610
michael.j.osullivan14.civ[redacted]
[redacted]

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was sent by electronic mail to the Court and Counsel for all five Accused on June 19, 2017.

//s//

MICHAEL J. O'SULLIVAN
Appellate Counsel for the United States
Office of the Chief Prosecutor
Office of Military Commissions
1610 Defense Pentagon
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[redacted]

UNITED STATES OF AMERICA

Appellant,

v.

KHALID SHAIKH MOHAMMAD,

WALID MUHAMMAD SALIH MUBAREK BIN 'ATTASH,

RAMZI BINALSHIBH,

ALI ABDUL-AZIZ ALI,
AKA AMMAR AL BALUCHI,

And

MUSTAFA AHMED ADAM AL HAWSAWI

Appellees.

IN THE UNITED STATES COURT OF MILITARY COMMISSION REVIEW

MOTION FOR STAY OF PROCEEDINGS

U.S.C.M.C.R. Case No. 17-002

Arraigned at Guantanamo Bay, Cuba on May 5, 2012

Before a Military Commission convened by Vice Admiral (ret.) Bruce E. MacDonald, USN

Presiding Military Judge
Colonel James L. Pohl, USA

DATE: 14 June 2017

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES COURT OF MILITARY COMMISSION REVIEW

Khalid Shaikh Mohammad, by and through undersigned counsel, moves to stay proceedings in this Court pending review by the United States Court of Appeals for the District of Columbia Circuit of Judge Silliman's denial of Appellee Mr. Mohammad's Motion For Recusal and/or Disqualification of Judge Silliman.

Procedural History

In May 2012, Mr. Mohammad and the four co-defendants were arraigned on eight charges, six of which were capital. On April 7, 2017, the military commission granted a motion filed by co-defendant Mr. al Baluchi, joined by Mr. Mohammad, and dismissed the only two non-capital charges as to all five defendants on the ground that prosecution of these charges was

barred by applicable statutes of limitation. The government filed an interlocutory appeal of the dismissal to this Court. That appeal is pending.

On May 9, 2017, counsel for Mr. Mohammad petitioned Judge Silliman to recuse himself as judge based on his prior statements and writings regarding the military commissions, the charges pending, and the guilt of Mr. Mohammad, as well as his public praise for the Chief Prosecutor.[1]

On June 6, 2017, Judge Silliman denied the motion for recusal and/or disqualification.

A Stay of Proceedings is Necessary to Avoid Irreparable Injury

It is in the interests of justice to stay further proceedings involving Mr. Mohammad before the CMCR."The authority to grant stays has historically been justified by the perceived need 'to prevent irreparable injury to the parties or to the public' pending review." *Nken v. Holder*, 556 U.S. 418, 432 (2009). "The factors to be considered in determining whether a stay is warranted are: (1) the likelihood that the party seeking the stay will prevail on the merits of the appeal; (2) the likelihood that the moving party will be irreparably harmed absent a stay; (3) the prospect that others will be harmed if the court grants the stay; and (4) the public interest in granting the stay." *WMATA v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir.1977). All "four factors have typically been evaluated on a sliding scale," *Davis v. Pension Benefit Guar. Corp.*, 571 F.3d 1288, 1291 (D.C. Cir. 2009) (internal quotation marks omitted), with the first two factors being the most important, *see Nken*, 129 S.Ct. at 1761. "The test is a flexible one [and] [i]njunctive relief may be granted with either a high likelihood of success and some injury, or vice versa." *Cuomo v. U.S. Nuclear Regulatory Comm'n,* 772 F.2d 972, 974 (D.C. Cir. 1985).

[1] USCMCR Case No. 17-002, APPELLEE MR. MOHAMMAD'S MOTION FOR RECUSAL AND/OR DISQUALIFICATION OF JUDGE SILLIMAN, Filed 9 May, 2017.

1. *Mr. Mohammad has made a substantial case on the merits.*

With respect to the likelihood of success on the merits, the crucial question is not whether the movant's "right to a final decision, after a trial, be absolutely certain, wholly without doubt[.]" *Holiday Tours*, 559 F.2d at 844. Instead, it is whether he has made "a substantial case on the merits." *Id.* at 843. For the reasons set forth in his original motion, Mr. Mohammad has presented a substantial case on the merits regarding Judge Silliman's refusal to recuse himself.

