

No. 12-35475

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ABD AL RAHIM HUSSEIN AL-NASHIRI,
Plaintiff-Appellant,

v.

BRUCE MACDONALD,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

BRIEF FOR THE DEFENDANT-APPELLEE

STUART F. DELERY
Principal Deputy Assistant
Attorney General

JENNY A. DURKAN
United States Attorney

ROBERT M. LOEB
(202) 514-4332
SYDNEY FOSTER
(202) 616-5374
Attorneys, Appellate Staff
Civil Division, Room 7258
U.S. Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530

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STATEMENT OF JURISDICTION

Plaintiff sought to invoke the district court's jurisdiction under 28 U.S.C. §§ 1331, 2201, and 2202. *See* Excerpts of Record ("ER") 73. As we discuss at pages 13-34, however, the district court lacked jurisdiction over plaintiff's claims under 28 U.S.C. § 2241(e)(2) and the provisions of the Military Commissions Act of 2009 providing for administrative and judicial review of military commission decisions, 10 U.S.C. §§ 950b-950g. On May 11, 2012, the district court entered judgment against plaintiff. ER 1. On June 7, 2012, plaintiff filed a timely notice of appeal. *See* ER 70; Fed. R. App. P. 4(a)(1)(B). This Court has jurisdiction over the appeal pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

Plaintiff, an alien detainee at Guantanamo Bay facing charges before a military commission, filed this action to challenge the decision to convene a military commission in his case. The issues presented on appeal are:

1. Whether the district court correctly concluded that it lacked subject-matter jurisdiction over plaintiff's claims under 28 U.S.C. § 2241(e)(2).
2. Whether the district court correctly held that plaintiff's action is precluded by the Military Commissions Act, which grants the D.C. Circuit exclusive jurisdiction over challenges to military commission judgments.

3. Whether the district court properly abstained from exercising equitable jurisdiction in this case.

PERTINENT STATUTES

Pertinent statutes—5 U.S.C. §§ 701-702; 10 U.S.C. §§ 948a-948d, 950b-950g, 950p, 950t; and 28 U.S.C. § 2241—are reproduced in the addendum to this brief.

STATEMENT OF THE CASE

Plaintiff, an alien detainee at Guantanamo Bay facing charges before a military commission, filed this action in district court to challenge the decision to convene a military commission in his case. The district court dismissed plaintiff's complaint on three independent grounds, concluding that (1) 28 U.S.C. § 2241(e)(2) jurisdictionally bars plaintiff's claims; (2) the action is precluded by the doctrine of sovereign immunity and the administrative- and judicial-review provisions of the Military Commissions Act; and (3) abstention from exercising equitable jurisdiction is appropriate. ER 11-19. Plaintiff appeals.

STATEMENT OF FACTS

A. Statutory Background

Under the Military Commissions Act of 2009, Pub. L. No. 111-84, div. A, tit. XVIII, 123 Stat. 2574 (codified at 10 U.S.C. §§ 948a *et seq.*) (“2009 MCA” or “MCA”), which largely supersedes the Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (“2006 MCA”), the President is authorized to establish military

commissions to try alien unprivileged enemy belligerents for violations of the law of war and other offenses triable by military commissions, 10 U.S.C. §§ 948b(a)-(b), 948c. The MCA establishes procedures governing the use of such military commissions, *id.* § 948b(a), and further procedures are set forth in the Rules for Military Commissions. *See* R. for Mil. Comm. (“RMC”) 101(a).¹

1. The MCA provides that military commissions “shall have jurisdiction to try persons subject to this chapter”—*i.e.*, “alien unprivileged enemy belligerent[s],” 10 U.S.C. § 948c—“for any offense made punishable” by, *inter alia*, the MCA, “whether such offense was committed before, on, or after September 11, 2001.” *Id.* § 948d. Subchapter VIII, titled “Punitive Matters,” sets out the elements and punishment for 32 offenses that are “triable by military commission.” *Id.* § 950t. Subsection 950p(c) of that subchapter, titled “[c]ommon circumstances,” further provides that “[a]n offense specified in this subchapter is triable by military commission under this chapter only if the offense is committed in the context of and associated with hostilities.” The statute defines “hostilities” as “any conflict subject to the laws of war.” *Id.* § 948a(9).

2. When the government seeks to try an individual before a military commission under the MCA, the first step is the “swearing” of charges. 10 U.S.C. § 948q. Next, the Secretary of Defense or his designee—known as the “Convening

¹ The Rules for Military Commissions appear in Part II of the Manual for Military Commissions (2010), *available at* <http://www.mc.mil/LEGALRESOURCES/MilitaryCommissionsDocuments/CurrentDocuments.aspx>.

Authority”—considers the charges, evidence, and other information, and decides whether each charge should be dismissed, forwarded to another authority for disposition, or “referred” to a military commission for trial. *Id.* § 948h; RMC 401(a), (b), 407(a), 601(a), (b), (d). The Convening Authority may refer charges to a military commission for trial only if “the [C]onvening [A]uthority finds, or is advised by a legal advisor,” that, *inter alia*, “there are reasonable grounds to believe that an offense triable by a military commission has been committed and that the accused committed it.” RMC 601(d)(1).

3. If an accused is convicted by a military commission, the conviction is subject to multiple layers of administrative and judicial review. First, the Convening Authority has discretion to dismiss any charge on which an accused was found guilty, to convict the accused instead of a lesser included offense, and to approve, disapprove, suspend, or commute (but not enhance) the sentence rendered by the commission in whole or in part. 10 U.S.C. § 950b(c). In the event that the Convening Authority approves a finding of guilty, the Convening Authority must refer the case to the United States Court of Military Commission Review unless the accused was not sentenced to death and waives the right of review. *Id.* § 950c(a), (b). The U.S. Court of Military Commission Review may affirm findings of guilty and sentences only if it concludes that those findings and sentences are “correct in law and fact” and only if it

“determines, on the basis of the entire record, [that the findings and sentences] should be approved.” *Id.* § 950f(d).

After the exhaustion of these procedures providing for review by the Convening Authority and the U.S. Court of Military Commission Review, an accused may file a petition for review with the D.C. Circuit, which has “exclusive jurisdiction to determine the validity of a final judgment rendered by a military commission (as approved by the [C]onvening [A]uthority and, where applicable, as affirmed or set aside as incorrect in law by the United States Court of Military Commission Review).” *Id.* § 950g(a)-(b). The scope of the D.C. Circuit’s review encompasses all “matters of law, including the sufficiency of the evidence to support the verdict.” *Id.* § 950g(d). Supreme Court review of any final judgment of the D.C. Circuit may be sought by writ of certiorari. *Id.* § 950g(e).

B. Factual And Procedural Background

1. Plaintiff Abd Al Rahim Hussein Al-Nashiri is a Saudi national detained at Guantanamo Bay. ER 73. In 2011, military commission charges were sworn against plaintiff and forwarded to the Convening Authority, defendant Vice Admiral (Retired) Bruce MacDonald. ER 73, 76, 93. After considering the sworn charges, the evidence, and a request by plaintiff that a military commission not be convened, the Convening Authority referred most of the charges to a military commission and specified that the case was referred as a capital case. ER 79, 86-104.

The referred charges alleged the following nine violations of the MCA, 10 U.S.C. § 950t: using treachery or perfidy; murder in violation of the law of war; attempted murder in violation of the law of war; terrorism; conspiracy; intentionally causing serious bodily injury; attacking civilians; attacking civilian objects; and hijacking or hazarding a vessel or aircraft. ER 95-104. The charges largely stem from plaintiff's alleged role in three terrorist attacks or attempted terrorist attacks perpetrated by al Qaeda: (1) the 2000 attempted bombing of USS THE SULLIVANS in Yemen; (2) the 2000 bombing of USS COLE in Yemen that killed seventeen American sailors; and (3) the 2002 bombing of the *M/V Limburg*, a French oil tanker, in Yemen that killed one crew member.² ER 95-104.

The proceedings in plaintiff's military commission case are now underway at Guantanamo, and the military judge has already heard and ruled on a number of pre-trial motions filed by plaintiff and the government. As relevant here, on August 30, 2012, plaintiff filed a motion to dismiss the case in which plaintiff argued that the Convening Authority should not have referred the charges because neither Congress nor the President "officially recognized hostilities in . . . Yemen" until 2003, after the bombings and attempted bombings at issue in plaintiff's military commission case. *See*

² The conspiracy charge concerns events beyond those described above, alleging conspiracy with Usama bin Laden and others to commit terrorism and murder in violation of the law of war from approximately August 1996 through approximately October 2002 "at multiple locations in and around Yemen, Afghanistan, Pakistan, Saudi Arabia, the United Arab Emirates . . . , the Middle East, the Arabian Peninsula, and other locations." ER 97-98.

Def. Mot. To Dismiss Because The Convening Authority Exceeded His Power In Referring This Case To A Military Commission, at 8, *United States v. Al-Nashiri*, AE104 (filed Aug. 30, 2012) (“Mil. Comm’n Mot.”).³ Plaintiff contended that referral in the absence of officially recognized hostilities in Yemen violated both the Constitution and the provision in the MCA stating that offenses are triable by military commission only if they are “committed in the context of and associated with hostilities,” 10 U.S.C. § 950p(c). *See* Mil. Comm’n Mot., at 5-10.

The government opposed the motion, and the military judge conducted a hearing on the motion on October 24, 2012. *See* Unofficial/Unauthenticated Transcript, at 1497-531, *United States v. Al-Nashiri* (Oct. 24, 2012).⁴ As of the date of the filing of this brief, the military judge has not yet ruled on the motion.

2. On November 3, 2011, almost ten months before plaintiff filed his motion to dismiss in the military commission, plaintiff filed a complaint asserting a similar challenge in the District Court for the Western District of Washington. Plaintiff’s complaint names the Convening Authority as the defendant and purports to sue him “in his individual capacity.” ER 73.

³ This motion and all other filings in plaintiff’s military commission case are available in the “Docket” section of “Abd al-Rahim Hussein Muhammed Abdu Al-Nashiri (2)” at <http://www.mc.mil/CASES/MilitaryCommissions.aspx>.

⁴ This transcript is available in the “Transcripts” section of “Abd al-Rahim Hussein Muhammed Abdu Al-Nashiri (2)” at <http://www.mc.mil/CASES/MilitaryCommissions.aspx>.

Like plaintiff's military commission motion to dismiss, plaintiff's district-court complaint alleges that the Convening Authority's referral decision violated 10 U.S.C. § 950p(c) and the Constitution because neither the President nor Congress "ch[ose] to invoke their war powers and apply the law of war in Yemen at any time relevant to the allegations against [plaintiff]." ER 73. Specifically, plaintiff's complaint alleges that the referral decision violated 10 U.S.C. § 950p(c), Article III of the Constitution, and the Fifth, Sixth, and Eighth Amendments because the alleged offenses did not "occur[] in the context of and were [not] associated with an armed conflict subject to the laws of war," ER 80-81.

As relief, plaintiff's complaint seeks "judgment[s] declaring that" (1) "neither the President nor the Congress certified the existence of an armed conflict subject to the laws of war in Yemen prior to September 2003"; and (2) the Convening Authority "acted beyond his authority and in violation of the [C]onstitution" by referring capital charges against plaintiff to a military commission relating to the attempted bombing of USS THE SULLIVANS and the bombing of USS COLE and *M/V Limburg* because those events "did not occur, as a matter of law, in the context of and w[ere] not associated with hostilities." ER 82.

