UNITED STATES COURT OF MILITARY COMMISSION REVIEW

BEFORE THE COURT
SILLIMAN, DEPUTY CHIEF JUDGE; POSCH; AND ALDYKIEWICZ, JUDGES

ABD AL HADI AL-IRAQI
ALSO KNOWN AS NASHWAN AL-TAMIR,
PETITIONER

v.

UNITED STATES,
RESPONDENT

CMCR 19-004

April 21, 2020

Captain John K. Waits, U.S. Navy; *Colonel Peter S. Rubin*, U.S. Marine Corps; *Lieutenant Colonel Michael D. Libretto*, U.S. Marine Corps, military commission judges.

On briefs for petitioner were *Meghan S. Skelton*; *Susan A. Hensler*; *Lieutenant Commander Jacob Meusch*, JAGC, U.S. Navy; *Lieutenant Charles D. Ball*, JAGC, U.S. Navy; *Lieutenant Mishael Danielson*, JAGC, U.S. Navy; and *Major Morgan Noel Engling*, JAGC, U.S. Air Force.

On brief for respondent were *Michael J. O'Sullivan*; *Haridimos V. Thravalos*; and *Brigadier General Mark S. Martins*.

PUBLISHED OPINION OF THE COURT

TABLE OF CONTENTS

Opinion for the Court filed by POSCH, JUDGE, with whom SILLIMAN, DEPUTY CHIEF JUDGE, and ALDYKIEWICZ, JUDGE, join.

Opinion for the Court

POSCH, JUDGE:

Petitioner Abd al Hadi al-Iraqi, also known as Nashwan al-Tamir, is being tried at Naval Station Guantanamo Bay, Cuba, on charges for alleged war crimes committed over a ten-year period through October 2006. The allegations include conspiracy with Usama bin Laden, also known as Osama bin Laden, and others, which resulted in deaths in Afghanistan of eight American servicemembers, two U.S. persons, coalition servicemembers, and numerous civilians.

At its core, this case concerns allegations of an appearance of partiality in the three judges who presided over petitioner's case. The three judges are Captain John K. Waits, U.S. Navy; Colonel Peter S. Rubin, U.S. Marine Corps; and Lieutenant Colonel Michael D. Libretto, U.S. Marine Corps. It is contended that the appearance of partiality stems from the job search activities of both the

first judge (Judge Waits) and Law Clerk Matthew Blackwood (LC Blackwood),[1] who served all three judges. The three main issues before us are (i) whether Judge Waits' application for an immigration judge position was disqualifying, (ii) whether Judges Libretto and Rubin were disqualified because of LC Blackwood's job search, and (iii) whether Judges Libretto and Rubin were required to recuse themselves.

Petitioner filed with our Court a Petition for Writ of Mandamus and Prohibition and Application for Stay of Proceedings, pursuant to the All Writs Act, 28 U.S.C. § 1651(a); the 2009 Military Commissions Act, 10 U.S.C. § 950f; and Rule 22 of this Court's Rules of Practice (2016). Pet'r Br. 1 (Sept. 13, 2019). He alleges "irreparable injury," *id.* at 2, 19-21, 44-46, from a taint originating after the first thirty-three minutes of proceedings, *id.* at 6, 8, 46. He contends that the taint springs from then-Presiding Judge Waits' search for employment as an immigration judge and acceptance of an offer for a U.S. Navy civilian job and from LC Blackwood's employment search and acceptance of a job offer from the United States Attorney's Office (USAO) for the Western District of Missouri. *See id.* at 2-3. Relying on *In re Al-Nashiri*, 921 F.3d 224 (D.C. Cir. 2019), petitioner argues that the judge's and the law clerk's searches for employment resulted in an appearance of partiality causing a taint over his proceeding, thus requiring vacatur of the convening orders, Pet'r Br. 6; Reply 19 (Oct. 23, 2019), and dismissal of charges, Pet'r Br. 41. Respondent argues that we should deny the mandamus petition, remand for implementation of the remedy at AE 158R, and decline to order vacatur of the convening orders and dismissal of charges. Resp't Br. 18 (Oct. 8, 2019).

After reviewing the parties' briefs and military judge rulings, we deny the petition for a mandamus writ and remand the case to the military commission for action not inconsistent with this opinion.

I. Statement of the case

On June 2, 2014, the convening authority referred the charges and specifications sworn against petitioner to a non-capital military commission. Charge Sheet at Block VI. The sworn charges and specifications are as follows: (I) denying quarter (one specification), 10 U.S.C. § 950t(6); (II) attacking protected property (one specification), 10 U.S.C. 950t(4); (III) using treachery or perfidy (three specifications), 10 U.S.C. § 950t(17); (IV) attempted use of treachery or perfidy (one specification), 10 U.S.C. § 950t(28); and (V) conspiracy with Usama bin Laden, Ayman al Zawahiri, Mohammed Atef, Khalid Shaikh Mohammad, and other individuals to commit: terrorism; denying

[1] During the entire period of his employment with the Office of Military Commissions Trial Judiciary (OMCTJ), LC Blackwood served in an "attorney-advisor" position. Resp't Br. 4-5 (Oct. 8, 2019); Tr. 2953. Based on party representations that the attorney advisor functioned as a law clerk, *see* Resp't Br. 4 & n.21, 5; Pet'r Br. 2-3, 11-12 (Sept. 13, 2109), we identify and consider LC Blackwood as a law clerk in our analysis.

quarter; using treachery or perfidy; murder of protected persons; attacking protected property, civilians, and civilian objects; and employing poison or similar weapons to force the United States, its allies, and non-Muslims out of the Arabian Peninsula, Afghanistan, and Iraq (one specification), 10 U.S.C. § 950t(29). *Id.* at Block II, Contin. Sheet at 8-12. The charge sheet includes sixty-three paragraphs of common allegations in support of charges (II) through (V). *Id.* at Block II, Contin. Sheet 1-7. Judge Waits arraigned petitioner on June 18, 2014; petitioner reserved entry of his plea. Tr. 16-19.

On September 13, 2019, Al-Hadi (i) petitioned our Court for a writ of mandamus and prohibition and (ii) applied for a stay of proceedings. Pet'r Br. 1-2. The main point in the brief was that relief was warranted because continued litigation "overseen by a judicial officer that should have recused himself, and . . . based on orders issued by judges who should have been disqualified, creates an irreparable injury."[2] *Id.* On October 8, 2019, respondent filed its brief in opposition arguing, in general, that (i) petitioner has not met the requirements for a writ of mandamus, (ii) Appellate Exhibit (AE) 160K (a recusal motion) was appropriately decided, and if not, that we remand with instructions for detail of a new judge, (iii) the reconsideration remedy at AE 158R be implemented by the commission, and (iv) we find vacatur or dismissal to be inappropriate relief. *See* Resp't Br. 18-19. On October 23, 2019, petitioner filed his reply maintaining his contentions.

On October 3, 2019, we granted a limited stay on petitioner's application,[3] Order (CMCR Oct. 3, 2019), and subsequently denied reconsideration, Order (CMCR Oct. 7, 2019).

When he filed his writ, pending before the military commission were three motions for dismissal (AEs 157, 158, 160) and a defense motion to compel

---

[2] On September 14, 2019, Chief Judge Burton appointed Judges Silliman, Aldykiewicz, and Posch to petitioner's case. Order 1 (CMCR Nov. 1, 2019). The Chief Judge's two-year appointment, however, had previously expired on May 25, 2019, and was not renewed, nor did the Secretary of Defense appoint a new chief judge. *Id.*; *see* Regulation for Trial by Military Commissions ¶ 25-2d-e (2011 ed.). This Court addressed the resulting lack of conformity in the September 2019 appointments, with Acting Chief Judge Silliman reappointing himself and Judges Aldykiewicz and Posch to petitioner's case on October 29, 2019. Order 2 (CMCR Nov. 1, 2019). The panel appointed by the Chief Judge had issued three orders: (i) a Court Order Granting Limited Stay (Oct. 3, 2019), (ii) a Court Order Denying Reconsideration of its October 3, 2019, Order (Oct. 7, 2019), and (iii) a Court Order Granting Respondent's Request to Submit Oversized Brief and Supplement its List of Documents for Consideration (Oct. 18, 2019). Order 1 (CMCR Nov. 1, 2019). On October 31 and November 1, 2019, petitioner's reappointed panel "conferred, reconsidered the [three] orders and voted to ratify and reaffirm each." *Id.* at 2. On December 10, 2019, the Secretary of Defense reappointed Judge Burton as Chief Judge.

[3] The limited stay permitted the military judge "to issue rulings and orders on pending motions, and [allowed] the parties [to] continue to file documents with the military commission as directed by the military commission judge." Order (CMCR Oct. 3, 2019).

discovery (AE 155). On September 19, 2019, Judge Libretto denied AE 160, a defense motion for disqualification and vacatur of all orders by Judge Libretto based on allegations that Judge Libretto's impartiality "could reasonably be questioned." AE 160K at 22. On October 1, 2019, he denied AE 157, a motion to dismiss alleging that the Convening Authority was disqualified based on his personal interest in the case's outcome. AE 157P at 23. On October 4, 2019, the military judge (i) denied AE 158, a dismissal motion alleging that an "appearance of partiality" pervaded Al-Hadi's entire commission, yet (ii) permitted "reconsideration of any rulings and orders issued by Judge Waits [and] specifically identified by the Defense as warranting review." AE 158R at 21. Also on October 4, 2019, the military judge (i) denied a defense motion filed on October 3, 2019, to abate all proceedings, or alternatively, for indefinite continuation of "all litigation deadlines and . . . [cessation] of additional rulings" pending our resolution of his mandamus petition, and (ii) stated that filings beyond established deadlines in AE 110S would be considered on a case-by-case basis. AE 179A.

On October 21, 2019, the military commission clarified and extended the deadline for relief granted in AE 158R in response to the defense concern over its ability under the 2009 Military Commissions Act to seek reconsideration of Judge Waits' Military Commission Rule of Evidence (Mil. Comm. R. Evid.) 505 rulings on classified information. AE 158T. Judge Libretto stated that AE 158R was a sua sponte determination by the commission "that reconsideration of any Mil. Comm. R. Evid. 505 order or ruling issued by Judge Waits is warranted based solely on the identification of such orders or rulings by the Defense. Accordingly, there is no statutory prohibition with regard to the specific relief granted in AE 158R." *Id.* at 1-2. He added that in the AE 158R order, the commission "has allowed for the prospect that any rulings or orders deemed favorable to the Defense may stand and not be subject to further litigation before this Commission . . . [while those] the Defense considers to be unfavorable will be fully reconsidered by this Commission upon request." *Id.* at 3. The discovery motion to compel (AE 155) remains outstanding. On October 23, the military commission issued a 5th Amended Litigation Schedule setting December 13, 2019, as the next filing deadline. AE 110V.

D.C. Circuit pleadings. On October 15, 2019, petitioner filed with our superior court three pleadings under Case No. 19-1212: (i) a Petition for a Writ of Mandamus and Prohibition for vacatur of the convening order for his military commission, alleging that the employment search of Judge Waits and LC Blackwood "create[d] the appearance of bias under R.M.C. [Rule for Military Commissions] 902(a)," (ii) an Emergency Motion to stay military commission proceedings pending resolution of his October 15, 2019, petition filed in the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit), and (iii) a Motion for Abeyance of his October 2019 mandamus petition before the D.C. Circuit pending our resolution of his September 13, 2019, mandamus writ. On November 6, 2019, the D.C. Circuit granted

petitioner's motion for a stay of military commission proceedings and motion for abeyance of the writ petitioner filed in the D.C. Circuit. Order, No. 19-1212 (D.C. Cir. Nov. 6, 2019) (per curiam).

We consider petitioner's mandamus and prohibition writ that is before us.

II. Statement of facts

A. Background

The sworn charges and specifications concern allegations of law of war violations committed from about 1996 through about October 2006, in the context of and associated with hostilities. *See* Charge Sheet at Block II & Contin. Sheet. The United States alleges, in general, that petitioner was involved in hostile actions committed by al Qaeda and the Taliban in Afghanistan, Pakistan, Iraq, Turkey, and elsewhere, *id.*; helped draft the governing rules for al Qaeda and formulate its objectives, Charge Sheet, Common Allegations at ¶¶ 12-13; coordinated hostile operations with and provided support and funding to al Qaeda and the Taliban, *id.* at ¶¶ 2, 5-63; and served as liaison to "al Qaeda in Iraq," *id.* at ¶ 55-63, and the Taliban, *id.* at ¶ 9, and as an al Qaeda representative to the Taliban's "Arab Liaison Committee," *id.* at ¶ 15. The hostile actions included inter alia: (1) car and human suicide bombings, use of roadside improvised explosive devices, and attacks that killed, in Afghanistan, eight American servicemembers and two U.S. persons, *id.* at ¶¶ 27, 31, 36, 41, 53, and at least six coalition servicemembers, *id.* at ¶¶ 34, 40, 46-47, 51, and injured many U.S. and coalition servicemembers and civilians, *id.* at ¶¶ 31, 34, 36, 40, 46-47; (2) a cash reward that resulted in the Taliban assassinating a United Nations worker who petitioner knew to be a civilian, *id.* at ¶ 43; (3) the ordering of a videotape of an attack that was made into a propaganda film showing a U.S. soldier dying, *id.* at ¶ 38; (4) funding in support of an assassination plot against Pakistani President Pervez Musharraf, *id.* at ¶¶ 23, 54; and (5) destruction of the ancient Buddha statutes in Afghanistan, with petitioner leading the al Qaeda element, *id.* at ¶ 16.

Judge Waits presided over petitioner's commission from June 3, 2014, through October 31, 2016; Judge Rubin presided from November 1, 2016, through June 12, 2018; Judge Libretto was detailed on June 13, 2018. *See* AEs 001, 001A, 001B; AE 151C at 1. Judge Libretto presided over his first session on September 9, 2018. AE 160K at 2-3. On January 13, 2020, he recused himself because of plans to search for federal employment with various federal agencies, "some" of which might create the appearance of a conflict in light of *Al-Nashiri*.[4] J. Libretto Mem. on Recusal (Jan. 15, 2020). Judge Libretto has not been replaced because of the stay issued by the D.C. Circuit on November 6,

[4] Despite his recusal, Judge Libretto remarked that he was "convinced" of his ability to preside over petitioner's commission "in an entirely neutral and unbiased manner as [he] ha[d] thus far." J. Libretto Mem. on Recusal (Jan. 15, 2020).

2019. Order, *In re: Nashwan al-Tamir [Al-Hadi]*, No. 19-1212 (D.C. Cir. Nov. 6, 2019) (per curiam). LC Blackwood worked for all three military commission judges while employed by the Office of Military Commissions Trial Judiciary (OMCTJ). *See* Tr. 2959. He generally performed the same role during his approximately four-year service in the OMCTJ, from about August 2014 through about December 2018. Tr. 2953. "All military judges who have presided over [petitioner's] Military Commission" and "[a]ll" OMCTJ law clerks assigned to support the presiding judges are or were Department of Defense (DoD) employees. AE 160K at 8.

The United States has been continuously represented in petitioner's commission by uniformed judge advocates from the armed services, employed by the DoD. *Id.* at 15. The Chief Prosecutor was (and is) a uniformed judge advocate and DoD employee. *Id.* The United States also was represented between 2014 and 2016 by two attorneys from two USAOs, who were detailed to the Office of the Chief Prosecutor and under the Chief Prosecutor's supervision. *Id.* at 15 & n.32. Neither of these attorneys were detailed from the USAO for the Western District of Missouri or the Western District of Texas.[5] *Id.* at 15 n.32; *see id.* at 3-4. No Department of Justice [DoJ] attorney represented the United States in petitioner's case during the time period when LC Blackwood applied for various Assistant U.S. Attorney (AUSA) positions at several USAOs. *Id.* at 15 n.32. Since July 7, 2016, all detailed prosecutors to petitioner's commission have been DoD employees. *Id.* at 8. All attorneys currently detailed to defend petitioner are DoD employees. *Id.*

B. Judge Waits[6]

In sum, Judge Waits was the presiding judge on petitioner's case (i) from when he began seeking DoJ employment in about August 2014 (when he applied for eleven immigration judge positions)[7] until January 2015 (when two of these offices finally contacted him),[8] and (ii) from when he began seeking civilian employment with the U.S. Navy in about April 2016 (when he applied for a Code 20 position) through about November 2016 (when he began negotiating his

[5] The two Assistant U.S. Attorneys (AUSAs) assigned to Al-Hadi's case between 2014 and 2016 were from the Western District of Oklahoma and the District of Utah. Resp't Br. 2.

[6] *See generally* Tr. 2977-3024 (testimony on August 24, 2019).

[7] In a preliminary response to the government's "formal written request," the Department of Justice [DoJ] has stated that Judge Waits "applied to a number of immigration judge positions with the Executive Office of Immigration Review in September of 2014." Appellate Exhibit (AE) 151C at 3 (emphasis added).

[8] Judge Waits first testified that he believed the Denver and Miami offices contacted him in January 2017 but he apparently was mistaken about the year because in the same discussion he said there was a lapse of "four months" between his application (in August 2014) and these two notifications. Tr. 2992, 3018. Later, he clarified the two notifications were made in January of 2015. Tr. 3023-24; *see* AE 158R at 8.

start date after his selection).[9] Tr. 2987-88, 3018. Judge Waits never disclosed to the parties that he was seeking a job after retirement from the military.[10] Tr. 3018-19; *see* Tr. 3021; AE 158R at 9. Nor did Judge Waits disclose that he had accepted the Code 20 Navy position. Tr. 3019; AE 158R at 9.

Judge Waits' first full interview with either party to petitioner's case was on August 24, 2019, when he testified before the commission. Tr. 2983. As presiding judge over petitioner's case, from arraignment in 2014 to about December 2016,[11] Judge Waits was "physically present" mostly in Naples, Italy. Tr. 2979-80. Judge Waits recalled there were two prosecutors on petitioner's case, one "on loan" from the DoJ, and an Army prosecutor. Tr. 2985.

1. Judge Waits and the immigration judge positions at the Department of Justice

In 2014, USAJOBS announced an opening for immigration judges nationwide; the open period for submission of applications was probably the last two weeks of August and maybe the first week of September 2014. Tr. 2985-86, 2989-90. Judge Waits submitted a single application for positions in eleven cities.[12] Tr. 2986, 2988. An application packet "typically" would have included a resume, cover letter, and maybe veteran documents; he did not recall if the immigration application included a writing sample. Tr. 2986-87. Judge Waits' resume identified "the commission assignment as one of [his] experiences," starting from May 2014 (the date of his detail) until August 2014 (the date of his immigration resume). Tr. 2987. His resume gave a brief general description of a commission, "used the name Abd al Hadi al-Iraqi," and stated that Judge Waits was "the only Navy or Marine Corps judge detailed to a commission at that time." Tr. 2987-88.

---

[9] Code 20, the Navy designation for Criminal Law, is the division within the Office of the Judge Advocate General of the Navy (Navy OJAG) that "oversees all aspects of military justice policy within the Department of the Navy." U.S. Navy Judge Advocate General Corps (Navy JAG Corps), https://www.jag.navy.mil/organization/code_20.htm (last visited Apr. 15, 2020).

[10] Judge Rubin "did not apply to any civilian positions while presiding" over petitioner's case. AE 151C at 4. As of August 21, 2019, Judge Libretto had not applied for DoJ or Department of Defense (DoD) positions and indicated no present intention to do so, Tr. 2614, although he has since recused himself, *see supra* text accompanying note 4.

[11] Judge Waits had a statutory retirement date in October 2017, Tr. 3006; he began the retirement process in the October/November 2016 timeframe, Tr. 3007.

[12] The eleven cities to which Judge Waits testified having applied to for an immigration judge position were Denver, Miami, Memphis, Pittsburgh, Atlanta, Arlington, Charlotte, Orlando, San Antonio, Kansas City, and Dallas. *See* Tr. 2994. While he did not recall, Tr. 2994-95, Immigration Judge Candidate Assessment Sheets show that he also applied for a Houston position. AE 155B, Attach. B at 16-34.

Judge Waits did not recall when he opened his USAJOBS account, nor whether the eleven immigration judge jobs were the first jobs to which he applied via USAJOBS. Tr. 2986. He received confirmation of his submission for the immigration jobs "within a few days," recalling an automatically generated email from the Office of Personnel Management (OPM). Tr. 2988. He understood the email confirmation to mean that his application had been accepted. *Id.* Judge Waits "assumed that [he] was under consideration from the time that [he] submitted the applications." Tr. 2992. In January 2015, the Denver office, and probably the Miami office, notified him that he was "no longer under consideration." *Id.*; AE 158R at 8; *see supra* note 8. He received no further communication at all on the other nine applications, which was his usual experience with USAJOBS and OPM—"at some point you just assume that you're no longer under consideration." Tr. 2992. The DoJ never requested an interview and never made any employment offer to Judge Waits for an immigration judge position. Tr. 3023. Judge Waits did not know if he was under consideration for four months, up to January 2015, because he did not know the agency's "internal procedures." Tr. 2992; *see* Tr. 3024.

Judge Waits did not recall applying to any other USAJOBS while on petitioner's case. Tr. 2994-96. In April 2016, he applied for employment through the OPM Administrative Law Judge Register in a process similar to the USAJOBS process, including as to the types of documents submitted. Tr. 2996. He did not apply to the agencies listed in the discovery requests and recalled submitting no other USAJOBS applications beyond the immigration judge positions in the eleven cities. Tr. 2995-96; *see supra* note 12.

2. Judge Waits and the Navy civilian job

After military retirement, Judge Waits was hired into a "new position," as Civilian Deputy Director of the Office of the Judge Advocate General of the U.S. Navy (Navy OJAG), Criminal Law Division, Code 20, Tr. 3008, and he began on January 9, 2017, Tr. 3011. This was a policy position, not prosecutorial. Tr. 3024, 3122. Judge Waits testified that the division's role is neutral, and it thus has no "interest in the outcome of any particular . . . military commission." Tr. 3024.

The Navy OJAG announced this position through direct email to the entire Navy Judge Advocate General (JAG) Corps; Judge Waits did not know how the position was advertised outside the JAG Corps but testified that it was not announced through USAJOBS. Tr. 3009. Judge Waits thought he submitted his application to Code 66 (civilian personnel) of the Navy OJAG, which was responsible for hiring at that time.[13] Tr. 3009-10. In his testimony, Judge Waits described how the Navy OJAG fit into the broader DoD organization:

[13] Code 66, the Navy designation for Performance Management, is the division within the Navy OJAG that currently provides support for performance management, training, awards,

Q. And what organization is Code 66 within?

A. The Office of the Judge Advocate General of the Navy.

Q. And is that within the Department of Defense?

A. Yes.

Tr. 3010. He submitted his application "around April of 2016." Tr. 3016. There was no cooling-off period between the time Judge Waits retired and the time he could apply. Tr. 3011. In his resume for the Navy position, Judge Waits listed his commission experience in "pretty much the same language" as was used in his DoJ immigration judge application. Tr. 3010. In about May 2016, Tr. 3016-17, a panel interviewed him in Naples via Video Teleconference (VTC), Tr. 3012-14. Judge Waits received an offer in about October 2016 and was informed by a low-level Code 66 Navy employee. AE 158R at 9; Tr. 3016. Judge Waits then requested retirement from the military and began negotiating his start date with "very low-level people." Tr. 3017.

3. Ethical considerations

Judge Waits testified that he never allowed "any extrajudicial influence to influence [his] decision making." Tr. 3021. Nothing gave him concern that a "possible" federal employment opportunity "could be substantially affected by any of [his] rulings in [petitioner's] case." Tr. 3022-23. Within nine days after the April 16, 2019, issuance of the *Al-Nashiri* opinion, Judge Waits "*sua sponte*" contacted the OMCTJ Staff Director (Mr. F) and provided information he "thought was relevant and needed to be disclosed based on the findings" in *Al-Nashiri*.[14] Tr. 2981; *see* AE 158R at 9. He asked how to "proceed to make this information known to the commission" and testified that he intended to achieve notification to the parties. Tr. 3020. On April 25, 2019, the prosecution informed Al-Hadi's defense team of Judge Waits' employment search with the DoJ and the U.S. Navy while he was detailed to petitioner's commission. AE 155, Attach. B; *see also* AE 151C at 1-2; AE 158R at 9.

Judge Waits also testified that the trial judiciary's policy on conflicts of interest was "to follow all of the ethical canons applicable to judges everywhere." Tr. 2997. "[I]t never occurred to" him that he "had even the

---

and civilian work life programs. Navy JAG Corps, https://www.jag.navy.mil/organization/code_66.htm (last visited Apr. 15, 2020).

[14] Judge Waits testified that he notified the OMCTJ of his job applications about one to two weeks after the *Al-Nashiri* decision. Tr. 2981; *see* Tr. 3019-20. The *Al-Nashiri* decision was issued on April 16, 2019; nine days later, on April 25, the government notified the defense in an email of Judge Waits' applications for employment. AE 155, Attach. B; AE 151C at 1-2; AE 158R at 9. Accordingly, Judge Waits in fact made notification of his job search activities within nine days of the *Al-Nashiri* decision.

appearance of a conflict of interest in this instance." Tr. 2998; *see* Tr. 2999; AE 158R at 8 (finding "Judge Waits did not recognize a need to disclose his applications to the parties because he did not believe there was any conflict" and that Judge Waits "did not view the DOJ as a party" before the *Al-Nashiri* decision). Given "the nature of the assignment process within the military justice system to which he was accustomed, [Judge Waits] did not see a need to" disclose his job search. AE 158R at 9; *see* Tr. 2997-98. Judge Waits testified that it "was a surprise to judges writ large" that "the very act of applying for this [immigration judge] job [was] an appearance of a conflict of interest."[15] Tr. 2999. Given how the *Al-Nashiri* opinion looked at the issue, he "would have recognized [his job search] as a conflict of interest" under the circumstances and "would have disclosed it." Tr. 2997. Judge Waits believed that he "was impartial in fact." Tr. 2998.

Conflicts of interests with law clerks "was never an issue" for Judge Waits. Tr. 2999. "[T]here wasn't any reason to -- to put out specific guidance to follow the ethical standards applicable to attorneys and the judicial canons applicable to judges. Everyone was expected to follow them." *Id.*

C. Judge Libretto[16]

Judge Libretto is stationed at Parris Island, South Carolina. Tr. 2622. He spent about twenty days in the trial judiciary office in Washington D.C. between June 13, 2018 (when he was detailed to OMCTJ) and August 21, 2019 (the date he gave additional voir dire testimony). Tr. 2623. When present in the trial judiciary office, he sat in one or two available offices located on the same floor as trial judiciary staff (which included LC Blackwood), but was located "[a]lmost across the building" from staff. Tr. 2642.

During the relevant time, Judge Libretto had direct contact with his attorney advisors (law clerks) including Mr. F, who was Judge Libretto's "primary" contact. Tr. 2633-34; *see* Tr. 2616. He testified that Mr. F and law clerks drafted documents for him and he "[a]most always" made revisions to varying degrees depending on need. Tr. 2634. Judge Libretto's law clerks "certainly" provided opinions regarding how to rule on a motion. Tr. 2635.

Judge Libretto further testified that he familiarized himself with the nearly four years of prior proceedings by reading through material in petitioner's case and through discussions with LC Blackwood, Mr. F, law clerk T, and the new law clerk hired in March 2019. Tr. 2626. The material he read included rulings, *id.*, "the vast, vast majority" of transcripts, Tr. 2627, and

[15] Judge Waits, however, "wouldn't have discussed [the matter] with any judges because it -- it didn't occur to [him] that it was a problem." Tr. 2999.

[16] *See generally* Tr. 2612-50 (testimony on August 21, 2019); Tr. 2602-09 (summarizing background to testimony).

"some" closed session transcripts, Tr. 2628. Judge Libretto reviewed this material in the first month of his detail to Al-Hadi's case. Tr. 2627-28.

Before issuing AE 119 on June 29, 2018 (a docketing order on outstanding motions), Tr. 2630-31, Judge Libretto spent "[p]robably collective four or five days" in the trial judiciary D.C. office, *see* Tr. 2632. He "likely" reviewed "pertinent records associated with what was outstanding at the time," and discussed with law clerks outstanding filed motions and what needed to be addressed in August 2018. Tr. 2631. He did not "affirmatively" instruct that outstanding rulings be re-drafted "from scratch." Tr. 2636; *see* Tr. 2636-37. Moreover, the "majority" of the motions at issue in AE 119 were long pending and "waiting to be argued initially"; Judge Libretto thus "suspect[ed] . . . [that] there was no work on them previously." Tr. 2636.

Regarding the Mil. Comm. R. Evid. 505 summary, substitution, and redaction process for classified information, Judge Libretto was involved in one ex parte prosecution presentation in January 2019 concerning AE 140, and he reviewed the source document at issue on this occasion. Tr. 2638-39. While presiding over petitioner's case, he was unaware if his staff had "participated in meetings with the prosecution . . . [regarding] [Mil. Comm. R. Evid.] 505 summaries or substitutions." *Id.*

Over the past twelve years, to include after October 2018 when he had a military retirement brief, Judge Libretto conversed informally with acquaintances or friends at the DoJ and DoD as he would run into them, Tr. 2614-16, about "what life is like" in their positions, Tr. 2616. These conversations "did not involve the prospect of [] future employment" and there was no follow-up. Tr. 2616.

Ethical considerations. Judge Libretto testified that the trial judiciary's policy for conflict screening "before an individual is detailed to work on a case" was essentially the obligation of the individual "as an attorney and a military judge," Tr. 2618, to exercise his or her "professional responsibility to identify any conflicts that may exist," Tr. 2619. He testified there was a "process in place, particularly for military judges . . . in order to ferret out and identify potential conflicts." *Id.* He considered the process being followed to be the trial judiciary's policy. *See id.*

Judge Libretto never sought ethics advice on petitioner's commission from "an ethics hotline or someone in the larger JAG organization," Tr. 2645, and did not pursue any steps to vet conflicts regarding LC Blackwood, Tr. 2646-47. He did not believe he ever "had an occasion to discuss matters with an independent ethics counselor that [had] not been satisfactorily vetted or discussed with an ethics counselor within the trial judiciary." Tr. 2646. As a military judge, he consulted "[p]rimarily other judges" when faced with an ethics or conflict issue, Tr. 2644, and he consulted "the larger Navy JAG

organization" one time about serving "as an adjunct faculty member," Tr. 2645-46. As a practicing attorney, he probably contacted a hotline or Navy JAG for ethics advice. Tr. 2645.

D. LC Blackwood[17]

LC Blackwood currently is an AUSA for the Western District of Missouri. Tr. 2926, 2971. Before his current position, he worked as a law clerk (attorney-advisor) for the OMCTJ. Tr. 2927. He worked as an OMCTJ law clerk from about August 2014 to about January 2017 as an active duty Marine Corps judge advocate, and as a federal civilian employee from about January 2017 to about sometime in December 2018. AE 160K at 2-3, 6; *see* Tr. 2927, 2953. His federal civilian position was a term position scheduled to expire in September 2019 "[a]t one point." Tr. 2941, 2971. LC Blackwood did not know if term staff positions in the OMCTJ were extended, and he was concerned about having no job. Tr. 2942.

LC Blackwood provided legal support to Judges Waits, Rubin, and Libretto. *See* Tr. 2959. He testified that in the OMCTJ he generally "would conduct research, draft proposed orders and rulings, get guidance from the judge on how he [the judge] wanted a particular ruling to come out based on the case law, follow [the judge's] instruction, [and] forward [the proposed drafts] up to the reviewing process." Tr. 2960. He also stated he was involved in the Mil. Comm. R. Evid. 505 process concerning the handling of classified information. Tr. 2960-61. LC Blackwood worked on petitioner's case, Tr. 2927, and also wrote some proposed orders in *United States v. Al-Nashiri* when he began working in the OMCTJ, Tr. 2967.

Judge Rubin, the second military judge in petitioner's case, stated in a written declaration that

> [a]s attorney-advisor, [LC Blackwood] provided day-to-day assistance and counsel to me during the performance of my judicial duties. [He] had a broad range of duties such as: conducting legal research, reviewing and managing filings, reviewing classified information, attending conferences and hearings, interacting with counsel and staff, and preparing draft orders and rulings. He was an invaluable sounding board, confidant, and advisor to me. While [LC Blackwood] was privy to, and intimately involved in, my judicial decision-making process, I made all decisions and rulings in the case.

AE 158H, Attach. B. Judge Libretto testified that in issuing rulings (i) he relied on his law clerks who assisted in drafting, and (ii) he conversed "with one or all

[17] *See generally* Tr. 2924-76 (testimony on August 24, 2019).

of them collectively in coming to a conclusion that [he made] independently," Tr. 2633, and that (iii) LC Blackwood was not permitted "to make judicial decisions for the commission," *see* Tr. 2950. At Naval Station Guantanamo Bay, LC Blackwood attended hearings with Judge Libretto, researched issues, and consulted with him on "issues that were the subject of litigation," whether in an open or closed session. Tr. 2642-43.

