No. _____

In the
Supreme Court of the United States

ALI HAMZA SULIMAN AL BAHLUL,
Petitioner,

v.

UNITED STATES,
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

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QUESTIONS PRESENTED

The federal disqualification statute, 28 U.S.C. §455, compels federal judges to recuse themselves "in any proceeding in which [their] impartiality might reasonably be questioned." *Id.* §455(a). That statute specifies that disqualification is "also" required if a judge, while previously serving in government, "participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy." *Id.* §455(b)(3).

1. Does §455(b)(3) require recusal when a federal judge is assigned to a case involving the same parties, same facts, and same issues as a case in which they previously appeared as counsel for the government?

2. Does §455(b)(3) provide the exclusive basis for federal judges' disqualification based upon their previous government service, as the D.C. Circuit holds, or is recusal still independently warranted under §455(a), where a judge's previous government service gives rise to reasonable questions about their impartiality, as at least the First, Fourth, Seventh, and Ninth Circuits hold?

PARTIES TO THE PROCEEDING

All parties appear in the caption of the case on the cover page.

RELATED PROCEEDINGS

There are no proceedings in state or federal trial or appellate courts, or in this Court, directly related to this case under Supreme Court Rule 14.1(b)(iii).

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Ali Hamza Ahmad Suliman al Bahlul, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the Honorable Gregory Katsas, Circuit Judge, (App. 1a-7a) is published at 61 F.4th 1008. The decision of the United States Court of Appeals for the D.C. Circuit (App. 16a-43a) is published at 61 F.4th 1008. The decision of the United States Court of Military Commission Review (App. 44a-112a) is published at 603 F.Supp.3d 1151.

JURISDICTION

The United States Court of Appeals for the D.C. Circuit issued its judgment on July 25, 2023, and denied a timely petition for rehearing on October 31, 2023. App. 10a-13a. On January 4, 2024, the Chief Justice granted an extension of time in which to petition for certiorari until March 29, 2024. The jurisdiction of this Court is invoked under 10 U.S.C. §950g(e) and 28 U.S.C. §1254(1).

WAIVER OF DISQUALIFICATION

Justices Gorsuch and Kavanaugh both recused themselves from the consideration of a previous petition filed in this case. *Bahlul v. United States*, 142 S. Ct. 621 (2021). Petitioner has studied the matter closely and for the reasons explained at pages 35-38, *infra*, Petitioner waives their disqualification to the extent permitted by law.

CONSTITUTIONAL, STATUTORY & REGULATORY PROVISIONS INVOLVED

28 U.S.C. §455(a) provides:

> Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

28 U.S.C. §455(b) provides, in relevant part:

> He shall also disqualify himself in the following circumstances: … (3) Where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy

28 U.S.C. §455(d) provides, in relevant part:

> For the purposes of this section the following words or phrases shall have the meaning indicated: (1) "proceeding" includes pretrial, trial, appellate review, or other stages of litigation

PRELIMINARY STATEMENT

This petition presents significant, recurring, and unresolved questions as to when federal judges must recuse themselves due to their previous government service. The federal disqualification statute mandates recusal "in any proceeding in which [a judge's] impartiality might reasonably be questioned," 28 U.S.C. §455(a), and "also" where, while "in government employment," a federal judge "participated as counsel . . . concerning the proceeding or expressed an opinion" on the case's merits. *Id*. §455(b)(3).

Because this Court has never authoritatively construed §455(b)(3), lower courts have divided over when previous government service is disqualifying. Relevant here, at least seven circuits have reached the commonsense conclusion that §455(b)(3) compels disqualification in any case involving the same parties, same facts, and same legal issues as a case on which a federal judge previously appeared as counsel for the government. The Tenth and D.C. Circuits, however, have broken with this consensus and construed the term "proceeding" narrowly to exclude prior cases, even if they involve the same parties, facts, and legal issues. Here, that led the D.C. Circuit to hold that federal judges may sit on a defendant's post-conviction appeal even though, as here, they appeared as counsel for the government in a pre-trial collateral attack challenging that prosecution on many of the same grounds that formed the basis of the post-trial appeal.

The lower courts also need guidance on the relationship between §455(a) and §455(b) generally,

and between §455(a) and §455(b)(3) specifically. There is presently a three-way circuit split over whether and when §455(a) and the subsections of §455(b) form independent bases of disqualification. And the circuits have sharply split over whether previous government service can compel disqualification under §455(a) when it is not disqualifying under §455(b)(3).

In the first camp, seven circuits hold that §455(a) and §455(b) are *independent* bases for disqualification, and of those, four have specifically held that prior government service is disqualifying whenever it satisfies either §455(a) or §455(b)(3). In the second camp, two circuits hold that §455(a) and §455(b) are *interrelated* bases for disqualification but have also held that prior government service is disqualifying whenever it satisfies either provision. The D.C. Circuit stands alone in the third camp, holding that §455(a) and §455(b) are *mutually exclusive* bases for disqualification and thus prior government service is not disqualifying unless it satisfies §455(b)(3).

Certiorari is needed to resolve both questions. A supermajority of federal judges come to the bench after serving, often exclusively, as counsel for the government. The questions presented are, therefore, routinely significant. But given that most disqualification questions are resolved ministerially, the opportunity for meaningful review is rare. And even where the questions presented here have been subject to reasoned opinions, the facts giving rise to claimed bases for recusal are often subject to dispute, conjecture, or are otherwise mired in uncertainty.

This case presents both questions squarely. It is the rare judicial disqualification case that comes to

this Court with a published opinion addressing the questions presented and an undisputed record, whose relevant facts are all subject to judicial notice. It involves a high-profile case that garnered an unusual degree of government and public scrutiny. And it offers this Court an opportunity to provide certainty on questions of judicial administration for which predictability is uniquely important to securing public confidence in the judiciary.

This Court should grant certiorari and reverse.

STATEMENT

I. Legal background.

1. As codified in 1948, the federal disqualification statute, 28 U.S.C. §455, provided:

> Any justice or judge of the United States shall disqualify himself in any case in which he has a substantial interest, has been of counsel, is or has been a material witness, or is so related to or connected with any party or his attorney as to render it improper, in his opinion, for him to sit on the trial, appeal, or other proceeding therein.

62 Stat. 908.

In 1974, Congress enacted "massive changes," *Liteky v. United States*, 510 U.S. 540, 564 (1994); to §455's scope and structure. 88 Stat. 1609. Congress added an objective disqualification mandate "in any proceeding in which [a federal judge's] impartiality might reasonably be questioned." 28 U.S.C. §455(a). "The goal of section 455(a)," this Court explained, "is to avoid even the appearance of partiality," which

Congress determined was "necessary to maintain public confidence" in the judiciary. *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 860 (1988) (cleaned up).

Congress also expanded the former terms of §455 into five non-waivable grounds for disqualification specified in §455(b). This "somewhat stricter provision" requires disqualification "regardless of whether or not the interest actually creates an appearance of impropriety." *Liljeberg*, 486 U.S. at 860. Among these grounds is that a judge, while previously serving in government, "participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy." 28 U.S.C. §455(b)(3). Congress then defined "proceeding" to include "pretrial, trial, appellate review, or other stages of litigation." *Id.* §455(d)(1).

This Court has considered the interaction between §455(a) and §455(b) on two occasions. In *Liljeberg*, this Court held the scienter requirement contained in §455(b)(4) did not apply to disqualification under §455(a). Holding otherwise, the Court reasoned, would "ignor[e] important differences between subsections (a) and (b)(4)." *Liljeberg*, 486 U.S. at 860 n.8.

In *Liteky*, this Court held that §455(b)(1) implicitly preserved the longstanding rule that, to be disqualifying, a judge's bias or prejudice must ordinarily derive from an "extrajudicial source." 510 U.S. at 552. This Court then reasoned that Congress incorporated this "extrajudicial source" factor into any claim of apparent bias under § 455(a) because "it is unreasonable to interpret § 455(a) (unless the

language requires it) as implicitly eliminating a limitation explicitly set forth in § 455(b)." *Ibid*.

II. Factual background and proceedings below.

This case arises from the military commission prosecution of a Guantanamo detainee. When Petitioner challenged his military commission in a pre-trial habeas petition, future-Judge Gregory Katsas was opposing counsel and, in several public appearances, both advocated against Petitioner's legal challenges and praised his prosecution because it "worked well; life sentence." When Petitioner raised many of the same legal challenges in a post-trial appeal, Judge Katsas declined to recuse himself and then ruled against them.

1. Judge Katsas served with distinction in several senior Justice Department positions from 2001 to 2009. Gregory Katsas, Questionnaire for Judicial Nominees, U.S. Senate Committee on the Judiciary, 2017 ("Questionnaire"),[1] at 31. The defining issue of his tenure was Guantanamo. In an oral history, Attorney General Michael Mukasey said, "The whole issue of the Guantanamo detainees and how their cases were being handled was something that came up literally daily. Greg Katsas described himself as the captain of the Department of Justice javelin-catching team." Michael Mukasey, Oral History, October 8, 2012, Miller Center, University of Virginia, at 85.[2]

Judge Katsas appeared in every Guantanamo case decided by this Court, which he identified as among the most significant matters of his career.

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[1] https://perma.cc/7KNR-DJMG

[2] https://perma.cc/7334-MK4S

Questionnaire, at 36-47. He argued some of the seminal Guantanamo cases decided by the D.C. Circuit. *Center for National Security Studies v. DOJ*, 331 F.3d 918 (D.C. Cir 2003); *Boumediene v. Bush*, 476 F.3d 981 (D.C. Cir. 2007); *Parhat v. Gates*, 532 F.3d 834 (D.C. Cir. 2008). And he testified several times before Congress on Guantanamo and military commissions. Questionnaire, at 8.

In his Congressional testimony, Judge Katsas consistently demonstrated a mastery of the relevant law, facts, and policy. He testified that the Military Commissions Act of 2006 ("MCA"), 120 Stat. 2600, "afforded far greater protections than did their World War II predecessors or than do counterpart procedures used by international tribunals." Gregory Katsas, Written Testimony, Committee on Armed Services, House of Representatives, No. 110-79, July 26, 2007 (GPO 2009), at 185.[3] He expressed his opinion that "The existing [military commission] system is both constitutional and prudent, and should not be upset." Gregory Katsas, Testimony, Committee on the Judiciary, House of Representatives, No. 110-152, Jun. 26, 2007 (GPO 2009), at 8.[4] He lamented that "Through a series of interlocutory habeas actions, military-commission trials were enjoined [due to *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006)] before they had even begun." *Id.* at 16. And responding to criticisms of the military commissions and the treatment of Guantanamo detainees, he opined, "I don't think the United States has anything to be ashamed about[.]" *Ibid.*

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[3] https://perma.cc/59VP-BWU4

[4] https://perma.cc/5RJZ-CRSU

The Bush Administration tasked Judge Katsas with engaging civil society on Guantanamo and military commissions on at least sixteen occasions. Questionnaire, at 16-20. This included a panel discussion in 2007, in which Judge Katsas debated a lawyer from the Office of the Chief Defense Counsel (now Military Commission Defense Organization), on the merits of coercive interrogation and military commissions. Gregory Katsas, Questionnaire for Judicial Nominees, Attachments to Question 12(a), U.S. Senate Committee on the Judiciary, 2017 ("Questionnaire Attachments"),[5] at A-2668. At this debate, Judge Katsas touted the fact that by enacting the MCA, "Congress promptly overruled" this Court's decision in *Hamdan*. *Id*. at A-2673. And he opined, "I am very comfortable with the legal and operational justification for" the use of coercive interrogation and military commissions, which "have prosecuted war crimes throughout American history." *Ibid*.

In January 2008, President Bush appointed Judge Katsas to head the Civil Division and the press touted his leading role in the Guantanamo litigation. Philip Shenon, *Bush Announces 5 Justice Nominees*, N.Y. Times, November 16, 2007. During his confirmation, Judge Katsas noted that he "advis[ed] Administration lawyers who were working with Congress to secure enactment of the Military Commissions Act." Questionnaire Attachments, at A-1669. And following this Court's *Boumediene* decision, Judge Katsas personally directed the litigation of the detainee habeas cases, including Petitioner's. *See*, *e.g.*, Gregory Katsas, to Royce Lamberth, Thomas Hogan, June 30,

[5] https://perma.cc/XEU6-PM3L

2008 ("Katsas Habeas Letter");[6] Gregory Katsas, Declaration, *In re Guantanamo Bay Detainee Litigation*, No. 08-442 (D.D.C, August 28, 2008).

Out of government, Judge Katsas remained a sought-after authority on Guantanamo and military commissions, *see*, *e.g.*, Mark Sherman, *Terror Trials Differ in Civilian, Military Courts*, Associated Press, November 22, 2009, and participated in at least thirteen public events on those topics after entering private life. Questionnaire, at 9-16. In the notes of his remarks for one event, he gave a broad outline of his work at the Justice Department, including his contributions to the "proc for military commissions." Questionnaire Attachments, at A-2741. And at another, he recalled his advocacy within the Bush Administration to "protect military commissions." *Id*. at A-2538.

At another event, Judge Katsas defended the use of coercive interrogation, "especially with respect to Al Qaeda, lose battle vs. lose NYC." Questionnaire Attachments, at A-2560. He described torture as a "tough line-draw/extreme 'inflict *severe* phys[ical]/ment[al] suffer[ing],'" which he understood as limited to "beatings, electric shock, hangings," and stated the "most aggressive tech[niques] auth[orized] at GTMO [fell] far short of that." *Id*. at A-2566. He defended the use of so-called "enhanced interrogation techniques" and opined that President Obama's restraints on their use "in future make us less safe." *Id*. at A-2583.

[6] https://perma.cc/5YRH-KN46

At his confirmation hearing to the D.C. Circuit, Judge Katsas was asked, "What forms of coercive interrogation do not equal torture?" He responded, the "ones that had been disclosed as previously used by the Department of Defense at Guantanamo Bay." Gregory Katsas, Responses to Questions for the Record, Oct. 24, 2017, at A-5.[7]

2. Petitioner was among the first detainees taken to Guantanamo in January 2002. Upon arrival, he was subject to a systematic policy of coercive interrogation that the Senate Armed Services Committee found was based upon methods derived from "Chinese Communist techniques used during the Korean war to elicit false confessions." Inquiry into the Treatment of Detainees in U.S. Custody, United States Senate, Committee on Armed Services, S. Prt. 110-54, Nov. 20, 2008, at 76 (GPO 2009).[8]

In March 2004, a military prosecutor preparing Petitioner's case for trial by military commission internally objected that there was "reason to believe that al Bahlul had suffered … mistreatment or torture." CPT John Carr to COL Fred Borch, March 15, 2004 *in* Hearing before the Committee on the Judiciary, United States Senate, Serial No. J-109-95, July 11, 2006 (GPO 2009), at 266-276.[9] Three months later, the government convened a military commission to prosecute Petitioner on a single count of conspiracy based near-exclusively upon his statements to

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[7] https://perma.cc/FP7C-REQZ
[8] https://perma.cc/BLM5-R4YE
[9] https://perma.cc/89FM-29LG

interrogators. *United States v. Bahlul*, Convening Order (Jun. 28, 2004).[10]

Petitioner consistently objected to his prosecution by military commission. He joined a letter to Congress objecting to the military commissions' rules, including the use of evidence obtained through torture. Neal Katyal, *et al.*, to John Warner, *et al.*, June 1, 2004.[11] And when *Hamdan* was pending before the D.C. Circuit, Petitioner separately asserted the military commissions' denial of his right to self-representation. *Hamdan v. Rumsfeld*, Case No. 04-1519, Brief Amicus Curiae of Philip Sundel as Military Counsel for Ali Hamza Al Bahlul (D.C. Cir., Dec. 29, 2004).

In December 2005, Petitioner sought to enjoin his prosecution via habeas corpus. *Jayafi v. Bush*, No. 05-2104, Supplemental Petition for a Writ of Habeas Corpus (D.D.C., Dec. 14, 2005). That petition alleged that Petitioner "has been the subject of continued, intensive, and enhanced interrogation, which ended only after [he] was detailed counsel for his military commission." *Id.* at 8. It asserted eight grounds for relief, including: 1) the Convening Authority "lacks power to exercise military authority to appoint a military commission," 2) "his accusers can introduce unreliable evidence of the worst sort – unsworn allegations, derived from coerced confessions with no right of confrontation," and 3) the charges were "created after the fact" in violation of the Define and Punish and Ex Post Facto Clauses. *Id.* at 13-33. In January 2006, the district court administratively closed Petitioner's habeas case until the then-pending

[10] https://perma.cc/7J6U-Z7ML
[11] https://perma.cc/G9PQ-LKPB

Boumediene litigation was resolved. *Jayafi v. Bush*, No. 05-2104, Order (D.D.C., Jan. 11, 2006).

With his habeas petition in abeyance, Petitioner's military commission began pre-trial proceedings. Most other military commission prosecutions had been stayed pending this Court's resolution of *Hamdan v. Rumsfeld*. As a result, Petitioner's prosecution was the first to begin and among the only to conduct proceedings on the record in 2006.

Petitioner again objected to being denied the right to self-representation and to the government's use of evidence "yielded under --- under torture." *United States v. Bahlul*, Record of Trial (2006), at 147.[12] His military counsel also challenged the use of statements obtained under torture, prompting the military judge to respond that such statements were not inadmissible under the military commissions' rules. *Id*. at 222-226. In his briefing to this Court, the petitioner in *Hamdan* highlighted the proceedings in Petitioner's case as confirmation that the military commissions could "admit testimony obtained by torture." *Hamdan v. Rumsfeld*, Case No. 05-184, Reply Brief for Petitioner (U.S., Mar. 15, 2006), at 2 n.3.

3. The Convening Authority dismissed the original charges against Petitioner following this Court's decision in *Hamdan* and in February 2008, recharged Petitioner with three inchoate crimes codified by the MCA, including conspiracy. When pre-trial proceedings recommenced, Petitioner reasserted his earlier objections and again protested the use of

[12] https://perma.cc/FV4X-R9HJ

torture in Guantanamo. *United States v. Bahlul*, Record of Trial (2008), at 26-27, 61.[13]

As Petitioner's military commission case approached trial, this Court decided *Boumediene* and Petitioner's habeas case was re-opened. Judge Katsas appeared as opposing counsel and submitted several pleadings advancing the position that "the filing of charges against a detainee before a military commission should require the detainee's habeas proceeding to be dismissed or held in abeyance pending resolution of the commission proceeding." *Jayafi v. Bush*, No. 05-2104, Notice (D.D.C., Jul. 9, 2008). This echoed an argument Judge Katsas had personally pressed to postpone "the factual returns for the approximately 20 detainees charged with war crimes under the Military Commissions Act of 2006 after the returns for other current detainees; as discussed below, we believe habeas proceedings for such detainees should be dismissed or held in abeyance pending resolution of their pending prosecution." Katsas Habeas Letter, at 7-8.[14]

Judge Katsas made similar arguments to Congress, where he testified in detail about ongoing military commission litigation. Gregory Katsas, Testimony, Committee on Armed Services, House of Representatives, No. 110-167, Jul. 31, 2009 (GPO 2010), at 6.[15] He pressed lawmakers to bar detainees such as Petitioner from challenging their military commission prosecutions via habeas "to ensure that

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[13] https://perma.cc/PR85-WVFE

[14] Though twenty detainees were charged, only seven military commission prosecutions were ongoing.

[15] https://perma.cc/E2XL-9N3A

the trials move forward so that terrorists can be brought to justice." *Ibid.*

Another pleading filed under Judge Katsas' name in Petitioner's habeas case described Petitioner's background, the procedural history of his case, his detention status, that he "has been charged with crimes triable by military commission under the Military Commissions Act of 2006." *Jayafi v. Bush*, No. 05-2104, Respondent's Status Report (D.D.C., Jul. 18, 2008).

By October 2008, Petitioner's habeas case had not proceeded toward the merits. Petitioner voluntarily dismissed his case without prejudice, *Jayafi v. Bush*, No. 05-2104, Minute Order (D.D.C., Oct. 24, 2008), and his trial by military commission began a week later. The bulk of the trial testimony came from interrogators who recounted admissions Petitioner allegedly made in Guantanamo. Following the denial of his right to self-representation, Petitioner declined to mount a defense on the merits. The military commission found Petitioner guilty on all charges and sentenced him to life imprisonment.

Petitioner appealed to the Court of Military Commission Review ("CMCR"), which affirmed his conviction and sentence. Petitioner timely petitioned for review in the D.C. Circuit, where he challenged his conviction because, *inter alia*, the charges violated the Ex Post Facto Clause. From 2011 to 2016, the D.C. Circuit ordered four rounds of merits briefing and two rehearings en banc. The ultimate result was the vacatur of Petitioner's conviction, save for the conspiracy charge, and remand to the CMCR to "determine the effect, if any, of the two vacaturs on

sentencing." *Bahlul v. United States*, 767 F.3d 1, 31 (D.C. Cir. 2014) (en banc).

4. While this appellate litigation was ongoing, Judge Katsas spoke regularly at public events about Guantanamo and military commissions. At one event, he compared the "Bush – [military commissions]" with their "tailor[ed] rules," including "no right to self-representation," to the reforms enacted by Congress in 2009. Questionnaire Attachments, at A-2546. At another event, Judge Katsas described the Obama Administration as "Scitzo" on the use of military commissions, adding that President Obama "ran against" the military commissions in 2008 only to "now defend [their] constitutionality." *Id*. at A-2463.

At another event, Judge Katsas expressed his opinion on the merits of the legal challenges Petitioner was mounting to his conviction. Questionnaire Attachments, at A-2543. His notes are recorded as answers to questions for discussion:

> Does the law of war (Common Article 3 or other) limit the jurisdiction of military commissions?
>
> - No.
>
> Does the U.S. constitution impose a limit? Applicability of *Ex parte Milligan*? *Quirin*?
>
> - not for aliens.
>
> What considerations should determine whether a particular suspect is tried in Article III court or military commissions?

> - In general, use military commissions if you can.

Id. at 2544. Then at the bottom of his notes, he opined on the three military commission cases to reach a verdict by that time:

> Hicks – plea
>
> Hamdan – short sentence
>
> Al Bahlul – worked well; life sent[ence].

Ibid.

5. On remand from the D.C. Circuit to the CMCR, Petitioner sought resentencing and reasserted his challenge the Convening Authority's power to appoint his military commission under this Court's intervening decisions in *Lucia v. SEC*, 585 U.S. 237 (2018) and *United States v. Arthrex*, 141 S. Ct. 1970 (2021). In his briefing, Petitioner emphasized that resentencing was required, in part, because the record evidence supporting his sentence was comprised of uncorroborated, coerced confessions, which Congress subsequently made inadmissible when it reformed the MCA in 2009. 10 U.S.C. §948r (2009). The CMCR affirmed both his conviction and sentence.[16] App. 44a.

Petitioner timely petitioned for review to the D.C. Circuit. The questions before the Court were: 1) was the military commission improperly appointed; 2) was resentencing required because Petitioner's prior sentence had been based upon coerced confessions; and 3) was resentencing required because the D.C.

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[16] The D.C. Circuit remanded a second time after the CMCR applied the wrong standard of review on the first remand. *Bahlul v. United States*, 967 F.3d 858 (D.C. Cir. 2020).

Circuit had vacated two of the three charges of conviction on *ex post facto* grounds?

Thirty days before oral argument, the Court announced that Judge Katsas was assigned to the merits panel in Petitioner's case. Petitioner promptly moved to disqualify Judge Katsas under 28 U.S.C. §§455(a); (b)(3), and Code of Conduct for United States Judges, Canons 3(C)(1)(b); 3(C)(1)(e). In that motion, Petitioner cited Judge Katsas' prominent role in the Guantanamo litigation and his appearance as opposing counsel in Petitioner's habeas case.[17] The government took no position.

Judge Katsas denied the motion. App. 1a. He rejected the §455(b)(3) challenge on the grounds that the post-trial appeal from Petitioner's military commission was not the same "proceeding" as Petitioner's pre-trial habeas challenge to his prosecution. And he further rejected the §455(a) challenge, because in the D.C. Circuit, §455(b)(3) is construed as the exclusive basis for disqualification based upon a judge's previous government service.

On July 25, 2023, the panel affirmed. App. 16a. This petition followed.

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[17] In support of his motion, Petitioner was able to cite to Judge Katsas' judicial questionnaire, which is publicly available, but had not yet obtained a copy of the attachments.

REASONS FOR GRANTING THE PETITION

I. Certiorari is necessary to resolve confusion in the lower courts on the important federal question of when previous government service is disqualifying under §455(b)(3).

Under §455(b)(3), recusal is required whenever a judge, while previously serving in government, "participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy." 28 U.S.C. §455(b)(3). A "proceeding," in turn, "include[s] pretrial, trial, appellate review, or other stages of litigation." *Id.* §455(d)(1). Because this Court has never authoritatively construed this open-ended statute, lower courts are confused as to its scope, and at least two sharp divisions have emerged. Certiorari is needed to correct the decision below and bring uniformity to an important area of federal law.

