[ORAL ARGUMENT NOT YET SCHEDULED]
No. 14-1203

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

IN RE: ABD AL-RAHIM HUSSEIN MUHAMMED AL-NASHIRI, Petitioner

ON PETITION FOR A WRIT OF MANDAMUS TO THE
UNITED STATES COURT OF MILITARY COMMISSION REVIEW

OPPOSITION OF THE UNITED STATES TO PETITIONER'S MOTION FOR A WRIT OF MANDAMUS

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INTRODUCTION

Petitioner Abd Al-Rahim Hussein Muhammed Al-Nashiri ("Al-Nashiri") moves this Court for a writ of mandamus to the United States Court of Military Commission Review (USCMCR). The petition ("Pet.") seeks an order disqualifying the two military judges serving on the USCMCR panel considering an interlocutory appeal in Al-Nashiri's case on the ground that they were appointed in violation of the Appointments Clause and the Commander-in-Chief Clause of the Constitution. As explained below, this Court should deny the petition because (1) the Court lacks jurisdiction to grant such relief, and (2) the petition fails to satisfy the stringent requirements for issuance of the writ.

STATEMENT

1. In the Military Commissions Act of 2009 ("2009 MCA"), Congress authorized the United States Court of Military Commission Review to hear appeals from the decisions of military commissions. 10 U.S.C. § 950f(a). Unless the defendant waives review, the USCMCR reviews all cases in which the final decision, as approved by the convening authority, includes a finding of guilty. Id. § 950c. The USCMCR also has jurisdiction to hear certain interlocutory appeals by the government, including the underlying appeal in this case. Id. § 950d. Review may not be waived in a case involving a sentence of death. See id. §

950c(b)(1). The USCMCR may affirm only such findings of guilt, and the sentence or such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved. Id. § 950f. In considering the record, the USCMCR may weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact, recognizing that the trial court saw and heard the witnesses. Id.

Congress has authorized the Secretary of Defense to "assign . . . appellate military judges" to serve on the Court. 10 U.S.C. § 950f. Each "appellate military judge" must be a commissioned officer of the armed forces. 10 U.S.C. § 950f(b)(2). Those officers must also be members of the bar of a federal court or the highest court of a State and certified to be qualified for duty as a military judge of general courts-martial by the Judge Advocate General of the armed force of which the judge is a member. Id. § 948j(b). Commissioned officers of the armed forces in the grades of major (or lieutenant commander in the Navy) and above are appointed as such by the President with the advice and consent of the Senate. See 10 U.S.C. § 531(a) (Supp. IV 2004); see also Weiss v. United States, 510 U.S. 163, 170 (1994). The 2009 MCA does not require a separate presidential appointment, with advice and consent of the Senate, for assignment of such officers to the USCMCR.

Congress has also authorized the President to "appoint, by and with the advice and consent of the Senate, additional judges," including civilians, to the USCMCR. 10 U.S.C. § 950f(b)(3). At present, 9 of the 11 judges on the USCMCR, and 2 of the 3 judges serving on the panel in the pending interlocutory appeal in this case, are active duty commissioned officers of the armed forces above the grade of major and "appellate military judges" who have been assigned to the USCMCR by the Secretary of Defense pursuant to 10 U.S.C. § 950f(b)(2).[1]

2. On September 28, 2011, the Convening Authority for Military Commissions, acting under the 2009 MCA, referred nine charges against Al-Nashiri to trial by a military commission. See Pet., Attachment B, at 23-34; see also Al-Nashiri v. MacDonald, 741 F.3d 1002, 1004 (9th Cir. 2013). The charges stem from Al-Nashiri's alleged role in two terrorist attacks and one attempted terrorist attack: (1) the attempted bombing of the *USS The Sullivans* in Yemen in 2000; (2) the bombing of the *USS Cole* in Yemen later that year that killed 17 American sailors; and (3) the bombing in Yemen in 2002 of the MV *Limburg*, a French oil tanker, that killed one crew member. Al-Nashiri, 741 F.3d at 1004; see also Brief on Behalf of Appellant, United States v. Al-Nashiri,

[1] See http://www.mc.mil/ABOUTUS/USCMCRJudges.aspx.

