UNITED STATES COURT OF APPEALS
***for the* District of Columbia Circuit**

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IN RE: ABD AL-RAHIM HUSSEIN AL-NASHIRI

No.

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

Dated: October 14, 2014

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CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

I. PARTIES AND *AMICI* APPEARING BELOW

The parties and *amici* who appeared before the United States Court of Military Commission Review are:

1. Abd Al-Rahim Hussein Al-Nashiri, *Appellee*
2. United States of America, *Appellant*

II. PARTIES AND *AMICI* APPEARING IN THIS COURT

1. Abd Al-Rahim Hussein Al-Nashiri, *Petitioner*
2. United States Court of Military Commission Review, *Respondent*

III. RULINGS UNDER REVIEW

This case involves a petition for a writ of mandamus and prohibition to disqualify Lieutenant Colonel Jeremy S. Weber, USAF, and Lieutenant Colonel R. Quincy Ward, USMC, from serving on the United States Court of Military Commission Review in Petitioner's case below.

IV. RELATED CASES

This case has not previously been filed with this court or any other court. Petitioner has a habeas petition in the United States District Court for the District of Columbia, Case No. 08-1207, that is presently under review in this Court as Case No. 14-5229.

Dated: October 14, 2014

By: /s/ Richard Kammen
Counsel for Petitioner

TABLE OF CONTENTS

TABLE OF AUTHORITIES

**Authorities upon which Petitioner chiefly relies are marked with an asterisk.*

Cases

Constitutional Provisions

U.S. Code

Congressional Materials

Executive Materials

Miscellaneous

GLOSSARY OF TERMS

2006 Act ..... Military Commissions Act, Pub. L. No. 109-366 (2006)

2009 Act ..... Military Commissions Act, Pub. L. No. 111-84 (2009)

CMCR ..... United States Court of Military Commission Review

RMC ..... U.S. Dep't of Def., *Manual for Military Commissions*, Part 2, Rules for Military Commissions (2012)

RTMC ..... U.S. Dep't of Def., Regulation for Trial by Military Commission (2011)

Supp.Pet ..... *Al-Nashiri v. Obama*, Case No. 08-1207, Supplemental Petition for a Writ of Habeas Corpus (D.D.C., April 21, 2014)

UCMJ ..... Uniform Code of Military Justice

USN ..... United States Navy

USAF ..... United States Air Force

USA ..... United States Army

USMC ..... United States Marine Corps

JURISDICTION

This Court has supervisory jurisdiction over the United States Court of Military Commission Review pursuant 10 U.S.C. § 950g. This Court has jurisdiction to issue all writs necessary and appropriate in aid of that jurisdiction pursuant to 28 U.S.C. § 1651.

RELIEF SOUGHT

Petitioner, Abd Al Rahim Hussein Al-Nashiri ("Al-Nashiri"), asks this Court to issue a writ of mandamus and prohibition ordering the disqualification of Lieutenant Colonel Jeremy S. Weber, USAF, and Lieutenant Colonel R. Quincy Ward, USMC, from presiding on the United States Court of Military Commission Review in his case because their assignment by the Secretary of Defense to serve on that court violates the Commander-in-Chief Clause and the Appointments Clause of the U.S. Constitution.

ISSUES PRESENTED

On September 19, 2014, the United States took an interlocutory appeal from an order issued by a military commission convened in Guantanamo Bay to the United States Court of Military Commission Review ("CMCR"). The CMCR was created by the Military Commissions Act of 2009, 123 Stat. 2574 ("2009 Act"), as one of the five independent Article I courts of record established under federal law. 10 U.S.C. § 950f(a). On September 22, 2014, this appeal was assigned to a panel of that court presided over by the Honorable Scott Silliman, who was appointed to the CMCR by the President and confirmed by the Senate on June 21, 2011, along with Colonel Eric Krauss, USA, and Lieutenant Colonel Jeremy Webber, USAF, who were assigned to the CMCR by the Secretary of Defense. The assignment of these military officers raises three questions of extraordinary importance:

1. The 2009 Act allows the Secretary to assign military officers to sit as appellate judges on the CMCR, but tightly circumscribes the President's authority to reassign these officers to other military duties. Do these restrictions on the President's authority to decide how individual military officers should be deployed violate the Commander-in-Chief Clause?

2. Assuming these restrictions on redeployment are unconstitutional, are they severable, when their absence vitiates the military officers' ability to act independently and thwarts Congress' express intent to establish the CMCR as a court of record?

3. Does the administrative assignment of mid-level military officers as judges on an Article I court of record violate the Appointments Clause?

STATEMENT OF FACTS

A. Proceedings in the Court Below.

All facts relating to events prior to 2013 are provided in Al-Nashiri's supplemental habeas petition, which was filed with the Court Security Officer and cleared for public filing and release in this Court on October 10, 2014. *In re Al-Nashiri*, Case No. 14-5229, Addendum (D.C. Cir., Oct. 10, 2014) ("Supp.Pet.") (Attachment B). Of specific relevance to the issue here, Al-Nashiri is charged before a military commission in Guantanamo. The prosecution is seeking the death penalty. Five of the charges against Al-Nashiri allege that he had a role in the October 2002 bombing of a French oil tanker, the *M/V Limburg*. This bombing occurred in Yemen and allegedly resulted in the death of a Bulgarian sailor. Four of these charges are death eligible. (*Id.* ¶ 23).

