



**UNITED STATES
COURT OF MILITARY COMMISSION REVIEW**

UNITED STATES,)	ORDER
)	
Appellant)	LIFTING STAY
)	AFFIRMING PRIOR ORDERS
v.)	DENYING DISQUALIFICATION
)	AND RECUSAL MOTIONS
ABD AL RAHIM HUSSAYN)	SETTING ORAL ARGUMENT
MUHAMMAD AL-NASHIRI,)	
)	CMCR Case No. 14-001
Appellee)	
)	May 18, 2016

BEFORE:

**MITCHELL, PRESIDING Judge
KING, SILLIMAN Judges**

On October 15, 2014, appellant requested oral argument. On October 16, 2014, appellee replied and did not object to oral argument. Oral argument was scheduled for November 13, 2014.

On October 14, 2014, appellee filed a petition for a writ of mandamus and prohibition in the Court of Appeals for the District of Columbia Circuit asking that court to order the disqualification of Judges Weber and Ward, the two military judges then on the panel assigned to hear the appeal. Appellee contended their assignment by the Secretary of Defense to our court violates the Commander-in-Chief Clause and the Appointments Clause of the U.S. Constitution. *See* Appellee's Pet. for Writ of Mandamus & Prohibition, *In re Al-Nashiri*, No. 14-1203 (D.C. Cir. Oct. 14, 2014).

On the eve of the oral argument, the Court of Appeals for the District of Columbia Circuit granted a stay in the proceedings for the purpose of giving it sufficient opportunity to consider appellee's mandamus petition. Order, *In re Al-Nashiri*, No. 14-1203 (D.C. Cir. Nov. 12, 2014).

On June 23, 2015, the Court of Appeals for the District of Columbia Circuit denied the appellee's mandamus petition, remanded the case back to our court, and lifted that Court's stay. *In re Al-Nashiri*, 791 F.3d 71 (D.C. Cir. 2015); Order, *In re Al-Nashiri*, No. 14-1203 (D.C. Cir. June 23, 2015).

On June 26, 2015, we granted the requests to hold this case in abeyance pending possible presidential nomination and Senate confirmation of the military appellate judges. *See In re Al-Nashiri*, 791 F.3d at 86 (suggesting such nomination and confirmation would “put to rest any Appointments Clause questions”). On March 14, 2016, the Senate received the nominations of Judges Mitchell and King to our court.¹ The Senate confirmed Judges Mitchell and King on April 28, 2016,² and they were sworn as USCMCR judges on May 2, 2016.

On April 29, 2016, appellant requested that we lift the stay and reaffirm our previous orders. Our court issued several procedural orders involving stays, extensions, recusals, and assignment of judges as well as the following substantive orders: granting on September 25, 2014, appellant’s motion for leave to file an oversized brief; denying on October 6, 2014, appellee’s motion to recuse the two military judges on the panel, alleging they were assigned to the USCMCR in violation of the Appointments Clause, U.S. Const. art. II, § 2, cl. 2, and could not be freely removed in violation of the Commander-in-Chief Clause, *id.* cl. 1; denying on October 6, 2014, appellee’s motion to “terminate the devolution of its judicial responsibilities onto the Clerk of Court.”; denying on October 10, 2014, appellee’s motion to dismiss the appeal as untimely; and granting on October 20, 2014, appellant’s motion to attach documents to the appendix accompanying its brief.

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

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

¹ *See* 162 CONG. REC. S1474 (daily ed. Mar. 14, 2016) (indicating receipt of President’s nominations of Colonel Martin T. Mitchell, U.S. Air Force, and Captain Donald C. King, U.S. Navy, as appellate military judges on the United States Court of Military Commission Review).

² U.S. Cong., Nominations of 114th Cong., PN 1219, <https://www.congress.gov/nomination/114th-congress/1219> (Judge Mitchell), and PN 1224, <https://www.congress.gov/nomination/114th-congress/1224> (Judge King). (Encl. 1, 2)

³ The language of the 16 Cong. Rec. 2599 (daily ed. Apr. 28, 2016) is that the Senate confirmed the “Air Force nomination of Martin T. Mitchell, to be colonel” and “Navy nomination to Donald C. King, to be Captain.” It mirrors the closing phrase of PN 1219 and 1224.

the nomination and confirmation process. Moreover, the Senate previously confirmed Judge Mitchell to Colonel, and Judge King to Captain more than two years ago. On April 28, 2016, the Senate confirmed Judges Mitchell and King as appellate military judges in accordance with the Secretary of Defense's recommendation and the President's nomination. *See* note 2, *supra*.

