

UNITED STATES OF AMERICA

v.

MAJID SHOUKAT KHAN

**BEFORE A MILITARY COMMISSION
CONVENED PURSUANT TO THE
MILITARY COMMISSIONS ACT OF 2009**

**Amicus Brief filed by Dru Brenner-Beck and
Rachel VanLandinham on behalf of the
National Institute of Military Justice**
in Support of
Mr. Majid Khan's Defense Motion
To Apply Article 13, UCMJ in
Military Commission Proceedings
AE 033B
1 May 2019

1. Required Statements: Our names are LTC (ret.) Dru Brenner-Beck and Lt. Col. (ret.) Rachel VanLandingham. 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 Lt. Col. 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.* Lt.Col. VanLandinham is not a party to any Commission case in any capacity, does not have an attorney-client relationship with any person whose case has been referred to a Military Commission. Both are not currently or seeking to be habeas counsel for any such person, and are not currently seeking to be the next friend for such person. Pursuant to Military Commissions Rule of Court 7(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 a 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 contrary 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 Guantánamo 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 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 Justice (UCMJ)³ apply to military commissions convened pursuant to the Military Commissions Act of 2009? Specifically, pursuant to article 36(b), UCMJ, which 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

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].

² 10 U.S.C. §§ 801 et seq.

³ 10 U.S.C. §813.

article 13 applicable to defendants before the commission 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 Mr. Khan. Further, Mr. Khan is accused of conspiracy, murder and attempted murder in violation of the laws of war, and spying (offenses under the 2009 MCA), with the alleged actions supporting these charges occurring between January 2002 and August 2003.⁵

Mr. Khan was subject to incommunicado detention and interrogation by the U.S. Government from early 2003 to September 2006 to as part of the Central Intelligence Agency's Rendition, Interrogation, and Detention program. This program is outlined in the U.S. Senate Select Committee on Intelligence (SSCI) *Study on the Central Intelligence Agency's Detention and Interrogation Program* (RDI Program).⁶ During his period of detention by the United States Government, Mr. Khan was subject to conditions of confinement and treatment that would justify a remedy pursuant to article 13, UCMJ if proven.⁷

Prior to enactment of the 2006 Military Commissions Act on Oct. 17, 2006, article 21 of the UCMJ provided the statutory authority for the convening and use of military commissions to

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 Referred Charge Sheet, *United States v. Majid Khan*, available at [https://www.mc.mil/Portals/0/pdfs/Khan/Khan%20\(Referred%20Charges\).pdf](https://www.mc.mil/Portals/0/pdfs/Khan/Khan%20(Referred%20Charges).pdf).

⁶ 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 29 Apr. 2019).

⁷ See e.g., *id.*, at 89 n. 497 (Khan subject to sleep deprivation, nudity, dietary manipulation and may have been subject to water bath); 100 n. 584 (Khan subject to rectal rehydration and feeding); 105 n. 615 (water bath); 114 n. 673 (rectal rehydration and feeding); 115 (same).

try alleged violations of the laws of war.⁸ All charges against Mr. Khan referred to trial by 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 constitutional 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 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

⁸ Art. 21, UCMJ. This provision was originally enacted as article 15 of the 1916 Articles of War. 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 war may be lawfully triable by such military commissions, provost courts, or other military tribunals.”) [hereinafter 1916 AW].

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).

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)).

In cases describing when 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, it 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 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 and, of the seven judges participating in the first *en banc* review of the case, five agreed that this clause 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,

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).

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)).

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 constitution is presumed to apply “whenever and wherever the U.S. government acts.”²¹ Even under the older *Insular* cases, protections of fundamental rights were considered to apply even in unincorporated overseas territories. In *Downes v. Bidwell*, the Court specifically listed the prohibition against ex post facto laws as one that goes to the power of Congress to act at all.²²

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

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, ed. Max Farrand (New Haven: Yale University Press, 1911), 375-76 (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.).

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

constitutional provisions that affect Congress’s power to legislate—no matter where that legislation is expected to apply—it applies as a restriction on the government’s legislative authority exercised over individuals subject to trial by military commission under the 2009 MCA. This clause is applicable at Guantanamo.²⁵ As will be explained below, when considered in connection with the UCMJ’s prohibition against pretrial punishment, this means that divesting any defendant subject to military commission jurisdiction of this protection for offenses that arose out of alleged misconduct that occurred prior to the enactment of the Military Commission Act of 2006 violates the protection against 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 “[a]s commander of occupied Mexican territory, and having available to him no other tribunal, General Winfield Scott . . . 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

In addition to prohibiting the use of military commissions to try any offense within the jurisdiction of courts-martial, Scott required that military commissions would be “appointed,

‘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)).

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)).

