MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY, CUBA

UNITED STATES OF AMERICA **v.** **MAJID SHOUKAT KHAN**	**AE 033L** **Government Motion** To Reconsider AE 033K, Ruling 23 December 2020

1. Timeliness

The Government timely files this Motion to Reconsider. A military judge may reconsider a decision at any time prior to authentication of the record of trial. Rule for Military Commissions ("R.M.C.") 905(f).

2. Relief Sought

The Government respectfully requests that the Commission reconsider AE 033K, Ruling. Specifically, the Government requests that the Commission reconsider its conclusion that it has the authority to grant illegal pretrial punishment sentencing credit to the Accused based on his claims regarding his treatment prior to the referral of his case to trial. Based on the revised conclusion that a proper and wise interpretation of all applicable law compels, the Government requests that the Commission vacate its decision that a military judge presiding over a military commission has the authority—maintained in AE 033K—to grant the pretrial punishment sentencing credit.

3. Burden of Proof

As the moving party, the Government bears the burden of establishing that it is entitled to the relief it seeks. R.M.C. 905(c)(1)–(2). A motion to reconsider should be granted where a court finds that there is an intervening change in controlling law, new evidence becomes available, or there is a need to correct a clear error or prevent manifest injustice. *See, e.g.*, *Foster v. Sedgwick Claims Mgmt. Servs.*, 842 F.3d 721, 735 (D.C. Cir. 2016); *Dyson v. Dist. of*

Columbia, 710 F.3d 415, 420 (D.C. Cir. 2013); *Nat'l Ctr. for Mfg. Scis. v. Dep't of Defense*, 199 F.3d 507, 511 (D.C. Cir. 2000); *Firestone v. Firestone*, 76 F.3d 1205, 1208 (D.C. Cir. 1996); *see also* AE 639SS at 4, *United States v. Mohammad* (Mil. Comm'n June 12, 2020) (citing R.M.C. 905(f)). Even where none of these three factors are present, it may nevertheless be appropriate for the Commission to grant a motion for reconsideration if there are other good reasons for doing so. *See, e.g.*, *United States v. All Assets Held at Bank Julius, Baer & Co.*, 308 F. Supp. 3d 186, 192–93 (D.D.C. 2018) ("[J]ustice may require revision where the Court has patently misunderstood a party, has made a decision outside the adversarial issues presented to the Court by the parties, [or] has made an error not of reasoning but of apprehension . . . ." (citation and internal quotations omitted)).

4. <u>Overview</u>

The Government respectfully requests that the Commission reconsider its ruling in AE 033K that the Military Judge has the authority to grant sentencing credit to the Accused as a remedy for illegal pretrial punishment. Reconsideration is appropriate to correct clear error. Specifically, the Commission's ruling reflects misapplications of law, including: (1) the incorporation of inapplicable international law in the absence of implementing legislation as a basis for finding an individual right that is enforceable in a criminal prosecution; (2) the misapplication of a doctrine of outrageous government conduct that has been vitiated by appellate courts across the federal judiciary; and (3) the assumption and exercise of "inherent" judicial power beyond that which is authorized and permitted by controlling legislation and regulation.

The Government's argument and request for reconsideration does not seek to address the merits of any claim of maltreatment of the Accused, or any other prisoner or law-of-war detainee, nor is it intended to challenge the prohibition of such treatment by international and domestic law. Rather, this Motion seeks reconsideration of a judicial ruling premised upon U.C.M.J.-specific concepts of inherent authority and pretrial confinement, which were improperly applied in this military commission forum through incorrect analysis and

misapplication of legal authorities. Even assuming that mistreatment occurred, for the purposes of this motion, the Commission acted *ultra vires* and overlooked the statutory and rule-based remedies already available to the Accused, specifically, argument in extenuation and mitigation to be considered by the members, and the right to seek clemency from the Convening Authority. The Government agrees that the Military Judge has the duty to ensure the fundamental fairness of military commission proceedings. However, fundamental fairness must always remain grounded in the following of duly enacted laws and duly promulgated rules binding upon all participants in the criminal proceedings governed by the Military Commissions Act ("M.C.A.") and R.M.C.s. This system of criminal proceedings specifically includes avenues of relief for allegations of mistreatment during law-of-war detention via mitigation and clemency, as well as via pretrial agreement terms. It does not authorize relief in contravention of the law and rules, however attractive a participant may view a particular substantive outcome.

5. Facts

The Government hereby incorporates the facts it submitted in AE 033D and AE 033I. The Government further offers the following facts for consideration.

On 17 September 2001, six days after the 11 September 2001 attacks, President George W. Bush authorized the Central Intelligence Agency ("CIA") to conduct a detention and interrogation program, which became known as the CIA's Rendition, Detention, and Interrogation ("RDI") Program and was reviewed and determined to be lawful by the U.S. Department of Justice. As recognized in the Executive Summary of the Senate Select Committee on Intelligence's Report on the Former RDI Program, personnel working in the former RDI Program were not motivated by obtaining a confession or a conviction at a trial, but rather by interests of national security—specifically, gathering intelligence to stop further terrorist attacks and to save lives after suffering the deadliest attack in U.S. history. *See* S. Rep. No. 113-228, Forward, at iv–v ("SSCI Report").

On 6 September 2006, the Accused was transferred from CIA custody to Department of Defense ("DoD") custody and detained on U.S. Naval Station Guantanamo Bay, Cuba. The

Accused has been detained in DoD custody from September 2006 to present as a law-of-war detainee under the Authorization for Use of Military Force ("A.U.M.F."), Pub. L. No. 107-40, 115 Stat. 224 (2001). During the Accused's detention in DoD custody, various reviews have concluded that the conditions of confinement have "met or exceeded all U.S. obligations" and standards for confinement under both international law and domestic law. *See* Third, Fourth, and Fifth Periodic Rep. of the United States of America to the Comm. Against Torture Concerning the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ¶ 216 (Aug. 12, 2013) U.N. Doc. CAT/C/USA/3-5 (Dec. 4, 2013) ("2013 CAT Report"); *see also* U.S. DEP'T OF DEFENSE, REVIEW OF DEPARTMENT COMPLIANCE WITH PRESIDENT'S EXECUTIVE ORDER ON DETAINEE CONDITIONS OF CONFINEMENT, at 4 (Feb. 20, 2009) ("The Walsh Report")[1] (concluding that "the conditions of confinement in Guantánamo are in conformity with Common Article 3 of the Geneva Conventions," that they "also meet the directive requirements of Common Article 3 of the Geneva Conventions," and that the specific conditions of interrogation also fully complied with Common Article 3); *see also* JOINT TASK FORCE-GUANTANAMO (JTF-GTMO), CAMP DELTA STANDARD OPERATING PROCEDURES (SOP) (Mar. 28, 2003).

On 30 July 2009, Major David J. R. Frakt, USAFR, "Lead Defense Counsel, Office of Military Commissions-Defense," testified before the Subcommittee on the Constitution, Civil Rights, and Civil Liberties of the House Committee on the Judiciary during a hearing on

[1] On 22 January 2009, President Obama issued Executive Order 13,492, mandating the Secretary of Defense to "immediately undertake a review of the conditions of detention at Guantanamo to ensure full compliance" with "all applicable laws governing conditions of such confinement, including Common Article 3 of the Geneva Conventions." Vice Chief of Naval Operations, Admiral Patrick Walsh, was appointed to conduct the review. On 20 February 2009, following thirteen days of intensive on-site investigation, and after considering input from external sources including the ICRC, Human Rights Watch, and the ACLU, as well as detainee legal defense teams and research groups from the Brookings Institute and the University of California, Berkeley Center for Constitutional Rights, ADM Walsh's team submitted The Walsh Report to President Obama. The report concluded that the detention conditions generally, and interrogation conditions specifically, at Guantanamo Bay fully complied with all applicable laws, including Common Article 3. The Walsh Report is available at https://archive.defense.gov/pubs/pdfs/Review_Of_Department_Compliance_With_Presidents_Executive_Order_On Detainee_Conditions_Of_Confinementa.pdf.

proposals for reform of the military commissions system. *See Proposals for Reform of the Military Commissions System: Hearing Before the Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the H. Comm. on the Judiciary*, 111th Cong. 90–108 (2009) (statement of David J. R. Frakt, Major, USAFR). In late April 2008, Major Frakt had been mobilized to active duty and detailed as lead defense counsel in *United States v. Jawad* (Mil. Comm'n) and *United States v. Al Bahlul* (Mil. Comm'n). *See id.* at 93 (prepared statement of Major Frakt). In his prepared statement before the Subcommittee, Major Frakt raised the issue of "Illegal Pretrial Punishment" and recommended a corresponding revision or amendment to the Military Commissions Act of 2006 ("2006 M.C.A."). *See id.* at 101; *id.* at 98. He stated that "Rule for Court-Martial 305(k) and military case law also authorize military judges to provide extra credit 'for each day of pretrial confinement that involves . . . unusually harsh circumstances'" and that "[t]his rule was omitted from the Rules for Military Commission." *Id.* at 101. He also stated that, "[i]n two rulings by Colonel Stephen Henley in response to pretrial motions in *U.S. v. Jawad*, Judge Henley indicated that he believed this remedy to be available in military commissions." *Id.* at 101 & n.15 (citing Ruling D-008 and Ruling D-012 in *Jawad*). Major Frakt concluded by specifically recommending that "Congress should affirm this power through an appropriate amendment to the MCA." *Id.* at 101.

On 28 October 2009, the President signed the M.C.A. into law. As enacted by Congress, the M.C.A. omitted any provision regarding the availability of sentencing credit for "pretrial punishment." Rather, the M.C.A. provided that any claims pertaining to post-capture treatment be handled as a matter to be brought up at sentencing by an accused in mitigation and extenuation before the commission, or as a matter for clemency before the Convening Authority.

On 27 April 2010, and in accordance with the authority provided to him in the M.C.A., the Secretary of Defense promulgated a revised version of the Manual for Military Commissions ("M.M.C."), the first such revision after the enactment of the 2009 M.C.A.[2] The Secretary of

[2] The M.M.C. contains, among other parts, the Rules for Military Commissions (R.M.C.). Subsequent revisions of the R.M.C.s have continued to "reserve" R.M.C. 305. As a result, there

Defense included R.M.C. 1001(g), which states as follows: "Detention. The physical custody of alien enemy belligerents captured during hostilities does not constitute pretrial confinement for purposes of sentencing and the military judge shall not grant credit for pretrial detention."

On 4 June 2020, the Commission issued AE 033K in which it ruled that "as a matter of law, this Military Judge has legal authority to grant administrative credit as a remedy for illegal pretrial punishment." AE 033K at 42.

6. Law and Argument

I. The Commission Has the Authority To Reconsider AE 033K and Reconsideration Is Appropriate in Order To Correct Clear Error

Granting a request for reconsideration falls squarely within the Military Judge's discretion. *See* 10 U.S.C. § 949l(b)(1)–(2) ("[A] military judge may change [] a[n interlocutory] ruling at any time during the trial "); R.M.C. 905(f) ("[O]n request of any party or sua sponte, the military judge may, prior to authentication of the record of trial, reconsider any ruling, other than one amounting to a finding of not guilty, made by the military judge."). Generally, reconsideration should be based on a change in the facts or law, or instances where the ruling is inconsistent with case law. *See United States v. Libby*, 429 F. Supp. 2d 46, 47 (D.D.C. 2006); *United States v. McCallum*, 885 F. Supp. 2d 105, 115 (D.D.C. 2012). Reconsideration may also be appropriate to correct a clear error or prevent manifest injustice. *See, e.g.*, *Foster*, 842 F.3d at 735; *Dyson*, 710 F.3d at 420; *Nat'l Ctr. for Mfg. Scis.*, 199 F.3d at 511; *Firestone*, 76 F.3d at 1208. Even where none of these factors are present, it may nevertheless be appropriate to grant a motion for reconsideration if there are other good reasons for doing so. *See, e.g.*, *All Assets Held at Bank Julius, Baer & Co.*, 308 F. Supp. at 192–93. Motions for reconsideration are not appropriate to raise arguments that could have been, but were not raised previously, or arguments

are no Rule for Courts-Martial ("R.C.M.") 305-like provisions in the current R.M.C.s that grant or even recognize the availability of pretrial punishment sentencing credit. M.M.C. revisions in 2012, 2016, and 2019 made no substantive changes to the relevant R.M.C.s as promulgated in the 2010 edition of the M.M.C.

the Commission has previously rejected. *See United States v. Bloch*, 794 F. Supp. 2d 15 (D.D.C. 2011); *United States v. Booker*, 613 F. Supp. 2d 32 (D.D.C. 2009).