LC Blackwood began looking for outside employment in about "winter/spring 2018." Tr. 2945. He applied for both prosecutorial and general counsel-type positions. Tr. 2971-72. Beyond that to which he testified on August 24, 2019, LC Blackwood did not "informally negotiate for employment." Tr. 2972.

1. LC Blackwood and the U.S. Attorney's Office for the Western District of Missouri

a. Application

On July 31, 2018, Tr. 2932, USAJOBS posted an AUSA position opening in the Western District of Missouri "to handle terrorism and national security related investigations and prosecutions." AE 160C, Attach. C. LC Blackwood submitted his application on the same day. *Id.* at Attach. H; Tr. 2933. He created the resume at attachment F to AE 160C in early 2018 "and then tweaked it" later.[18] Tr. 2950. In this resume, when he stated that he was "a senior staff attorney to the military judge presiding over a contested military commissions case," Tr. 2951, LC Blackwood was referring to petitioner's case, Tr. 2952.

In his cover letter, LC Blackwood indicated (i) his long-term goal was to work as a criminal AUSA, (ii) he had worked on national security cases in the OMCTJ, (iii) his "breadth of experience" had prepared him for the offered position, Tr. 2933-34, and (iv) he had "considerable experience working on complex criminal and national security related issues," including experience in national security information that was acquired in the OMCTJ, Tr. 2936. His application included a writing sample from his work as a reserve judge advocate before the U.S. Navy-Marine Court of Criminal Appeals. AE 158R at 5; AE 160C, Attach. G.

[18] LC Blackwood discussed two resumes during his testimony: (i) a 2018 resume for his AUSA job in the Western District of Missouri and (ii) an earlier resume when he transitioned from a military to civilian employee in the OMCTJ. *See* Tr. 2950, 2953, 2956-57; AE 160C, Attach. F. The OMCTJ resume was created in "probably 2016." Tr. 2956-57. It referenced work on *Al-Nashiri* and *Al-Hadi* and stated that LC Blackwood had provided "feedback to the military judge on extensive classified discovery in accordance with [Military Commission Rule of Evidence (Mil. Comm. R. Evid.)] 505." Tr. 2953; AE 160A (corr.), Attach. B. When he converted to the OMCTJ civilian position, LC Blackwood applied for no other jobs. Tr. 2957.

b. Interview

LC Blackwood interviewed for the AUSA position in the Western District of Missouri on August 9, 2018, at a VTC site at the Executive Office for the U.S. Attorneys (EOA) in Washington, D.C. Tr. 2936-37; AE 160L, Attach. B at 2. He did not know if the DoJ owned the office space where he was interviewed. Tr. 2937. LC Blackwood was alone during his VTC interview and no EOA employees participated, although one administrative person let him in and assisted with the VTC connection. Tr. 2938; AE 160K at 6. In the Western District of Missouri, a hiring committee consisting of senior and supervisory AUSAs "interview and select candidates subject to [U.S. Attorney] approval."[19] AE 160J, Attach. B at 2. LC Blackwood recalled that the U.S. Attorney for the Western District of Missouri, Criminal Division Chief, and Deputy Criminal Division Chief (Deputy Chief) were present, among others. Tr. 2938. The Deputy Chief, and now Deputy U.S. Attorney for the Kansas City USAO, Chief of Criminal Division, and LC Blackwood's current supervisor, interviewed LC Blackwood, AE 160L, Attach. B at 2, and "was involved" in his hiring, AE 158Q at 2. LC Blackwood was not aware whether national security prosecutors were involved in his interview. Tr. 2938.

Regarding the Deputy Chief, in "2016 or so" in response to a "direct request" from the DoJ's Capital Case Section, he was made "available" as a "privilege review filter team" attorney in *Al-Nashiri* if mental health became an issue in that case, especially on sentencing.[20] AE 160L, Attach. B at 1. On April 12 and 13, 2017, the Deputy Chief traveled to Washington D.C. to determine his level of interest in the *Al-Nashiri* filter team. *Id.* About this time, he learned that Mr. Mark A. Miller was the lead prosecutor in *Al-Nashiri*. *See id.* Mr. Miller had been the Deputy Chief's supervisor earlier, from when the Deputy Chief was assigned to the Narcotics Unit in the USAO until about

[19] In general, the AUSA hiring process at a U.S. Attorney's Office (USAO) outside the D.C. area involves seven steps: (1) posting by the USAO of an announcement through the DoJ Office of Attorney Recruitment and Management (OARM) portal, (2) submission of application packets through the U.S. Attorney Staffing system or by email to a "local email box," (3) interviews and selection by the "individual" USAO, which has "delegated authority to establish [its] own hiring procedures," (4) approval of final selections by the "individual" U.S. Attorney, (5) submission of Human Resources and Security documents to the DoJ Executive Office for U.S. Attorneys for review and transmittal to the OARM Director, (6) approval of "onboarding" by OARM "pending completion of a full background investigation," and (7) issuance by OARM of the "final offer letter" and notification to the USAO, which arranges an enter-on-duty date. AE 160J, Attach. B at 1-2; *see also* AE 160K at 7. Neither the United States Attorney General (AG) nor Deputy AG is "personally involved in the selection or approval of individual AUSAs" for hire in a USAO outside the National Capital Region. AE 160J, Attach. B at 2; *see also* AE 160K at 7.

[20] In its notice, the government recognized the information about the Deputy Criminal Division Chief for the USAO for the Western District of Missouri and his potential role in *Al-Nashiri* as "new information, not previously provided to the Defense, which may serve as a basis for a motion for reconsideration of AE 160K." AE 158Q at 2.

December 2002. *Id.* He stopped working for Mr. Miller in about 2003 when Mr. Miller transitioned to New Orleans. *Id.* During their joint time, they "worked together routinely and acted as trial partners on two separate capital cases." *Id.*

During the Deputy Chief's April 2017 D.C. visit, he was scheduled to meet with Mr. Miller and Brigadier General Mark S. Martins, the Chief Prosecutor of Military Commissions. *Id.* He met with persons from the Office of the Chief Prosecutor (OCP), "read some basic materials about the [*Al-Nashiri*] case, and then provided generalized thoughts about how the sentencing case might be constructed and how a filter team would operate within that construction." *Id.* After the OCP meeting, he received read-ons at the DoJ for access to "certain" classified information in the event the read-ons were later required. *Id.* at 2. April or May of 2017 was the last time the Deputy Chief corresponded with OCP about his potential role in *Al-Nashiri*, *id.* at 2, and the filter team was not yet established as of October 7, 2019, AE 158Q at 1.

The Deputy Chief has performed "no work" on *Al-Nashiri*. AE 160L, Attach. B at 3. Nor has he been officially detailed to, or assigned "tasks or directives" on, *Al-Nashiri* or any other commission. *Id.* He has not taken the oath required of attorneys serving as prosecutors in military commission cases, pursuant to 10 U.S.C. § 949g and R.M.C. 807. *Id.* He has not been integrated into OCP at all: he has no OCP office, phone, email address, or computer server access. *Id.* He has made no appearance in a military commission, has "not been identified on the record" in *Al-Nashiri*, and has not "drafted, reviewed, contributed to, or signed any military commission filing." *Id.* The Deputy Chief also has had "no involvement" in the *Al-Hadi* prosecution. AE 158Q at 1.

In LC Blackwood's interview for the AUSA position in the Western District of Missouri, lasting less than one hour, the Deputy Chief asked to which commission LC Blackwood was assigned, thought LC Blackwood indicated *Al-Hadi*, and told LC Blackwood that he (the Deputy Chief) was identified as a "possible filter attorney" in *Al-Nashiri*. AE 160L, Attach. B at 2. This was the entire discussion on military commissions during the interview, which lasted "no more than a handful of seconds." *Id.* The Deputy Chief "shared [his] thoughts about hiring [LC Blackwood] with the United States Attorney." *Id.* He talked to no one else about hiring LC Blackwood until October 3, 2019, when counsel for both parties in *Al-Hadi* contacted him. *Id.* The Deputy Chief "knew nothing" about and "had never met" LC Blackwood until just before the August 9, 2018, interview. *Id.*

In his interview, LC Blackwood highlighted his trial judiciary experience with classified information and discussed his writing experience gained from all his legal experience. Tr. 2938-39. After his interview, LC Blackwood provided

the names of Judge Waits, Judge Rubin, and Associate Dean Lisa Schenck of The George Washington Law School as references.[21] Tr. 2939.

c. Offer, acceptance, and notification to judge

On August 31, 2018, a "contingent formal offer" was made, which LC Blackwood accepted on the same day. AE 160C, Attach. B. A "firm offer" via telephone call was made in November 2018 after completion of a "suitability for employment and background investigation." Tr. 2963, 2968. He began working in the USAO for the Western District of Missouri in early January 2019. Tr. 2926-27. LC Blackwood testified he took a pay cut of approximately $40,000 by accepting the AUSA position. Tr. 2941.

LC Blackwood "[p]robably" told the OMCTJ Staff Director (Mr. F) first about his search for "other jobs" in "[p]robably August" of 2018 because Mr. F was his senior in the OMCTJ, Tr. 2962, although the topic could have come up earlier, Tr. 2949. LC Blackwood told Mr. F, in general, about the types of jobs to which he was applying, including the USAO positions and the Naval Criminal Investigative Service position. Tr. 2962-63. He told Mr. F shortly after August 31, 2018, the date of his acceptance of the AUSA position, that he had accepted a "tentative offer" from the U.S. Attorney for the Western District of Missouri. Tr. 2963; AE 160C, Attach. B. This is the only job offer LC Blackwood accepted. Tr. 2973.

Judge Libretto had no recollection of "when or if" Mr. F disclosed to him that LC Blackwood had accepted an AUSA position. Tr. 2609. He was unaware before November 2018 of LC Blackwood's interest in working for the DoJ or the DoD. Tr. 2647. At a November 2018 session, he recalled informally asking LC Blackwood about his long-term plans and learned for the first time of LC Blackwood's upcoming transition to the DoJ as an AUSA.[22] Tr. 2643-44. On May 6, 2019, the prosecution informed Al-Hadi's defense counsel, upon information and belief, that LC Blackwood had taken an AUSA position

[21] Judge Waits testified that LC Blackwood "probably" asked him to be a job reference but he did not know when and he never talked to potential employers. Tr. 3004. Judge Rubin recalled no conversations with LC Blackwood about his job search and stated he was not asked to be a reference. AE158H, Attach. B; *see* AE 158R at 6 (finding similar facts). LC Blackwood testified he would not have used Judge Rubin as a reference without first talking to him but remembered no specifics of their conversation. Tr. 2961. Judge Libretto did not know if LC Blackwood listed him as a reference, was not contacted by any potential employer, and did not know whether any other trial judiciary member was listed as a reference. Tr. 2647-48. LC Blackwood listed Associate Dean Schenck because she had knowledge of his grades when he attended The George Washington Law School for an LLM, or master's degree, in National Security and because he had spoken to her directly about coordinating classes and at social events. Tr. 2939-40.

[22] A Rule for Military Commissions (R.M.C.) 803 session was held on November 6 and 9 of 2018. R. of Trial, vol. 1, cover sheet. LC Blackwood, however, said he informed Judge Libretto of his new job in about September 2018. *Infra* Part II.D.1.d.

"immediately following" his OMCTJ employment but had no information yet about LC Blackwood's "employment search while he was . . . [a] clerk for the military commissions." AE 155, Attach. C.

d. Duties after acceptance of job offer

LC Blackwood testified that his "daily" OMCTJ responsibilities "didn't change" after he applied for outside jobs. Tr. 2963. He testified that in about September 2018, he told then presiding Judge Libretto about the position he "was going to" but LC Blackwood did not "think [his daily responsibilities] changed based on the interaction." Tr. 2963-64. When he learned of LC Blackwood's new AUSA job, "[t]o the extent that he was already transitioning off the case at that point, or he was about to be, [Judge Libretto] didn't take any action." Tr. 2644. Nor did he instruct anyone to screen LC Blackwood from petitioner's case. *Id*. Concerning the matter before us, LC Blackwood reviewed the pleading instructing him to testify, the government notice of his employment, and the transcript up to page 2611, the point where defense counsel requested sequestration of Mr. F. Tr. 2964.

Judge Libretto could not "definitively state" when LC Blackwood "ceased working" on petitioner's case because inter alia "there was no one individual that provided advice to [him] on any given issue." Tr. 2609. Rather, Mr. F, LC Blackwood, and law clerk T (a second attorney advisor) "would work together in providing any support [Judge Libretto] directed, and normally [Mr. F] would function as the final sounding board on issues presented to [Judge Libretto]." *Id*. Yet, he understood that LC Blackwood "significantly reduced his participation in [petitioner's] case immediately or shortly after the November [2018] session of [petitioner's] commission." *Id*. In any event, Judge Libretto testified that LC Blackwood, Mr. F (his supervisor), and law clerk T participated in "certain matters" on petitioner's case after LC Blackwood applied to the AUSA position in Missouri until his departure from the OMCTJ—that is, from July 31, 2018, through late November or early December of 2018.[23] Tr. 2608; *see* AE 160K at 6; AE 158R at 6.

Between August 31, 2018 (when LC Blackwood accepted the AUSA "contingent formal" job offer), and November 29, 2018 (about when he departed the OMCTJ), petitioner's military commission issued twenty-four rulings or orders. AE 160K at 6; AE 160C, Attach. B. Fourteen rulings and orders are non-substantive, involving "administrative matters, session scheduling, docketing, or excusal of defense counsel." AE 160K at 6. Ten are substantive.[24] *Id*. They generally concern some defense counsel excusals and

[23] LC Blackwood departed the OMCTJ "before the holidays in December [2018]," and he remained on the payroll until he used up his accrued annual leave. Tr. 2942-43.

[24] The attachment to AE 160K includes a list of substantive and non-substantive rulings and orders. The non-substantive list includes sixteen rulings and orders, including AE 124I and

petitioner's ability to attend hearings in light of his medical issues. The ten substantive rulings and orders are as follows: (1) Second Interim Order, AE 099NNN (Sept. 27, 2018) (clarifying minimum information for health status reports on Al-Hadi); (2) Order, AE 125 (Sept. 27, 2018) (directing a government course of action to ensure Al-Hadi's presence at scheduled sessions given his "fluctuating medical conditions" restricting transportation); (3) Trial Conduct Order, AE 129 (Oct. 24, 2018) (directing sixty-day notice for defense counsel excusal); (4) Order, AE 125F (Nov. 6, 2018) (directing medical assessment on whether Al- Hadi can be safely transported to and attend military commission sessions and an updated course of action on transportation); (5) Order, AE 131 (Nov. 29, 2018) (directing additional testimony on medical issues and accommodations on access to counsel and participation in proceedings in the long-term); (6) Trial Conduct Order, AE 133 (Nov. 29, 2018) (directing status report of all current and pending detailed defense counsel); (7) Ruling, AE 128B (Dec. 11, 2018) (denying Defense Motion to Prohibit Anonymous Witness Testimony); (8) Ruling, AE 099YYY (Dec. 26, 2018) (denying Defense Motion to Reconsider AE 099TT, a ruling denying Defense Motion to Abate Proceedings Until [Petitioner] is Physically Competent to Stand Trial); (9) AE 124I (Sept. 20, 2018) denying defense request (i) to withdraw without prejudice AEs 019, 024, and 027 on striking and dismissing certain common allegations and charges, and (ii) to add to docket AE 102I on reconsideration of denial of motion to compel access to counsel in recovery facility, and (iii) to grant defense request to add to docket AE 121 concerning a neurosurgery mitigation expert); and (10) AE 126E (Oct. 26, 2018) (denying continuance where medical assessment allowed petitioner's transportation to sessions with accommodations). *Id*. & Attach.

2. LC Blackwood and other job applications

In addition to the AUSA position in the Western District of Missouri, LC Blackwood applied for eight other AUSA positions via USAJOBS,[25] AE 160K at 4, and submitted his first application about one year before he began work as an AUSA, Tr. 2945. He was invited to interview, and was interviewed, at six offices, namely, the (1) Southern District of Florida (Miami), (2) Western District of Texas, (3) Northern District of New York, (4) Southern District of West Virginia, (5) District of Minnesota, and (6) District of Nevada. Tr. 2947; AE 160K at 5. All six interviews "probably" were held before July 31, 2018, when he applied to the Western District of Missouri. Tr. 2948. LC Blackwood

AE 126E. These two rulings, however, are substantive and were mistakenly included in the non-substantive list.

[25] The eight other AUSA positions to which LC Blackwood applied were in the (1) Southern District of Florida (Miami) (2) Western District of Texas, (3) Northern District of New York, (4) Southern District of West Virginia, (5) District of Minnesota, (6) District of Nevada, (7) Western District of Virginia, and (8) Eastern District of Virginia. AE 160K at 4; Tr. 2943, 2947.

took leave from work to interview in-person for the Miami position, while the other interviews were either telephonic or by VTC at the EOA. *Id.* He did not tell the OMCTJ about his in-person Miami interview. *Id.* LC Blackwood did not receive an offer from the Miami office. AE 160K at 5; *see* Tr. 2949. He did receive "an initial or tentative offer" from the Western District of Texas in about mid-July 2018, AE 160K at 5, but declined due to "[l]ocation," Tr. 2949-50.

On January 19, 2018, LC Blackwood applied to the National Security Division within the DoJ, Pet'r Mot. to Supp. Rec., Attachs. B-C (email and cover letter) (Nov. 5, 2019), but "never heard back from anyone," AE 160I, Attach. B. LC Blackwood also applied to six executive branch agencies during the summer of 2018, including the Naval Criminal Investigative Service (NCIS).[26] AE 160K at 5. Only the NCIS invited him to an interview. Tr. 2946. He applied in about July or August of 2018, interviewed at Quantico, but NCIS did not extend an offer. Tr. 2946-47; AE 160K at 5; *see* Tr. 2972.

3. Ethical considerations

While employed by the OMCTJ, LC Blackwood "was aware" that the issue resulting from the disqualification of Judge Vance Spath, Colonel, U.S. Air Force, in *Al-Nashiri* had been "percolating." Tr. 2968. Before searching for outside employment, LC Blackwood

> researched the ethics rules for judicial employees as well as read the published advisory opinions on uscourts.gov relating to whether applications alone create a conflict of interest and whether a conflict of interest is created by accepting a position at one U.S. [A]ttorney's [O]ffice while working as a law clerk for a different -- in a different district.
>
> Based on those, [LC Blackwood] concluded that no conflict of interest was created by [his] applications or by accepting a position at the Western District of Missouri.

Tr. 2974. The published advisory opinions upon which LC Blackwood relied were the "official formal advisory opinions of the Judicial Conference Committee."[27] *Id.* LC Blackwood was unaware of (i) "any policies regarding

[26] In addition to the Naval Criminal Investigative Service, LC Blackwood applied to the following executive branch agencies: (1) Department of Homeland Security, (2) Federal Bureau of Investigation, (3) U.S. Immigration and Customs Enforcement, (4) National Security Agency or National Geospatial Agency, and (5) Defense Intelligence Agency (DIA). AE 160K at 5; Tr. 2945-46. He applied to DIA in approximately 2017. AE 151C at 4.

[27] First established in 1922 under a different name, the Judicial Conference of the United States (Judicial Conference) is "the national policy-making body for the federal courts." United States Courts, Governance & the Judicial Conference, https://www.uscourts.gov/

potential conflicts of interest raised by an outside job search at the trial judiciary" and (ii) "paper policy specific to the trial judiciary beyond the general ethics rules." Tr. 2975. Judge Libretto was unaware of any "written policy" to identify conflicts when a law clerk seeks outside employment but stated that, informally, the clerk would follow his or her "professional obligations as a licensed attorney."[28] Tr. 2621.

LC Blackwood testified he never "attempt[ed] to influence the military judge for an extrajudicial purpose" while employed by the OMCTJ. Tr. 2974. He also stated that the "various military judges" issued commission "rulings and orders," not him. Tr. 2975.

E. AE 160K disqualification motion (Sept. 19, 2019)

Judge Libretto denied petitioner's motion for recusal. AE 160K at 22. He found there was "simply no discernible link of any substance or import between . . . the United States Attorney for the Western District of Missouri, and [petitioner's] case." *Id.* at 21. He concluded that his recusal was not required by LC Blackwood's (i) application and acceptance of an AUSA job[29] or (ii) application for employment with a DoD agency. *Id.* at 20-21. This two-part ruling was based on several conclusions, which follow.

1. LC Blackwood and the Western District of Missouri job

In concluding that his recusal was not required on account of LC Blackwood's application to, and acceptance of, an offer for employment as an

---

about-federal-courts/governance-judicial-conference (last visited Apr. 15, 2020). "It prescribes ethical norms for federal judges as a means to preserve the actual and apparent integrity of the federal judiciary." *United States v. Microsoft Corp.*, 253 F.3d 34, 111 (D.C. Cir. 2001) (en banc) (per curiam).

[28] Judge Libretto was "certain" that attorney or staff candidates for OMCTJ employment with conflicts "would be identified in the normal hiring process," although he was "not overly familiar with" and had no control over this process. Tr. 2620.

[29] Assuming that the DoJ was a party to petitioner's commission based "solely" on *Al-Nashiri*, Judge Libretto concluded that

> [LC Blackwood's] application for and acceptance of employment as an AUSA in the office of the United States Attorney for the Western District of Missouri would not lead a reasonable, disinterested person or third-party observer with knowledge and understanding of *all* the facts and circumstances to the conclusion that this Military Judge should have disqualified or recused himself from presiding over this Military Commission due to the appearance of a lack of impartiality arising from [LC Blackwood's] search for and acceptance of his current employment.

AE 160K at 20-21.

AUSA for the Western District of Missouri, Judge Libretto, in general, made four primary points.

(i) First he observed that the "structure" of military commission practice is different from the federal judicial system. *Id.* at 13. Further, as in military courts-martial practice, the defense organization and the trial judiciary in the military commission system are independent organizations. *Id.* at 14. Judge Libretto also highlighted that military commission judges are DoD employees, *id.* at 13, "hav[ing] no fixed terms and are subject to normal re-assignments (even as a prosecutor or defense attorney)," *id.* at 14. In contrast, Article III federal judges are "members of a separate branch of the federal government" and "appointed for life." *Id.* at 14.

(ii) Second, as to who was a party to petitioner's case, Judge Libretto essentially found that the DoJ made no substantive contribution in the decision to hire LC Blackwood as an AUSA for the Western District of Missouri. *See id.* at 16-19. He acknowledged similarities between Al-Hadi's case and *Al-Nashiri* and observed that Al-Hadi's commission applies "the same statute and rules of procedure and evidence as the *al Nashiri* military commission." *Id.* at 16. As in *Al-Nashiri,* DoJ attorneys also would represent the United States if any "interlocutory appeal, extraordinary writ, or appeal on the merits in this case were" filed in federal court. *Id.*

Judge Libretto considered the salient facts in *Al-Nashiri* to be the military judge's: (a) "application for and acceptance of an immigration law judge position," where the United States Attorney General (AG) "personally acted on and approved" the application, (b) communication and negotiation of his start date with the DoJ's Executive Office for Immigration Review (EOIR) for more than one year, and (c) that both (a) and (b) occurred while the military judge was presiding over Al-Nashiri's commission.[30] *Id.* By way of contrast, Judge Libretto had not applied for employment with "any component of the [DoJ]" while presiding over petitioner's commission. *Id.* He also concluded that

> neither the [AG] nor the Deputy [AG] had anything to do with [LC Blackwood's] selection or appointment as an AUSA in the Western District of Missouri. [LC Blackwood] was interviewed and hired directly by the U.S. Attorney for the Western District of Missouri,
>
> with the [DoJ] essentially relegated to handling the paperwork to complete the hiring action.

Id. at 16-17.

[30] Organizationally, the DoJ's Executive Office for Immigration Review (EOIR) comes directly under the Deputy AG, at the same level as, for example, the National Security Division, Federal Bureau of Investigation, and Criminal Division. AE 160B, Attach. D.

(iii) Third, Judge Libretto concluded that a different standard applied to a law clerk's employment search than a military judge's. *Id.* at 17 (citing Jud. Conf. of U.S. Comm. on Codes of Conduct, Advisory Op. 74, "Pending Cases Involving Law Clerk's Future Employer" (June 2009), Guide to Jud. Policy, Vol. 2B ch. 2, at 110 [hereinafter Advisory Op. 74]). He interpreted Advisory Opinion No. 74 as "suggest[ing] that a law clerk need only be excluded from participating in a case involving a potential employer when an *offer* of employment has been extended *and* either has been, or may be, accepted by the clerk." *Id.* (second emphasis added). Accordingly, "only" LC Blackwood's acceptance on August 31, 2018, of the AUSA job offer raised the specter of disqualification. *Id.* "[M]ere applications" did not require disqualification or exclusion. *Id.*

Judge Libretto added that LC Blackwood's acceptance of the AUSA position in Missouri "would only be problematic if someone from *that particular* U.S. Attorney's Office was involved in some meaningful way in [petitioner's] case, such as serving as counsel for the United States in [petitioner's] Military Commission." *Id.* at 18 (citing Jud. Conf. of U.S. Comm. on Codes of Conduct, Advisory Op. 81, "United States Attorney as Law Clerk's Future Employer" (June 2009), Guide to Jud. Policy, Vol. 2B ch. 2, at 121 [hereinafter Advisory Op. 81]). Judge Libretto distinguished the instant case factually from *Al-Nashiri* and other cases cited by petitioner, *see id.* at 16-18,[31] finding that LC Blackwood's search for an AUSA position was not problematic for two main reasons. One, neither of the USAOs in Missouri and Texas, which had extended offers to LC Blackwood, had assigned any of their attorneys to the Office of the Chief Prosecutor of Military Commissions to prosecute petitioner's case. *Id.* at 17-18. Two, no DoJ attorney had made an appearance as United States counsel in petitioner's case during LC Blackwood's entire AUSA job search. *Id.* at 18. Accordingly, "even if the [DoJ], writ large, is considered a party to this Military Commission due to the [AG's] involvement generally with military commissions, this Commission cannot reasonably expand the definition of a 'party' to the United States Attorney for the Western District of Missouri . . . ." *Id.*

(iv) Fourth, Judge Libretto concluded that a "reasonable, disinterested, well informed, objective observer with knowledge of all the facts and circumstances" would not question his (Judge Libretto's) impartiality. *Id.* at 19. He distinguished petitioner's case from *Al-Nashiri* because the judge in *Al-Nashiri* "was essentially directly hired by the [AG], someone with a definite connection and interest in the outcome of that military commission." *Id.* Also, the military judge in *Al-Nashiri* (Judge Spath) negotiated with the DoJ for

[31] Judge Libretto distinguished *Hall v. Small Bus. Admin.*, 695 F.2d 175 (5th Cir. 1983); *Parker v. Connors Steel Co.*, 855 F.2d 1510 (11th Cir. 1988); and *Miller Indus., Inc. v. Caterpillar Tractor Co.*, 516 F. Supp. 84 (S.D. Ala. 1980), as cases not involving acceptance of employment with a USAO having no involvement in the case before the judge. AE 160K at 18.

employment while he was "engaged in what amounted to a very public battle of wills with the [assigned] defense attorneys." *Id.* Judge Libretto found the following three facts to be especially determinative. One, LC Blackwood did not use a writing sample from petitioner's commission as occurred in *Al-Nashiri*, meaning LC Blackwood was not trying to "parlay" his commission work into an AUSA position. *Id.* at 19-20. Two, LC Blackwood's direct supervisor, the OMCTJ Staff Director (Mr. F), was a member of the judiciary team and "would surely [have] serve[d] to limit any" effort by LC Blackwood to favorably "steer" commission rulings toward the DoJ. *Id.* at 20. That "judges, not law clerks," decide cases also was pertinent here. *Id.* Third, petitioner's commission issued few substantive decisions between LC Blackwood's acceptance of the AUSA job and his departure from the commission "only a few short months" later. *Id.* Judge Libretto added that the defense had not questioned a single commission decision from this interim period nor addressed the significance of the nine-month lapse since LC Blackwood last worked on petitioner's commission. *Id.*

2. LC Blackwood and the Navy civilian job application

Under the second part of his AE 160K ruling, Judge Libretto relied on three specific conclusions in deciding that LC Blackwood's application for the employment with a DoD agency did not require his recusal. First, LC Blackwood was never offered a DoD job. *Id.* at 21. Second, even if *Al-Nashiri* dictates that the DoD is a party to petitioner's case, there was "no indication" that this potential employer (including the Naval Criminal Investigative Service with whom LC Blackwood interviewed and the Defense Intelligence Agency, which did not request an interview) had "a direct connection to this Military Commission." *Id.* Third, given (i) how the military justice system works, (ii) the military assignment process, and (iii) that nearly all military commission participants are DoD employees, no "reasonable, objective person . . . would harbor doubts about this Military Judge's impartiality simply because [LC Blackwood] applied for work within the same [DoD] that already employed [LC Blackwood]."[32] *Id.* at 22.

F. AE 158R dismissal motion (Oct. 4, 2019)

In denying petitioner's motion for dismissal on the basis of an alleged taint over the entirety of petitioner's commission proceedings stemming from Judge Waits' and LC Blackwood's search for and acceptance of outside employment, Judge Libretto considered four main areas. He addressed (1) Judge Waits' application for the eleven DoJ immigration judge positions; (2) Judge Waits' application to and acceptance of the U.S. Navy job; (3) whether Judge Rubin should have been disqualified; and (4) remedies.

[32] The military judge remarked, "To conclude otherwise would suggest that the entire military commission system . . . must be found legally insufficient," as well as the military justice system—the "structural blueprint for the military commission system." *Id.* at 22.

1. Judge Waits and the Department of Justice immigration judge applications

Judge Libretto held that because Judge Waits applied to be an immigration judge with the DoJ, absent waiver, he was required to recuse himself based on the party status of his prospective employer. AE 158R at 15-16. In so ruling, he recounted the main facts in *Al-Nashiri*, as follows: Judge Spath (i) was detailed to *Al-Nashiri* in July 2014, (ii) applied to be an immigration judge in November 2015, (iii) was temporarily appointed by the AG in March 2017 and received an initial offer, (iv) began year-long negotiations with the EOIR for a start date, (v) was notified by EOIR in February 2018 that his start date was in July 2018, (vi) abated commission proceedings the next day "noting his frustration with the defense and stating on the record '[i]t might be time for me to retire, frankly,'"[33] (vii) announced his retirement several months later, and (viii) was invested as an immigration judge in September 2018. *Id.* at 11-12 (alteration in original) (quoting *Al-Nashiri*, 921 F.3d at 231). Judge Libretto also noted that Judge Spath highlighted in his resume his experience as the presiding judge in *Al-Nashiri*, did not inform the parties of his job application, and continued to preside over Al-Nashiri's commission while negotiating his start date. *Id.* at 11.

Judge Libretto observed that the *Al-Nashiri* conclusion—Judge Spath's search for post-judicial employment created an appearance of partiality—was informed by a third advisory opinion. *Id.* at 12 (citing *Al-Nashiri*, 921 F.3d at 235 (citing Jud. Conf. of U.S. Comm. on Codes of Conduct, Advisory Op. 84, "Pursuit of Post-Judicial Employment" (Apr. 2016), Guide to Jud. Policy, Vol. 2B ch. 2, at 127 [hereinafter Advisory Op. 84])). He stated that "after the initiation of any discussions with a [potential employer], no matter how preliminary or tentative the exploration may be, the judge must recuse . . . on any matter in which the [prospective employer] appears." *Id.* (alterations in original) (quoting *Al-Nashiri*, 921 F.3d at 235 (quoting Advisory Op. 84)). Judge Libretto found that *Al-Nashiri* concluded

> the DOJ is the employer of immigration judges, noting that the [AG] is directly involved in selecting and supervising immigration judges. . . . [and] that the DOJ was a party to the *Al Nashiri* military commission, relying heavily on the statutory role of the [AG] in military commissions, as well as the fact that the DOJ assigned one of its lawyers to represent the United States in the *Al Nashiri* commission.

[33] The Chief Defense Counsel in *Al-Nashiri* had terminated three of Al-Nashiri's defense counsel, which created "a very public battle of wills" between the trial judge and defense counsel, AE 158R at 11, culminating in "the trial judge finding the Chief Defense Counsel in contempt," *id.* at 12. The Chief Defense Counsel's contempt conviction was vacated as unlawful. *Baker v. Spath*, No. 17-cv-02311-RCL, 2018 U.S. Dist. LEXIS 101622 (D.D.C. June 18, 2018).

