

MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY, CUBA

UNITED STATES OF AMERICA

v.

KHALID SHAIKH MOHAMMAD, WALID
MUHAMMAD SALIH MUBARAK BIN
'ATTASH, RAMZI BIN AL SHIBH, ALI
ABDUL-AZIZ ALI, MUSTAFA AHMED
ADAM AL HAWSAWI

AE693 (AAA)

**Mr. al Baluchi's Motion to Establish
Protections Against Pretrial Punishment**

02 January 2020

1. **Timeliness:** This motion is timely filed.
2. **Relief Sought:** Mr. al Baluchi asks the military commission to hold that as both a matter of due process and statutory construction, Mr. al Baluchi is protected against pretrial punishment. Specifically, Mr. al Baluchi asks that this military commission hold that Section 948b (b)-(c) of the MCA of 2009, which applies some UCMJ provisions to military commissions, applies Article 13 and the principles of RCM 703 to Mr. al Baluchi. To do otherwise, and construe the omission of Article 13, UCMJ, and Rule for Court Martial (RCM) 305(k) from the Military Commissions Manual as the allowance of pretrial punishment, would violate the *Ex Post Facto* Clause. Ultimately, Mr. al Baluchi asks the military commission to rule it has authority to provide Mr. al Baluchi credit under these provisions for the punishment he endured while detained by the United States government before trial.
3. **Overview:**
 - a. In 1979, the Supreme Court made clear that punishing pretrial detainees before trial violates Due Process.¹ The military has protected this right in the Uniform Code of Military Justice

¹ *Bell v. Wolfish*, 441 U.S. 520, 535 (1979).

since 1949.² Rule for Court Martial (RCM) 305(k) provides a remedy for violations of Article 13 by awarding administrative confinement credit or another appropriate remedy, up to an including the dismissal of charges, to the illegally punished pre-trial detainee. While the Military Commissions Act of 2006 does not contain Article 13 or any reference to the treatment of pretrial prisoners, the protections of Article 13 and RCM 305(k) nonetheless apply to Mr. al Baluchi since the protections are constitutionally protected rights under the Due Process.

b. Construing the omission of Article 13 protections from the MCA to authorize pretrial punishment would violate the *Ex Post Facto* Clause. Mr. al Baluchi is accused of committing crimes between 1996 and 2001. During this time, pretrial detainee rights and remedies were firmly established. *Calder v. Bull* and the subsequent case law make clear that Congress' 2006 passage of the MCA have no impact on Mr. al Baluchi in so much as it increases his punishment exposure.³

4. **Burden of Proof:** The defense bears the burden of persuasion by a preponderance of the evidence.⁴

5. **Facts:**

a. The alleged offenses occurred between 1996 and September 2001.

b. On or about 29 April 2003, Mr. al Baluchi was arrested in Karachi, Pakistan, by Pakistani authorities.⁵ In May 2003, he was transferred to CIA custody.⁶ The CIA detained alleged

² Article 13, UCMJ (2016).

³ *Calder v. Bull*, 3 U.S. (Dall.) 386, 390 (1798); *see also Stogner v. California*, 539 U.S. 607, 611 (2003) (*Calder* provides the “authoritative account of the scope of the *Ex Post Facto* clause”).

⁴ *See* R.M.C. 905(c); RC 3.8.

⁵ S. REP. NO. 113-288 (2014) at 356.

⁶ *Id.*

al Qaeda members, including Mr. al Baluchi, and held them incommunicado in CIA black sites.⁷ At the black sites, the prisoners were subjected to torture, other cruel, inhuman, and degrading treatment, and conditions which would otherwise amount to punishment under U.S. law.

c. Among other conditions condemned by U.S. law, Mr. al Baluchi was held incommunicado in CIA black sites for three and a half years. During this time, he was unable to speak with anyone other than his captors or contact an attorney. He was never given an opportunity to challenge his detention or seek relief from any judicial body. Rather, the CIA kept him under inhumane conditions and violated his liberty and dignity interests in nearly every conceivable way. Mr. al Baluchi, like many others, was subjected to sensory deprivation and overload, forced nudity, sleep deprivation, starvation and forced dehydration.⁸ He was hit in his face and stomach, thrown against walls, and doused with icy water.⁹ The different techniques were combined so a detainee, such as Mr. al Baluchi, were forced to stand in a stress position while naked, sleep deprived, and starving.¹⁰ After the formal “Enhanced Interrogation Techniques” were complete, he was held in the strictest of solitary confinement from 2003 to 2006, with no contact with anyone other than his captors. The express purpose of these techniques was to “eliminate” a detainee’s will and force them to cooperate with authorities.¹¹ The CIA’s goal in the interrogation was to “create a state

⁷ *Background Paper on CIA’s Combined Use of Interrogation Techniques* (undated) (redacted), Fax from Central Intelligence Agency, to Dan Levin, Office of Legal Counsel, Department of Justice (30 December 2004) (released 24 August 2009). https://www.thetorturedatabase.org/files/foia_subsite/pdfs/DOJOLC001126.pdf (herein after *Background Paper on CIA*) at 2-3 (last accessed March 23, 2019).

⁸ S. REP. NO. 113-288 at 89 n.497.

⁹ *Background Paper on CIA* at 5-7.

¹⁰ *Background Paper on CIA* at 7-8.

¹¹ Office of Medical Services (OMS), Central Intelligence Agency, *OMS Guidelines on Medical and Psychological Support to Detainee Rendition, Interrogation, and Detention* (December 2004)

of learned helplessness and dependence conducive to the collection of intelligence in a predictable, reliable, and sustainable manner.”¹² The CIA intentionally subjected detainees to mental and physical pain and suffering as part of this process.¹³

d. On or about 6 September 2006, Mr. al Baluchi was transferred to the detention facility at Guantanamo Bay, Camp 7. After this transfer, he continued to be held under cruel, inhuman, and degrading conditions, including solitary confinement, denial of access to an attorney, and denial of rehabilitative care for his torture and CIDT.

e. On 17 October 2006, Congress passed the Military Commission Act of 2006 (MCA 2006).¹⁴

6. Law and Argument.

a. Detainees’ right to be free from Punishment.

The Constitution, the UCMJ, and international law all recognize the right of detainees to be free from pre-conviction punishment regardless of the detainees’ confinement status. A central truth remains constant: without a conviction detainees may be held, but never punished.

In *Bell v. Wolfish*, the Supreme Court held that under the Constitution’s Due Process Clause, pretrial detainees cannot be punished.¹⁵ Due process of law “encompass[es] freedom from

(redacted. released 24 August 2009) (hereafter *OMS Guidelines*), at 8 available at <https://www.cia.gov/library/readingroom/docs/0006541536.pdf>.

¹² *Background Paper on CIA* at 1.

¹³ *OMS Guidelines* at 8.

¹⁴ Military Commissions Act of 2006, Pub. L. 109-366, 12 Stat. 2600 (17 Oct. 2006).

¹⁵ *Bell*, 441 U.S. at 535.

bodily restraint and punishment.”¹⁶ Indeed, the Supreme Court calls this a “fundamental” right: “the state cannot hold and physically punish an individual except in accordance with due process of law.”¹⁷ The government may detain an individual in order to ensure their appearance at trial, but only so long as “those conditions and restrictions do not amount to punishment, or otherwise violate the Constitution.”¹⁸ Detention and restrictions of rights must be “reasonably related to a legitimate nonpunitive governmental objective.”¹⁹

Even before the Supreme Court’s ruling in *Bell v. Wolfish*, the rights of detainees have been long acknowledged under the Uniform Code of Military Justice. Article 13, UCMJ provides:

“No person, while being held for trial, may be subjected to punishment or penalty other than arrest or confinement upon the charges pending against him, nor shall the arrest or confinement imposed upon him be any more rigorous than the circumstances required to insure his presence, but he may be subjected to minor punishment during that period for infractions of discipline.”

A review of the history of detainee treatment demonstrates the intentional way in which Congress acted to gradually increase rights of pretrial detainees under military jurisdiction and remove any semblance of pretrial punishment. Originally, the 1775 Articles of War did nothing to protect detainee rights. Article XLI discussed the treatment of pretrial service members. Under this Article, all pretrial detainees met with absolute confinement.

It provided:

"To the end that offenders may be brought to justice; whenever any officer or soldier shall commit a crime deserving punishment, he shall, by his commanding officer, if an officer, be put in arrest; if a non-commissioned officer or soldier, be

¹⁶ *Ingraham v. Wright*, 430 U.S. 651, 673-74 (1977).

¹⁷ *Id.* at 674.

¹⁸ *Bell* at 536-537; *see also Graham v. Connor*, 490 U.S. 386, 395 n.10 (1989) (“[T]he Due Process Clause protects a pretrial detainee from the use of excessive force that amounts to punishment.”).

¹⁹ *Bell* at 539.

imprisoned till he shall be either tried by a court-martial, or shall be lawfully discharged by proper authority."

This Article remained unchanged until 1920. That year, Article 69 of the Articles of War 1920 was enacted. With this amendment, Congress took a view that was more "intelligent and humane" with regard to the treatment of pretrial detainees.²⁰ It provided that: "Any person subject to military law charged with crime or with a serious offense under these articles shall be placed in confinement or in arrest, as circumstances may require."²¹

This article remain in effect until 1948, when the United States Congress passed the statute commonly known as the "Elston Act," which was a comprehensive revision of the Articles of War and which also served as the precursor to the Uniform Code of Military Justice.²² Included in the provisions was Article 16, which established for the first time protection for pretrial detainees. It stated: "...nor shall any defendant awaiting trial be made subject to punishment or penalties other than confinement prior to sentence on charges against him."²³

The 1949 Manual for Court-Martial expounded:

"Any person subject to military law charged with crime or with a serious offense under the Articles of War shall be placed in confinement or in arrest as circumstances may require, but when charged with a minor offense only, he shall not ordinarily be placed in confinement... The character and duration of the restraint imposed before and during trial, and pending final action upon a case, will be the minimum necessary under the circumstances. No restraint need be imposed in cases involving minor offenses..."

"... Nor shall any accused who is confined while awaiting trial be made subject to punishments or penalties other than confinement for any offense with which he stands charged prior to execution of an approved sentence on charges against

²⁰ *Id.* at 765.

²¹ Article of War 69 (1920).

²² Selective Service Act, Pub. L. No. 80-759, 62 Stat. 604, 627-44 (1948).

²³ Article of War 16 (1948).

him.”²⁴

It further stated:

“Confinement will not be imposed pending trial unless deemed necessary to assure the Accused's presence at trial, or because of the seriousness of the offense charged, as for an offense involving moral turpitude.”²⁵

In 1950, Congress again updated the UCMJ and Article of War 16 became Article 13, UCMJ. The language of Article 13 was directly derived from Article of War 16 and the changes were insubstantial.²⁶ The legislative history demonstrates that lawmakers were appalled with the treatment of pretrial detainees, including the infamous scandal at the 10th Reinforcement Depot near Lichfield, England,²⁷ and that the intent of Article 13 was to clearly establish a rule that distinguished the treatment of pretrial detainees from that of post-trial prisoners. The purpose of Article 13 was discussed by the House Armed Services Subcommittee during debate:

"MR. SMART: . . . I might advise the committee that that likewise was a floor amendment during the consideration of 2575 and it was raised for the reason that apparently people who were confined pending trial were being subjected to rock breaking and everything else, the same as people who had already been convicted of offenses and happened to be incarcerated in the same place of confinement.

That is the reason for it. And this is merely a carry over from 2575.

MR. BROOKS. Is there any discussion on article 13?

²⁴ The Manual for Courts-Martial, U.S. Army (1949), para. 19.

²⁵ *Id.* at para. 19d(2)(c).

²⁶ Article 13, UCMJ (1951). The words "the provisions of" were omitted as surplusage. The word "results" is changed to the singular. The word "may" is substituted for the word "shall". 10 USCS § 813 (1981).

²⁷ *See generally* Jack Gieck, *Lichfield: The U.S. Army on Trial* (1997).

MR. RIVERS. Well the case you have in mind is if you have a boy incarcerated for an alleged offense, unless he is just insubordinate in the jail there, there is the only time you can impose any disciplinary action?

MR. SMART. That is right.

MR. RIVERS. And in no case can you impose possible rock breaking on him.

MR. SMART. That is right.

MR. RIVERS. That is the case you have in mind.

MR. GAVIN. Yes.

MR. SMART. That is the intent of this article.

MR. GAVIN. In no case can rock breaking be imposed upon him, unless convicted.

MR. SMART. Correct.

MR. GAVIN. And sentenced for it.

MR. SMART. Correct.

MR. RIVERS. Sentenced for it as a result of conviction, I should say.

MR. LARKIN. Hard labor, that is right."²⁸

This colloquy demonstrates that Congress recognized the sensitive position of pretrial detainees as individuals whose guilt had yet been established and that Congress intended at the inception of the new rule for these pretrial detainees to be treated preferentially.

Further, while the text of Article 13 remained substantially the same from 1949-1951, the enactment of the 1951 UCMJ again expanded the rights of pretrial detainees through the regulatory text. The UCMJ added the provision that:

". . . During such periods prior to the order directing execution of the sentence, an accused of those classes [pretrial detainees] will not be required to observe either duty hours or training schedules devised as punitive measures, nor required to

²⁸ Hearing on H.R. 2498 Before the H. Subcomm. on Armed Services, 81st Cong. 916-917 (1949).

perform punitive labor, nor required to wear other than the uniform prescribed for unsentenced prisoners, except that he may be subjected to minor punishment for infractions of discipline."²⁹

Article 13, as enacted in 1951, has remained unchanged to the modern day. The Court of Military Appeals described the changes as a recognition that “the earlier Articles of War... failed to take cognizance of the fact that confinement itself was a form of penal servitude, and that if the restraint imposed was more than that needed to retain safe custody, the unnecessary restrictions were in the nature of punishment.”³⁰ It is clear that the changes showed an intent by Congress to advance pretrial detainee protections and avoid the injustice that occurs when men and women whom the law presumes innocent are unfairly punished before they are given the opportunity to have their day in court.

The Constitution and the UCMJ clearly establish that pretrial detainees have the right to be free of punishment, however this right is not limited to only pretrial detainees, but all detainees. This includes Law of War (LOW) detainees.³¹ No matter how this court classifies Mr. al Baluchi, he may not be punished without pre-conviction violating the Due Process Clause.

In *Hamdi v. Rumsfeld*, the Supreme Court acknowledged that the detention of combatants, lawful or unlawful, is "important incident[s] of war."³² The purpose of this detention is “to prevent

²⁹ UCMJ (1951) para.125.

³⁰ *Bayhand*, 6 U.S.C.M.A. at 768.

³¹ Under the Geneva Conventions, Mr. al Baluchi is entitled to protection as a “prisoner of war” until determined otherwise by a competent tribunal; this determination has never occurred. *See* AE480 (AAA) Motion for Article 5 Hearing Before a Competent Tribunal (explaining Geneva regime); AE480J (declining to address Mr. al Baluchi’s status).

³² *Hamdi v. Rumsfeld*, 542 U.S. 507, 518-519, (2004)(quoting *Ex parte Quirin*, *Supra*, at 28, 30).

captured individuals from returning to the field of battle and taking up arms once again.”³³ This “captivity in war is ‘neither revenge, nor punishment, but solely protective custody, the only purpose of which is to prevent the prisoners of war from further participation in the war.’” The captivity is intended to be “devoid of all penal character.”³⁴ This requirement is consistent with obligations under the Geneva Conventions which require that detained prisoners of war (POWs) and civilians in war zones be treated humanely.³⁵

As a pretrial detainee Mr. al Baluchi’s right to be free of pretrial punishment under is and always has been protected by the Due Process Clause.³⁶ All detainees have the right under the Due Process clause to be treated humanely. This is true whether they are citizen or noncitizen, in the United States or abroad. Due Process mandates that they not be punished. Although the Constitution's application to interrogation outside the United States is not settled, in *Vance v. Rumsfeld*, the Government conceded that it governed, at the very least, U.S citizen abroad when

³³ *Id.* (quoting Nuremberg Military Tribunal, reprinted in 41 Am. J. Int’l L. 172, 229 (1947); W. Winthrop, *Military Law and Precedents* 788 (rev. 2d ed. 1920)).

