**UNITED STATES COURT OF MILITARY COMMISION REVIEW**

**BEFORE THE COURT**

**POLLARD, PRESIDING JUDGE**
**BURTON, CHIEF JUDGE, STEPHENS, JUDGE**

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**UNITED STATES OF AMERICA**

**v.**

**OMAR AHMED KHADR**

**CMCR 13-005**

**October 21, 2021**

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

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

On briefs and/or motions for the United States were *Brigadier General Mark S. Martins*, U.S. Army, *Captain Edward S. White*, JAGC, U.S. Navy, *Danielle S. Tarin*, *Marc A. Wallenstein,* and *Bryce G. Poole*.

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**PUBLISHED OPINION OF THE COURT**

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Opinion for the court filed by POLLARD, PRESIDING JUDGE, with whom BURTON, CHIEF JUDGE, and STEPHENS, JUDGE, join.

Opinion for the court

POLLARD, PRESIDING JUDGE:

On November 8, 2013, Appellant Omar Ahmed Khadr filed a brief in this court, in which he stated: "Appellant files this appeal as of right from the Convening Authority's final action approving the judgment and sentence rendered by Appellant's military commission," based upon his plea of guilty to five offenses, including murder in violation of the law of war. *See* Khadr Br. 1 (Nov. 8. 2013). The convening authority has not referred Khadr's case to us for

review. *See* 10 U.S.C. § 950f(c) (2021) (citing 10 U.S.C. § 950c). By orders dated November 19 and December 5, 2013, we asked the parties to brief inter alia whether we had jurisdiction to hear the appeal without a referral by the convening authority.

In March 2014, we abated the appeal before reaching the jurisdictional issue. Order (CMCR Mar. 7, 2014). We said that the resolution of a then-pending appeal before the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit) sitting en banc, *al Bahlul v. United States*, No. 11-1324, "concerning the Military Commission's subject-matter jurisdiction[,] may have a material bearing on the disposition of a significant issue that Appellant raises in this Court." *Id.* at 2. This was so, we said, because:

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

*Id.* at 1. The *al Bahlul* case continues to wind its way through the appellate process,[1] but we ordered the abatement lifted on September 2, 2020,[2] re-imposed it on November 19, 2020, and then lifted it again on

[1] *United States v. Al Bahlul*, 820 F. Supp. 2d 1141 (CMCR 2011) (en banc) (affirming findings and sentence approved on June 3, 2009), *conviction vacated*, No. 11-1324, 2013 U.S. App. LEXIS 1820, at *2 (D.C. Cir. Jan. 25, 2013) (per curiam) (order vacating convictions approved on June 3, 2009), *reh'g en banc granted, order vacated*, No. 11-1324, 2013 U.S. App. LEXIS 8120, at *1 (D.C. Cir. Apr. 23, 2013) (per curiam) (unpublished) (order vacating order of January 25, 2013), *clarified*, No. 11-1324, 2013 U.S. App. LEXIS 26164 (D.C. Cir. May 2, 2013) (per curiam) (order clarifying order of April 23, 2013), *aff'd in part, vacated in part en banc and remanded*, 767 F.3d 1, 31 (D.C. Cir. 2014) (vacating material support and solicitation convictions and remanding to determine effect of vacatur, if any, on sentencing, rejecting ex post facto challenge to conspiracy conviction, and remanding conspiracy conviction for consideration of "alternative challenges" not addressed in opinion), *vacated in part*, 792 F.3d 1, 3 (D.C. Cir. 2015) (vacating inchoate conspiracy conviction), *reh'g en banc granted, judgment vacated*, No. 11-1324, 2015 U.S. App. LEXIS 16967, at *4 (D.C. Cir. Sept. 25, 2015) (per curiam) (order vacating judgment at 792 F.3d 1), *aff'd en banc*, 840 F.3d 757, 759 (D.C. Cir. 2016) (per curiam) (affirming 2011 CMCR judgment upholding conspiracy conviction), *cert. denied*, 138 S. Ct. 313 (2017), *aff'd en banc on remand*, 374 F. Supp. 3d 1250, 1274 (CMCR 2019) (affirming life sentence upon reassessment), *aff'd in part, rev'd in part and remanded*, 967 F.3d 858 (D.C. Cir. 2020) (affirming CMCR discretion to reassess sentence without remand to military commission, reversing reassessment for not applying harmless beyond a reasonable doubt standard, and remanding for reassessment under this standard), *reh'g en banc denied*, No. 19-1076, 2021 U.S. App. LEXIS 1733 (D.C. Cir. Jan. 21, 2021) (per curiam order), *cert. filed*, No. 21-339 (Aug. 24, 2021).