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 Although the two original Mexican War-era military tribunals were collapsed into one in the Civil War, the separate council of war being unnecessary, the fundamental restrictions imposed by Scott were also applied in the Civil War commissions; in the absence of any statute or regulation governing the proceedings of military commissions, they were “commonly conducted according to the rules and forms governing courts-martial.”²⁹

In 1916 Major General Enoch H. Crowder, The Army Judge Advocate General during the World War I period, began his “project” to update and revise the Articles of War, including an initiative to add jurisdiction over law of war offenses to general courts-martial, preserve the traditional jurisdiction of military commissions, and to explicitly authorize the President to

²⁷ WILLIAM E. BIRKHMIR, *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 30 Apr. 2019),

²⁸ Kasun, *supra* note 29, 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; BIRKHMIR, *supra* note 28, 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 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].

prescribe rules of procedure to govern both. The latter revision was enacted against the 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 some leeway from strict adherence because of the 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

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.

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 37, 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 23 Apr. 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).

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.

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 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 was accomplished primarily through general orders issued by the President, Secretary of War, or subordinate commanders. To remedy the lack of statutory authority for such practice, Crowder proposed what would become article 38 of the 1916 AW (which ultimately became art. 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 into alignment with the procedural rules of 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

³³ Article 38, 1916 AW, *supra* note 8.

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 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 a deprivation of that jurisdiction for military commissions.³⁷ As a result, he proposed article 15 to

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/r/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 34, at 41.

preserve 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: “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

³⁸ Feb. 1916 Revisions AW Hearings, *supra* note 35, at 40-41 (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.”) (emphasis added).

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 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

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 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 amended 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

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).

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.

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 the issue of 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 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 did recognize 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

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 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).

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

By enacting the 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 constitutional prohibition of ex post facto laws, and any MCA provision inconsistent with this 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

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 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 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 the Lichfield abuses and courts-martials.⁵⁷ The abuses of US soldiers at Lichfield,⁵⁸ characterized by

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.].

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 who were confined in unheated cell blocks with only one toilet, being 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, soldiers were forced to overeat several loaded trays of food and then were forced to ingest castor oil (a stimulant laxative). Soldiers wounded in combat also described being deliberately hit with clubs on their wounds. Although 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

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 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 US 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 the House debate on passage of 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 comingled with enemy prisoners of war and were punished before being tried. His amendment to prohibit both

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 backcover.

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).

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

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). Ultimately article 16, of the 1948 Articles of War split into two articles under the UCMJ: article 12 (prohibiting confinement with enemy prisoners) and 13 (prohibiting pretrial punishment).

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

The Ex Post Facto Clause of the U.S. Constitution would condemn as unconstitutional the military commission's deprivation of protection against pretrial punishment embodied in article 13 on the assertion that Congress's decision to omit an analogous article in the 2006 MCA indicates no such protection is available. Prior to the 17 October 2006 effective date of the 2006 MCA, military commission jurisdiction over Mr. Khan was based exclusively on article 21 of the UCMJ.⁶⁵ Furthermore, the alleged misconduct that forms the basis for the offenses for which he

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 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 Mr. Khan 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 his alleged offenses.

is charged pursuant to the 2006/2009 MCA pre-date that effective date by several years.

Accordingly, it is necessary to acknowledge that 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. In this regard, 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 indicates compliance with article 13 could not and can not credibly be considered “impractical.”⁶⁶ In addition to the almost seventy years of experience of the American military justice system in enforcing these provisions, this conclusion is bolstered by the fact that the requirements of article 13 align with the requirements of the US Constitution and the non-derogable obligations of both the Convention Against Torture and Common Article 3 of the Geneva Conventions.

Military case law interpreting allegations of pretrial punishment state they have both a statutory (Article 13, UCMJ) and constitutional dimension (due process).⁶⁷ The Court of Appeals for the Armed Forces (CAAF) has explained in *United States v. Zarbatany*:

[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).⁶⁸

⁶⁶ *Hamdan*, 548 U.S. at 624.

⁶⁷ *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.”).

⁶⁸ *United States v. Zarbatany*, 70 M.J. 169, 174 (C.A.A.F. 2011) (internal citations omitted).

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 for the due process violation caused by pretrial punishment. The analysis under article 13 military jurisprudence captures both dimensions, and because it requires “meaningful relief” if available,⁶⁹ 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 are a hybrid system, one that draws from both federal and military jurisprudence in their substance and procedure. As discussed above, the military commission available to try Mr. Khan as of the date of the alleged commission of his offenses, the constitutional measuring point for the ex post facto clause, was a military commission recognized 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 a defendant in such a commission. And under *Zarbatany*, meaningful relief is required for violations of article 13. If Mr. Khan was punished before trial, he would be entitled to a reduction in any future sentence for his offenses under article 13. 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

⁶⁹ *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).

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 the retroactive alteration of gain time credit or application of a different sentencing guideline range would. Refusal to apply article 13 as a remedy for pretrial punishment would thus present a “sufficient risk of increasing the measure of punishment attached to the covered crimes,”⁷⁰ with a similar unconstitutional result to that recognized by the Supreme Court in *United States v. Peugh* and *Weaver v. Graham*.