A. Lower courts are deeply divided over when previous government service requires recusal.

Two sharp circuit splits have emerged over when §455(b)(3) compels disqualification. There is a 7-2 circuit split on whether "proceeding" is defined broadly using commonsense, or "restrictive[ly]" to exclude prior cases. And there is an acknowledged 3-2 circuit split on what role a federal judge must have played in such proceedings to require recusal.

1. At least seven circuits have interpreted "proceeding" in §455(b)(3) to include any litigation that involves the same parties, same facts, and same legal issues as a matter on which the judge previously

worked.[18] Even where the litigation is complex, spans multiple jurisdictions, and extends over decades, these circuits have held, "[a] district judge who previously served as counsel of record for a related case may be disqualified" under §455(b)(3). *Murray*, 253 F.3d at 1312. This same commonsense definition was also applied to the stricter word "case" in the pre-1974 version of §455. *See*, *e.g.*, *United States v. Amerine*, 411 F.2d 1130, 1133 (6th Cir. 1969) (holding that a complaint that was later withdrawn was part of the same "case" as a prosecution brought by indictment after the judge had been appointed).

Applying this commonsense definition, the Ninth Circuit held that disqualification was mandated under §455(b)(3) where the investigation that ultimately led to indictment was opened during that judge's previous tenure as U.S. Attorney. *Arnpriester*, 37 F.3d at 467. The Seventh Circuit disqualified a magistrate, who had once appeared for the government in a parole revocation hearing, from presiding over another parole revocation proceeding involving the same defendant several years later. *Smith*, 775 F.3d at 881. The Eleventh Circuit disqualified a district judge, who had served as counsel for the government in an environmental case involving the same parties, from a tangentially related fraud suit brought decades later. *Murray*, 253 F.3d at 1313. And the Fifth Circuit

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[18] *United States v. Sciarra*, 851 F.2d 621, 635 (3d Cir. 1988); *United States v. Lindsey*, 556 F.3d 238, 246 (4th Cir. 2009); *Mixon v. United States*, 620 F.2d 486, 591 (5th Cir. 1980); *Jenkins v. Bordenkircher*, 611 F.2d 162, 166 (6th Cir. 1979); *United States v. Smith*, 775 F.3d 879, 881 (7th Cir. 2015); *United States v. Arnpriester*, 37 F.3d 466, 467 (9th Cir. 1994); *Murray v. Scott*, 253 F.3d 1308, 1313 (11th Cir. 2001).

disqualified a magistrate, who had appeared for the government at a sentencing proceeding, from presiding over the same defendant's habeas case a decade later. *Mixon*, 620 F.2d at 487.

The Tenth and D.C. Circuits, by contrast, read "proceeding" narrowly to exclude any "prior case involving the defendant." *United States v. Gipson*, 835 F.2d 1323, 1326 (10th Cir. 1988). The Tenth Circuit, for its part, construed Congress' substitution of the word "case" in the pre-1974 statute with the word "proceeding" as indicative of an intent to adopt "a more restrictive standard." *Ibid.* And the decision below concluded that §455(b)(3) should only reach litigation occurring within the trial and appellate review process, excluding any litigation that predated charges being withdrawn and a defendant being recharged. App. 4a-5a.

Collateral attacks are a routine stage of criminal litigation. And Petitioner's habeas case involved the same parties, same facts, and same legal issues raised in the post-trial appeal of his military commission conviction. Petitioner's case would, in short, have been resolved differently in seven other circuits. And this creates inconsistency where public confidence depends upon clarity and uniformity. ABA Model Code of Judicial Conduct, Application, cmt. 1 (2020).

2. There is also an acknowledged circuit split as to what role a judge must have played in earlier proceedings for recusal to be required under §455(b)(3).

The Tenth Circuit, joined by the Fifth Circuit, has construed §455(b)(3) to apply only when "a judge had previously taken a part, albeit small, in the

investigation, preparation, or prosecution of a case." *Gipson*, 835 F.2d at 1326; *Mangum v. Hargett*, 67 F.3d 80, 83 (5th Cir. 1995). This splits with the Seventh, Eighth, and Ninth Circuits, who each hold that a judge "participated" in a proceeding whenever they served as U.S. Attorney, or relevant supervisory counterpart, irrespective of their direct involvement. *United States v. Ruzzano*, 247 F.3d 688 (7th Cir. 2001); *Kendrick v. Carlson*, 995 F.2d 1440, 1444 (8th Cir. 1993); *Arnpriester*, 37 F.3d 466, 467; *see also United States v. Jones*, 55 M.J. 317, 319 (C.A.A.F. 2001) (acknowledging the split and recommending that lower court judges recuse themselves from cases over which they had supervisory responsibility).

B. The decision below is wrong.

The minority rule applied in the decision below cannot be squared with the statutory text or Congress' purposes in revising the federal disqualification statute. There are at least three reasons this Court should grant certiorari to reverse.

First, the word "proceeding" is a defined term. Congress codified an open-ended definition that broadly includes, not just trial and appellate proceedings, but also all "other stages of litigation." 28 U.S.C. §455(d)(1). Neither the Tenth Circuit, nor the decision below, accounted for this statutory definition in construing "proceeding" narrowly.

Second, as this Court observed in *Williams*, the risks to judicial impartiality are heightened, rather than diminished, in "a complex criminal justice system, in which a single case may be litigated through multiple proceedings taking place over a period of years." *Williams v. Pennsylvania*, 579 U.S. 1,

10 (2016). This case illustrates those very risks, insofar as Petitioner's prosecution has been pending in near-identical substance for twenty years, albeit before six different tribunals and under three different statutes.[19] By defining "proceeding" broadly, Congress adopted a commonsense standard for disqualification under §455(b)(3) that included not just the trial and appellate review stages, but also open-endedly included all "other stages of litigation."

Third, while it is axiomatic that judges should not recuse from cases where disqualification is not warranted, treating that principle as a reason to narrowly construe §455 runs counter to Congress' 1974 reforms. S.Rep. No. 93-419, 93d Cong., 2d Sess. 5 (1973); H.R.Rep. No. 93-1453, 93d Cong., 2d Sess. 5 (1974); *Liljeberg*, 486 U.S. at 871 (Rehnquist, J., dissenting) ("The amended statute also had the effect

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[19] Petitioner filed his pre-trial habeas petition whilst facing prosecution before a military commission convened under the Uniform Code of Military Justice, 10 U.S.C. ch. 47; prosecutions this Court invalidated in *Hamdan*. Judge Katsas determined that his post-trial appeal was a different "proceeding" because Petitioner was recharged under the 2006 MCA, 10 U.S.C., ch. 47A, which itself was superseded by the Military Commissions Act of 2009, 123 Stat. 2190. The MCA's statutory amendments, however, were largely immaterial to Petitioner's claims for relief. As Judge Katsas himself observed in several public remarks, the 2006 "MCA overrule[d] every aspect of *Hamdan*." Questionnaire Attachments, at A-2574. And had Petitioner prevailed in his habeas case, that judgment would have had res judicata and/or collateral estoppel effects after he was recharged because his subsequent military commission prosecution involved the same parties, same facts, and same issues. *See Yates v. United States*, 354 U.S. 298, 335 (1957).

of removing the so-called 'duty to sit,' which had become an accepted gloss on the existing statute.").

In fact, the most significant deviation this Court made from the Code of Conduct for United States Judges in its own code of conduct was the inclusion of the provision that "A Justice is presumed impartial and has an obligation to sit unless disqualified." Code of Conduct for Justices of the Supreme Court (2023, Canon 3(B)(1). This difference was warranted, this Court explained, because "Lower courts can freely substitute one district or circuit judge for another." *Id*. at 10. This case therefore provides this Court a well-timed opportunity to clarify whether lower courts should continue to apply the "duty to sit" principle, and whether, when confronted with competing interpretations of §455(b), they should err on the side of sitting when they should not, or err on the side of recusal when another judge can freely substitute.

Clarifying that §455(b)(3) compels disqualification whenever a judge previously served as counsel in a case involving the same parties, same facts, and same legal issues will provide uniformity around a commonsense standard. That standard is generally used to determine whether different cases form part of the same overall litigation for collateral estoppel and res judicata purposes. *United States v. Mendoza*, 464 U.S. 154, 158 (1984); *Montana v. United States*, 440 U.S. 147, 153 (1979). And it harmonizes judicial disqualification with the general professional conduct rules that bar former government attorneys from appearing in matters on which they worked for the government. *See*, *e.g.*, 18 U.S.C. §207; ABA Model Rules of Professional Conduct, Rule 11 (1983).

This Court should therefore grant certiorari to clarify that "proceeding" in §455(b)(3) comports with the commonsense notion that judges should not hear a case involving the same parties, same facts, and same issues as a case in which they appeared as government counsel.

II. Certiorari is also needed to resolve a three-way circuit split on the important federal question of whether §455(a) and §455(b) form independent bases for disqualification.

The second question presented, on the relationship between §455(a) and § 455(b), cries out for this Court's resolution. In *Liljeberg*, this Court emphasized that §455(a) and § 455(b) formed independent bases for disqualification. 486 U.S. at 860 n.8. Six years later in *Liteky*, however, this Court held that §455(b) can limit the scope of §455(a), when necessary to avoid "nullifying the limitations (b) provides." 510 U.S. at 553 n.2. As Justice Kennedy's concurrence in *Liteky* noted, these two holdings are in "unfortunate" tension. *Id*. at 557 (Kennedy, J., concurring).

That tension has led to considerable confusion, as is starkly illustrated in the Federal Judicial Center's official guidance on recusal. In one breath, citing *Liljeberg*, it states, "Any circumstance in which a judge's impartiality might reasonably be questioned, whether or not touched on in section 455(b), requires recusal under section 455(a)." Federal Judicial Center, *Recusal: Analysis of Case Law under 28 U.S.C. §§455 & 144*, 5 (2002). Then, in the very next breath, citing *Liteky*, it states, "where section 455(b) sets forth a particular situation requiring recusal, it will tend to control any section 455(a) analysis with respect to that

specific circumstance." *Ibid*. And, specific to §455(b)(3), lower courts have expressed uncertainty over whether §455(a) can compel disqualification based upon prior government service, when §455(b)(3) does not. *See*, *e.g.*, *United States v. Gorski*, 48 M.J. 317 (C.A.A.F. 1997) (Effron, J.). Only this Court can provide certainty on this important question of judicial administration.

A. There is a three-way split over whether, and when, §455(a) and §455(b) operate as independent bases for recusal.

Attempting to reconcile the tension between *Liljeberg* and *Liteky*, lower courts have divided into three camps. And in cases where previous government service is the basis for a judge's disqualification, the circuits have further and irreconcilably split over whether a judge's previous government service can be disqualifying under §455(a) when it is not under §455(b)(3).

1. The first camp – comprised of the First, Second, Fourth, Fifth, Sixth, Eighth, and Ninth Circuits – treats §455(a) and §455(b) as *independent* bases for disqualification.[20]

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[20] *See*, *e,g.*, *In re Bulger*, 710 F.3d 42, 45 (1st Cir. 2013) (Souter, J.); *United States v. Rechnitz*, 75 F.4th 131, 143 (2d Cir. 2023); *United States v. Stone*, 866 F.3d 219, 229 (4th Cir. 2017); *United States v. DeTemple*, 162 F.3d 279, 286 (4th Cir. 1998); *United States v. Randall*, 440 F. App'x 283, 286 (5th Cir. 2011); *Sensley v. Albritton*, 385 F.3d 591, 588-601 (5th Cir. 2004); *United States v. Liggins*, 76 F.4th 500, 506 (6th Cir. 2023); *United States v. Norwood*, 854 F.3d 469, 471-472 (8th Cir. 2017); *United States v. Arnpriester*, 37 F.3d 466, 467 (9th Cir. 1994).

The Second Circuit, for example, reversed in a case where the district court held "that where recusal is sought under §455(a) and (b), analysis under §455(a) is limited only to those facts not implicated by the analysis under §455(b)." *In re Certain Underwriter*, 294 F.3d 297, 305 (2d Cir. 2002). The Circuit held:

> A fact's failure to give rise to recusal under §455(b) does not automatically mean that same fact does not create an appearance of partiality under §455(a). … Even where the facts do not suffice for recusal under §455(b), however, those same facts may be examined as part of an inquiry into whether recusal is mandated under §455(a).

Id. at 305–06; *see also Andrade v. Chojnacki*, 338 F.3d 448, 454 (5th Cir. 2003) ("whenever a judge's partiality might reasonably be questioned, recusal is required under §455(a), irrespective whether the circumstance is covered by §455(b).").

Within this camp, the First, Fourth, and Ninth Circuits have held that recusal under §455(a) is warranted when a judge's previous government service calls their impartiality into question, irrespective of whether §455(b)(3) compels the same result. *See*, *e,g.*, *Bulger*, 710 F.3d at 45; *Arnpriester*, 37 F.3d at 467; *Rice v. McKenzie*, 581 F.2d 1114, 1117 (4th Cir. 1978). And the Eighth Circuit has evaluated them independently in such cases, albeit in denying disqualification. *Norwood*, 854 F.3d at 472.

2. The second camp – comprised of the Seventh and Tenth Circuits – treats the terms of §455(b) as *interrelated* bases for disqualification. *See*, *e.g.*, *In re*

Gibson, 950 F.3d 919, 927 (7th Cir. 2019); *Vazirabadi v. Denver Health & Hosp. Auth.*, 782 F. App'x 681, 685 (10th Cir. 2019).

With respect to prior government service, the Seventh Circuit holds that recusal under §455(a) is warranted whenever a judge's previous government service calls their impartiality into question, irrespective of whether §455(b)(3) compels the same result. *See*, *e.g.*, *United States v. Herrera-Valdez*, 826 F.3d 912, 919 (7th Cir. 2016); *Russell v. Lane*, 890 F.2d 947, 948 (7th Cir. 1989). The Tenth Circuit has also evaluated §455(a) and §455(b)(3) independently, albeit in denying disqualification. *See*, *e.g.*, *United States v. Cheatwood*, 42 F. App'x 386, 392-393 (10th Cir. 2002); *Gibbs v. Massanari*, 21 F. App'x 813, 815 (10th Cir. 2001); *Gipson*, 835 F.2d at 1326.

3. In the third camp, the D.C. Circuit stands alone in holding that §455(a) and §455(b) provide *mutually exclusive* bases for disqualification.

In the D.C. Circuit, "if an issue is within the scope of section 455(b), section 455(a) should not be read to require disqualification if section 455(b) does not." *In re Hawsawi*, 955 F.3d 152, 159–60 (D.C. Cir. 2020). The D.C. Circuit is also alone in holding that §455(b)(3) occupies the field in the absence of "rare and extraordinary circumstances," whenever a judge's previous government service is raised as the basis for disqualification. *Ibid.*; *see also Baker Hostetler v. Commerce*, 471 F.3d 1355, 1358 (D.C. Cir 2006) (Kavanaugh, J.).

The D.C. Circuit's break with its sister circuits traces to then-Judge Kavanaugh's decision in *Baker Hostetler*, in which he held that §455(b)(3) did not

apply where he had never been involved at any stage of the appellant's litigation and where his only potential relationship to the questions presented was prior government service in a policymaking role. Justice Kavanaugh applied the reasoning of *Liteky* to conclude that mere participation in policymaking did not give rise to appearance of partiality under §455(a) and opined more generally that §455(a) cannot compel disqualification where §455(b)(3) does not.

Given the uncertainty over the interplay between §455(a) and §455(b), judges in both in the D.C. Circuit and other circuits have interpreted the broadest language from Justice Kavanaugh's opinion in *Baker Hostetler* as license to treat §455(a) as permitting whatever §455(b) does not forbid. In *Bulger*, for example, Whitey Bulger moved to recuse a district judge, who had "held a variety of managerial and supervisory appointments within the U.S. Attorney's Office" at the time Bulger claimed to have received immunity as an informant. *Bulger*, 710 F.3d at 44. The judge denied having had direct involvement in Bulger's case and, citing *Baker Hostetler*, declined to recuse. *United States v. Bulger*, No. 99-10371, Order, 3 n.2 (D. Mass, Jul. 17, 2012). This, in turn, compelled the First Circuit, in an opinion written by Justice Souter, to issue a writ of mandamus, disqualifying the judge under §455(a), and directing the case to be "reassigned to a judge whose curriculum vitae does not

implicate the same level of institutional responsibility described here." *Bulger*, 710 F.3d at 49.[21]

B. The decision below is wrong.

Outside the policymaking context at issue in *Baker Hostetler*, neither the text and purposes of §455(b)(3), nor the holding of *Liteky*, support a general rule that presumptively exempts previous government service from scrutiny under §455(a). And the facts of this case illustrate why such a rule must be wrong.

1. The text of §455(b) states that judges "must *also* disqualify" themselves, irrespective of whether the relevant facts call their impartiality into question. And construing §455(b)(3) to cover the field leads to absurd results, insofar as §455(b)(3) excludes a judge's prior service in several government positions (such as adjudicatory positions), where the need for disqualification is well-settled. *See*, *e.g.*, *Fowler v. Butts*, 829 F.3d 788, 790 (7th Cir. 2016); Code of Conduct for United States Judges, Canon 3(C)(1)(e).

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[21] Likewise, in *Perry v. Schwarzenegger*, 630 F.3d 909 (9th Cir. 2011), Judge Reinhardt relied upon *Baker Hostetler*, rather than Ninth Circuit precedent, to decline recusal in a case where his wife was the director of an organization that had appeared below. After finding recusal not required under §455(b)(5), he ruled that recusal was also not warranted under §455(a), because §455(a) should not be construed to prohibit "what is permissible under §455(b)(5)." *Id*. at 914–15. Petitioner takes no position on whether Judge Reinhardt's recusal under §455(a) was warranted. But his reasoning is squarely contradicted by *Microsoft v. United States*, 530 U.S. 1301, 1302 (2000) (Rehnquist, J.) (treating §455(a) and §455(b)(5) as independent bases for disqualification); *see also* Code of Judicial Conduct, Canon 3C(1)(d)(ii), cmt.

Such a rule also frustrates §455's purposes. As this Court held in *Liljeberg*, "Congress amended the Judicial Code 'to *broaden* and clarify the grounds for judicial disqualification.'" 486 U.S. at 849 (quoting 88 Stat. 1609) (emphasis added). If anything, scrutiny under §455(a) becomes far more important, where a judge was deeply involved in a related matter that, for purely technical reasons, falls outside of §455(b)(3)'s scope. And that scrutiny should be especially exacting if §455(b)(3) is given the "restrictive" interpretation adopted by the Tenth Circuit and below. As the Tenth Circuit itself recognized, its "restrictive" interpretation of §455(b)(3) significantly *narrowed* the circumstances under which recusal had been mandatory before 1974. *Gipson*, 835 F.2d at 1326. But this perverse result was mitigated by the fact that the Tenth Circuit also held, "a judge who has had an affiliation with a prior case involving a defendant might find recusal mandated by § 455(a)." *Ibid*.

2. *Liteky*'s reasoning, which asks what precedents formed the background principles against which Congress amended §455, also fails to support a general rule that exempts previous government service from scrutiny under §455(a). The most analogous precedents to the circumstances presented here arose out of Justice Robert Jackson's service as the prosecutor before the International Military Tribunal at Nuremberg ("IMT"). Justice Jackson recused himself from legal actions involving not just the IMT, but also the related German war crimes prosecutions brought under Control Council Order No. 10; prosecutions conducted against different German war crimes defendants in the years after he returned to the

bench. *See*, *e.g.*, *Flick v. Johnson*, 338 U.S. 879 (1949); *Pohl v. Acheson*, 341 U.S. 916 (1951).

Justice Jackson also recused himself from legal challenges brought by Japanese war crime defendants against the International Military Tribunal for the Far East. As he explained when making a necessity-based exception to his recusal policy, "I do not regard myself as under a legal disqualification in these Japanese cases under the usages as to disqualification which prevail in this Court. … Nevertheless, I have been so identified with the subject of war crimes that, if it involved my personal preferences alone, I should not sit in this case." *Hirota v. MacArthur*, 335 U.S. 876, 879 (1948).

Justice Jackson's recusals predate §455(a). But his stated rationale illustrates the role that Congress would have expected §455(a) to play in a case such as *Bulger* or here: compelling recusal where a judge's previous government service led them to become closely identified with high-profile, high-priority litigation involving the same parties, same facts, and same legal issues as a case to come before them.

3. Justice Jackson's rule makes particular sense here. The duration and high-level attention given to Petitioner's case has resulted in sua sponte recusals from a judge on the CMCR, App. 44a, the Chief Judge of the D.C. Circuit, App. 13a, and two justices of this Court, due to their prior involvement in the case, as well as a Convening Authority. Christian Reismeier, Supplement to Memorandum for File, July 18, 2019.[22] None of these individuals ever appeared, as Judge

[22] https://perma.cc/89JJ-G32U

Katsas did, as opposing counsel against Petitioner. None publicly stated their opinion, as Judge Katsas did, that Petitioner's prosecution "worked well; life sentence." And none are as like Justice Jackson as Judge Katsas is, in being so identified with a category of high-profile, high-priority litigation as to be celebrated by the former Attorney General as the "captain of the [Guantanamo] javelin-catching team."

A reasonable person could question whether Judge Katsas should sit in judgment of a high-profile case, in which the questions presented were whether Petitioner was entitled to relief on the very grounds that Judge Katsas had advocated against before ascending to the bench. But because Judge Katsas concluded that he was not disqualified under §455(b)(3), D.C. Circuit precedent led him to stop his inquiry there. The D.C. Circuit's rule is wrong and warrants this Court's review.

III. This case presents a uniquely strong vehicle to resolve both of the important questions presented.

1. Studies indicate that a supermajority of federal judges come to the bench with significant experience as government counsel. Clark Neily, "Are a Disproportionate Number of Federal Judges Former Government Advocates?" CATO Institute Study (May 27, 2021); *see also Baker Hostetler*, 471 F.3d at 1358. That makes disqualification under §455(b)(3) a routine question. Yet, §455(b)(3) is only rarely subject to judicial scrutiny because, in the courts of appeal, panels are ministerially assigned often using software that screens disqualified judges off cases without notice. *See*, *e.g.*, Handbook of Practice and Internal

Procedures of the United States Court of Appeals for the District of Columbia Circuit, 48 (rev. 2021).

Reasoned opinions applying §455(b)(3) are rare and approximately 86.5% of circuit court opinions in which §455(b)(3) is raised are dedicated to affirming a decision not to recuse.[23] To be sure, many disqualification motions are frivolous. But the caselaw interpreting a routine basis for disqualification is dedicated near wholly to the circumstances where §455(b)(3) does not apply, leaving responsible judges and litigants scant guidance on when it does.

It is often only in the context of en banc proceedings that disqualified judges are identified. Yet, the reasons for disqualification are rarely, if ever, noted.[24] Indeed, Judge Katsas could only speculate as to why Justice Gorsuch and Chief Judge Srinivasan recused themselves from Petitioner's case, since neither had appeared in any case involving Petitioner. App. 6a.

Regardless of the outcome of this case, clarifying when §455(b)(3) applies and whether and when disqualification under §455(a) is warranted, even if disqualification under §455(b)(3) is not, will provide the lower courts much needed guidance on recurring questions for which there is no authoritative precedent. This case is an ideal vehicle for providing

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[23] A Westlaw search of circuit cases citing "455(b)(3)" returns seventy-six published and unpublished opinions. Of these, four arise out of the same two matters. Ten out of seventy-four remaining cases resulted in a finding that recusal was warranted, though not necessarily on §455(b)(3) grounds.

[24] In this Court, too, only Justice Kagan appears to regularly indicate the bases for her recusals. *See*, *e.g.*, *Salley v. United States*, 144 S. Ct. 412 (2023).

that guidance, insofar as it comes to the Court from one of the few published opinions to consider both questions and where the grounds for disqualification under both §455(a) and §455(b)(3) rest on an uncontested factual record comprised of public records subject to judicial notice. Granting certiorari here, therefore, affords this Court a rare opportunity to provide certainty on an open question that frequently recurs but ordinarily evades review.

2. The only vehicle problem this case may present is that Justices Gorsuch and Kavanaugh both recused themselves from the consideration of a previous petition filed in this case. *Bahlul v. United States*, 142 S. Ct. 621 (2021). Petitioner has studied the matter closely and waives their disqualification to the extent permitted by law.

With respect to Justice Kavanaugh, Petitioner assumes that the basis for his recusal was his participation in the en banc D.C. Circuit's rehearings of this case. Canon 3(B)(2)(e) of this Court's Code of Conduct disqualifies any Justice who "served in government employment and in that capacity participated as a judge (in a previous judicial position) ... concerning the proceeding." Unlike the Code of Conduct for United States Judges, however, neither this ground, nor any other, is non-waivable. *Compare* Code of Conduct for United States Judges, Canon 3(D). And the statutory prohibitions of 28 U.S.C. §47 do not apply to the justices of this Court.

While §455(b)(3) makes prior government service as "counsel, adviser or material witness concerning the proceeding" a non-waivable ground for disqualification, it conspicuously does not include

prior judicial service. Given that the questions presented here were not previously before Justice Kavanaugh, Petitioner waives his prior judicial service as a basis for disqualification.

