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

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

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

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

RESPONSE OF THE UNITED STATES TO PETITIONER'S MOTION FOR A STAY OF PROCEEDINGS BEFORE THE UNITED STATES COURT OF MILITARY COMMISSION REVIEW

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CERTIFICATE AS TO PARTIES

Abd Al-Rahim Hussein Al-Nashiri is the petitioner in this case. The United States is the respondent.

INTRODUCTION

Petitioner Abd Al Rahim Hussein Al-Nashiri moves this Court for an order staying further proceedings in the United States Court of Military Commission Review (USCMCR) pending this Court's disposition of his petition for a writ of mandamus to the USCMCR. That petition seeks an order from this Court disqualifying the military judges currently serving on the USCMCR on the ground that they were appointed in violation of the Appointments Clause and Commander-in-Chief Clause of the Constitution. As explained below, the Court should deny petitioner's application for a stay because he cannot show a likelihood of success on the merits of his mandamus petition, nor can he establish irreparable injury.

STATEMENT

On September 28, 2011, the Convening Authority for Military Commissions under the Military Commissions Act of 2009 (MCA) referred nine charges against petitioner to trial by a military commission. See Petition for a Writ of Mandamus, Attachment B, at 23-34; Al-Nashiri v. MacDonald, 741 F.3d 1002, 1004 (9th Cir. 2013). The charges largely stem from petitioner's alleged role in two terrorist attacks and one attempted terrorist attack: (1) the 2000 attempted bombing of USS THE SULLIVANS in Yemen; (2) the 2000 bombing of USS COLE in Yemen that

killed seventeen American sailors; and (3) the 2002 bombing of the MV *Limburg*, a French oil tanker, in Yemen that killed one crew member. Al-Nashiri, 741 F.3d at 1004; see also Brief on Behalf of Appellant, United States v. Al-Nashiri, USCMCR Case No. 14-001 (filed Sep. 29, 2014) ("Gov't USCMCR Brief") at 2-5.[1]

On September 16, 2014, the military judge dismissed without prejudice the charges related to the bombing of the MV *Limburg*. Gov't USCMCR Brief at 2. The government brought an interlocutory appeal of that dismissal in the USCMCR. See 10 U.S.C. § 950d. Petitioner filed a motion seeking disqualification of the two military judges on the USCMCR panel considering the interlocutory appeal, on the ground that their appointments to the USCMCR violated the Appointments Clause and impermissibly infringed on the President's authority as Commander in Chief. The USCMCR denied the motion on October 6, 2014. See Petition for Writ of Mandamus, Attachment A.

On October 14, 2014, petitioner filed a petition for a writ of mandamus in this Court seeking an order disqualifying the military judges from adjudicating the interlocutory appeal. On the same day, petitioner filed the instant application for a

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

stay of the proceedings in the USCMCR pending this Court's resolution of his petition for a writ of mandamus.

ARGUMENT

A stay pending appeal, like other forms of preliminary injunction, is "an extraordinary remedy" that is "never awarded as of right." Winter v. Natural Resources Def. Council, Inc., 555 U.S. 7, 24 (2008). This Court will only grant a motion for a stay pending appeal where the moving party shows: (1) a substantial likelihood of success on the merits of the appeal; (2) that the moving party will suffer irreparable injury if the stay is denied; (3) that issuance of the stay will not cause substantial harm to other parties; and (4) that the public interest will be served by issuance of the stay. United States v. Philip Morris, Inc., 314 F.3d 612, 617 (D.C. Cir. 2003) (citing Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir. 1977)). A stay applicant "bears the burden of showing that the circumstances justify an exercise of [judicial] discretion." Nken v. Holder, 556 U.S. 418, 433-34 (2009) (citation and internal quotation marks omitted).

I. Petitioner Cannot Show a Strong Likelihood of Success on the Merits

Petitioner cannot establish a likelihood of ultimate success in his petition for a writ of mandamus compelling the disqualification of the USCMCR's military

judges. See Nken, 556 U.S. at 434-35 (A stay applicant must make a "strong showing" of likelihood of success; "more than a mere possibility of relief is required.").