Id. at 12-13. Judge Libretto also remarked that given 28 U.S.C. § 455(a), judicial codes of conduct, and precedent, *Al-Nashiri* found: (i) Judge Spath's conduct to be "squarely on the impermissible side" under a "totality of the circumstances," (ii) his "employment application alone would [] be enough to require his disqualification," (iii) he "did yet more to undermine his apparent neutrality" by emphasizing his presiding role in *Al-Nashiri* on his job application and not telling the defense of his job search for two years after submitting his job application, (iv) his application had "cast an intolerable cloud of partiality over his subsequent judicial conduct" in Al-Nashiri's commission, and (v) his conduct exhibited a "lack of candor." *Id.* at 13 (quoting *Al-Nashiri*, 921 F.3d at 235, 237).

In *Al-Hadi*, Judge Libretto found no lack of candor by Judge Waits, explaining that the need for disclosure of his job application only became apparent after the *Al-Nashiri* decision. *See id.* Moreover, while *Al-Hadi* and *Al-Nashiri* both involved the presiding judge applying for an immigration judge position "while a DOJ attorney was detailed as Trial Counsel" in the commission, "Judge Waits was never interviewed for or offered a position as an immigration judge." *Id.* at 14. He never made it past step one in the seven-step DoJ hiring process,[34] never heard back from any person, and received only automated acknowledgements of receipt and two notifications that he was no longer being considered. *Id.* Judge Libretto also noted that unlike *Al-Nashiri*, (i) "Judge Waits' application was not personally considered or acted on by the [AG]," (ii) he did not negotiate his start date with the DoJ for "over a year" while presiding over [Al-Hadi's] commission, (iii) he was not engaged in a "feud or public battle of wills with the Defense," (iv) he "did not find the Chief Defense Counsel in contempt," and (v) the defense had not identified a "single ruling" or "interaction" between Judge Waits and the defense or defendant "that would seem to call into question [Judge Waits'] impartiality." *Id.* Yet Judge Libretto held that under *Al-Nashiri*, (i) "the DOJ must be considered a party" to *Al-Hadi* "at least during the time that Judge Waits presided over this case" and especially where DoJ attorneys were detailed to the prosecution from June 2014 to July 2016—"almost the entire period" that Judge Waits served as presiding judge, *id.*, and (ii) Judge Waits undoubtedly "applied for employment with a party . . . and neglected to disclose that fact to the parties while he presided over [*Al-Hadi*]," *id.* at 15.

[34] The seven-step DoJ immigration judge hiring process consists of (1) evaluation of applications by Supervisory Immigration Judges and review by the EOIR Director and Chief Immigration Judge; (2) contact with "highly recommended" first-tier applicants; (3) interview of first-tier candidates by a three-person panel; (4) selection of at least three candidates by the Chief Immigration Judge and EOIR Director; (5) any additional interviews by a panel consisting of the EOIR Director (or designee) and two Deputy AG designees, which recommends a final candidate to the Deputy AG for recommendation to the AG; (6) selection by the AG of the recommended candidate (or who requests additional candidates) and offer of employment by the DoJ; and (7) formal offer by the EOIR after background check and more vetting. AE 158R at 7-8.

Judge Libretto held that under the totality of the circumstances standard seemingly acknowledged in *Al-Nashiri*, 921 F.3d at 235¸ "a reasonable, well-informed person would be much less likely to question Judge Waits' impartiality than the impartiality of the judge in *Al Nashiri*." *Id.* at 15. Moreover, considering that Judge Waits "did little more than electronically submit" his application to the EOIR and was never interviewed, Judge Libretto stated that "this Commission might conclude that a reasonable person, familiar with all of the circumstances, would not question Judge Waits' impartiality." *Id.* He explained, however, that the D.C. Circuit "seems to establish a bright line rule that, if a presiding judge in a military commission submits an application to be an immigration judge, that military judge, absent waiver, must recuse himself because his prospective employer, the DOJ (or a sub-agency of the DOJ), is a party to the military commission." *Id.* at 15-16. Judge Libretto found this language "dispositive" and concluded that Al-Hadi was thus "entitled to some form of relief" because Judge Waits did not recuse himself when he applied to be an immigration judge. *Id.* at 16.

2. Judge Waits and the Navy civilian job

In his second area of discussion, Judge Libretto rejected (i) the defense proposition that the DoD is also a party to Al-Hadi's commission and (ii) any suggestion to apply the *Al-Nashiri* analysis to Judge Waits and the Navy civilian position. *Id.* at 16-17. He first noted, "Judge Waits was an employee of the DOD the entire time he presided over this Military Commission as an active duty officer in the United States Navy, and had been an employee of the DOD dating back to 1987," *id.* at 16, when he joined the military, *see* AE 158O, Attach. B at 2. He also noted that "all the relevant participants in [Al-Hadi's] Commission are DOD employees," AE 158R at 17, including "Detailed Defense Counsel . . . [and] the entire prosecution team," *id.* at 16. Next, he found that the defense had multiple opportunities "to *voir dire* Judge Waits while he presided over this Military Commission, but never argued that the DOD or [Navy] was a party to [Al-Hadi's] case" or that the trial judge was "disqualified" as a DoD employee. *Id.* at 17. Finally, Judge Libretto remarked that adherence to the defense position would "essentially invalidate not only the military commissions, but also the entire military justice system." *Id.* He reasoned that the defense position would contradict Supreme Court precedent validating the military justice system and disregard differences between the military justice system (wholly embedded in the DoD and executive branch) and Article III Courts (having life-appointed judges employed in a branch of government separate from the prosecuting agency). *Id.*

Judge Libretto summarized that just as a "reasonable observer would not question Judge Waits' impartiality as a military judge based simply on his" active duty military status, so would the same observer not question his impartiality as a military commission judge for having applied to a Navy civilian position. *Id.* He rationalized that because "[a]ll military judges" are

DoD employees (as active duty servicemembers), Judge Waits' "application for employment with the [Navy]" does not warrant relief. *Id.* at 17-18.

3. Judge Rubin and LC Blackwood

The defense argued that LC Blackwood's multiple employment applications when Judge Rubin was presiding over Al-Hadi's commission raised a question about Judge Rubin's impartiality "in the mind of a reasonable observer." *Id.* at 18; *see* Pet'r Br. 4, 13, 39. Judge Libretto incorporated and adopted "the legal reasoning and the conclusions of law" in AE 160K addressing LC Blackwood's search for and acceptance of employment with the DoJ as an AUSA[35] and applied "the same strong presumption" of "impartiality." *Id.* at 18. He found "a reasonable, disinterested person with knowledge and understanding of all the facts and circumstances would not reasonably question Judge Rubin's impartiality based on [LC Blackwood's] search for employment in the first half of 2018." *Id.* Significantly, LC Blackwood was not offered and did not accept employment "at any time while Judge Rubin presided over this Commission." *Id.*

4. Remedies

In fashioning a remedy at AE 158R, Judge Libretto distinguished *Al-Nashiri*'s "far more egregious factual record," *id.* at 19, recognized vacatur of a court's rulings as an "extraordinary" remedy, *id.* (quoting *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 864 (1988)), and applied the three *Liljeberg* factors, *id.* at 19-20. These three factors are consideration of "the risk of injustice to the parties in the particular case, the risk that the denial of relief will produce injustice in other cases, and the risk of undermining the public's confidence in the judicial process."[36] *Id.* at 19. Judge Libretto looked to the "totality of the circumstances" in appraising the first and third factor. *Id.* He noted that the military judge in *Al-Nashiri*

> was interviewed and hired for the position and continued to preside over the military commission while he negotiated with his future employer over the course of more than a year. He also engaged in a very public legal battle with the defense team over much of that year. [In contrast,] Judge Waits' application never made it past the first step in the [seven-step] DOJ hiring process. He was never even given any hint that he was being favorably considered for [an immigration judge] position.

[35] In his ruling, Judge Libretto declined to recuse himself on account of LC Blackwood's search for and acceptance of DoJ employment as an AUSA for the USAO for the Western District of Missouri. AE 160K at 18, 22; *see supra* Part II.E.1.

[36] *Liljeberg* used these three factors in determining a remedy for violation of 28 U.S.C. § 455(a). *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 864 (1988).

Id. at 20.

Based on the "drastically different factual record" in *Al-Hadi* and the evidence, Judge Libretto (i) found "no actual injustice" from "Judge Waits' job search and his contemporaneous rulings and orders" and (ii) held that "a reasonable third person would concur." *Id.* He also held there was "absolutely no reason to believe that denial of relief in this case would produce injustice in other cases." *Id.* This was so because consistent with the intent of *Al-Nashiri*, "every military judge" detailed to *Al-Hadi* is now aware of the issues related to applying for employment with DoJ (and the EOIR) while presiding over a commission. *Id.* Nor did Judge Libretto find an "actual threat" to "public confidence in the proceedings." *Id.*

In the absence of "extraordinary circumstances," the military judge concluded that vacatur "of all of Judge Waits' rulings" was unwarranted. *Id.* He denied the defense motion to dismiss all charges on account of the job search and eventual acceptance of a job offer by Judge Waits and LC Blackwood. *Id.* at 21. He found "any potential harm to the Accused would be adequately remedied by allowing the Defense to request reconsideration of any rulings or orders issued by Judge Waits during his tenure over this Commission." *Id.* at 20-21. He ordered the defense to "specific[ally]" identify the rulings and orders for reconsideration. *Id.* at 21.

III. Jurisdiction

We have jurisdiction under the 2009 Military Commissions Act to consider petitioner's Writ of Mandamus and Prohibition "in aid of [our] jurisdiction." *United States v. Mohammad*, 391 F. Supp. 3d 1066, 1071 (CMCR 2019) (alteration in original); *Hawsawi v. United States*, 389 F. Supp. 3d 1001, 1006 (CMCR 2019) (quoting *In re Al-Nashiri (Al-Nashiri I)*, 791 F.3d 71, 78 (D.C. Cir. 2015)),[37] *petitions for mandamus denied, In re Al-Hawsawi,* No. 19-1100 consolidated with 19-1117, 2020 U.S. App. LEXIS 11340 (D.C. Cir. Apr. 10, 2020); *see* 28 U.S.C. § 1651(a); 10 U.S.C. § 950f.

IV. Standard of review

A petitioner must satisfy three conditions upon the filing of a mandamus petition. *Cheney v. U.S. District Court*, 542 U.S. 367, 380 (2004), *quoted in Hawsawi*, 389 F. Supp. 3d at 1006. Petitioner "[must] have no other adequate means to attain the relief" sought, the "right to issuance of the writ is 'clear and indisputable,'" and the issuing court is satisfied within its own discretion that mandamus is "appropriate under the circumstances." *Id.* at 380-81 (alteration in original) (citations omitted). The D.C. Circuit recently clarified that the

[37] The suffix "I" is used in references and citations to *In re Al-Nashiri*, 791 F.3d 71 (D.C. Cir. 2015). *In re Al-Nashiri*, 921 F.3d 224 (D.C. Cir. 2019), sometimes referenced in opinions as *Al-Nashiri III*, will be referred and cited with no the suffix.

standard of review when a party seeks to disqualify a judge is "using the specific standard for mandamus relief alone." *In re Al-Hawsawi*, 2020 U.S. App. LEXIS 11340, at *8.

Concerning whether a military judge is disqualified, "[w]e begin with a 'strong presumption' against . . . disqualification." *Hawsawi*, 389 F. Supp. 3d at 1007 (quoting *United States v. Quintanilla*, 56 M.J. 37, 44 (C.A.A.F. 2001)). "A judge is presumed to be impartial, and 'the party seeking disqualification bears the substantial burden of proving otherwise.'" *United States v. Denton*, 434 F.3d 1104, 1111 (8th Cir. 2006) (citation omitted). "[J]udges (and their law clerks) are presumed to be impartial and to discharge their ethical duties faithfully so as to avoid the appearance of impropriety." *Doe v. Cabrera*, 134 F. Supp. 3d 439, 452 (D.D.C. 2015) (alterations in original) (quoting *First Interstate Bank of Arizona v. Murphy, Weir & Butler*, 210 F.3d 983, 988 (9th Cir. 2000)). We then look to R.M.C. 902, Manual for Military Commissions, United States (2019 ed.), and the statute on which it is based, 28 U.S.C. § 455. *See Hawsawi*, 389 F. Supp. 3d at 1007. These two provisions state the general rule that disqualification is required when the presiding "judge's impartiality might reasonably be questioned." *Id.*; *see also Al-Nashiri*, 921 F.3d at 234 (stating same); *United States v. Miranne*, 688 F.2d 980, 985 (5th Cir. 1982) ("Section 455(a) is a general safeguard of the appearance of impartiality and establishes a 'reasonable factual basis-reasonable man' standard." (quoting *Fredonia Broad. Corp., Inc. v. RCA Corp.*, 569 F.2d 251 (5th Cir. 1978)); *In re Martinez-Catala*, 129 F.3d 213, 220 (1st Cir. 1997) (explaining how 28 U.S.C. § 455 is applied).

The "standard is objective . . . from the perspective of a reasonable and informed observer, fully apprised of the surrounding circumstances." *Hawsawi*, 389 F. Supp. 3d at 1007; *see Al-Nashiri*, 921 F.3d at 234-35 ("[W]e recognize the somewhat 'subjective character of this ostensibly objective test.'" (quoting *Pepsico, Inc. v. McMillen*, 764 F.2d 458, 460 (7th Cir. 1985))); *Khadr v. United States*, 62 F. Supp. 3d 1314, 1317 (CMCR 2014) (stating recusal standard is "objective" (quoting *United States v. Scrushy*, 721 F.3d 1288, 1303 (11th Cir. 2013))); *In re B & W Mgmt., Inc.*, 86 B.R. 1, 2 (D.D.C. 1988) (stating statutory language of 28 U.S.C. § 455 clearly requires application of "a reasonable person standard" for determination of judicial disqualification, and collecting cases). In our analysis, we consider all the stated reasons for disqualification "individually [and] in the aggregate." *Hawsawi*, 389 F. Supp. 3d at 1007. We also will determine "whether all the circumstances surrounding [the judge's] service as military judge, individually and collectively, would lead a member of the public to reasonably question his impartiality." *Id.*

V. Arguments

A. Petitioner's arguments

Petitioner argues his mandamus petition should be granted because "requiring [him] to continue with litigation in proceedings overseen by a judicial officer that should have recused himself, and proceeding with litigation that has been based on orders issued by judges who should have been disqualified, creates an irreparable injury." Pet'r Br. 1-2. He asserts that the undisclosed job searches by Judge Waits and LC Blackwood have caused an appearance of partiality in violation of R.M.C. 902(a) under *Al-Nashiri*. *Id.* at 3. He contends that the circumstances here are "identical to that which required the vacatur of four-years-worth of litigation in *In re Al-Nashiri*." *Id.* (citing *Al-Nashiri*, 921 F.3d at 226).

Petitioner explains that in both *Al-Nashiri* and the instant case, the presiding judge submitted an application for an immigration judge position to the EOIR. *See id.* He states that *Al-Nashiri* held the application was for "work at a component of the DOJ . . . a party to the military commissions." *Id.* These circumstances, he notes, "created a 'disqualifying appearance of partiality.'" *Id.* (quoting *Al-Nashiri*, 921 F. 3d at 235-36). Accordingly, Judge Waits' immigration judge application "was also disqualifying." *Id.* at 5. Petitioner highlights that Judge Waits submitted his immigration judge applications before the first substantive hearing, before any substantive pleadings, and before issuance of any substantive orders. *Id.* at 3. He also observes that Judge Waits did not disclose his later acceptance of DoD employment as a Navy civilian. *Id.* at 3-4, 9.

Petitioner then argues that when LC Blackwood applied for DoJ and DoD employment, and accepted DoJ employment, Judges Rubin's and Libretto's impartiality became subject to being "reasonably questioned." *Id.* at 5; *see id.* at 17. He claims that a law clerk and a judge have the "same 'duty to avoid the appearance of impropriety'" and if seeking employment with an office or firm representing a party "must be walled off from any further contact with the litigation involving that party." *Id.* at 5 (citation omitted). Here, petitioner notes that LC Blackwood "was never walled off from work on [Al-Hadi's] commission." *Id.* at 4. Nor did anyone notify Al-Hadi about LC Blackwood's job applications until after LC Blackwood had accepted DoJ employment. *Id.*

Regarding relief, petitioner argues that vacatur of the order convening his commission is "the only remedy that can purge the taint." *Id.* at 6. This is so, he argues, because only thirty-three minutes of the entire record "predate the disqualifying conduct," conduct which lasted until LC Blackwood's departure from the OMCTJ in December 2018. *Id.*; *see id.* at 17. Alternatively, Al-Hadi requests that we direct (i) the commission to vacate all orders since Judge Waits submitted an application for eleven immigration judge positions in about the

first week of September 2014, *id.* at 17; *see* Resp't Br. 3; Tr. 2985-86, 2988-90, and (ii) the recusal of Judge Libretto, Pet'r Br. at 17, the presiding judge when Al-Hadi filed his petition.

Petitioner argues that all three *Cheney* conditions for issuance of a mandamus writ are satisfied. *Id.* at 19 (citing 542 U.S. at 380-81). First, regarding whether a writ is the only way to remedy the disqualifying conduct, *id.*, he argues that because he seeks recusal of the judge, his injury "is by its nature irreparable," *id.* at 20 (quoting *Al-Nashiri*, 921 F.3d at 238 (quoting *Cobell v. Norton*, 334 F.3d 1128, 1139 (D.C. Cir. 2003))). Therefore, all commission orders, all pleadings based on those orders, and all motions not acted upon are tainted. *Id.* Petitioner further asserts that orders "enforced by a new, untainted judge" still result in irreparable harm. *Id.* He explains that under *Al-Nashiri*, proceeding in his case would be unfair and irreparably damage public confidence, stating it is "too difficult to detect all of the ways that bias can influence" his commission. *Id.* (quoting *Al-Nashiri*, 921 F.3d at 238).

Second, on whether Judge Waits' and LC Blackwood's employment searches were "clearly and indisputably" disqualifying, *id.* at 19, the next writ condition, petitioner makes four sub-points:

(i) He contends that "a judge cannot have a prospective financial relationship with one side, yet persuade the other that he can judge fairly in the case." *Id.* at 21 (quoting *Al-Nashiri*, 921 F.3d at 235 (quoting *Pepsico*, 764 F.2d at 461)). Thus, Judge Waits should have recused himself after the most "preliminary, exploratory discussions with the party," *id.*, including even when he just began "mentioning to others involved with parties that he [was] contemplating a career change," *id.* at 22. Petitioner argues that *Al-Nashiri*, due process, and codes and canons on judicial conduct also require Judge Libretto to recuse himself. *Id.* at 22; *see id.* at 23 n.116 (citing *Al-Nashiri*, 921 F.3d at 234; 28 U.S.C. § 455(a); Code of Conduct for United States Judges Canon 3C(1), Guide to Jud. Policy, Vol. 2A ch. 2 [hereinafter Judge Conduct Code]; Model Code of Judicial Conduct r. 2.11 (Am. Bar Ass'n); Rule for Courts-Martial 902(a)).

(ii) Petitioner next argues that "the recusal rule 'extend[s] to those who make up the contemporary judicial family, [including] the judge's law clerks,'" *id.* at 23 (first alteration in original) (quoting *Hall v. Small Busin. Admin.*, 695 F.2d 175, 176 (5th Cir. 1983)), even though law clerks do not make final decisions, *id.* at 24. He offers that "it is universally accepted" that a court is disqualified when "its law clerk continue[s] to participate in a case in which his future employer represent[s] one of the parties." *Id.* at 23 (quoting *McCulloch v. Hartford Life & Acc. Ins. Co.*, Civil No. 3:01CV1115 (AHN), 2005 U.S. Dist. LEXIS 31051, at *15 (D. Conn. Nov. 23, 2005)); *see also id.* at 24 n.123 (citing Advisory Op. 74). Petitioner adds that law clerks are unique among employees as "[t]hey are sounding boards for tentative opinions" and their legal research

impacts the decisions that are issued. *Id.* at 24 (quoting *Hall*, 695 F.2d at 179). Accordingly, LC Blackwood's job searches were clearly and indisputably disqualifying, unless he was "walled off from all litigation involving the party" to which he applied for employment. *Id.* at 23 (bold omitted).

In the interest of "exact[ing] the appearance of impartiality," *id.* at 25 (citation omitted), petitioner asserts that LC Blackwood had an "ethical duty" to "'promptly'" notify the judge of his job search, *id.* (quoting *First Interstate*, 210 F.3d at 987-88 (citing Code of Conduct for Law Clerks, Canon 5(C)(1))); [38] *see also id.* at 25-26 (citing Model R. of Prof'l Conduct r. 1.12(b) (Am. Bar. Ass'n); Code of Conduct for Judicial Employees Canon 4C(4), Guide to Jud. Policy, Vol. 2A ch. 3, § 320 [hereinafter Employee Conduct Code]; Sec'y of Navy Instr. 5803.1E, Professional Conduct of Attorneys Practicing under the Cognizance and Supervision of The Judge Advocate General, encl. 1, Rules of Professional Conduct, r. 1.12(b) (Jan. 20, 2015)). The requirement to notify, he claims, "begins at the preliminary application stage, not at the offer and acceptance stage," *id.* at 26, and, as with judges, includes the "first [] exploratory conversations with potential employers," *id.* at 27. "The judge then bears the responsibility" of walling-off the law clerk. *Id.* at 26; *see id.* at 28, 36.

(iii) In point three, petitioner claims that under *Al-Nashiri* the AG is a party to all military commissions. *Id.* at 28. He notes the D.C. Circuit found the AG "plays an important institutional role in the military commissions more generally." *Id.* at 29 (quoting *Al-Nashiri*, 921 F.3d at 236). The *Al-Nashiri* judge thus had to treat the Justice Department, as a whole, "with neutral disinterest," *id.* at 29-30 (quoting *Al-Nashiri*, 921 F.3d at 236), because "[t]he real problem was that [] the *appearance* of partiality touched the *entire* DOJ," *id.* at 30. Petitioner remarks that as in *Al-Nashiri*, the AG detailed counsel to significant roles in his commission. *Id.* at 30. Pointing out the DoJ's general overarching role in all military commissions at trial, on appeal, and at significant decision points, *see id.* at 30-31, petitioner contends that *Al-Nashiri* addresses military commissions and the DoJ—not the EOIR—as a party, *id.* at 32. Petitioner cites to the Justice Manual, a DoJ publication, in support of his claim that the DoJ has a meaningful role in the hiring of AUSAs. *Id.* at 32 (citing https://www.justice.gov/jm/jm-3-4000-personnel-management#3-4.200). The manual, he explains, permits the Deputy AG to delegate his responsibilities concerning employment matters to the EOA and the DoJ Office of Attorney Recruitment and Management (OARM) and OARM must approve all AUSA appointments. *Id.* Petitioner concludes that under *Al-Nashiri*, the DoJ and AG are party to petitioner's commission and all military commissions. *Id.* at 33. Therefore, LC Blackwood's applications to USAOs, and the two offers received, were applications to and offers from a party to petitioner's commission. *Id.*

[38] The Code of Conduct for Judicial Employees (Employee Conduct Code) was preceded by the Code of Conduct for Law Clerks. *See infra* note 64 and accompanying text.

(iv) Finally, petitioner urges that the "employment applications alone" of Judge Waits and LC Blackwood resulted in an appearance of partiality under D.C. Circuit precedent. *Id.* (quoting *Al-Nashiri*, 921 F.3d at 237). He explains that seeking employment as a "suppliant" creates the appearance of bias. *Id.* at 35. As to LC Blackwood, petitioner describes him (i) as "a long-term participant in the commissions" with institutional knowledge of petitioner's case and supervisory authority over others involved in petitioner's commission, (ii) as a subject matter expert, and (iii) as someone holding ex parte meetings with the prosecution on the use of classified information and briefing the presiding judge on those discussions. *Id.* Petitioner argues that this amplified role "requires extra vigilance" when addressing the appearance of partiality. *Id.*

On the third writ condition—whether issuance of the writ is "appropriate under the circumstances," *id.* at 19 & n.98 (citing *Cheney*, 542 U.S. at 381)—petitioner claims that judicial bias in military commissions is "systemic," *id.* at 36; *see id.* at 36 & n.178, 37 & n.179 (citing as examples petitioner's case, *Al-Nashiri*, and *In re Mohammad*, 866 F.3d 473, 475-77 (D.C. Cir. 2017) (per curiam)). He claims this recurring problem is a threat to "public confidence in the military commission process." *Id.* at 37. Also, he comments on the limited number of proceedings in Al-Hadi's commission before Judge Waits' submission of applications for an immigration judge position. *Id.* In contrast to the facts in *Al-Nashiri*, Al-Hadi's commission thus presents "an even more 'powerful case for dissolving the commission'" through issuance of the writ. *Id.* Because Judge Waits should have recused himself, petitioner argues that "any work [he] produced . . . must also be recused—that is, suppressed." *Id.* at 38 (internal quotation marks omitted) (quoting *Al-Nashiri*, 921 F.3d at 238 (quoting *In re Brooks*, 383 F.3d 1036, 1044 (D.C. Cir. 2004))). Moreover, he contends that revisiting prior orders by a new judge will not remove the taint because of the "serious risk" of "influence[] by an improper, if inadvertent, motive to validate and preserve the result." *Id.* at 37 (quoting *Williams v. Pennsylvania*, 136 S. Ct. 1899, 1907 (2016)). He also argues that "'the effects and continuing force' of the original tainted decisions" may remain despite the passage of time or the detail of new judges. *Id.* at 38 (quoting *Williams*, 136 S. Ct. at 1907).

Petitioner seeks dismissal, as "continuing to litigate while attempting to untangle the tainted orders from current litigation is impossible because 'it is too difficult to detect all of the ways that bias can influence a proceeding.'" *Id.* at 39 (quoting *Al-Nashiri*, 921 F.3d at 238). To remove the "shadow of misconduct" from his commission, petitioner argues that rulings and orders from all three judges must be "scrubbed" from the record because of (i) Judge Waits' disqualification for applying to be an immigration judge, (ii) the compounding taint (or cascading impact) from that disqualification on every subsequent ruling and order, (iii) the invisible impact of that disqualification on every ruling or order never made, and (iv) Judges Rubin's and Libretto's disqualification arising from LC Blackwood's search for and eventual acceptance of an AUSA

position. *Id.* He argues that "[e]very substitution for classified evidence" is similarly tainted. *Id.* at 40.

Additionally, petitioner argues that under the three factors in *Liljeberg*, vacating the entire proceedings and dismissing the charges is "appropriate because 'the violation is neither insubstantial nor excusable.'" *Id.* (quoting *Liljeberg*, 486 U.S. at 865, 867). He claims that he has enjoyed practically no taint-free proceedings and that "vacating all orders since the disqualifying conduct began is tantamount to dismissal" in any event. *Id.* Furthermore, since "the same violation" is recurrent in other commissions, "a clear, prophylactic message [vacatur] is necessary to prevent future injustice to other parties." *Id.* Finally, petitioner claims that "public confidence" in Al-Hadi's commission and in military commissions in general will diminish if petitioner's writ is denied. *Id.*

B. Respondent's arguments

Respondent argues that petitioner has not satisfied the three *Cheney* conditions for issuance of a mandamus writ. Resp't Br. 19. First, the government argues that petitioner has "other adequate means to attain the relief he desires" in the reconsideration remedy afforded at AE 158R. *Id.* at 20 (quoting *Cheney*, 542 U.S. at 380). Second, it argues that petitioner has not demonstrated a "'clear and indisputable'" right to issuance of the writ because he cannot show that he is "clearly and indisputably entitled to" vacatur of the convening orders or of all rulings and orders since the first disqualifying act by Judge Waits. *Id.* at 26 (quoting *Cheney*, 542 U.S. at 381). Third, respondent argues that mandamus is not appropriate in petitioner's case because petitioner has failed to identify the "exceptional circumstances amounting to a judicial usurpation of power, or clear abuse of discretion." *Id.* at 48 (quoting *Cheney*, 542 U.S. at 381).

1. On the first writ condition, respondent contends that (i) AE 158R allowing reconsideration of Judge Waits' rulings and orders is adequate and (ii) Judge Libretto may evaluate any reconsideration requests because the ruling at AE 160K establishes he is not disqualified. *Id.* at 20. The government explains that permitting Judge Libretto "to effectuate [the] remedy will eliminate the appearance of judicial bias." *Id.* at 21. In this way, the record also can be developed factually and with the commission's reasoning, *id.* at 22, thus avoiding review on an "incomplete record," *id.* at 25.

Respondent contends that petitioner has "improperly attempted to subvert the normal judicial process by demanding appellate intervention" prior to commission rulings on judicial recusal and dissolution of the commission.[39] *Id.*

[39] If we infer an "ongoing challenge to Judge Libretto's ability to serve as Military Judge moving forward," respondent requests dismissal of Al-Hadi's petition and that he be directed to refile and address the particular inadequacies in AE 160K. Resp't Br. 23. Respondent

at 24-25; *see id.* at 21-22, 23 n.138 (discussing new evidence before the commission). Respondent argues, "Appellate courts are supposed to be courts of review, not first view." *Id.* at 23 n.138 (quoting *Al Bahlul v. United States*, 840 F.3d 757, 779 (D.C. Cir. 2016) (en banc) (Millett, J., concurring) (per curiam) (citing *Zivotofsky ex rel. Zivotofsky v. Clinton*, 132 S. Ct. 1421, 1430 (2012))). It also notes that "[recusal] is not a decision that an appellate panel may make for a district court judge in the first instance." *Id.* (alteration in original) (quoting *Liberty Lobby, Inc. v. Dow Jones & Co.*, 838 F.2d 1287, 1301 (D.C. Cir. 1987)).[40]

Respondent concludes that petitioner has not established a basis for appellate intervention "'in aid of its appellate jurisdiction' before the trial judge has finished ruling on reconsideration." *Id.* at 25; *see also id.* at 25 n.143 (citing historical cases stating writ does not lie to control judicial discretion).

2. On the second writ condition—whether petitioner has shown a "clear and indisputable right to [the] relief" sought—respondent makes three main arguments. *Id.* at 26 (quoting *Cheney*, 542 U.S. at 381). In its first main argument, respondent contends that LC Blackwood's application for, and acceptance of, an AUSA position in the Western District of Missouri is not disqualifying. *Id.* at 32. This argument consists of three sub-points.

(i) The government notes that LC Blackwood acted in accordance with then-existing ethical guidance. *Id.* It observes that petitioner failed to cite to

---

also urges us to decline review of "the conclusions of AE 158R or AE 160K in light of AE 158Q or any other facts not before the Military Judge when he issued [these] rulings without first requiring" a reconsideration request by petitioner. *Id.* at 23 n.138; *see also id.* at 48 n.281 (requesting dismissal of Al-Hadi's petition and that he seek remedy in the commission pursuant to AE 158R, and stating if petitioner is directed to re-file that he "state specifically where in AE 158R and AE 160K the Judge abused his discretion"). To the extent petitioner argues that our Court should remove Al-Hadi's case from Judge Libretto's discretion because he "operated under the cloud of a recusal motion," the government contends this issue was mooted by AE 160K. *Id.* at 23 n.137 (quoting Pet'r Br. 44). Finally, if we consider the merits, respondent requests an opportunity "to file a surreply to any new arguments Petitioner raises in his Reply." *Id.* at 48 n.281.

[40] In *Liberty Lobby*, appellant's recusal motion was filed in district court after the district court had ruled on the merits and after appellant had filed its appeal. *Liberty Lobby, Inc. v. Dow Jones & Co.*, 838 F.2d 1287, 1301 (D.C. Cir. 1987). The recusal motion was still before the district court when the D.C. Circuit concluded that the motion was not "properly before" it because the district court judge had not ruled on it. *Id.* In *Hasan v. Gross*, 71 M.J. 416 (C.A.A.F. 2012) (per curiam), the Court of Appeals for the Armed Forces granted appellant's "writ-appeal petitions" for mandamus, ordering the military judge's removal for the appearance of bias. *Id.* at 416. *Hasan* is distinguishable from petitioner's case, however, because the military judge, and the service Court of Criminal Appeals, had ruled on the defense motion to recuse before defense sought relief in the Court of Appeals for the Armed Forces. *Id.* at 418. In contrast, Al-Hadi filed with this Court his petition seeking inter alia the recusal of Judge Libretto before the military commission ruled on the issue. *See* Pet'r Br.; AE 160K.

the Judicial Conference of the United States Committee (Judicial Conference Committee) on judicial ethics, Advisory Opinion No. 81: United States Attorney as Law Clerk's Future Employer. *Id.* at 32-33. Opinion No. 81 addresses "when a clerk has been offered employment by a particular [USAO's] office, and the *offer has been or may be accepted* by the law clerk." *Id.* at 33. The opinion says "*the law clerk would have no financial interest* in that office," yet states that participation "in a pending case involving the prospective employer may reasonably create an appearance of impropriety and a cause for concern on the part of opposing counsel." *Id.* Respondent notes that Advisory Opinion No. 81 states "[t]he judge should isolate the law clerk from cases in which *that particular* [USAO] appears." *Id.*

Respondent remarks that the Judicial Conference Committee also has issued an opinion specifically addressing "where there is *actual* prospective employment, rather than the mere *application* for employment." *Id.* (citing Advisory Op. 74). Advisory Opinion No. 74 provides: "[T]he need to exclude the law clerk from pending matters handled by the prospective employer arises whenever *an offer of employment has been extended to the law clerk and either has been, or may be, accepted* by the law clerk . . . ." *Id.* at 33-34. Against this backdrop, respondent argues that petitioner's citation to Opinion No. 74 fails to identify its "main thrust"—that "mere application for future employment does not create a disqualifying conflict for a law clerk." *Id.* at 34.