2. *Mr. Mohammad will be irreparably harmed if a stay is not granted.*

With respect to a showing of irreparable harm, the D.C Circuit has held that actual or apparent judicial bias is a paradigmatic example of a situation presenting the absence of "other adequate means" to obtain relief:

> [w]ith actual bias, ordinary appellate review is insufficient because it is too difficult to detect all of the ways that bias can influence a proceeding. *See Cobell* [*v. Norton*, 334 F.3d 1128 (D.C. Cir. 2003)] at 1139. ("[I]f prejudice exist[ed], it has worked its evil and a judgment of it in a reviewing tribunal is precarious. It goes there fortified by presumptions, and nothing can be more elusive of estimate or decision than a disposition of a mind in which there is a personal ingredient." (*quoting Berger v. United States*, 255 U.S. 22, 36 (1921)). With apparent bias, ordinary appellate review fails to restore "public confidence in the integrity of the judicial process," *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 860, (1988) -- confidence that is irreparably dampened once "a case is allowed to proceed before a judge who appears to be tainted." *In re Sch. Asbestos Litig.*, 977 F.2d 764, 776 (3d Cir. 1992); accord *In re United States*, 666 F.2d 690, 694 (1st Cir. 1981).

In re Al-Nashiri, 791 F.3d 71, 79 (D.C. Cir. 2015). And just last year in the *Khadr* case, the Circuit confirmed that "mandamus is appropriate when an interlocutory order would cause an 'irreparable' injury that would otherwise 'go unredressed'" such as "'the existence of actual or apparent bias' by the judge." *In re Khadr*, 823 F.3d 92, 97 n.2 (D.C. Cir. 2016).

3. *Others will be harmed if a stay is not granted.*

In *American Constr. Co.* v. *Jacksonville, T. & K. W R. Co., 148* U. S. 372 (1893), a

judgment of the Circuit Court of Appeals was challenged because one member of that court had been prohibited by statute from taking part in the hearing and decision of the appea1. The Supreme Court held: "If the statute made him incompetent to sit at the hearing, the decree in which he took part was unlawful, and perhaps absolutely void, and should certainly be set aside or quashed by any court having authority to review it by appeal, error or *certiorari*." *Id.*. at 387. *See also Cobell*, 334 F.3d at 1139 ("When the relief sought is recusal of a disqualified judicial officer … the injury suffered by a party required to complete judicial proceedings overseen by that officer is by its nature irreparable.") Accordingly, all parties to the government's interlocutory appeal will be harmed if a reviewing court finds merit to Mr. Mohammad's motion for recusal and any and all decisions by the panel would be void. The interests of the parties – and the interests of judicial economy – would be well served by staying proceedings until the issue of the composition of the panel is resolved.

4. *The public has a great interest in proceedings untainted by bias.*

The public evaluating the fairness and integrity of the military commission process will look to whether there is indeed a fair and unbiased decision-maker, but will also look to whether there is an *appearance* of a fair and unbiased decision-maker. In this situation, Judge Silliman's decision to assign himself to a case that he has spoken about and written about for many years, and his decision not to recuse himself from that case when requested, gives the appearance of impropriety that will reduce public trust in the military commissions system. Without a stay of these proceedings, the Court, as currently composed, may well rule on the appeal before the D.C. Circuit is able fully to address Mr. Mohammad's petition for a writ of mandamus. A stay in this Court would heighten public confidence because it would assure the appeal's review by an unbiased panel.

CONCLUSION

Accordingly, Mr. Mohammad moves this Court to stay further proceedings in this Court pending resolution of the matter in the United States Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

//s//
DAVID Z. NEVIN
Learned Counsel

//s//
GARY D. SOWARDS
Defense Counsel

//s//
DEREK A. POTEET
Maj, USMC
Defense Counsel

//s//
RITA RADOSTITZ
Defense Counsel

Counsel for Mr. Mohammad

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was sent via email to the Clerk of the U.S. Court of Military Commission Review and to all parties of record on the 14th day of June 2017.

//s//
David Z. Nevin