On September 6, 2013 and March 7, 2014, Al-Nashiri's military commission defense counsel filed motions challenging this commission's subject-matter jurisdiction over the *M/V Limburg* charges. AE168 (Sept. 6, 2013), AE241 (Mar. 7, 2014).[1] All told, these issues were the subject of twenty docketed filings and two on-the-record hearings before the military commission.

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[1] All public documents filed in Al-Nashiri's military commission are retrievable by Appellate Exhibit ("AE") number on the military commissions' website: http://www.mc.mil/CASES. These pleadings have not been included with this Petition because their substance is irrelevant to the issues before this Court.

On July 10, 2014, the Chief Judge of the Military Commissions Trial Judiciary, who had presided over the *Al-Nashiri* case since 2008, resigned from the case. He assigned Col. Vance Spath, USAF, to preside in his place. On August 11, 2014, after reviewing the record and outstanding motions, Col. Spath dismissed all charges and specifications relating to the bombing of the *M/V Limburg*, finding that the prosecution had failed to carry its threshold evidentiary burden to establish jurisdiction. AE168G/AE241C, at 5 (Aug. 11, 2014).

On August 18, 2014, the prosecution asked Col. Spath to reconsider his ruling in order to reset its five-day deadline for filing an interlocutory appeal in the CMCR. AE168H/AE241D, at 1 (Aug. 18, 2014). On September 16, Col. Spath granted the prosecution's motion for reconsideration. Upon reconsideration, the Commission reaffirmed its previous order because "[t]he Prosecution was given multiple opportunities with the filing of two sets of pleadings and during two separate oral arguments to provide a factual basis for the Government's assertion of subject matter jurisdiction over the charged offenses. The Prosecution continually declined the opportunity[.]" AE168K/AE241G, at 5-7 (16 Sept. 2014).

On September 19, 2014, the prosecution took an interlocutory appeal to the CMCR.[2] On September 22, the CMCR docketed the appeal and assigned it to a

[2] Under the 2009 Act, the government has five days in which to file an interlocutory appeal or a motion for reconsideration. The prosecution missed this

panel composed of Judge Scott Silliman, Colonel Eric Krauss, USMC, and Lieutenant Colonel Jeremy S. Weber, USAF. On September 25, Al-Nashiri moved to disqualify Col. Krauss and Lt Col Weber on the ground that their assignment to the CMCR violated the Appointments Clause and because the protections the 2009 Act erects to regulate their removal are unenforceable, thereby compromising the independence Congress intended them to have whilst serving on the CMCR. On September 30, Col. Krauss recused himself for unstated reasons and was replaced by Lieutenant Colonel R. Quincy Ward, USMC. On October 6, the CMCR issued a one-paragraph order summarily denying Al-Nashiri's motion to disqualify the military officers on his panel. (Attachment A).

B. The Institutional Status of the CMCR under the 2006 Act.

In response to *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006), Congress passed the Military Commissions Act of 2006, 120 Stat. 2600 ("2006 Act"). The 2006 Act's purpose was to establish "a comprehensive statutory structure that would allow for the fair and effective prosecution of captured members of al Qaeda and other unlawful enemy combatants." 152 Cong. Rec. 17,189 (Sept. 6, 2006)

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deadline by filing a motion for reconsideration on August 18, instead of August 16, 2014. The CMCR recognized that under long-established military law, this deadline is jurisdictional, strictly construed, and would have rendered this motion for reconsideration (and subsequent appeal) untimely. However, the CMCR ruled on October 10, 2014, that the Secretary of Defense could toll this statutory deadline over weekends and holidays via the CMCR's internal rules.

(Message from the President). As part of that structure, Congress gave the accused a right of appeal. The first level of appellate review was to be conducted by a new entity, the "Court of Military Commission Review." Congress constructed this tribunal as an agency review board within the Department of Defense that the Secretary of Defense would establish under his direct control and supervision. 10 U.S.C. § 950f(a) (2006); R.M.C. 1201(a) (2007) (the CMCR exists "[w]ithin the Office of the Secretary of Defense.").

Consistent with its status as an agency review board, Congress authorized the Secretary to direct the operations and composition of the CMCR. The statute made no provision for the appointment of "judges" in the constitutional sense. Instead, the Secretary was authorized to "assign appellate military judges" to the CMCR. 10 U.S.C. § 950f(b) (2006); *see also Weiss v. United States*, 510 U.S. 163, 171-72 (1994) (distinguishing between "appointing" and "assigning" appellate military judges). These could be either a commissioned officer in the Armed Forces who was qualified to serve as a judge advocate or "a civilian with comparable qualifications." *Id.* The choice was left to the Secretary's discretion.

In either case, the statute placed no conditions on the Secretary's authority to assign or remove a CMCR judge. Indeed, while Congress prohibited unlawful attempts to coerce or influence the actions of military commission participants, this protection was limited to adverse personnel actions against panel members, trial

and defense counsel, and military trial judges. 10 U.S.C. § 949b(a) (2006). The members of the CMCR were, instead, at-will employees of the Secretary.[3]

Finally, although the CMCR was intended to adjudicate the rights of a criminal accused, it did not enjoy many of the attributes traditionally associated with a court. For example, the Secretary deprived the CMCR of any authority under the All Writs Act, which extends to "all courts established by Act of Congress," 28 U.S.C. § 1651, instead mandating that "[p]etitions for extraordinary relief will be summarily denied." Rule 21(b), CMCR Rules of Practice (2008).