Appellee's reading of Cong. Rec. 2599 is taken out of context. PN 1219 and 1224 contain the complete description of the nomination and confirmation process.

Title 10 U.S.C. § 973(b)(2)(A) provides, "Except as otherwise authorized by law, an officer to whom this subsection applies may not hold, or exercise the functions of, a civil office in the Government of the United States-- . . . (ii) that requires an appointment by the President by and with the advice and consent of the Senate." Appellate military judges are specifically authorized by law under 10 U.S.C. § 950f(b)(2), and 10 U.S.C. § 973(b)(2) does not prohibit Judges Mitchell and King from acting as appellate military judges.⁴ Title 10 U.S.C. §§ 950f(b)(2) and 973(b)(2) do not define the term "civil office", and there is no evidence that Congress intended commissioned officers appointed as appellate military judges to the Court of Military Commission Review to occupy a civil office.⁵ The 2009 Military Commissions Act states, "The Court shall consist of one or more panels, each composed of not less than three appellate military judges." 10 U.S.C. § 950f(a). Military commissions are used "to try alien unprivileged enemy belligerents for violations of the law of war and other offenses triable by military commission." 10 U.S.C. § 948b(a). Disposition of violations of the law of war by military commissions is a classic military function and Judges Mitchell and King do not occupy a "civil office" when serving as appellate military judges on the Court of Military Commission Review.

Therefore, it is hereby

ORDERED that appellant's April 29, 2016 request to lift our stay of litigation of appellant's appeals, which were initially filed on September 19, 2014 and March 27, 2015, is **GRANTED**.

⁴ Title 10 U.S.C. § 950f(b)(2) states, "The Secretary of Defense may assign persons who are appellate military judges to be judges on the Court. Any judge so assigned shall be a commissioned officer of the armed forces, and shall meet the qualifications for military judges prescribed by section 948j(b) of this title."

⁵ *See* Department of Defense Directive Number 1344.10, Political Activities by Members of the Armed Forces (Feb. 19, 2008) Section E2.3. (defining "civil office" as "A non-military office involving the exercise of the powers or authority of civil government, to include elective and appointed office in the U.S. Government, a U.S. territory or possession, State, county, municipality, or official subdivision thereof. This term does not include a non-elective position as a regular or reserve member of civilian law enforcement, fire, or rescue squad.").

ORDERED that appellant's motion that we reconsider the orders our Court previously decided in this case is **GRANTED**.

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

ORDERED that Judges Mitchell and King have considered appellee's May 16, 2016 motion to recuse. Judges Mitchell and King have declined to recuse themselves. The motion to recuse is **DENIED**.

ORDERED that appellee's May 16, 2016 motion to disqualify Colonel Mitchell and Captain King is **DENIED**.

ORDERED that oral argument will be heard at 10:00 a.m. Eastern Time on June 2, 2016, in Courtroom 201, United States Court of Appeals for the Federal Circuit, 717 Madison Place, NW, Washington, DC.

FOR THE COURT:


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

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[Legislation](#) [Congressional Record](#) [Committees](#) [Members](#)[BACK TO RESULTS](#)**PN1219 — Martin T. Mitchell — Air Force**

114th Congress (2015-2016)

NOMINATION [Hide Overview](#)

Confirmed on 04/28/2016.

Description

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

To be Colonel
Martin T. Mitchell

Organization
Air Force

Latest Action

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

Date Received from President

03/14/2016

Committee

Senate Armed Services

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

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

[BACK TO RESULTS](#)

PN1224 — Donald C. King — Navy

114th Congress (2015-2016)

NOMINATION [Hide Overview](#)

Confirmed on 04/28/2016.

Description

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

To be Captain
Donald C. King

Organization
Navy

Latest Action

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

Date Received from President

03/14/2016

Committee

Senate Armed Services

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

Sort by GO

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