3. The district court dismissed plaintiff's complaint on three independent grounds. ER 2-20. The district court first held that it lacked subject-matter jurisdiction over the complaint under 28 U.S.C. § 2241(e)(2), which, as relevant here, bars

jurisdiction over any non-habeas action “against the United States or its agents relating to any aspect of the . . . trial . . . of an alien who is . . . detained by the United States and has been determined by the United States to have been properly detained as an enemy combatant.” ER 11-13. In arriving at this conclusion, the district court rejected plaintiff’s argument that *Boumediene v. Bush*, 553 U.S. 723 (2008), invalidated § 2241(e)(2). To the contrary, the district court explained, *Boumediene* addressed a distinct statutory provision barring habeas actions concerning certain Guantanamo detainees, 28 U.S.C. § 2241(e)(1). ER 12-13.

The district court also dismissed the complaint on the independent ground that the government has not waived its sovereign immunity for plaintiff’s claims and that judicial review in district court was implicitly precluded by the 2009 MCA, which vests the D.C. Circuit with exclusive jurisdiction over challenges to final judgments of military commissions, 10 U.S.C. § 950g. ER 14-15. In reaching those conclusions, the district court rejected plaintiff’s argument that he was permitted to bring his “individual-capacity” suit against the Convening Authority under *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949). The district court held that plaintiff’s case is really against the United States and that the 2009 MCA preempts any remedy under *Larson*. ER 15-18.

In addition, the district court dismissed based on a third independent ground—that abstention was required under *Schlesinger v. Councilman*, 420 U.S. 738 (1975). ER

18-19. The court arrived at this conclusion because it determined that many of the considerations that counseled in favor of abstention in *Councilman*—including “the necessity of respect for coordinate judicial systems,” “the value of ‘looking to the special competence of agencies in which Congress has reposed the duty to perform particular tasks,’” the interest in avoiding “‘duplicative proceedings,’” the “possibility that the ‘agency’s ultimate decision will obviate the need for judicial intervention,’” and the need to show deference to Congress’s balancing of interests, ER 18-19 (quoting *Councilman*, 420 U.S. at 756-57)—apply to plaintiff’s case.

SUMMARY OF ARGUMENT

Plaintiff filed this action in district court to challenge the Convening Authority’s decision to convene a military commission in his case. The district court properly dismissed plaintiff’s action on three independent grounds.

First, the district court correctly held that plaintiff’s claims are barred by 28 U.S.C. § 2241(e)(2), which bars jurisdiction over any non-habeas action “against the United States or its agents relating to any aspect of the . . . trial . . . of an alien who is . . . detained by the United States and has been determined by the United States to have been properly detained as an enemy combatant.” The statute’s plain language bars plaintiff’s claims, and the district court correctly concluded that § 2241(e)(2) is still good law after *Boumediene v. Bush*, 553 U.S. 723 (2008). Plaintiff’s argument that § 2241(e)(2) violates the equal protection component of the Due Process Clause has

been waived and, in any event, is meritless because there was a rational basis for limiting § 2241(e)(2)'s reach to aliens detained as enemy combatants.

Subsection 2241(e)(2) is also not an unconstitutional bill of attainder. The withdrawal of jurisdiction does not fall within the historical meaning of legislative punishment, and the purpose and intent underlying the statutory provision are nonpunitive.

Second, the district court correctly concluded that plaintiff's action is independently precluded by the administrative- and judicial-review provisions of the Military Commissions Act. Those provisions establish that upon exhaustion of a detailed set of procedures providing for initial review of military commission judgments by the Convening Authority and the U.S. Court of Military Commission Review, judicial review is available in the D.C. Circuit, which has "exclusive jurisdiction to determine the validity of a final judgment rendered by a military commission." 10 U.S.C. § 950g(a). This comprehensive mechanism for administrative and judicial consideration of military commission issues clearly shows that Congress did not intend to permit judicial review beyond the review provided for by statute in the D.C. Circuit. Plaintiff's argument that his suit may proceed as an officer suit under *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949), is without merit. Suits under *Larson* are not available where, as here, Congress has implicitly precluded that remedy by enacting a comprehensive and detailed alternative remedial scheme.

Third, the district court properly determined that it should abstain from exercising equitable jurisdiction under the principles established in *Schlesinger v. Councilman*, 420 U.S. 738 (1975). The primary comity consideration that makes abstention appropriate in the court martial context applies here because due respect is warranted for Congress's judgment that the integrated system it created in the Military Commissions Act for review of military commission decisions—including review as of right in the D.C. Circuit—is generally adequate to address claims like plaintiff's. In addition, the exception to *Councilman* abstention for personal-jurisdiction challenges does not apply here because plaintiff's challenge concerns only the offenses with which he was charged. Because plaintiff does not allege any injury beyond that attendant to his military commission trial, the district court properly determined that *Councilman* abstention was warranted.

STANDARD OF REVIEW

This Court conducts de novo review of the district court's dismissal for lack of subject-matter jurisdiction. *Jeffredo v. Macarro*, 599 F.3d 913, 917 (9th Cir. 2010); *Alaska v. Babbitt*, 75 F.3d 449, 451 (9th Cir. 1996). This Court conducts de novo review of decisions to abstain under *Younger v. Harris*, 401 U.S. 37 (1971), *Potrero Hills Landfill, Inc. v. County of Solano*, 657 F.3d 876, 881 (9th Cir. 2011), which are analogous to decisions to abstain under *Schlesinger v. Councilman*, 420 U.S. 738 (1975), *see id.* at 754-57.

ARGUMENT⁵

I. PLAINTIFF'S CLAIMS ARE JURISDICTIONALLY BARRED BY 28 U.S.C. § 2241(e)(2).

A. The Plain Text Of 28 U.S.C. § 2241(e)(2) Bars Plaintiff's Claims.

Under 28 U.S.C. § 2241(e)(2),

no court, justice, or judge shall have jurisdiction to hear or consider any other action against the United States or its agents relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien who is or was detained by the United States and has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.

As the D.C. Circuit explained in *Kiyemba v. Obama*, “any other action” in § 2241(e)(2) means all actions “other than a petition for a writ of habeas corpus, which is the subject of [the prior subsection,] § 2241(e)(1).” 561 F.3d 509, 513 (D.C. Cir. 2009), *cert. denied*, 130 S. Ct. 1880 (2010).

⁵ Most of the arguments of amici curiae Physicians for Human Rights and Retired Military Admirals et al. are not relevant to the three issues on appeal and/or have not been asserted by plaintiff in this Court or even in district court. *See, e.g.*, Br. for Amici Curiae Retired Military Admirals et al. 15-20 (arguing that the Convening Authority’s decision violates due process and ex post facto principles); Br. for Amicus Curiae Physicians For Human Rights 18-29 (arguing that plaintiff was mistreated during his detention). Although the government disagrees with these arguments, this brief does not address them because they do not relate to the issues on appeal and/or have not been raised by plaintiff himself and thus are not properly before this Court. *See Intermountain Fair Hous. Council v. Boise Rescue Mission, Inc.*, 657 F.3d 988, 996 n.6 (9th Cir. 2011) (this Court generally does not consider on appeal an issue raised only by an amicus); *see also Zango, Inc. v. Kaspersky Lab, Inc.*, 568 F.3d 1169, 1177 n.8 (9th Cir. 2009).

Plaintiff's claims plainly fall within the terms of this statute. His claims "relat[e] to . . . aspect[s] of [his] . . . trial," § 2241(e)(2), because plaintiff seeks a declaration that he should not even be subject to trial before a military commission. In addition, plaintiff does not dispute that he "has been determined by the United States to have been properly detained as an enemy combatant," *id.*, because a "Combatant Status Review Tribunal" determined in 2007 that plaintiff was an "enemy combatant," *see* Supplemental Excerpts of Record 1-6. Thus, his claims are barred. That legal conclusion is supported by the D.C. Circuit's recent decision holding that 28 U.S.C. § 2241(e)(2) bars jurisdiction over damages claims concerning the alleged mistreatment and death of former Guantanamo detainees. *See Al-Zabirani v. Rodriguez*, 669 F.3d 315, 317-18 (D.C. Cir. 2012).

Plaintiff argues (Pl. Br. 33-34) that his action is not "against the United States or its agents" within the meaning of § 2241(e)(2) because his complaint purports to sue the Convening Authority "in his individual capacity," ER 73, and alleges that the Convening Authority had no lawful authority to refer his charges. As explained *infra* on pages 31-32, plaintiff's action does not seek relief against the Convening Authority in his "individual capacity." In any event, plaintiff's action against the Convening Authority easily qualifies as an "action against the United States or its agents" under

the plain meaning of those terms. *Cf. Al-Zabrani*, 669 F.3d at 317-18 (§ 2241(e)(2) bars damages actions asserted against government officials in their individual capacities).⁶

Plaintiff's second argument (Pl. Br. 35) relies on the fact that the 2009 MCA did not reenact a provision of the 2006 MCA, 10 U.S.C. § 950j(b), that expressly barred judicial review of "any claim or cause of action . . . relating to the prosecution, trial, or judgment of a military commission" unless the challenge was asserted through the judicial-review mechanisms established by the MCA. 2006 MCA, Pub. L. No. 109-366, § 3(a)(1), 120 Stat. at 2623-24 (formerly codified at 10 U.S.C. § 950j(b)). Plaintiff argues that if the district court's reading of § 2241(e)(2) is correct, former § 950j(b) was unnecessary and would have been surplusage. Canons of construction like the "surplusage" canon plaintiff references are, however, "no more than rules of thumb," and "a court should always turn first to [the] cardinal canon" that "a legislature says in a statute what it means and means in a statute what it says." *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992). The "surplusage" canon thus provides no grounds for ignoring the plain language of § 2241(e)(2) and failing to "respect[] the

⁶ Had Congress intended to limit § 2241(e)(2) to exclude suits asserted against government officials in their individual capacities or to exclude suits alleging that an official took actions that were not lawfully authorized, Congress would have used narrowing language in the statute. For example, 28 U.S.C. § 1391(e), a venue statute upon which plaintiff relies (Pl. Br. 34), is limited to suits where a defendant is, *inter alios*, "an officer or employee of the United States or any agency thereof acting in his official capacity or under color of legal authority," and the Supreme Court has held that it does not apply to government officials sued in their individual capacities for damages, *Stafford v. Briggs*, 444 U.S. 527, 533-45 (1980).

words of Congress.” *Lamie v. U.S. Trustee*, 540 U.S. 526, 536 (2004) (holding that plain meaning trumps “surplusage” canon); *see also Conn. Nat’l Bank*, 503 U.S. at 253 (“[r]edundancies across statutes are not unusual events in drafting”).

In addition, plaintiff cannot escape the plain language of § 2241(e)(2) by focusing on the omission of former § 950j(b) in the 2009 MCA. The 2009 MCA replaced all of chapter 47A of Title 10 of the U.S. Code—the chapter governing military commissions that was first enacted in the 2006 MCA—with a new set of statutory provisions, and Congress did not focus specifically on former § 950j(b). *See* Pub. L. No. 111-84, div. A, tit. XVIII, § 1802, 123 Stat. at 2574-612. The fact that, given the existence of § 2241(e)(2), Congress saw no need to reenact § 950j(b) tells us very little and certainly does not amend or repeal § 2241(e)(2). Moreover, in the 2009 MCA, Congress continued to provide that the D.C. Circuit has “exclusive jurisdiction to determine the validity of a final judgment rendered by a military commission” after exhaustion of initial review procedures, 10 U.S.C. § 950g(a), thus making clear that Congress intended to channel all review of military commission proceedings through the D.C. Circuit. If the omission of former § 950j(b) was intended to work the dramatic change that plaintiff contends it effected, the legislative history likely would

have included some mention of the change, but we are not aware of any discussion of the issue.⁷

B. *Boumediene* Did Not Invalidate 28 U.S.C. § 2241(e)(2).

Plaintiff argues (Pl. Br. 29-33) that § 2241(e)(2) does not bar his action because the Supreme Court struck § 2241(e)(2) down as unconstitutional in *Boumediene v. Bush*, 553 U.S. 723 (2008). That argument is incorrect and has been rejected by every single court to have reached the question with the exception of one lone district court.