With respect to Justice Gorsuch, Petitioner assumes, as Judge Katsas did below, that the basis for his recusal arose from his role as Judge Katsas' predecessor as the Principal Deputy Associate Attorney General. App. 6a. The records made public during Justice Gorsuch's confirmation to this Court indicate that his most substantial involvement in litigation in which Petitioner had a material interest was his participation in the *Hamdan* and *Boumediene* cases. Ryan Newman to Dianne Feinstein, March 8, 2017.[25] Though he never appeared as counsel, Justice Gorsuch did discuss litigation strategy, participate in moots, and review pleadings, which, as noted above, highlighted Petitioner's ongoing military commission proceedings. *Ibid*.

The most direct involvement Justice Gorsuch appears to have had with Petitioner's case was his receipt of a spreadsheet the Department of Defense sent to "provide regular updates on military commission issues" across federal components. Department of Justice, Nomination Documents Relating to Neil M. Gorsuch, March 10, 2017 ("Gorsuch Documents), at DOJ_NMG_0013362.[26] The sender of this email stated that it "should not be distributed further unless absolutely necessary" and forwarded it to Justice Gorsuch, "[f]or further distribution within your respective organizations on a

[25] https://perma.cc/9E6T-4CYE
[26] https://perma.cc/54KY-9CS6

need-to-know basis." *Ibid*. This spreadsheet included a field indicating the "latest developments" in Petitioner's military commission proceedings and Justice Gorsuch, in turn, forwarded the spreadsheet to nine other Justice Department officials. *Ibid*.

Justice Gorsuch also received write-ups on the pre-trial proceedings in Petitioner's case, which were featured in the Attorney General's "News Briefing," an internal roundup of legal news circulated to "the Attorney General and Senior Staff." Gorsuch Documents, at DOJ_NMG_0008362,[27] DOJ_NMG_0009076.[28] He was copied on an update about the scheduling of pre-trial proceedings in Petitioner's military commission. *Id*. at DOJ_NMG_0008311.[29] And he received status updates about Petitioner's case that were included in the Justice Department's internal Terrorism Litigation Report. *Id*. at DOJ_NMG_0042684.[30]

Justice Gorsuch did not indicate whether the basis of his recusal was under §455(a) or §455(b)(3). If the former, Petitioner waives the need for disqualification because the very question presented is whether this degree of involvement is disqualifying. Judge Katsas shared nearly all the known contacts Justice Gorsuch had with Petitioner's case while in government.[31] Judge Katsas was counsel in both *Hamdan* and

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[27] https://perma.cc/TS5M-VZN3
[28] https://perma.cc/EL8R-DU66
[29] https://perma.cc/47U8-2SYX
[30] https://perma.cc/5ASQ-3V44
[31] Justice Gorsuch and Judge Katsas also worked on detainee treatment policy, Gorsuch Documents, at DOJ_NMG_0040196 (https://perma.cc/ZGL5-UT9H), and the drafting of the MCA. *Id*. at DOJ_NMG_0040177 (https://perma.cc/VP4T-RM66).

Boumediene. He was included on the distribution lists for the Terrorism Litigation Report. And he was one of the nine Justice Department officials whom Justice Gorsuch determined had a need-to-know the Defense Department's military commission updates. If the latter, Petitioner recognizes that Justice Gorsuch's disqualification is mandatory.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Appendix

TABLE OF APPENDICES

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Issued March 10, 2023
No. 22-1097

ALI HAMZA AHMAD SULIMAN AL BAHLUL,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

Consolidated with 22-1173

On Motion to Disqualify

KATSAS, *Circuit Judge*: The Department of Defense has detained Ali Hamza Ahmad Suliman al Bahlul at Guantanamo Bay, Cuba for over two decades. In 2008, a military commission convicted Bahlul of conspiracy to commit various war crimes. He now seeks judicial review of his ensuing life sentence. Bahlul has moved to disqualify me based on my involvement in other Guantanamo Bay detainee litigation while serving in the Department of Justice between 2001 and 2009. Bahlul cites my appearance as government counsel in a habeas action brought by him and other Guantanamo detainees, my supervisory responsibilities at DOJ, and the recusal decisions of other senior DOJ officials with whom I served.

Section 455 of Title 28 establishes disqualification standards for federal judges. Section 455(b) lists five specific circumstances requiring disqualification. One applies if the judge, in former government employment, "participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy." 28 U.S.C. § 455(b)(3). Another applies if the judge has "personal knowledge of disputed evidentiary facts concerning the proceeding." *Id.* § 455(b)(1). In addition, section 455(a) requires disqualification in any proceeding where the judge's "impartiality might reasonably be questioned." *Id.* § 455(a). The statute defines "proceeding" to include "pretrial, trial, appellate review, or other stages of litigation." *Id.* § 455(d)(1). The Code of Conduct for United States Judges imposes the same requirements. Canon 3C(1), 3C(1)(a), 3C(1)(e).

Bahlul cites these provisions, and a handful of cases applying them, for the general proposition that a judge "may not hear a case in which he previously played any role." *Cobell v. Norton*, 334 F.3d 1128, 1144 (D.C. Cir. 2003). These decisions further indicate that a judge may not hear a case raising a collateral attack on another case where the judge played any role. *See Williams v. Pennsylvania*, 579 U.S. 1, 10–11 (2016); *Clemmons v. Wolfe*, 377 F.3d 322, 326 (3d Cir. 2004); *Rice v. McKenzie*, 581 F.2d 1114, 1117 (4th Cir. 1978). They also indicate that a judge who previously headed a DOJ litigating

component—such as a former United States Attorney—may not hear any case over which the judge had supervisory responsibility, regardless of whether he was personally involved in it. *See United States v. Herrera-Valdez*, 826 F.3d 912, 919 (7th Cir. 2016); *United States v. Amerine*, 411 F.2d 1130, 1133 (6th Cir. 1969). Of course, I have no quarrel with any of these settled principles. And that is why I have recused myself from all Guantanamo detainee litigation that I was personally involved in during my tenure at DOJ, as well as from all Guantanamo detainee litigation handled by the Civil Division while I supervised it, either as Principal Deputy Associate Attorney General (from 2006 to 2008) or as Assistant Attorney General (from 2008 to 2009).

In this proceeding, Bahlul seeks review of a life sentence imposed after his conviction by a military commission convened under the Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600. The Department of Defense handled Bahlul's prosecution, not the Civil Division or any other DOJ component. And while DOJ has defended Bahlul's conviction and sentence before this Court, that task falls with the National Security Division, in which I never served and over which I never had supervisory authority. Also, Bahlul did not file his first petition for review in this Court until September 2011—more than 2.5 years after I left DOJ. In sum, during my time at DOJ, I never appeared as counsel in either Bahlul's underlying prosecution or the ensuing proceedings for judicial review. I never supervised either the prosecution or the review

proceedings. I never expressed an opinion on the merits of the prosecution or the review proceedings. And I gained no knowledge of disputed evidentiary facts regarding the prosecution or the review proceedings.

Bahlul contends that disqualification is warranted because I appeared as government counsel in Al Jayfi v. Bush, a habeas action filed on behalf of Bahlul and five other Guantanamo detainees. But this proceeding is not that one, and it involves no direct, collateral, or any other review of that case. Jayfi challenged the preventive detention of aliens held as enemy combatants at Guantanamo Bay. *See* Petition for Writs of Habeas Corpus, *Al Jayfi v. Bush*, No. 05-cv-2104 (D.D.C. Oct. 27, 2005), ECF No. 1. This case, in contrast, involves detention imposed as punishment for a criminal conviction. *Jayfi* also challenged the lawfulness of military commissions convened under a 2001 presidential order. *See* Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 (Nov. 13, 2001); Supplemental Petition of Ali Hamza Ahmad Suliman Bahlool for Writ of Habeas Corpus and Complaint for Injunctive, Declaratory and Other Relief, *Al Jayfi v. Bush*, No. 05-cv-2104 (D.D.C. Dec. 14, 2005), ECF No. 12. At the time, Bahlul was being prosecuted before such a commission, but it was disbanded after the Supreme Court's decision in *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006). In contrast, this case involves a conviction by a tribunal convened under the Military Commissions Act of 2006, which restructured the commissions after

Hamdan. *Jayfi* produced one interlocutory appeal while I had supervisory authority over the Civil Division, *Al Jayfi v. Obama*, No. 08-5306. It involved the question whether the government must provide advance notice before transferring a detainee out of Guantanamo Bay, an issue resolved favorably to the government in *Kiyemba v. Obama*, 561 F.3d 509 (D.C. Cir. 2009). This case bears no relationship to that question. Finally, Jayfi presented no occasion for me—or any other DOJ lawyer—to learn of facts relevant to Bahlul's prosecution. Like the other Guantanamo habeas cases, Jayfi was stayed pending resolution of the threshold question whether habeas corpus jurisdiction extends to aliens held as enemy combatants at Guantanamo Bay. *See Al Jayfi v. Bush*, No. 05-cv-2104 (D.D.C. Jan. 11, 2006), ECF No. 23. Shortly after *Boumediene v. Bush*, 553 U.S. 723 (2008), held that habeas jurisdiction does extend to the Guantanamo detainees, Bahlul withdrew from the *Jayfi* litigation—before the government had occasion to file a factual return seeking to justify his detention. *See Al Jayfi v. Bush*, No. 05-cv-2104 (D.D.C. Oct. 24, 2008), ECF No. 84. So, I did not learn any facts bearing on Bahlul's prosecution or on this Court's review of his conviction and sentence.

Bahlul urges me to disqualify myself because Justice Gorsuch and Chief Judge Srinivasan, who served with me at DOJ, disqualified themselves in earlier iterations of this case. But each of us had different work portfolios at the Department. Chief Judge Srinivasan served as Principal Deputy Solicitor General in early 2013, when the Solicitor General

authorized the National Security Division to seek en banc at an earlier stage of this proceeding. *See* Petition of the U.S. for Rehearing En Banc, *Al Bahlul v. United States*, No. 11-1324 (March 5, 2013). And Justice Gorsuch, while serving as Principal Deputy Associate Attorney General, reportedly was involved in work on the Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat. 2739. *See* Savage, *Newly Public Emails Hint at Gorsuch's View of Presidential Power*, N.Y. Times (Mar. 18, 2017). Such work may have involved assessing factual claims that the Guantanamo detainees were mistreated, for section 1002(a) of the Act significantly restricted the interrogation methods that the Department of Defense could lawfully employ. *See* 119 Stat. at 2739. In making these points, I do not mean to endorse or reject the disqualification decisions made by Justice Gorsuch and Chief Judge Srinivasan, which I have neither the knowledge nor the authority to do. Instead, I simply point out that each of us faced different considerations given the work each of us had done at DOJ, so their decisions do not control mine.

Bahlul does not press a distinct argument under section 455(a), but I will address that provision for the sake of completeness. Section 455(b)(3) specifically addresses when a judge must recuse based on past government service, and it "draw[s] the recusal line ... at participation in the proceeding or expression of an opinion concerning the merits of the particular case in controversy." *Baker & Hostetler LLP v. Dep't of Commerce*, 471 F.3d 1355, 1357 (D.C. Cir. 2006) (opinion of Kavanaugh, J.). Likewise, section

455(b)(1) draws a specific recusal line at knowledge of disputed evidentiary facts concerning the proceeding. Section 455(a) is a more general "catch-all" provision, so we should not lightly use it to shift the lines specifically drawn in section 455(b). See id. at 1357–58. At most, that should occur only in "rare and extraordinary circumstances," *id*. at 1358, which are not present here. In short, my work at DOJ does not disqualify me under the specific rules set forth in section 455(b), and no other consideration tips the balance in favor of disqualification under section 455(a).

For these reasons, the motion to disqualify is denied.

So ordered.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22-1097	**September Term 2022**
Ali Hamza Ahmad Suliman Al Bahlul,	**CMCR 21-003**
Petitioner	Filed On: March 10, 2023
v.	
United States of America,	
Respondent	

Consolidated with 22-1173

BEFORE: Katsas, Circuit Judge

ORDER

Upon consideration of petitioner's motion to disqualify Judge Katsas, Filed February 23, 2023, it is

ORDERED that the motion be denied, in accordance with the opinion filed herein this date.

Per Curiam

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

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22-1097	**September Term 2023**
Ali Hamza Ahmad Suliman Al Bahlul,	Filed On: October 31, 2023
Petitioner	
v.	
United States of America,	
Respondent	

Consolidated with 22-1173

BEFORE: Katsas and Pan, Circuit Judges; and Sentelle*, Senior Circuit Judge

ORDER

Upon consideration of petitioner's corrected petition for panel rehearing filed on September 12, 2023, it is

ORDERED that the petition be denied.

Per Curiam

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

* Senior Circuit Judge Sentelle was a member of the panel that decided this case but did not participate in the disposition of this petition.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22-1097	**September Term 2023**
Ali Hamza Ahmad Suliman Al Bahlul,	Filed On: October 31, 2023

Petitioner

v.

United States of America,

Respondent

Consolidated with 22-1173

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

ORDER

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

ORDERED that the petition be denied. It is

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

Per Curiam

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

* Chief Judge Srinavasan did not participate in this matter.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22-1097	**September Term 2022**
Ali Hamza Ahmad Suliman Al Bahlul,	Filed On: July 25, 2023
Petitioner	
v.	
United States of America,	
Respondent	

Consolidated with 22-1173

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

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BEFORE: Katsas and Pan, *Circuit Judges*; and Sentelle, *Senior Circuit Judge*.

JUDGEMENT

These causes came on to be heard on the petitions for review of a decision of the U.S. Court of

Military Commission Review and were argued by counsel. On consideration thereof, it is

ORDERED and **ADJUDGED** that the petitions for review be denied and the U.S. Court of Military Commission Review's decision be affirmed, in accordance with the opinion of the court filed herein this date.

Per Curiam

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

Date: July 25, 2023

Opinion for the court filed by Circuit Judge Pan

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued March 22, 2023 Decided July 25, 2023

No. 22-1097

ALI HAMZA AHMAD SULIMAN AL BAHLUL,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

Consolidated with 22-1173

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

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August 4, 2020

Michel Paradis, Counsel, Office of the Chief Defense Counsel, argued the cause for petitioner. With him on the briefs were *Todd E. Pierce* and *Alexandra Link*.

Eric L. Lewis was on the brief for amicus curiae Concerned Musicians in support of petitioner.

John S. Summers, *Andrew M. Erdlen*, and *Alexander J. Egervary* were on the brief for amici curiae The

Center for Victims of Torture, et al. in support of petitioner.

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, *Steven M. Dunne*, Chief, and *Joseph F. Palmer*, Attorney.

Before: KATSAS and PAN, *Circuit Judges*, and SENTELLE, *Senior Circuit Judge*.

Pan, *Circuit Judge*. Petitioner Ali Hamza Ahmad Suliman al Bahlul ("Bahlul") served as the personal assistant and public-relations secretary to Usama bin Laden, the leader of al Qaeda and mastermind of the 9/11 terrorist attack against the United States. Members of a military commission convicted Bahlul of conspiracy to commit war crimes, providing material support for terrorism, and solicitation of others to commit war crimes. The members sentenced Bahlul to imprisonment for life, and the U.S. Court of Military Commission Review ("CMCR") affirmed. On Bahlul's first appeal to this court, we upheld the conspiracy charge but vacated the other convictions as unconstitutional under the Ex Post Facto Clause. The CMCR subsequently reaffirmed Bahlul's remaining conspiracy conviction and life sentence, twice. In these petitions for review of the CMCR's latest decision, Bahlul asks us to vacate his conspiracy conviction or, alternatively, to remand his case for resentencing by military-commission members. We deny the petitions.

I. BACKGROUND

Bahlul is a Yemeni national who traveled to Afghanistan in the late 1990s and joined al Qaeda. He attended an al Qaeda training camp and pledged a loyalty oath to Usama bin Laden, who assigned him to al Qaeda's media operations. After suicide bombers targeted a U.S. naval ship, the U.S.S. Cole, in October 2000, bin Laden directed Bahlul to produce a propaganda video celebrating the attack. The video that Bahlul created included footage of the bombing, as well as calls for jihad against the United States. Al Qaeda distributed the film widely and in several languages as part of its recruiting efforts.

Bahlul then became bin Laden's personal assistant and secretary for public relations. In that role, Bahlul arranged for two of the 9/11 hijackers to make loyalty oaths to bin Laden and helped prepare their "martyr wills" — propaganda declarations to be used after the attacks. In the days before 9/11, Bahlul traveled with bin Laden and maintained bin Laden's media equipment. On the day of the attacks, Bahlul ensured that bin Laden could listen to media reports about them. Afterward, Bahlul fled to Pakistan, where he was captured in December 2001 and turned over to the United States. Since 2002, Bahlul has been detained at the U.S. Naval Base at Guantanamo Bay, Cuba.

We have described Bahlul's extensive legal proceedings in past decisions. *See*, *e.g.*, *Al Bahlul v. United States (Al Bahlul II)*, 767 F.3d 1, 6–8 (D.C. Cir.

2014) (en banc). Here, we focus on the procedural history relevant to this appeal.

In 2003, President George W. Bush designated Bahlul as eligible for trial by military commission under the 2001 Authorization for Use of Military Force ("AUMF") and 10 U.S.C. § 821. Military prosecutors charged Bahlul with conspiracy to commit war crimes in 2004. But that prosecution was suspended when the Supreme Court held in *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006), that the procedures governing the military commissions convened under the AUMF and § 821 rendered those commissions unlawful.

After *Hamdan*, Congress enacted the Military Commissions Act ("MCA") of 2006, Pub. L. No. 109–366, 120 Stat. 2600 (2006). *See also* Military Commissions Act of 2009, Pub. L. No. 111-84, 123 Stat. 2190, 2574 (2009) (amending MCA). That Act "establishe[d] procedures governing the use of military commissions to try alien unprivileged enemy belligerents for violations of the law of war and other offenses triable by military commission." 10 U.S.C. § 948b(a); *see also id.* § 948b(a) (2006). The MCA enabled military commissions to "be convened by the Secretary of Defense or by any officer or official of the United States designated by the Secretary for that purpose." *Id.* § 948h. Pursuant to that authority, in 2007, the Secretary of Defense designated Susan Crawford, a Senior Judge of the U.S. Court of Appeals for the Armed Forces ("CAAF"), as the convening authority.

In 2008, Crawford convened a new military commission under the MCA to try Bahlul. This time, prosecutors charged him with conspiracy to commit war crimes, 10 U.S.C. § 950v(b)(28) (2006); providing material support for terrorism, id. § 950v(b)(25) (2006); and solicitation of others to commit war crimes, id. § 950u (2006). The conspiracy and solicitation charges alleged seven object crimes: murder of protected persons, attacking civilians, attacking civilian objects, murder in violation of the law of war, destruction of property in violation of the law of war, terrorism, and providing material support for terrorism.

Bahlul refused to participate in his trial before the military commission. He waived all pretrial motions, made no objections, asked no questions of prosecution witnesses, and presented no opening argument, defense, or closing argument. The members of the commission convicted Bahlul of all three charges. They made written findings that Bahlul had conspired to commit and solicited all seven alleged object offenses. They also specifically found that he had committed ten of eleven alleged overt acts, including pledging a loyalty oath to bin Laden; preparing the *U.S.S. Cole* propaganda video "to solicit, incite and advise persons to commit terrorism"; acting as personal and media secretary to bin Laden; arranging for two of the 9/11 hijackers to "pledge fealty" to bin Laden and preparing their martyr wills; and researching the economic effect of 9/11 on the United States for bin Laden. *Al Bahlul II*,

767 F.3d at 8 n.2. Bahlul was acquitted of only one overt act — wearing a suicide belt to protect bin Laden.

During sentencing, Bahlul did not question the prosecution's witnesses or raise objections. He did give an unsworn statement, admitting that he worked with bin Laden and explaining that he was a "media person in al Qaeda" who "put some clips in the videotape that [the members] ... watched." Sentencing Transcript at 968:11–18, 969:9–10, 973:22–974:6. The members of the military commission imposed a life sentence.

The commission submitted the findings and sentence to the convening authority, as required by 10 U.S.C. § 950b(a). Crawford approved them in their entirety. At Bahlul's request, Crawford referred his case for review by the CMCR, pursuant to 10 U.S.C. § 950c(a). The CMCR affirmed his convictions and sentence in full. *See United States v. Al Bahlul*, 820 F. Supp. 2d 1141, 1158–59 (USCMCR 2011).

A panel of this court vacated Bahlul's convictions based on *Hamdan v. United States*, 696 F.3d 1238, 1247–48 (D.C. Cir. 2012), which held that the MCA did not authorize prosecution for conduct committed before its enactment in 2006. *See Al Bahlul v. United States (Bahlul I)*, No. 11-1324, 2013 WL 297726, at *1 (D.C. Cir. Jan. 25, 2013) (per curiam). Sitting en banc, this court overruled Hamdan, and thus *Bahlul I*, but reinstated only Bahlul's conspiracy conviction. *Bahlul II*, 767 F.3d at

5, 11. We determined that the conspiracy conviction did not violate the Ex Post Facto Clause and remanded for a panel of this court to hear Bahlul's remaining challenges to that conviction. *Id*. at 18–27, 31.

A panel again vacated Bahlul's conspiracy conviction, determining that the MCA improperly permitted Article I tribunals to try conspiracy cases. *Al Bahlul v. United States (Bahlul III)*, 792 F.3d 1, 3 (D.C. Cir. 2015). Sitting en banc once more, we reversed the panel decision and reinstated Bahlul's conspiracy conviction. *Al Bahlul v. United States (Bahlul IV)*, 840 F.3d 757, 759 (D.C. Cir. 2016) (en banc). We remanded to the CMCR "to determine the effect, if any, of the two vacaturs [of the material-support and solicitation convictions] on sentencing." *Bahlul II*, 767 F.3d at 31.

The CMCR reaffirmed Bahlul's life sentence for conspiracy. It concluded that the military commission would have "sentenced the appellant to confinement for life" even "absent the error" with respect to his convictions for providing material support to terrorists and solicitation of others to commit terrorism. *Al Bahlul v. United States*, 374 F. Supp. 3d 1250, 1273 (USCMCR 2019). The CMCR also determined that life imprisonment was "an appropriate punishment for the sole remaining conviction." *Id*. at 1271–74. In addition, the CMCR rejected a new argument made by Bahlul: that the military court lacked jurisdiction to try him because the convening authority was not properly appointed

under the Appointments Clause. *Id.* at 1255, 1265, 1268–71.

On appeal of that decision to this court, Bahlul contended that the CMCR erred in its resentencing decision, both by re-examining his sentence itself instead of remanding to a military commission, and by misapplying the harmless-error doctrine. *Al Bahlul v. United States (Bahlul V)*, 967 F.3d 858, 865 (D.C. Cir. 2020). This court held that "it was not an abuse of discretion [for the CMCR] to reevaluate Al Bahlul's sentence without remand to the military commission." *Id.* at 866. But we vacated Bahlul's sentence because the CMCR had failed to determine whether any constitutional error potentially affecting the sentence was harmless beyond a reasonable doubt. *Id.* at 866–67 (citing *Chapman v. California*, 386 U.S. 18, 24 (1967) and *United States v. Sales*, 22 M.J. 305, 307–08 (C.M.A. 1986)). We rejected Bahul's argument that his military commission was unlawfully convened because Crawford was a "principal officer" under the Appointments Clause but was not appointed by the President with the advice and consent of the Senate. *Id.* at 870; *see also* U.S. CONST. art. II, § 2, cl. 2. Employing three factors drawn from *Edmond v. United States*, 520 U.S. 651 (1997), we determined that Crawford was an inferior — not a principal — officer. *Bahlul V*, 967 F.3d at 870–73 (citing *In re Grand Jury Investigation*, 916 F.3d 1047, 1052 (D.C. Cir. 2019)). We therefore remanded solely "for the CMCR to redetermine 'the effect, if any, of the two vacaturs on sentencing'" under the appropriate harmless-error standard. *Id.* at

867 (quoting *Bahlul II*, 767 F.3d at 31). Bahlul's petition for a writ of certiorari was denied. *Al Bahlul v. United States*, 142 S. Ct. 621 (2021).

The CMCR once again affirmed Bahlul's life sentence. *Al Bahlul v. United States (Bahlul VI)*, 603 F. Supp. 3d 1151, 1183 (USCMCR 2022). "Taking into consideration the entire record of appellant's trial and sentencing," the CMCR declared that it was "certain beyond a reasonable doubt that, absent the constitutional errors, the members would have sentenced appellant to confinement for life." Id. at 1172. The CMCR also rejected Bahlul's renewed argument that the commission lacked jurisdiction because Crawford's appointment violated the Appointments Clause. *Id.* at 1157–60. This time, Bahlul relied on the Supreme Court's intervening decision in *United States v. Arthrex*, 141 S. Ct. 1970 (2021). *Bahlul VI*, 603 F. Supp. 3d at 1155. The CMCR determined that nothing in Arthrex conflicted with its earlier decision upholding the appointment of Crawford as the convening authority. *Bahlul VI*, 603 F. Supp. 3d at 1157–60.