³⁴ *Id.*

³⁵ *See* Geneva Convention (III) Relative to the Treatment of Prisoners of War, art. 87, Aug. 12, 1949, [1955] 6 U.S.T. 3316 (“[C]ourts or authorities of the Detaining Power . . . shall be at liberty to reduce the penalty provided for the violation of which the prisoner of war is accused, and shall therefore not be bound to apply the minimum penalty prescribed.”); Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, art. 118, Aug. 12, 1949, 6 U.S.T. 3516 (same involving non-POWs).

³⁶ The applicability of elements of the Due Process Clause is already pending before this Commission in AE 628 Mr. al Baluchi’s Motion to Suppress Alleged Statements as Involuntary and Obtained by Torture. *See* AE628N (AAA) Reply to Government’s Response to Motion to Suppress Alleged Statements as Involuntary and Obtained by Torture (addressing applicability of due process protections against compelled statements).

confined and interrogated by the U.S. government.³⁷ In *Vance*, the plaintiffs alleged that they were tortured by U.S. military members on foreign soil while in U.S. custody. The Seventh Circuit held that, if true, this was a violation of their “constitutional right to substantive due process.” “Substantive due process involves the exercise of governmental power without reasonable justification. . . . It is most often described as an abuse of government power which ‘shocks the conscience.’”³⁸ The Supreme Court “has long held that certain interrogation techniques, either in isolation or as applied to the unique characteristics of a particular suspect, are so offensive to a civilized system of justice that they must be condemned under the Due Process Clause.”³⁹ In *Vance*, the United States government did not even attempt to assert that the plaintiffs' allegations, if pled correctly, do not amount to a violation of a constitutional right.⁴⁰ The Court stated that to do so “would be futile.”⁴¹

Though the defendants in *Vance* were never charged with, let alone convicted of, any crime, the Court considered Supreme Court precedent on the treatment of convicted prisoners to guide their reasoning.⁴² The Supreme Court concluded “[p]risoners retain the essence of human dignity inherent in all persons. Respect for that dignity animates the Eighth

³⁷ *Vance v. Rumsfeld*, 701 F.3d 193, 198 (7th Cir. 2012); see *United States v. Verdugo-Urquidez*, 494 U.S. 259, 268-69 (1990).

³⁸ *Tun*, 398 F. 3d at 902, quoting *Rochin v. California*, 342 U.S. 165, 172 (1952).

³⁹ *Miller v. Fenton*, 474 U.S. 104, 109, 106 S. Ct. 445, 88 L. Ed. 2d 405 (1985); see also *Wilkinson v. Utah*, 99 U.S. 130, 136, 25 L. Ed. 345 (1878) (concluding that “it is safe to affirm that punishments of torture . . . are forbidden by . . . the Constitution”).

⁴⁰ *Vance v. Rumsfeld*, 653 F.3d 591, 607, *vacated on other grounds*, 2011 U.S. App. LEXIS 22083 (7th Cir. 2011).

⁴¹ *Id.*

⁴² *Id.* at 608-609.

Amendment prohibition against cruel and unusual punishment. The basic concept underlying the Eighth Amendment is nothing less than the dignity of man."⁴³

While the Plaintiffs in *Vance* were U.S. citizens, the language of the Court and the language of the Supreme Court in precedent makes clear that treating prisoners humanely is an issue of human dignity, not citizen dignity. Further, the Fifth Amendment's text does not limit the category of individuals entitled to protection.⁴⁴ Whereas the Fourth Amendment applies only to "the people," a term of art, the Fifth Amendment applies by its express terms to "any person."⁴⁵ Additionally, the Supreme Court has recognized some Fifth Amendment protections apply extraterritorially including at Guantanamo Bay.⁴⁶ Mr. al Baluchi is a person and therefore, he cannot be excluded from Due Process Protections under the Fifth Amendment.⁴⁷ This commission must recognize Mr. al Baluchi's due process right to be free of pretrial punishment.

b. Article 13 and RCM 305 apply to Mr. al Baluchi.

Mr. al Baluchi is accused of committing crimes between 1996 and 2001. During this time, should prosecution by military commission have occurred, it would have been governed by the

⁴³ *Brown v. Plata*, 131 S. Ct. 1910, 1928, 179 [*609] L. Ed. 2d 969 (2011) (citations omitted); see also *Estelle v. Gamble*, 429 U.S. 97, 102, 97 S. Ct. 285, 50 L. Ed. 2d 251 (1976) (concluding that the Eighth Amendment "embodies broad and idealistic concepts of dignity, civilized standards, humanity, and decency . . . against which we must evaluate penal measures") (citations omitted).

⁴⁴ See, e.g., *Lynch v. Cannatella*, 810 F.2d 1363, 1374-75 (5th Cir. 1987).

⁴⁵ *Id.*

⁴⁶ See *Boumediene v. Bush*, 553 U.S. 723, 766 (2008).

⁴⁷ See *id.*; see, e.g., *Reid v. Covert*, 354 U.S. 1, 18-19 (plurality opinion); *id.* at 49 (Frankfurter, J., concurring) (concluding that, at least as to capital cases overseas, "the exercise [**44] of court-martial jurisdiction over civilian dependents in time of peace cannot be justified by Article I, considered in connection with the specific protections of Article III and the Fifth and Sixth Amendments").

UCMJ.⁴⁸ During this time, Article 13 and RCM 305 would have been applied to all military trials, both military commissions' trials and courts-martial.⁴⁹ The MCA is based on the UCMJ, but has important distinctions. One of those distinctions is the omission of Article 13 and RCM 305.

The omission of Article 13 and RCM 305 should not be read as a removal of Mr. al Baluchi's protections against pretrial punishment. The MCA of 2009, Section 948b (b)-(c), discusses the interrelationship between the UCMJ, Chapter 47, and the MCA. In section 948b(b) specifically excludes certain sections of the UCMJ from the military commissions, while section 948b(c) states that "other provisions" of the UCMJ shall apply to military commissions "to the extent provided by the terms of the provisions." A look at Article 13 makes clear that that this UCMJ provision would still apply to all military commissions trials.

Article 13 begins by stating that "No person, while being held for trial, may be subjected to punishment or penalty...." The language "no person" is important because it demonstrates that Article 13 is intended to apply to all pretrial detainees, not simply servicemembers or some other subset of detainees, but all detainees. This is particularly clear when examining this language in connection with Article 12. In Article 12, the UCMJ describes some of the different types of detainees and explains how they are to be treated differently: "No member of the armed forces may be placed in confinement in immediate association with enemy prisoners or other foreign nationals not members of the armed forces." Article 12 lists three potentially different types of detainees: members of the armed forces, enemy prisoners, and other foreign nationals not members of the armed forces. It specifically details that members of the armed forces are to be housed separately. Contrast that with the language of Article 13, the very next article: "No

⁴⁸ *Hamdan v. Rumsfeld*, 548 U.S. 557, 624-625 (2006).

⁴⁹ *See id.*

person”. This makes clear that these three different categories of detainee, and any other categories of detainee which may later arise, may not be punished pretrial.⁵⁰

In *Hamdan v. Rumsfeld*, the Supreme Court analyzed the principle of uniformity between courts-martial and military commission procedure.⁵¹ The Court held that Congress and the Geneva Convention mandated parity of pretrial, trial, and post-trial procedures between courts-martial and military commissions.⁵² Therefore, absent effective action establishing a departure, “the rules [of] courts-martial must apply.”⁵³ At the time Mr. al Baluchi allegedly committed his offenses, no actions establishing a departure from the UCMJ with regard to Article 13 or RCM 305 existed. Therefore, these provisions applied to Mr. al Baluchi at the time his offenses were committed and at the time his detention began.

Previous military commissions have established Article 13’s applicability to military commission defendants. In September 2008, in the case of *United States v. Mohammed Jawad*, the military judge, COL Stephen R. Henley, United States Army (USA), held that “[i]t is beyond peradventure that a Military Commission may dismiss charges because of abusive treatment of the Accused [a detainee at Guantanamo].”⁵⁴ Judge Henley held that the Commission may also order

⁵⁰ The application of Article 13 raises a factual question about at which point Mr. al Baluchi was being held “for trial” that Mr. al Baluchi intends to address in a later evidentiary motion for pretrial confinement credit. However, it is of note that the Government has asserted national security privilege over the facts of Mr. al Baluchi’s capture making it impossible for Mr. al Baluchi to properly argue the issue.

⁵¹ *Hamdan*, 548 U.S. at 623.

⁵² *Id.* at 624-625.

⁵³ *Id.* at 624.

⁵⁴ Attachment B. Ruling on Defense Motion to Dismiss—Torture of the Detainee (AE084) at 5-6 & n.7, *United States v. Jawad* (Sept. 24, 2008) (D-008) (citing R.M.C. 907(b), R.C.M. 907(b), and *United States v. Fulton*, 55 M.J. 88 (C.A.A.F. 2001)).

other forms of remedial relief to:

“adequately address the wrong inflicted upon the Accused, including but not limited to, sentence credit towards any approved period of confinement, excluding statements and any evidence derived from the abusive treatment, and prohibiting persons who may have been involved in any improper actions against the Accused from testifying at trial.”⁵⁵

Further, Judge Henley found that “[a]ny degrading treatment carries a presumption it was imposed as a punitive not preventative measure.”⁵⁶ Judge Henley ruled Mr. Jawad had suffered “abusive conduct and cruel and inhuman treatment” because he had been subjected to sleep deprivation as well as excessive temperatures and other environmental conditions, 30 days of physical isolation, and other abuse.⁵⁷

Mr. Jawad’s treatment was unquestionably unlawful, and warranted relief, but it pales in comparison to the horrors that Mr. al Baluchi suffered in detention. Regardless, the fact that Mr. Jawad’s court ruled he was entitled to this credit, in conjunction with the ruling in *United States v. Haman*, makes evident that Article 13 and RCM 305 apply to Mr. al Baluchi.

c. Construing the omission of Article 13 and RCM 305 to authorize pretrial punishment would violate the *Ex Post Facto* Clause of the Constitution.

The most logical interpretation of the law in this instance is to determine that § 948b (b)-(c) apply Article 13 to the military commissions because construing the omission of Article 13 and RCM 305 to authorize pretrial punishment would violate the *Ex Post Facto* Clause of the

⁵⁵ *Id.* at 4.

⁵⁶ *Id.* at 4-5.

⁵⁷ *Id.* at 2.

Constitution.⁵⁸ Mr. al Baluchi's alleged crimes were committed between 1996 and 2001, before the enactment of the MCA. During this time frame, military courts were still governed by the UCMJ and military commissions' courts under the UCMJ were permitted to award RCM 305(k) credit and to apply that credit administratively in accordance with *Hamdan*.⁵⁹ Allowing the omission of Article 13 and RCM 305(k) to removes all laws or regulations that would award similar credit to Mr. al Baluchi would have the impact of greatly increasing Mr. al Baluchi's potential sentence and/or removing remedies available to him for improper treatment. A ruling that RCM 305(k) does not apply means Mr. al Baluchi would be left to rely on an amorphous theory of judicial credit to remedy his illegal pretrial punishment. This discretionary and unregulated "remedy" is inadequate and would leave Mr. al Baluchi in a position of having his sentence unlawfully increased. Instead, this military commission should rule that Mr. al Baluchi is entitled to administrative RCM 305(k) credit as he would have been at the time his crimes were committed.

The Constitution states that "No Bill of Attainder or *Ex Post Facto* law shall be passed."⁶⁰ In *United States v. Mohammad*, the CMCR made clear that *Ex Post Facto* applies to detainees at Guantanamo Bay.⁶¹ *Ex Post Facto* laws consist of:

- Every law that makes an action done before the passing of the law; and which was innocent when done, criminal; and punishes such action;
- Every law that aggravates a crime, or makes it greater than it was, when committed;

⁵⁸ The *Ex Post Facto* Clause protects the defendants. *Bahlul v. United States*, 767 F.3d 1, 18 n.9 (Henderson, J., opinion for the court); *United States v. Mohammad*, 280 F. Supp. 3d 1305, 1312 (CMCR 2017).

⁵⁹ See *Hamdan*, 548 U.S. at 623. *United States v. Allen*, 17 M.J. 126 (C.M.A. 1984); *Suzuki*, 39 M.J. at 1083.

⁶⁰ U.S. CONST. art. I, § 9, cl. 3.

⁶¹ *Mohammad*, 280 F. Supp. 3d at 1312.

- Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed; and
- Every law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offense, in order to convict the offender.⁶²

In this case, the removal of Article 13 is *ex post facto* because the change in law creates a significant risk of increasing the punishment for a given crime.⁶³

In *Peugh v. United States*, the Supreme Court addressed this type of *Ex Post Facto* law when it invalidated the retrospective application of the 2009 United States Sentencing Guidelines (“Guidelines”) to conduct that occurred in 1999 and 2000.⁶⁴ The advisory Guidelines range was 30 to 37 months at the time of the offense and under the 2000 Guidelines, but the range increased to 70 to 87 months by the time of trial and under the 2009 Guidelines. The Court invalidated the defendant’s sentence of 70 months under the 2009 Guidelines. “[T]here is an *Ex Post Facto* violation when a defendant is sentenced under Guidelines promulgated after he committed his criminal acts and the new version provides a higher applicable Guidelines sentencing range than the version in place at the time of the offense.”⁶⁵ Additionally, “a law can run afoul of the Clause even if it does not alter the statutory maximum punishment attached to a crime.”⁶⁶ And “the coverage of the *Ex Post Facto* clause is not limited to legislative acts.”⁶⁷

⁶² *Calder v. Bull*, 3 U.S. (Dall.) at 390.

⁶³ *Garner*, 529 U.S. at 250 (2000).

⁶⁴ *Peugh v. United States*, 133 S. Ct. 2072 (2013).

⁶⁵ *Id.* at 2078.

⁶⁶ *Id.* at 2086.

⁶⁷ *Id.*

Like the advisory Guidelines at issue in *Peugh*, the removal of Article 13 and RCM 305(k) credit creates a significant risk of increased punishment by denying Mr. al Baluchi administrative sentencing credit for the violation of his constitutional and procedural rights. This “offend[s] ‘one of the principal interests that the *Ex Post Facto* clause was designed to serve, fundamental justice.’”⁶⁸

The military commission should find that the removal of Article 13 and RCM 305(k) is an *ex post facto* law. Justice requires applying its provisions and the associated case law to Mr. al Baluchi, whose crimes were committed prior to the enactment of this law. Otherwise, his sentence is unconstitutionally increased.

d. Mr. al Baluchi has the right to have administrative credit granted for illegal pretrial confinement.

An examination of the way pretrial punishment credits are given under RCM 305(k) versus pretrial punishment credit given without RCM 305(k) demonstrates that the removal of RCM 305(k) would in fact increase Mr. al Baluchi’s punishment and therefore violate *Ex Post Facto*. Under RCM 305(k), credit for illegal pretrial punishment is applied administratively against the adjudged sentence.⁶⁹ Administrative credit is important. While any credit against a sentence is always beneficial to a defendant, administrative credit is particularly so due to the impact it can have on detainees’ sentences.⁷⁰

⁶⁸ *Id.* at 2088 (citation omitted).

⁶⁹ RCM 305(k), UCMJ.

⁷⁰ Major Michael G. Seidel, *Giving Service Members the Credit They Deserve: A Review of Sentencing Credit and Its Application*, 1999 ARMY LAW. 1 (August, 1999). The alternative to administrative credit is judicial credit.