Compare, e.g., Al-Zabrani, 669 F.3d at 319 (rejecting argument); *Kiyemba*, 561 F.3d at 512 n.1 (same); *and Al Janko v. Gates*, 831 F. Supp. 2d 272, 280 n.12 (D.D.C. 2011) (same, collecting cases), *appeal pending*, No. 12-5017 (D.C. Cir.); *with Hamad v. Gates*, 2011 WL 6130413, at *2-3 (W.D. Wash. 2011) (accepting argument), *appeal pending*, Nos. 12-35395, 12-35489 (9th Cir.).

Plaintiff relies (Pl. Br. 29) heavily on *Boumediene*'s statements that it was striking down “§ 7 of [the 2006 MCA]” as an unconstitutional suspension of the writ, 553 U.S. at 733, 792, 795. Although § 7 of the 2006 MCA enacted the current version of 28

⁷ Plaintiff also appears to argue (Pl. Br. 33) that this Court somehow retains jurisdiction to address his statutory challenge, but the plain text of § 2241(e)(2) bars review of all claims regardless of their basis. The decisions upon which plaintiff relies are inapposite because they address the distinct question of the scope of judicial review where a statute commits certain agency actions to agency discretion. *See Spencer Enters. v. United States*, 345 F.3d 683, 688-91 (9th Cir. 2003); *Wallace v. Christensen*, 802 F.2d 1539, 1541-553 (9th Cir. 1986) (en banc).

U.S.C. § 2241(e)(2), it also enacted the current version of 28 U.S.C. § 2241(e)(1), which provides that

[n]o court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.

Pub. L. No. 109-366, § 7(a), 120 Stat. at 2635-36. The district court correctly concluded that *Boumediene* addressed § 2241(e)(1), not § 2241(e)(2). *See* ER 12-13.

As the D.C. Circuit recently explained, *Boumediene* “involved a decision applying the first subsection of § 7 governing and barring the hearing of applications for writs of habeas corpus filed by detained aliens [§ 2241(e)(1)],” and the “Court’s conclusion that the statute unconstitutionally stripped the courts of jurisdiction to review habeas corpus petitions relied on the Suspension Clause of the Constitution.” *Al-Zabrani*, 669 F.3d at 319; *see Boumediene*, 553 U.S. at 736, 739-55, 765-98. Significantly, § 2241(e)(2) “has no effect on habeas jurisdiction,” and thus the Suspension Clause “is not relevant” to the constitutionality of § 2241(e)(2). *Al-Zabrani*, 669 F.3d at 319. *Boumediene*’s discussion of the Suspension Clause thus “clearly indicates [that the Court] was referring only to that part of § 7 codified at § 2241(e)(1).” *Kiyemba*, 561 F.3d at 512 n.1.

Plaintiff also contends (Pl. Br. 30-33) that § 2241(e)(2) is not severable from § 2241(e)(1). A court, however, must “refrain from invalidating more of the statute than is necessary,” and “[w]henver an act of Congress contains unobjectionable provisions separable from those found to be unconstitutional, it is the duty of this court to so declare, and to maintain the act in so far as it is valid.” *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684 (1987) (internal quotation marks omitted).

This Court’s task in conducting severability analysis is to determine “what Congress would have intended in light of the Court’s constitutional holding” in *Boumediene. United States v. Booker*, 543 U.S. 220, 246 (2005) (internal quotation marks omitted). There can be no doubt that the Congress that enacted the 2006 MCA would want § 2241(e)(2) to remain intact even if § 2241(e)(1) were declared unconstitutional. Congress enacted these provisions because it was concerned about burdening the military and clogging the courts with legal challenges that went beyond the two specific types of challenges that Congress authorized the D.C. Circuit to hear—(1) challenges to final judgments of military commissions, *see* 2006 MCA, Pub. L. No. 109-366, § 3(a)(1), 120 Stat. at 2622; and (2) challenges to Combatant Status Review Tribunal determinations, *see* Detainee Treatment Act of 2005 (“DTA”), Pub. L. No. 109-148, § 1005(e)(2), 119 Stat. 2680, 2742-43. *See, e.g.*, H.R. Rep. No. 109-664, pt. 1, at 27 (2006) (“The committee notes its intention to make clear . . . that except for . . .

review of final judgments by [Combatant Status Review Tribunals] and final judgments of military commissions, this section forecloses any legal claim . . .”).⁸

Because Congress sought to channel and limit judicial review available to detainees, it would have wanted § 2241(e)(2) to remain in force even if § 2241(e)(1) were struck down as unconstitutional. *Cf. Bismullah v. Gates*, 551 F.3d 1068, 1073 (D.C. Cir. 2009) (explaining that “Congress’s overriding goal throughout [the enactment of the DTA and the 2006 MCA] was to limit the judicial review available to detainees” to that provided for by statute). Significantly, plaintiff has not identified any plausible reason why Congress would want § 2241(e)(2) to rise or fall with § 2241(e)(1), and there is none.

Although a provision must be “fully operative as a law” to be severable from an unconstitutional provision, *Alaska Airlines*, 480 U.S. at 684 (internal quotation marks omitted), § 2241(e)(2) operates independently of the other statutory provisions explicitly or implicitly referenced in the statute that are no longer good law. Plaintiff argues (Pl. Br. 30-31) that § 2241(e)(2) is inseverable from § 2241(e)(1) because one must consult § 2241(e)(1) to understand that “any other action” in § 2241(e)(2) means

⁸ Plaintiff contends (Pl. Br. 32) that Congress’s sole purpose in enacting 28 U.S.C. § 2241(e)(1) and (e)(2) was to bar habeas actions, but that purpose is contradicted by the statutory text, which bars certain habeas actions in § 2241(e)(1) and bars certain “other action[s]” in § 2241(e)(2). *See Kiyemba*, 561 F.3d at 513. Plaintiff’s argument is also belied by the legislative history cited above and by the Committee Report that plaintiff relies upon (Pl. Br. 32), which explains that § 2241(e) would bar jurisdiction over “any claim or cause of action, *including* an application for a writ of habeas corpus.” H.R. Rep. No. 109-664, pt. 2, at 16 (2006) (emphasis added).

“any non-habeas action.” Subsection 2241(e)(1) remains on the books, however, and is good law with respect to at least some aliens detained abroad, *see Al Maqaleh v. Gates*, 605 F.3d 84, 88-99 (D.C. Cir. 2010) (detainees at Bagram Airfield in Afghanistan). Moreover, plaintiff’s approach is unduly formalistic, as § 2241(e)(1) and 2241(e)(2) are functionally independent and § 2241(e)(2)’s severability should not turn on whether Congress used the phrase “any other action” as shorthand for the phrase “any non-habeas action.”

Plaintiff also argues (Pl. Br. 31) that § 2241(e)(2) is inoperative because its text provides that its jurisdictional bar applies “[e]xcept as provided in paragraphs (2) and (3) of section 1005(e) of the Detainee Treatment Act of 2005,” § 2241(e)(2), and DTA § 1005(e)(2) and (3) are no longer good law. But DTA § 1005(e)(3) is not properly part of the severability analysis because it was rendered inoperative by Congress, not the courts. *See* 2009 MCA, Pub. L. No. 111-84, div. A, tit. XVIII, § 1803(b), 123 Stat. at 2612 (repealing DTA § 1005(e)(3), which provided for judicial review of certain military commission determinations in the D.C. Circuit). And although the D.C. Circuit held that DTA § 1005(e)(2)—which provided for judicial review of Combatant Status Review Tribunal determinations in the D.C. Circuit—was inseverable from § 2241(e)(1) and thus inoperative, *see Bismullah*, 551 F.3d at 1070-75, the exception in § 2241(e)(2) for actions under DTA § 1005(e)(2) does not render § 2241(e)(2) itself inoperative. To the contrary, § 2241(e)(2) is fully independent of DTA § 1005(e)(2)

because that provision—like DTA § 1005(e)(3)— simply no longer needs to be consulted when applying § 2241(e)(2).

At bottom, plaintiff argues that a statutory provision’s mere cross-reference to an unconstitutional statutory provision renders the initial provision invalid, but *Booker* makes clear that such a formalistic approach is not the law. *Booker* held that the statute at issue there was constitutionally valid if two statutory sections were excised and if “cross-references to the two sections [were] consequently invalidated.” *Booker*, 543 U.S. at 259. *Booker* thus contemplated that a statutory provision’s cross-reference to a second statutory provision that is unconstitutional does not necessarily render the first provision invalid. Instead, as *Booker* explained, only statutory provisions containing “critical cross-references” to unconstitutional statutory provisions are inseverable from those unconstitutional provisions. *Id.* at 260 (emphasis added). As explained above, the cross-references in § 2241(e)(2) to § 2241(e)(1) and the DTA are not critical, and thus § 2241(e)(2) remains valid.⁹

⁹ For related reasons, plaintiff errs in relying (Pl. Br. 31) on this Court’s decision in *City of Auburn v. Qwest Corp.*, 260 F.3d 1160, 1180 (9th Cir. 2001), *overruled on other grounds*, *Sprint Telephony PCS, L.P. v. County of San Diego*, 543 F.3d 571 (9th Cir. 2008) (en banc). That case applied Washington state’s severability law and concerned a “complex mix” of provisions in several ordinances “whose preempted provisions [we]re so pervasive that it [wa]s not practicable to conduct a line-by-line severability analysis.” *Id.* Attempting to sever the ordinances there would have resulted in a “disjointed” scheme lacking in relevant standards. *Id.* Here, by contrast, § 2241(e)(2) includes cross-references to just two invalid statutory provisions, and it functions independently of those provisions.

C. Plaintiff's Constitutional Attacks On 28 U.S.C. § 2241(e)(2) Are Without Merit.

Plaintiff argues (Pl. Br. 36-39) that 28 U.S.C. § 2241(e)(2) violates the equal-protection component of the Due Process Clause and the Bill of Attainder Clause. Plaintiff did not assert the equal-protection argument in district court, and thus it is waived. *See, e.g., Fair Housing of Marin v. Combs*, 285 F.3d 899, 907-08 (9th Cir. 2002). In any event, both that argument and plaintiff's bill-of-attainder argument are meritless. As explained below, even assuming that plaintiff possesses equal-protection and bill-of-attainder rights under the Constitution, § 2241(e)(2) does not violate those rights.