Reconsideration of AE 033K is necessary in order to correct clear error and ameliorate inconsistencies between the Commission's ruling and governing law. Specifically, AE 033K erred by applying courts-martial pretrial punishment practice under the U.C.M.J. to (1) a law-of-war military commission not governed by the U.C.M.J.,[3] and (2) a period of time when the Accused was exclusively a law-of-war detainee, which, by definition, cannot implicate the principle of "innocent until proven guilty" upon which illegal pretrial punishment claims and analysis in courts-martial must be grounded. Respectfully, the Commission also appears to have relied on inapplicable case law, such as cases regarding outrageous government conduct that subsequent courts have declined to adopt or extend, inapposite aspects of U.S. domestic court-martial practice under the U.C.M.J., and international law that is inapplicable in U.S. domestic courts such as this Commission, which is created and governed by the M.C.A. and its implementing rules and regulations. These identified errors in law are explained below.

II. Specific Errors in Law

The Commission accurately stated that "the authority of a military judge presiding over a military commission to order administrative credit against an approved sentence to confinement following a finding of pretrial punishment by U.S. Government officials is not obvious." AE 033K at 33. The Commission, however, relied upon inapplicable law to conclude that a military commission judge has inherent authority as the presiding officer to affect a preferred outcome despite the governing statute and regulations. However, as detailed below, the Military Judge made several errors in his explanation, interpretation, and application of international law and military law in reaching the conclusion that he did, in fact, have the authority to impose

[3] The Commission's treatment and application of U.C.M.J. "principles" in AE 033K is also directly contrary to the controlling conclusion of how principles of U.C.M.J. practice that are excluded from the M.C.A. and the M.M.C. must be treated (i.e., disregarded as inapplicable) by military commission judges in military commission cases. *See United States v. Mohammad*, 398 F. Supp. 3d 1233 (U.S.C.M.C.R. 2019) (concluding that Congress never intended for the five-year limitation period in Article 43, U.C.M.J., to apply to military commissions).

administrative credit against an approved sentence based on a claim of illegal pretrial punishment prior to charges being sworn or referred in the Accused's case.

A. Neither the International Law Principle of *Jus Cogens,* Nor Any Related International Law Treaty, Creates an Individual, Justiciable Right on Behalf of a Law-of-War Detainee Subsequently Charged with Criminal Offenses Under the 2009 M.C.A. To Obtain Sentencing Relief or Administrative Sentencing Credit from the Military Judge for Allegations of Pretrial Punishment.

In AE 033K, the Commission effected a remedy that (1) usurps statutory and rule-based authority allocated to other actors within the military commission system, and (2) is premised on an incorrect interpretation of international law and an incorrect understanding of the extent to which international law may form the basis of a remedy within the United States judicial system.

1. The International Treaties Cited in AE 033K Cannot Be the Legal Basis for the Unilateral Judicial Remedy of Pretrial Punishment Credit.

The Commission stated that the Accused possesses certain individual rights articulated in specific international treaties, *jus cogens*, and principles of customary international law, and suggested that these rights were violated by certain aspects of the Accused's detention as a law-of-war detainee in the CIA's former RDI Program before his transfer to Guantanamo in September 2006. *See* AE 033K at 7–18. The Commission then concluded that these individual rights inure to the benefit of the Accused in his later criminal prosecution, despite U.S. domestic federal law to the contrary, as well as myriad judicial opinions and rulings holding that international treaties or norms do not, of their own force, constrain the U.S. Constitution or other more recently enacted domestic law. *See Al-Bihani v. Obama*, 619 F.3d 1, 10 (D.C. Cir. 2010) (Kavanaugh, J., concurring in denial of rehearing en banc) (observing that "international-law norms are not domestic U.S. law in the absence of action by the political branches to codify those norms.") (citing *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938)).

Subsequently, this Commission found that as a result of its "broad discretion," an undefined "responsibility . . . to insure . . . adherence to basic notions of fundamental fairness,"

and a general "applicability of Article 13 U.C.M.J. principles" to this case, the Military Judge has the "inherent authority" to craft a novel procedural remedy, never granted by Congress or the Executive Branch, whereby the Military Judge may unilaterally award sentencing credit as a remedy for allegations of mistreatment while the Accused was being detained by a separate government agency pursuant to the law of war. *See id.* at 29, 31–33, 42. Notably, the Commission discussed its self-imposed duty to ensure what it considers to be the fairness of the final sentence, and its perception of the treatment the Accused alleges he was subjected to, within the context of the Accused's time in the former RDI Program.

Moreover, the Commission's reliance on non-self-executing international treaties is inconsistent with the long-established treatment and understanding of international law by U.S. courts, including courts that are controlling over this Commission. Although it included references to other inapplicable international human rights law treaties,[4] the Commission primarily relies on two international treaties, the Convention Against Torture ("CAT") and Common Article 3 of the 1949 Geneva Conventions ("CA3"), as the legal basis providing judicial authority for the potential award of sentencing credit for an allegation of pretrial punishment while the Accused was in a law-of-war detention status. *See* AE 033K at 8–9, 11–13.

Non-self-executing treaties, such as the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights ("ICCPR") and the CAT, all cited by the Commission in AE 033K, are not binding "law" for a court to consider, apply, or rely upon. *Medellin v. Texas*, 552 U.S. 491, 505 (2008) (explaining that "while treaties may compromise international commitments . . . they are not domestic law unless Congress has either enacted implementing statutes or the treaty itself conveys an intention that it be 'self-executing' and is ratified on these terms") (quotations and citations omitted). For instance, as noted above with

[4] Examples of other inapplicable treaties referenced by the Commission include the International Covenant on Civil and Political Rights and the Universal Declaration of Human Rights.

respect to the CAT, the United States has indicated through its declarations, reservations, and understandings that it does not consider itself bound by the instrument in full. *See* 136 CONG. REC. S17,486–01, S17,492, S17,494–01 (1990). Furthermore, it is a long-standing principle that non-self-executing treaties require implementing legislation before a court may apply them in a given case. *See Sosa v. Alvarez-Machain*, 542 U.S. 692, 734–35 (2004) (concluding "the United States ratified the [ICCPR] on the express understanding that it was not self-executing and so did not itself create obligations enforceable in the federal courts"); *Pierre v. Gonzales*, 502 F.3d 109, 119 (2d Cir. 2007) (explaining the CAT is non-self-executing); *Singh*, 398 F.3d at 404 n.3 (same); *see also Medellin*, 552 U.S. at 521–23 (explaining that non-self-executing treaties and international tribunal judgements "do[] not of [their] own force constitute binding federal law" and noting that "Congress knows how to accord domestic effect to international obligations when it desires such a result"); *United States v. Li*, 206 F.3d 130 (2d Cir. 2003) (refusing to dismiss the indictment or remove the death penalty as a possible punishment despite violation of the non-self-executing Vienna Convention on Consular Relations); *Al Odah v. United States*, 321 F.3d 1134, 1146 (D.C. Cir. 2003) (Randolph, J., concurring), *rev'd on other grounds sub nom.*, *Rasul v. Bush*, 542 U.S. 466 (2004) ("Treaties do not generally create rights privately enforceable in the courts. Without authorizing legislation, individuals may sue for treaty violations only if the treaty is self-executing."); *Al-Bihani v. Obama*, 619 F.3d 1, 10 (D.C. Cir. 2010) (Kavanaugh, J., concurring in denial of rehearing *en banc*) (observing that "international-law norms are not domestic U.S. law in the absence of action by the political branches to codify those norms.") (citing *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938)).

a. The Convention Against Torture

The United States signed the CAT on 18 April 1988, and the Senate provided its advice and consent to ratification on 21 October 1994. The Senate's advice and consent was subject to specific reservations, understandings, and declarations ("RUDs"). *See* 136 CONG. REC. S17,486-01, S17,492, S17,494-01 (1990) (explaining that the Senate specifically declared that Articles 1–

16 of the CAT were not self-executing). *Id*. The CAT is not self-executing; federal legislation is ultimately required to implement and give effect in federal courts to the provisions and rights enumerated in the CAT. *See Medellin v. Texas*, 552 U.S. at 508, 525 (citing *Igartuna-De La Rosa v. United States*, 417 F.3d 145, 150 (1st Cir. 2005) (en banc)); *see also Foster v. Neilson*, 27 U.S. (2 Pet.) 253 (1829), *overturned in part, on another grounds, United States v. Percheman*, 32 U.S. 51 (1883); *Pierre v. Gonzales*, 502 F.3d 109, 119–20 (2d Cir. 2007) (explaining that "the CAT is not self-executing; by its own force, it confers no judicially enforceable right on individuals"); *Singh v. Ashcroft*, 398 F.3d 396, 404 n.3 (6th Cir. 2005); *M.C. v. Bianchi*, 782 F. Supp. 2d 127 (E.D. Pa. 2011). Thus, Articles 1–16 of the CAT itself confer no substantive or justiciable rights on the Accused in this Commission. To date, only Articles 3, 5, and 7 have been implemented domestically.[5] Further, Articles 3, 5, and 7 deal solely with issues of non-refoulement, jurisdiction, and extradition,[6] and none of these three articles, as currently implemented under U.S. domestic law, provide a legal basis for the judicial reduction of a criminal sentence under the facts of this Commission. Therefore, neither the Accused nor this Commission can rely on the CAT, a non-self-executing treaty, to unilaterally award judicial relief from an otherwise properly imposed sentence in this or any other U.S. court. *See, e.g.*, *Medellin*, 552 U.S. at 504; *Pierre*, 502 F.3d at 119–20; *Singh*, 398 F.3d at 404 n.3.

Courts have also routinely held that even when a self-executing treaty (which the ICCPR and the CAT are not, *see Medellin*, 552 U.S at 522 n.12), and other legislation conflict,[7] the law

[5] Committee Against Torture, Consideration of Reports Submitted by States Parties Under Article 19 of the Convention, Pursuant to the Optional Reporting Procedure, United States of America, U.N. Doc. CAT/C/USA/3–5, Aug. 12, 2013. Pages 5–35 of the report provide a discussion on U.S. federal statutes and case law which implement Articles 3, 5, and 7 as outlined in CAT Articles 1–16.

[6] Articles 5 and 7 of the CAT were implemented as part of U.S. domestic law by the enactment of 18 U.S.C. § 2340A (1994). Article 3 was implemented by the enactment of the Foreign Affairs Reform and Restructuring Act, Pub. L. No. 105-277, § 2242, 112 Stat. 2681 (1998).

