



UNITED STATES
COURT OF MILITARY COMMISSION REVIEW

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

BEFORE:

BURTON, PRESIDING Judge
HERRING, SILLIMAN, Judges

On May 8, 2017, Appellee Mohammad moved this Court to disqualify Presiding Judge Burton and Judge Herring from the panel designated to decide this appeal on the grounds that their service on the U.S. Court of Military Commission Review (USCMCR) is in violation of 10 U.S.C. § 973(b) and the Commander-in-Chief Clause of Article II Section 2 of the U.S. Constitution. Appellee Mohammad Motion 1, 14. Appellee Mohammad argued their service on the USCMCR violated the Fifth and Eighth Amendments to the U.S. Constitution. Appellee Mohammad Motion 1.¹ Appellee Mohammad moved “to

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

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

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

Facts

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

(b) *Judges.* (1) Judges on the Court shall be assigned or appointed in a manner consistent with the provisions of this subsection.

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

(3) The President may appoint, by and with the advice and consent of the Senate, additional judges to the United States Court of Military Commission Review.

10 U.S.C. § 948j(b) states:

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

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

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

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

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

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

Discussion

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

(a) No officer of an armed force on active duty may accept employment if that employment requires him to be separated from his organization, branch, or unit, or interferes with the performance of his military duties.

(b) (1) This subsection applies--

(A) to a regular officer of an armed force on the active-duty list (and a regular officer of the Coast Guard on the active duty promotion list);

* * *

(2) (A) *Except as otherwise authorized by law*, an officer to whom this subsection applies may not hold, or exercise the functions of, a civil office in the Government of the United States--

(i) that is an elective office;

(ii) *that requires an appointment by the President by and with the advice and consent of the Senate*; or

(iii) that is a position in the Executive Schedule under sections 5312 through 5317 of title 5 [5 USCS §§ 5312-5317].

(B) An officer to whom this subsection applies may hold or exercise the functions of a civil office in the Government of the United States that is not described in subparagraph (A) when assigned or detailed to that office or to perform those functions.

* * *

(5) Nothing in this subsection shall be construed to invalidate any action undertaken by an officer in furtherance of assigned official duties.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The Department of Justice, Office of Legal Counsel observed that the phrase “otherwise authorized by law” in 10 U.S.C. § 973(b) need not be mentioned in the appointment statute to be effective.⁶ The appointment statute does not, for example, need to indicate that the position to which a military officer is appointed in the appointment statute is an exception to the prohibition in 10 U.S.C. § 973.⁷ Moreover, § 973’s “‘otherwise authorized by law’ clause also does not list specific statutes authorizing active duty officers to hold particular civilian offices.”⁸

In addition, 10 U.S.C. § 950f(b)(2), currently applying to only three military appellate judges assigned to the USCMCR, is more specific than 10 U.S.C. § 973(b)(2)(A)(ii) (currently over 1,000 Presidential appointments with Senate confirmation (PAS)),⁹ and 10 U.S.C. § 950f was more recently amended than 10 U.S.C. § 973.¹⁰

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

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

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

⁷ See *id.*

⁸ *Id.* at *10 (citations omitted).

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

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

Accepting an appointment as a federal appellate judge on an independent Article I court of record is constitutionally incompatible with the status of a serving commissioned officer. Judges appointed to the USCMCR under § 950f(b)(3) cannot be reassigned or otherwise removed from the USCMCR for any reason other than good cause. This level of tenure protection, only slightly below the “good behavior” tenure of an Article III judge, is irreconcilable with the President’s constitutional authority as Commander-in-Chief and therefore cannot stand.

* * *

Even if Congress had contemplated the “appointment” of military officers to the principal office of USCMCR judge – which is inconsistent with the scheme of 10 U.S.C. § 950f – the good cause tenure that accompanies such an appointment would be an unconstitutional encroachment on the President’s ability to direct and supervise the duties of those in the chain-of-command. *Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2095 (2015)) (“[W]hen a Presidential power is ‘exclusive,’ it ‘disabl[es] the Congress from acting upon the subject.”) (citation omitted); *Relation of the President to the Executive Departments*, 7 U.S. Op. Att’y. Gen. 453, 464 (1955); 1855 U.S. AG LEXIS 35 (“No act of Congress . . . can . . . authorize or create any military officer not subordinate to the President.”). Unsurprisingly, there is no precedent for military officers simultaneously serving as principal officers with the attendant tenure protections for the chain-of command. *Orloff v. Willoughby*, 345 U.S. 83, 94 (1953) (failing to find a single “case where this Court has assumed to revise duty orders as to one lawfully in the service.”). It is probably no coincidence that 10 U.S.C. § 973(b), discussed above, has long been a bar to military members’ simultaneous holding of civil offices that could prevent the reassignment by their military chain of command.

Appellee Mohammad Motion 11-14.

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

(4) No appellate military judge on the United States Court of Military Commission Review may be reassigned to other duties, except under circumstances as follows:

(A) The appellate military judge voluntarily requests to be reassigned to other duties and the Secretary of Defense, or the designee of the Secretary, in consultation with the Judge Advocate General of the armed force of which the appellate military judge is a member, approves such reassignment.

(B) The appellate military judge retires or otherwise separates from the armed forces.

(C) The appellate military judge is reassigned to other duties by the Secretary of Defense, or the designee of the Secretary, in consultation with the Judge Advocate General of the armed force of which the appellate military judge is a member, based on military necessity and such reassignment is consistent with service rotation regulations (to the extent such regulations are applicable).

(D) The appellate military judge is withdrawn by the Secretary of Defense, or the designee of the Secretary, in consultation with the Judge Advocate General of the armed force of which the appellate military judge is a member, for good cause consistent with applicable procedures under chapter 47 of this title (the Uniform Code of Military Justice).

10 U.S.C. § 949b(b)(4).

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

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

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

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

Conclusion

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

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

ORDER

Therefore, it is hereby

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

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

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

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

FOR THE COURT:


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

Appendix A



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).

Appendix A

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.

Appendix A

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.").

Appendix A

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


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

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

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

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

FOR THE COURT:


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

Appendix A

[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 **GO**

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

Appendix A

[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.
03/14/2016	Received in the Senate and referred to the Committee on Armed Services.



**UNITED STATES
COURT OF MILITARY COMMISSION REVIEW**

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

BEFORE:

**POLLARD, PRESIDING Judge
WARD, WEBER, Judges**

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

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

Appendix B

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

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

It is hereby,

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

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

FOR THE COURT:


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