A. Petitioner Has Not Established that this Court Has Jurisdiction To Issue A Writ of Mandamus to the USCMCR in an Interlocutory Appeal

As a threshold matter, it is doubtful whether this Court has jurisdiction to issue the writ petitioner seeks, given the interlocutory posture of the case. Although Congress has granted the USCMCR jurisdiction over a limited set of interlocutory appeals, see 10 U.S.C. § 950d, judicial review in this Court is limited to "determin[ing] the validity of a final judgment rendered by a military commission," id. § 950g(a), after the accused has exhausted the statutory review process before the Convening Authority, id. § 950b, and the USCMCR, id. § 950c, 950f. See Khadr v. United States, 529 F.3d 1112, 1117 (D.C. Cir. 2008) (dismissing an attempted appeal from an interlocutory USCMCR decision, because the MCA "requires a final judgment by a military commission, approved by the convening authority, for which all administrative review has been exhausted" as prerequisites to this Court's jurisdiction).

Petitioner's motion provides no basis for disregarding the congressional requirement that his challenge to the appointment of military judges to the

USCMCR must await a final judgment and exhaustion of administrative remedies. To be sure, this Court has in some circumstances recognized jurisdiction under the All Writs Act to issue interlocutory writs of mandamus when they are "necessary to protect [the Court's] prospective jurisdiction" over a final decision. Telecommunications Research & Action Ctr. v. FCC, 750 F.2d 70, 76 (D.C. Cir. 1984); see id. at 74-79 (holding that mandamus may be appropriate when the Court's jurisdiction would otherwise be defeated by an agency that unlawfully delays rendering a final decision). In this case, however, review of the USCMCR's rejection of petitioner's challenge to that court's military judges is not "necessary" to protect the Court's authority to review a final military commission judgment because petitioner may renew his constitutional challenges to the appointment of military judges to the USCMCR in the event that petitioner is finally convicted and exhausts his remedies in the military commission system. See United States v. Cisneros, 169 F.3d 763, 768-69 (D.C. Cir. 1999) (holding that a criminal defendant's separation-of-powers claim was not appealable before trial, because the President's and the Senate's constitutional powers would not be further infringed if the defendant could appeal only from a final judgment).

Petitioner also fails to explain how his mandamus petition is viable in light of 28 U.S.C. § 2241(e)(2), which provides:

> Except as provided in [sections 1005(e)(2) and (3) of the Detainee Treatment Act of 2005], no court, justice, or judge shall have jurisdiction to hear or consider any other action against the United States or its agents relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien who is or was detained by the United States and has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.

As this Court explained in Kiyemba v. Obama, 561 F.3d 509 (D.C. Cir. 2009), "[t]hat provision eliminates court jurisdiction over 'any . . . action [other than a petition for habeas corpus] against the United States or its agents relating to any aspect of the [trial]'" of a detainee. Id. at 512. See also Aamer v. Obama, 742 F.3d 1023, 1030 (D.C. Cir. 2014) (quoting Al-Zahrani v. Rodriguez, 669 F.3d 315, 319 (D.C. Cir. 2012)) ("if petitioners' claims do not sound in habeas, their challenges 'constitute[] an action other than habeas corpus' barred by section 2241(e)(2)"). Thus, aside from a claim properly alleging a basis for habeas relief – which is not at issue here – Section 2241(e)(2) forecloses jurisdiction to issue a writ relating to "any aspect" of a military commission trial. See The Miami Herald, Inc. v. United States, Case No. 13-002, at 5 (USCMCR Mar. 27, 2013) (unpub. order denying writ of mandamus) (Silliman, J., concurring). Petitioner's petition for a writ of mandamus disqualifying military judges from the USCMCR involves an "action against the United States . . . relating to [an] aspect of the . . .