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

June 21, 2021. In our September 2, 2020, order, we asked the parties to supplement the briefing on whether we had jurisdiction to hear Khadr's appeal. They have done so.

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

Title 10, section 950f(c) of the United States Code (2021), our jurisdictional statute, calls upon us to review cases that have been "referred to the Court by the convening authority under section 950c of this title with respect to any matter properly raised by the accused." Here, the convening authority has not referred Khadr's case to our court. Until there is such a referral, we have no jurisdiction to hear an appeal because referral by the convening authority is jurisdictional for our court.

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

## I. FACTS

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

Appellant was convicted, on his plea of guilty before a military commission, of murder in violation of the law of war, in violation of 10 U.S.C. § 950t(15) (2009) (Charge I); attempted murder in violation of the law of war, in violation of 10 U.S.C. § 950t(28) (2009) (Charge II); conspiracy to attack civilians, to attack civilian objects, to commit murder in violation of the law of war, to destroy property in violation of the law of war, and to commit terrorism, in violation of 10 U.S.C. § 950t(29) (2009) (Charge III); providing material support for terrorism, in violation of 10 U.S.C. § 950t(25) (2009) (Charge IV); and spying in violation of the law of war, in violation of 10 U.S.C. § 950t(27) (2009) (Charge V). App. Ex. 1, Vol. 19, at pp. 179–85; App. Ex. 217-B, Vol. 36, at p. 324.[3]

On October 31, 2010, the military commission sentenced Khadr to forty years' confinement. Tr. 4890, Vol. 18, at p. 341. However, the pretrial agreement (PTA) between the convening authority and Khadr limited his sentence to eight years' confinement. PTA ¶ 6.a, App. Ex. 341, Vol. 42, at p. 143. In the PTA, Khadr agreed to waive his appellate rights, which required him to sign and file a waiver (Military Commission Form 2330) with the convening authority. PTA ¶ 2.f, App. Ex. 341, Vol. 42, at p. 139 (citing Rule

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

for Military Commissions (R.M.C.) 1110, Manual for Military Commissions, United States); *see* 10 U.S.C. § 950c(b) (2021). Khadr agreed to file his waiver within ten days after he or his counsel was served with the convening authority's action on the commission's findings and his sentence. PTA ¶ 2.f, App. Ex. 341, Vol. 42, at p. 139; *see* R.M.C. 1110(f)(1) (2010); 10 U.S.C. § 950c(b)(3) (2021).

On May 26, 2011, the convening authority issued his action approving "only so much of the sentence as provides for eight years confinement." Gov. App. 74 (Dec. 19, 2013). The action was served on Khadr's counsel the same day. *Id.* at 95–102. Khadr, however, did not file an appellate rights waiver with the convening authority within ten days of service of the action, as promised in paragraph 2.f of his PTA. Khadr Opp'n 7 (Oct. 7, 2020); *see* Gov. Resp. 9 (Nov. 26, 2013); App. Ex. 386 ¶ 7, Vol. 42, at p. 277. A waiver of appellate rights has never been filed with the convening authority.

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

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

## II. DISCUSSION

### A. Jurisdiction

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

> "Because Article III courts are courts of limited jurisdiction, we must examine our authority to hear a case before we can determine the merits." *United States v. British Am. Tobacco Australia Servs., Ltd.,* 437 F.3d 1235, 1239 (D.C. Cir. 2006) (quoting *Wyo. Outdoor Council v. U.S. Forest Serv.,* 165 F.3d 43, 47 (D.C. Cir. 1999)). As the party claiming subject matter jurisdiction, Khadr has the burden

> to demonstrate that it exists. *Moms Against Mercury v. FDA,* 483 F.3d 824, 828 (D.C. Cir. 2007).

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

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

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

From this language, four things are clear.

1. Congress commands the court "shall . . . review the record,"
2. "with respect to any matter properly raised by the accused,"
3. "in each case that is referred to the Court by the convening authority under section 950c," and
4. in accordance with the U. S. Court of Military Commission Review Rules of Practice.

