No. ______

# In the Supreme Court of the United States

OMAR AHMED KHADR,

*Petitioner*,

v.

UNITED STATES OF AMERICA,

*Respondent*.

*On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit*

## PETITION FOR A WRIT OF CERTIORARI

Juan O. Perla
*Counsel of Record*
CURTIS, MALLET-PREVOST, COLT & MOSLE LLP
1717 Pennsylvania Ave NW
Suite 1300
Washington, DC 20006
(202) 452-7373
jperla@curtis.com

T. Barry Kingham
Sylvi Sareva
Andrew Larkin
Joseph Muschitiello
Steven Thomas
CURTIS, MALLET-PREVOST, COLT & MOSLE LLP
101 Park Avenue
New York, NY 10178

Samuel Morison
MILITARY COMMISSION DEFENSE ORGANIZATION
1620 Defense Pentagon
Appellate Defense Division
Washington, D.C. 20301

*Counsel for Petitioner*

## QUESTION PRESENTED

Plea agreements often include a general waiver of the right to appeal. Circuits are divided over whether the inclusion of such a term bars a defendant from bringing a direct appeal of a conviction, when a subsequent controlling judicial decision has held that the conduct to which the defendant pled guilty was not a crime. The Second, Third, and Fourth Circuits hold that an appeal may proceed. In the decision below, a divided panel of the D.C. Circuit joined the Seventh and Ninth Circuits in holding that it may not.

Does a plea agreement that includes a general appellate waiver foreclose a direct appeal when a defendant has pled guilty to conduct that was not criminal?

## RELATED PROCEEDINGS

United States Court of Military Commission Review

*United States v. Khadr*, No. CMCR 13-005 (Oct. 21, 2021)

United States Court of Appeals (D.C. Cir.)

*United States v. Khadr*, No. 21-1218 (May 9, 2023)

## TABLE OF CONTENTS

Page

QUESTION PRESENTED .......................................... i

INTRODUCTION ...................................................... 1

OPINIONS BELOW .................................................. 3

JURISDICTION OF THIS COURT ............................ 4

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS ....................................... 4

STATEMENT............................................................... 4

REASONS FOR GRANTING THE PETITION .......... 8

I. There Is a Circuit Split as to Whether a Plea Agreement that Waives Appellate Rights Bars a Defendant from Appealing a Conviction on the Ground that the Conduct to which the Defendant Pled Was Not Criminal. ....................... 9

II. This Case is an Excellent Vehicle for Consideration of the Question Presented. ...........21

CONCLUSION..........................................................25

Appendix A — U.S. Court of Appeals for the District of Columbia Circuit Opinion (May 9, 2023) ............. 1a

Appendix B — U.S. Court of Appeals for the District of Columbia Circuit 34a

| | | |
|---|---|---|
| | Opinion and Order (August 4, 2023)......................................... | |
| Appendix C — | U.S. Court of Military Commission Review Opinion (October 21, 2021)...................... | 36a |
| Appendix D — | USCS Const. Amend. 5, Part 1 of 13 ........................................... | 59a |
| Appendix E — | 10 USCS § 949i .......................... | 60a |
| Appendix F — | 10 USCS § 950g ........................ | 63a |
| Appendix G — | RMC Rules 910, 1110 ............... | 66a |

## TABLE OF AUTHORITIES

**Cases**

*Al Bahlul* v. *United States*,
767 F.3d 1 (D.C. Cir. 2014) ............................6, 7, 21
*Al Bahlul* v. *United States*,
792 F.3d 1 (D.C. Cir. 2015),
rev'd en banc sub nom.
*Bahlul* v. *United States*,
840 F.3d 757 (D.C. Cir. 2016) ................................. 7
*Al Bahlul* v. *United States*,
967 F.3d 858 (D.C. Cir. 2020) ................................. 6
*Blackledge* v. *Perry*,
417 U.S. 21 (1974) ..................................................13
*Bousley* v. *United States*,
523 U.S. 614 (1998) ...................................11, 20, 22
*Class* v. *United States*,
583 U.S. 174 (2018) ............1, 8, 9, 12, 13, 17, 20, 22
*Commonwealth* v. *Hinds*,
101 Mass. 209 (Mass 1869)...................................... 9
*Davis* v. *United States*,
417 U.S. 333 (1974) ..........................................10, 18
*Ex parte Quirin*,
317 U.S. 1 (1942) ..................................................... 5
*Fiore* v. *White*,
531 U.S. 225 (2001) ..........................................10, 20
*Grzegorczyk* v. *United States*,
142 S. Ct. 2580 (2022) ........................................3, 22
*Hamdan* v. *United States*,
696 F.3d 1238 (D.C. Cir. 2012) ............................6, 7

*Harper* v. *Virginia Dept. of Taxation*,
509 U.S. 86 (1993) .................................................20
*Henderson* v. *Morgan*,
426 U.S. 637 (1976) .............................................2, 10
*In re Winship*,
397 U.S. 358 (1970) ...............................................12
*Jackson* v. *Virginia*,
443 U.S. 307 (1979) ...............................................12
*Lafler* v. *Cooper*,
566 U.S. 156 (2012) ................................................. 2
*Martin* v. *Franklin Cap. Corp.*,
546 U.S. 132 (2005) ...............................................23
*Mathis* v. *United States*,
579 U.S. 500 (2016) ...............................................12
*McCarthy* v. *United States*,
394 U.S. 459 (1969) ...............................................11
*Menna* v. *New York*,
423 U.S. 61 (1975) .................................................13
*Missouri* v. *Frye,*
566 U.S. 134 (2012) .............................................2, 24
*Oliver* v. *United States*,
951 F.3d 841 (7th Cir. 2020) ...............................2, 18
*Padilla* v. *Kentucky*,
559 U.S. 356 (2010) ...............................................24
*Portis* v. *United States*,
33 F.4th 331 (6th Cir. 2022) .................................19
*Rehaif* v. *United States*,
139 S. Ct. 2191 (2019) ......................................13, 14
*Smith* v. *O'Grady*,
312 U.S. 329 (1941) ...............................................10

*Thompson* v. *City of Louisville*,
362 U.S. 199 (1960) ....................................................12
*United States* v. *Adams*,
814 F.3d 178 (4th Cir. 2016) .....................................15
*United States* v. *Balde*,
943 F.3d 73 (2d Cir. 2019)...........................1, 2, 13, 14
*United States* v. *Broce*,
488 U.S. 563 (1989) ....................................................10
*United States* v. *Castro*,
704 F.3d 125 (3d Cir. 2013)...................................1, 16
*United States* v. *Crockett*,
No. 20-3025, 2023 U.S. App. LEXIS 12106
(7th Cir. May 17, 2023) ..................................2, 17, 18
*United States* v. *Davis*,
139 S. Ct. 2319 (2019) ...............................................15
*United States* v. *Dubin*,
27 F.4th 1021 (5th Cir. 2022),
vacated and remanded, 599 U.S. 110 (2023)..........23
*United States* v. *Elliott*,
703 F.3d 378 (7th Cir. 2012) .....................................17
*United States* v. *Goodall*,
21 F.4th 555 (9th Cir. 2021) ................................2, 18
*United States* v. *Leyva*,
916 F.3d 14 (D.C. Cir. 2019) .....................................11
*United States* v. *Lloyd*,
901 F.3d 111 (2d Cir. 2018).......................................14
*United States* v. *McCoy*,
895 F.3d 358 (4th Cir 2018) .......................................16
*United States* v. *McKinney*,
60 F.4th 188 (4th Cir. 2023) ...................1, 15, 16, 19

*United States* v. *Negron*,
60 M.J. 136 (C.A.A.F. 2004) .......... 11, 20

*United States* v. *Simms*,
914 F.3d 229 (4th Cir. 2019) .......... 15

*United States* v. *Sweeney*,
833 F. App'x 395 (4th Cir. 2021) .......... 1, 14, 15

*United States* v. *Taylor*,
978 F.3d 73 (4th Cir. 2020) .......... 15

*United States* v. *Wheeler*,
857 F.3d 742 (7th Cir. 2017) .......... 18

*Wooden* v. *United States*,
142 S. Ct. 1063 (2022) .......... 17, 18

**Constitutional Provisions**

U.S. Const. Amend. V .......... 4, 20

**Statutes**

10 U.S.C. § 821 .......... 5, 6, 7

10 U.S.C. § 949i .......... 4, 11, 20

10 U.S.C. § 950g .......... 4

18 U.S.C. § 924(c) .......... 14, 15, 18

28 U.S.C. § 1254(1) .......... 4

5 U.S.C. § 6103 .......... 4

Armed Career Criminal Act .......... 17

Military Commissions Act of 2006,
120 Stat. 2600 .......... 5, 6, 7, 21

**Rules**

Fed. R. Crim. P. 11 .......... 20

R.M.C. 1110 .......... 4

R.M.C. 910 .......... 4, 11, 20

Supreme Court Rule 30.1 .......... 4

**Other Authorities**

Dave S. Sidhu, *The Supreme Court's Narrow Construction of Federal Criminal Laws: Historical Practice and Recent Trends*, CRS Legal Sidebar (Sept. 5, 2023) ......................3, 22

Glenn R. Schmitt & Lindsey Jeralds, U.S. Sentencing Comm'n, Overview of Federal Criminal Cases: Fiscal Year 2021 (2022)...............24

## INTRODUCTION

A valid guilty plea requires more than an agreement. It requires a crime. Plea agreements based upon non-criminal conduct cannot serve as a proper basis for convicting or sentencing individuals. See *Class* v. *United States*, 583 U.S. 174 (2018) (describing the "nature of guilty pleas" and noting that "if the facts alleged and admitted do not constitute a crime against the laws of the Commonwealth, the defendant is entitled to be discharged"). In the decision below, the D.C. Circuit, over a dissent, rejected that principle. Petitioner waived his rights to appeal or collaterally attack his conviction as part of a plea agreement in which he pleaded guilty to charges that the unanimous en banc D.C. Circuit later determined were not crimes. The majority below nevertheless held that Petitioner's otherwise timely appeal of his conviction was barred by this appellate waiver. In dismissing Petitioner's appeal, the court below deepened a circuit split on a significant and recurring federal question that this Court should resolve.

The Second, Third, and Fourth Circuits have held that an appeal waiver does not bar criminal defendants from bringing otherwise timely direct appeals to assert that there is no legal basis for their conviction. *United States* v. *Balde*, 943 F.3d 73, 95 (2d Cir. 2019); *United States* v. *Castro*, 704 F.3d 125 (3d Cir. 2013); *United States* v. *Sweeney*, 833 F. App'x 395, 396 (4th Cir. 2021); *United States* v. *McKinney*, 60 F.4th 188, 192 (4th Cir. 2023). As the Second Circuit has explained, a district court's erroneous description

of the elements of an offense in a plea colloquy, even if correct under then-prevailing law, cannot provide a basis for a knowing and voluntary plea. *Balde*, 943 F.3d at 94. That principle applies even where the legal insufficiency of the charges only becomes clear during an appeal's pendency. *Ibid.* That approach is sound. Where a defendant has "an incomplete understanding of the charge [the] plea cannot stand as an intelligent admission of guilt." *Henderson* v. *Morgan*, 426 U.S. 637, 644 n.13 (1976).

In adopting a contrary rule, the D.C. Circuit joined the Seventh and Ninth Circuits in construing generic appeal waivers to preclude criminal defendants from appealing facially invalid convictions and sentences. *United States* v. *Crockett*, No. 20-3025, 2023 U.S. App. LEXIS 12106 at *8 (7th Cir. May 17, 2023); *Oliver* v. *United States*, 951 F.3d 841, 847 (7th Cir. 2020); *United States* v. *Goodall*, 21 F.4th 555, 562 (9th Cir. 2021). Simply put, had Petitioner appealed in the Second, Third, or Fourth Circuits, his appeal would have proceeded to the merits despite his appellate waiver. In the D.C. Circuit, it was dismissed.

Because "ours 'is for the most part a system of pleas, not a system of trials,'" *Missouri* v. *Frye,* 566 U.S. 134, 143 (2012) (quoting *Lafler* v. *Cooper*, 566 U.S. 156, 170 (2012)), resolving this split is of urgent practical importance to the uniformity with which the federal criminal justice system is administered. This Court and the courts of appeal regularly issue opinions that either invalidate or narrow the prevailing interpretation of federal criminal statutes, thereby clarifying the boundary between lawful and

unlawful conduct in pending cases. See, *e.g.*, Dave S. Sidhu, *The Supreme Court's Narrow Construction of Federal Criminal Laws: Historical Practice and Recent Trends*, CRS Legal Sidebar (Sept. 5, 2023) (collecting cases). The existing split between circuits on the question presented here guarantees the discriminatory application of this Court's decisions from one courthouse to the next.

Last term, this Court split five to four in declining to GVR a case in which the Seventh Circuit held that a generic appeal waiver bars habeas petitioners from availing themselves of intervening judicial decisions that rendered their convictions or sentences facially invalid. *Grzegorczyk* v. *United States*, 142 S. Ct. 2580 (2022). If the peculiarities of collateral review made *Grzegorczyk* a close case, this case asks the fundamental question of whether appeal waivers also bar appellants from seeking review of their convictions for conduct that is not criminal before the judgments underlying their convictions have even become final.

The answer to that question has divided the circuits and warrants this Court's review of the decision below. Certiorari should therefore be granted.

## OPINIONS BELOW

The D.C. Circuit's May 9, 2023 opinion (Pet. App. 1a) is reported at 67 F.4th 413. The D.C. Circuit's unpublished order denying rehearing en banc is reprinted at Pet. App. 34a. The decision of the United

States Court of Military Commission Review (Pet. App. 36a) is published at 568 F. Supp. 3d 1266.

## JURISDICTION OF THIS COURT

The D.C. Circuit issued its opinion and judgment in this case on May 9, 2023, and denied a timely petition for en banc rehearing on August 4, 2023. On October 13, 2023, the Chief Justice granted Petitioner's application for an extension of time to file certiorari until January 1, 2023, a federal holiday.[1] This Court has jurisdiction under 10 U.S.C. § 950g(e) and 28 U.S.C. § 1254(1).

## RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

This case involves U.S. Const. Amend. V; 10 U.S.C. §§ 949i, 950g; and Rules for Military Commission (R.M.C.) 910 and 1110. The relevant portions of these provisions are reproduced in the Appendix.

## STATEMENT

In 2002, when Petitioner was fifteen years old, he was detained by U.S. forces in Afghanistan, following a firefight in which a U.S. soldier was killed. P.A.77-

---

[1] Under Supreme Court Rule 30.1, if a filing date falls on a federal holiday listed in 5 U.S.C. § 6103, the deadline is extended until the end of the following day.

78.[2] In 2007, Petitioner was charged before a military commission with several crimes first enacted under the Military Commissions Act of 2006, 120 Stat. 2600 ("MCA"), including "Material Support for Terrorism" ("MST"). P.A.13-16.

Petitioner stipulated that under 10 U.S.C. § 821, military commissions could exercise jurisdiction over offenses against the "law of war," the "branch of international law" now generally referred to as international humanitarian law. *Ex parte Quirin*, 317 U.S. 1, 29 (1942). However, because none of the offenses with which he was charged constituted a war crime before the enactment of the MCA, Petitioner moved to dismiss on the ground that his prosecution was a violation of the Ex Post Facto Clause, and alternatively that the MCA should be construed not to cover his alleged conduct because that conduct was not criminal. In the course of litigating those objections, the government stipulated that if offenses committed prior to the MCA's enactment required a violation of the international law of war, it would be "unable to convict [him] of the charges."[3] The military commission overruled Petitioner's objection in favor of the government, holding that pre-enactment conduct

---

[2] Citations to "P.A." refer to the appendix Petitioner filed at the D.C. Circuit. See Appendix to Brief of Petitioner, No. 21-1218, Doc. 1938110 (D.C. Cir. May 8, 2022).

[3] Gov't Motion for Findings Instructions, AE295, at 2 (Nov. 14, 2008), *available at* https://perma.cc/YL3C-6WKD; see also Supp. Br. in Support of Gov't Motion for Findings Instructions, AE295-C, at 4 (July 23, 2010).

could be punished under the MCA without limitation. P.A.273-74; see also P.A.28.