1. Plaintiff first argues (Pl. Br. 36-37) that § 2241(e)(2) violates the equal-protection component of the Due Process Clause because it applies only to *aliens* detained by the United States who have been determined to be properly detained as an enemy combatant or are awaiting such a determination, not to *citizens* who are similarly situated. Plaintiff argues that alienage classifications are subject to strict scrutiny, and that § 2241(e)(2) fails that standard.¹⁰

¹⁰ Plaintiff also argues (Pl. Br. 36) that legislation imposing a burden on “fundamental rights” is subject to strict scrutiny and that “[a]ccess to courts to seek the redress of wrongs is a fundamental right.” But any fundamental right of judicial access that plaintiff possesses has not been infringed upon here, because plaintiff may obtain judicial review of the claims asserted in this case in the D.C. Circuit if he is convicted by a military commission, *see* 10 U.S.C. § 950g. *See Palmer v. City Nat'l Bank*, 498 F.3d 236, 246-47 (4th Cir. 2007) (rejecting similar argument for similar reasons). Moreover, “there is no constitutional requirement that the federal courts hear any and every case; rather, it is within the power of Congress to limit the jurisdiction of the lower federal courts.” *Marozsan v. United States*, 90 F.3d 1284, 1288 (7th Cir. 1996)

It is well established, however, that whereas states are subject to substantial limitations when making classifications based upon alienage, *see, e.g., Toll v. Moreno*, 458 U.S. 1, 10-13 (1982); *Graham v. Richardson*, 403 U.S. 365, 372 (1971), alienage classifications established by the federal government are subject to rational-basis review because “[f]ederal interests regarding aliens are significantly different than those of the states.” *United States v. Lopez-Flores*, 63 F.3d 1468, 1473 (9th Cir. 1995); *see also, e.g., Mathews v. Diaz*, 426 U.S. 67, 84-85 (1976); *Aleman v. Glickman*, 217 F.3d 1191, 1197-99 (9th Cir. 2000). Under rational-basis review, a statutory classification must be upheld “if there is any reasonably conceivable state of facts that could provide a rational basis for the classification,” even if there is an “imperfect fit between means and ends.” *Aleman*, 217 F.3d at 1201 (internal quotation marks omitted).

Here, § 2241(e)(2) easily passes muster under rational-basis review. Congress could have adopted an incremental approach to determining the degree to which judicial review should be afforded to individuals detained by the military as enemy combatants. *See RUI One Corp. v. City of Berkeley*, 371 F.3d 1137, 1155 (9th Cir. 2004) (incremental approach permissible under rational-basis review). Congress can legislate as to the problem at hand and need not address every potential or hypothetical scenario. Here, when Congress enacted § 2241(e)(2), it was attempting to avoid “divert[ing] our soldiers from the battlefield and . . . t[ying] their hands in ways with

(rejecting argument that provision barring jurisdiction over certain claims violates the right of access to the courts).

frivolous litigation and appeals,” 152 Cong. Rec. 20,263, 20,276 (2006) (Sen. Cornyn), and the flood of litigation that Congress was attempting to manage concerned enemy aliens, not citizens. Indeed, only a handful of citizens were ever detained in this conflict as enemy combatants, and today there are none. Thus, it is not surprising that Congress saw no need in the 2006 MCA to address potential litigation concerning citizen detainees.

In addition, § 2241(e)(2) reflects the longstanding assumption that during times of armed conflict, enemy aliens are, of necessity, subject to a different legal regime than citizens. *See, e.g., Johnson v. Eisentrager*, 339 U.S. 763, 771 (1950) (“It is war that exposes the relative vulnerability of the alien’s status.”); *id.* at 769 (“[O]ur law does not abolish inherent distinctions recognized throughout the civilized world between citizens and aliens, nor between aliens of friendly and of enemy allegiance.”); *Al-Bihani v. Obama*, 590 F.3d 866, 877 n.3 (D.C. Cir. 2010) (noting that “the procedures to which Americans are entitled [in habeas] are likely greater than the procedures to which non-citizens seized abroad” during this conflict are entitled). Congress thus had a rational basis for enacting the statute.

2. Plaintiff also argues (Pl. Br. 37-39) that § 2241(e)(2) violates the Bill of Attainder Clause, U.S. Const. art. I, § 9, cl. 3. That clause, however, applies only to legislative punishment, and § 2241(e)(2) is not legislative punishment. *Selective Serv. Sys. v. Minn. Pub. Interest Research Grp.*, 468 U.S. 841, 852 (1984). Three inquiries determine

whether a statute inflicts legislative punishment: “(1) whether the challenged statute falls within the historical meaning of legislative punishment; (2) whether the statute, viewed in terms of the type and severity of burdens imposed, reasonably can be said to further nonpunitive legislative purposes; and (3) whether the legislative record evinces a congressional intent to punish.” *Id.* (internal quotation marks omitted).

None of these factors is present here.

First, the withdrawal of jurisdiction does not fall within the historical meaning of legislative punishment. Such punishments include “imprisonment, banishment, . . . the punitive confiscation of property by the sovereign,” and the “barring [of] designated individuals or groups from participating in specified employments or vocations.” *Nixon v. Adm’r of Gen. Servs.*, 433 U.S. 425, 474 (1977). A “jurisdictional limitation” like § 2241(e)(2), by contrast, “does not impose a punishment traditionally adjudged to be prohibited by the Bill of Attainder Clause.” *Nagac v. Derwinski*, 933 F.2d 990, 991 (Fed. Cir. 1991) (internal quotation marks omitted). The decisions upon which plaintiff relies (Pl. Br. 38) do not establish that jurisdictional limitations fall within the historical meaning of legislative punishment, as the “punishment” at issue in each of those decisions was not a jurisdictional limitation. *See, e.g., Putty v. United States*, 220 F.2d 473, 478 (9th Cir. 1955) (penalty of imprisonment).

Nor is plaintiff correct in contending (Pl. Br. 38) that § 2241(e)(2) is a “civil death” statute as applied to him. Subsection 2241(e)(2) does not operate as an

absolute bar to plaintiff's claims challenging the Convening Authority's referral decision; instead, § 2241(e)(2) simply channels those claims through the procedures established in the MCA for review of military commission proceedings. Plaintiff has asserted the same claims before the military commission, and if the military commission rules against him and he is ultimately convicted, he may reassert those claims on appeal before the Convening Authority, the U.S. Court of Military Commission Review, the D.C. Circuit, and the Supreme Court. 10 U.S.C. §§ 950b-950g. Such a channeling provision in no way amounts to legislative punishment for purposes of the Bill of Attainder Clause.

In addition, the congressional intent and statutory purpose underlying § 2241(e)(2) were nonpunitive. As a House Committee Report explained, the purpose of § 2241(e) was to ensure that “judicial review of detention and military commission decisions is channeled through the adequate alternative procedures provided by this Act and the DTA.” H.R. Rep. No. 109-664, pt. 2, at 16 (2006); *see also* 152 Cong. Rec. 20,059, 20,096 (2006) (Rep. Hunter) (explaining that § 2241(e) “channel[s] . . . suits” to the D.C. Circuit); *supra* pp. 19-20. The ultimate goal of this channeling was to avoid “divert[ing] our soldiers from the battlefield and . . . t[ying] their hands in ways with frivolous litigation and appeals.” 152 Cong. Rec. at 20,276 (Sen. Cornyn); *see also* 152 Cong. Rec. 19,928, 19,976 (2006) (Sen. Kyl) (intent was to avoid “disrupt[ing] the operation of Guantanamo and undermin[ing] the war”). There was thus plainly no

punitive purpose or intent underlying § 2241(e)(2), and § 2241(e)(2) is not an unlawful bill of attainder.

II. PLAINTIFF'S ACTION IS PRECLUDED BY THE ADMINISTRATIVE- AND JUDICIAL-REVIEW PROVISIONS OF THE MILITARY COMMISSIONS ACT.

Even if 28 U.S.C. § 2241(e)(2) does not bar plaintiff's action, the action is barred because the MCA vests exclusive jurisdiction over challenges to military commission proceedings in the D.C. Circuit, 10 U.S.C. § 950g.

A. A statute may preclude district court jurisdiction over a claim where the intent to preclude review is “fairly discernible” from the statute’s “text, structure, and purpose.” *Elgin v. Dep’t of Treasury*, 132 S. Ct. 2126, 2133 (2012); *see also Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 345 (1984) (“*Block II*”) (“Whether and to what extent a particular statute precludes judicial review is determined not only from [the statute’s] express language, but also from the structure of the statutory scheme, its objectives, its legislative history, and the nature of the administrative action involved.”).

As discussed, the MCA establishes a highly reticulated scheme of administrative and judicial review of decisions made in connection with a military commission prosecution. Congress has granted the U.S. Court of Military Commission Review jurisdiction over a limited set of interlocutory appeals. 10 U.S.C. § 950d. In the event that an accused is convicted by a military commission, he may appeal to the Convening Authority, *id.* § 950b, and the U.S. Court of Military Commission Review,

id. § 950c, 950f. Upon exhaustion of these initial review procedures, judicial review is available in the D.C. Circuit, which has “exclusive jurisdiction to determine the validity of a final judgment rendered by a military commission (as approved by the [C]onvening [A]uthority and, where applicable, as affirmed or set aside as incorrect in law by the United States Court of Military Commission Review).” *Id.* § 950g(a). Finally, the Supreme Court may review the D.C. Circuit’s decision by writ of certiorari. *Id.* § 950g(e); 28 U.S.C. § 1254.

The district court correctly concluded that the finely wrought scheme for administrative and judicial review in the MCA implicitly precludes judicial review outside of the confines of the statute because the MCA establishes “formal administrative remedies” and a “detailed mechanism for judicial consideration of particular issues” that reflect an intent by Congress to confine judicial review to the review in the D.C. Circuit provided by the statute, *Block II*, 467 U.S. at 346, 349. ER 14-15, 17-18. To hold otherwise and license suits of this kind would “severely disrupt this [statutory] scheme” and “effectively nullify Congress’ intent” in enacting it, whereas “[p]reclusion of [this suit] does not pose any threat to realization of the [MCA’s] statutory objectives; it means only that those objectives must be realized through the specific remedies provided by Congress.” *Block II*, 467 U.S. at 348, 352-53.

That Congress intended to channel and limit judicial review of military commission decisions is further supported by the fact that the Administrative Procedure Act (“APA”) excludes “military commissions” from its definition of “agency,” 5 U.S.C. § 701(b)(1)(F). *See* ER 14. This exclusion is significant because APA review is available only for certain “agency” actions, and the APA waives the government’s sovereign immunity only with respect to actions by “an agency or an officer or employee thereof,” 5 U.S.C. § 702. In addition, the APA expressly bars judicial review where another “statute[] preclude[s] judicial review.” *Id.* § 701(a)(1); *see also id.* § 702. The APA thus expresses congressional intent that decisions issued in connection with military commission proceedings should be subject to judicial review only as specifically provided by other statutes such as the MCA.

The correctness of these conclusions is underscored by *McKinney v. White*, 291 F.3d 851 (D.C. Cir. 2002), which affirmed a district court’s dismissal of an action seeking review of a Judge Advocate General’s decision refusing to set aside a court martial finding and sentence. *McKinney* affirmed because “Congress’ establishment . . . of a separate judicial system for courts martial review is . . . convincing evidence that Congress could not have intended Judge Advocate General review of courts martial to fall within APA review of agency decisions.” *Id.* at 853. In addition, *McKinney* held that the Judge Advocate General decision was not reviewable because the APA excepts “courts martial” from its definition of “agency,” 5 U.S.C. § 701(b)(1)(F). *See* 291 F.3d

at 854-55. As discussed above, similar circumstances are present here, and thus plaintiff's "attempt to end run a military justice system wherein Congress has afforded him the direct review procedures it deemed appropriate" must be denied, *id.* at 856.¹¹

B. Plaintiff argues (Pl. Br. 41-43) that his suit challenging the Convening Authority's referral decision is permitted because he is suing the Convening Authority "in his individual capacity for actions taken beyond his statutory authority and in breach of the Constitution," ER 73. Plaintiff thus contends that his suit is authorized by *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949), which held that sovereign immunity does not bar suits for specific relief against a federal official when the official, *inter alia*, (1) acts beyond his statutory authority, or (2) commits an unconstitutional act. *See id.* at 689-90; *United States v. Yakima Tribal Court*, 806 F.2d 853, 859 (9th Cir. 1986). Plaintiff is mistaken.