[7] To be clear, the M.C.A. and the ICCPR and CAT do not conflict, and nothing in either treaty would, in any event, require credit for an allegation of pretrial punishment as applied to a period of detention experienced by an AUEB. However, even if the Commission views either treaty as requiring something that the M.C.A. and R.M.C. 1001(g) expressly do not allow, thus

enacted "last in time" controls.[8] The 2009 M.C.A. and the M.M.C. (which implements the statute) postdate the CAT and are therefore the "latest expression of the federal government's sovereign will" on the subject. *Kappus*, 337 F.3d at 1057. Not only does the 2009 M.C.A. not provide for sentencing credit for AUEBs for the duration or nature of law-of-war detention, R.M.C. 1001(g) expressly precludes such sentencing credit. Indeed, R.M.C. 1001(g) plainly denies a military judge the authority to categorize the detention of unprivileged alien enemy belligerents as "pretrial confinement" for purposes of awarding sentencing credit, leaving the procedural remedies available for post-capture treatment claims brought in a future criminal prosecution to mitigation and extenuation at sentencing and in clemency.

The existence of statutory provisions, 18 U.S.C. §§ 2340–2340A, which define and criminalize the act of torture, similarly do not create an individual cause of action or rights that are cognizable to the Accused in this Commission or any other court. Rather, these provisions support the conclusion that the proper remedies for a violation of international law norms are separate government action brought against the alleged violators or injunctive relief to stop the alleged conduct. But respectfully, the existing statutes (as the only applicable law on the subject)

---

being in conflict, the M.C.A. and R.M.C. would control as a matter of U.S. statutory law. *See Kappus v. Comm'r of Internal Revenue*, 337 F.3d 1053, 1057 (D.C. Cir. 2003) (noting that "[w]hen a statute conflicts with a treaty, the later of the two enactments prevails over the earlier under the last-in-time rule").

[8] *See Whitney v. Robertson*, 124 U.S. 190, 194 (1888) (stating that if a statute and a treaty "are inconsistent, the one last in date will control the other: provided always the stipulation of the treaty on the subject is self-executing"); *Owner-Operator Indep. Drivers Ass'n v. United States DOT*, 724 F.3d 230, 233–34 (D.C. Cir. 2013) (observing that "[t]he Constitution places treaties and federal statutes on equal legal footing—both are 'the supreme Law of the Land.' Courts therefore approach conflicts between treaties and statutes the way they would a conflict between two treaties or two statutes: the more recent legal pronouncement controls") (citation omitted); *Maqaleh v. Gates*, 604 F. Supp. 2d 205, 234–35 (D.D.C. 2009) (discussing the 2006 M.C.A. and stating "[b]ut whatever treaties or norms might otherwise find their way into domestic law, the M.C.A. unambiguously, and subsequently, removed federal court jurisdiction to consider habeas cases filed by petitioners such as these . . . the last-in-time enactment of M.C.A. § 7(a) overrides the international law principles on which petitioners rely, and hence his international law arguments do not provide a separate means for testing the legality of his detention"); *Fund for Animals, Inc. v. Kempthorne*, 472 F.3d 872, 878 (D.C. Cir. 2006) ("[T]he Supreme Court has long recognized that a later-enacted statute trumps an earlier-enacted treaty to the extent the two conflict. This is known as the last-in-time rule.").

do not provide a basis for a judicially imposed reduction in sentence for an Accused based on alleged violations of the otherwise non-self-executing treaty between the United States and other states. *See Matta-Ballesteros v. Henman*, 896 F.2d 255, 261 n.7 (7th Cir. 1990) ("The remedy, however, for violations of the due process clause during pre-trial detention is not the divestiture of jurisdiction, but rather an injunction or money damages.").

Additionally, *United States v. Mohammad*, a military commission case arraigned in May 2012, has already considered and rejected arguments that provisions of the CAT have any bearing or application to military commission proceedings. *See* Order: Defense Motion To Dismiss Because *Amended* Protective Order #1 Violates the Convention Against Torture at 4 (AE 200II) (Mil. Comm'n Dec. 16, 2013) (Pohl, J.) (noting that "the Senate declared Articles 1–16 of the Treaty was [*sic*] not self-executing" and rejecting any right to relief for the Accused under the CAT).[9] Like this Commission, the *Mohammad* commission also "accept[ed], for purposes of [the instant] motion, [that] torture is prohibited as a *jus cogens* norm of customary international law." *Id.* at 5. However, the *Mohammad* commission then correctly explained that "[t]his legal fact has no impact on this ruling. Customary international law norms, like non-self-executing treaties, are not part of domestic U.S. law. Absent implementing legislation, international norms . . . are not a part of the fabric of the law enforceable by federal courts . . . ." *Id.* (internal citations omitted).

[9] *See, e.g.*, John B. Bellinger, III, Legal Adviser, U.S. Dep't of State, Opening Remarks, U.S. Meeting with U.N. Committee Against Torture, Geneva, Switzerland, May 5, 2006, in 2006 DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 405, 407 (noting that the law of armed conflict before the CAT already prohibited torture and that "[a]t the conclusion of the negotiation of the Convention, the United States made clear 'that the convention . . . was never intended to apply to armed conflicts . . . .' The United States emphasized that having the Convention apply to armed conflicts ''would result in an overlap of the different treaties which would undermine the objective of eradicating torture.'' [U.N. Doc. E/CN.4/1984, March 9, 1984]") (amendments and insertions shown in the DIGEST); U.N. Human Rights Committee, Summary Record of the 1405th Meeting, U.N. Doc. CCPR/C/SR.1405, at 6–7 (¶ 20) (Apr. 24, 1995) (reflecting explanation by Department of State Legal Adviser Conrad K. Harper that the ICCPR "was not regarded as having extraterritorial application").

b. Common Article 3 of the 1949 Geneva Conventions

In AE 033K, the Commission also discussed the applicability of CA3 of the 1949 Geneva Conventions, which the United States has signed and ratified. *See* Geneva Convention III art. 87, Aug. 12, 1949. The Commission asserted that the 1949 Geneva Conventions "afford judicially-enforceable individual rights to detainees in military custody" and that Common Article 3 of the same convention "prohibits torture at any time and in any place in an armed conflict not of an international character." AE 033K at 11. The Commission found that CA3 provided, on its own, an additional legal basis for the Commission's judicially devised, unilateral remedy to provide sentencing credit for anything a military judge alone deemed to violate CA3.

As noted above, regardless of the question of the application of CA3 or any other international treaty provision to an individual accused facing trial by military commission governed by the M.C.A., the conditions of confinement for persons detained by the DoD, including the Accused, met or exceeded, and continue to meet or exceed, all obligations or requirements under CA3 (as well as the CAT), as evidenced by multiple reviewing officials.

Moreover, irrespective of the conditions of the Accused's confinement, the M.C.A. specifically provides that "no alien unprivileged enemy belligerent subject to trial by military commission under this chapter may invoke the Geneva Conventions as a basis for a private right of action" before a commission. 10 U.S.C. § 948b(e). The Commission fairly stated that CA3 "is widely regarded as establishing the most fundamental guarantees of humane treatment for all persons in all conflicts," AE 033L at 12, and later cited *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006), for the inference that CA3 applies of its own force to the United States' conflict with al Qaeda.

The Government does not dispute this basic framing of CA3's place in the law of war. But the Supreme Court's conclusions in *Hamdan* do not apply *a fortiori* to the Accused as a basis for the Commission's own judgment on actions that are alleged to have violated CA3 and then used to create the novel remedy of sentencing credit under an illegal pretrial punishment

theory imported from the court-martial context governed by the inapplicable U.C.M.J.[10] The *Hamdan* Court simply found that the military commissions created by the Executive Branch and existing at that time did not comply with a CA3 requirement that they be "regularly constituted." *See Hamdan*, 548 U.S. at 632. That determination did not create a basis to manufacture a third (judicial) remedy where two subsequent statutes specifically enacted in response to *Hamdan* and their implementing regulatory remedies already exist to vindicate whatever rights under CA3 might inure to The Accused.

This principle is further illustrated by analogy to a domestic criminal law setting. For example, a violation of an individual right under the Fourth Amendment does not automatically lead to the windfall of suppression, let alone a sentence reduction, where the conviction or sentence is otherwise supported by legal and competent evidence in a procedurally fair trial. *See, e.g.*, *Hudson v. Michigan*, 547 U.S. 586, 597–98 (2006) (observing that the Court could not "assume that exclusion in this context is necessary deterrence simply because we found that it was necessary deterrence in different contexts and long ago" and further noting the availability of other remedies, such as a civil lawsuit, to deter alleged police misconduct); *Haring v. Prosise*, 462 U.S. 306, 321–22 (1983) (describing an alleged Fourth Amendment violation claim as "irrelevant to the constitutionality of [the defendant's] criminal conviction" and holding that by pleading guilty a defendant does not necessarily waive separate lawsuits to recover from Fourth Amendment violations). Similarly, the Accused here is not entitled to the windfall of a sentence unilaterally reduced by a military judge where the claimed violation of a right has nothing to do with his guilt and where he has already been convicted pursuant to his own admissions and pleas in a fair proceeding.

[10] *See United States v. Mohammad*, 398 F. Supp. 3d at 1249 ("Congress knew how to make the U.C.M.J. applicable to military commissions when it expressly did so elsewhere in the very same law. . . . [B]ecause Congress generally acts intentionally when it uses particular language in one section of a statute but omits it in another, the absence of any reference to military commissions" in an article of the U.C.M.J. "is significant") (citations and quotations omitted).

Even if CA3 applied of its own force, military commission proceedings fully accord with CA3. The proceedings do not prevent the Accused from raising issues regarding the conditions of his confinement. In fact, the Commission properly identified the critical threshold question of whether any alternative remedial process exists. *Klay v. Panetta*, 758 F.3d 369, 373 (D.C. Cir. 2014) (explaining that a court should consider "whether any alternative, existing process for protecting the interest amounts to a convincing reason for the Judicial Branch to refrain from providing a new and freestanding remedy"). Contrary to the Military Judge's assertion that there are no other avenues of redress available to the Accused,[11] however, the R.M.C. already expressly provide the Accused with two "avenues of redress"—as a matter in mitigation during sentencing, *see* R.M.C. 1001(b), and as a matter the Accused can submit to the Convening Authority for clemency, *see* R.M.C. 1105, 1107.

Nothing in CA3 or cited by the Commission suggests or requires, in what is otherwise a fair, impartial, and "regularly constituted court" that affords "all the judicial guarantees which are recognized as indispensable by civilized peoples," that a military judge take unilateral action in changing a sentence pronounced by such a court. The aspect of CA3 that "applies" to military commissions as indicated by the Supreme Court in *Hamdan* is the *procedural* aspect of a fair and "regularly constituted court," which this commission satisfies without the military judge putting a thumb on the scale. *See* 2019 M.M.C., I-1 (declaring that the M.C.A. and M.M.C. "extend to the accused all the judicial guarantees which are recognized as indispensable by civilized peoples as required by Common Article 3 of the Geneva Conventions of 1949."). The substantive, post-capture treatment part of CA3 exists as a legal requirement on a *party* to the treaty, but—regardless of whether the United States did or did not violate that aspect with respect to the Accused during any portion of his law-of-war detention—it in no way creates an *individual* right

[11] *See, e.g.*, AE 033K at 42 (concluding "this Military Judge has the inherent authority to grant a remedy in the form of administrative sentencing credit for abusive treatment amounting to illegal pretrial punishment, *especially when no other remedy is available*") (emphasis added).

that is judicially enforceable in a later, CA3-compliant military commission. Respectfully, that is simply not how international law works.