Administrative credit is applied against the approved sentence to confinement after trial. When a military judge orders administrative credit, the report of result of trial explicitly notes the credit. Confinement officials then reduce the term of confinement by the appropriate amount. Once the convening authority approves the sentence, the promulgating order must account for any administrative credit ordered by the military judge.⁷¹ After the promulgating order is published, confinement officials make further adjustments to the sentence, if necessary.⁷²

The alternative to administrative credit is judicial credit. Judicial credit reduces the adjudged sentence at trial. Essentially, the military judge considers any mitigating evidence and subsequently reduces the sentence. This can end up being a remedy without a benefit. Even worse a person who receives judicial credit for their pretrial punishment may actually serve more time in confinement than a similarly sentenced service member who gets administrative credit.⁷³

Two primary reasons explain this unintended and undesired result. First, pretrial agreements impact judicial credit and can eliminate its actual effect. Second, the way confinement facilities calculate good time credit impacts the efficacy of judicial credit.

Take this example from *Giving Service Members the Credit They Deserve: A Review of Sentencing Credit and Its Application*:

Assume two [detainees] both receive an adjudged sentence of thirty-six months, have pretrial agreements limiting confinement to eighteen months, and are given thirty days credit for their respective pretrial punishment. When the convening authority approves the eighteen month sentence, [Detainee] A's term of confinement is administratively reduced to seventeen months. [Detainee] B, however, receives the full eighteen-month approved sentence. While the military

⁷¹ The convening authority typically has the discretion to reduce a sentence in addition to any credit given by the military judge, although there are exceptions, for example in cases involving a sexual assault.

⁷² *Id.*

⁷³ *Id.*

judge reduces his adjudged sentence to thirty-five months, the convening authority still approves the pretrial agreement limitation of eighteen months. Whether or not one considers [Detainee] B's result as just, [Detainee] A received a bonafide credit, while [Detainee] B's credit was preempted by the pretrial agreement. [Detainee] B received "no meaningful . . . credit at all."⁷⁴

In a second example, assume two detainees each receive a six month sentence to confinement without any pretrial agreement. Both detainees are awarded 30 days of pretrial confinement credit, but Detainee A receives administrative credit and Detainee B receives judicial credit. Both detainees earn all the good time credit allowable and good time credit rate is five days per month for confinement term of less than one year:

“Because of the way good time abatement credit is earned at the confinement facility, [detainee] A would serve a total of four months in confinement; but [detainee] B, who also received thirty days of credit for pretrial punishment, would serve four months and five days. This occurs because the basis for earning good time credit is the adjudged sentence at trial adjusted for any pretrial agreement limitations... [Detainee] A earned thirty days good time credit based on his six month adjudged sentence. This good time credit combined with the thirty days of administrative Article 13 credit reduces the total term of confinement to four months. [Detainee] B, however, can only earn twenty-five days of good time credit. Because [detainee] B received judicial Article 13 credit, which reduced his adjudged sentence to five months, his basis for earning good time credit was only five months. Therefore, [detainee] B earned twenty five days of good time credit, which reduced his total term of confinement to four months and five days.”⁷⁵

Without RCM 305(k), the Military Commission would have no established way of granting credit for individuals' pretrial punishment. Aggrieved detainees would be left with no clear remedy and likely, if any remedy was given, it would be similar to that which is found in the federal courts. In federal courts, no laws or regulations explicitly address credit for pretrial punishment. Instead, Section 5K2.0 of the United States Sentencing Guidelines (USSG), which outlines the permissible basis for a departure from the federal sentencing guidelines, permits consideration of pretrial

⁷⁴ *Id.*

⁷⁵ *Id.*

punishment.⁷⁶ This section does not explicitly allow for a departure due to pretrial punishment, but some federal courts use Section 5K2.0 (a)(2)(b) to award a downward departure when pretrial confinement is particularly harsh.⁷⁷ Under Section 5K2.0, a sentencing court may depart if the court finds "that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines."⁷⁸ This may occur when the conditions in question [were] extreme to an exceptional degree and their severity [fell] upon the defendant in some highly unusual or disproportionate manner."⁷⁹

The rights afforded to Mr. al Baluchi under the military justice system—the award of administrative credit as opposed to judicial credit and the greater protections over his right to be treated justly pretrial— are far superior. The grant of administrative credit only avoids potential "absurdity," by avoiding the possibility of granting a remedy without a relief."⁸⁰ The *Ex Post Facto* Clause protects Mr. al Baluchi from this absurdity by disallowing Congress omit Article 13 and 305(k).

e. Conclusion

The Due Process Clause protects Mr. al Baluchi's right to be free of punishment pretrial. Mr. al Baluchi requests that this Commission rule that the Due Process Clause applies to Mr. al

⁷⁶ Downward departures in federal court are a form of judicial credit.

⁷⁷ See *United States v. Brinton*, 139 F.3d 718, 725 (9th Cir. 1998); *United States v. Carty*, 264 F.3d 191, 196 (2d Cir. 2001); *United States v. Sutton*, 973 F. Supp. 488, 492 (D.N.J. 1997);

⁷⁸ USSG § 5K2.0 (quoting 18 U.S.C. 3553 (b)).

⁷⁹ *United States v. Mateo*, 299 F. Supp. 2d 201, 208 (S.D.N.Y. 2004).

⁸⁰ *United States v. Gregory*, 21 M.J. 952, 957 (A.C.M.R. 1986), *aff'd*, 23 M.J. 246 (C.M.A 1986).

Baluchi under AE 628. Further, Mr. al Baluchi moves this Commission to rule that the Section 948b (b)-(c) of the MCA of 2009, applies Article 13 and RCM 703 to Mr. al Baluchi and to determine otherwise would violate the *Ex Post Facto* Clause. Ultimately, Mr. al Baluchi asks the military commission to rule it has authority to provide Mr. al Baluchi credit under these provisions for the punishment he endured while detained by the United States government before trial.

7. **Request for Oral Argument**: Mr. al Baluchi requests oral argument.

8. **Conference with Opposing Counsel**: The Prosecution opposes the motion.

9. **Attachments**:

A. Certificate of Service

B. *United States v. Mohammed Jawad*, Ruling on Defense Motion to Dismiss – Torture of the Detainee

C. *Amicus* Brief filed by Dru Brenner-Beck and Rachel Van Landinham on behalf of the National Institute of Military Justice in Support of Defense Motion to Establish Protections Against Pretrial Punishment

Very respectfully,

//s//

JAMES G. CONNELL, III
Learned Counsel

//s//

STERLING R. THOMAS
Lt Col, USAF
Defense Counsel

//s//

ALKA PRADHAN
Defense Counsel

//s//

BENJAMIN R. FARLEY
Defense Counsel

//s//

MARK E. ANDREU
Capt, USAF
Defense Counsel

Counsel for Mr. al Baluchi

Attachment A

CERTIFICATE OF SERVICE

I certify that on the 2nd day of January, 2020, I electronically filed the foregoing document with the Clerk of the Court and served the foregoing on all counsel of record by email.

//s//
JAMES G. CONNELL, III
Learned Counsel

Attachment B

UNITED STATES OF AMERICA

v.

MOHAMMED JAWAD

**D-008
RULING ON DEFENSE MOTION
TO DISMISS --
TORTURE OF THE DETAINEE**

1. The defense asserts the Accused was subjected to an intentional sleep deprivation program and other abusive treatment while detained in U.S. custody which constitutes torture in violation of the law of war, U.S. law and DOD regulations and policy¹ and moves to dismiss the Charge and specifications with prejudice. The government opposes the motion, submitting that, even if the allegations are true, dismissal of charges is not the appropriate remedy, if one exists at all.

2. On or about December 17, 2002, in Kabul, Afghanistan, the Accused allegedly threw a hand grenade into a vehicle in which two American service members and their Afghan interpreter were riding. All suffered serious injuries. The Accused was immediately apprehended by Afghan police and transferred to U.S. custody the next day. He remained in continuous U.S. custody until his transfer to Guantanamo Bay, Cuba on or about February 6, 2003.

3. On December 25, 2003, the accused attempted suicide.

¹ The President directed in Military Order 1, dated November 13, 2001, that detainees would be treated humanely. A February 7, 2002 White House memo reaffirmed this order and stated further they would be treated, "to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of Geneva."

4. As early as November 2003, Joint Task Force-Guantanamo Bay personnel (JTF-GTMO) used a sleep deprivation measure to disorient selected detainees thought to have important intelligence data, disrupt their sleep cycles and biorhythms, make them more compliant and break down their resistance to interrogation. Pursuant to this technique, euphemistically referred to as the “frequent flyer” program, a detainee would be repeatedly moved from one detention cell to another in quick intervals, usually at night.

5. Shortly after assuming command of JTF-GTMO in March 2004, Major General (MG) Jay Hood ordered the “frequent flyer” program discontinued. Apparently unknown to MG Hood, the accused was subjected to the frequent flyer program and moved from cell to cell 112 times from 7 May 2004 to 20 May 2004, on average of about once every three hours. The accused was shackled and unshackled as he was moved from cell to cell. The Accused was not interrogated and the scheme was calculated to profoundly disrupt the his mental senses.

6. While the “frequent flyer” program was intended to create a feeling of hopelessness and despair in the detainee and set the stage for successful interrogations, by March 2004 the accused was of no intelligence value to any government agency. The infliction of the “frequent flyer” technique upon the Accused thus had no legitimate interrogation purpose.

7. On or about June 2, 2008, the Accused was beaten, kicked, and pepper sprayed for not complying with a guard's instructions. He suffered, among other injuries, a broken nose.

8. The conditions experienced by the Accused while confined at Guantanamo Bay include excessive heat, constant lighting, loud noise, linguistic isolation (separating the accused from other Pashto² speakers), and, on at least two separate occasions, 30 days physical isolation.

9. The Accused has not apparently suffered any permanent physical injuries as a result of his detention in U.S. custody. While the long term psychological impact of the Accused's detention is unclear, the Rule for Military Commission (RMC) 706 board concluded the Accused is "not currently suffering from a mental disease or defect," "does have sufficient present ability to consult with his lawyers with a reasonable degree of rational understanding" and "does have sufficient mental capacity to understand the nature of the proceedings against him and cooperate intelligently in his defense."³ Additionally, the Accused does not require immediate medical or psychological treatment. See Appellate Exhibit 72.

² Pashto is one of two national languages of Afghanistan.

³ After referral of charges, an inquiry into the mental capacity of the accused may be ordered by the military judge. When a mental examination is ordered, the matter shall be referred to a board consisting of one or more persons. Each member of the board shall be either a physician or a clinical psychologist. Normally, at least one member of the board shall be either a psychiatrist or a clinical psychologist. See RMC 706.

10. The Military Commissions Act prohibits both the torture⁴ and cruel and inhuman treatment⁵ of detainees. Any degrading treatment carries a presumption it was imposed as a punitive not preventative measure.

11. The defense asserts that the government's conduct amounts to torture and violates the principles of due process of such a magnitude that dismissal of the charges is the only acceptable remedy.⁶

12. This Commission finds that, under the circumstances, subjecting this Accused to the "frequent flyer" program from May 7-20, 2004 constitutes abusive

⁴ "Torture" under 18 U.S.C. § 2441(d)(1)(A) means "an act specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control for the purpose of obtaining information or a confession, or punishment, intimidation, coercion, or any reason based on discrimination of any kind." "[S]evere mental pain or suffering" means the prolonged mental harm caused by or resulting from the intentional infliction or threatened infliction of severe physical pain or suffering; the administration or application, or threatened administration or application, of mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality; the threat of imminent death; or the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind-altering substances or other procedures calculated to disrupt profoundly the senses or personality." See 18 U.S.C. § 2340(2) (internal marks omitted).

Article I of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment defines torture as:

"any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions. "

See United Nations General Assembly Resolution 39/46 of 10 December 1984.

⁵ "Cruel or inhuman treatment" under 18 U.S.C. § 2441(d)(1)(B) means "an act intended to inflict severe or serious physical or mental pain or suffering (other than pain or suffering incident to lawful sanctions), including serious physical abuse upon another within his custody or control."

⁶ *United States v. Barrero-Moreno*, 951 F2d 1089, 1092 (9th Cir. 1991) (dismissal appropriate when prosecutorial process violated a constitutional or statutory right and no lesser remedial action available).

conduct and cruel and inhuman treatment. Further, it came at least two months after the JTF-GTMO commander had ordered the program stopped. Its continuation was not simple negligence but flagrant misbehavior. Those responsible should face appropriate disciplinary action, if warranted under the circumstances.

13. That being said, the narrow issue before this Military Commission is whether dismissal of the charges against this Accused is appropriate for the conduct of an apparent few government agents. Answering this question does not require the Military Commission to decide as fact that this Accused was tortured. Assuming, but not deciding, that the government's actions against this Accused produced the pain and suffering of the requisite physical and/or mental intensity and of such duration to rise to the level of "torture", this Military Commission finds that the remedy sought by the defense is not warranted under the circumstances.

14. It is beyond peradventure that a Military Commission may dismiss charges because of abusive treatment of the Accused.⁷ However, when other remedies are available to adequately address the wrong, dismissal should be the last of an escalating list of options. Here, the Commission finds other remedies are available to adequately address the wrong inflicted upon the Accused, including,

⁷ See, e.g., *United States v. Fulton*, 55 M.J. 88 (2001) (analyzing Rule for Courts-Martial (RCM) 907 and finding list of grounds for dismissal at RCM 907(b) non-exclusive). As RMC 103(26) states that the definitions in 10 U.S.C. § 101 shall apply, and 10 U.S.C. § 101(13) states that "includes" means "includes but is not limited to," the *Fulton* court's analysis applies to RMC 907(b) as well. While 10 U.S.C. § 948(c) provides that case interpreting the UCMJ are not binding on military commissions, they can nevertheless be persuasive authority in appropriate circumstances.

but not limited to, sentence credit towards any approved period of confinement, excluding statements and any evidence derived from the abusive treatment, and prohibiting persons who may have been involved in any improper actions against the Accused from testifying at trial. The Military Commission will rule upon the appropriate application of these, and other proposed remedies, as dictated by developments in this case.

15. Accordingly, the defense motion to dismiss based on torture of the Accused is DENIED.

So ordered this 24th day of September 2008:

/s/
Stephen R. Henley
Colonel, US Army
Military Judge

Attachment C

MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY, CUBA

UNITED STATES OF AMERICA

v.

KHALID SHAIKH MOHAMMAD, WALID
MUHAMMAD SALIH MUBARAK BIN
'ATTASH, RAMZI BIN AL SHIBH, ALI
ABDUL-AZIZ ALI, MUSTAFA AHMED
ADAM AL HAWSAWI

**Amicus Brief filed by Dru Brenner-Beck and
Rachel VanLandinham on behalf of the
National Institute of Military Justice
in Support of
Defense Motion
to Establish Protections Against Pretrial
Punishment**

31 December 2019

1. Required Statements: Our names are LTC (ret.) Dru Brenner-Beck and Professor Rachel VanLandingham Lt. Col. (ret.). We are the President and Vice-President of the National Institute of Military Justice. We certify that LTC Brenner-Beck is licensed to practice before the highest courts of Washington and Colorado and that Professor VanLandingham is licensed to practice before the highest court of Texas. We further certify:

a. LTC Brenner-Beck has acted as an expert consultant on the laws of war for counsel for Ammar al Baluchi, also known as Ali Abdul Aziz Ali, in the case of *United States v. Khalid Sheik Mohammad, et. al.* Professor VanLandingham is not a party to any Commission case in any capacity, and does not have an attorney-client relationship with any person whose case has been referred to a Military Commission. Neither are habeas counsel (nor seeking to be) for any such person, nor are currently or seeking to be the next friend for such person. Pursuant to Military Commissions Rule of Court 8(2)(b), we state that “the submission is only to be considered for its value as an *amicus* brief and not for any other purpose to include as a brief on behalf of any specific party to any Commission proceeding.”

b. We certify our good faith belief as licensed attorneys that the law in the attached brief is accurately stated, that we have read and verified the accuracy of all points of law cited in the brief, and that we are not aware of any contrary authority not cited to in the brief or substantially addressed by the authority cited to in the brief.

c. The National Institute of Military Justice (NIMJ) is a District of Columbia nonprofit corporation organized in 1991 to advance the fair administration of military justice and foster improved public understanding of the military justice system. NIMJ's advisory board includes law professors, private practitioners, and other experts in the field, none of whom are on active duty in the military, but nearly all of whom have served as military lawyers—several as flag officers. NIMJ has appeared regularly as *amicus curiae* in the Supreme Court—in support of the government in *Clinton v. Goldsmith*, 526 U.S. 529 (1999), and in support of the petitioners in *Rasul v. Bush*, 542 U.S. 466 (2004), *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006), and *Boumediene v. Bush*, 553 U.S. 723 (2008). NIMJ has also appeared as an amicus before individual military commissions, the Court of Military Commission Review and the D.C. Circuit in numerous cases arising out of the Guantanamo military commissions. Although NIMJ has generally avoided taking a position on the legality of the military commissions established by the Military Commissions Acts of 2006 and 2009 (“MCA”),¹ it is compelled to file this amicus to address the serious constitutional questions that would arise from a failure to apply the protections of Article

¹ Military Commissions Act of 2006, PUB. L. 109-366, 120 Stat. 2600, codified at 10 U.S.C. § 948a et seq. (2006) [hereinafter 2006 MCA]; Military Commissions Act of 2009, PUB. L. 111-84, 123 Stat. 2190, 2574 amending 10 U.S.C. 948a et seq. [hereinafter 2009 MCA].