Respondent also relies on a 2013 law clerk guide or pamphlet, which provided that if a job offer is accepted, the law clerk "may not work on any pending or future cases involving [the] future employer." *Id.* at 35 (quoting Fed. Jud. Ctr., Jud. Conf. of the U.S., Comm. on Codes of Conduct, Maintaining the Public Trust, Ethics for Federal Judicial Law Clerk 24-25 (4th ed. 2013) (prepared cooperatively with the Judicial Conference Committee)); *see also id.* at 34. Petitioner highlights a hypothetical at page 26 in the 2013 pamphlet, the "Daniel" example, which illustrates that if a law clerk is offered a position in a USAO, he does not have to "*isolate himself from any matter involving a* [USAO]" and "is only restricted from working on matters handled by the specific [USAO] he is joining." *Id.* at 35.

(ii) In sub-point two, respondent argues that the USAO for the Western District of Missouri is not a party to Al-Hadi's commission; thus, LC Blackwood's acceptance of the AUSA job offer did not require him to be sealed off from petitioner's commission. *Id.* Respondent contends that "considerable deference" is owed to the commission findings in AE 160K that (a) neither the Deputy AG nor the AG "are personally involved in the selection or approval of individual [AUSAs]" and (b) "the USAO for the Western District of Missouri [was] delegated authority to establish its own hiring procedures to fill AUSA positions." *Id.* at 35-36. Respondent then distinguishes *Al-Nashiri* in three ways.

First, respondent observes that *Al-Nashiri* found the AG "'himself [was] directly involved in selecting and supervising immigration judges.'" *Id.* at 36 (quoting *Al-Nashiri*, 921 F.3d at 235). In petitioner's commission, however, neither the AG nor his deputy were "directly involved" in LC Blackwood's selection or appointment as an AUSA. *Id.* at 37. Respondent comments that the U.S. Attorney for each district "selects and supervises his or her subordinate AUSAs," *id.* at 36 (quoting *Al-Nashiri*, 921 F.3d at 235), and argues that the DoJ performs "only . . . ministerial" paperwork in AUSA hiring actions, *id.* at 37. Respondent adds that in *Al-Nashiri* the military judge communicated and negotiated a start date (for more than a year) with the EOIR, a DoJ component, while in petitioner's case the DoJ's Office of Attorney Recruitment and Management only approved the U.S. Attorney's selection of LC Blackwood as an AUSA and his appointment. *Id.* at 36.

Second, respondent notes *Al-Nashiri* found that the AG had participated in *Al-Nashiri* (i) by consulting on trial procedures, (ii) loaning out an AUSA, and (iii) through the AG's role in the defense of any conviction on appeal. *Id.* In contrast, in *Al-Hadi* (i) the U.S. Attorney for the Western District of Missouri did not "consult[]" or provide "input" on petitioner's prosecution, (ii) the U.S. Attorneys for the Western Districts of Missouri and Texas (both having made job offers to LC Blackwood) never assigned any of their attorneys for detail to the prosecution team for *Al-Hadi* nor had "any connection" to *Al-Hadi*, and (iii) U.S. Attorneys do not assist in the appeal of any conviction in a military commission. *Id.* at 37.

Third, respondent highlights that U.S. Attorneys are "appointed directly by the President" with Senate advice and consent and "are the primary federal law enforcement officers in their respective jurisdictions" but "immigration judges are appointed by the [AG] and are subject to his supervision." *Id.*

"Even if DoJ, as an entity" is found to be a "party" to *Al-Hadi*, respondent argues that expanding "'party' to include the U.S. Attorney for the Western District of Missouri" is "unreasonable." *Id.* at 38. Also, concerning the new evidence on the potential privilege filter attorney for *Al-Nashiri* who is from the Western District of Missouri, respondent asserts this connection is too "attenuated" to "conclude that the USAO for the Western District of Missouri was somehow a party to the *Hadi* commission." *Id.* LC Blackwood, it is argued, did not apply to work for the Office of the Chief Prosecutor. *Id.*

(iii) In its third and final sub-point supporting the contention that petitioner has not established a "clear and indisputable right" to the relief sought, respondent claims that LC Blackwood's other job applications did not create a disqualifying conflict where there was no job offer or acceptance. *Id.* at 38, 43. This is so, respondent claims, because a law clerk's "mere" interview for a job with an office or firm representing a party to a case "does not by itself

create a reasonable question as to the judge's impartiality." *Id.* at 42 (citation omitted).

Respondent explains, under *Al-Nashiri* a reasonable person might question the impartiality of a judge who submits a job application to an office or firm representing a party. *Id.* at 43. *Al-Nashiri*, however, does not mean, nor should it be construed to mean, that a judge's impartiality might also be questioned when a law clerk applies to, or interviews with, "an office appearing as a party before the court." *Id.* at 38; *see id.* at 43. Precedent in *Scott v. United States*, 559 A.2d 745 (D.C. 1989) (en banc), and in *Al-Nashiri*, requires a "direct link between the employing component and the litigating component," *id.* at 40, which respondent argues is missing in petitioner's case, *see id.* at 39-41.

Respondent urges us to consider *United States v. Persico*, No. 04-CR-911 (SJ), 2006 U.S. Dist. LEXIS 64389 (E.D.N.Y Sept. 7, 2006), which it claims is more on point factually. *Id.* at 40. In *Persico*, where the law clerk applied to be an AUSA for the Eastern District of New York—the very office prosecuting Persico—the judge found "no statutory provision, common law precedent, or ethical rule that compels the Court's or the law clerk's recusal." *Id.* at 40-41 (quoting *Persico*, 2006 U.S. Dist. LEXIS 64389, at *5 (citing Fed. Jud. Ctr., Chambers Handbook for Judges' Law Clerks and Secretaries § 2-2(J)(1) (1994)). The judge also found, "no reasonable person would determine that an appearance of impropriety currently exists," and remarked on the absence of authority for a contrary result. *Id.* at 41 (quoting *Persico*, 2006 U.S. Dist. Lexis 64389, at *8). The Eastern District of New York said it was only required to "remain cognizant" of developments and "revisit the issue of recusal if the USAO extends an offer of employment and that offer is accepted." *Id.* (quoting *Persico*, 2006 U.S. Dist. Lexis 64389, at *7). In conclusion, respondent cautions, whatever their ethical obligations, the judge cannot be the "easy victim" of his or her clerk's mistakes or perceived shortcomings. *Id.* at 42 (quoting *Cabrera*, 134 F. Supp. 3d at 446 (quoting *In re San Juan Dupont Plaza Hotel Fire Litig.*, 129 F.R.D. 409, 412 n.5 (D.P.R. 1989).

In the second main argument supporting its contention that petitioner lacks a "clear and indisputable right" to the relief sought, respondent states it is unlikely that Judges Rubin's and Libretto's impartiality "was ever in doubt" on account of LC Blackwood's job applications and his acceptance of the AUSA position in Missouri. *Id.* at 43. Moreover, even if LC Blackwood's actions are problematic, respondent essentially contends that no reasonable and objective person would conclude that any "taint should be imputed to" the two judges, *id.*, because "judges, not law clerks," decide cases, *id.* at 44 (quoting *In re Allied-Signal, Inc.*, 891 F.2d 967, 971 (1st Cir. 1989)). Respondent also relies on (i) the capability of judges to account for their law clerk's potential bias and, (ii) on the military backgrounds of LC Blackwood and the judges, including their military oaths and LC Blackwood's junior rank, as constraints against any inclination to engage in improper conduct. *Id.* at 44-45. Under a "totality of

the circumstances," *id.* at 43-44, respondent further argues that a reasonable person would doubt that a Marine Corps judge advocate would risk criminal liability under the Uniform Code of Military Justice and military and professional consequences to curry favor for his law clerk by engaging in favoritism from the bench toward the law clerk's potential employer, *id.* at 45. Finally, respondent argues that petitioner, in fact, cannot point to any conduct by Judge Libretto that would lead a reasonable person to believe that he appeared partial towards respondent and cites to numerous rulings favorable to petitioner, the extensive voir dire of Judge Libretto, and the substance of compelled testimony given by Judge Waits and LC Blackwood. *Id.* at 45-46.

In its third (and final) main argument concerning the "clear and indisputable" condition for issuance of a writ, respondent contends that any disqualification of Judge Waits does not entitle petitioner to the relief requested. *Id.* at 46. Respondent notes Judge Libretto found in AE 158R that "Judge Waits should have been recused by virtue of his applications to serve as an immigration judge." *Id.* Judge Libretto also gave petitioner "the opportunity to request reconsideration of any of Judge Waits's orders or rulings," which respondent argues is "another means of relief from the appearance of bias" by Judge Waits. *Id.* Respondent also argues that petitioner cannot show a clear and indisputable right to dismissal of the commission or vacatur of all the commission's orders and ruling. *Id.*

Respondent further contends that Judge Libretto's rulings do not "create even the slightest appearance of" bias that render "'fair judgement impossible.'" *Id.* at 47 (citation omitted). Respondent argues that permitting Judge Libretto to continue presiding over petitioner's commission is "perfectly consonant" with *United States v. Microsoft Corp.*, 253 F.3d 34, 117 (D.C. Cir. 2001) (en banc) (per curiam). *Id.* Respondent remarks that it is not clear and indisputable from *Al-Nashiri* that the work of all three judges in petitioner's commission should be suppressed. *Id.* Finally, petitioner cannot show that Judge Libretto clearly abused his discretion, respondent argues, because (i) petitioner filed his mandamus petition before Judge Libretto issued AE 158R and (ii) the commission ruling afforded a remedy where in *Al-Nashiri* there was no remedy by a subsequent judge. *Id.* at 48.

3. On the third writ condition—whether mandamus is appropriate in petitioner's case—respondent argues that the facts do not involve "exceptional circumstances amounting to a judicial usurpation of power, or a clear abuse of discretion." *Id.* (quoting *Cheney*, 542 U.S. at 381). Respondent remarks that *Al-Nashiri* declined vacatur and granted lesser relief to Al-Nashiri. *Id.* at 49. Yet, the facts in *Al-Nashiri* included not just withholding of the judge's job search from the parties, but also a "feud" between the judge and defense counsel and the "lack of discovery or testimony" into the alleged bias, plus the withholding of jurisdiction from the trial court, *id.*, and a job offer and

acceptance, *id.* at 50 & n.291 (citing AE 158R at 13-15). Respondent contends none of these circumstances are present in *Al-Hadi*. *Id.* at 50 & n.291.

Also, applying the three factors listed in *Liljeberg*, respondent argues there is no injustice to petitioner by moving forward because Judge Libretto is unbiased and has granted a remedy to remove previous judicial bias. *Id.* at 50. Respondent argues that denial of the requested relief produces "no injustice in other cases" because the need for a prophylactic message "to encourage judges to [closely] examine and disclose possible grounds for disqualification," *id.*, was served by *Al-Nashiri*. "[T]he government writ-large well marked the *Al-Nashiri III* decision." *Id.* at 51. No one in *Al-Hadi* violated the judicial standards of *Al-Nashiri*, Judge Waits made a voluntary disclosure right after the *Al-Nashiri* decision, *id.* at 50-51, and the government has thoroughly examined the alleged judicial disqualification, *id.* at 51 & n.299 (citing note 55 in its brief detailing discovery in *Al-Hadi*). Finally, respondent argues that "public confidence in the judicial process will be undermined" as petitioner's request for relief is "an attempt to avoid trial," where an unbiased judge can re-evaluate the decisions of Judge Waits. *Id.* at 51. Based on these reasons, respondent claims that "even the [requested] alternative relief," vacatur of all orders since the disqualifying conduct began and recusal of Judge Libretto, is inappropriate. *Id.* at 50; *see* Pet'r Br. 17.

C. Reply

In his reply, petitioner contends that reconsideration of rulings is "not viable" as Judge Libretto "pre-judged any impact of the appearance of bias" when in AE 158R he "determined that no reasonable person would question Judge Waits's impartiality."[41] Reply 2-3. He argues that reconsideration is inadequate here where (i) the rulings are based on complex analyses of "thousands of pages [of] classified information," *id.* at 3-4, (ii) Judge Libretto is disqualified, *id.* at 4, and (iii) the impact from an appearance of bias is not visible from the record, as when Judge Waits may have avoided making decisions to improve his employment opportunities, *id.* at 4-5.

Petitioner further argues that reconsideration "ignores the cascading effect of Judge Waits's rulings." *Id.* at 5; *see id.* at 6, 9; Pet'r Br. 39. For example, Judge Rubin's first order, unwritten and from the bench, "directly stemmed from one of Judge Waits's rulings," Reply 6, on petitioner's "sincerely held religious beliefs," *id.* at 5. He contends that rulings on petitioner's beliefs were "particularly susceptible to being impacted by the appearance of bias" as they addressed "politically visible" issues that "would have been on the mind of [Judge Waits] who was" seeking DoD employment. *Id.* at 7. In sum, petitioner claims that judicial bias has a pervasive and indelible influence on proceedings

[41] Petitioner also claims that Judge Libretto improperly "imposed a prejudice requirement to relief under R.M.C. 902(a)," though there is no such requirement. Reply 3 (Oct. 23, 2019).

and irreparably damages public confidence in the proceedings. *See id.* at 7-8.[42] Reconsideration, he concludes, is not adequate. *See id.* at 8-9. It affords only what R.M.C. 905(f) already provides—"reconsideration of any ruling until the record is authenticated for appeal . . . [and possibly] a potentially infinite loop of reconsideration for years to come." *Id.* at 9.

Petitioner also asserts his commission clearly abused its discretion when it determined that an appearance of bias was "unclear to Judge Waits in 2014 and 2015" because the D.C. Circuit issued a writ of mandamus on this point. *Id.* at 10. He claims that Judge Libretto's analysis on Judge Waits' DoD application was faulty because Judge Libretto focused on the DoD as the source of pay and essentially treated a civilian job application "the same as receiving active duty orders." *Id.* at 11. He asserts, however, that "hop[ing]" for a job offer and "convinc[ing] the DoD that it should" make an offer is different from "simply waiting to receive orders for the next military assignment." *Id.* Finally, petitioner distinguishes *Weiss v. United States*, 510 U.S. 163 (1994), as inapposite on the issue of similarity between commissions and courts-martial because *Weiss* does not address the Military Commissions Act and the structural protections for military judges discussed in *Weiss* are not relevant to the issue presented. *Id.* at 12.

Petitioner next contends that LC Blackwood's applications to the Defense Intelligence Agency and Naval Criminal Investigative Service were disqualifying for the same reasons that Judge Waits' applications to the Code 20 Navy civilian position were. *Id.* at 13. LC Blackwood's application to the DoJ's National Security Division (NSD) was disqualifying because NSD is "inextricably intertwined with the Office of the Chief Prosecutor" for military commissions, as it had worked with the DoD to determine which cases to prosecute (and the forum) under a congressional protocol developed in conjunction with the 2009 reform of the Military Commissions Act. *Id.* Petitioner argues that Judge Libretto's decision to the contrary was a clear abuse of discretion "giving rise to a clear and indisputable right to a writ of mandamus" because these applications, alone, created a disqualifying appearance of bias. *Id.* (citing *Al-Nashiri*, 921 F.3d at 237; *Pepsico*, 764 F.2d at 461).

Petitioner notes the government's "newly disclosed" facts show that (i) the U.S. Attorney from the Western District made his Deputy U.S. Attorney (the Deputy Criminal Division Chief) available for work on a privilege team in *Al-Nashiri*, and (ii) the Deputy Chief "interviewed and helped select" LC Blackwood to be a national security AUSA in his district. *Id.* at 14. Petitioner argues that these facts show a clear connection between the USAO for the Western District of Missouri and the military commissions, and between the Deputy Chief and the Office of the Chief Prosecutor for military commissions.

[42] Petitioner also discusses *Corbell v. Norton*, 334 F.3d 1128, 1139 (D.C. Cir. 2003) (collecting cases addressing appropriateness of issuing a writ of mandamus for recusal of a judicial officer). *Id.* at 8.

Id. Regarding the extent of DoJ involvement in AUSA hiring, he observes that along with the Deputy Chief's personal involvement in military commissions, a single DoJ webpage lists all open AUSA positions and DoJ "main justice" made the final offer to LC Blackwood. *Id.* at 15.

Petitioner also offers that LC Blackwood's ex parte meetings with the prosecution on classified information, *id.*, left "'no trace in the record' and thus [led] to 'selection bias,' an influence over the way the judicial officer approaches the task," *id.* at 16 (quoting *Brooks*, 383 F.3d at 1046; citing *In re Kempthorne*, 449 F.3d 1265, 1270 (D.C. Cir. 2006)). Finally, petitioner emphasizes the corrosive effect of the appearance of bias on public confidence in military commissions and concludes that mandamus is appropriate. *Id.* at 16.

VI. Discussion

Petitioner argues his mandamus petition should be granted because (i) irreparable injury results from continued litigation that was overseen by a judge (Judge Waits), who should have recused himself, and (ii) the litigation is based on "orders issued by judges [Rubin and Libretto] who should have been disqualified." Pet'r Br. 1-2. Our analysis involves consideration of the military judge's (Judge Libretto's) refusal to recuse himself (AE 160K) and his ruling on petitioner's motion to dismiss (AE 158R).

A. Writ of mandamus

Our superior court has explained the writ of mandamus in the following terms:

> As we often caution, "[m]andamus is a 'drastic' remedy, 'to be invoked only in extraordinary circumstances.'" *Fornaro v. James*, 416 F.3d 63, 69 (D.C. Cir. 2005) (quoting *Allied Chem. Corp. v. Daiflon, Inc.*, 449 U.S. 33, 34 (1980)). It is not available unless "no adequate alternative remedy exists." *Barnhart v. Devine*, 771 F.2d 1515, 1524 (D.C. Cir. 1985). Otherwise, the writ could "be used as a substitute for the regular appeals process." *Cheney*, 542 U.S. at 380-81. Chief Justice Waite summed it up well: "The general principle which governs proceedings by *mandamus* is, that whatever can be done without the employment of that extraordinary remedy, may not be done with it." *Ex parte Rowland*, 104 U.S. 604, 617 (1881).

Al-Nashiri I, 791 F.3d at 78 (alteration in original) (parallel citations omitted). We may grant a writ of mandamus when all three of the following conditions are met:

> First, the party seeking issuance of the writ must have no other adequate means to attain the relief he desires . . . . Second, the petitioner must satisfy the burden of showing that his right to issuance of the writ is clear and indisputable. Third, even if the first two prerequisites have been met, the issuing court, in the exercise of its discretion, must be satisfied that the writ is appropriate under the circumstances.

Id. (quoting *Cheney*, 542 U.S. at 380-81). "[M]andamus requires a case not merely close to the line but clearly over it . . . ." *Martinez-Catala*, 129 F.3d at 221 (involving mandamus petition to compel judge's recusal).

B. Judge Waits' application for immigration judge positions was disqualifying

1. No clear and indisputable right to writ of mandamus

Judge Waits presided over petitioner's commission from June 3, 2014, through October 31, 2016. AEs 001, 001A. As an initial matter, we do not question his candor because his actions were not unreasonable. *See* Tr. 2997-99, 3021-23; AE 158R at 8, 13. We have no reason to doubt his testimony that he considered the *Al-Nashiri* decision to be "a surprise" and "monumental" in light of his own legal background. Tr. 2999. As the *Al-Nashiri* decision features prominently in our analysis, a comparison with its facts relative to this point is pertinent. In *Al-Nashiri*, the trial judge (Judge Spath) did not disclose the fact that he had accepted an immigration judge position in the DoJ, EOIR for over a year, while he negotiated a start date and also continued to preside over *Al-Nashiri*. 921 F.3d at 237. Also, "less than twenty-four hours after" being notified of his July 2018 start date as an immigration judge, he "indefinitely abated commission proceedings." *Id.* Comparison of Judge Spath's two-plus-year notification to Judge Waits' nine-day notification, *supra* note 14, is not relevant here to the extent that Judge Waits had the benefit of, and in fact relied on, the analysis in *Al-Nashiri* to guide him. *See* Tr. 2997, 3019-20. In contrast to Judge Spath, however, Judge Waits did not abate proceedings, which ruling could be construed as being based on personal career decisions, depending on the circumstances.

Nonetheless, Judge Waits' application for an immigration judge position with the EOIR disqualified him from serving as the presiding judge on this commission and thus petitioner is entitled to a remedy. The D.C. Circuit decided in *Al-Nashiri* that an appearance of partiality is created when a military commission judge applies for an immigration judge position. 921 F.3d at 237. The Court reasoned, "[T]he "Attorney General himself is directly involved in selecting and supervising immigration judges," *id.* at 235, and "was a participant in Al-Nashiri's case from start to finish: he has consulted on commission trial procedures, he has loaned out one of his lawyers [to prosecute

Al-Nashiri], and he will play a role in defending any conviction on appeal," *id.* at 236. Accordingly, the Court determined that "[Judge] Spath's employment application alone would thus be enough to require his disqualification." *Id.* at 237. Judge Libretto recognized this as a "bright line" rule, AE 158R at 15, and apparently so did Judge Waits once he reviewed the *Al-Nashiri* decision,[43] *see* Tr. 2997, 3000. Judge Libretto concluded that under *Al-Nashiri*, the "application alone" for an immigration judge position "was enough to require [] disqualification." AE 158R at 16. *Al-Nashiri* mandates our conclusion that Judge Waits created a disqualifying appearance of partiality when he applied for an immigration judge position while presiding over petitioner's commission.[44] Thus, the question before us is not whether a remedy is appropriate but whether the remedy in AE 158R is adequate. Petitioner has not shown that his right to a writ of mandamus is "clear and indisputable." *Cheney*, 542 U.S. at 381 (citations omitted).

2. Another means to attain desired relief is adequate

Judge Libretto did not abuse his discretion in providing for reconsideration of Judge Waits' rulings and orders because this remedy is an "adequate means to attain" the desired relief, that is, trial in proceedings before an impartial judge. *Cheney*, 542 U.S. at 380 (citation omitted). *Al-Nashiri I*

---

[43] Judge Waits testified that the *Al-Nashiri* decision "was a surprise to judges writ large." Tr. 2999. He explained,

> [A]s a judge advocate in the Navy, you move from job to job and you fulfill different roles within the military justice system, and you fulfill the role that you're fulfilling at that time.
>
> . . . [I]t never occurred to me. And I don't think any other judge that I've talked to who I've asked this question -- would have occurred to them that I had even the appearance of a conflict of interest in this instance.

Tr. 2997-98. He elaborated that in the military justice system, attorneys "move from prosecution to defense to being judges to being [Staff Judge Advocates]. It happens all the time. And people have to stay within their lanes, and they have to perform the roles that they are charged with performing . . . ." Tr. 3022. Judge Waits added that when he "negotiated for orders" for his next assignment, "there were jobs that I wanted more than other jobs, but it didn't affect how I performed the job that I was doing at the time. In the military, we just don't think in those terms." *Id.*; *cf.* Tr. 3119 (convening authority stating there was no discussion in his DoD interview "about a particular desired result in any military commission case"). It is the sense of this Court, based on our interactions with judge advocates over the course of our legal careers and our personal experience in the Judge Advocate General assignment process (for the two military judges assigned to this case), that Judge Waits' reaction to *Al-Nashiri* is fair.

[44] We decline to consider whether Judge Waits' application for any position with the DoD or any component or agency thereof (including the Code 20 Navy civilian position) is disqualifying. Moreover, even if disqualified because of his DoD job search, the period of disqualification would overlap the existing period of disqualification created by Judge Waits' application for an immigration judge position.

explained that the mandamus writ cannot "remedy anything less than a 'clear abuse of discretion or usurpation of judicial power.'" 791 F.3d at 82 (quoting *Bankers Life & Cas. Co. v. Holland*, 346 U.S. 379, 383 (1953)); *see also Allied Chem. Corp. v. Daiflon, Inc.*, 449 U.S. 33, 35 (1980) (per curiam) ("Only exceptional circumstances, amounting to a judicial usurpation of power, will justify the invocation of this extraordinary remedy."). "Otherwise, 'every interlocutory order which is wrong might be reviewed under the All Writs Act' and '[t]he office of a writ of mandamus would be enlarged to actually control the decision of the trial court rather than used in its traditional function of confining a court to its prescribed jurisdiction.'" *Al-Nashiri I*, 791 F.3d at 82 (alteration in original) (quoting *Banker's Life*, 346 U.S. at 383). Petitioner has available "'ordinary appellate review' after conviction" and therefore "'must identify some "irreparable" injury that will go unredressed if he does not secure mandamus relief' now." *Al-Nashiri*, 921 F.3d at 237 (quoting *Al-Nashiri I*, 791 F.3d at 79 (quoting *Banks v. Office of Senate Sergeant-at-Arms & Doorkeeper of U.S. Senate*, 471 F.3d 1341, 1350 (D.C. Cir. 2006))).

The requirement for irreparable injury is "easily satisfied here" because petitioner's alleged injury is "'by its nature irreparable'"—without relief he would have to proceed before a disqualified judge. *Id.* at 238 (quoting *Cobell*, 334 F.3d at 1139). As our superior court explained,

> After conviction, no amount of appellate review can remove completely the stain of judicial bias, both "because it is too difficult to detect all of the ways that bias can influence a proceeding" and because public "confidence . . . is irreparably dampened once 'a case is allowed to proceed before a judge who appears to be tainted.'" *Al-Nashiri I*, 791 F.3d at 79 (quoting *In re School Asbestos Litigation*, 977 F.2d 764, 776 (3d Cir. 1992), *as amended* (Oct. 23, 1992)).

Id. Thus, mandamus is "'an appropriate vehicle for seeking recusal of a judicial officer during the pendency of a case, as "ordinary appellate review" following a final judgment is "insufficient" to' remove the insidious taint of judicial bias." *Id.* at 233 (quoting *Mohammad*, 866 F.3d at 475 (quoting *Al-Nashiri I*, 791 F.3d at 79)); *see also Pepsico*, 764 F.2d at 460 (stating it is "clear that mandamus is an appropriate remedy against a judge who refuses to recuse himself when required to do so by the statutory standard" (citing *SCA Servs., Inc. v. Morgan*, 557 F.2d 110, 117-18 (7th Cir. 1977) (per curiam))).

Yet, because we have found that no objective reasonable person, knowing all the facts and circumstances of petitioner's case, would conclude that LC Blackwood created an appearance of bias by engaging in a search for employment with the USAOs for the Western Districts of Missouri and Texas (both of which extended offers) and by accepting a position with the Missouri USAO, *see infra* Part VI.C.2.a, we need only address whether the relief provided

in AE 158R adequately addresses the goal of securing proceedings free from the appearance of bias created by Judge Waits. We thus address (i) the adequacy of the remedy at AE 158R to remove any taint from rulings or orders issued by Judge Waits, and (ii) whether vacatur of the convening orders or dismissal is required to remove any taint from petitioner's commission.[45] We first consider, however, petitioner's reliance on *Al-Nashiri* for his position that there exists no other adequate means to attain the desired relief. *See* Pet'r Br. 19-20.

Such reliance is inapt, as the facts of *Al-Nashiri* are unique and particularly egregious. We focus on two primary distinctions between *Al-Nashiri* and petitioner's commission. First, featured prominently was the "public battle of wills" between Judge Spath and defense counsel, AE 158R at 11, and the impact of that battle on Judge Spath's conduct. The D.C. Circuit elaborated on this battle over the span of four pages, *see Al-Nashiri*, 921 F.3d at 228-31, and rightfully so as such a display can result in disqualification of a judge, *Hurles v. Ryan*, 752 F.3d 768, 789 (9th Cir. 2014) ("A judge must withdraw where [he or] she . . . 'becomes embroiled in a running, bitter controversy' with one of the litigants . . . ." (quoting *Mayberry v. Pennsylvania*, 400 U.S. 455, 465 (1971))); *see also Offutt v. United States*, 348 U.S. 11, 17 (1954) (involving case where judge became "personally embroiled" with defense counsel), *cited in McBryde v. Comm. to Rev. Cir. Council Conduct & Disability Orders of the Jud. Conf. of the U.S.*, 264 F.3d 52, 78 (D.C. Cir. 2001). Petitioner's case, however, involves no such battle. Second, Judge Spath continued to preside over the case during his year-long negotiation for a start date. *See Al-Nashiri*, 921 F.3d at 228; AE 158R at 11. Combined with the curious timing of his indefinite abatement of the proceedings (within twenty-four hours of receipt of the notice of a start date), *Al-Nashiri*, 921 F.3d at 237, the facts in *Al-Nashiri* stand in sharp contrast to *Al-Hadi*, where Judge Waits was not extended an opportunity to interview and did not receive a job offer. Tr. 3023.

a. Law of the case does not apply

The law of the case does not render reconsideration by Judge Libretto (or his successor) "pointless," as argued. Reply 3. Pursuant to AE 158R, petitioner only has to file a "notice pleading" on the rulings or orders he wants reconsidered. AE 158T at 3. Unlike R.M.C. 905(f), there is no requirement to "make any new argument for relief, nor offer new evidence, nor point to any change in the law." *Id.* at 2-3. Appellate Exhibit 158R thus permits all rulings and orders favorable to petitioner to remain but subjects unfavorable ones to full reconsideration. *Id.* at 3. The reconsideration remedy permits no ruling or order of Judge Waits to escape review. In his reply, petitioner argues that the law of the case precludes Judge Libretto from reconsidering Judge Waits' rulings and orders because Judge Libretto has already ruled that "no reasonable

[45] At *infra* Part VI.D.1 (discussing AE 160K), we conclude that Judge Libretto was not required to recuse himself and thus we find he was qualified to reconsider the rulings and orders to be identified by petitioner pursuant to AE 158R, as would be his successor.

person would question Judge Waits's impartiality." Reply 2-3 (citing *Al-Nashiri*, 921 F.3d at 238 (applying law of the case); AE 158R at 13, 15, 17). The law of the case doctrine means "the *same* issue presented a second time in the *same case* in the *same court* should lead to the *same result*." *LaShawn A. v. Barry*, 87 F.3d 1389, 1393 (D.C. Cir. 1996) (en banc), *quoted in FedEx Home Delivery v. NLRB*, 849 F.3d 1123, 1127 (D.C. Cir. 2017) (adding doctrine applies twice as strongly "when the parties are the *same*"). As cited by petitioner, Judge Libretto made three statements in his ruling that touch upon petitioner's argument. The first two are similar for purposes of analysis and do not implicate the law of the case doctrine. The third statement is considered separately.

In his first statement at page 13 of AE 158R, Judge Libretto stated:

> However, this Commission understands why, pre-*Al Nashiri*, Judge Waits would not have considered the DOJ to be a party to this Military Commission and why it would not have occurred to him that his application for employment in the field of immigration law could be seen as raising potential questions regarding his impartiality while presiding over this Military Commission.

Here, Judge Libretto talks about Judge Waits' perception of the law before *Al-Nashiri*. Stating that he comprehended Judge Waits' viewpoint prior to *Al-Nashiri* is another way of conveying that the outcome of *Al-Nashiri* was unexpected. Judge Libretto's statement is merely giving credit to this fact and is not a statement that implicates the law of the case doctrine.

In Judge Libretto's second statement at page 15 of AE 158R, he said:

> Based on a consideration of the totality of the circumstances, including a comparison of the facts of this case with those of *Al Nashiri*, a reasonable, well-informed person would be *much less likely* to question Judge Waits' impartiality than the impartiality of the judge in *Al Nashiri* for the reasons (previously discussed) that distinguish these two cases. In fact, based . . . [on] the totality of the circumstances . . . this Commission *might* conclude that a reasonable person, familiar with all of the circumstances, would not question Judge Waits' impartiality.

(Emphasis added.) The first sentence in this segment is a comparison between *Al-Nashiri* and *Al-Hadi*. It essentially says the facts in *Al-Hadi* are different than the facts in *Al-Nashiri*. Thus, any cause to question Judge Waits' impartiality by a reasonable, well-informed person "would be much less likely" than in the circumstances of *Al-Nashiri*. This comparative statement on the nature of the facts in each case and their implication on the appearance of

partiality does not create law of case. It is just an observation about how the two cases are different.