2. Non-Self-Executing Treaties and International Law Do Not Empower the Military Judge To Devise a Remedy Prohibited by Law

As noted above, customary international law norms "are not part of the fabric of the law enforceable by federal courts." *Al-Bihani v. Obama*, 619 F.3d at 6 (Brown, C.J., concurring); *id.* at 17 (Kavanaugh, J., concurring) (citing *Erie R.R. Co v. Tompkins*, 304 U.S. 64 (1938)); *id.* at 33 ("[I]t is clear that customary-international-law norms, like non-self-executing treaties, are not part of domestic U.S. law. Congress has incorporated customary international law into domestic U.S. law on numerous occasions, including in statutes related to war. Thus, when Congress does not act to incorporate those norms into domestic U.S. law, such non-incorporation presumably reflects a deliberate congressional choice."). International law, whether in the form of treaties or custom, is not binding on domestic courts or the Executive Branch where there is domestic legislation that addresses the law in question, particularly where the legislation post-dates an otherwise applicable treaty. Congress may "shut the door to the law of nations" either "explicitly, or implicitly by treaties or statutes that occupy the field." *Alvarez-Machain*, 542 U.S. at 731. "While 'international law' is part of this nation's laws, international law must give way when it conflicts with or is superseded by a federal statute . . ." *United States v. Howard-Arias*, 679 F.2d 363, 371 (4th Cir. 1982) (citing *The Paquete Habana*, 175 U.S. 677 (1900)). *See also TMR Energy Ltd. v. State Prop. Fund of Ukr.*, 411 F.3d 296, 302 (D.C. Cir. 2005) (noting that "[n]ever does customary international law prevail over a contrary federal statute"); *Barrera-Echavarria v. Rison*, 44 F.3d 1441, 1451 (9th Cir. 1995), *cert denied*, 516 U.S. 976 (1995) (citing *The Paquete Habana*, 175 U.S. at 700, and citing *Alvarez-Mendez v. Stock*, 941 F.2d 956, 963 (9th Cir. 1991)); *accord Oliva v. U.S. Dep't of Justice*, 433 F.3d 229, 236 (2d Cir. 2005) (observing that "clear congressional action trumps customary international law"); *Bradvica v. INS*, 128 F.3d 1009, 1024 n.5 (7th Cir. 1997) ("[C]ustomary international law is not applicable in domestic courts where there is a controlling legislative act, such as the statute here."). Therefore,

before an accused can obtain relief by referring to customary international law, there must be a determination made regarding the existence or absence of controlling domestic legislation.

Here, the political branches, at the express invitation of the Supreme Court, *see Hamdan*, 548 U.S. at 655 (Kennedy, J., concurring), enacted controlling legislation for military commissions that the Executive and Legislative branches both determined satisfied CA3. Both the Executive and Legislative branches expressed their clear intent regarding the treatment of law-of-war detainees through the 2006 M.C.A. and the 2009 M.C.A. By enacting this legislation, the United States clearly conveyed its legal position and intent to occupy this area of domestic law regarding treatment of detainees, the status of the detention (law-of-war and *not* pretrial confinement) and the unavailability of sentencing credit premised on the status and conditions of an AUEB's detention. In addition, through implementation of the Rules for Military Commissions, the Secretary of Defense did not incorporate any provision of the R.C.M.s providing for sentencing credit for the nature and duration of any period of pretrial detention consistent with the concept of pretrial confinement embodied within the R.C.M.s (such as R.C.M. 305, 1101, 1102, and 1111), refused the application of pretrial punishment credit for the duration and conditions of law-of-war detention in R.M.C. 1001(g), and provided remedies for alleged pretrial punishment through extenuation and mitigation claims or requests for clemency.

Moreover, Congress explicitly excluded U.C.M.J. provisions that were not explicitly included. *See* 10 U.S.C. § 948b(c); *see also id.* § 948b(d)(2) ("Other provisions of chapter 47 of this title shall apply to trial by military commission under this chapter only to the extent provided by the terms of such provisions or by this chapter."). As a result, international law does not create an individual right to a remedy of sentencing credit for alleged improper pretrial punishment, the 2009 M.C.A. does not provide for it, and the Rules for Military Commissions do not provide for it. Congress and the Executive Branch clearly conveyed that while the U.C.M.J., the Rules for Courts-Martial, and the principles and practice related to illegal pretrial punishment apply to general court-martial proceedings involving members of our own armed forces, they do

not apply to military commissions under the 2009 M.C.A. Where governing laws and regulations do not expressly provide for the exercise of the judicial authority contemplated, it should not be presumed to exist. *See Tippit v. Wood*, 140 F.2d 689, 692 (D.C. Cir. 1944) ("But [the court] cannot wrest once the law to [its] authority and decide this case according to sympathy rather than the law.").

Ultimately, where Congress has enacted, and the President has signed, legislation addressing this issue, the Commission may not import emerging *jus cogens* norms to grant itself the power to impose an additional, non-statutory or rule-based form of relief to an AUEB in a military commission. As has always been true, and remains true now, the Accused is not precluded from putting on evidence regarding his treatment in CIA custody before a neutral factfinder and in a fair and public trial, as he may submit matters in extenuation and mitigation during the sentencing phase. Additionally, beyond what any federal civilian defendant would be entitled to do, the Accused may also include all the information and claims of mistreatment in a request for clemency directed toward the Convening Authority. However, as the *Mohammad* commission explained, military commissions are "without jurisdiction, as established in the [M.C.A.], to rely on customary international law to grant any relief" to the Accused. *See* AE 200II, *Mohammad.*

B. The Outrageous Government Conduct Doctrine Is Not Applicable and Provides No Sources of Rights.

As the Commission noted, "[a]n illegal arrest, without more, has never been viewed as a bar to subsequent prosecution, nor as a defense to a valid conviction." AE 033K at 18 (citing *Frisbie v. Collins*, 342 U.S. 519 (1952); *Ker v. Illinois*, 119 U.S. 436 (1886)). The Commission nevertheless cited *United States v. Toscanino*, 500 F.2d 267, 269 (2d Cir. 1974), and stated that the U.S. Court of Appeals for the Second Circuit created an exception to the *Ker-Frisbie* doctrine. The Government respectfully requests that the Court reconsider its application of the "outrageous government conduct" doctrine to the present case to correct a misapprehension of

the law. *All Assets Held at Bank Julius, Baer & Co.*, 308 F. Supp. 3d at 192–93 ("Justice may require revision where the Court . . . has made an error not of reasoning but of apprehension.").

The Government understands AE 033K as citing "outrageous government conduct" as a source of rights that an accused can assert against the government for alleged misconduct. The Commission first notes that D.C. Circuit case law holds that, "the means used to bring a defendant before the court do not affect jurisdiction." AE 033K at 19. However, the Commission then suggests that there is a limited exception for certain cases. *Id.* (citing *United States v. Rezaq*, 134 F.3d 1121, 1130 (D.C. Cir. 1998)). The Commission cites *Toscanino* as an exemplar for the application of this type of an outrageous government conduct claim. *Id.*

The Commission has misapprehended the law on the outrageous government conduct doctrine and its application to the present case for two reasons. First, the doctrine is based in the Constitution's Due Process Clause, which does not apply to the Accused. Second, the doctrine is essentially defunct and pertains only to extremely limited situations, none of which apply here.

1. The Outrageous Government Conduct Doctrine Comes from the Due Process Clause, Which Does Not Apply to the Accused

First, the "outrageous government conduct" concept is rooted in the Due Process Clause, which has never been held to apply to unprivileged enemy belligerents like the Accused. The *Toscanino* Court acknowledged the root of its holding:

> Faced with a conflict between the two *concepts of due process*, the one being the restricted version found in *Ker-Frisbie* and the other the expanded and enlightened interpretation expressed in more recent decisions of the Supreme Court, we are persuaded that to the extent that the two are in conflict, the *Ker-Frisbie* version must yield.

Toscanino, 500 F.2d at 275 (emphasis added).

The applicability of the Fifth Amendment, and therefore the Due Process Clause, to various types of unique cases has been extensively litigated, and no court has ever held that it or general constitutional provisions apply to AUEBs such as the Accused. *See Johnson v. Eisentrager*, 339 U.S. 763, 784–85 (1950) ("If the Fifth Amendment confers its rights on all the world except Americans engaged in defending it, the same must be true of the companion civil-

rights Amendments . . . . Such extraterritorial application of [the Fifth Amendment] would have been so significant an innovation in the practice of governments that, if intended or apprehended, it could scarcely have failed to excite contemporary comment. Not one word can be cited. No decision of this Court supports such a view. None of the learned commentators on our Constitution has even hinted at it. The practice of every modern government is opposed to it."); *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990) ("'[T]he people' protected by the Fourth Amendment, and by the First and Second Amendments, and to whom rights and powers are reserved in the Ninth and Tenth Amendments, refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community"); *Kiyemba v. Obama*, 555 F.3d 1022, 1026–27 (D.C. Cir. 2009) ("Decisions of the Supreme Court and of this court . . . hold that the due process clause does not apply to aliens without property or presence in the sovereign territory of the United States."), *vacated and remanded*, 559 U.S. 131 (2010) (*per curiam*), *reinstated*, 605 F.3d 1046 (D.C. Cir. 2010); *Bostan v. Obama*, 674 F. Supp. 2d 9, 29 (D.D.C. 2009) ("The detainees at Guantanamo Bay, however, have no due process rights."); *United States v. Hamdan*, 801 F. Supp. 2d 1247, 1316–18 (U.S.C.M.C.R. 2011) ("Appellant cites to no precedent comprehensively extending equal protection or other constitutional due process rights to noncitizens tried by military commissions, either inside or outside the United States. Likewise, we find none."), *rev'd on other grounds*, *Hamdan v. United States*, 696 F.3d 1238 (D.C. Cir. 2012); *United States v. Ali*, 71 M.J. 256, 268 (C.A.A.F. 2012) ("Ultimately, we are unwilling to extend constitutional protections granted by the Fifth and Sixth Amendments to a noncitizen who is neither present within the sovereign territory of the United States nor has established any substantial connections to the United States."); *see also Paracha v. Trump*, 453 F. Supp. 3d 168, 236–37 (D.D.C. 2020) (denying habeas petition and ruling that the controlling law of the D.C. circuit is that the Due Process Clause does not apply to detainees at Guantanamo Bay).[12]

[12] *But see Ali v. Trump*, 959 F.3d 364 (D.C. Cir. 2020). Although the majority in *Ali* stated that "whether and which particular aspects of the Due Process Clause apply to detainees at

Thus, "outrageous government conduct" theory, based on constitutional legal concepts, has never been held to apply as a legal basis for relief in the form of judicially imposed sentencing credit to post-capture, law-of-war detention conditions. This is especially true when considering what little remains of the underlying rationale for the doctrine, as explained below.

2. The Underlying Rationales of the Due Process Clause, the Outrageous Government Conduct Doctrine, and Toscanino *Do Not Favor a Grant of Relief to the Accused in this Situation*

Even if the Constitution's Due Process Clause applied to the Accused, it would not grant him the relief of pretrial punishment credit that the Commission asserts through its application of *Toscanino* and the "outrageous government conduct" doctrine. The Due Process Clause only grants a defendant relief where the Government seeks to benefit directly from an alleged due process violation by using its fruits at trial. This case involves the use of a guilty plea and utilizes no evidence other than the Accused's plea. As such, the Accused has no basis for relief based upon his treatment while in the former RDI program.

Although not controlling, *United States v. Ghailani*, 751 F. Supp. 2d 502 (S.D.N.Y. 2010) (Kaplan, J.), is instructive as it is the most directly applicable precedent on this legal point and the facts relevant to the Accused's case. But other than a brief footnote citation on an unrelated matter, *cf.* AE 033K at 39 n.81, the Commission did not grapple with *Ghailani* or its treatment of *Toscanino*, which makes reconsideration appropriate to ameliorate AE 033K's inconsistency with case law. *See Libby*, 429 F. Supp. 2d at 47; *McCallum*, 885 F. Supp. 2d at 115.