As an initial matter, the district court properly concluded that plaintiff's complaint does not assert an action against the Convening Authority in his "individual

¹¹ Even if judicial review of the Convening Authority's referral decision was available at this stage in plaintiff's military commission proceedings notwithstanding the fact that the statute provides only for judicial review of "final judgment[s] rendered by a military commission" that have been reviewed, as appropriate, by the Convening Authority and the U.S. Court of Military Commission Review, 10 U.S.C. § 950g(a); *see also Khadr v. United States*, 529 F.3d 1112, 1115-19 (D.C. Cir. 2008) ("*Khadr P*"), the district court would still lack jurisdiction here. The MCA grants the D.C. Circuit exclusive jurisdiction over military commission decisions, 10 U.S.C. § 950g, and thus if any court were to have jurisdiction over plaintiff's interlocutory challenge, it would be the D.C. Circuit on mandamus in relationship to its exclusive jurisdiction. *See Telecomms. Research & Action Ctr. v. FCC*, 750 F.2d 70, 74-79 (D.C. Cir. 1984).

capacity” as that term is typically used. ER 15-16. Plaintiff’s complaint seeks declarations that “neither the President nor the Congress certified the existence of an armed conflict subject to the laws of war in Yemen prior to September 2003” and that the Convening Authority thus “acted beyond his authority and in violation of the [C]onstitution” when he referred charges against plaintiff concerning pre-2003 events in Yemen to a military commission. ER 82. Plaintiff’s district court filings make clear that his goal in this suit is to use any declaratory relief he is awarded to obtain dismissal of his military commission charges. *See, e.g.*, Pl. Resp. to Def. Mot. To Dismiss, at 14, Doc. 23 (Apr. 6, 2012) (explaining that if declaratory relief is granted, then, “[i]nsofar as [the Convening Authority] is a government employee, it is presumed that he will comply with this Court’s orders” and stating that “[t]he requested declaratory judgment affords [the Convening Authority] the flexibility to comply” in a number of ways, including “by rescinding his orders, withdrawing charges, etc.”). The relief plaintiff seeks thus would run against the Convening Authority’s office, not against the Convening Authority as an individual, and plaintiff’s suit, accordingly, is not an “individual-capacity” suit.

Regardless of the terminology used to characterize plaintiff’s action, the district court correctly held, ER 16-17, that plaintiff’s action is not permitted under *Larson* even if plaintiff is correct that the Convening Authority’s decision was beyond his

statutory authority and unconstitutional,¹² because officer suits under *Larson* are not available where, as here, Congress has implicitly precluded those remedies by providing a comprehensive set of alternative remedies. *See Block v. North Dakota*, 461 U.S. 273, 283 (1983) (“*Block I*”) (holding that an officer’s suit under *Larson* was unavailable where Congress had enacted a “precisely drawn, detailed statute” providing a different judicial remedy that was “intended . . . to provide the exclusive means” of obtaining judicial review); *see also Hinck v. United States*, 550 U.S. 501, 506 (2007); *cf. Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 74 (1996) (“[W]here Congress has prescribed a detailed remedial scheme for the enforcement against a State of a statutorily created right, a court should hesitate before casting aside those limitations and permitting an action against a state officer based upon *Ex parte Young*[], 209 U.S. 123 (1908)].”).

Here, as in *Block I*, “[i]t would require the suspension of disbelief to ascribe to Congress the design to allow its careful and thorough remedial scheme to be circumvented by artful pleading.” 461 U.S. at 285 (quoting *Brown v. GSA*, 425 U.S.

¹² As the government explained in its opposition to plaintiff’s motion to dismiss the military commission case, the Convening Authority’s referral of charges was consistent with the 2009 MCA and the Constitution. Although formal recognition of hostilities by the President or Congress can be dispositive as to the existence of hostilities, the existence of such hostilities prior to formal recognition remains a question of fact. *See Gov’t Resp. To Def. Mot. To Dismiss Because The Convening Authority Exceeded His Power In Referring This Case To A Military Commission*, at 6-15, *United States v. Al-Nashiri*, AE104A (filed Sept. 13, 2012). The government has not asserted these arguments in this case, however, because they go to the merits of plaintiff’s complaint, which was not properly before the district court.

820, 833 (1976)). To the contrary, as in *Block I*, “the ‘balance, completeness, and structural integrity’ of the statute” make clear that it “preempts more general remedies” such as a suit under *Larson*. *Id.* at 285-86 (quoting *Brown*, 425 U.S. at 832). *See also Brown*, 425 U.S. at 824-35 (holding that § 717 of the Civil Rights Act, 42 U.S.C. § 2000e-16, is the exclusive remedy for federal employment discrimination based on the comprehensiveness of the statute).¹³

III. THE DISTRICT COURT PROPERLY ABSTAINED FROM EXERCISING EQUITABLE JURISDICTION UNDER *COUNCILMAN*.

Even if the district court had jurisdiction over plaintiff’s complaint notwithstanding 28 U.S.C. § 2241(e)(2) and the 2009 MCA, affirmance is still required because the district court properly determined that it should abstain from exercising equitable jurisdiction under the principles established in *Schlesinger v. Councilman*, 420 U.S. 738 (1975). As explained below, considerations of comity establish that it was appropriate for the district court to abstain from intervening in plaintiff’s ongoing military commission proceedings, and plaintiff’s action is not a status-based challenge that is not subject to *Councilman* abstention. Because plaintiff has also not alleged any

¹³ Plaintiff’s argument (Pl. Br. 44-45) that the district court misunderstood *EEOC v. Peabody W. Coal Co.*, 610 F.3d 1070 (9th Cir. 2010), as holding that the APA superseded *Larson* is beside the point. As established above, plaintiff’s argument that he may proceed under *Larson* fails because the MCA implicitly precludes a *Larson* suit here.

irreparable harm, the district court properly concluded that abstention was warranted here.

In reaching this conclusion, the district court's decision is consistent with the decision of every court to have considered whether to abstain under *Councilman* from intervening in ongoing proceedings of military commissions convened pursuant to the 2006 and 2009 MCA. *See Khadr v. Obama*, 724 F. Supp. 2d 61, 64-70 (D.D.C. 2010) (“*Khadr III*”); *Al Odah v. Bush*, 593 F. Supp. 2d 53, 57-60 (D.D.C. 2009); *Khadr v. Bush*, 587 F. Supp. 2d 225, 230-34 (D.D.C. 2008) (“*Khadr II*”); *Hamdan v. Gates*, 565 F. Supp. 2d 130, 136-37 (D.D.C. 2008) (“*Hamdan III*”).

A. Considerations Of Comity Counsel In Favor Of Abstention.

1. In *Councilman*, the Supreme Court held that federal courts should normally not intervene in a pending court martial proceeding against a member of the Armed Forces, identifying two principal “considerations of comity” that favor abstention, one of which applies here. 420 U.S. at 756-58. *Hamdan v. Rumsfeld*, 548 U.S. 557, 586 (2006) (“*Hamdan II*”) (describing *Councilman*'s two primary rationales).

The central comity consideration that *Councilman* emphasized was that abstention would properly respect the balance Congress struck between “military necessities” and “ensuring fairness to servicemen charged with military offenses” when it created “an integrated system of military courts and review procedures, a critical element of which is the Court of Military Appeals consisting of civilian judges

completely removed from all military influence or persuasion.” *Councilman*, 420 U.S. at 757-58 (internal quotation marks omitted); *Hamdan II*, 548 U.S. at 586. Comity requires federal courts to give “due respect to the autonomous judicial system created by Congress,” *New v. Coben*, 129 F.3d 639, 643 (D.C. Cir. 1997), and the military commission system plaintiff is subject to is worthy of such respect because it was created by Congress and it gives detainees an appeal as of right to the D.C. Circuit, 10 U.S.C. § 950g, which is “unquestionably ‘removed from all military influence or persuasion’ as *Councilman* requires.” *Khadr II*, 587 F. Supp. 2d at 231 (quoting *Councilman*, 420 U.S. at 758).

The second comity consideration that *Councilman* identified concerns the need to avoid impinging on the military’s ability to “insist upon a respect for duty and a discipline without counterpart in civilian life,” *Councilman*, 420 U.S. at 757. Although that factor does not directly apply in the military commission context, abstention is still appropriate here because of the significance of the other *Councilman* consideration discussed above. Indeed, every court to have considered whether to abstain from intervening in military commission proceedings under the MCA has abstained solely on the basis of the *Councilman* comity consideration mandating respect for the autonomous administrative- and judicial-review procedures established by Congress. *See Khadr III*, 724 F. Supp. 2d at 66-68; *Al Odah*, 593 F. Supp. 2d at 57-59; *Khadr II*, 587 F. Supp. 2d at 230-33; *Hamdan III*, 565 F. Supp. 2d at 136-37.

This case is thus very different from the context faced by the Supreme Court in *Hamdan II*, where the Supreme Court held that abstention in favor of the Guantanamo military commission proceedings that predated the Military Commissions Act of 2006 was not warranted. *See Hamdan II*, 548 U.S. at 587-88. The military commissions system at issue in *Hamdan II* was created by order of the President, and final decisions of those military commissions were not subject to review as of right by a civilian court, thus leading the Court to conclude that “the[] review bodies [at issue there] clearly lack the structural insulation from military influence . . . and thus bear insufficient conceptual similarity to state courts to warrant invocation of abstention principles.” *Id.* Abstention is appropriate in this case because, unlike in *Hamdan II*, the military commission system at issue here was enacted by Congress and is subject to review as of right by the D.C. Circuit.¹⁴

2. Plaintiff observes (Pl. Br. 52) that the D.C. Circuit’s decision that was being reviewed by the Supreme Court in *Hamdan II* stated that *Councilman* has “little to tell . . . about the proceedings of military commissions against alien prisoners.” *Hamdan v. Rumsfeld*, 415 F.3d 33, 36 (D.C. Cir. 2005) (“*Hamdan I*”), *rev’d on other grounds*, 548 U.S. 557 (2006). To the extent that these statements reflected the D.C. Circuit’s judgment that *Councilman* abstention could never apply to a military commissions

¹⁴ *Ex parte Quirin*, 317 U.S. 1 (1942), upon which plaintiff relies (Pl. Br. 51-52), is similarly distinguishable because the military commissions in that case were not convened pursuant to a statute affording review by civilian judges, *see Quirin*, 317 U.S. at 22-23. *See Khadr II*, 587 F. Supp. 2d at 233 n.9.

regime, however, they were contradicted by the Supreme Court’s decision in *Hamdan II*, which expressly left open “the possibility that abstention may be appropriate in some cases seeking review of ongoing military commission proceedings.” *Hamdan II*, 548 U.S. at 590. Plaintiff argues (Pl. Br. 52) that the Supreme Court “opined that abstention would only ever be warranted for ‘military commissions convened on the battlefield,’” but that characterization of *Hamdan II* is inaccurate, as *Hamdan II* stated that abstention may be appropriate in some military commission cases “*such as* military commissions convened on the battlefield.” 548 U.S. at 590 (emphasis added).