USCMCR Case No. 14-001, at 2-5 (filed Sep. 29, 2014) ("Gov't USCMCR Merits Brief").[2]

On September 16, 2014, the military judge dismissed without prejudice the charges related to the bombing of the MV *Limburg*. Gov't USCMCR Merits Brief at 2. The government filed an interlocutory appeal of that dismissal in the USCMCR. See 10 U.S.C. § 950d. The appeal was assigned to a three-judge panel of the USCMCR. The panel consists of Judge Scott Silliman, a civilian appointed to the USCMCR by the President with the advice and consent of the Senate (see 10 U.S.C. § 950f(b)(3)), and Colonel (COL) Eric Krauss, U.S Army, and Lieutenant Colonel (Lt Col) Jeremy S. Weber, U.S. Air Force. COL Krauss and Lt Col Weber are both appellate military judges of their respective services assigned to duty on the USCMCR by the Secretary of Defense. See 10 U.S.C. § 950f(b)(2); Response to Motion to Recuse Judge Krauss and Judge Weber, United States v. Al-Nashiri, USCMCR Case No. 14-001, at 2 (filed Sep. 29, 2014) ("Gov't USCMCR Response to Motion to Recuse"). Both COL Krauss and Lt

[2] The Gov't USCMCR Merits Brief and other filings in the interlocutory appeal before the USCMCR are available at the Office of Military Commissions website, http://www.mc.mil/Cases.aspx?caseType=cmcr.

Col Weber have been appointed by the President and confirmed by the Senate as officers in their respective services.[3]

Following the panel assignment, Al-Nashiri filed a motion seeking disqualification of both COL Krauss and Lt Col Weber on the ground that their assignments to the USCMCR violated the Appointments Clause and impermissibly infringed on the President's authority as Commander-in-Chief. The government opposed the motion. See Gov't USCMCR Response to Motion to Recuse. On October 6, 2014, the USCMCR denied the motion. See Pet., Attachment A.

On October 14, 2014, Al-Nashiri filed a petition for a writ of mandamus in this Court seeking an order disqualifying the military judges assigned to the USCMCR panel from adjudicating the interlocutory appeal. On the same day, Al-Nashiri filed an application for a stay of the proceedings in the USCMCR pending this Court's resolution of his mandamus petition. On November 12, 2014, a divided motions panel of this Court granted the motion for a stay and directed the government to respond to the petition. See Order, Case No. 14-1203, Doc. #1521946 ("Stay Order").

[3] COL Krauss was nominated by the President and confirmed by the Senate to his present grade in 2011. See 157 Cong. Rec. S6929 (daily ed. Oct. 31, 2011) (nomination); 157 Cong. Rec. S7389-90 (daily ed. Nov. 10, 2011) (confirmation). Lt Col Weber was most recently nominated by the President and confirmed by the Senate in 2014. See 160 Cong. Rec. S4629 (daily ed. July 17, 2014) (nomination); 160 Cong. Rec. S5311 (daily ed. July 31, 2014) (confirmation).

Judge Kavanaugh dissented. Stay Order at 3. In his view, the Court lacked jurisdiction to issue a stay because, under 10 U.S.C. § 950g(a), this Court's jurisdiction is limited to reviewing a "final judgment" rendered by a military commission, and there was no such final judgment in this case. Stay Order at 3. Judge Kavanaugh noted further that, because there was no final judgment, Al-Nashiri's claims were subject to the jurisdictional bar in 28 U.S.C. § 2241(e)(2) over any non-habeas action brought against the United States challenging any aspect of Al-Nashiri's military commission trial. Stay Order at 3. Judge Kavanaugh concluded that, under these statutes, Al-Nashiri could only raise his claims in this Court on direct appeal following a conviction and exhaustion of appeals in the military justice system. Id.

ARGUMENT

I. THIS COURT LACKS JURISDICTION TO ISSUE THE WRIT

Al-Nashiri challenges by writ of mandamus the constitutionality of the assignment of appellate military judges to the USCMCR panel hearing the interlocutory appeal in his military commission case. But because there has not been a "final judgment" in Al-Nashiri's military commission trial, his claims do not come within this Court's limited jurisdiction to review "final judgment[s]" of military commissions under 10 U.S.C. § 950g. Moreover, because Al-Nashiri's

petition falls outside of the limited jurisdiction authorized by Section 950g, and because it is not a petition for a writ of habeas corpus, Al-Nashiri's claims fall within the scope of the jurisdictional bar of 28 U.S.C. § 2241(e)(2). Finally, in light of these statutes, this Court lacks authority under the All Writs Act, 28 U.S.C. § 1651, to issue the writ Al-Nashiri seeks because the writ would not be "necessary or appropriate in aid of [the Court's] jurisdiction." Id. § 1651(a).

"Federal courts are courts of limited subject-matter jurisdiction." Al-Zahrani v. Rodriguez, 669 F.3d 315, 317 (D.C. Cir. 2012). This Court's appellate jurisdiction in military commission cases is narrowly circumscribed by statute to determining "the validity of a final judgment rendered by a military commission," as approved by the Convening Authority and, where applicable, the USCMCR.[4] 10 U.S.C. § 950g(a). This Court may not review a final judgment "until all other appeals under this chapter have been waived or exhausted." Id. § 950g(b). Congress further clarified that this Court "may act under this section

[4] Section 950g of the 2009 MCA provides:

(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, . . . the United States Court of Military Commission Review) under this chapter.