C. The Institutional Status of the CMCR under the 2009 Act.

Upon taking office in 2009, President Obama exercised his authority as Commander-in-Chief to halt all military commission proceedings, stating that the procedures contained in the 2006 Act had "failed to establish a legitimate legal framework." Remarks by the President on National Security (May 21, 2009). He urged Congress to enact reforms to make "military commissions a more credible and effective means of administering justice." *Id.* In response, Congress passed the 2009 Act, one of the principal goals of which was to "strengthen the military

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[3] The CMCR was originally modeled on the service Courts of Criminal Appeals, which are established by the Judge Advocate General for each military service. 10 U.S.C. § 866. The Judge Advocates General "may ... remove a Court of Criminal Appeals judge from his judicial assignment without cause." *Edmond v. United States*, 520 U.S. 651, 664 (1997).

commissions system during appellate review." *Hearing to Receive Testimony on Legal Issues Regarding Military Commissions and the Trial of Detainees for Violations of the Law of War: Before the Sen. Comm. on Armed Services*, 111th Cong. 5 (2009) (Statement of Sen. McCain).

The most significant structural reform made by the 2009 Act was the abolition of the CMCR as an agency review board under the Secretary's supervision and the establishment of a new CMCR as the fifth independent Article I court of record in the federal system.[4] 10 U.S.C. § 950f(a); *see also* RMC 1201(a) (2012). The phrase "court of record" is a term of art that Congress uses when it intends to establish an adjudicatory tribunal that is functionally independent of the Political Branches. The 2009 Act followed this settled usage.

The CMCR exercises judicial powers to the exclusion of any other function. Absent a timely election by the accused to waive his appellate rights, the court is obligated to hear "any matter properly raised by the accused." 10 U.S.C. § 950f(c). Congress endowed the court with the power to "weigh the evidence, judge the

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[4] There are currently four other Article I courts of record: (1) the United States Court of Appeals for the Armed Forces (10 U.S.C. § 941); (2) the United States Tax Court (26 U.S.C. § 7441); (3) the United States Court of Federal Claims (28 U.S.C. § 171); and (4) the United States Court of Appeals for Veterans Claims (38 U.S.C. § 7251). This designation has also been used with respect to territorial courts established under Article IV. *See* 48 U.S.C. § 1424(a)(3) (District Court of Guam); 48 U.S.C. § 1611(a) (District Court for the Virgin Islands); 48 U.S.C. § 1821(a) (District Court for the Northern Mariana Islands).

credibility of witnesses, and determine controverted questions of fact, recognizing that the military commission saw and heard the witnesses." *Id.* §950f(d). Finally, the court's decisions are binding on the United States, without the review or approval of any Executive Branch official. Instead, like the judgments of a federal district court or the Court of Appeals for the Armed Forces, the CMCR's decisions are appealable only and directly to the Article III courts. *Id.* §950g.

Consistent with the CMCR's elevated status, the 2009 Act requires the President to appoint civilian judges through the formal mechanism of the Appointments Clause. 10 U.S.C. §950f(b)(3). The 2009 Act retained, however, the Secretary's authority to assign "commissioned officers of armed forces" to also serve. 10 U.S.C. § 950f(b)(2). To afford these officers the judicial independence enjoyed by the civilian appointees, Congress prohibited the President or the Secretary from reassigning these officers at-will. In contrast to the Uniform Code of Military Justice, 10 U.S.C. § 866(a), the 2009 Act imposes a good-cause removal standard for military officers assigned to the CMCR. *Id.* §949b(b)(4)(D). The statute also prohibits any person from attempting to influence (by threat of removal or otherwise) "the action of a judge" in an individual proceeding before the CMCR. *Id.* §949b(b)(1)(a). Furthermore, no one may "censure, reprimand, or admonish a judge ... with respect to any exercise of their functions in the conduct of proceedings." *Id.* §949b(b)(2).

REASONS FOR GRANTING THE WRIT

With the 2009 Act, Congress sought to bolster and legitimize the military commission system in Guantanamo. One of Congress' principal means to accomplish this end was to transform the commissions' supervisory appellate body, the CMCR, into an Article I court of record. Reflecting its elevated status, the 2009 Act made the judges on the CMCR principal officers subject to Presidential appointment and Senate confirmation. 10 U.S.C. § 950f(b)(3). Another provision of the 2009 Act authorizes the Secretary of Defense to assign active duty military officers to sit as judges on the CMCR as well and, in effect, to wield majority-voting power over the courts' Presidential appointees. 10 U.S.C. § 950f(b)(2). Recognizing that this posed a threat to the CMCR's judicial independence, Congress conferred on all of the CMCR judges, including its military officers, tenure during good behavior and statutory protections against command supervision. *Id.* §949b(b) . While well-intentioned, this arrangement is unconstitutional in two distinct but related ways.

First, by giving military officers tenure in their assignment to the CMCR, Congress breached the separation-of-powers and interfered with the President's exclusive authority to control the deployment of individual military officers. The Supreme Court has long reserved to the President, particularly in wartime, the sole discretion to deploy military officers where they are needed to meet the nation's

security needs. Put simply, Congress cannot micromanage troop movements. As a consequence, the conditions Congress has put on the assignment of military officers to the CMCR are invalid.