The *Ghailani* court dealt with the very same allegations of mistreatment by Mr. Ghailani stemming from the CIA's former RDI Program as the Accused seeks to make here. Mr.

Guantanamo Bay largely remain open questions in this circuit," it rejected the petitioner's arguments that his ongoing detention violated substantive or procedural aspects of the Due Process Clause. *Id.* at 366. *See also id.* at 379–80 (Randolph, J., concurring in the judgment only) (observing the "litany of [District of Columbia] circuit cases since *Eisentrager* confirming that the Fifth Amendment does not apply to aliens without property or presence in the United States").

Ghailani, a member of al Qaeda, was indicted in the Southern District of New York and charged with conspiring with Usama Bin Laden and others to kill Americans abroad by, among other means, bombing the United States Embassies in Nairobi and Tanzania in which 224 people were killed on August 7, 1998. Years later, he was captured abroad by a foreign state and subsequently turned over to the CIA.

Mr. Ghailani was held and interrogated in the same RDI Program as the Accused. Also, like the Accused, he was then transferred to DoD custody at U.S. Naval Station Guantanamo Bay where he remained until June 2009, at which time he was transferred to the Southern District of New York for prosecution on the indictment. Mr. Ghailani moved for relief from the court on the ground that he was tortured by the CIA in violation of his rights under the Due Process Clause of the Fifth Amendment. *See id*. at 503. The trial judge denied his motion to dismiss, and in so doing offered pertinent analysis that this Commission did not discuss or consider in AE 033K. In denying Mr. Ghailani's motion, Judge Kaplan explained that:

> [R]elief against the government in a criminal case is appropriate if, *and only if*, a conviction otherwise would be a product of the government misconduct that violated the Due Process Clause. For only in such circumstances may it be said that the deprivation of life or liberty that follows from a criminal conviction flows from the denial of due process.

Id. at 505 (emphasis added). Significant in Judge Kaplan's ruling was the fact that the United States would not be using anything that Mr. Ghailani said in CIA custody or any fruits of any such statements. As such, Judge Kaplan found that:

> In consequence, any deprivation of liberty that Ghailani might suffer as a result of a conviction in this case would be entirely unconnected to the alleged due process violation. Even if Ghailani was mistreated while in CIA custody and even if that mistreatment violated the Due Process Clause, there would be no connection between such mistreatment and this prosecution.

Id. at 506.

The same analysis applies here, where the prosecution in this case has not used, and will not use, any evidence obtained or derived from the Accused's time in the same RDI Program. As such, there is no valid claim to relief based on a Due Process deprivation, and the Commission's citation of the outrageous government conduct doctrine, based on Due Process,

does not support the Commission's ultimate conclusion that it has the authority to impose a unilateral remedy of sentencing credit for illegal pretrial punishment imported from inapplicable aspects of the U.C.M.J.

Case law clearly articulates the very narrow situations where the outrageous government conduct doctrine remains alive, making the inapplicability of the doctrine to the present case readily apparent. Specifically, the doctrine can only grant relief in the form of the judicial denial of jurisdiction where the Government's Due Process violations themselves were the very reason the Government was able to bring the defendant into court on criminal charges. Generally, this arises in cases of entrapment where the defendant would not have committed any crime had it not been for the government's outrageous actions in inducing the defendant's conduct. *See, e.g.*, *Al Baluchi v. Esper*, 392 F. Supp. 3d 46, 65 (D.C. Cir. 2019); *United States v. Blood*, 435 F.3d 612, 629 (6th Cir. 2006). This type of outrageous government conduct claim is plainly inapplicable here, as the U.S. government had nothing to do with aiding or encouraging the Accused's serious terrorism offenses.

The other type of outrageous government conduct claim—the type which the Commission considered as support for its ruling in AE 033K—relates to objectionable or even patently illegal means by which a defendant is apprehended and brought into the United States' jurisdiction for prosecution. This is the specific subject of *Ker v. Illinois* and *Frisbie v. Collins*, which allowed jurisdiction and prosecution in those cases, and *Toscanino*, which may appear to create an exception to *Ker-Frisbie* and thus to allow a defendant immunity from prosecution in particularly egregious cases of government misconduct during the capture of such a defendant. However, the scope of the holding of *Toscanino* itself is limited to such an extent that it is inapplicable to the present case because it deals solely with capture and jurisdiction.

Moreover, courts' subsequent negative treatment of *Toscanino* make even clearer that that case was not a cudgel for a defendant to wield at will to attempt to gain judicially sanctioned windfalls to vindicate alleged Due Process violations sometime during or after capture. Rather, courts quickly, consistently, and firmly clarified *Toscanino*'s extremely limited applicability, if

they did not reject outright the continued viability of the case. *Ghailani* is the most potent example of such subsequent limitation.

The *Ghailani* court addressed *Toscanino* directly after its previously described due process analysis. The *Ghailani* court explained that, once a court has determined it has jurisdiction, the outrageous government conduct claim for post-capture treatment is irrelevant to considerations of due process *within the proceeding itself*. Specifically, the court explained:

> As an initial matter, *Toscanino* was concerned with "denying the government the fruits of its exploitation of any deliberate and unnecessary lawlessness on its part." To whatever extent it is authoritative, a subject discussed below, the case is limited to situations in which the alleged outrageous government conduct brought the defendant within the court's jurisdiction, and thus was a but-for cause of any resulting conviction, and compromised the fairness and integrity of the criminal proceedings. *There is no similar connection between Ghailani's alleged mistreatment while in CIA custody and this prosecution*. Hence, to whatever extent that *Toscanino* remains viable, it does not apply here.
>
> Second, as suggested already, it is doubtful that *Toscanino* remains authoritative. Several circuits have expressed doubt as to its continued viability in light of subsequent Supreme Court decisions. Moreover, the Second Circuit itself subsequently has relied heavily on the *Ker-Frisbie* rule in deciding a case very similar to the one currently before this Court. . . . *Brown* [*v. Doe*] confirms this Court's view that *Toscanino*, if it retains any force, does so only where the defendant's presence before the trial court is procured by methods that offend the Due Process Clause. Dismissal of the indictment in the absence of a constitutional violation affecting the fairness of the criminal adjudication itself is unwarranted.

Ghailani, 751 F. Supp. 2d at 507–08 (emphasis added) (citing *Brown v. Doe*, 2 F.3d 1236 (2d Cir. 1993). *See also Matta-Ballesteros*, 896 F.2d at 261 n.7 ("The remedy, however, for violations of the due process clause during pre-trial detention is not the divestiture of jurisdiction, but rather an injunction or money damages.").

Here, where the Accused has pleaded guilty to several serious offenses, he has already acknowledged a "fair trial" on the findings—with sentencing proceedings to follow, *see* AE 048—and acknowledged the propriety of this Commission to try him. *See* Transcript of R.M.C. 803 Hearing at 78–84, *United States v. Khan* (February 29, 2012). Thus, the unilateral judicial importation of U.C.M.J. sentencing practices and any inherent authorities military judges possess in the court-martial forum into the congressionally-created military commissions sentencing process has no support in the limited (if even still viable) holding in *Toscanino*.

Moreover, as noted above, the *Ghailani* court was far from alone in this interpretation of *Toscanino* and the ever-diminishing viability of *Toscanino*'s outrageous government conduct doctrine. *See United States v. Boyd*, 55 F.3d 239, 241 (7th Cir. 1995) ("The doctrine of outrageous governmental misconduct . . . has no support in the decisions of this court, which go out of their way to criticize the doctrine . . . . Today we let the other shoe drop, and hold that the doctrine does not exist in this circuit.") (quotations, citations, and alterations omitted); *United States v. Tucker*, 28 F.3d 1420, 1422–27 (6th Cir. 1994) (concluding that "such a defense simply does not exist"); *United States v. Santana*, 6 F.3d 1, 4 (1st Cir. 1993) ("[T]he doctrine is moribund; in practice, courts have rejected its application with almost monotonous regularity."); *see also United States v. Best*, 304 F.3d 308, 312–13 (3d Cir. 2002) ("Subsequent decisions of the Supreme Court indicate that there is reason to doubt the soundness of the *Toscanino* exception, even as limited to its flagrant facts. . . . In light of these cases, it appears clear that the *Ker-Frisbie* doctrine has not eroded and that the exception described in *Toscanino* rests on shaky ground."); *United States v. Mitchell*, 957 F.2d 465, 470 (7th Cir. 1992) ("Although the Second Circuit recognized an 'outrageous conduct' or 'shock-the-conscience' exception to the *Ker-Frisbie* doctrine in *United States v. Toscanino* . . . we have declined to follow the exclusionary rule grounds of *Toscanino* and have questioned its continuing constitutional vitality."); *United States v. Postal*, 589 F.2d 862, 874 n.17 (5th Cir. 1979) ("This circuit has declined to follow the *Toscanino* rationale, and its continuing validity is questionable after the intervening Supreme Court decision in *Gerstein v. Pugh*, 420 U.S. 103 (1975)") (citations omitted). Otherwise, courts have limited the doctrine strictly to the government participation context. *United States v. Gutierrez, Jr.*, 343 F.3d 415, 421 (5th Cir. 2003) (holding that a defendant claiming "outrageous government conduct," must demonstrate "both substantial government involvement in the offense and a passive role by the defendant."); *United States v. Blood*, 435 F.3d 612, 629 (6th Cir. 2006) ("To establish outrageous government conduct a defendant must show that "the government's involvement in creating his crime (i.e. the means and degrees of inducement) was so great that a criminal prosecution for the crime violates the fundamental principles of due

process.") (quotation marks omitted); *United States v. Garcia*, 411 F.3d 1173, 1181 (10th Cir. 2005) ("To succeed on an outrageous conduct defense, the defendant must show either (1) excessive government involvement in the creation of the crime, or (2) significant governmental coercion to induce the crime.") (citations and quotations omitted); *United States v. Padilla*, No. 04-60001, 2007 U.S. Dist. LEXIS 26077, at *11–13 (S.D. Fla. Apr. 9, 2007) ("The *only* instance where the claim may be properly invoked is within this governmental participation context.").

In sum, *Toscanino* is inapplicable, and outrageous government conduct is an extremely limited doctrine applicable only in situations not present in this case.

Here, the crux of the allegations raised by the Accused involves a U.S. intelligence agency attempting to thwart potential terrorist attacks and gain valuable intelligence to help win an ongoing armed conflict between al Qaeda and the United States. To view the conduct of an intelligence agency during a time of war through the same prism as that of a domestic law enforcement officer seeking evidence to be used in a federal prosecution is unwarranted and unparalleled in military and federal law and practice, further underscoring why the Commission should reconsider any ruling based even in part on this vitiated doctrine.

This argument should not be read, of course, to condone any mistreatment of detainees or prisoners, only to emphasize that it is not within the authority of a military judge to effect sentencing credit for any such mistreatment. This is especially true where, as here, the alleged mistreatment occurred prior to the Accused's transfer to DoD custody and control. Respectfully, moral and legal opposition to the Accused's treatment in law-of-war detention, however reasonable or warranted, does not support the importation of a judicial power that has been specifically excluded by both case law and rule. That is, it does not empower the Military Judge to construct an additional means for the Accused to attempt to reduce his confinement for violent crimes against innocent civilians—to include the deaths of 11 civilians and the attempted murder of 76 other innocent civilians. This is especially true where doing so contradicts precedent, the parameters established by Congress and the Secretary of Defense, and the confinement cap and procedures agreed to between the Accused and the Convening Authority in his voluntarily

entered pretrial agreement. The Commission's reliance on *Toscanino* and its widely rejected interpretation of the outrageous government conduct doctrine as a basis to exercise judicial power to change the Accused's sentence constitutes a misapprehension of the law and should be reconsidered.

