REDACTED

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

No. 19-1212

ARGUMENT NOT YET SCHEDULED

In re: NASHWAN AL-TAMIR,
Petitioner

CORRECTED Brief in Support of Petition for a Writ of Mandamus and Prohibition

MEGHAN S. SKELTON
SUSAN A. HENSLER
MAJ MORGAN N. ENGLING, USAF
LCDR JACOB E. MEUSCH, JAGC, USN
LT CHARLES D. BALL, JAGC, USN
Military Commissions Defense Organization
1620 Defense Pentagon
Washington, DC 20301

CERTIFICATE AS TO PARTIES AND RELATED CASES

I. Parties and *Amici* Appearing Below:

1. Nashwan al-Tamir (charged as Abd al Hadi al-Iraqi), defendant/petitioner;

2. United States of America, plaintiff/respondent.

II. Parties and *Amici* Appearing in this Court

1. Nashwan al-Tamir, petitioner;

2. United States of America, respondent.

III. Rulings Under Review

This case involves a petition for a writ of mandamus and prohibition to the Department of Defense and the Court of Military Commission Review. Four orders denying relief are under review.

1. The Court of Military Commission Review denial of a writ of mandamus is at page 2 of the Appendix.

2. The military commission judge's Ruling denying Mr. al-Tamir's Motion to Dismiss Because a Military Judge and Law Clerk Sought Employment with the DOD and DOJ is at page 95 of the Appendix.

3. The military commission judge's Order (regarding reconsideration of certain of the disqualified judge's rulings) is at page 118 of the Appendix.

4. The military commission judge's Ruling denying the Defense Motion for Judge Libretto to Disqualify Himself Under RMC 902 is at page 122 of the Appendix.

IV. Related Cases

This case has not previously been filed in this Court. Petitioner has a habeas petition pending in the District Court for the District of Columbia, *Abdulrazzaq v. Trump,* Case No. 1:17-cv-1928-EGS.

TABLE OF CONTENTS

Page

Certificate of Service

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

OTHER AUTHORITIES

GLOSSARY OF ACRONYMS

CMCR stands for Court of Military Commission Review.

DIA means the Defense Intelligence Agency.

EOIR means the DOJ's Executive Office of Immigration Review.

EOUSA means the Executive Office of U.S. Attorneys.

MCA stands for the Military Commissions Act of 2009.

MCRE means Military Commission Rules of Evidence.

NCIS means the Naval Criminal Investigative Service.

NSD means the DOJ's National Security Division.

OCP means the military commissions' Office of Chief Prosecutor.

OMC means the Office of Military Commissions.

RMC means the Rules for Military Commissions.

RTMC means Regulation for Trial by Military Commission.

Preliminary Statement

This petition presents the same issue as *In re Al-Nashiri*, where this Court took the drastic step of granting a writ of mandamus because a military commission judge applied for a job with the Department of Justice (DOJ), a party to the military commissions. This Court held that "it is beyond question that judges may not adjudicate cases involving their prospective employers."[1] When a military commission judge does so, an objective observer would question the neutrality of the tribunal. Rule for Military Commissions (RMC) 902(a) therefore requires recusal.[2]

Just like the judge in *Al-Nashiri*, the first military commission judge to preside over *United States v. Hadi* applied to be an immigration judge. He did so within weeks of the arraignment, after only 33 minutes of litigation on the record. Then a senior member of the

---

[1] *In re Al-Nashiri*, 921 F.3d 224, 235 (D.C. Cir. 2019). Maintaining the appearance of impartiality is "an essential means of ensuring the reality of fair adjudication. Both the appearance and reality of impartial justice are necessary to the public legitimacy of judicial pronouncements and thus to the rule of law itself." *Williams v. Pennsylvania*, 136 S. Ct. 1899, 1909 (2016).

[2] This rule mirrors 28 U.S.C. § 455(a).

Office of Military Commissions (OMC) Trial Judiciary, a confidential Senior Attorney Advisor to the military commissions judges, applied for a job with the National Security Division (NSD) of the DOJ and for other jobs as a federal prosecutor. Both traded on their experience in the *Hadi* commission. And the attorney advisor even secretly used one of the judge's rulings as his writing sample.

The military commission denied the petitioner's motion to dismiss, and the Court of Military Commission Review (CMCR) denied his petition for a writ of mandamus. Instead of following this Court's instructions in *Al-Nashiri*, the lower courts relied on their own sense that the job applicants continued to act ethically and impartially despite seeking employment with a party. They doubted that an objective observer would question the impartiality of the tribunal.

Last year, this Court concluded that the military commissions needed "some additional 'encouragement . . . to more carefully examine possible grounds for disqualification.'"[3] Necessary, because "The eyes of

---

[3] *Al-Nashiri*, 921 F.3d at 240 (quoting *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 868 (1988)).

the world are on Guantanamo Bay. Justice must be done there, and must be seen to be done there, fairly and impartially."[4] But the hybrid civilian-military prosecutions in the military commissions lack the institutional or historic safeguards to protect the appearance of neutrality.

This petition presents yet another example of how insufficient structural protections irreparably damage impartial justice on Guantanamo Bay. The CMCR focused on salacious details of overt confrontation between the judge and the defense in *Al-Nashiri* as an excuse to overlook five years-worth of an intertwined tangle of conflicts caused by multiple judicial actors making multiple applications to multiple parties, each time trading on their experience in the *Hadi* commission while seeking future employment. This case reveals the uncomfortable truth that issuing the writ in *Al-Nashiri* did not resolve the reasons for concern about judicial integrity in the military commissions. Corrective action is still necessary.

---

[4] *Hamdan v. Gates*, 565 F. Supp. 2d 130, 137 (D.D.C. 2008).

Jurisdictional Statement

Nashwan al-Tamir is imprisoned at Guantanamo Bay's Camp 7 and faces trial by a law-of-war military commission under the name of Abd al Hadi al Iraqi. This Court has exclusive supervisory jurisdiction over military commission proceedings under the Military Commissions Act of 2009 (MCA), and over the United States Court of Military Commission Review pursuant to 10 U.S.C. § 950g. Remedial authority to issue all writs necessary and appropriate in aid of that jurisdiction arises under 28 U.S.C. § 1651.[5]

Issue

This Court granted a writ of mandamus in *In re Al-Nashiri* because a military commission judge applied for post-judicial employment with the DOJ, a party to the military commission, which created a disqualifying appearance of partiality. Here, the first military commission judge to preside over the *Hadi* commission and the Supervisory Attorney Advisor to all three military commission judges

[5] *See also In re Al-Nashiri*, 791 F.3d 71, 75-78 (D.C. Cir. 2015) ("We can issue a writ of mandamus *now* to protect the exercise of our appellate jurisdiction *later*.").

engaged in the same disqualifying conduct, applying for jobs with parties adverse to al-Tamir. Should this Court issue a writ of mandamus and prohibition vacating the order convening this military commission?

Statement of the Case

Nashwan al-Tamir was arrested in Turkey in October 2006. He was moved to a CIA black site where the United States held him incommunicado and tortured him for approximately six months. The government then transferred him to Guantanamo Bay in late spring 2007, where it continued to hold him incommunicado and without charges. Finally, seven years later, the Convening Authority referred charges against al-Tamir, specifying a number of counts of war crimes and conspiring to commit offenses prohibited by the MCA.[6]

A. Captain Kirk Waits applied for post-judicial employment with the DOJ.

[6] App. 448-63. "App." refers to the Appendix filed with this Brief. Most of these documents are available at https://www.mc.mil, the military commissions website, which includes redacted versions of materials marked FOUO. Unredacted FOUO materials are included in the Appendix's under-seal volume.

In June 2014, Captain J. Kirk Waits, USN, JAGC, then nearing retirement, became the first military judge to preside over the *Hadi* commission.[7] The Attorney General detailed an "Asst. U.S. Attorney" from the DOJ's NSD as the lead prosecutor.[8] Waits arraigned al-Tamir on June 18, 2014, during a 33-minute hearing, where the first attorney to speak on the record was the DOJ prosecutor.[9] Waits recognized that this prosecutor was "on loan from the Department of Justice."[10]

Less than two months later, before any other hearing in the commission and before he issued any substantive orders or rulings, Waits applied to be an immigration judge in the DOJ's Executive Office of Immigration Review (EOIR).[11] His application stated that he was the only Navy or Marine Corps judge detailed to a military commission, and identified the *Hadi* commission by name.[12]

---

[7] App. 465.

[8] App. 473, 595.

[9] App. 148, 148-66.

[10] App. 321.

[11] App. 324.

[12] App. 324, 344-45. When Waits began applying for post-judicial civilian jobs, Rear Admiral Christian Reismeier was the Navy's Chief

Waits applied for at least eleven immigration judge positions in multiple locations around the country.[13] Immigration Judge Candidate Assessment checklists reflect active DOJ consideration of his application on March 24, 2015, June 24, 2015, and July 27, 2015.[14] And an email regarding Captain Wait's application to the position in Miami is dated August 19, 2015.[15] His DOJ application thus remained under active consideration for the entire first year of litigation in the *Hadi*

Judge, making him the Navy's senior supervisory jurist. As such, he served as Rules Counsel for Waits and maintained administrative oversight over Waits's judicial billet, which included Waits's collateral assignment to the OMC Trial Judiciary and his prospective retirement plans. App. 607, 1012. From 2019 to 2020, while the parties litigated the issues arising from Waits's job search, Reismeier (now retired) became the Convening Authority. His service as the Convening Authority in the *Hadi* commission, and others, prompted extensive litigation over his own conflicts of interest. Eventually, in April 2020, the Secretary of Defense removed Reismeier as the Convening Authority. *See* Press Release, Dept. of Defense, SECDEF Appoints New Convening Authority for Military Commissions, (Apr. 21, 2020), https://www.defense.gov/Newsroom/Releases/Release/Article/2158184/secdef-appoints-new-convening-authority-for-military-commissions.

[13] App. 322, 324.

[14] App. 967, 970, 973. The document containing these application materials are unclassified and available in a redacted format in AE 155B, Defense Reply to AE 155A (15 July 2019) on www.mc.mil.

[15] App. 982.

commission. He ultimately did not interview for any of these positions and was not offered a job as an immigration judge.[16]

Waits did not disclose the fact that he applied for these jobs. He testified that he saw no ethical problem with presiding over a military commission when he applied for these DOJ jobs although DOJ lawyers were prosecuting al-Tamir.[17] He did not regard the DOJ as a party—he viewed the DOJ lawyer as someone who "was there just to lend some expertise to the prosecution in the case."[18] He was "not thinking about conflicts of interest."[19] He said that the apparent conflict "never dawned on" him,[20] and "never occurred to" him.[21] He also believed the appearance of partiality would not have occurred to any other military judges that he knew and spoke to.[22]

---

[16] App. 361.

[17] App. 335.

[18] App. 360.

[19] *Id.*

[20] App. 356.

[21] App. 335.

[22] *Id.* When the defense attempted to ask Waits about whether the Judge Advocate General of the Navy screened him for potential conflicts of interest in advance of his nomination to the OMC Trial Judiciary,

B. Waits applied to be a civilian attorney with the DOD.

Waits learned of a new civilian attorney opening with the DOD: Deputy Director of the Navy Office of the Judge Advocate General (OJAG) Criminal Law Division.[23] In April 2016, while still presiding over this commission, he applied for that job.[24] Again, Waits's application highlighted his position as the *Hadi* judge.[25] He interviewed in May 2016 with the Director of that section, the OJAG's Inspector General, and the Department of the Navy's Chief Judge (and Rules Counsel for the judiciary).[26] The DOD offered him a civilian job in the summer or fall of 2016.[27] He accepted, and began the process of retiring from the Navy. He started working as a DOD civilian in January 2017.[28] Waits never disclosed the facts of his application, his interview, or

---

Libretto—*sua sponte*—ruled that the line of questioning was irrelevant. App. 335, 344-46.

[23] App. 347.

[24] App. 348, 354.

[25] *Id.*

[26] App. 350.