In 2010, Petitioner entered into a plea agreement under which he pleaded guilty to all charges. That pretrial agreement included a general appellate waiver, requiring Petitioner to sign a pre-printed waiver statement, Form 2330, which waived his appellate rights "to the extent permitted by law." P.A.60. Pursuant to his plea, the military judge found Petitioner guilty of each charged offense.

Following his conviction, a unanimous panel of the D.C. Circuit decided *Hamdan* v. *United States*, 696 F.3d 1238 (D.C. Cir. 2012). *Hamdan* held that as a matter of statutory construction, for any crime first enacted in the MCA to apply to pre-enactment conduct, it must have been "a pre-existing war crime under 10 U.S.C. § 821." *Id.* at 1241. Applying this standard, the panel further held that persons could not be charged with MST for conduct occurring prior to 2006. *Ibid.*

Petitioner timely appealed to the United States Court of Military Commission Review ("CMCR"), arguing that none of the crimes to which he pled guilty, including MST, met the standard the D.C. Circuit laid down in *Hamdan*. The CMCR then held Petitioner's case in abeyance pending the D.C. Circuit's resolution of the related *Al Bahlul* case, which the D.C. Circuit had agreed to hear en banc. See *Al Bahlul* v. *United States*, 767 F.3d 1 (D.C. Cir. 2014) (en banc) *("Al Bahlul I")*; see also *Al Bahlul* v. *United States*, 967 F.3d 858 (D.C. Cir. 2020); *Al Bahlul* v.

*United States*, 792 F.3d 1 (D.C. Cir. 2015), rev'd en banc sub nom. *Bahlul* v. *United States*, 840 F.3d 757 (D.C. Cir. 2016).

In *Al Bahlul I*, the D.C. Circuit overruled *Hamdan*'s statutory holding, and instead grounded its limitation of the MCA's pre-enactment scope on the Ex Post Facto Clause.[4] 767 F.3d at 11-17. It then reaffirmed the two holdings relevant to Petitioner's appeal. *First*, the D.C. Circuit held the MCA could only be applied retroactively to offenses that were already punishable under 10 U.S.C. § 821 at the time of the conduct. *Id.* at 18. *Second*, it held that retroactively prosecuting MST was a "plain ex post facto violation." *Id.* at 29; see also *id.* at 77 (Kavanaugh, J., concurring in the judgment in part and dissenting in part) ("[T]he majority opinion reaches the same bottom-line conclusion that this Court reached in *Hamdan*.").

Following the decisions in *Al Bahlul I*, the CMCR lifted the abeyance and summarily dismissed Petitioner's appeal. It found that Petitioner had not waived his statutory right of appeal, but nevertheless dismissed the appeal after finding that a procedural defect in how the case had come to the CMCR, not relevant here, was jurisdictionally fatal to its review. Pet. App. 40a.

---

[4] While a majority of the en banc Court agreed that the Ex Post Facto Clause applied, the majority opinion assumed without deciding that it applied based upon the government's concession.

Petitioner appealed to the D.C. Circuit. The majority below dismissed the appeal "because Khadr waived his right to appellate review by this Court." Pet. App. 2a. The majority reasoned, "Nothing in *Class* [v. *United States*] ... suggests that his non-jurisdictional claims, even if based on the Constitution, survive his express waiver [of appeal]." Pet. App. 17a. The majority therefore held that Petitioner categorically waived "any challenge [he] may have made to his convictions or sentence," including whether the conduct to which he pled guilty was criminal. Pet. App. 13a. The dissent below criticized the majority for too quickly dismissing the appeal and foreclosing the possibility that the appeal waiver was not valid in these circumstances. Pet. App. 32a.

Petitioner filed a timely petition for rehearing en banc. On August 4, 2023, the Circuit denied rehearing. This petition followed. On October 13, 2023, the Chief Justice granted Petitioner's application for an extension of time to file certiorari until January 1, 2023.

## REASONS FOR GRANTING THE PETITION

This case presents a recurring question of criminal procedure that has divided the circuits, divided the panel below, and implicates the integrity of the plea-bargaining process that predominates the federal criminal justice system.

In *Class*, this Court held that the general waiver of appellate rights implicit in a guilty plea does not bar

a criminal defendant from asserting on direct appeal that the "facts alleged and admitted do not constitute a crime against the laws." 583 U.S. at 181 (quoting *Commonwealth* v. *Hinds*, 101 Mass. 209, 210 (Mass 1869)). In so holding, this Court left open the question of whether – and how – a criminal defendant could expressly waive the right to appeal a conviction predicated on conduct that did not constitute a crime. *Id*. at 185.

Plea agreements now routinely include, as a term, a generic waiver of appellate rights that reflect the general waiver of appellate rights implicit in the plea itself. Here, Petitioner agreed to waive his appellate rights "to the extent permitted by law." P.A.60. The circuits are divided on whether the inclusion of such general waivers bar otherwise timely direct appeals when an intervening, controlling judicial decision clarifies the conduct to which the defendant pled was not criminal. This Court should therefore grant certiorari to resolve this split and answer the question left open in *Class*.

## I. There Is a Circuit Split as to Whether a Plea Agreement that Waives Appellate Rights Bars a Defendant from Appealing a Conviction on the Ground that the Conduct to which the Defendant Pled Was Not Criminal.

1. The circuit split at issue in this case arises against a backdrop of two fundamental requirements for a valid plea agreement. Specifically, a valid plea agreement must (i) arise out of criminal conduct by

the defendant (ii) to which he knowingly and voluntarily admits guilt.

Plea agreements, therefore, are only enforceable where a person committed a crime. Plea or no plea, due process does not permit the government to "convict a person of a crime" for engaging in "conduct that its criminal statute, as properly interpreted, does not prohibit." *Fiore* v. *White*, 531 U.S. 225, 228-29 (2001) (per curiam). As this Court previously explained, "[t]here can be no room for doubt" that sustaining "conviction and punishment … for an act that the law does not make criminal … inherently results in a complete miscarriage of justice." *Davis* v. *United States*, 417 U.S. 333, 346-47 (1974).

A criminal defendant may plead guilty for a variety of reasons, but a plea must always be "knowing and voluntary." It is axiomatic that "[b]y entering a plea of guilty, the accused is not simply stating that he did the discrete acts described in the indictment; he is admitting guilt of a substantive crime." *United States* v. *Broce*, 488 U.S. 563, 570 (1989). For a guilty plea to be "voluntary" in the requisite sense, it therefore must be "an intelligent admission that [the accused] committed the offense," which requires him to receive "real notice of the true nature of the charge against him, the first and most universally recognized requirement of due process." *Henderson* v. *Morgan*, 426 U.S. 637, 645 (1976) (quoting *Smith* v. *O'Grady*, 312 U.S. 329, 334 (1941)).

To satisfy this standard, the trial judge must ensure that the accused possesses a substantively

correct "understanding of the law in relation to the facts" of his case, *McCarthy* v. *United States*, 394 U.S. 459, 466 (1969), which in turn permits the accused to make a rational assessment of "the Government's ability to prove his conduct falls within the charge." *United States* v. *Leyva*, 916 F.3d 14, 23 (D.C. Cir. 2019). In addition, the trial court must independently determine that there is an adequate factual basis for the plea, which aims to "protect a defendant who is in the position of pleading voluntarily with an understanding of the nature of the charge but without realizing that his conduct does not actually fall within the charge." *McCarthy*, 394 U.S. at 467.

2. When there is general confusion over the elements of the offense, the resulting plea cannot stand as an intelligent admission of guilt. *Bousley* v. *United States*, 523 U.S. 614, 618 (1998). Thus, a guilty plea is invalid when "the record reveals that neither [the accused], nor his counsel, nor the court correctly understood the essential elements of the crime with which he was charged." *Ibid.*[5]

---

[5] This is equally true in military practice applicable to this case. 10 U.S.C. § 949i(a) (rendering plea invalid "if it appears that the accused has entered the plea through a lack of understanding of its meaning and effect."); R.M.C. 910(e) (prohibiting military judge from accepting a plea that lacks an adequate factual basis); see also *United States* v. *Negron*, 60 M.J. 136, 141-42 (C.A.A.F. 2004) (military judge's erroneous definition of essential element during plea colloquy, coupled with the lack of any factual

The "elements" of an offense are, of course, "the constituent parts of a crime's legal definition—the things the prosecution must prove to sustain a conviction." *Mathis* v. *United States*, 579 U.S. 500, 504 (2016) (cleaned up). Where "a conviction [is] based upon a record wholly devoid of any relevant evidence of a crucial element of the offense charged," it is, by definition, "constitutionally infirm." *Jackson* v. *Virginia*, 443 U.S. 307, 314 (1979) (citing *Thompson* v. *City of Louisville*, 362 U.S. 199, 206 (1960)). "The 'no evidence' doctrine of *Thompson* … thus secures to an accused the most elemental of due process rights: freedom from a wholly arbitrary deprivation of liberty." *Ibid.*

The issue does "not concern a question of evidentiary 'sufficiency,'" which "clearly stands on a different footing." *Jackson*, 443 U.S. at 314 (citing *In re Winship*, 397 U.S. 358 (1970)). Rather, "a total want of evidence to support" an essential element of a charged offense requires "the case [to be resolved] in favor of the accused" on direct appeal. *Ibid.*

Hence, in *Class*, this Court held that the general waiver of appellate rights implicit in a guilty plea does not foreclose a defendant from bringing a direct appeal challenging the conviction, where the claim is that the underlying conduct was not lawfully deemed criminal. That was because "Class' challenge [did] not in any way deny that he engaged in the conduct to

---

basis in the record for that element, as properly construed, rendered plea invalid).

which he admitted. Instead, like the defendants in *Blackledge* and *Menna*, he seeks to raise a claim which, judged on its face based upon the existing record, would extinguish the government's power to constitutionally prosecute the defendant if the claim were successful." *Class*, 583 U.S. at 183 (cleaned up); see also *Blackledge* v. *Perry*, 417 U.S. 21 (1974); *Menna* v. *New York*, 423 U.S. 61 (1975).

3. Three circuits—the Second, Third and Fourth—have recognized that these principles preserve the right to appeal, even in the face of a plea agreement in which a defendant expressly waived the general right to appeal, where a defendant claims that the underlying conduct to which the defendant pleaded guilty was not criminal.

In *United States* v. *Balde*, 943 F.3d 73, 77-78 (2d Cir. 2019), the Second Circuit held that a plea was not knowing and voluntary – and that an appeal waiver was unenforceable where – an intervening judicial decision held that the conduct, as charged, was non-criminal. Specifically, Balde pled guilty to unlawful possession of a firearm by an alien "illegally or unlawfully in the United States." *Id.* at 77. His plea included an explicit waiver of his right to appeal "any other aspect of conviction" aside from one legal objection on which he had lost before the district judge. *Id*. at 93. On appeal, the Second Circuit upheld his conviction. *Id*. at 77. However, eight days after the panel issued its decision, this Court decided *Rehaif* v. *United States*, 139 S. Ct. 2191 (2019), holding that the statutes of conviction required the government to prove that a defendant knew not only that he

possessed a firearm, but also that he was "illegally or unlawfully in the United States" at the time. *Id.* at 2199.

In light of *Rehaif*, Balde petitioned for rehearing, and the same panel that upheld his conviction granted his petition and withdrew its prior opinion. *Balde*, 943 F.3d at 78. On rehearing, the Second Circuit refused to enforce Balde's appellate waiver, reasoning that the accused had not been correctly informed of the elements of the offense, even though a decision clarifying those elements was only issued while his appeal was pending. *Id.* at 93. The court explained that an appeal waiver "does not bar challenges to the process leading to the plea," including arguments that the defendant was not correctly informed of the elements of the charged offense. *Id.* (citing *United States* v. *Lloyd*, 901 F.3d 111, 118 (2d Cir. 2018)). Because of the intervening decision in *Rehaif*, the court found Balde's plea deficient. *Id.* at 94. Through "no fault of the district court . . . [which] was merely applying what had long been the law of the circuit," Balde pleaded guilty based upon an interpretation of the relevant statute that was no longer good law. *Id.*

The Fourth Circuit in *United States* v. *Sweeney*, 833 F. App'x 395, 396 (4th Cir. 2021), likewise refused to enforce an appeal waiver where an intervening judicial decision revealed that the underlying conduct was non-criminal. The defendant in that case pleaded guilty to using a firearm in relation to a crime of violence under 18 U.S.C. § 924(c) and waived his right to appeal his conviction. *Sweeney*, 833 F. App'x at 395. During the pendency of his appeal, this Court held

that the residual clause of section 924(c)(3)(b) was unconstitutionally vague, *United States* v. *Davis*, 139 S. Ct. 2319, 2323-24 (2019), and the Fourth Circuit held that the predicate offenses underlying the section 924(c) charge against Sweeney did not meet the statutory definition of crimes of violence. *Sweeney*, 833 F. App'x at 396-97 (citing *United States* v. *Simms*, 914 F.3d 229, 233-34 (4th Cir. 2019) (en banc), and *United States* v. *Taylor*, 978 F.3d 73, 77-78 (4th Cir. 2020)).

The Fourth Circuit found that the appeal waiver was valid and "remained valid even in light of a subsequent change in the law." *Sweeney*, 833 F. App'x at 396. However, drawing on circuit precedent, it found that because Sweeney's challenge raised a cognizable claim of actual innocence, based upon an intervening holding that section 924(c) was unconstitutionally vague, it therefore fell outside the scope of the waiver. *Ibid.* (citing *United States* v. *Adams*, 814 F.3d 178, 182 (4th Cir. 2016)). It thus permitted the appeal and vacated Sweeney's conviction.

The Fourth Circuit later adopted a similar approach in the habeas context in *United States* v. *McKinney*, 60 F.4th 188, 190 (4th Cir. 2023), explaining that enforcing appeal waivers in the face of a "cognizable claim of actual innocence" would result in a miscarriage of justice. *Id.* at 192-93. The majority thus rejected the notion that the terms of a plea bargain trump the defendant's fundamental right not to be convicted and punished for conduct that is not

criminal.[6] See also *United States* v. *McCoy*, 895 F.3d 358, 364 (4th Cir 2018) ("We agree and hold that even valid appeal waivers do not bar claims that a factual basis is insufficient to support a guilty plea.").

The Third Circuit, for its part, has held more broadly that an appeal waiver does not bar a defendant from arguing on direct appeal that the conduct to which he pled guilty is not a crime, irrespective of whether that claim is supported by an intervening judicial decision. *United States* v. *Castro*, 704 F.3d 125 (3d Cir. 2013). In *Castro*, the defendant pled guilty to one count of conspiracy to commit extortion. *Id.* at 129. The plea agreement contained a term that expressly waived "all rights to appeal or collaterally attack" the "conviction, sentence, or any other matter relating to [the] prosecution." *Ibid.* However, it was undisputed that Castro had not made a false statement, an element of the crime to which he had pleaded. 704 F.3d at 139. The court held that enforcing the appeal waiver when the underlying crime had not occurred would work a miscarriage of justice. *Id.* at 136.

In sum, applying the well-settled background principle that valid plea agreements must be based on knowing and voluntary admissions of actual criminal conduct, three circuits have recognized that a generic

---

[6] Judge Wilkinson dissented, arguing that the plea "was the valid outcome of a valid process" and that the majority's approach "subverts the parties' plea bargain." *McKinney*, 60 F.4th at 200.

appellate waiver does not bar a defendant from asserting that the charged conduct is not criminal, so long as the defendant "does not in any way deny that he engaged in the conduct to which he admitted." *Class*, 583 U.S. at 183.

4. The majority opinion below went the other way. The majority reasoned that Petitioner's appeal waiver barred him from showing that under a correct understanding of the law, he had not committed a crime. In doing so, the D.C. Circuit joined with the Seventh and Ninth Circuits.