Regarding the second sentence from this segment of AE 158R, Judge Libretto merely seems to be saying that given the facts, the commission "might" conclude (or there was some "possibility" of a conclusion) that a reasonable person would not question Judge Waits' impartiality. *See* Webster's Third New Int'l Dictionary Unabridged (2002) (defining "might" as "less probability or possibility than *may*"); Black's Law Dictionary (11th ed. 2019) (defining "possibility" as "[a]n event that may or may not happen" and "often (but not always) conveys a sense of uncertainty or improbability"). The business of lawyers is words. *See, e.g.*, *Loe v. Heckler*, 768 F.2d 409, 414 n.4 (D.C. Cir. 1985) (recognizing lawyers' specialty in language). We thus are obliged to presume that Judge Libretto's selection of "might" for use in the second sentence was intentional rather than merely a "simple mistake in draftsmanship," *Russello v. United States*, 464 U.S. 16, 23 (1983), or the result of stylistic editing, *cf. Andreiu v. Ashcroft*, 253 F.3d 477, 482 (9th Cir. 2001) (en banc) (observing that use of literary device should be compatible with "need for precision in legislative drafting" (quoting *Reno v. Am.-Arab Anti-Discrim. Comm'n*, 525 U.S. 471 (1999))). As a mere possibility, the second statement is not law of the case in *Al-Hadi*.[46]

Regarding the third and final statement on the reasonable knowledgeable observer highlighted by petitioner, Judge Libretto concluded, "[A] reasonable observer with knowledge of all circumstances would not reasonably question Judge Waits' impartiality simply because he applied for a civilian position with DON [Department of the Navy] . . . ." AE 158R at 17. We make three points here.

(i) First, the facts in *Al-Hadi* dictate a different outcome than in *Al-Nashiri*. In *Al-Nashiri*, the D.C. Circuit held that "the enduring consequences of [the CMCR's] previous rulings—two in particular—would significantly constrain and maybe even bar the new military judge's ability to afford Al-Nashiri a complete remedy." 921 F.3d at 238. The first CMCR ruling involved our Court "retain[ing] jurisdiction over the issue of Al-Nashiri's representation." *Id.* at 238 (citation omitted). In our second ruling, we

[46] It bears worth noting here that the specific wording of the CMCR ruling at issue in Al-Nashiri—that Appellee has not shown that "'a reasonable and informed observer would question the judge's impartiality.' *SEC v. Loving Spirit Foundation, Inc.*, 392 F.3d 486, 493 (D.C. Cir. 2004) (internal quotation marks omitted)," Order, *United States v. Al-Nashiri*, No. 18-002, at 3 (CMCR Nov. 2, 2018), was a conclusion we drew from the paucity of evidence by Al-Nashiri of the conflict of interest when the case was before our Court. *Id.* at 2-3. It is not an understanding of the military judge, as is Judge Libretto's statement at page 13 of AE 158R. It is not a comparison and contains no conditional terminology or words of equivocation like Judge Libretto's statements on page 15 of AE 158R. Unlike these statements in Al-Hadi's commission, the CMCR ruling (and law of the case) in *Al-Nashiri* is a clear and concise determination of the issue that was before the D.C. Circuit.

determined that Al-Nashiri had not established that a reasonable, informed observer would question Judge Spath's impartiality under a "heightened mandamus standard." *Id.* Our superior court determined that these two CMCR decisions rendered a new judge "incapable of vacating all the orders necessary to purge" the *Al-Nashiri* proceedings of any disqualifying influence from Judge Spath. *Id.* at 239. Petitioner argues that with his third statement, Judge Libretto likewise "pre-judged any impact of the appearance of bias on Judge Waits's rulings," thereby preventing the efficacy of AE 158 as a remedy. Reply 3. There is, however, no similar jurisdiction retention ruling by our Court in *Al-Hadi*. Thus, the first half of the factual basis relied upon in *Al-Nashiri* for its law of the case ruling is missing from *Al-Hadi*.

(ii) Second, the D.C. Circuit's *Al-Nashiri* ruling is much more tentative than recognized in petitioner's argument. The Court stated the two CMCR rulings "would significantly constrain and *maybe* even bar" a new judge from providing a "complete remedy." *Al*-Nashiri, 921 F.3d at 238 (emphasis added). It did not say that the rulings prevented a new judge from providing a complete remedy. The Court only said the two rulings made it much harder for a new judge to provide a complete remedy and there was even a possibility that the new judge may not be able to do so. The plain meaning of the specific words used in the *Al-Nashiri* law of the case ruling causes us to pause over the certainty with which petitioner argues the correctness of his position.

(iii) Third, if Judge Libretto's third statement is law of the case under *Al-Nashiri*, it has no application to matters we are presently addressing. In his analysis of Judge Waits' application for DoD employment, Judge Libretto concluded that the reasonable observer "would not reasonably question Judge Waits' impartiality" for having applied for a Navy civilian position. AE 158R at 17. Noticeably, the ruling applies to Judge Waits' DoD or Navy job search. *See id.* at 16-18. Judge Libretto's ruling thus has no relevance to our analysis because we have deferred consideration of whether the DoD or Navy job search created an appearance of partiality. *See supra* note 44 and *infra* Part VI.C.2.d. Nor should we apply law of the case, specifically confined to Judge Waits' search for and acceptance of a Navy job, to his search for an immigration judge position because (i) the issues raised by each of these employment searches require different analysis and (ii) Judge Waits' search for an immigration judge position was central to our conclusion that he created a disqualifying appearance of partiality, while his search for a DoD position played no role. *See supra* Part VI.B.1.

For all the above reasons, we conclude that petitioner's law of the case argument is inapplicable here.

b. Invisible impact argument is speculative

The argument that Judge Waits' appearance of bias had an invisible impact tainting rulings and orders never made, or even considered, is speculative. *Al-Nashiri* ruled that Judge Spath's employment application "cast an intolerable cloud of partiality over *his* subsequent judicial conduct." 921 F.3d. at 237 (emphasis added). Petitioner seeks to expand this ruling to all rulings and orders never made by all judges in petitioner's case, *see* Pet'r Br. 20, 39. He argues that the appearance of bias had an "invisible" impact on "minute-by-minute rulings—and failures to rule—during hearings and in *ex parte* meetings with the prosecution. . . . For example, the issues where Judge Waits failed to rule are invisible, but certainly an area where the appearance of bias has an impact." Reply 4-5. Petitioner cites to *Al-Nashiri* for this argument. *See* Pet'r Br. 20.

Petitioner's "invisible" impact argument, however, is speculative. *See Martinez-Catala*, 129 F.3d at 220 (explaining that section 455 recusal cannot "be based on an 'unsupported, irrational, or highly tenuous speculation'" (quoting *In re United States (Tauro)*, 666 F.2d 690, 694 (1st Cir. 1981))); *Miranne*, 688 F.2d at 985 (stating bias allegations were "far too speculative" where appellants alleged they long thought of suing judge's son, who sued a bankrupt company in which appellants had an interest, yet had not filed during the five years since son filed suit); *B & W Mgmt.*, 71 B.R. at 992 (reciting complex bias allegation originating from court's financial arrangements with a non-party, which was found to be "remote and unrealistic" (citing *Chitimacha Tribe of Louisiana v. Harry L. Laws Co.*, 690 F.2d 1157 (5th Cir. 1982))).

Petitioner asserts that Judge Waits' interest in a DoD civilian job "could easily inform his choices to avoid ruling on motions where he anticipated that a ruling might be viewed negatively by his future employer. It is impossible to articulate and identify the impact of the appearance of bias on every order and failure to rule." Reply 5, *see* Pet'r Br. 20. We find, however, "[t]he fact that a party can postulate a series of events which, if they occurred, might tend to affect a judge's impartiality cannot satisfy the objective test mandated." *B & W Mgmt.*, 71 B.R. at 992 (concerning section 455(a)). Petitioner's opinion as to how the military judge might have ruled is not evidence of judicial partiality. *Cf. Cooney v. Booth*, 262 F. Supp. 2d 494, 503 (E.D. Penn. 2003) ("A lawyer's opinion as to how a judge has ruled or is likely to rule does not constitute evidence of the judge's partiality." (citing *Martinez-Catala*, 129 F.3d at 219)), *aff'd*, 108 Fed. App'x 739 (3d Cir. 2004). Here, a knowledgeable reasonable observer undoubtedly would see petitioner's "invisible" impact claim as just a "theor[y] about matters over which there is no certain knowledge"—the definition of speculation in Black's Law Dictionary (11th ed. 2019).

c. Cascading impact argument is forfeited

Petitioner's "cascading impact" argument is forfeited due to lack of citation to relevant authority, except possibly with regard to the AE 21 series. Petitioner argues that *Al-Nashiri* encompasses not just rulings and orders of the judge who created the appearance of bias, but also all rulings and orders issued by any subsequent judge in his case. *See* Pet'r Br. 20, 36-37 & n.179, 39; Reply 5-9. He explains that Judge Waits' rulings had a "cascading effect," Reply 5, such that his "orders necessarily impacted Judge Rubin's, and both of their orders necessarily impacted Judge Libretto's." Pet'r Br. 39. As an example, petitioner argues that Judge Rubin's "first order . . . from the bench—directly stemmed," Reply 6, from Judge Waits' ruling (AE 21DD) on petitioner's request for no contact with female guards during transportation, *id.* at 5-6. This example aside, citation to facts in the record to support the broader claim that all rulings and orders by all subsequent judges in petitioner's case were "necessarily impacted" by the rulings of previous judges is found wanting. *See infra* discussion on AE 21 series. Nor does any of his cited legal authority concern the theory of cascading impact.[47] In *Al-Nashiri*, the D.C. Circuit never had occasion to consider any "cascading impact" because Judge Spath was the only judge who issued rulings and orders in *Al-Nashiri*.[48] *See* 921 F.3d at 226.

Arguments "lacking citation to the record and relevant authority" are "forfeited." *United States v. Moore*, 651 F.3d 30, 97 (D.C. Cir. 2011) (per curiam), *aff'd sub nom. Smith v. United States*, 568 U.S. 106 (2013); *Abdelfattah v. U.S. Dep't of Homeland Sec.*, 787 F.3d 524, 532 (D.C. Cir. 2015) (stating "'cursory arguments'" need not be considered and are "deem[ed] forfeited" (quoting *Hutchins v. District of Columbia*, 188 F.3d 531, 539-40 n.3 (D.C. Cir. 1999) (en banc))). In *Carducci v. Regan*, the D.C. Circuit declined to resolve an issue of first impression "on the basis of briefing and argument by counsel which literally consisted of no more than the assertion of violation of due process rights, with no discussion of case law supporting that proposition or of the statutory text and legislative history relevant to the central question." 714 F.2d 171, 177 (D.C. Cir. 1983). *Carducci* explained, "The premise of our adversarial system is that appellate courts do not sit as self-directed boards of legal inquiry and research, but essentially as arbiters of legal questions

[47] In support of his cascading bias theory, petitioner cites to *Al-Nashiri*, 921 F.3d 224, as well as (1) *Cobell v. Norton*, 334 F.3d 1128, 1139 (D.C. Cir. 2003), for its statements on irreparable injury and the appropriateness of issuing a mandamus, Pet'r Br. 19-20; Reply 8; (2) *In re Sch. Asbestos Litig.*, 977 F.2d 764, 776-77 (3d Cir. 1992), for the proposition that "public confidence in the judicial system . . . cannot be remedied on appeal," Reply 8; and (3) *In re United States (Tauro)*, 666 F.2d 690, 694 (1st Cir. 1981), for its statement on public confidence, Reply 8.

[48] Judge Spath's replacement was detailed, effective on August 6, 2018, *Al-Nashiri*, 921 F.3d at 231, until about January 4, 2019, and a second replacement had been detailed when *Al-Nashiri* was decided, *id.* at 233. Neither replacement judge issued any rulings or orders in *Al-Nashiri* while the D.C. Circuit was deciding the case.

presented and argued by the parties before them." *Id.*, *quoted in Jawad v. Gates*, 832 F.3d 364, 371 (D.C. Cir. 2016); *Abdelfattah*, 787 F.3d at 540; *and Anna Jaques Hosp. v. Sebelius*, 583 F.3d at 1, 7 (D.C. Cir. 2009). *Carducci* continued, stating that Fed. R. App. P. 28(a)(4) thus "requires that the appellant's brief contain 'the contentions of the appellant with respect to the issues presented, and the reasons therefor, with citations to the authorities, statutes and parts of the record relied on.'" 714 F.2d at 177; *see Bush v. District of Columbia*, 595 F.3d 384, 388 (D.C. Cir. 2010) ("Appellate briefs 'must contain' citations to the authorities and record that support their arguments." (quoting Fed. R. App. P. 28(a)(9)(A))); *Jaques*, 583 F.3d at 7 (stating parties must "provide 'citations to the authorities and parts of the record . . . [that] bolster their arguments" (quoting Fed. R. App. P. 28(a)(9)(A))).[49]

"Unsupported allegations" that Judge Waits' disqualifying appearance of lack of impartiality had a cascading impact on all the rulings and orders of Judges Rubin and Libretto "are insufficient for us to render a judgment on the merits of such a claim." *Jaques*, 583 F.3d at 7. As in *Carducci*, "where counsel has made no attempt to address the [legal] issue, we will not remedy the [alleged] defect, especially where, as here, 'important questions of far-reaching significance' are involved."[50] 714 F.2d at 177 (quoting *Alabama Power Co. v. Gorsuch*, 672 F.2d 1, 7 (D.C. Cir. 1982) (per curiam)). Here, petitioner's argument involves "important questions of far-reaching significance." *Id.*

---

[49] *See* Fed. R. App. P. 28(a)(8)(A) for the current provision requiring citation to legal authorities and parts of the record in support of argument.

[50] Although declining to supplement petitioner's argument "through our own deliberation and research," *Carducci v. Regan*, 714 F.2d 171, 177 (D.C. Cir. 1983), we have come across one case cited in *Doe v. Cabrera*, 134 F. Supp. 3d 439, 453 (D.D.C. 2015), that has addressed the cascading impact argument quite directly. In this case, *In re Chandler's Cove Inn, Ltd.*, 97 B.R. 752, 755 (Bankr. E.D.N.Y. 1988), the first bankruptcy judge (Judge One) recused herself sua sponte upon learning of her law clerk's attendance at the first creditor's meeting when she was out of country and a second judge (Judge Two) was presiding over the case. The court determined that 11 U.S.C. § 341(c) prohibited the court's attendance at the meeting to free the judge from an "administrative function," not "to make [attendance] improper." *Id.* Section 341(c) made no mention of law clerks. *Id.* at 754. Judge Two was assigned to the case after Judge One recused herself. *Id.* Debtor sought recusal of Judge Two for an appearance of impropriety, *id.*, based in part on his being tainted due to "routine contact with the law clerk" after the law clerk's attendance at the meeting, *id.* at 755. On the motion for his recusal, Judge Two found that the prior sua sponte recusal was more to avoid delay and the "possibility of a specious accusation" than for the "appearance of impropriety." *Id.* at 754. He concluded that Judge One's sua sponte recusal did not "create a precedent that mandates recusal of any judge who has had any peripheral contact with [Judge One's] former law clerk." *Id.* at 756. Judge Two also observed that debtor's recusal request was based on "the alleged misconduct of the law clerk, and not the court. Even if this argument had any validity, then it is the law clerk, and not the judge, to whom recusal should be directed." *Id.*, *quoted in Cabrera*, 134 F. Supp. 3d at 453. Judge Two continued, "where a reasonable person might question the law clerk's impartiality, then the clerk should be disqualified, and not the court." *Id.* If our Court were to consider petitioner's cascading impact argument, petitioner's position would be inconsistent with *Chandler's Cove*.

(citation omitted). A decision about the scope of the impact from Judge Waits' disqualifying appearance of partiality has the potential to negate four years of litigation. *See, e.g., Uniloc USA, Inc. v. Microsoft Corp.*, 492 F. Supp. 2d 47, 56-57 (D.R.I. 2007) (commenting on negative impact of recusal in complex software patent case involving four years of litigation), *aff'd in part, rev'd in part*, 290 Fed. App'x 337 (Fed. Cir. 2008) (unpublished);[51] *San Juan*, 129 F.R.D. at 414-16 (commenting on negative impact of recusal in hotel fire case that killed 97 people and involved 230 attorneys and 2 ½ years of litigation).

Finally, petitioner cites *Williams v. Pennsylvania*, 136 S. Ct. 1899 (2016), as authority to support his argument that "Judge Waits's conduct must be scrubbed from this military commission." Pet'r Br. 39. Petitioner states "that revisiting orders with a fresh judge is unlikely to purge the taint because this half-remedy produces the risk 'that the judge would consciously or unconsciously avoid the appearance of having erred or changed position.'" *Id.* at 37 (quoting *Williams*, 136 S. Ct. at 1906). To the extent petitioner relies on *Williams* for his "cascading impact" argument, *see id.* at 37-39, this reliance is misplaced. *Williams* and the case it applies, *In re Murchison*, 349 U.S. 133 (1955), each involved a judge who previously served as a prosecutor on the case. *Williams*, 136 S. Ct. at 1903 (involving district attorney who officially approved death penalty and then as state supreme court justice denied prisoner's recusal motion); *In re Murchison*, 349 U.S. at 134-35 (involving state judge who served as "one-man grand-jury" and then "convicted and sentenced" defendants for contempt). *Williams* explains a prosecutor's special circumstances: "Having been a part of [the accusatory] process a judge cannot be, in the very nature of things, wholly disinterested in the conviction or acquittal of those accused." 136 S. Ct. at 1906 (alteration in original) (quoting *In re Murchison*, 349 U.S. at 137). Petitioner's claim that "[t]here remains a serious risk that a judge [here, Judges Rubin and Libretto] would be influenced by an improper, if inadvertent, motive to validate and preserve the result," Pet'r Br. 37 (quoting *Williams*, 136 S. Ct. at 1907), is not on point. The enduring interest of a prosecutor in the outcome of his or her case is plain to see. *See Murchison*, 349 U.S. at 138 (stating "it is difficult if not impossible for a judge to free himself from the influence" of his involvement in the accusatory process). There is no similar enduring interest in a military judge who has no prior history with the commission case to which he or she has been detailed. *Williams* does not apply to the instant case where neither Judge Libretto nor Judge Rubin had previous involvement in petitioner's case, much less as a prosecutor.

This being said, petitioner's allegation that Judge Waits' disqualifying appearance of partiality impacted the AE 21 series stands apart from his general allegation impugning all subsequent rulings and orders. Although there is an

[51] The United States Court of Appeals for the Federal Circuit affirmed the district court's denial of Uniloc's motion for recusal and reversed and remanded the decision granting summary judgment in favor of Microsoft. *Uniloc USA, Inc. v. Microsoft Corp.*, 290 Fed. App'x 337, 339 (Fed. Cir. 2008).

absence of citation to relevant legal authority, we understand from the pleadings how the AE 21DD ruling from Judge Waits, rendered while he was laboring under an appearance of partiality, may have played a role in a ruling by Judge Rubin in the AE 21 series. *See* Reply 5-6 (citing Unofficial/Unauthenticated Tr. 946-48, 960). Petitioner has cited to facts in the record, *see id.*, and his position may prove reasonable upon further examination. While we are unwilling to extrapolate from this single example a finding that all subsequent rulings and orders by Judges Rubin and Libretto have been tainted, we conclude that petitioner's allegation regarding the AE 21 series should be remanded for further consideration not inconsistent with this opinion.

d. Two issues regarding Mil. Comm. R. Evid. 505

(i) Background

We begin by observing that the Classified Information Procedures Act (CIPA), Pub. L. No. 96-456, 94 Stat. 2025 (1980) (codified as amended at 18 U.S.C. app., §§ 1-16 (2020)), from which the military commission rule on classified information originated, "has been used in Federal court very successfully" since its enactment. *Prosecuting Law of War Violations: Reforming the Military Commissions Act of 2006: Hearing Before the H. Comm. on Armed Servs.*, 111th Cong. 23 (2009) [hereinafter *Prosecution Hearing*] (statement of Vice Admiral Bruce E. MacDonald, The Judge Advocate General, U.S. Navy). *See generally United States v. Reynolds*, 345 U.S. 1, 6-7 (1953) (stating military secrets privilege is "well established"); *Totten v. United States*, 92 U.S. 105, 107 (1876) (affirming dismissal of petition for compensation under government contract for secret services based on public policy forbidding suit that "would inevitably lead to the disclosure of [confidential] matters"); *Ellsberg v. Mitchell*, 709 F.2d 51, 56-57 (D.C. Cir. 1983) (recognizing state secrets privilege and discussing scope); *United States v. Nichols*, 8 U.S.C.M.A. 119, 127, 23 C.M.R. 343, 351 (C.M.A. 1957) (Latimer, J., concurring in the result) (stating protection of national interests "may militate against" disclosure of information (citing *Jencks v. United States*, 353 U.S. 657 (1957))); S. Elisa Poteat, *Discovering the Artichoke: How Mistakes and Omissions Have Blurred the Enabling Intent of the Classified Information Procedures Act*, 7 J. Nat'l Sec. L. & Pol'y 81, 81 (2014) (discussing distinction between CIPA, "intended to enable the discovery of classified information," and state secrets privilege, "intended to block the discovery of military and state secrets," and explaining constitutional and common law origins of both).

Reform concerning protection of classified information in military commissions used CIPA as a model. *See Legal Issues Regarding Military Commissions and the Trial of Detainees for Violations of the Law of War: Hearing Before the S. Comm. on Armed Servs.*, 111th Cong. 8, 11 (2009) [hereinafter *Legal Hearing*] (statements of Hon. Jeh C. Johnson, General Counsel, DoD, and Hon. David S. Kris, Asst. Att'y Gen., Nat'l Sec. Div., DoJ).

The reform amendment garnered support from "both DOD and DOJ." *Id.* at 101 (statements of Hon. Jeh C. Johnson and Hon. David S. Kris); *see Prosecution Hearing*, *supra*, at 6-7, 41-42, 48 (statements of Lieutenant General Jack L. Rives, The Judge Advocate General, U.S. Air Force; Brigadier General James C. Walker, Staff Judge Advocate to the Commandant, U.S. Marine Corps; Lieutenant General Scott C. Black, The Judge Advocate General, U.S. Army; Vice Admiral Bruce E. MacDonald, The Judge Advocate General, U.S. Navy). "[S]ome key modifications [were made] to reflect lessons learned from past terrorism prosecutions." *Legal Hearing*, *supra*, at 101 (statements of Hon. Jeh C. Johnson and Hon. David S. Kris).[52] The intent in the reform endeavor was to "adequately protect classified information and advance the President's objective of ensuring that commissions are a fair, legitimate, and effective forum for the prosecution of law of war offenses." *Id.*

(ii) Judge's sua sponte authority to reconsider Mil. Comm. R. Evid. 505 rulings

Petitioner argues that because Mil. Comm. R. Evid. 505(f) prevents him from seeking reconsideration of certain orders concerning the protection of classified information, the military judge is "incapable" of vacating the rulings and orders necessary to remove the appearance of bias, as contemplated in AE 158R. *See* Reply 3 (quoting *Al-Nashiri*, 921 F.3d at 238); AE 158T at 1. Petitioner does not substantively confront the sua sponte issue presented in Judge Libretto's ruling at AE 158T.[53] We conclude that just because Mil. Comm. R. Evid. 505(f)(3) prevents an *accused* from seeking reconsideration of certain rulings and orders on classified information, it does not necessarily preclude the *military judge* from reconsidering those decisions.

Against this background, we turn to the D.C. Circuit's recent decision addressing a judge's sua sponte authority. *Maalouf v. Islamic Republic of Iran*, concerned a habeas corpus petition and a statute of limitations defense forfeited by a defendant sovereign wholly absent from the proceedings. 923 F.3d 1095, 1100-01 (D.C. Cir. 2019). The D.C. Circuit recognized that "[o]ur adversary system is designed around the premise that the parties know what is best for them, and are responsible for advancing the facts and arguments entitling them

[52] *See Standards of Military Commissions and Tribunals: Hearing Before the H. Comm. on Armed Servs.*, 109th Cong. 29 (July 12, 2006) (statement of Rep. Ellen O. Tauscher, Member, H. Comm. on Armed Servs.) (stating "we have to be enormously creative" about protecting classified information while at the "same time . . . deal[ing] with the rule of law and the law of war"); *Ellsberg v. Mitchell*, 709 F.2d 51, 63 (D.C. Cir. 1983) (in state secrets privilege case, recognizing need to not "hobble district courts in designing procedures appropriate to novel cases").

[53] Petitioner's comment that review of classified rulings will necessarily be "cursory," Reply 4 & n.7, does not bear on our analysis. We presume that reconsideration of any ruling will be completed with due diligence, regardless of the amount of time required or the burden imposed on the presiding military judge.

to relief." *Id.* at 1109 (alteration in original) (quoting *Greenlaw v. United States*, 554 U.S. 237, 244 (2008)). It then held that only "when certain institutional interests of the judiciary are implicated and both parties are present in the litigation" may a judge raise sua sponte a forfeited affirmative defense. *Id.* at 1111 (citing *Wood v. Milyard*, 566 U.S. 463 (2012)); *see also United States v. Sioux Nation of Indians*, 448 U.S. 371, 432 (1980) (Rehnquist, J., dissenting) (stating sua sponte dismissal for res judicata is consistent with "avoidance of unnecessary judicial waste" policy underlying res judicata), *quoted in Arizona v. California*, 530 U.S. 392, 412 (2000), *supp. op.*, 531 U.S. 1 (2000), *amended by, ops. combined*, 547 U.S. 150 (2006); *United States ex rel. Totten v. Bombardier Corp.*, 380 F.3d 488, 497 (D.C. Cir. 2004) ("The court has authority to remedy errors *sua sponte* in 'exceptional circumstances' -- when they 'seriously affect the fairness, integrity, or public reputation of judicial proceedings . . . ." (quoting *United States v. TDC Mgmt. Corp., Inc.*, 288 F.3d 421, 425 (D.C. Cir. 2002)); *cf. Tenn. Gas Pipeline Co. v. Fed. Energy Reg. Comm'n*, 871 F.2d 1099, 1108 (D.C. Cir. 1989) (stating statutory provisions conferring sua sponte authority to correct own rulings and orders "has been consistently interpreted as granting the agency power to modify *any* aspect of an order at any time until an appeal has been filed").[54] *But cf. Dellums v. U.S. Nuclear Reg. Comm'n.*, 863 F.2d 968, 975 n.8 (D.C. Cir. 1988) (stating Fed. R. Civ. P. 15 and 28 U.S.C. § 1653 concerning amended pleadings do not give court sua sponte authority "to construct petitioners' case for them").

Under the "exceptional circumstances" that were created by Judge Waits' employment search, Judge Libretto issued sua sponte AE 158R to cleanse the record of any disqualifying appearance of partiality. *Totten*, 380 F.3d at 497 (citation omitted); *see* AE 158T. Without remedy, the ensuing appearance of partiality would have a grave impact on the "public reputation" of military commissions, as well as on the "fairness" and "integrity" of the process and on petitioner's commission, in particular. *Totten*, 380 F.3d at 497 (citation omitted); *see Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 433 (2015) (explaining that with "no influence over either the sword or the purse" (quoting The Federalist No. 78, 465 (Alexander Hamilton)), public perception of integrity of judiciary is "a state interest of the highest order" (quoting *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 889 (2009))); *Liljeberg*, 486 U.S. at 859-60 (stating purpose of § 455(a) is "to promote public confidence" in integrity of judicial process (citing S. Rep. No. 93-419, at 5 (1973); H.R. Rep. No. 93-1453, at 5 (1974))); *infra* note 63 (referencing Judge Conduct Code provisions on public confidence). Also, "both parties are present in the litigation," *Maalouf*, 923 F.3d at 1111, and petitioner thus has had a "fair opportunity to present his

[54] The statutory provision the Court considered, section 19 of the Natural Gas Act, reads that until the record has been filed for appeal "the Commission may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it under the provisions of this chapter." *Tenn. Gas Pipeline Co. v. Fed. Energy Reg. Comm'n*, 871 F.2d 1099, 1108 (D.C. Cir. 1989) (quoting 15 U.S.C. § 717r(a) (1976)).

position," *Wood*, 566 U.S. at 472, as evidenced by the petition we are now considering.

Finally, Judge Libretto's sua sponte decision is consistent with one of the policies behind the Mil. Comm. R. Evid. 505 process—preventing an accused from abusing "our process, our due process, our legal system as one of his other weapons as he carries on this [assymetrical] fight" against the United States. *Standards of Military Commissions and Tribunals: Hearing Before the H. Comm. on Armed Servs.*, 109th Cong. 29 (July 12, 2006) [hereinafter *Standards Hearing*], (statement of Daniel J. Dell'Orto, Principal Deputy Gen. Counsel, DoD); H.R. No. 109-664, pt. 1, at 13 (2006) (House Committee on Armed Services noting that introduction of classified evidence without the accused's presence was to prevent "exploit[ation]" of "procedures to gain information . . . [for] future attacks against the United States"); *see Standards Hearing*, 109th Cong. 11 (Sept. 7, 2006) (statement of Steven G. Bradbury, Acting Asst. Att'y Gen., Off. of Legal Counsel, DoJ) ("[I]t is essential for these procedures to work in an orderly and efficient fashion . . . ."); *cf. Standards Hearing*, 109th Cong. 74 (July 26, 2006) (statement of Judge Gerald Gahima, Senior Fellow, U.S. Institute of Peace)[55] (in light of the "ongoing" nature of the war on terror and because "its architects retain the capacity . . . to threaten the security of states . . . [with] potentially catastrophic risks," recommending inter alia changes in disclosure rules to minimize risks to national security and development of procedural rules "to discourage or minimize defendants' attempts to politicize proceedings or to abuse the criminal justice process in general").

Mil. Comm. R. Evid. 505(f)(3) thus may not serve to usurp Judge Libretto's legitimate exercise of sua sponte authority, as expressed in AE 158R. *See* AE 158T. Indeed, this authority is recognized under the rules of evidence in the context of the classified information pretrial conference. *See* Mil. Comm. R. Evid. 505(d)(2). That the military judge's sua sponte authority is not specifically mentioned under the reconsideration provision at Rule 505(f) merely supports the "exceptional circumstances" in petitioner's case. *Totten*, 380 F.3d at 497 (citation omitted). We also have some question about whether Mil. Comm. R. Evid. 505(f)(3) even applies to AE 158R.

Here, the military judge has opened the door in AE 158R to revisit Mil. Comm. R. Evid. 505 rulings or orders, not the accused-petitioner. Petitioner's only role is to identify the rulings or orders responsive to AE 158R. In other words, an accused identifying rulings for reconsideration in compliance with the specific ruling or order of a judge is a world apart from an accused independently filing a motion for reconsideration on his own accord. Given Congress' concern over exploitation of the process, we believe our

[55] Judge Gerald Gahima is also a former judge of the War Crimes Chamber of the Court of Bosnia Herzegovina and former Deputy Chief Justice and Attorney General of Rwanda.

understanding of what Mil. R. Evid. 505(f) intends is accurate. Mil. Comm. R. Evid. 505(f)(3), inter alia, was intended to prevent an accused from using the rules and procedures tactically, not to limit the military judge's authority over discovery of or access to classified information.

(iii) LC Blackwood and the Mil. Comm. R. Evid. 505 process

Finally, we address petitioner's concern about LC Blackwood's involvement in the classified information summary, substitution, and redaction process set forth at Mil. Comm. R. Evid. 505. Petitioner is concerned because LC Blackwood attended ex parte meetings with the prosecution.[56] *See* Pet'r Br. 35. He points out Judge Waits' remarks that such meetings were odd and he had never held ex parte hearings in courts-martial. *Id.* at 12. Judge Waits met once with the prosecution on Mil. Comm. R. Evid. 505 issues and LC Blackwood attended "probably less than five or six" meetings.[57] Tr. 659. Although the timing of Judge Waits' meeting relative to LC Blackwood's meetings is not apparent from the record, it is reasonable to assume that having acquired first-hand knowledge of the process, Judge Waits believed that the task was appropriate for delegation to LC Blackwood, with instructions. *Cf. In re Chandler's Cove Inn, Ltd.*, 97 B.R. 752, 755 (Bankr. E.D.N.Y. 1988) (remarking that 1978 Bankruptcy Code provision excluded judge from first creditor meeting to relieve judge of "obligation incidental to an administrative function"); *Legal Hearing, supra*, at 136 (statement of Hon. David S. Kris, Asst. Att'y Gen., Nat'l Sec. Div., DoJ) (describing the process for proposing substitutions and summaries as a "cumbersome process"). Judge Waits discussed each Mil. Comm. R. Evid. 505 meeting that LC Blackwood had with prosecutors (i) to confirm that the meeting occurred, (ii) to inquire into whether the prosecutors had "taken . . . the input that [Judge Waits] had on the proposed summaries, substitutions, and redactions," and (iii) to determine whether his proposals had been provided to the prosecution "for consultation with the OCAs [Original Classification Authorities]." Tr. 659; *see* Tr. 3002-03. In the first two years of petitioner's proceedings, about forty binders of classified information were generated. Tr. 659-60.