The CMCR's unwillingness to disqualify its own members, indeed to even seriously consider this issue, requires this Court to intervene on mandamus to protect the integrity of the justice system generally, as well as the independence Congress intended the CMCR to have specifically. The Secretary has assigned military officers to fill four out of the six judgeships on the CMCR, including two of the panel members deciding Al-Nashiri's case below. This has subordinated the CMCR to the Secretary and reverted it back into the kind of agency review board that Congress abolished when it established the CMCR as a court of record.

Second, only principal officers can preside as appellate judges on an independent Article I court of record. Not only are their interpretations of law binding on issues of significant importance to the government, they answer to no one within the Executive Branch. A principal officer, such as this, must be appointed by the President and confirmed by the Senate, as the civilian judges on the CMCR are. That ensures accountability in the selection of individuals, who must decide controversial legal questions of first impression. Military officers are necessarily inferior officers and cannot be administratively assigned that duty by the Secretary consistently with the Appointments Clause.

I. A WRIT OF MANDAMUS AND PROHIBITION IS NECESSARY AND APPROPRIATE WHEN A SUBORDINATE JUDICIAL OFFICER IS DISQUALIFIED.

While a writ of mandamus to a lower court is ordinarily an "extraordinary remedy," *Cheney v. U.S. Dist. Court for Dist. of Columbia*, 542 U.S. 367, 380 (2004), it is clearly warranted on the facts and issues presented in this case.

First, mandamus is the only legal remedy when judicial officers refuse to step aside in cases in which their qualifications to serve have been called into serious question. *See, e.g.*, *In re Kempthorne*, 449 F.3d 1265 (D.C. Cir. 2006) (mandamus disqualifying a special master); *In re Brooks*, 383 F.3d 1036, 1041 (D.C. Cir. 2004) (same); *Cobell v. Norton*, 334 F.3d 1128, 1139 (D.C. Cir. 2003) (mandamus disqualifying a court monitor); *see also Union Carbide Corp. v. U.S. Cutting Service*, 782 F.2d 710, 712 (7th Cir. 1986) (Posner, J.) ("A judge's refusal to recuse himself in the face of a substantial challenge casts a shadow not only over the individual litigation but over the integrity of the federal judicial process as a whole. The shadow should be dispelled at the earliest possible opportunity by an authoritative judgment either upholding or rejecting the challenge. In recognition of this point we have been liberal in allowing the use of the extraordinary writ of mandamus to review orders denying motions to disqualify.").

Second, the separation-of-powers issues raised here, which ask novel questions about the Appointments Clause and the limits Congress can place on the

Commander-in-Chief power, fall into a special class of issues where the usual need for judicial reticence is inapplicable. *Cheney*, 542 U.S. at 382 (mandamus is "broad enough to allow a court of appeals to prevent a lower court from interfering with a coequal branch's ability to discharge its constitutional responsibilities.").

Third, once rendered, the CMCR's decision is probably unreviewable. *See Khadr v. United States*, 529 F.3d 1112 (D.C. Cir. 2008). This is thus a case in which "appeal is a clearly inadequate remedy." *Ex parte Fahey*, 332 U.S. 258, 260 (1947). Without intervention by this Court, a structurally void panel of the CMCR will remit Al-Nashiri back to an *ad hoc* capital trial in Guantanamo, where he will face the "sui generis" harms associated with defending against capital charges that the presiding military judge had the courage to dismiss as legally defective. *United States v. Harper*, 729 F.2d 1216, 1223 (9th Cir. 1984) (granting a writ of mandamus to resolve the constitutionality of the death penalty); *see also United States v. Quinones*, 313 F.3d 49, 59 (2d Cir. 2002) (interlocutory appeal entertained due to the "defendant's obvious desire to know in advance whether he will be risking his life by going to trial" and "withholding consideration ... until after trial, conviction and sentence could cause him substantial hardship."). As this Court has held, "[w]hen the relief sought is recusal of a disqualified judicial officer ... the injury suffered by a party required to complete judicial proceedings overseen by that officer is by its nature irreparable." *Cobell*, 334 F.3d at 1139.

Both issues now before this Court ask only whether two of the military officers the Secretary has assigned to the CMCR are eligible to make such weighty decisions, not whether the charges should or should not have been dismissed by the military commission. The questions here are thus collateral to the underlying merits and go only to the integrity and regularity of a judicial process that is now underway. "[T]he validity of the composition of the [CMCR]," is an important issue that must be resolved at the earliest opportunity. *Nguyen v. United States*, 539 U.S. 69, 81 (2003). It "call[s] into serious question the integrity as well as the public reputation of judicial proceedings" and that presents an issue of extraordinary importance for this Court's review on mandamus. *Id.* at 83 n.17.

II. CONGRESS VIOLATED THE SEPARATION OF POWERS BY RESTRICTING HOW THE PRESIDENT MAY DEPLOY INDIVIDUAL MILITARY OFFICERS.

A. Congress Intended to Establish the CMCR as an Independent Article I Court.

In the 2009 Act, Congress exercised its prerogative to establish the CMCR as a "court of record." By using this designation, "the clear intent of Congress [was] to transform" the CMCR from an administrative agency within the Department of Defense "into an Article I legislative court." *Freytag v. C.I.R.*, 501 U.S. 868, 888 (1991). The essential attributes of an Article I court are well known and the CMCR has all of them.