[27] App. 354.

[28] App. 349.

acceptance of employment as a civilian with the DOD to al-Tamir.[29]

Waits testified that he was unaware of any policies in the OMC Trial Judiciary regarding screening for or policing conflicts of interest other than ethical canons that apply to all judges and lawyers.[30] The military judge who presided over Waits's testimony would not allow defense counsel to inquire about Waits's understanding of the need for the appearance of impartiality for military judges.[31]

C. The Supervisory Attorney Advisor, Matthew Blackwood, applied for post-judicial employment with the DOJ and DOD.

Matthew Blackwood began working as an attorney advisor in the OMC Trial Judiciary in August 2014 while a judge advocate in the Marine Corps. After two years, he left the Marine Corps and became a civilian Supervisory Attorney Advisor[32] to all three judges: Captain Waits, Colonel Peter Rubin, USMC, who replaced Waits in 2016, and Lieutenant Colonel Michael Libretto, USMC, who took over in June

---

[29] App. 356.

[30] App. 334, 337.

[31] App. 320.

[32] App. 793.

2018.[33] Other than performing a few limited tasks on the *Al-Nashiri* commission, Blackwood was exclusively assigned to assist and advise the *Hadi* military commission judges.[34]

1. Blackwood's duties as a Supervisory Attorney Advisor

According to his official position description, as a Supervisory Attorney Advisor, Blackwood was a "senior, highly experienced" attorney[35] who assisted and advised the military commission judges as a "subject matter expert attorney with expertise in trial practice in the context of Military Commissions."[36] All three judges in the *Hadi* commission relied on him for his expertise in the MCA, military law,

---

[33] App. 302-03. The military commission judges generally referred to Blackwood as their law clerk.

[34] App. 260.

[35] App. 797. This GS-15 position description equates the responsibilities of the incumbent as those of an O-6 military officer, an equivalent rank to Captain Waits and Colonel Rubin, the first two military commission judges, and higher than Lieutenant Colonel Libretto, the third military commission judge. App. 799.

[36] App. 797.

"criminal law and procedures; international law, law of war, and national security law as they apply to the Military Commissions."[37]

Blackwood's duties also included overseeing legal research; consulting with key academic and practicing experts; reviewing national and international practices and models; preparing recommendations and "drafting of opinions, rulings, and orders."[38] The three military commission judges relied on him to prepare and deliver "oral presentations and briefings, training sessions, consultations, and strategy sessions . . . [and] resolve controversial matters."[39]

Blackwood supervised other employees within the OMC Trial Judiciary, including the court information security officer, a position that had not previously existed in the DOD and was created specifically for the military commissions.[40] Blackwood thus supervised the expert whose job was to "govern[] the creation, protection, safeguarding,

---

[37] *Id.*

[38] App. 798.

[39] *Id.*

[40] App. 798.

transmission, and destruction of classified information," which is abundant in military commissions.[41]

Rubin described Blackwood's responsibilities as providing "day-to-day assistance and counsel" involving "a broad range of duties such as: conducting legal research, reviewing and managing filings." He also prepared "draft orders and rulings."[42] Rubin called Blackwood "an invaluable sounding board, confidant, and advisor" who was "privy to, and intimately involved in, [his] judicial decision-making process."[43]

Blackwood provided continuity for the three military commission judges assigned to the *Hadi* commission. The judges changed, but Blackwood, as their Supervisory Attorney Advisor, remained a consistent presence. Indeed, Blackwood provided necessary briefings for newly detailed military commission judges, as the number of pleadings and transcripts far exceeds typical litigation, even in a complex matter.[44]

---

41 *Id.*

42 App. 645.

43 *Id.*

44 *See* App. 227-28.

Waits described Blackwood's role in the process of approving government-proposed substitutions for classified evidence under Military Commission Rule of Evidence (MCRE) 505, which bears a slight relationship with the Classified Information Protection Act (CIPA).[45] "My clerk, [then-] Captain Blackwood, is the one who actually physically, you know, has a physical meeting with the prosecutors. I try to avoid those myself."[46] Blackwood—alone—thus personally met with prosecutors *ex parte*, conveying input on their proposed summaries, substitutions, and redactions, of classified information on behalf of the

---

[45] The drafters of the rules relating to military commissions used CIPA as a model for MCRE 505 governing classified information. While Congress used CIPA as a model for MCRE 505, DOJ attorneys recognized that the two frameworks are not identical. David S. Kris, *Law Enforcement as a Counterterrorism Tool*, 5 J. Nat'l Security L. & Pol'y 1, 47-49 (2011) (acknowledging differences between the MCA and CIPA). One notable difference comes on the issue of whether defense counsel can seek reconsideration of a government substitution authorized pursuant to an *ex parte* hearing. 10 U.S.C. § 949p-4(b)(3) and MCRE 505(f)(3) bar the defense from seeking reconsideration in the military commissions. CIPA does not contain that prohibition. *See* 18 U.S.C. app. 3 § 4; *United States v. Libby*, 429 F. Supp. 2d 18, 21 (D.D.C. 2006) (allowing the defense to file a motion for reconsideration under CIPA).

[46] App. 168-69. *See also* App. 337-41.

military commission judge, and seeking status updates on consultations with the Original Classification Authorities.[47] While working for Rubin, Blackwood similarly "review[ed] classified information" then "interact[ed] with counsel."[48]

Waits described what an unusual process this was: "For the record, it's odd to me too. Until I became a commissions judge, I never had an *ex parte* hearing with counsel in any court-martial."[49]

Blackwood's role as the judicial representative in *ex parte* classified evidence meetings was substantial, consistent with his position description. Not only did he preside at the meetings in the absence of the military commission judge, but the judge was not sure of all the details of the meetings. When pressed, Waits conceded that he was unsure about how many *ex parte* meetings Blackwood conducted and how many pages of classified documents Blackwood discussed with

---

[47] App. 169.

[48] App. 645.

[49] App. 171. One of the detailed DOJ lawyers then defended this process, which seems so counterintuitive in an adversarial system of justice. *See id.*

the prosecutors.[50] Waits also described conversations that he had with Blackwood after these meetings as being limited to brief procedural discussions: did he talk with the prosecutors; did the prosecutors respond to suggestions about proposed summaries and substitutions; were the documents sent to the original classification authority?[51]

Blackwood began looking for a job outside of the OMC Trial Judiciary in late 2017 or early 2018.[52] But he did not tell Rubin about his plan to look for a job in general or about any specific job application. Rubin stated, "I had no knowledge that Mr. Blackwood was pursuing or even contemplating outside employment. I had no involvement with Mr. Blackwood's job search and was not asked to be a reference for him."[53] Rubin did not know he had "accepted employment with the Department of Justice until detailed defense counsel" told him.[54]

---

[50] App. 169.

[51] App. 169.

[52] App. 279, 930, 1146. *See also* App. 272-73, 291-93.

[53] App. 645.

[54] *Id.*

UNDER SEAL material is redacted

2. Blackwood's application to the DOJ's National Security Division

In January 2018, Blackwood applied for a job with the DOJ's National Security Division.[55] The Attorney General employed the first prosecutor in this commission as a member of the NSD.[56] Likewise, the Attorney General employs the counsel representing the government in this petition in that section.

Like Waits before him, Blackwood highlighted his work on the *Hadi* commission when applying to the DOJ.[57] His resume summarized his experience: [redacted]

---

[55] [redacted] Libretto refused to allow counsel to inquire about the job networking he did while part of this program. App. 293.

[56] App. 473, 595.

[57] Neither the government nor Blackwood informed the defense of Blackwood's NSD application until *after* Blackwood testified in the *Hadi* commission. App. 379, 913-18.

UNDER SEAL material is redacted

[redacted] His cover letter stated, [redacted]

Blackwood provided a writing sample to the NSD that the government described as "a copy of a ruling (AE 083C) in this Commission."[60] The government further described Blackwood's writing sample as "omit[ing] the case name, the Military Commissions Trial Judiciary banner markings, appellate exhibit number, and specific identity of the accused."[61] But other than these markings "and minor

---

[58] App. 1150.

[59] App. 1146.

[60] App. 930.

[61] *Id.* [redacted], these omissions would have hidden nothing from anyone reviewing the application.

scrivener's errors that were corrected prior to issuance, the remaining content of Blackwood's writing sample tracks" that judicial ruling.[62]

Blackwood used this ruling ostensibly issued by Rubin as his writing sample without asking Rubin's permission.[63] Moreover, as discussed above, he did not notify Rubin that he was applying for the job with the NSD—or any other job.[64]

3. Blackwood's other DOJ and DOD applications

Over the next few months, while continuing to work as the Supervisory Attorney Advisor to Rubin, and then to Libretto, who replaced Rubin in June 2018, Blackwood applied for multiple other jobs with the DOJ and DOD. He applied to at least three law enforcement agencies that were direct participants in multiple interrogations of al-Tamir while the United States government held him incommunicado in conditions amounting to cruel, inhuman and degrading treatment: the

---

[62] *Id.* This Court can compare the documents: The ruling is located at page 518 of the Appendix, and the writing sample is located at page 1153 of the Appendix.

[63] *See* App. 645.

[64] *Id.*

FBI, DIA, and NCIS.[65] In July 2018, he interviewed with NCIS at its office in Quantico.[66] He never disclosed these applications to anyone in the OMC Trial Judiciary or to al-Tamir.

Blackwood also applied to be a federal prosecutor in at least ten different United States Attorney's Offices.[67] He interviewed for at least six Assistant U.S. Attorney (AUSA) positions.[68] He took leave from the OMC Trial Judiciary to do so, but did not disclose the reason for his absence to Rubin or Libretto.[69] Multiple interviews occurred by video

---

[65] App. 279-81. Since the government has acknowledged that the interrogations of CIA prisoners that occurred in CIA black sites were coercive and inadmissible, the government devised a strategy to interrogate High Value Detainees, including al-Tamir, after they were transferred to Guantanamo Bay to obtain "clean team" or "law enforcement" statements. The government used a new agency called the Criminal Investigation Task Force, which consisted of agents from NCIS, DIA, and the FBI. *See* Mark Fallon, UNJUSTIFIABLE MEANS, THE INSIDE STORY OF HOW THE CIA, PENTAGON, AND US GOVERNMENT CONSPIRED TO TORTURE at 38-40 (Reagan Arts 2017). Thus, applications to these agencies are not just applications to parties (the DOJ and DOD), but are applications to components within those parties directly prosecuting al-Tamir.

[66] App. 281, 929.

[67] App. 273-81, 929.

[68] App. 281-83, 929.

[69] *Id.*

teleconference hosted by the Executive Office of U.S. Attorneys (EOUSA) at one of the DOJ's many buildings in downtown Washington, D.C.[70]

Regarding the hiring process, a United States Attorney's Office, as a "component" of the DOJ, works with the EOUSA and Office of Attorney Recruitment Management (OARM) to hire AUSAs.[71] The USAO posts openings on the DOJ's website, then selects and interviews candidates. The USAO notifies the EOUSA of the selections, and forwards all human resources and security documents to the EOUSA.[72] The EOUSA conducts a review, then forwards the documents to OARM for additional review and approval. If OARM approves the candidate, OARM issues the final offer, and notifies the USAO of its action.[73]

---

[70] App. 282.

[71] App. 924.

[72] *Id.*

[73] App. 924-25.

Another AUSA who provided a declaration in this case explained that, as an AUSA, the Attorney General appointed him.[74]

In July 2018, Blackwood was offered a job as an AUSA in the Western District of Texas.[75] He declined this offer, but did not tell Libretto or the defense about it.

4. Blackwood's application to be a federal prosecutor in the Western District of Missouri

On July 31, 2018, Blackwood saw a new position advertised on the DOJ's website.[76] It was an opening for an AUSA specializing in terrorism and national security investigations and prosecutions in the Western District of Missouri.[77] He applied the same day it was advertised.[78] In his cover letter, he stated, "I seek to continue to work on

---

[74] App. 1142. The document appearing at App. 1142-44 is unclassified and publicly available on www.mc.mil. AE 160L, Government's Notice Relevant to the Commission's Order in AE 160K, (Oct. 24, 2019) available at https://www.mc.mil/Portals/0/pdfs/alIraqi/Al%20Iraqi%20(AE160L).pdf.