Bahlul sought reconsideration or rehearing en banc, raising the argument that the CMCR's decision impermissibly relied on evidence procured through Bahlul's torture or abuse. The en banc CMCR denied reconsideration. In a separate opinion, one judge commented that Bahlul cited nothing in the record demonstrating that the evidence on which the CMCR relied was the product of Bahlul's torture or abuse.

Bahlul appeals the CMCR's latest decision to reinstate his life sentence. We have jurisdiction under 10 U.S.C. § 950g(a).

II. Analysis

Bahlul raises three familiar challenges: (1) that the military commission lacked jurisdiction to hear his case because the convening authority was unconstitutionally appointed; (2) that the CMCR erred by not remanding his case to the military commission for resentencing and instead reevaluating his sentence itself; and (3) that the CMCR erred by determining that the military-commission members would have sentenced him to life imprisonment even absent the constitutional errors at his trial. He adds an argument that the CMCR erred by considering evidence gathered through his abuse and torture in determining that his life sentence remained appropriate.

As a threshold legal issue, we review the CMCR's determination that the convening authority was properly appointed de novo. *See Aamer v. Obama*, 742 F.3d 1023, 1038 (D.C. Cir. 2014); *EV v. United States*, 75 M.J. 331, 333 (C.A.A.F. 2016).[1] We review

[1] The government previously argued before the CMCR that the Appointments Clause issue was not live because it was not jurisdictional. *See Al Bahlul*, 370 F. Supp. 3d at 1259. The government does not renew that argument here. Accordingly, we need not consider whether the Appointments Clause issue implicated the subject-matter jurisdiction of the military commission, as our standard of review would be de novo either way. *See Aamer*, 742 F.3d at 1028, 1038.

the CMCR's sentencing decisions for abuse of discretion. *See Bahlul V*, 967 F.3d at 866–67; 10 U.S.C. § 950g(d) ("The United States Court of Appeals for the District of Columbia Circuit ... shall take action only with respect to matters of law, including the sufficiency of the evidence to support the verdict.").

A. Appointments Clause

"The Appointments Clause of the Constitution lays out the permissible methods of appointing 'Officers of the United States,' a class of government officials distinct from mere employees." *Lucia v. SEC*, 138 S. Ct. 2044, 2049 (2018) (quoting U.S. Const. art. II, § 2, cl. 2). The Clause provides that the President:

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

U.S. Const. art. II, § 2, cl. 2. "By requiring the joint participation of the President and the Senate, the Appointments Clause was designed to ensure public accountability for both the making of a bad appointment [of a principal officer] and the rejection

of a good one." *Edmond*, 520 U.S. at 660. It is "designed to assure a higher quality of appointments," and is "among the significant structural safeguards of the constitutional scheme." *Id.* at 659.

All agree that the convening authority is an officer under Article II. *See Bahlul V*, 967 F.3d at 870. The only dispute is whether she is a "principal" officer, who must be appointed by the President with advice and consent of the Senate, or an "inferior" officer, who may be appointed by the President or the Secretary of Defense acting alone. *See Buckley v. Valeo*, 424 U.S. 1, 132 (1976); *In re Grand Jury Investigation*, 916 F.3d at 1052. If the convening authority is a principal officer, Crawford was improperly appointed by the Secretary, and the remedy would be a new trial before a military commission convened by a constitutionally appointed convening authority. *See Lucia*, 138 S. Ct. at 2055 ("[T]he 'appropriate' remedy for an adjudication tainted with an appointments violation is a new 'hearing before a properly appointed' official." (quoting *Ryder v. United States*, 515 U.S. 177, 183, 188 (1995))).

We previously decided that the convening authority is an inferior officer. *See Bahlul V*, 967 F.3d at 870. Under the law-of-the case doctrine, a court should not reopen issues that it decided earlier. See *Wye Oak Tech., Inc. v. Republic of Iraq*, 24 F.4th 686, 697 (D.C. Cir. 2022). This is particularly so when a subsequent appeal is heard by a different panel. *United States v. Philip Morris USA Inc.*, 801 F.3d 250,

257 (D.C. Cir. 2015). Because we lack authority to overrule a prior panel's decision, "'an even stronger than usual version of the law-of-the-case doctrine,' law of the circuit, governs." *Id.* (emphasis original) (quoting *LaShawn A. v. Barry*, 87 F.3d 1389, 1395 (D.C. Cir. 1996) (en banc)). "[W]hen both doctrines are at work, the law-of-the-circuit doctrine should increase a panel's reluctance to reconsider a decision made in an earlier appeal in the same case." *LaShawn A.*, 87 F.3d at 1395.

We may depart from the law of the case and from circuit precedent, however, based on an intervening Supreme Court decision. *See Aamer*, 742 F.3d at 1032 (noting that panel need not follow law of the circuit if inconsistent with Supreme Court precedent); *Wye Oak Tech.*, 24 F.4th at 697–98 (explaining that courts should not follow law of the case when faced with an intervening change in law). For a panel to reconsider a prior decision of this court in favor of a new Supreme Court precedent, the Court's intervening decision must "effectively overrule[ ], i.e., 'eviscerate[ ]' " the law of our circuit. *United States v. Williams*, 194 F.3d 100, 105 (D.C. Cir. 1999) (quoting *Dellums v. Nuclear Reg. Comm'n*, 863 F.2d 968, 978 n.11 (D.C. Cir. 1988)), *abrogated on other grounds by Apprendi v. New Jersey*, 530 U.S. 466 (2000); *accord Nat'l Inst. of Mil. Just. v. Dep't of Def.*, 512 F.3d 677, 682 n.7 (D.C. Cir. 2008). In other words, the "intervening Supreme Court precedent must clearly dictate a departure from circuit law." *Old Dominion Elec. Coop. v. FERC*, 892 F.3d 1223, 1232 n.2 (D.C. Cir. 2018) ((citing *Dellums*, 863 F.2d at

978 n.11)). For example, we did not revisit a prior decision where a new Supreme Court opinion merely indicated "doubts" about the constitutionality of the statutory scheme at issue, and where the Court left "unresolved several questions that le[d] us to wonder about the precise scope of its holding." *Williams*, 194 F.3d at 105–06.

Bahlul argues that the Supreme Court's decision in *United States v. Arthrex, Inc.*, 141 S. Ct. 1970 (2021), compels us to reevaluate our ruling in *Bahlul V* that the convening authority is an inferior officer. Our consideration of that argument hinges on whether Arthrex effectively overruled or eviscerated *Bahlul V*. Because Bahlul's interpretation of *Arthrex* is merely arguable, we conclude that *Arthrex* does not "clearly dictate" a departure from our prior decision. *Old Dominion Elec. Coop.*, 892 F.3d at 1232 n.2. We therefore may not reconsider it here.

In *Bahlul V*, we relied on *Edmond v. United States*, 520 U.S. 651 (1997), to hold that the convening authority, Crawford, was an inferior officer. In Edmond, the Supreme Court considered three factors to determine that judges of the Coast Guard Court of Criminal Appeals, an intermediate court in the military-justice system, were inferior officers: degree of oversight, removability, and final decision-making authority. 520 U.S. at 662–65. First, the Court explained that "[w]hether one is an 'inferior' officer depends on whether he has a superior" and whether one's "work is directed and supervised at some level by" principal officers. *Id*. at 662–63. The Coast Guard

judges were inferior because they were supervised by two sets of principal officers: the Coast Guard's Judge Advocate General, who prescribed the judges' rules and policies, and the CAAF. *Id*. at 664; *see also* 10 U.S.C. § 866(f). Second, the Court found it significant that the Judge Advocate General could remove the judges without cause, so long as it was not an "attempt to influence ... the outcome of individual proceedings." *Edmond*, 520 U.S. at 664 (citing 10 U.S.C. § 837). Third, the judges did not have final decision-making authority: The CAAF had the power to review the judges' rulings if the Judge Advocate General ordered it, if the CAAF granted a petition for review from the accused, or if the accused received a death sentence. *Id*. at 665. The CAAF's review was limited to determining whether "there is some competent evidence in the record to establish each element of the offense beyond a reasonable doubt" without reevaluating the facts. *Id*. But, the Court opined, "[w]hat is significant is that the judges of the [Coast Guard] Court of Criminal Appeals have no power to render a final decision on behalf of the United States unless permitted to do so by other Executive officers." *Id*.

Our opinion in *Bahlul V* specifically applied the three factors described in *Edmond* to conclude that Crawford was an inferior officer. 967 F.3d at 870–73. First, we explained that a principal officer, "the Secretary [of Defense,] maintains a degree of oversight and control over the Convening Authority's work through policies and regulations," including evidentiary standards and post-trial procedures. *Id*.

at 872.[2] Next, we noted that "the bulk of the Convening Authority's decisions are not final" and "are subject to review by the CMCR," which is also composed of principal officers. *Id*. at 871. Finally, we explained that "the Convening Authority is removable at will by the Secretary," id. at 872, except that "no person may attempt to coerce or, by any unauthorized means, influence ... the action of any convening, approving, or reviewing authority with respect to his judicial acts," *id*. at 873 (quoting 10 U.S.C. § 949b(a)(2)(B) (2006)). All those factors weighed in favor of concluding that the convening authority was an inferior officer. *Id*.

According to Bahlul, the *Arthrex* decision departed from the three-factor approach of *Edmond* and *Bahlul V* by elevating one factor — final decision-making authority — over the others. In *Arthrex*, the Supreme Court determined that the Patent Trial and Appeal Board's Administrative Patent Judges were unconstitutionally appointed under the Appointments Clause. 141 S. Ct. at 1985. In Bahlul's view, the Court determined that the Patent Judges were principal officers solely because they could make final, unreviewable decisions on patentability, which "is incompatible with their appointment by the

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[2] *See also id.* (citing R.M.C. 104(a)(1) (2007) (prohibiting convening authority from censuring, reprimanding, or admonishing military commission, members, or judge); R.M.C. 407 (2007) (prescribing forwarding and disposition of charges); and R.M.C. 601(f) (2007) ("The Secretary of Defense may cause charges, whether or not referred, to be transmitted to him for further consideration, including, if appropriate, referral.")).

Secretary to an inferior office." Pet'r's Br. 26 (quoting *Arthrex*, 141 S. Ct. at 1985). Bahlul thus reads *Arthrex* to hold that an officer's ability to exercise final decision-making authority is sufficient, by itself, to render her a principal officer. Here, he contends, the convening authority exercises that type of significant final authority. For instance, the convening authority may "approve, disapprove, commute, or suspend the sentence in whole or in part," 10 U.S.C. § 950b(c)(2)(C) (2006) (current version at *id*. § 950b(c)(3)(C)); "(A) dismiss any charge or specification by setting aside a finding of guilty thereto; or (B) change a finding of guilty to a charge to a finding of guilty to an offense that is a lesser included offense of the offense stated in the charge," *id*. § 950b(c)(2)(C)(3) (2006). Those decisions are left to her "sole discretion," id. § 950b(c)(1), although the Secretary of Defense may issue regulations about their timing and process, *see id*. § 949a(a); see also *Bahlul V*, 967 F.3d at 871 ("[T]he bulk of the Convening Authority's decisions are not final."). Bahlul insists that, under the approach followed in Arthrex, the convening authority must be a principal officer.

Yet *Arthrex* does not "clearly dictate a departure" from our prior ruling that the convening authority is an inferior officer. *Old Dominion Elec. Coop.*, 892 F.3d at 1232 n.2. Despite the language in *Arthrex* emphasized by Bahlul, that case still considered each of the three factors that were central to *Edmond*: degree of oversight and removability, as well as final decision-making authority. *Arthrex*, 141

S. Ct. at 1980–83. The *Arthrex* Court compared the degree of supervision of the Patent Judges to that of the Coast Guard judges in Edmond, explaining that the Patent and Trademark Office Director had "administrative oversight" powers over the Patent Judges. *Id*. at 1980 (quoting *Edmond*, 520 U.S. at 664) (citing 35 U.S.C. §§ 3(a)(2)(A), (b)(6), 6(c), 314(a), 316(a)(4)). Indeed, the Court explicitly "reaffirm[ed] and appl[ied] the rule from *Edmond* that the exercise of executive power by inferior officers must at some level be subject to the direction and supervision of an officer nominated by the President and confirmed by the Senate." *Arthrex*, 141 S. Ct. at 1988. The Court also examined removability, concluding that the Patent Judges are not "'meaningfully controlled' by the threat of removal ... because the Secretary can fire them ... only 'for such cause as will promote the efficiency of the service.'" *Id*. at 1982 (quoting *Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2203 (2020) and then 5 U.S.C. § 7513(a)). To be sure, the Court emphasized that "[w]hat was 'significant' to the outcome [in *Edmond*] — review by a superior executive officer — is absent" for the Patent Judges. *Id*. at 1981 (quoting *Edmond*, 520 U.S. at 665). The Patent Judges have unreviewable power to "issue decisions on patentability" or, in other words, "'to render a final decision on behalf of the United States' without any ... review by their nominal superior or any other principal officer in the Executive Branch." *Id*. at 1980–81 (quoting Edmond, 520 U.S. at 665). But despite assigning the most weight to the factor of un-reviewability, the majority opinion in *Arthrex* expressly disclaimed that its decision "set forth an

exclusive criterion" to distinguish principal officers from inferior ones. *Id.* at 1985 (quoting *Edmond*, 520 U.S. at 661).[3]

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[3] Notably, *Arthrex* also confined its ruling to "the context of adjudication." *Arthrex*, 141 S. Ct. at 1986. It is not clear whether the role of the convening authority as challenged in this case falls within that narrow context. Generally, adjudication involves the particularized determination of individual rights, resulting in an order. *See Safari Club Int'l v. Zinke*, 878 F.3d 316, 332 (D.C. Cir. 2017) (citing *Londoner v. City and Cnty. of Denver,* 210 U.S. 373 (1908)); *cf.* 5 U.S.C. § 551(6), (7) (defining adjudication as "agency process for the formulation of an order" and an order as "the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing" under the Administrative Procedure Act). We have noted that the MCA is a "system enacted to adjudicate" the rights of enemy belligerents. *In re Al-Nashiri*, 835 F.3d 110, 122–23 (D.C. Cir. 2016); *see also Ortiz v. United States*, 138 S. Ct. 2165, 2170 (2018) (describing military court martial system as one "to adjudicate charges against service members"). But the role of the convening authority in that process is very different from the adjudicative one assigned to the patent judges in *Arthrex* or the Coast Guard judges in *Edmond*. The convening authority under the MCA has duties that are not adjudicative, such as convening a military commission and selecting its members. *See* 10 U.S.C. §§ 948h, 948i. It is those functions that Bahlul appears to challenge in this case, claiming that the military commission that tried him was improperly *convened* by Crawford and so lacked jurisdiction. Unlike the petitioners in *Arthrex* and *Edmond,* Bahlul's main argument is not that his case was *adjudicated* by an unconstitutionally appointed officer. It is therefore unclear that Bahlul's claim falls within "the context of adjudication" that was addressed in *Arthrex*. 141 S. Ct. at 1986.

Bahlul's argument that *Arthrex* determined that the Patent Judges were principal officers based solely on their final decision-making authority is plausible. Indeed, one of the dissenting opinions in that case asserted, "[T]he majority suggests most of Edmond is superfluous: All that matters is whether the Director has the statutory authority to individually reverse Board decisions." *Arthrex*, 141 S. Ct. at 2002 (Thomas, J. dissenting); *see also id.* at 1997 (Breyer, J. dissenting) ("In my view, today's decision is both unprecedented and unnecessary."); Jennifer Mascott and John F. Duffy, *Executive Decisions After* Arthrex, 2021 Sup. Ct. Rev. 225, 228 (2021) ("Arthrex seems to mark a significant shift."). But that reading of the case is "not sufficiently clear" to justify overturning the law of the circuit, *Williams*, 194 F.3d at 102, given that the Court discussed all three *Edmond* factors and explicitly denied that it relied on any "exclusive criterion" to hold that the Patent Judges were principal officers. *Arthrex*, 141 S. Ct. at 1985 (quoting *Edmond*, 520 U.S. at 661). Bahlul has not shown that *Arthrex* "clearly" disavows or "eviscerates" the *Edmond* factors on which *Bahlul V* relied. Therefore, we have no occasion to reconsider our determination that the convening authority is an inferior officer.

B. Resentencing

Bahlul also challenges the CMCR's resentencing decision, arguing: (1) that the CMCR erred in resentencing Bahlul itself, instead of remanding to a military commission; and (2) that the

CMCR erred in reaffirming his life sentence. We find his arguments unconvincing.

1. Consideration by the CMCR

We held in *Bahlul V* that the CMCR could properly assess Bahlul's sentence without remanding to a military commission. *See Bahlul V*, 967 F.3d at 865–66.[4] Nothing has changed that conclusion. Instead of relying on our prior holding, however, the CMCR considered again whether to send the case to a military commission for resentencing by applying the four factors described in *United States v. Winckelmann*, 73 M.J. 11, 15–16 (C.A.A.F. 2013), *see Bahlul VI*, 603 F. Supp. 3d at 1168–71, i.e.: "(1) whether the defendant was tried by military judges; (2) whether there are 'dramatic changes' in the penalty the defendant is exposed to; (3) whether 'the nature of the remaining offenses capture the gravamen of criminal conduct included within the

[4] Bahlul asserts that "this Court did not hold that resentencing was not required because CMCR's weighing of the *Winckelmann* factors was correct." Pet'r's Reply at 23. He says that "[t]his Court held that CMCR 'properly applied' the *Winckelmann* factors – in the sense that it was correct to apply the *Winckelmann* factors." *Id.* (quoting *Bahlul V*, 967 F.3d at 865–67). That is inaccurate. We explicitly stated that "it was not an abuse of discretion to reevaluate Al Bahlul's sentence without remand to the military commission." *Bahlul V*, 967 F.3d at 866. Similarly, Bahlul insists that we ordered the CMCR to apply a "beyond a reasonable doubt" standard in its evaluation of the *Winckelmann* factors on remand. But since we never held that the CMCR had to consider those factors anew, we certainly did not determine that it needed to make that finding beyond a reasonable doubt. *See Bahlul V*, 967 F.3d at 866–67.

original offenses'; and (4) whether 'the remaining offenses are of the type that judges of the courts of criminal appeals should have the experience and familiarity with to reliably determine what sentence would have been imposed at trial.'" *Bahlul V*, 967 F.3d at 866 (quoting *Winckelmann*, 73 M.J. at 15–16).

As in its previous decision, the CMCR explained that the first factor is of "limited relevance to military commissions as there is no option for sentencing by military judge alone." *Bahlul VI*, 603 F. Supp. 3d at 1169.[5] It also again concluded that the second, third, and fourth factors weighed against remand because Bahlul continued to face the same maximum sentence; the "gravamen" of all three crimes for which he was tried was the same; the evidence concerning the vacated convictions remained relevant; and conspiracy to commit war crimes, like other forms of conspiracy, fell within the CMCR judges' experience to consider. *Id*. at 1169–71. Thus, as in *Bahlul V*, the CMCR properly resentenced Bahlul. See *Bahlul V*, 967 F.3d at 866.

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[5] Bahlul contends that the CMCR's analysis of the first *Winckelmann* factor varied from its previous decision, and that it erred by determining the factor "ha[d] limited relevance." *Bahlul VI*, 603 F. Supp. at 1169. We see no meaningful difference, however, between this determination and the CMCR's previous conclusion that the first factor was not dispositive, particularly when it again concluded that the remaining factors weighed against resentencing by members of a military commission. *See Bahlul V*, 967 F.3d at 866; *Al Bahlul*, 374 F. Supp. 3d at 1273.

Bahlul argues that the CMCR should have weighed in his favor the second *Winckelmann* factor — concerning "dramatic changes" in applicable penalties — because the nature of his penalty has been altered by new factors, including his ineligibility for parole and his placement in solitary confinement. But there has been no change with respect to Bahlul's eligibility for parole — he had no right to parole at the time he was first sentenced by the commission. See Pet'r's Br. 43 (citing a parole policy enacted after his sentencing, Exec. Order No. 13567, 76 Fed. Reg. 13277 § 1(a) (Mar. 7, 2011)); *see also Greenholtz v. Inmates of Neb. Penal & Corr. Complex*, 442 U.S. 1, 7 (1979) ("There is no constitutional or inherent right of a convicted person to be conditionally released before the expiration of a valid sentence."). As for his solitary confinement, that it is not a part of his sentence and so we lack jurisdiction to consider it here. *See Bahlul V*, 967 F.3d at 877 ("Al Bahlul must bring any challenges to the conditions of his confinement through a different mechanism — likely a petition for a writ of habeas corpus."); 10 U.S.C. § 950g(d).

Bahlul's remaining objections to resentencing by the CMCR repeat the arguments he raised in earlier appeals, and fail for the reasons stated in *Bahlul V*.

2. Reaffirmance of Life Sentence

When we reversed and remanded in *Bahlul V*, we instructed the CMCR to apply the standard of "harmless[ness] beyond a reasonable doubt" to determine whether Bahlul's life sentence remained

appropriate for the conspiracy charge, despite his trial on additional charges that should not have been brought. *Bahlul V*, 967 F.3d at 866–67. The CMCR applied the correct standard and concluded that Bahlul's sentence for conspiracy would have been the same, irrespective of his erroneous trial on the vacated counts charging him with material support and solicitation of terrorism. *Bahlul VI*, 603 F. Supp. 3d at 1171–75.

The record supports the CMCR's decision. Because the gravamen of the dismissed offenses was reflected in the conspiracy charge, the CMCR correctly reasoned that the evidence introduced at trial would have been essentially the same for the conspiracy count alone. *Id*. at 1172; *see also United States v. Torres*, 60 M.J. 559, 570 (A.F. Ct. Crim. App. 2004) (determining sentence remained appropriate because military judge would have been presented with the same evidence absent vacated charges); *cf. United States v. Boone*, 49 M.J. 187, 197–98 (C.A.A.F. 1998) (explaining resentencing was necessary where constitutional error circumscribed the available record evidence). In returning the verdicts, the military commission members made explicit findings about the objects of the conspiracy and the overt acts committed in its furtherance. *See Bahlul VI*, 603 F. Supp. 3d at 1172–73. The members determined that the conspiracy's "objects included murder of protected persons, murder in violation of the law of war, and attacking civilians," and that Bahlul's overt acts encompassed pledging fealty to Usama bin Laden, creating propaganda for al Qaeda, "arrang[ing] for a

pledge of fealty or bayat to Usama bin Laden by two of the 9/11 terrorists" and "prepar[ing] the propaganda declarations, or martyr wills" of the same 9/11 terrorists. Id. In short, Bahlul's conspiracy conviction encompassed the same extraordinarily serious conduct that supported the dismissed counts of solicitation and lending material support to terrorists. *See United States v. Moffeit*, 63 M.J. 40, 41–42 (C.A.A.F. 2006) (considering severity of conduct underlying remaining charge). The CMCR also noted that Bahlul showed no remorse at sentencing, instead making a statement that praised the 9/11 attacks and al Qaeda. *See Bahlul VI*, 603 F. Supp. 3d at 1174. Thus, the CMCR did not abuse its discretion in finding any error related to the vacated counts harmless beyond a reasonable doubt.

Bahlul's arguments to the contrary are unavailing. Bahlul argues that the CMCR erroneously inferred from the record that he played a role in the 9/11 attacks. Pet'r's Br. 54–56. But the CMCR relied on the detailed factual findings by the members of the military commission, who concluded that Bahlul facilitated martyr wills and fealty pledges for terrorists involved in 9/11. *See* Conviction Worksheet 3–4, 7–8; *Bahlul VI*, 603 F. Supp. 3d at 1172–73. In determining what the commission members would have done absent the constitutional errors of charging Bahlul with material support and solicitation, there is no better evidence than the members' own findings of fact.

Bahlul also asserts that when the CMCR resentenced him, it relied on a speculative theory of the case that was never presented to the commission members, urging that the focus of the government's case at trial was its solicitation charge. Pet'r's Br. 56–57 (citing *United States v. Bennitt*, 74 M.J. 125, 128 (C.A.A.F. 2015) and *United States v. Miller*, 67 M.J. 385, 388 (C.A.A.F. 2009)). That argument is belied by Bahlul's conviction on the charge of conspiracy, and the detailed factual findings that supported that conviction. The cases cited by Bahlul are inapposite, for they involve resentencings where the intermediate appeals court improperly determined that a defendant could have been convicted of an offense that was not charged or relied on a theory that was not presented at trial. *See Bennitt*, 74 M.J. at 127–128; *Miller*, 67 M.J. at 388–89.

Finally, Bahlul raises a new argument based on an amendment to the MCA that was enacted after his trial, but before the briefing in his first appeal to the CMCR was complete. That amended provision prohibits any evidence "obtained by the use of torture or by cruel, inhuman, or degrading treatment" from being admitted in trials by a military commission. 10 U.S.C. § 948r(a) (emphasis added); see also Military Commissions Act of 2009, Pub. L. No. 111-84, 123 Stat. 2190, 2580 (2009). Under the amended provision

> [a] statement of the accused may be admitted in evidence in a military commission under this chapter only if the military judge finds (1) that the totality of the circumstances renders the

> statement reliable and possessing sufficient probative value; and (2) that (A) the statement was made incident to lawful conduct during military operations at the point of capture or during closely related active combat engagement, and the interests of justice would best be served by admission of the statement into evidence; or (B) the statement was voluntarily given.