13, Uniform Code of Military Justice (UCMJ)² to military commissions adjudicating criminal allegations that predate the 2006 MCA.

2. Issue Presented: Does Article 13 of the Uniform Code of Military Justice³ apply to military commissions convened pursuant to the Military Commissions Act of 2009? Given that Article 36(b), UCMJ, in 2001 required that all procedures established by the President for trial by courts-martial, military commission and other military tribunals “be uniform insofar as practicable,” are the protections against—and remedies for—pretrial punishment encompassed within Article 13 applicable to commission defendants charged with offenses that allegedly occurred prior to the enactment of the 2006 MCA?⁴

3. Statement of Facts: *Amicus* accepts the facts as stated by the defendants and the description of the treatment of the accused in the U.S. Senate Select Committee on Intelligence (SSCI) *Study on the Central Intelligence Agency’s Detention and Interrogation Program*.⁵ The

² 10 U.S.C. §§ 801 *et seq.*

³ 10 U.S.C. §813.

⁴ 10 U.S.C. §836(b). The effective date of 2006 MCA was 17 Oct. 2006. In it, Article 36, UCMJ, 10 U.S.C. § 836(b), was amended to exclude military commissions convened under the new chapter 47A (military commissions under the 2006 MCA, and the subsequent 2009 MCA) from the requirement of uniformity that existed prior to that date. The constitutional permissibility of that change, when applied to charges arising from acts that predated the statutory change, is the underlying constitutional question that is at issue in the question of whether Article 13 of the UCMJ’s protections against pretrial punishment apply to current military commissions convened under the 2009 MCA.

⁵ All citations are to the declassified, redacted Executive Summary that was released by the U.S. Government and is available on-line. Senate Select Committee on Intelligence, THE SENATE INTELLIGENCE COMMITTEE REPORT ON TORTURE, COMMITTEE STUDY ON THE CENTRAL INTELLIGENCE AGENCY’S DETENTION AND INTERROGATION PROGRAM [hereinafter SSCI EXECUTIVE SUMMARY] (9 Dec. 2014), available at <https://www.govinfo.gov/content/pkg/CRPT-113srpt288/pdf/CRPT-113srpt288.pdf> (visited on 18 Nov. 2019).

defendants in this case are accused of conspiracy, attacking civilians, attacking civilian objects, murder in violation of the law of war, destruction of property in violation of the law of war, hijacking or hazarding a vessel or aircraft, and terrorism (offenses under the 2009 MCA), with the alleged actions supporting these charges occurring prior to, and on September 11, 2001.⁶

The five defendants were subject to incommunicado detention and interrogation by the U.S. Government from approximately September 2002 to September 2006 as part of the Central Intelligence Agency's Rendition, Interrogation, and Detention program (CIA's RDI program), as described in the SSCI Executive Summary. During their period of detention by the United States Government, Mr. Mohammad, Mr. bin 'Atash, Mr. bin al Shibh, Mr. al-Baluchi/Ali and Mr. al Hawsawi were subject to conditions of confinement and treatment that if proved would justify a remedy pursuant to Article 13, UCMJ.⁷

Prior to enactment of the 2006 Military Commissions Act in 2006, Article 21 of the UCMJ provided the statutory authority for the convening and use of military commissions to try alleged violations of the laws of war.⁸ All charges against the defendants referred to trial by

⁶ Referred Charge Sheet, *United States v. Khalid Shaik Mohammad, et. al.*, available at [https://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20\(Referred%20Charges\).pdf](https://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20(Referred%20Charges).pdf).

⁷ See e.g., SSCI EXECUTIVE SUMMARY, *supra note 5*, at Part II.F. The Detention and Interrogation of Ramzi Bin Al-Shibh; II.G The Detention and Interrogation of Khalid Shaykh Muhammad (water boarding, rectal feeding, standing sleep deprivation); 101-102 (water dousing/boarding of Al Hawsawi); 82, 84, 91, 104 (standing sleep deprivation); 82, 100, and n. 584, n. 673, (rectal hydration and feeding).

⁸ Art. 21, UCMJ. This provision was originally enacted as Article 15 of the 1916 Articles of War. See Act of Aug. 29, 1916, ch. 418, § 3, Art. 15, 39 Stat. 652 [hereinafter 1916 AW] ("ART. 15. NOT EXCLUSIVE.-The provisions of these articles conferring jurisdiction upon courts-martial shall not be construed as depriving military commissions, provost courts, or other military tribunals of concurrent jurisdiction in respect of offenders or offenses that by the law of

military commission pursuant to the 2006 MCA (as amended in 2009), arose from misconduct that allegedly occurred prior to 2006.

4. Law and Argument.

A. Ex Post Facto.

The U.S. Constitution prohibits the enactment of ex post facto laws.⁹ In *Calder v. Bull*, the Supreme Court explained that this prohibition included: “Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed.”¹⁰ The Supreme Court, rather than attempting “to precisely delimit the scope of this Latin phrase, [has] . . . instead given it substance by an accretion of case law.”¹¹ The Court, in examining the component of the Ex Post Facto Clause prohibiting laws that change the punishment for a crime, has explained that the touchstone of the inquiry is when “a given change in law presents a ‘*sufficient risk*’ of increasing the measure of punishment attached to the covered

war may be lawfully triable by such military commissions, provost courts, or other military tribunals.”).

⁹ U.S. CONST. art. I, §9 (“No Bill of Attainder or ex post facto Law shall be passed”).

¹⁰ *Calder v. Bull*, 3 U.S. 386, 390 (1798)(“1st. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action. 2d. Every law that aggravates a crime, or makes it greater than it was, when committed. 3d. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed. 4th. Every law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offence, in order to convict the offender.”).

¹¹ *Dobbert v. Florida*, 432 U.S. 282, 292 (1977).

crimes.”¹² The Court further explained that the question of whether a change in the law has created such a risk cannot be reduced to a single formula, but is instead “a matter of degree.”¹³

When analyzing whether such a prohibited change has occurred the Supreme Court has held that a sentencing court “applying amended sentencing guidelines that increase a defendant’s recommended sentence range can violate the Ex Post Facto Clause, notwithstanding the fact that sentencing courts possess discretion to deviate from the recommended sentencing range.”¹⁴ Similarly, the Court has held that a state’s alteration of its “gain time” credit system which rewards an inmate for “good conduct and obedience to prison rules by using a statutory formula that reduces the portion of his sentence that he must serve”¹⁵ also violates the Ex Post Facto Clause. Thus, even changes in sentencing guidelines which involve the exercise of discretion by the sentencing court, or that negatively alter the basis for claims that would reduce the amount of time actually served, can violate the ex post facto prohibition.¹⁶

In *Al-Bahlul v. United States*, the D.C. Circuit accepted the government’s concession that the prohibitions of the Ex Post Facto Clause applied at Guantanamo military commissions;¹⁷ of the seven judges participating in the first *en banc* review of the case, five agreed that this clause

¹² *Peugh v. United States*, 569 U.S. 530, 540 (2013) (quoting *Garner v. Jones*, 529 U.S. 244, 250 (2000) (internal quotations omitted) (emphasis added).

¹³ *Peugh*, 569 U.S. at 539 (quoting *California Dept. of Corrections v. Morales*, 514 U.S. 499, 509 (1995)).

¹⁴ *Peugh*, 569 U.S. at 541 (describing *Miller v. Florida*, 482 U.S. 423, 435 (1987)).

¹⁵ *Weaver v. Graham*, 450 U.S. 24, 25 (1981).

¹⁶ *See Peugh*, 569 U.S. at 539.

¹⁷ *Al Bahlul v. United States*, 767 F.2d 1, 63 (2014) (*en banc*) (Kavanaugh, J., concurring in the judgment in and dissenting in part).

applied at Guantanamo.¹⁸ In *Boumediene v. Bush*, Justice Kennedy explained that “[e]ven when the United States acts outside its borders, its powers are not ‘absolute and unlimited’ but are subject ‘to such restrictions as are expressed in the Constitution.’”¹⁹ Although the Constitution’s application to U.S. governmental action abroad has differed depending on whether the constitutional restriction is considered a “structural limitation,” such as separation of powers, or as an “individual right,”²⁰ some constitutional restrictions such as the Ex Post Facto and Bill of Attainder Clauses sound in both. If considered a structural limitation, then the clauses are presumed to apply “whenever and wherever the U.S. government acts.”²¹ Even under the older *Insular Cases*, certain constitutional provisions were considered to apply even in unincorporated overseas territories. In one of those cases, *Downes v. Bidwell*, the Court specifically listed the prohibition against ex post facto laws as a foundational limitation that goes to the power of Congress to act at all.²²

¹⁸ *Al Bahlul*, 767 F.3d at 63.

¹⁹ *Boumediene v. Bush*, 553 U.S. 723, 765 (2008) (quoting *Murphy v. Ramsey*, 114 U.S. 15, 44 (1885)).

²⁰ See Jules Lobel, *Separation of Powers, Individual Rights, and the Constitution Abroad*, 98 IOWA L. REV. 1629, 1631 (2013); KAL RAUSTIALA, DOES THE CONSTITUTION FOLLOW THE FLAG? THE EVOLUTION OF TERRITORIALITY IN AMERICAN LAW, 244-45 (2009).

²¹ Lobel, *supra* note 20, at 1631.

²² *Downes v. Bidwell*, 182 U.S. 244, 277-78 (1901) (“There is a clear distinction between such prohibitions as go to the very root of the power of Congress to act at all, irrespective of time or place, and such as are operative only ‘throughout the United States’ or among the several States. Thus, when the Constitution declares that ‘no bill of attainder or ex post facto law shall be passed,’ and that ‘no title of nobility shall be granted by the United States,’ it goes to the competency of Congress to pass a bill of that description.”); see also Max Farrand, 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, 375-76 (Max Farrand ed., Yale University Press, 1911) (Ex Post Facto Clause among the “first principles of Legislation” and such clause unnecessary because such laws were “void of themselves” and therefore it was unnecessary to prohibit them.).

In the *Insular Cases* and *United States v. Verdugo-Urquidez*, the Supreme Court recognized that “only fundamental constitutional rights” are guaranteed in unincorporated territories,²³ and the prohibition against ex post facto laws was explicitly included in that core category.²⁴ Because the Ex Post Facto Clause’s prohibitions are among those fundamental constitutional provisions that govern Congress’s power to legislate—no matter where that legislation is expected to apply—they limit the government’s legislative authority exercised over individuals subject to trial by military commission under the 2009 MCA. The Ex Post Facto

²³ See *United States v. Verdugo-Urquidez*, 494 U.S. 259, 268 (1990), citing *Dorr v. United States*, 195 U.S. 138, 148 (1905); *Downes*, 182 U.S. at 282-83 (“We suggest, without intending to decide, that there may be a distinction between certain natural rights, enforced in the Constitution by prohibitions against interference with them, and what may be termed artificial or remedial rights, which are peculiar to our own system of jurisprudence. Of the former class are the rights to one’s own religious opinion and to a public expression of them, or, as sometimes said, to worship God according to the dictates of one’s own conscience; the right to personal liberty and individual property; to freedom of speech and of the press; to free access to courts of justice, to due process of law and to an equal protection of the laws; to immunities from unreasonable searches and seizures, as well as cruel and unusual punishments; and to such other immunities as are indispensable to a free government. Of the latter class are the rights to citizenship, to suffrage, and to the particular methods of procedure pointed out in the Constitution, which are peculiar to Anglo-Saxon jurisprudence, and some of which have already been held by the States to be unnecessary to the proper protection of individuals.”) (internal citation omitted).

²⁴ *Dorr v. United States*, 195 U.S. at 142 (“the exercise of the power expressly granted to govern the territories is not without limitations . . . in common with all the other legislative powers of Congress, if finds limits in the express prohibitions on Congress not to do certain things; that, in the exercise of the legislative power, Congress cannot pass an *ex post facto* law or bill of attainder”). Even in evaluation of rights that partake of both structural and individual rights protections, such as whether the right of habeas applies at Guantanamo, the Court has used a three-part test to determine if the prohibition will apply extra-territorially. See *Boumediene v. Bush*, 553 U.S. 723, 759 (2008) (explaining prior Court decisions, “whether a constitutional provision has extraterritorial effect depends upon the ‘particular circumstances, the practical necessities, and the possible alternatives which Congress had before it’ and, in particular, whether judicial enforcement of the provision would be ‘impracticable and anomalous.’”) (citing *Reid v. Covert*, 354 U.S. 1, 74-75 (Black, J., plurality)).

Clause is applicable at Guantanamo.²⁵ As will be explained below, when considered in connection with the UCMJ’s prohibition against pretrial punishment, divesting any defendant subject to military commission jurisdiction of this protection in trials—for offenses that arose out of alleged misconduct occurring prior to the enactment of the Military Commission Act of 2006—violates the constitutional ban on ex post facto legislation.

B. The History of Military Commissions, Their Procedure, and Article 36(b) of the UCMJ.

Military commissions were implemented in the American military system in 1847, when General Winfield Scott:

“[a]s commander of occupied Mexican territory, and having available to him no other tribunal, . . . ordered the establishment of both “ ‘military commissions’ ” to try ordinary crimes committed in the occupied territory and a “council of war” to try offenses against the law of war. . . . [T]he need for military commissions during [the Mexican and Civil Wars] was driven largely by the then very limited jurisdiction of courts-martial.” ‘The *occasion* for the military commission arises principally from the fact that the jurisdiction of the court-martial proper, in our law, is restricted by statute almost exclusively to members of the military force and to certain specific offences defined in a written code.’ *Id.*, at 831 (emphasis in original).”²⁶

²⁵ Even in 1912, the military considered the principles of the Ex Post Facto Clause to be applicable to Presidential rule-making for the Articles of War authorized by statute. When discussing the President’s order establishing maximum penalties in courts-martial for violations of the Articles of War, MG Crowder (the Army Judge Advocate General at the time) testified before Congress that the President would be “restrained by constitutional principle” from changing the maximum penalty order to apply to offenses after their commission. *See On H.R. 23628 Being a Project for the Revision of the Articles of War: Hearings before H. Comm. on Mil. Aff, 62d Cong. 58 (1912) [hereinafter 1912 Hearings], available at https://www.loc.gov/rr/frd/Military_Law/pdf/hearing_comm.pdf.*

²⁶ *Hamdan v. Rumsfeld*, 548 U.S. 557, 590-91 (2006) (citing W. Winthrop, *MILITARY LAW AND PRECEDENTS* 831-832 (rev. 2d ed. 1920)).