First, the CMCR "exercises judicial, rather than executive, legislative, or administrative, power. It was established by Congress to interpret and apply the [2009 Act] in disputes between [criminal defendants] and the Government. ... As an adjudicative body, it construes statutes passed by Congress and regulations promulgated by the [Secretary]." *Freytag*, 501 U.S. at 890-91. By empowering it to adjudicate cases and controversies falling within the scope of its jurisdiction, Congress vested the CMCR with "a portion of the judicial power of the United States" to represent the judicial system before the world and, crucially, to say what the law is. *Id.* at 891; *see also Shaw v. United States*, 209 F.2d 811, 813 (D.C. Cir. 1954) (observing that the Court of Military Appeals is "a court in every significant respect, rather than an administrative agency.").

Second, Congress intended the CMCR to be "independent of the Executive and Legislative Branches." *Freytag*, 501 U.S. at 891. Like the judgments of its sister Article I courts, the CMCR's "decisions are not subject to review by either Congress or the President," *id.* at 892, but rather are "subject to reversal or change only when challenged in an Article III court." *Intercollegiate Broadcasting Sys., Inc. v. Copyright Royalty Bd.*, 684 F.3d 1332, 1340 (D.C. Cir. 2012). Thus, unlike the services' Courts of Criminal Appeals, the CMCR is neither "directed" nor "supervised" by any other Executive Branch officials. *Edmond*, 520 U.S. at 663.

Finally, and of greatest relevance to this case, Congress endowed the CMCR's members with good-cause tenure to shield them from the threat of removal at will by the Executive. That means those appointed or assigned to the CMCR cannot be removed by the President "except under the *Humphrey's Executor* standard of inefficiency, neglect of duty, or malfeasance in office," which is tantamount to "good-cause tenure." *Free Enterprise Fund v. PCAOB*, 130 S.Ct. 3138, 3148-52 (2010) (quotation omitted). Indeed, the Office of Military Commissions website advertises that "judges assigned to the [CMCR] have statutory tenure. As such, the 2009 Act is more protective of the independence of appellate judges than the [UCMJ]." Office of Military Commissions, *About Us: USCMCR History*, *at* http://www.mc.mil/ABOUTUS/USCMCRHistory.aspx.

The purpose of giving Article I judges tenure is to ensure that they are able to "operate free of presidential direction and supervision." *In re Aiken County*, 645 F.3d 428, 440 (D.C. Cir. 2011) (Kavanaugh, J., concurring); *see also Morrison v. Olson*, 487 U.S. 654, 693 (1988) (noting that limits on the removal power are "essential ... to establish the necessary independence of the office"); *Wiener*, 357 U.S. at 356 (describing good-cause tenure as "involving the rectitude of the member of an adjudicatory body"). The Supreme Court has long recognized that "one who holds his office only during the pleasure of another cannot be depended

upon to maintain an attitude of independence against the latter's will." *Humphrey's Executor v. United States*, 295 U.S. 602, 629 (1935).

The provision of statutory tenure is "not an end in itself," but rather "a means of promoting judicial independence, which in turn helps to ensure judicial impartiality." *Weiss*, 510 U.S. at 179. The core meaning of "impartiality" in this context is "being free from any personal stake in the outcome of the cases to which [a judge] is assigned." *Repub. Party of Minn. v. White*, 536 U.S. 765, 788 (2002) (O'Connor, J., concurring); *see also id.* at 776 (collecting cases). If military officers on the CMCR know that their professional future lies in the unfettered discretion of one of the parties to a dispute before them, they will have a personal stake in the outcome, especially given the politically contentious nature of military commission proceedings. *Id.* at 789. Moreover, "the public's confidence" in the system is arguably "undermined simply by the possibility that judges would be unable" to suppress such parochial concerns. *Id.* Accordingly, when Congress designated the CMCR as a court of record and gave its members good-cause tenure, it did so to give this Court "greater confidence in [its] judgment's validity" on the assumption that it would be "disinterested in the outcome and committed to procedures designed to ensure its own independence." *Boumediene v. Bush*, 553 U.S. 723, 782-83 (2008).

B. The Mechanism Congress Chose to Effectuate its Intent is Unconstitutional.

With 10 U.S.C. §§ 949b(b) and 950f(b)(2), Congress authorized the Secretary to assign military officers to the CMCR but also put statutory constraints on the Executive's power to reassign them to other duties. However well-intentioned, these constraints impermissibly infringe on the President's core authority as Commander-in-Chief to direct the deployment of military officers.

"In the national security realm," there are "at least some areas of exclusive, preclusive Presidential power – where Congress cannot regulate and the Executive 'wins' even in Justice Jackson's *Youngstown* Category Three. For example, courts have generally accepted that the President possesses exclusive, preclusive power under the Commander-in-Chief Clause ... to command troop movements during a congressionally authorized war." *El-Shifa Pharm. Indus. Co. v. United States*, 607 F.3d 836, 858-59 (D.C. Cir. 2010) (Kavanaugh, J., concurring).