The Seventh Circuit has consistently held that a generic appellate waiver bars any review, even where intervening decisions clarify the governing law. Most recently, in *Crockett*, the Seventh Circuit dismissed a direct appeal where the defendant was improperly subject to a sentencing enhancement under the Armed Career Criminal Act ("ACCA"). *United States* v. *Crockett*, No. 20-3025, 2023 U.S. App. LEXIS 12106 (7th Cir. May 17, 2023). Specifically, when Crockett pled under the then-prevailing interpretation of ACCA, predicate offenses could occur near simultaneously and still be deemed to have occurred on different "occasions," so long as the defendant had an "opportunity to stop and proceed no further." *United States* v. *Elliott*, 703 F.3d 378, 383 (7th Cir. 2012).

Before the time for appeal had run, this Court decided *Wooden* v. *United States*, 142 S. Ct. 1063 (2022), and Crockett sought to challenge the application of ACCA on the ground that his prior

conviction had been for a single criminal "occasion" within the meaning of *Wooden*. The Seventh Circuit dismissed the appeal on the ground that his appellate waiver "assumed the risk of this legal development." *Crockett*, No. 20-3025, 2023 U.S. App. LEXIS 12106 at *1. This followed from the Seventh Circuit's general rule that "a defendant's freedom to waive his appellate rights includes the ability to waive his right to make constitutionally-based appellate arguments." *Oliver* v. *United States*, 951 F.3d 841, 846 (7th Cir. 2020) (denying post-trial habeas where two defendants sought to rely on *Davis* to challenge their convictions under section 924(c)); see also *United States* v. *Wheeler*, 857 F.3d 742, 744 (7th Cir. 2017) (holding that the defendant waived his right to challenge whether he committed a "crime of violence" despite an intervening change in law).

The Ninth Circuit expressly joined the Seventh Circuit in holding that generic appellate waivers bar all review, even where subsequent legal developments reveal the conduct to which the defendant pled was non-criminal. In *United States* v. *Goodall*, the defendant pursued a direct appeal following this Court's decision in *Davis* to challenge his section 924(c) conviction despite having waived "the right to appeal any … aspect of the conviction or sentence." 21 F.4th 555, 558-59 (9th Cir. 2021). Goodall argued that the change in law made his guilty plea neither knowing nor voluntary, but the Court disagreed, asserting that as a matter of circuit precedent, "[w]e have found appellate waivers knowing and voluntary despite later changes in the law." *Id.* at 562.

The Sixth Circuit has taken a similar approach to the D.C., Seventh, and Ninth Circuits on the analogous question presented when habeas petitions seek relief based upon an intervening judicial decision. *Portis* v. *United States*, 33 F.4th 331 (6th Cir. 2022), presented almost identical facts to the Fourth Circuit's decision in *McKinney* but yielded a different result, with the Sixth Circuit holding that the waiver of a right to bring postconviction challenges remained enforceable even if later decisions of this Court undermined the legal basis for the conviction. *Id.* at 334-35. Judge White dissented on the ground that the defendants could not waive their right "to not be imprisoned for a constitutionally non-cognizable crime." *Id.* at 339 (White, J., dissenting).

In sum, defendants who waive their appellate rights as part of a guilty plea in the Second, Third, and Fourth Circuits may appeal their convictions on the ground that the underlying conduct to which they pleaded was not criminal. Identically situated defendants in the D.C., Seventh, and Ninth Circuits, by contrast, are irrevocably foreclosed from appealing, even if this Court invalidates their statute of conviction the day after their pleas were entered.

5. The circuits that have held challenges to the legal validity of the charge of conviction to be outside the scope of a defendant's general waiver of appellate rights have done so both on the theory that a subsequent clarification of the law revealed the plea to be neither knowing, nor voluntary, and because enforcing an appeal waiver under such circumstances would give rise to a miscarriage of justice. These

holdings are consistent with the basic principle, long recognized by this Court, that courts lack the power to convict a defendant of conduct that is not criminal. *Fiore*, 531 U.S. at 225.

That principle is fundamental and implemented, in part, through the plea colloquy process in which the court must independently assess that there is a factual basis for a plea and that it is voluntary and informed based on the elements of the charged offense in all federal criminal trials. U.S. Const. Amend. V; Fed. R. Crim. P. 11; *Class*, 583 U.S. at 180-81; 10 U.S.C. § 949i(a); R.M.C. 910(e); *Negron*, 60 M.J. at 141-42.

It also reflects the fundamental principle that controlling judicial decisions that clarify what is and is not criminal apply with full retroactive effect. *Bousley*, 523 U.S. at 626 (Stevens, J., concurring) ("A judicial construction of a statute is an authoritative statement of what the statute meant before as well as after the decision of the case giving rise to that construction."); *Harper* v. *Virginia Dept. of Taxation*, 509 U.S. 86, 97 (1993) ("When this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule").

This Court should therefore grant certiorari to affirm that criminal convictions can only arise from criminal conduct and the government cannot by

consent punish an individual for non-criminal conduct. A plea agreement that purports to do so, even including an appellate waiver, is therefore unenforceable.

## II. This Case is an Excellent Vehicle for Consideration of the Question Presented.

1. This case is the right vehicle to resolve the circuit split because it presents the issue starkly. In *Al Bahlul I*, the en banc D.C. Circuit unanimously held that at least one of the charges to which Petitioner pleaded guilty was not a crime, see Pet. App. 18-19a; *Al Bahlul I*, 767 F.3d at 27, and undercut the legal foundation of the remaining charges by articulating a standard governing when offenses first codified in the MCA can be prosecuted on the basis of pre-enactment conduct without violating the Ex Post Facto Clause. *All* of Petitioner's remaining charges were first codified in the MCA, and *all* of them rest on his pre-enactment conduct. P.A.273-74, 283-85; see also P.A.28; *Al Bahlul I*, 767 F.3d at 24. Indeed, the CMCR itself recognized that *Al Bahlul I* was potentially dispositive to the validity of Petitioner's convictions when it stayed his appeal for six years pending the D.C. Circuit's resolution of that case.

This case thus squarely presents the issue of whether the inclusion of a generic appeal waiver as part of a plea agreement, that merely does explicitly what a guilty plea does implicitly, bars a defendant from challenging a conviction based on conduct that the law does not proscribe. And it does so in the

context of a direct appeal in which the appeal waiver presented the sole basis for the lower court's decision.

2. The question presented implicates the same important interests presented in *Grzegorczyk* v. *United States*, 142 S. Ct. 2580, 2581 (2022), where four members of this Court would have voted to GVR in light of the Solicitor General's concession that the petitioner was improperly convicted under section 924(c), even though that case arose in the habeas context which implicates distinct finality interests. Indeed, this Court has "strictly limited the circumstances under which a guilty plea may be attacked on collateral review," and emphasized that "the voluntariness and intelligence of a guilty plea can be attacked on collateral review only if first challenged on direct review." *Bousley*, 523 U.S. at 621.

This case is a direct appeal. To the extent the habeas context of *Grzegorczyk* presented unique obstacles to answering whether appellate waivers render criminal convictions predicated upon non-criminal conduct invulnerable to review, the judgment in this case remains non-final and only seeks direct review. *Cf. Class*, 583 U.S. at 182.

3. Uniformity on the question presented is urgently needed. This Court and the circuit courts of appeal routinely narrow the scope of criminal statutes, if not invalidate them in their entirety. See, *e.g.*, Dave S. Sidhu, *The Supreme Court's Narrow Construction of Federal Criminal Laws: Historical Practice and Recent Trends*, CRS Legal Sidebar (Sept. 5, 2023) (collecting cases). As one appellate judge has

observed, "[i]n the last decade" decisions of this sort have become "nearly an annual event." *United States* v. *Dubin*, 27 F.4th 1021, 1041 (5th Cir. 2022) (Costa, J., dissenting), vacated and remanded, 599 U.S. 110 (2023) (narrowly construing the aggravated identity theft statute). Those decisions necessarily affect cases that are pending at the time of the courts' decisions. And how to accommodate those clarifications in the law, when the judgment in a case remains non-final, but where a defendant has already waived appellate rights, has divided panels in three circuits and yielded sharply divergent approaches across at least six circuits.

Under the approach taken by the majority below, as well as the Seventh and Ninth Circuits, identically situated defendants face dramatically different legal consequences based – not on the character of their conduct – but based on the timing of otherwise identical pleas. And nationally, identically situated defendants face dramatically different legal consequences based – not on the character of their conduct – but on the circuit in which they entered their plea. Indeed, had Petitioner been prosecuted in the Second, Third or Fourth Circuit, his appeal would have been allowed to proceed, notwithstanding his appellate waiver. Such inconsistency violates "the basic principle of justice that like cases should be decided alike." *Martin* v. *Franklin Cap. Corp.*, 546 U.S. 132, 139 (2005).

The lack of consistency across the circuits injects considerable uncertainty into the plea-bargaining process. See *Padilla* v. *Kentucky*, 559 U.S. 356, 373

(2010) ("informed consideration" of the significant consequences of a guilty plea "can only benefit both the State and .... defendants during the plea-bargaining process."). Because "[n]inety-seven percent of federal convictions ... are the result of guilty pleas," clear direction from this Court is needed. *Frye,* 566 U.S. at 143; see also Glenn R. Schmitt & Lindsey Jeralds, U.S. Sentencing Comm'n, Overview of Federal Criminal Cases: Fiscal Year 2021, at 8 (2022) (noting that 98.3% of federal offenders pleaded guilty in fiscal year 2021, "an all-time high"). Certiorari is therefore warranted.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Juan O. Perla
*Counsel of Record*
Curtis, Mallet-Prevost,
Colt & Mosle LLP
1717 Pennsylvania Ave
NW Suite 1300
Washington, DC 20006
(202) 452-7373
jperla@curtis.com

T. Barry Kingham
Sylvi Sareva
Andrew Larkin
Joseph Muschitiello
Steven Thomas
Curtis, Mallet-Prevost,
Colt & Mosle LLP
101 Park Avenue
New York, NY 10178

Samuel Morison
Military Commission
Defense Organization
1620 Defense Pentagon
Appellate Defense
Division
Washington, D.C. 20301

*Counsel for Petitioner*

January 2, 2024

# APPENDIX

**APPENDIX**
**TABLE OF CONTENTS**

| | | |
|---|---|---|
| Appendix A — | U.S. Court of Appeals for the District of Columbia Circuit Opinion (May 9, 2023) .............. | 1a |
| Appendix B — | U.S. Court of Appeals for the District of Columbia Circuit Opinion and Order (August 4, 2023)........................................... | 34a |
| Appendix C — | U.S. Court of Military Commission Review Opinion (October 21, 2021)...................... | 36a |
| Appendix D — | USCS Const. Amend. 5, Part 1 of 13........................................... | 59a |
| Appendix E — | 10 USCS § 949i.......................... | 60a |
| Appendix F — | 10 USCS § 950g ........................ | 63a |
| Appendix G — | RMC Rules 910, 1110 ............... | 66a |

## APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

---

NO. 21-1218

OMAR AHMED KHADR, PETITIONER

*v.*

UNITED STATES, RESPONDENT

---

September 19, 2022, Argued; May 9, 2023, Decided

---

**Subsequent History:** Rehearing denied by, En banc *Khadr v. United States*, 2023 U.S. App. LEXIS 20294 (D.C. Cir., Aug. 4, 2023)

**Prior History:** On Petition for Review of an Order of the U.S. Court of Military Commission Review. *Khadr v. United States*, 2022 U.S. App. LEXIS 5101 (D.C. Cir., Feb. 24, 2022)

**Counsel:** Samuel T. Morison, Attorney, Office of Military Commissions, argued the cause for petitioner. With him on the briefs was Alexandra Link, Attorney.

Danielle S. Tarin, Attorney, U.S. Department of Justice, argued the cause for respondent. With her on the brief were Matthew G. Olsen, Assistant Attorney General for National Security, and Joseph F. Palmer, Attorney.

**Judges:** Before: HENDERSON and WILKINS, Circuit Judges, and RANDOLPH, Senior Circuit Judge. Opinion for the Court filed by Circuit Judge HENDERSON. Concurring opinion filed by Senior Circuit Judge RANDOLPH. Dissenting opinion filed by Circuit Judge WILKINS.

**Opinion by:** HENDERSON

**Opinion**

KAREN LECRAFT HENDERSON, *Circuit Judge*: Omar Ahmed Khadr is a former Guantanamo Bay detainee. He asks us to vacate his convictions for war crimes—including providing material support to terrorism and murder of a United States soldier in violation of the law of war—based on the alleged constitutional and statutory infirmities of those convictions. We dismiss the petition because Khadr waived his right to appellate review by this Court.

**I.**

The Military Commissions Act (MCA) provides that a military commission "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 official, usually

referred to as the "convening authority," details the commission's members, refers charges to the commission and reviews any conviction and sentence imposed by the commission. *Id.* §§ 948i, 950b; R.M.C. 601. On review of a final conviction and sentence, the convening authority may dismiss any charge, convict the accused of a lesser included offense or approve, disapprove, suspend or commute the sentence the commission imposed. *Id.* § 950b(c). The convening authority's decision to approve, disapprove or modify the commission's findings or sentence is the convening authority's "action." *Id.*

In every case in which the convening authority approves a commission decision that includes a finding of guilty, "the convening authority shall refer the case to the United States Court of Military Commission Review [CMCR]," a military appellate court. *Id.* § 950c(a); *see also In re al-Nashiri*, 791 F.3d 71, 74-75, 416 U.S. App. D.C. 248 (D.C. Cir. 2015). "[I]n each case that is referred," the CMCR "shall . . . review the record . . . with respect to any matter properly raised by the accused," 10 U.S.C. § 950f(c), and "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," *id.* § 950f(d).

We have exclusive jurisdiction to determine the validity of any final judgment rendered by a military commission and, where applicable, affirmed or set aside as incorrect in law by the CMCR. *Id.* § 950g(a); *see also id.* § 950c(b) (permitting accused to waive review in the CMCR).

**II.**

Khadr is a Canadian citizen and the son of Ahmad Khadr, a former senior member of al Qaeda. In 2002, when Khadr was 15 years old, he joined an al Qaeda cell in Afghanistan that constructed and planted improvised explosive devices targeting U.S. forces. Khadr and his cell also clandestinely observed the movements of U.S. military convoys and conveyed the information to other al Qaeda operatives.

On July 27, 2002 U.S. forces raided the compound where Khadr and other al Qaeda operatives were located. In the ensuing firefight, Khadr threw a hand grenade and killed an American soldier, Sergeant First Class Christopher Speer. Another American solider then engaged Khadr and shot him twice. Khadr was taken into U.S. military custody, given medical treatment and transferred to the Naval Base at Guantanamo Bay for detention.

In 2007, Khadr was charged under the MCA with murder and attempted murder in violation of the law of war, conspiracy, providing material support to terrorism and spying. In October 2010, Khadr entered into a pretrial agreement (PTA) with the convening authority. Khadr agreed, among other things, to plead guilty to all five charges and to waive his appeal rights. In the pertinent portion of the PTA, Khadr "offer[ed] and agree[d]" to

> [s]ign and execute the document found at Attachment B, a two (2) page document that is

> Military Commission Form 2330, Waiver/Withdrawal of Appellate Rights, within the specified timeframe found within Attachment Band R.M.C. 1110. In doing so I understand I will, at the time of execution of Attachment B, waive my rights to appeal this conviction, sentence, and/or detention to the extent permitted by law, or to collaterally attack my conviction, sentence, and/or detention in any judicial forum (found in the United States or otherwise) or proceeding, on any grounds, except that I may bring a post-conviction claim if any sentence is imposed in excess of the statutory maximum sentence or in violation of the sentencing limitation provisions contained in this agreement. I have been informed by my counsel orally and in writing of my post-trial and appellate rights.

App. 59-60.

In exchange, the convening authority agreed not to approve any sentence in excess of eight years' confinement and to support Khadr's request for a transfer to Canadian custody.

On October 30, 2010 Khadr and his counsel executed Form 2330. The executed form stated, in relevant part:

> I understand that . . . [i]f I waive or withdraw appellate review -
>
> a. My case will not be reviewed by the Court of Military Commission Review, or be subject to

> further review by the Court of Appeals for the District of Columbia Circuit, or by the Supreme Court.
>
> . . . .
>
> c. A waiver or withdrawal, once filed, cannot be revoked, and bars further appellate review.
>
> Understanding the foregoing, I waive my rights to appellate review. I make this decision freely and voluntarily.