---

[56] To the extent petitioner suggests abdication of judicial responsibilities to LC Blackwood, *see* Pet'r Br. 12 (citing to Judge Waits' remark, "I try to avoid those [meetings] myself," (quoting Tr. 659, authority quoted in petitioner's brief as Tr. 709-10 in the Unofficial/ Unauthenticated Transcript)), we disagree with the suggestion as the next sentence in the transcript provides full context. Judge Waits explained, "There wouldn't be anything wrong with me doing it, but I am located -- you know, I'm physically stationed in Naples, Italy, so Captain Blackwood, my clerk, is the one who normally meets with [the prosecution]." Tr. 659. Clearly, Judge Waits was motivated by judicial efficiency.

[57] Judge Libretto testified that the prosecution made a Mil. Comm. R. Evid. 505 presentation directly to him one time; he did not recall any of his staff meeting with the prosecution on Mil. Comm. R. Evid. 505 classified information. Tr. 2638-39. In his declaration, Judge Rubin stated that LC Blackwood "review[ed] classified information." AE 158H, Attach. B.

We work from the presumption that trial judges are "capable of doing what the law requires." *Gerlaugh v. Stewart*, 129 F.3d 1027, 1036 (9th Cir. 1997); *see United States v. Downing*, 56 M.J. 419, 424 (C.A.A.F. 2002) (Crawford, C.J., concurring in part and in the result) (in case involving denial of panel member challenge for implied bias, stating "[m]ilitary judges are presumed to know the law and apply it correctly" (citing *United States v. Prevatte*, 40 M.J. 396, 398 (C.M.A. 1994))); *United States v. Vangelisti*, 30 M.J. 234, 240 (C.M.A. 1990) (presuming that "military judge knew the law and acted according to it" with respect to questionable testimony); *cf. United States v. Seals*, 130 F.3d 451, 458 & n.8 (D.C. Cir. 1997) (stating in the absence of contrary evidence, "D.C. Superior Court judge is presumed competent" on constitutional questions in criminal trial (citing *Swain v. Pressley*, 430 U.S. 372, 383 (1977))). In petitioner's case, a "reasonable reading of the record," *Tauro*, 666 F.2d at 695, supports the conclusion that the military judges were competent and capable of lawfully applying the Mil. Comm. R. Evid. 505 process to petitioner's case. Moreover, petitioner fails to cite to any evidence or portion of the record where the judges misapplied the 505 process. *See* Pet'r Br. 11-12, 14, 16, 35 (discussing LC Blackwood's general involvement in the process); Reply 3-4, 15-16 (discussing same general involvement and asserting "an ever-changing set of classification guidance" without elaboration).

Petitioner cites to two D.C. Circuit cases, *Brooks*, 383 F.3d at 1046, and the related case of *Kempthorne*, 449 F.3d at 1270, in support of his contention on the application of "selection bias." Reply 12-13. Selective bias influences "the way the judicial officer approaches the task." *Id.* at 12. In *Brooks*, special master Balaran had performed "investigative and adjudicative tasks that entailed *ex parte* communications." 383 F.3d at 1044. Based on the "tone and substance" of a letter by Balaran to a DoJ attorney representing the Department of Interior (Interior), the court found it "likely, if not inevitable," *id.* at 1045, that Balaran's record compilation, reports, and recommendations "would be subject to selection bias" and a knowledgeable observer "would reasonably question his impartiality," *id.* at 1046. Balaran complained in his letter that government counsel had "launched a misguided campaign to undermine [his] authority . . . both personally and professionally in front of [Bureau of Indian Affairs] employees" by "call[ing] into question [his] ability to read" and "insist[ing] that [he had] never practiced law," inter alia. *Id.* at 1045 (second brackets in original).[58] Later, in *Kempthorne*, selection bias was applied again

[58] Petitioner also cites to *In Re Brooks*, 383 F.3d 1036, 1046 (D.C. Cir. 2004), in support of his position that "[m]andamus is particularly appropriate when an individual tainted by the appearance of bias has *ex parte* meetings with a party." Reply 15. In *Brooks*, a contempt proceeding, special master Balaran was authorized to perform "adjudicative" functions. *Id.* at 1045. Some of his ex parte contacts were with the Office of the Special Trustee in New Mexico, title records office personnel in Montana, the Deputy Commissioner of the Bureau of Indian Affairs, employees of the agency under scrutiny for mishandling trust accounts (the Department of Interior), "moles," and plaintiff attorneys. *Id.* at 1041-42, 1044. The D.C. Circuit held that "the nature and extent of [] *ex parte* contacts would lead an informed observer reasonably to question [Balaran's] impartiality" and thus required his recusal. *Id.*

based on Balaran's hiring of a former senior executive (Smith) of a company that had alleged misconduct by Interior and unsuccessfully sought to intervene in a class action suit against Interior, which stood to gain financially from a misconduct finding by Balaran, and which rehired Smith after Smith's employment with Balaran had ended. 449 F.3d at 1269-70. The D.C. Circuit concluded that Balaran's reliance on documents from Smith likely influenced how Balaran tackled his task "and ultimately his reports and recommendations to the district court." *Id.* at 1270 (citation omitted). These two cases are readily distinguishable. Unlike the situation between Balaran and party counsel in *Brooks*, which was one of significant friction and tension, there is no evidence of any friction between LC Blackwood and petitioner's counsel (or petitioner). Similarly, the Missouri USAO and Texas USAO did not (and do not) have the same interest in LC Blackwood's work product respecting *Al-Hadi* as Smith's company (or Smith) had in Balaran's findings about Interior's conduct in *Kempthorne*. Indeed, in our review of the record, we find that the Missouri USAO and Texas USAO had no discernable interest in LC Blackwood's work on *Al-Hadi* or in the outcome of *Al-Hadi* rulings and orders. Selection bias simply does not apply in petitioner's case under D.C. Circuit precedent.

Given the "enormous" amount of classified information in the record, consisting of "thousands of pages," Tr. 3277, a "reasonable reading of the record," *Tauro*, 666 F.2d at 695, also supports the appropriateness of the military judges' decisions to use LC Blackwood in the Mil. Comm. R. Evid. 505 prosecution meetings. LC Blackwood's expertise was key to moving the proceedings along. *See Allied-Signal*, 891 F.2d at 972 (stating effective management of complex case "benefited from" or "absolutely require[d]" support from career law clerks who had worked for judge from start of litigation); *Uniloc*, 492 F. Supp. 2d at 57 (recognizing "a just and efficient resolution" of case as one factor in a recusal decision); *supra* note 56 (discussing Judge Waits' reason for using LC Blackwood in the process). Petitioner's comment that Judge Waits admittedly had not been exposed to the Mil. Comm. R. Evid. 505 procedure in his military practice, Pet'r Br. 12, is not relevant to the appropriateness of LC Blackwood's involvement in that process. The *Al-Hadi* commission has ruled many times that the Mil. Comm. R. Evid. 505 process is applicable to Al-Hadi's commission. *E.g.*, AE 023B; *see* Tr. 660; *cf. supra* Part VI.B.2.d(i). Moreover, petitioner points to no law prohibiting use of LC Blackwood's expertise to review and ferret out issues concerning classified information by attending Mil. Comm. R. Evid. 505 meetings at the behest of his judge. *Cf. Chandler's Cove*, 97 B.R. at 754-55, 759 (where judges, not law clerks, were prohibited from attending meeting and law clerk attended the

---

at 1046. In contrast, LC Blackwood had ex parte contact with the prosecution pursuant to the provisions of Mil. R. Evid. 505, under the supervision of his judge, for the purpose of working through a "cumbersome process" concerning classification of information. *See Legal Hearing*, *supra*, at 136 (statement of Hon. David S. Kris, Asst. Att'y Gen., Nat'l Sec. Div., DoJ).

meeting, refusing to recuse for appearance of impropriety). Reviewing and identifying issues is a task a law clerk routinely performs in research and in drafting documents. In sum, we are unpersuaded that the military judges' use of LC Blackwood's expertise to assist in review of classified information under Mil. Comm. R. Evid. 505 is problematic.

3. Writ is not appropriate under the circumstances

Here, we consider the third *Cheney* condition for issuance of a writ of mandamus. 542 U.S. at 381. Issuance of a writ of mandamus in this case is not appropriate. As in *Al-Nashiri*, because petitioner "seeks vacatur of judicial decisions, our discretion is guided by the three *Liljeberg* factors: "the risk of injustice to the parties [in *Al-Hadi*], the risk that the denial of relief will produce injustice in other cases, and the risk of undermining the public's confidence in the judicial process." *Al-Nashiri*, 921 F.3d at 239 (quoting *Liljeberg*, 486 U.S. at 864). Regarding the first factor, and using *Al-Nashiri* as a baseline, the risk of injustice to petitioner in the instant case is less than the risk of injustice that was facing Al-Nashiri in a fundamental way—petitioner is not facing the death penalty. *See id.*; Charge Sheet at Block VI. Yet, even in the *Al-Nashiri* death penalty case, dissolution of the commission was found to be "unnecessarily 'draconian.'" *Al-Nashiri*, 921 F.3d at 240 (quoting *Liljeberg*, 486 U.S. at 862); *see Hawsawi*, 389 F. Supp. 3d at 1003 (in case involving some capital offenses, finding no indisputable right to mandamus writ where issue was recusal for apparent bias).

On the second *Liljeberg* factor, the relief sought by petitioner is not needed to "encourag[e] a judge or litigant to more carefully examine possible grounds for disqualification and to promptly disclose them when discovered." *Al-Nashiri*, 921 F.3d at 239 (quoting *Liljeberg*, 486 U.S. at 868). Prior to *Al-Nashiri*, Judge Waits did not know that a job application would create a disqualifying appearance of partiality and he was "surprise[d]" by the *Al-Nashiri* ruling. Tr. 2998-99. Within nine days after issuance of *Al-Nashiri*, Judge Waits sua sponte informed the OMCTJ of his job search activities so that the parties could be notified. *See supra* note 14 and accompanying text. Moreover, Judge Waits testified that, had he the benefit of the *Al-Nashiri* analysis, he would have recognized the conflict and disclosed his job search sooner. Tr. 2997; *see* Tr. 3000. The sequence of events regarding issuance of *Al-Nashiri* and Judge Waits' notification, in conjunction with his testimony, show the absence of any need for a prophylactic message to emphasize the *Al-Nashiri* holding. The requirement for judicial notification to the parties when seeking DoJ employment (including employment as an immigration judge) has been heard, as demonstrated by the facts before us.[59]

[59] In petitioner's case there is no similar breakdown in the "shared responsibility" to ensure fair proceedings, as occurred in *Al-Nashiri*. *Al-Nashiri*, 921 F.3d at 239. During the litigation of *Al-Nashiri* at the CMCR level, the prosecution failed to seek and our Court failed to order production of facts about Judge Spath's quest for immigration judge

Concerning the third *Liljeberg* factor, "the public's confidence in the judicial process" is comprised of both an "interest in impartial justice" and "efficient justice" free of "unwarranted delays." *Al-Nashiri*, 921 F.3d at 240. Our superior court found these two interests to be equal in *Al-Nashiri*, although the "hefty burdens" to Al-Nashiri and the public of proceeding under a "cloud of illegitimacy" outweighed the costs of granting the writ at the pre-trial stage. *Id.* In contrast, petitioner has an adequate remedy in AE 158R to ensure the continuation of his commission free from the appearance of judicial bias. "[T]he public unquestionably possesses . . . an 'interest in avoiding unwarranted delays in the administration of justice,' . . . ." *Id.* (citation omitted). Allowing the military commission to proceed with implementation of the remedy at AE 158R supports this interest, as well as "the public's ultimate objective . . . in achieving a just outcome." *Id.*

In further consideration of the appropriateness of vacatur, we turn to the specific facts of *Al-Nashiri* for comparison with *Al-Hadi*. The D.C. Circuit recognized in *Al-Nashiri* a "powerful case for dissolving the current military commission entirely," but chose not to. *Id.* It was satisfied that "vacatur of all orders entered by [Judge] Spath after . . . the date of his application [would] sufficiently scrub the case of judicial bias without imposing an unnecessarily 'draconian remedy.'" *Id.* (quoting *Liljeberg*, 486 U.S. at 862). Again using *Al-Nashiri* as a baseline, clearly vacatur or dismissal in *Al-Hadi* is even less

---

employment at the DoJ. We observed that a new trial judge was appointed, and noted, "None of appellee's contentions were raised before the military commission because the case has been abated. Thus, we have no factual record or findings of the military judge at the trial level to support appellee's allegations for this Court to review." Order, *United States v. Al-Nashiri*, No. 18-002, at 2-3 (CMCR Nov. 2, 2018) (quoting Order, *Al-Nashiri*, No. 18-002, at 2 (CMCR Sept. 28, 2018)). We suggested that Al-Nashiri present the issue at the military commission. *Id.* at 3. This would enable the parties to present facts and we could receive the benefit of the military judge's findings. While the case was at the D.C. Circuit, additional facts were disclosed as the result of a Freedom of Information Act request, and those additional facts concerning Judge Spath's negotiations for employment were considered at the D.C. Circuit. *See Al-Nashiri*, 921 F.3d at 227, 237.

By contrast in *Al-Hadi*, both the prosecution and the military commission were proactive in collecting and disseminating information regarding potential bias. For example, on April 25, 2019, nine days after *Al-Nashiri* was issued, the prosecution notified the defense in an email that it had obtained information indicating that Judge Waits had applied for employment with the DoJ and the U.S. Navy. AE 151A, Attach. B. On May 13, 2019, the prosecution filed notice informing the defense (i) that all known information about Judges Waits' and Rubin's job searches had been disclosed, and (ii) of all actions taken, and to be taken, regarding collection of information in the matter. AE 151C. Also, the prosecution interviewed for the first time the Deputy U.S. Attorney for the Western District of Missouri on October 3, 2019, and four days later filed notice of its interview. AE 158Q. On October 21, 2019, the prosecution re-interviewed the Deputy Chief and three days later filed notice thereof and an affidavit by the Deputy on his potential role in *Al-Nashiri* and his role in LC Blackwood's hiring. AE 160L & Attach. B. In deciding whether to recuse himself, Judge Libretto subjected himself to considerable additional voir dire, Tr. 2612-2650, considered testimony from Judge Waits and LC Blackwood, and Judge Rubin's declaration, Tr. 2924-3024, AE 158H, Attach. B.

warranted and would certainly be "unnecessarily" severe, *id.*, as Judge Waits' actions and the circumstances were considerably less egregious than that which occurred in *Al-Nashiri.* Judge Waits did not submit an order from an ongoing military commission to the AG as a writing sample in his application packet. *See* Tr. 3181-82 (Judge Waits not recalling a writing sample); *Al-Nashiri*, 921 F.3d at 227. The AG never "personally considered or acted on" his application and he was never interviewed or offered an immigration judge position. AE 158R at 14; Tr. 3023. Judge Waits did not negotiate a start date, for about a year, while presiding over petitioner's case, AE 158R at 14, *see Al-Nashiri*, 921 F.3d at 228, 231, and did not order an abatement of the proceedings within twenty-four hours of receiving a firm date from the DoJ's EOIR, AE 158R at 12 (citing *Al-Nashiri*, 921 F.3d at 231). Nor was Judge Waits engaged in a "public battle of wills" with the defense ultimately resulting in a contempt finding against the Chief Defense Counsel. AE 158R at 14; *see Al-Nashiri*, 921 F.3d at 228-31; *supra* note 33.

To the extent petitioner argues that *Al-Hadi* is "an even more 'powerful case'" for vacatur or dismissal, Pet'r Br. 37, we disagree. Vacatur of the convening orders, or dismissal of all rulings and orders since the first disqualifying action by Judge Waits, a "draconian remedy," is unwarranted under these facts. *Al-Nashiri*, 921 F.3d at 240 (citation omitted). Remand, however, is necessary to implement the remedy at AE 158R, and to determine the extent of the appearance of bias, if any, on the AE 21 series and any remedy.

C. Judges Libretto and Rubin were not disqualified because of LC Blackwood's job search

Judge Rubin presided over petitioner's commission from November 1, 2016, through June 12, 2018; Judge Libretto was detailed on June 13, 2018, and was the presiding judge until his recusal on January 13, 2020. AEs 001A, 001B; J. Libretto's Mem. on Recusal (Jan. 15, 2020). While LC Blackwood ought to have disclosed his job search, failure to do so is not a basis for disqualification of the judge. LC Blackwood's exclusion from petitioner's case was not required in the absence of a job offer—not at the earliest stages of his job search when he first considered looking for a job, not when he submitted job applications, and not when he was interviewed. Nor was exclusion required when he accepted a job offer from a non-party, the USAO for the Western District of Missouri, which never appeared in petitioner's case. Moreover, in the absence of a job offer from a party that is likely to result in a future employment relationship, exclusion of LC Blackwood was not required on account of his job search (i) with any DoJ component or entity (including the USAO for the Western District of Texas) or (ii) (assuming DoD party status) with any DoD component or agency. Finally, LC Blackwood's applications to various USAOs and DoD components or agencies, including the Naval Criminal Investigative Service with whom he interviewed, did not require recusal. *See* discussion *infra* and Part VI.D. These findings are based on applicable ethical provisions and a plain

reading of the advisory opinions interpreting codes of conduct, as well as the underlying bedrock premise "that judges, not law clerks, make the decisions." *Cabrera*, 134 F. Supp. 3d at 446 (quoting *Allied-Signal*, 891 F.2d at 971).

1. Applicable ethical provisions (and LC Blackwood's notice to judge—should v. must)

a. Ethical provisions concerning LC Blackwood's job search

The Acting Chief Judge of this Court issued revised Rules of Practice, effective on February 3, 2016. Rule 25(a) provides,

> Judges must disqualify themselves under circumstances set forth in 28 U.S.C. § 455, R.M.C. 902, or in accordance with Canon 3C, Code of Conduct for United States Judges as adopted by the Judicial Conference of the United States. For purposes of R.M.C. 902, the same disqualification standards which apply to military judges shall also apply to civilian judges appointed under 10 U.S.C. § 950f.

(Citation omitted.).[60] 28 U.S.C. § 455(a) applies to recusal issues presented by LC Blackwood's search for employment and acceptance of a position with the USAO for the Western District of Missouri. *See, e.g.*, *San Juan*, 129 F.R.D. at 412. The district court in *San Juan* observed that in both the Eleventh Circuit decision in *Parker v. Connors Steel Co.*, 855 F.2d 1510, 1528 (11th Cir. 1988), and the Fifth Circuit decision in *Hall*, 695 F.2d 175, recusals stemming from the law clerks' familial ties with a party or as a class action member were based "entirely" and "exclusively" on 28 U.S.C. § 455(a). *Id.* at 412-13; *Cabrera*, 134 F. Supp. 3d at 443-44 (analyzing recusal under § 455(a) where recusal allegation based on conduct of law clerk who had familial ties and communications with firm representing defendant). Rule for Military Commissions 902 was "modeled on 28 U.S.C. § 455." *Hawsawi*, 389 F. Supp. 3d at 1007. Rule for Military Commissions 902(a) therefore applies to the recusal issues created by LC Blackwood's conduct to the same extent that 28 U.S.C. § 455(a) applies. These provisions "obligate a judge to 'disqualify' himself or herself in . . . any 'proceeding' in which his or her 'impartiality might reasonably be questioned.'" *In re Khadr*, 823 F.3d 92, 97 (D.C. Cir. 2016); 28 U.S.C. § 455(a) (providing that a "justice, judge, or magistrate . . . shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned"); R.M.C. 902(a) (providing that "a military judge shall disqualify himself or herself in any proceeding in which that military judge's impartiality might reasonably be questioned"). Both R.M.C. 902(b) and 28 U.S.C. § 455(b) give "more precise

[60] This Court's 2008 revised Rules of Practice, Rule 24(a), identified 28 U.S.C. § 455 or Canon 3C of the Code of Conduct for United States Judges, Guide to Jud. Policy, Vol. 2A ch. 2 [hereinafter Judge Conduct Code], as sources regarding judicial recusal or disqualification for CMCR judges.

guidance for specific situations."[61] *Hawsawi*, 389 F. Supp. 3d at 1007. 28 U.S.C. § 455(b), however, applies only to conduct by the judge, *San Juan*, 129 F.R.D. at 412, as does R.M.C. 902(b) given their substantial similarity in fact.

The Code of Conduct for United States Judges (Judge Conduct Code) was first adopted by the Judicial Conference of the United States (Judicial Conference) in 1973. *Microsoft*, 253 F.3d at 111; *see* 28 U.S.C. § 331. The code "is designed to provide guidance to judges." *In re Charges of Jud. Misconduct*, 769 F.3d 762, 765 (D.C. Cir. 2014) (quoting Judge Conduct Code Canon 1 cmt). The code in effect at the time of the events in petitioner's case was revised by Transmittal 02-016 on March 20, 2014.[62] Guide to Jud. Policy, Vol. 2A ch. 2 (2014). Concerning its treatment of recusal, we have stated:

> The grounds for disqualification or recusal in Canon 3C are substantively the same as found in section 455. If the circumstances described in section 455 or Canon 3C are present, then recusal is mandatory. The grounds for mandatory recusal, also called disqualification, include when the judge's impartiality might reasonably be questioned, [and] bias . . . . Recusal for partiality or bias is required if established in fact or appearance. The other grounds are fact-based circumstances.

Khadr, 62 F. Supp. 3d at 1317. Canon 3C(1) of the 2014 Judge Conduct Code states, "A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned . . . ."[63] Canon 3A(4) provides, "A judge may: (a) initiate, permit, or consider ex parte communications as authorized by law; . . . ." The comment states, "A judge should make reasonable efforts to ensure that law clerks . . . comply with" the restrictions on ex parte communications in Canon 3A(4). A second reference to law clerks in the judge's code is not relevant here. *See* Judge Conduct Code Canon 3B(3) & cmt. (concerning judicial appointees).

The Judicial Conference subsequently adopted a Code of Conduct for Judicial Employees (Employee Conduct Code) in 1995. Report of the

---

[61] Rule 902(b) lists five circumstances where a military judge "shall also disqualify." R.M.C. 902(b), Manual for Military Commissions, United States (2019 ed.); *see* 28 U.S.C. § 455(b).

[62] In March 2019, the Judicial Conference adopted several revisions to the Judge Conduct Code, including the commentary on Canon 2A entitled, Respect for Law. Guide to Jud. Policy, Vol. 2 ch. 2, intro. (last revised by Transmittal 02-046 Mar. 12, 2019).

[63] Judge Conduct Code Canon 2A provides, "A judge should respect and comply with the law and should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." Commentary to Canon 2A provides, "A judge must avoid all impropriety and appearance of impropriety." Also, commentary to Canon 1 on judiciary integrity and independence states that adherence to Canon 1 "helps to maintain public confidence in the impartiality of the judiciary."

Proceedings of the Judicial Conference Committee 74 (Sept. 19, 1995), https://www.uscourts.gov/sites/default/files/1995-09.pdf, *repealing* Code of Conduct for Law Clerks effective on January 1, 1996;[64] Guide to Jud. Policy, Vol. 2A ch. 3, § 310.20(a) (2013). The 2013 Employee Conduct Code was in effect during LC Blackwood's job search in 2018.[65] Canon 3F(3) of the 2013 code states

> When a judicial employee knows that a conflict of interest may be presented, the judicial employee should promptly inform his or her appointing authority. The appointing authority, after determining that a conflict or the appearance of a conflict of interest exists, should take appropriate steps to restrict the judicial employee's performance of official duties in such matter so as to avoid a conflict or the appearance of a conflict of interest.

Canon 4C of the Employee Conduct Code is entitled, Financial Activities. Canon 4C(4) concerns searches for employment and provides:

> During judicial employment, a law clerk or staff attorney may seek and obtain employment to commence after the completion of the judicial employment. However, the law clerk or staff attorney should first consult with the appointing authority and observe any restrictions imposed by the appointing authority. If any law firm, lawyer, or entity with whom a law clerk or staff attorney has been employed or is seeking or has obtained future employment appears in any matter pending before the appointing authority, the law clerk or staff attorney should promptly bring this fact to the attention of the appointing authority.[66]

---

[64] Canon 5(C)(1) of the prior Code of Conduct for Law Clerks stated that a law clerk may search for and accept post-clerkship employment and

> if any law firm, lawyer, or entity with whom a law clerk has been employed or is seeking or has obtained future employment appears in any matter pending before the appointing judge, the law clerk should promptly bring this fact to the attention of the appointing judge, and the extent of the law clerk's performance of duties in connection with such matter should be determined by the appointing judge.

First Interstate Bank of Arizona v. Murphy, Weir & Butler, 210 F.3d 983, 987 (9th Cir. 2000) (quoting Canon 5(C)(1)).

[65] The 1996 Code was revised in March 2001 and again by Transmittal 02-013 on August 2, 2013. Guide to Jud. Policy, Vol. 2A ch. 3, at 1 and § 310.20(c)-(d). The 2013 Employee Conduct Code was last revised by Transmittal 02-046 on March 12, 2019.

[66] "Appointing authority" is not defined under definitions in the Employee Conduct Code. Guide to Jud. Policy, Vol. 2A ch. 3, § 310.30. Canon 2B of the Judge Conduct Code informs that the appointing authority is, as the term suggests, an individual that is involved in the selection of judges. The individual is distinct from the employee's supervisor or the chief judge. *See* Guide to Jud. Policy, Vol. 2A ch. 3, §310.40(a), (c). For our purposes in this

Another publication from the Judicial Conference, in cooperation with the Federal Judicial Center,[67] also addresses ethics for law clerks. Fed. Jud. Ctr., Jud. Conf. of the U.S., Comm. on Codes of Conduct, Maintaining the Public Trust, Ethics for Federal Judicial Law Clerks 2013 (rev. 4th ed. Oct. 18, 2018) [hereinafter Fed. Jud. Ctr. Pamphlet or Law Clerk pamphlet]. The 2013 version of this pamphlet was revised on October 18, 2018. *Id.* Both the 2013 and 2018 editions were in effect during LC Blackwood's job search in 2018 because his job search occurred during the effective period of each edition; the provisions relevant to our discussion are substantially the same in each pamphlet.[68] The introduction instructs law clerks, "[y]ou need to become familiar" with the five canons of the Employee Conduct Code. Fed. Jud. Ctr. Pamphlet 1. The pamphlet "provides an overview of [] ethical obligations as well as resources [one] can consult for further information. These obligations apply to all law clerks, including career clerks, clerks who serve for a defined period of time, and clerks who work full-time or part-time, for pay or as a volunteer." *Id.* at 2.

Under its "Conflicts of Interest" section, the Law Clerk pamphlet notes that a conflict may be presented "from contacts with a prospective employer." *Id.* at 10. In an example, it identifies the following situation as creating an actual conflict: "The firm where you plan to work after your clerkship serves as counsel in a matter before your judge." *Id.* at 11. There is no elaboration on what constitutes a "plan." In the section on "Career," the pamphlet provides:

> First, a job search may create new conflicts of interest. Ask your judge if you may apply for a job with a firm that represents a party currently before the court. If you interviewed with a firm but have not accepted an offer, your judge has discretion about whether you may work on matters involving the firm. *Once you have accepted an offer, however, the ethics rules take the decision out of your judge's*

---

case, we consider any obligations to the appointing authority to be satisfied by notification to the judge for whom the law clerk works, as the judge has an obligation to notify the appointing authority when required by the circumstances.

[67] The Federal Judicial Center, established by Congress in 1967, 28 U.S.C. §§ 620-29, is a "research and education agency of the judicial branch" of the U.S. government. Fed. Jud. Ctr., https://www.fjc.gov/ (last visited Apr. 17, 2020). It is "a separate agency within the judicial branch," whose governing board is chaired by the Chief Justice of the United States and which is staffed by the Director, Administrative Office, U.S. Courts and "seven judges elected by the Judicial Conference of the United States." *Id.*

[68] We cite to the revised October 18, 2018, edition of the law clerk pamphlet in our opinion. *See* Fed. Jud. Ctr., Jud. Conf. of the U.S., Comm. on Codes of Conduct, Maintaining the Public Trust, Ethics for Federal Judicial Law Clerks 2013 (rev. 4th ed. Oct. 18, 2018). The law clerk pamphlet was recently revised again on March 12, 2019, to include new approved provisions. *See* Fed. Jud. Ctr., Jud. Conf. of the U.S., Comm. on Codes of Conduct, Maintaining the Public Trust, Ethics for Federal Judicial Law Clerks, at last page (rev. 4th ed. 2019).

> *hands*. You may not work on any pending or future cases involving your future employer.

Id. at 24 (emphasis added). One example under the Career section states: "*Daniel has been offered a position in a U.S. Attorney's Office in another part of the state. Must he isolate himself from any matter involving a U.S. Attorney's Office?* No. He is only restricted from working on matters handled by the specific U.S. Attorney's Office he is joining." *Id*. at 26.

The Law Clerk pamphlet directs law clerks to additional resources for more guidance on ethical issues concerning their careers, including Advisory Opinion Nos. 74 and 81.[69] *Id*. The Judicial Conference Committee "publish[es] formal advisory opinions on ethical issues that are frequently raised or have broad application. These opinions provide ethical guidance for judges and judicial employees and assist in the interpretation of the codes of conduct and ethics regulations that apply to the judiciary." United States Courts, Ethics Policies, https://www.uscourts.gov/rules-policies/judiciary-policies/ethics-policies (last visited Apr. 17, 2020).

Advisory Opinion No. 74 addresses what a judge should do "when it is contemplated that a law clerk *may accept* employment with a lawyer or law firm that is participating in a pending case." (Emphasis added.) It says, "such a circumstance does not in itself mandate disqualification of the judge. The law clerk, however, should have no involvement whatsoever in pending matters handled by the prospective employer." The Committee on Codes of Conduct continues:

> The occasion for these precautionary measures does not arise merely because the law clerk has submitted an application for employment, but there may be situations in which, because of the nature of the litigation, or the likelihood that a future employment relationship with the clerk will develop, the judge feels it advisable to take these precautionary measures even at a preliminary stage of the employment discussions.

Advisory Op. 74.

The second advisory opinion referenced by the Law Clerk pamphlet, Advisory Opinion No. 81, addresses procedures for "when a clerk has been offered employment by a particular United States Attorney's office, and the offer has been or may be accepted by the law clerk." It states that even though the law clerk has "no financial interest in" the USAO, "participation by the law

[69] Advisory Opinion Nos. 74 and 81, and No. 38 were all issued in June 2009. *See* Jud. Conf. of U.S. Comm. on Codes of Conduct, Advisory Op. 38, "Disqualification When Relative Is an Assistant United States Attorney" (June 2009), Guide to Jud. Policy, Vol. 2B ch. 2, [hereinafter Advisory Op. 38].

clerk in a pending case involving the prospective employer may reasonably create an appearance of impropriety and a cause for concern on the part of opposing counsel." (Citing Employee Conduct Code Canon 3F(1)). Opinion No. 81 then states: "The judge should isolate the law clerk from cases in which that particular United States Attorney's office appears."

A third advisory opinion issued by the Committee on Codes of Conduct, Advisory Opinion No. 84, concerns the "measures that judges contemplating retirement or resignation may appropriately take to explore post-judicial employment." It explains, "After the initiation of any discussions with a law firm [regarding employment opportunities], no matter how preliminary or tentative the exploration may be, *the judge must recuse*, subject to remittal, on any matter in which the firm appears. Absent such recusal, a judge's impartiality might reasonably be questioned." (Emphasis added.)

The American Bar Association's (ABA's) Model Rule of Professional Conduct 1.12(b), addressing a lawyer's negotiation for employment, states in pertinent part: "A lawyer serving as a law clerk to a judge or other adjudicative officer may negotiate for employment with a party or lawyer involved in a matter in which the clerk is participating personally and substantially, but only after the lawyer has notified the judge or other adjudicative officer." There have been no changes to Model Rule 1.12 since 2014 when Judge Waits was detailed to petitioner's commission. *See* Am. Bar Ass'n, Most Recent Changes to the Model Rules of Professional Conduct, https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/ (last visited Apr. 18, 2020); AE 001. The comment to Model Rule 1.12 does not mention law clerks. The armed forces have similar provisions.[70]

Having set forth the ethical provisions at issue, we now address whether the Judicial Conference's Employee Conduct Code and ABA Model Rule of Professional Conduct 1.12(b) are applicable to petitioner's case.

