



Military Commission Judges Do Not Have Unilateral Power to Punish for Contempt

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Brigadier General (Gen.) John G. Baker, Chief Defense Counsel of the Military Commission System, [prevailed](#) in his habeas case against a military commission judge who sentenced him to 21 days' confinement and fined him \$1,000 for contempt. The contempt charge [stemmed](#) from Gen. Baker's refusal to appear before the military judge to defend or rescind his decision to permit all but one of the defense attorneys in the *Al-Nashiri* (U.S.S. Cole bombing) case to [withdraw on ethical grounds](#). The District Court for the District of Columbia ultimately [granted](#) the petition in *Baker v. Spath* on the grounds that military judges in the military commission system do not have the authority unilaterally to impose punishment for contempt. Rather, contempt charges must be decided by a full military commission in the same way as any other [offense punishable](#) by military commissions established under the [Military Commissions Act of 2009 \(MCA\)](#).

Prior to addressing the military judge's contempt power, the court reviewed whether it had jurisdiction to hear the petition. Although Gen. Baker was no longer subject to confinement and his fine was remitted, the court [determined](#) his habeas petition was not moot because the presumption of [collateral consequences](#) applied. The court also [rejected](#) the government's argument that the court should [abstain](#) because Gen. Baker had not exhausted remedies available in the military commission system. The court [pointed out](#) that the military commission rules do not provide for further review of a contempt conviction in the [Court of Military Commission Review \(CMCR\)](#) and also [disagreed](#) with the government that appellate review could be available at the CMCR through the [All Writs Act](#) in aid of its jurisdiction over the *Al-Nashiri* case.

Turning to the merits, the court rejected Gen. Baker's argument that he is not subject to military commission jurisdiction because he is not an alien unprivileged enemy belligerent subject to such jurisdiction [under the MCA](#). However, while the first 30 of 32 offenses listed in the MCA ([10 U.S.C. §950t](#)) apply to "any person subject to this chapter," the crime of contempt applies to "any person" ([10 U.S.C. §950t\(31\)](#)). The court [agreed](#) with the government that this difference means that the contempt

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offense provides an exception to the MCA's general statements regarding jurisdiction. Consequently, MCA commissions have jurisdiction to try non-enemy belligerents for [contempt](#). This reasoning may also apply with respect to the offense of "perjury and obstruction of justice," which as defined in [10 U.S.C. §950t\(32\)](#) omits the phrase "any person subject to this chapter," but also omits the phrase "any person."

A textual reading of relevant provisions of the MCA, however, doomed the government's argument that military judges in the military commission system have the authority summarily to punish participants for contempt. The court [noted](#) that the contempt provision clearly contemplates punishment by a *military commission*, not a military judge. That military commissions and military judges are not used interchangeably in the MCA could be [elicited](#) from the fact that military commission members have different qualifications from military judges. Also, while commission members *serve on* a military commission, the military judge is *detailed to and presides over* the military commission. Consequently, the court [deemed](#) a military commission to consist of the panel members. And because "[no person may be convicted ... of any offense](#)" except with the requisite number of members' votes, their votes would be [necessary](#) to convict and sentence a person for contempt just as for any other military commission offense.

The government did not argue to the contrary. Rather, respondents pointed to the [Manual for Military Commissions \(MMC\) rules regarding punishment for contempt](#), which permit the military judge to mete out such punishment unilaterally. The court [refused](#) to apply *Chevron* deference to the MMC in this regard because that doctrine applies only where a statute is ambiguous, which the court noted could not be brought about circularly by promulgating non-conforming regulations. The court also rejected the government's efforts to create ambiguity by referring to legislative history and the relevant rules under the [Uniform Code of Military Justice \(UCMJ\)](#), which [accord](#) the military judge authority unilaterally to punish for contempt in courts martial. The court also [rejected](#) the government's argument that the MCA's failure to state that military judges do not have unilateral contempt authority means they must have it. According to the court, the MCA in fact [says exactly that](#), just not in so many words.

Unless this decision is appealed and reversed, a rule permitting military judges unilaterally to punish individuals for contempt would require an act of Congress to amend the MCA.