App. 71. Khadr's counsel filed the executed form with the commission and thus made it part of the "record of trial." *See* R.M.C. 808, 1103.

The following day, October 31, 2010, the military commission sentenced Khadr to 40 years' confinement. At the sentencing hearing, the military judge reviewed with Khadr the terms of his appeal waiver and confirmed in a colloquy that the waiver was both knowing and voluntary.

In May 2011 the convening authority issued an action approving "only so much of the sentence as provides for eight years confinement." App. 82. The approval action was served on Khadr's counsel that same day. Despite his agreement to do so in the PTA, Khadr did not refile his appeal waiver after the convening authority took action.

In September 2012, based in part on the convening authority's support, Khadr was transferred to Canada

to serve the remainder of his sentence. The Queen's Bench of Alberta ordered Khadr released on bail in 2015 and determined in 2019 that his sentence had expired. *Khadr v. Bowden Inst.* (2015), 590 A.R. 359 (Can. Alta. Q.B.); *Khadr v. Warden of Bowden Inst.*, 2015 ABQB 207 (Can. Alta. Q.B.). Khadr has been released without conditions.

Although the convening authority approved the commission's finding of guilty, he did not refer Khadr's case to the CMCR for review pursuant to 10 U.S.C. § 950c. Instead, Khadr tried to initiate review himself in 2013—two years after the convening authority's action—by filing a brief with the CMCR challenging his convictions. Khadr argued, *inter alia*, that the military commission lacked jurisdiction of the offenses to which he pleaded guilty. The CMCR held the appeal in abeyance pending our resolution of a series of related appeals. *See Al Bahlul v. United States (Al Bahlul I)*, 767 F.3d 1, 412 U.S. App. D.C. 372 (D.C. Cir. 2014) (en banc); *Al Bahlul v. United States (Al Bahlul II*), 792 F.3d 1, 416 U.S. App. D.C. 340 (D.C. Cir. 2015), *rev'd* en banc *sub nom. Bahlul v. United States (Al Bahlul III*), 840 F.3d 757, 426 U.S. App. D.C. 182 (D.C. Cir. 2016); *Al Bahlul v. United States (Al Bahlul IV)*, 967 F.3d 858, 448 U.S. App. D.C. 465 (D.C. Cir. 2020).

After *Al Bahlul IV* was decided, the CMCR lifted the abeyance, denied all pending motions without prejudice and ordered the parties to file supplemental briefs addressing the court's jurisdiction and the merits of Khadr's appeal. On October 21, 2021 the

CMCR dismissed the appeal for lack of subject-matter jurisdiction, concluding that "until a case is referred to our court by the convening authority under section 950c . . . we lack jurisdiction to review it on the merits." *United States v. Khadr*, 568 F. Supp. 3d 1266, 1271 (C.M.C.R. 2021) (cleaned up). The court remanded the case to the convening authority with the following instructions:

> Khadr, if he elects, may ask the convening authority to refer his case to this court. The government, if it elects, has the right to state its position in response. We caution the parties that they should attend to this matter diligently.
>
> We do not presume to tell the convening authority what he should do. We do say that within forty-five (45) days of the date of this opinion the convening authority should resolve the referral matter. If it is not resolved by then, and Khadr can show . . . that (i) he has acted diligently on remand, including making a proper request seeking a referral, and (ii) the convening authority has refused his request, in fact or constructively, then we will entertain a petition for a writ of mandamus. In the event Khadr seeks a writ, we express no view on whether the mandamus requirements could or might be satisfied.

*Id.* at 1277.

On remand, the convening authority declined to refer Khadr's case to the CMCR, concluding that Khadr's

appellate waiver was binding notwithstanding it was made before the convening authority took action.

Khadr petitioned this Court for review of the CMCR's dismissal for lack of subject-matter jurisdiction.

## III.

### A.

Khadr argues his convictions should be set aside for six reasons. He first argues that the military commission lacked jurisdiction of offenses that he committed as a juvenile. Second, he claims the Ex Post Facto Clause bars his convictions because the offenses of which he was convicted were not crimes triable by military commission at the time of his conduct in 2002. Third, he argues that, by authorizing the military commission to convict him of "purely domestic crimes" not cognizable under international law, the Congress exceeded its constitutional authority under Article I's Define and Punish Clause and violated Article III's Judicial Power Clause. Fourth, he argues the "specifications" of murder, attempted murder and conspiracy failed to state an offense under the MCA because they did not allege that Khadr engaged in conduct that could render his crimes "violations of the law of war." Fifth, he claims that the MCA discriminates against aliens in violation of the equal protection component of the Due Process Clause. And finally, he contends his guilty plea was unknowing and involuntary and that it lacked a factual basis.

The Government argues that we lack subject-matter jurisdiction of Khadr's petition because Khadr did not satisfy the MCA's exhaustion requirement, 10 U.S.C. § 950g(b), and because Khadr does not petition for review of a "final judgment of a military commission" as "affirmed or set aside as incorrect in law" by the CMCR, *id.* § 950g(a). We do not reach the Government's jurisdictional arguments, however, because Khadr's petition is fatally infirm on another threshold ground: waiver.[1]

*Steel Company v. Citizens for a Better Environment* established a rule of priority dictating the sequence in which a federal court must decide the different issues that a case presents. 523 U.S. 83, 93-102, 118 S. Ct. 1003, 140 L. Ed. 2d 210 (1998). But "*Steel Co.*'s rule of priority does not invariably require considering a jurisdictional question before *any* nonjurisdictional issue. Rather, courts may address certain nonjurisdictional, threshold issues before examining jurisdictional questions." *Kaplan v. Cent. Bank of the Islamic Republic of Iran*, 896 F.3d 501, 513, 437 U.S.

[1] The dissent faults us for addressing the validity of Khadr's appeal waiver without first giving the CMCR the chance to do so. *See* Dissenting Op. at 1-2, 5 n.1. The question before us, however, is whether Khadr waived his right to appellate review by this Court, not whether he waived his right to review by the CMCR. Those are distinct questions, especially given that the MCA imposes special limitations on an accused's ability to waive CMCR review. *See, e.g.*, 10 U.S.C. § 950c(b)(3) (accused must waive CMCR review within 10 days after convening authority's action). Even if the CMCR were to address the validity of Khadr's appeal waiver, it would consider only whether Khadr properly waived its review, not ours.

App. D.C. 270 (D.C. Cir. 2018). A court therefore need not consider its subject-matter jurisdiction if it can dispose of the case on another non-merits ground. *See Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 431, 127 S. Ct. 1184, 167 L. Ed. 2d 15 (2007) ("[A] federal court has leeway 'to choose among threshold grounds for denying audience to a case on the merits.'" (quoting *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 585, 119 S. Ct. 1563, 143 L. Ed. 2d 760 (1999))); *see also Kowalski v. Tesmer*, 543 U.S. 125, 129, 125 S. Ct. 564, 160 L. Ed. 2d 519 (2004) (assuming Article III standing and dismissing case on prudential standing ground); *Steel Co.*, 523 U.S. at 100 n.3 (approving case resolving *Younger* abstention question before addressing subject-matter jurisdiction).

Whether a defendant waived his appellate rights is a non-jurisdictional, non-merits threshold issue. *United States v. Hunt*, 843 F.3d 1022, 1026 n.1, 427 U.S. App. D.C. 117 (D.C. Cir. 2016). A dismissal based on an appeal waiver is a determination that the merits may not be reached because the defendant knowingly and voluntarily gave up his right to an appellate court's consideration of the merits of his case. Although resolving a case on waiver "may . . . involve a brush with 'factual and legal issues of the underlying dispute,'" *Sinochem*, 549 U.S. at 433 (quoting *Van Cauwenberghe v. Biard*, 486 U.S. 517, 529, 108 S. Ct. 1945, 100 L. Ed. 2d 517 (1988)), that brush does not transform the decision into a merits determination because deciding the waiver issue "does not entail any assumption by the court of substantive 'law-declaring

power,'" *id.* (quoting *Ruhrgas*, 526 U.S. at 584-85). We may therefore decide whether Khadr waived his right to appeal without first considering whether we have subject-matter jurisdiction. *See id. at 431* ("[J]urisdiction is vital only if the court proposes to issue a judgment on the merits." (quoting *Intec USA, LLC v. Engle*, 467 F.3d 1038, 1041 (7th Cir. 2006))).

**B.**

We generally may enforce a knowing, intelligent and voluntary waiver of the right to appeal. *Hunt*, 843 F.3d at 1027 (citing *United States v. Guillen*, 561 F.3d 527, 529, 385 U.S. App. D.C. 216 (D.C. Cir. 2009)). Even an anticipatory waiver—a waiver made before the defendant knows what his sentence will be—is enforceable as long as the defendant "is aware of and understands the risks involved in his decision." *Guillen*, 561 F.3d at 529. But we will not enforce an appeal waiver that "only arguably or ambiguously forecloses [the defendant's] claims." *Hunt*, 843 F.3d at 1027. Because a plea agreement is in essence a contract, we apply contract principles in interpreting a plea agreement. *Id.* If the agreement unambiguously covers the accused's claims, we dismiss the appeal. *Id.*

Here, Khadr agreed in the PTA to waive "my rights to appeal this conviction, sentence, and/or detention to the extent permitted by law, or to collaterally attack my conviction, sentence, and/or detention in any judicial forum (found in the United States or otherwise) or proceeding, on any grounds." App. 60. This broad waiver, which took effect "at the time of

execution of Attachment B [Form 2330]," excepts only "a post-conviction claim if any sentence is imposed in excess of the statutory maximum sentence or in violation of the sentencing limitation provisions contained in this agreement." App. 60. Otherwise, the provision unambiguously waives any challenge Khadr may have made to his convictions or sentence. Khadr does not challenge the length of his sentence and all of the claims he raises on appeal therefore fall within the scope of his appeal waiver (except, of course, for any jurisdictional challenge—more on that below).

Khadr gives a number of reasons that his unambiguous appeal waiver should not be enforced. None is availing. He first contends that his waiver is unenforceable because, in the military justice system, an accused cannot waive the right to appeal until after the convening authority takes action. *Cf. United States v. Miller*, 62 M.J. 471, 472 (C.A.A.F. 2006). Citing 10 U.S.C. § 950c(b)(3), he argues that the Congress expressly included this limitation in the MCA and that his appeal waiver is therefore unenforceable under the plain language of the statute.

10 U.S.C. § 950c(b)(3) provides: "A waiver under paragraph (1) must be filed, if at all, within 10 days after notice of the action is served on the accused or on defense counsel." Khadr reads this provision as precluding an accused from filing an anticipatory waiver of this Court's review. By its own terms, however, the provision applies only to an accused's waiver of *CMCR* review. *See id.* § 950c(b)(1) ("Except in a case in which the sentence . . . extends to death,

an accused may file with the convening authority a statement expressly waiving the right of the accused to appellate review by the United States Court of Military Commission Review under section 950f of this title."). The MCA includes no similar statement respecting waiver of *our* review. Indeed, the statute is utterly silent regarding whether, and under what conditions, an accused may waive appellate review by this Court. Given such silence, we decline Khadr's invitation to read a post-action limitation into the Act.

Khadr next argues, citing Regulation for Trial by Military Commission (R.T.M.C.) 24-2(b)(6), that an accused can never waive our appellate review. But like 10 U.S.C. § 950c(b), the Regulation discusses only waiver of appellate review by the CMCR, not by this Court. Indeed, this is evident from the Regulation's title: "Automatic Review by the United States Court of Military Commission Review." Although the Regulation states that "[t]his subsection does not apply to appeals before the United States Court of Appeals for the District of Columbia Circuit," 24-2(b)(1)(6), that language does not suggest an accused can waive review only by the CMCR and not by this Court. Rather, it merely clarifies that the procedures governing waiver of appellate review in the CMCR do not apply to us.

Khadr also contends that his claims are non-waivable and, thus, even if his waiver is enforceable, he may nevertheless raise his arguments on appeal. His claims fall into three basic categories: those challenging the constitutionality of the MCA; those

alleging that certain specifications fail to state an offense; and those challenging the constitutional validity of his plea.

Khadr argues that his claims challenging the constitutionality of the MCA are non-waivable under *Class v. United States*, 138 S. Ct. 798, 200 L. Ed. 2d 37 (2018). In Khadr's view, *Class* held that a facial constitutional challenge to a statute of conviction can never be waived. But the holding of *Class* is not so expansive. Rather, *Class* held only that a plea of guilty *on its own* does not waive a defendant's right to challenge the constitutionality of the statute of conviction. *See* id. at 803 (framing the question presented as "whether a guilty plea *by itself* bars a federal criminal defendant from challenging the constitutionality of the statute of conviction on direct appeal." (emphasis added)). As we have explained:

> *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. 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."

*Al Bahlul IV*, 967 F.3d at 875 (citations omitted); *see also United States v. Ríos-Rivera*, 913 F.3d 38, 42 (1st Cir. 2019) ("In *Class*, the Supreme Court only decided that a guilty plea alone does not waive claims that the government could not constitutionally prosecute the

defendant." (cleaned up)); *Oliver v. United States*, 951 F.3d 841, 846 (7th Cir. 2020) ("*Class* held that a guilty plea, *by itself*, does not implicitly waive a defendant's right to challenge the constitutionality of his statute of conviction.").

*Class* does not preclude a defendant from *expressly* waiving his right to challenge the statute of conviction on appeal. This limitation is evident from the structure of the opinion. The Court first considered whether Class's arguments fell within the scope of the express waivers in his plea agreement. *Class*, 138 S. Ct. at 802. It then asked whether Class's guilty plea "implicitly" waived his claims, but only after concluding that those arguments had not been expressly waived in Class's plea agreement. *See id.* at 803. Toward the end of the opinion, the Court again emphasized that Class's agreement had not waived his constitutional claims. *Id.* at 805-07. That the Court first noted that Class's arguments were not encompassed by his express waivers, and again referred to that fact at the conclusion of its opinion, strongly suggests that, although Class's plea agreement did not waive his claims, it could have. *See Al Bahlul IV*, 967 F.3d at 875 ("The Court twice emphasized that Class had not waived his objections through conduct other than his guilty plea, thus making clear that the Court was addressing only the effect of pleading guilty." (citation omitted)); *Oliver*, 951 F.3d at 846 ("[T]he Court's reasoning assumed that Class's plea agreement *could have* expressly waived such an argument but had not actually done so.").

In this case, Khadr expressly waived the right to appeal his convictions, sentence and detention. Nothing in *Class*, or other binding precedent of which we are aware, suggests that his non-jurisdictional claims, even if based on the Constitution, survive his express waiver.

Nor are we convinced the rule Khadr advocates would benefit the accused. As we explained in *Guillen*, "[a]llowing a defendant to waive the right to appeal his sentence . . . gives him an additional bargaining chip to use in negotiating a plea agreement with the Government." 561 F.3d at 530. If an appeal waiver were not enforced in the "mine run of cases," the government would cease to rely on it and the waiver would lose its value as a bargaining chip for the defendant. *See United States v. Adams*, 780 F.3d 1182, 1184, 414 U.S. App. D.C. 302 (D.C. Cir. 2015).

We note that the waiver was an especially effective bargaining chip in this case. In exchange for agreeing to waive his appellate rights, Khadr's sentence was remitted by the convening authority from 40 years' imprisonment to only 8 years' imprisonment. In addition, Khadr was transferred—on the convening authority's recommendation—to Canadian custody, where he was released on bail after serving only a portion of his sentence. There is thus good reason to believe that, had Khadr been unable to bargain with his appellate rights, he would remain in custody today.

