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TABLE OF APPENDICES

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19-1076

ALI HAMZA AHMAD SULIMAN AL BAHLUL,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Review from the United States Court of Military Commission Review

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OPINION

August 4, 2020

MICHEL PARADIS, Washington, DC, Counsel, Office of the Chief Defense Counsel, argued the cause for petitioner. With him on the briefs were MARY MCCORMICK, TIMOTHY MCCORMICK, and TODD E. PIERCE.

ERIC S. MONTALVO, Washington, DC, was on the brief for amici curiae The Anti-Torture Initiative of the Center for Human Rights & Humanitarian Law at American University Washington College of Law in support of petitioner.

JOSEPH PALMER, Washington, DC, Attorney, argued the cause for respondent. With him on the brief were STEVEN M. DUNNE, Chief, and DANIELLE S. TARIN, Attorney.

Before GRIFFITH and RAO, *Circuit Judges*, and EDWARDS, Senior *Circuit Judge*.

RAO, *Circuit Judge*.

Ali Hamza Ahmad Suliman Al Bahlul was Osama bin Laden's head of propaganda at the time of the September 11 attacks. After he was captured in Pakistan, Al Bahlul was tried and convicted by a military commission in Guantanamo Bay. Our court subsequently vacated two of his three convictions on ex post facto grounds and remanded his case back to the military courts, where his life sentence was reaffirmed. In this most recent appeal, Al Bahlul raises six different statutory and constitutional challenges to his sentence and detention, including three challenges to the appointment of the officer who convened the military commission under the Military Commissions Act of 2006. Only one argument has merit: In reaffirming Al Bahlul's life sentence, the Court of Military Commission Review failed to apply the correct harmless error standard, so we reverse and remand for the court to reassess the sentence. Each of Al Bahlul's remaining arguments lacks merit for the reasons explained below.

I.

Al Bahlul is a Yemeni national who travelled to Afghanistan in the late 1990s to join Al Qaeda. Once there, Al Bahlul pledged an oath of loyalty to Osama bin Laden, underwent military training, and

eventually led Al Qaeda's propaganda efforts. Most notably, he created a video for bin Laden in the aftermath of the U.S.S. Cole bombing that celebrated the terrorist attack on an American destroyer and called for jihad against the United States. Al Bahlul also served as bin Laden's personal assistant and secretary for public relations. Just before the attacks of September 11, 2001, Al Bahlul arranged loyalty oaths for two of the hijackers. In the immediate aftermath, he operated the radio used by bin Laden to follow media coverage of the attacks.

Weeks after the September 11 attacks, Al Bahlul fled to Pakistan, where he was captured in December 2001 and turned over to the United States. He was transferred in 2002 to the United States Naval Station at Guantanamo Bay, Cuba, where he has since been detained. This is Al Bahlul's second direct appeal challenging his prosecution under the military commission system established by Congress in the Military Commissions Act of 2006 ("2006 MCA"), Pub. L. No. 109-366, 120 Stat. 2600.[1] In previous opinions, we have provided a detailed account of his legal actions, so we provide only a brief summary here. *See Al Bahlul v. United States (Al Bahlul I)*, 767 F.3d 1,

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[1] Congress amended the 2006 MCA three years later. *See* National Defense Authorization Act for Fiscal Year 2010, Pub. L. No. 111-84, §§ 1801–07, 123 Stat. 2190, 2574–2614 (2009) ("Military Commissions Act of 2009"). Al Bahlul's trial was conducted under the original 2006 MCA. While the statute was for the most part "left ... substantively unaltered as relevant" to Al Bahlul's prosecution, *Al Bahlul v. United States (Al Bahlul I)*, 767 F.3d 1, 6 n.1 (D.C. Cir. 2014), we note explicitly throughout this opinion when citing provisions of the 2006 MCA that were later changed.

5–8 (D.C. Cir. 2014) (en banc); *Al Bahlul v. United States (Al Bahlul III)*, 840 F.3d 757, 758 (D.C. Cir. 2016) (per curiam).

Al Bahlul was tried by a military commission convened pursuant to the 2006 MCA. Section 948h of the 2006 MCA provides that "[m]ilitary commissions ... may be convened by the Secretary of Defense or by any officer or official of the United States designated by the Secretary for that purpose." 10 U.S.C. § 948h. In a number of provisions, the 2006 MCA refers to the person designated under Section 948h as "the convening authority." *See*, *e.g.*, 10 U.S.C. §§ 950b, 950f(c). The 2006 MCA also vests the Convening Authority with significant powers and responsibilities other than convening military commissions. Both the government and Al Bahlul agree that the Convening Authority has the responsibilities of a constitutional "Officer[ ] of the United States" under the Appointments Clause, U.S. CONST. art. II, § 2, cl. 2, but they disagree about whether the Convening Authority is properly considered a principal or inferior officer. The Convening Authority's final decision to "approve, disapprove, commute, or suspend [a] sentence" is reviewed by the Court of Military Commission Review ("CMCR"), although the 2006 MCA provides for review "only with respect to matters of law." 10 U.S.C. §§ 950b(c)(2)(C), 950f(d) (2006).

In 2007, the Secretary of Defense designated Susan Crawford as the Convening Authority. Prior to her designation, Crawford was already serving as a Senior Judge of the Court of Appeals for the Armed

Forces ("CAAF")[2] as well as an employee serving a three-year term in the Senior Executive Service. Crawford convened a commission to try Al Bahlul of three substantive offenses enumerated in the 2006 MCA: conspiracy to commit war crimes, providing material support for terrorism, and soliciting others to commit war crimes. See id. §§ 950u, 950v(b)(25), 950v(b)(28) (2006). The three charges were predicated on largely the same conduct. Al Bahlul refused to participate in the proceedings and instructed his appointed defense counsel to waive objections and to abstain from any motions. Al Bahlul, however, admitted every factual allegation against him but one—an allegation that he once used a suicide belt. Nonetheless, he pleaded not guilty on the grounds that American tribunals lack the authority to try him.

The commission convicted Al Bahlul on all three counts and sentenced him to life in prison. Crawford approved the conviction, and the CMCR affirmed. *See United States v. Al Bahlul*, 820 F. Supp. 2d 1141 (CMCR 2011). A panel of this court then vacated all three convictions on the grounds that the 2006 MCA did not authorize prosecutions based on conduct occurring before 2006 unless the conduct was already prohibited as a war crime and triable by military commission. *See Al Bahlul v. United States*, No. 11-1324, 2013 WL 297726 (D.C. Cir. Jan. 25, 2013).

Sitting en banc, this court upheld Al Bahlul's conviction for conspiracy while vacating the two remaining convictions. *See Al Bahlul I*, 767 F.3d 1.

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[2] CAAF reviews the military's intermediate courts. It is the military's highest appellate court.

Because Al Bahlul raised no objections at trial, we reviewed his newly raised constitutional objections only for plain error. *See id*. at 8–11. We held that Al Bahlul's ex post facto challenge to his conspiracy conviction failed under the plain error standard on two grounds: First, "the conduct for which he was convicted was already criminalized under 18 U.S.C. § 2332(b)," which punishes conspiracies to kill United States nationals; second, "it is not 'plain' that conspiracy was not already triable by law-of-war military commission." *Id*. at 18. After vacating the remaining two convictions under the Ex Post Facto Clause,[3] *id*. at 27–31, the court ordered the case to be remanded, "after panel consideration, ... to the CMCR to determine the effect, if any, of the two vacaturs on sentencing." *Id*. at 31.[4]

On remand to the CMCR, Al Bahlul argued for the first time that Crawford's appointment as Convening Authority was unlawful, both on statutory and constitutional grounds. He also argued that intervening Supreme Court precedent required de

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[3] We "assume[d] without deciding that the Ex Post Facto Clause applies at Guantanamo" based on the government's concession. *Al Bahlul I*, 767 F.3d at 18. In so doing, we emphasized that we were "not to be understood as remotely intimating in any degree an opinion on the question" of the Clause's extraterritorial application. *Id*. (quoting *Petite v. United States*, 361 U.S. 529, 531 (1960) (per curiam)).

[4] After *Al Bahlul I*, a panel of this court again vacated the conspiracy conviction, this time concluding Al Bahlul had raised meritorious structural separation of powers objections that could not be forfeited below. *See Al Bahlul v. United States (Al Bahlul II)*, 792 F.3d 1 (D.C. Cir. 2015). The court once again took Al Bahlul's case en banc, reinstated the conspiracy conviction, and remanded the case to the CMCR. *See Al Bahlul III*, 840 F.3d 757.

novo review of his ex post facto challenge to the conspiracy conviction. Without remanding to the military commission, the CMCR rejected these arguments on the merits and determined that a life sentence continued to be appropriate, reasoning that the military commission would have imposed the same sentence even if Al Bahlul had been convicted only of conspiracy. *See Al Bahlul v. United States*, 374 F. Supp. 3d 1250 (CMCR 2019). Al Bahlul appealed to this court, and we have exclusive jurisdiction under 10 U.S.C. § 950g.

Al Bahlul raises six discrete arguments on appeal. First, he argues that the CMCR applied the wrong harmless error standard in reviewing his sentence on remand by failing to determine beyond a reasonable doubt that the military commission would have imposed the same sentence absent the two convictions vacated by *Al Bahlul I*. Second, he claims that Crawford's appointment as the Convening Authority violated the 2006 MCA, which in his view permits the Secretary to designate only individuals who are already officers of the United States at the time of the designation. Third, he argues that Crawford's appointment violated the Appointments Clause of the Constitution because the Convening Authority acts as a principal officer who must be appointed by the President with Senate approval. Fourth, even if the Convening Authority is an inferior officer, Al Bahlul contends that Crawford's appointment violated the Appointments Clause because Congress did not vest the appointment of the Convening Authority in the Secretary by law. Fifth, Al Bahlul argues that recent Supreme Court precedent requires us to reexamine

his ex post facto challenge to his conspiracy conviction, this time de novo. Sixth and finally, he raises several challenges to the conditions of his ongoing confinement—namely, that he has allegedly been subjected to indefinite solitary confinement and denied eligibility for parole.

For the reasons discussed below, only Al Bahlul's first argument has merit. In reevaluating Al Bahlul's sentence, the CMCR should have asked whether it was beyond a reasonable doubt that the military commission would have imposed the same sentence for conspiracy alone. We reject Al Bahlul's remaining arguments. Crawford's appointment as the Convening Authority was lawful, there is no reason to unsettle Al Bahlul I's ex post facto ruling, and we lack jurisdiction in an appeal from the CMCR to entertain challenges to the conditions of Al Bahlul's ongoing confinement. We therefore affirm in part, reverse in part, and dismiss Al Bahlul's petition in part for lack of jurisdiction. We remand for reconsideration of the sentence under the correct standard.

II.

We start with Al Bahlul's sole meritorious claim. Al Bahlul argues that the CMCR erred by reassessing his sentence without remand to the military commission and, further, by misapplying the harmless error doctrine in maintaining his life sentence. In *Al Bahlul I*, the en banc court directed the CMCR to "determine the effect, if any, of the two" vacated convictions on Al Bahlul's sentence. 767 F.3d at 31. While we conclude that the CMCR had the discretion to reassess the sentence without remanding to the military commission, we agree that

the CMCR erred by reaffirming Al Bahlul's life sentence without first determining that the constitutional errors were harmless beyond a reasonable doubt.

As an initial matter, the CMCR correctly determined that it had the authority to assess Al Bahlul's sentence without remand. In the analogous court-martial context governed by the Uniform Code of Military Justice ("UCMJ"), intermediate military appellate courts may in some circumstances revise sentences without remand to the court-marital. See *Jackson v. Taylor*, 353 U.S. 569, 579–80 (1957). In *United States v. Winckelmann*, CAAF held that intermediate military courts should consider four factors in determining whether to reassess a sentence without remand: (1) whether the defendant was tried by military judges; (2) whether there are "dramatic changes" in the penalty the defendant is exposed to; (3) whether "the nature of the remaining offenses capture the gravamen of criminal conduct included within the original offenses"; and (4) whether "the remaining offenses are of the type that judges of the courts of criminal appeals should have the experience and familiarity with to reliably determine what sentence would have been imposed at trial." 73 M.J. 11, 15–16 (CAAF 2013).

In light of the parallels in text and structure, we have previously relied on the UCMJ to inform our interpretation of the statutes governing military commissions. *See In re Al Nashiri*, 835 F.3d 110, 122–23 (D.C. Cir. 2016). Here, we conclude that the CMCR did not err when it applied the *Winckelmann* factors in concluding it was appropriate to evaluate the

sentence without remanding to a military commission. In the court-martial context, a military court has discretion under *Winckelmann* to reevaluate a sentence without remand, and we have held that the military should not be held to higher procedural standards in the context of military commissions than it would in the court-martial context. *Id*. To the contrary, if a "procedure for courts-martial is considered adequate to protect defendants' rights, the same should be true of the review procedure for military commissions." *Id*. at 123.

Whether to remand for reconsideration of a sentence is left to the military court's discretion, so we review the CMCR's decision only for abuse of discretion. *See Winckelmann*, 73 M.J. at 12. The CMCR properly applied the Winckelmann factors, and it was not an abuse of discretion to reevaluate Al Bahlul's sentence without remand to the military commission. After we vacated two of his convictions, Al Bahlul remained subject to the same maximum sentence—life in prison—and the one remaining conviction for conspiracy was predicated on the same conduct as the two that were vacated. Moreover, as the CMCR noted, "conspiracy to commit murder is not so novel a crime that" the intermediate court would be "unable to 'reliably determine what sentence would have been imposed at trial'" with respect to Al Bahlul's similar crime of conspiracy to commit war crimes, including the murder of noncombatants. *Al Bahlul*, 374 F. Supp. 3d at 1273 (quoting *Winckelmann*, 73 M.J. at 16).

In reevaluating Al Bahlul's sentence, however, the CMCR applied the wrong legal standard. When an

intermediate military court "reassesses a sentence because of a prejudicial error, its task differs from that which it performs in the ordinary review of a case." *United States v. Sales*, 22 M.J. 305, 307 (CMA 1986). To "purge[ ]" the sentence "of prejudicial error," the new sentence should be less than or equal to the sentence that would have been delivered by the trier of fact "absent any error." *Id*. at 308. Here, the CMCR concluded that the original life sentence remained appropriate because any constitutional error in Al Bahlul's original sentence was harmless. Yet the CMCR misapplied well-established harmless error principles.

In ordinary criminal proceedings, an error may be found harmless if the court determines it had no "substantial and injurious effect or influence in determining the jury's verdict." *United States v. Whitmore*, 359 F.3d 609, 622 (D.C. Cir. 2004) (quoting *Kotteakos v. United States*, 328 U.S. 750, 776 (1946)). Yet "before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." *Chapman v. California*, 386 U.S. 18, 24 (1967) (emphasis added). The military courts have adopted the same standard in the court-martial context for reviewing whether a constitutional error was harmless, *see Sales*, 22 M.J. at 307–08 (concluding that in cases of constitutional error "the Court of Military Review should be persuaded beyond a reasonable doubt that its reassessment has rendered harmless any error affecting the sentence adjudged at trial"), and the government concedes that the same standard should apply in the military commission

context, Gov't Br. 28. We agree. In both the court-martial context and in civilian criminal proceedings, a constitutional error is considered harmless only if found to be harmless beyond a reasonable doubt. As all parties agree, military commissions should be subject to the same harmless error standard that is uniformly applied in other criminal contexts in cases involving constitutional errors.

The CMCR purported to rely on the standard articulated by the Court of Military Appeals in *Sales* but erred in the application of the standard. The CMCR maintained that it could reaffirm the original sentence because the court was "confident that, absent the error, the [military commission] would have sentenced the appellant to confinement for life." *Id*. at 1273. Yet nowhere did the court explicitly address whether the errors were harmless beyond a reasonable doubt. Because the errors identified by *Al Bahlul I* were constitutional ex post facto violations, the CMCR applied the wrong harmless error standard and therefore abused its discretion. *See Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990) (holding that it is necessarily an abuse of discretion to apply the wrong legal standard). We therefore reverse and remand for the CMCR to redetermine "the effect, if any, of the two vacaturs on sentencing." *Al Bahlul I*, 767 F.3d at 31. Under the harmless error standard the government concedes applies, the CMCR must determine the constitutional errors were harmless beyond a reasonable doubt.

III.

Next, Al Bahlul argues that Crawford's appointment by the Secretary as Convening

Authority was unlawful on three grounds. First, he maintains that the 2006 MCA permits the Secretary to select only individuals who are already serving as officers of the United States. Alternatively, he argues that the Convening Authority acts as a principal officer, thus requiring presidential appointment after Senate confirmation. Finally, Al Bahlul argues that even if the Convening Authority is an inferior officer, Crawford's appointment by the Secretary violated the Appointments Clause, because the 2006 MCA did not vest the Secretary with the power to appoint an inferior officer.

Al Bahlul's challenges require us to interpret both the Constitution's Appointments Clause and the 2006 MCA. The Appointments Clause provides that the President

> shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law; but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

U.S. CONST. art. II, § 2, cl. 2. Courts have long referred to officers who must be appointed by the President with Senate confirmation as "principal officers." *See*, *e.g.*, *United States v. Germaine*, 99 U.S.

508, 509–11 (1878). The statute establishing the Convening Authority, Section 948h of the 2006 MCA, provides that "[m]ilitary commissions ... may be convened by the Secretary of Defense or by any officer or official of the United States designated by the Secretary for that purpose." 10 U.S.C. § 948h. The Convening Authority has significant authority, including wide discretion to review a military commission's findings and sentences. See 10 U.S.C. § 950b(c)(2)(C) (2006) ("[T]he convening authority may, in his sole discretion, approve, disapprove, commute, or suspend the sentence in whole or in part.").

Crawford's appointment was entirely consistent with both the Constitution and the 2006 MCA: Section 948h allows the Secretary to select any official of the United States to serve as the Convening Authority, including mere employees. Moreover, the Convening Authority is an inferior officer. Because the 2006 MCA vests the Secretary with the power to appoint inferior officers by law, Crawford's appointment was constitutional.

A.

Al Bahlul argues that Crawford's appointment as Convening Authority violated the 2006 MCA because the Secretary may designate only an "officer or official of the United States." 10 U.S.C. § 948h. According to Al Bahlul, the term "officer" refers only to military officers, while the term "official" refers to civilian officers. Either way, he contends the Convening Authority must be a person who is already a principal or inferior officer appointed through the procedures prescribed by the Appointments Clause. Al Bahlul argues that Crawford's appointment was therefore

unlawful because she was only an employee at the time of her designation. In the government's view, the 2006 MCA's reference to "officer" includes all officers of the United States in the constitutional sense, both military and civilian, while the term "official" refers broadly to other government employees. The MCA thus allows the Secretary to select an employee to serve as Convening Authority. The government has the better reading of the statute. The term "official" includes government employees who are not "Officers of the United States" in the constitutional sense. Even assuming Crawford was only an employee at the time of her appointment, a question we do not decide,[5] her designation was consistent with the requirements of the 2006 MCA.

The 2006 MCA permits the Secretary to designate either officers or officials of the United States as the Convening Authority. Against the Appointments Clause background and in light of the text and structure of the MCA, "official" cannot be read to mean "civilian officer." In the constitutional context,

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[5] The parties dispute the significance of the fact that Crawford was already serving as a senior judge of CAAF. The government contends that her status as a senior judge made her a principal officer, which would cure several of the problems alleged by Al Bahlul. *See* Gov't Br. 47–50. Judges of CAAF are appointed by the President with Senate confirmation; however, "[a] senior judge shall be considered to be an officer or employee of the United States ... only during periods the senior judge is performing duties [as senior judge.]" 10 U.S.C. § 942(e)(4). Because we conclude that Crawford's appointment was lawful on both statutory and constitutional grounds regardless of whether she was already a principal or inferior officer of the United States, we need not address the significance of her status as a senior judge of CAAF.

an "officer" is someone who "occup[ies] a continuing position established by law" and who "exercis[es] significant authority pursuant to the laws of the United States." *Lucia v. SEC*, —— U.S. ——, 138 S. Ct. 2044, 2051 (2018) (quotation marks omitted). An "official," on the other hand, can be an employee with less responsibility. *See Lucia*, 138 S. Ct. at 2050 (referring to "mere employees" as "officials with lesser responsibilities who fall outside the Appointments Clause's ambit"). Congress regularly uses the word "official," a term that extends beyond officers in the constitutional sense, to refer broadly to government employees.[6]

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[6] For example, in a provision of the Military Commissions Act of 2009 governing access to classified information, the government must submit a declaration signed by any "knowledgeable United States official possessing authority to classify information." 10 U.S.C. § 949p-4(a)(1). The statute does not limit the term "official" to officers of the United States, and employees can possess the authority to classify information. Similarly, in a statute governing "military custody for foreign Al-Qaeda terrorists," Congress provided that certain procedures do "not apply when intelligence, law enforcement, or other Government officials of the United States are granted access to an individual who remains in the custody of a third country"—again suggesting that the term "official" applies broadly to those who work for the United States government. National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, § 1022, 125 Stat. 1298, 1564 (2011). This consistent usage extends to other parts of the United States Code as well. For instance, in a provision punishing the bribery of public officials, the term "public official" includes "an officer or employee or person acting for or on behalf of the United States, or any department, agency or branch of Government ... in any official function." 18 U.S.C. § 201(a)(1).