In addition to prohibiting the use of military commissions to try any offense within the jurisdiction of courts-martial, Scott required that military commissions be “appointed, governed, and limited, as nearly as practicable,” by the law governing courts-martial,²⁷ and further limited the punishment a commission could adjudge to that which would be applicable for like cases existing in the United States.²⁸ During the Civil War, the two original Mexican War-era military tribunal types were reduced to one, with Scott’s fundamental restrictions retained: in the absence of any statute or regulation governing their proceedings, these military commissions were “commonly conducted according to the rules and forms governing courts-martial.”²⁹

²⁷ WILLIAM E. BIRKHIMER, *MILITARY GOVERNMENT AND MARTIAL LAW*, 97 (Washington, DC, James J. Chapman, 1892); Joseph F. Kasun, *Civil affairs and military government in Mexico under General Winfield Scott, 1847-1848*, 38-39 (Apr. 28, 1965) (unpublished M.A. thesis, University of Arizona) available at https://repository.arizona.edu/bitstream/handle/10150/551771/AZU_TD_BOX255_E9791_1965_143.pdf?sequence=1 (last visited on 18 Nov. 2019).

²⁸ Kasun, *supra* note 27, at 37; Erika Myers, *Conquering Peace: Military Commissions as a Lawfare Strategy in the Mexican War*, 35 AM. J. CRIM. L. 201, 215-220 (2008) (Because of Scott’s concern that the American public would be suspicious of the application of “martial law,” he cabined the then-necessary military commissions he established within the limits of offenses and punishments recognized in the common-law and under the laws of war.).

²⁹ WILLIAM WINTHROP, *MILITARY LAW AND PRECEDENTS* 841 (rev. 2d ed. 1920) (“In the absence of any statute or regulation governing the proceedings of military commissions, the same are commonly conducted according to the rules and forms governing courts-martial; BIRKHIMER, *supra* note 27, at 426 (“Military tribunals, under martial law authority and in absence of statutory regulation, should observe as nearly as may be consistently with their purpose, the rules of procedure of courts-martial. This, however, is not obligatory.”); STEPHEN V. BENET, *MILITARY LAW AND THE PRACTICE OF COURTS-MARTIAL* (4th Ed. 1864) (“These commissions were appointed, governed and limited as nearly as practicable, as prescribed for courts martial; their proceedings to be recorded, reviewed, revised, disapproved or confirmed, and their sentences executed, all as near as may be, as in the cases of the proceedings and sentences of courts-martial; ” provided that no military commission shall try any case, clearly cognizable, by any court-martial, and provided also that no sentence of a military commission shall be put in execution against any individual belonging to this army, which may not be, according to the nature and degree of the offence, as established by evidence, in conformity with known punishments, in like cases, in some one of the states of the United States of America.”); GEORGE

In 1916 Major General Enoch H. Crowder, the Army Judge Advocate General, began his project to update and revise the Articles of War, which included initiatives to add jurisdiction over law of war offenses to general courts-martial, preserve the traditional jurisdiction of military commissions, and explicitly authorize the President to prescribe rules of procedure to govern both. The latter revision was enacted against a backdrop of prior courts-martial practice and Manuals for Courts-Martial that historically required adherence “in general, so far as apposite, [to] the common-law rules of evidence as observed by the United States courts in criminal cases.”³⁰ Prior Manuals, illustrating courts-martial procedure from 1890 to 1908, required reasonable adherence to the requirements of the rules of evidence and procedure, but allowed

B. DAVIS, *MILITARY LAW OF THE UNITED STATES, TOGETHER WITH THE PRACTICE AND PROCEDURE OF COURTS-MARTIAL AND OTHER MILITARY TRIBUNALS* 309, 313 (1898) (same); *see also* C. HOWLAND, *DIGEST OF OPINIONS OF THE JUDGE ADVOCATES GENERAL OF THE ARMY* 1071 (1912) [hereinafter HOWLAND]; *see also* Gen. Order No. 1 (Jan. 1, 1862), in 8 *WAR OF THE REBELLION: A COMPILATION OF THE OFFICIAL RECORDS OF THE UNION AND CONFEDERATE ARMIES*, Ser. 1, 476, 476-478 (1883) (Major General Halleck, Commander of the Department of the Missouri, himself an authority on international law and the laws of war, after being authorized by President Lincoln to declare martial law in the Department of the Missouri, issued the first order authorizing military commissions in the Civil War—General Order No. 1, Jan. 1, 1862. This order recognized the same jurisdictional gaps experienced by General Scott in the earlier Mexican-American War, and similarly authorized military commissions to try such cases, ordering that “these commissions should be ordered by the same authority, be constituted in a similar manner, and their proceedings be conducted according to the same general rules as courts-martial, in order to prevent abuses which might otherwise arise.”), *available at* <https://babel.hathitrust.org/cgi/pt?id=coo.31924079893719&view=1up&seq=488>.

³⁰ *See e.g.* A *MANUAL FOR COURTS-MARTIAL, ETC., UNITED STATES, 1908*, 45 [hereinafter 1908 MCM]; A *MANUAL FOR COURTS-MARTIAL AND OF PROCEDURE UNDER MILITARY LAW, UNITED STATES, 1898*, 38, [hereinafter 1898 MCM]; *INSTRUCTIONS FOR COURTS-MARTIAL AND JUDGE ADVOCATES, UNITED STATES, 1890*, 31-32, [hereinafter 1890 MCM]. Prior Manuals are available at the Library of Congress, Military Legal Resources site, at https://www.loc.gov/rr/frd/Military_Law/CM-manuals.html. *See Revision of the Articles of War*, Hearings before H. Subcomm. on Mil. Aff., 64th Cong. 47 (Jun. 1916) [hereinafter Jun. 1916 Revision AW Hearings], *available at* https://www.loc.gov/rr/frd/Military_Law/pdf/Hearing_subcomm.pdf.

some leeway from strict adherence out of recognition that many of the participants in the military justice system were not trained in the law.³¹ Nonetheless, the protections of the common law rules of evidence applied in military courts. For example, these prior Manuals made hearsay explicitly inadmissible, required witnesses to testify only on the basis of direct knowledge, largely precluded opinion testimony, prohibited leading questions on direct examination, and required certification of written records.³² Thus, far from being forums ungoverned by the rule of law, courts-martial in 1916 were recognized by major military law treatises of the time as governed by the traditional protections provided by the common law in criminal trials, with limited statutory exceptions; and military commissions used the same procedures as courts-martial.

³¹ *Id.*; see also DAVIS, *supra* note 29, at 255 (“Courts-martial being executive agencies form no part of the judicial system of the United States; and although Congress has provided no specific rules for their guidance in this respect, and although their procedure is exempted from the operation of the Fifth Amendment to the Constitution, these tribunals should in general follow, so far as they are applicable to military cases, the rules of evidence observed in the civil courts, and especially those applied by the courts of the United States in criminal cases. ‘As courts-martial are not bound, however, by any statute in this particular, it is thus open to them, in the interests of justice, to apply these rules with more indulgence than the civil courts—to allow, for example, more latitude in the introduction of testimony and in the examination and cross-examination of witnesses than is commonly permitted by the latter tribunals. In such particulars, as persons on trial by courts-martial are ordinarily not versed in legal science or practice, a liberal course should in general be pursued and an over-technicality be avoided.’”).

³² See e.g. 1890 MCM, *supra* note 30, at 36 (hearsay inadmissible); BENET, *supra* note 29, at chapter XX (chapter on common law rules of evidence applicable in courts-martial); DAVIS, *supra* note 29, at chapter XV (same); 3 SIMON GREENLEAF, A TREATISE ON THE LAW OF EVIDENCE (Boston: Little, Brown and Company, 1853) (describing common law rules of evidence in courts-martial), available at <http://www.nycourts.gov/library/queens/Lincoln/greenleaf.shtml> (last visited on 18 Nov. 2019); WILLIAM C. DE HART, OBSERVATIONS ON MILITARY LAW AND THE CONSTITUTION AND PRACTICE OF COURTS MARTIAL: WITH A SUMMARY OF THE LAW OF EVIDENCE AS APPLICABLE TO MILITARY TRIALS (New York 1846) (extensive discussion of common law rules of evidence applicable in courts-martial).

One of MG Crowder's goals in the 1916 revision of the Articles of War was to ensure that courts-martial practice set out in Army regulations, orders, or publications under authority of the Secretary of War was both supported by statutory authority and aligned with federal practice to the maximum extent practicable. Prior to this revision, only a small subset of court-martial procedure was established by statute—the remainder was based on common-law and custom of the Army, and promulgated primarily through general orders issued by the President, Secretary of War, or subordinate commanders. To remedy the general lack of statutory authority, Crowder proposed what would become Article 38 of the 1916 AW (which ultimately became Article 36 of the UCMJ, as later amended):

The President may, by regulations, which he may modify from time to time, prescribe the procedures including modes of proof, in cases before courts-martial, courts of inquiry, military commissions, and other military tribunals, which regulations shall insofar as he deem practicable, apply the rules of evidence generally recognized in the trial of criminal cases in the district courts of the United States: Provided. That nothing contrary to or inconsistent with these articles shall be so prescribed: Provided further, That all rules made in pursuance to this article shall be laid before the Congress annually. 10 USC s. 1509.³³

Within Article 38 as originally proposed were two major proposals to bring courts-martial procedurally into alignment with federal criminal courts. In addition to the authority for the President to prescribe rules of procedure in Article 38 (the precursor to the UCMJ's Article 36), the revision also explicitly aligned the rule dealing with the effect of trial irregularities with that applicable in federal courts, limiting it to circumstances where the error affected the substantial rights of the accused. This change statutorily recognized the customary practical latitude employed by courts-martial in adherence to the common-law rules of evidence, and equalized the

³³ Article 38, 1916 AW, *supra* note 25.

effect of any technical non-compliance with these rules in courts-martial with the standard applying in federal criminal courts. Before Congress, MG Crowder defended the proposal authorizing the President to prescribe procedures for the military justice system by repeatedly emphasizing that such an authorization would be limited to matters of procedure only, and would not extend to the essential rules of evidence or burdens of proof.³⁴ Based on these repeated and lengthy assurances Congress enacted what became Article 38 of the 1916 AW; and, as a safeguard against abuse also required that these procedures be annually submitted to Congress.³⁵

As a result of adding jurisdiction over law of war violations to general courts-martial, Crowder also proposed the addition of the new Article 15 to preserve the traditional jurisdiction of military commissions over such offenses—this provision later became Article 21, UCMJ.³⁶ Because military commissions jurisdiction was limited to cases which could not be tried under the Articles of War unless explicit statutory authority provided for concurrent jurisdiction, as it had for the offense of spying, Crowder was concerned that adding jurisdiction over offenses under the laws of war to general courts-martial in the new Article 12, would result in the loss of that jurisdiction for military commissions.³⁷ As a result, he proposed Article 15 to preserve

³⁴ See Jun. 1916 Revision AW Hearings, *supra* note 30, at 58, 63; 1912 Hearings, *supra* note 8, at 64.

³⁵ Appendix to *On S. 3191, Being a Project for the Revision of the Articles of War*, Hearings before S. Subcomm. on Mil. Aff., 64th Cong. (Feb. 1916)) to S. Rpt. No. 130, *Revisions of the Articles of War*, 64th Cong, 97 (1916) [hereinafter Feb. 1916 Revision AW Hearings], available at https://www.loc.gov/rr/frd/Military_Law/pdf/RAW-vol1.pdf#page=2.

³⁶ Art. 15, 1916 AW, *supra* note 8 (“ART. 15. NOT EXCLUSIVE.-The provisions of these articles conferring jurisdiction upon courts-martial shall not be construed as depriving military commissions, provost courts, or other military tribunals of concurrent jurisdiction in respect of offenders or offenses that by the law of war may be lawfully triable by such military commissions, provost courts, or other military tribunals.”).

³⁷ 1912 Hearings, *supra* note 25, at 53; Feb. 1916 Revision AW Hearings, *supra* note 35, at 41.

concurrent jurisdiction over law of war offenses in military commissions, provost courts and other military tribunals. Importantly MG Crowder emphasized that Article 15:

just saves to those war courts the jurisdiction they now have and makes it a concurrent jurisdiction with courts-martial, so that the commander in the field in the time of war will be at liberty to employ either form of court that happens to be convenient. *Both classes of court have the same procedure.*³⁸

Opinions of the Judge Advocate General and authoritative military treatises of the time support the assertion that military commissions employed the same procedure as courts-martial with the exception of the minimum number of members appointed to try the case.³⁹ Winthrop concurs:

³⁸ Feb. 1916 Revisions AW Hearings, *supra* note 35, at 40-41 (emphasis added) (Crowder then inserted in the congressional hearing an explanation from Winthrop’s MILITARY LAW AND PRECEDENTS, which included the following reference to military commissions: “Its composition, constitution, and procedure follows the analogy of courts-martial.”).

³⁹ HOWLAND, *supra* note 29, at 1070 (“IC8a(3)(d)[1]. Except in so far as to invest military commissions in a few cases with special jurisdiction and power of punishment, the statute law has failed to define their authority, nor has it made provision in regard to their constitution, composition, or procedure. In consequence, the rules which apply in these particulars to general courts-martial have almost uniformly been applied to military commissions. They have ordinarily been convened by the same officers as are authorized by the Articles of War to convene such courts, the accusations investigated by them have been presented in charges and specifications similar in form to those entertained by general courts; their proceedings have been similar and similarly recorded; and their sentences have been similarly passed upon and executed. . . . Their composition has also been the same except that the *minimum* of member has been fixed by usage at three. . . . They have generally also been supplied with judge advocate as a prosecuting officer. A military commission constituted with less than three members, or which proceeded to trial with less than three members, or which was not attended by a judge advocate, would be contrary to precedent. . . . In view of the analogy prevailing and sanctioned between these bodies and courts-martial, *held* that military commissions would properly be sworn like general courts-martial . . . ; that the right of challenging their members should be afforded to the accused; that two-thirds of their members should concur in death sentences . . . ; and that the two years’ limitation would properly be applied to prosecutions before them. . . . “)(footnotes and citations omitted)); WINTHROP, *supra* note 29, at 841; DAVIS, *supra* note 29, at 309, 313 (“Except in so far as to invest military commissions in a few cases with a special jurisdiction and power of punishment, that statute law has failed to define their authority, nor has it made provision in regard to their constitution, composition, or procedure. In consequence, the rules which apply in these particulars to general courts-martial have almost uniformly been applied to

“In the absence of any statute or regulation governing the procedures of military commissions, the same are commonly conducted according to the rules and forms governing courts-martial.”⁴⁰

Thus, after 1916, Article 38 authorized the President to prescribe rules of procedure, and modes of proof, for courts-martial and military commissions. This authorization was enacted against the

military commissions.”); BENET, *supra* note 29, at 15 (Military commissions “should be ordered by the same authority, be constituted in a similar manner, and their proceedings be conducted according to the same general rules as courts-martial in order to prevent abuses which might otherwise arise.”); *but see* WILLIAM E. BIRKHIMER, *MILITARY GOVERNMENT AND MARTIAL LAW* 312 (3d ed. 1914) (“Regarding rules of evidence which should be observed in their proceedings, it may be remarked that martial-law tribunals are not to be bound either by common-law rules or those which ordinarily govern in courts-martial. Here, however, as in their procedure, the rules which are observed by courts-martial may well be taken as a guide.”)