Khadr also argues that his constitutional challenges

and his challenges regarding the sufficiency of the specifications are non-waivable under Rules 905 and 907 of the Rules for Military Commissions.[2] This argument is easily dismissed as we considered and rejected the same argument in *Al Bahlul I*, 767 F.3d at 10 n.6. There, Al Bahlul argued that his convictions should be set aside because they violated the Ex Post Facto Clause. *Id.* at 8. Al Bahlul did not raise that claim before the military commission but on en banc review three of our colleagues suggested it was non-forfeitable under Rules 905 and 907 either because the claim was jurisdictional or because it amounted to an argument that the indictment failed to allege an offense. *See id.* at 48 (Rogers, J., concurring in judgment in part and dissenting); *id.* at 51 (Brown, J., concurring in judgment in part and dissenting in part); *id.* at 78-79 (Kavanaugh, J., concurring in judgment in part and dissenting in part). The en banc

---

[2] R.M.C. 905(e) provides:

> Failure by a party to raise defenses or objections or to make motions or requests which must be made before pleas are entered under section (b) of this rule shall constitute waiver. The military judge for good cause shown may grant relief from the waiver. Other motions, requests, defenses, or objections, except lack of jurisdiction or failure of a charge to allege an offense, must be raised before the commission is adjourned for that case and, unless otherwise provided in this Manual, failure to do so shall constitute waiver.

Similarly, R.M.C. 907(b)(1), titled "Nonwaivable Grounds," provides that "[a] charge or specification shall be dismissed at any stage of the proceedings if: (A) The military commission lacks jurisdiction to try the accused for the offense; or (B) The specification fails to state an offense."

majority disagreed. It explained that the claim was not jurisdictional because "the question whether th[e MCA] is unconstitutional does not involve 'the courts' statutory or constitutional *power* to adjudicate the case.'" *Id.* at 10 n.6 (quoting *United States v. Cotton*, 535 U.S. 625, 630, 122 S. Ct. 1781, 152 L. Ed. 2d 860 (2002)).

The en banc court also rejected the suggestion that Al Bahlul's ex post facto claim was non-forfeitable because it alleged that the indictment failed to state an offense. "Failure to state an offense," the court explained, "is simply another way of saying there is a defect in the indictment—as evidenced by Rule 907's cross-reference to Rule 307(c), which sets forth the criteria for charges and specifications." *Id.* Supreme Court precedent is clear that "such a claim can be forfeited." *Id.*; *see Cotton*, 535 U.S. at 630 ("[D]efects in an indictment do not deprive a court of its power to adjudicate a case."); *Lamar v. United States*, 240 U.S. 60, 65, 36 S. Ct. 255, 60 L. Ed. 526 (1916) ("The objection that the indictment does not charge a crime against the United States goes only to the merits of the case."); *United States v. Delgado-Garcia*, 374 F.3d 1337, 1342-43, 362 U.S. App. D.C. 512 (D.C. Cir. 2004) ("[T]he substantive sufficiency of the indictment is a question that goes to the merits of the case.").

Our en banc *Al Bahlul I* decision controls. Khadr argues his constitutional claims are non-waivable because they are "jurisdictional." But his claims are no more jurisdictional than was Al Bahlul's ex post facto claim. Like Al Bahlul's ex post facto claim,

Khadr's claims challenge only the constitutionality of the MCA, not the courts'—or commission's—power to adjudicate his case.[3] Challenges to the constitutionality of a statute are not themselves jurisdictional.[4] *See United States v. Williams*, 341 U.S.

---

[3] Notably, although the Judicial Power Clause appears in Article III of the Constitution, the clause does not limit the power of the courts, but of the Congress. *See* U.S. CONST. art. III § 1. In particular, the clause curbs the Congress's power to transfer adjudicatory authority from Article III to non-Article III tribunals. *See CFTC v. Schor*, 478 U.S. 833, 850, 106 S. Ct. 3245, 92 L. Ed. 2d 675 (1986) (The clause "bar[s] congressional attempts to transfer jurisdiction to non-Article III tribunals." (cleaned up)). Khadr's Judicial Power Clause argument therefore does not implicate our subject-matter jurisdiction.

[4] Only one of Khadr's arguments is conceivably jurisdictional in the true sense. Khadr contends that the military commission lacked jurisdiction to convict him because of the Juvenile Delinquency Act (JDA), 18 U.S.C. §§ 5031 et seq. But the JDA, by its own terms, forbids criminal proceedings against juveniles only in a "court of the United States." 18 U.S.C. § 5032. Although the JDA does not define "court of the United States," definitions elsewhere in the U.S. Code cast serious doubt on whether a military commission qualifies as a court. *See, e.g.*, 28 U.S.C. § 451 ("The term 'court of the United States' includes the Supreme Court of the United States, courts of appeals, district courts . . . and any court created by Act of Congress the judges of which are entitled to hold office during good behavior."). Military courts have also held that the JDA does not apply to military tribunals. *See, e.g.*, *United States v. Thieman*, 33 C.M.R. 560, 561-62 (1963) ("Since it appears Congress enacted the Federal Juvenile Delinquency Act solely under its Article III powers and made no mention of persons in the military, we see no justification for extending the application of the Act to the military judicial system absent additional legislation."). Likewise, Supreme Court precedent and notable military treatises cast doubt on Khadr's argument. *See Ex Parte Vallandigham*, 68 U.S. (1 Wall.) 243,

58, 66, 71 S. Ct. 595, 95 L. Ed. 747 (1951) ("Even the unconstitutionality of the statute under which the proceeding is brought does not oust a court of jurisdiction."). Indeed, if a constitutional challenge to a statute of conviction were jurisdictional, a federal court would be required to address, *sua sponte*, the constitutional validity of every statute of conviction in every criminal case it considered. *See United States v. Baucum*, 80 F.3d 539, 541, 317 U.S. App. D.C. 63 (D.C. Cir. 1996). That practice would not only consume judicial resources but also run afoul of a long line of Supreme Court decisions declining to consider constitutional claims not raised by the parties. *Id.*; *see also Mazer v. Stein*, 347 U.S. 201, 206 n.5, 74 S. Ct. 460, 98 L. Ed. 630, 1954 Dec. Comm'r Pat. 308 (1954) ("We do not reach for constitutional questions not raised by the parties."); *Al Bahlul III*, 840 F.3d at 780 (Millett, J., concurring) ("To hold otherwise would mean that 'a court would be required to raise [a Judicial Power Clause challenge] *sua sponte* each time it reviews a decision of a non-Article III tribunal,' even

---

253, 17 L. Ed. 589 (1864) (although a military commission has "discretion to examine, to decide and sentence," it is not "judicial . . . in the sense in which judicial power is granted to the courts of the United States"); *Ex Parte Quirin*, 317 U.S. 1, 39, 63 S. Ct. 2, 87 L. Ed. 3 (1942) ("[M]ilitary tribunals . . . are not courts in the sense of the Judiciary Article."); *Ortiz v. United States*, 138 S. Ct. 2165, 2179-80, 201 L. Ed. 2d 601 (2018) ("[T]he commission [at issue in *Vallandigham*] lacked 'judicial character.' It was more an adjunct to a general than a real court."); W. WINTHROP, MILITARY LAW AND PRECEDENTS 49 (2d Ed. 1920) ("None of the statutes governing the jurisdiction or procedure of the 'courts of the United States' have any application to [a court-martial].").

if the parties do not contest that issue." (quoting *Al Bahlul II*, 792 F.3d at 32 (Henderson, J., dissenting))).

Likewise, Khadr's argument that his claims challenging the sufficiency of his specifications are non-waivable is materially identical to the argument the en banc court deemed forfeited in *Al Bahlul I*. Khadr neither points to any facts nor identifies an intervening change in the law that would support distinguishing our decision in *Al Bahlul I*.[5] *Cf. Al Bahlul IV*, 967 F.3d at 876 (declining to reconsider *Al Bahlul I* based on argument that defect in charging document deprives military court of jurisdiction).

Nevertheless, Khadr's challenge to the validity of his guilty plea is reviewable notwithstanding his appeal waiver. *See Garza v. Idaho*, 139 S. Ct. 738, 745, 203 L.

---

[5] Khadr contends *Al Bahlul I* is inapposite because that case involved forfeiture whereas this case involves waiver. Granted, our *Al Bahlul I* decision relied in part on the distinction between waiver and forfeiture in rejecting the argument that Rules 905 and 907 rendered Al Bahlul's ex post facto claim non-forfeitable but the decision also rejected the argument for reasons unrelated to the distinction between waiver and forfeiture. See *Al Bahlul I*, 767 F.3d at 10 n.6 ("Nor is Bahlul's *ex post facto* argument 'jurisdictional.' . . . The question whether [the MCA] is unconstitutional does not involve 'the courts' statutory or constitutional *power* to adjudicate the case.'" (quoting *Cotton*, 535 U.S. at 630)); i*d.* ("Failure to state an offense is simply another way of saying there is a defect in the indictment . . . . As *Cotton* makes clear, such a claim can be forfeited."); *id.* (citing *Delgado-Garcia*, 374 F.3d at 1342-43, a case involving waiver, for the proposition that "[t]he question of an indictment's failure to state an offense is an issue that goes to the merits of a case").

Ed. 2d 77 (2019) ("[C]ourts agree that defendants retain the right to challenge whether the waiver itself is valid and enforceable."); *Guillen*, 561 F.3d at 529 ("A defendant may waive his right to appeal his sentence as long as his decision is knowing, intelligent, and voluntary."). "An appeal waiver is knowing, intelligent, and voluntary if the defendant 'is aware of and understands the risks involved' in waiving the right to appeal." *United States v. Lee*, 888 F.3d 503, 506, 435 U.S. App. D.C. 182 (D.C. Cir. 2018) (quoting *Guillen*, 561 F.3d at 529). Granted, "[a] written plea agreement in which the defendant waives the right to appeal" serves as "strong evidence that the defendant knowingly, intelligently, and voluntarily waived the right to appeal," we still examine the entire record to determine whether the plea was knowing, intelligent and voluntary. *Id.* at 507.

Here, the record shows that Khadr's plea was made knowingly, intelligently and voluntarily. The waiver language of the PTA and the Form 2330 is clear, both documents are signed by Khadr and his counsel and the military judge confirmed in a colloquy at Khadr's sentencing that he waived his appeal rights knowingly and voluntarily. *See id.* (listing factors).

Khadr argues his plea is invalid because the military judge misinformed him about the nature and constitutionality of the charges against him. In essence, Khadr claims that his plea should be set aside because the judge ruled against him on the merits of his legal claims. This argument is too clever by half. A defendant cannot challenge a plea based on an alleged

error of law that was raised, rejected and then waived pursuant to the plea. Khadr, aware that the military judge had rejected his theories, nonetheless chose to plead guilty and expressly waive his right to appeal those erroneous (in his view) rulings. He cannot now have the merits of his waived claims reviewed on appeal by arguing his waiver was invalid because those claims were wrongly decided. Indeed, the basic principle behind an appeal waiver is that the defendant *gives up* his right to have an appellate court review the merits of his arguments in exchange for valuable consideration. *See Guillen*, 561 F.3d at 530 ("Allowing the defendant to waive this right . . . improves the defendant's bargaining position and increases the probability he will reach a satisfactory plea agreement with the Government.").

For the foregoing reasons, we conclude that Khadr unambiguously waived his right to challenge his conviction on appeal and did so knowingly, intelligently and voluntarily. We therefore dismiss the petition.

*So ordered.*

**Concur by: RANDOLPH**

**Concur**

RANDOLPH, *Senior Circuit Judge*, concurring: I agree with Judge Henderson's opinion, but I write in the hope of clarifying once and for all exactly what the Supreme Court held in *Steel Co*. and what it did not. *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 118 S. Ct. 1003, 140 L. Ed. 2d 210 (1998). *See* Maj. Op. 9-10.

The issue in *Steel Co.*, as the opinion's author - Justice Scalia - described it, was this: must Article III jurisdiction (*e.g.*, standing) always be confirmed before a federal court may move on to decide the merits of a controversy? The Court answered yes even though a federal court may decide a controversy before determining whether statutory jurisdiction exists.[1]

*Steel Co*. thus held in the clearest possible terms that a "merits question cannot be given priority over an Article III question," and so rejected Justice Stevens' contrary opinion (*see* note 1 *supra*). 523 U.S. at 97 n.2.

A few years after *Steel Co.*, the author of that opinion, Justice Scalia, again writing for the Court majority, wrote that it was unnecessary to decide a statutory jurisdictional question because it was so clear that the

---

[1] "Justice Stevens' opinion concurring in the judgment, however, claims that the question whether [the statute] permits this cause of action is also 'jurisdictional,' and so has equivalent claim to being resolved first." *Steel Co.*, 523 U.S. at 88-89.

plaintiffs would lose on the merits. *See Verizon Commc'ns Inc. v. L. Offs. of Curtis v. Trinko, LLP*, 540 U.S. 398, 416 n.5, 124 S. Ct. 872, 157 L. Ed. 2d 823 (2004). In support, Justice Scalia cited, in addition to his opinion in *Steel Co.*, the Court's opinion in *Nat'l R. R. Passenger Corp. v. Nat'l Ass'n of R. R. Passengers*, 414 U.S. 453, 456, 94 S. Ct. 690, 38 L. Ed. 2d 646 (1974). The Court there held that "it is only if . . . a right of action exists that we need consider whether the respondent had standing to bring the action and whether the District Court had jurisdiction to entertain it." *Id.* Our own decisions have followed suit: we have often bypassed statutory jurisdiction to decide merits issues.[2]

It is fair to ask what any of this has to do with this case. My answer is very little, which is why Judge Henderson's opinion does not dwell on it. That is, we are not asked here to decide the merits before deciding "jurisdiction," whether Article III jurisdiction, as in *Steel Co.* or statutory jurisdiction, as in *National Rail.*

As to what remains of the case, I am with Judge

---

[2] *See, e.g.*, *Am. Hosp. Ass'n 2 v. Azar*, 964 F.3d 1230, 1246, 448 U.S. App. D.C. 186 (D.C. Cir. 2020); *Sherrod v. Breitbart*, 720 F.3d 932, 936, 405 U.S. App. D.C. 395 (D.C. Cir. 2013); *Lin v. United States*, 690 F. App'x 7, 9 (D.C. Cir. 2017); *Chalabi v. Hashemite Kingdom of Jordan*, 543 F.3d 725, 728, 383 U.S. App. D.C. 207 (D.C. Cir. 2008); *Kramer v. Gates*, 481 F.3d 788, 791, 375 U.S. App. D.C. 292 (D.C. Cir. 2007); *Thomas v. Network Sols., Inc.*, 176 F.3d 500, 509-10, 336 U.S. App. D.C. 74 (D.C. Cir. 1999); *U.S. ex rel. Long v. SCS Bus. & Tech. Inst., Inc.*, 173 F.3d 890, 896, 335 U.S. App. D.C. 351 (D.C. Cir. 1999).

Henderson.

**Dissent by: WILKINS**

**Dissent**

WILKINS, *Circuit Judge*, dissenting: There is but one issue directly before this Court: jurisdiction. With no final order to review on appeal, I believe the answer to whether we have jurisdiction must be no. In order to sidestep jurisdiction and dismiss the appeal on other grounds, the majority upholds Mr. Khadr's appeal waiver. It does so, however, without the complete record of the proceedings below, contrary to our precedent, and also without the benefit of a finding of the validity of the appeal waiver by the United States Court of Military Commission Review ("CMCR") or the trial judge in the first instance. Because we are not permitted to make findings about the scope or validity of an appeal waiver without the complete record, and because "we are a court of review, not of first view," *Capitol Servs. Mgmt., Inc. v. Vesta Corp.*, 933 F.3d 784, 789, 443 U.S. App. D.C. 62 (D.C. Cir. 2019) (quoting *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7, 125 S. Ct. 2113, 161 L. Ed. 2d 1020 (2005)), I respectfully dissent.

**I**.

As outlined by the majority, the Military Commissions Act ("MCA") provides that the convening authority "shall refer the case to the [CMCR]" whenever it approves a military commission decision "includ[ing] a finding of guilty[.]" 10 U.S.C. § 950c(a). The only listed exception to such automatic referral concerns

waiver. And should a defendant waive the right to appeal, such waiver "must be filed, if at all, within 10 days after notice of the action is served on the accused or on defense counsel." *Id.* § 950c(b)(3). Although the MCA grants this Court exclusive jurisdiction, it does so on a limited basis. As such, our jurisdiction is triggered when asked to review final judgments rendered by "the military commission as approved by the convening authority and, where applicable, as affirmed or set aside as incorrect in law by the [CMCR]." *Id.* § 950g(a).