[military commission] trial," 28 U.S.C. § 2241(e)(2), and it is therefore barred by that provision.

B. In Any Event, Petitioner Cannot Meet the Exacting Standards for Obtaining Mandamus Relief

Even if petitioner may properly invoke this Court's mandamus jurisdiction at this stage in the military commission proceedings, notwithstanding the fact that the MCA provides only for this Court's review of final judgments following exhaustion of administrative remedies, petitioner cannot show a likelihood of success under the exacting standard for obtaining the exceptional writ of mandamus.

Because the writ of mandamus, see 28 U.S.C. § 1651(a), is a "drastic and extraordinary remedy," "only exceptional circumstances amounting to a judicial usurpation of power or a clear abuse of discretion will justify [its] invocation." Cheney v. United States Dist. Court for Dist. of Columbia, 542 U.S. 367, 380 (2004) (citations and internal quotation marks omitted). See also Roche v. Evaporated Milk Ass'n, 319 U.S. 21, 26 (1943). The writ will issue only when the petitioner demonstrates that: (1) there is "no other adequate means to attain the [requested] relief"; (2) his or her "right to issuance of the writ is clear and indisputable"; and (3) "the writ is appropriate under the circumstances." Belize

Social Dev. Ltd. v. Government of Belize, 668 F.3d 724, 729-30 (D.C. Cir. 2012) (quoting Cheney, 542 U.S. at 380-81). "Ordinarily mandamus may not be resorted to as a mode of review where a statutory method of appeal has been prescribed or to review an appealable decision of record." Roche, 319 U.S. at 28.

1. Petitioner Cannot Demonstrate That There Are No Other Adquate Means To Obtain Relief

Mandamus relief is unavailable to petitioner because he has not shown that he would lack the opportunity to renew his challenge to the appointment of military judges to the USCMCR "on appeal from the ultimate disposition of this litigation." Belize, 668 F.3d at 730 (quoting Dellinger v. Mitchell, 442 F.2d 782, 790 (D.C. Cir. 1971)). See also Nguyen v. United States, 539 U.S. 69 (2003) (considering challenge to qualification of appellate judge on direct appeal from final judgment of conviction). For that reason, petitioner cannot satisfy the mandamus requirement that there be "no other adequate means to attain the [requested] relief." Belize, 668 F.3d at 729. See also Cheney, 542 U.S. at 380-81 (noting that the purpose of the "no other adequate means" requirement is "to ensure that the writ will not be used as a substitute for the regular appeals process").

2. Petitioner Cannot Establish A Clear and Indisputable Right to Relief

Petitioner also cannot show that his right to relief is "clear and indisputable." As the government explained in its response to petitioner's recusal motion in the USCMCR[2], the military judges' appointments are consistent with the Appointments Clause because (1) the judges had been previously appointed by the President, with the advice and consent of the Senate, as commissioned military officers at the time they were assigned to the USCMCR, see Edmond v. United States, 520 U.S. 651, 654 (1997); and (2) judges on the USCMCR are properly considered inferior officers because the Secretary of Defense may reassign them to other duties for reasons of "military necessity" and for "good cause." See 10 U.S.C. § 949b(b)(4)(C) & (D); see also Edmond, 520 U.S. at 662-63, 665. In Weiss v. United States, 510 U.S. 163 (1994), the Supreme Court rejected an argument nearly identical to the one petitioner raises now. Id. at 170; see also Edmond, 520 U.S. at 654. Petitioner's attempt to distinguish Weiss on the ground that the military judges in that case were "inferior" officers falls far short of establishing that his right to relief is "clear and indisputable." Nothing in Weiss suggests that the Supreme Court's decision upholding the judicial assignments at

[2] See Government's Response to Motion to Recuse Judge Krauss and Judge Weber, United States v. Nashiri, Case No. 14-001, at 3-11 (USCMCR Sep. 29, 2014).

issue turned on whether those assignments belonged to principal or inferior officers.