C. The Military Judge's Inherent Power and Overall Duty Under the Military Commissions Act To Ensure a Fair Trial Does Not Support the Expansion of Jurisdictional Limitations or the Supplemental Application of Unenforceable International Law to Domestic Courts Governed by Applicable Domestic Statute.

1. A Military Commission Judge Is Bound by the Limits Imposed by Congress in the M.C.A.

The M.C.A. governs the appointment and inherent powers of military judges. Contrary to the Commission's ruling in AE 033K, military commission judges do not have "inherent" authority beyond the authority specifically provided in the 2009 M.C.A. *See Baker v. Spath*, No. 17-cv-02311, 2018 U.S. Dist. LEXIS 101622, at *41 (D.D.C. June 18, 2018) (Lamberth, J.) (ruling that a military commission judge may not go beyond powers enumerated to the judge in the 2009 M.C.A.). Section 948j(b) of the 2009 M.C.A. provides eligibility standards for appointment as a military judge and further states that such individual must be qualified under 10 U.S.C. § 826—that is, Article 26 of the U.C.M.J. Other provisions of the 2009 M.C.A. enumerate judicial powers. *See, e.g.*, 10 U.S.C. §§ 948m (empowering the military judge to excuse members), 948r (empowering the military judge to determine the voluntariness of a statement), 949a (empowering the military judge to determine the authenticity of evidence), 949e (empowering the military judge to grant continuances). However, military judges presiding over military commissions may not usurp authority delegated to other entities in the military commission system as described in the 2009 M.C.A. *See Baker*, 2018 U.S. Dist. LEXIS, at *41 (ruling that a military commission judge may not go beyond powers enumerated to the judge in the 2009 M.C.A.).

R.M.C. 801 provides military judges with the responsibility for ensuring the military commission proceedings are conducted in a fair and orderly manner. However, respectfully, this generalized responsibility related to *procedural* fairness does not empower a military judge to craft unprecedented substantive remedies in order to achieve a subjectively fair result. *See Baker*, 2018 U.S. Dist. LEXIS 101622, at *4. The Commission cited *Hampton v. United States*, 425 U.S. 484, 489 (1976), for the bare proposition that a trial judge possesses "oversight authority" in cases involving an alleged violation of constitutional rights. *See* AE 033L at 21, 37. However, *Hampton* actually undermines the Commission's reliance on the opinion. First, the *Hampton* court denied the defendant's claim that he was entrapped into committing the offense.[13] *Hampton*, 425 U.S. at 489–91. Second, the Court noted that the police conduct did not deprive the defendant of any right secured to him by the United States Constitution. *Id.* at 490–91. Perhaps most importantly, the Supreme Court explained that even where the defense of entrapment *is* available, that fact "is not intended to give the federal judiciary a chancellor's foot veto over law enforcement practices of which it d[oes] not approve." *Id.* at 490 (quotations and citations omitted). Rather, the Court explained that a defendant's criminal actions and criminal intent are separate and apart from any governmental violation of the defendant's rights after the crimes are committed (leaving aside the issue of using evidence illegally obtained against the defendant at trial, which does not exist in this case). The former are the subject of, and therefore the only actions appropriate for, the consideration of a court in a criminal prosecution that is designed to find the truth and vindicate society's interest in upholding the rule of law; the latter simply is not. *See Hudson*, 547 U.S. at 591 (warning against any expansion of the "substantial societal costs" of "setting the guilty free and the dangerous at large" for law enforcement conduct otherwise unrelated to a defendant's criminal conduct and not affecting the procedural fairness of a defendant's trial).

[13] As articulated above, entrapment-type claims of government misconduct or violation of a defendant's rights are wholly inapplicable in this case, where the Accused has pleaded guilty to several serious offenses years before any involvement by United States government officials.

Where Congress has felt the need to enumerate powers of a military judge for military commissions, it has done so in the M.C.A. If Congress had intended military judges to possess the unilateral power to impose sentencing credit for pretrial treatment based on an illegal pretrial punishment theory stemming from Article 13 of the U.C.M.J., it would have said so. *See Mohammad*, 398 F. Supp. 3d at 1249; *see also Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001) ("Congress, we have held, does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes."). Instead, Congress excluded any such language or provision in the M.C.A. evoking the spirit or principles of Article 13 on which the Military Judge relied in AE 033K. As the U.S. Court of Military Commissions Review ("U.S.C.M.C.R.") explained when ruling that Article 43 of the U.C.M.J.—or any of its principles—did not apply to military commissions, "[a] broad rule of statutory construction is where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Mohammad*, 398 F. Supp. 3d at 1249 (quotations and citations omitted).

In place of any Article 13-type considerations in the M.C.A, Congress delegated authority to the Executive Branch via the Secretary of Defense to provide for claims arising from post-capture treatment while an accused was in law-of-war detention status to be addressed via two separate and distinct remedies. As discussed above, these remedies are addressed by the rules implementing the M.C.A. and provide that post-capture treatment should be considered in mitigation by the members of the commission (just as would a jury in any federal court), *see* R.M.C. 1001(a)(2)(B), and by the Convening Authority in clemency, *see* R.M.C. 1105, 1107. A military judge's subjective assessment of the substantive fairness of a properly adjudged sentence does not provide a legal basis for straying from the plain meaning of the M.C.A. *See Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1749 (2020) (stating that "when the meaning of the statute's terms is plain, our job is at an end. The people are entitled to rely on the law as written, without fearing that courts might disregard its plain terms based on some extratextual

consideration"); *see also Carcieri v. Salazar*, 555 U.S. 379, 387 (2009); *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253–254 (1992); *Rubin v. United States*, 449 U.S. 424, 430 (1981). Absent express authority in the M.C.A., a military judge may not usurp the power to consider pretrial punishment claims and unilaterally impose a reduction in a sentence adjudged by the members of the commission simply by borrowing from the principles behind an inapplicable U.C.M.J. article. *See Baker*, 2018 U.S. Dist. LEXIS, at *41; *see also id.* at *39 (noting "the provisions and judicial interpretations of the U.C.M.J., 'while instructive,' are not of their 'own force binding on military commissions established under this chapter.' 10 U.S.C. § 948b(c). The Court does not interpret 'instructive' to mean that the U.C.M.J. may be used to create ambiguity in the text where none existed before.").

Like Articles 10 and 13, Article 48 of the U.C.M.J., was also excluded from the M.C.A. and R.M.C. Despite what appeared to be an obvious, inherent power of a military judge to find and hold a disruptive person in contempt at a military commission, the U.S. District Court for the District of Columbia ruled that a military commission judge does *not* have that power where the M.C.A. and R.M.C. grant that power to another specific entity—there, the members of a commission. *Baker*, 2018 U.S. Dist. LEXIS, at *41. Further, unlike contempt authority, which is expressly provided to a military judge in Article 48 of the U.C.M.J., the authority to impose sentencing credit for illegal pretrial punishment is not even provided to a military judge in Article 13. Rather, as the Military Judge correctly noted in AE 033K, that "authority" merely emanates from the principles underlying Article 13. AE 033K at 31. Yet, where the M.C.A. is silent as to a military judge's contempt authority while providing that authority to another entity, a military judge in a military commission does not have that authority. Concomitantly, military commission judges do not have the authority to reduce an accused's sentence, as that is specifically precluded by R.M.C. 1001(g) and, like the contempt authority, expressly provided by the M.C.A. to other entities—the members of this Commission (through mitigation and extenuation) and to the Convening Authority (through clemency).

Justice Kennedy's concurring opinion in *Hamdan v. Rumsfeld* emphasized the importance of resolving even issues arising from extraordinary cases "by ordinary rules" and extolled reliance on "standards deliberated upon and chosen in advance . . . ." 548 U.S. at 637 (Kennedy, J., concurring). Like the majority opinion, the concurrence found fault with the *Hamdan* military commission because it failed to conform to pertinent pre-existing rules requiring that procedures be uniform with court-martial procedures insofar as practicable and the military commissions be "regularly constituted." *Id.* at 638–55. Although the present case is convened under statutory authority that post-dates *Hamdan*, this issue, too, is governed by and should be decided by an ordinary rule. The ordinary rules—and sensible standards—controlling the issue before this Commission are found in the M.C.A. and, specifically, R.M.C. 1001(g) which precludes the sentencing credit awarded by the Military Judge in AE 033K. The authority by which this sensible rule was promulgated, and the rule itself, are part of a framework specifically enacted to address the Supreme Court's concerns in *Hamdan* about participating officers who may tend to substitute their discretion for the lawfully prescribed process. Noncompliance with this rule, however innocently explained, reflects disregard for the Secretary's lawful role in that framework and deviates from the "procedural rigor" the Supreme Court held was fundamental to military commissions' authority. *Id.* at 645. For adherence to pre-existing rules and respect for the distribution of lawful functions among different officers and bodies is essential to counteracting the "mere expedience and convenience" that invalidated the *Hamdan* commission. *Id.* at 640.

Simply put, the authority of military commission judges, inherent or otherwise, is not the same as the authority exercised by court-martial judges, and their respective authorities derive from distinctly different sources. Although in many respects military commissions under the M.C.A. share some common heritage with courts-martial under the U.C.M.J., military commissions are entirely distinct from, and ungoverned by, U.C.M.J. articles not otherwise incorporated into the M.C.A. This Commission's controlling superior court has specifically held as much. *See Mohammad*, 398 F. Supp. 3d at 1258 (holding that the military judge erred in

applying the U.C.M.J. statute of limitations provision to military commission offenses and explaining "Congress did not intend for that statute to govern military commissions").

Respectfully, authority on a substantive matter provided for in the U.C.M.J. and available to a court-martial judge, but absent from the M.C.A. and the R.M.C., demonstrates that a judge presiding over a military commission does not have that same legal authority. *Baker*, 2018 U.S. Dist. LEXIS, at *41.

2. The History and Current Text of the M.C.A. Does Not Provide Statutory Authority for a Military Judge To Award Pretrial Punishment Credit.

The 2006 M.C.A. and the 2007 R.M.C. were silent on pretrial punishment credit. Congress specifically chose not to include an analogue to Article 13, U.C.M.J. when drafting the 2006 M.C.A. Similarly, Congress specifically declined to include such a provision despite being implored to do so in hearings leading up to the 2009 M.C.A. In July 2008, a military commission convened under the 2006 M.C.A. found Salim Ahmed Hamdan guilty of five specifications of providing material support for terrorism and imposed a sentence of 66 months. Hamdan received administrative *Allen* credit for time served at Guantanamo Bay from the time that the President announced his determination that Hamdan was subject to trial by military commission until he was sentenced, which equaled sixty-one months and seven days; the military judge accordingly reduced the sentence to approximately five-and-a-half months.[14]

On 28 October 2009, President Obama signed the 2009 M.C.A into law. In implementing the 2009 M.C.A., and in accordance with its requirements, the Secretary of Defense issued the 2010 M.M.C. Unlike the R.M.C.s promulgated in the prior M.M.C. to implement the 2006 M.C.A., the 2010 M.M.C. specifically addressed the sentencing credit issue that Congress had again excluded from the 2009 M.C.A. (again, despite having heard requests to add a provision allowing sentencing credit). The 2010 M.M.C. stated that "[t]he physical custody of alien belligerents captured during hostilities does not constitute pretrial confinement

[14] Rpt. of Res. of Trl. 1 (Aug. 7, 2008).

for the purposes of sentencing and the military judge *shall not grant credit for pretrial detention*." 2010 R.M.C. 1001(g) (emphasis added). However, the 2010 M.M.C. did specifically highlight a legal remedy for an accused to raise allegations of adverse conditions of confinement during pretrial detention by stating that "[w]hile no credit is given for pretrial detention, the defense may raise the nature and length of pretrial detention as a matter in mitigation." 2010 R.M.C. 1001(c)(1), Discussion. Consequently, although the Commission attempted to distinguish confinement credit from pretrial punishment credit, *see* AE 033K at 37, in effect that effort amounted to an attempt to distinguish between the nature and length of pretrial detention. But R.M.C. 1001(c) must be read in conjunction with R.M.C. 1001(g). In so doing, it becomes clear that the prohibition on granting credit for pretrial detention includes both the nature *and* length of pretrial detention, as those are reserved for consideration by the members of the Commission as matters in mitigation.