[75] App. 283.

[76] App. 264.

[77] App. 261, 1111.

[78] App. 266.

national security cases in the Department of Justice."[79] He testified that he meant that he wanted to continue the national security work he was doing as Supervisory Attorney Advisor for the military commission judge.[80] He highlighted his experience working on the *Hadi* commission, involving national security issues and classified information.[81] Blackwood interviewed for the position on August 9, 2018, from the EOUSA's video teleconferencing facility.[82]

Jeffrey Valenti, the Deputy U.S. Attorney and Criminal Chief in the Western District of Missouri's U.S. Attorney's Office, was one of the individuals who interviewed Blackwood.[83] In 2016, Valenti had been selected to work for the OMC Office of Chief Prosecutor (OCP) as an attorney on a "privilege filter team" in the case of *United States v. Al-Nashiri*.[84] During Blackwood's interview, Blackwood and Valenti

---

[79] App. 267, 1076.

[80] App. 267.

[81] App. 269-70, 272.

[82] App. 270.

[83] App. 735.

[84] App. 298, 734, 928, 1142-43.

discussed Valenti's work with the prosecution in *Al-Nashiri* and Blackwood's work on the *Hadi* commission.[85]

Valenti's position as both an AUSA in the Western District of Missouri and as a member of the OCP prosecution team in the *Al-Nashiri* military commission demonstrates the connection between Main Justice, the U.S. Attorneys' Offices, and OCP. Valenti was well known in the DOJ for his experience prosecuting death penalty cases. He had worked with the DOJ's Capital Case Section on the Attorney General's Review Committee that reviewed whether the government could or should seek the death penalty.[86] He had also worked directly with the *Al-Nashiri* lead prosecutor at OCP when that individual had also been an AUSA in the Western District of Missouri.[87]

The Director of the Capital Case Section at Main Justice contacted him to see if he would be interested in joining OCP as part of the "privilege filter team" that would address mental health issues during

---

[85] App. 1143.

[86] App. 1142.

[87] *Id.*

the *Al-Nashiri* penalty phase.[88] The U.S. Attorney for the Western District of Missouri "consented to the Capital Case Section's direct request and agreed to make [Valenti] available as a filter attorney for the *Al-Nashiri* commission."[89]

In 2017, he met with OCP attorneys, including Brigadier General Mark Martins, the Chief Prosecutor of the military commissions.[90] OCP had sent him read ahead materials on a secure email system. During the meeting they shared privileged information and discovery materials.[91] After the meeting, Valenti went to Main Justice, where he received several "read ons" to classified programs that he would need to fully participate in prosecuting Al-Nashiri.[92]

The connection between the DOJ and U.S. Attorney's Office is also evident from the procedural steps the DOJ took when one of its attorneys, Blackwood, was called as a witness here. Before he testified,

---

[88] *Id.*

[89] *Id.*

[90] App. 734, 928, 1142-43.

[91] App. 1142.

[92] App. 1143.

the DOJ "issued" Blackwood a "Touhy letter," limiting the "specifics" he could talk about, such as his work with the NSD.[93] In fact, "DOJ counsel . . . told" Blackwood not to answer certain questions.[94]

Blackwood received a tentative job offer to be a federal national security prosecutor on August 31, 2018, and accepted the same day.[95] The offer came on DOJ letterhead, with a DOJ seal, and stated in bold type at the top of the page that it was from the U.S. Department of Justice. The letter stated that a final offer of employment will come from the DOJ's OARM.[96]

Blackwood did not immediately inform Libretto about this application, interview or offer.[97] Blackwood believes that he told the Libretto about accepting this offer before a September 2018 hearing in the *Hadi* commission, but Libretto recalls that Blackwood first told him

---

[93] App. 262.

[94] App. 264.

[95] App. 274, 298, 1131.

[96] App. 924.

[97] App. 297-99.

in November 2018.[98] After accepting the job, Blackwood kept working for Libretto on the *Hadi* commission, including assisting during two hearings, until late December 2018, when he finally left the Trial Judiciary. Blackwood's duties did not change after applying, interviewing, being offered, or accepting the job, even when Libretto belatedly learned about the new position.[99]

Blackwood testified that he was aware that the post-judicial job search issues in *Al-Nashiri* were "percolating" in this Court while he worked as a Supervisory Attorney Advisor on this commission and after he had accepted the DOJ job.[100] This knowledge, however, did not prompt him to disclose his job search. He, like Waits, testified that he was unaware of any OMC Trial Judiciary policies addressing potential conflicts of interest and employment applications.[101]

During the August 2019 hearing in this commission, the parties

---

[98] App. 245-46, 298-99.

[99] *Id.*

[100] App. 303.

[101] App. 311,336-37.

voir dired Libretto about Blackwood's job search and his continued work on the *Hadi* commission. Libretto confirmed that Blackwood performed substantive work on the commission after applying for and being offered jobs with the DOJ.[102] When asked what actions he took to limit Blackwood's tasks relating to this commission, Libretto stated "little to none."[103]

Libretto relied on his Supervisory Attorney Advisor throughout the judicial decision-making process in the *Hadi* commission.[104] Consistent with the position description, his Supervisory Attorney Advisor drafts orders and rulings, provides opinions on how he should rule, conducts research, and consults on pending legal issues.[105]

Libretto necessarily relied on the attorney advisor with respect to classified information and pleadings because, at his permanent duty station in Parris Island, South Carolina, he does not have a SIPR

---

[102] App. 208-09.

[103] App. 247.

[104] App. 224-27.

[105] App. 231, 235-37, 245.

terminal.[106] And since being detailed to the commission, he spent only about 20 days in the National Capital Region in the offices of the OMC Trial Judiciary.[107] He could only personally review classified pleadings or exhibits when he is the National Capital Region or on Guantanamo Bay.[108] Indeed, during the period after Blackwood applied for, then accepted the DOJ job, both the government and al-Tamir filed multiple classified pleadings which Libretto did not have the equipment to review himself from his office.

Libretto described the conversation where Blackwood finally told him about his new job as "informal" and occurring sometime during the November 2018 session of the military commission.[109] Blackwood told him "he was going to be transitioning in the near future to the

---

[106] App. 223, 226-27. SIPRnet is the DOD's network for information classified at the Secret level. Libretto had no access to, and indeed was not familiar with, the network for TS/SCI/Codeword materials. This commission, however, includes pleadings and rulings at those classification levels.

[107] App. 224.

[108] App. 226-27.

[109] App. 246.

Department of Justice as an Assistant U.S. Attorney."[110] Neither one took any steps to disclose Blackwood's employment plans to the defense.

Libretto, like the other witnesses on this issue, knew of no policies within the trial judiciary with respect to post-judicial employment and conflicts of interest.[111] Moreover, he, also nearing retirement, stated that the DOD retirement seminars did not address any conflicts issues for military judges seeking civilian employment.[112] Libretto has since recused himself because he wants to seek employment with a party.[113]

Al-Tamir unsuccessfully moved to dismiss the commission.[114] With

---

[110] *Id*. (emphasis added).

[111] App. 222.

[112] App. 214.

[113] App. 471.

[114] Libretto made a point to address what he believed was the absence of a writing sample from Blackwood reflecting his work on the *Hadi* commission. Libretto asked, "If Mr. Blackwood's goal was to secure a job within the Department of Justice as an AUSA by implying he would tilt decisions in favor of the United States, what better way than to provide a writing sample that would demonstrate his ability to do so?" App. 141. At the time, Libretto was not aware that Blackwood had indeed submitted one of Rubin's orders to the NSD as a writing sample. The government did not produce any records relating to Blackwood's NSD application until *after* Libretto issued both rulings in the government's favor. App. 96, 122, 928-930.

significant litigation deadlines approaching and the government's failure to timely produce relevant discovery, al-Tamir filed a petition for a writ of mandamus in the CMCR and asked for a stay of proceedings.

The CMCR denied the stay, prompting al-Tamir to seek relief in this Court, which grated a stay. This Court held al-Tamir's petition in abeyance pending the CMCR's resolution of the matter.

The CMCR denied al-Tamir's petition for a writ of mandamus. It held that a well-informed observer would not question Waits's impartiality.[115] It also held that it was "unwilling to adopt [the] improbable premise" that Blackwood's applications and acceptance of employment with the DOJ would undermine the integrity of the military commission.[116] Since neither the military commission nor the CMCR will provide relief under circumstances nearly identical to this Court's *Al-Nashiri* decision, al-Tamir now asks this Court to issue a writ of mandamus and prohibition vacating the order convening the military commission.

---

[115] App. 46-57.

[116] App. 94.

Summary of the Argument

Mandamus is a drastic remedy. But when judges apply for jobs with parties, that drastic remedy is necessary to protect the integrity of the judicial process. Repeatedly, military commissions judges and members of their confidential staff applied for jobs with parties aligned with the prosecution. In *Al-Nashiri*, Colonel Spath applied to be an immigration judge, and then his replacement judge did as well (although she stepped down before going on the record). Here, Captain Waits applied to be an immigration judge within weeks of the arraignment. And the Supervisory Attorney Advisor to all three judges applied to be a federal prosecutor with the NSD and multiple other components within the DOJ, while keeping those applications secret from his judges.

They traded on their experience in the OMC Trial Judiciary in hopes of future employment with parties aligned with the prosecution. These applications, all hidden from al-Tamir, created a disqualifying appearance of partiality.

The military commissions and CMCR have proved that they are unable to police themselves from this recurrent judicial misconduct.

They treated the conduct of the commission judge in *Al-Nashiri* as an aberration, deciding that the identical job applications here do not raise questions about impartiality in the commissions. They substituted their own belief that the judicial actors in the *Hadi* commission harbored no ill-will toward al-Tamir and that the actual rulings were fair for this Court's unambiguous instructions. In doing so, they misapplied the standards of RMC 902(a) (and thus 28 U.S.C. § 455(a)), erroneously interpreted binding precedent, and allowed a laissez-faire approach to judicial misconduct to infect the fairness and appearance of fairness of the military commissions.

Congress, in its efforts to reform the military commission system in 2009, designed the MCA so that military commissions would be joint DOJ-DOD prosecutions. This means that military commissions judges may not seek post-judicial employment with the DOJ and DOD as happened here, and has happened in other military commissions. But in general, military judges may try to become immigration judges because the DOJ is not a party to courts martial. The hybrid military commissions simply have not adopted procedures necessary to protect the judicial integrity in this new and untested system.

The military commissions are conducting themselves as if they are not joint prosecutions, ignoring the role of the DOJ and what that means for the conduct of the OMC Trial Judiciary. *Al-Nashiri* did not sufficiently remind the commissions of the implications of the DOJ's role, or to take that difference into account when considering ethical obligations.

Mandamus may be drastic, and may impose societal costs, but the remedy and the costs are necessary and worth it when the repeated failures of the hybrid military commissions system remain unredressed by the CMCR. This Court decided mandamus was available and appropriate under the circumstances in *Al-Nashiri*. The same is true here because the same conflict exists here. *Al-Nashiri* controls. No meaningful distinction exists.

Reasons for Granting the Petition

This case presents a recurring problem of unaddressed judicial bias in the military commissions that calls for this Court to issue a writ of mandamus and prohibition. In the military commissions context, the All Writs Act empowers this Court to "issue all writs necessary or appropriate in aid of our jurisdiction" such that this Court "can issue a

writ of mandamus *now* to protect the exercise of our appellate jurisdiction *later*."[117] This mandamus power includes addressing a lower court's "clear abuse of discretion"[118] such as permitting a military commission to proceed despite the fact that a military commission judge and a member of the judges' confidential staff applied for jobs with parties without disclosing those applications.