Plaintiff contends (Pl. Br. 48-49) that the comity consideration in *Councilman* mandating respect for an autonomous judicial system created by Congress does not apply here because his challenge assertedly “requires the development of no factual record.” Even assuming plaintiff’s challenge presents a pure question of law,¹⁵ plaintiff’s argument fails because *Councilman* never suggested that the “respect” due to the “system of military courts and review procedures” that Congress enacted was unnecessary when the issue presented is a question of law. *Hamdan II*, 548 U.S. at 586 (quoting *Councilman*, 420 U.S. at 758). To the contrary, *Councilman* abstention is particularly appropriate here to allow the military commission, the Convening Authority, and the U.S. Court of Military Commission Review—which Congress created to become experts in matters of armed conflict and the international law of

¹⁵ See *supra* note 12 (explaining that the government has argued in plaintiff’s military commission case that the “hostilities” question here is factual).

war—to adjudicate this matter in the first instance. *Councilman* supports deferring judicial review in such circumstances, where “the expertise of military courts is singularly relevant, and their judgments indispensable to inform any eventual review in Art. III courts.” 420 U.S. at 760; *see also id.* at 756 (observing parallels with the “requirement of exhaustion of administrative remedies,” which permits agencies to “develop the facts [and] apply the law in which they are peculiarly expert”).

Plaintiff also argues (Pl. Br. 48-49) that the comity consideration mandating respect for Congress’s autonomous judicial system does not apply here because plaintiff alleges the violation of a statute. Plaintiff again misunderstands the nature of the consideration, which mandates respect for Congress’s judgment that its “system of military courts and review procedures” “generally is adequate to and responsibly will perform its task.” *Councilman*, 420 U.S. at 758. The Court explained that “it must be assumed that the military court system will vindicate [a defendant’s] constitutional rights.” *Id.* *A fortiori*, a similar assumption must be made concerning plaintiff’s statutory rights. The Supreme Court’s decision in *Hamdan II* underscores the correctness of this understanding because the Court’s conclusion that the consideration did not apply to that case turned not on the fact that statutory violations were alleged there but on the fact that there, unlike here, “the tribunal convened to try

Hamdan is not part of the integrated system of military courts, complete with independent review panels, that Congress established.” 548 U.S. at 587.¹⁶

B. Plaintiff’s Action Does Not Fall Within The Exception To *Councilman* Abstention For Personal-Jurisdiction Challenges.

Councilman explained that abstention is not appropriate, even in cases where comity considerations counsel in favor of abstention, when an individual raises “substantial arguments denying the right of the military to try them at all” where the legal challenge “turn[s] on the status of the persons as to whom the military asserted its power.” 420 U.S. at 759. *Councilman* thus “distinguished service personnel from civilians, whose challenges to ongoing military proceedings are cognizable in federal courts.” *Hamdan II*, 548 U.S. at 585 n.16. “In other words,” as *Hamdan II* explained, *Councilman* held that courts may not abstain “when there is a substantial question whether a military tribunal has personal jurisdiction over the defendant.” *Id.*

Plaintiff’s challenge does not fall within this narrow personal-jurisdiction exception because he does not question that he is an “alien unprivileged enemy belligerent” subject to commission jurisdiction under the MCA. 10 U.S.C. § 948c (“Any alien unprivileged enemy belligerent is subject to trial by military commission as set forth in this chapter.”). Instead, plaintiff’s complaint alleges that the *offenses* he has

¹⁶ *Martin v. Young*, 134 F. Supp. 204 (N.D. Cal. 1955), upon which plaintiff relies (Pl. Br. 49), is not to the contrary. The decision not to abstain there turned not just on the factors plaintiff identifies, but also on the presence of “exceptional circumstances” demonstrating that abstention would result in “irreparable harm.” *Id.* at 209. As explained *infra* in Section III(C), there is no irreparable harm here.

been charged with are not triable by military commission because “the underlying allegations did not occur in the context of and were not associated with hostilities.”

ER 79; *see also* ER 80, 81.

Plaintiff ignores the language in *Councilman* and *Hamdan II* establishing that the *Councilman* exception applies only to personal-jurisdiction challenges, and he contends instead that *Hamdan II* held that that the exception applies anytime an individual “raises a substantial argument that, because the military commission that has been convened to try him [violates Congressional law], it is ultra vires and thus lacks jurisdiction over him.” Pl. Br. 50 (quoting *Hamdan II*, 548 U.S. at 589 n.20) (alteration supplied by plaintiff). Plaintiff’s paraphrasing of *Hamdan II* is misleading, however, because the relevant passage, without any paraphrasing, states: “it appears that the exception would apply” because the defendant “raises a substantial argument that, because the military commission that has been convened to try him *is not a regularly constituted court under the Geneva Conventions*, it is ultra vires and thus lacks jurisdiction over him.” 548 U.S. at 589 n.20 (emphasis added and internal quotation marks omitted).

Hamdan II thus did not hold, as plaintiff’s paraphrasing suggests, that any statutory violation provides the basis for applying the *Councilman* exception. Instead, the *Hamdan II* dictum merely suggested that a commission that is without authority to try *any* defendant because it violates the Geneva Conventions may qualify for the

Councilman exception. Here, plaintiff does not contend that the military commission lacks authority over all defendants under the Geneva Conventions or any other law.

Plaintiff also contends (Pl. Br. 50) that § 950p(c)'s language "requires intervention before trial in order to be meaningful" because it provides that the hostilities element must be satisfied for an offense to be "triable." That argument, too, ignores that the relevant standard is whether plaintiff has asserted a challenge to the military commission's personal jurisdiction over him, and § 950p(c) addresses "offenses" triable by commissions, not personal jurisdiction. *See* 10 U.S.C. § 950p(c) ("An offense . . . is triable by military commission . . . only if the offense is committed in the context of and associated with hostilities."). Moreover, plaintiff's claim that the offenses he is charged with are not "triable" is directly parallel to the challenge at issue in *Councilman*, where a member of the military claimed that the offenses he was charged with were not "service connected," *Councilman*, 420 U.S. at 741-42, which the Supreme Court held at the time was necessary for the offenses to be "triable by a military court," *Relford v. Commandant*, 401 U.S. 355, 367 (1971). The *Councilman* Court held that the "service connection" challenge did not qualify for the personal-jurisdiction exception, *Councilman*, 420 U.S. at 758-60, and thus plaintiff's parallel claim here likewise does not qualify for the exception.

C. Plaintiff Does Not Allege Harm Warranting Immediate Review Of His Claims.

Councilman held that abstention is not appropriate when a defendant is threatened with irreparable injury, 420 U.S. at 754-55, 757, but the Court further held that the mere “harm . . . attendant to resolution of [a defendant’s] case in the military court system” does not amount to irreparable injury, *id.* at 758. The sole injury that plaintiff alleges here is the “burden of defending himself” against charges that he contends may not be tried by a military commission. ER 80-81. But this alleged harm is precisely the harm that the Supreme Court found inadequate to justify intervention into an ongoing military prosecution in *Councilman*, 420 U.S. at 758, and the alleged harm has likewise been deemed insufficient in other cases where courts have declined to entertain challenges to ongoing MCA prosecutions, *see, e.g., Khadr III*, 724 F. Supp. 2d at 69 n.11; *Al Odab*, 593 F. Supp. 2d at 58. Here, too, it is an inadequate basis for federal court intervention in plaintiff’s pending military prosecution.

To the extent that plaintiff contends (Pl. Br. 52-53) that immediate consideration of his claims by the district court is warranted because of unique harms attendant to defending himself in a death-penalty case, that argument fails because *Councilman* itself acknowledged that the “inevitable injury . . . incident to any criminal prosecution” is “often of serious proportions.” 420 U.S. at 754. Furthermore, the only court of appeals to have considered the argument that “‘death is different’ and that [a] death sentence implicates an extraordinary circumstance mandating federal court

intervention under *Councilman*” has rejected it. *Hennis v. Hemlick*, 666 F.3d 270, 280 (4th Cir. 2012); cf. *Foster v. Kassulke*, 898 F.2d 1144, 1145-46 (6th Cir. 1990) (abstaining under *Younger v. Harris*, 401 U.S. 37 (1971), regarding ongoing appeal of death penalty convictions).¹⁷

* * *

As explained above, considerations of comity make abstention appropriate with respect to military commissions convened pursuant to the MCA. In addition, because plaintiff does not challenge the military commission’s jurisdiction over his person and does not allege any irreparable injury, the district court properly concluded that *Councilman* abstention was warranted here. This Court should affirm, thereby allowing the military commission to resolve in the first instance the claim that plaintiff asserted in the district court, subject, of course, to review by the Convening Authority, the U.S. Court of Military Commission Review, the D.C. Circuit, and the Supreme Court.

¹⁷ *United States v. Harper*, 729 F.2d 1216 (9th Cir. 1984), upon which plaintiff relies (Pl. Br. 52), held that interlocutory review of a district court ruling that the death penalty applied was not available under the collateral order doctrine because the right at issue would not be “significantly undermined if review were postponed until final judgment,” *id.* at 1220, but that a writ of mandamus could issue because, *inter alia*, the defendant would be “damaged or prejudiced in a way not correctable on appeal,” *id.* at 1222. Even if the latter holding was relevant to the *Councilman* injury inquiry, which it is not, *Harper* is still not controlling because it based that holding not just on the hardships of enduring a death-penalty trial, but on several other factors not present here, such as the impact “the spectre of the death penalty” could have on the defendant’s tactical decisions in that case. *Id.* at 1223.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

STUART F. DELERY
Principal Deputy Assistant
Attorney General

JENNY A. DURKAN
United States Attorney

ROBERT M. LOEB
(202) 514-4332
SYDNEY FOSTER s/Sydney Foster
(202) 616-5374
Attorneys, Appellate Staff
Civil Division, Room 7258
U.S. Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530

NOVEMBER 2012

STATEMENT OF RELATED CASES

In *Hamad v. Gates*, Nos. 12-35395, 12-35489 (9th Cir.), a former alien detainee at Bagram Airfield and Guantanamo Bay filed a damages action in district court against a number of current and former Department of Defense officials, in their individual capacities. One of the issues in that appeal is whether 28 U.S.C. § 2241(e)(2) bars the plaintiff's action, which is similar to one of the issues in this appeal. The plaintiff filed the first cross-appeal brief on August 23, 2012; the defendants filed the second cross-appeal brief on October 15, 2012; and the plaintiff filed the third cross-appeal brief on November 14, 2012. The defendants' reply brief is due December 17, 2012.

Counsel for the Defendant-Appellee are aware of no other related cases pending in this Court within the meaning of Ninth Circuit Rule 28-2.6.

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, I hereby certify that this brief complies with the type-volume limitation in Rule 32(a)(7)(B). The foregoing brief contains 11,309 words from its Statement of Jurisdiction through its Conclusion, and is presented in Garamond 14-point typeface. The brief was prepared using Microsoft Word 2010.

s/Sydney Foster
Sydney Foster

CERTIFICATE OF SERVICE

I hereby certify that on November 20, 2012, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. All participants in the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

s/Sydney Foster
Sydney Foster

ADDENDUM

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5 U.S.C. § 701. Application; definitions

(a) This chapter applies, according to the provisions thereof, except to the extent that—

- (1) statutes preclude judicial review; or
- (2) agency action is committed to agency discretion by law.

(b) For the purpose of this chapter—

(1) “agency” means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include—

- (A) the Congress;
- (B) the courts of the United States;
- (C) the governments of the territories or possessions of the United States;
- (D) the government of the District of Columbia;
- (E) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them;
- (F) courts martial and military commissions;
- (G) military authority exercised in the field in time of war or in occupied territory; or
- (H) functions conferred by sections 1738, 1739, 1743, and 1744 of title 12; subchapter II of chapter 471 of title 49; or sections 1884, 1891-1902, and former section 1641(b)(2), of title 50, appendix; and

(2) “person”, “rule”, “order”, “license”, “sanction”, “relief”, and “agency action” have the meanings given them by section 551 of this title.

5 U.S.C. § 702. Right of review

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: Provided, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

10 U.S.C. § 948a. Definitions

In this chapter:

(1) Alien.—The term “alien” means an individual who is not a citizen of the United States.