The Constitution declares that the President "shall be Commander in Chief of the Army and Navy of the United States." U.S. Const., art. II, § 2, cl. 1. The purpose of this clause is to "vest in the President the supreme command over all the military forces, such supreme and undivided command as would be necessary to the prosecution of a successful war." *United States v. Sweeny*, 157 U.S. 281, 284 (1895). The President is thus authorized to use whatever military resources are provided to him by Congress to protect the national interest and the "Constitution

nowhere requires for the exercise of such authority the consent of Congress." 26 Op. O.L.C. at 151; *see also Ex parte Quirin*, 317 U.S. 1, 11 (1942) ("[T]he Constitution itself gives the Commander in Chief [authority] to direct the performance of those functions which may constitutionally be performed by the military arm of the nation in time of war."); *Fleming v. Page*, 9 How. 603, 615 (1850) ("As commander in chief, [the President] is authorized to direct the movements of the naval and military forces placed by law at his command, and to employ them in the manner he may deem most effectual[.]").

Nor is the President's authority limited to the actual conduct of hostilities. "The inescapable demands of military discipline and obedience to orders cannot be taught on battlefields" but rather "inevitably reflects the training that precedes combat." *Chappell v. Wallace*, 462 U.S. 296, 300 (1983). This rationale applies with equal weight to those serving in professional capacities. *Brown v. Glines*, 444 U.S. 348, 357 n.14 (1980) ("[M]embers of the Armed Services, wherever they are assigned, may be transferred to combat duty or called to deal with civil disorder or natural disaster.").

Finally, "[p]erhaps the most telling indication of the constitutional problem with the [constitution of the CMCR] is the lack of historical precedent for this entity." *Free Enterprise Fund*, 130 S.Ct. at 3159 (quotation omitted). If Congress can give these military officers statutory tenure in a particular assignment, these

officers can refuse to obey any otherwise lawful order that they believed interfered with their judicial duties. If this intrusion into the President's command authority is constitutionally valid, there would be no principled way to prevent Congress from dictating duty assignments generally, a result that would fundamentally alter the balance of power between the political branches.

Those portions of the 2009 Act that afford the military officers the Secretary has assigned to the CMCR independence from the chain-of-command are therefore unconstitutional and fail to serve as the safeguard of judicial independence that Congress intended.

C. Section 950f(b)(2), Granting the Secretary of Defense the Authority to Assign Military Officers to the CMCR, Must Be Struck Down Because These Officers Are Not and Cannot be Institutionally Independent.

Congress was under no obligation to create the CMCR as a court of record and, by extension, have interlocutory appellate questions decided by an independent judicial tribunal. Nevertheless, "Congress for reasons of its own decided upon the method for the protection of the 'right' which it created. It selected the precise machinery and fashioned the tool which it deemed suited to that end." *Switchman's Union v. Nat'l Mediation Bd.*, 320 U.S. 297, 300-01 (1943). In the 2009 Act, "Congress has taken great care both to define the rights of

those subject to [the law of war], and provide a complete system of review ... to secure those rights." *Burns v. Wilson*, 346 U.S. 137, 140 (1953).

Specifically, Congress has determined that questions of law should be adjudicated by a structurally independent Article I appellate court. *See Schlesinger v. Councilman*, 420 U.S. 738, 757-58 (1975) ("Congress created an integrated system of military courts and review procedures [in the UCMJ], a critical element of which is the [CMA] consisting of civilian judges completely removed from all military influence or persuasion."); *Noyd v. Bond*, 395 U.S. 683, 694-95 (1969) (Congress "deliberately chose to confide" the "primary responsibility for the supervision of military justice" in the CMA, which is composed of "disinterested civilian judges"). When it reconstituted the CMCR as a court of record with jurisdiction over interlocutory appeals, Congress was confident enough in the newly fortified CMCR that it abolished this Court's jurisdiction over interlocutory appeals from military commissions. *Compare* 10 U.S.C. § 950d(d) (2006) (giving this Court jurisdiction over interlocutory appeals from the CMCR) *with* 10 U.S.C. § 950d (giving the CMCR final say on interlocutory appeals).

Because the tenure protections of §949b(b) are unconstitutional, however, the military officers on the CMCR are not independent, either in practical fact or consistent with Congress' scheme. It is a "bedrock" principle of constitutional law that the President "may decline to follow [a] statutory mandate or prohibition if

[he] concludes that it is unconstitutional." *In re Aiken County*, 725 F.3d 255, 259-61 (D.C. Cir. 2013). And nowhere is this truer than with respect to laws that impinge upon the President's power as Commander-in-Chief.

As a result, even in the absence of a ruling from this Court invalidating all or some of §949b(b), the military officers assigned to the CMCR know that, in truth, their judicial independence is an illusion. Even assuming good faith and the highest moral fortitude on their part, this fact alone must "have some impact (even though the extent of which may be impossible to measure) on how the [CMCR] decides matters before it." *FEC v. NRA Political Victory Fund*, 6 F.3d 821, 825 (1993).

This constitutional infirmity in Congress' scheme to guarantee the judicial independence of the CMCR can be remedied in one of two ways. Either §949(b), protecting the independence of the CMCR as a whole is invalid, thereby nullifying Congress' establishment of the CMCR *in toto*. *See, e.g.*, *MWAA v. Citizens for the Abatement of Aircraft Noise*, 501 U.S. 252 (1991); *Springer v. Philippine Islands*, 277 U.S. 189 (1928). Or this Court can "limit the solution to the problem" of the "constitutional flaw" by invalidating only the "problematic portions while leaving the remainder intact." *Free Ent. Fund*, 130 S.Ct. at 3161 (quotation omitted). Here, "the existence of the [CMCR] does not violate the separation of powers, but the substantive removal restrictions imposed by [§949b(b) as applied to §950f(b)(2)] do." *Id.* The "problematic portion" of the 2009 Act is therefore only §950f(b)(2),

which authorizes the Secretary to assign military officers to the CMCR on the unenforceable condition that such a decision is, in effect, irrevocable even by the President under §949b(b). This Court should therefore invalidate §950f(b)(2) and leave both the CMCR and §949b(b)'s general safeguards for its judicial independence intact.