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

*Gonzalez* is particularly instructive. It concerned 28 U.S.C. § 2253(c), a provision regarding the requirements for appealing final orders in certain habeas corpus proceedings. Section 2253(c)(1)(A) says, "Unless a circuit justice or judge issues a certificate of appealability [(COA)], an appeal may not be taken to the court of appeals from . . . the final order in [certain] habeas corpus proceeding[s] . . . ." The Supreme Court held that the statutory language requiring issuance of a certificate not only was jurisdictional, but also was "'clear' jurisdictional language." *Gonzalez*, 565 U.S. at 142. In the absence of a certificate, federal courts "lack jurisdiction to rule on the merits of appeals

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

Conditions precedent to federal appellate jurisdiction are common. They range, for example, (i) from the timely filing of a notice of appeal, which is "mandatory and jurisdictional," *Bowles v. Russell*, 551 U.S. 205, 209 (2007) (citation omitted), (ii) to "administrative remedies [that must] be exhausted," *Am. Dairy of Evansville, Inc. v. Bergland*, 627 F.2d 1252, 1268 (D.C. Cir. 1980) (Robinson III, J., dissenting), (iii) to the requirement for parties to "permissibly consent[] to have the magistrate judge enter judgment and" for any appeal to "be taken 'to the Court of Appeals'" directly, *Stevens, Hinds & White, P.C. v. Fisher, Byrialsen & Kreizer, PLLC (In re McCray, Richardson, Santana, Wise, & Salaam Litig.)*, 832 F.3d 150, 154 (2d Cir. 2016) (inner quotation marks and citation omitted), (iv) "to review [of] Rule 35(b) sentences [only if] one of four criteria are met under 18 U.S.C. § 3742(a),"[4] *United States v. Williams*, 590 F.3d 579, 580 (8th Cir. 2009). Section 950f(c)'s referral requirement is no different from these examples.

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

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

Khadr's first argument based on *Hicks* has no merit. That case, like the one before us, involved an accused who pleaded guilty pursuant to a PTA that included an appellate waiver provision and then failed to file the waiver within ten days of service of the convening authority's action, pursuant to § 950c(b)(3)

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

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

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

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

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

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

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

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

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

D.C. Circuit's controlling decision in *al Bahlul*, 767 F.3d at 29. *Id.* at 1248. Finally, it set aside and dismissed Hicks' conviction, and vacated the sentence. *Id.*

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

Khadr's argument to the contrary does not take into consideration the "well-established principle of interpretation that courts are 'not bound by a prior exercise of jurisdiction in a case where it was not questioned and it was passed *sub silentio*.'" *Doe v. Exxon Mobil Corp.*, 473 F.3d 345, 352 (D.C. Cir. 2007) (quoting *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 38 (1952));[9] *LaShawn A. v. Barry*, 87 F.3d 1389, 1395 n.6 (D.C. Cir. 1996) (en banc) (stating Supreme Court "does not consider itself bound by decisions on questions of jurisdiction" decided silently (citation omitted)); *see Brecht v. Abrahamson*, 507 U.S. 619, 631 (1993) ("[S]ince we have never squarely addressed the issue, and have at most assumed the applicability of the *Chapman* standard [of review for setting aside a conviction] on habeas, we are free to address the issue on the merits."); *Basardh v. Gates*, 545 F.3d 1068, 1072 n.6 (D.C. Cir. 2008) (per curiam) (stating prior D.C. Circuit decision, in which severability "was neither briefed nor argued and the panel's opinion [did] not mention it[,] . . . has no precedential force on the [severability] question" at issue).

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

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

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

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

The government argues that § 950f(c) further limits jurisdiction to review of alleged errors that are "properly raised by the accused."[11] Gov. Reply 6 (Nov. 5, 2020); Gov. Resp. 3 (Oct. 26, 2020); Gov. Reply 7 (Oct. 14, 2020); Gov. Suppl. Br. 5 (Oct. 14, 2020). We disagree with the government position. We are obligated to enforce a rule as jurisdictional only "[i]f the Legislature clearly states that a threshold limitation on a statute's scope shall count as jurisdictional." *Arbaugh,* 546 U.S. at 515. Our superior court reminds us that "the Supreme Court, of late, has 'pressed a stricter distinction between truly jurisdictional rules, which govern a court's adjudicatory authority, and nonjurisdictional claim-processing rules, which do not.'" *Huerta v. Ducote*, 792 F.3d 144, 151 (D.C. Cir. 2015) (quoting *Gonzalez,* 565 U.S. at 141).