By contrast, and consistent with the constitutional background, Congress generally uses the word "officer" to refer to principal and inferior officers who must be appointed in accordance with the Appointments Clause. *See Steele v. United States*, 267 U.S. 505, 507 (1925) (explaining that it is usually "true that the words 'officer of the United States,' when employed in ... statutes ... have the limited constitutional meaning"). The 2006 MCA is no exception. The statute refers throughout to military officers by using explicit language like "commissioned officer of the armed forces." *See*, *e.g.*, 10 U.S.C. § 948i(a) (2006) ("Any commissioned officer of the armed forces on active duty is eligible to serve on a military commission."); *id*. § 948j(b) ("A military judge shall be a commissioned officer of the armed forces."); *id*. § 949b(b) (prohibiting the consideration of military commission performance when "determining whether a commissioned officer of the armed forces is qualified to be advanced in grade"). Rather than use the military officer language found elsewhere in the 2006 MCA, Section 948h uses the more generic "officer ... of the United States," without qualification. This language mirrors the text of the Constitution's Appointments Clause, U.S. CONST. art. II, § 2, cl. 2, which is a strong indication that "officer ... of the United States" refers to all officers in the constitutional sense, not just military officers. *See Steele*, 267 U.S. at 507; *United States v. Mouat*, 124 U.S. 303, 307 (1888).

Contrary to this plain meaning, Al Bahlul maintains that "officer or official of the United States" includes only officers in the constitutional sense. Yet

this interpretation reads the word "official" out of the statute. *See Hibbs v. Winn*, 542 U.S. 88, 101 (2004) ("A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant."). Al Bahlul attempts to sidestep the surplusage problem by limiting "officer" to military officers and "official" to civilian officers. Yet nothing in the 2006 MCA suggests that Congress used "official" in an unorthodox sense meaning constitutional "officer." Similarly, there is no indication that "officer" means exclusively military officers in Section 948h. To the contrary, the statute explicitly refers to military officers in other provisions as "commissioned officer[s] of the armed forces." 10 U.S.C. §§ 948i(a), 948j(b), 949b(b) (2006). We decline to limit Section 948h's use of the general term "officer" only to military officers, a conclusion inconsistent with other provisions of the 2006 MCA as well as the ordinary constitutional meaning of "officer ... of the United States."

Al Bahlul next cites 10 U.S.C. § 101(b)(1), which states that "'officer' means a commissioned or warrant officer" in Title 10 of the United States Code. This particular definition of "officer," however, appears in Section 101(b)'s list of definitions specifically "relating to military personnel," not in Section 101(a)'s general list of definitions, which apply to Title 10 without qualification. In other words, the specialized definition found in Section 101(b)(1) would apply only if we first assumed what Al Bahlul is trying to prove—that "officer" in Section 948h refers only to military personnel. Nothing in the text of Section 948h suggests that it refers specifically to

military personnel, so the military personnel definition in Section 101(b)(1) is of little use. Moreover, Section 101(b)(1) was not enacted as part of the 2006 MCA; it was enacted over four decades earlier as part of a general definitional statute. *See* Pub. L. No. 87-649, 76 Stat. 451, 452 (1962). General definitional statutes are more easily defeasible by context than definitions found in the same statute as the language at issue. *See* ANTONIN SCALIA & BRYAN GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 279–80 (2012) ("[A] legislature has no power to dictate the language that later statutes must employ. ... [W]hen the definition set forth in an earlier statute provides a meaning that the word would not otherwise bear, it should be ineffective.").

Here, the text is unambiguous: The Secretary may designate either an officer or an official of the United States, and the term official includes individuals who were mere employees prior to their designation. Thus, irrespective of whether Crawford was already an officer, her appointment as the Convening Authority did not violate the 2006 MCA.

B.

In addition to his statutory challenge to Crawford's appointment, Al Bahlul raises two constitutional challenges under the Appointments Clause. We start with his argument that Crawford's appointment by the Secretary was unconstitutional because the Convening Authority acts as a principal officer and therefore must be appointed by the President with Senate confirmation. Because other executive officers directed and supervised the Convening Authority's work, we hold that Crawford

was an inferior officer and was therefore properly appointed by the Secretary.

Both the government and Al Bahlul agree that Crawford acted as an officer of the United States for purposes of the Appointments Clause. The parties dispute only whether she acted as a principal or inferior officer. The Supreme Court addressed the distinction between principal and inferior officers most directly in *Edmond v. United States*, 520 U.S. 651 (1997). The Court explained that "the term 'inferior officer' connotes a relationship with some higher ranking officer or officers below the President: Whether one is an 'inferior officer' depends on whether he has a superior." *Id.* at 662. More specifically, "'inferior officers' are officers whose work is directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate." *Id.* at 663; *see also NLRB v. SW Gen., Inc.*, —— U.S. ——, 137 S. Ct. 929, 947 (2017) (Thomas, J., concurring) ("[A] principal officer is one who has no superior other than the President."). Whether an officer is principal or inferior is a "highly contextual" inquiry requiring a close examination of the specific statutory framework in question. *In re Al-Nashiri*, 791 F.3d 71, 84 (D.C. Cir. 2015).

In order to determine whether an officer is inferior because he is supervised by a principal officer, our court looks to three factors drawn from *Edmond*: whether there is a sufficient "degree of oversight," whether the officer has "final decisionmaking authority," and the extent of the officer's "removability." *In re Grand Jury Investigation*, 916

F.3d 1047, 1052 (D.C. Cir. 2019). Each of the three factors identified by *Edmond* and our subsequent cases indicates that the Convening Authority is an inferior officer. The Convening Authority's decisions are not final and are subject to review by the CMCR; the Secretary maintains additional oversight by promulgating rules and procedures; and the Convening Authority is removable at will by the Secretary.

First, the bulk of the Convening Authority's decisions are not final. Instead, they are subject to review by the CMCR. See 10 U.S.C. § 950f (2006). To be sure, the CMCR's review was limited to questions of law under the 2006 MCA, id. § 950f(d), but the same was true in *Edmond*, which held that the judges of the Coast Guard Court of Criminal Appeals were inferior officers even though CAAF can review their factual findings only to determine whether the evidence underlying a conviction is sufficient as a matter of law. *See* 520 U.S. at 665 (noting that CAAF "will not reevaluate the facts" unless there is no "competent evidence in the record to establish each element of the offense beyond a reasonable doubt"); *United States v. Leak*, 61 M.J. 234, 239 (C.A.A.F. 2005) ("[T]his Court's review is limited to questions of law."). Despite that limitation, *Edmond* concluded that the degree of oversight was sufficient to render judges of the Court of Criminal Appeals inferior officers for Appointments Clause purposes. *Id*. at 665–66 (explaining that the narrow scope of the review did not "render the judges of the Court of Criminal Appeals principal officers. What is significant is that the judges of the Court of Criminal Appeals have no power to render a final

decision on behalf of the United States unless permitted to do so by other Executive officers.").

Similarly, in *Intercollegiate Broadcasting System, Inc, v. Copyright Royalty Board*, we determined that Copyright Royalty Judges were inferior officers, even though direct review of the Judges' factual findings was also severely limited. 684 F.3d 1332, 1339 (D.C. Cir. 2012) ("[T]he Register's power to control the [Judges'] resolution of pure issues of law plainly leaves vast discretion over the rates and terms."). Nonetheless, after our court severed the Judges' removal protections, we determined that they were inferior officers. *Id*. 1341–42 ("Although individual ... decisions will still not be directly reversible, the Librarian would be free to provide substantive input on non-factual issues. ... This, coupled with the threat of removal satisfies us that the [Copyright Royalty Judges'] decisions will be constrained to a significant degree by a principal officer (the Librarian)."). The power to review even pure legal determinations is "is a nontrivial limit on" an officer's decisionmaking such that an officer may be deemed an "inferior" officer for purposes of the Appointments Clause. *Id*. at 1339.

Al Bahlul emphasizes that the CMCR is unable to review several of the Convening Authority's consequential powers. Most importantly, the Convening Authority has the power to modify charges, overturn a verdict, or commute a sentence, all of which are effectively unreviewable. *See* 10 U.S.C. § 950b(c)(2)(C) (2006) ("[T]he convening authority may, in his sole discretion, approve, disapprove, commute, or suspend the sentence in whole or in part."). Once again, *Edmond* is closely

analogous: The judges of the Court of Criminal Appeals have the power to "independently weigh the evidence" without "defer[ence] to the trial court's factual findings." *See* 520 U.S. at 662 (quotation marks omitted). If they decide to reverse the factual findings underlying a conviction, thus overturning the verdict, CAAF has no power to reverse that decision unless the evidence was insufficient as a matter of law. *See id*. at 665; *Leak*, 61 M.J. at 239. Although the Convening Authority may make some final decisions, that authority is consistent, as in *Edmond*, with being an inferior officer. *See Edmond*, 520 U.S. at 662 (emphasizing that the significance of the authority exercised by an officer does not necessarily determine whether he is principal or inferior, because all constitutional officers "exercis[e] significant authority on behalf of the United States").

Second, the Secretary maintains a degree of oversight and control over the Convening Authority's work through policies and regulations. The Secretary has the power to prescribe procedures and rules of evidence governing military commissions, including rules governing "post-trial procedures." 10 U.S.C. § 949a(a). The Secretary has exercised that authority to regulate and to oversee the conduct of the Convening Authority in detailed ways. *See*, *e.g.*, R.M.C. 104(a)(1) (2007) (prohibiting the Convening Authority from censuring, reprimanding, or admonishing the military commission, its members, or the military judge); R.M.C. 407 (2007) (prescribing rules for the forwarding and disposition of charges); R.M.C. 601(f) (2007) ("The Secretary of Defense may cause charges, whether or not referred, to be transmitted to him for

further consideration, including, if appropriate, referral."); *see also In re Grand Jury*, 916 F.3d at 1052 (concluding that special counsel Robert Mueller was an inferior officer because the Attorney General "has authority to rescind at any time the Office of Special Counsel regulations"). While the Secretary's power to define rules of evidence and other procedures does not by itself make the Convening Authority an inferior officer, it provides further evidence that the Convening Authority's work is directed by the Secretary and subject to his supervision.

Finally, the Convening Authority is removable at will by the Secretary. The 2006 MCA includes no explicit tenure provisions, and "[t]he long-standing rule relating to the removal power is that, in the face of congressional silence, the power of removal is incident to the power of appointment." *Kalaris v. Donovan*, 697 F.2d 376, 401 (D.C. Cir. 1983); *see also* Oral Argument at 14:25 (Al Bahlul's counsel conceding that "there's no tenure protection" for the Convening Authority). As the Supreme Court concluded in *Edmond*, the "power to remove officers ... is a powerful tool for control." *Edmond*, 520 U.S. at 664.

Al Bahlul argues that the power to remove means little here because the Convening Authority's "'judicial acts' are statutorily insulated from" the Secretary's interference. Reply Br. 16. The 2006 MCA provides that "[n]o person may attempt to coerce or, by any unauthorized means, influence ... the action of any convening, approving, or reviewing authority with respect to his judicial acts." *See* 10 U.S.C. § 949b(a)(2)(B) (2006). Yet such insulation was also

present in *Edmond*: The judges of the Court of Criminal Appeals are removable at will only by the Judge Advocate General, who is prohibited from "influenc[ing] (by threat of removal or otherwise) the outcome of individual proceedings." 520 U.S. at 664 (citing UCMJ Art. 37, 10 U.S.C. § 837). In other words, the judicial acts of the Court of Criminal Appeals, like the judicial acts of the Convening Authority, have some statutory insulation from interference by the person holding the removal power. The removal power was nonetheless an important factor in *Edmond* in determining that the Court of Criminal Appeals judges are inferior officers. Similarly, we held in *Intercollegiate* that removal at will is a powerful tool for control even when direct review is limited. *See* 684 F.3d at 1340–41 (severing removal restrictions was sufficient to make Copyright Royalty Judges inferior officers); *see also In re Grand Jury*, 916 F.3d at 1052–53 (holding that special counsel Robert Mueller was an inferior officer in part because he "effectively serve[d] at the pleasure of an Executive Branch officer" and because the "control thereby maintained" ensured a meaningful degree of oversight).

Edmond requires that inferior officers have "some level" of direction and supervision by a principal officer, 520 U.S. at 663, not necessarily total control. Even inferior officers exercise discretion and important duties established by law. The Appointments Clause allows the appointment of such officers to be vested in a Head of Department so long as the proper chain of command is maintained. *See* 1 Annals of Cong. 499 (1789) (statement of James

Madison) (explaining that the President may rely primarily on subordinates because "the lowest officers, the middle grade, and the highest, will depend, as they ought, on the President," establishing a "chain of dependence"). Here, the factors identified by the Supreme Court in *Edmond* establish that the Convening Authority is an inferior officer. As an inferior officer, Crawford's appointment by the Secretary was perfectly consistent with the Appointments Clause.

C.

Even if the Convening Authority is an inferior officer, Al Bahlul argues that Crawford's appointment violated the Appointments Clause because Section 948h does not vest the Secretary with the power to appoint an inferior officer. Al Bahlul Br. 28–34. According to Al Bahlul, Section 948h does no more than describe a duty that can be delegated to existing constitutional officers. He also argues that the 2006 MCA does not create "a freestanding office" to which an inferior officer could be appointed. *Id*. Contrary to Al Bahlul's characterizations, the 2006 MCA's conferral of the power to designate the Convening Authority was sufficient to vest the Secretary with the constitutional power to appoint an inferior officer.

Article II of the Constitution grants Congress broad power to "vest the Appointment of ... inferior Officers" in "the Heads of Departments." U.S. CONST., art. II, § 2, cl. 2. Whether to exercise this power is explicitly left to Congress's discretion, to be done "as they think proper." *Id*. This power is reinforced by Article I, which authorizes Congress "[t]o make all Laws which shall be necessary and

proper for carrying into Execution ... Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." *Id.*, art. I, § 8, cl. 18. Thus, "Congress has plenary control over the ... existence of executive offices." *Free Enterprise Fund v. PCAOB*, 561 U.S. 477, 500 (2010); *see also Myers v. United States*, 272 U.S. 52, 129 (1926) ("To Congress under its legislative power is given the establishment of offices, the determination of their functions and jurisdiction, the prescribing of reasonable and relevant qualifications and rules of eligibility of appointees, and the fixing of the term for which they are to be appointed and their compensation.").

Consistent with the Constitution's requirement that Congress vest the power to appoint an officer "by law," statutes "repeatedly and consistently distinguish[ ] between an office that would require a separate appointment and a position or duty to which one [can] be 'assigned' or 'detailed' by a superior." *Weiss v. United States*, 510 U.S. 163, 172 (1994). While the explicit use of the term "appoint" may "suggest[ ]" whether a statute vests the appointment power, *Edmond*, 520 U.S. at 658, our court has held that Congress need not use explicit language to vest an appointment in someone other than the President. *See In re Grand Jury*, 916 F.3d at 1053–54; *In re Sealed Case*, 829 F.2d 50, 55 (D.C. Cir. 1987). Thus, reading the statute as a whole, we consider whether Congress in fact authorized a department head to appoint an inferior officer. *Cf. In re Sealed Case*, 829 F.2d at 55 (reading the statute as a whole and determining it "accommodat[ed] the delegation" of

responsibilities by the Attorney General to a special counsel). Two features of the 2006 MCA suggest that Congress exercised its broad power to vest the appointment of the Convening Authority in the Secretary. First, after establishing and defining the office of the Convening Authority in considerable detail, Section 948h specifically provides that the Secretary will choose the person to fill that office. Second, because the text and structure of the statute are readily interpreted as a lawful exercise of Congress's power to vest the appointment power in a department head, we decline to adopt an interpretation that would render the provision unconstitutional.

The text and structure of the 2006 MCA show that Congress established a new office—the Convening Authority—and tasked the Secretary with selecting the person to fill that office. By referring to the Convening Authority by name and using the definite article "the," several sections of the 2006 MCA strongly suggest that the Convening Authority is a distinct office and not simply a duty to be performed by existing officers. *See*, *e.g.*, 10 U.S.C. § 948i(b) (2006) ("[T]he convening authority shall detail as members of the commission such members ... [who] in the opinion of the convening authority, are best qualified for the duty."); *see also id.* § 950b(a); *id.* § 950b(b); § 948l(a). The text of the 2006 MCA is in stark contrast to the UCMJ, which specifically lists existing officers who are permitted to perform the function of convening courts-martial. *See* 10 U.S.C. § 822. The 2006 MCA, on the other hand, grants the Secretary the power to designate any officer or official

to be "the convening authority," a new office created by the statute. Section 948h authorizes the Secretary to designate the person who will occupy that office. Because no magic words are required to grant a department head the power to appoint an inferior officer, this designation is sufficient for the power to be vested "by law."

Al Bahlul's reading not only runs contrary to the ordinary meaning of the statute, but would unnecessarily raise serious constitutional concerns. We decline to read the 2006 MCA in a manner that would render Crawford's appointment unconstitutional when another interpretation is readily available. *See United States v. X-Citement Video, Inc.*, 513 U.S. 64, 69 (1994) ("[A] statute is to be construed where fairly possible so as to avoid substantial constitutional questions."). As discussed above, the 2006 MCA unambiguously permits the Secretary to designate as the Convening Authority an individual who, at the time of the designation, was a mere employee. Both parties agree, however, that the Convening Authority exercises the type of significant responsibilities that properly belong to an officer of the United States. Thus, if Section 948h does not vest in the Secretary the power to appoint an inferior officer, then the statute permits an employee to exercise the duties of an officer of the United States without a constitutional appointment. Nothing in the text or structure of the statute requires us to interpret it in this way, which flies in the face of the plain meaning and would raise significant constitutional doubts. Al Bahlul's final challenge to Crawford's appointment therefore fails.

Reading the statute as a whole, we conclude that in Section 948h Congress exercised its broad power under the Appointments and Necessary and Proper Clauses to create an office of the Convening Authority and to vest the power to appoint this inferior officer in the Secretary. Thus, Crawford's appointment satisfied the requirements of the Constitution as well as the 2006 MCA.

IV.

Next, Al Bahlul asks the court to reconsider his ex post facto challenge to his conspiracy conviction, a challenge we reviewed for plain error in *Al Bahlul I* because it was forfeited below. *See* 767 F.3d at 18–27. The law-of-the-case doctrine dictates that "the same issue presented a second time in the same case in the same court should lead to the same result." *LaShawn A. v. Barry*, 87 F.3d 1389, 1393 (D.C. Cir. 1996) (en banc) (emphasis omitted). The doctrine bars re-litigation "in the absence of extraordinary circumstances." *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 817 (1988). We may reconsider a prior ruling in the same litigation if there has been "an intervening change in the law." *Kimberlin v. Quinlan*, 199 F.3d 496, 500 (D.C. Cir. 1999). None of these limited circumstances are present here and therefore we cannot reconsider our forfeiture ruling in *Al Bahlul I*.

According to Al Bahlul, the Supreme Court's decision in *Class v. United States* fundamentally changed the law of forfeiture and plain error review. *See* —— U.S. ——, 138 S. Ct. 798 (2018). But *Class*'s holding was relatively narrow. The Supreme Court held that a criminal defendant who pleads guilty does

not necessarily waive challenges to the constitutionality of the statute under which he is convicted. *Id*. at 803–05. The Court did not, however, hold that such claims are not waivable at all: The Court addressed only whether a guilty plea constitutes a waiver "by itself." *Id*. at 803; *see also id*. at 805 (concluding that a "guilty plea does not bar a direct appeal in these circumstances") (emphasis added). The Court twice emphasized that *Class* had not waived his objections through conduct other than his guilty plea, *see id*. at 802, 807, thus making clear that the Court was addressing only the effect of pleading guilty. Al Bahlul did not plead guilty, so *Class* is irrelevant to this case.

Moreover, because *Class* addressed only waiver, it did not diminish our holding in *Al Bahlul I*, which involved forfeiture. *See* 767 F.3d at 10. "Forfeiture is the failure to make the timely assertion of a right; waiver is the intentional relinquishment or abandonment of a known right." *United States v. Miller*, 890 F.3d 317, 326 (D.C. Cir. 2018) (quotation marks and alterations omitted). After *Class*, two of our sister circuits have held that constitutional claims should be reviewed only for plain error if a criminal defendant forfeits his claims before the district court. *See United States v. Rios-Rivera*, 913 F.3d 38, 42 (1st Cir. 2019); *United States v. Bacon*, 884 F.3d 605, 610–11 (6th Cir. 2018). Those decisions are consistent with the "familiar" principle "that a constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right." *Peretz v. United States*, 501 U.S. 923, 936–37 (1991). Al Bahlul "flatly refused to participate in the military

commission proceedings and instructed his trial counsel not to present a substantive defense." *Al Bahlul I*, 767 F.3d at 10. This forfeiture made it appropriate for our court to review his ex post facto defense for plain error.

Taking a slightly different approach, Al Bahlul argues that even if a challenge to the constitutionality of the statute of conviction would be subject to forfeiture in the Article III context, it cannot be forfeited in the military context, where any fundamental defect in the document charging the accused with a crime deprives the military court of jurisdiction. Al Bahlul Br. 37–39 (citing *United States v. Ryan*, 5 M.J. 97, 101 (CMA 1978)). Even assuming arguendo that Al Bahlul has accurately characterized jurisdictional rules in the military context, he fails to identify an intervening change in the law that would support overturning *Al Bahlul I*: An ex post facto violation has been a constitutional defect since the Constitution's ratification, and every source Al Bahlul cites for the proposition that military courts view jurisdiction differently predates *Al Bahlul I*. *See id*.