"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 cure the existence of actual or apparent bias with actual bias . . . because it is too difficult to detect all of the ways that bias can influence a proceeding and with apparent bias because it fails to restore public confidence in the integrity of the judicial process."[119]

Courts describe mandamus as a "drastic and extraordinary

---

[117] *Al-Nashiri,* 791 F.3d at 75-76 (internal quotations omitted) (original emphasis).

[118] *Cheney v. United States District Court*, 542 U.S. 367, 380 (2004) (citing *Bankers Life & Cas. Co. v. Holland*, 346 U.S. 379, 383 (1953)).

[119] *In re Mohammad,* 866 F.3d 473, 475 (D.C. Cir. 2017) (internal quotations and citations omitted).

remedy."[120] But judicial disqualification presents a special case for mandamus. Problematic judicial ethics cast "a shadow not only over the individual litigation but over the integrity of the federal judicial process as a whole."[121]

Writs of mandamus turn on three factors enumerated in *Cheney v. United States*.[122] First, mandamus cannot substitute for the regular appeals process.[123] Second, the petitioner's right to relief must be "clear and indisputable."[124] Third, issuing the writ must be appropriate under the circumstances and necessary to protect the integrity of the judicial system.[125] Al-Tamir satisfies all three *Cheney* criteria.

---

[120] *Cheney*, 542 U.S. at 380.

[121] *Union Carbide v. U.S. Cutting Service,* 782 F.2d 710, 712 (7th Cir. 1986); *see also In re IBM,* 618 F.2d 923, 926-27 (2d Cir. 1980); *In re United States,* 666 F.2d 690, 694 (1st Cir. 1981); 9 MOORE'S FEDERAL PRACTICE P 110.13[10].

[122] 542 U.S. at 380-81.

[123] *Id.*

[124] *Id.* at 381.

[125] *Id.*

A. Issuing the writ is the only means of remedying the irreparable injury caused by the military commission judges' disqualifying conduct.

Al-Tamir will suffer an "irreparable injury that will go unredressed if he does not secure mandamus relief now."[126] Appeal after final judgment is insufficient. He must defend himself in a military commission that has been overseen by three disqualified judicial officers. And "'the injury suffered by a party required to complete judicial proceedings overseen by [those] officer[s] is by its nature irreparable.'"[127]

"Unbiased, impartial adjudicators are the cornerstone of any system of justice worthy of the label. And because '[d]eference to the judgments and rulings of courts depends upon public confidence in the integrity and independence of judges,' jurists must avoid even the appearance of partiality."[128] Disqualifying judges for the appearance of

---

[126] *Al-Nashiri*, 921 F.3d at 237 (internal quotations omitted).

[127] *Id.* at 238 (quoting *Cobell v. Norton*, 334 F.3d 1128, 1139 (D.C. Cir. 2003)).

[128] *Al-Nashiri*, 921 F.3d at 233-34 (quoting *United States v. Microsoft Corp.*, 253 F.3d 34, 115 (D.C. Cir. 2001)).

partiality may bar judges who have no actual bias,[129] but is worth the risk because, in order for the public to maintain faith in the judicial system, "justice must satisfy the appearance of justice."[130]

This entire commission is tainted by an "intolerable cloud of partiality."[131] Even the motions where the military judges failed to act are tainted. Did they avoid ruling because it would look bad during the job interview? Or did the Supervisory Attorney Advisor refrain from drawing attention to a meritorious defense motion? What happened during the *ex parte* MCRE 505 meetings when Blackwood was alone with the prosecutors?

Even if a new, untainted judge[132] were to enforce existing orders, al-Tamir will suffer an "irreparable injury unfixable on direct

---

[129] *In re Murchison*, 349 U.S. 133, 136 (1955) (internal quotation omitted).

[130] *Liljeberg*, 486 U.S. at 864 (quoting *Murchison*, 349 U.S. at 136).

[131] *Id.* at 237.

[132] As of January 2020, the *Hadi* commission has no presiding judge, since Libretto recused himself to pursue employment with parties. App. 471.

review."[133] Persisting under these circumstances means persisting in a tainted prosecution although public confidence is irreparably damaged. "It is too difficult to detect all of the ways that bias can influence a proceeding."[134]

B. Al-Tamir's right to relief is clear and indisputable.

This case bears an uncanny resemblance to *Al-Nashiri*. The right to relief was clear and indisputable there, just as it is here.

1. A judge's undisclosed application for post-judicial employment with a party creates a disqualifying appearance of partiality that gives rise to a clear and indisputable right to relief.

"It is beyond question that judges may not adjudicate cases involving their prospective employers."[135] This rule "applies with equal force to judges serving on military commissions, where, as in every other court, the dignity and independence of the commission are diminished when a judge comes before the lawyers in a case in the role

---

[133] *Al-Nashiri*, 921 F.3d at 238.

[134] *Id.* (internal quotations omitted).

[135] *Al-Nashiri*, 921 F.3d at 235.

of a suppliant for employment."[136]

"Even in the case of a scrupulous judge with no intention of parlaying his judicial authority into a new job, the risk that he may *appear* to have done so remains unacceptably high. Simply put, 'a judge cannot have a prospective financial relationship with one side yet persuade the other that he can judge fairly in the case.'"[137] Multiple codes and canons regulating judicial conduct compel recusal under these circumstances.[138]

a. Waits's application to be an immigration judge created a disqualifying appearance of bias.

Waits applied to work for the DOJ, a party aligned against al-Tamir in this joint prosecution. His application to be an immigration judge, like Judge Spath's in *Al-Nashiri*, created a disqualifying appearance of partiality. There can be no reasonable dispute on this

---

[136] *Id.* (internal quotations omitted).

[137] *Id.* at 235 (quoting *Pepsico, Inc. v. McMillen*, 764 F.2d 458, 461 (7th Cir. 1985)).

[138] *See id.* at 234. *See also* 28 U.S.C § 455(a); Code of Conduct for United States Judges, Canon 3(C)(1); ABA Model Code of Judicial Conduct, Rule 2.11; Rule for Courts-Martial 902(a).

point.

The CMCR, however, expressed skepticism. That court endorsed Waits's position that *Al-Nashiri* "was a surprise to judges writ large," and that no other military judge would have recognized "even the appearance of a conflict of interest in this instance."[139] The CMCR—reasoning from the members' of the court's personal experience rather than this Court's reasoning in *Al-Nashiri*—stated, "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's reaction to *Al-Nashiri* is fair."[140] The CMCR's decision makes clear that, before *Al-Nashiri*, it saw no reason for military judges to conform to what this Court viewed as obvious, indisputable ethical norms regarding seeking future employment with parties.

The *Al-Nashiri* decision, however, did not come out of the blue.

---

[139] App. 47.

[140] *Id.*

Since this Court granted an extraordinary writ, the ethical issue was necessarily not novel, but clear and indisputable, leaving no room for debate.[141] The CMCR's (and military commission's)[142] attempt to excuse the disqualifying conduct of applying to a job with the DOJ is clear error.

b. Waits's application to be a civilian DOD attorney also created a disqualifying appearance of bias.

Waits's separate job application to the DOD is equally disqualifying, although the CMCR "declined to consider" this issue.[143] The military judge stated that, in light of *Al-Nashiri*, "at first glance" it would appear that the DOD is a party to the military commissions.

---

[141] *Compare In re Khadr*, 823 F.3d 92, 100-101 (D.C. Cir. 2016) (explaining that a writ of mandamus was not available, despite the petitioner's raising "significant questions.").

[142] *See* App. 110 (deciding that a reasonable, informed member of the public would not question the appearance of partiality raised by Waits's application to work for the DOJ).

[143] App. 47. Libretto also gave this argument short shrift, deciding that al-Tamir's argument "borders on the absurd." (App. 111-12, 143.) The military commission drew the same conclusion with respect to his Supervisory Attorney Advisor, who also applied for positions with the DOD. Because the analysis and rulings are the same, this discussion applies to both Waits and Blackwood.

According to the military judge, however, applying for a civilian job with the DOD created no conflict because military judges are, as active duty military officers, already paid by the DOD, so applying for civilian employment is essentially the same as receiving active duty orders.[144]

In fact, seeking civilian DOD employment is fundamentally different from receiving orders as a military officer. The DOD must provide orders for—and pay—its commissioned officers. The DOD, however, need not hire a former officer after that officer retires. It could choose whether to hire *Mr*. Waits. Yet, absent an involuntary separation, it had no discretion about paying *Captain* Waits and assigning him to a duty station while he remained in uniform.

The military commission incorrectly focused on the DOD as the current source of a paycheck for Captain Waits as military judge. In fact, the disqualifying appearance of partiality at issue here arose because Captain Waits became a suppliant to a party, not because he was a naval officer while presiding over the military commission. The appearance of partiality stems from the forward-looking nature of

---

[144] App. 111-12.

looking for a job: he asked a party to provide him future employment when that party was under no obligation to do so. He hoped that the DOD would pay him in the future as a civilian, and had to convince the DOD that it should.[145] A military judge's application for civilian employment with the DOD is thus fundamentally different from receiving orders for the next military assignment.[146]

The military judge's and the government's reliance on *Weiss v. United States*,[147] which addresses the judicial independence of military judges, is inapposite. *Weiss* concluded that due process does not require instituting fixed terms for military judges because other regulations protect military judges from command influence and promote judicial independence.[148] The decision does not address any canon of judicial

---

[145] When the defense attempted to inquire with Waits about specific matters discussed during his interview, Libretto—*sua sponte*—stopped the line of questioning. App. 352-53.

[146] The same is true for a Supervisory Attorney Advisor's efforts to work in a different position in the DOD. The DIA and NCIS were under no obligation to employ him, but he was trying to convince them that they should.

[147] 510 U.S. 163 (1994).

[148] *Id.* at 179-80.

ethics, and does not excuse military judges from ethical obligations.[149]

Weiss does not relax any military judge's obligation to maintain the appearance of impartiality. The fact that a military judge will get another assignment within the military does not eliminate the need for the judge to refrain from any activity that would create the appearance of bias. And the applications for civilian employment at issue here, including to the DOD, created the appearance of partiality under RMC 902(a).

Military courts typically do not need to consider the ethical implications of a military judge applying to be an immigration judge. The DOJ is not a party to a court-martial. Military caselaw will not address the issue presented in this petition because the military commissions are an untested, novel hybrid civilian-military prosecution.

2. The Supervisory Attorney Advisor's undisclosed application for employment with a party is also disqualifying, since he was not walled off from litigation involving the party.

a. Law clerks may not work on matters that involve prospective employers.

---

[149] *Id.*

Judicial impartiality may also be reasonably questioned when someone in a judge's confidential staff applies for and accepts employment with a party.[150] Law clerks share the same "duty to avoid the appearance of impropriety" as the judge.[151] They may not continue to work on cases involving future employers.[152] Law clerks, or their more professionally advanced counterparts, Supervisory Attorney Advisors like Blackwood, may seek employment with a party, but must disclose their applications to the judge and be walled off from any litigation involving that party. If a judge fails to wall off the clerk, or the wall is permeable, the judge must recuse himself because of the appearance of partiality.[153]

---

[150] *Al-Nashiri*, 921 F.3d at 226; *Miller Indus., Inc. v. Caterpillar Tractor Co.*, 516 F. Supp. 84, 89 (S.D. Ala. 1980); *Price Bros. Co. v. Philadelphia Gear Corp.,* 629 F.2d 444, 447 (6th Cir. 1980).

[151] *Miller Indus.*, 516 F. Supp. at 89; *Hall v. Small Bus. Admin.*, 695 F.2d 175, 179 (5th Cir. 1983).

[152] *Hall*, 695 F.2d at 179; *Price Bros.,* 629 F.2d at 447.

[153] *See First Interstate Bank of Arizona v. Murphy, Weir & Butler*, 210 F.3d 983, 987-88 (9th Cir. 2000) (explaining that the firewall established by the judge after the clerk sought employment with a party turned out to be permeable, causing the judge to recuse herself and vacate the judgment she had entered after conducting a bench trial).