(2) Classified information.—The term “classified information” means the following:

(A) Any information or material that has been determined by the United States Government pursuant to statute, Executive order, or regulation to require protection against unauthorized disclosure for reasons of national security.

(B) Any restricted data, as that term is defined in section 11 y. of the Atomic Energy Act of 1954 (42 U.S.C. 2014(y)).

(3) Coalition partner.—The term “coalition partner”, with respect to hostilities engaged in by the United States, means any State or armed force directly engaged along with the United States in such hostilities or providing direct operational support to the United States in connection with such hostilities.

(4) Geneva Convention Relative to the Treatment of Prisoners of War.—The term “Geneva Convention Relative to the Treatment of Prisoners of War” means the Convention Relative to the Treatment of Prisoners of War, done at Geneva August 12, 1949 (6 UST 3316).

(5) Geneva Conventions.—The term “Geneva Conventions” means the international conventions signed at Geneva on August 12, 1949.

(6) Privileged belligerent.—The term “privileged belligerent” means an individual belonging to one of the eight categories enumerated in Article 4 of the Geneva Convention Relative to the Treatment of Prisoners of War.

(7) Unprivileged enemy belligerent.—The term “unprivileged enemy belligerent” means an individual (other than a privileged belligerent) who—

(A) has engaged in hostilities against the United States or its coalition partners;

(B) has purposefully and materially supported hostilities against the United States or its coalition partners; or

(C) was a part of al Qaeda at the time of the alleged offense under this chapter.

(8) National security.—The term “national security” means the national defense and foreign relations of the United States.

(9) Hostilities.—The term “hostilities” means any conflict subject to the laws of war.

10 U.S.C. § 948b. Military commissions generally

(a) Purpose.—This chapter establishes 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.

(b) Authority for military commissions under this chapter.—The President is authorized to establish military commissions under this chapter for offenses triable by military commission as provided in this chapter.

(c) Construction of provisions.—The procedures for military commissions set forth in this chapter are based upon the procedures for trial by general courts-martial under

chapter 47 of this title (the Uniform Code of Military Justice). Chapter 47 of this title does not, by its terms, apply to trial by military commission except as specifically provided therein or in this chapter, and many of the provisions of chapter 47 of this title are by their terms inapplicable to military commissions. The judicial construction and application of chapter 47 of this title, while instructive, is therefore not of its own force binding on military commissions established under this chapter.

(d) Inapplicability of certain provisions.—(1) The following provisions of this title shall not apply to trial by military commission under this chapter:

(A) Section 810 (article 10 of the Uniform Code of Military Justice), relating to speedy trial, including any rule of courts-martial relating to speedy trial.

(B) Sections 831(a), (b), and (d) (articles 31(a), (b), and (d) of the Uniform Code of Military Justice), relating to compulsory self-incrimination.

(C) Section 832 (article 32 of the Uniform Code of Military Justice), relating to pretrial investigation.

(2) Other provisions of chapter 47 of this title shall apply to trial by military commission under this chapter only to the extent provided by the terms of such provisions or by this chapter.

(e) Geneva Conventions not establishing private right of action.—No alien unprivileged enemy belligerent subject to trial by military commission under this chapter may invoke the Geneva Conventions as a basis for a private right of action.

10 U.S.C. § 948c. Persons subject to military commissions

Any alien unprivileged enemy belligerent is subject to trial by military commission as set forth in this chapter.

10 U.S.C. § 948d. Jurisdiction of military commissions

A military commission under this chapter shall have jurisdiction to try persons subject to this chapter for any offense made punishable by this chapter, sections 904 and 906 of this title (articles 104 and 106 of the Uniform Code of Military Justice), or the law of war, whether such offense was committed before, on, or after September 11, 2001, and may, under such limitations as the President may prescribe, adjudge any

punishment not forbidden by this chapter, including the penalty of death when specifically authorized under this chapter. A military commission is a competent tribunal to make a finding sufficient for jurisdiction.

10 U.S.C. § 950b. Review by the convening authority

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

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

(2)(A) Except as provided in subparagraph (B), a submittal under paragraph (1) shall be made in writing within 20 days after the accused has been given [FN1] an authenticated record of trial under section 949o(c) of this title.

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

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

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

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

(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.

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

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

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

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

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

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

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

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

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

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

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

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

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

[FN1] So in original. Probably should read “given”.

10 U.S.C. § 950c. Appellate referral; waiver or withdrawal of appeal

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

(b) Waiver of right of review.—(1) Except in a case in which the sentence as approved under section 950b of this title extends to death, an accused may file with the convening authority a statement expressly waiving the right of the accused to appellate review by the United States Court of Military Commission Review under section 950f of this title of the final decision of the military commission under this chapter.

(2) A waiver under paragraph (1) shall be signed by both the accused and a defense counsel.

(3) A waiver under paragraph (1) must be filed, if at all, within 10 days after notice of the action is served on the accused or on defense counsel under section 950b(c)(4) of this title. The convening authority, for good cause, may extend the period for such filing by not more than 30 days.

(c) Withdrawal of appeal.—Except in a case in which the sentence as approved under section 950b of this title extends to death, the accused may withdraw an appeal at any time.

(d) Effect of waiver or withdrawal.—A waiver of the right to appellate review or the withdrawal of an appeal under this section bars review under section 950f of this title.

10 U.S.C. § 950d. Interlocutory appeals by the United States

(a) Interlocutory appeal.—Except as provided in subsection (b), in a trial by military commission under this chapter, the United States may take an interlocutory appeal to the United States Court of Military Commission Review of any order or ruling of the military judge—

(1) that terminates proceedings of the military commission with respect to a charge or specification;

(2) that excludes evidence that is substantial proof of a fact material in the proceeding;

(3) that relates to a matter under subsection (c) or (d) of section 949d of this title; or

(4) that, with respect to classified information—

(A) authorizes the disclosure of such information;

(B) imposes sanctions for nondisclosure of such information; or

(C) refuses a protective order sought by the United States to prevent the disclosure of such information.

(b) Limitation.—The United States may not appeal under subsection (a) an order or ruling that is, or amounts to, a finding of not guilty by the military commission with respect to a charge or specification.

(c) Scope of appeal right with respect to classified information.—The United States has the right to appeal under paragraph (4) of subsection (a) whenever the military judge enters an order or ruling that would require the disclosure of classified information, without regard to whether the order or ruling appealed from was entered under this chapter, another provision of law, a rule, or otherwise. Any such appeal may embrace any preceding order, ruling, or reasoning constituting the basis of the order or ruling that would authorize such disclosure.

(d) Timing and action on interlocutory appeals relating to classified information.—

(1) Appeal to be expedited.—An appeal taken pursuant to paragraph (4) of subsection (a) shall be expedited by the United States Court of Military Commission Review.

(2) Appeals before trial.—If such an appeal is taken before trial, the appeal shall be taken within 10 days after the order or ruling from which the appeal is made and the trial shall not commence until the appeal is decided.

(3) Appeals during trial.—If such an appeal is taken during trial, the military judge shall adjourn the trial until the appeal is decided, and the court of appeals—

(A) shall hear argument on such appeal within 4 days of the adjournment of the trial (excluding weekends and holidays);

(B) may dispense with written briefs other than the supporting materials previously submitted to the military judge;

(C) shall render its decision within four days of argument on appeal (excluding weekends and holidays); and

(D) may dispense with the issuance of a written opinion in rendering its decision.

(e) Notice and timing of other appeals.—The United States shall take an appeal of an order or ruling under subsection (a), other than an appeal under paragraph (4) of that subsection, by filing a notice of appeal with the military judge within 5 days after the date of the order or ruling.

(f) Method of appeal.—An appeal under this section shall be forwarded, by means specified in regulations prescribed by the Secretary of Defense, directly to the United States Court of Military Commission Review.

(g) Appeals court to act only with respect to matter of law.—In ruling on an appeal under paragraph (1), (2), or (3) of subsection (a), the appeals court may act only with respect to matters of law.

(h) Subsequent appeal rights of accused not affected.—An appeal under paragraph (4) of subsection (a), and a decision on such appeal, shall not affect the right of the accused, in a subsequent appeal from a judgment of conviction, to claim as error reversal by the military judge on remand of a ruling appealed from during trial.

10 U.S.C. § 950e. Rehearings

(a) Composition of military commission for rehearing.—Each rehearing under this chapter shall take place before a military commission under this chapter composed of members who were not members of the military commission which first heard the case.

(b) Scope of rehearing.—(1) Upon a rehearing—

(A) the accused may not be tried for any offense of which the accused was found not guilty by the first military commission; and

(B) no sentence in excess of or more than the original sentence may be imposed unless—

(i) the sentence is based upon a finding of guilty of an offense not considered upon the merits in the original proceedings; or

(ii) the sentence prescribed for the offense is mandatory.

(2) Upon a rehearing, if the sentence approved after the first military commission was in accordance with a pretrial agreement and the accused at the rehearing changes his plea with respect to the charges or specifications upon which the pretrial agreement was based, or otherwise does not comply with pretrial agreement, the sentence as to those charges or specifications may include any punishment not in excess of that lawfully adjudged at the first military commission.

10 U.S.C. § 950f. Review by United States Court of Military Commission Review

(a) Establishment.—There is a court of record to be known as the “United States Court of Military Commission Review” (in this section referred to as the “Court”). The Court shall consist of one or more panels, each composed of not less than three judges on the Court. For the purpose of reviewing decisions of military commissions under this chapter, the Court may sit in panels or as a whole, in accordance with rules prescribed by the Secretary of Defense.

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

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

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

(4) No person may serve as a judge on the Court in any case in which that person acted as a military judge, counsel, or reviewing official.

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

(d) Standard and scope of review.—In a case reviewed by the Court under this section, the Court may act only with respect to the findings and sentence as approved by the convening authority. The Court may affirm only such findings of guilty, and

the sentence or such part or amount of the sentence, as the Court finds correct in law and fact and determines, on the basis of the entire record, should be approved. In considering the record, the Court may weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact, recognizing that the military commission saw and heard the witnesses.

(e) Rehearings.—If the Court sets aside the findings or sentence, the Court may, except where the setting aside is based on lack of sufficient evidence in the record to support the findings, order a rehearing. If the Court sets aside the findings or sentence and does not order a rehearing, the Court shall order that the charges be dismissed.

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

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

(b) Exhaustion of other appeals.—The United States Court of Appeals for the District of Columbia Circuit may not review a final judgment described in subsection (a) until all other appeals under this chapter have been waived or exhausted.

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

(1) not later than 20 days after the date on which written notice of the final decision of the United States Court of Military Commission Review is served on the parties; or

(2) if the accused submits, in the form prescribed by section 950c of this title, a written notice waiving the right of the accused to review by the United States Court of Military Commission Review, not later than 20 days after the date on which such notice is submitted.

(d) Scope and nature of review.—The United States Court of Appeals for the District of Columbia Circuit may act under this section only with respect to the findings and

sentence as approved by the convening authority and as affirmed or set aside as incorrect in law by the United States Court of Military Commission Review, and shall take action only with respect to matters of law, including the sufficiency of the evidence to support the verdict.

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

10 U.S.C. § 950p. Definitions; construction of certain offenses; common circumstances

(a) Definitions.—In this subchapter:

(1) The term “military objective” means combatants and those objects during hostilities which, by their nature, location, purpose, or use, effectively contribute to the war-fighting or war-sustaining capability of an opposing force and whose total or partial destruction, capture, or neutralization would constitute a definite military advantage to the attacker under the circumstances at the time of an attack.