Finally, Al Bahlul argues that we should reconsider the en banc decision because the Department of Defense has purportedly changed its position on a material legal question. In *Al Bahlul I*, our court held that it was "not obvious" for the purposes of plain error review "that conspiracy was not traditionally triable by law-of-war military commission." 767 F.3d at 27. Al Bahlul contends that the Department of Defense has since taken a position that is inconsistent with this court's conclusion, albeit in non-binding materials such as the LAW OF WAR

MANUAL. Al Bahlul Br. 40–42; *see also* DEPARTMENT OF DEFENSE, LAW OF WAR MANUAL § 1.1.1 (2015) ("This manual is not intended to, and does not, create any right ... enforceable at law or in equity against the United States."). Al Bahlul offers no support for the notion that a party's change of position—in this case, one gleaned from non-binding internal documents—is one of the extraordinary circumstances warranting reconsideration of a court's holding under the law-of-the-case doctrine.[7]

Furthermore, we rejected this ex post facto challenge in *Al Bahlul I* "for two independent and alternative reasons." 767 F.3d at 18. Al Bahlul contends that the government changed its position on whether conspiracy was previously triable by military commissions under the law of war, but his argument does not undermine this court's alternative holding that "the conduct for which he was convicted was already criminalized under 18 U.S.C. § 2332(b)," id., which punishes conspiracies to kill United States nationals.

Because Al Bahlul has failed to identify an intervening change of law or any other extraordinary circumstance, we decline to revisit the en banc court's

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[7] In any event, the Department of Defense maintains that it has not changed its position on whether conspiracy was historically triable by military commission, which is supported by the LAW OF WAR MANUAL. *See* LAW OF WAR MANUAL § 18.23.5 (stating that "[t]he United States has taken the position that conspiracy to violate the law of war is punishable" and that "[t]he United States has" historically "used military tribunals to punish unprivileged belligerents for the offense of conspiracy to violate the law of war").

treatment of his ex post facto challenge to his conspiracy conviction.

V.

Finally, Al Bahlul argues that the manner in which the government is executing his sentence is unlawful. Specifically, he claims that the government has unlawfully subjected him to indefinite solitary confinement and that the government's current policies wrongfully bar him from parole consideration. Al Bahlul's challenges to the ongoing status of his confinement are outside our jurisdiction on direct appeal, which is limited to "determin[ing] the validity of a final judgment rendered by a military commission." 10 U.S.C. § 950g(a). We "may act ... only with respect to the findings and sentence as approved by the convening authority and as affirmed or as set aside as incorrect in law by the [CMCR]." *Id.* § 950g(d). Because we have jurisdiction in this posture only to review the validity of the sentence, and because we may act only with respect to actions taken by the Convening Authority and the CMCR, Al Bahlul must bring any challenges to the conditions of his confinement through a different mechanism—likely a petition for a writ of habeas corpus. *See Aamer v. Obama*, 742 F.3d 1023, 1038 (D.C. Cir. 2014).[8]

In response, Al Bahlul emphasizes that CAAF has interpreted its analogous jurisdictional provision to permit consideration on direct review of whether the "approved sentence is being executed in a manner that offends the Eighth Amendment." *United States*

[8] Because this court lacks jurisdiction, we express no opinion on the procedural or substantive merits of such a challenge.

v. White, 54 M.J. 469, 472 (CAAF 2001). We recognize that "military courts are capable of, and indeed may have superior expertise in, considering challenges to their jurisdiction over disciplinary proceedings." *New v. Cohen*, 129 F.3d 639, 645 (D.C. Cir. 1997). Yet we always have an independent obligation to determine whether our court's jurisdiction is proper. *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 506–07 (2006). While we sometimes rely on parallels between the UCMJ and the 2006 MCA, an Article III court cannot assume jurisdiction by analogy to an Article II court's interpretation of a different statute. The MCA permits us to act "only with respect to the findings and sentence as approved by the convening authority," 10 U.S.C. § 950g(d), and therefore we lack jurisdiction to hear Al Bahlul's challenges to the conditions of his ongoing confinement.

* * *

For foregoing reasons, we affirm in part, reverse in part, and dismiss Al Bahlul's petition in part for lack of jurisdiction. We remand for the CMCR to reevaluate Al Bahlul's life sentence under the correct harmless error standards, but we reject Al Bahlul's remaining challenges.

So ordered.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19-1076	**September Term 2019**
Ali Hamza Ahmad Suliman Al Bahlul,	Filed On: August 4, 2020
Petitioner	
v.	
United States of America,	
Respondent	

On Petition for Review from the United States Court of Military Commission Review

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BEFORE: Griffith and Rao, Circuit Judges; and Edwards, Senior Circuit Judge

JUDGMENT

This cause came on to be heard on the petition for review from the United States Court of Military Commission Review and was argued by counsel. On consideration thereof, it is

ORDERED and **ADJUDGED** that the petition for review be affirmed in part and reversed in part, and the case be remanded for the CMCR to reevaluate Al Bahlul's life sentence under the correct harmless error standard, and in accordance with the opinion of the court filed herein this date.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk
BY: /s/
Daniel J. Reidy
Deputy Clerk

Date: August 4, 2020

Opinion for the court filed byt Circuit Judge Rao

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19-1076	**September Term 2020**
Ali Hamza Ahmad Suliman Al Bahlul	**CMCR-16-002**
Petitioner	**Filed On**: January 21, 2021
v.	
United States of America	
Respondent	

BEFORE: Srinivasan*, Chief Judge; Henderson*, Rogers, Tatel, Garland*, Millett, Pillard, Wilkins, Katsas, Rao, and Walker, Circuit Judges; and Edwards, Senior Circuit Judge

ORDER

Upon consideration of petitioner's petition for rehearing en banc and the response thereto; petitioner's motion for leave to file a reply and the lodged reply; and the absence of a request by any member of the court for a vote, it is

ORDERED that the motion be granted. The Clerk is directed to file the lodged reply. It is

FURTHER ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk
BY: /s/
Daniel J. Reidy
Deputy Clerk

*Chief Judge Srinivasan and Circuit Judges Henderson and Garland did not participate in this matter.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19-1076 **September Term 2020**

Ali Hamza Ahmad
Suliman Al Bahlul **CMCR-16-002**

Petitioner **Filed On**: March 29, 2021

v.

United States of America

Respondent

BEFORE: Srinivasan*, Chief Judge; Henderson*, Rogers, Tatel, Garland*, Millett, Pillard, Wilkins, Katsas, Rao, and Walker, Circuit Judges; and Edwards, Senior Circuit Judge

ORDER

Upon consideration of petitioner's motion for reconsideration en banc of the denial of his petition for rehearing en banc, the response thereto, and the reply, it is

ORDERED that the motion be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk
BY: /s/
Michael C. McGrail
Deputy Clerk

*Chief Judge Srinivasan and Circuit Judge Henderson did not participate in this matter.

Appendix B

UNITED STATES COURT OF MILITARY COMMISSION REVIEW

No. 16-002

ALI HAMZA AHMAD SULIMAN AL BAHLUL,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

On Petition for Review from the United States Court of Military Commission Review

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OPINION

March 21, 2019

Colonel Peter E. Brownback, III, JA, U.S. Army, was the military commission judge through arraignment, and *Colonel Ronald A. Gregory*, JA, U.S. Air Force, was the military commission judge through trial.

On the briefs for appellant were *Major Todd Pierce*, JA, U.S. Army (Ret.), Senior Fellow Univ. of Minnesota Human Rights Center, *Michel Paradis*, and *Mary R. McCormick*.

On the briefs for appellee were *Brigadier General Mark S. Martins*, U.S. Army, and *Michael J. O'Sullivan*.

Before BURTON, *Chief Judge*; SILLIMAN, *Deputy Chief Judge*; and POLLARD, HUTCHISON, and FULTON, *Appellate Judges*

HUTCHINSON, *Judge*.

This case is before us on remand from the Court of Appeals for the District of Columbia Circuit (D.C. Circuit). That Court returned this case to us after affirming appellant Al Bahlul's conspiracy to commit war crimes conviction,[1] and vacating his convictions for solicitation and providing material support for terrorism. *Al Bahlul v. United States*, 767 F.3d 1, 31 (D.C. Cir. 2014) (en banc) *(Bahlul II)*, aff'd en banc per curiam, 840 F.3d 757, 759 (D.C. Cir. 2016) *(Bahlul III)*, cert. denied, 138 S.Ct. 313 (2017).[2] The D.C.

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[1] Appellant was tried and sentenced in 2008 for violating § 950u of the 2006 Military Commissions Act (MCA), Pub. L. No. 109-366, 120 Stat. 2600. *United States v. Al Bahlul*, 820 F.Supp.2d 1141, 1156-58 (CMCR 2011) (en banc) (*Bahlul I*), *Al Bahlul v. United States*, 767 F.3d 1, 31 (D.C. Cir. 2014) (en banc) (*Bahlul II*), aff'd en banc per curiam, 840 F.3d 757, 759 (D.C. Cir. 2016) (*Bahlul III*), cert. denied, —— U.S. ——, 138 S.Ct. 313 (2017).

[2] The court held that "any Ex Post Facto clause error in trying Bahlul on conspiracy to commit war crimes [was] not plain." *Id.* at 27. In a subsequent opinion, the court rejected Al Bahlul's additional arguments "that Articles I and III of the Constitution bar Congress from making conspiracy an offense triable by military commission, because conspiracy is not an offense under the international law of war" and, once again affirmed his conviction for conspiracy to commit war crimes. *Bahlul III*, 840 F.3d at 758.

Circuit's mandate directs us "to determine the effect, if any, of the two vacaturs on sentencing." *Id*.

Before us, the appellant argues that his sentence is inappropriate for his remaining offense, and that we cannot be confident that, but for the error affecting his case, he would have received a sentence of confinement for life. He also raises two other issues not directly related to the D.C. Circuit's mandate: First, he challenges his remaining conviction for conspiracy to commit war crimes. He asserts that the vacatur of the two other charges casts doubt on the legality of the remaining charge, which survived the D.C. Circuit's scrutiny only because that court found that the appellant's ex post facto challenge had been forfeited. On remand, the appellant urges that our more generous scope of review allows us to perform a de novo review now, even though the D.C. Circuit has affirmed the conviction. The appellant's second new issue is a motion to dismiss his case altogether for lack of subject-matter jurisdiction. He claims that his commission lacked jurisdiction because the Convening Authority's appointment was statutorily and constitutionally improper, and that she was therefore without any authority to convene a military commission.

The government argues that we may reassess the appellant's sentence and that we should affirm the appellant's sentence to confinement for life. The government further argues that the appellant is not entitled to a de novo review of his remaining conviction, and that we should not now consider his newest challenge to the Convening Authority's appointment contending it is not jurisdictional.

Our task, then, is first to determine what arguments we may properly consider given the procedural posture of the case. We conclude that a de novo review of the appellant's remaining conviction is beyond the scope of our review on remand. We further conclude that we should consider the appellant's jurisdictional claim and his argument that his sentence is inappropriate to his remaining offense. We decide both of these issues in the government's favor.

I. Scope of review on remand

The D.C. Circuit directed us to determine the effect, if any, of the two vacaturs on the appellant's sentence. *Bahlul II*, 767 F.3d at 31. The two additional issues raised by the appellant—the request for a de novo review of the remaining conviction and the jurisdictional question—are not plainly within the scope of our review on remand.

A. De novo review of remaining conviction

We first ask if a de novo review of the appellant's remaining conviction is within the scope of our review. We approach this question with two closely-related concepts: the law-of-the-case doctrine and the mandate rule.

The "'law-of-the-case' doctrine refers to a family of rules embodying the general concept that a court involved in later phases of [litigation] should not reopen questions decided ... by that court or a higher one in earlier phases." *Crocker v. Piedmont Aviation*, 49 F.3d 735, 739 (D.C. Cir. 1995). Our superior court further explained that:

> When there are multiple appeals taken in the course of a single piece of litigation, law-of-the-case doctrine holds that decisions rendered on the first appeal should not be revisited on later trips to the appellate court. The Supreme Court has instructed the lower courts to be loathe to reconsider issues already decided in the absence of extraordinary circumstances such as where the initial decision was clearly erroneous and would work a manifest injustice.

LaShawn A. v. Barry, 87 F.3d 1389, 1393 (D.C. Cir. 1996) (*LaShawn II*) (en banc) (internal citations and quotation marks omitted).

The "mandate rule is [simply] a 'more powerful version' of the law-of-the-case doctrine." *Indep. Petroleum Ass'n v. Babbitt*, 235 F.3d 588, 597 (D.C. Cir. 2001) (quoting *LaShawn II*, 87 F.3d at 1393). Under the mandate rule, "an inferior court has no power or authority to deviate from the mandate issued by [a superior] appellate court." *Briggs v. Penn. R.R.*, 334 U.S. 304, 306 (1948); *see also United States v. Kpodi*, 888 F.3d 486, 491 (D.C. Cir. 2018) ("A district court commits legal error and therefore abuses its discretion when it fails to abide by ... the mandate rule."). "In long-running litigation like this, [we] are especially constrained because [we] may not 'do anything which is contrary to the letter or spirit of the mandate.'" *Morley v. CIA*, 894 F.3d 389, 401 (D.C. Cir. 2018) (citation omitted).

"The mandate rule has two components—the limited remand rule, which arises from action by an appellate court, and the waiver rule, which arises from action (or inaction) by one of the parties." *United States v. O'Dell*, 320 F.3d 674, 679 (6th Cir. 2003). Thus, the mandate rule places "two major limitations" on the scope of a remand: "any issue that could have been but was not raised on appeal is waived and thus not remanded," and "any issue conclusively decided by [the appellate court] is not remanded." *United States v. Husband*, 312 F.3d 247, 250-51 (7th Cir. 2002). The rule, therefore, "forecloses relitigation of issues expressly or impliedly decided by the appellate court." *United States v. Ben Zvi*, 242 F.3d 89, 95 (2d Cir. 2001) (citations omitted) (emphasis in original). "Likewise, where an issue was ripe for review at the time of an initial appeal but was nonetheless foregone, the mandate rule generally prohibits [our Court] from reopening the issue on remand unless the mandate can reasonably be understood as permitting it to do so." *Id.* (citations omitted).

"The mandate rule serves two key interests, those of hierarchy and finality." *Doe v. Chao*, 511 F.3d 461, 465 (4th Cir. 2007). "A rule requiring a [lower] court to follow a [superior] court's directives that establish the law of a particular case is necessary to the operation of a hierarchical judicial system." *Mirchandani v. United States*, 836 F.2d 1223, 1225 (9th Cir. 1988). In our judicial hierarchy, the decisions of the D.C. Circuit bind the district courts within the circuit—and our Court—just as decisions of the Supreme Court bind the D.C. Circuit. "The principle of hierarchy is no empty shell. It protects the very

value and essential nature of an appeal, namely the chance afforded litigants for review of a judgment and for correction, generally by a larger judicial body, of errors that may have serious consequences or work significant injustice." *Doe*, 511 F.3d at 465. With regard to finality, once the superior appellate court "determines questions put before it, the orderly resolution of the litigation requires the [lower] court to recognize those interests served by final judgments and to implement the appellate mandate faithfully." *Id*. at 466.

The appellant wishes to make an ex post facto challenge to his remaining conviction. He argues that the D.C. Circuit was constrained by Federal Rule of Criminal Procedure (Fed R. Crim. P.) 52 to find that this issue had been forfeited. Since we are not so constrained, argues the appellant, we should conduct a de novo review of this conviction before determining whether we should affirm his sentence.

The appellant's assertion that the scope of our review is more generous than the D.C. Circuit's is correct. The 2009 MCA § 950f(d) requires our Court to review the appellant's record for factual sufficiency and sentence appropriateness:

> The Court may affirm only such findings of guilty, and the sentence or such part or amount of the sentence, as the Court finds correct in law and fact and determines, on the basis of the entire record, should be approved. In considering the record, the Court may weigh the evidence, judge the credibility

> of witnesses, and determine controverted questions of fact, recognizing that the military commission saw and heard the witnesses.

See also Hicks v. United States, 94 F.Supp.3d 1241, 1247 (CMCR 2015). This statutory language mirrors the language from Article 66(c), UCMJ, 10 U.S.C. § 866(c), which defines the authority exercised by the military service courts of criminal appeals. We, like the service courts of criminal appeals, may reach issues that are forfeited, or even waived. The Court of Appeals for the Armed Forces (CAAF) has interpreted this language to be a grant of an "awesome, plenary, de novo power of review." *United States v. Cole*, 31 M.J. 270, 272 (C.M.A. 1990). Under 2009 MCA § 948b(c), the appellate decisions from the service courts of criminal appeals and the CAAF are "instructive" but not "binding" on this Court.

Congress is presumed to know the judicial interpretation of statutory language when enacting legislation. When it later uses the same language in reenacting the statute or enacting another statute, it is understood that Congress is adopting the extant statutory interpretation. *See Owens v. Republic of Sudan*, 864 F.3d 751, 778 (D.C. Cir. 2017) (citing *Lorillard v. Pons*, 434 U.S. 575, 580, 98 S.Ct. 866, 55 L.Ed.2d 40 (1978)); *see also Johnson v. United States*, 529 U.S. 694, 710 (2000) ("when a new legal regime develops out of an identifiable predecessor, it is reasonable to look to the pre-cursor in fathoming the new law"). We, therefore, follow the judicial

interpretation of 10 U.S.C. § 866(c) set forth above by the military appellate courts.

Though our scope of review is different from and more expansive than that of the D.C. Circuit, the government contends that the D.C. Circuit's remand to our Court limits our review to consideration of the appellant's sentence; that our plenary review under 2009 MCA § 950f(d) has already been completed; that the appellant's conviction for conspiracy to commit war crimes has been affirmed by the D.C. Circuit and is final and conclusive, pursuant to 2009 MCA § 950j;[3] and that we therefore have no authority to consider challenges to the underlying conviction at this stage in the litigation.

In *United States v. Reed*, 1 M.J. 1114 (N.C.M.R. 1977), the Navy Court of Military Review was tasked on remand with reassessing Reed's sentence after its superior Court, the Court of Military Appeals, set aside two of the three offenses to which Reed had pleaded guilty. *Id.* at 1115. On remand, Reed sought to challenge the providence of his guilty plea to the remaining charge. The Navy Court held that Reed's remaining conviction became final when its superior court affirmed the conviction and the Navy Court, therefore, had "no jurisdiction to further consider

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[3] *See also* Rule for Military Commission (R.M.C.) 1209, Manual for Military Commissions (2016 ed.) ("A military commission conviction is final when review is completed by the United States Court of Military Commission Review and ... (b) the conviction is affirmed by the United States Court of Appeals for the District of Columbia Circuit and a writ of certiorari ... is denied by the United States Supreme Court[.]").

whether" Reed's conviction was "correct in law and in fact." *Id*.

In *United States v. Smith*, 41 M.J. 385 (C.A.A.F. 1995), the CAAF remanded the case for a fact-finding hearing in accordance with *United States v. DuBay*, 17 U.S.C.M.A. 147, 37 C.M.R. 411 (1967), to resolve concerns about the defense counsel's prior representation of a prosecution witness. *Smith*, 41 M.J. at 385. After the *DuBay* hearing was complete, the record was submitted to the service court of criminal appeals in accordance with the CAAF's order, and new appellate defense counsel raised and briefed two additional assignments of error not raised in the initial appeal before the service court. The service court declined to consider the new issues. The CAAF held that the lower court did not err by refusing to consider supplemental assignments of error beyond the scope of the remand order: "While appellant is entitled to plenary review under Article 66, Uniform Code of Military Justice, 10 U.S.C. § 866, he is only entitled to one such review." *Id*. at 386.

Reed and *Smith* are instructive. First, just as in Reed, the appellant's conviction is final. We, therefore, have no authority at this stage of the litigation to determine—again—whether that conviction is correct in law and fact. Moreover, the appellant has had his day in our Court; although he is entitled to plenary review under 2009 MCA § 950f(d), "he is only entitled to one such review." *Smith*, 41 M.J. at 386. In 2011, we conducted our plenary review of the appellant's conspiracy conviction pursuant 2009 MCA § 950f(d) and affirmed

the judgment of conviction. *Bahlul I*, 820 F.Supp.2d at 1230-31.

Thus, we have already conducted our review of the conspiracy offense, and our judgment as to it has been affirmed by the D.C. Circuit. The issue was not remanded and we have no authority to review the appellant's claims now. *Husband*, 312 F.3d at 251. To the extent the appellant's claims are new—and not simply a rehashing of the arguments made before this Court in his initial appeal—they are waived. *See id.* at 250 ("[A]ny issue that could have been but was not raised on appeal is waived and thus not remanded.") (citing *United States v. Morris*, 259 F.3d 894, 898 (7th Cir. 2001) ("Parties cannot use the accident of remand as an opportunity to reopen waived issues.")).