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.⁷¹ Recognizing in the 2009 MCA that military commissions must draw upon military law, Congress instructed that judicial interpretation of the UCMJ, while not binding on military commissions, is instructive.⁷² Further, while Congress explicitly makes three provisions of the UCMJ inapplicable in military commissions under the 2009 MCA,⁷³ 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

⁷⁰ *Peugh*, 569 U.S. at 539.

⁷¹ 2009 MCA, §948b(c), *supra* note 1.

⁷² *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.”)

⁷³ 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.”).

provisions or by this chapter.”⁷⁴ The text of article 13 does not limit its applicability in any way;⁷⁵ it is applicable to “any person, while being held for trial”⁷⁶ and the concurrent nature of the jurisdiction exercised by courts-martial and military commissions reinforces its uniform 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,⁷⁷ 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.”⁷⁸ Just as Article 13 requires humane treatment of pre-trial detainees, U.S. law requires humane treatment of law of war detainees.⁷⁹ Defendants before

⁷⁴ *Id.* at §948b(d)(2)(emphasis added).

⁷⁵ 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.”).

⁷⁶ The jurisdiction under article 21, UCMJ, conferring jurisdiction on courts-martial in respect to offenders and offenses under the laws of war is concurrent.

⁷⁷ *Hamdan*, 548 U.S. at 631.

⁷⁸ 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.

⁷⁹ 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 89; 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 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,

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.⁸⁰

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.⁸¹

This prohibition continued as a core tenet of the American conduct of war, included in its manuals from 1914 to present day.⁸² Recognized in the Department of Defense *Law of War*

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.).

⁸⁰Letter 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>.

⁸¹ 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.).

⁸² 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

Manual, prohibition of torture is a *jus cogens* norm binding on all nations everywhere at all times⁸³ and is prohibited by international human rights and international humanitarian law treaties to which the United States is a party.⁸⁴ The Convention Against Torture, a treaty ratified by the United States in 1994, includes non-derogable prohibitions against torture and cruel or inhumane treatment, prohibitions that apply even in war.⁸⁵ 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.⁸⁶ These manuals reflect the long-standing United States position that torture and cruel and inhumane treatment are all prohibited in war.⁸⁷

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.).

⁸³ DOD LAW OF WAR MANUAL, *supra* note 79, at 21, note 83.

⁸⁴ *Id.*

⁸⁵ DOD LAW OF WAR MANUAL, *supra* note 79, 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.

⁸⁶ Compare DoDD 2310.01E, *supra* note 79, 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 79 (no such restriction.)

⁸⁷ 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 Mr. Khan. 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 6, at 32, 32 note 135.

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 criteria recognized by the Supreme Court 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 raise a significant constitutional question (certainly as to its applicability to pre-2006 offenses), under the doctrine of constitutional avoidance the commission should not interpret this section to preclude application of article 13 in this case. Alternatively, as a court required to apply due process of law, the commission as a tribunal affording all the necessary ‘judicial guarantees which are recognized as indispensable by civilized peoples’ has inherent power to remedy the abuse experienced by Mr. Khan; article 13 provides a time-tested remedial scheme to accomplish that end.⁸⁸

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.⁸⁹ In the face of

⁸⁸ 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 2006 MCA, *supra* note 1, at §948b(f).

⁸⁹ 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 88, at 5, n.7

government claims that the sole remedy under the 2006 MCA was exclusion of any coerced statements,⁹⁰ the military judge instead interpreted the MCA's instruction that UCMJ jurisprudence was persuasive authority to recognize 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”⁹¹ 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 Mr. Khan as part of the CIA's RDI program further support the commission's consideration of Mr. Khan's allegations through the mechanism of article 13.

4. Conclusion.

The Ex Post Facto Clause of the U.S. Constitution would condemn as unconstitutional any refusal by the military commission to consider allegations of pretrial punishment experienced by Mr. Khan under article 13. Prior to the 17 October 2006 effective date of the 2006 MCA, military commission jurisdiction over Mr. Khan was based exclusively on article 21

⁹⁰ Government Response to Defense Motion to Dismiss Based on Torture of Detainee Pursuant to R.M.C. 907 4 June 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)

⁹¹ 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.

of the UCMJ.⁹² The alleged misconduct that forms the basis for the offenses for which he 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 indicates compliance with article 13 can not credibly be considered "impractical."⁹³ This conclusion is bolstered by the fact that the requirements of article 13 align with the requirements of the US Constitution and the non-derogable obligations of both the Convention Against Torture and common article 3. 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 treatment principles deeply rooted in U.S. practice, the Geneva Conventions, and the UCMJ.

Request for Oral Argument: Amicus does not request oral argument.

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⁹² Mr. Khan 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 the offense.

⁹³ See *Hamdan*, 548 U.S. at 624.