Id. § 948r(c) (cleaned up). Those requirements are stricter than the rules that were in place at the time of Bahlul's trial. *See id*. § 948r (2006). Bahlul claims that most of the trial evidence against him was drawn from his custodial statements, and that such evidence was improperly admitted because the military judge did not make the findings that the amended provision requires. Thus, Bahlul argues, we should order resentencing by the military commission to ensure that his sentence is not based on evidence procured by torture.

The government responds that Bahlul cannot raise this argument because he has not previously objected to the introduction of the evidence that allegedly was unlawfully obtained — either at trial or at any time before this most recent remand. Gov't's Br. 26–30. We agree. "[W]here an argument could have been raised on an initial appeal, it is inappropriate to consider that argument on a second appeal following remand," absent exceptional circumstances like a change in law between appeals. *United States v. Henry*, 472 F.3d 910, 913 (D.C. Cir.

2007) (quoting *Nw. Ind. Tel. Co. v. FCC*, 872 F.2d 465, 470 (D.C. Cir. 1989)); *accord United States v. Brice*, 748 F.3d 1288, 1289 (D.C. Cir. 2014). Bahlul could have raised the change in law, or other similar objections, in his initial appeal to the CMCR or during the extensive proceedings since then. He did not. On the most recent remand to the CMCR, he questioned the admissibility of the statements in his opening brief but did not argue that § 948r barred their admission until his reply. *See* Appellant Br. 7, 44 n.4, *United States v. Bahlul*, No. 20-002 (USCMCR Dec. 20, 2021); Appellant Reply Br. 4, *United States v. Bahlul*, No. 20-002 (USCMCR Jan. 26, 2022). And previously, he noted that much of the trial evidence was based on his custodial statements but also did not cite § 948r or argue that the military commission should not have considered those statements. *See*, e.g., Appellant Br. 7–8, *United States v. Bahlul*, No. 16-002 (USCMCR Jan. 2, 2017). Accordingly, his arguments on this point are forfeited.

* * *

For the foregoing reasons, we affirm the CMCR's decision. We decline to revisit our prior ruling that the convening authority is an inferior officer because the intervening Supreme Court case cited by Bahlul does not clearly dictate a departure from our circuit's precedent. Finding no error or abuse of discretion in Bahlul's resentencing, we also uphold his sentence of life imprisonment.

So ordered.

UNITED STATES COURT OF MILITARY COMMISSION REVIEW

BEFORE THE COURT SILLIMAN, DEPUTY CHIEF JUDGE, AND POLLARD, POSCH, KEY, AND STEPHENS, APPELLATE JUDGES.[1]

ALI HAMZA AHMAD SULIMAN AL BAHLUL,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

CMCR 21-003

May 17, 2022

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

On briefs for appellant were *Major Todd Pierce*, JA, U.S. Army (Ret.), Senior Fellow, University of Minnesota Human Rights Center, *Michel Paradis*,

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[1] Judges Lewis and Schenck have recused themselves from participation in this case.

Lieutenant Commander Aaron Shepard, JAGC, U.S. Navy, and *Alexandra Link*.

On brief for appellee were *Michael J. O'Sullivan* and *Colonel George C. Kraehe*, JA, U.S. Army.

PUBLISHED EN BANC OPINION OF THE COURT

Opinion filed by POSCH, JUDGE. Opinion for the court

POSCH, JUDGE:

The case of appellant, Ali Hamza Ahmad Suliman Al Bahlul, is before the court on remand from the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit). *Al Bahlul v. United States* (*Al Bahlul IV*), 967 F.3d 858, 863, 877 (D.C. Cir. 2020), *cert. denied*, 142 S. Ct. 621 (2021); *Al Bahlul v. United States* (*Al Bahlul I*), 767 F.3d 1, 31 (D.C. Cir. 2014) (en banc). The D.C. Circuit returned the case for this court to reevaluate appellant's life sentence under the correct standard of review, specifically, to determine whether "the constitutional errors [in his case] were harmless beyond a reasonable doubt." *Al Bahlul IV*, 967 F.3d at 867; *see Al Bahlul I*, 767 F.3d at 31.

On remand, appellant first asserts that the military commission lacked jurisdiction because the convening authority was not a principal officer, as

required by the Constitution's Appointments Clause, given that some convening authority decisions are not reviewable in the Executive Branch. Appellant's Br. 16–27 (Dec. 20, 2021) (discussing *United States v. Arthrex, Inc.*, 141 S. Ct. 1970 (2021)); Appellant's Reply Br. 5–15 (Jan. 26, 2022) (discussing same). Second, appellant argues there is no basis to conclude that the impact from his two unconstitutional convictions on his reassessed sentence was harmless beyond a reasonable doubt. Appellant's Br. 37–45, 49; Appellant's Reply Br. 19–26 (discussing *United States v. Ghailani*, 733 F.3d 29 (2d Cir. 2013), *cert. denied*, 572 U.S. 1010 (2014), a case raised in appellee's brief). In addition, appellant urges the court to evaluate his sentence by comparison to other cases in which sentences less than confinement for life were imposed. Appellant's Br. 46–49; Appellant's Reply Br. 21–22. Appellant further urges the court to find that his sentence was "*unlawfully increased by prison officials*," Appellant's Br. 28 (quoting *United States v. Guinn*, 81 M.J. 195, 200 (C.A.A.F. 2021)); Appellant's Reply Br. 3, 15–16 (quoting same), because (i) he was placed in solitary confinement, Appellant's Br. 2–4, 28–33, 35–36, Appellant's Reply Br. 3, 15–18, and (ii) he is not eligible for parole, Appellant's Br. 3–4, 33–37; Appellant's Reply Br. 3, 15–16. As a remedy, appellant urges the court to (i) vacate his remaining conspiracy conviction, or alternatively (ii) "vacate or [] disapprove the remainder of the custodial portion of [his] sentence as incorrect in law and fact," or "at a minimum" (iii)

remand his case to the commission for resentencing. Appellant's Br. 50; Appellant's Reply Br. 26.

In this decision, the court evaluates whether the constitutional errors at trial might have contributed to the adjudged sentence or were harmless beyond a reasonable doubt. The court also considers the other issues raised by appellant, and concludes by evaluating the appropriateness of the sentence.

I. Appellate history

The members of appellant's commission found him guilty of "conspiracy to commit war crimes, providing material support for terrorism and solicitation of others to commit war crimes." *Al Bahlul I*, 767 F.3d at 5; *see* Tr. 916–17. They sentenced appellant to confinement for life. Tr. 992.

The D.C. Circuit, en banc, vacated appellant's "convictions of providing material support for terrorism and solicitation of others to commit war crimes." *Al Bahlul I*, 767 F.3d at 31. It rejected appellant's "*ex post facto* challenge to his conspiracy conviction,"[2] which involved murder of protected

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[2] Appellant's conviction for conspiracy to commit war crimes is based on § 950v(b)(28) of the 2006 Military Commissions Act (2006 MCA), Pub. L. No. 109-366, 120 Stat. 2600 (current version at 10 U.S.C. § 950t(29)). *Al Bahlul v. United States* (*Al Bahlul III*),
840 F.3d 757, 775 (D.C. Cir. 2016) (en banc) (per curiam) (Millett, J., concurring); *see United States v. Al Bahlul* (*Al Bahlul I*), 767 F.3d 1, 12 (D.C. Cir. 2014) (en banc) (explaining how 2006

persons, murder in violation of the law of war, and attacking civilians, in violation of 10 U.S.C. § 950v(b)(28) (2006). *Id.* at 5; *see id.* at 31. The Court remanded appellant's case to the original D.C. Circuit panel that heard it to consider the challenges to the conspiracy conviction that had not yet been considered. *Id.* at 31. *Al Bahlul I* also ordered that after consideration by the original D.C. panel, appellant's case be remanded "to the CMCR to determine the effect, if any, of the two vacaturs on sentencing." *Id.* That original panel vacated the conspiracy conviction because of a perceived Article III structural Separation of Powers objection that could not be forfeited below. *Al Bahlul v. United States* (*Al Bahlul II*), 792 F.3d 1, 3, 22 (D.C. Cir. 2015). The D.C. Circuit, again sitting en banc, disagreed with that panel and affirmed this court's judgment upholding appellant's conspiracy

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MCA confers jurisdiction over appellant's offenses). Title 10, section 950v(b)(28) of the United States Code (2006), states:

> Any person subject to this chapter who conspires to commit one or more substantive offenses triable by military commission under this chapter, and who knowingly does any overt act to effect the object of the conspiracy, shall be punished, if death results to one or more of the victims, by death or such other punishment as a military commission under this chapter may direct, and, if death does not result to any of the victims, by such punishment, other than death, as a military commission under this chapter may direct.

conviction.[3] *Al Bahlul v. United States* (*Al Bahlul III*), 840 F.3d 757, 759 (D.C. Cir. 2016) (en banc) (per curiam). Appellant's case was returned to this court for sentence reassessment. *Bahlul I*, 767 F.3d at 31; *see Al Bahlul v. United States*, 374 F. Supp. 3d 1250, 1255 (CMCR 2019) (en banc) (explaining remand history).

This court reassessed and affirmed the sentence of confinement for life. *Al Bahlul*, 374 F. Supp. 3d 1250. Thereafter, appellant again sought dismissal of his conspiracy conviction, raising "six discrete arguments." *Al Bahlul IV*, 967 F.3d at 865. The D.C. Circuit affirmed the conspiracy conviction but agreed with appellant that this court erred in its sentence reassessment by applying the wrong standard of review. *Id.* at 865, 867. The Court remanded the case to this court to apply the "same harmless error standard that is uniformly applied in other criminal contexts in cases involving constitutional errors." *Id.* at 867; *see Al Bahlul I*, 767 F.3d at 31. It rejected appellant's remaining arguments, dismissing for lack of jurisdiction the "challenges to the conditions of his ongoing confinement." *Al Bahlul IV*, 967 F.3d at 877.

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[3] Four of the six-judge majority concluded that "Congress may make conspiracy to commit war crimes an offense triable by military commission" under Articles I and III of the Constitution while the other two judges stated they would not reach this question. *Al Bahlul Al Bahlul III*, 840 F.3d. at 758. The three dissenting judges concluded that Article III barred Congress from conferring jurisdiction to military commissions over such conduct. *Id.*

II. Appointments Clause challenge of convening authority

The D.C. Circuit denied appellant's Appointments Clause, U.S. Const. art. II, § 2, cl. 2, challenge to the Secretary of Defense's appointment of the Convening Authority, Susan Crawford. *Id.* at 870. The Court explained that "[b]ecause other executive officers directed and supervised the Convening Authority's work, . . . Crawford was an inferior officer and was therefore properly appointed by the Secretary." *Id.* The Court applied the three-factor test in *Edmond v. United States*, 520 U.S. 651 (1997), stating:

> Each of the three factors identified by *Edmond* and our subsequent cases indicates that the Convening Authority is an inferior officer. The Convening Authority's decisions are not final and are subject to review by the CMCR; the Secretary maintains additional oversight by promulgating rules and procedures; and the Convening Authority is removable at will by the Secretary.

Id. at 871. *Al Bahlul IV* concluded, "Here the factors identified by the Supreme Court in *Edmond* establish that the Convening Authority is an inferior officer. As an inferior officer, Crawford's appointment by the Secretary was perfectly consistent with the Appointments Clause." *Id.* at 873. The Court

acknowledged that some convening authority decisions are final, such as "the power to modify charges, overturn a verdict, or commute a sentence, all of which are effectively unreviewable." *Id*. at 872. Yet, "all constitutional officers 'exercis[e] significant authority on behalf of the United States,'" *id*. (alteration in original) (quoting *Edmond*, 520 U.S. at 662), and "the bulk of the Convening Authority decisions" are reviewable in this court, *id*. at 871 (citing 10 U.S.C. § 950f (2006)).

Moreover, the Secretary of Defense, who is the convening authority's supervisor, is a superior convening authority and can withhold cases from the convening authority and handle them himself. *See* Rule for Military Commission (R.M.C.) 601(b), Manual for Military Commissions, United States (2007 ed.) ("The Secretary of Defense or a designated convening authority may refer charges to a military commission."); R.M.C. 601(f) (2007 ed.) ("The Secretary of Defense may cause charges, whether or not referred, to be transmitted to him for further consideration, including, if appropriate, referral."), *quoted in Al Bahlul IV*, 967 F.3d at 872; R.M.C. 604(a) Discussion (2007 ed.) ("Charges . . . may be withdrawn only by the direction of the convening authority or a superior competent authority . . . . When directed to do so by [the] convening authority or a superior competent authority, trial counsel may withdraw charges or specifications . . . .").

Convening authority referral decisions also may be reviewable by this court depending on the

facts and circumstances. *See, e.g.*, *Vanover v. Clark*, 27 M.J. 345, 347–48 (C.M.A. 1988) (stating extraordinary relief warranted where convening authority's withdrawal of charge, and re-referral of same charge plus two more, effectively overturned first judge's evidentiary ruling against government); *United States v. Lawrence*, No. 20011164, 2005 CCA LEXIS 632, at *4 (Army Ct. Crim. App. Feb. 15, 2005) (unpublished) (regarding soldier assigned to rear unit, stating court-martial may try an accused not under command of convening authority unless jurisdiction "withheld or limited by a superior convening authority"); *United States v. Squadere*, No. S28522, 1991 CMR LEXIS 1314, at *5 (A.F.C.M.R. Oct. 10, 1991) (stating if guilty plea reneged, "prosecution could have withdrawn the charge and had it referred to the superior convening authority for appropriate action"); *see United States v. Jones*, 15 M.J. 890, 891–92 (A.C.M.R. 1983) (per curiam) (regarding "procedural irregularity in forwarding charges," stating "superior commander may overrule a subordinate commander's decision to dismiss, and may prefer or cause to be preferred new charges in place of those dismissed"). The Secretary of Defense may limit the convening authority's discretion in pretrial agreements. R.M.C. 705(a) (2007 ed.); *United States v. Allen*, 31 M.J. 572, 594–95 (N.M.C.M.R. 1990) (en banc), *aff'd*, 33 M.J. 209 (C.M.A. 1991).

Further, in the area of post-trial clemency, we see no reason why the authority of the Secretary of Defense or the President to grant additional clemency is limited by anything the convening authority does

or fails to do. "The Secretary of the Defense, or the convening authority acting on the case (if other than the Secretary), may suspend the execution of any sentence or part thereof in the case, except a sentence of death." 10 U.S.C. § 950i(d) (2006); *Harbison v. Bell*, 556 U.S. 180, 187 (2009) ("[T]he President has the power to grant clemency for offenses under federal law." (quoting U.S. Const. art. II, § 2, cl. 1)).

In *Arthrex*, the Supreme Court held that the power of Administrative Patent Judges to issue final decisions adjudicating patent disputes on behalf of the United States—without being subject to review by a principal officer within the Executive Branch—conflicted with the Appointments Clause. 141 S. Ct. at 1981–82 (citing *Edmond*, 520 U.S. at 663, 665). The Court held that when a nonprincipal renders such a decision, the Court must determine whether that decision is subject to review by a principal officer in the Executive Branch. *See id.* In so holding, it explicitly reaffirmed *Edmond*'s applicability to Appointments Clause issues. *Id.* at 1988. Appellant contends that *Arthrex* is "an 'intervening change of controlling law'"[4] that raises questions about the continuing validity of D.C. Circuit precedent in Appointments Clause cases. Appellant's Br. 18 (quoting *Alliance for Cannabis Therapeutics v. DEA*,

[4] The Supreme Court decided *United States v. Arthrex*, 141 S. Ct. 1970, on June 21, 2021, after the D.C. Circuit had issued its most recent order in this case, *Al Bahlul v. United States*, No. 19-1076, 2021 U.S. App. LEXIS 1733 (D.C. Cir. Jan. 21, 2021) (en banc) (per curiam).

15 F.3d 1131, 1134 (D.C. Cir. 1994)); *see also* Appellant's Reply Br. 2.

Significantly, the Supreme Court limited the scope of *Arthrex*. It said in determining whether an officer is a principal or inferior, *Arthrex* did "not address [the need for Executive Department] supervision outside the context of adjudication." 141 S. Ct. at 1986. Accordingly, some degree of adjudicatory power in the convening authority is relevant to the court's inquiry into whether or not we must assess the convening authority's role under *Arthrex*. This is so because adjudicatory power over public rights can be evidence of the "exercis[e] [of] significant authority pursuant to the laws of the United States." *Id.* at 1980 (first alteration in original) (quoting *Buckley v. Valeo*, 424 U.S. 1, 126 & n.162 (1976) (per curiam)). One who exercises "significant authority" must be appointed under the Appointments Clause. *Buckley*, 424 U.S. at 126. Here, we assume arguendo that the convening authority has sufficient adjudicatory authority to necessitate under *Arthrex* an assessment of the convening authority's role in appellant's case.[5]

We first note that our superior court already has rejected appellant's convening authority

[5] Appellant in his brief marshalled the powers of a convening authority. Appellant's Br. 19–20. These powers are principally focused on the initiation of criminal charges and the administrative management of the adjudication of those charges. Virtually all are (i) reviewable within the Executive Department, (ii) ministerial, or (iii) both. *See id.*

argument. *See Al Bahlul IV*, 967 F.3d at 870. But even if it had not, we need not decide whether *Arthrex* is an intervening change of controlling law permitting a fresh look at appellant's argument. *See* Appellant's Br. 18. Nonetheless, assuming the court may look anew at appellant's argument, we find it has no merit.

We do not have to determine whether *Arthrex* applies here because the nature of the appointment in *Arthrex* is easily distinguishable from the convening authority's appointment in appellant's case. In *Arthrex*, the Secretary of Commerce appointed administrative judges to the Patent Trial and Appeal Board (PTAB). 141 S. Ct. at 1977. No Executive Branch entity or officer had authority to "direct[] and supervise[]" decisions by the Administrative Patent Judges. *Id*. at 1980 (quoting *Edmond*, 520 U.S. at 665). The Supreme Court concluded this structure and exercise of power violated the Appointments Clause, thereby diminishing "political accountability." *Id.* at 1982 (quoting *Edmond*, 520 U.S. at 663). The Court concluded that 35 U.S.C. § 6(c), providing that only the PTAB may grant rehearings of panel decisions, "is unenforceable as applied to the Director insofar as it prevents the Director from reviewing the decisions of the PTAB on his own." *Id.* at 1987. In contrast, here, the Secretary of Defense and the President, both of the Executive Branch, have authority to review substantially all convening authority decisions. *See* discussion *supra*. This court also has significant authority to review many such decisions and actions on direct appeal or through a writ of mandamus when appropriate.

"[W]e do not attempt to 'set forth an exclusive criterion for distinguishing between principal and inferior officers for Appointments Clause purposes.'" *Id*. at 1985 (quoting *Edmond*, 520 U.S. at 661). Even so, the *Edmond* factors clearly dictate that a convening authority is an inferior officer, subject to dismissal by the Secretary at will. "The power to remove officers . . . is a powerful tool for control." *Edmond*, 520 U.S. at 664.

More to the point, appellant does not point to any particular decision made in his case over which higher-level Executive Branch authorities lacked authority to supervise or change. Appellant's argument that *Arthrex* (i) changes the legal landscape for assessing the applicability of the Constitution's Appointments Clause and (ii) undercuts the D.C. Circuit's resolution of this issue is without merit.

III. Sentence reassessment

Appellant contends that the vacatur of Charges II (solicitation of others to commit war crimes) and III (providing material support for terrorism) cast reasonable doubt on the legality of his sentence of confinement for life for the sole remaining charge of conspiracy "to commit one or more substantive offenses triable by military commission, to wit: Murder of Protected Persons[,] Attacking Civilians[,] Attacking Civilian Objects, Murder in Violation of the Law of War, Destruction of Property in Violation of the Law of War, Terrorism, and Providing Material Support for Terrorism." Appellee's App. 4 (Jan. 19,

2022) (amended Charge Sheet); Tr. 109–13, 122; *see* Appellant's Br. 37–45, 49; Appellant's Reply Br. 19–26; 10 U.S.C. § 950v(b)(28) (2006). The statutory punishment for this offense, "if death results to one or more of the victims, [is] death or such other punishment as a military commission under this chapter may direct, and, if death does not result to any of the victims, [is] such punishment, other than death, as a military commission under this chapter may direct." 10 U.S.C. § 950v(b)(28) (2006). In this instance, the convening authority referred the charges to a non-capital military commission, Appellee's App. 5, and the maximum punishment was confinement for life.

A. Background

Appellant is a native of Yemen. Tr. 477. He studied oil production and interned at an oil company in Iraq from about 1993 to 1995; he then returned to Yemen but was unable to find employment in his field. Tr.

505;[6] Pros. Ex. (PE) 5 at 2.[7] Appellant sought out an al Qaeda facilitator in about 1999, who assisted him with transportation to Afghanistan. Tr. 506–07; PE 5 at 3.

Prior to traveling to Afghanistan, and before and during his al Qaeda membership, appellant was well aware of Usama bin Laden's 1996 jihad (holy war) declaration and 1998 fatwa (religious edict). Tr. 511; PE 5 at 4; *see* Tr. 543, 545. He supported those objectives. PE 5 at 4; *see* Tr. 511. In February 1998, bin Laden

signed a joint fatwah requiring all Muslims able to do so to kill Americans–whether civilian or military–anywhere they can be found and to "plunder their

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[6] Citation to transcript pages 485 through 577 consists of testimony from a native Arabic- speaking FBI Special Agent, Tr. 486, referred to herein as "FBI SA" as opposed to "an FBI agent." FBI SA's resume included a master's degree in international relations. *Id.* He joined the FBI in 1997 and was assigned to the Joint Terrorism Task Force, working on the USS *Cole* bombing, 9/11 attacks, and East African embassy bombings. Tr. 485–86. As lead interviewer of appellant, FBI SA watched and discussed the USS *Cole* video with appellant. Tr. 534, 537; *see* Tr. 584. He gave testimony, inter alia, on all three video segments (PEs 31E, 31F, 31G), *see* Tr. 537–50, and on appellant's journal as public relations secretary, which included his daily entries from January through December of 2000, *see* Tr. 515–34; PE 33A at 33–326.

[7] Appellant was interviewed nine times while in United States custody, beginning in July 2002. Prosecution Exhibits (PEs) 5–13. Some of these interviews identify appellant solely by his aliases, *e.g.*, Ali Hamza Ismail and/or Ali Hamza Ahmed Suliman. PEs 7–12; *see* Tr. 645.

money." On May 29, 1998, Usama Bin Laden issued a second declaration entitled "The Nuclear Bomb of Islam," under the banner of his new "World Islamic Front," in which he stated that "it is the duty of the Muslims to prepare as much force as possible to terrorize the enemies of God." PE 14A at 7 (citations omitted).[8] Al Qaeda cells bombed the U.S. embassies in Nairobi, Kenya, and Dar-es-Salaam, Tanzania, on August 7, 1998. *Id*. The embassy bombings killed 257 people, including 12 Americans. *Id.*; PE 2 at 2; *see* Tr. 502, 795.

Appellant received "military training," Tr. 507, in 1999 at an al Qaeda training camp in Aynak, Afghanistan, which included both "basic and tactical" training, PE 5 at 3–4. He trained for at least two and one half months, PE 5 at 4, and perhaps as long as six months, Tr. 647; PE 7 at 2. During this time period, appellant met and discussed with Usama bin Laden "the situation in the Muslim Umma, the war, and the Jihad and the concept of Hijra migration."[9]

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[8] Prosecution Exhibit 14A consists of a writing entitled, Script: "The Al-Qaida Plan," by Evan F. Kohlmann, which cites extensively from The 9/11 Commission Report, Final Report of the National Commission on Terrorist Attacks Upon the United States (July 22, 2004) (The 9/11 Report), https://govinfo.library.unt.edu/911/hearings/index.htm (commission closed on August 21, 2004).

[9] *Umma* means "the Islamic nation or the Islamic community," Tr. 779, or "the faithful of Islam," PE 13 at 7. *Hijri*, also spelled *Hijra* and *Hijrah* in the record, is the call for migration to Afghanistan for training and sacrifice of everything for jihad. Tr. 812; *see also* Tr. 525–26, 548.

Tr. 509; *see also* PE 5 at 4. He pledged to bin Laden "bayat." Tr. 509–10, 646; PE 5 at 4. Bayat encompasses a promise to "obey [orders] at all time" and to fight "until death or victory." Tr. 509. Within the al Qaeda organization, it is "a formal agreement, a formal oath to" join al Qaeda in its war or jihad "against the American and the Jews" specifically. Tr. 510; *see* Tr. 597, 646–47; PE 5 at 4. In a 2002 interview, appellant said "his intention was to 'die a martyr' and 'to be killed in the name of the lord'." PE 7 at 2; Tr. 593 (stating similar).