Finally, we recognize that our superior Court may authorize us to reopen an issue by issuing a mandate that "can reasonably be understood as permitting" us to do so. *Ben Zvi*, 242 F.3d at 95. The appellant argues that the D.C. Circuit's mandate does just that, since his conspiracy conviction is the "sine qua non for his sentence." Appellant Corrected Mot. to Dismiss 15. We disagree. Had our superior Court wanted us to review the appellant's claim that conspiracy was not an offense triable by military commission—a claim rejected by this Court and the D.C. Circuit—they would have remanded the case with instructions to answer that very question. Instead, our superior Court's mandate was clear and unambiguous. The Court simply directed that we determine what effect, if any, the vacation of two convictions would have on the appellant's sentence. We conclude that a de novo

review of the appellant's remaining conviction is beyond the scope of our permissible review.

B. Jurisdictional claim

Next we address whether we may consider the appellant's claim that the commission was not properly convened and therefore without jurisdiction.

The appellant challenges Susan Crawford's appointment to the position of Convening Authority within the Office of the Convening Authority for Military Commissions. He challenges her appointment on statutory and constitutional grounds, and further argues that Ms. Crawford's defective appointment deprived his commission of subject-matter jurisdiction in his case. In response, the government first argues that even if Ms. Crawford's appointment was infirm, this would not create a jurisdictional issue. Second, the government argues that even if the challenge to Ms. Crawford's appointment did amount to a challenge to the jurisdiction of his commission, we may not now entertain this allegation of error on remand.

We find that jurisdictional challenges are within the scope of our review and that the appellant's challenge to Ms. Crawford's appointment does in fact constitute a challenge to the commission's subject-matter jurisdiction for reasons we explain below.

As discussed above, the law-of-the-case doctrine and mandate rule generally prevent a lower court from going beyond the scope of the mandate or addressing issues on remand not previously raised during the initial appeal. And the appellant did not object to Ms. Crawford's appointment as the

Convening Authority during his military commission, during his direct appeal before our Court, or before the D.C. Circuit. But jurisdiction is arguably different because it involves a "court's power to hear a given case [and] can never be waived or forfeited." *United States v. Munoz Miranda*, 780 F.3d 1185, 1188 (D.C. Cir. 2015) (citing *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 514 (2006)); *see also Gonzalez v. Thaler*, 565 U.S. 134, 141 (2012) ("Subject-matter jurisdiction can never be waived or forfeited. The objections may be resurrected at any point in the litigation").

Indeed, a "charge or specification shall be dismissed at any stage of the proceedings if ... [t]he military commission lacks jurisdiction to try the accused for the offense." Rule for Military Commission (R.M.C.) 907(b)(1), Manual for Military Commissions (MMC) (2007 ed.); *see also* R.M.C. 907(b)(1), MMC (2016 ed.) (stating same). This is so because jurisdictional limits define the foundation of judicial authority, and subject-matter jurisdiction, when questioned, must be decided before any other matter. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 93-95 (1998); *In re Sealed Case*, 131 F.3d 208, 210 (D.C. Cir. 1997) ("before we can legitimately decide any question, whether on interlocutory or final appeal, we, like all federal courts, 'are under an independent obligation to examine [our] own jurisdiction'") (brackets in original; citation omitted).

Neither the Supreme Court nor our superior Court has "directly opined on how to reconcile the mandate rule with subsequent distinct challenges to ... subject matter jurisdiction, a challenge that could ordinarily be raised at any time and even sua sponte."

Flame S.A. v. Freight Bulk Pte. Ltd., 807 F.3d 572, 580 (4th Cir. 2015). But other circuit courts of appeals have. In *United States v. Adesida*, 129 F.3d 846, 848 (6th Cir. 1997), the Sixth Circuit Court of Appeals affirmed the district court's judgment denying a defendant's motion for a new trial after he alleged—for the first time on remand for resentencing—three separate errors with one of the charges. Before examining the merits of the defendant's motion for a new trial, the court first had to determine whether the defendant had waived his right to raise new issues after "there already ha[d] been a prior appeal of the case to the Sixth Circuit, in which the[ ] issues were not raised, and the Sixth Circuit in the prior appeal affirmed defendant's conviction." *Id.* at 849. Applying the law-of-the-case doctrine, the court held that the defendant waived two of the three challenges to the charge because they "could have been challenged in a prior appeal, but were not." *Id.* at 850. However, the court held that the third claim—alleging that the charge failed to charge an offense—had not been waived because "[i]f an indictment does not charge a cognizable federal offense, then a federal court lacks jurisdiction to try a defendant for violation of the offense." *Id.* (citing *United States v. Armstrong*, 951 F.2d 626, 628 (5th Cir. 1992)). The court held that "[l]ack of subject-matter jurisdiction may be raised at any time in the course of a proceeding and is never waived. Matters of jurisdiction may be raised at any time, because if a court lacks subject-matter jurisdiction, it does not have the power to hear the case." *Id.* (citations omitted); *see also* Fed. R. Crim. P.

12(b)(2) ("A motion that the court lacks jurisdiction may be made at any time while the case is pending").

In the context of a civil case, the Supreme Court has opined on the timeliness of objections to subject-matter jurisdiction. In analyzing Federal Rule of Civil Procedure (Fed. R. Civ. P.) 12(h)(3),[4] the Court held that "[t]he objection that a federal court lacks subject-matter jurisdiction ... may be raised by a party, or by a court on its own initiative, at any stage in the litigation, even after trial and the entry of judgment." *Arbaugh*, 546 U.S. at 506 (emphasis added). We see no reason to apply R.M.C. 907(b)(1)'s language directing that a charge or specification be dismissed "at any stage of the proceeding" for lack of jurisdiction differently from the Supreme Court's application of Rule 12(h)(3)'s similar language requiring courts to dismiss an action "at any time" for lack of jurisdiction.[5]

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[4] The current rule directs that "[i]f the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action." Fed. R. Civ. P. 12(h)(3). When the Supreme Court decided *Arbaugh*, the version of the rule in effect read, "[w]henever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action." *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 506-07 (2006) (quoting Fed. R. Civ. P. 12(h)(3) (2000 ed.)). The Rule was amended in 2007 "to make [it] more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only." Fed. R. Civ P. 12, Committee Notes on Rules, 2007 Amendment.

[5] We have found only one service court case that deals with whether a service court of criminal appeals could entertain a challenge to subject-matter jurisdiction after a conviction had become final. In *United States v. Claxton*, 34 M.J. 1112

Therefore, our consideration of R.M.C. 907(b)(1), the persuasive authority from Sixth Circuit, the Supreme Court's analysis of similar language in Federal Rule of Civil Procedure 12(h)(3), and "the duty which rests on the courts, in time of war as well as in time of peace, to preserve unimpaired the constitutional safeguards of civil liberty," *Ex Parte Quirin*, 317 U.S. 1, 19 (1942), convince us that we must assure ourselves that the military commission had subject-matter jurisdiction over the charged offense of which the appellant remains convicted. *See Hamdan v. Rumsfeld*, 548 U.S. 557, 611-12 (2006) (plurality op.); *id.* at 683 (Thomas, J., and Scalia, J., dissenting); *see also In re Yamashita*, 327 U.S. 1, 17-20 (1946); 10 U.S.C. § 950g(d).

Of course, deciding that the appellant may raise a jurisdictional claim is not the same thing as deciding that this claim is jurisdictional. Even though we have decided that jurisdictional claims are within the scope of our review, we must ask whether the challenge to Ms. Crawford's appointment has jurisdictional implications. The government argues that even if Ms. Crawford's appointment was defective the commission she convened would still have had subject-matter jurisdiction. We think, however, that

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(C.G.C.M.R. 1992), the Coast Guard Court of Military Review held that it did not have the authority to entertain the challenge. However, the court provided no substantive analysis regarding its lack of authority to review a subject matter-jurisdiction challenge, and cited only one case, and it did not address the issue. Thus, we do not find *Claxton* persuasive for our purposes.

the appellant's claim does go to the jurisdiction of appellant's commission.

The commission's jurisdiction in this case is defined first by 2006 MCA § 948d(a), which provides that "[a] military commission under this chapter shall have jurisdiction to try any offense made punishable by this chapter or the law of war when committed by an alien unlawful enemy combatant before, on, or after September 11, 2001." The government argues that this limits jurisdictional issues to just two areas: the accused's status as a person subject to Chapter 47a, and whether the offenses are made punishable by Chapter 47a. Since the appellant's motion to dismiss does not implicate either his "status or the offenses," the government contends that the appellant "incorrectly couches [his] argument in jurisdictional terms."[6] We disagree.

Because Congress used the UCMJ as a model for the 2006 MCA, we once again turn to the UCMJ and case law interpreting it for persuasive guidance on how we should interpret provisions of the 2006 MCA. *See* 2006 MCA § 948b(c) (court-martial case law is instructive but not binding). Two UCMJ articles with close analogues to relevant MCA provisions inform our analysis. The first article, Article 18, UCMJ (10 U.S.C. § 818) defines the jurisdiction of general courts-martial in language functionally identical to 2006 MCA § 948d(a)'s treatment of military commission jurisdiction. Article 18, UCMJ provides

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[6] Government Opposition to Motion to Dismiss (Aug. 6, 2018), at 8 (quoting *United States v. Al-Nashiri*, 191 F.Supp.3d 1308, 1316 (CMCR 2016)) (brackets and ellipses omitted).

that "general courts-martial have jurisdiction to try persons subject to this chapter for any offense made punishable by this chapter ..."—language essentially identical to that in the analogous MCA provision. The second UCMJ article, Article 22, (10 U.S.C. § 822), sets forth the officials and officers who may convene general courts-martial. This article is analogous to 2006 MCA § 948h, and this section authorizes "the Secretary of Defense or ... any officer or official of the United States designated by the Secretary" to convene military commissions.

Military courts construing Articles 18 and 22, UCMJ have for years uniformly held that courts-martial convened by an improperly appointed convening authority are "without jurisdiction to proceed and, hence, ... a nullity." *United States v. Cunningham*, 21 U.S.C.M.A. 144, 146, 44 C.M.R. 198, 200 (1971) (Secretary of the Navy improperly delegated to another officer authority to appoint special court-martial convening authorities); *see also*, *e.g.*, *United States v. Greenwell*, 19 U.S.C.M.A. 460, 463, 42 C.M.R. 62, 65 (1970) ("[W]e believe that [the Secretary of the Navy's] personal action is an absolute prerequisite, we must hold that the court-martial which convicted this accused was without jurisdiction to proceed and, hence, was a nullity."). This determination reflects the fact that "[i]n the military justice system there are no standing courts." *Loving v. United States*, 62 M.J. 235, 254 (C.A.A.F. 2005). Indeed, "[a] court-martial is a creature of an order promulgated by an authorized commander ... which convenes, or creates, the court-martial entity. Without such an order, there is no court." *United*

States v. Ryan, 5 M.J. 97, 101 (C.M.A. 1978) (citing Article 22, UCMJ). So while Article 18, UCMJ, may define the jurisdiction of a general court-martial in terms of the type of offense and the status of the offender—without reference to the convening authority or referral of charges—it presupposes that a general court-martial actually exists. Thus, "[j]urisdiction depends upon a properly convened court, composed of qualified members chosen by a proper convening authority, and with charges properly referred." *United States v. Adams*, 66 M.J. 255, 258 (C.A.A.F. 2008).

The similarity of these two UCMJ articles and their MCA counterparts—in both language and in function—is an important indication of congressional intent. *See Lorillard*, 434 U.S. at 580 ("[W]here, as here, Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute."). We find that Congress intended reviewing courts to analyze the jurisdiction of military commissions in the same manner military courts review the jurisdiction of courts-martial. Like courts-martial, military commissions are ad hoc tribunals that depend on the exercise of an empowered official's authority for their existence. A military commission not convened by an official with the authority to convene one is really no commission at all and is without jurisdiction of any sort.

The regulations implementing the MCA's jurisdictional requirements reinforce our conclusion

that a military commission purportedly convened by one who lacks the authority to convene them lacks jurisdiction to try anyone under the MCA. Rule for Military Commission (R.M.C.) 201(b)(3), MMC (2007, ed.) was in effect at the time the appellant's charges were referred and tried. It reads: "for a military commission to have jurisdiction: (A) The military commission must be convened by an official empowered to convene it;" and "(C) Each charge before the military commission must be referred to it by a competent authority[.]"[7] These requirements mirror Rule for Courts-Martial (R.C.M.) 201(b), Manual for Courts-Martial (MCM), United States, (2019 ed.), which prescribes the requirements for court-martial jurisdiction.[8]

We conclude that the appellant's challenge to Ms. Crawford's authority to convene military commissions is a jurisdictional challenge, and that as such it is properly within the scope of our review.[9]

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[7] The 2016 version of the MMC is currently in effect, and R.M.C. 201(b)(1) and (3), MMC (2016 ed.), contain these same two provisions.

[8] R.C.M. 201(b) requires that "for a court-martial to have jurisdiction ... (1) The court-martial must be convened by an official empowered to convene it;" and "(3) Each charge before the court-martial must be referred to it by competent authority[.]"

[9] The government argues, citing *Freytag v. Commissioner*, 501 U.S. 868 (1991) and *Lucia v. SEC*, —— U.S. ——, 138 S.Ct. 2044 (2018), that appellant's Appointments Clause challenge to Ms. Crawford as the Convening Authority is not a jurisdictional challenge, and, in any event, the challenge was forfeited because it was not timely raised. In other contexts, those arguments appear to have significant force. *See Intercollegiate Broad. Sys.,*

II. Motion to Dismiss for Lack of Subject-Matter jurisdiction

Having determined that the appointment of the convening authority implicates the military commission's subject-matter jurisdiction to try the appellant, we next turn to the merits of the appellant's motion and determine whether Ms. Crawford was properly appointed as the Convening Authority. The appellant contends that Ms. Crawford was improperly appointed as the Convening Authority, and thus his military commission lacked subject-matter jurisdiction to try him. Specifically, the appellant's argument is two-fold. First he argues that pursuant to the Appointments Clause, the convening authority is a principal officer that must be appointed by the President with the advice and consent of the Senate. Alternatively, he argues that 2006 MCA § 948h requires that the convening authority for military commissions be either "the

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Inc. v. Copyright Royalty Bd., 574 F.3d 748, 755-56 (D.C. Cir. 2009) ("Royalty Logic has forfeited its [Appointments Clause] argument by failing to raise it in its opening brief.... An Appointments Clause challenge is 'nonjurisdictional,' [*Freytag*, 501 U.S.] at 878 (majority opinion), and thus not subject to the axiom that jurisdiction may not be waived"). Here, however, the military commission does not exist and is without any jurisdiction whatsoever unless and until convened by someone with authority to convene it. If there is a defect in Ms. Crawford's appointment as convening authority, then she was powerless to convene the commission. The nature of the defect does not matter. Accordingly, the appellant's Appointments Clause challenge to Ms. Crawford—which we reject—is merely the predicate to appellant's claim that the military commission lacked jurisdiction to try him.

Secretary of Defense or any officer or official of the United States designated by the Secretary of Defense" and that Ms. Crawford was neither an "officer" nor an "official" when she was appointed by the Secretary. We review appellant's claim that his military commission lacked subject-matter jurisdiction de novo. *Paralyzed Veterans of Am. v. United States DOT*, 909 F.3d 438, 443 (D.C. Cir. 2018); *Schnitzler v. United States*, 761 F.3d 33, 37 (D.C. Cir. 2014).

A. Background

One week after the September 11, 2001, attacks on the United States, Congress passed the Authorization for Use of Military Force resolution (AUMF). Pub. L. No. 107-40, 115 Stat. 224 (2001). The AUMF authorized the President to "use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks." Id. In a November 13, 2001 order the President "vested in the Secretary of Defense the power to appoint military commissions to try individuals subject to the Order," and that power was then delegated to the Appointing Authority. Hamdan, 548 U.S. at 568-69.10

On January 5, 2007, Deputy Secretary of Defense Gordon England established the position of Director, Office of the Convening Authority, as a "special sensitive" position, and on January 18, 2007, that position was certified.[11] The position was designated as a general, managerial position in the Senior

[10] The Appointing Authority was the predecessor to the Convening Authority.

[11] Appellant Corrected Mot. to Dismiss at Attach. B (Position Description (Jan. 5, 2007)).

Executive Service.[12] On January 31, 2007, Ms. Crawford was appointed as a limited-term appointee in the Senior Executive Service as the Director, Office of the Convening Authority.[13]

On February 6, 2007, Secretary of Defense Robert M. Gates appointed Ms. Crawford, "currently the Director of the Office of the Convening Authority" as "the Convening Authority for Military Commissions."[14] On April 27, 2007, the Deputy Secretary of Defense promulgated the Regulation for Trial by Military Commission (RTMC). The 2007 RTMC, paragraph 2-1 provides:

> The Office of the Convening Authority for Military Commissions is established in the Office of the Secretary of Defense under the authority, direction, and

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[12] *Id*. *See also* 5 U.S.C. § 3132(a)(2) (A Senior Executive Service position is a senior position in an agency, "which is not required to be filled by an appointment by the President by and with the advice and consent of the Senate, and in which the employee: (A) directs the work of an organizational unit; (B) is held accountable for the success of one or more specific programs or projects; (C) monitors progress toward organizational goals and periodically evaluate[s] and makes appropriate adjustments to such goals; (D) supervises the work of employees other than personal assistants; or (E) otherwise exercises important policy-making, policy-determining, or other executive functions[.]").

[13] Appellant Corrected Mot. to Dismiss at Attach. C (Notification of Personnel Action (effective Jan. 31, 2007)). *See also* 5 U.S.C. § 3132(a)(5) (A "limited term appointee" is "an individual appointed under a nonrenewable appointment for a term of 3 years or less to a Senior Executive Service position the duties of which will expire at the end of such term.").

[14] Appellant Corrected Mot. to Dismiss at Attach. A.

> control of the Secretary of Defense. The Office of the Convening Authority shall consist of the Director of the Office of the Convening Authority, the Convening Authority ....[15]

On February 26, 2008, Ms. Crawford convened a military commission to try Al Bahlul. Al Bahlul was tried on May 7, August 15, September 24, and October 27 to November 3, 2008. On June 3, 2009, Ms. Crawford approved the findings and sentence of Al Bahlul's military commission. She served as Convening Authority for military commissions until January 30, 2010.[16]

B. Discussion

The appellant challenges Ms. Crawford's appointments as the Director, Office of the Convening Authority and Convening Authority, on statutory and constitutional grounds. We first address whether Ms. Crawford's appointments comply with 2006 MCA § 948h, and then consider whether the Constitution's requirements were satisfied.

(1) Appointment of Convening Authority under 2006 MCA § 948h

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[15] The RTMC was not in existence when Ms. Crawford was appointed as either the Director, Office of the Convening Authority or as the Convening Authority. It was in effect when Ms. Crawford, as Convening Authority referred Al Bahlul's charges to trial by military commission. The 2007 version of the RTMC describes the duties and responsibilities of the Office of the Convening Authority.

[16] Appellant Corrected Mot. to Dismiss at Attach. E, (Notification of Personnel Action (effective Jan. 30, 2010)).

Section 948h of the 2006 MCA states "Military commissions under [10 U.S.C. §§ 948a et seq.] may be convened by the Secretary of Defense or by any officer or official of the United States designated by the Secretary for that purpose."[17] At the time Ms. Crawford was appointed to be the Convening Authority, she was already the Director, Office of the Convening Authority. First, we assess whether Ms. Crawford was properly appointed to the position of Director, Office of the Convening Authority, and then we determine whether her appointment to this position resulted in her being an "officer or official of the United States."

(a) Authority of Deputy Secretary of Defense to appoint the Director, Office of the Convening Authority

As noted above, Ms. Crawford was appointed by the Deputy Secretary of Defense on January 31, 2007, as Director, Office of the Convening Authority. Then, six days later, the Secretary of Defense appointed her to be the Convening Authority. Subject to the direction of the President, the Secretary of Defense has "has authority, direction, and control over the Department of Defense." 10 U.S.C. § 113(b). Consequently, "[u]nless specifically prohibited by law, the Secretary may, without being relieved of his responsibility, perform any of his functions or duties, or exercise any of his powers through, or with the aid of, such persons in, or organizations of, the

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[17] (Emphasis added). 2009 MCA § 948h, Pub. L. No. 111-84, 123 Stat. 2576, contains the same provision as 2006 MCA § 948h, Pub. L. No. 109-366, 120 Stat. 2600.

Department of Defense as he may designate." 10 U.S.C. § 113(d). Part of the Secretary's duties include ensuring the employment of necessary civilian employees "to carry out the functions and activities of the department." 10 U.S.C. § 129(b).

"The Deputy Secretary shall perform such duties and exercise such powers as the Secretary of Defense may prescribe." 10 U.S.C. § 132(b). The Secretary of Defense delegated to the Deputy Secretary of Defense the "full power and authority to act for the Secretary of Defense and to exercise the powers of the Secretary of Defense upon any and all matters concerning which the Secretary of Defense is authorized to act pursuant to law."[18] The Deputy Secretary of Defense is authorized to make "specific" further delegations as necessary.[19] This includes delegating authority to the Convening Authority and the Director, Office of the Convening Authority. Nothing in the 2006 MCA, any version of the MMC, or any version of the RTMC specifically or expressly limits the authority of the Deputy Secretary of Defense to exercise the authority delegated to him with respect to matters affecting military commissions that we address.

Accordingly, the Deputy Secretary had authority to appoint Ms. Crawford as the Director, Office of the Convening Authority.

