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STEPHEN I. VLADECK
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May 23, 2018

The Honorable Scott S. Harris
Clerk of the Court
Supreme Court of the United States
One First Street, N.E.
Washington, DC 20543-0001

Re: *Dalmazzi v. United States, No. 16-961*
Cox v. United States, No. 16-1017
Ortiz v. United States, No. 16-1423

Dear Mr. Harris:

I am Counsel of Record for the Petitioners in the above-referenced cases, which were argued on January 16, 2018.

These consolidated cases have at their core the appointment by the President and confirmation by the Senate of five active-duty military officers to also serve as judges on the U.S. Court of Military Commission Review (CMCR) under 10 U.S.C. § 950f(b)(3). One of the officers at issue—Army Col. James Wilson Herring, Jr.—retired from the U.S. Army effective July 31, 2017. But according to an order in a pending case issued by the CMCR earlier today (a copy of which is attached to this letter), he is continuing to hold office as a CMCR judge. (Prior to today’s order, counsel was unaware that Judge Herring was continuing to serve on the CMCR.)

This fact may bear upon two of the issues that are before this Court in the consolidated cases: Whether judges appointed to the CMCR by the President with the advice and consent of the Senate hold a “civil office” for purposes of 10 U.S.C. § 973(b)(2)(A), and whether military officers so appointed can indeed be “reassigned” off the CMCR by the General Counsel of the Department of Defense, as the government argued in its merits brief. *See* Brief for the United States at 29–30 & n.7; *see also* Reply Brief for the Petitioners at 16 & n.8.

I would appreciate it if you would distribute this letter to the Members of the Court.

Sincerely yours,

A handwritten signature in black ink, appearing to read "Stephen I. Vladeck".

Stephen I. Vladeck

cc: Counsel for Respondent and Counsel for *Amicus Curiae*



UNITED STATES
COURT OF MILITARY COMMISSION REVIEW

Ammar Al Baluchi,)	
)	MEMORANDUM TO
Petitioner)	THE PARTIES
)	
v.)	
)	
United States,)	May 23, 2018
)	
Respondent)	CMCR Case No. 18-003

On May 17, 2018, Petitioner Al Baluchi sought a writ of mandamus requesting that the Court “prevent the further destruction of material evidence crucial to the guilt-innocence and sentencing phases of the pending military commission trial of Mr. al Baluchi” by staying the Government’s further destruction of a “black site” that he asserts is evidence material to his defense. Pet. for Extraordinary Relief 1, 5-6 (May 17, 2018). This motion was followed the next day by motions for (1) a 90-day extension of the Military Judge’s April 20, 2018 stay pending this Court addressing the mandamus petition, and (2) an order addressed to the Military Judge directing him to release relevant classified documents to our Court. Pet. Mot. for Stay 2 (May 18, 2018); Pet. Mot. for Release of Classified Records 1-2 (May 18, 2018).

From the papers submitted to us, the “black site” at issue is a CIA detention facility where, it appears, the Government held Al-Baluchi. Pet. for Extraordinary Relief 9. “Between June 2014 and February 2016, the Government ‘decommissioned’ the black site to some extent” and the facility was partially destroyed. Pet. for Extraordinary Relief 7, 18. The Military Judge had stayed the further destruction of this site until April 20, 2018, when he vacated the stay effective May 20, 2018, thereby allowing the Government to resume the destruction of the decommissioned “black site” facility. Appellate Exhibit 052SS (Sup) 1. On May 18, 2018, the Military Judge extended the stay until June 19, 2018, “to allow completion of the briefing cycle” for a motion for a further stay pending before the Commission. *Id.*

At this time, our Court can resolve uncontested motions. However, it cannot address the merits of the issues raised by Petitioner. Deputy Chief Judge Scott Silliman is disqualified from hearing matters related to Khalid Shaikh Mohammad. *See In re Khalid Shaikh Mohammad*, 866 F.3d 473 (D.C. Cir. 2017). Subsequently, he recused himself from all matters related to *United States v. Khalid Shaikh Mohammad, et al.* Chief Judge Paulette V. Burton and

Judge James W. Herring, Jr. were on the panel with Deputy Chief Judge Silliman that heard the appeal in *Khalid Shaikh Mohammad* that lead to Deputy Chief Judge Silliman's disqualification. Both have recused themselves from all matters involving that case. Petitioner is a co-defendant in *Khalid Shaikh Mohammad*. This leaves only Judge William B. Pollard, III and Judge Larss G. Celtnieks available to consider the present petition and contested motions. By statute, our panels must be "composed of not less than three judges on the Court." 10 U.S.C. § 950f(a). Thus, the Court lacks a quorum.

Moreover, only the Chief Judge and the Deputy Chief Judge have the authority to appoint panels even if three judges were available. *See Manual for Military Commissions* (2016 rev. ed.), Rule for Military Commission 1201(b)(5); Regulation for Trial by Military Commission (2011 ed.), ¶¶ 25-2d, 25-2e; Rules of Practice for the U.S. Court of Military Commission Review (Feb. 3, 2016), Rule 4. Accordingly, without a panel appointment, no single judge can act on the motions before the Court. *See* Rules of Practice for the U. S. Court of Military Commission Review, Rules 4(b), 21(f).

Our Court has notified the Department of Defense that additional appellate judges are needed, and an Acting Chief Judge must be designated to appoint the panel(s) for appeals related to *Khalid Shaikh Mohammad*. The Department of Defense has informed the Court that several military and civilian nominees are currently under consideration.

Petitioner is entitled to have our Court hear and decide the matters that he has put before it. As it stands, however, our Court cannot act in contested matters related to *Khalid Shaikh Mohammad*, which includes the present appeal, until more judges are added to this Court and an Acting Chief Judge is appointed who can designate a panel.

FOR THE COURT:


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