⁴⁰ WINTHROP, *supra* note 29, at 841-842 (Although recognizing that these war courts are more summary than general courts under the Articles of War, and that their proceedings will not be rendered “illegal” by the omission of details required upon trials by courts, such as the omission of a specific oath for members of the opportunity to challenge members, or a record more summary than permitted in a courts-martial, Winthrop concluded that these omissions may properly be a basis for disapproval, particularly in a capital case. He continued: “Procedure. In the absence of any statute or regulation governing the proceedings of military commissions, the same are commonly conducted according to the rules and forms governing courts-martial. These war-courts are indeed more summary in their action than are the courts held under the Articles of war, and, as their powers are not defined by law, their proceedings— as heretofore indicated — will not be rendered illegal by the omission of details required upon trials by courts-martial, such, for example, as the administering of a specific oath to the members, or the affording the accused an opportunity of challenge. So, the record of a military commission will be legally sufficient though much more succinct than the form adopted by courts martial, as—for example—where it omits to set forth the testimony, or states it only in substance. ***But, as a general rule, and as the only quite safe and satisfactory course for the rendering of justice to both parties, a military commission will —like a court-martial —***permit and pass upon objections interposed to members, as indicated in the 88th Article of war, will formally arraign the prisoner, allow the attendance of counsel, ***entertain special pleas if any are offered*** [if legally apposite], receive all the material evidence desired to be introduced, hear argument, find and sentence after adequate deliberation, render to the convening authority a full authenticated record of its proceedings, and, while in general even less technical than a court-martial, will ordinarily ***and properly be governed, upon all important questions, by the established rules and principles of law and evidence.*** Where essential, indeed, to a full investigation or to the doing of justice, these rules and principles will be liberally construed and applied.”) (emphasis added) (footnotes omitted).

historic practice of the War Department to “almost uniformly” apply the rules of courts-martial to the constitution, composition, and procedure of military commissions, to include considering any special pleas and defenses.⁴¹

When the UCMJ was enacted in 1950, Congress revised Article of War 38, making it Article 36, UCMJ:

(a) The procedure, including modes of proof, in cases before courts-martial, courts of inquiry, military commissions, and other military tribunals may be prescribed by the President by regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with this chapter.

(b) All rules and regulations made under this article shall be uniform insofar as practicable and shall be reported to Congress. 70A Stat. 50.⁴²

The UCMJ’s addition of the requirement to apply the *principles of law* generally applicable in the trial of criminal cases in federal district courts to the requirement to apply the generally recognized *rules of evidence* was not controversial. However, there was significant discussion in the House Committee on Armed Services on uniformity under Article 36. Because a central purpose of the UCMJ was to achieve uniformity, legislators were concerned that the President could undo by regulation the uniformity Congress had mandated by enacting the Code.⁴³ As a

⁴¹ WINTHROP, *id.*

⁴² 10 U.S.C. §836 (2002); *compare* 10 U.S.C. § 836 as amended by 2006 MCA, Pub. L. 109–366, § 4(a)(3), Oct. 17, 2006, 120 Stat. 2631 (“(b) All rules and regulations made under this article shall be uniform insofar as practicable, except insofar as applicable to military commissions established under chapter 47A of this title.”) *See Hamdan v. Rumsfeld*, 548 U.S. at 620. Congressional inclusion of this change implies that prior to its enactment, the uniformity rule recognized in *Hamdan* would be required for military commissions under the MCA.

⁴³ *On H.R. 2498, A Bill to Unify, Consolidate, Revise, and Codify the Articles of War, The Articles for the Government of the Navy, and the Disciplinary Laws of the Coast Guard, And to*

result the House added subsection (b) to require the President to ensure that the regulations were uniform insofar as practicable, “leaving . . . enough leeway to provide a different provision when it is absolutely necessary,”⁴⁴ yet still requiring any such regulation not be “contrary to or inconsistent” with the UCMJ.⁴⁵ In a short discussion, the committee recognized that Article 36 would apply to regulations governing procedures at military commissions, but did not delve into the implications of that conclusion.⁴⁶

In *Hamdan v. Rumsfeld*, Justice Stevens provided the Court’s interpretation of this uniformity mandate:

Article 36 places two restrictions on the President’s power to promulgate rules of procedure for courts-martial and military commissions alike. First, no procedural rule he adopts may be “contrary to or inconsistent with” the UCMJ—however practical it may seem. Second, the rules adopted must be “uniform insofar as practicable.” That is, the rules applied to military commissions must be the same as those applied to courts-martial unless such uniformity proves impracticable.⁴⁷

The second uniformity requirement, that the rules for courts-martial and military commission must be “uniform insofar as practicable” was also added during the development of the UCMJ and, prior to 2006, applied to an Article 21 military commission.⁴⁸

Enact and Establish a Uniform Code of Military Justice, Hearings before a Subcomm. Of the House Comm. on Armed Serv., 81st Cong. 1014-1019, 1061-1064 (1949).

⁴⁴ *Id.* at 1015.

⁴⁵ *Id.* at 1016-17 (observing that the President is bound by this Code in his promulgation of regulations under Article 36).

⁴⁶ *Id.* at 1017.

⁴⁷ *Hamdan v. Rumsfeld*, 548 U.S. 557, 620 (2004).

⁴⁸ *Id.* at 617-620 (2004)(discussing “glaring historical exception” to the general rule of procedural parity between courts-martial and commissions procedures and how changes in Article 36(b) and the 1949 Third Geneva Convention eliminated any precedential support for the

By enacting the 2006/2009 MCA, Congress adopted certain procedures that deviated from the UCMJ. These provisions unquestionably supersede the uniformity requirement of Article 36. Nonetheless, Congress is still limited by the prohibition of ex post facto laws, and any MCA provision inconsistent with that constitutional limitation on congressional power is invalid. Importantly, the benchmark from which these changes are measured is Congress's codification of "the longstanding practice of procedural parity between courts-martial and other military tribunals" in Article 36 and in the American common law of war.⁴⁹

C. The 1948 Elston Act:⁵⁰ Article 16, 1948 Articles of War (Article 13, UCMJ), and the prohibition of unlawful pretrial punishment.⁵¹

In 1948, in the aftermath of World War II, Congress amended the Articles of War to include substantial new protections in military law: creating an independent Army Judge Advocate General Corps; authorizing enlisted personnel to serve on courts-martial; adding articles to prohibit unlawful command influence;⁵² implementing statutory protections against

variance in procedures used in the Yamashita military commission from the Court's prior ruling in *In re Yamashita*, 327 U.S. 1 (1946). The Court in *Yamashita* "did not pass on the merits of Yamashita's procedural challenges because it concluded that his status disentitled him to any protection under the Articles of War. . . . At least partially in response to subsequent criticism of General Yamashita's trial, the UCMJ's codification of the Articles of War after World War II expanded the category of persons subject thereto . . . and the Third Geneva Convention of 1949 explicitly extended prisoner-of-war protections to individuals tried for crimes committed before their capture.").

⁴⁹ *Hamdan*, 548 U.S. at 623.

⁵⁰ The Elston Act, H.R. 2575, A bill to amend the Articles of War to improve the administration of military justice, to provide for more effective appellate review, to insure the equalization of sentences, and for other purposes, passed as Title II of the Selective Service Act of 1948, 80 P.L. 759, 62 Stat. 604 (Jun. 24, 1948) (hereinafter 1948 AW).

⁵¹ 10 U.S.C. § 813.

⁵² Article 88, 1948 AW, *supra* note 50 (to become art. 37, UCMJ).

self-incrimination;⁵³ and critically, clearly prohibiting pretrial punishment.⁵⁴ The protection against pretrial punishment in Article 16 of the 1948 Articles of War⁵⁵ was a significant evolution in military law, passed against the backdrop of a nation-wide scandal involving the abuse of U.S. soldiers in the 10th Replacement Depot in Lichfield, England.⁵⁶ This scandal was equivalent in notoriety and the resulting outrage of the American people to the 2004 Abu Ghraib scandal. The allegations and subsequent courts-martial resulted in numerous public complaints to Congress, a U.S. Army investigation ordered by General Dwight D. Eisenhower, and resolutions in both the House of Representatives and the Senate authorizing congressional investigations of

⁵³ Article 24, 1948 AW, *id.* (to become Art. 31, UCMJ).

⁵⁴ Art 16, 1948 AW, *id.* (to become art. 13, UCMJ).

⁵⁵ Art. 16, 1948 AW, *id.* ("No person subject to military law shall be confined with enemy prisoners or any other foreign nationals outside of the continental limits of the United States, nor shall any defendant awaiting trial be made subject to punishment or penalties other than confinement prior to sentence on charges against him.").

⁵⁶ The town is also referred in testimony, letters, and newspaper accounts as Litchfield. One citizen wrote to Congress complaining of the allegations of abuse at Lichfield, as follows: "Sadism, brutality, and flagrant misuse of authority and responsibility has gone virtually unpunished, with such punishment as has been made apparently being in inverse ratio to the rank and measure of control involved. How this country can exercise the leadership over the conquered and other nations of Europe and Asia which the state of the world demands as our necessary obligation to humanity and to ourselves, if such an outstanding violation of our principles is allowed to remain uninvestigated and unremedied, seem to be utterly incomprehensible. *Letter of Arthur N. Turner, to Chairman, Military Affairs Committee* (Sep. 5, 1946), H. Comm. Mil. Aff. Invest. 76th-79th Cong. 1941-1946, Record Group 233, Box 1, National Archives and Record Administration [hereinafter House Lichfield Invest.].

the Lichfield abuses and courts-martials.⁵⁷ The abuses of U.S. soldiers at Lichfield,⁵⁸ characterized by *Stars and Stripes* as “an American concentration camp run by Americans for American soldiers,”⁵⁹ shared coverage in the *New York Times*, *Time Magazine*, and *Stars and*

⁵⁷ S. Res. 240, 79th Cong. 2d Sess. (Mar. 14, 1946); H. Res. 27, 80th Cong. 1st Sess (Jan. 3, 1947). As part of the House investigation, the House Committee on Military Affairs (the predecessor to the House Armed Services Committee) sent its own investigator to observe the numerous courts-martial on-site in Europe and interview the participants. As part of his duties, this investigator forwarded weekly reports prepared by the US Army, Europe Judge Advocate General’s Office on the numerous courts-martial back to the House Committee’s Chief Counsel. Because of the volume of complaints, the Committee also prepared a “form” response letter for use by congressional members to respond to the numerous letters of outrage from their constituents.). See House Lichfield Invest., *supra* note 56.

⁵⁸ Among the abuses were reports of hundreds of soldiers being confined in unheated cell blocks with only one toilet, forced to clean the floor with frozen water, forced to engage in strenuous calisthenics for up to nine hours a day as the normal daily activity with only a short break for lunch, forced to double-time with their nose and toes against a brick wall as punishment, and having their heads slammed into the wall, being beaten with hoses, clubs, and whips, often to unconsciousness, with some soldiers dying from intracranial hemorrhages, being shot in the leg, being denied medical care, being confined in “solitary” in a dark freezing cell with minimal food and water and only a bucket for bodily needs, often for weeks at a time, and after complaining of not having sufficient time to eat meals, being forced to overeat several loaded trays of food and then forced to ingest castor oil (a stimulant laxative). Soldiers wounded in combat also described being deliberately hit with clubs on their wounds. Many of the soldiers had been convicted by inadequate special courts-martial for minor offences such as overstaying a pass by a few hours. (One soldier described fifteen soldiers court-martialed in a proceeding that lasted 42 minutes total for minor offenses such as being AWOL a few hours). The Lichfield abuse was a violation of the 8th Amendment or the prohibition against cruel and unusual punishment in the Articles of War, whether pre- or post-conviction. The scandal, combined with investigations conducted by members of the House Committee on Military Affairs outraged members on how military prisoners were treated. See JACK GIECK, LICHFIELD, THE U.S. ARMY ON TRIAL (The Univ. of Akron Press. 1997); U.S. Army Judge Advocate General weekly summaries, in House Lichfield Invest., *supra* note 56; National Affairs: The Colonel & the Private, TIME MAGAZINE, Sep. 9, 1946, at 12 (“Men had been beaten there with fists and rifle butts till they were unconscious, then revived and ordered to clean up their own blood. Prisoners who complained of hunger were gorged with three meals at a time, then dosed with castor oil. Hours of calisthenics, of standing “nose and toes” to a guardhouse wall were routine punishments. Purple Heart veterans were deliberately jabbed in their old wounds. There was even a ghastly, sardonic slogan among Lichfield guards: “Shoot a prisoner and be made Sergeant.”).

⁵⁹ GIECK, *supra* note 58, at back cover.

Stripes with the international war crime tribunals at Nuremberg. Testimony before the House Committee on Military Affairs considering the Elston Act amending the Articles of War included references to the abuses at Lichfield.⁶⁰ Tellingly the Lichfield abuses, similar to those in the CIA RDI program, also echoed abuses experienced by American soldiers in American disciplinary prisons in France during World War I.⁶¹

Against the backdrop of this high profile scandal, what would ultimately become Article 13 of the UCMJ was introduced as a floor amendment during House debate on the Elston Act in January 1948.⁶² When offering his amendment, Representative James Fulton, although not specifically referencing the Lichfield abuses, instead described his visits to U.S. disciplinary training facilities in Italy in which American soldiers were commingled with enemy prisoners of war and were punished before being tried. His amendment to prohibit both comingling of American prisoners with enemy prisoners of war and pretrial punishment of American soldiers was approved, becoming Article 16 of the 1948 Articles of War.⁶³

⁶⁰ On H. R. 2575, *To Amend the Articles of War, To Improve the Administration of Military Justice, To Provide for More Effective Appellate Review, To Insure the Equalization of Sentences and for Other Purposes*, Hearings before the H. Comm. on Armed Serv., 80th Cong. 1947, 2072 (1947) [hereinafter Elston Act Hearings], available at https://www.loc.gov/rr/frd/Military_Law/pdf/hearings_No125.pdf.

⁶¹ This sort of abuse was not a new story to Congress, as similar problems had arisen at prison farms in France in World War I. See e.g., *General March Tells of Cruelty Found in Army Prisons*, N.Y. Times, Jul. 24, 1919, at 1 (describing abuse of U.S. soldiers at, where officers at “Hard-Boiled Smith’s: Prison Farm No. 2 near Paris were beaten, abused and robbed).

⁶² 94 CONG. REC. H. 184 (1948).

⁶³ *Id.* (“[A]t the same training center, at Pisa, I have seen men held for months under physical punishment conditions who were not even tried yet. They were deprived of beds; they were deprived of sufficient clothing for their boards; they were forced to sleep on boards. They were put under this disciplinary training, gotten up for special inspections, forced to do work as if they had already been convicted. I said to those boys when I was at that training camp, ‘I will try to

Although no hearings were held in the Senate, the Elston Act as amended and passed in the House was added without change as an amendment to the Selective Service Act of 1948 in the Senate, and in June 1948, became the short-lived 1948 Articles of War.⁶⁴ As a result, the provisions against pretrial punishment, self-incrimination, and unlawful command influence and changes allowing enlisted members to serve on courts-martial panels passed into the UCMJ a year later—without controversy or significant debate (although the unlawful command influence provision did continue to receive attention prior to passage of the 1950 UCMJ).⁶⁵ Ultimately Article 16, of the 1948 Articles of War split into two articles under the UCMJ: Article 12 (prohibiting confinement with enemy prisoners) and Article 13 (prohibiting pretrial punishment).

D. Article 13’s Prohibition of Pretrial Punishment and the Ex Post Facto Prohibition.

The Ex Post Facto Clause makes unconstitutional the military commission’s deprivation of protection against pretrial punishment embodied in Article 13 notwithstanding an assertion that the absence of an analogous article in the 2006 MCA demonstrates Congressional intent that no such protection be afforded. Prior to the October 17, 2006 effective date of the 2006 MCA, military commission jurisdiction over the defendants was based exclusively on Article 21 of the

see first that you are not confined with these enemy prisoners and certainly that you are not punished before you have been sentenced.””).

⁶⁴ 94 CONG. REC. S.7510-S.7525 (1948).

⁶⁵ As to pretrial punishment, the House did discuss the carryover of the provision against pretrial punishment from the 1948 Elston Act, clarifying that the provision was designed to prohibit the imposition of punishment on pretrial detainees. *See* Hearing on H.R. 2498 Before the H. Subcomm. on Armed Service, 81st Cong. 916-917 (1949).