(b) Status of the position Director, Office of the Convening Authority

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[18] Dept. of Def. Dir. 5105.02, Deputy Secretary of Defense, ¶ 1.2 (Jan. 9, 2006).
[19] *Id*. at ¶ 1.3.

Under 2006 MCA § 948h only the Secretary of Defense or an "officer or official of the United States designated by the Secretary" is empowered to convene a military commission. The appellant argues that Ms. Crawford was neither an officer nor an official of the United States but rather merely an employee of the United States ineligible to be appointed as the Convening Authority pursuant to § 948h. Therefore, we next examine whether, as Director, Office of the Convening Authority, Ms. Crawford was an "officer or official of the United States" or merely a government employee.

Citing 10 U.S.C. § 101(b)(1), the appellant argues that for purposes of Title 10, officer means only "a commissioned or warrant officer." Appellant Corrected Mot. to Dismiss 9. Similarly, he argues that an official is simply one who "holds or is invested with an office and is roughly synonymous with the term officer." *Id*. at 9-10 (quoting *Tanvir v. Tanzin*, 894 F.3d 449, 461 (2d Cir. 2018) (internal quotation marks omitted)). The appellant points to the UCMJ and argues that "Congress made the ability to serve as a convening authority, an ancillary duty germane to the most senior positions of authority and command" and cannot, therefore, be delegated to mere government employees. *Id*. at 10 (citing *United States v. Grindstaff*, 45 M.J. 634, 636 (N-M. Ct. Crim. App. 1997)). As a result, the appellant contends that the person designated to serve as Convening Authority in the Secretary's stead—whether a military officer or a civilian official—must "by statute, be an officer of the United States for Appointments Clause purposes." *Id*.

From the context of 2006 MCA § 948h, it is unlikely Congress intended officers and officials to

have the same meaning. We apply the rule against surplusage, that is, we "'give effect, if possible, to every clause and word of a statute.'" *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (quoting *Montclair v. Ramsdell*, 107 U.S. 147, 152 (1883)). As a result, we interpret the term "officers or officials of the United States" as describing two categories of individuals—officers and officials—each with a distinct meaning. *See McDonnell v. United States*, —— U.S. ——, 136 S.Ct. 2355, 2369 (2016) (finding that two similar words have distinct meanings, which is consistent "with the presumption 'that statutory language is not superfluous.'" (citation omitted)). We should avoid a reading that would render any portion of the statute inoperative or superfluous.

Title 10 U.S.C.A., § 101(b) defines certain terms "relating to military personnel." "The term 'officer' means a commissioned or warrant officer." § 101(b)(1). Appellant contends that officer, as used in 2006 MCA § 948h, refers to a military officer and not a civilian official. Another reading of the statute is that the definition applies only if the term officer, contextually, refers to "military personnel." Accordingly, perhaps officer as used in 2006 MCA § 948h means "any appointee exercising significant authority pursuant to the laws of the United States ... and must, therefore, be appointed in the manner prescribed by [the Appointments Clause]." *Buckley v. Valeo*, 424 U.S. 1, 126 (1976). "The Appointments Clause provides the exclusive process for appointing 'Officers of the United States.'" *Lucia v. SEC*, —— U.S. ——, 138 S.Ct. 2044, 2056 (2018) (Thomas & Gorsuch, JJ., concurring). Pursuant to the

Appointments Clause, "principal officers must be nominated by the President and confirmed by the Senate, [and] Congress can authorize the appointment of 'inferior Officers' by 'the President alone,' 'the Courts of Law,' or 'the Heads of Departments.'" *Id.* (quoting U.S. Const., Art. II, § 2, cl. 2). Since Ms. Crawford was not appointed as Director, Office of Military Commissions by the President, a Court of Law, or the Head of a Department, her appointment to that position would not be consistent with the Appointments Clause. But for the purposes of our inquiry here, we need not decide whether Ms. Crawford was an officer for purposes of § 948h because we specifically find that as Director, Office of Military Commissions she was an "official of the United States."

First, we reject the appellant's contention that an "official of the United States" means "an officer of the United States for Appointments Clause purposes." Appellant Corrected Mot. to Dismiss 10. The appellant provides no case law or other authoritative support for this assertion. As we noted above, the term "official" in the statute must mean something different that the term "officer." Had Congress desired to limit delegation of convening authority duties to only existing "officers of the United States for Appointments Clause purposes," it could have expressly done so. Alternatively, it could have simply limited appointment to "officers of the United States," and we would then concern ourselves with whether this term embraced both military officers and those civilian officers "exercising significant authority pursuant to the laws of the United States." *Buckley*,

424 U.S. at 126. But Congress included the term "official." In *United States v. Germaine*, 99 U.S. 508 (1879), the Supreme Court held that a law criminalizing extortion by "officers of the United States" did not apply to a government physician because he was not appointed pursuant to the Appointments Clause and was not, therefore, an "officer of the United States." In reaching this conclusion, the Court explained that had Congress intended the law to reach any "person in the service or employment of the government," then "words to that effect would be used." *Id*. at 510. In the 2006 MCA, Congress did use words to that effect. By including official in § 948h, Congress expressly broadened the pool of people beyond "Officers of the United States" that the Secretary could designate as the convening authority.

Next, because the term "official of the United States" is not defined in the 2006 MCA or elsewhere within Title 10, we "construe it in accord with its ordinary or natural meaning." *Smith v. United States*, 508 U.S. 223, 228 (1993). When a statute fails to define terms, a dictionary may be an appropriate source for determining a word's ordinary meaning. *See Muscarello v. United States*, 524 U.S. 125, 128 (1998) (emphasizing first dictionary definition as supplying "the word's primary meaning"); *Noel Canning v. NLRB*, 705 F.3d 490, 505, 509 (D.C. Cir. 2013) (applying dictionary definitions). BLACK'S LAW DICTIONARY defines official as "[s]omeone who holds or is invested with a public office; a person elected or appointed to carry out some portion of a government's

sovereign powers." Official, BLACK'S LAW DICTIONARY [1259] (10th ed. 2014).

Support for this broad definition of "official of the United States" is found in the term's widespread use in other federal statutes. For example, an "official of the United States" may be authorized to inspect poultry and eggs. *See* 21 U.S.C. §§ 453(k), 1033(k)(1). Likewise, no person in charge of a tuna fishing vessel shall "fail to stop upon being hailed by a duly authorized official of the United States." 16 U.S.C. § 957(b). The U.S. Code is replete with other examples.[20] Even within Title 10, the term is used to describe those individuals who determine whether information is classified. 10 U.S.C. § 801(15)(A). In sum, the term "official of the United States" is widely

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[20] *See*, *e.g.*, 16 U.S.C. § 6906(a)(13) (making it unlawful "to fail to stop a vessel upon being hailed and instructed to stop by a duly authorized official of the United States ...."); 18 U.S.C. § 201(a)(1) ("[T]he term 'public official' [includes] ... an officer or employee or person acting for or on behalf of the United States, or any department, agency or branch of Government thereof, including the District of Columbia, in any official function, under or by authority of any such department, agency, or branch of Government, or a juror"); 31 U.S.C. § 3341(a) ("A disbursing official of the United States Government may sell [or dispose of] a Government [security] ..., only if the official deposits ... the proceeds in the Treasury or with a depositary for the credit of the Government."); 31 U.S.C. § 3342(a)(3)(B) ("A disbursing official of the United States Government may" cash certain checks of U.S. citizens overseas.); 46 U.S.C. § 31322(f)(1)(D) ("A mortgage trustee may hold ... evidence of indebtedness, secured by a mortgage of the vessel to the mortgage trustee, provided that the mortgage trustee-- ... (D) is subject to supervision or examination by an official of the United States Government or a State").

used to describe the government agents and employees doing a myriad of often mundane acts that carry out some measure of sovereign power, but whose duties do not include "exercising significant authority pursuant to the laws of the United States" and who are, therefore, not officers of the United States for Appointments Clause purposes. *Buckley*, 424 U.S. at 126.

As the Director, Office of the Convening Authority, Ms. Crawford held a special sensitive, national security position and had authority to carry out some portion of the federal government's sovereign powers. Ms. Crawford was a member of the Senior Executive Service, and she had a responsibility to ensure that the executive management of the Office of the Convening Authority was responsive to the needs, policies, and goals of the nation.

We conclude, therefore, that Ms. Crawford, as the Director, Office of the Convening Authority, was an official of the United States when the Secretary of Defense designated her as the Convening Authority. We next examine Ms. Crawford's position as Convening Authority.[21]

(2) Status of the Convening Authority position under the Appointments Clause

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[21] We distinguish between Ms. Crawford's status as Director, Office of the Convening Authority, a Senior Executive Service position within the Department of Defense, discussed supra part II.B.(1)(b), and her appointment as the Convening Authority for Military Commissions. Though occupied by the same individual, the positions are distinct.

As a threshold matter, we have no doubt that while serving as the Convening Authority and convening the appellant's military commission and taking action in approving its findings, Ms. Crawford was acting as an "officer of the United States" for Appointments Clause purposes. First, Ms. Crawford, as the Convening Authority, held a "continuing office established by law," specifically § 948h. [22] *Lucia*, 138 S.Ct. at 2053. Second, she exercised "significant discretion" in "carrying out the ... important functions," of convening the appellant's military commission, referring his charges to trial, assigning members, and taking action on the findings and sentence. Id. As the Supreme Court recently made clear in Lucia, an adjudicative official with the scope of judicial and prosecutorial discretion enjoyed by the convening authority must be appointed in conformity with the Appointments Clause. *Id*. at 2052-53.

Again, while principal officers must be nominated by the President and confirmed by the Senate, Congress can authorize the heads of the department—such as the Secretary of Defense—to appoint inferior officers. The question before us then is whether the convening authority must be a principal officer. The appellant contends that given the nature of the convening authority's responsibility and the "significant and unreviewable discretion" the

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[22] The Office of Legal Counsel has defined a "continuing" federal office to be "either that the position is permanent or that, even though temporary, it is not personal, transient, or incidental." Officers of United States within the of Meaning of the Appointments Cl., 2007 OLC LEXIS 3, *10-11, 73-74 (citations omitted; internal quotation marks omitted).

convening authority exercises, the convening authority is a principal officer that must be nominated by the President and confirmed by the Senate. Appellant Corrected Mot. to Dismiss 13. And since Ms. Crawford was only appointed by the Secretary of Defense, the appellant argues, her appointment was invalid and she could not, therefore, convene the appellant's military commission.

We recognize that "[t]he line between 'inferior' and 'principal' officers is one that is far from clear." *Morrison v. Olson*, 487 U.S. 654, 671 (1988). A review of Appointments Clause challenges to courts-martial personnel is instructive. The Supreme Court first examined an Appointments Clause challenge to a court-martial in *Weiss v. United States*, 510 U.S. 163 (1994). In *Weiss*, the petitioner argued that the trial and appellate judges that presided over his court-martial and subsequent appeal were "principal officers" and were not appointed pursuant to the Appointments Clause. The Court held that because the challenged military judges were all commissioned officers who had already been appointed by the President with the advice and consent of the Senate, they did not require a second appointment as a military judge. *Id*. at 176. In reaching this conclusion, Chief Justice Rehnquist, writing for the majority, did not distinguish between "inferior" or "principal" officers. However, Justice Souter, in his concurrence, opined that "[s]ince the chosen method for selecting military judges shows that neither Congress nor the President thought military judges were principal officers, and since in the presence of doubt deference to the political branches' judgment is appropriate, ...

military judges are inferior officers for purposes of the Appointments Clause." *Id*. at 194 (Souter, J. concurring).

Since *Weiss*, the CAAF and the service courts of criminal appeals have routinely rejected Appointments Clause challenges to convening authorities, military judges, and military appellate judges from performing their duties under the UCMJ. *See*, *e.g.*, United States v. Akbar, 74 M.J. 364, 415 (C.A.A.F. 2015) (challenging appellate judges); *United States v. Hennis*, 75 M.J. 796, 853 (A. Ct. Crim. App. 2016) (en banc) (same); *United States v. Parker*, 71 M.J. 594, 630 & n.44 (N-M. Ct. Crim. App. 2012) (challenging the military judge and convening authority); *United States v. Grindstaff*, 45 M.J. 634, 636 (N-M. Ct. Crim. App. 1997) (per curiam) (challenging the military judge, appellate judges, and the convening authority); *United States v. Grey*, 1997 CCA LEXIS 198, *20 & n.9 (N-M. Ct. Crim. App. 1997) (same). These cases largely relied on the fact that the "officer" being challenged was a commissioned officer who did not require a second appointment.

However, in *Edmond v. United States*, 520 U.S. 651, 666 (1997), the Supreme Court held that civilian judges on the Coast Guard Court of Criminal Appeals were "inferior officers" under the Appointments Clause. The Court first noted the "importance of the responsibilities that [the] judges bear," but explained that the "exercise of 'significant authority pursuant to the laws of the United States' marks, not the line between principal and inferior officer for Appointments Clause purposes, but rather ... the line

between officer and non-officer." *Id*. at 662 (quoting *Buckley*, 424 U.S. at 126). Therefore, we must look beyond the mere scope and importance of the convening authority's duties to determine whether the convening authority is a principal or inferior officer.

In concluding that civilian Coast Guard appellate judges were inferior officers, the Court emphasized two factors. First, the appellate judges are supervised by other Executive Department officers and by CAAF, an Executive Department entity. *Id*. at 664 (citations omitted). This "administrative supervision of these judges by the Judge Advocate General of the Coast Guard, combined with his power to control them by removal from a case, establishes that the intermediate appellate judges here have the necessary superior" to render them inferior officers. *Id*. at 667 (Souter, J. concurring). Second, another executive branch entity, CAAF, has the power to reverse the judges' decisions. *Id*. at 665 (citations omitted). Thus, the judges did not have the "power to render a final decision on behalf of the United States unless permitted to do so by other Executive officers." *Id*.

In addressing an Appointments Clause question involving Copyright Royalty Judges (CRJ), our superior Court held that CRJs were principal officers, but noted that the power of a supervising officer to remove them without cause would be sufficient to conclude that those judges were "inferior officers" notwithstanding additional *Edmonds* factors that tended to make them principal officers. *Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd.*, 684 F.3d

1332, 1341 (D.C. Cir. 2012). *See also In re Al-Nashiri*, 791 F.3d 71, 83 (D.C. Cir. 2015) (observing that "The CRJs' for-cause removal protection is not 'generally consistent with the status of an inferior officer.'"). Thus, a supervising officer's power to terminate without cause may be dispositive. We begin there.

The convening authority for military commissions is both appointed by the Secretary of Defense, 2006 MCA § 948h, and subject to removal by the Secretary without cause. *See Myers v. United States*, 272 U.S. 52, 119 (1926) ("the power of appointment carried with it the power of removal"); *Kalaris v. Donovan*, 697 F.2d 376, 401 (D.C. Cir. 1983) ("The long standing rule relating to the removal power is that, in the face of congressional silence, the power of removal is incident to the power of appointment."). "The power to remove officers ... is a powerful tool for control." *Edmond*, 520 U.S. at 664. In fact, the Secretary of Defense recently exercised this powerful tool and removed the convening authority.[23] Thus, the Secretary of Defense had the power to remove Ms. Crawford as the Convening Authority without cause. This power alone is instructive if not dispositive. But there are also additional *Edmonds* factors that support a conclusion that Ms. Crawford is an inferior officer.

The convening authority acts "under the authority, direction, and control of the Secretary of Defense." 2007 RTMC, paragraph 2-1. Ms. Crawford

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[23] *See* Carol Rosenberg, *Secretary of Defense fires Guantanamo war court overseer*, Miami Herald (Feb. 5, 2018), https://www.miamiherald.com/news/nation-world/world/americas/guantanamo/article198456714.html (last visited Mar. 10, 2019).

as the Convening Authority, therefore, was "supervised at some level" by an officer "appointed by presidential nomination with the advice and consent of the Senate"—the Secretary of Defense. *Edmond*, 520 U.S. at 663. This supervision includes regulations promulgated by the Secretary, pursuant to 2006 MCA § 949a, that directly control the convening authority's substantive conduct in certain respects and reserves to the Secretary the right to disregard and supersede certain of her actions.[24] Thus, as Justice Souter pointed out in *Edmonds*, administrative supervision and the power to remove renders the convening authority an inferior officer. *Edmond*, 520 U.S. at 667 (concurring opinion).

Finally, like the Coast Guard appellate judges in Edmond, whose decisions were subject to review by the CAAF, a court within the executive branch, the convening authority's decisions are subject to review by our Court—another executive branch court. Therefore, the convening authority has "no power to

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[24] *See*, *e.g.*, R.M.C. 104(a)(1) (2007) (prohibiting a convening authority from censuring, reprimanding or admonishing the military commission, its members or the military judge); R.M.C. 407 (2007) (prescribing rules for forwarding and disposition of charges). If the Secretary of Defense disagrees with the convening authority's referral decision, he can refer the case to trial by military commission. *See* R.M.C. 601(f) (2007) ("The Secretary of Defense may cause charges, whether or not referred, to be transmitted to him for further consideration, including, if appropriate, referral."); *see also* R.M.C. 601(f) (2016) ("Except as otherwise provided in these rules, a superior competent authority may cause charges, whether or not referred, to be transmitted to the authority for further consideration, including, if appropriate, referral.").

render a final decision on behalf of the United States unless permitted to do so by other executive officers." *Id*. at 665.

Consequently, we conclude the convening authority is an inferior officer.

Since Congress authorized the appointment of the convening authority by the Secretary of Defense in 2006 MCA § 948h, and the Secretary of Defense did appoint Ms. Crawford as the Convening Authority, she had authority, as an inferior officer of the United States to convene the appellant's military commission. Therefore, the commission had subject-matter jurisdiction to try the appellant for his offenses.

III. Effect of Vacatur on the Sentence

The D.C. Circuit affirmed the appellant's conviction under Charge I (conspiracy to commit war crimes) and vacated his convictions under Charges II (solicitation of others to commit war crimes) and III (providing material support for terrorism). We must now decide what effect, if any, our superior Court's vacatur of these two charges has on the appellant's sentence. Once again, we turn to court-martial jurisprudence to examine the scope of our authority.

First, in *Jackson v. Taylor*, 353 U.S. 569 (1957), the Supreme Court upheld the authority of military appellate courts to conduct sentence reassessments. *Jackson* had been convicted at court-martial of premeditated murder and attempted rape, and had received a sentence of life in prison. *Id*. at 570. After the "board of review" (the precursor to the service courts of criminal appeals) set aside the murder

conviction, it reassessed the sentence and affirmed a sentence of 20 years' imprisonment. *Id.* at 572. Jackson argued before the Supreme Court that he should have been afforded a sentence rehearing. *Id.* In rejecting Jackson's argument, the Supreme Court relied on the board of review's statutory authority, pursuant to Article 66(c), UCMJ as it then existed to "affirm only ... the sentence or such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved." *Id.* at 573. The Court also observed the difficulties inherent in court-martial sentence rehearings, explaining that "[a] court-martial has neither continuity nor situs and often sits to hear only a single case. Because of the nature of military service, the members of a court-martial may be scattered throughout the world within a short time after a trial is concluded." *Id.* at 579.

Next, in *United States v. Sales*, 22 M.J. 305 (C.M.A. 1986), the Court of Military Appeals further explained the authority of the service courts of criminal appeal to reassess a sentence because of prejudicial error:

> [The court's] task differs from that which it performs in the ordinary review of a case. Under Article 66, [UCMJ], 10 U.S.C. § 866, the Court of [Criminal Appeals] must assure that the sentence adjudged is appropriate for the offenses of which the accused has been convicted; and, if the sentence is excessive, it must reduce the sentence to make it appropriate. However, when prejudicial

> error has occurred in a trial, not only must the Court of [Criminal Appeals] assure that the sentence is appropriate in relation to the affirmed findings of guilty, but also it must assure that the sentence is no greater than that which would have been imposed if the prejudicial error had not been committed. Only in this way can the requirements of Article 59(a), UCMJ, 10 U.S.C. § 859(a), be reconciled with the Code provisions that findings and sentence be rendered by the court-martial, see Articles 51 and 52, UCMJ, 10 U.S.C. §§ 851 and 852, respectively.

Id. at 307-08.

Finally, in *United States v. Winckelmann*, 73 M.J. 11 (C.A.A.F. 2013), the CAAF, building upon Jackson and Sales, announced factors or "points of analysis" for the service courts of criminal appeals "to consider when determining whether to reassess a sentence or order a rehearing." *Id*. at 15. These four, "illustrative, but not dispositive" factors are:

> (1) Whether there has been a "dramatic change[ ] in the penalty landscape or exposure." *Id*. at 15.
>
> (2) Whether sentencing was by members or a military judge alone. *Id*. at 16.
>
> "(3) Whether the nature of the remaining offenses capture the gravamen of criminal conduct included within the original offenses ... and

> whether significant or aggravating circumstances addressed at the court-martial remain admissible and relevant to the remaining offenses." *Id.*
>
> "(4) Whether the remaining offenses are of the type [with which appellate judges] should have the experience and familiarity ... to reliably determine what sentence would have been imposed at trial." *Id.*

We find *Winckelmann* persuasive and adopt its factors for determining whether we can reassess the appellant's sentence. First, our responsibility in 2009 MCA § 950f(d) to "affirm only ... the sentence or such part or amount of the sentence, as the Court finds correct in law and fact and determines, on the basis of the entire record, should be approved" is nearly identical to the service courts of criminal appeals' task under Article 66(c), UCMJ. Second, 2009 MCA § 950a mirrors Article 59, UCMJ, and therefore our ability to reassess a sentence necessarily includes the requirement that any reassessed sentence "is no greater than that which would have been imposed if the prejudicial error had not been committed." *Sales*, 22 M.J. at 308. We find that we may properly reassess the appellant's sentence if we are able to "reliably determine" that, absent the convictions for solicitation of others to commit war crimes and providing material support to terrorism, the "sentence would have been at least of a certain magnitude." *See Winckelmann*, 73 M.J. at 15.