This limited record speaks for itself. In October 2010, Mr. Khadr entered into a pretrial agreement with the convening authority. Later that month, Mr. Khadr signed Military Commission Form 2330, Waiver/Withdrawal of Appellate Rights ("Form 2330"). Although the military commission made a guilty finding, the convening authority failed to refer Mr. Khadr's case under § 950c, and Mr. Khadr never filed his appeal waiver under § 950c(b)(3). As relevant here, the CMCR dismissed Mr. Khadr's appeal on October 21, 2021, for lack of jurisdiction, finding it is authorized by statute only to "review cases that have been 'referred to the Court by the convening authority.' 10 U.S.C. § 950f(c)." *United States v. Khadr*, 568 F. Supp. 3d 1266, 1275 (C.M.C.R. 2021).

For our purposes, it is important to note that the CMCR expressly declined to resolve any issues regarding the scope or validity of Mr. Khadr's appeal waiver. *Khadr*, 568 F. Supp. 3d at 1274 n.11. Instead, the CMCR counseled Mr. Khadr to ask the convening

authority to refer his case within 45 days, and should that fail, the CMCR would "entertain a petition for a writ of mandamus." *Id.* at 1277. It also found that should the convening authority refer the case, "the briefing of the merits appeal will be deemed completed." *Id.* Rather than immediately following these instructions, Mr. Khadr petitioned this Court on November 8, 2021, for review of the CMCR's decision dismissing for lack of jurisdiction.

The CMCR's decision, dismissing Mr. Khadr's case for lack of jurisdiction and remanding with instructions can hardly be characterized as "affirm[ing] or set[ting] aside as incorrect in law" a decision which is required to grant us jurisdiction under § 950g(a). For that reason, the government urges us to dismiss this appeal for lack of jurisdiction, because the CMCR remand order before us is not a "final order," as we have squarely held. *See Khadr v. United States*, 529 F.3d 1112, 1115-16, 381 U.S. App. D.C. 408 (D.C. Cir. 2008) (dismissing appeal for lack of jurisdiction after holding that CMCR remand order was not a final order).

**II**.

The majority rejects this straightforward approach. Instead, the majority reasons that unlike subject matter jurisdiction, we need not satisfy ourselves that we have statutory jurisdiction as a threshold matter in every instance, so we can dismiss the appeal on a non-merits ground, like waiver. Maj. Op. 8-10. While the majority's approach is correct in theory, *see United*

*States v. Shemirani*, 802 F.3d 1, 3, 419 U.S. App. D.C. 359 & n.1 (D.C. Cir. 2015), it is not appropriate to decide whether Mr. Khadr waived his right to appeal in this instance.

Mr. Khadr's guilty plea was taken in open court on October 25, 2010. Oral Arg. Tr. 20. However, the appeal waiver was not executed until five days later, on October 30, 2010. *Id.* at 20-21; App. 71. The transcript of October 25 is in the record before us, but not the transcript from any proceedings on October 30. The trial judge said on October 25 that he would review the appeal waiver with the defendant later, but we do not have transcripts to determine whether that ever occurred, and if so, what was said by the judge, counsel, or Mr. Khadr. Granted, the military commission made a cursory statement to Mr. Khadr on October 25, asking him if he understood that he was waiving his right to appeal. App. 304-05. But we do not know if there were subsequent statements made on October 30 that could impact the voluntariness of the appeal waiver or the scope of the waiver. *See, e.g.*, *United States v. Kaufman*, 791 F.3d 86, 88, 416 U.S. App. D.C. 263 (D.C. Cir. 2015) (holding that "the district court made two problematic statements in explaining the waiver provision in the plea agreement" that "transformed the nature" of the written appeal waiver); *United States v. Godoy*, 706 F.3d 493, 495, 403 U.S. App. D.C. 443 (D.C. Cir. 2013) (where district court mischaracterized scope of appeal waiver provision during colloquy with the defendant, the oral pronouncement controlled over the terms of the appeal waiver in the written plea agreement).

Furthermore, while the trial judge made a finding on October 25 that Mr. Khadr knowingly and involuntarily waived his right to trial, there is no concomitant finding that he knowingly and voluntarily waived his right to an appeal. App. 311-12. Thus, we do not even have before us a contemporaneous finding in the trial court that the appeal waiver was knowing and voluntary. Without the oral colloquy and the trial court's finding, we cannot adequately review whether the appeal waiver was knowing and involuntary and whether its scope encompasses the claims being asserted by Mr. Khadr. As we have previously explained,

> a written plea agreement *on its own* does not end the inquiry. Rather, the court of appeals must examine, among other things, the clarity of the written plea agreement, the defendant's signature on the agreement, defense counsel's signature on the agreement, the defendant's statements at the plea hearing, defense counsel's statements at the plea hearing, and the judge's questioning and statements at the plea hearing.

*United States v. Lee*, 888 F.3d 503, 507, 435 U.S. App. D.C. 182 (D.C. Cir. 2018) (Kavanaugh, J.) (emphasis in original).

In sum, we should not make a determination about the scope and validity of the appeal waiver in the first instance, and even if it were appropriate to do so, our precedent does not permit us to do so unless we have

the complete record.[1] The majority has jumped the gun and prematurely dismissed the appeal by reaching the non-merits issue of waiver on an incomplete record and as if we are a court of first view, rather than a court of review. I therefore dissent.

---

[1] After the CMCR dismissed the appeal and remanded the case, the Convening Authority made a finding in 2021 that the appeal waiver was knowing and voluntary. App. 132. That finding was made after the order we have before us on review, so it is not properly before us. It also relies on the larger record, *see id.*, which, again, is not before us. The Convening Authority's finding should be reviewed by the CMCR in the first instance, before we speak on the issue.

# APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

---

NO. 21-1218

OMAR AHMED KHADR, PETITIONER

*v.*

UNITED STATES, RESPONDENT

---

August 4, 2023, Filed

---

**Prior History:** CMCR-13-005.

*Khadr v. United States*, 67 F.4th 413, 2023 U.S. App. LEXIS 11345, 2023 WL 3312345 (D.C. Cir., May 9, 2023)

**Counsel:** For Omar Ahmed Khadr, Petitioner: Alexandra Link, Military Commissions Defense Organization, Washington, DC; Samuel T. Morison, Office of Military Commissions, Washington, DC.

For United States, Respondent: Joseph Francis Palmer, Danielle Sue Tarin, U.S. Department of Justice, Washington, DC.

**Judges:** BEFORE: Srinivasan, Chief Judge; Henderson, Millett, Pillard, Wilkins, Katsas*, Rao, Walker, Childs, Pan, and Garcia, Circuit Judges; and Randolph, Senior Circuit Judge.

**Opinion**

**ORDER**

Upon consideration of petitioner's petition for rehearing en banc, the response thereto, and the absence of a request by any member of the court for a vote, it is

**ORDERED** that the petition be denied.

**Per Curiam**

* Circuit Judge Katsas did not participate in this matter.

## APPENDIX C

UNITED STATES
COURT OF MILITARY COMMISSION REVIEW

---

CMCR 13-005

UNITED STATES

*v.*

OMAR AHMED KHADR

---

October 21, 2021, Decided

---

**Prior History:** Colonel Peter E. Brownback, U.S. Army (ret.), and Colonel Patrick J. Parrish, U.S. Army, military commission judges.

*Khadr v. United States*, 2014 Military Commission Review 3 (Oct. 17, 2014)

**Counsel:** On briefs and/or motions for Omar Ahmed Khadr were Samuel T. Morison, Captain Justin Swick, U.S. Air Force, Dennis Edney, and Alexandra Link.

On briefs and/or motions for the United States were Brigadier General Mark S. Martins, U.S. Army, Captain Edward S. White, JAGC, U.S. Navy, Danielle

S. Tarin, Marc A. Wallenstein, and Bryce G. Poole.

**Judges:** BEFORE THE COURT POLLARD, PRESIDING JUDGE, BURTON, CHIEF JUDGE, STEPHENS, JUDGE. Opinion for the court filed by POLLARD, PRESIDING JUDGE, with whom BURTON, CHIEF JUDGE, and STEPHENS, JUDGE, join.

**Opinion by:** POLLARD

**Opinion**

POLLARD, PRESIDING JUDGE:

On November 8, 2013, Appellant Omar Ahmed Khadr filed a brief in this court, in which he stated: "Appellant files this appeal as of right from the Convening Authority's final action approving the judgment and sentence rendered by Appellant's military commission," based upon his plea of guilty to five offenses, including murder in violation of the law of war. *See* Khadr Br. 1 (Nov. 8. 2013). The convening authority has not referred Khadr's case to us for review. *See* 10 U.S.C. § 950f(c) (2021) (citing 10 U.S.C. § 950c). By orders dated November 19 and December 5, 2013, we asked the parties to brief inter alia whether we had jurisdiction to hear the appeal without a referral by the convening authority.

In March 2014, we abated the appeal before reaching the jurisdictional issue. Order (CMCR Mar. 7, 2014). We said that the resolution of a then-pending appeal before the United States Court of Appeals for the

District of Columbia Circuit (D.C. Circuit) sitting en banc, *al Bahlul v. United States*, No. 11-1324, "concerning the Military Commission's subject-matter jurisdiction[,] may have a material bearing on the disposition of a significant issue that Appellant raises in this Court." *Id.* at 2. This was so, we said, because:

> The principal argument that Appellant raises in his brief is his contention that the military commission below lacked subject matter jurisdiction to convict him of the majority of the offenses set forth in the charging instrument because at the time of his alleged criminal conduct no such crimes existed under the international law of war. Brief for Appellant 18-39.

*Id.* at 1. The *al Bahlul* case continues to wind its way through the appellate process,[1] but we ordered the

---

[1] *United States v. Al Bahlul*, 820 F. Supp. 2d 1141 (CMCR 2011) (en banc) (affirming findings and sentence approved on June 3, 2009), *conviction vacated*, No. 11-1324, 2013 U.S. App. LEXIS 1820, at *2 (D.C. Cir. Jan. 25, 2013) (per curiam) (order vacating convictions approved on June 3, 2009), *reh'g en banc granted, order vacated*, No. 11-1324, 2013 U.S. App. LEXIS 8120, at *1 (D.C. Cir. Apr. 23, 2013) (per curiam) (unpublished) (order vacating order of January 25, 2013), *clarified*, No. 11-1324, 2013 U.S. App. LEXIS 26164 (D.C. Cir. May 2, 2013) (per curiam) (order clarifying order of April 23, 2013), *aff'd in part, vacated in part en banc and remanded*, 767 F.3d 1, 31 (D.C. Cir. 2014) (vacating material support and solicitation convictions and remanding to determine effect of vacatur, if any, on sentencing, rejecting ex post facto challenge to conspiracy conviction, and remanding conspiracy conviction for consideration of "alternative challenges" not addressed in opinion), *vacated in* part, 792 F.3d 1, 3 (D.C. Cir. 2015) (vacating inchoate conspiracy conviction),

abatement lifted on September 2, 2020,[2] re-imposed it on November 19, 2020, and then lifted it again on June 21, 2021. In our September 2, 2020, order, we asked the parties to supplement the briefing on whether we had jurisdiction to hear Khadr's appeal. They have done so.

After giving full consideration to the parties' arguments and the law, we dismiss Khadr's appeal for lack of jurisdiction.

Title 10, section 950f(c) of the United States Code (2021), our jurisdictional statute, calls upon us to review cases that have been "referred to the Court by the convening authority under section 950c of this title with respect to any matter properly raised by the accused." Here, the convening authority has not

---

*reh'g en banc granted, judgment* vacated, No. 11-1324, 2015 U.S. App. LEXIS 16967, at *4 (D.C. Cir. Sept. 25, 2015) (per curiam) (order vacating judgment at 792 F.3d 1), *aff'd en banc*, 840 F.3d 757, 759 (D.C. Cir. 2016) (per curiam) (affirming 2011 CMCR judgment upholding conspiracy conviction), *cert. denied*, 138 S. Ct. 313 (2017), *aff'd en banc on remand*, 374 F. Supp. 3d 1250, 1274 (CMCR 2019) (affirming life sentence upon reassessment), *aff'd in part, rev'd in part and remanded*, 967 F.3d 858 (D.C. Cir. 2020) (affirming CMCR discretion to reassess sentence without remand to military commission, reversing reassessment for not applying harmless beyond a reasonable doubt standard, and remanding for reassessment under this standard), *reh'g en banc denied*, No. 19-1076, 2021 U.S. App. LEXIS 1733 (D.C. Cir. Jan. 21, 2021) (per curiam order), *cert. filed*, No. 21-339 (Aug. 24, 2021).

[2] This court's order, dated September 2, 2020, was amended on September 28, 2020, and on September 1, 2021.

referred Khadr's case to our court. Until there is such a referral, we have no jurisdiction to hear an appeal because referral by the convening authority is jurisdictional for our court.

In dismissing Khadr's appeal for lack of jurisdiction, we remand the case to the convening authority with instructions that the parties and the convening authority address the referral matter within forty-five (45) days of the date of this opinion. *See infra* Part III.

## I. FACTS

We set forth only the facts necessary to resolve the jurisdictional issue.

Appellant was convicted, on his plea of guilty before a military commission, of murder in violation of the law of war, in violation of 10 U.S.C. § 950t(15) (2009) (Charge I); attempted murder in violation of the law of war, in violation of 10 U.S.C. § 950t(28) (2009) (Charge II); conspiracy to attack civilians, to attack civilian objects, to commit murder in violation of the law of war, to destroy property in violation of the law of war, and to commit terrorism, in violation of 10 U.S.C. § 950t(29) (2009) (Charge III); providing material support for terrorism, in violation of 10 U.S.C. § 950t(25) (2009) (Charge IV); and spying in violation of the law of war, in violation of 10 U.S.C. § 950t(27) (2009) (Charge V). App. Ex. 1, Vol. 19, at

pp. 179-85; App. Ex. 217-B, Vol. 36, at p. 324.[3]

On October 31, 2010, the military commission sentenced Khadr to forty years' confinement. Tr. 4890, Vol. 18, at p. 341. However, the pretrial agreement (PTA) between the convening authority and Khadr limited his sentence to eight years' confinement. PTA ¶ 6.a, App. Ex. 341, Vol. 42, at p. 143. In the PTA, Khadr agreed to waive his appellate rights, which required him to sign and file a waiver (Military Commission Form 2330) with the convening authority. PTA ¶ 2.f, App. Ex. 341, Vol. 42, at p. 139 (citing Rule for Military Commissions (R.M.C.) 1110, Manual for Military Commissions, United States); *see* 10 U.S.C. § 950c(b) (2021). Khadr agreed to file his waiver within ten days after he or his counsel was served with the convening authority's action on the commission's findings and his sentence. PTA ¶ 2.f, App. Ex. 341, Vol. 42, at p. 139; *see* R.M.C. 1110(f)(1) (2010); 10 U.S.C. § 950c(b)(3) (2021).

On May 26, 2011, the convening authority issued his action approving "only so much of the sentence as provides for eight years confinement." Gov. App. 74 (Dec. 19, 2013). The action was served on Khadr's counsel the same day. *Id.* at 95-102. Khadr, however, did not file an appellate rights waiver with the convening authority within ten days of service of the action, as promised in paragraph 2.f of his PTA. Khadr Opp'n 7 (Oct. 7, 2020); *see* Gov. Resp. 9 (Nov. 26, 2013); App. Ex. 386 ¶ 7, Vol. 42, at p. 277. A waiver of

[3] Citations to "Vol." are to record of trial volumes.

appellate rights has never been filed with the convening authority.

The convening authority did not refer this case to our court for review. There is nothing in the record that shows Khadr asked the convening authority to refer his case to us. Rather, we can infer from the arguments in his briefs that he has not made any such request. *See, e.g.*, Khadr Reply 8, 16 (Jan. 10, 2014).