As noted above, in 2009, Maj Frakt testified before Congress as it was considering amendments to the 2006 M.C.A. Maj Frakt implored Congress to codify and provide a legal basis for military commission judges to grant administrative sentencing credit for illegal pretrial punishment for individuals while in pretrial detention status. *See Proposals for Reform of the Military Commissions System: Hearing Before the Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the H. Comm. on the Judiciary*, 111th Cong. 98–103 (2009) (statement of David J. R. Frakt, Maj, USAFR). In passing the 2009 M.C.A., Congress rejected this specific recommendation. Congress did, however, include some of the amendments recommended by Maj Frakt and others who testified before Congress. *See* Jennifer K. Elsea, *The Military Commissions Act of 2009 (MCA 2009): Overview and Legal Issues* (CRS Report No. R41163) (2014), https://crsreports.congress.gov/product/pdf/R/R41163.[15] Thus, Congress's decision not to amend the 2009 M.C.A. in order to permit credit to be applied by a military judge to a convicted AUEB's sentence for pretrial confinement *or* pretrial punishment reflects a deliberate

[15] These amendments included, *inter alia*, expanded choice of defense counsel and enhanced protection against coerced statements of the accused. *Id*. at 22–30.

decision and proper exercise of legislative authority, which cannot simply be disregarded in favor of an amorphous claim of "inherent authority" completely missing from the text of the M.C.A. (and rejected by the court in *Baker*). The fact that in the 11 years that have followed Congress has made no effort to further amend the M.C.A. to include an allowance for pretrial punishment credit, coupled with the clear language in R.M.C. 1001(g), makes even more clear that the exclusion of a U.C.M.J. Article 13-type provision from the 2009 M.C.A. was not an "oversight." *See* AE 033K at 33–34.

Finally, it is significant that, as in court-martial and military commission practice, in federal district court, a defendant may raise matters in mitigation. *See* Fed. R. Crim. P. 32(i)(4)(A)(ii) (requiring a court, before imposing sentence, to "address the defendant personally in order to permit the defendant to speak or present any information to mitigate the sentence"). However, under the Federal Sentencing Guidelines, federal courts do not apply sentencing credit for allegations of pretrial punishment or government misconduct in violation of a defendant's rights. Downward departures or variances in the Sentencing Guidelines are merely the federal judges, as the sentencing authorities, exercising their authority to consider mitigation evidence, and are based in statutory authority granted to the judge, not on an ill-defined notion of "inherent authority." *See* 18 U.S.C. § 3553(b)(1) ("[T]he court shall impose a sentence of the kind, and within the range referred to [in the Guidelines] unless 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 . . . ."); *see also* Sentencing Guidelines, § 5K2.0, Commentary 3.(A) ("Subsection (a)(2) authorizes the court to depart if there exists an aggravating or a mitigating circumstance in a case under 18 U.S.C. § 3553(b)(1), or an aggravating circumstances in a case under 18 U.S.C. § 3553(b)(2)(A)(i) . . . ."). Such departures do not equate or amount to "administrative credit," but rather to what sentencing authorities, in the above example, federal judges, and the military commission in this case, are called to do in determining the appropriate sentence pursuant to established rules, in this case, R.M.C. 1001(c) and R.M.C. 1002—considering and assigning mitigating circumstances their due weight.

Seeking relief for alleged mistreatment in confinement from the sentencing court in the form of mitigation is consistent with long-established federal civilian practice. *See Koon v. United States*, 518 U.S. 81, 111–12 (1996) (noting that the district court did not abuse its discretion by considering the possibility of abuse in prison); *Al-Marri v. Davis*, 714 F.3d 1183, 1186–87 (10th Cir. 2013) (noting the trial court's discretion to consider mistreatment during pretrial confinement in determining the appropriate sentence under 18 U.S.C. § 3553(a)(2)(A)). As Article III courts provide relief for demonstrated illegal pretrial punishment by considering it in *adjudging* the appropriate sentence, it follows that similarly requiring an accused in a military commission to raise claims of prior mistreatment as a matter in sentence mitigation in no way violates a procedural or substantive right to which the Accused is entitled. And beyond the ability to raise his allegations before the sentencing authority, the Accused enjoys another right unavailable to defendants in federal district courts—the right to seek clemency from the Convening Authority. Thus, applying sentencing credit to allegations of pretrial punishment is a feature unique to courts-martial under the U.C.M.J., and may not be imported into the military commission system.

Recognizing the lack of textual legal authority to impose changes to a properly adjudged sentence, the Commission looked to military judges in the separate court-martial context and stated that "military courts have routinely invoked their 'inherent authority' to fashion appropriate relief for violations of Article 13 and other pretrial punishment violations." AE 033K at 33 (citing *United States v. Gregory*, 21 M.J. 952, 958 n.15 (C.M.R. 1986); *United States v. Suzuki*, 14 M.J. 491, 493 (C.M.A. 1983)). Respectfully, those cases simply cannot support the Commission's conclusion. First, *Gregory* stated that "[b]ecause restriction tantamount to confinement is in essence confinement, the basic provisions of [R.C.M.] 305 apply." 21 M.J. at 959. Thus, *Gregory* specifically grounded its conclusion in the statutory and regulatory schemes that apply exclusively to courts-martial, and which were specifically excluded from military commissions. *See* 10 U.S.C. § 948b(c)–(d) (2012).

Moreover, although the military judge in *Suzuki* granted administrative sentencing credit to the accused in that case, the Court of Military Appeals was primarily focused on correcting the Convening Authority's decision to ignore the military judge. *Id.* at 493. Although *Suzuki* addressed administrative credit for illegal pretrial punishment, the case it cited for support for the conclusion that it could grant a remedy for illegal pretrial punishment, *United States v. Bruce*, 14 M.J. 254, 256 (C.M.A. 1982), was expressly rooted in Article 13 of the U.C.M.J., rather than the "inherent authority" of a judicial officer. *See also Baker*, 2018 U.S. Dist. LEXIS, at *39 ("The provisions and judicial interpretations of the U.C.M.J., 'while instructive,' are not of their 'own force binding on military commissions established under this chapter.' The Court does not interpret 'instructive' to mean that the U.C.M.J. may be used to create ambiguity in the text where none existed before.").

Neither the 2009 M.C.A. nor the 2006 M.C.A. addressed the issue of pretrial punishment sentencing credit or directed the Secretary of Defense to promulgate a specific rule that allows such credit, despite Congress's awareness that this form of sentencing credit was an issue that the defense community wanted addressed in the revised 2009 M.C.A. The Secretary of Defense, in exercising the discretion granted him in the M.C.A., then declined to prescribe the type of rule that would allow a trial judge to take the type of action the Military Judge in this Commission nonetheless believes he has as a matter of inherent authority. *See* 10 U.S.C. § 948a(a) (directing the Secretary of Defense to submit the revised rules for military commissions no later than 90 days after the enactment date).

Considering this background, the application of U.C.M.J. Article 13 to the present case is demonstrably incorrect, especially as the U.S.C.M.C.R. has considered and rejected the importation of a U.C.M.J. provision to fill an assumed gap in the M.C.A. As noted above, in *United States v. Mohammad*, the military judge dismissed without prejudice certain charges referred against the accused on the basis that the statute of limitations had expired. *See* Ruling: Defense Motion To Dismiss Charges III and V as Barred by the Statute of Limitations (AE 251J), *United States v. Mohammad* (Mil. Comm'n Apr. 7, 2017). The military judge ruled that

Article 43, U.C.M.J. (10 U.S.C. § 843) applied to the accused at the time they committed the relevant offenses, imposing a statute of limitations of five years. *See id.* at 20–21. The government filed an interlocutory appeal.

On appeal, the U.S.C.M.C.R. reversed the military judge, holding that Article 43, U.C.M.J. did not apply to the accused's offenses. The court noted that "Congress knew how to make the U.C.M.J. applicable to military commissions when it expressly did so elsewhere in the very same law. . . . [B]ecause Congress generally acts intentionally when it uses particular language in one section of a statute but omits it in another, the absence of any reference to military commissions in Article 43 is significant." *United States v. Mohammad*, 398 F. Supp. 3d at 1249 (quotations and citations omitted). The court went on to hold that it could "infer that Congress did not intend for Article 43 to apply to military commissions," *id.*, and also noted that over the course of several amendments to the U.C.M.J., Congress never updated Article 43's five-year statute of limitations to encompass non-capital war crimes, *see id.* at 1250–51. The same logic applies here. There is no reference to military commissions in Article 13, U.C.M.J., even though Congress plainly knew how to reference military commissions in other U.C.M.J. provisions. Congress also amended the U.C.M.J. since the enactment of the 2009 M.C.A. and the promulgation of the 2010 M.M.C., *see, e.g.*, Military Justice Act of 2016, Pub. L. No. 114-328, 130 Stat. 2000 (2016), § 5001, *et seq.* Yet, it chose not to alter Article 13 to expand its application outside of courts-martial.

Respectfully, congressional silence on the specific issue of pretrial punishment sentencing credit regarding AUEBs should be interpreted as it is intended—that the Secretary's rule governs the field, and thus any administrative sentencing credit contemplated for award by the Military Judge in this instance, as a matter of law, may not be granted as a remedy by a military judge in a military commission.

3. Article 13 Does Not Codify Pre-Existing Judicial Powers To Grant Remedies Congress Failed To Provide in the 2009 M.C.A.

The M.C.A. expressly provides that it, not the U.C.M.J., sets forth the applicable crimes, procedures, and protections for its military commissions. Military commissions convened pursuant to the M.C.A. will apply the provisions of the U.C.M.J. only if (1) the M.C.A. expressly incorporates that specific provision of the U.C.M.J. or (2) the U.C.M.J. specifically states that one of its provisions applies to military commissions:

> Chapter 47 of this title [the U.C.M.J.] does not, by its terms, apply to trial by military commission excepted as specifically provided therein or in this chapter [the 2009 M.C.A.], 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.

10 U.S.C. § 948b(c); *see also id.* § 948b(d)(2) ("Other provisions of chapter 47 of this title shall apply to trial by military commission under this chapter only to the extent provided by the terms of such provisions or by this chapter."); R.M.C. 102(b) (same).

This inapplicability of the U.C.M.J. in military commissions is no accident, as it comports with the U.C.M.J.'s own provisions that only certain persons are subject to the U.C.M.J., *see* 10 U.S.C. § 802 ("Persons subject to this chapter"), and that courts-martial may only try those certain persons. *See* 10 U.S.C. § 803 ("Jurisdiction to try certain personnel"). However, AUEBs subject to trial by military commissions under the M.C.A., *see* 10 U.S.C. §§ 948a(7), 948c, are not subject to the U.C.M.J. *See* 10 U.S.C. § 802(a)(13) (providing that Chapter 47 of Title 10 applies to individuals who qualify as prisoners of war); *see also* 10 U.S.C. §§ 948a(4)–(7), 948c (exempting *privileged* belligerents from military commissions in accordance with the Third Geneva Convention). Rejecting the clear distinction between the two fora of military tribunals, and importing U.C.M.J. practices and authorities when convenient to arrive at a preferred conclusion, is not only legally incorrect, but also disregards the clear and purposeful policy decision of the Legislative and Executive branches to employ law-of-war military commissions (with all of the concomitant procedural characteristics of such courts) to prosecute and punish war crimes and other offenses committed by AUEBs in the conflict between al Qaeda and the United States. To base such a rejection of both law and policy on an

unspecified "inherent authority" of military judges in the wholly separate fora of courts-martial governed by the U.C.M.J., is legal error and should be reconsidered.