Under all the circumstances presented, we find that we can reassess the appellant's sentence, and it is appropriate for us to do so. Although sentencing by the military judge alone was not an option under the 2006 MCA, the other factors favor reassessment by this Court. First, the penalty landscape has not dramatically changed. Although two of the three offenses for which the appellant was convicted have been vacated, the maximum punishment for the appellant's remaining conviction remains confinement for life.

Second, and most importantly, the remaining offense—conspiracy to commit war crimes—captures the gravamen of the criminal conduct at issue. Specifically, the members found beyond reasonable doubt that the appellant entered into an agreement to, among other things, murder protected persons.[25] In furtherance of the conspiracy, the members concluded that the appellant committed several overt acts, including: traveling to Afghanistan with the purpose of joining al Qaeda; undergoing military training at an al Qaeda sponsored training camp; pledging fealty to al Qaeda leader Usama bin Laden; preparing various propaganda videos to solicit

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[25] Under 2006 MCA § 950v(b)(1), the murder of protected persons is the intentional killing of one or more persons "entitled to protection under on or more of the Geneva Conventions, including ... civilians not taking an active part in hostilities." 10 U.S.C. § 950v(a)(2)(A). 10 U.S.C. § 950v was omitted in the general revision of Chapter 47A by Act Oct. 28, 2009, P.L. 111-84, Div A, Title XVIII, § 1802. Title 10 U.S.C. § 950t(1) (2009) punishes "murder of protected persons" with "death or such other punishment as a military commission under this chapter may direct."

support for al Qaeda and to indoctrinate al Qaeda personnel; acting as personal secretary and media secretary to Usama bin Laden; arranging for two of the 9/11 hijackers to pledge fealty to Usama bin Laden; preparing propaganda declarations or "Martyr Wills" for the two 9/11 hijackers; and researching the economic effects of the 9/11 attacks. *Bahlul I*, 820 F.Supp.2d at 1222.

These overt acts in support of the conspiracy charge were the same overt acts the members found in support of Charge III (providing material support to terrorism). Moreover, in Charge II (solicitation) the members found that Al Bahlul urged others to commit the same crimes he conspired to commit in Charge I. Thus, any evidence presented to establish Charges II and III was also admissible to establish Charge I.

Finally, although the appellant's conviction for conspiracy to commit war crimes remains the only such conviction of its kind reviewed by our Court, we recognize, as we stated above, that "one of the conspiracy's object offenses was the murder of protected persons." *Bahlul II*, 767 F.3d at 22. Conspiracy to commit murder is not so novel a crime that we are unable to "reliably determine what sentence would have been imposed at trial." *Winckelmann*, 73 M.J. at 16.

Taking these facts as a whole, as well as the entire record of the appellant's trial, we are confident that, absent the error, the members would have sentenced the appellant to confinement for life. We also find that sentence to be an appropriate punishment for the sole remaining conviction and this offender—thus

satisfying the requirement for a reassessed sentence to be both purged of error and appropriate for the offense involved. *Sales*, 22 M.J. at 308. In reaching this conclusion that confinement for life is an appropriate sentence for this offender and his offense, we have considered—and rejected—the appellant's renewed claims that a sentence to life in prison is inappropriately severe. As we noted in our original review of the appellant's conviction, "[t]he nature and seriousness" of the conspiracy offense is manifest in the charge itself. *Bahlul I*, 820 F.Supp.2d at 1260. The objects of the conspiracy charge included committing murder and attacking civilians. Undeniably, the appellant's overt acts in furtherance of the conspiracy made valuable contributions to the conspiracy and to al Qaeda. As a result, in fulfilling our "judicial function of assuring that justice is done and that the [appellant] gets the punishment he deserves," we affirm a sentence of confinement for life. *United States v. Healy*, 26 M.J. 394, 395 (C.M.A. 1988).

IV. Conclusion

The appellant's and appellee's motions to consider various briefs and attachments are GRANTED.

The appellant's motions to dismiss the charge based on his challenges to the appointment of the Convening Authority are DENIED.

The sentence is AFFIRMED.

Appendix C

DESIGNATED CONVENING AUTHORITIES FOR MILITARY COMMISSIONS

2006 – *present*

Date	*Name*	*Position*	*Type of Appt*
11/17/06 – 02/06/07	Gordon England	Deputy Secretary of Defense	PAS
02/06/07 – 01/31/10	Susan Crawford	Director, Office of Convening Authority	*none*
03/25/10 – 03/22/13	Bruce MacDonald	Director, Office of Convening Authority	*none*
03/22/13 – 09/30/14	Paul Oostburg Sanz	General Counsel, Dept. of the Navy	PAS

09/30/14 – 03/18/15	Vaugn Ary	Director, Office of Convening Authority	*none*
03/18/15 – 04/04/17	Paul Oostburg Sanz	General Counsel, Dept. of the Navy	PAS
04/04/17 – 02/03/18	Harvey Rishikof	Director, Office of Convening Authority	*none*
02/03/18 – 08/09/18	James Coyne	General Counsel, Defense Logistics Agency	*none*
08/09/18 – 05/23/19	Melinda Perritano	Deputy General Counsel, Defense Logistics Agency	*none*

05/23/19 – 04/17/20	Christian Reismeier[1]	Director, Office of Convening Authority	*none*
07/05/19 – 04/17/20	Robert Hogue	Counsel to the Commandant, Marine Corps	*none*
04/17/20 – *present*	Jeffrey Wood[2]	Convening Authority	*unk.*

[1] On June 14, 2019, Christian Reismeier recused himself from overseeing this case and the *Al-Nashiri* case due to his past involvement military commission prosecutions. His recusal left the Secretary of Defense as the only convening authority in these two cases until the designation of Robert Hogue on July 5, 2019.

[2] As of this filing, Christian Reismeier remains the Director, Office of Convening Authority. Though a reservist in the Army National Guard, Jeffrey Wood serves as the Convening Authority in a civilian capacity. Counsel for Petitioner submitted multiple requests for information on Mr. Wood's civilian position without response. The limited records available indicate that this position is titled "Convening Authority," but all other details remain unknown.

Appendix D

SECRETARY OF DEFENSE
1000 DEFENSE PENTAGON
WASHINGTON, DC 20301-1000

Feb 6 2007

MEMORANDUM FOR SECRETARIES OF THE MILITARY DEPARTMENTS, CHAIRMAN OF THE JOINT CHIEFS OF STAFF UNDER SECRETARIES OF DEFENSE, GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE, ASSISTANT SECRETARIES OF DEFENSE

SUBJECT: Designation of Convening Authority for Military Commissions

Pursuant to Chapter 47A of Title 10, United States Code, Section 948h, the Honorable Susan J. Crawford, currently the Director of the Office of the Convening Authority, is designated as the Convening Authority for Military Commissions. The designation of the Deputy Secretary of Defense as the Convening Authority, dated November 17, 2006, is rescinded.

/s/ Robert M. Gates

cc:
The Honorable Susan J. Crawford
The Honorable Pete Geren
Legal Advisor, Office of Military Commissions
Chief Prosecutor, Office of Military Commissions
Chief Defense Counsel, Office of Military Commissions

Appendix E

No. 040003

UNITED STATES v. ALI HAMZA AHMAD SULAYMAN AL BAHLUL a/k/a Ali Hamza Ahmed Suleman al Bahlul a/k/a Abu Anas al Makki a/k/a Abu Anas Yemeni a/k/a Mohammad Anas Abdullah Khalidi	)	Approval of Charges and Referral June 28, 2004

The charge against Ali Hamza Ahmad Sulayman al Bahlul (a/k/a Ali Hamza Ahmed Suleman al Bahlul, a/k/a Abu Anas al Makki, a/k/a Abu Anas Yemeni, a/k/a Mohammad Anas Abdullah Khalidi) is approved and referred to the Military Commission identified at Encl 1. The Presiding Officer will notify me not later than July 15, 2004, of the initial trial schedule, including dates for submission and argument of motions, and a convening date.

/s/ John Altenburg, Jr.

John Altenburg, Jr.
Appointing Authority
for Military Commissions

Appendix F

DEPARTMENT OF DEFENSE
Office of Military Commissions
1600 Defense Pentagon
Washington, DC 20301-1600

MILITARY COMMISSION ORDER NUMBER 1

3 June 2009

Ali Hamza Ahmad Suliman al Bahlul, a/k/a "Abu Anas al Makki," a/k/a "Ali Hamza Ismael," a/k/a "Abu Anas al Yemeni," a/k/a "Muhammad Anis Abdulla Khalidi," (ISN 0039) of Yemen was arraigned and tried before a military commission convened at the U.S. Naval Station, Guantanamo Bay, Cuba, pursuant to Military Commission Convening Order No. 07-01, dated 1 March 2007, as amended by Military Commission Convening Order No. 07-05, dated 29 May 2007, and as amended by Military Commission Convening Order No. 08-03, dated 22 October 2008.

The accused was arraigned and tried on the following offenses and the following findings or other dispositions were reached:

Charge I: 10 U.S.C. § 950v(b)(28) Conspiracy. Plea: Not Guilty. Finding: Guilty.

Specification: From about February 1999 through about December 2001 did conspire and agree with Usama bin Laden, Saif al 'Adl, and other members and associates of al Qaeda, known and unknown, to commit one or more offenses triable by military commission, to wit: murder of protected persons; attacking civilians; attacking civilian objects; commit murder in violation of the Law of War; destruction of property in violation of the Law of War; terrorism; and providing material support for terrorism at various locations in Afghanistan and elsewhere, and did undertake several overt acts in furtherance of the conspiracy.

Plea: Not Guilty. Finding: Guilty, except the words "armed himself with an explosive belt, rifle, and grenades to protect and prevent the capture of Usama bin Laden." Of the excepted words: Not Guilty.

Charge II: 10 U.S.C. § 950u Solicitation. Plea: Not Guilty. Finding: Guilty.

Specification: From about February 1999 through about December 2001 at various locations in Afghanistan, Pakistan, and elsewhere, did solicit several suspected al Qaeda operatives, known and unknown, to commit substantive offenses triable by military commissions, to wit: murder of protected persons; attacking civilians; attacking civilian objects; murder in violation of the Law of War; destruction of property in violation of the Law of War; terrorism; and providing material support for terrorism.

Plea: Not Guilty. Finding: Guilty.

Charge III: 10 U.S.C. § 950v(b)(25) Providing Material Support for Terrorism. Plea: Not Guilty. Finding: Guilty.

Specification: From about February 1999 through about December 2001, at various locations in Afghanistan and elsewhere, did intentionally provide material support and resources to al Qaeda, an international terrorist organization then engaged in hostilities against the United States of America, including violent attacks against United States' embassies at or near Nairobi, Kenya, and Dar es Salaam, Tanzania, on or about August 7, 1998; on the USS COLE at or near Aden, Yemen, on or about October 12, 2000; and at various locations in the United States on or about September 11,2001; knowing that al Qaeda engaged in or engages in terrorism, and acting in support of al Qaeda's objectives.

Plea: Not Guilty. Finding: Guilty, except the words "arming himself with an explosive belt, rifle, and grenades to protect and prevent the capture of Usama bin Laden." Of the excepted words: Not Guilty.

SENTENCE

The following sentence was adjudged by the members on 3 November 2008: Confinement for Life.

ACTION

In the case of Ali Hamza Ahmad Suliman al Bahlul, a/k/a "Abu Anas al Makki," a/k/a "Ali Hamza Ismael," alkla "Abu Anas al Yemeni," a/k/a "Muhammad Anis Abdulla Khalidi," ISN 0039, the sentence is approved and will be executed. The accused will be confined in such place as may be prescribed by the Commander, Joint Task Force Guantanamo Bay, Cuba, or superior authority.

BY DIRECTION OF SUSAN J. CRAWFORD, CONVENING AUTHORITY:

/s/ Donna L. Wilkins

Donna L. Wilkins
Clerk of Court
for Military Commissions

DISTRIBUTION:

1-Accused (Mr. al Bahlul)
1-Military Judge (Col Gregory)
1-Trial Counsel (MAJ Cowhig)
1-Defense Counsel (Maj Frakt)
1-Clerk of Court, OMC
1-Clerk of Court, CMCR
1-OSD (OGC)
1-JTF GTMO (Detention Facility)
1-SJA, JTF GTMO
5-Original Record of Trial
1-Each Copy of the Record of Trial

Jun 3 2009

ACTION

In the case of Ali Hamza Ahmad Suliman al Bahlul, a/k/a "Abu Anas al Makki," a/k/a "Ali Hamza Ismael," a/k/a "Abu Anas al Yemeni," a/k/a "Muhammad Anis Abdulla Khalidi," ISN 0039, the sentence is approved and will be executed. The accused will be confined in such place as may be prescribed by the Commander, Joint Task Force Guantanamo Bay, Cuba, or superior authority.

/s/ Susan J, Crawford

Susan J. Crawford
Convening Authority
for Military Commissions

Appendix G

RELEVANT CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS

Article II § 2, cl. 2 of the United States Constitution states:

[The President] shall have power, by and with the advice and consent of the Senate, to make treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law: but the Congress may by law vest the appointment of such inferior officers, as they think proper, in the President alone, in the courts of law, or in the heads of departments.

10 U.S.C. § 948h (2006/2009) states:

Military commissions under this chapter may be convened by the Secretary of Defense or by any officer or official of the United States designated by the Secretary for that purpose.

10 U.S.C. § 948i(b) (2006) states:

Detail of Members.—When convening a military commission under this chapter, the convening authority shall detail as members of the commission such members of the armed forces eligible under

subsection (a), as in the opinion of the convening authority, are best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament. No member of an armed force is eligible to serve as a member of a military commission when such member is the accuser or a witness for the prosecution or has acted as an investigator or counsel in the same case.

10 U.S.C. § 948i(c) (2006) states:

Excuse of Members.— Before a military commission under this chapter is assembled for the trial of a case, the convening authority may excuse a member from participating in the case.

10 U.S.C. § 948m(b) (2006) states:

Excuse of Members.— No member of a military commission under this chapter may be absent or excused after the military commission has been assembled for the trial of a case unless excused—

(1) as a result of challenge;

(2) by the military judge for physical disability or other good cause; or

(3) by order of the convening authority for good cause.

10 U.S.C. § 948m(c) states:

Absent and Additional Members.— Whenever a military commission under this chapter is reduced below the number of members required by subsection (a), the trial may not proceed unless the convening authority details new members sufficient to provide

not less than such number. The trial may proceed with the new members present after the recorded evidence previously introduced before the members has been read to the military commission in the presence of the military judge, the accused (except as provided in section 949d of this title), and counsel for both sides.

10 U.S.C. § 949b(a)(2)(B) (2006) states, in relevant part:

No person may attempt to coerce or, by any unauthorized means, influence—

(A) the action of a military commission under this chapter, or any member thereof, in reaching the findings or sentence in any case;

(B) the action of any convening, approving, or reviewing authority with respect to his judicial acts; or

(C) the exercise of professional judgment by trial counsel or defense counsel.

10 U.S.C. § 949m(c)(2) (2006) states:

In any case described in paragraph (1) in which 12 members are not reasonably available because of physical conditions or military exigencies, the convening authority shall specify a lesser number of members for the military commission (but not fewer than 9 members), and the military commission may be assembled, and the trial held, with not fewer than the number of members so specified. In such a case, the convening authority shall make a detailed written statement, to be appended to the record, stating why

a greater number of members were not reasonably available.

10 U.S.C. § 949b (2006) states:

(a) *Notice to Convening Authority of Findings and Sentence*.—The findings and sentence of a military commission under this chapter shall be reported in writing promptly to the convening authority after the announcement of the sentence.

(b) *Submittal of Matters by Accused to Convening Authority*.—

(1) The accused may submit to the convening authority matters for consideration by the convening authority with respect to the findings and the sentence of the military commission under this chapter.

(2)(A) Except as provided in subparagraph (B), a submittal under paragraph (1) shall be made in writing within 20 days after the accused has been given an authenticated record of trial under section 949o(c) of this title.

(B) If the accused shows that additional time is required for the accused to make a submittal under paragraph (1), the convening authority may, for good cause, extend the applicable period under subparagraph (A) for not more than an additional 20 days.

(3) The accused may waive his right to make a submittal to the convening authority under paragraph (1). Such a waiver shall be made in writing and may not be revoked. For the purposes of subsection (c)(2), the time within which the accused

may make a submittal under this subsection shall be deemed to have expired upon the submittal of a waiver under this paragraph to the convening authority.

(c) *Action by Convening Authority*.—(1) The authority under this subsection to modify the findings and sentence of a military commission under this chapter is a matter of the sole discretion and prerogative of the convening authority.

(2)(A) The convening authority shall take action on the sentence of a military commission under this chapter.

(B) Subject to regulations prescribed by the Secretary of Defense, action on the sentence under this paragraph may be taken only after consideration of any matters submitted by the accused under subsection (b) or after the time for submitting such matters expires, whichever is earlier.

(C) In taking action under this paragraph, the convening authority may, in his sole discretion, approve, disapprove, commute, or suspend the sentence in whole or in part. The convening authority may not increase a sentence beyond that which is found by the military commission.

(3) The convening authority is not required to take action on the findings of a military commission under this chapter. If the convening authority takes action on the findings, the convening authority may, in his sole discretion, may—

(A) dismiss any charge or specification by setting aside a finding of guilty thereto; or

(B) change a finding of guilty to a charge to a finding of guilty to an offense that is a lesser included offense of the offense stated in the charge.

(4) The convening authority shall serve on the accused or on defense counsel notice of any action taken by the convening authority under this subsection.

(d) *Order of Revision or Rehearing*.—(1) Subject to paragraphs (2) and (3), the convening authority of a military commission under this chapter may, in his sole discretion, order a proceeding in revision or a rehearing.

(2)(A) Except as provided in subparagraph (B), a proceeding in revision may be ordered by the convening authority if—

(i) there is an apparent error or omission in the record; or

(ii) the record shows improper or inconsistent action by the military commission with respect to the findings or sentence that can be rectified without material prejudice to the substantial rights of the accused.

(B) In no case may a proceeding in revision—

(i) reconsider a finding of not guilty of a specification or a ruling which amounts to a finding of not guilty;

(ii) reconsider a finding of not guilty of any charge, unless there has been a finding of guilty under a specification laid under that charge, which sufficiently alleges a violation; or

(iii) increase the severity of the sentence unless the sentence prescribed for the offense is mandatory.

(3) A rehearing may be ordered by the convening authority if the convening authority disapproves the findings and sentence and states the reasons for disapproval of the findings. If the convening authority disapproves the finding and sentence and does not order a rehearing, the convening authority shall dismiss the charges. A rehearing as to the findings may not be ordered by the convening authority when there is a lack of sufficient evidence in the record to support the findings. A rehearing as to the sentence may be ordered by the convening authority if the convening authority disapproves the sentence.

10 U.S.C. § 950c(a) (2006/2009) states:

Automatic Referral for Appellate Review.—Except as provided under subsection (b), in each case in which the final decision of a military commission (as approved by the convening authority) includes a finding of guilty, the convening authority shall refer the case to the Court of Military Commission Review. Any such referral shall be made in accordance with procedures prescribed under regulations of the Secretary.

10 U.S.C. § 950f(c) (2006) states:

Cases to be Reviewed.—The Court of Military Commission Review, in accordance with procedures prescribed under regulations of the Secretary, shall review the record in each case that is referred to the Court by the convening authority under section 950c of this title with respect to any matter of law raised by the accused.

10 U.S.C. § 950f(c) (2009) states:

Cases to be Reviewed.— The Court shall, in accordance with procedures prescribed under regulations of the Secretary, review the record in each case that is referred to the Court by the convening authority under section 950c of this title with respect to any matter properly raised by the accused.

10 U.S.C. § 950f(d) (2009) states:

In a case reviewed by the Court under this section, the Court may act only with respect to the findings and sentence as approved by the convening authority. The Court may affirm only such findings of guilty, and the sentence or such part or amount of the sentence, as the Court finds correct in law and fact and determines, on the basis of the entire record, should be approved. In considering the record, the Court may weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact, recognizing that the military commission saw and heard the witnesses.

10 U.S.C. § 950g(a) (2009) states:

Except as provided in subsection (b), the United States Court of Appeals for the District of Columbia Circuit shall have exclusive jurisdiction to determine the validity of a final judgment rendered by a military commission (as approved by the convening authority and, where applicable, as affirmed or set aside as incorrect in law by the United States Court of Military Commission Review) under this chapter.

10 U.S.C. § 950g(d) (2009) states:

Scope and Nature of Review. — The United States Court of Appeals for the District of Columbia Circuit may act under this section only with respect to the findings and sentence as approved by the convening authority and as affirmed or set aside as incorrect in law by the United States Court of Military Commission Review, and shall take action only with respect to matters of law, including the sufficiency of the evidence to support the verdict.