[70] *See* Air Force Instr. 51-110, Law, Professional Responsibility Program, Attach. 2, Rules of Professional Conduct r. 1.12(b) & discussion (Dec. 11, 2018) (A law clerk "may negotiate for employment with a party or lawyer involved in a matter in which the clerk is participating personally and substantially, but only after the lawyer has notified the judge, or other adjudicative officer."); Army Reg. 27-26, Legal Services, Rules of Professional Conduct for Lawyers r. 1.12(b) [modified] (June 28, 2018) ("A lawyer shall not negotiate for employment with any person who is involved as a party or as a lawyer for a party in a matter in which the lawyer is participating personally and substantially as a judge or other adjudicative officer or as an arbitrator, mediator, or other third-party neutral."); Navy Instr. 5803.1E, Professional Conduct of Attorneys Practicing under the Cognizance and Supervision of the Judge Advocate General, encl. 1, Navy Rules of Professional Conduct r. 1.12.b (Jan. 20, 2015) (A law clerk "may negotiate for employment with a party or attorney involved in a matter in which the clerk is participating personally and substantially, but only after the [clerk] has notified the judge . . . and been disqualified from further involvement in the matter.").

b. Judicial Conference's Code of Conduct for Judicial Employees (Employee Conduct Code) applies

The Judicial Conference's Employee Conduct Code specifically discusses at Canon 4C(4) the ethical considerations related to a law clerk's search for employment during clerkship. Thus, we find it necessary to consider whether the Employee Conduct Code (and the corresponding Law Clerk pamphlet) may be used in our analysis of petitioner's request for a writ of mandamus. The Employee Conduct Code complements the corresponding Judge Conduct Code. While the Judge Conduct Code does not apply at the commission level and to law clerks, *see* Rule of Practice 25(a) (listing Judge Conduct Code Canon 3C(1) as an ethics source for CMCR judges), Canon 3C(1) states, "A judge shall disqualify" when his or her "impartiality might reasonably be questioned." 28 U.S.C. §455(a) and R.M.C. 902(a), which apply to LC Blackwood's job search, are essentially the same as Judge Conduct Code Canon 3C(1).

The complementing nature of the Employee Conduct Code is evident in its elaboration of a judge's ethical obligations when his or her law clerk is engaged in a job search.[71] *See Stevens v. BYU-Idaho*, No. 4:16-cv-00530-DCN, 2018 U.S. Dist. LEXIS 133867, at *3-5 (D. Idaho Aug. 7, 2018) (discussing interplay between Judge Conduct Code and Employee Conduct Code in case of judicial disqualification based on law clerk conflict of interest). For example, Employee Conduct Code Canon 3F(3) states, "after determining that a conflict or the appearance of a conflict of interest exists," the appointing authority (judge) "should take appropriate steps" to avoid the conflict or appearance of one. Section 310.40(c) of the Employee Conduct Code states a judge may seek an advisory opinion on certain conduct by law clerks. *See also* Employee Conduct Code Canon 4C(4) (stating law clerk "should . . . observe restrictions" on job search imposed by judge).

The advisory opinions issued by the Judicial Conference Committee further link and intertwine the judge and the judicial employee codes. United States Courts, Ethics Policies, Published Advisory Opinions, https://www.uscourts.gov/rules-policies/judiciary-policies/ethics-policies (last visited Apr. 17, 2020) [hereinafter Pub. Advisory Ops.] (stating advisory opinions "assist in the interpretation of the codes of conduct . . . that apply to the judiciary"). For example, Advisory Opinion No. 74 concerns what a judge should do when his or her law clerk receives a job offer from a lawyer or law firm participating in matters before the court. Advisory Opinion No. 81 concerns when a judge should isolate a law clerk who has received an offer from a USAO, citing Employee Conduct Code Canon 3F(1).

[71] The Employee Conduct Code is not included in Rule of Practice 25 as an available source concerning recusal issues with respect to judges on our Court, nor is it referenced in the 2012 Manual for Military Commissions, the 2016 Trial Judiciary Rules of Court, the 2011 Regulation for Trial by Military Commission, or the Military Commissions Act of 2009, 10 U.S.C. § 950f.

We find that Judge Conduct Code Canon 3C(1) on disqualification, stating that a "judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned," is basically mirrored in 28 U.S.C. § 455(a) and R.M.C. 902(a). To the extent the Employee Conduct Code is intertwined with the Judge Conduct Code, it is likewise intertwined with 28 U.S.C. § 455(a) and R.M.C. 902(a). In other words, we need to apply the Employee Conduct Code in order to fully apply § 455(a) and R.M.C. 902(a). For all the above reasons, we conclude that Canons 3F(3) and 4C(4) of the Employee Conduct Code (regarding law clerk conflicts of interest and search for employment, respectively) are applicable in the instant case.

We will consider the advisory opinions issued by the Judicial Conference Committee that address "the application and interpretation of" the codes for judges and judicial employees. Guide to Jud. Policy, Vol. 2A ch.3, § 310.40(a); *see* Pub. Advisory Ops. The Conference's guidance to Law Clerks contained in the pamphlet entitled, Maintaining the Public Trust, Ethics for Federal Judicial Law Clerks 2013, and the 2018 edition, are relevant to our analysis, as well.[72]

c. ABA Model Rule of Professional Conduct 1.12(b) does not apply

In 2016, the D.C. Circuit observed that CMCR Rule of Practice 25(a) listed the sources that may be used to determine whether a CMCR judge is disqualified. *In re Khadr*, 823 F.3d at 97. Rule of Practice 25(a) (rev. 2016) lists 28 U.S.C. § 455, R.M.C. 902, and Judge Conduct Code Canon 3C as sources on ethical conduct for CMCR judges. In addressing disqualification of a military commission judge, our superior court suggested that the ABA's Model Code of Judicial Conduct was generally applicable to military commissions and specifically applied Rule 2.11. *See Al-Nashiri*, 921 F.3d at 234. *Al-Nashiri* added Model Rule 2.11 to the basket of sources applicable to judicial ethical issues in military commissions because it helped to comprise the "various

[72] To the extent petitioner suggests that employment or seeking employment with a USAO creates a disqualifying financial interest, *see* Pet'r Br. 26-27, we disagree. Advisory Opinion No. 81 provides: "The United States Attorney's Office is not a law firm and the law clerk would have no financial interest in that office." Jud. Conf. of U.S. Comm. on Codes of Conduct, Advisory Op. 81, "United States Attorney as Law Clerk's Future Employer" (June 2009), Guide to Jud. Policy, Vol. 2B ch. 2, at 121 [hereinafter Advisor Op. 81] (citing Advisory Op. 38); *see* Advisory Op. 38 (explaining that "an AUSA does not have an 'interest' in the [USAO] in the same sense that a partner, member or shareholder may have an interest in a private law firm," at 46, because the U.S. Attorney represents a sovereign "whose obligation . . . is not that it shall win a case, but that justice shall be done," at 45 (quoting *Berger v. United States*, 295 U.S. 78, 88 (1935))). While the Employee Conduct Code includes Canon 4C(4) concerning a law clerk's search for employment under its "Financial Activities" section, the more specific guidance in Advisory Opinion No. 81 leaves no doubt that a law clerk's search for employment with a USAO does not result in the law clerk generating a financial interest in the USAO. *See United States v. Villanueva-Sotelo*, 515 F.3d 1234, 1243 (D.C. Cir. 2008) ("[T]he title of a statute and the heading of a section are tools available for the resolution of a doubt about the meaning of a statute." (alteration in original) (quoting *Almendarez-Torres v. United States*, 523 U.S. 224, 234 (1998))).

statutes and codes of conduct . . . [that] function 'to maintain the integrity of the judiciary and the rule of law.'" *Id.* (quoting *Caperton*, 556 U.S. at 889-90). In deciding which "statutes and codes of conduct" on ethics among the many that are applicable to military commissions, about one month after *Al-Nashiri* was decided we provided one guidepost in *Hawsawi*, 389 F. Supp. 3d 1001.

The question in *Hawsawi* was whether the military judge was disqualified for his prior work at the DoJ National Security Division (NSD) and for his relationship with an NSD attorney. *Id.* at 1007. Petitioners urged application of a specific model rule, Rule 2.11(A)(6)(a) of the 2010 ABA Model Code of Judicial Conduct, addressing disqualification for a judge's prior work in the matter at issue as counsel or a government official. *Id.* at 1008. We agreed that the ABA Model Code of Judicial Conduct was "generally applicable to military judges presiding over military commissions," yet questioned whether the specific ABA model rule applied. *Id.* We explained that the ABA Model Code applies to military commissions "when it does not conflict with other applicable regulations such as the Rules for Military Commissions." *Id.* (citing R.M.C 109(b)(3)(A), (C)); *see United States v. Dorman*, 58 M.J. 295, 298 n.2 (C.A.A.F. 2003) (noting that ABA Model Rules of Professional Conduct apply to Coast Guard courts-martial "as far as practicable and when not inconsistent with the law" (citation omitted));[73] *cf. United States v. S. Ct. of New Mexico*, 839 F.3d 888, 923 (10th Cir. 2016) (concluding that conflict between specific state ethics rule and federal grand jury law renders state rule "conflict-preempted"), *aff'd on reh'g*, 839 F.3d 888 (10th Cir. 2016); *Paul E. Iacono Structural Eng'r, Inc. v. Humphrey*, 722 F.2d 435, 439 (9th Cir. 1983) (stating Model Code is used for "ethical standards to supplement and explicate the principles and rules" where state rules are "imprecise or incomplete"), *cited in Cakebread v. Berkeley Millwork & Furniture Co.*, 218 F. Supp. 3d 1040, 1047 (N.D. Cal. 2016) (stating that *Iacono* "has been cited primarily in the context of attorney or law firm disqualification"). *See generally* ABA Jurisdictional Adoption of Revised Model Code of Judicial Conduct (Oct. 17, 2018), https://www.americanbar.org/groups/professional_responsibility/resources/judicial_ethics_regulation/map/ (last visited Apr. 19, 2020) (stating that thirty-six states and the District of Columbia have approved a revised model code of judicial conduct as of October 2018). In *Hawsawi*, we identified R.M.C. 902(b)(2) and 28 U.S.C. § 455(b) as substantively analogous to ABA Model Code of Judicial Conduct Rule 2.11(A)(6) (2010). 389 F. Supp. 3d at 1008. We then explained, "If the Model Rule and the Rule for Military Commissions provide conflicting guidance to

[73] The current Coast Guard provision states prosecution, defense, and trial judge functions and "Fair Trial and Free Press" provisions under American Bar Association Standards for the Administration of Criminal Justice are applicable to Coast Guard courts-martial "[a]s far as practicable and [when] not inconsistent with the law." Coast Guard Military Justice Manual, Dep't of Homeland Sec. (2019), COMDTINST M5810.1G, ch. 24, Standards of Conduct, Professional Responsibility § D.1 (Jan. 29, 2019).

judges who may be disqualified . . . we must apply the Rule for Military Commissions." *Id.* (citing R.M.C. 109(b)(3)(A), (C)).[74]

In *In re Al-Hawsawi*, 2020 U.S. App. LEXIS 11340, at *9, the D.C. Circuit did not address our discussion of the ABA Model Rules. In *Hawsawi*, we ultimately declined to decide whether the ABA Model Rule was inconsistent with R.M.C. 902(b)(2) because we reached the same result under each rule. *Hawsawi*, 389 F. Supp. 3d at 1008. In petitioner's case, however, a different result is produced under Canon 4C(4) of the Employee Conduct Code than under ABA Model Rule of Professional Conduct 1.12(b). Canon 4C(4), which applies to petitioner's case, *see supra* Part VI.C.1.b, provides in relevant part that a law clerk "may seek and obtain [post-clerkship] employment . . . [but] *should* first consult with the [judge]." (Emphasis added.) "Should," however, does not mean "must." *See infra* Part VI.C.1.d. Model Rule 1.12(b) is substantially similar to Canon 4C(4), except it permits a law clerk to search for work during clerkship "*but only after*" notification to the judge. Model Rule of Prof'l Conduct r. 1.12(b) (Am. Bar Ass'n 2019) (emphasis added). The phrase, "but only after," is a straightforward conditional requirement. If the law clerk informs the judge about his or her job search, then the clerk may search for employment during clerkship. If the law clerk does not tell the judge, he or she is not permitted to seek employment. Use of the word "only" provides emphasis. Notification under the ABA model rule is mandatory, not merely something that ought to be done.

The conflict between the model rule and the canon applicable to petitioner's commission is plain: Notification is precatory under Canon 4C(4), as are all Canons in the Employee Conduct Code, *see infra* note 75, but mandatory under ABA Model Rule 1.12(b). Given this conflict, we cannot apply

[74] Rule for Military Commissions 109(b)(3) provides:

> (A) In effecting a choice of law between the professional responsibility rules of a counsel's licensing jurisdiction and the rules, regulations, and instructions applicable to trials by military commission, the latter shall be considered paramount, unless such consideration is expressly forbidden by the rules of a counsel's licensing jurisdiction.
>
> * * *
>
> (C) If an express conflict exists between the rules applicable to trials by military commission and the branch specific armed forces Rules of Professional Conduct, the convening authority or military judge shall apply the rules applicable to trials by military commission only after the legal advisor to the convening authority has coordinated with The Judge Advocate General of the appropriate armed force to resolve the conflict. If the conflict cannot be resolved, the chief prosecutor or chief defense counsel, as appropriate, or the military judge shall remove the affected counsel from the case and may effect detail of another military counsel.

ABA Model Rule of Professional Conduct 1.12(b) to petitioner's case under our own precedent in *Hawsawi*, 389 F. Supp. 3d at 1008.

Even if ABA Model Rule 1.12(b) applies, there is no substantive impact on our ultimate conclusion for two reasons. First, as discussed *infra* Part VI.C.2.a, the primary reason LC Blackwood's job search with various USAOs, and eventual employment with the USAO for the Western District of Missouri, did not require recusal of Judge Libretto is because none of these USAOs are parties to petitioner's commission. *See* Advisory Op. 81; Fed. Jud. Ctr. Pamphlet 26 ("Daniel" example). No attorney from these USAOs was ever assigned to or appeared in petitioner's commission. *See* Resp't Br. 2; AE 160K at 3-4. Second, assuming without deciding that the DoD and all its components and agencies, as well as the Naval Criminal Investigative Service and Defense Intelligence Agency, are parties to petitioner's commission, any appearance of impropriety caused by LC Blackwood's failure to notify his judge of his job search is not imputed to the military judge. These two possible employers did not extend a job offer to LC Blackwood. *See infra* Part VI.C.2.d. This same analysis applies to any other potential employer who did not extend a job offer. Moreover, LC Blackwood exercised due diligence in researching the law and relevant advisory opinions. *See* Tr. 2974. Any appearance of impropriety stemming from an error by LC Blackwood in his legal analysis about the import of these authorities on his notification obligations is not imputed to the judge. In this alternative scenario where the ABA Model Rule applies, any "follies" of LC Blackwood do not require Judge Libretto's recusal. *Cabrera*, 134 F. Supp. 3d at 446 (quoting *San Juan*, 129 F.R.D. at 412 n.5).

d. LC Blackwood's notice to judge—should v. must

A law clerk may search for and obtain post-clerkship employment while clerking for a judge. Employee Conduct Code Canon 4C(4); *see* Fed. Jud. Ctr. Pamphlet 24. In general, after accepting employment with an office or firm representing a party to a pending case, a law clerk may not continue to work on the pending case. *See* Employee Conduct Code Canon 3F(3); Fed. Jud. Ctr. Pamphlet 24. Ethical rules thus call for communication between a law clerk and judge about the clerk's post-clerkship employment. The issue here, however, is not when *should* notification be made to the judge but when *must* it be made. Canon 4C(4) provides that if a law clerk "has been employed or is seeking or has obtained future employment" with an office or firm representing a party to a case pending before the law clerk's judge, the law clerk "*should* promptly bring this fact to the attention of [his or her judge]." (Emphasis added.)

The Judicial Conference Committee phrased all canons in the Employee Conduct Code, including Canon 4C(4), in terms of "should." Canon 4C(4) states that the law clerk "*should* promptly" notify his or her judge of the clerk's employment search. (Emphasis added.) The Employee Conduct Code does not

use "shall" or "must."[75] In contrast, the Committee selected mandatory words to describe a judge's ethical obligations in the Judge Conduct Code. For example, Canon 3C(1) provides: "A judge *shall* disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned . . . ." (Emphasis added.) Use of different terms in these two related codes signals that different meanings were intended. *E.g.*, *Russello*, 464 U.S. at 23 (concerning two subsections); *see Schwerin v. Bessemer Tr. Co.*, No. X04HHDCV126036160S, 2017 Conn. Super. LEXIS 299, at *39 (Feb. 14, 2017) (in context of will, stating "familiar[ity] with accepted rules of construction" by drafting attorney "may be assumed" (citation omitted)).

Also, the Employee and Judge Conduct Codes were drafted "for lawyers by lawyers," by the same institutional body. *United States v. Miller*, 66 M.J. 306, 311 n.3 (C.A.A.F. 2008) (Baker, J., dissenting) (recognizing significance of "for lawyers by lawyers" on reading of Air Force Instruction); *Comm. on Prof'l Ethics & Conduct of State Bar Ass'n v. Durham*, 279 N.W.2d 280, 284 (Iowa 1979) (recognizing significance of "for lawyers by lawyers" in context of interpreting attorney conduct standards); *cf. Loe*, 768 F.2d at 414 n.4 (commenting on lawyer's special "lexicon"). The purposeful use of *should* in an attorney-drafted document, *see supra* note 75, constitutes strong support for our conclusion that the Committee was both intentional and exercised "precision" in word usage, *F&D Group, Ltd. v. Am. Autofran, Inc.*, No. 89 C 3621, 1990 U.S. Dist. LEXIS 16213, at *14 (N.D. Ill. Nov. 30, 1990) (commenting on expectation from attorney-drafted document), when drafting the law clerk notification responsibilities in Employee Conduct Code Canon 4C(4).

Now turning to the meaning of the word "should," the D.C. Circuit holds that "'should' is generally 'precatory, not mandatory.'" *United States v. Concord Mgmt. & Consult. LLC*, 317 F. Supp. 3d 598, 611 (D.D.C. 2018) (quoting *Ass'n of Flight Attendants v. Huerta*, 785 F.3d 710, 718 (D.C. Cir. 2015), and collecting cases from D.C. Circuit); *Lambert v. Austin Ind.*, 544 F.3d 1192, 1196 (11th Cir. 2008) (stating "'should' means 'usually no more than an obligation of propriety or expediency, or a moral obligation'" and is "permissive, rather than mandatory"); *United States v. Maria*, 186 F.3d 65, 70 (2d Cir. 1999) ("[T]he common meaning of 'should' suggests or recommends a course of action, while the ordinary understanding of 'shall' describes a course of action that is mandatory."); *O'Donnell v. U.S. Agency for Int'l Dev.*, No. 1:18-cv-03126 (TNM), 2019 U.S. Dist. LEXIS 109457, at *7 (D.D.C. July 1, 2019) ("Generally, 'should' is precatory, not mandatory."); *Baptist Healthcare Sys. v. Sebelius*, Civil No. AW-08-0677, 2009 U.S. Dist. LEXIS 130277, at *14 (D.D.C. Aug. 18, 2009) (concluding that "words must and should are not synonymous neither in the context of government regulations and manuals nor in

[75] We observe that the Employee Conduct Code uses "should" seventy-eight times and "may" twenty-five times. In contrast, the code uses "may not" twice in describing Canon 5 on political activities and never uses the following mandatory words: cannot, must, must not, shall, shall not, will, and will not.

everyday usage"); *see Marx v. Gen. Revenue Corp.*, 568 U.S. 371, 377 (2013) (regarding award of costs, stating that "the word 'should' makes clear that the decision . . . ultimately lies within the sound discretion of the district court").[76]

In *Concord*, even where the D.C. District Court acknowledged that "use of 'should' instead of 'shall' is not 'automatically determinative,'" it found use of the two words in the same sub-provision and provision to be "particularly striking." 317 F. Supp. 3d at 611 (quoting *Doe v. Hampton*, 566 F.2d 265, 281 (D.C. Cir. 1977)); *see Russello*, 464 U.S. at 23 (declining to conclude that different language in two subsections have "the same meaning in each"). *Concord* presumed that "differences in language . . . convey differences in meaning." 317 F. Supp. 3d at 611 (alteration in original) (quoting *Henson v. Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1723 (2017) (concerning interpretation of statutes)). *Concord* also found "little reason to think that 'should' means 'shall'" where the regulation's background "cuts both ways." *Id.* (citing *St. Francis Med. Ctr. v. Azar*, 894 F.3d 290, 297 (D.C. Cir. 2018)).

Based on our superior court's interpretation of "should" as precatory, *see Flight Attendants*, 785 F.3d at 718, and because the drafters of the Employee Conduct Code knew how to use mandatory language (as they did in the Judge Conduct Code), we interpret the "should" provisions in the Employee Conduct Code as meaning something that ought to be done, as opposed to something that must be done or is required.

Applied to the facts of the instant case, the real point of the relevant ethical provisions is that a law clerk ought to discuss with the judge his or her job search endeavors early and often. This proactive approach provides the judge with the best opportunity to address any potential issue and take appropriate steps to exclude the law clerk from working on the case at issue, if necessary. Early notification decreases the chances of the judge's recusal becoming necessary. We recognize that LC Blackwood researched the ethical codes and guidance to determine his responsibilities. Tr. 2974; *cf. First Interstate*, 210 F.3d at 989 (in civil suit for legal fees and costs, declining to fault firm for recusal because it hired judges' law clerk, explaining that "law clerk is the one person who is always sure to know of a conflict"). We also recognize that the better practice would have been to discuss with his judge sooner his job search efforts. *See* Employee Conduct Code Canon 4C(4); Fed. Jud. Ctr. Pamphlet 24. We nonetheless find that LC Blackwood acted in good

[76] The scope section of the Model Code of Judicial Conduct states that "should" and "may" are "permissive" and that the conduct being addressed is "committed to the personal and professional discretion of the judge . . . no disciplinary action should be taken for action or inaction within the bounds of such discretion." Model Code of Judicial Conduct, scope at [2] (Am. Bar. Ass'n 2011 ed.), https://www.americanbar.org/groups/professional_responsibility/publications/model_code_of_judicial_conduct/ (last visited Apr. 17, 2020). It also states that use of "must" in commentary means the corresponding rule "properly understood, is obligatory as to the conduct at issue." *Id.* at [3].

faith and was not *required* to notify his judge until his actions required exclusion, that is, upon acceptance of employment with an office or firm representing a party in *Al-Hadi*. Fundamentally, notification is thus merely best-practice advice—otherwise the drafters would have chosen mandatory terms to explain a law clerk's notification responsibilities.

In any event, whatever ethical requirements a law clerk has, "the judge cannot be made an easy victim of the clerk's follies or perceived faults." *Cabrera*, 134 F. Supp. 3d at 446 (quoting *San Juan*, 129 F.R.D. at 412 n.5). "If a clerk has a possible conflict of interest, it is the clerk, not the judge, who must be disqualified." *Hunt v. Am. Bank & Tr. Co. of Baton Rouge*, 783 F.2d 1011, 1016 (11th Cir. 1986) (per curiam), *quoted in Allied-Signal*, 891 F.2d at 972-73; *and San Juan*, 129 F.R.D. at 412 n.5. We find that, without a requirement that notice *shall* be made, an objective reasonable person with knowledge of all relevant facts and circumstances could not logically conclude that LC Blackwood created an appearance of partiality by not notifying his judge sooner. Because LC Blackwood had no requirement to notify his judge sooner, his failure to do so would not cause a reasonable person to question judicial impartiality.

2. No clear and indisputable right to writ of mandamus

a. LC Blackwood's job search for a position with U.S. Attorney's Offices (USAOs) did not create an appearance of impropriety

LC Blackwood's acceptance of employment from the USAO for the Western District of Missouri did not require his exclusion from petitioner's case, as this particular USAO was not a party and had not appeared in petitioner's case during LC Blackwood's job search (or at any other time). We first address whether LC Blackwood's prospective employer was a party to petitioner's case "such that it 'would appear to a reasonable person . . . knowing all the circumstances,' that [LC Blackwood's] impartiality was in jeopardy." *Al-Nashiri*, 921 F.3d at 235 (ellipsis in original) (citation omitted). Identification of "employer" and "party" are critical to the answer. *Id.* In the context of a judge's search for post-judicial employment, *Al-Nashiri* stated that "[i]f they are one and the same, then an intolerable appearance of partiality exists." *Id.* Neither the Judge Conduct Code nor the Employee Conduct Code define "party." In Advisory Opinion No. 81, however, the Committee has essentially told judges and law clerks that a USAO is not a party to a case pending before a judge unless that particular USAO has appeared before the judge in that case.

Advisory Opinion No. 81 begins its analysis under the premise of a "particular" USAO having made an offer to a law clerk. It states, when "the offer has been or may be accepted" the "judge should isolate the law clerk from

cases in which that particular [USAO] appears."[77] *See also* Fed. Jud. Ctr. Pamphlet 26 ("Daniel" example) (explaining that after receiving an offer from a USAO, a law clerk "is only restricted from working on matters handled by the specific [USAO] he is joining"). In other words, sometimes a USAO is a party and sometimes it is not. For purposes of analyzing the impartiality of a law clerk who is looking for a job with a USAO, Advisory Opinion 81 in effect operates to simplify the legal consequences arising from the complex relationships presented when an office (here a USAO) falls within a large organizational chart (the DoJ organization as a whole).

In the first scenario contemplated in Advisory Opinion No. 81, if the "particular" USAO has "appear[ed]" in a case on which the law clerk is working, "[t]he judge should isolate the law clerk" from the case. Isolation serves to "preserve[]" the appearance of impartiality. *Milgard Tempering v. Selas Corp. of Am.*, 902 F.2d 703, 714 (9th Cir. 1990); Employee Conduct Code Canon 3F(3) (stating restriction is "to avoid a conflict or the appearance of a conflict of interest"). Opinion No. 81 explains that the clerk's participation in the pending case "may reasonably create an appearance of impropriety and a cause for concern on the part of opposing counsel." (Citing Employee Conduct Code Canon 3F(1).) In the second scenario, if the particular USAO has not appeared in a case on which the law clerk is working, Opinion No. 81 is silent regarding the judge and isolation of the clerk, of course meaning there is no need for isolation. The absence of any need to consider isolation signifies that the circumstances do not present an appearance of impropriety. If there is no appearance of impropriety, by definition the USAO is not a party or an office or firm representing a party to the pending case at issue. Applying Advisory Opinion No. 81 to petitioner's case, LC Blackwood did not jeopardize his impartiality or appearance of impartiality when he accepted the job offer from the USAO for the Western District of Missouri. The USAO for the Western District of Missouri did not appear in *Al-Hadi* during LC Blackwood's job search or at any other time. *See supra* Part II.A.

Yet, petitioner further argues that the USAO for the Western District of Missouri is a party to *Al-Hadi* because of new information revealing that the Deputy U.S. Attorney from this USAO has been designated as a potential filter attorney in a different military commission case, *Al-Nashiri*. Reply 14. He argues that the Deputy's potential role in *Al-Nashiri* is the link that connects the Missouri USAO to military commissions in general, and thus to *Al-Hadi*. *See*

[77] The only reason for a judge to restrict or isolate his or her clerk from work on a case is because the judge believes that the law clerk's relationship with the USAO has jeopardized the clerk's impartiality or created the appearance of partiality. If the judge believes this to be an issue, it is because the other side may think it is working under a disadvantage. Assuming LC Blackwood has jeopardized his appearance of impartiality, an objective, reasonable, and knowledgeable observer also would have reason to question the fairness of the proceeding for two primary reasons: (i) it appears the law clerk may be influencing the judge to gain advantage in the hiring process or (ii) it looks like the law clerk (and future prosecutor) is a government mole working directly in the judge's chambers.

id. Advisory Opinion No. 81, however, defeats this argument. It requires an attorney from the Western District of Missouri to *appear* in *Al-Hadi*, not merely have a potential role in a different and unrelated military commission case at some future undetermined time. No reasonable person with knowledge of all the facts and circumstances would conclude that an appearance of partiality was created when LC Blackwood accepted a job offer from a USAO that has never appeared in petitioner's case. We also note the minimal involvement of the DoJ, the AG, and the Deputy AG in the administrative processing of LC Blackwood's application for employment with the USAO for the Western District of Missouri. *See* AE 160K at 16-17; *supra* note 19 (discussing seven-step AUSA hiring process). This level of involvement contrasts sharply with the facts in *Al-Nashiri*, 921 F.3d at 235-36, and does not show active participation by the DoJ, the AG, or the Deputy AG in *Al-Hadi*'s commission "from start to finish," *id.* at 236.

For the same reasons, we also find that LC Blackwood's Texas USAO job search effort did not jeopardize his impartiality or appearance of impartiality. Briefly stated, the USAO for the Western District of Texas never appeared in petitioner's case and thus was not a party. *See* Advisory Op. 81; *supra* Part II.A. At most, there is an attenuated connection[78] between a possible employer (the Texas USAO) and the pending case of *Al-Hadi* because LC Blackwood submitted a job application to that office, which interviewed and extended an offer to him that he declined. *Supra* Part II.D.2. These facts stand in contrast to circumstances involving an obvious appearance of partiality, as when a law clerk accepts a job offer from a law firm whose counsel is "sitting at counsel table" in the courtroom. *Cf.* Tr. 2997. Even if the Texas USAO was a party, "few knowledgeable people would expect that" the "relatively weak and remote" conflict, if any, created by LC Blackwood's interaction with the Texas USAO "would ordinarily cause most law clerks to actually commit the serious ethical breach of seeking to influence a judge improperly." *Allied-Signal*, 891 F.2d at 971.

b. Judge Libretto was not required to exclude LC Blackwood

We find there was no requirement to exclude LC Blackwood from work on *Al-Hadi* as a result of his acceptance of the employment offer from the USAO for the Western District of Missouri, as argued. Pet'r Br. 5, 23-28, 33-36; *see* Resp't Br. 32-35. Exclusion or isolation of a law clerk from work on a pending case in which the law clerk's future employer is involved removes the appearance of bias emanating from the law clerk's job search. *Milgard*, 902 F.2d at 714. Exclusion also prevents litigants from "sabatog[ing] trials" with employment offers to law clerks. *Id.* In the instant case, when Judge Libretto

[78] *See In re Allied-Signal, Inc.*, 891 F.2d 967, 971 (1st Cir. 1989). In *Allied-Signal*, the connection was familial. Two law clerks each had a brother who worked for a law firm representing parties. *Id.* at 969. An overriding factor in the court's analysis was the obvious problem of "trying such a large case in such a small district." *Id.* at 971.

learned of LC Blackwood's employment as an AUSA in the Western District of Missouri, he took no steps to screen LC Blackwood from *Al-Hadi* and did not direct his isolation from petitioner's case. Tr. 2829. But he did not have to. When LC Blackwood accepted the USAO job offer, he had no obligation to notify his judge because the USAO for the Western District of Missouri was not a party to petitioner's commission. *See* Advisory Op. 81. When there is "no conflict of interest in the first place, there is nothing that [can] be imputed to the judge that might require [a law clerk's] isolation, let alone the drastic remedy of recusal." *Uniloc*, 492 F. Supp. 2d at 56. An objective, reasonable, and knowledgeable observer would come to a similar conclusion in petitioner's case—that LC Blackwood did not create an appearance of partiality when he accepted employment with the USAO for the Western District of Missouri, and Judge Libretto thus had no reason to exclude LC Blackwood from petitioner's case.

Moreover, even if the USAO for the Western District of Missouri was a party to petitioner's case, the facts of *Al-Hadi* did not require the military judge to exclude LC Blackwood. *See Philip Morris USA, Inc. v. FDA*, 156 F. Supp. 3d 36, 45 (D.D.C. 2016) (stating "recusal under Section 455(b)(2) is necessarily a fact-intensive inquiry"). This fact analysis involves inquiry into LC Blackwood's conduct. *See Mathis v. Huff & Puff Trucking, Inc.*, 787 F.3d 1297, 1311 (10th Cir. 2015) (stating inquiry into existence of "appearance problem under § 455(a) is a fact specific inquiry"). Some cases draw a bright line, holding that failure to exclude the clerk creates an appearance of partiality—even where the clerk did not "actually affect[]" the judge's decision. *E.g.*, *Hall*, 695 F.2d at 179-80 (finding appearance of partiality where before judgment law clerk accepted job with firm representing party, even where judge "made up his mind immediately after hearing the case, without the law clerk's assistance"), *quoted in Mathis*, 787 F.3d at 1311. Other cases focus on the extent and nature of the law clerk's involvement. *See Mantiply v. Horne (In re Horne)*, Civil No. 13-00258-CB-B, 2014 U.S. Dist. LEXIS 48037, at *15-16 (S.D. Ala. Apr. 8, 2014) (relying on decisions holding that a law clerk does not create an appearance of partiality in the absence of substantive work to conclude that courtroom deputy did not create appearance of partiality given deputy's administrative function), *aff'd*, 630 Fed. App'x 908 (11th Cir. 2015), *aff'd*, 876 F.3d 1076 (11th Cir. 2017), *quoted in Cabrera*, 134 F. Supp. 3d at 451; *United States v. Martinez*, 446 F.3d 878, 883 (8th Cir. 2006) (finding "average observer" informed that law clerk "performed only ministerial duties" at motion hearing and was otherwise screened from case "would not reasonably question [judge's] impartiality," even where in prior Special AUSA position clerk had initiated prosecution against defendant and conducted cross-examination at suppression hearing).