As a member of al Qaeda, appellant held several roles,[10] each successive position requiring more responsibility and trust. His al Qaeda resume includes (i) work in the media office, Tr. 513–14; 591, (ii) production of the USS *Cole* propaganda video, *e.g.*, Tr. 651–52; *see* Tr. 647; PE 7 at 2, and (iii) service as bin Laden's public relations secretary until arrested, Tr. 514, 556. Bin Laden "personally appointed" appellant to al Qaeda's media office. Tr. 513; *see* PE 5 at 4; PE 13 at 2. Appellant said in an investigative interview that this office was "equipped with computers, satellite television, video equipment" and an audio and videotape library. PE 13 at 2; *see* PE 7 at 2. Bin Laden "personally gave" appellant a laptop computer for his work in the media office. PE 7 at 1. In this position, appellant collected "articles from

[10] In his opening statement, the prosecutor described appellant's main roles in al Qaeda as bin Laden's "personal secretary," Tr. 315–16, to "grow the organization," Tr. 322, and to "produce propaganda," including the video on the bombing of the USS *Cole*, Tr. 316.

different news outlets," Tr. 513, recorded foreign television news and prepared news briefs for bin Laden, PE 13 at 2, recorded bin Laden's lectures and maintained the media office's library, Tr. 513; PE 13 at 2, and conducted research for bin Laden's statements and speeches, Tr. 513, 526.

Appellant and bin Laden were in Afghanistan when the USS *Cole* was attacked off the Yemen coast on October 12, 2000. PE 5 at 5. Bin Laden took responsibility for this attack. *Id.* The bombing caused the deaths of seventeen American sailors, wounded nearly forty, and cost approximately $250 million in damage to the ship. PE 14A at 9; Tr. 797, 925. In anticipation of retaliation strikes, appellant evacuated Afghanistan with bin Laden and others, moving about for around two months to avoid detection. Tr. 514. He evacuated with an "office on the run," as appellant had loaded all his media equipment into their van so he could have access to news reports and other information. *Id.*

After the USS *Cole* bombing, bin Laden specifically asked appellant to produce a video of the attack for recruitment and requested appellant to include a recitation of a Koran verse by an al Qaeda member jailed in America. Tr. 514, 535; PE 5 at 5; PE 13 at 2. The video was named, "The Destruction of the American Destroyer USS COLE." Tr. 534; *see* Tr. 381; PE 13 at 2, 5. Appellant understood that production of this video was his "main responsibility" for bin Laden. PE 7 at 2. He used a tape of bin Laden's "Id Al-Fitr" Ramadan sermon as the "blueprint" for the

USS *Cole* video. PE 13 at 2, 5; *see* Tr. 535, 541. *See generally* Tr. 534–56 (testimony of FBI SA, *supra* note 6, describing video's purpose, production, structure, and content based on appellant's statements during interviews); PE 7 at 2 (an FBI agent summarizing video production and content based on interview of appellant). It took appellant six months to produce the video. Tr. 514, 556; *see* Tr. 535.

As relayed in the testimony of FBI SA, all of appellant's "ideas and [] beliefs" were in the video and he was "proud" of it. Tr. 534; *see* Tr. 546. The central purpose of the video was to use the USS *Cole* bombing for recruitment and propaganda. Tr. 534–35; *see* Tr. 809–15[11] (expert witness on terrorism explaining how video functions to "keep al Qaeda's message alive" and describing its "absolutely incredible impact"). FBI SA testified that the video's "core message" was, "Go to Afghanistan, join al Qaeda, [and] do martyrdom operation[s]"—that is, suicide bombings. Tr. 550; *see* Tr. 775–76. Appellant's video was translated into at least seven languages, Tr. 809; *see* Tr. 782, sent to "radical mosques and Islamic bookstores," and uploaded to the Internet, PE 14A at 9. Video segments were "recovered at Al-Qaida safehouses and in the custody of a variety of Al-Qaida suspects around the world." PE 14A at 9; *see* Tr. 810.

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[11] Citation to transcript pages 750 through 816 consists of testimony from Evan F. Kohlmann, an "expert in terrorist groups" and in "[t]heir use of the Internet, the history, organization, leadership, propaganda and tradecraft of al Qaeda, and the Arab-Afghan Movement," as recognized by the military judge presiding over appellant's commission, without defense objection. Tr. 767–68.

The expert witness on terrorism testified that the USS *Cole* video was perhaps "the most popular al Qaeda video of all time" and "it is disturbing how often it comes up, [and] it has come up in multiple federal terrorism trials." Tr. 810. The USS *Cole* video was evidence of the acts appellant committed to produce propaganda for al Qaeda. *See* PE 31.

The opening of his recruitment video "celebrat[ed]" al Qaeda's attack on the USS *Cole*. *Al Bahlul I*, 767 F.3d at 5; *see* Tr. 317. FBI SA testified that appellant "considered it one of the best propaganda video[s]" al Qaeda had produced. Tr. 534; *see* PE 13 at 2. The commanding officer of the USS *Cole* when it was attacked described the video as a "very powerful recruiting tool" for al Qaeda. Tr. 926. The father of a sailor who was killed in the bombing described appellant's video as very damaging to the morale of the families of those injured or killed. Tr. 933–34. Appellant hoped it would result in additional recruits for jihad in Afghanistan. PE 13 at 2.

After completion of the USS *Cole* video, bin Laden appointed appellant as his personal secretary for public relations. Tr. 514, 556; PE 5 at 6. In this position, appellant attended several important meetings, the minutes of which he recorded in a leather-bound journal. PE 33A (journal); Tr. 315–16 (prosecutor describing purpose of journal); Tr. 890–91 (same); *see* Tr. 355–56, 361. For example, he attended a meeting with bin Laden and approximately twenty-five "high-level [al Qaeda] operatives" in the month prior to the USS *Cole* bombing, Tr. 516–18, and an al

Qaeda "leadership" meeting around the same time with Abu Hafs, al Qaeda's number two person and head of its military committee at that time, as relayed by FBI SA, Tr. 524–25; *see* Tr. 508. In the Abu Hafs meeting, appellant "spoke about media and [its] shortcomings." Tr. 525. In general, however, meeting participants discussed objectives and plans for future al Qaeda operations and the future of al Qaeda. These topics included recruitment and expansion, theological differences and internal hostilities within al Qaeda, and potential retaliatory strikes from the upcoming planned attack on the USS *Cole*.[12] *See* Tr. 516–25; PE 33A.

As public relations secretary, appellant also analyzed questions raised by recruits during bin Laden's visits to training camps to determine their primary concerns, Tr. 526–33, essentially conducting "[f]ocus group[]" research, Tr. 529–30. Appellant "edited media research for [bin Laden]," made statements, and produced a total of six to eight video tapes for dissemination by al Qaeda's security people. Tr. 514–15; PE 13 at 2. He also formatted
bin Laden's chosen Koran verses and his writings into a word processing format, which bin Laden used for speeches, and he utilized his technical ability to acquire satellite signals for television news of interest

[12] Appellant also referenced in his journal (PE 33A) a letter by bin Laden in which bin Laden offered encouragement to appellant with respect to a personal family matter. Tr. 523–24. In an interview, appellant said he attended the wedding of the son of bin Laden and the daughter of Abu Hafs. PE5 at 6.

to bin Laden. Tr. 648–49; *see also* Tr. 526. Appellant noted reconnaissance activity in his journal, as well, including an American "spy plane," an unmanned aerial vehicle or drone, flying over an al Qaeda compound at Tarnak Farms, Afghanistan, on September 29, 2000.[13] Tr. 516; *see* Tr. 298, 413–18. He observed this activity on a morning and noontime walk with Abu Hafs. Tr. 516; *see* Tr. 418. At the time, in September 2000, Tarnak Farms was the location where bin Laden and senior al Qaeda leaders met for speeches, press conferences, and meetings and where promising recruits were groomed "under the direct eyes of senior al Qaeda leadership . . . for martyrdom operations," especially against America. Tr. 791–92; *see* Tr. 415.

In about July to August 2001, appellant, bin Laden, and other al Qaeda members went on the run for about four months through September 11, 2001, and leading up to the Ramadan timeframe in November 2001. Tr. 648, 650; PE 7 at 1–2; *see, e.g.*, PE 13 at 3. Like he did after the USS *Cole* bombing, Tr. 514, appellant loaded the media van with all the equipment he needed for his "office on the run," Tr. 563, and he and bin Laden moved every few days for operational security, Tr. 648, 650. A few days before the 9/11 attacks, appellant evacuated Qandahar, Afghanistan, with bin Laden and other al Qaeda members. Tr. 562; PE 5 at 6.

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[13] The government argued in its opening that the date of the "spy plane" or drone sighting was September 28, 2000. Tr. 316, 324. The difference in the observation dates resulted from the Gregorian and the Hijri or Islamic dating methods. Tr. 417.

Appellant was aware that an "operation" was imminent but had no details until after the operation (the 9/11 attacks) had occurred. PE 5 at 6; *see infra* note 15.

On September 11, 2001, al Qaeda terrorists hijacked commercial airplanes and attacked both World Trade Center Towers in New York City and the Pentagon in Arlington, Virginia. PE 14A at 10–11; *see Hamdan v. Rumsfeld*, 548 U.S. 557, 567–68 (2006).[14] On the same day, al Qaeda terrorists also hijacked a fourth commercial airplane, Flight 93, that crashed into a field near Shanksville, Pennsylvania, when "passengers attempted to retake control of the airplane" to prevent the hijackers from reaching their apparent target, the U.S. Capital building in Washington, D.C. *United States v. Moussaoui*, 591 F.3d 263, 266 (4th Cir. 2010); *see* PE 14A at 11. Thousands of people were killed in the 9/11 attacks. Tr. 799; *see Moussaoui*, 591 F.3d at 266 ("Collectively, the 9/11 attacks resulted in the deaths of nearly 3,000 people."). The fatalities included civilians and U.S.

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[14] The court takes judicial notice of facts about the impact and scope of the 9/11 attacks consistent with Federal Rule of Evidence 201(b)(2), which allows a court to "judicially notice a fact that is not subject to reasonable dispute because it . . . can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Several chapters from The 9/11 Report containing additional facts about the attacks on September 11, 2001, are included in the record as well. Encl. 37 to Memorandum from Trial Counsel to Convening Authority, Transmittal of Charges (Feb. 11, 2008), RoT Vol. 2 at 9; *see also* PE 14A at 2 nn.6–10, 3 nn.11–12 & 14, 5 n.22, 6 nn.23–24, 7 nn.27 & 30–31, 8 n.36, 9 nn.38–40, 10 n.45, 11 nn.46–49 (citing The 9/11 Report).

military servicemembers. *See* App. Ex. 14A at 10–11. "The attacks of September 11, 2001 constituted the deadliest attack on American soil since the bombing of Pearl Harbor on December 7, 1941." *Gallop v. Cheney*, 642 F.3d 364, 366–67 (2d Cir. 2011).

On September 11, 2001, bin Laden asked appellant to set up satellite reception. Tr. 562, 649; PE 5 at 6–7; *see* PE 9 at 2; PE 13 at 3. Appellant told a Naval Criminal Investigative Service (NCIS) agent during an interview about bin Laden's remark on this day, "It is very important to see the news today." PE 13 at 3; Tr. 562 (FBI SA testifying similarly); *see* Tr. 649. After 9/11 "when they were on the run," Tr. 573, at bin Laden's request, appellant researched and provided information to bin Laden about the economic effects of the attacks, Tr. 559–60, 591; PE 13 at 6. Bin Laden used the economic research for an interview. Tr. 526; PE 13 at 3. Appellant later fled to Pakistan, where he was captured and turned over to United States authorities. PE 5 at 7. He has been in the custody of the United States since December 22, 2001. Tr. 950; *see also* Appellant's App. 132a (Dec. 20, 2021).

While appellant did not have prior knowledge of al Qaeda's attacks on the United States on September 11, 2001, PE 5 at 6; PE 9 at 2, he nonetheless played a role. He assisted with the loyalty oaths to bin Laden and the preparation of "martyr wills" for (i) Muhammed Atta, a/k/a Abu Abdul Rahman al Masri, who hijacked one of the planes that crashed into one of the World Trade Center Towers, and (ii) Ziad al Jarrah, who hijacked Flight 93, which

crashed in Pennsylvania. Tr. 552, 555; PE 14A at 10–11. Even though he helped prepare Atta's and al Jarrah's martyr wills, an NCIS agent who interviewed appellant testified that appellant said he did not realize what mission Atta and al Jarrah had.[15]

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[15] In its 2014 opinion, the D.C. Circuit noted that "Bahlul claims he sought to participate in the 9/11 attacks himself but bin Laden refused." *Al Bahlul I*, 767 F.3d 1, 6. In 2016, the Court said, "Bahlul volunteered to participate in the 9/11 attacks himself, but bin Laden thought [given his computer skills] he was too important to lose." *Al Bahlul III*, 840 F.3d at 776. To the extent these statements indicate that appellant had prior knowledge of the 9/11 attacks, appellant's statements made close in time to the attacks show this is not so. According to appellant's statements in an October 2002 interview, "no one but UBL [Usama bin Laden] and ABU HAFS [Al-Masri a/k/a Muhammad Atef, bin Laden's deputy,] had prior knowledge of the events" on September 11, 2001. PE 9 at 2; *see* PE 6 at 1; PE 13 at 3; Tr. 593. Appellant's boast before members during the 2008 sentencing hearing that he "was number 20, but bin Laden refused," Tr. 979, more likely was mere embellishment. The record shows his unsworn statement to be an expression of a long-existing, aching desire to be counted as one of the 9/11 hijackers. *See, e.g.*, PE 10 at 3 (appellant stating in an FBI interview in about December 2002 that "he wished he had been on one of the airplanes that hit the World Trade Center"); PE 15 at 5 (letter by appellant dated September 20, 2005, relaying "envy [of hijacker] for the direct role [he] had in the 9/11 events"); Tr. 552 (FBI SA testifying about same contents in appellant's letter). In other words, to inflate his personal narrative of his role in the 9/11 plot, appellant may have transformed his actual request to bin Laden to be a martyr in general, *e.g.*, PE 7 at 2 (indicating desire to "'die a martyr'"); Tr. 593 (Naval Criminal Investigative Service agent testifying to same effect), into a request to be a 9/11 hijacker specifically. Given, however, that he helped prepare martyr wills for Muhammed Atta and Ziad al Jarrah, we are confident appellant suspected that al Qaeda was planning to launch a suicide attack against the United States,

Tr. 593. Appellant, Atta, and al Jarrah were roommates when appellant lived in Qandahar, Afghanistan, in January 1999. Tr. 555; PE 6 at 4.

Trial evidence explained the significance of martyr wills to al Qaeda's ideology and the facilitation of its terrorist operations.

> [Martyr wills] are declarations that a suicide operative reads into a camera, describing in general terms the terrorist act he is yet to carry out. Trial Tr. 554. The point of the videotaped message is to motivate the operative, incite others to follow his example, spread fear among al-Qaeda's enemies, and allow the organization to later prove its responsibility for the terrorist act. *Id*. at 554, 798–99, 808.

Al Bahlul III, 840 F.3d at 802 (Wilkins, J., concurring). The martyr wills of Atta and al Jarrah document their and al Qaeda's role in the carnage of the September 11, 2001, attacks. *See* Tr. 554. Appellant wrote in a letter to Ramzi Bin al Shibh, alleged to be one of the main 9/11 coordinators, "I praise Almighty Allah for allowing me to have [the] simple and indirect role" in 9/11 of preparing martyr wills and facilitating fealty pledges

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its allies, or their common interests, which had the possibility of resulting in the death of people.

for two of the hijackers. PE 15 at 5;[16] Tr. 552, 555. Al Qaeda distributed Atta and al Jarrah's martyr wills within weeks of the 9/11 attacks as part of its propaganda and recruitment program. PE 14A at 11; *see* PE 5 at 5.

At trial appellant did not contest the charges. He

> pleaded not guilty to the charged offenses because he denied the legitimacy of the military commission and sought to absent himself from the proceedings as a boycott. He objected to representation by appointed defense counsel and expressed a desire to proceed *pro se* . . . . Bahlul waived all pretrial motions, asked no questions during voir dire, made no objections to prosecution evidence, presented no defense and declined to make opening and closing arguments.

Al Bahlul I, 767 F.3d at 7.

The jury members of appellant's commission found appellant guilty of the following offense, Tr. 916, as amended at trial upon motion by trial counsel, Tr. 109–113, 122.

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[16] The letter admitted into evidence as PE 15 consists of two parts. Prosecution Exhibit 15A is the original letter in Arabic and PE 15B, discussed in the transcript, is the English translation. Tr. 453.

> In that [appellant], a person subject to trial by military commission as an alien unlawful enemy combatant, did, in the context of and associated with an armed conflict, at various locations in Afghanistan and elsewhere, from in or about February 1999 through in or about December 2001, conspire and agree with Usama bin Laden, Saif al 'Adl,[17] and other members and associates of al Qaeda, known and unknown, to commit one or more substantive offenses triable by military commission . . . .[18]

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[17] Investigative agents who interviewed appellant testified that Saif al 'Adl, at the time, was the number three person in al Qaeda, Tr. 647, and head of the organization's security committee, Tr. 508. As relayed by FBI SA, *supra* note 6, Al 'Adl was "[v]ery influential, very close to Usama bin Laden," Tr. 508, and he introduced appellant to bin Laden in 1999, Tr. 508, 647.

[18] This first part of the conspiracy specification read as follows before trial counsel's amendment, the stricken text indicated by the line-through.

> In that [appellant], a person subject to trial by military commission as an alien unlawful enemy combatant, did, in the context of and associated with an armed conflict, at various locations in Afghanistan and elsewhere, from in or about February 1999 through in or about December 2001, ~~join al Qaeda, an enterprise of persons who shared a common criminal purpose, that involved, at least in part, the commission or intended commission of one or more substantive offenses triable by military commission, and did~~ conspire and agree with Usama bin Laden, Saif al 'Adl, and other members and associates of al

App. Ex. 74 (findings worksheet); *see* Appellee's App. 4.

Seven substantive offenses were included in the conspiracy specification, as follows:

> 1. Murder of Protected Persons;
> 2. Attacking Civilians;
> 3. Attacking Civilian Objects;
> 4. Murder in Violation of the Law of War;
> 5. Destruction of Property in Violation of the Law of War;
> 6. Terrorism; and
> 7. Providing Material Support for Terrorism.

Appellee's App. 4. The amended specification alleged that these seven offenses were committed "with knowledge of the unlawful purposes of the agreement" and that appellant "willfully entered into the agreement with the intent to further those unlawful purposes, and knowingly committed [eleven] overt acts in order to accomplish some objective or purpose of the agreement." Appellee's App. 4, 6; Tr. 109–113, 122.[19] The eleven alleged overt acts were that appellant

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> Qaeda, known and unknown, to commit one or more substantive offenses triable by military commission . . . .

Appellee's App. 4 (Jan. 19, 2022) (amended Charge Sheet); Tr. 109–10, 122; *see Al Bahlul I*, 767 F.3d at 20 n.12 (noting appellant convicted of stand-alone conspiracy offense).

[19] This part of the conspiracy specification read as follows before trial counsel's amendment, the stricken segments indicated by

a. traveled to Afghanistan with the purpose and intent of joining al Qaeda;

b. met with Saif al-Adl, the head of the al Qaeda Security Committee, as a step toward joining the al Qaeda organization;

c. underwent military-type training at an al Qaeda sponsored training camp then located in Afghanistan near Mes Aynak;

d. pledged fealty, or "bayat," to the leader of al Qaeda, Usama bin Laden, joined al Qaeda, and provided personal services in support of al Qaeda;

e. prepared and assisted in the preparation of various propaganda products, including the video "The Destruction of the American Destroyer *U.S.S. Cole*," to solicit material support for al Qaeda, to recruit and indoctrinate personnel to the organization and objectives of al Qaeda, and to solicit,

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the line-through: "with knowledge ~~of the common criminal purpose of the al Qaeda enterprise and of~~ the unlawful purposes of the agreement" and that appellant ~~"willfully joined the al Qaeda enterprise and~~ willfully entered into the agreement with the intent to further those unlawful purposes, and knowingly committed [eleven] overt acts in order to accomplish some objective or purpose of ~~the enterprise and~~ the agreement." Appellee's App. 4, 6; Tr. 109–13, 122.

incite and advise persons to commit Terrorism;

f. acted as personal secretary and media secretary of Usama bin Laden in support of al Qaeda;

g. arranged for Muhammed Atta, also known as Abu Abdul Rahman al Masri, and Ziad al Jarrah, also known as Abu al Qa'qa
al Lubnani, to pledge fealty, or "bayat," to Usama bin Laden;

h. prepared the propaganda declarations styled as martyr wills of Muhammed Atta and Ziad al Jarrah in preparation for the acts of terrorism perpetrated by the said Muhammed Atta, Ziad al Jarrah and others at various locations in the United States on September 11, 2001;

i. at the direction of Usama bin Laden, researched the economic effect of the September 11, 2001 attacks on the United States, and provided the result of that research to Usama bin Laden;

j. operated and maintained data processing equipment and media communications equipment for the benefit of Usama bin Laden and other members of the al Qaeda leadership, and;

> k. armed himself with an explosive belt, rifle, and grenades to protect and prevent the capture of Usama bin Laden.

Appellee's App. 6–7; *see Al Bahlul III*, 840 F.3d at 776–77 (Millett, J., concurring) (providing factual history of case).

The members found beyond a reasonable doubt that appellant committed each of the seven substantive crimes that were the object of the conspiracy.[20] App. Ex. 74 at 2. They found beyond a reasonable doubt that appellant committed ten of the eleven alleged overt acts in furtherance of the conspiracy (subparagraphs a–j). *Id.* at 3–4. They found him not guilty of one overt act (subparagraph k concerning arming himself with an explosive belt and other weapons). *Id*. at 4–5.

FBI SA testified that appellant told him during a 2002 interview that "every American is a target. And regardless if they are civilians, if they are women or children." Tr. 512; *see* Tr. 968–69; PE 13 at 1. An NCIS agent, who interviewed appellant over approximately two months in September and October of 2002, testified that appellant supported the attacks

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[20] Appellant was convicted of Charge I, violation of 10 U.S.C. § 950v(b)(28) (2006), conspiracy to commit the following seven substantive offenses: 10 U.S.C. § 950v(b)(1) (2006) ("Murder of protected persons"), (b)(2) ("Attacking civilians"), (b)(3) ("Attacking civilian objects"), (b)(15) ("Murder in violation of the law of war"), (b)(16) ("Destruction of property in violation of the law of war"), (b)(24) ("Terrorism"), & (b)(25) ("Providing material support for terrorism").

on the United States on September 11, 2001, and believed the murder of civilians was warranted because they paid taxes to the U.S. Government. Tr. 652–53; *see also* PE 5 at 7; PE 8 at 1; PE 11 at 1–2; PE 13 at 1, 3. The NCIS agent also testified that when asked how he felt about the people who were killed in the World Trade Center on 9/11, appellant said he felt no remorse for the death of non-Muslims because "they were infidels; and that [it] was his duty and all Muslims' duty to kill—[] infidels." Tr. 652–53.

In his unsworn statement just prior to sentencing, appellant justified the 9/11 attacks. *See* Tr. 963–81. He said, "we have given you a taste of your own medicine." Tr. 978. Citing the Koran, he promised, "'We are going to throw fear in the hearts of . . . [the] infidels . . . .'"[21] Tr. 976. Appellant also submitted two paper airplanes and one paper boat fashioned from folded lined sheets of writing paper, and a poem called, "The Storm of Aircrafts." Def. Ex. A, RoT Vol. 12 at 73–75, 81, 83–84; Tr. 971, 982. The poem spoke of the destruction on 9/11, disparaged the United States' leaders and armed forces, and praised those who attacked the United States.[22] Def. Ex. A, RoT Vol. 12 at 81, 84–84. The members sentenced

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[21] The verbatim transcription uses quotation marks around this particular sentence, apparently to indicate that it is quoted directly from the Koran as stated by appellant in his unsworn statement.

[22] Appellant said in his unsworn statement before sentencing that originally the poem was written for Desert Storm but bin Laden recycled it for 9/11 by renaming it, "The Storm of the Airplanes." Tr. 978.

appellant to confinement for life, Tr. 992, and the convening authority approved the adjudged sentence, RoT Vo1. 1 at 7. This custodial sentence did not exceed the punishment permitted by 10 U.S.C. § 950v(b)(28) (2006).

B. Law

Assuming without deciding that the Ex Post Facto Clause applied to appellant, *Al Bahlul I*, 767 F.3d at 29–30, the D.C. Circuit "vacated [his] convictions of providing material support for terrorism and solicitation of others to commit war crimes," *id.* at 31, based on a "plain *ex post facto* violation," *id.* at 29–30. Vacatur of these two charges requires an assessment of the impact of the change to findings on the sentence that we can approve. "[B]efore a federal *constitutional* error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." *Al Bahlul IV*, 967 F.3d at 867 (quoting *Chapman v. California*, 386 U.S. 18, 24 (1967)).