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 [USCMCR]." Id. § 950g(d) (emphasis added). The governing statute thus "requires a final judgment by a military commission, approved by the convening authority, for which all administrative review has been exhausted" as a prerequisite to this Court's jurisdiction. Khadr v. United States, 529 F.3d 1112, 1117 (D.C. Cir. 2008).[5]

Because Section 950g narrowly restricts this Court's jurisdiction to review of military commission final judgments, and because that statute requires this Court to act "only" with respect to such final judgments, this Court has no jurisdiction under Section 950g over Al-Nashiri's challenge to the composition of the USCMCR panel. See Khadr, 529 F.3d at 1117 (dismissing an appeal from an interlocutory USCMCR decision because it did not seek review of a final judgment). Al-Nashiri's motion provides no basis for disregarding the congressional requirement that this Court's review of his claims must await a final judgment and exhaustion of administrative remedies. See id. at 1115 (noting that the "party claiming subject matter jurisdiction" under the Military Commissions Act "has the burden to demonstrate that it exists").

[5] Although Khadr involved the 2006 MCA, rather than the 2009 MCA

Moreover, because there is no final judgment and therefore no jurisdiction under Section 950g, Al-Nashiri's claims are barred under 28 U.S.C. § 2241(e)(2). As relevant here, that statute 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." Id.; see also Janko v. Gates, 741 F.3d 136, 139 (D.C. Cir. 2014); Al-Nashiri, 741 F.3d at 1006-10 (holding that Section 2241(e)(2) barred Al-Nashiri's declaratory judgment action challenging the jurisdiction of the military commission because the action related to an aspect of the military commission trial). Al-Nashiri's mandamus petition challenging the composition of the USCMCR panel hearing an interlocutory appeal from an order issued by the military commission falls within the scope of Section 2241(e)(2)'s bar on any non-habeas action against the United States that "relat[es] to any aspect" of Al-Nashiri's trial. Accordingly, the applicable jurisdictional statutes "could hardly be clearer" in precluding this Court from ruling on Al-Nashiri's claims at this interlocutory stage of his military commission proceedings. Stay Order at 3 (Kavanaugh, J., dissenting).

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which governs here, the same finality principles apply.

Al-Nashiri's reliance on the All Writs Act, 28 U.S.C. § 1651, is misplaced. It is well settled that the All Writs Act, "in authorizing all writs necessary or appropriate in aid of the court's jurisdiction, is not an independent grant of appellate jurisdiction." 16 Charles Alan Wright, et al., Federal Practice and Procedure § 3932 (3d ed. 2014). As applied here, that means this Court may issue writs only in cases otherwise within its appellate jurisdiction under Section 950g; the Act does not expand the bases for jurisdiction. See Pennsylvania Bureau of Correction v. U.S. Marshals Service, 474 U.S. 34, 41 (1985) (noting that the All Writs Act does not authorize review "where jurisdiction [does] not lie under an express statutory provision").

Although this Court has in some circumstances recognized jurisdiction under the All Writs Act to protect its *potential* appellate jurisdiction even before an "appeal has been perfected," see In re Tennant, 359 F.3d 523, 529 (D.C. Cir. 2004), that principle does not apply here because the applicable jurisdictional statutes expressly limit the Court's jurisdiction to review of final judgments, see 10 U.S.C. § 950g(a), permit the Court to act "only" with respect to such judgments, id. § 950g(d), and explicitly bar any other action relating to a military commission trial, 28 U.S.C. § 2241(e)(2). And in any event, interlocutory review by extraordinary writ of the USCMCR's rejection of Al-Nashiri's challenge to that

court's military judges is not "necessary" to protect the Court's potential jurisdiction to review that claim on direct appeal. In the event that Al-Nashiri is convicted and exhausts his remedies in the military commission system, nothing would prevent him from renewing his claim in this Court on appeal from a final military commission judgment. See In re Briscoe, 448 F.3d 201, 212 (3d Cir. 2006) (mandamus is not intended to permit review of interlocutory district court decisions that are otherwise appealable upon final judgment) (citing cases).

Al-Nashiri argues that nothing in Section 2241(e)(2) expressly addresses this Court's all-writs jurisdiction under 28 U.S.C. § 1651 and that the purpose of Section 2241(e)(2) was merely to "strip[ ] federal courts of jurisdiction over [civil] . . . causes of action by Guantanamo detainees that would be the functional equivalent of habeas." See Petitioner's Reply in Support of His Motion for a Stay at 2-3 ("Stay Mot. Reply"). That argument, however, cannot be squared with Section 2241(e)(2)'s broad language, which bars jurisdiction over *any* action (other than habeas corpus or direct review of a final judgment) relating to "any aspect" of the military commission trial of an alien who is detained by the United States as an enemy combatant. 28 U.S.C. § 2241(e)(2); see also H.R. Rep. No. 109-664, pt. 1, at 27 (2006) ("The Committee notes its intention to make clear through this section that . . . this section forecloses *any legal claim* . . . brought by or on behalf of these