Section 950c(a) of Title 10 of the United States Code (2021) says "the convening authority shall refer . . . to the United States Court of Military Commission Review," "each case in which [a] final decision of a military commission" regarding a finding of guilt has been "approved by the convening authority"—except for those cases in which an individual has waived appellate rights. Khadr's opening brief invokes § 950f(c) as the basis for jurisdiction, but does not address the statutory referral requirement in section 950c(a). *See* Khadr Br. 1-2 (Nov. 8, 2013). Nor does his brief explain why the convening authority has not referred this case to us or why Khadr has not asked that it be to referred to us. *See id.*

## II. DISCUSSION

### A. Jurisdiction

The first step of appellate adjudication is to determine whether the court has jurisdiction.

> "Because Article III courts are courts of limited jurisdiction, we must examine our authority to

> hear a case before we can determine the merits." *United States v. British Am. Tobacco Australia Servs., Ltd.*, 437 F.3d 1235, 1239 (D.C. Cir. 2006) (quoting *Wyo. Outdoor Council v. U.S. Forest Serv.*, 165 F.3d 43, 47 (D.C. Cir. 1999)). As the party claiming subject matter jurisdiction, Khadr has the burden to demonstrate that it exists. *Moms Against Mercury v. FDA*, 483 F.3d 824, 828 (D.C. Cir. 2007).

*Khadr v. United States*, 529 F.3d 1112, 1115 (D.C. Cir. 2008) (parallel citations omitted); *see also Arbaugh v. Y&H Corp.*, 546 U.S. 500, 514 (2006) (All courts "have an independent obligation to determine whether subject-matter jurisdiction exists, even in the absence of a challenge from any party."). The same starting point applies to Article I courts. Here, Khadr has not met his burden of establishing jurisdiction.

We begin with our jurisdictional statute, 10 U.S.C. § 950f(c), which says:

> **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.

From this language, four things are clear.

> 1. Congress commands the court "shall . . . review the record,"

2. "with respect to any matter properly raised by the accused,"

3. "in each case that is referred to the Court by the convening authority under section 950c," and

4. in accordance with the U. S. Court of Military Commission Review Rules of Practice.

"[T]he word 'jurisdictional' is generally reserved for prescriptions delineating the classes of cases a court may entertain. . . ." *Fort Bend Cnty. v. Davis*, 139 S. Ct. 1843, 1848 (2019). The scope of that jurisdiction is defined when there is a "clear jurisdictional grant to the courts" and a "clear limit on that grant." *Gonzalez v. Thaler*, 565 U.S. 134, 142 (2012). In construing our jurisdictional statute, "traditional tools of statutory construction must plainly show that Congress imbued a procedural bar with jurisdictional consequences." *United States v. Kwai Fun Wong*, 575 U.S. 402, 410 (2015).

*Gonzalez* is particularly instructive. It concerned 28 U.S.C. § 2253(c), a provision regarding the requirements for appealing final orders in certain habeas corpus proceedings. Section 2253(c)(1)(A) says, "Unless a circuit justice or judge issues a certificate of appealability [(COA)], an appeal may not be taken to the court of appeals from . . . the final order in [certain] habeas corpus proceeding[s] . . . ." The Supreme Court held that the statutory language requiring issuance of a certificate not only was jurisdictional, but also was "'clear' jurisdictional

language." *Gonzalez*, 565 U.S. at 142. In the absence of a certificate, federal courts "lack jurisdiction to rule on the merits of appeals from habeas petitioners." *Id.* (quoting *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003)). The *Gonzalez* holding applies equally to Khadr's effort to appeal his conviction. Until a "case [] is referred to [our court] by the convening authority under section 950c," 10 U.S.C. § 950f(c)—a statute that provides "'clear' jurisdictional language"—we "lack jurisdiction to [review it] on the merits," *Gonzalez*, 565 U.S. at 142.

Conditions precedent to federal appellate jurisdiction are common. They range, for example, (i) from the timely filing of a notice of appeal, which is "mandatory and jurisdictional," *Bowles v. Russell*, 551 U.S. 205, 209 (2007) (citation omitted), (ii) to "administrative remedies [that must] be exhausted," *Am. Dairy of Evansville, Inc. v. Bergland*, 627 F.2d 1252, 1268 (D.C. Cir. 1980) (Robinson III, J., dissenting), (iii) to the requirement for parties to "permissibly consent[] to have the magistrate judge enter judgment and" for any appeal to "be taken 'to the Court of Appeals'" directly, *Stevens, Hinds & White, P.C. v. Fisher, Byrialsen & Kreizer, PLLC (In re McCray, Richardson, Santana, Wise, & Salaam Litig.)*, 832 F.3d 150, 154 (2d Cir. 2016) (inner quotation marks and citation omitted), (iv) "to review [of] Rule 35(b) sentences [only if] one of four criteria are met under 18 U.S.C. § 3742(a),"[4] *United States v. Williams*, 590 F.3d 579,

[4] Federal Rule of Criminal Procedure 35(b) addresses sentence reduction for substantial assistance to an investigation or

580 (8th Cir. 2009). Section 950f(c)'s referral requirement is no different from these examples.

Khadr makes two principal arguments regarding why we have jurisdiction. Each fails.

First, he argues that our opinion in *Hicks v United States*, 94 F. Supp. 3d 1241 (CMCR 2015), found jurisdiction on similar facts and is binding precedent that we must follow. Khadr Opp'n 2-5 (Oct. 26, 2020).[5] Second, he reads 10 U.S.C. § 950f to impose a mandatory obligation on this court to review his conviction—and nothing more is required to find jurisdiction. *See, e.g.*, Khadr Resp. 1-6 (Dec. 19, 2013); Khadr Reply 7 (Jan. 10, 2014); Khadr Suppl. Br. 3 (Oct. 14, 2020). The lack of a referral to this court, he says, is a ministerial act that does not preclude a finding of jurisdiction. *See* Khadr Resp. 6 (Dec. 19, 2013); Khadr Reply 7-9 (Jan. 10, 2014); Khadr Suppl. Br. 2-4 (Oct. 14, 2020); Khadr Opp'n 7-8 (Oct. 26, 2020).

Khadr's first argument based on *Hicks* has no merit. That case, like the one before us, involved an accused who pleaded guilty pursuant to a PTA that included an appellate waiver provision and then failed to file the waiver within ten days of service of the convening

---

prosecution.

[5] Khadr Reply 2 (Nov. 5, 2020); Khadr Suppl. Br. 2-4 (Oct. 14, 2020); Khadr Opp'n 5-7 (Oct. 7, 2020); Khadr Mot. 2 n.1 (Apr. 26, 2019); *see also* Gov. Reply 2-3 (Nov. 5, 2020); Gov. Resp. 2-3 (Oct. 26, 2020); Gov. Suppl. Br. 2-4 (Oct. 14, 2020).

authority's action, pursuant to § 950c(b)(3) (2006), as agreed. *Hicks*, 94 F. Supp. 3d at 1244. Also like the instant case, the convening authority did not refer *Hicks* to this court for review. Hicks Br. 5 n.6 (Nov. 5, 2013), *Hicks v. United States*, No. 13-004 (CMCR).

Years later, Hicks sought to appeal his conviction for providing material support to an international terrorist organization engaged in hostilities against the United States—namely, al Qaeda, in violation of 10 U.S.C. § 950v(b)(25) (2006).[6] *Hicks*, 94 F. Supp. 3d at 1243. Hicks argued that subsequent to his conviction, the D.C. Circuit held that the 2006 MCA did not authorize a military commission to retroactively "punish" an accused "for conduct that was not a war crime at the time of the offense." Hicks Br. 2 (Nov. 5, 2013) (citing *Hamdan v. United States (Hamdan II)*, 696 F.3d 1238 (D.C. Cir. 2012)).[7] However, the principal dispute in *Hicks* was whether

---

[6] The convening authority took action in *Hicks* on May 1, 2007. Hicks Br. 5 (Nov. 5, 2013), *Hicks v. United States*, No. 13-004 (CMCR). Counsel filed Hicks' appeal six and one-half years later on November 5, 2013.

[7] *See also* Hicks Br. 2 n.1 (Nov. 5, 2013) (citing Gov. Pet. for Reh'g En Banc 2, 14 (Mar. 5, 2013), *al Bahlul v. United States*, Case No. 11-1324, Doc. No. 1423745 (D.C. Cir. Sept. 14, 2011) (government conceding that *Hamdan II* requires vacatur of material support conviction)); *al Bahlul v. United States*, 767 F.3d 1, 27-31 (D.C. Cir. 2014) (en banc) (assuming without deciding application of Ex Post Facto Clause to al Bahlul's case and finding a "plain *ex post facto* violation . . . to try Bahlul by military commission for [material support]" and reaching same finding on solicitation charge).

his appellate rights waiver was valid.

Shortly before he filed an appellate brief, Hicks asked that his case be referred to this court. The convening authority deferred acting, saying, "The issue as to the validity of an appellate waiver, which was executed before the Convening Authority took action on a case, and was not filed with the Convening Authority after such action, is currently pending before the USCMCR in *US. v. AI Qosi*."[8] Neither the defense nor, apparently, the government brought these facts to the attention of this court. The government did argue that the court lacked jurisdiction to hear the appeal because of the lack of a referral. *See* Gov. Br. 16 (Dec. 19, 2013). However, *Hicks* did not address that question.

The court apparently assumed jurisdiction and went straight to the merits. It first held that Hicks' appellate rights waiver was ineffective for failure to comply with the ten-day filing rule and his "appeal [was] properly before our Court." *See Hicks*, 94 F. Supp. 3d at 1246. The court next held that his material support conviction violated the Ex Post Facto Clause, based on the D.C. Circuit's controlling decision in *al Bahlul*, 767 F.3d at 29. *Id.* at 1248.

[8] Memorandum from detailed defense counsel Samuel T. Morison to Convening Authority (Apr. 25, 2013), Hicks Br. 6, App. 331 (Nov. 5, 2013), *Hicks*, No. 13-004 (requesting convening authority to forward record of trial to CMCR); Memorandum from Convening Authority to detailed defense counsel Samuel T. Morison (May 30, 2013), *id.* at App. 332 (declining action pending CMCR decision in *United States v. Al Qosi*).

Finally, it set aside and dismissed Hicks' conviction, and vacated the sentence. *Id.*

Black's Law Dictionary, the 9th edition of 2009, defines *holding* as "[a] court's determination of a matter of law pivotal to its decision." There is no holding in *Hicks* addressing jurisdiction. Therefore, there is nothing in *Hicks* that binds us regarding jurisdiction in the matter before us.

Khadr's argument to the contrary does not take into consideration the "well-established principle of interpretation that courts are 'not bound by a prior exercise of jurisdiction in a case where it was not questioned and it was passed *sub silentio*.'" *Doe v. Exxon Mobil Corp.*, 473 F.3d 345, 352 (D.C. Cir. 2007) (quoting *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 38 (1952));[9] *LaShawn A. v. Barry*, 87 F.3d 1389, 1395 n.6 (D.C. Cir. 1996) (en banc) (stating Supreme Court "does not consider itself bound by decisions on questions of jurisdiction" decided silently (citation omitted)); *see Brecht v. Abrahamson*, 507 U.S. 619, 631 (1993) ("[S]ince we have never squarely addressed the issue, and have at most assumed the applicability of the *Chapman* standard [of review for setting aside a conviction] on habeas, we are free to address the issue on the merits."); *Basardh v. Gates*,

[9] *United States v. L. A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 38 (1952), explained that "[e]ven as to our own judicial power or jurisdiction, this Court has followed the lead of Mr. Chief Justice Marshall who held that this Court is not bound by a prior exercise of jurisdiction in a case where it was not questioned and it was passed *sub silentio*."

545 F.3d 1068, 1072 n.6 (D.C. Cir. 2008) (per curiam) (stating prior D.C. Circuit decision, in which severability "was neither briefed nor argued and the panel's opinion [did] not mention it[,] . . . has no precedential force on the [severability] question" at issue).

Now that the jurisdictional issue is squarely presented, we have a mandatory obligation to address it, as we do now.

In his second argument concerning jurisdiction, Khadr points to the statutory command in the first part of 10 U.S.C. § 950f(c), which states the "Court shall . . . review the record." *See* Khadr Suppl. Br. 3 (Oct. 14, 2020). Then he contends that "in the absence of timely-filed waiver as prescribed by statute, Congress's mandatory language vests this Court with jurisdiction to conduct the automatic and plenary review of Khadr's case under 10 U.S.C. § 950f." Id. This, of course, ignores the second part of § 950f(c) that limits our review to cases that have been referred to us and to matters properly raised by the accused. In construing a statute, it is axiomatic that we must "give effect, if possible, to every clause and word," and to render none superfluous. *Duncan v. Walker*, 533 U.S. 167, 174 (2001) (internal quotation marks and citation omitted). Khadr's argument is inconsistent with this black letter principle of statutory construction.

In further support of his jurisdictional argument, Khadr says that the convening authority cannot "'evade judicial review'" by "refus[ing] to comply with

[his] statutory obligation to forward a record of trial." Khadr Opp'n 7-8 (Oct. 26, 2020) (citation omitted). There is no evidence, however, before us to support the contention that the convening authority refused to refer Khadr's case to this court. Even if there were some evidence, the lack of a referral cannot overcome the statutory restraint that our jurisdiction is limited to cases referred to us.[10] *See, e.g., Gonzalez* 565 U.S. at 142 (stating courts "lack jurisdiction to rule on the merits of appeals from habeas petitioners" in the absence of a COA (quoting *Miller-El*, 537 U.S. at 336)).

The government argues that § 950f(c) further limits jurisdiction to review of alleged errors that are "properly raised by the accused."[11] Gov. Reply 6 (Nov.

---

[10] Khadr contends that referral is a ministerial act for the convening authority. *See, e.g.*, Khadr Resp. 6 (Dec. 19, 2013); Khadr Reply 7-9 (Jan. 10, 2014); Khadr Suppl. Br. 2-3 (Oct. 14, 2020). Assuming that is true, it nonetheless remains a jurisdictional requirement for us that we may not ignore.

[11] The government also makes an argument that we have no jurisdiction because Khadr's waiver is valid. Gov. Br. 11 (Dec. 19, 2013) (Khadr's waiver of "appellate review 'bars review' of *all* his claims" and therefore "[t]he Court should . . . dismiss the case because the Court lacks authority to hear it."). This is coupled with an argument that we should enforce Khadr's promise in the pretrial agreement to waive his appellate rights. *Id.* at 11, 25-29; *see also* Gov. Ans. 11-12 (Jan. 10, 2014); Gov. Suppl. Br. 7-13 (Oct. 14, 2020). We need not reach either argument given our dismissal of the appeal. However, we do not view these arguments as implicating jurisdiction. Section 950f(c) confers jurisdiction to review a case that is properly referred to us by the Convening Authority. The statutory words used are a "statement of the Congress's intent to confer jurisdiction" on this court for cases referred to it. See *al Bahlul*, 767 F.3d at 12. The contract

5, 2020); Gov. Resp. 3 (Oct. 26, 2020); Gov. Reply 7 (Oct. 14, 2020); Gov. Suppl. Br. 5 (Oct. 14, 2020). We disagree with the government position. We are obligated to enforce a rule as jurisdictional only "[i]f the Legislature clearly states that a threshold limitation on a statute's scope shall count as jurisdictional." *Arbaugh*, 546 U.S. at 515. Our superior court reminds us that "the Supreme Court, of late, has 'pressed a stricter distinction between truly jurisdictional rules, which govern a court's adjudicatory authority, and nonjurisdictional claim-processing rules, which do not.'" *Huerta v. Ducote*, 792 F.3d 144, 151 (D.C. Cir. 2015) (quoting *Gonzalez*, 565 U.S. at 141).