10 U.S.C. § 950i(d) (2006/2009) states:

Suspension of Sentence. — The Secretary of the Defense, or the convening authority acting on the case (if other than the Secretary), may suspend the execution of any sentence or part thereof in the case, except a sentence of death.

10 U.S.C. § 950j(a) (2006) states:

Finality. The appellate review of records of trial provided by this chapter, and the proceedings, findings, and sentences of military commissions as approved, reviewed, or affirmed as required by this chapter, are final and conclusive. Orders publishing the proceedings of military commissions under this chapter are binding upon all departments, courts, agencies, and officers of the United States, except as otherwise provided by the President.

10 U.S.C. § 950j (2009) states:

Finality of proceedings, findings, and sentences. The appellate review of records of trial provided by this chapter, and the proceedings, findings, and sentences of military commissions as approved, reviewed, or affirmed as required by this chapter, are final and conclusive. Orders publishing the proceedings of military commissions under this chapter are binding upon all departments, courts, agencies, and officers of the United States, subject only to action by the Secretary or the convening authority as provided in section 950i(c) of this title and the authority of the President.

Regulation for Trial by Military Commission § 1-3(b) (2007) states:

The Chief Trial Judge, Military Commissions Trial Judiciary, as designee of the convening authority, is responsible for the supervision and administration of the Military Commissions Trial Judiciary.

Regulation for Trial by Military Commission § 1-5 (b) (2007) states:

Those who fail to adhere to the rules, procedures, regulations, and instructions applicable to trials by military commission may be subject to appropriate action by the Secretary of Defense or his designee, the Convening Authority for Military Commissions, or the military judge of a military commission.

Regulation for Trial by Military Commission § 2-1 (2007) states:

The Office of the Convening Authority for Military Commissions is established in the Office of the Secretary of Defense under the authority, direction, and control of the Secretary of Defense. The Office of the Convening Authority shall consist of the Director of the Office of the Convening Authority, the convening authority, the legal advisor to the convening authority, and such other subordinate officials and organizational elements as are within the resources of the Secretary of Defense.

Regulation for Trial by Military Commission § 2-2 (2007) states:

Pursuant to 10 U.S.C. § 948h, the Secretary of Defense or any officer or official of the United States designated by the Secretary for that purpose may convene military commissions. No specific form or order is designated as required to effect the appointment of one or more convening authorities by the Secretary of Defense.

Regulation for Trial by Military Commission § 2-3 (2007) states:

a. In performing duties directly related to military commissions, the convening authority shall:

1. dispose of charges forwarded to the convening authority by the trial counsel through the legal advisor, by either referring any or all charges to a military commission, returning them to trial counsel with directions for further action, or dismissing them;

2. issue orders convening one or more military commissions to try alien unlawful enemy combatants for violations of the law of war or other crimes triable by military commissions;

3. detail as military commission members and alternate members those commissioned officers who are, in the opinion of the convening authority, best qualified for duty by reason of age, education, training, experience, length of service, and judicial temperament;

4. detail or employ qualified court reporters to make verbatim records of all commission sessions;

5. detail or employ qualified interpreters who shall interpret for the commissions and, as necessary, for the accused;

6. appoint all other personnel necessary to facilitate military commissions;

7. approve or disapprove requests from the prosecution to communicate with news media representatives regarding military commission cases and other matters related to military commissions;

8. approve or disapprove plea agreements with an accused;

9. order that such investigative or other resources be made available to defense counsel and the accused as deemed necessary by the convening authority for a fair trial;

10. employ those experts requested by a party and found by the convening authority to be relevant and necessary;

11. be responsible for effecting preparation of the record of trial;

12. consider matters submitted by an accused with respect to the findings and sentence prior to taking action on the case;

13. take such action on the findings and sentence deemed by the convening authority appropriate;

14. forward the case (as approved by the convening authority) to the Court of Military Commission Review; and

15. perform such other functions as the Secretary of Defense or an appellate court may prescribe.

b. In the performance of assigned functions and responsibilities, the convening authority for military commissions shall:

1. report directly to the Secretary of Defense or his designee;

2. use existing facilities and services of the Department of Defense and other federal agencies, whenever practicable, to avoid duplication and to achieve an appropriate level of efficiency and economy;

3. communicate directly with the heads of other DOD components as necessary to carry out assigned functions. Communications to the military departments shall be transmitted through the Secretaries of the military departments, their designees, or as otherwise provided by law or directed by the Secretary of Defense. Communications to the Commanders of the Combatant Commands, except in unusual circumstances, shall be transmitted through the Chairman of the Joint Chiefs of Staff; and

4. communicate with other Government officials, representatives of the legislative branch, members of the public, and representatives of foreign governments, as applicable, in carrying out assigned functions.

Regulation for Trial by Military Commission § 4-1 (2007) states:

a. The Secretary of Defense or a convening authority designated by the Secretary of Defense may order charges against an accused be tried by a specified military commission.

b. The convening authority will personally determine whether to refer the charges to trial by military commission and to the type of military

commission (capital or non-capital) to which charges will be referred. This function may not be delegated.

Regulation for Trial by Military Commission § 4-3(a) (2007) states:

The convening authority refers cases by personal order and may include instructions regarding the disposition of the charges and how they are to be tried. The convening authority may refer cases to a non-capital commission even if the offenses referred are capital offenses. If a case is referred to a capital commission, the offenses referred must be capital offenses and the convening authority must indicate on the referral with a special instruction that the case is to be tried as capital (see R.M.C. 201(d))

Regulation for Trial by Military Commission § 4-3(c) (2007) states:

In a case where the death penalty is authorized, and the convening authority decides to refer the case as non-capital, the referral should include special instructions stating the case is referred as non-capital.

1. Instructions. The convening authority may include instructions in his referral order that:

A. charges against an accused be tried with other charges previously referred;

B. charges against one accused be referred for joint or common trial with another accused; and

C. capital offenses be referred as non-capital offenses (see R.M.C. 601 (e)).

Regulation for Trial by Military Commission § 4-3(h) (2007) states:

If the convening authority is unable to refer the case to trial, forward the case to the Secretary of Defense for further action. If the Secretary of Defense cannot take action in a particular case, the Secretary of Defense should designate an official to serve as the convening authority for a particular case.

Regulation for Trial by Military Commission § 5-2(h) (2007) states:

a. Pursuant to 10 U.S.C. § 948i(b) the convening authority shall detail as members of the commission such commissioned officers who are on active duty and who in the opinion of the convening authority are best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament. No member of an armed force is eligible to serve as a member of a military commission when such member is the accuser or a witness for the prosecution or has acted as an investigator or counsel in the same case (see R.M.C. 502(a)).

b. The convening authority may excuse a member from participating in a case before a military commission is assembled for trial (see 10 U.S.C. § 948i(c)).

c. After assembly of the court, the convening authority may excuse a member for good cause (see 10 U.S.C. § 948m(b)(3)).

Regulation for Trial by Military Commission § 5-3 (2007) states:

a. Convening orders. A convening order is used to announce the detail of a military commission. A military commission is created by a convening order of the convening authority (see R.M.C. 504(a)). The convening authority for a military commission shall detail the members and designate where the military commission will meet. If the convening authority has been designated by the Secretary of Defense, the convening order will so state (see R.M.C. 504(d)).

b. The convening authority will issue convening orders for each military commission as soon as practicable after he or she personally determines the members of a military commission. Oral convening orders will be confirmed by written orders as soon as practicable. Convening orders may be amended.

c. A list of the individuals, organizations, and installations to which copies of the order will be sent and the number of copies to be furnished will be indicated under "DISTRIBUTION." Distribution includes one copy for the reference set, when needed, and the record set of the military publications.

Regulation for Trial by Military Commission § 6-1(b) (2007) states:

The Military Commissions Trial Judiciary will consist of military judges nominated by The Judge Advocates General from the military departments. The Chief Trial Judge will be selected from that pool of military judges by the convening authority.

Regulation for Trial by Military Commission § 7-4 (2007) states:

The convening authority may detail a security officer to advise a military commission on matters related to classified and protected information. In addition to any other duties assigned by the convening authority, the security officer shall ensure that all classified or protected evidence and information is appropriately safeguarded at all times and that only personnel with the appropriate clearances and authorizations are present when classified or protected evidence are presented before military commissions.

Regulation for Trial by Military Commission § 7-7 (2007) states:

Reporters, interpreters, security personnel, and clerical assistants may be detailed from either military or civilian personnel serving under the convening authority or, in the case of reporters and interpreters, through a commercial provider. When necessary, the convening authority may employ or authorize the employment of a reporter or interpreter, at the prevailing wage scale, for duty with a military commission or at the taking of a deposition. No expense to the Government shall be incurred by the employment of a reporter, interpreter, or other person to assist in a military commission or the taking of a deposition, except when authorized by the convening authority.

Regulation for Trial by Military Commission § 8-4(d)(3) (2007) states:

The trial counsel shall, as directed by the military judge or the convening authority, prepare any

documentation necessary to facilitate the conduct of military commissions proceedings.

Regulation for Trial by Military Commission § 8-4(d)(5) (2007) states:

Trial counsel shall perform all other functions, consistent with the M.C.A. and M.M.C., as may be directed by the convening authority or the military judge.

Regulation for Trial by Military Commission § 8-6(b)(1) (2007) states:

The Chief Prosecutor shall report to the legal advisor to the convening authority.

Regulation for Trial by Military Commission § 8-6(b)(4) (2007) states:

All other military commission personnel, such as court reporters, interpreters, security personnel, bailiffs and clerks detailed or employed by the convening authority, if not assigned to the Office of the Chief Defense Counsel or Chief Prosecutor, shall report to the convening authority or her designee.

Regulation for Trial by Military Commission § 8-7 (2007) states:

The Assistant Secretary of Defense for Public Affairs shall serve as the sole release authority for Department of Defense information and audiovisual materials regarding military commissions. Personnel assigned to the Office of the Chief Prosecutor may communicate with news media representatives

regarding cases and other matters related to military commissions only when approved by the convening authority.

Regulation for Trial by Military Commission § 9-1(a)(4) (2007) states:

The Chief Defense Counsel shall detail a judge advocate of any United States armed force, who is assigned to or performing duty with, the Office of the Chief Defense Counsel, to perform the duties of the detailed defense counsel as set forth in R.M.C. 502(d)(6). The Chief Defense Counsel shall also detail or employ any other personnel as approved by the convening authority. The Chief Defense Counsel may not detail himself to perform the duties of detailed defense counsel.

Regulation for Trial by Military Commission § 10-1(b) (2007) states:

Failure, by any individual, including military or civilian counsel, to adhere to the rules, procedures, regulations, and instructions applicable to trials by military commission may result in action by the Secretary of Defense or his designee, convening authority, or the military judge of a military commission. Such action may include permanently barring an individual from participating in any military commission proceeding convened pursuant to the M.C.A., punitive measures imposed under R.M.C. 809, and any other lawful sanction.

Regulation for Trial by Military Commission § 12-1 (2007) states:

Unless such authority is withheld by a superior competent authority, convening authority is authorized to enter into or reject offers to enter into Pretrial Agreements (PTAs) with the accused. The decision to accept or reject a PTA offer submitted by an accused is within the sole discretion of the convening authority who referred the case to trial.

Regulation for Trial by Military Commission § 13-1 (2007) states:

The funding for all witness travel approved by the convening authority related to trials by military commission will be arranged by the Office of Military Commissions.

Regulation for Trial by Military Commission § 13-7(b) (2007) states:

Only the convening authority may authorize the employment of an expert witness at government expense. Such authorization shall be in writing and shall fix the limit of compensation to be paid such expert based on the normal compensation paid by United States attorneys for attendance of a witness of such standing in the United States courts in the area involved. The expert witness fee prescribed by the convening authority however, will be paid in lieu of the ordinary attendance fee only on those days the witness is required to attend the court at government expense.

Regulation for Trial by Military Commission § 14-2 (2007) states:

A request for a deposition may be made by either party. A deposition may be ordered after the charges are sworn. The convening authority, who has the charges for disposition, or, after referral, the military judge, may order a deposition taken upon request of a party pursuant to R.M.C. 702. The parties may also agree to take a deposition without cost to the United States. Requests to the convening authority should be forwarded through the convening authority's legal advisor.

Regulation for Trial by Military Commission § 15-1(b)(1) (2007) states:

The military commissions convening authority may grant immunity to any persons subject to the M.C.A. However, the convening authority may grant immunity to a person subject to the M.C.A. extending to a prosecution in a United States District Court only when specifically authorized to do so by the Attorney General of the United States or other authority designated under 18 U.S.C. § 6004.

Regulation for Trial by Military Commission § 17-3(a) (2007) states:

A protective order may be sought by either party at any time counsel believes information must be protected or limited in its disclosure. Protective orders are governed by R.M.C. 701-703 and Mil. Comm. R. Evid. 505 and 506. Any military judge, or if

prior to referral of charges, the convening authority, may issue a Protective Order.

Regulation for Trial by Military Commission § 23-7 (2007) states:

The convening authority shall follow the provisions of R.M.C. 1105(a) and 1107 in taking action on post-trial matters. The convening authority may, in her sole discretion, approve, disapprove, commute, or suspend the sentence in whole or in part. The convening authority may not increase a sentence beyond that which is found by the military commission.

Regulation for Trial by Military Commission § 26-4(b) (2007) states:

Final orders. The convening authority shall issue final orders in cases that:

1. Are returned from the appellate courts for action in accordance with the decision of the court.

2. Implement the decision of the President to approve or to commute the sentence of death adjudged by the military commission.

3. The accused waives appellate review.

Regulation for Trial by Military Commission § 27-2(a) (2007) states:

Proceeding in revision. Up to the point of action, only the convening authority may order the convening of a proceeding in revision. Such proceedings may be convened to correct errors, omissions, or inconsistencies arising during or after trial, provided

that such correction can be affected without material prejudice to the accused.

Regulation for Trial by Military Commission § 27-2(b) (2007) states:

Post-trial R.M.C. 803 session. Either the convening authority or the military judge may order a post-trial R.M.C. 803 session for the purpose of: (1) inquiring into or resolving a matter arising after trial that substantially affects the legal sufficiency of any finding of guilty or the sentence; or (2) reconsidering any ruling by the military judge that substantially affects the legal sufficiency of any finding of guilty or the sentence. An R.M.C. 803 session may not be called for the purpose of inquiring into any matter arising after trial or any reconsidering any ruling of the military judge, if the inquiry or reconsideration pertains to any finding of not guilty. A request by either party for a posttrial R.M.C. 803 session may be directed to the convening authority or the military judge, or both. Either the convening authority or military judge may order such session sua sponte. If a post-trial R.M.C. 803 session is ordered, the official directing the session will ensure that counsel and the accused are notified as soon as practicable. Trial counsel will seek expeditious scheduling of the session with the military judge.

Regulation for Trial by Military Commission § 27-3(c) (2007) states:

Although the convening authority is not required to take action on the findings or to review the case for factual sufficiency or legal errors prior to taking action under R.M.C. 1107, the convening authority may, in his or her sole discretion, order a rehearing of any offense for which a finding of guilty was entered, unless the convening authority also determines that there is insufficient evidence in the record to support a finding of guilty on the offense charged or any lesser included offense. Pursuant to R.M.C. 1107, the convening authority may also order a rehearing as to any lesser-included offense of any offense for which a finding of guilty was entered at trial, so long as the convening authority does not also find that the record contains insufficient evidence to support that lesser included offense. In determining whether the evidence is sufficient to support a rehearing of findings under R.M.C. 1107, the convening authority may consider substitute evidence for evidence the convening authority determines should not have been admissible at trial. If, after a rehearing under this paragraph, any finding of guilty remains, the convening authority may direct a rehearing as to sentence or may approve a sentence of no punishment.

Regulation for Trial by Military Commission § 27-3(d) (2007) states:

In acting on the sentence in any case under R.M.C. 1107, the convening authority may elect to approve all or part of the sentence, approve a sentence of a lesser type, direct a rehearing as to sentence, or approve a sentence of no punishment.

Regulation for Trial by Military Commission § 27-4(a) (2007) states:

Within two years after the convening authority has approved the sentence in a military commission case, the accused may petition the convening authority for a new trial on the grounds of:

1. Newly discovered evidence (except as to any specification for which a guilty plea was accepted by the military judge); or

2. Fraud on the commission.

Manual for Military Commissions, Rule for Military Commission 103(8) (2007) states:

"Convening authority" means the Secretary of Defense or any officer or official of the United States designated by the Secretary of Defense for that purpose.

Manual for Military Commissions, Rule for Military Commission 104(a)(2) (2007) states:

No person may attempt to coerce or, by any unauthorized means, influence the action of a military commission or any member thereof, in reaching the findings or sentence in any case or the action of any convening, approving, or reviewing authority with respect to such authority's judicial acts or the exercise of profession judgment by trial counsel or defense counsel.

Manual for Military Commissions, Rule for Military Commission 201(b)(3)(A) (2007) states:

Requisites for military commission jurisdiction. … The military commission must be convened by an official empowered to convene it.

Manual for Military Commissions, Rule for Military Commission 407 (2007) states:

(a) *Disposition*. When in receipt of charges, the convening authority may:

(1) Dismiss any charges;

(2) Dismiss any specification;

(3) Subject to R.M.C. 601(d), refer any or all charges to a military commission.

(b) National security matters. When in receipt of charges the trial of which the convening authority finds would probably be inimical to the prosecution of a war or harmful to national security, that convening authority, unless otherwise prescribed by regulations of the Secretary of Defense, and after appropriate consultation with the Office of the Director of National Intelligence, shall determine whether trial is warranted and, if so, whether the security considerations involved are paramount to a trial. As the convening authority finds appropriate, he may dismiss the charges, or authorize trial of them.

Manual for Military Commissions, Rule for Military Commission 501(b) (2007) states:

Counsel in a military commission. Military trial and defense counsel shall be detailed to military commissions by the Chief Prosecutor and Chief Defense Counsel, respectively. Assistant trial and associate or assistant defense counsel may also be detailed. Civilian trial counsel may be detailed by the Chief Prosecutor, with the approval of the convening authority and, if such counsel are employed by another government agency, with the approval of the head of that agency. Should an accused, pursuant to his request, be deemed competent to represent himself, detailed defense counsel shall serve as standby counsel.

Manual for Military Commissions, Rule for Military Commission 502(a)(1) (2007) states:

The members detailed to a military commission shall be those active duty commissioned officers, who in the opinion of the convening authority are best

qualified for the duty by reason of their age, education, training, experience, length of service, and judicial temperament. No member of an armed force is eligible to serve as a member of a military commission when such member is the accuser or a witness for the prosecution or has acted as an investigator or counsel in the same case.

Manual for Military Commissions, Rule for Military Commission 503(a) (2007) states:

The convening authority shall detail active duty commissioned officers as members and alternate members for trials by military commission. Each of the military departments shall nominate officers in the number and grades requested by the convening authority, who meet the qualifications of 10 U.S.C. § 825 (Article 25 of the Code). The convening authority shall select from the lists of available officers those who are best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament.

Manual for Military Commissions, Rule for Military Commission 503(b)(2) (2007) states:

The Convening Authority shall select a military judge from the pool described in subsection (1) to serve as the Chief Judge of the Military Commissions Trial Judiciary. The Chief Trial Judge shall have extensive experience as a military judge certified to be qualified for duty as a military judge in general courts-martial and shall be currently appointed in the grade of colonel or captain. If the officer selected is not currently serving on active duty, but consents to the

selection, he or she shall be ordered to active duty for this purpose, in accordance with applicable service regulations, for a period not to exceed three years.

Manual for Military Commissions, Rule for Military Commission 504(a) (2007) states:

A military commission is created by a convening order of the convening authority.

Manual for Military Commissions, Rule for Military Commission 504(b) (2007) states:

A military commission may be convened by the Secretary of Defense or persons occupying positions designated as a convening authority by the Secretary of Defense. The power to convene military commissions may not be delegated.

Manual for Military Commissions, Rule for Military Commission 504(e) (2007) states:

The convening authority shall ensure that an appropriate location and facilities for military commissions are provided.

Manual for Military Commissions, Rule for Military Commission 505(c) (2007) states:

Changes of members.

(1) *Before assembly*. Before the military commission is assembled, the convening authority may change the members of the military commission without showing cause.

(2) *After assembly*. After assembly no member may be excused, except:

(A) By the convening authority for good cause shown on the record;

(B) By the military judge for good cause shown on the record; or

(C) As a result of challenge.

(3) *New members*. New members may be detailed after assembly only when, as a result of excusals under subsection (c)(2) of this rule, the number of members of the commission is reduced below a quorum.

Manual for Military Commissions, Rule for Military Commission 601(a) (2007) states:

Referral is the order of a convening authority that charges against an accused will be tried by a specified military commission.

Discussion. Referral of charges requires three elements: a convening authority who is authorized to convene the military commission and is not disqualified (see R.M.C. 601(b) and (c)); sworn charges that have been received by the convening authority for disposition (see R.M.C. 307); and a military commission convened by that convening authority or a predecessor. If trial would be warranted but would be detrimental to the prosecution of a war or inimical to national security, see R.M.C. 407(b).

Manual for Military Commissions, Rule for Military Commission 601(b) (2007) states:

Who may refer. The Secretary of Defense or a designated convening authority may refer charges to a military commission.