The words, "any matter properly raised by the accused," in 10 U.S.C. § 950f(c) "do[] not speak in jurisdictional terms or refer in any way to the jurisdiction of the [appeals] courts." *Gonzalez*, 565 U.S. at 143 (second alteration in original) (quoting *Arbaugh*, 546 U.S. at 515). Rather, they constitute a claim processing rule. As a claim processing rule, the phrase "merely prescribe[s] the *method* by which the jurisdiction granted the courts by

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

[11] The government also makes an argument that we have no jurisdiction because Khadr's waiver is valid. Gov. Br. 11 (Dec. 19, 2013) (Khadr's waiver of "appellate review 'bars review' of *all* his claims" and therefore "[t]he Court should . . . dismiss the case because the Court lacks authority to hear it."). This is coupled with an argument that we should enforce Khadr's promise in the pretrial agreement to waive his appellate rights. *Id.* at 11, 25–29; *see also* Gov. Ans. 11–12 (Jan. 10, 2014); Gov. Suppl. Br. 7–13 (Oct. 14, 2020). We need not reach either argument given our dismissal of the appeal. However, we do not view these arguments as implicating jurisdiction. Section 950f(c) confers jurisdiction to review a case that is properly referred to us by the Convening Authority. The statutory words used are a "statement of the Congress's intent to confer jurisdiction" on this court for cases referred to it. *See al Bahlul*, 767 F.3d at 12. The contract argument is a legal argument concerning whether we should entertain the appeal or hold Khadr to his promise and enforce his waiver. *See, e.g., United States. v. Williams*, 510 F.3d 416, 422 (3d Cir. 2007) (discussing PTA breach under contract law). We express no opinion regarding the merits of the government's arguments.

Congress is to be exercised." *United States v. Hartwell*, 448 F.3d 707, 717 (4th Cir. 2006) (quoting *Kontrick v. Ryan*, 540 U.S. 443, 454 (2004)). The rule "does not speak to a court's [jurisdictional] authority, but only to a party's procedural obligations." *EPA v. EME Homer City Generation, L.P.*, 572 U.S. 489, 512 (2014); *see also Rivero v. Fid. Invs., Inc.*, 1 F.4th 340, 344 (5th Cir. 2021) ("Claim-processing rules are 'threshold requirements that claimants must complete, or exhaust, before filing a lawsuit.'" (quoting *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 166 (2010))).

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

In sum, claim processing rules "are statutory mechanisms for sifting out insubstantial [or otherwise unsound] appeals, not limitations on judicial power." *Huerta*, 792 F.3d at 152. We need not, and do not, parse the meaning of "properly raised by the accused" in deciding the jurisdictional issue. We need only find, as we do, that these words comprise a claim processing rule. Therefore, we reject the government's invitation to expand the jurisdictional prerequisite found in § 950f(c) beyond what the statute requires.

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

**B. Mandamus**

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

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

> We may review the denial of a COA by the lower courts. See, e.g., *Miller-El v. Cockrell*, 537 U.S. 322, 326-327 (2003). When the lower courts deny a COA and we conclude that their reason for doing so was flawed, we may reverse and remand so that the correct legal standard may be applied. See *Slack v. McDaniel*, 529 U.S. 473, 485-486, 489-490 (2000).

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

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

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

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

Accordingly, if the criteria are satisfied, we may issue a writ of mandamus to correct an actual or constructive refusal by the convening authority to refer a case that should be referred.[13] *See Wilbur v. United State**s***, 281 U.S. 206, 218 (1930) ("Mandamus is employed to compel the performance, ***when refused***, of a ministerial duty, this being its chief use." (emphasis added)); *Margolis v. Banner*, 599 F.2d 435, 441–42 (C.C.P.A. 1979) (stating "the court clearly has the power to issue writs under the All Writs Act in aid of its

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

prospective appellate jurisdiction in the face of action [below] that would frustrate such prospective appellate jurisdiction").

## III. REMAND

While we dismiss Khadr's appeal for want of jurisdiction, we are mindful of what the D.C. Circuit recently said in denying Khadr's mandamus petition seeking to require this court to vacate its abatement order and adjudicate the matter before us: "We are confident that [the CMCR] will act upon petitioner's appeal promptly following the resolution of *Bahlul v. United States*, No. 19-1076." Order, *In re Khadr* 2020 U.S. App. LEXIS 1072 (D.C. Cir. Jan. 13, 2020) (No. 19-1157) (per curiam) (unpublished).

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

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

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

Any application by either party to file a supplemental brief shall be made pursuant to CMCR Rule 15(k). This restriction does not apply to non-argumentative letters that bring to the court's attention relevant new authority.

FOR THE COURT:

Edward Loughran
Assistant Clerk of Court
U.S. Court of Military Commission Review