Still other cases focus on whether the law clerk has usurped the judicial role, but with starkly different outcomes. *Compare, e.g., Bayou Fleet, Inc. v. Alexander*, 234 F.3d 852, 857-58 (5th Cir. 2000) (in analysis of constitutional

right of access to court, finding no usurpation where proceedings and a ruling were delayed based on law clerk's schedule and clerk interrupted judge to correctly explain meaning of ruling),[79] *with Parker*, 855 F.2d at 1523-26, 1524 n.14 (finding public may reasonably conclude that law clerk usurped judicial role based on judge giving credit to law clerk in footnote to decision). In *Parker*, in a footnote to his summary judgment decision in favor of the steel company, the judge expressed "indebted[ness]" to the law clerk "for his careful analysis of the massive discovery materials and his countless discussions with the Court as to how the law should be applied to the material facts as to which there is no genuine issue." 855 F.2d at 1523. The Eleventh Circuit found that the following combination of facts raised an appearance of impropriety and a reasonable question about the judge's impartiality: (i) the public's perception from the footnote that it was the clerk, not the judge, who decided the summary judgment motion; (ii) the clerk's holding of a summary judgment hearing in absence of the judge's presence, albeit solely to determine legal positions, and later reporting results to his judge; and (iii) the clerk's father's status as a senior partner in the firm representing the steel company and as a former clerk to the judge. *Id.* at 1524-25, 1524 n.14. The Eleventh Circuit specifically stated that its decision should not be interpreted as imputing to the district court any appearance of impartiality created by the clerk. *Id.* at 1525. Ultimately, the court found the judge's failure to recuse harmless under *Liljeberg*, 486 U.S. 847. *Id.* at 1525-26.

From our survey of cases, we think it is fair to conclude that apparent bias in a law clerk may be "imputed to the Court only when the clerk substantively participates in a case where that bias can potentially manifest itself." *Cabrera*, 134 F. Supp. 3d at 449; *cf. Railey v. Webb*, 540 F.3d 393, 415 (6th Cir. 2008) (in case involving habeas relief, explaining that 28 U.S.C. § 455 "establishes stricter grounds for disqualification than the Due Process Clause" (quoting *Davis v. Jones*, 506 F.3d 1325, 1336 (11th Cir. 2007))); *Del Vecchio v. Ill. Dep't of Correc.*, 31 F.3d 1363, 1373 (7th Cir. 1994) (under due process analysis, stating that Supreme Court disqualification cases "all involved 'direct, personal [and] substantial' influences on the judges involved" (alteration in original) (quoting *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 822 (1986))). If a law clerk continues work on a case where impartiality might reasonably be questioned, the "clerk's actual or potential conflict may be imputed to the judge." *Mathis*, 787 F.3d at 1311 (citing *Hall*, 695 F.2d at 180); *Hamid v. Price*

[79] In *Bayou Fleet, Inc. v. Alexander*, the Fifth Circuit found that a law clerk had not "usurped the judge's role in the decision-making process of the trial," 234 F.3d 852, 858 (5th Cir. 2000), where the clerk (i) interjected into a discussion between counsel and judge to explain that a ruling would not be issued at 1:30 because law clerk was "sitting in the courtroom right now" and the judge then changed the timeline, (ii) interrupted the judge's explanation of a ruling denying a motion for summary judgment to provide the correct meaning of the ruling, and (iii) where trial was postponed for two days to permit the clerk to visit family, *id.* at 857. Although "unfortunate" circumstances, the court found the judge was "engaged" during pretrial and trial by questioning witnesses and lawyers, ruling on evidence, and making decisions "necessary for a traditional trial." *Id.* at 858.

Waterhouse, 51 F.3d 1411, 1416 (9th Cir. 1995) (stating law clerk's acceptance of offer raises no question about judge's appearance of impartiality if clerk is isolated); *Milgard*, 902 F.2d at 714 (stating removal of law clerk from case involving future employer preserves appearance of impartiality).

Based on the preceding cases involving fact-intensive inquiries, we find that if the USAO for the Western District of Missouri was a party to *Al-Hadi*, Judge Libretto still did not err in declining to exclude LC Blackwood for three main reasons. First, LC Blackwood's work effort was a team effort by himself, two other law clerks, and Mr. F, the OMCTJ Staff Director, Tr. 2609, 2616, 2626, who was the supervisor of attorneys, Tr. 2608, 2616, and "final sounding board" for Judge Libretto, Tr. 2609. The team approach and Mr. F's role served to mitigate the impact from any appearance of partiality in LC Blackwood.

Second, there is no dispute that LC Blackwood had some involvement in "certain matters" in petitioner's case after he accepted the offer from the Missouri USAO. Tr. 2608. While the record does not reveal any detail about the extent or specific nature of his involvement, we can conclude with a fair degree of confidence that LC Blackwood's actions and circumstances, for example, bear no resemblance to the law clerk's conduct and situation in *Parker* that was cause for the judge's recusal. Assisting the Court in wading through the "cumbersome" Mil. Comm. R. Evid. 505 process, *see Legal Hearing, supra*, at 136 (statement of Hon. David S. Kris, Asst. Att'y Gen., Nat'l Sec. Div., DoJ), is intrinsically different from holding a summary judgment hearing in the absence of the judge, as in *Parker*, 855 F.2d at 1524. LC Blackwood's contribution to the Mil. Comm. R. Evid. 505 process, at the direction of and with oversight from the judge, Tr. 659, *see* Tr. 3002-03, is more akin to an administrative task appropriate for a law clerk under the circumstances presented in *Al-Hadi*, than an adjudicative function like holding a summary judgment hearing, *see Horne*, 2014 U.S. Dist. LEXIS 48037, at *15-16. We also think that from the viewpoint of an objective, reasonable, and knowledgeable observer, holding a hearing having the potential to completely resolve the entire case, as occurred in *Parker*, certainly looks more judicial than reviewing voluminous classified documents.

Third, the unique relationship between a judge and law clerk is relevant to our factual analysis. A judge and law clerk have an "intimate working relationship," *Horen v. Cook*, 546 Fed. App'x 531, 537 (6th Cir. 2013), based on the need for the "absolute free flow of information," *Sheppard v. Beerman*, 18 F.3d 147, 152 (2d Cir. 1994). Given this special relationship, we presume that when Judge Libretto learned of LC Blackwood's new job in Missouri, he knew with a considerable degree of accuracy the extent to which his law clerk was working on petitioner's case and the nature of any such work. *Cf. Anderson v. Valdez*, 845 F.3d 580, 605 (5th Cir. 2016) (Jones, J., dissenting) (A law clerk "is normally accountable to the judge (or judges) for whom he directly works."). Judge Libretto would have known exactly what, if anything, LC Blackwood was

doing or scheduled to do on Al-Hadi's case until his departure from the OMCTJ. Indeed, one would be hard-pressed to find a judge in similar circumstances, presiding over a complex case of grave importance to national security interests, to be asleep at the wheel during any stage of the trial. Moreover, law clerks also "are presumed to be impartial," *First Interstate*, 210 F.3d at 988 (stating in civil case that it is not foreseeable that hiring a law clerk will result in recusal), and "judges are fully capable (and believed by reasonable members of the public to be fully capable) of taking account of whatever 'bias' . . . a clerk [might bring to chambers]," *see Allied-Signal*, 891 F.2d at 971, *quoted in Cabrera*, 134 F. Supp. 3d at 452. Finally, we note that in cases involving issues of post-clerkship employment, the appearance of impartiality, and law clerk exclusion, "[j]udges themselves are in the best position to forestall future difficulties with . . . quick action *where necessary*," *First Interstate*, 210 F.3d at 988 (emphasis added) (quoting Kevin D. Swan, Comment, *Protecting the Appearance of Judicial Impartiality in the Face of Law Clerk Employment Negotiations*, 62 Wash. L. Rev. 813, 840 (1987)).

In addition to our reliance on the particular facts in petitioner's commission, we are overall mindful "that judges, not law clerks, make the decisions."[80] *Cabrera*, 134 F. Supp. 3d at 446 (quoting *Allied-Signal*, 891 F.2d at 971, and collecting cases); *Ohio Valley Envtl. Coal v. Fola Coal. Co.*, 120 F. Supp. 3d 509, 514 n.4 (S.D. W. Va. 2015) ("At the risk of stating the obvious, a term law clerk is not a judge."). "The statute itself speaks of 'justices, judges, or magistrates,' not clerks." *Allied-Signal*, 891 F.2d at 971 (quoting 28 U.S.C. § 455(a)), *quoted in Horne*, 2014 U.S. Dist. LEXIS 48037, at *16 (embracing maxim). The record before us supports this truism. *See* Tr. 2633 (Judge Libretto stating he received assistance from his law clerks but "independently" reached conclusions); AE 158H, Attach. B (Judge Rubin stating he received assistance from LC Blackwood but "made all decisions and rulings" in *Al-Hadi*); Tr. 2975 (LC Blackwood stating judges issue rulings and orders, not him). For the above reasons, if the Missouri USAO was a party to *Al-Hadi*, based on the particular facts before us, Judge Libretto's decision to refrain from excluding LC Blackwood is a "rational conclusion supported by reasonable reading of the record." *Tauro*, 666 F.2d at 695.

Regarding LC Blackwood's job search for positions with the: (1) Northern District of New York, (2) Southern District of West Virginia, (3) District of Minnesota, (4) District of Nevada, (5) Western District of Virginia, (6) Eastern District of Virginia, and (7) Southern District of Florida (Miami), AE 160K at 4; Tr. 2943, 2947, whether the military judge should have isolated LC Blackwood never comes into play because these USAOs never extended a

[80] While the status of the law clerk as a "term law clerk" was highlighted in *Cabrera*, 134 F. Supp. 3d at 452-53, the significance of this distinction is not obvious to us. A law clerk, whether term or career, "is not a judge," "performs tasks as delegated to him or her by a supervising judge," "does not enjoy the exercise of discretion," and does not decide cases. *Id.* at 452.

job offer to LC Blackwood. *See* Tr. 2972. The precatory language in Advisory Opinion No. 81—that a judge "should isolate" his or her law clerk—does not apply. Isolation of a law clerk is not a consideration where there is no job offer. *See* Advisory Op 81; Fed. Jud. Ctr. Pamphlet 26 ("Daniel example"). Nor does isolation of LC Blackwood come up in connection with the offer from the Western District of Texas since there was little, if any, likelihood of this offer being accepted. *See infra* note 82.

c. Even if LC Blackwood should have been excluded . . .

Even if LC Blackwood's employment offers or acceptance of a job offer from the USAO for the Western District of Missouri required Judge Libretto to exclude him from working on *Al-Hadi*, an objective, reasonable, knowledgeable person would not see the circumstances as evidence of partiality in LC Blackwood. If only a few law clerks ever applied for post-clerkship employment, then "one might wonder about the appearance of one" law clerk working on a case, after receiving or accepting a job offer from an office or firm representing a party to that case. *Allied-Signal*, 891 F.2d at 971. The vast majority of law clerks, however, begin their search for post-clerk employment during their clerkship. *Cf. Martinez-Catala*, 129 F.3d at 221 ("It is common knowledge in the profession that former law clerks practice regularly before judges for whom they once clerked."). The risk of receiving a job offer from or post-clerkship employment with an office or firm representing a party to a pending case is therefore considerable, *Allied-Signal*, 891 F.2d at 971, so much so that Canon 4C(4) of the Employee Conduct Code specifically addresses a law clerk's search for post-clerkship employment, as do the "Conflicts of Interest" and "Career" sections in the Federal Judiciary Center's Law Clerk pamphlet, at 10-11, 24, 26, Advisory Opinion Nos. 74 and 81 from the Judicial Conference Committee, and related service rules.

Under these circumstances, "other things being equal, the more common a potentially biasing circumstance and the less easily avoidable it seems, the less that circumstance will appear to a knowledgeable observer as a sign of partiality." *Allied-Signal*, 891 F.2d at 971; *see Uniloc*, 492 F. Supp. 2d at 58 (stating that risk of unpaid law clerk pursuing "an advanced degree in computer science will have at least some connection to Microsoft is not inappreciable"). We acknowledge that LC Blackwood's situation was avoidable because he could have notified the judge sooner. Still, his situation clearly arose "out of a common circumstance" in the clerkship arena. *Allied-Signal*, 891 F.2d at 971. As such, "a knowledgeable objective observer is [] more likely to see [LC Blackwood's situation] as implicit in the special circumstances [facing law clerks] rather than as an odd coincidence the failure to avoid which might suggest bias," *id.* at 971-72, *quoted in Hamid*, 51 F.3d at 1417, especially where LC Blackwood researched his ethical responsibilities before conducting his job search, Tr. 2974; *cf. First Interstate*, 210 F.3d at 989 (stating law clerk "is always sure to know of a conflict").

Also, petitioner's commission "is not an ordinary case" because "[i]t is large, complex, and time consuming." *Allied-Signal*, 891 F.2d at 971; *see Uniloc*, 492 F. Supp. 2d at 49, 56-57, (in analyzing recusal in $525 million case based on unpaid judicial intern's receipt of $12.64 in royalties from defendant, considering complexity and time required in case). *Al-Hadi* involves an abundance of issues, over 1,600 pleadings, motions, and rulings, and very serious allegations with national security implications. Off. Mil. Comm'n website, https://www.mc.mil/CASES.aspx (last visited Apr. 17, 2020) (*Al-Hadi* tab listing documents filed in case); Tr. 3275-77 (defense stating that *Al-Hadi* is a "large" case, "huge undertaking," and that the "volume of classified information . . . is enormous").

We agree with petitioner on the importance of law clerks in the judicial process. *See* Pet'r Br. 24; *Kincaid v. Vail*, 969 F.2d 594, 600-01 (7th Cir. 1992) (stating law clerk's role often affords them absolute quasi-judicial immunity); *Fredonia*, 569 F.2d at 255-56 (commenting on role of law clerks). LC Blackwood clearly played an important role in the administration of petitioner's case. *See* AE 158H, Attach. B; Tr. 2633, 2649, 2927, 2953, 2960. "[T]he effective management of this highly complex litigation benefited from, if it did not absolutely require, the services of [LC Blackwood]. . . . [a] career clerk[]." *Allied-Signal*, 891 F.2d at 972. The commission's "need for [LC Blackwood] was somewhat special and likely to have been seen as such." *Id.*; *see* Tr. 3276 (defense arguing that judges in *Al-Hadi* "necessarily need[] to rely on the assistance of other attorneys in working through the subject matter"). We thus find that "other things being equal, the greater the extent to which the potentially disqualifying circumstance facilitates the just and efficient resolution of a case, the less likely a knowledgeable observer will consider it a sign of judicial partiality." *Allied-Signal*, 891 F.2d at 972. In simple terms, a knowledgeable observer would see LC Blackwood's experience on petitioner's case as necessary and a positive, not the source of an appearance of impropriety.

d. LC Blackwood's applications to Department of Defense components and agencies did not require his exclusion

LC Blackwood was not required to be excluded on account of his job search with the Naval Criminal Investigative Service (NCIS) and Defense Intelligence Agency (DIA). *See* AE 160K at 5; Tr. 2946-47. This job search effort is not conduct that raises a question about the appearance of impropriety because these possible employers did not make a job offer to LC Blackwood. *See supra* Part II.D.2; Advisory Op. 74 (stating "need to exclude" arises with offer and acceptance, or an offer that "may be accepted"). Although Judge Libretto based his decision, in part, upon his finding that the DoD is not a party to Al-Hadi's commission, *see* AE 158R at 16-18, based on the lack of any offers we find no need to now address whether the DoD writ large, or a particular component or agency of the DoD—including NCIS, or DIA—is a party to *Al-Hadi* specifically or to military commissions in general.

D. Judge Libretto was not required to recuse himself after LC Blackwood's acceptance of job offer, nor was Judge Rubin's recusal required

1. No clear and indisputable right to writ of mandamus as to Judge Libretto

Here, we consider Judge Libretto's recusal decision at AE 160K. On August 31, 2018, the USAO for the Western District of Missouri made a "contingent formal offer," which LC Blackwood accepted on the same day. AE 160C, Attach. B. Judge Libretto, the presiding judge, issued rulings and orders during the three to four month period LC Blackwood remained employed at the OMCTJ after accepting the USAO offer; some of LC Blackwood's time was spent on leave. *See supra* Part II.D.1.d and note 23. Judge Libretto was not required to recuse himself after LC Blackwood's acceptance of the Missouri offer because (i) LC Blackwood's exclusion was not required and (ii) judges, not law clerks, decide cases.[81] Judges "must preserve both the reality and appearance of impartiality," meaning a judge must not only be impartial in fact but also in the eyes of a "'reasonable person . . . knowing all the circumstances.'" *Al-Nashiri*, 921 F.3d at 234 (ellipsis in original) (quoting *Liljeberg*, 486 U.S. at 860-61). "[J]udges 'shall disqualify' themselves in any 'proceeding in which [their] impartiality might reasonably be questioned.'" *Id.* (alteration in original) (quoting 28 U.S.C. § 455(a); Judge Conduct Code Canon 3C(1); Model Code of Judicial Conduct r. 2.11 (Am. Bar Ass'n); Rule for Courts-Martial 902(a); citing R.M.C. 902(a)). This requirement is necessary because "[d]eference to the judgments and rulings of courts depends upon public confidence in the integrity and independence of judges." *Id.* (alteration in original) (quoting *Microsoft*, 253 F.3d at 115 (quoting Judge Conduct Code Canon 1 cmt. (2000))). Justice functioning at its "best . . . must satisfy the appearance of justice." *Id.* (quoting *Liljeberg*, 486 U.S. at 864); *Offutt*, 348 U.S. at 14 (Justice Frankfurter stating, "justice must satisfy the appearance of justice"), *quoted in Williams-Yulee*, 575 U.S. at 446.

"'[A]ll that must be demonstrated to compel recusal,' then, is 'a showing of an appearance of bias . . . sufficient to permit the average citizen reasonably to question a judge's impartiality.'" *Al-Nashiri*, 921 F.3d at 234 (alterations in original) (quoting *United States v. Heldt*, 668 F.2d 1238, 1271 (D.C. Cir. 1981) (per curiam)). The trial judge, however, is "allowed a range of discretion" because "reasonable deciders may disagree." *Cabrera*, 134 F. Supp. 3d at 446 (quoting *Tauro*, 666 F.2d at 695). There is no "mandatory rule requiring the recusal of the judge whenever a law clerk employed by that judge has a real or possible conflict of interest." *Id.* at 449 (quoting *Baugh v. City of Milwaukee*, 829 F. Supp. 274, 275 (E.D. Wis. 1993) (explaining that *Hall*, 695 F.2d 175, does not create mandatory rule)); *Stevens*, 2018 U.S. Dist. LEXIS 133867, at *4-5 ("Nothing in [the Judge and Employee Conduct Codes] require the judge to

[81] *See supra* Part VI.C.2.b (discussing principle that judges, not law clerks, decide cases).

disqualify himself or herself due to a law clerk's or staff attorney's conflict of interest. Instead, the judge is to take appropriate steps to restrict the law clerk[] . . . ." (citing Judge Conduct Code Canon 3C(1)(a); Employee Conduct Code Canon 3F(3))). "The decision to grant or to deny a motion for disqualification is committed largely to the discretion of the trial court, and we review it solely to evaluate whether the decision below amounted to an abuse of discretion." *Allied-Signal*, 891 F.2d at 970 (quoting *United States v. Giorgi*, 840 F.2d 1022, 1034 (1st Cir. 1988)). "The appellate court, therefore, must ask itself not whether it would have decided as did the trial court, but whether that decision cannot be defended as a rational conclusion supported by reasonable reading of the record." *Tauro*, 666 F.2d at 695 (involving mandamus petition for recusal in criminal case). Any doubt should be resolved "in favor of disqualification." *Cabrera*, 134 F. Supp. 3d at 446 (quoting *Parker*, 855 F.2d at 1524-25); *Hall*, 695 F.2d at 178-79 ("A judge should exercise his discretion in favor of disqualification if he has any question about the propriety of his sitting in a particular case."). Under these standards and on the record before us, we do not find "reasonable bases," *In re Al-Hawsawi*, 2020 U.S. App. LEXIS 11340, at 18, for a conclusion that Judge Libretto was partial towards respondent..

Obviously, "judges may not adjudicate cases involving their prospective employers." *Al-Nashiri*, 921 F.3d at 235 (citing Advisory Op. 84). The question here, however, is whether potential bias evidenced in a law clerk's job search activities may be imputed to the judge. Had we decided that LC Blackwood was laboring under an appearance of partiality in the eyes of the objective, reasonable, and knowledgeable person, we would have to answer this question. Because we find that there was no "need" to exclude LC Blackwood under applicable ethical provisions, we do not have to. More succinctly, without a conflict by LC Blackwood (real or apparent) we have nothing to impute to Judge Libretto that might require his recusal. *Uniloc*, 492 F. Supp. 2d at 56; *see Hamid*, 51 F.3d at 1416 ("[Law clerk's] advice to and research for Judge [] could not be tainted if he gave no advice and did no research."). On the facts presented to us concerning LC Blackwood's acceptance of the job offer from the USAO for the Western District of Missouri, Judge Libretto's decision to not recuse himself is not "on the impermissible side of the line."[82] *Al-Nashiri*, 921 F.3d at 235.

[82] No attorney from the Western District of Texas appeared in petitioner's case, AE 160K at 15 n.32, 17-18; Resp't Br. 2, which renders the Texas USAO a non-party, *see* Advisory Op. 81. This aside, the Texas USAO made an offer to LC Blackwood. Tr. 2947; AE 160K at 5. Advisory Opinion 74 and 81 state a judge should isolate his or her clerk when an offer "may be accepted," and Advisory Opinion No. 74 indicates that "may be accepted" means a "likelihood that a future employment relationship with the clerk may develop." Because of LC Blackwood's success in obtaining job interviews, gaining seven USAO interviews and an interview with the Naval Criminal Investigative Service, *see supra* Parts II.D.1.b, II.D.2, we find that he was under little pressure to accept the Texas offer. The sole reason for rejecting the offer was location of the office, Tr. 2950, an aspect of the position that was not going to change. Thus, assuming that the Texas USAO was a party, we find there was little likelihood, if any, that LC Blackwood was going to accept the offer. Judge Libretto

We find Judge Libretto's denial of petitioner's motion (AE 160K) to be within his "range of discretion." *Cabrera*, 134 F. Supp. 3d at 446 (quoting *Tauro*, 666 F.2d at 695). "[A]n objective, knowledgeable member of the public" would have no "reasonable basis for doubting [his] impartiality." *In re United States (Franco)*, 158 F.3d 26, 30 (1st Cir. 1998) (quoting *Tauro*, 666 F.2d at 695). Judge Libretto's decision can be defended as "rational" and "supported by reasonable reading of the record." *Tauro*, 666 F.2d at 695. Moreover, under a "totality of the circumstances," *Al-Nashiri*, 921 F.3d at 235, it is absurd to suggest that an objective reasonable person with knowledge of all the relevant facts would think that Judge Libretto would (i) violate his professional duties as an attorney and judge, (ii) violate his oath as a military officer, (iii) put his career and reputation at risk, and (iv) subject himself to potential prosecution under the Uniform Code of Military Justice to possibly improperly help LC Blackwood, or that Judge Libretto would be incapable of discerning partiality in his law clerk's advice or work product and "doing what the law requires," *Gerlaugh*, 129 F.3d at 1036. The facts do not support this conclusion. Not only did Judge Libretto know LC Blackwood for only about six months at most, *see* Tr. 2640; AE 001B; AE 160K at 3, never having met him prior to being detailed to the Al-Hadi's military commission, Tr. 2640. Judge Libretto worked mostly at Parris Island, South Carolina, Tr. 2622, while LC Blackwood worked in Washington D.C. "It is to filter out fantastic suggestions like this that the word 'reasonable' is part of the recusal test." *Hamid*, 51 F.3d at 1416 (involving allegation that "law clerk was slanting his advice" to favor law firm because clerk was hired by "a different law firm 'in the same building . . . on a contiguous floor'" (ellipsis in original)); *see Del Vecchio*, 31 F.3d at 1372 (under due process analysis, stating that "[a]t some point, a 'biasing influence . . . will be too remote and insubstantial to violate the constitutional constraints'" (ellipsis in original) (quoting *Aetna*, 475 U.S. at 826)).

2. No clear and indisputable right to writ of mandamus as to Judge Rubin

For similar reasons, we find that recusal of Judge Rubin also was not required. As with Judge Libretto, without a "need" to exclude LC Blackwood from working on *Al-Hadi*, there was no basis for recusal. Although LC Blackwood certainly worked for Judge Rubin longer than Judge Libretto, it is not just the length of the relationship but also its nature that is relevant to analysis of recusal issues. *E.g.*, *Santiago v. Universidad de Puerto Rico*, Civil No. 19-1762(RAM), 2019 U.S. Dist. LEXIS 198869, at *3 (D.P.R. Nov. 15, 2019) (in case for recusal of judge for prior representation of co-defendant in unrelated litigation, considering "the nature, duration, and intensity of the earlier representation; the presence or absence of ongoing personal relationships; etc." (quoting *Citizens for a Better Env't v. Coleman Cable Sys.*,

---

therefore was not required to exclude LC Blackwood for his interactions with the Texas USAO.

Inc., Civil No. 98 C 2024, 1998 U.S. Dist. LEXIS 4521, at *1 (N.D. Ill. 1998))); *Kissing Camels Surgery Ctr., LLC v. HCA Inc.*, No. 12-cv-3012-WJM-BNB, 2013 U.S. Dist. LEXIS 10997, at *6 (D. Colo. Jan. 25, 2013) (stating "nature, duration and intimacy" of Judge's relationship with nonparty that had sponsorship interest in defendant "must be carefully assessed" in recusal analysis); *Dillingham v. Schofield*, No. 2:11-CV-07, 2011 U.S. Dist. LEXIS 93187, at *31-32 (E.D. Tenn. Aug. 19, 2011) (stating "nature, duration, and intensity of the earlier representation" is one factor relevant to recusal analysis where judge previously was party's attorney in unrelated case (quoting Guide to Jud. Policy, Vol. 2 ch. 3, Compendium of Selected Opinions § 3.6-5(b) (rev. July 11, 2011))); *see State v. Madden*, No. M2012-02473-CCA-R3-CD, 2014 Tenn. Crim. App. LEXIS 208, at *28-38 (Mar. 11, 2014) (McMullen, J. concurring) (analyzing nature of judge's Facebook relationships). If the length of the relationship changes its nature from professional to personal, then a long working relationship of course has some relevance. *Cf. Hawsawi*, 389 F. Supp. 3d at 1013 & n.64 (concluding recusal not required where judge and prosecutor were on same military competitive wilderness team but contact during subsequent ten-year relationship was "infrequent," and citing cases where recusal did not result from personal relationships, including joint family vacation by judge and prosecutor). Here, no facts give the slightest hint of a personal relationship between LC Blackwood and Judge Rubin during their approximately two years together in the OMCTJ. Instead, the evidence solidly supports a professional relationship between a subordinate and a superior, further entrenched by a level of respect that is fundamental to military rank structure, here involving an O-4 major and an O-6 colonel.[83]

As with Judge Libretto, and in light of the facts of petitioner's case and the above discussion, an objective, reasonable, and knowledgeable person could not sincerely believe that Judge Rubin would violate his duties as an attorney, judge, and military officer and would risk his career, reputation, and possibly a court-martial to skew his rulings for perhaps a slightly better chance that his law clerk might get hired, or that Judge Rubin would be incapable of discerning partiality in his law clerk's advice or written product. *See Gerlaugh*, 129 F.3d at 1036. Apparently, the argument is that a potential employer might be so impressed with rulings from the law clerk's court that the potential employer would extend an offer to the law clerk. In the absence of contrary evidence, we assume Judge Rubin, as well as Judge Libretto, "to be men of conscience and intellectual discipline, capable of judging a particular controversy fairly." *Salem Hosp. Corp. v. NLRB*, 808 F.3d 59, 71 n.17 (D.C. Cir. 2015) (quoting *Withrow v. Larkin*, 421 U.S. 35, 55 (1975)).

We also are guided by the principle that "[a] judge is as much obliged not to recuse himself when it is not called for as he is obliged to when it is." *In re*

[83] Even with LC Blackwood being a reserve officer and the judge being on active duty, the strictures inherent in military relationships still defined their professional relationship when LC Blackwood was working on *Al-Hadi* in a civilian capacity.

Drexel Burnham Lambert, Inc., 861 F.2d 1307, 1312 (2d Cir. 1988) (citing *In re Union Leader Corp.*, 292 F.2d 381, 391 (1st Cir. 1961)); *United States v. Nixon*, 267 F. Supp. 3d 140, 147 (D.D.C. 2017) (quoting *Cabrera*, 134 F. Supp. 3d at 446 (quoting *Drexel*, 861 F.2d at 1312)). Indeed, "where the standards governing disqualification have not been met, disqualification is not optional; rather, it is prohibited." *Aguinda v. Texaco, Inc. (In re Aguinda)*, 241 F.3d 194, 201 (2d Cir. 2001). Moreover, we consider that recusal decisions reflect not just a "need to secure public confidence through proceedings that appear impartial, but also the need to prevent parties from too easily obtaining the disqualification of a judge, thereby potentially manipulating the system for strategic reasons." *Belue v. Leventhal*, 640 F.3d 567, 574 (4th Cir. 2011) (quoting *In re United States (Perez-Gimenez)*, 441 F.3d 44, 67 (1st Cir. 2006) (quoting *Allied-Signal*, 891 F.2d at 970)); *Martinez-Catala*, 129 F.3d at 220 (stating considerations in recusal decision include "a concern to discourage judge shopping"); *cf. Tauro*, 666 F.2d at 695 (stating recusal is a "restricted mandate" otherwise "a litigant could avoid adverse decisions by alleging the slightest of factual bases for bias").

The extent to which recusal burdens the commission's expeditious administration of justice also factors into the analysis. *Martinez-Catala*, 129 F.3d at 220 (stating one factor in recusal is court's "desire for expedition"); *see Al-Nashiri*, 921 F.3d at 240 (stating "public unquestionably possesses . . . an 'interest in avoiding unwarranted delays in the administration of justice'" (quoting Opp'n to Al-Nashiri 50)); *cf. Chandler v. Dep't of Correc.*, Civil No. 95-2366 GK, 1996 U.S. Dist. LEXIS 23397, at *9 (D.D.C. Mar. 11, 1996) (in context of frequent filings by inmate, recognizing use of injunctive relief to protect "orderly and expeditious administration of justice" (quoting *Urban v. United Nations*, 768 F.2d 1497, 1500 (D.C. Cir. 1985) (per curiam))). We must consider the "ponderous burden that would be thrown upon the judicial system were this enormous and costly case to begin anew." *San Juan*, 129 F.R.D. at 423. "The ripple effect of granting [a recusal] motion [can] be a tidal wave of delay, costs, and loss of confidence in the system." *Id.* at 416 (quoting Pls.' Mem. in Opp'n . . . ., docket No. 12261, at 9); *Uniloc*, 492 F. Supp. 2d at 57 (stating recusal in complex case would result in "unnecessary repetition and expense for the parties" (*comparing Allied-Signal*, 891 F.2d at 973 (noting repetitious litigation as "significant risk of injustice" to parties thus affecting remedy), *with Parker*, 855 F.2d at 1526 (finding recusal appropriate in part because no risk of injustice to parties))). In *San Juan*, "[t]hese factors weigh[ed] heavily against . . . recusal," and the district court concluded that granting recusal would lessen the public's "confidence in the system." 129 F.R.D. at 416.

At the end of the day, acceptance of petitioner's position requires us to conclude that an objective reasonable person with knowledge of all relevant facts would conclude LC Blackwood skewed his work effort, research, and legal advice to Judges Rubin and Libretto with the hope of improving his chance of

securing employment, including with the USAO for the Western District of Missouri. The underlying premise is that certain rulings and orders by the military commission judge would elevate LC Blackwood in the eyes of a potential employer. This theory is speculative. The record before us belies petitioner's position. We are unwilling to adopt this improbable premise.

VII. Conclusion

We deny the Petition for Writ of Mandamus and Prohibition. Petitioner has not met the three conditions for issuance. *See Cheney*, 542 U.S. at 380-81. We remand petitioner's case for implementation of the remedy at AE 158R. While we have determined that the "invisible impact" argument is speculative, the one example relating to the AE 21 series, *see* Reply 5-6, may have some merit. We remand petitioner's case to the military commission for consideration of the claim that the AE 21 series was impacted by Judge Waits' appearance of partiality and, if impacted, to determine appropriate relief. A new military judge shall be detailed to preside over the *Al-Hadi* commission.

FOR THE COURT:

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