detainees. The committee notes its intention that judicial review of detention and military commission [proceedings] is channeled through the adequate alternative procedures provided by this Act and the [Detainee Treatment Act].") (emphasis added); Aamer v. Obama, 742 F.3d 1023, 1030 (D.C. Cir. 2014) ("if petitioner's claims do not sound in habeas, their challenges 'constitute[ ] an action other than habeas corpus' barred by section 2241(e)(2)") (quoting Al-Zahrani, 669 F.3d at 319); Miami Herald, Inc. v. United States, Case No. 13-002, at 3-5 (USCMCR Mar. 27, 2013) (unpub. order denying a writ of mandamus in light of Section 2241(e)(2)) (Silliman, J., concurring). Because Al-Nashiri's mandamus petition seeks the disqualification of appellate military judges considering an interlocutory appeal from a judicial order issued by a military commission, that petition constitutes an "action against the United States . . . relating to an[] aspect of [a military commission] trial," 28 U.S.C. § 2241(e)(2), and his claims are therefore subject to review in this Court only upon review of a military commission's final judgment under 10 U.S.C. § 950g.

II. Al-NASHIRI CANNOT SATISFY THE STRINGENT STANDARDS GOVERNING MANDAMUS RELIEF

Even if Al-Nashiri could properly invoke this Court's mandamus jurisdiction at this pretrial stage in the military commission proceedings, he cannot satisfy the exacting standards for obtaining the writ.

Because the writ of mandamus is a "drastic and extraordinary remedy," "only exceptional circumstances amounting to a judicial usurpation of power or a clear abuse of discretion will justify [its] invocation." Cheney v. U.S. Dist. Court, 542 U.S. 367, 380 (2004) (citations and internal quotation marks omitted). The writ will issue only when the petitioner demonstrates that: (1) there is "no other adequate means to attain the [requested] relief;" (2) his or her "right to issuance of the writ is clear and indisputable;" and (3) "the writ is appropriate under the circumstances." Belize Social Dev. Ltd. v. Government of Belize, 668 F.3d 724, 729-30 (D.C. Cir. 2012) (quoting Cheney, 542 U.S. at 380-81). Al-Nashiri cannot satisfy any of these requirements.

A. Al-Nashiri Cannot Demonstrate That There Are No Other Adequate Means To Obtain Relief

"Ordinarily mandamus may not be resorted to as a mode of review where a statutory method of appeal has been prescribed or to review an appealable decision of record." Roche v. Evaporated Milk Ass'n, 319 U.S. 21, 27-28 (1943). Mandamus relief is unavailable to Al-Nashiri because he has not shown that he would lack the opportunity to renew his challenge to the appointment of military judges to the USCMCR "on appeal from the ultimate disposition of this litigation." Belize, 668 F.3d at 730 (quoting Dellinger v. Mitchell, 442 F.2d 782, 790 (D.C. Cir. 1971)).

As Judge Kavanaugh noted, "if Nashiri is convicted and exhausts his remedies in the military justice system, he then may raise in this Court his constitutional challenges." Stay Order at 3 (Kavanaugh, J., dissenting); see also Nguyen v. United States, 539 U.S. 69 (2003) (considering challenge to qualification of appellate judge on direct appeal from final judgment of conviction). For that reason, Al-Nashiri cannot satisfy the mandamus requirement that there be "no other adequate means to attain the [requested] relief." Belize, 668 F.3d at 729; see also Cheney, 542 U.S. at 380-81 (noting that the purpose of the "no other adequate means" requirement is "to ensure that the writ will not be used as a substitute for the regular appeals process").

Al-Nashiri contends (Stay Mot. Reply 4-5, 10-11) that direct appeal from a final judgment is not an adequate means for redressing claims challenging the qualification of the judges assigned to hear the case. Although, as Al-Nashiri argues, courts have found that mandamus can be an appropriate avenue for reviewing an order denying a motion to recuse, those cases generally involve claims of judicial partiality. See, e.g., Cobell v. Norton, 334 F.3d 1128, 1140 (D.C. Cir. 2003) (granting mandamus review of claims that special master should have been disqualified "due to his personal knowledge of the case and the resulting appearance of partiality"); In re Kempthorne, 449 F.3d 1265, 1271 (D.C. Cir.

2006) (special master, appointed by district court, should have recused himself under 28 U.S.C. § 455; his resignation while the case was pending did not moot the petition for mandamus relief because his reports may have biased the fact-finding process); In re Brooks, 383 F.3d 1036, 1043 (D.C. Cir. 2004) (rejecting challenge, via a petition for mandamus, that district court possessed personal knowledge of operative facts and that his impartiality might reasonably be challenged under 28 U.S.C. § 455(a)). In such cases, the remedy of appeal after judgment may be inadequate because it is difficult for the reviewing court to ascertain and correct all of the subtle ways in which a potentially biased judge may have prejudiced the process. Cobell, 334 F.3d at 1139.