(2) The term “protected person” means any person entitled to protection under one or more of the Geneva Conventions, including civilians not taking an active part in hostilities, military personnel placed out of combat by sickness, wounds, or detention, and military medical or religious personnel.

(3) The term “protected property” means any property specifically protected by the law of war, including buildings dedicated to religion, education, art, science, or charitable purposes, historic monuments, hospitals, and places where the sick and wounded are collected, but only if and to the extent such property is not being used for military purposes or is not otherwise a military objective. The term includes objects properly identified by one of the distinctive emblems of the Geneva Conventions, but does not include civilian property that is a military objective.

(b) Construction of certain offenses.—The intent required for offenses under paragraphs (1), (2), (3), (4), and (12) of section 950t of this title precludes the applicability of such offenses with regard to collateral damage or to death, damage, or injury incident to a lawful attack.

(c) Common circumstances.—An offense specified in this subchapter is triable by military commission under this chapter only if the offense is committed in the context of and associated with hostilities.

(d) Effect.—The provisions of this subchapter codify offenses that have traditionally been triable by military commission. This chapter does not establish new crimes that did not exist before the date of the enactment of this subchapter, as amended by the National Defense Authorization Act for Fiscal Year 2010, but rather codifies those crimes for trial by military commission. Because the provisions of this subchapter codify offenses that have traditionally been triable under the law of war or otherwise triable by military commission, this subchapter does not preclude trial for offenses that occurred before the date of the enactment of this subchapter, as so amended.

10 U.S.C. § 950t. Crimes triable by military commission

The following offenses shall be triable by military commission under this chapter at any time without limitation:

(1) Murder of protected persons.—Any person subject to this chapter who intentionally kills one or more protected persons shall be punished by death or such other punishment as a military commission under this chapter may direct.

(2) Attacking civilians.—Any person subject to this chapter who intentionally engages in an attack upon a civilian population as such, or individual civilians not taking active part in hostilities, 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.

(3) Attacking civilian objects.—Any person subject to this chapter who intentionally engages in an attack upon a civilian object that is not a military objective shall be punished as a military commission under this chapter may direct.

(4) Attacking protected property.—Any person subject to this chapter who intentionally engages in an attack upon protected property shall be punished as a military commission under this chapter may direct.

(5) Pillaging.—Any person subject to this chapter who intentionally and in the absence of military necessity appropriates or seizes property for private or personal use, without the consent of a person with authority to permit such appropriation or seizure, shall be punished as a military commission under this chapter may direct.

(6) Denying quarter.—Any person subject to this chapter who, with effective command or control over subordinate groups, declares, orders, or otherwise indicates to those groups that there shall be no survivors or surrender accepted, with the intent to threaten an adversary or to conduct hostilities such that there would be no survivors or surrender accepted, shall be punished as a military commission under this chapter may direct.

(7) Taking hostages.—Any person subject to this chapter who, having knowingly seized or detained one or more persons, threatens to kill, injure, or continue to detain such person or persons with the intent of compelling any nation, person other than the hostage, or group of persons to act or refrain from acting as an explicit or implicit condition for the safety or release of such person or persons, 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.

(8) Employing poison or similar weapons.—Any person subject to this chapter who intentionally, as a method of warfare, employs a substance or weapon that releases a substance that causes death or serious and lasting damage to health in the ordinary course of events, through its asphyxiating, bacteriological, or toxic properties, 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.

(9) Using protected persons as a shield.—Any person subject to this chapter who positions, or otherwise takes advantage of, a protected person with the intent to shield a military objective from attack. [FN1] or to shield, favor, or impede military operations, 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.

(10) Using protected property as a shield.—Any person subject to this chapter who positions, or otherwise takes advantage of the location of, protected property with the intent to shield a military objective from attack, or to shield, favor, or impede military operations, shall be punished as a military commission under this chapter may direct.

(11) Torture.—

(A) Offense.—Any person subject to this chapter who commits an act specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control for the purpose of obtaining information or a confession, punishment, intimidation, coercion, or any reason based on discrimination of any kind, 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.

(B) Severe mental pain or suffering defined.—In this paragraph, the term “severe mental pain or suffering” has the meaning given that term in section 2340(2) of title 18.

(12) Cruel or inhuman treatment.—Any person subject to this chapter who subjects another person in their custody or under their physical control, regardless of nationality or physical location, to cruel or inhuman treatment that constitutes a grave breach of common Article 3 of the Geneva Conventions shall be punished, if death results to the victim, by death or such other punishment as a military commission under this chapter may direct, and, if death does not result to the victim, by such punishment, other than death, as a military commission under this chapter may direct.

(13) Intentionally causing serious bodily injury.—

(A) Offense.—Any person subject to this chapter who intentionally causes serious bodily injury to one or more persons, including privileged belligerents, in violation of the law of war 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.

(B) Serious bodily injury defined.—In this paragraph, the term “serious bodily injury” means bodily injury which involves—

- (i) a substantial risk of death;
- (ii) extreme physical pain;
- (iii) protracted and obvious disfigurement; or
- (iv) protracted loss or impairment of the function of a bodily member, organ, or mental faculty.

(14) Mutilating or maiming.—Any person subject to this chapter who intentionally injures one or more protected persons by disfiguring the person or persons by any mutilation of the person or persons, or by permanently disabling any member, limb, or organ of the body of the person or persons, without any legitimate medical or dental purpose, 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.

(15) Murder in violation of the law of war.—Any person subject to this chapter who intentionally kills one or more persons, including privileged belligerents, in violation of the law of war shall be punished by death or such other punishment as a military commission under this chapter may direct.

(16) Destruction of property in violation of the law of war.—Any person subject to this chapter who intentionally destroys property belonging to

another person in violation of the law of war shall [FN2] punished as a military commission under this chapter may direct.

(17) Using treachery or perfidy.—Any person subject to this chapter who, after inviting the confidence or belief of one or more persons that they were entitled to, or obliged to accord, protection under the law of war, intentionally makes use of that confidence or belief in killing, injuring, or capturing such person or persons 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.

(18) Improperly using a flag of truce.—Any person subject to this chapter who uses a flag of truce to feign an intention to negotiate, surrender, or otherwise suspend hostilities when there is no such intention shall be punished as a military commission under this chapter may direct.

(19) Improperly using a distinctive emblem.—Any person subject to this chapter who intentionally uses a distinctive emblem recognized by the law of war for combatant purposes in a manner prohibited by the law of war shall be punished as a military commission under this chapter may direct.

(20) Intentionally mistreating a dead body.—Any person subject to this chapter who intentionally mistreats the body of a dead person, without justification by legitimate military necessary, shall be punished as a military commission under this chapter may direct.

(21) Rape.—Any person subject to this chapter who forcibly or with coercion or threat of force wrongfully invades the body of a person by penetrating, however slightly, the anal or genital opening of the victim with any part of the body of the accused, or with any foreign object, shall be punished as a military commission under this chapter may direct.

(22) Sexual assault or abuse.—Any person subject to this chapter who forcibly or with coercion or threat of force engages in sexual contact with one or more persons, or causes one or more persons to engage in sexual contact, shall be punished as a military commission under this chapter may direct [FN3]

(23) Hijacking or hazarding a vessel or aircraft.—Any person subject to this chapter who intentionally seizes, exercises unauthorized control over, or endangers the safe navigation of a vessel or aircraft that is not a legitimate military objective 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.

(24) Terrorism.—Any person subject to this chapter who intentionally kills or inflicts great bodily harm on one or more protected persons, or intentionally engages in an act that evinces a wanton disregard for human life, in a manner calculated to influence or affect the conduct of government or civilian population by intimidation or coercion, or to retaliate against government conduct, 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.

(25) Providing material support for terrorism.—

(A) Offense.—Any person subject to this chapter who provides material support or resources, knowing or intending that they are to be used in preparation for, or in carrying out, an act of terrorism (as set forth in paragraph (24) of this section), or who intentionally provides material support or resources to an international terrorist organization engaged in hostilities against the United States, knowing that such organization has engaged or engages in terrorism (as so set forth), shall be punished as a military commission under this chapter may direct.

(B) Material support or resources defined.—In this paragraph, the term “material support or resources” has the meaning given that term in section 2339A(b) of title 18.

(26) Wrongfully aiding the enemy.—Any person subject to this chapter who, in breach of an allegiance or duty to the United States, knowingly and intentionally aids an enemy of the United States, or one of the co-belligerents

of the enemy, shall be punished as a military commission under this chapter may direct.

(27) Spying.—Any person subject to this chapter who, in violation of the law of war and with intent or reason to believe that it is to be used to the injury of the United States or to the advantage of a foreign power, collects or attempts to collect information by clandestine means or while acting under false pretenses, for the purpose of conveying such information to an enemy of the United States, or one of the co-belligerents of the enemy, shall be punished by death or such other punishment as a military commission under this chapter may direct.

(28) Attempts.—

(A) In general.—Any person subject to this chapter who attempts to commit any offense punishable by this chapter shall be punished as a military commission under this chapter may direct.

(B) Scope of offense.—An act, done with specific intent to commit an offense under this chapter, amounting to more than mere preparation and tending, even though failing, to effect its commission, is an attempt to commit that offense.

(C) Effect of consummation.—Any person subject to this chapter may be convicted of an attempt to commit an offense although it appears on the trial that the offense was consummated.

(29) Conspiracy.—Any person subject to this chapter who conspires to commit one or more substantive offenses triable by military commission under this subchapter, 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.

(30) Solicitation.—Any person subject to this chapter who solicits or advises another or others to commit one or more substantive offenses triable by military commission under this chapter shall, if the offense solicited or advised is attempted or committed, be punished with the punishment provided for the

commission of the offense, but, if the offense solicited or advised is not committed or attempted, shall be punished as a military commission under this chapter may direct.

(31) Contempt.—A military commission under this chapter may punish for contempt any person who uses any menacing word, sign, or gesture in its presence, or who disturbs its proceedings by any riot or disorder.

(32) Perjury and obstruction of justice.—A military commission under this chapter may try offenses and impose such punishment as the military commission may direct for perjury, false testimony, or obstruction of justice related to the military commission.

[FN1] So in original. The period probably should be a comma.

[FN2] So in original. Probably should be followed by “be”.

[FN3] So in original. Probably should be followed by a period.

28 U.S.C. § 2241. Power to grant writ

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

(b) The Supreme Court, any justice thereof, and any circuit judge may decline to entertain an application for a writ of habeas corpus and may transfer the application for hearing and determination to the district court having jurisdiction to entertain it.

(c) The writ of habeas corpus shall not extend to a prisoner unless—

(1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or

(2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or

(3) He is in custody in violation of the Constitution or laws or treaties of the United States; or

(4) He, being a citizen of a foreign state and domiciled therein is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, order or sanction of any foreign state, or under color thereof, the validity and effect of which depend upon the law of nations; or

(5) It is necessary to bring him into court to testify or for trial.

(d) Where an application for a writ of habeas corpus is made by a person in custody under the judgment and sentence of a State court of a State which contains two or more Federal judicial districts, the application may be filed in the district court for the district wherein such person is in custody or in the district court for the district within which the State court was held which convicted and sentenced him and each of such district courts shall have concurrent jurisdiction to entertain the application. The district court for the district wherein such an application is filed in the exercise of its discretion and in furtherance of justice may transfer the application to the other district court for hearing and determination.

(e)(1) No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.

(2) Except as provided in paragraphs (2) and (3) of section 1005(e) of the Detainee Treatment Act of 2005 (10 U.S.C. 801 note), no court, justice, or judge shall have jurisdiction to hear or consider any other action against the United States or its agents relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien who is or was detained by the United States and has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.