Applying the two possibilities described above for importation of U.C.M.J. provisions into M.C.A. military commissions, the "text, context, and legislative history" of Article 13 make clear that it is inapplicable to military commissions convened under the M.C.A. *See Musacchio v. United States*, 136 S. Ct. 709, 717 (2016) (citing *Reed Elsevier, Inc. v. Nuchnick*, 559 U.S. 154, 166 (2010)) (analyzing the text, context, and legislative history of a statute in interpreting it). Turning first to the text, Article 13 provides:

> Art. 13. Punishment prohibited before trial.
>
> 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 ensure his presence, but he may be subjected to minor punishment during that period for infractions of discipline.

10 U.S.C. § 813. As such, the text does not "provide specifically therein" that it applies to military commissions. *Compare* 10 U.S.C. § 813, *with id.* §§ 821, 828, 836, 846–47, 849, 881, 946a (specifically referencing military commissions). Indeed, Article 13 refers only to punishment of persons "being held for trial." Regardless, Article 13 is inapplicable to those detained not for trial, but as enemy belligerents under the law of war. *See United States v. Starr*, 53 M.J. 380, 382 (C.A.A.F. 2000) (holding Article 13 of the U.C.M.J. inapplicable when the intent is not to punish but to pursue "legitimate, operational, military purposes"). In *Starr*, the military judge conducted a two-part analysis considering whether there was "an intent to punish or stigmatize a person" and, if not, whether "the conditions [were] in furtherance of a legitimate, nonpunitive, government objective." *Id*. at 381.

The interrogation of AUEBs generally, and the Accused in particular, detained by the CIA pursuant to the law of war was not connected to law enforcement or future prosecution for any crimes. Rather, the Accused's detention focused on intelligence collection that could be used to stop future attacks and ensuring that AUEBs like the Accused were kept off the

battlefield to aid in the war against al Qaeda, not to punish.[16] These are exactly the types of "legitimate, nonpunitive government objective[s]" described in *Starr*.

The Accused was—and, despite proceedings continuing in this Commission, still is—being held as a law-of-war detainee. *See Hamdi v. Rumsfeld*, 542 U.S. 507, 518 (2004) ("The capture and detention of lawful combatants and the capture, detention, and trial of unlawful combatants, by 'universal agreement and practice,' are 'important incident[s] of war.' The purpose of detention is to prevent captured individuals from returning to the field of battle and taking up arms once again." (quoting *Ex parte Quirin*, 317 U.S. 1, 28, 30 (1942)); *Boumediene v. Bush*, 553 U.S. 723, 797 (2008) ("The law must accord the Executive substantial authority to apprehend and detain those who pose a real danger to our security.").

The fact that the Accused was convicted pursuant to a pretrial agreement in 2012 and now awaits sentencing does not transform his earlier law-of-war detention by the CIA (or, for that matter, by the DoD) as an AUEB into a period of pretrial confinement. At the time the Accused was held by the CIA and questioned regarding knowledge of upcoming operations by al Qaeda, the purposes of his detention were—and remain—the "legitimate, nonpunitive governmental objective[s]" of stopping future terrorist attacks, winning the war against al Qaeda, and removing the Accused from the battlefield where he presented a danger to the United States. *Starr*, 53 M.J. at 381. Case law concerning pretrial detention and the issue of sentencing credit for illegal pretrial punishment are simply not applicable to the Accused's situation here.

Hence, it would be inconsistent with the law of war, Supreme Court interpretation of the law of war, domestic statutory and regulatory schemes, and policy decisions by the Legislative and Executive branches in the execution of hostilities against al Qaeda to read judicial authority into the R.M.C. or the M.C.A. provisions related to pretrial confinement or punishment credit at sentencing. The Accused is lawfully held for reasons beyond ensuring his presence at trial and

[16] *See* SSCI Report at 11 (citing "DTS #2002-0371, [4]"), https://www.intelligence.senate.gov/sites/default/files/documents/CRPT-113srpt288.pdf (updated for release in 2014).

can continue to be so held until the cessation of hostilities. The Supreme Court has consistently recognized the principle that unlawful enemy combatants are subject to capture and detention as a result of their belligerent conduct and status, but ultimately may be subject to criminal charges, trial, and subsequent punishment. *See, e.g.*, *Quirin*, 317 U.S. at 30 (recognizing that, while lawful combatants may be captured and detained as prisoners of war, "[u]nlawful combatants [such as the Accused] are likewise subject to capture and detention, but *in addition* they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful") (emphasis added); *Hamdi*, 542 U.S. at 518 (observing that captivity in war is "neither revenge, nor punishment, but solely protective custody") (citation omitted); WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 788 (rev. 2d ed. 1920) (observing that "[i]t is now recognized that 'Captivity is neither a punishment nor an act of vengeance,' but 'merely a temporary detention which is devoid of all penal character'").

Again, the issue of the Accused's treatment in the CIA's former RDI Program is not irremediable as avenues of relief are available to the Accused for any rights purportedly violated by the United States. Conditions of confinement or treatment during time spent in law-of-war detention may properly be raised by the Accused as a factor in mitigation or through his clemency submissions. However, respectfully, it is simply improper to import without authority and apply an Article 13-type pretrial punishment credit remedy for the Accused when he has been held strictly in a law-of-war detention status during all times deemed relevant by the Commission (i.e., during CIA custody).

In AE 033K, the Commission traced the origins of Article 13 to suggest that "confinement itself was a form of penal servitude" and therefore a form of punishment. *See* AE 033K at 30–31 (citing *United States v. Bayhand*, 21 C.M.R. 84, 87–88 (1956)). But *Bayhand* did not consider law-of-war detention of enemy belligerents during ongoing hostilities, which is a crucial distinction in military law and the law of war.[17] Moreover, *Bayhand* was not the Court of

[17] Indeed, if such an interpretation of detention were correct in the law-of-war context, all of the Geneva Conventions would be upended, as they allow for the detention of privileged

Military Appeals' last word on the matter. In *United States v. Heard*, the C.M.A. cited *Bayhand* approvingly, but noted that such confinement prior to trial is not unlawful punishment if "compelled by a legitimate and pressing social need sufficient to overwhelm the individual's right to freedom." 3 M.J. 14, 20 (C.M.A. 1977). Indeed, the *Heard* court acknowledged that society has a weighty interest in avoiding the foreseeable criminal conduct of the accused, *see id.*, which is precisely one reason why the Accused is being held as a law-of-war detainee. *See Boumediene*, 553 U.S. at 797.

In AE 033K, the Commission seemed to recognize that law-of-war detention was indeed separate and distinct from pretrial confinement, but did not give that distinction its due weight. Rather, the Commission seemed to indicate that once criminal prosecution was even *contemplated*, the law-of-war ground for detention was immediately terminated. *See* AE 033K at 39–40 (identifying a single press release from President Bush indicating that some of the CIA detainees being transferred to DoD custody in 2006 would someday face trial for acts they committed, and referencing that statement as the time the Commission would presumably consider to be the beginning of pretrial confinement for purposes of illegal pretrial punishment credit). Respectfully, the Commission offered no legal support for the conclusion that the detention status of law-of-war detainees is legally and fully transformed to a pretrial confinement status the moment future prosecution is merely contemplated. *See al-Marri*, 714 F.3d at 1187 (noting that the defendant "was detained because the President declared him to be an enemy combatant; he was not detained for an alleged violation of the federal criminal code" and consequently was not eligible for any administrative credit for his time spent in law-of-war detention).

---

combatants as prisoners of war—without trial and for however long hostilities continue—despite such prisoners being "privileged," i.e., *immune from punishment*, for lawful acts of war they may have committed or supported. If detaining legal combatants as prisoners of war were somehow being "punished" by their mere detention, holding prisoners of war would be illegal punishment, and thus prohibited, under the law of war.

Indeed, the Commission's conclusion cannot be legally correct, as an AUEB such as the Accused may remain a law-of-war detainee throughout the duration of hostilities. Such law of war detention status is based on a government case-review and determination of his status as an AUEB and any current or future risk attendant to his potential release. A detainee's law of war detention status and the threat he poses as an enemy belligerent is not extinguished because the Executive Branch also seeks to prosecute and punish that AUEB for war crimes he may have committed during hostilities. This is because the "legitimate, nonpunitive governmental objectives" of removing an enemy belligerent from the battlefield remain as long as the detainee is considered an enemy belligerent and there is a battlefield to which he may return.[18] In short, law-of-war detention authority remains a valid and current basis for the Accused's detention, regardless of the instant military commission case. R.M.C. 1001(g) simply recognizes this to be the case, and by logical extension pretrial punishment credit for an AUEB who was not in "pretrial confinement," as defined under the U.C.M.J., cannot be appropriate.

7. <u>Conclusion</u>

The Government respectfully requests that the Commission reconsider its Ruling in AE 033K in order to correct clear error. In so doing, the Government requests that the Military Judge acknowledge upon further study of binding law that he does not have the authority to grant administrative credit for alleged pretrial punishment; rather, the Accused's rights to seek sentence relief for issues related to his conditions of confinement (including even his time detained exclusively as a law-of-war detainee) are afforded during both the extenuation and mitigation phases of sentencing, as well as during any clemency request the Accused may choose to make to the Convening Authority. The Government requests the Military Judge vacate his

[18] This problem is not merely hypothetical, as at least one AUEB who pleaded guilty before a military commission, was sentenced by that commission, and subsequently released has rejoined al Qaeda in the Arabian Peninsula as a senior leader and has publicly called for further attacks on Americans. *See* Ruling: DuBay Hearing Findings of Fact and Conclusions of Law at 13–14, ¶¶ 3.k–3.l, *United States v. Al Qosi* (July 11, 2019).

decision that a military judge presiding over a military commission has the authority to grant the pretrial punishment sentencing credit discussed in AE 033K.

8. Oral Argument

The Government does not request oral argument.

9. Witnesses and Evidence

The Government will not rely on any witnesses or additional evidence in support of this Motion.

10. Conference with Opposing Party

On 17 December 2020, the Government consulted with the Defense regarding the instant motion for reconsideration. The Defense stated that they object to the relief requested.

11. Additional Information

The Government has no additional information.

12. Attachments

A. Certificate of Service, dated 23 December 2020.

Respectfully submitted,

//s//

Walter H. Foster IV, LTC, USAR
Trial Counsel
Office of the Chief Prosecutor
Office of Military Commissions

Stephen J. Romeo, MAJ, USAR
Assistant Trial Counsel
Office of the Chief Prosecutor
Office of Military Commissions

Thomas O. Walker II, LT, JAGC, USN
Assistant Trial Counsel
Office of the Chief Prosecutor
Office of Military Commissions

ATTACHMENT A

CERTIFICATE OF SERVICE

We certify that on the 23rd of December 2020, we filed AE 033L, Government Motion To Reconsider AE 033K, Ruling, with the Office of Military Commissions Trial Judiciary and we served a copy on counsel of record.

//s//

Walter H. Foster IV, LTC, USAR
Trial Counsel
Office of the Chief Prosecutor
Office of Military Commissions

Stephen J. Romeo, MAJ, USAR
Assistant Trial Counsel
Office of the Chief Prosecutor
Office of Military Commissions

Thomas O. Walker II, LT, JAGC, USN
Assistant Trial Counsel
Office of the Chief Prosecutor
Office of Military Commissions