This case, in contrast, does not involve any claim of bias and, thus, "it lacks one important ingredient that . . . [has] often prompted [the court] to undertake review of judicial disqualification orders at the earliest practicable time" via mandamus. In re Cargill, Inc., 66 F.3d 1256, 1263-64 (1st Cir. 1995). Instead, Al-Nashiri's petition raises separation-of-powers issues that are "clearly distinguishable" from claims of judicial bias because they "may be fully addressed and remedied on appeal." Cobell, 334 F.3d at 1139.

Al-Nashiri relies on Cheney to argue (Pet. 12) that appeal after final judgment is an inadequate remedy for the kind of separation-of-powers claims

raised here. In Cheney, however, the validity of discovery orders issued to the Vice President were challenged in circumstances where the President's ability to obtain confidential advice would have been irretrievably lost if mandamus relief had not been available. 542 U.S. at 381-82. That is not the case here, because the infringements on the authority of the President and the Senate that Al-Nashiri alleges will not be irreparably lost if he cannot immediately appeal. See United States v. Cisneros, 169 F.3d 763, 768-69 (D.C. Cir. 1999) (holding that a criminal defendant's separation-of-powers claim was not appealable before trial under the collateral order doctrine because the President's and the Senate's constitutional powers would not be further infringed if the defendant could appeal only from a final judgment).

Al-Nashiri also argues (Pet. 13) that mandamus is warranted because an unfavorable ruling by a "structurally void panel of the [US]CMCR" would require him to stand trial on capital charges. However, "structural" separation-of-powers claims of the sort Al-Nashiri alleges do not amount to "a right not to be tried." Cisneros, 169 F.3d at 769; see also id. (noting that, because the defendant's claim was "not an affront [to him] personally" but rather "a supposed infringement" of the President's and Senate's authority, trying the defendant "would not itself interfere with the President's nomination judgments or with the Senate's

advise-and-consent function."). Thus, Al-Nashiri's claims do not implicate a right not to be tried that would warrant a writ of mandamus.

Finally, Al-Nashiri argues (Pet. 14; Stay Mot. Reply 12) that his petition raises "an important issue" that the public interest requires to "be resolved at the earliest opportunity." In Khadr, this Court rejected an almost identical argument, reasoning that it was nothing more than a claim that the public has an interest in ensuring that all criminal proceedings are just. That interest, this Court held, can be fully vindicated on direct appeal from a final judgment and "does not warrant [the Court's] interruption of [a] criminal proceeding just because it is a military commission." Khadr, 529 F.3d at 1118-19.

B. Al-Nashiri Cannot Establish a Clear and Indisputable Right to Relief

Al-Nashiri also cannot show that his right to relief is "clear and indisputable." Cheney, 542 U.S. at 381. Indeed, Al-Nashiri acknowledges that his constitutional claims involve "novel questions about the Appointments Clause and the limits Congress can place on the Commander-in-Chief Power."[6] Pet.

[6] In his Motion for a Stay, Al-Nashiri claimed (Stay Mot. 6-7; see also Pet. 29) that the government had "stipulat[ed]" in a mandamus proceeding brought by a different military commission defendant that his constitutional challenge is "difficult" and "substantial." There was no such stipulation. Rather, the government's argument was that the Court should deny the petitioner's request for summary reversal because this Court should not declare an Act of Congress unconstitutional pursuant to summary proceedings. See Reply of the United

12-13. Given the absence of governing precedent in Al-Nashiri's favor, Al-Nashiri cannot show that the USCMCR's denial of his motion to recuse amounted to a "judicial usurpation of power . . . or a clear abuse of discretion." Cheney, 542 U.S. at 380 (citation and internal quotation marks omitted).

1. The Appointments Clause Claim

Regarding the assignment of judges to the USCMCR, the 2009 MCA provides that

> 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.
>
> 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.

10 U.S.C. § 950f(b). Al-Nashiri argues (Pet. 24-27) that appellate military judges assigned to the USCMCR are principal officers under the Appointments Clause[7]

States, In re Qosi, No. 14-1075, at 16-17 (D.C. Cir. Aug. 19, 2014) (Doc. #1508233).