"The law clerk's duty to avoid the appearance of impropriety is equivalent to the trial judge's."[154] Indeed, "the clerk is forbidden to do all that is prohibited to the judge."[155] The recusal rule "extend[s] to those who make up the contemporary judicial family, the judge's law clerks and secretaries."[156]

"A law clerk should not participate in litigation in which his future employer appears as counsel for one of the parties. In fact, it is universally accepted that the court must be disqualified where its law clerk continued to participate in a case in which his future employer represented one of the parties."[157] "The law clerk's continuing participation with the judge in the case in which his future employers were counsel presented a situation in which disqualification was

---

[154] *Miller Indus.*, 516 F. Supp. at 89. Blackwood's position was akin to a law clerk, and the military commission judges referred to him as their clerk, as does the defense. But in many respects, the responsibilities of a supervisory attorney advisor exceed those of many law clerks.

[155] *Hall,* 695 F.2d at 179; *Price Bros.,* 629 F.2d at 447.

[156] *Hall*, 695 F.2d at 176.

[157] *McCulloch v. Hartford Life & Acc. Ins. Co.*, 2005 U.S. Dist. LEXIS 31051 *15 (D. Conn. Nov. 23, 2005) (internal citations omitted).

mandated under 28 U.S.C. § 455(a)."[158]

Disqualifying judges based on law clerks' employment applications does not require actual bias by judge or clerk, nor does it require any actual influence over judicial decisions. "Whether or not the law clerk actually affected the magistrate's decision, her continuing participation with the magistrate in a case in which her future employers were counsel gave rise to an appearance of partiality."[159]

Preventing the appearance of impropriety is paramount in the case of law clerks as well as judges.[160] "Judicial ethics reinforced by statute exact more than virtuous behavior; they command impeccable appearance. Purity of heart is not enough."[161] Recusal rules apply when facts that are publicly known *and knowable*—meaning "objectively ascertainable"—create the appearance of partiality; the rule does not

---

[158] *Miller Indus.*, 516 F. Supp. at 89. *See also* Judicial Conference Committee on Codes of Conduct, Advisory Opinion No. 74 (the clerk "should have no involvement whatsoever in pending matters handled by the prospective employer.").

[159] *Hall*, 695 F.2d at 179.

[160] *Id.*

[161] *Id.* at 176.

apply to the judge's or clerk's "actual virtue, because, were that so, the test would be not the appearance of impartiality but the absence of actual prejudice."[162]

The bar to clerks (or attorney advisors) working on prospective employer's matters begins at the preliminary application stage. A law clerk may not "engage in activities that would put into question the propriety of the law clerk's conduct in carrying out the duties of office," which includes "seeking" employment.[163]

b. Blackwood applied for multiple jobs with parties, creating an appearance of bias under RMC 902(a).

Blackwood applied for multiple positions with parties, ultimately accepting a position with the DOJ, yet was not walled off from the *Hadi* commission. His applications therefore created an appearance of bias

---

[162] *Id.* at 179.

[163] *First Interstate Bank*, 210 F.3d at 987-88 (relying on Canons 2 and 5 of then-Code of Conduct for Law Clerks). Canon 4 of the current Code of Conduct for Judicial Employees employs the same language as the prior Canon 5, stating that employees must "refrain from financial and business dealings that tend to detract from the dignity of the court, [or] interfere with the proper performance of official duties. Code of Conduct for Judicial Employees, Canon 4(C)(1).

that disqualified Rubin and Libretto.

The CMCR questioned whether a law clerk's conduct can necessitate a judge's recusal, noting that judges, not law clerks, make decisions.[164] It stated that judges should not become easy victims of a law clerk's follies.[165] To be sure. But the body of case law and ethics rules relating to law clerks demonstrates that the actions of the contemporary judicial family can impact the appearance of partiality, especially when the clerk plays a substantial role in the litigation. That is what happened here.

"Conflicted advisors who participate or influence a judge requires the judge's disqualification."[166] When the advisor is conflicted and labors under the appearance of bias, this leads to "selection bias"—impacting the way the judicial officer approaches the task.[167] This means that the appearance of bias impacted the way that Blackwood

---

[164] App. 67.

[165] App. 80.

[166] *In re Kensington Int'l, Ltd.*, 368 F.3d 289, 311 (3d Cir. 2004).

[167] *In re Brooks*, 383 F.3d 1036, 1046 (D.C. Cir. 2004).

would have reported to the military judge or made recommendations to the military judge, causing irreparable injury to al-Tamir and irreparably undermining public confidence in the fairness of the judicial system.[168]

Blackwood applied for jobs with the DOD and DOJ—the two parties adverse to al-Tamir. Although law clerks may apply for jobs with parties, continuing to work on matters involving the parties creates a disqualifying appearance of partiality requiring recusal under RMC 902(a) and its analogs. Failing to disclose the applications meant that the two military commission judges could not take protective action, prohibiting him from working on matters involving the parties.[169] Since he continued to perform substantial work on this commission, these undisclosed applications created an appearance of partiality that disqualified Rubin and Libretto.

---

[168] *In re Kempthorne*, 449 F.3d 1265, 1270 (D.C. Cir. 2006).

[169] Of course, Libretto took "little to no" action to limit Blackwood's involvement in the commission even after learning of Blackwood's new job with the DOJ. This failure increases the significance of the ethical violation.

3. Contrary to the CMCR's decision, the DOJ as an entity, including all its components, is a party to this litigation, rendering Blackwood's numerous applications there disqualifying.

The CMCR insists that Blackwood's conduct was not disqualifying because the U.S. Attorney's Office for the Western District of Missouri was not a party to the military commission and had not appeared in the commission.[170] The CMCR, like the military commission below, carved out the U.S. Attorney's office from the Justice Department. But *Al-Nashiri* recognized that the Attorney General, who oversees all U.S. Attorney's Offices and components within the DOJ, is a party to the military commissions.[171] The DOJ as a department is a party to the commission. The Western District of Missouri's U.S. Attorney's Office is as much a part of the DOJ as the EOIR. Applying to that U.S. Attorney's office is as disqualifying as applying to be an immigration judge.

The MCA states that the Attorney General and Secretary of

---

[171] *Al-Nashiri*, 921 F.3d at 236.

Defense together craft rules for trial by military commissions and, detail lawyers from both departments as prosecutors.[172] "The Attorney General plays an important institutional role in the military commissions more generally."[173] This Court concluded that the challenge Judge Spath faced after applying to be an immigration judge "was to treat *the Justice Department* with neutral disinterest,"[174] not whether he would appear to give the EOIR an unfair advantage in litigation. The real problem was that the appearance of partiality touched the *entire* DOJ.

The identical factors exist here. The structural aspects of the military commissions are identical. Detailing DOJ lawyers to prosecute al-Tamir is also identical. The factors discussed above address the military commissions and the Attorney General, not just the EOIR. In any event, on the DOJ's organization chart, the EOIR and the U.S. Attorney's Offices are exactly parallel—they fall the same number of

---

[172] *Id.* (citing 10 U.S.C. §§ 949a and 950h(b)(2); RTMC § 8-6(a)).

[173] *Id.*

[174] *Id.* (emphasis added).

steps below the Attorney General and remain under the Attorney General's auspices.[175]

Unlike a normal federal or military prosecution, where charging decisions are generally delegated to local authorities, charging decisions in the military commissions occur at the cabinet level.[176] In attempting to reform the military commissions in 2009, Congress noted the protocol for determining which cases to prosecute in an Article III court and which to prosecute on Guantanamo. This plan involved lawyers from the NSD and the DOD, who would "jointly determine whether the case is feasible for prosecution, and the appropriate forum," then transmit "that determination to the Attorney General," who, "in consultation with the Secretary of Defense, will make the final decision as to the appropriate forum . . . for any prosecution."[177] This protocol brings the

---

[175] App. 899. Indeed, immigration judges fall multiple steps below the EOIR, placing even greater distance between the Attorney General and immigration judges as compared to the distance between the Attorney General and Assistant U.S. Attorneys. *See* App. 901.

[176] App. 885-86, 888-91.

[177] Legal Issues Regarding Military Commissions and the Trial of Detainees for Violations of the Law of War, hearing before the Senate Armed Services Committee, July 7, 2009, S. Hrg. 111-190 at p. 138.

entire DOJ into play in a Guantanamo prosecution. The prosecution is not local and contained.[178]

Regardless, the relationship between the U.S. Attorney's Office for the Western District of Missouri and the military commissions could not be more clear. The Attorney General agreed to loan out the Deputy U.S. Attorney for that district to participate directly with OCP in prosecuting Al-Nashiri.[179] And that same Deputy interviewed and helped select Blackwood for his position as a national security prosecutor.

The way the DOJ hires AUSAs demonstrates the close link inside the department. A single DOJ web page lists attorney vacancies—including for AUSAs in districts across the country.[180] The Western

---

[178] Advisory ethics opinions that address a law clerk's application to a U.S. Attorney's Office are not particularly instructive here. They simply do not contemplate the same level of involvement of the entirety of the DOJ and cabinet-level supervision of military commissions.

[179] AE 160L, Government Notice, at p. 6, available at https://www.mc.mil/Portals/0/pdfs/alIraqi/Al%20Iraqi%20(AE160L).pdf; App. 1142.

[180] Attorney Vacancies, https://www.justice.gov/legal-careers/attorneys-vacancies?position=1.

District of Missouri was permitted to select candidates, but only Main Justice issues the final offer. First, the EOUSA conducted a background check, then OARM reviews and approves AUSA candidates.[181] Main Justice does not select individuals on behalf of U.S. Attorney's Offices, but only Main Justice can approve selections and make final offers. And AUSAs, like immigration judges, are appointed by the Attorney General.[182]

As an AUSA, Blackwood is an employee within the DOJ, and his testimony in the August 2019 hearing demonstrated as much. Before testifying he consulted with "DOJ counsel."[183] The DOJ issued him a "Touhy letter," which limited the scope of his testimony.[184] As Blackwood explained, he could not answer whether he works or communicates with the NSD.[185] Indeed, "DOJ counsel . . . told" him "not

---

[181] App. 924-25.

[182] AE 160L, Government Notice, at p. 6, available at https://www.mc.mil/Portals/0/pdfs/alIraqi/Al%20Iraqi%20(AE160L).pdf; App. 1142.

[183] App. 264.

[184] App. 262-64.

[185] App. 262-64.

to answer" such questions.[186]

Moreover, Blackwood also applied for a position with the NSD. Without question, that section within DOJ is a party—its lawyers actively represent the government in this case—in this Court. A lawyer from that section drafted the charges and was the first to speak on the record. And when Blackwood applied for a position with the NSD, he highlighted his work on this commission and used an opinion ostensibly written by Rubin as his writing sample.[187]

4. The applications alone created the disqualifying appearance of partiality.

The "fact" of the "employment application alone" is "enough to require . . . disqualification" based on an apparent conflict of interest.[188] Recusal is required at the earliest stages of the application process, including preliminary, exploratory discussions with the party.[189] The Judicial Conference's Committee on Codes of Conduct "has opined that

---

[186] App. 264.

[187] App. 930, 1153.

[188] *Al-Nashiri*, 921 F.3d at 237.

[189] *Id.* at 235.

'after the initiation of any discussions with a [prospective employer], no matter how preliminary or tentative the exploration may be, the judge must recuse . . . on any matter in which the [potential employer] appears.'"[190] Even "preliminary, tentative, indirect, unintentional, and ultimately unsuccessful" job negotiations with a litigant so diminished "the dignity and independence of the judiciary" that "the public cannot be confident that a case tried under such conditions will be decided in accordance with the highest traditions of the judiciary."[191]

The Ninth Circuit, in describing ethical canons relating to law clerks, emphasizes that, although clerks may seek employment to commence after their clerkship ends, ethical obligations include a disclosure requirement: "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

---

[190] *Id.* (alterations in original) (quoting Judicial Conference of the United States Committee on Codes of Conduct, Advisory Opinion No. 84: Pursuit of Post-Judicial Employment (April 2016)).