Congress, for its part, did not require military officers serve on the CMCR. Instead, based on the legislative context, the retention of military officers on the new CMCR was most likely intended to prevent any disruption to the cases pending at that time the 2009 Act was passed. *See* 2009 Act § 1804(b)(6), 123 Stat. 2613. Even though Congress did not include a severability clause within the 2009 Act, it is reasonable to presume that Congress "would wish the offending portion of the statute—creating the [military] members of the [CMCR]—to be severed from the rest," so that the CMCR's judgments have the weight and legitimacy of those coming from a court of record. *NRA*, 6 F.3d at 828.

Accordingly, we only ask this Court to strike down 10 U.S.C. § 950f(b)(2) and to issue a writ of mandamus and prohibition disqualifying Lieutenant Colonels Webber and Ward from further service in this case.

III. THE SECRETARY'S ASSIGNMENT OF LIEUTENANT COLONELS WEBER AND WARD TO AN INDEPENDENT ARTICLE I COURT VIOLATED THE APPOINTMENTS CLAUSE.

Even if this Court concludes that conferring statutory tenure on military officers does not offend the separation-of-powers, the military officers presently assigned to Petitioner's case should be disqualified because their assignment by the Secretary of Defense to an independent Article I court is impermissible under the Appointments Clause. U.S. Const., art. II, § 2, cl. 2. Both the goals and basic structure of the Appointments Clause make it unconstitutional to place an existing inferior officer in a principal officer position except through the Clause's formal mechanism of Presidential appointment and Senate confirmation.

A. Military Officers are Inferior Officers.

Generally speaking, military officers, "because of the authority and responsibilities they possess, act as 'Officers' of the United States" in the constitutional sense of the term. *Weiss*, 510 U.S. at 169. Yet, there is no dispute that "[m]ilitary officers performing ordinary military duties are inferior officers," since "no analysis permits the conclusion that each of the [thousands of] active military officers ... is a principal officer." *Id.* at 182 (emphasis added). Indeed, the very premise of military life is the chain-of-command principle that "everyone answers to someone," all the way up to the Commander-in-Chief.

In *Weiss*, the Supreme Court concluded that military officers assigned to sit on the services' Courts of Criminal Appeals act as inferior officers. This finding was rooted in 1) their total subordination to and supervision by other officers in the Executive Branch and 2) the fact that their judicial duties to regulate the good order and discipline of service members under the UCMJ was consistent with the general responsibilities given to all other commissioned officers. *Weiss*, 510 U.S. at 170-71, 174-76; *id.* at 196 (Scalia, J., concurring). Thus, a military officer's assignment to one of these courts does not offend the Appointments Clause.

Three years later in *Edmond*, the Supreme Court reiterated that *none* of the judges on the services' Courts of Criminal Appeals, including civilians appointed by the Department Heads, qualify as principal officers. The Court reached this conclusion for two reasons. *First*, these judges are subject to administrative supervision and oversight by the Judge Advocates General of their respective services. In particular, a Judge Advocate General may "remove a Court of Criminal Appeals judge from his judicial assignment without cause," which "is a powerful tool for control." *Edmond*, 520 U.S. at 664. *Second*, these judges are powerless "to render a final decision" that is binding on the United States "unless permitted to do so by other Executive officers," namely the Court of Appeals for the Armed Forces, which like the CMCR, is an Article I court of record. *Id.* at 665.

B. Judges on the CMCR are Superior Officers.

The CMCR is fundamentally different from the services' Courts of Criminal Appeals. In form and practical operation, the CMCR is modeled on the Court of Appeals for the Armed Forces, whose judges are also "principal" officers for Appointments Clause purposes. *Edmond*, 520 U.S. at 665-66; *see also Copyright Royalty Bd.*, 684 F.3d at 1338-40 (Copyright Royalty Board judges were principal officers because they were not removable at will by the Librarian of Congress and their decisions were not reversible by any Executive Branch official); *Soundexchange, Inc. v. Librarian of Congress*, 571 F.3d 1227, 1226-27 (D.C. Cir. 2009) (Kavanaugh, J., concurring).

As a consequence, the military officers assigned to the CMCR are impermissibly assuming the duties of principal officers. "If military judges were principal officers, the method of selecting them ... would [have] amount[ed] to an impermissible abdication by both political branches of their Appointments Clause duties." *Weiss*, 510 U.S. at 189-90 (Souter, J., concurring); *see also United States v. Libby*, 429 F.Supp.2d 27, 43 n.15 (D.D.C. 2006) (the United States Attorney is an inferior officer and thus "cannot be given duties [by the Attorney General] that would elevate him to a 'principal officer.'"). Indeed, the statutory tenure the 2009 Act affords CMCR judges affords them a degree of freedom from supervision that no other member of the Armed Forces enjoys. Instead, like the Court of Appeals

for the Armed Forces, the CMCR's military judges have the authority to issue decisions that are binding on the United States and subject only to review for legal error by the Judicial Branch. 10 U.S.C. § 950g(a).