[7] The Appointments Clause, U.S. Const., Art. II, § 2, cl. 2, provides:

> [The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose appointments are not herein

who must be appointed by the President and confirmed by the Senate to their positions on that court. At the outset, it does not matter whether appellate military judges assigned to the USCMCR are principal or inferior officers because their Senate-confirmed appointments as commissioned officers of the armed forces are sufficient to satisfy the requirements of the Appointments Clause. In Weiss v. United States, 510 U.S. 163 (1994), the Supreme Court rejected essentially the same arguments Al-Nashiri raises here in upholding the assignment of appellate military judges to the United States Navy-Marine Corps Court of Military Review. Id. at 176. The Court held that the assignments were valid under the Appointments Clause "because each [judge] had been previously appointed by the President as a commissioned military officer, and was serving on active duty under that commission at the time he was assigned to a military court." Edmond v. United States, 520 U.S. 651, 654 (1997). Thus, although "those [officers] serving as military judges must be appointed pursuant to the Appointments Clause, . . . [a]ll of the military judges involved in these cases . . . were already commissioned officers when they were assigned to serve as judges, and thus they had already

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> otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the appointment of such inferior Officers as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

been appointed by the President with the advice and consent of the Senate." Weiss, 510 U.S. at 170.

The Weiss Court rejected the argument that the officers needed another appointment pursuant to the Appointments Clause before assuming their judicial duties. The Court recognized that, although military judges "obviously perform certain unique and important functions [in the military justice system], all military officers, consistent with a long tradition, play a role in the operation of the military justice system," including the authority to apprehend offenders, impose non-judicial punishment for minor offenses, serve as a member of a court-martial, and serve as a convening authority empowered to review and modify the sentences imposed by a court-martial. Id. at 174-75. For that reason, the Court concluded that the special role of appellate military judges was sufficiently "germane" to the role of military officers generally such that there was no requirement under the Appointments Clause for a separate appointment to the Navy-Marine Corps criminal appellate court. Id. at 174-76.

The reasoning of Weiss applies equally to the appellate military judges assigned to the USCMCR. Those judges, like the judges in Weiss, were commissioned officers who had already been appointed by the President with the advice and consent of the Senate when they were assigned to serve as judges on a

military appellate court.

Al-Nashiri's argument (Pet. 25) that the Weiss Court approved the assignment of military officers to a military appellate court on the ground that they were inferior officers who did not require an appointment under the Appointments Clause is mistaken. Nothing in the majority opinion suggests that the Court relied on such reasoning or purported to resolve whether the judges were principal or inferior officers. That issue did not require resolution because the Appointments Clause was satisfied in any event by the incumbents' appointments as commissioned officers of the armed forces. See Edmond, 520 U.S. at 654. But see Weiss, 510 U.S. at 193-95 (Souter, J., concurring) (concluding that the appellate military judges were inferior officers).

The 2009 MCA makes clear that Congress did not intend to require a second appointment for appellate military judges to be assigned to the USCMCR. See 10 U.S.C. § 950f(b) (permitting appellate military judges to be "assigned" by the Secretary of Defense while requiring civilian judges to be "appointed" by the President "with the advice and consent of the Senate"). That determination, in which both the President and Congress concurred, merits judicial deference. Cf. Weiss, 510 U.S. at 193-94 (Souter, J., concurring) (rational congressional

determination as to whether a separate appointment is required "surely merits . . . tolerance").

Al-Nashiri argued below (Motion to Recuse 16-17) that the Weiss Court's reasoning is inapplicable to USCMCR judges because their function is not "germane" to the general responsibilities given to all commissioned officers. However, "military commissions . . . have invariably been composed of commissioned officers of the army" since the beginning of the nation. William Winthrop, Military Law and Precedents 835 (2d ed. 1920). Moreover, all officers in the armed forces bear responsibility for preventing and sanctioning violations of the law of war.[8] As in the case of any other breach of military law or discipline, commissioned officers of the armed forces sit as members of courts-martial or military commissions adjudicating such offenses and, in some cases, are empowered to convene such proceedings. See 10 U.S.C. § 818. Accordingly, service on the USCMCR is "germane" to the well-recognized role of military officers in administering the law of war.

[8] See, e.g., In re Yamashita, 327 U.S. 1, 16 (1946) ("Th[e] duty of a commanding officer [to protect prisoners of war and the civilian population] has heretofore been recognized, and its breach penalized by our own military tribunals"); Dep't of the Army, Field Manual 27-10, The Law of Land Warfare ¶ 501 (1956) (commanders at all levels are responsible for ensuring that persons under their control comply with the law of war and for punishing persons who violate it).

Nor does Edmond v. United States, 520 U.S. 651 (1997), support Al-Nashiri's argument (Pet. 25) that the appellate military judges on the USCMCR are principal officers who require separate appointments. In Edmond, the petitioner challenged the appointment of two civilians to the Coast Guard Court of Criminal Appeals (CGCCA). Although their appointments to the CGCCA had been ratified by the Secretary of Transportation, the civilian appellate judges had not been appointed by the President and confirmed by the Senate. Rejecting Edmond's claim that the appointments therefore violated the Appointments Clause, the Supreme Court held that the judges were inferior officers and consequently did not require Presidential appointment and Senate confirmation. Edmond, 520 U.S. at 666.