We must determine whether it is "appropriate to evaluate [appellant's] sentence without remanding to a military commission" for a sentence rehearing. *Id.* at 866. The court's analysis is guided by the factors laid out by the United States Court of Appeals for the Armed Forces (CAAF) in *United States v. Winckelmann*, 73 M.J. 11, 15–16 (C.A.A.F. 2013). The four "illustrative, but not dispositive," factors are as follows:

(1) Whether there has been "[d]ramatic changes in the penalty landscape and exposure." *Id.* at 15.
(2) Whether sentencing was by members or a military judge alone. *Id*. at 16.
(3) "Whether the nature of the remaining offenses capture the gravamen of criminal conduct included within the original offenses and . . . whether significant or aggravating circumstances addressed at the [trial] remain admissible and relevant to the remaining offenses." *Id.*
(4) "Whether the remaining offenses are of the type [with which appellate judges] . . . should have the experience and familiarity [] to reliably determine what sentence would have been imposed [after] trial." *Id.*

C. Analysis

Our analysis consists of two parts. First, we address whether reassessment of the sentence is appropriate or whether a rehearing on the sentence is required. *Id.* at 15; *United States v. Moffeit*, 63 M.J. 40, 43–44 (C.A.A.F. 2006) (Baker, J., concurring in result). In our analysis, *infra*, we determine a rehearing is not required. Second, we reassess appellant's sentence. For us to reassess appellant's sentence, we must reliably determine beyond a reasonable doubt that, on this record, there is no

reasonable possibility the constitutional errors that resulted in vacatur of two of the three convictions might have contributed to appellant's sentence. *See Al Bahlul IV*, 967 F.3d at 867 (citing *Chapman*, 386 U.S. at 24); *Moffeit*, 63 M.J. at 41; *United States v. Sales*, 22 M.J. 305, 307 (C.M.A. 1986). After reassessing his sentence, we reaffirm the sentence of confinement for life for the conviction of conspiracy to commit "substantive offenses triable by military commission," which offenses included murder of protected persons, murder in violation of the law of war, and attacking civilians. Appellee's App. 4.

We consider the *Winckelmann* four-factor test in "determining whether to reassess a sentence or order a rehearing." 73 M.J. at 15. The first factor requires the court to consider the "penalty landscape and exposure." *Id.* In this analysis, courts have compared the maximum sentence for charged offenses with the maximum sentence for the remaining offenses, *e.g.*, *Moffeit*, 63 M.J. at 41–42, and also with the sentence requested and adjudged, *e.g.*, *United States v. Torres*, 60 M.J. 559, 570 (A.F. Ct. Crim. App. 2004). In appellant's case there was no change in the penalty landscape and exposure. The maximum punishment before and after vacatur of the convictions for solicitation and material support is unchanged. The maximum punishment under the 2006 MCA for the three charged offenses at appellant's commission was confinement for life, 10 U.S.C. §§ 950u, 950v(b)(25), 950v(b)(28), and the maximum sentence for the single remaining conspiracy conviction is confinement for life, 10 U.S.C. § 950v(b)(28) (2006).

The sentence reassessment question in appellant's case is like the one that was before the Air Force Court of Criminal Appeals in *United States v. Corralez*, 61 M.J. 737 (A.F. Ct. Crim. App. 2005). The maximum sentence in *Corralez* before and after dismissal of two offenses was the same—life without parole (each dismissed offense was subject to life without parole). *Id.* at 750. The court determined that under these circumstances it could reassess the sentence. *Id.*; *see also United States v. Lipscomb*, No. 20120829, 2015 CCA LEXIS 256, at *17–18 (Army Ct. Crim. App. June 15, 2015) (in case involving similar facts, finding no reason to "pause in reassessing appellant's sentence"); *United States v. Ballan*, No. 201000242, 2011 CCA LEXIS 426, at *7 (N.M. Ct. Crim. App. Jan. 27, 2011) (per curiam) (unpublished) (in case involving similar facts, finding no "dramatic change in the sentencing landscape" and reassessing sentence), *aff'd*, 71 M.J. 28 (C.A.A.F. 2012); *cf. United States v. Johansson*, No. 200401940, 2008 CCA LEXIS 250, at *5–6 (N.M. Ct. Crim. App. July 10, 2008) (unpublished) (where maximum possible confinement decreased from life without parole to seven years after main charge dismissed, "the facts, rather than [] what label the law attaches to those facts" permitted reassessment), *aff'd*, 67 M.J. 251 (C.A.A.F. 2009) (unpublished). The absence of change in the landscape penalty and exposure in appellant's case weighs in favor of reassessment.

The second *Winckelmann* factor has limited relevance to military commissions as there is no option for sentencing by military judge alone. The

members provide the sentencing function in military commissions. *See* R.M.C. 502(a)(2), MMC (2007 ed.).[23]

Regarding the third *Winckelmann* factor, the court's analysis has two parts. We first ask whether the remaining conspiracy conviction includes the gravamen or essence of the solicitation and material support convictions that were vacated. *Winckelmann*, 73 M.J. at 16. To answer this question, we compare the nature of the remaining conspiracy conviction with that of the dismissed solicitation and material support charges. *See Moffeit*, 63 M.J. at 41–42 (considering seriousness of remaining internet child solicitation offense in case involving dismissed offenses for possession and receipt of child pornography). Appellant's conspiracy (Charge I) involved his entry into an agreement to commit seven substantive war crimes, including murder of protected persons,[24] murder in violation of the law of

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[23] "The members of a military commission shall determine whether the accused is proved guilty and, if necessary, adjudge a proper sentence, based on the evidence and in accordance with the instructions of the military judge." R.M.C. 502(a)(2), MMC (2007 ed.) (current 2019 provision at R.M.C. 502(a)(3) (stating same)).

[24] Under the 2006 MCA, murder of protected persons is the intentional killing of one or more persons, 10 U.S.C. § 950v(b)(1), who are "entitled to protection under one or more of the Geneva Conventions, including . . . civilians not taking an active part in hostilities," 10 U.S.C. § 950v(a)(2)(A) (current version of provisions at 10 U.S.C. § 950p(a)(2) (stating same)). The 2006 MCA punishes murder of protected persons with "death or such other punishment as a military commission under this chapter may direct." 10 U.S.C. § 950v(b)(1) (current version at 10 U.S.C. § 950t(1) (stating same)). Title 10, section 950v of the United

war, and attacking civilians. Appellee's App. 4, 6–7. The solicitation offense (Charge II) involved appellant urging others to commit the same seven substantive war crimes. *Id.* at 7–8. Similarly, each of the eleven overt acts alleged in appellant's conspiracy were identical to the overt acts alleged in his material support offense (Charge III). *Compare id.* at 6–7, *with id.* at 8–9. For example, the first three overt acts alleged in the conspiracy concerned appellant's travel to Afghanistan to join al Qaeda, his meeting with al Qaeda's head of security, and his military-like training at an al Qaeda sponsored camp. The material support charge alleged these same three overt acts. The fourth overt act alleged in the conspiracy charge was appellant's pledge of fealty or bayat to Usama bin Laden. This pledge also was alleged in the material support charge. In this way, the prosecution wove the three charges together, alleging the same seven substantive war crimes and the same eleven overt acts in both the conspiracy and solicitation charges, and in the conspiracy and material support charges, respectively. Under these circumstances the court can reliably determine that the conspiracy charge necessarily captures the gravamen or essence of the two vacated convictions—that gravamen being the taking of acts to cause harm to the United States, its allies, and common interests.

States Code, was omitted in the general revision of Chapter 47A by the Act of Oct. 28, 2009, Pub. L. No. 111-84, § 1802, 123 Stat. 2190, 2574. *See Al Bahlul I*, 767 F.3d at 22 (discussing conspiracy as a triable offense by military commission).

We next ask under the third *Winckelmann* factor if the "significant or aggravating circumstances addressed" at the commission are still "admissible and relevant to the remaining" conspiracy conviction. 73 M.J. at 16. We conclude the circumstances underlying the solicitation and material support convictions "would have been before the court during sentencing regardless of whether or not [al Bahlul] was charged with these offenses." *Torres*, 60 M.J. at 570. This is so because evidence presented to prove the vacated offenses, "charged or not," was admissible to prove the conspiracy conviction. *Id.* That is to say, evidence concerning any "significant or aggravating circumstances" from appellant's trial remains "admissible and relevant" to the conspiracy offense. *Winckelmann*, 73 M.J. at 16. The outcome of our analysis of both parts of the third *Winckelmann* factor supports reassessment.

As for the fourth *Winckelmann* factor, we ask whether appellant's remaining conspiracy conviction would be appropriate for sentence reassessment by the judges on this court. *Id.* The D.C. Circuit has addressed this very issue, quoting from this court's recent decision with approval:

> Moreover, as the CMCR noted, "conspiracy to commit murder is not so novel a crime that" the intermediate court would be "unable to 'reliably determine what sentence would have been imposed at trial'" with respect to Al Bahlul's similar crime of conspiracy to

> commit war crimes, including the murder of noncombatants.

Al Bahlul, 374 F. Supp. 3d at 1273 (quoting *Winckelmann*, 73 M.J. at 16). *Al Bahlul IV*, 967 F.3d at 866. Given the experience of the appellate judges on this court, we can reassess appellant's sentence rather than order a rehearing, and it is appropriate that we do so.[25] *Id.* at 865–66. As further set forth in this opinion, the court can "reliably determine" that, even without error at the commission level, the "sentence would have been at least of a certain magnitude." *Winckelmann*, 73 M.J. at 15 (quoting *Sales*, 22 M.J. at 307). This answer to the fourth *Winckelmann* factor also supports reassessment.

We find the *Winckelmann* factors weigh in favor of reassessment rather than rehearing. The court thus determines that reassessment is appropriate, and that remand to the commission for a

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[25] Only "commissioned officer[s] of the armed forces on active duty" may serve as members of a military commission. R.M.C. 502(a)(1) (2007 ed.) (unchanged in 2019 MMC). As such, remanding appellant's case for a sentence rehearing would not put his case before the same members who decided the original sentence. *See Winckelmann*, 73 M.J. at 15 (stating "impossible to remand" military case with members for sentence rehearing before same members due to nature of military service). The members who decided appellant's original sentence "may be scattered throughout the world," *id.* (quoting *Jackson v. Taylor*, 353 U.S. 569, 579 (1957)), or are no longer on active duty. We thus note that, here, a remand for sentence rehearing "merely substitute[s] one group of nonparticipants in the original trial for another." *Id.* (alteration in original) (quoting *Jackson*, 353 U.S. at 580).

sentence rehearing is not required. We now proceed to reassess appellant's sentence. We rely on the following guidance from our superior Court:

> When an intermediate military court "reassesses a sentence because of a prejudicial error, its task differs from that which it performs in the ordinary review of a case." *United States v. Sales*, 22 M.J. 305, 307 (CMA 1986). To "purge[]" the sentence "of prejudicial error," the new sentence should be less than or equal to the sentence that would have been delivered by the trier of fact "absent any error." *Id.* at 308.

Al Bahlul IV, 967 F.3d at 866 (alteration in original).

Presented with constitutional errors in appellant's case, we turn to a harmless error analysis because before we can hold a federal *constitutional* error harmless, we must find the error harmless beyond a reasonable doubt. *Id.* at 867; *Chapman*, 386 U.S. at 24. We cannot affirm the adjudged and approved sentence unless we are first "persuaded beyond a reasonable doubt that [such] reassessment has rendered harmless any error affecting the sentence adjudged [after] trial." *Sales*, 22 M.J. at 307; *Moffeit*, 63 M.J. at 41 (stating "court must be satisfied beyond a reasonable doubt that its reassessment cured the [constitutional] error" at trial (quoting *United States v. Doss*, 57 M.J. 182, 185 (C.A.A.F. 2002))); *United States v. Boone*, 49 M.J. 187, 195

(C.A.A.F. 1998) (stating a service court of criminal appeals "must be persuaded beyond a reasonable doubt that its reassessment" renders harmless constitutional errors at trial), *aff'd*, No. 94-0796/AR, 2000 CAAF LEXIS 1351 (C.A.A.F. Dec. 8, 2000). If the error does not contribute to the verdict, or in this case the sentence, this means the error was "unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record." *United States v. Moran*, 65 M.J. 178, 187 (C.A.A.F. 2007) (quoting *Yates v. Evatt*, 500 U.S. 391, 403, *overruled on other grounds by Estelle v. McGuire*, 502 U.S. 62, 72 n.4 (1991) (disapproving *Yates*' standard of review language for jury instructions)).

Taking into consideration the entire record of appellant's trial and sentencing, the court is certain beyond a reasonable doubt that, absent the constitutional errors, the members would have sentenced appellant to confinement for life. Under a "totality of the circumstances," *Winckelmann*, 73 M.J. at 12, appellant remains convicted of conspiracy, he remains exposed to a life sentence, and the gravamen of the two dismissed charges—the taking of acts to cause harm to the United States, its allies, and common interests—is captured in the conspiracy conviction, *see id.* at 15–16. Because the gravamen of the vacated convictions is reflected in the remaining conviction, "much [if not all] of the aggravating evidence . . . remain[s] relevant and [can] properly be considered" in our reassessment, *id.* at 16, and has been considered. We discern little change, if any, in the admissible evidence and its logical and

legal relevance. Of note, if appellant had been subject to sentencing under the U.S. Sentencing Guidelines for conspiracy to commit murder in violation of Title 18, the advisory sentence would have been a life sentence.[26] *See* 18 U.S.C. § 2332(b)(2).

We have considered the gravity of appellant's conspiracy conviction as well. *See Moffeit*, 63 M.J. at 41–42 (considering seriousness of remaining offense, including community impact); *Torres*, 60 M.J. at 570 (commenting on seriousness of remaining convictions). Appellant's conspiracy conviction is exceptionally serious. Its objects included murder of protected persons, murder in violation of the law of war, and attacking civilians. Appellee's App. 4. Appellant's overt acts offered significant aid to the conspiracy and to al Qaeda's operations against America and its allies. The following overt acts, *see id.* at 6–7, proven below, underscore the seriousness of his conduct:

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[26] Section 2A1.5 of the U.S. Sentencing Commission, Federal Sentencing Guidelines, Guidelines Manual is the applicable sentencing guideline for the federal offense of conspiracy to commit murder. 18 U.S.C. app. § 2A1.5. The Base Offense Level is 33, but if death results it is 43. *Id.* at §§ 2A1.5(c)(1), 2A1.1(a). There is a twelve-level upward adjustment if the offense "involved, or was intended to promote, a federal crime of terrorism." *Id.* at § 3A1.4(a). Without consideration of further adjustments, appellant thus would have faced a guideline sentence using Base Offense Level 43 or 55. Under either calculation, the guidelines sentence would be confinement for life, which may be adjudged when the Base Offense Level is 43 or higher. 18 U.S.C. § 2A1.1, Application Note 2(A).

> (1) Al Bahlul willingly chose to pledge fealty or bayat to Usama bin Laden, the architect of the 9/11 attacks against the United States.
>
> (2) Al Bahlul was key to the creation of Internet propaganda content designed to increase recruitment for al Qaeda and terrorism, including a well- produced propaganda video entitled, "The Destruction of the American Destroyer *U.S.S. Cole*."
>
> (3) Al Bahlul arranged for a pledge of fealty or bayat to Usama bin Laden by two of the 9/11 terrorists, Muhammed Atta (one of the hijackers who flew a commercial airplane into the World Trade Center on 9/11), and Ziad al Jarrah (one of the hijackers of commercial Flight 93, which crashed into the ground in Pennsylvania).
>
> (4) Al Bahlul prepared the propaganda declarations, or martyr wills, of Muhammad Atta and Ziad al Jarrah, in preparation for their 9/11 terrorist attacks against the United States.

Additionally, many years before the terrorism carried out by al Qaeda, the Supreme Court made potent and timeless observations about the often profound nature of conspiracy as a separate and individual

offense. The Court considers conspiracy to be "socially reprehensible conduct . . . [that] presents a greater potential threat to the public than individual delicts." *Callanan v. United States*, 364 U.S. 587, 593 (1961) (discussing breadth of impact), *quoted in Iannelli v. United States*, 420 U.S. 770, 778 (1975); *see Al Bahlul II*, 792 F.3d at 9 (stating "the nature of the crime of conspiracy at common law . . . [was] an offense of a grave character, affecting the public at large" (alterations in original) (quoting *Callan v. Wilson*, 127 U.S. 540, 556 (1888))). "For two or more to confederate and combine together to commit or cause to be committed a breach of the criminal laws, is an offense of the gravest character, sometimes quite outweighing, in injury to the public, the mere commission of the contemplated crime." *Pinkerton v. United States*, 328 U.S. 640, 644 (1946) (quoting *United States v. Rabinowich*, 238 U.S. 78, 88 (1915)); *see also Woods v. United States*, 240 F.2d 37, 41 (D.C. Cir. 1956) (quoting *Rabinowich*); *cf. Al Bahlul III*, 840 F.3d at 767 (Kavanaugh, Brown, & Griffith, JJ., concurring) ("Put simply, the most well-known and important U.S. military commissions in American history tried and convicted the defendants
of *conspiracy*."). In sum, "conspiracy may be an evil in itself, independently of any other evil it seeks to accomplish." *Iannelli*, 420 U.S. at 779 (citation omitted). As stated by the Supreme Court, the crime of conspiracy is unique and especially grievous.

The Court has even recognized that conspiracy may be punished "more severely than the doing of the

[object] act itself." *Clune v. United States*, 159 U.S. 590, 595 (1895), *cited with approval in Iannelli*, 420 U.S. at 778, *Callanan*, 364 U.S. at 593, *and Tyner v. United States*, 23 App. D.C. 324, 361 (D.C. Cir. 1904). *Clune* involved a conviction for conspiracy to commit an offense against the United States, obstruction of mail. 159 U.S. at 590–91. The statutory penalty for the conspiracy was much greater than for obstruction of mail. *Id.* at 594–95. Plaintiffs in error contended that conspiracy "cannot be punished more severely than the offence itself." *Id.* at 595. The Supreme Court disagreed, explaining that Congress held the power to punish conspiracy more severely than its object offense. *Id.*; *see Pinkerton*, 328 U.S. at 643 (holding tax violations and conspiracy to commit tax violations were "separate and distinct" offenses subject to different penalties as determined by Congress). In line with these cases, we find that conspiracy as a stand-alone offense is "a serious offense, at least as serious as the dismissed offenses." *Moffeit*, 63 M.J. at 44 (Baker, J., concurring in result). Congress' decision to authorize a sentence that included confinement for life for conspiracy to commit war crimes also is a good indication of the seriousness of appellant's crime.

We have considered the entire record in extenuation and mitigation that was considered by the commission, which is unchanged by the constitutional errors. We also have considered appellant's lack of remorse before the sentencing authority. At the time of appellant's sentencing on November 3, 2008, he had been in United States custody almost seven years. *See* Tr. 950, 998;

Appellant's App. 132a. He had ample time to consider his conduct and assess his culpability before his sentencing proceeding. Yet, appellant chose to provide an unsworn statement that included, inter alia, two paper airplanes, one paper boat, and a poem called, "The Storm of Aircrafts," which reflected approvingly on the 9/11 attacks and praised the terrorists. Def. Ex. A, RoT Vol. 12 at 73–75, 81, 83–84; Tr. 971, 982.

For the foregoing reasons, including the reasons underlying our assessment of the *Winckelmann* factors, the court is confident beyond a reasonable doubt (i) that appellant's "sentence would have been at least of a certain magnitude," *Sales*, 22 M.J. at 307, and no lesser sentence than confinement for life would have been imposed for the remaining conviction of conspiracy—and for appellant, *see Al Bahlul IV*, 967 F.3d at 866 (citing *Sales*, 22 M.J. at 308), and (ii) that our "reassessment has rendered harmless any error affecting [appellant's] sentence adjudged," *Sales*, 22 M.J. at 307 (citing *Chapman*, 386 U.S. 18).

IV. Sentence review

In asking us to review his sentence, appellant argues that this court "has a heightened statutory duty to 'affirm only such findings of guilty, and the sentence or such part or amount of the sentence, as the Court finds correct in law and fact and determines, on the basis of the entire record, should be approved.' 10 U.S.C. § 950f(d)." Appellant's Br. 28.

We need not address, however, the nature and scope of any review obligation that § 950f(d) requires of us because even under the standard urged, none of appellant's sentencing arguments have merit. Thus, for the standard regarding review and assessment of appellant's sentence—and for the purposes of this opinion only—we look to military law applicable to service courts of criminal appeals under Article 66(d)(1), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866(d)(1) (2019) (formerly 10 U.S.C. § 866(c)).[27] All that we say regarding appellant's sentencing arguments should be read in light of this assumption.

Consistent with those military appellate precedents, and assuming appellant's claims about his sentence are "properly raised" before us, 10 U.S.C. § 950f(c), we now turn to consider his claims. We first examine the claim that his sentence is disparate compared to sentences in other cases alleged to be similar. Second, we consider the claim that his sentence is now inappropriately severe because he was placed in solitary confinement and denied

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[27] Article 66(d)(1), Uniform Code of Military Justice (UCMJ) (2019), 10 U.S.C. § 866(d)(1), took effect on January 1, 2019. Exec. Order No. 13,825, § 3(a), 83 Fed. Reg. 9889 (Mar. 1, 2018). The Article 66(d)(1) standard applies to cases "in which every finding of guilty entered into the record . . . is for an offense that occurred on or after [January 1, 2021]." Act of Jan. 1, 2021, Pub. Law No. 116-283, § 542(e)(2), 134 Stat. 3388. Article 66(d)(1) is substantively the same as the former Article 66(c) military appellate standard of review previously codified at 10 U.S.C. § 866(c). *See*, *e.g.*, Manual for Courts-Martial, United States, app. 2, at A2-23 (2016 ed.).

consideration for parole. Third, we evaluate whether, and to what extent, appellant's sentence may be appropriate, and on the basis of the entire record, should be affirmed.

A. Disparity claim

Appellant urges the court to compare his sentence with the sentences of others convicted of allegedly similar crimes, who received lesser sentences of confinement than he received. *See* Appellant's Br. 47–49; Appellant's Reply Br. 21–22. Appellee indicates there are no cases that are closely related to appellant's but nevertheless cites *United States v. Ghailani*, 733 F.3d 29 (2d Cir. 2013), as a potentially analogous case. Appellee's Br. 25–28 (Jan. 19, 2022).

Military appellate case law interprets Article 66, UCMJ, to give service courts of criminal appeals the authority to address claims of sentence disparity. In military law, the "power to review a case for sentence appropriateness, including relative uniformity," "is highly discretionary." *United States v. Lacy*, 50 M.J. 286, 288 (C.A.A.F. 1999).[28] Moreover, a sentence disparity assessment based on comparison with other cases is inappropriate "except in those *rare instances* in which sentence appropriateness can be fairly determined only by reference to disparate

[28] In the military justice system, sentence comparison "is not part of the members' deliberations; it is a power assigned to the convening authority and Court of Criminal Appeals." *United States v. Barrier*, 61 M.J. 482, 484 n.2 (C.A.A.F. 2005).

sentences adjudged in closely related cases, such as those of accomplices." *United States v. Ballard*, 20 M.J. 282, 283 (C.M.A. 1985) (emphasis added), *quoted in Lacy*, 50 M.J. at 288.

"[A]n appellant bears the burden of demonstrating that any cited cases are 'closely related' to his or her case and that the sentences are 'highly disparate.' If the appellant meets that burden, . . . then the Government must show that there is a rational basis for the disparity." *Lacy*, 50 M.J. at 288. Closely related "cases must involve offenses that are similar in both nature and seriousness or which arise from a common scheme or design." *United States v. Lin*, 78 M.J. 850, 866 (N.M. Ct. Crim. App. 2019) (quoting *United States v. Kelly*, 40 M.J. 558, 570 (N.M.C.M.R. 1994) (per curiam)). This prerequisite can be met by evidence of co-actors engaged "in a common crime, . . . common or parallel scheme, or some other direct nexus between the [co-actors] whose sentences are sought to be compared." *Id.* (quoting *Lacy*, 50 M.J. at 288).

Appellant cites several cases from combat zones in Vietnam, Iraq, and Afghanistan. *See* Appellant's Br. 48. The cited cases involved the commission of civilian murders, detainee abuse, and the murder of (or death to) detainees by U.S. servicemembers. *See id.* Some cases included conspiracy offenses. *See id.* Those court-martial cases are unrelated to the substantive offenses and overt acts in the conspiracy charge of which appellant, an

alien unlawful enemy combatant, stands convicted. *See Lin*, 78 M.J. at 866.

With respect to U.S. district court cases offered for comparison, a key element for sentencing in district court cases is the U.S. Sentencing Guidelines. *See, e.g.*, *United States v. Jayyousi*, 657 F.3d 1085, 1115–19 (11th Cir. 2011) (applying Guidelines to case involving Islamist violence). The U.S. Sentencing Guidelines, however, do not apply in commission trials. *United States v. Berry*, 618 F.3d 13, 14 (D.C. Cir. 2010) (stating Guidelines "assist district courts"); *see* 28 U.S.C. §§ 991(b), 994(a)(1). Notwithstanding this inherent limitation, in our sentence disparity analysis we considered terrorism-related cases tried in U.S. district courts.