The words, "any matter properly raised by the accused," in 10 U.S.C. § 950f(c) "do[] not speak in jurisdictional terms or refer in any way to the jurisdiction of the [appeals] courts." *Gonzalez*, 565 U.S. at 143 (second alteration in original) (quoting *Arbaugh*, 546 U.S. at 515). Rather, they constitute a claim processing rule. As a claim processing rule, the phrase "merely prescribe[s] the *method* by which the jurisdiction granted the courts by Congress is to be exercised." *United States v. Hartwell*, 448 F.3d 707, 717 (4th Cir. 2006) (quoting *Kontrick v. Ryan*, 540 U.S. 443, 454 (2004)). The rule "does not speak to a court's

---

argument is a legal argument concerning whether we should entertain the appeal or hold Khadr to his promise and enforce his waiver. *See, e.g., United States. v. Williams*, 510 F.3d 416, 422 (3d Cir. 2007) (discussing PTA breach under contract law). We express no opinion regarding the merits of the government's arguments.

[jurisdictional] authority, but only to a party's procedural obligations." *EPA v. EME Homer City Generation, L.P.*, 572 U.S. 489, 512 (2014); *see also Rivero v. Fid. Invs., Inc.*, 1 F.4th 340, 344 (5th Cir. 2021) ("Claim-processing rules are 'threshold requirements that claimants must complete, or exhaust, before filing a lawsuit.'" (quoting *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 166 (2010))).

Typically, claim processing rules "seek to promote the orderly progress of litigation by requiring that the parties take certain procedural steps at certain specified times." *Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 435 (2011). For example, most "filing deadline[s] . . . are quintessential claim-processing rules." *Id.* Claim processing rules also may include other factors beyond familiar procedural steps. *E.g., Huerta*, 792 F.3d at 150 (noting "significant adverse impact" finding by Federal Aviation Administration Administrator as precondition to D.C. Circuit review); *Cebollero-Bertran v. Puerto Rico Aqueduct & Sewer Auth.*, 4 F.4th 63, 71 (1st Cir. 2021) (noting diligent prosecution bar, which prevents citizen lawsuit if Environmental Protection Agency "has commenced and is diligently prosecuting a civil or criminal action" (quoting 33 U.S.C. § 1365(b)(1)(B)); *Rivero*, 1 F.4th at 344 (noting copyright pre-registration or registration as pre-condition to instituting civil action).

In sum, claim processing rules "are statutory mechanisms for sifting out insubstantial [or otherwise unsound] appeals, not limitations on judicial power."

*Huerta*, 792 F.3d at 152. We need not, and do not, parse the meaning of "properly raised by the accused" in deciding the jurisdictional issue. We need only find, as we do, that these words comprise a claim processing rule. Therefore, we reject the government's invitation to expand the jurisdictional prerequisite found in § 950f(c) beyond what the statute requires.

Accordingly, we hold that this court only has jurisdiction to review cases that have been "referred to the Court by the convening authority," 10 U.S.C. § 950f(c), and that the phrase "with respect to any matter properly raised by the accused" in the statute is a claim processing rule.

**B. Mandamus**

Khadr, in effect, argues that there is no remedy if the convening authority improperly fails to refer a case to this court for review. *See* Khadr Reply 6 (Jan. 10, 2014).[12] This is wrong. We need look no further than to Supreme Court jurisprudence regarding certificates of appealability.

> We may review the denial of a COA by the lower courts. See, e.g., *Miller-El v. Cockrell*, 537 U.S. 322, 326-327 (2003). When the lower courts deny a COA and we conclude that their reason for doing so was flawed, we may reverse and remand so that

---

[12] Khadr argues that a convening authority's refusal to refer a case for review, if jurisdictional, is "akin to his substantive clemency decision-making . . . 'over which courts have no review.'" Khadr Reply 6 (Jan. 10, 2014) (citation omitted).

> the correct legal standard may be applied. See *Slack v. McDaniel*, 529 U.S. 473, 485-486, 489-490 (2000).

*Ayestas v. Davis*, 138 S. Ct. 1080, 1088 n.l (2018) (parallel citations omitted).

In our court, this may be accomplished through the use of our mandamus powers, when appropriate. The Court in *Roche v. Evaporated Milk Association* told us that this

> authority is not confined to the issuance of writs in aid of a jurisdiction already acquired by appeal but extends to those cases which are within its appellate jurisdiction although no appeal has been perfected. Otherwise the appellate jurisdiction could be defeated and the purpose of the statute authorizing the writ thwarted by unauthorized action of the district court obstructing the appeal.
>
> * * *
>
> The traditional use of the writ in aid of appellate jurisdiction both at common law and in the federal courts has been to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so.

319 U.S. 21, 25-26 (1943) (citations omitted).

Accordingly, if the criteria are satisfied, we may issue a writ of mandamus to correct an actual or

constructive refusal by the convening authority to refer a case that should be referred.[13] *See Wilbur v. United States*, 281 U.S. 206, 218 (1930) ("Mandamus is employed to compel the performance, ***when refused***, of a ministerial duty, this being its chief use." (emphasis added)); *Margolis v. Banner*, 599 F.2d 435, 441-42 (C.C.P.A. 1979) (stating "the court clearly has the power to issue writs under the All Writs Act in aid of its prospective appellate jurisdiction in the face of action [below] that would frustrate such prospective appellate jurisdiction").

## III. REMAND

While we dismiss Khadr's appeal for want of jurisdiction, we are mindful of what the D.C. Circuit recently said in denying Khadr's mandamus petition seeking to require this court to vacate its abatement order and adjudicate the matter before us: "We are confident that [the CMCR] will act upon petitioner's appeal promptly following the resolution of *Bahlul v. United States*, No. 19-1076." Order, *In re Khadr* 2020

---

[13] There is no evidence before us of a refusal to act or explanation of why the convening authority has not acted. The government has proffered reasons why there has been no referral. *See, e.g.*, Gov. Suppl. Br. 6 (Oct. 14, 2020) (asserting no duty to refer under express waiver in PTA); Gov. Resp. 3 n.13 (Oct. 26, 2020) (asserting convening authority "understood" appellate waiver was the "waiver of appeal as contemplated in [the] Pre-Trial Agreement"). We give no weight to these reasons. They are not "annotated with a citation to the appendix page(s) or the affidavit paragraph(s) and/or exhibit(s) that provides record support for the asserted fact," which is mandatory. Order 4 (CMCR Sept. 2, 2020).

U.S. App. LEXIS 1072 (D.C. Cir. Jan. 13, 2020) (No. 19-1157) (per curiam) (unpublished).

We therefore remand this matter to the convening authority with instructions. Khadr, if he elects, may ask the convening authority to refer his case to this court. The government, if it elects, has the right to state its position in response. We caution the parties that they should attend to this matter diligently.

We do not presume to tell the convening authority what he should do. We do say that within forty-five (45) days of the date of this opinion the convening authority should resolve the referral matter. If it is not resolved by then, and Khadr can show by affidavit that (i) he has acted diligently on remand, including making a proper request seeking a referral, and (ii) the convening authority has refused his request, in fact or constructively, then we will entertain a petition for a writ of mandamus. In the event Khadr seeks a writ, we express no view on whether the mandamus requirements could or might be satisfied.

If the convening authority refers Khadr's case to us for review, the briefing of the merits appeal will be deemed completed. No further merits briefs will be permitted without prior consent of the court. The clerk is directed to not accept any such filings after the date of this opinion without the court's prior permission.

Any application by either party to file a supplemental brief shall be made pursuant to CMCR Rule 15(k). This restriction does not apply to non-argumentative

letters that bring to the court's attention relevant new authority.

# APPENDIX D

## USCS Const. Amend. 5, Part 1 of 13

Current through the ratification of the 27th Amendment on May 7, 1992.

**Amendment 5 Criminal actions—Provisions concerning—Due process of law and just compensation clauses.**

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

# APPENDIX E

## 10 USCS § 949i

Current through Public Law 118-30, approved December 21, 2023, with a gap of Public Law 118-26.

***United States Code Service > TITLE 10. ARMED FORCES (§§ 101 — 18506) > Subtitle A. General Military Law (Pts. I — V) > Part II. Personnel (Chs. 31 — 89) > CHAPTER 47A. Military Commissions (Subchs. I — VIII) > Subchapter IV. Trial Procedure (§§ 949a — 949o)***

### § 949i. Pleas of the accused

**(a) Plea of not guilty.** If an accused in a military commission under this chapter [10 USCS §§ 948a et seq.] after a plea of guilty sets up matter inconsistent with the plea, or if it appears that the accused has entered the plea of guilty through lack of understanding of its meaning and effect, or if the accused fails or refuses to plead, a plea of not guilty shall be entered in the record, and the military commission shall proceed as though the accused had pleaded not guilty.

**(b) Finding of guilt after guilty plea.** With respect to any charge or specification to which a plea of guilty has been made by the accused in a military commission under this chapter [10 USCS §§ 948a et seq.] and accepted by the military judge, including a charge or

specification that has been referred capital, a finding of guilty of the charge or specification may be entered by the military judge immediately without a vote by the members. The finding shall constitute the finding of the military commission unless the plea of guilty is withdrawn prior to announcement of the sentence, in which event the proceedings shall continue as though the accused had pleaded not guilty.

**(c) Pre-trial agreements.**

**(1)** A plea of guilty made by the accused that is accepted by a military judge under subsection (b) and not withdrawn prior to announcement of the sentence may form the basis for an agreement reducing the maximum sentence approved by the convening authority, including the reduction of a sentence of death to a lesser punishment, or that the case will be referred to a military commission under this chapter [10 USCS §§ 948a et seq.] without seeking the penalty of death. Such an agreement may provide for terms and conditions in addition to a guilty plea by the accused in order to be effective.

**(2)** A plea agreement under this subsection may not provide for a sentence of death imposed by a military judge alone. A sentence of death may only be imposed by

> the unanimous vote of all members of a military commission concurring in the sentence of death as provided in section 949m(b)(2)(D) of this title [10 USCS § 949m(b)(2)(D)].

**HISTORY:**

Added Oct. 28, 2009, P. L. 111-84, Div A, Title XVIII, § 1802, 123 Stat. 2587; Dec. 31, 2011, P. L. 112-81, Div A, Title X, Subtitle D, § 1030(b), 125 Stat. 1570; Dec. 19, 2014, P. L. 113-291, Div A, Title X, Subtitle G, § 1071(f)(9), 128 Stat. 3510.

## APPENDIX F

## 10 USCS § 950g

Current through Public Law 118-30, approved December 21, 2023, with a gap of Public Law 118-26.

***United States Code Service > TITLE 10. ARMED FORCES (§§ 101 — 18506) > Subtitle A. General Military Law (Pts. I — V) > Part II. Personnel (Chs. 31 — 89) > CHAPTER 47A. Military Commissions (Subchs. I — VIII) > Subchapter VII. Post-Trial Procedure and Review of Military Commissions (§§ 950a — 950j)***

### § 950g. Review by United States Court of Appeals for the District of Columbia Circuit; writ of certiorari to Supreme Court

**(a) Exclusive appellate jurisdiction.** 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 USCS §§ 948a et seq.].

**(b) Exhaustion of other appeals.** The United States Court of Appeals for the District of Columbia Circuit may not review a final

judgment described in subsection (a) until all other appeals under this chapter [10 USCS §§ 948a et seq.] have been waived or exhausted.

**(c) Time for seeking review.** A petition for review by the United States Court of Appeals for the District of Columbia Circuit must be filed in the Court of Appeals—

> **(1)** not later than 20 days after the date on which written notice of the final decision of the United States Court of Military Commission Review is served on the parties; or
>
> **(2)** if the accused submits, in the form prescribed by section 950c of this title [10 USCS § 950c], a written notice waiving the right of the accused to review by the United States Court of Military Commission Review, not later than 20 days after the date on which such notice is submitted.

**(d) 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.

**(e) Review by Supreme Court.** The Supreme Court may review by writ of certiorari pursuant to section 1254 of title 28 the final judgment of the United States Court of Appeals for the District of Columbia Circuit under this section.

**HISTORY:**

Added Oct. 28, 2009, P. L. 111-84, Div A, Title XVIII, § 1802, 123 Stat. 2603; Dec. 31, 2011, P. L. 112-81, Div A, Title X, Subtitle D, § 1034(d), 125 Stat. 1573.

# APPENDIX G

## RMC Rules 910, 1110

### Rule 910. Pleas

(a) Alternatives.

(1) In general. An accused may plead as follows: not guilty; guilty; not guilty to an offense as charged, but guilty of a named lesser included offense; guilty with exceptions, with or without substitutions, not guilty of the exceptions, but guilty of the substitutions, if any. A plea of guilty may be received as to an offense for which the death penalty may be adjudged by the military commission.

…

### Rule 1110. Waiver or withdrawal of appellate review

(a) In general. After any military commission, except one in which the approved sentence includes death, the accused may waive or withdraw appellate review.

(b) Right to counsel.

(1) In general. The accused shall have the right to consult with counsel qualified under R.M.C. 502(d)(1) before submitting a waiver or withdrawal of appellate review.

(2) Waiver.

(A) Counsel who represented the accused at the military commission. The accused may consult with any civilian or detailed counsel who represented the accused at the military commission concerning whether to waive appellate review unless such counsel has been excused under R.M.C. 505(d)(2)(B).

(B) Associate appellate counsel. If counsel who represented the accused at the military commission has not been excused but is not available to consult with the accused, because of military exigency, separation from the service, or other reasons, associate defense counsel shall be detailed to the accused upon request by the accused. Such counsel shall communicate with counsel who represented the accused at the military commission, and shall advise the accused concerning whether to waive appellate review.

(C) Substitute counsel. If counsel who represented the accused at the military commission has been excused under R.M.C. 505(d), substitute defense counsel shall be detailed to advise the accused concerning waiver of appellate rights.

(3) Withdrawal.

(A) Appellate defense counsel. If the accused is represented by appellate defense counsel, the

accused shall have the right to consult with such counsel concerning whether to withdraw the appeal.

(B) Associate appellate defense counsel. If the accused is represented by appellate defense counsel, and such counsel is not immediately available to consult with the accused, because of physical separation or other reasons, associate appellate defense counsel shall be detailed to the accused, upon request by the accused. Such counsel shall communicate with appellate defense counsel and shall advise the accused whether to withdraw the appeal.

(C) No counsel. If appellate defense counsel has not been assigned to the accused, defense counsel shall be detailed for the accused. Such counsel shall advise the accused concerning whether to withdraw the appeal. If practicable, counsel who represented the accused at the military commission shall be detailed.

(4) Civilian counsel. Whether or not the accused was represented by civilian counsel at the military commission, the accused may consult with civilian counsel, at no expense to the United States, concerning whether to waive or withdraw appellate review.

(5) Record of trial. Any defense counsel with whom the accused consults under this rule shall be given

reasonable opportunity to examine the record of trial.

(6) Consult. The right to consult with counsel, as used in this rule, does not require communication in the presence of one another.

(c) Compulsion, coercion, inducement prohibited. No person may compel, coerce, or induce an accused by force, promises of clemency, or otherwise to waive or withdraw appellate review.

(d) Form of waiver or withdrawal. A waiver or withdrawal of appellate review shall:

(1) Be written;

(2) State that the accused and defense counsel have discussed the accused's right to appellate review and the effect of waiver or withdrawal of appellate review and that the accused understands these matters;

(3) State that the waiver or withdrawal is submitted voluntarily; and

(4) Be signed by the accused and by defense counsel.

(e) To whom submitted.

(1) Waiver. A waiver of appellate review shall be filed with the convening authority. The waiver shall be attached to the record of trial.

(2) Withdrawal. A withdrawal of appellate review may be filed with the convening authority and shall be attached to the record of trial.

(f) Time limit.

(1) Waiver. The accused may sign a waiver of appellate review at any time after the sentence is announced. The waiver must be filed, if at all, within 10 days after notice of the action is served on the accused or on defense counsel under 10 U.S.C. §950b(c)(4) as implemented by R.M.C. 1107(h). Upon written application of the accused, the convening authority may extend this period for good cause, by not more than 30 days.

(2) Withdrawal. Except in a case in which the sentence includes death, the accused may file a withdrawal from appellate review at any time before such review is completed.

(g) Effect of waiver or withdrawal. A waiver or withdrawal of appellate review under this rule shall bar review by the United States Court of Military Commission Review. Once submitted, a waiver or withdrawal in compliance with this rule may not be revoked.