UCMJ.⁶⁶ Furthermore, the alleged misconduct that forms the basis for the offenses of which the defendants are charged pursuant to the 2006/2009 MCA pre-dates that effective date by several years. Accordingly, a military commission convened pursuant to Article 21 – not the MCA – would have been obligated by Article 36’s uniformity mandate to apply the protections established by Article 13. Here it is important to note that the longstanding prohibition against pretrial punishment—recognized in both military and federal law and consistently applied to courts-martial—shows that compliance with Article 13 could not and cannot credibly be considered “impractical.”⁶⁷ This conclusion is bolstered not only by almost seventy years of experience of the American military justice system in enforcing these provisions, but also by the fact that the requirements of Article 13 align with the requirements of the U.S. Constitution and the non-derogable obligations of both the Convention Against Torture and Common Article 3 of the Geneva Conventions.

Military case law regarding allegations of pretrial punishment state they have both a statutory (Article 13, UCMJ) and constitutional dimension (due process).⁶⁸ The Court of Appeals for the Armed Forces (CAAF) has explained in *United States v. Zarbatany*:

⁶⁶ The defendants could have been tried by general courts-martial under Article 21, UCMJ, or for violations of applicable federal statutes in federal court, but the sole statutory authority for a military commission was Article 21 at the time of their alleged offenses.

⁶⁷ *Hamdan*, 548 U.S. at 624.

⁶⁸ *United States v. McCarthy*, 46 M.J. 162, 164-65 (C.A.A.F. 1997) (citing *Bell v. Wolfish*, 441 U.S. 520 (1979) and *United States v. Palmiter*, , 20 M.J. 90 (CMA 1985)); see also *United States v. King*, 61 M.J. 225, 227 (C.A.A.F. 2005). The Supreme Court has rooted the protection against pretrial punishment in the due process clause. See *Bell v. Wolfish*, 441 U.S. 542, 535 (1979) (“For under the Due Process Clause, a detainee may not be punished prior to an adjudication of guilt in accordance with due process of law.”).

Article 13, UCMJ, prohibits two things: (1) the imposition of punishment prior to trial, and (2) conditions of arrest or pretrial confinement that are more rigorous than necessary to ensure the accused's presence for trial. The first prohibition of Article 13 involves a purpose or intent to punish, determined by examining the intent of detention officials or by examining the purposes served by the restriction or condition, and whether such purposes are "reasonably related to a legitimate governmental objective.

The second prohibition of Article 13 prevents imposing unduly rigorous circumstances during pretrial detention. Conditions that are sufficiently egregious may give rise to a permissive inference that an accused is being punished, or the conditions may be so excessive as to constitute punishment. (conditions that are "arbitrary or purposeless" can be considered to raise an inference of punishment).⁶⁹

Both dimensions—statutory, and constitutional—of the prohibition against pretrial punishment are historically rooted in significant systemic governmental abuses that led Congress and the Supreme Court to provide meaningful remedies. Article 13 military jurisprudence captures both dimensions, and because it requires “meaningful relief” if available,⁷⁰ an interpretation of the 2009 MCA that eliminates its applicability violates the Ex Post Facto Clause, at least as to retroactive applicability of such an interpretation to offenses that occurred before its effective date.

The 2006 and 2009 MCAs create a hybrid military justice system, one that draws from both federal and military jurisprudence in its substance and procedure. As discussed above, the

⁶⁹ *United States v. Zarbatany*, 70 M.J. 169, 174 (C.A.A.F. 2011) (discussing *United States v. King*, 61 M.J. 225, 227 (C.A.A.F. 2005) (internal citations omitted).

⁷⁰ *Zarbatany*, 70 M.J. at 177 (“we conclude that meaningful relief for violations of Article 13, UCMJ, is required, provided such relief is not disproportionate in the context of the case, including the harm an appellant may have suffered and the seriousness of the offenses of which he was convicted.”); see also *United States v. Adcock*, 65 M.J. 18, 24, (2007 CAAF) (detainees have a *per se* right to administrative credit for Article 13 violations).

military commission available to try the defendants as of the date of the alleged commission of their offenses, the constitutional measuring point for the Ex Post Facto Clause, was a military commission under Article 21, UCMJ. Under the procedural parity between courts-martial and other military tribunals required prior to October 17, 2006 by Article 36, UCMJ (and by the American common law of war upon which the jurisdiction of the commission is ultimately based), Article 13's prohibition of and remedy for pretrial punishment would have been available to defendants in such a commission. And under *Zarbatany*, meaningful relief is required for violations of Article 13. If these five defendants were punished before trial, they would be entitled by Article 13 to a reduction in any future sentence for their offenses. The requirement that meaningful relief be provided moves the availability of Article 13 remedies from a category that has a merely speculative result on the ultimate sentence, to one that creates a sufficient risk of increasing the "measure" of punishment. The Supreme Court's use of the term "measure" implies an equitable assessment of the punishment due, and removing a right attached to the military's sentencing regime, such as the right embodied in Article 13, affects the ultimate sentence just as would the retroactive alteration of gain time credit or application of a different sentencing guideline range. Refusal of a remedy for pretrial punishment would thus present a "sufficient risk of increasing the measure of punishment attached to the covered crimes,"⁷¹ with a similar unconstitutional result to that recognized by the Supreme Court in *United States v. Peugh* and *Weaver v. Graham*.

⁷¹*Peugh*, 569 U.S. at 539.

Although the procedures under the 2009 MCA are a hybrid of military and federal jurisprudence, the commissions themselves remain military tribunals. Congress based the 2009 MCA (and its 2006 predecessor) on the procedures for trial by general courts-martial.⁷² Recognizing in the 2009 MCA that military commissions must draw upon military law, Congress endorsed as “instructive” judicial interpretation of the UCMJ, albeit without making it binding.⁷³ Further, while Congress explicitly makes three provisions of the UCMJ inapplicable in military commissions under the 2009 MCA,⁷⁴ Article 13, UCMJ is not one of the exempted provisions. For those remaining (which would include Article 13), Congress states that they shall apply to trial by military commission “only to the extent provided by the terms of such provisions or by this chapter.”⁷⁵ The text of Article 13 does not limit its applicability in any way;⁷⁶ it is applicable

⁷² 2009 MCA, §948b(c), *supra* note 1.

⁷³ *Id.* (“Chapter 47 of this title does not, by its terms, apply to trial by military commission except as specifically provided therein or in this chapter, and many of the provisions of chapter 47 of this title are by their terms inapplicable to military commissions. The judicial construction and application of chapter 47 of this title, while instructive, is therefore not of its own force binding on military commissions established under this chapter.”)

⁷⁴ 2009 MCA, *supra* note 1, at §948b(d)(1)(“The following provisions of this title shall not apply to trial by military commission under this chapter: (A) Section 810 (article 10 of the Uniform Code of Military Justice), relating to speedy trial, including any rule of courts-martial relating to speedy trial. (B) Sections 831(a), (b), and (d) (articles 31(a), (b), and (d) of the Uniform Code of Military Justice), relating to compulsory self-incrimination.”). (C) Section 832 (article 32 of the Uniform Code of Military Justice), relating to pretrial investigation.”).

⁷⁵ *Id.* at §948b(d)(2)(emphasis added).

⁷⁶ 10 U.S.C. §813 (emphasis added) (“**No person**, while being held for trial, may be subjected to punishment or penalty other than arrest or confinement upon the charges pending against him, nor shall the arrest or confinement imposed upon him be any more rigorous than the circumstances required to insure his presence, but he may be subjected to minor punishment during that period for infractions of discipline.”).

to “any person, while being held for trial”⁷⁷ and the concurrent nature of the jurisdiction exercised by courts-martial and military commissions reinforces its application to those subject to U.S. military jurisdiction and trial under the laws of war.

E. Application of Protections Against Pretrial Punishment Are Consistent With Law of War Prohibitions, and as such, are Practicable.

Common Article 3 of the 1949 Geneva Conventions, applicable to the current conflict with Al Qaeda,⁷⁸ prohibits “violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture” and “outrages upon personal dignity, in particular humiliating and degrading treatment.”⁷⁹ Just as Article 13 requires humane treatment of pre-trial detainees, U.S. law requires humane treatment of law of war detainees.⁸⁰ Defendants before

⁷⁷ The jurisdiction under Article 21, UCMJ, conferring jurisdiction on courts-martial in respect to offenders and offenses under the laws of war is concurrent.

⁷⁸ *Hamdan*, 548 U.S. at 631.

⁷⁹ Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, art. 3, Aug. 12, 1949, T.I.A.S. 3362; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, art. 3, Aug. 12, 1949, T.I.A.S. 3363 Geneva Convention Relative to the Treatment of Prisoners of War, art. 3, Aug. 12, 1949, T.I.A.S. 3364; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, art. 3, Aug. 12, 1949, T.I.A.S. 3365.

⁸⁰ *See e.g.*, UCMJ, 10 U.S.C. §§ 893, 928, 928a; The Torture Act, 18 U.S.C. §§ 2340-2340A; THE CONVENTION AGAINST TORTURE, AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT, Dec. 10, 1984, 1465 U.S.T.S. 113; Common Article 3, *supra* note 79; U.S. DEP’T OF DEFENSE DIRECTIVE (DoDD) 2310.01E, *DoD Detainee Program* (May 24, 2017). [hereinafter DoDD 2310.01E]; Dep’t of Army, Reg. AR 190-8 [OPNAVINST. 3461.6, AFJI 31-304, MCO 3461.1] *Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees 2* (1 Oct. 1997) [hereinafter AR 190-8] (“**1–5. General protection policy.** *a.* U.S. policy, relative to the treatment of EPW, CI and RP in the custody of the U.S. Armed Forces, is as follows: (1) All persons captured, detained, interned, or otherwise held in U.S. Armed Forces custody during the course of conflict will be given humanitarian care and treatment from the moment they fall into the hands of U.S. forces until final release or repatriation. . . . (3) The punishment of EPW, CI and RP known to have, or suspected of having, committed serious offenses will be

Guantanamo military commissions are both. Humane treatment of prisoners has been a bedrock principle of the American common law of war since our Founding. General George Washington underscored the fundamental nature of our nation's commitment to this principle:

Should any American soldier be so base and infamous as to injure any [prisoner] . . . I do most earnestly enjoin you to bring him to such severe and exemplary punishment as the enormity of the crime may require. Should it extend to death itself, it will not be disproportional to its guilt at such a time and in such a cause . . . or by such conduct they bring shame, disgrace and ruin to themselves and their country.⁸¹

administered IAW due process of law and under legally constituted authority per the GPW, GC, the Uniform Code of Military Justice and the Manual for Courts Martial. (4) The inhumane treatment of EPW, CI, RP is prohibited and is not justified by the stress of combat or with deep provocation. Inhumane treatment is a serious and punishable violation under international law and the Uniform Code of Military Justice (UCMJ). b. All prisoners will receive humane treatment without regard to race, nationality, religion, political opinion, sex, or other criteria. The following acts are prohibited: murder, torture, corporal punishment, mutilation, the taking of hostages, sensory deprivation, collective punishments, execution without trial by proper authority, and all cruel and degrading treatment. c. All persons will be respected as human beings. They will be protected against all acts of violence to include rape, forced prostitution, assault and theft, insults, public curiosity, bodily injury, and reprisals of any kind. They will not be subjected to medical or scientific experiments. This list is not exclusive"); U.S. DEP'T OF DEFENSE, LAW OF WAR MANUAL 333 (13 Dec. 2016) [hereinafter DOD LAW OF WAR MANUAL] ("5.26.2 Information Gathering. The employment of measures necessary for obtaining information about the enemy and their country is considered permissible.⁸²⁶ Information gathering measures, however, may not violate specific law of war rules.⁸²⁷ For example, it would be unlawful, of course, to use torture or abuse to interrogate detainees for purposes of gathering information.).

⁸¹Letter from George Washington to Colonel Benedict Arnold, charge to the Northern Expeditionary Force, Sept. 14, 1775 ("Should any American soldier be so base and infamous as to injure any [prisoner]. . . I do most earnestly enjoin you to bring him to such severe and exemplary punishment as the enormity of the crime may require. Should it extend to death itself, it will not be disproportional to its guilt at such a time and in such a cause... for by such conduct they bring shame, disgrace and ruin to themselves and their country."), *available at* <https://founders.archives.gov/documents/Washington/03-01-02-0355>.

In the Civil War, Francis Lieber included a similar prohibition in General Order No. 100 which governed the Armies of the United States:

Military necessity does not admit of cruelty—that is, the infliction of suffering for the sake of suffering or for revenge, nor of maiming or wounding except in fight, nor of torture to extort confessions.⁸²

This prohibition continued as a core tenet of the American conduct of war, included in its manuals from 1914 to present day.⁸³ Recognized in the Department of Defense *Law of War Manual*, prohibition of torture is a *jus cogens* norm binding on all nations everywhere at all times⁸⁴ and is prohibited by international human rights and international humanitarian law treaties to which the United States is a party.⁸⁵ The Convention Against Torture, a treaty ratified

⁸² U.S. DEP'T OF WAR, Gen. Orders No. 100 (Apr. 24, 1863), *Instructions for Government of the Armies of the United States in the Field*, ¶16 (Paragraph 16 continues, “It does not admit of the use of poison in any way, nor of the wanton devastation of a district. It admits of deception, but disclaims acts of perfidy; and, in general, military necessity does not include any act of hostility which makes the return to peace unnecessarily difficult.”).

⁸³ U.S. DEP'T OF WAR, WAR DEP'T DOCUMENT NO. 467, RULES OF LAND WARFARE 14 (Washington: Gov't Printing Office Apr. 25, 1914) (“13. What military necessity does not admit of.—Military necessity does not admit of cruelty—that is, the infliction of suffering for the sake of suffering or for revenge, nor of maiming or wounding except in fight, nor of torture to extort confessions.”); U.S. DEP'T OF WAR, BASIC FIELD MANUAL 27-10, RULES OF LAND WARFARE (Oct. 1, 1949) 7 (“25. Measures not justified by military necessity.—Military necessity does not admit of cruelty—that is, the infliction of suffering merely for spite or revenge; nor of maiming or wounding except in combat; nor of torture to extort confessions.”); *Id.* at 88-89 (“356. Right of trial.—No individual should be punished for an offense against the laws of war unless pursuant to a sentence imposed after trial and conviction by a military court or commission or some other tribunal of competent jurisdiction designated by the belligerent.”); DEP'T OF ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE (July 18, 1956) 68, 107 (prohibiting moral or physical coercion on prisoner of war in order to induce himself to admit himself guilty of the act which he is accused or on protected person to obtain information.).

⁸⁴ DoD LAW OF WAR MANUAL, *supra* note 80, at 21, n. 83.

⁸⁵ *Id.*

by the United States in 1994, includes non-derogable prohibitions against torture and cruel or inhumane treatment, prohibitions that apply even in war.⁸⁶ Although the 2009 MCA prohibits detainees from relying on the 1949 Geneva Conventions as the basis for a private right of action, the protections of Common Article 3 prohibiting torture and inhumane treatment are also reflected in DoD regulations that require humane treatment for all detainees.⁸⁷ These manuals reflect the long-standing United States position that torture and cruel and inhumane treatment are

⁸⁶ DOD LAW OF WAR MANUAL, *supra* note 80, at 25. Although the CAT is a non-self-executing treaty, its prohibitions are included in numerous U.S. human rights and international humanitarian law treaties, and reflects the U.S. view that prohibition of torture and other cruel and inhumane treatment is not impractical in war.