[191] *Pepsico*, 764 F.2d at 461.

the appointing judge."[192] The judge then must ensure that the clerk no longer participates in litigation involving prospective, potential employers.[193]

Blackwood's unusually significant role as Supervisory Attorney Advisor—even more substantive than a traditional law clerk—requires extra vigilance regarding the appearance of partiality. Blackwood was assigned to one commission: *Hadi*. He personally—without the judge—held *ex parte* meetings with prosecutors about the scope of discovery on the most important issue—torture and interrogations at CIA black sites—through the MCRE 505 process. The record bears no trace of his invisible, yet significant impact on these critical *ex parte* meetings discussing evidence with the prosecutors about critical issues to the

---

[192] *First Interstate Bank*, 210 F.3d at 987-88 (citing Canon 5(C)(1) of then-Code of Conduct for Law Clerks). *See also* ABA Model Rules of Professional Conduct 1.12(b); Guide to Judiciary Policy, Vol. 2A, Ch. 3 § 320, Canon 4(C)(4).

[193] *First Interstate Bank*, 210 F.3d at 988. *See* also *Reddy v. Jones*, 419 F. Supp. 1391 (W.D.N.C. 1976) (no impropriety when judge follows "the unvaried custom" of taking law clerks off "all work, conference, hearings, or other activity, including the delivery of messages, in cases being tried by [the clerk's] prospective employers.").

defense—torture. The injury from the appearance of bias here is all the more irreparable.

The fact that Blackwood was the one to hold the *ex parte* meetings raises particular concerns regarding the appearance of bias. Mandamus is particularly appropriate when an individual tainted by the appearance of bias has *ex parte* meetings with a party.[194] When decisions are reflected on the record, the adversarial process can theoretically test them. But when the individual has *ex parte* contact with a party, the record is silent and thus unreviewable. These meetings "leave no trace in the record" and thus lead to "selection bias," an influence over the way the judicial officer approaches the task.[195]

Blackwood held the trust and confidence of all three military judges. He traded on his experience in the commissions in seeking a job with multiple parties adverse to al-Tamir, but never disclosed the fact of his applications. And conflicted advisors make for conflicted judges.[196] Under *Al-Nashiri*, Blackwood's influence on the commissions also must

---

[194] *Brooks*, 383 F.3d at 1046.

[195] *Id.*; *see also Kempthorne* 449 F.3d at 1270.

[196] *Kensington*, 368 F.3d at 311.

be scrubbed from the proceedings at the earliest opportunity.

5. Ethics rules establish that Blackwood's hiding his applications to parties from the military commission judges would make an objective observer question the impartiality of the OMC Trial Judiciary, thereby creating cause for mandatory recusal under RMC 902(a).

The CMCR reviewed ethical canons included in the Code of Conduct for United States Judges, the Code of Conduct for Judicial Employees, and Rule 1.12 of the ABA's Model Rules of Professional Conduct.[197] The CMCR concluded that the ABA Model Rule, which states that law clerks *must* disclose job applications to their judges, did not apply because neither this Court nor the CMCR had previously applied Model Rule 1.12, although both courts have applied other model rules.[198]

Instead, the CMCR held that the rules in the Code of Conduct for Judicial Employees, which states that law clerks *should* disclose job

---

[197] App. 66-72 (reviewing Canon 3(C)(1) of the Code of Conduct for United States Judges (which mirrors 28 U.S.C. § 455(a)), Canons 3(F) and 4(C) of the Code of Conduct for Judicial Employees, and ABA Model Rule 1.12(b)).

[198] App. 74-76.

applications, applied. The CMCR reasoned that Blackwood should have disclosed his applications, but did not need to. According to the CMCR, this distinction meant that no disqualifying appearance of partiality arose.

The CMCR's reasoning is flawed. First, whether *should* or *must* is the operative verb in the ethical guidance relating to law clerk job applications, Blackwood's conduct creates a disqualifying appearance of partiality. The number of applications, the nature and content of the applications, Blackwood's significant role in the trial judiciary, and the nature of the military commission combine to create a disqualifying appearance of partiality in this case regardless of the verb in the applicable ethical canon. It is inconsequential that the Judicial Conference Committee used "should" rather than "must" in Employee Conduct Code Canon 4(C).

Second, the CMCR's reasoning does not reflect the roll of the ethical canons. That both the Judge Conduct Codes and the Employee Conduct Code use "precatory" language is, if anything, a recognition of the fact that the Judicial Conference Committee is, unlike a bar

association, an advisory body with no power to sanction.[199] The ABA Model Rules, in contrast, are meant to be adopted by state licensing authorities, and thus are meant to reflect the power to sanction. The Judicial Conference Committee is an advisory body, and thus advises.

Moreover, the Employee Conduct Code states that a "judicial employee *should respect and comply with the law and these canons* [of the Employee Conduct Code]," [200] placing the law and the Employee Conduct Code on equal footing. The heading of all five canons use "should," including that of the canon that the CMCR decision references as an example of "mandatory language" in the Judge Conduct Code.[201]

Regardless, RMC 902(a), 28 U.S.C. § 455(a), and Canon 3(C) all state that judges *shall* recuse themselves when a reasonable person with knowledge of the situation would question the neutrality of the commission. Blackwood's conduct here, covertly applying to parties

---

[199] *See About the Judicial Conference*, UNITED STATES COURTS (last visited July 9, 2020), https://www.uscourts.gov/about-federal-courts/governance-judicial-conference/about-judicial-conference (stating that the Judicial Conference Committees are "policy-advisory entities" that make "policy recommendations to the conference").

[200] Employee Conduct Code at 4 (emphasis added).

[201] Judge Conduct Code at 1, 7; App. 78.

while trading on his experience, would raise just such a suspicion.

The CMCR appears to take a selective incorporation approach to ethics rules. Only specific rules mentioned by name and number in a previous decision govern the ethics of military commissions judges. But ethics cannot be piecemeal.

Based on this selective incorporation, the CMCR held that, although Blackwood should have disclosed his job search to Rubin and Libretto, he did not *need* to. Therefore, those military judges were not disqualified.[202] But this disregards the fact that his applications, including hiding them from the judges, would lead a reasonable person with knowledge of all the facts to question the impartiality of the military commission. The applications raised the appearance partiality that disqualified the judges under RMC 902(a). Moreover, even when Blackwood did disclose his actual offer, Libretto took no action to wall him off from litigation with a party. Whether *Al-Nashiri* or *Hadi*, military commissions consistently fail to safeguard the appearance of neutrality.

---

[202] App. 90.

6. Contrary to the CMCR's decision, no alternate remedy cures the irreparable injury that these multiple job applications on the part of judicial actors in the *Hadi* commission caused, meaning al-Tamir has a clear and indisputable right to mandamus.

Even in the face of a clear mandate from this Court in *In re Al-Nashiri*, the military commission judge and the CMCR have refused to undertake the remedial actions necessary to scrub the taint of judicial bias from the *Hadi* commission. And although this case is legally similar to *Al-Nashiri*, the conflicts at issue here are different in a key way: they arose at the very beginning of litigation, and involve multiple individuals and multiple applications. They layered and pervasive disqualifying conduct created a tangle of conflicts impossible to unravel.

The CMCR reluctantly agreed that Waits's job application was disqualifying, but not Blackwood's. The CMCR, however, concluded that reconsidering Waits's rulings is an alternate remedy that obviates the need for issuing a writ of mandamus.[203] This purported remedy is contrary to this Court's decision in *Al-Nashiri* and in fact is no relief at all.

---

[203] App. 47.

The proposed alternate relief is illusory, as it overlooks the invisible ways in which the appearance of bias infects a proceeding. This proposal would address only written rulings, which fails to address all the minute-by-minute rulings—and failures to rule—during hearings and in *ex parte* meetings with the prosecution. The appearance of bias impacts aspects of the case that are not visible on the record.

For example, the issues where Waits failed to rule are invisible, but certainly an area where the appearance of bias has an impact. Waits's interest in becoming a civilian DOD employee could easily inform his choices to avoid ruling on motions where he anticipated that a ruling might be viewed negatively by his future employer. Even scheduling hearings or considering taking evidence on defense motions would be impacted. It is impossible to articulate and identify the impact of the appearance of bias on every order and failure to rule.

a. Waits's rulings impacted subsequent litigation.

In addition, this purported relief ignores the cascading effect of Waits's rulings. The litigation on the subject of certain reasonable accommodations for al-Tamir's sincerely held religious beliefs provides an example. Two months after Waits applied to be an immigration

judge, the parties began a protracted period litigating accommodations for al-Tamir's sincerely held religious belief that men and women who are unrelated should not have physical contact. More than two dozen pleadings were filed in that series, with at least five orders preceding the final ruling (AE 21DD). Waits ultimately denied al-Tamir relief in late February 2015, in a ruling that describes two forced cell extractions[204] used against al-Tamir when he objected to physical contact with women.[205]

---

[204] A forced cell extraction is a brutal procedure whereby a tactical team of guards don riot gear and beat a detainee into submission, then remove the detainee from the cell. *See* Erica Goode, *When the Cell Door Opens, Tough Tactics and Risk,* New York Times, July 29 2014, available at https://www.nytimes.com/2014/07/29/us/when-cell-door-opens-tough-tactics-and-risk.html. The procedure is so violent that, during a training exercise on forced cell extractions on Guantanamo Bay, the soldier who volunteered to act as the detainee was permanently injured with a traumatic brain injury causing seizures that ended his military career with a 100% medical disability. David Zucchino, *Ex-Soldier Recalls Beating He Received in Guantanamo Drill*, Los Angeles Times, June 16, 2004, available at https://www.latimes.com/archives/la-xpm-2004-jun-16-na-baker16-story.html.

[205] AE 021DD at pp 5, 12, available at https://www.mc.mil/Portals/0/pdfs/alIraqi/Al%20Iraqi%20(AE021DD).pdf. App. 174-85.

During the very first hearing over which Rubin presided, al-Tamir refused to come to court based on these same sincerely held religious beliefs. Defense counsel asked for Rubin to either order an all-male guard force to escort al-Tamir movement or to reconsider Waits's ruling.[206] The government objected, stating that issues had been "vigorously fought by both the defense and the government," and that reconsideration would "gut the law of the case."[207] The government stated that Rubin should order "forcefully bring[ing] Mr. Hadi to the table."[208] Rubin agreed and stated, "I am going to issue the order as requested by the government."[209] The guards then executed a forced cell extraction and brought al-Tamir—bleeding—into court.[210]

As al-Tamir stated during that hearing, this was Rubin's order, not Waits's or the guard force's.[211] Nor was this a written ruling, but an

---

[206] App. 174.

[207] *Id.*

[208] App. 175.

[209] App. 176.

[210] App. 188.

[211] App. 181.

order from the bench that directly arose from and applied one of Waits's rulings. And Rubin's decision to allow a forced cell extraction to bring al-Tamir into court precipitated the accelerating decline of al-Tamir's pre-existing spinal disease.[212]

Within months of that brutal event, al-Tamir was on the verge of permanent paralysis.[213] Al-Tamir endured five surgeries in less than one year, three of them emergent, two of them to correct complications from previous surgeries. The military commissions lost years of litigation and al-Tamir is permanently injured, can no longer walk unassisted, and, according to the military's neurosurgeon who finally treated him after three surgeries had already occurred, will likely deteriorate further. This is an irreparable injury in the most literal sense.

---

[212] Physicians for Human Rights and the Center for Victims of Torture detailed al-Tamir's pre-existing spinal disease and medical history, including his near paralysis following the FCE, in a white paper titled Deprivation and Despair, The Crisis of Medical Care at Guantanamo at pages 35-47. This report is available at https://phr.org/wp-content/uploads/2019/06/PHR_CVT-Guantanamo-medical-crisis-report-June-2019-1.pdf.