Manual for Military Commissions, Rule for Military Commission 601(e)(2) (2007) states:

How charges shall be referred.

(1) Order, instructions. Referral shall be by the personal order of the convening authority. The convening authority may include proper instructions in the order.

Discussion. Referral is ordinarily evidenced by an indorsement to the charging document. The signature may be that of a person acting by the order or direction of the convening authority. In such a case, the signature element must reflect the signer's authority. The convening authority may instruct that the charges against the accused be tried with certain other charges against the accused. (See subsection (2) below.) The convening authority may instruct that charges against one accused be referred for joint or common trial with another accused. (See subsection (3) below.) Capital offenses may be referred as non-capital. Any special instructions must be stated in the referral indorsement. When the charges have been referred to a military commission, the indorsed charge sheet and allied papers should be promptly transmitted to the trial counsel.

(2) *Joinder of offenses*. In the discretion of the convening authority, two or more offenses charged against an accused may be referred to the same military commission for trial, whether serious or minor offenses or both, regardless whether related.

Additional charges may be joined with other charges for a single trial at any time before arraignment if all necessary procedural requirements concerning additional charges have been complied with. After arraignment of the accused upon charges, no additional charges may be referred to the same trial without consent of the accused.

(3) *Joinder of accused*. Allegations against two or more accused may be referred for joint trial if the accused are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such accused may be charged in one or more specifications together or separately, and every accused need not be charged in each specification. Related allegations against two or more accused which may be proved by substantially the same evidence may be referred to a common trial.

Discussion. A joint offense is one committed by two or more persons acting together with a common intent. Joint offenses may be referred for joint trial, along with all related offenses against each of the accused. A common trial may be used when the evidence of several offenses committed by several accused separately is essentially the same, even though the offenses were not jointly committed. A joint offense is one committed by two or more persons acting together with a common intent. Offenders are properly joined only if there is a common unlawful design or purpose. Convening authorities should consider that joint and common trials may be complicated by procedural and evidentiary rules.

Manual for Military Commissions, Rule for Military Commission 604 (2007) states:

(a) *Withdrawal.* The convening authority may for any reason cause any charges or specifications to be withdrawn from a military commission at any time before findings are announced.

Discussion. Charges which are withdrawn from a military commission should be dismissed (see R.M.C. 401(b)), unless it is intended to refer them anew promptly or to forward them to another authority for disposition. Charges should not be withdrawn from a military commission arbitrarily or unfairly to an accused. (See also section (b) of this rule.) Some or all charges and specifications may be withdrawn. In a joint or common trial the withdrawal may be limited to charges against one or some of the accused. Charges which have been properly referred to a military commission may be withdrawn only by the direction of the convening authority or a superior competent authority in the exercise of that officer's independent judgment. When directed to do so by convening authority or a superior competent authority, trial counsel may withdraw charges or specifications by lining out the affected charges or specifications, renumbering remaining charges or specifications as necessary, and initialing the changes. Charges and specifications withdrawn before commencement of trial will not be brought to the attention of the members. When charges or specifications are withdrawn after they have come to the attention of the members, the military judge must instruct them that the withdrawn charges or specifications may not be considered for any reason.

(b) *Referral of withdrawn charges.* Charges which have been withdrawn from a military commission may be referred to another military commission unless the withdrawal was for an improper reason. Charges withdrawn after the introduction of evidence on the general issue of guilt may be referred to another military commission only if the withdrawal was necessitated by urgent and unforeseen military necessity.

Discussion. See also R.M.C. 915 (Mistrial). When charges which have been withdrawn from a military commission are referred to another military commission, the reasons for the withdrawal and later referral should be included in the record of the later military commission, if the later referral is more onerous to the accused. Therefore, if further prosecution is contemplated at the time of the withdrawal, the reasons for the withdrawal should be included in or attached to the record of the earlier proceeding. Improper reasons for withdrawal include an intent to interfere with the free exercise by the accused of any rights to which he may be entitled, or with the impartiality of a military commission. A withdrawal is improper if it was not directed personally and independently by the convening authority or by a superior competent authority. Whether the reason for a withdrawal is proper, for purposes of the propriety of a later referral, depends in part on the stage in the proceedings at which the withdrawal takes place. Before arraignment, there are many reasons for a withdrawal which will not preclude another referral. These include receipt of additional charges, absence of the accused,

reconsideration by the convening authority or by a superior competent authority of the seriousness of the offenses, questions concerning the mental capacity of the accused, and routine duty rotation of the personnel constituting the military commission. Charges withdrawn after arraignment may be referred to another military commission under some circumstances. For example, it is permissible to refer charges which were withdrawn pursuant to a pretrial agreement if the accused fails to fulfill the terms of the agreement (see R.M.C. 705). Charges withdrawn after some evidence on the general issue of guilty is introduced may be re-referred only under the narrow circumstances described in the rule.

Manual for Military Commissions, Rule for Military Commission 702(b) (2007) states:

A convening authority who has the charges for disposition or, after referral the military judge may order that a deposition be taken on request of a party.

Manual for Military Commissions, Rule for Military Commission 703(d) (2007) states:

Employment of expert witnesses. When the employment at Government expense of an expert is considered necessary by a party, the party shall, in advance of employment of the expert, and with notice to the opposing party, submit a request to the convening authority to authorize the employment and to fix the compensation for the expert. The request shall include a complete statement of reasons why employment of the expert is necessary and the estimated cost of employment. A request denied by the convening authority may be renewed before the

military judge, who shall determine whether the testimony of the expert is relevant and necessary, and, if so, whether the Government has provided or will provide an adequate substitute. If the military judge grants a motion for employment of an expert or finds that the Government is required to provide a substitute, the proceedings shall be abated if the Government fails to comply with the ruling. In the absence of advance authorization, an expert witness may not be paid fees other than those to which entitled under paragraph (e)(2)(D) of this rule.

Manual for Military Commissions, Rule for Military Commission 703(e)(2)(G)(i) (2007) states:

The military judge or, if there is no military judge, the convening authority may, in accordance with this rule, issue a warrant of attachment to compel the attendance of a witness or production of documents.

Manual for Military Commissions, Rule for Military Commission 704(c)(1) (2007) states:

The military commission convening authority may grant immunity to any person subject to the M.C.A. However, the convening authority may grant immunity to a person subject to the M.C.A. extending to a prosecution in a United States District Court only when specifically authorized to do so by the Attorney General of the United States or other authority designated under 18 U.S.C. § 6004.

Manual for Military Commissions, Rule for Military Commission 705(a) (2007) states:

Subject to such limitations as the Secretary may prescribe, an accused and the convening authority may enter into a pretrial agreement in accordance with this rule. All of the terms of the agreement must be contained in the agreement and must be in writing.

Discussion. The authority of convening authorities to refer cases to trial and approve pretrial agreements extends only to trials by military commission. To ensure that such actions do not preclude appropriate action by Federal civilian authorities in cases likely to be prosecuted in the United States district courts, convening authorities shall ensure that appropriate consultation under the "Memorandum of Understanding Between the Departments of Justice and Defense Relating to the Investigation and Prosecution of Crimes Over Which the Two Departments Have Concurrent Jurisdiction " (see Manual for Courts-Martial app. 3) has taken place prior to trial by military commission or approval of a pretrial agreement in cases where such consultation is required.

Manual for Military Commissions, Rule for Military Commission 705(d)(3) (2007) states:

The convening authority may either accept or reject an offer of the accused to enter into a pretrial agreement or may propose by counteroffer any terms or conditions not prohibited by law or public policy. The decision whether to accept or reject an offer is within the sole discretion of the convening authority. When the convening authority has accepted a pretrial

agreement, the agreement shall be signed by the convening authority or by a person, such as the legal advisor, who has been authorized by the convening authority to sign.

Discussion. The convening authority should consult with the legal advisor before acting on an offer to enter into a pretrial agreement.

Manual for Military Commissions, Rule for Military Commission 706(b) (2007) states:

(1) *Before referral*. Before referral of charges, an inquiry into the mental capacity or mental responsibility of the accused may be ordered by the convening authority before whom the charges are pending for disposition.

(2) *After referral*. After referral of charges, an inquiry into the mental capacity or mental responsibility of the accused may be ordered by the military judge. The convening authority may order such an inquiry after referral of charges but before beginning of the first session of the military commission (including any R.M.C. 803 session) when the military judge is not reasonably available. The military judge may order a mental examination of the accused regardless of any earlier determination by the convening authority.

Manual for Military Commissions, Rule for Military Commission 809(d) (2007) states:

A record of the contempt proceedings shall be part of the record of the trial of the military commission during which it occurred. If the person was held in contempt, then a separate record of the contempt

proceedings shall be prepared and forwarded to the convening authority for review. The convening authority may approve or disapprove all or part of the sentence. The action of the convening authority is not subject to further review or appeal.

Manual for Military Commissions, Rule for Military Commission 809(e) (2007) states:

A sentence of confinement pursuant to a finding of contempt shall begin to run when it is adjudged unless deferred, suspended, or disapproved by the convening authority. The place of confinement for a civilian or military person who is held in contempt and is to be punished by confinement shall be designated by the convening authority. A fine does not become effective until ordered executed by the convening authority. The military judge may delay announcing the sentence after a finding of contempt to permit the person involved to continue to participate in the proceedings.

Manual for Military Commissions, Rule for Military Commission 810(a)(4) (2007) states:

[Rehearings] may be ordered in the sole discretion of the convening authority.

Manual for Military Commissions, Rule for Military Commission 905(j) (2007) states:

Except as otherwise provided in this Manual, any matters which may be resolved upon motion without trial of the general issue of guilt may be submitted by a party to the convening authority before trial for decision. Submission of such matter to the convening

authority is not, except as otherwise provided in this Manual, required, and is, in any event, without prejudice to the renewal of the issue by timely motion before the military judge.

Manual for Military Commissions, Rule for Military Commission 1009(d) (2007) states:

When a sentence adjudged by the military commission is ambiguous, the convening authority may return the matter to the military commission for clarification. When a sentence adjudged by the military commission is apparently illegal, the convening authority may return the matter to the military commission for reconsideration or may approve a sentence no more severe than the legal, unambiguous portions of the adjudged sentence.

Manual for Military Commissions, Rule for Military Commission 1101(c)(2)(A) (2007) states:

The convening authority [may defer the execution of the sentence], if at the time of deferment the accused is subject to the military commission jurisdiction of the convening authority

Manual for Military Commissions, Rule for Military Commission 1102(a) (2007) states:

Post-trial sessions may be proceedings in revision or R.M.C. 803 sessions. Such sessions may be directed by the military judge or the convening authority in accordance with this rule.

Manual for Military Commissions, Rule for Military Commission 1107 (2007) states:

(a) *Who may take action*. The convening authority shall take action on the sentence and, in the discretion of the convening authority, the findings, unless it is impracticable. If it is impracticable for the convening authority to act, the convening authority shall, forward the case to an official designated by the Secretary of Defense for action under this rule.

(b) General considerations.

(1) *Discretion of convening authority*. The action to be taken on the findings and sentence is within the sole discretion of the convening authority. Determining what action to take on the findings and sentence of a military commission is a matter of prerogative. The convening authority is not required to review the case for legal errors or for factual sufficiency.

(2) When action may be taken. The convening authority may take action only after the applicable time periods under R.M.C. 1105(b) have expired or the accused has waived the right to present matters under R.M.C. 1105(d), whichever is earlier, subject to regulations of the Secretary concerned.

(3) Matters considered.

(A) *Required matters*. Before taking action, the convening authority shall

consider:

(i) The result of trial;

(ii) The recommendation of the legal advisor under R.M.C. 1106, if applicable; and

(iii) Any matters submitted by the accused under R.M.C. 1105 or, if applicable, R.M.C. 1106(e).

(B) *Additional matters*. Before taking action the convening authority may consider:

(i) The record of trial;

(ii) Any relevant records pertaining to the accused; and

(iii) Such other matters as the convening authority deems appropriate.

However, if the convening authority considers matters adverse to the accused from outside the record, with knowledge of which the accused is not chargeable, the accused shall be notified and given an opportunity to rebut.

(4) When proceedings resulted in finding of not guilty or not guilty only by reason of lack of mental responsibility, or there was a ruling amounting to a finding of not guilty. The convening authority shall not take action disapproving a finding of not guilty, a finding of not guilty only by reason of lack of mental responsibility, or a ruling amounting to a finding of not guilty. When an accused is found not guilty only by reason of lack of mental responsibility, the convening authority, however, may commit the accused to a suitable facility or otherwise make provisions for appropriate treatment of the accused, pending a hearing and disposition in accordance with R.M.C. 1102A.

(5) *Action when accused lacks mental capacity*. The convening authority may not approve a sentence while the accused lacks mental capacity to understand and to conduct or cooperate intelligently in the post-trial proceedings. In the absence of substantial evidence to the contrary, the accused is presumed to have the capacity to understand and to

conduct or cooperate intelligently in the post-trial proceedings. If a substantial question is raised as to the requisite mental capacity of the accused, the convening authority may direct an examination of the accused in accordance with R.M.C. 706 before deciding whether the accused lacks mental capacity, but the examination may be limited to determining the accused's present capacity to understand and cooperate in the post-trial proceedings. The convening authority may approve the sentence unless it is established, by a preponderance of the evidence—including matters outside the record of trial—that the accused does not have the requisite mental capacity. Nothing in this subsection shall prohibit the convening authority from disapproving the findings of guilty and sentence.

(c) *Action on findings*. Action on the findings is not required. However, the convening authority may, in the convening authority's sole discretion:

(1) Change a finding of guilty to a charge or specification to a finding of guilty to an offense that is a lesser included offense of the offense stated in the charge or specification; or

(2) Set aside any finding of guilty and—

(A) Dismiss the specification and, if appropriate, the charge, or

(B) Direct a rehearing in accordance with section (e) of this rule.

Discussion. The convening authority may for any reason or no reason disapprove a finding of guilty or approve a finding of guilty only of a lesser offense. However, see section (e) of this rule if a rehearing is ordered. The convening authority is not required to

review the findings for legal or factual sufficiency and is not required to explain a decision to order or not to order a rehearing, except as provided in section (e) of this rule. The power to order a rehearing, or to take other corrective action on the findings, is designed solely to provide an expeditious means to correct errors that are identified in the course of exercising discretion under the rule.

(d) Action on the sentence.

(1) *In general*. The convening authority may for any or no reason disapprove a legal sentence in whole or in part, mitigate the sentence, and change a punishment to one of a different nature as long as the severity of the punishment is not increased. The convening or higher authority may not increase the punishment imposed by a military commission. The approval or disapproval shall be explicitly stated.

(2) *Determining what sentence should be approved*. The convening authority shall approve that sentence which is warranted by the circumstances of the offense and appropriate for the accused. When the military commission has adjudged a punishment pursuant to a pretrial agreement, the convening authority may nevertheless approve a lesser sentence.

(3) Deferring service of a sentence to confinement.

(A) In a case in which a military commission sentences an accused referred to in paragraph (B), below, to confinement, the convening authority may defer service of a sentence to confinement by a military commission, without the consent of the accused, until after the accused has been

permanently released to U.S. custody by a foreign country.

(B) Paragraph (A) applies to an accused who, while in custody of a foreign country, is temporarily returned by that foreign country to the U.S. for trial by military commission; and after the military commission is returned to that, or another, foreign country under the authority of a mutual agreement or treaty, as the case may be.

(e) Ordering rehearing.

(1) *In general*. The convening authority may in the convening authority's discretion order a rehearing. A rehearing may be ordered as to some or all offenses of which findings of guilty were entered and the sentence, or as to sentence only.

(2) *Limitation: Lack of sufficient evidence*. A rehearing may not be ordered as to findings of guilty when there is a lack of sufficient evidence in the record to support the findings of guilty of the offense charged or of any lesser included offense. A rehearing may be ordered, however, if the proof of guilt consisted of inadmissible evidence for which there is available an admissible substitute. A rehearing may be ordered as to any lesser offense included in an offense of which the accused was found guilty, provided there is sufficient evidence in the record to support the lesser included offense.

(3) *Rehearing on sentence only*. A rehearing on sentence only shall be referred to the same type of military commission that made the original findings, provided however that the convening authority may elect to refer to a noncapital military commission the rehearing on sentence only of a case previously tried

before a capital military commission. This latter referral precludes death as an authorized punishment. If the convening authority determines a rehearing on sentence is impracticable, the convening authority may approve a sentence of no punishment without conducting a rehearing.

(f) Contents of action and related matters.

(1) *In general*. The convening authority shall state in writing and insert in the record of trial the convening authority's decision as to the sentence, whether any findings of guilty are disapproved, and orders as to further disposition. The action shall be signed personally by the convening authority.

(2) *Modification of initial action*. The convening authority may recall and modify any action taken by that convening authority at any time before it has been published or before the accused has been officially notified.

(3) *Findings of guilty*. If any findings of guilty are disapproved, the action shall so state. If a rehearing is not ordered, the affected charges and specifications shall be dismissed by the convening authority in the action. If a rehearing or other trial is directed, the reasons for the disapproval shall be set forth in the action.

(4) Action on sentence.

(A) *In general*. The action shall state whether the sentence adjudged by the military commission is approved. If only part of the sentence is approved, the action shall state which parts are approved. A rehearing may not be directed if any sentence is approved.

(B) *Execution; suspension*. The action shall indicate, when appropriate, whether an approved sentence is to be executed or whether the execution of all or any part of the sentence is to be suspended. No reasons need be stated.

(C) *Place of confinement*. If the convening authority orders a sentence of confinement into execution, the convening authority shall designate the place of confinement in the action, unless otherwise prescribed by the Secretary of Defense or the Attorney General of the United States.

(5) Action on rehearing or new or other trial.

(A) *Rehearing or other trial*. In acting on a rehearing or other trial the convening authority shall be subject to the sentence limitations prescribed in R.M.C. 810(d). Except when a rehearing or other trial is combined with a trial on additional offenses and except as otherwise provided in R.M.C. 810(d), if any part of the original sentence was suspended and the suspension was not properly vacated before the order directing the rehearing, the convening authority shall take the necessary suspension action to prevent an increase in the same type of punishment as was previously suspended. The convening authority may approve a sentence adjudged upon a rehearing or other trial regardless whether any kind or amount of the punishment adjudged at the former trial has been served or executed. However, in computing the term or amount of punishment to be actually served or executed under the new sentence, the accused shall be credited with any kind or amount of the former sentence included within the new sentence that was served or executed before the time it was disapproved

or set aside. The convening authority shall, if any part of a sentence adjudged upon a rehearing or other trial is approved, direct in the action that any part or amount of the former sentence served or executed between the date it was adjudged and the date it was disapproved or set aside shall be credited to the accused. If, in the action on the record of a rehearing, the convening authority disapproves the findings of guilty of all charges and specifications which were tried at the former hearing and that part of the sentence which was based on these findings, the convening authority shall, unless a further rehearing is ordered, provide in the action that all rights, privileges, and property affected by any executed portion of the sentence adjudged at the former hearing shall be restored. The convening authority shall take the same restorative action if a military commission at a rehearing acquits the accused of all charges and specifications which were tried at the former hearing.

(B) *New trial*. The action of the convening authority on a new trial shall, insofar as practicable, conform to the rules prescribed for rehearings and other trials in paragraph (f)(5)(A) of this rule.

(g) *Incomplete, ambiguous, or erroneous action*. When the action of the convening or of a higher authority is incomplete, ambiguous, or contains clerical error, the authority who took the incomplete, ambiguous, or erroneous action may be instructed by superior authority to withdraw the original action and substitute a corrected action.

(h) *Service on accused*. A copy of the convening authority's action shall be served on the accused or on

defense counsel. If the action is served on defense counsel, defense counsel shall, by expeditious means, provide the accused with a copy.

Manual for Military Commissions, Rule for Military Commission 1108(b) (2007) states:

Who may suspend and remit. The convening authority may, after approving the sentence, suspend the execution of all or any part of the sentence of a military commission, except for a sentence of death. The Secretary of Defense may suspend or remit any part or amount of the unexecuted part of any sentence other than a sentence approved by the President or a sentence of confinement for life that has been ordered executed.

Manual for Military Commissions, Rule for Military Commission 1210(a) (2007) states:

At any time within two years after approval by the convening authority of a military commission sentence, the accused may petition the convening authority for a new trial on the ground of newly discovered evidence or fraud on the military commission. A petition may not be submitted after the death of the accused. A petition for a new trial of the facts may not be submitted on the basis of newly discovered evidence when the accused was found guilty of the relevant offense pursuant to a guilty plea.

Manual for Military Commissions, Rule for Military Commission 1210(e) (2007) states:

The convening authority may consider and grant a petition for new trial, in his discretion. If the convening authority declines to consider or grant a petition for new trial, he shall refer the petition to the Court of Military Commission Review for action.

Manual for Military Commissions, Military Commission Rule of Evidence 506(f) (2007) states:

After referral of charges, if the defense moves for disclosure of government information for which a claim of privilege has been made under this rule, the matter shall be reported to the convening authority. The convening authority may:

(1) institute action to obtain the information for use by the military judge in making a determination under section (i);

(2) dismiss the charges;

(3) dismiss the charges or specifications or both to which the information relates; or

(4) take other action as may be required in the interests of justice. If, after a reasonable period of time, the information is not provided to the military judge, the military judge shall dismiss the charges or specifications or both to which the information relates.