The Edmond Court explained that, although there was no "exclusive criterion for distinguishing between principal and inferior officers for Appointments Clause purposes," id. at 661, inferior officers are generally officers whose work is directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate. Id. at 663. The Court then noted that Court of Criminal Appeals judges were subject to oversight by both the Judge Advocate General of their service, who was responsible for promulgating rules for the court on which they sat and possessed

limited removal power, as well as the Court of Appeals for the Armed Forces (CAAF), which exercised appellate review of their decisions. Id. at 664.

Al-Nashiri argues (Pet. 26-27) that appellate military judges assigned to the USCMCR are principal officers because they possess statutory tenure and their decisions are not subject to review by a superior adjudicative body within the Executive Branch. As noted above, however, it is immaterial whether appellate military judges assigned to the USCMCR are principal or inferior officers because their Senate-confirmed appointments as commissioned officers satisfy the requirements of the Appointments Clause. But, in any event, it is not "clear and indisputable" that, unlike their counterparts on the armed forces' Courts of Criminal Appeals, the appellate military judges assigned to the USCMCR are principal officers. Although USCMCR decisions are not subject to further judicial review within the Executive Branch, that single factor is not dispositive of their status. See Edmond, 520 U.S. at 661. In a manner similar to the judges of the Courts of Criminal Appeals, military judges on the USCMCR do not acquire their authority except by assignment to that court by an official of the Executive Branch – the Secretary of Defense. In addition, like their counterparts on the Courts of Criminal Appeals, appellate military judges on the USCMCR can be removed from their judicial assignments by an Executive Branch official – the Secretary of

Defense or a designee – for reasons of military necessity, 10 U.S.C. § 949b(b)(4)(C), or for "good cause," id. § 949b(b)(4)(D). Finally, the Secretary of Defense exercises a measure of administrative oversight over the USCMCR and its judges by reviewing and approving the court's rules of procedure.[9] See Manual for Military Commissions, Rule 1201(b)(6) (2012); 10 U.S.C. § 950f(a) (authorizing the Secretary of Defense to prescribe rules for the USCMCR).[10]

2. The Commander-in-Chief Clause Claim

Al-Nashiri contends (Pet. 20-23) that the provisions of the 2009 MCA governing the removal and reassignment of appellate military judges assigned to the USCMCR are unconstitutional because they infringe on the President's power

[9] Al-Nashiri relies (Pet. 26) on Intercollegiate Broadcasting Sys., Inc. v. Copyright Royalty Bd., 684 F.3d 1332 (D.C. Cir. 2012), for the proposition that limitations on removal of the members of the USCMCR renders them principal officers. In that case, however, the officials whose appointments were at issue were removable only for misconduct or neglect of duty. Id. at 1340-41. As for appellate military judges assigned to the USCMCR, the reasons for removal are significantly broader, encompassing both military necessity and good cause.

[10] Al-Nashiri also maintains (Pet. 27-28) that the current structure of the USCMCR impermissibly affords inferior officers, i.e., the appellate military judges assigned to the court by the Secretary of Defense, equal stature with principal officers, i.e., the civilian members appointed by the President and confirmed by the Senate. That argument, however, rests on the erroneous assumption that, in contrast with their civilian counterparts, the appellate military judges lack "appointments" within the meaning of the Appointments Clause, an argument that the Weiss Court rejected.

as commander-in-chief. That contention has no merit.

The 2009 MCA ensures the judicial independence of the appellate military judges assigned to the USCMCR by providing certain protections from censure or arbitrary removal. See, e.g., 10 U.S.C. § 949b(b)(2) (providing that "[n]o person may censure, reprimand or admonish a judge on the [USCMCR] . . . with respect to any exercise of their functions in the conduct of proceedings under this chapter"); 10 U.S.C. § 949b(b)(4) (limiting assignment of appellate military judges on the USCMCR to other duties to certain specified circumstances). However, the exceptions to the reassignment limitations contemplate routine changes of duty in the ordinary course of a military career and provide sufficient flexibility to accommodate military exigencies. For example, Section 949b(b)(4)(A) authorizes reassignment upon the appellate military judge's voluntary request when the Secretary of Defense, in consultation with the Judge Advocate General of the armed force of which the military judge is a member, approves such reassignment. Section 949b(b)(4)(C) authorizes the Secretary of Defense, in consultation with the Judge Advocate General, to reassign appellate military judges to other duties "based on military necessity" consistent with "service rotation regulations." Finally, Section 949b(b)(4)(D) authorizes reassignment when "[t]he appellate military judge is withdrawn by the Secretary of Defense . . . in consultation with

the Judge Advocate General of the armed force of which the appellate military judge is a member, for good cause . . . ."