[213] *Id.*

Moreover, this issue of the sincere religious beliefs coming into conflict with JTF staffing—a clash of ideologies—became a political issue that drew attention from senior military leaders. The Chairman of the Joint Chiefs made statements in front of the Senate Armed Services Committee, and the Commander of SOUTHCOM decried the fact that the military commissions judges had afforded any interim relief to the detainees.[214] The military judge in the 9/11 commission held that these comments were "substantive comments regarding ongoing litigation . . . disparaging the decision to implement the Interim Order."[215] The military judge in that case found that the comments by senior officials in the DOD raised the appearance of unlawful influence.[216]

An issue that was so politically visible would have been on the

---

[214] *See United States v. Khalid Shaikh Mohammad*, Ruling on Emergency Defense Motion to bar Regulations Substantially Burdening Free Exercise of Religion and Access to Counsel, AE 254JJJJJ at p. 24, available at https://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20(AE254JJJJJ).pdf.

[215] *Id.* at p. 35. The 9/11 military commission entered an interim order granting temporary relief on the same reasonable accommodations issue as in this case.

[216] *See id.*

mind of an individual who was trying to obtain civilian employment with the DOD, like Waits was. This litigation was particularly susceptible to the impact of the appearance of bias. And this was just one of the many high-profile legal issues that Waits handled during his tenure.

The CMCR held that it was unwilling to extrapolate from this example that Waits's other rulings had an enduring impact in the litigation. In the CMCR's view, al-Tamir's argument on this point was speculative, and only the FCE might have had a continuing impact on the *Hadi* commission.[217] But this Court, like all others that have addressed the impact of judicial bias, recognize that it is "too difficult to detect all of the ways that bias can influence a proceeding."[218] The fact that such an immediate and dramatic example of the enduring impact of decisions rendered during a period of disqualification exists is the exception not the rule.

b. Reconsideration is not an "alternate remedy," but an illusory half-measure that does not eliminate al-Tamir's clear and

---

[217] App. 53-57.

[218] *Al-Nashiri*, 921 F.3d at 238 (internal quotations omitted).

indisputable right to relief.

The CMCR's proposed "alternate remedy" of reconsideration is both impossible and insufficient. Decisions regarding substitutions of classified evidence will not even appear on the record. Indeed, al-Tamir is statutorily prohibited from seeking reconsideration MCRE 505.[219] Second, al-Tamir always has the right to seek reconsideration of any order.[220] But here, the tribunal below has already ruled that there is no basis for reconsideration since he decided that no injustice occurred.[221] Reconsideration before this military commission is a hollow remedy.

Litigation choices that the defense had to make because of discovery rulings or scheduling rulings are invisible. Lost investigation opportunities are potentially lost forever. Yet rulings issued under a period of disqualification impact all of those as well.

The chief flaw in the CMCR's proposal is that it ignores this

---

[219] MCRE 505(f)(3) ("An order of a military judge authorizing a request of the trial counsel to substitute, summarize, withhold, or prevent access to classified information under this section is not subject to reconsideration by the accused.").

[220] *Id.*

[221] App. 115.

Court's numerous cases holding that, when the appearance of bias under 28 U.S.C. § 455(a) and RMC 902(a) is at issue, mandamus is appropriate because no other adequate remedy exists. *Al-Nashiri* held that "no amount of appellate review can remove completely the stain of judicial bias."[222] This Court explained that this is so because of the impossibility of detecting all the myriad ways that bias influences a proceeding and because public confidence is irreparably damaged when a case proceeds with a partial judicial officer.[223]

In *Cobell v. Norton*, this Court noted that "every circuit to have addressed the issue" of whether issuing a writ is appropriate when bias is at issue under Section 455(a) "has found it appropriate."[224] Under 28 U.S.C. § 455, and thus by extension RMC 902(a), apparent bias erodes public confidence in the judicial system, which, unlike personal harm to a litigant, cannot be remedied on appeal.[225] "With apparent bias,

---

[222] *Al-Nashiri*, 921 F.3d at 238.

[223] *Id.*

[224] 334 F.3d at 1139 (collecting cases from all circuits).

[225] *In re School Asbestos Litig.*, 977 F.2d 764, 776-77 (3d Cir 1994).

ordinary appellate review fails to restore public confidence in the integrity of the judicial process, . . .confidence that is irreparably dampened once a case is allowed to proceed before a judge who appears to be tainted."[226] "Public confidence in the courts requires that [bias] question[s] be disposed of at the earliest possible opportunity."[227]

The CMCR's decision that reconsideration would suffice is rooted in its discomfort with acknowledging that this military commission is tainted by disqualified judicial actors. It peppers its discussion with excuses for Waits and Blackwood, who the CMCR viewed as decent individuals who meant no harm. The CMCR notes that Waits did not "have the benefit of" the *Al-Nashiri* decision and that it could not identify rulings that could "be construed as being based on personal career decisions..."[228] And the lower courts repeatedly stated that Waits never acted as badly on the record as the military commission judge in

---

[226] *Al-Nashiri*, 791 F.3d at 79 (internal quotations omitted, citing *Liljeberg*, 486 U.S. at 860, and *School Asbestos Litig.*, 977 F.2d at 776).

[227] *In re United States*, 666 F.2d at 694 .

[228] App. 46.

Al-Nashiri.[229] But good intentions are not the issue. Mandatory recusal under RMC 902(a) is.

The CMCR held that al-Tamir speculated that Blackwood would have tried to exploit advantageous job opportunities through rulings from the commission.[230] In reaching this conclusion, however, the CMCR did not even address the fact that Blackwood submitted one of Rubin's orders to the NSD as a writing sample. The record establishes that Blackwood exploited rulings for career advantage.[231] Like with the FCE that Rubin ordered, the fact that such a visible example exists here is the exception that proves the rule. It begs the question: how many other aspects of the case were impacted? Reconsideration simply can never remove the loss of public trust in the integrity of this prosecution.

When assessing the mandamus standard, courts must consider not simply the existence of a different remedy, but its adequacy.

---

[229] App. 47, 64-66, 108-11.

[230] App. 94.

[231] App. 930. *See also* App. 1153-60 (providing a sealed copy of the writing sample Blackwood submitted to the NSD).

Mandamus is appropriate, meaning no other adequate remedy exists, when the procedural dynamics of a case are skewed. The appearance of bias at the heart of this petition has skewed the procedural dynamics of this case.

Al-Nashiri instructs that the relief must "scrub"[232] the taint of the appearance of bias from the military commission. Reconsidering Waits's rulings will never scrub the taint from the commission. Indeed, Rubin's first judicial act enforced and implemented one of these rulings with permanent effect.

C. Issuing the writ is appropriate under the circumstances.

The CMCR held that the facts of *Al-Nashiri* were unique.[233] Sadly not. A systemic problem exists in the military commissions. This Court noted that the ethical violation in *Al-Nashiri* was not "a one-time aberration."[234] The Court issued a writ of mandamus in the 9/11 military commission because of a different judge's bias.[235] The case at

---

[232] 921 F.3d at 238.

[233] App. 49.

[234] *Al-Nashiri*, 921 F.3d at 240.

[235] *Id.* (citing *Mohammad*, 866 F.3d at 475-77).

hand establishes that the ethical problem was not a two-time lapse either.

All three current, actively contested military commissions have at least one instance of judges presiding despite a disqualifying conflict. The fact that the identical ethical problem keeps recurring, yet remains unaddressed by the military commissions or CMCR, undermines public confidence in the military commissions process.

The military commissions judges and the CMCR have not heard this Court's message. Although this Court gave "additional encouragement" to the CMCR and military commissions to more carefully review questions of judicial disqualification, the lower courts continue to find excuses for the disqualifying conduct and have tried to limit *Al-Nashiri* to the most narrow reading possible.[236] For example, Libretto decided that al-Tamir "suffered no actual injustice as a result of Judge Waits'[s] job search," and stated that he "is confident that a

---

[236] *See, e.g.*, App. 47-51. *See also* App. 115 (describing Waits's disqualifying conduct here as "drastically different" from *Al-Nashiri*).

reasonable third person would concur."[237] Contrary to this Court's decision, Libretto decided that "there is no actual threat that Judge Waits'[s] actions have undermined public confidence in these proceedings."[238] As this Court stated, the fact of applying for a job as an immigration judge alone undermines public confidence in the military commission sufficient to require mandamus.

The fact that the writ of mandamus in *Al-Nashiri* caught the CMCR and the military commissions judges by surprise is not a statement about this Court's decision, as they try to characterize it, but about their interpretation of RMC 902(a). The CMCR and military commissions have so far refused to implement this Court's unambiguous instructions. The OMC Trial Judiciary did not have any policies to protect judicial neutrality before *Al-Nashiri*, and apparently still do not.[239]

1. Under *Williams v. Pennsylvania*, dismissal is the appropriate relief.

---

[237] App. 115.

[238] *Id.*

[239] App. 219-22, 311, 334, 337.

Dismissal is the appropriate relief. Simply asking a new judge to review the existing orders would fail to scrub the case of taint. *Williams v. Pennsylvania* explains that revisiting orders with a fresh judge will not purge the taint because this half-remedy risks "that the judge would consciously or unconsciously avoid the appearance of having erred or changed position."[240]

Reaffirming prior decisions would give the impression of trying to establish the absence of actual bias, although al-Tamir need not establish actual bias infected any particular decision, as public confidence in the integrity of the entire prosecution is at stake.[241] "There remains a serious risk that a judge would be influenced by an improper, if inadvertent, motive to validate and preserve the result."[242]

The fact that other judges become involved, or that significant time passes between the initial conduct giving rise to the taint and

---

[240] 136 S. Ct. at 1906 (internal quotations omitted).

[241] *See id.*

[242] *Id.* at 1907.

fashioning the remedy, does not purge the taint.[243] Indeed, even if a decade intervenes and other judges preside, "the case may implicate the effects and continuing force" of the original tainted decisions.[244]

This petition presents the same issue as *Williams* and *Al-Nashiri*—the question of remedy when "a disqualified adjudicator is gone, but his orders remain."[245] None of the tainted judges (or the Supervisory Attorney Advisor) remains on the commission. Yet the orders they produced form the foundation for five years of litigation. "If a judge 'should have been recused from the proceedings, then any work produced by that judge must also be 'recused'—that is, suppressed.'"[246] This Court decided that "requiring Al-Nashiri to proceed under the long shadow of all those orders, even if enforced by a new, impartial military judge, would inflict an irreparable injury unfixable on direct review."[247]

Applying that rule here, Waits's rulings must be scrubbed from

---

[243] *Id.* at 1906-07.

[244] *Id.*

[245] *Al-Nashiri*, 921 F.3d at 238.

[246] *Id.* (quoting *Brooks*, 383 F.3d at 1044).

[247] *Id.*

this commission. But his rulings are not the only ones that need to be scrubbed. The shadow of misconduct also clouds Rubin's and Libretto's tenures. Waits's orders necessarily impacted Rubin's, and both of their orders impacted Libretto's. Even without that compounded taint, the latter two presided over this commission despite laboring under a disqualifying appearance of partiality that Blackwood's undisclosed applications created. Moreover, written orders are not the only tainted orders. The shadow of bias clouds all the minute-by-minute rulings and decisions in every hearing after the arraignment.

2. Applying the three-part test in *Liljeberg v. Health Services Acquisition Corp.* also establishes that dismissal is the appropriate remedy.

The Supreme Court in *Liljeberg* considered remedies for violating 28 U.S.C. § 455(a).[248] Courts consider three factors when deciding whether to vacate a judgment based on the appearance of partiality: (1) "the risk of injustice to the parties in the particular case;" (2) the risk that denying relief "will produce injustice in other cases;" and (3) "the

[248] 486 U.S. 847 (1988).

risk of undermining public confidence in the judicial process."[249]

Here, these risks demand that the commission be dissolved. First, the risk to al-Tamir is substantial. Unlike *Al-Nashiri,* he has enjoyed no period of taint-free decision making. The shadow of taint began before any substantive orders were entered in the commission and before any hearings. Every substitution for classified evidence, every denial of discovery, every scheduling order all occurred after Waits applied for a job with the DOJ. His application to the DOD and Blackwood's numerous applications only compound the problem and demonstrate that the period of taint endures throughout the entire commission.