⁸⁷ Compare DoDD 2310.01E, *supra* note 80, at ¶1d (This directive “Is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.”); with AR 190-8, *supra* note 80 (no such restriction.). Additionally, the D.C. Circuit has recognized that provisions of the Geneva Conventions if incorporated into AR 190-8 can provide a basis for a habeas claim by Guantanamo detainees, and AR 190-8 clearly includes a provision requiring humane treatment, and prohibiting punishment, torture, or inhumane treatment of detainees. See *Al Warafi v. Obama (Al Warafi II)*, 716 F.3d 627, 629 (D.C. Cir. 2013) (finding Army Regulation 190-8 applicable to detainees), *cert. denied*, 134 S. Ct. 2134 (2014) (mem.). Although applicable to detainees in the custody of the U.S. Armed Forces, such an explicit prohibition against punishment, and mandate of humane treatment supports the conclusion that application of Article 13, UCMJ is neither impracticable nor anomalous.

prohibited in war.⁸⁸ Current statutes and executive orders on interrogation of detainees similarly prohibit the type of treatment detailed in the SSCI Executive Summary.⁸⁹

Application of the protections of Article 13 of the UCMJ to trials by military commissions, in light of the fundamental nature of this prohibition, cannot be interpreted as “impractical,” the sole criterion recognized by the Supreme Court as justifying a deviation from courts-martial procedure for trial of pre-2006 MCA offenses under the laws of war. Further, because interpretation of the 2009 MCA to omit this article’s protections raises a significant constitutional question (certainly as to its applicability to pre-2006 offenses), the doctrine of constitutional avoidance should instruct the commission not to interpret this section so as to preclude application of Article 13 here. Alternatively, as a court required to assure due process of law, the commission as a tribunal affording all the necessary “judicial guarantees which are

⁸⁸ The United States prosecuted its own soldiers for war crimes in the Philippine Insurrection for water boarding detainees and tried Japanese soldiers for water boarding after World War II. Evan Wallach, *Drop by Drop: Forgetting the History of Water Torture in U.S. Courts*, 45 Colum. J. Transnat'l L. 468 (2007). The Civil War military commission trying Captain Henry Wirz for violations of the laws of war for inhumane treatment of Union prisoners at Andersonville, convicted him of treatment that was similar to that included within the CIA RDI’s alleged treatment of these five defendants. See House Exec. Doc. No. 23, *Trial of Henry Wirz*, 805-808, 40th Cong.(Dec. 7, 1867) (In addition to finding him guilty of subjecting prisoners to extreme temperatures, lack of food, clothing, blankets, tents, etc., and filthy lice ridden disease causing conditions, the military commission trying Wirz also convicted him of torture in the tortuous and cruel use of dogs, stocks and stress positions and the use of vaccination agents.). Even within the current hostilities with Al Qaeda, the United States Army has court-martialed U.S. soldiers for their role in the abuse of detainees at Abu Ghraib. See e.g., *Lynndie England found guilty in abuse of Iraqi detainees*, N.Y. Times, Sep. 27, 2005; *Army Dog Handler is Convicted in Detainee Abuse at Abu Ghraib*, N.Y. Times, Mar. 22 2006. The SERE program upon which the CIA based its RDI program, was itself designed to enable U.S. military members to withstand conduct that would amount to war crimes and grew out of U.S. experiences of North Korean abuse in the Korean War. SSCI EXECUTIVE SUMMARY, *supra* note 5, at 32, 32 n. 135.

⁸⁹ See e.g., The Detainee Treatment Act of 2005; *Ensuring Lawful Interrogations*, Executive Order No. 13,491, 74 Fed. Reg. 4893 (Jan. 27, 2009)).

recognized as indispensable by civilized peoples” has inherent power to remedy the abuse experienced by the five defendants here; Article 13 provides a time-tested remedial scheme to accomplish that end.⁹⁰

In fact, the applicability of an Article 13-type remedy has already been recognized in a 2008 military commissions case, *United States v. Jawad*. There the military judge determined that dismissal as a potential remedy for a claim of torture as pretrial punishment was within the power of the commission under R.M.C. 907. Both the base motion and the ruling are instructive on how to interpret R.M.C. 907’s permissible bases for the dismissal of charges.⁹¹ In the face of government claims that the sole remedy under the 2006 MCA was exclusion of any coerced statements,⁹² the military judge instead interpreted the MCA’s instruction that UCMJ

⁹⁰ *AE-84, D-008 Ruling Defense Motion to Dismiss—Torture of the Detainee*, Sep. 24, 2008, at 5, n.7 (evaluating R.C.M. 907 and article 13 as persuasive authority under 2006 MCA provisions and Rules of Military Commission 907, recognizing availability of relief, but finding alleged treatment did not rise to the level to support dismissal), in *United States v. Jawad.*, available at [https://www.mc.mil/Portals/0/pdfs/Jawad/Jawad%20\(AE084%20-%20D008\)%20MJ%20Ruling.pdf](https://www.mc.mil/Portals/0/pdfs/Jawad/Jawad%20(AE084%20-%20D008)%20MJ%20Ruling.pdf); see also §948b(f), 2006 MCA, *supra* note 1.

⁹¹ See *United States v. Mohammed Jawad*, available at <https://www.mc.mil/CASES/MilitaryCommissions.aspx>. In the *Jawad* case, both the motion to dismiss and the judge’s order evaluated claims for torture as illegal pretrial punishment and cited cases supporting dismissal under R.C.M. 907 on the basis of article 13 with both the motion and order specifically citing *United States v. Fulton*, 55 M.J. 88 (CAAF 2001). See *Defense Motion to Dismiss Based on Torture of Detainee Pursuant to R.M.C. 907*, 28 May 2008, at 15, in *United States v. Mohammed Jawad*, available at [https://www.mc.mil/Portals/0/pdfs/Jawad/Jawad%20\(AE084%20-%20D008\)xS%20Def%20Mot.pdf](https://www.mc.mil/Portals/0/pdfs/Jawad/Jawad%20(AE084%20-%20D008)xS%20Def%20Mot.pdf); *AE084, D-008 Ruling Defense Motion to Dismiss—Torture of the Detainee*, *supra* note 90, at 5, n.7

⁹² Government Response to Defense Motion to Dismiss Based on Torture of Detainee Pursuant to R.M.C. 907, 4 Jun. 2008, in *id.*, available at [https://www.mc.mil/Portals/0/pdfs/Jawad/Jawad%20\(AE084%20-%20D008\)%20Gov%20Resp%20to%20Def%20Mot.pdf](https://www.mc.mil/Portals/0/pdfs/Jawad/Jawad%20(AE084%20-%20D008)%20Gov%20Resp%20to%20Def%20Mot.pdf)

jurisprudence was persuasive authority as a basis for recognizing an Article 13-analog remedy under R.M.C. 907. Combining the effect of R.M.C. 907 and the persuasive authority of *United States v. Fulton*, the military judge recognized the availability of dismissal or other relief as remedies for pretrial punishment, even though he also determined that the specific allegations did not justify dismissal in that case.

As stated above, both dimensions—statutory, and constitutional—of the legal prohibition against, and remedy for pretrial punishment are historically rooted in significant systemic governmental abuses that led Congress and the Supreme Court to develop remedies for such illegal punishment. “Dictated by the cold and cruel logic of belligerent experience”⁹³ of the U.S. military, these protections are an integral part of the American common law of war. The specifics of those historical abuses and their similarity to those allegedly experienced by these five defendants as part of the CIA’s RDI program further support the commission’s consideration of their allegations through the mechanism of Article 13.

F. Bill of Attainder Prohibition.

In addition to its prohibition against ex post facto laws, the Constitution similarly prohibits bills of attainder.⁹⁴ Interpretation of the 2006 and 2009 MCA to remove the protections applicable under Article 13 and the Due Process Clause as to offenses that predated their

⁹³ SENATE EXEC. RPT. NO. 9, *Geneva Conventions for the Protection of War Victims*, Report of the Committee on Foreign Relations, 84th Cong. 31 (1955) [hereinafter SENATE GC EXEC. RPT. NO. 9], available at <https://www.justice.gov/sites/default/files/jmd/legacy/2014/03/15/senateexecrpt-9-1955.pdf>; GC3, *supra* note 78.

⁹⁴ U.S. CONST. art. I, §9 (“No Bill of Attainder or ex post facto Law shall be passed”).

enactment would call into question whether the MCA, if so interpreted, amounted to a prohibited bill of attainder. In the context of Mr. al Hawsawi’s broad bill of attainder challenge to the MCA, the commission held that “the procedural tailoring of the M.C.A. does not constitute punishment. The law does not impose any form of historically recognized legislative punishment.”⁹⁵ As explained by the D.C. Circuit in *Kaspersky Lab, Inc. v. United States Department of Homeland Security*,⁹⁶ “each bill of attainder case “has turned on its own highly particularized context.”⁹⁷ When Congress passed the 2006 MCA (and its 2009 amendment), it was clearly aware of the mistreatment of detainees, to include these defendants.⁹⁸ This congressional awareness, and the strident congressional references to this case described by the Commission in AE 625G, form part of the particularized context that would have to be considered in a bill of attainder analysis of a retrospective denial of the applicability of the protections of Article 13, UCMJ by the Commission to these defendants.

As discussed above, when Congress enacted the 2006 MCA, it did not include a direct analogue to Article 13, UCMJ, but neither did it list Article 13 in section 948b(d) of the 2009 MCA, where it specifically listed three UCMJ articles it deemed inapplicable in MCA trials. Interpretation of the MCA to remove the protections of Article 13, UCMJ, at least as it applies to trial of offenses that predated the enactment of the MCA in 2006, raises a different particularized

⁹⁵ AE625G, *Ruling, Defense Motion to Dismiss Because the Military Commissions Act of 2009 is a Bill of Attainder*, 6 Dec. 2019, at 20, in *United States v. Khalid Shaik Mohammad, et. al.*

⁹⁶ *Kaspersky Lab, Inc. v. United States Department of Homeland Security*, 909 F.3d 446, 454 (D.C. Cir. 2018).

⁹⁷ *Id.* (citing *Flemming v. Nestor*, 363 U.S. 603, 616 (1960)).

⁹⁸ *See e.g.*, DETAINEE TREATMENT ACT OF 2005, Pub. L. No. 109-148, §§ 1001–1006 (2005).

context than that raised by Mr. al Hawsawi's broad challenge to the MCA or by the U.S.C.M.C.R. in *Al Bahlul*.⁹⁹ As explained in *Foretich v. United States*,¹⁰⁰ the treatment experienced by the defendants would clearly fall within the scope of the bill of attainder prohibition, which as early as 1810,

was extended to cover so-called "bills of pains and penalties," or legislative acts that sentenced specified persons to penalties short of death, including banishment, deprivation of the right to vote, corruption of blood, or confiscation of property."¹⁰¹

The treatment of the detainees described in the SSCI Executive Summary would clearly fall within that historically imposed parameter, as a bill of pains and punishment. While Congress did not impose this punishment legislatively, any statutory action to remove Article 13, UCMJ remedies for this illegal pretrial punishment after it was imposed, has the same effect. As stated by the D.C. Circuit,

Our treatment of the scope of the Clause has never precluded the possibility that new burdens and deprivations might be legislatively fashioned that are inconsistent with the *bill of attainder* guarantee. It is the job of the courts to "prevent[] Congress from circumventing the clause by cooking up newfangled ways to punish disfavored individuals or groups."¹⁰²

In accordance with the doctrine of constitutional avoidance, the Commission should avoid interpreting the 2006/2009 MCA to eliminate Article 13's protections and remedies for pretrial punishment, at least when such an interpretation would apply to trial for offenses that occurred

⁹⁹ See AE 625G, *supra* note 95, at 13-16 (discussing *Al Bahlul v. United States*, 820 F.Supp.2d 1141 (U.S.C.M.C.R. 2011)).

¹⁰⁰ *Foretich v. United States*, 351 F.3d 1198 (D.C. Cir. 2003) (

¹⁰¹ *Foretich*, 351 F.3d at 1217 (citing *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810)).

¹⁰² *Kaspersky*, 909 F.3d at 454 (internal citations omitted).

prior to the MCA's enactment in October 2006.¹⁰³ Given both congressional knowledge of the defendants' mistreatment described in the SSCI Executive Summary, and Congress's strident references to both this case and defendants in its passage of the 2006 MCA, interpreting the MCA to prohibit such a remedy would raise constitutional questions of the highest order. Such a remedy would have clearly been applicable in an Article 21, UCMJ military commission, the sole statutory authority for a military commission on the date of the alleged offenses.

The 2006 MCA states that the judicial construction and application of the UCMJ are instructive in trials by military commissions, but are not "of their own force" binding on military commission trials under the MCA. However as *Jawad* demonstrated, interpretations of existing MCA provisions can incorporate Article 13 jurisprudence respecting remedies for pretrial punishment. Such a determination by this Commission avoids both of the difficult constitutional ex post facto and bill of attainder questions, and is in accord with over seventy years of military jurisprudence. At its most basic level, interpreting the MCA to permit such a remedy, particularly in light of its constitutional due process aspects—in the face of congressional omission but not prohibition of such a remedy in the MCA—supports the long-standing military law prohibition against pretrial punishment and abuse of prisoners. These prohibitions are a fundamental part of the American common law of war.

¹⁰³ A full brief on the punishment aspects of the bill of attainder analysis is beyond the scope of this amicus brief. However the Commission should bear in mind that the proof currently being offered by the defense on the purpose and intent of the CIA RDI program and its implementation in the AE 628 and AE 524 series is relevant to the determination of all three aspects of the punishment prong of the bill of attainder prohibition—historical, functional, and motivational. Legislatively removing a long-standing remedy for illegal punishment is functionally the same as legislatively imposing the same punishment.

4. Conclusion.

The Ex Post Facto Clause of the U.S. Constitution condemns as unconstitutional any refusal by the military commission to consider allegations of pretrial punishment experienced by the accused in this case under Article 13. Prior to the October 17, 2006 effective date of the 2006 MCA, military commission jurisdiction over the defendants was based exclusively on Article 21 of the UCMJ.¹⁰⁴ The alleged misconduct that forms the basis for the offenses for which each is charged pursuant to the 2006/2009 MCA pre-date that effective date by several years. A military commission convened pursuant to Article 21 would have been obligated by Article 36's uniformity mandate to apply the protections established by Article 13. The longstanding prohibition against pretrial punishment recognized in both military and federal law and consistently applied to courts-martial strongly demonstrates that compliance with Article 13 cannot credibly be considered "impractical."¹⁰⁵ This conclusion is bolstered by the fact that the requirements of Article 13 align with the requirements of the U.S. Constitution and the non-derogable obligations of both the Convention Against Torture and Common Article 3 of the 1949 Geneva Conventions. Refusal to do so in a commission trial of offenses committed before 2006 would thus violate the Ex Post Facto Clause. In short, extending the protections against pretrial punishment codified in Article 13 to this military commission trial would merely require respect for principles deeply rooted in U.S. practice, the Geneva Conventions, and the UCMJ.

¹⁰⁴ The defendants could have been tried by general courts-martial under article 21, UCMJ, or for violations of applicable federal statutes in federal court, but the sole statutory authority for a military commission at the time of the offense was article 21, UCMJ.

¹⁰⁵ See *Hamdan*, 548 U.S. at 624.

Request for Oral Argument: Amicus does not request oral argument. When the National Institute of Military Justice requested an AE number as instructed by the Rules of Court, NIMJ was informed by the trial judiciary staff that we must file this amicus brief through a party to the commission in accordance with AE 627—Trial Conduct Order. Although NIMJ has complied with this order in this instance and does not have standing before the commission as an amicus, we request that the commission sua sponte reconsider such an order as it places neutral non-governmental organizations (NGOs) such as NIMJ in the position of having to file through a party when the amici party’s views or interests may not be in accord with the party’s views or legal positions. Such a limitation significantly inhibits, and may even prohibit, independent NGOs such as NIMJ from filing amicus briefs with the commission. The current rules of court leave the determination of the acceptance of an amicus brief to the military judge in every instance, and require that any relationship between amicus counsel and parties be disclosed in the filing. Such disclosure rules should adequately protect the interests of the commission while still allowing the traditional independent role of amicus before the commissions.

Very Respectfully,

//s//
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That was the cost.