Al-Nashiri argues (Pet. 18-20) that the rules constraining the reassignment of appellate military judges on the USCMCR impermissibly infringe on "the President's core authority as commander-in-chief" to reassign these officers to other duties. But, although Section 949b(b)(4) insulates appellate military judges from arbitrary removal, it does not establish statutory "tenure" as the phrase is ordinarily understood in the context of judicial appointments. Compare 10 U.S.C. § 949b(b)(4) with 10 U.S.C. § 942(b)(2) (establishing 15-year terms for members of the CAAF). Rather, Section 949b(b)(4) contemplates that, as in the case of any officer of the armed forces, the appellate military judges of the USCMCR will be subject to retirement or separation from the armed forces, as well as reassignment "consistent with service rotation regulations," reassignment "based on military necessity," and reassignment "for good cause." That authority assures that the Executive is able to reassign these officers to other duties when the interests of national security, military exigency, or good cause so require.

Moreover, Al-Nashiri's argument disregards that, while the President is the Commander-in-Chief of the armed forces (U.S. Const. Art. II, § 2, cl. 1), the Constitution also grants Congress significant war powers. See, e.g., Ex parte

Quirin, 317 U.S. 1, 26 (1942) (enumerating Congress's war powers). Those powers "lay[] upon Congress primary responsibility for supplying the armed forces." Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 643 (1952) (Jackson, J., concurring) (internal quotation marks and emphasis omitted).

Congress has regularly enacted legislation pursuant to its war powers that limits the President's ability to deploy, assign, or regulate the activities of members of the armed forces. See, e.g., 10 U.S.C. § 664 (regulating the duration of tours of officers qualified for joint duty assignments); 10 U.S.C. § 671 (prohibiting the assignment of a member of the armed forces overseas before completing entry-level training); 10 U.S.C. § 1161 (limiting the President's authority to drop an officer from the rolls for misconduct); 10 U.S.C § 1181 et seq. (limiting the circumstances in which an officer can be discharged for substandard performance or misconduct); 10 U.S.C. § 3033 (limiting the time an officer may serve as Chief of Staff). These examples of statutes restricting the President's discretion in military personnel matters, including the reassignment of officers, put the lie to Al-Nashiri's claim (Pet. 19) that there is a lack of historical precedent for the modest limitations that Section 949b(b)(4) imposes on the reassignment of appellate military judges assigned to the USCMCR.

Al-Nashiri's related argument (Pet. 20-23) that the judicial independence of

the appellate military judges assigned to the USCMCR is illusory is based on the mistaken premise that the reassignment limitations are unconstitutional. As shown above, however, such limitations are fully compatible with the allocation of constitutional war powers between the Congress and the President and are no different than other congressionally-imposed limitations on the Executive's authority over military personnel matters. As such, they are neither constitutionally suspect nor illusory.

C. Al-Nashiri Cannot Show That the Writ Is Appropriate under the Circumstances

Al-Nashiri has failed to demonstrate any other reasons for this Court to exercise its discretion and award him mandamus relief. Al-Nashiri contends (Stay Mot. 9) that, in the absence of judicial intervention at this juncture, he must waste time briefing and arguing issues before a panel that may be improperly appointed. But, because briefing in the USCMCR is now complete, that alleged harm has already occurred. In any event, the cost and delay caused by trial and the appellate process do not constitute sufficient reason for the grant of mandamus relief in this case. See DeGeorge v. U.S. Dist. Court, 219 F.3d 930, 935-36 (9th Cir. 2000) ("Being forced to stand trial," and the "unnecessary cost and delay," that result from an erroneous trial court ruling do not constitute "prejudice correctable through use of the writ of mandamus").

Al-Nashiri also argues (Stay Mot. Reply 10-11) that this Court's intervention is warranted because "this is a capital case" and that, due to the possible spill-over effect on the remaining counts, he should now be relieved of the prospect of going to trial on the MV *Limburg* charges. The argument that a dismissible count may prejudice the remaining charges, however, is not unique to capital prosecutions. In such cases, the question of prejudice is cognizable – and subject to remedial action – on direct appeal. See, e.g., United States v. Cross, 308 F.3d 308, 316 (3d Cir. 2002); United States v. Prosperi, 201 F.3d 1335, 1345-46 (11th Cir. 2002).

CONCLUSION

For the foregoing reasons, the petition for mandamus should be denied, and the stay previously entered by the Court should be vacated.

Respectfully submitted,

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CERTIFICATE OF SERVICE

U.S. Court of Appeals Docket Number 14-1203.

I hereby certify that I electronically filed the foregoing Opposition of the United States with the Clerk of the Court for the United States Court of Appeals for the D.C. Circuit by using the appellate CM/ECF system on December 3, 2014.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

DATED: December 3, 2014

/s/ John De Pue
John De Pue
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