In addition, the risk of injustice in other cases is substantial. The fact that there are relatively few cases involving this type of error demonstrates that courts need to "encourage careful examination" of judges developing personal, financial interests in parties to the litigation.[250] Since this Court has confronted other cases of biased judges in military commissions, it has identified a need to give

---

[249] *Id.* at 864.

[250] *Id.* at 755.

"additional encouragement to more carefully examine possible grounds for disqualification."[251] Seeing that the same violation has recurred, a clear, prophylactic message is necessary to prevent future injustice to other parties.

Moreover, the fact that the same disqualifying conduct occurred here as occurred in *Al-Nashiri*, yet the CMCR refused to take corrective actions, puts the military commissions system as a whole at risk. The internal review structure has failed to protect the integrity of the military commissions. This casts doubt on all the active military commissions. This Court should grant the petition to protect against the risks lying hidden in the other commissions.

Third, public confidence in the military commission would suffer by denying dismissal. This Court noted that *its own* confidence in the military commissions was shaken, in light of the fact that it had only recently granted mandamus in a different military commission because of judicial conflict.[252] And slightly more than a year after deciding *Al-*

---

[251] *Al-Nashiri*, 921 F.3d at 240 (internal quotation omitted).

[252] *Id.*

Nashiri, al-Tamir presents this Court with an identical ethical violation in another military commission. Vacating the proceedings sends this message and encourages greater sensitivity to the requirements of maintaining the appearance of neutrality under Section 455(a) or RMC 902(a).

Conclusion

Al-Nashiri controls. No distinction exists. Al-Tamir is entitled to a writ of mandamus and prohibition directing the vacatur of the order convening the military commission. Dismissal—in the form of dissolving this military commission—is the appropriate remedy. The appearance of bias has clouded this military commission since its inception. Nothing will change unless this Court vacates these proceedings. The military commission judge and the CMCR refused every opportunity to take the drastic, yet warranted, measures needed to address the pervasive judicial conflicts in this case.

Sometimes remedies are drastic and costly, as undoing this commission surely would be. But that cost does not provide a "license . .

. to disregard the law."[253] Mandamus is an appropriate tool to address the repeated refusal to safeguard the integrity of the military commissions process. This Court should grant the petition and direct the vacatur of the order convening this military commission.

Respectfully submitted,

//s//
MEGHAN S. SKELTON
Appellate Defense Counsel
Military Commissions Defense Organization
1620 Defense Pentagon
Washington, DC 20301
(571) 256-9697
meghan.s.skelton.civ@mail.mil

SUSAN AMELIA HENSLER
Lead Defense Counsel
Military Commissions Defense Organization
1620 Defense Pentagon
Washington, DC 20301
(703) 695-4801
susan.a.hensler.civ@mail.mil

MORGAN N. ENGLING
MAJ, USAF
Defense Counsel for Mr. al-Tamir

[253] *McGirt v. Oklahoma*, 2020 U.S. LEXIS 3554 *60 (July 9, 2020).

Military Commissions Defense
Organization
1620 Defense Pentagon
Washington, DC 20301
(703) 695-1265
morgan.n.engling.mil@mail.mil

JACOB E. MEUSCH
LCDR, JAGC, USN
Detailed Defense Counsel
Military Commissions Defense
Organization
1620 Defense Pentagon
Washington, DC 20301
(703) 695-4716
jacob.e.meusch.mil@mail.mil

CHARLES D. BALL
LT, JAGC, USN
Detailed Defense Counsel
Military Commissions Defense
Organization
1620 Defense Pentagon
Washington, DC 20301
(703) 614-0515
charles.d.ball35.mil@mail.mil

Statutory Addendum

RMC Rule 902. Disqualification of military judge

(a) In general. Except as provided in section (e) of this rule, a military judge shall disqualify himself or herself in any proceeding in which that military judge's impartiality might reasonably be questioned.

MCRE Rule 505. Classified information

(f) Discovery of, and access to, classified information by the accused.

(1) Limitations on Discovery or Access by the Accused

(A) Declarations by the United States of damage to national security. In any case before a military commission in which the United States seeks to delete, withhold, or otherwise obtain other relief with respect to the discovery of or access to any classified information, the trial counsel shall submit a declaration invoking the United States' classified information privilege and setting forth the damage to the national security that the discovery of or access to such information reasonably could be expected to cause. The declaration shall be signed by a knowledgeable United States official possessing authority to classify information.

(B) Standard for authorization of discovery or access. Upon the submission of a declaration under paragraph (1), the military judge may not authorize the discovery of or access to such classified information unless the military judge determines that such classified information would be noncumulative, relevant, and helpful to a legally cognizable defense, rebuttal of the prosecution's case, or to sentencing, in accordance with standards generally applicable to

discovery of or access to classified information in Federal criminal cases. If the discovery of or access to such classified information is authorized, it shall be addressed in accordance with the requirements of subsection Mil. Comm. R. Evid. 505(f)(2).

(2) Discovery of Classified Information

(A) Substitutions And Other Relief. The military judge, in assessing the accused's discovery of or access to classified information under this section, may authorize the United States:

(i) to delete or withhold specified items of classified information;

(ii) to substitute a summary for classified information; or

(iii) to substitute a statement admitting relevant facts that the classified information or material would tend to prove.

(B) Ex Parte Presentations. The military judge shall permit the trial counsel to make a request for an authorization under Mil. Comm. R. Evid. 505(f)(2)(A) in the form of an ex parte presentation to the extent necessary to protect classified information, in accordance with the practice of the Federal courts under the Classified Information Procedures Act (18 U.S.C. App.). If the military judge enters an order granting relief following such an ex parte showing, the entire presentation (including the text of any written submission, verbatim transcript of the ex parte oral conference or hearing, and any exhibits received by the court as part of the ex parte presentation) shall be sealed and preserved in the

records of the military commission to be made available to the appellate court in the event of an appeal.

(C) Action By Military Judge. The military judge shall grant the request of the trial counsel to substitute a summary or to substitute a statement admitting relevant facts, or to provide other relief in accordance with paragraph (1), if the military judge finds that the summary, statement, or other relief would provide the accused with substantially the same ability to make a defense as would discovery of or access to the specific classified information.

(3) Reconsideration. An order of a military judge authorizing a request of the trial counsel to substitute, summarize, withhold, or prevent access to classified information under this section is not subject to a motion for reconsideration by the accused, if such order was entered pursuant to an ex parte showing under this section.

U.S. Code § 455. Disqualification of Justice, Judge, or Magistrate Judge

(a) Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

U.S. Code § 949a. Rules

(b) Exceptions.—

(1) In trials by military commission under this chapter, the Secretary of Defense, in consultation with the Attorney General, may make such exceptions in the applicability of the procedures

and rules of evidence otherwise applicable in general courts-martial as may be required by the unique circumstances of the conduct of military and intelligence operations during hostilities or by other practical need consistent with this chapter.

(2) Notwithstanding any exceptions authorized by paragraph (1), the procedures and rules of evidence in trials by military commission under this chapter shall include, at a minimum, the following rights of the accused:

(A) To present evidence in the accused's defense, to cross-examine the witnesses who testify against the accused, and to examine and respond to all evidence admitted against the accused on the issue of guilt or innocence and for sentencing, as provided for by this chapter.

(B) To be present at all sessions of the military commission (other than those for deliberations or voting), except when excluded under section 949d of this title.

(C)

(i) When none of the charges sworn against the accused are capital, to be represented before a military commission by civilian counsel if provided at no expense to the Government, and by either the defense counsel detailed or the military counsel of the accused's own selection, if reasonably available.

(ii) When any of the charges sworn against the accused are capital, to be represented before a military commission in accordance with clause (i) and, to the greatest extent practicable, by at least one additional counsel who is learned in applicable law relating to capital cases and who, if necessary, may be a civilian

and compensated in accordance with regulations prescribed by the Secretary of Defense.

(D) To self-representation, if the accused knowingly and competently waives the assistance of counsel, subject to the provisions of paragraph (4).

(E) To the suppression of evidence that is not reliable or probative.

(F) To the suppression of evidence the probative value of which is substantially outweighed by—

(i) the danger of unfair prejudice, confusion of the issues, or misleading the members; or

(ii) considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

(3) In making exceptions in the applicability in trials by military commission under this chapter from the procedures and rules otherwise applicable in general courts-martial, the Secretary of Defense may provide the following:

(A) Evidence seized outside the United States shall not be excluded from trial by military commission on the grounds that the evidence was not seized pursuant to a search warrant or authorization.

(B) A statement of the accused that is otherwise admissible shall not be excluded from trial by military commission on grounds of alleged coercion or compulsory self-incrimination so long as the evidence complies with the provisions of section 948r of this title.

(C) Evidence shall be admitted as authentic so long as—

(i) the military judge of the military commission determines that there is sufficient evidence that the evidence is what it is claimed to be; and

(ii) the military judge instructs the members that they may consider any issue as to authentication or identification of evidence in determining the weight, if any, to be given to the evidence.

(D) Hearsay evidence not otherwise admissible under the rules of evidence applicable in trial by general courts-martial may be admitted in a trial by military commission only if—

(i) the proponent of the evidence makes known to the adverse party, sufficiently in advance to provide the adverse party with a fair opportunity to meet the evidence, the proponent's intention to offer the evidence, and the particulars of the evidence (including information on the circumstances under which the evidence was obtained); and

(ii) the military judge, after taking into account all of the circumstances surrounding the taking of the statement, including the degree to which the statement is corroborated, the indicia of reliability within the statement itself, and whether the will of the declarant was overborne, determines that—

(I) the statement is offered as evidence of a material fact;

(II) the statement is probative on the point for which it is offered;

(III) direct testimony from the witness is not available as a practical matter, taking into

consideration the physical location of the witness, the unique circumstances of military and intelligence operations during hostilities, and the adverse impacts on military or intelligence operations that would likely result from the production of the witness; and

(IV) the general purposes of the rules of evidence and the interests of justice will best be served by admission of the statement into evidence.

(4)

(A) The accused in a military commission under this chapter who exercises the right to self-representation under paragraph (2)(D) shall conform the accused's deportment and the conduct of the defense to the rules of evidence, procedure, and decorum applicable to trials by military commission.

(B) Failure of the accused to conform to the rules described in subparagraph (A) may result in a partial or total revocation by the military judge of the right of self-representation under paragraph (2)(D). In such case, the military counsel of the accused or an appropriately authorized civilian counsel shall perform the functions necessary for the defense.

Certificate of Compliance

1. This brief has been prepared using fourteen point, proportionally spaced, serif typeface: Century Schoolbook using Microsoft Word.

2. EXCLUSIVE of the corporate disclosure statement; table of contents; table of citations; any addendum containing statutes, rules or regulations, and the certificate of service, the petition contains 14,636 words, in compliance with this Court's order dated May 15, 2020, which granted the petitioner's motion to file a brief not exceeding 15,000 words.

I understand that a material misrepresentation can result in the Court's striking the brief and imposing sanctions. If the Court so directs, I will provide an electronic version of the brief and/or a copy of the work or line print-out.

/S/

MEGHAN SKELTON
Appellate Attorney

Certificate of Service

I hereby certify that on this 15th day of July, 2020, I electronically filed the foregoing Petition with the Clerk of Court using the CM/ECF System, and I served the following counsel for the government:

Joseph F. Palmer
Danielle S. Tarin
U.S. Department of Justice
joseph.palmer@usdoj.gov
(202) 353-9402
danielle.tarin@usdoj.gov
(202) 532-4493

Brigadier General Mark S. Martins
Michael J. O'Sullivan
Haridimos V. Thravalos
Appellate Counsel for the United States
Office of the Chief Prosecutor
Office of Military Commissions
1610 Defense Pentagon
Washington, D.C. 20301-1610
mark.s.martins.mil@mail.mil
(703) 275-9031
michael.j.osullivan14.civ@mail.mil
(703) 275-9033
haridimos.v.thravalos.civ@mail.mil
(703) 275-9037

/s/
MEGHAN SKELTON
Appellate Attorney