C. Inferior and Superior Officers on an Article I Court Cannot Have Equal an Say on Matters under Review

The peculiarity inherent in the assignment of inferior officers to sit as equals with principal officers on a single judicial tribunal highlights the violation of the Appointments Clause here. A mixed body of this sort is constitutionally suspect for two basic reasons. *Cf. Nguyen*, 539 U.S. at 76 (interpreting statute to bar an Article IV judge from sitting on a Ninth Circuit panel by designation).

First, the inferior officers are necessarily subordinate to some other superior officer in the Executive Branch. *Edmond*, 520 U.S. at 662 ("Whether one is an 'inferior' officer depends on whether he has a superior."). If they have an equal vote in a given case, the inferior officers are, in effect, given the power to overrule a principal officer. And insofar as their inferior status is defined by their having a superior, who has not only the power but also the obligation to direct their decision-making, the tribunal devolves into nothing more than an instrumentality of that supervisor, instead of an independent Article I court of record.

This diffusion of accountability and responsibility is perfectly illustrated in this case. In form and practical fact, the military officers assigned to the CMCR are

agents of the Secretary of Defense. And insofar as the Secretary can pack the CMCR with as many military officers as he pleases, he is able to exercise an indirect veto over the President's Senate-confirmed appointees on all matters coming before the CMCR. This kind of "super-superior officer," whose will is carried out *sub rosa* by the subordinates he assigns to the court, obscures the very lines of accountability that the Appointments Clause requires to be clear.

Second, this kind of mixed arrangement allows the Executive Branch to use rulemaking to structure government offices in ways that marginalize, if not directly subordinate, the principal officers that Congress believed and the Constitution requires to be actually responsible for policymaking. Under regulations issued by the Secretary of Defense, the CMCR's Chief Judge and Deputy Chief Judge *must* be military officers. Reg.T.Mil.Comm. § 25-2.d (2011). Thus, aside from the sheer numerical superiority of the military officers the Secretary has assigned to the CMCR, the 2009 Act has been implemented in a way that puts military officers, and by extension the Secretary of Defense, in a position to exercise formal supervisory authority over the civilian members of the court.

The Constitution does not allow – and Congress did not intend – a court of the United States to be a mere instrumentality for the political prerogatives of the Secretary of Defense. Besides acting as "a bulwark against one branch aggrandizing power at the expense of another branch," the Appointments Clause is

designed to "preserve[] another aspect of the Constitution's structural integrity by preventing the diffusion of the appointment power." *Ryder v. United States*, 515 U.S. 177, 182 (1995) (quotation omitted). "In the Framers' thinking," the Clause's "strict requirements" for choosing the highest ranking positions in the Government promotes democratic accountability by forcing the President and the Senate to publicly share the responsibility "for injudicious appointments." *Weiss*, 510 U.S. at 186 (Souter, J., concurring).

If nothing else, the conclusory decision by the CMCR on this very issue illustrates the danger that arises when accountability is diffuse and ostensibly principal officers are, in truth, subordinate to the President's political appointees. When these issues were raised before this Court in the *Qosi* case, the government protested that these are "issues of first impression" that were unfit for summary disposition because "[a]djudicating the constitutionality of an Act of Congress is 'the gravest and most delicate duty' that courts are 'called upon to perform.'" *In re Qosi*, Case No. 14-1075, Reply Brief, at 14-17 (D.C. Cir., Aug. 19, 2014). Yet, with its cursory order, the CMCR forwent the independent judicial reasoning that is ordinarily expected from a court in favor of the summary ratification of a conclusion that the Department of Defense's counsel had pressed it to adopt.

CONCLUSION

As presently constituted, the CMCR "clearly lack[s] the structural insulation from military influence that characterizes the Court of Appeals for the Armed Forces[.]" *Hamdan v. Rumsfeld*, 548 U.S. 557, 587 (2006). It thereby fails to satisfy the ordinary meaning of the word "court" in American law and Congress' clear intent for impartial and independent judicial review in these cases. This Court should grant the writ of mandamus and prohibition, so that Al-Nashiri's rights and important questions of federal law are determined as Congress intended by an independent court of record, not agents of the Secretary of Defense.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 14, 2014, copies of the foregoing Petition for a Writ of Mandamus and Prohibition were delivered to the Court Security Officer pursuant to the Amended Protective Order for Habeas Cases Involving Top Secret/Sensitive Compartmented Information and Procedures for Counsel Access to Detainees at the United States Naval Station in Guantanamo Bay, Cuba, in Habeas Cases Involving Top Secret/Sensitive Compartmented Information, Case Nos. 08-MC-442-TFH (Dkt. Nos. 1481 and 1496) & 08-cv-01207-RJR (Dkt. Nos. 79 & 80) (D.D.C. 9 January 2009), for service on the Chief Judge of the United States Court of Military Commission Review, Colonel Eric Krauss, Judge Advocate General's Corps, United States Army, 9275 Gunston Road, Fort Belvoir, VA 22060-5546, and counsel for the Government in the matter below, Ms. Danielle S. Tarin, Office of the Chief Prosecutor, Office of Military Commissions, 1610 Defense Pentagon, Washington, D.C. 20301-1610.