Appellant cites to cases tried in district courts involving support for terrorism leading up to (and after) the attacks perpetrated against the United States on September 11, 2001. *See* Appellant's Br. 47 (citing *United States v. Mehanna*, 735 F.3d 32, 41, 44–45 (1st Cir. 2013) (involving unsuccessful efforts to fight in Iraq, posting translated al Qaeda material on sympathetic website named "at-Tibyan," and terrorism-related conspiracies in 2004 and 2005); *Jayyousi*, 657 F.3d at 1091 (involving support of overseas Islamist violence and related conspiracies from 1993 through November 1, 2001); *United States v. Lindh*, 227 F. Supp. 2d 565, 567–69 (E.D. Va. 2002) (involving fighting with the Taliban in Afghanistan from May 2001 through November 25, 2001)). Those cases are inherently

inapposite. None are *closely related* as relevant case law defines that term. Offenses involving fighting on foreign soil against non- American fighters, violence and support of violence overseas, and al Qaeda postings on the at-Tibyan website are not comparable to appellant's offense of conspiracy (i) to commit murder of protected persons, murder in violation of the law of war, and attacking civilians, (ii) that included his assistance in preparation of martyr wills for two 9/11 hijackers and arrangement of their fealty pledges to bin Laden, and (iii) that involved his production of a propaganda video using the USS *Cole* bombing, which at the time was "consistently one of the most popular" al Qaeda videos, Tr. 810, being translated into at least "Arabic, English, French, Italian, Spanish, Urdu, [and] Turkish," Tr. 809.

Regarding the *Ghailani* case offered by appellee, Appellee's Br. 26–28, appellant argues that it is inapposite because in that case, "the minimum Guideline sentence was life imprisonment," Appellant's Reply Br. 21; *see supra* note 26 and accompanying text. A jury convicted Ghailani, a member of al Qaeda, of one count of conspiracy with other al Qaeda members to destroy U.S. government buildings and property. *Ghailani*, 733 F.3d at 40. The jury's decision included a specific finding that Ghailani's actions "directly or proximately caused death to" non-conspirators. *Id.* These deaths totaled 224 and included civilian embassy personnel and U.S. military servicemembers at the American embassies in Kenya and Tanzania. *Id.* at 37–38, 53. The Second Circuit held Ghailani's life sentence "was neither

procedurally nor substantively unreasonable." *Id.* at 37. *Ghailani* is not comparable to *Al Bahlul* for purposes of sentence disparity due to, inter alia, that court's specific finding on causation of death. There is no similar finding in *Al Bahlul. See* App. Ex. 74.

In *United States v. Abu Ali*, not cited by the parties, Abu Ali was convicted of offenses relating to his al Qaeda affiliation, including conspiracy. 528 F.3d 210, 221, 225–26 (4th Cir. 2008). The recommended Sentencing Guidelines sentence was life imprisonment but the district court sentenced Abu Ali to thirty years' confinement. *Id*. at 226, 258–59. The Fourth Circuit vacated that sentence. *Id.* at 262. It found that *Lindh*, 227 F. Supp. 2d 565 (imposing a twenty-year sentence), was not comparable for sentence disparity. *Id.* at 263. Lindh fought against the Northern Alliance on an Afghanistan battlefield. *Id.* at 262. Americans were not targeted and he claimed no prior awareness of the 9/11 plot. *Id.* at 262–63. In contrast, Abu Ali pledged jihad to "inflict[] massive civilian casualties on American soil," and helped plan a plot to assassinate the President of the United States. *Id*. at 263. The court also found that the maximum possible sentences were not comparable, *id.* at 263 & n.24, and while Lindh pleaded guilty, accepted responsibility, and showed remorse—Abu Ali did not.[29] *Id*. at 263,

[29] Although circuit precedent might have required vacatur of Abu Ali's sentence, the Fourth Circuit declined consideration of this issue because several factors made *Lindh* and *Abu Ali* "starkly different." *United States v. Abu Ali*, 528 F.3d 210, 264 (4th Cir. 2008).

267; *see United States v. Abu Ali*, 410 Fed. App'x 673, 681 (4th Cir. 2011) (per curiam) (unpublished) (stating remorse and acceptance of responsibility are routine sentencing considerations).

The Fourth Circuit found comparison to *United States v. McVeigh*, 153 F.3d 1166 (10th Cir. 1998) (affirming death sentence), and *United States v. Nichols*, 169 F.3d 1255 (10th Cir. 1999) (affirming sentence of life imprisonment), inapposite as well. *Abu Ali*, 528 F.3d at 267. The court specifically rejected comparison to *McVeigh*/*Nichols* based on the absence of fatalities or economic destruction in *Abu Ali*. *Id.* at 267. It explained:

> [W]hile the Oklahoma City bombing was undoubtedly one of the most heinous and devastating acts in our nation's history, to require a similar infliction of harm before imposing a similar sentence would effectively raise the bar too high. We should not require that a defendant do what McVeigh and Nichols did in order to receive a life sentence.

Id. at 265. In other words, although he did not plant bombs or fire weapons, Abu Ali had taken "serious and significant steps in their own right." *Id.* at 265.

On remand, the district court resentenced Abu Ali to confinement for life. 410 Fed. App'x at 677. Abu Ali argued sentence disparity on appeal, comparing his sentence to other 9/11 terrorism sentences. *Id.* at

679. The Fourth Circuit found Abu Ali's proffered cases incomparable. In addition to differences regarding the level of remorse, acceptance of responsibility, and maximum possible sentence, *id.* at 679–80, the proffered cases did not involve "massive civilian casualties" on American soil *and* harm to the highest U.S. government officials, as in *Abu Ali*, *id.* at 680. In other words, "Abu Ali sought to inflict harm of a singular sort." *Id.* We consider *Abu Ali* for the proposition that degree of remorse, acceptance of responsibility, and possible maximum sentence are relevant to review of cases proffered for comparison when analyzing allegations of sentence disparity.

Perhaps a better analogy to appellant's case than *Abu Ali* is the case of the "20th hijacker," Zacarias Moussaoui. *Moussaoui*, 591 F.3d at 273 (citation omitted). Moussaoui pleaded guilty to six conspiracy counts arising from al Qaeda's plot to hijack commercial airplanes to commit terrorism in America, including on September 11, 2001. *Id.* at 266. Unlike appellant, Moussaoui entered the United States to participate as a 9/11 hijacker and was arrested before September 11, 2001. *Id.* at 274. Like appellant, Moussaoui had no direct role in any of the deaths or destruction from 9/11. *Compare id.* at 266–67, 273–76, *with, e.g.*, Tr. 513–15. Nonetheless, Moussaoui was more culpable than appellant. He "knew . . . that the [9/11] hijacking plot was in the works when he was arrested." *Moussaoui*, 591 F.3d at 276. Appellant did not have advance notice of the plot. *See supra* note 15. The jury sentenced Moussaoui to "six terms of life

imprisonment without the possibility of release" and, as structured, he is required to serve two consecutive life sentences. *Moussaoui*, 591 F.3d at 277–78.

In sum, we find none of the cases proffered by the parties to be "closely related" or comparable to appellant's case. *Ballard*, 20 M.J. at 283. That is, none relate to or concern defendants who were coactors with appellant in a common crime or in a common or parallel scheme, or who had a direct nexus with appellant. *Lacy*, 50 M.J. at 288. The proffered cases, and *Abu Ali*, do not provide a reasonable possibility, much less a persuasive argument, that appellant's sentence to confinement for life, as reassessed by the court, is an inappropriately severe penalty. To the extent *Moussaoui* amounts to a useful comparison, that case offers no support for appellant's position that a sentence of confinement for life is unwarranted.

B. Severity claim

Appellant urges the court to order his release from confinement because he has been placed in solitary confinement and denied consideration for parole. Appellant's Br. 2–4, 28–35; Appellant's Reply Br. 3, 15–18. He provided the following facts in support of his solitary confinement claim:

> [S]ince 2008, JTF-GTMO [(Joint Task Force, Guantanamo Bay)] has maintained a policy of segregating detainees serving military commission

> sentences from the rest of the detainee population, [Appellant's] App. 145a [(Dec. 20, 2021)],[30] a policy the Assistant Secretary of Defense reaffirmed as recently as July 2019. App. 146a-47a. …
>
> Appellant has objected to his segregation from other prisoners as an unlawful imposition of solitary confinement and accordingly sought exceptions to this policy. Appellee first approved a one-year limited exception to this policy in December 2019 and informed Appellant of the exception in February 2020. App. 148a. While this exception did not relieve Appellant of segregation, it did authorize Appellant to receive other detainees as "visitors" in the recreation areas of the

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[30] On August 8, 2008, Joint Task Force, Guantanamo Bay (JTF-GTMO), requested guidance from the Commander, U.S. Southern Command, recommending segregation of Salim Ahmed Hamdan (recently convicted by military commission) from detainees not convicted. Appellant's App. 145a (Dec. 20, 2021). The purpose of segregation was "to ensure that convicted detainees are segregated from non-convicted detainees." *Id.* The Joint Task Force noted Hamdan was the sole detainee in post-trial confinement and recommended he "should temporarily be permitted to have outdoor recreation with other detainees . . . . Access to outdoor facilities with other detainees would ensure he has continued social contact with other detainees until a time when other convicted detainees are housed with him." *Id.* The Joint Task Force recommended Southern Command develop a comprehensive plan for the handling of post-trial prisoners. *Id.* Southern Command's response to JTF-GTMO's request and recommendations is not part of the record.

> facility in which he is currently being held for a maximum of eight-hours a day. A month later, however, the COVID-19 pandemic made even this minimal contact impracticable.

Appellant's Br. 12. Appellant states for the first time on appeal that he has been segregated for nine years altogether, *id.*, and contends his solitary confinement "violates the Eighth Amendment and statutory prohibitions on cruel and unusual punishment," *id.* at 29 (citing 10 U.S.C. § 949s). Appellee asserts the record does not establish that appellant is in solitary confinement, but apparently concedes appellant has not been considered for parole. Appellee's Br. 28–30; *see id.* at 30–31, 30 n.189 (noting *Al Bahlul IV* declined consideration of solitary confinement and parole issues on direct appeal).

We note the unresolved controversy over whether the Eighth Amendment applies to prisoners at Guantanamo Bay, Cuba. *See Ali v. Rumsfeld*, 649 F.3d 762, 770–72 (D.C. Cir. 2011). In this instance, however, we find it is unnecessary to determine if the Eighth Amendment applies to appellant. *See id.* at 770 & n.11 (citing *Pearson v. Callahan*, 129 S. Ct. 808, 815–16, 818 (2009)). The language in the Eighth Amendment prohibiting "cruel or unusual punishment" is captured in 10 U.S.C. § 949s, which applies to punishment imposed by military commissions. *See also* Geneva Convention Relative to the Treatment of Prisoners of War art. 3(1)(a), Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 (prohibiting

"violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture").[31]

The D.C. Circuit addressed solitary confinement and parole in *Al Bahlul IV*, stating it had jurisdiction on direct appeal only to review a sentence's validity and to act on action taken by the convening authority and CMCR. 967 F.3d at 877 (citing 10 U.S.C. § 950g(a), (d)). As such, it suggested that Al Bahlul might bring his challenges to confinement conditions in a petition for a writ of habeas corpus.[32] *Id.* (citing *Aamer v. Obama*, 742 F.3d 1023, 1038 (D.C. Cir. 2014)).[33]

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[31] Article 3 is in "all four Geneva Conventions" and thus is referred to as "Common Article 3." *Hamdan v. Rumsfeld*, 548 U.S. 557, 629 (2006), *cited in Ali v. United States*, 398 F. Supp. 3d 1200, 1217 (CMCR 2019).

[32] In a footnote to this passage, the D.C. Circuit said, "Because this court lacks jurisdiction, we express no opinion on the procedural or substantive merits of such a challenge." *Al Bahlul v. United States* (*Al Bahlul IV*), 967 F.3d 858, 877 n.8 (D.C. Cir. 2020).

[33] *See United States v. Ramzi Yousef*, No. 93-cr-00180, 2011 U.S. Dist. LEXIS 85612 (S.D.N.Y. July 22, 2011) (declining consideration of habeas petition challenging confinement conditions). In *Yousef*, Special Administrative Measures limited Yousef's contact and communication during confinement and prohibited other prisoners from sharing his cell. *Id.* at *2. The Federal Bureau of Prisons denied his prior requests for relief. *Id.* at *2–3. The court explained that "for core habeas petitions challenging present physical confinement, jurisdiction lies in . . . the district of confinement," the facility's warden is the proper respondent, and the proper venue is the district where the prisoner is confined. *Id.* at *3 (quoting *Rumsfeld v. Padilla*, 542 U.S. 426, 435, 443 (2004)). The court thus declined to consider

Following holdings of the service courts of criminal appeals, *see* discussion *infra*, on direct appeal the CMCR is "empowered to grant sentence relief based on *post-trial* confinement conditions." *Guinn*, 81 M.J. 195, 200 (C.A.A.F. 2021). Our authority arises when we find "a legal deficiency in the post-trial process." *United States v. Gay*, 75 M.J. 264, 269 (C.A.A.F. 2016). In such cases, the genesis for relief must be "sparked by a legal error." *Id.* One such legal error is when an appellant demonstrates that his treatment in confinement is unlawful and thus not appropriate. *Guinn*, 81 M.J. at 200–01. Under such circumstances, the court "not only has the authority but also *the duty* to ensure that the severity of an adjudged and approved sentence has not been *unlawfully increased by prison officials*," *id.* at 200, a duty we accept in deciding appellant's appeal.

We assume, for purposes of this appeal only, that the CMCR has discretion to grant sentence relief on direct appeal when prison officials unlawfully increase the sentence approved by the convening authority. *Guinn*, 81 M.J. at 202; *see also Gay*, 75 M.J. at 269; *United States v. White*, 54 M.J. 469, 472 (C.A.A.F. 2001). We use a de novo standard to review claims of cruel or unusual punishment. *White*, 54 M.J. at 471. "[C]ruel or unusual punishment, may not be . . . inflicted" upon appellant. 10 U.S.C. § 949s.

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the merits of Yousef's habeas petition and transferred it to the U.S. District Court for the District of Colorado, where he was confined. *Id.* at *4 (citing 28 U.S.C. § 1631; *Padilla*, 542 U.S. at 430).

To show cruel or unusual punishment, appellant

> must show: (1) an objectively, sufficiently serious act or omission resulting in the denial of necessities [(note citing *Farmer v. Brennan*, 511 U.S. 825, 834 (1994) (quoting *Wilson v. Seiter*, 501 U.S. 294, 298 (1991); *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981)))]; (2) a culpable state of mind on the part of prison officials amounting to deliberate indifference to [appellant's] health and safety [(note citing *Farmer*, 511 U.S. at 834 (quoting *Wilson*, 501 U.S. at 302–03))]; and (3) that he "has exhausted the prisoner-grievance system . . . ." [(note quoting *United States v. Miller*, 46 M.J. 248, 250 (C.A.A.F. 1997) (quoting *United States v. Coffey*, 38 M.J. 290, 291 (C.M.A. 1993))).]

United States v. Lovett, 63 M.J. 211, 215 (C.A.A.F. 2006).

The service courts of appeal have the authority to address claims concerning the conditions of confinement based on extra-record material. *See United States v. Pena*, 64 M.J. 259, 266–67 (C.A.A.F. 2007); *United States v. Erby*, 54 M.J. 476, 478–79 (C.A.A.F. 2001), *aff'd*, 59 M.J. 46 (C.A.A.F. 2003). Relying on material outside the record, however, is not without concern. *See United States v. Jessie*, 79 M.J. 437, 445 (C.A.A.F. 2020) (court noting it "may

decide in a future case whether [the *Pena* and *Erby*] holdings," permitting consideration of extra-record material for claims of post-trial mistreatment, "should be overruled, modified, or instead allowed to stand as 'aberration[s]' that are 'fully entitled to the benefit of stare decisis' because they have become established" (second bracket in original) (citation omitted)). We proceed on the assumption that we may address the solitary confinement and parole issues, and may do so on the basis of extra-record submissions pursuant to the *Pena* and *Erby* holdings. We address the solitary confinement issue first.

Appellant argues that his placement in solitary confinement is an unlawful increase in his sentence and seeks disapproval of his sentence as incorrect in law and fact. Appellant's Br. 28–33, 36–37; Appellant's Reply Br. 15–18. Appellee urges the court to deny relief, indicating "the Guantanamo prison-grievance system granted [appellant's] single request for an exception to his isolation until the COVID-19 pandemic intervened." Appellee's Br. 29 (citing Appellant's Br. 12; Appellant's App. 148a). Appellee also states that JTF- GTMO "prison officials [] are willing to make reasonable exceptions to avoid unintentional, indefinite solitary confinement." *Id.*

On the surface, appellant's solitary confinement issue presents a Gordian knot, of sorts, for the government. Avoidance of unwarranted solitary confinement encroaches upon rules prohibiting commingling of the convicted and the unconvicted. Avoiding the commingling of a post-trial

prisoner like appellant with unconvicted pretrial detainees serves a legitimate penological interest, as pretrial prisoners are presumed innocent. *See generally United States v. Adcock*, 65 M.J. 18, 24–25 (C.A.A.F. 2007) (listing service regulations prohibiting commingling); *United States v. Palmiter*, 20 M.J. 90 (C.M.A. 1985) (discussing history of law against commingling). In *Adcock*, the CAAF granted confinement credit for intentional violation of regulations prohibiting commingling. 65 M.J. at 25. Yet, the court denied confinement credit in *United States v. King* for commingling as a result of the post-trial prisoner's security classification by confinement officials, to which the court deferred. 61 M.J. 225, 228 (C.A.A.F. 2005). Unlawful solitary confinement also may warrant relief. In *Gay*, the CAAF affirmed a reduction in confinement for an unlawful placement of a pretrial confinee in solitary confinement. 75 M.J. at 265 (citing 10 U.S.C. § 866(c)). The placement was made to avoid violation of Article 12, UCMJ, prohibiting commingling with foreign nationals,[34] which the court found to be an invalid reason for solitary confinement placement. *Id.* at 269; *see also King*, 61 M.J. at 228 (finding segregation of pretrial confinee in six-by-six windowless cell to avoid commingling amounted to punishment warranting confinement credit).

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[34] Article 12, UCMJ (2012), prohibits confining a servicemember with enemy prisoners, or persons "(A) who are detained under the law of war and are foreign nationals; and (B) who are not members of the armed forces."

Appellant provided extra-record material stating that JTF-GTMO, while cognizant of its goal to avoid commingling, had planned in 2008 to allow another detainee, Salim Ahmed Hamdan, post-conviction contact and social interaction with unconvicted detainees during recreation. Appellant's App. 148a; *see supra* note 30. This evidence is insufficient to support appellant's claim and request for relief. He did not meet his burden to provide a "'clear record' of facts and circumstances," *Pena*, 64 M.J. at 266, that would establish cruel or unusual punishment under the three-pronged *Lovett* test, and 10 U.S.C. § 949s. Appellant has not satisfied *Lovett* factors two and three. *See* 63 M.J. at 215. Appellant asserts that prison officials granted him permission for some commingling—made impossible only by COVID-19 safety precautions. Appellant's Br. 12. This shows that prison officials were not deliberately indifferent to his health and safety. *Lovett* factor two is unmet. Nor has appellant exhausted the prisoner-grievance system. The record and the extra- record submission do not reflect that appellant has made a request for permission to commingle in the post-pandemic period. *Lovett* factor three also is unmet. "[I]t is particularly important that the appellant provide us with a 'clear record' of the facts and circumstances relevant to [his] claim of legal error." *Pena*, 64 M.J. at 266. He has not done so. Assuming appellant has been placed in solitary confinement, his claim that he was illegally punished by such placement is without merit.

Regarding his parole claim, appellant contends his sentence was illegally enhanced because there is no

parole system. Appellant's Br. 33–35. Without access to a parole hearing, appellant argues that he essentially must serve a sentence to confinement for life without eligibility for parole—which is not his adjudged sentence. Appellant's Br. 3, 33, 36–37; Appellant's Reply Br. 15–17. Appellant contends that Department of Defense Instruction 1325.07 indicates he became eligible for parole at least by November 2018 under the law existing when he was sentenced. Appellant's Br. 33, 36–37. This instruction, however, applies to "prisoners," who are defined as persons "sentenced by a court-martial to confinement." *See* Dep't of Def. Instr. 1325.07, Administration of Military Correctional Facilities and Clemency and Parole Authority, pt. II at p. 93 (Mar. 11, 2013) (C4 Aug. 19, 2020). Neither party has presented any regulatory authority for parole of a person sentenced by a military commission.

"There is no constitutional or inherent right of a convicted person to be conditionally released before the expiration of a valid sentence." *Greenholtz v. Inmates of Neb. Penal & Corr. Complex*, 442 U.S. 1, 7 (1979). "A convicted prisoner [in a federal prison] has no absolute right to parole; rather, the issue of parole is delegated to the [Parole] Commission's discretion." *Alamo v. Clay*, 137 F.3d 1366, 1369 (D.C. Cir. 1998) (citing 18 U.S.C. §§ 4206, 4218(d) (West Supp. 1997) as basis for federal parole). "Accordingly, to the extent the Inmates enjoy a protectible interest in parole, this interest must find its roots in rights imparted by [] law." *Burnette v. Fahey*, 687 F.3d 171, 181 (4th Cir. 2012).

Congress did not create a parole or supervised release system for the class of prisoners to which appellant belongs. In the absence of congressional action, it is not for us under our sentencing review authority to grant the sentencing relief requested. Appellant has not presented any evidence of a constitutional, statutory, or regulatory right to the availability of post-trial parole when the commission sentenced him, or subsequently. Appellant's claim that he has been denied consideration for parole is without merit.

The court finds that appellant's sentence has not been "*unlawfully increased by prison officials*," as contended. Appellant's Br. 28 (quoting *Guinn*, 81 M.J. at 200); Appellant's Reply Br. 3, 15–16 (quoting same).

C. Appropriateness review

The court reviews sentence appropriateness de novo. *United States v. Lane*, 64 M.J. 1, 2 (C.A.A.F. 2006). We again assume for purposes of this appeal only, that our "discretion over sentence appropriateness," *Kelly*, 77 M.J. at 407, also "has no direct parallel in the federal civilian sector" and is like the authority a service court of criminal appeals may exercise. *Id.* (quoting *Lacy*, 50 M.J. at 288); *see also* 10 U.S.C. § 948b(c) (stating construction and application of UCMJ is instructive but not binding on military commissions). "[N]o other federal appellate court, including [the CAAF], in the American criminal

justice system possesses the same power" over the appropriateness of a sentence. *Kelly*, 77 M.J. at 407.

"We assess sentence appropriateness by considering the particular appellant, the nature and seriousness of the offense[s], . . . and all matters contained in the record of trial." *United States v. Anderson*, 67 M.J. 703, 705 (A.F. Ct. Crim. App. 2009) (per curiam). Although the court is accorded great discretion in determining whether a particular sentence is appropriate, we are not authorized to engage in exercises of clemency. *See United States v. Nerad*, 69 M.J. 138, 146 (C.A.A.F. 2010). Our review is necessarily limited to the record. *See United States v. Willman*, 81 M.J. 355, 361 (C.A.A.F. 2021) (concluding service court of criminal appeals "did not err when it held that it could not consider evidence outside the record to determine sentence appropriateness . . . even when it had already considered that evidence to resolve Appellant's Eighth Amendment and Article 55, UCMJ, 10 U.S.C. § 855 (2012), claims"), *cert. filed*, No. 21-920 (Dec. 17, 2021).

The court, like the commission, considers appellant individually "on the basis of the nature and seriousness of the offense and [his] character." *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982) (quoting *United States v. Mamaluy*, 10 U.S.C.M.A. 102, 106–07, 27 C.M.R. 176, 180–81 (1959)). At the same time as we find beyond a reasonable doubt that the constitutional errors were harmless in terms of the sentence, as reassessed, we can reliably

determine beyond a reasonable doubt that the sentence is not inappropriate, as argued. In fulfilling our "judicial function of assuring that justice is done and that the [appellant] gets the punishment he deserves," *United States v. Healey*, 26 M.J. 394, 395 (C.M.A. 1988), we determine that a sentence of confinement for life is correct in law and fact and we affirm this sentence on the basis of the entire record.

V. Conclusion

Appellant's and appellee's motions to consider appendices are **GRANTED**.

Appellant's motion to vacate the remaining conspiracy charge based on challenges to the appointment of the convening authority is **DENIED.**

Appellant's motion for sentence relief, based on his claim that he was unlawfully placed in solitary confinement and unlawfully denied consideration for parole, is **DENIED**.

The sentence, as reassessed, is **AFFIRMED**.

FOR THE COURT:

Mark Harvey

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