Petitioner's separation of powers argument likewise fails to meet the mandamus "clear and indisputable" standard. Petitioner cites no authority suggesting that the MCA provisions governing the USCMCR, which permit the Secretary of Defense to reassign appellate military judges based on military necessity, see 10 U.S.C. § 949b(b)(4)(C), impermissibly trespass on the President's authority as Commander in Chief, especially in light of Congress's broad authority to regulate with respect to the armed forces.

Petitioner contends (Motion at 6-7) that the government "stipulate[ed]" in a mandamus proceeding brought by a different military commission defendant that petitioner's constitutional challenge is "difficult" and "substantial." That is incorrect. In that case, the government opposed the petitioner's request for a summary disposition holding the MCA unconstitutional on the ground that this Court should not declare an Act of Congress unconstitutional pursuant to summary proceedings. See Gov't Reply Br., Doc. # 1508233, In re Qosi, No. 14-1075, at 16-17 (D.C. Cir. Aug. 19, 2014). That argument does not amount to a stipulation that the constitutional challenge has sufficient merit to warrant mandamus relief.

3. Petitioner Cannot Show That the Writ is Appropriate under the Circumstances

Petitioner has failed to demonstrate any other reasons for this Court to exercise its discretion and award him mandamus relief, other than the burden and delay resulting from trial on the counts related to the MV *Limburg*. However, such delays generally do not constitute sufficient reason for the grant of mandamus relief. See DeGeorge v. United States Dist. Ct., 219 F.3d 930, 935 (9th Cir. 2000).

For all of these reasons, petitioner cannot establish a likelihood of success on his petition for a writ of mandamus.

II. Petitioner Cannot Demonstrate That He Satisfies the Remaining Requirements for Obtaining a Stay

Petitioner has not demonstrated irreparable injury. Petitioner asserts that, in the absence of a stay, he must waste time briefing and arguing issues before a panel that petitioner contends is improperly appointed. In this case, that alleged harm has for the most part already occurred, because merits briefing in the interlocutory appeal before the USCMCR is now complete. But, in any event, the injury petitioner alleges is precisely the harm that the Supreme Court has found inadequate to justify intervention into an ongoing military prosecution. Schlesinger v. Councilman, 420 U.S. 738, 758 (1975) (the mere "harm . . . attendant to resolution of [a defendant's] case in the military court system" does

not amount to irreparable injury). Similar alleged harms have likewise been deemed insufficient in other cases where courts have declined to entertain challenges to ongoing MCA prosecutions. See, e.g., Khadr v. Obama, 724 F. Supp. 2d 61, 69 n.11 (D.D.C. 2010) ("[n]or will Khadr be irreparably harmed by permitting the military commission to fully adjudicate the charges against him in the first instance"); Al Odah v. Bush, 593 F. Supp. 2d 53, 60 (D.D.C. 2009) (declining to consider petitioner's claims because they "may be fully addressed by the military commissions in the first instance, and then addressed, if necessary, by this Court following the conclusion of the military commission proceedings").

Petitioner contends (Motion at 7), relying on Cobell v. Norton, 334 F.3d 1128 (D.C. Cir. 2003), that a party required to complete judicial proceedings overseen by a disqualified judicial officer necessarily suffers an irreparable injury. However, that case, and the precedents on which it relies, refers to the injuries suffered from proceedings at the trial stage before a disqualified judge, where the remedy on appeal is "inadequate" because of the numerous discretionary decisions a trial judge makes that are not subject to *de novo* correction on appeal. Id. at 1139-40. Here, by contrast, petitioner's alleged injury may be fully remedied by this Court on direct appeal from any final judgment rendered in his case (including a judgment on the MV *Limburg* counts) through an order remanding to the

USCMCR for re-consideration of the appeal by a panel of properly appointed judges.

Finally, petitioner also fails to address the other side of the equation – the harm to the government and the public interest arising from further delays in the underlying military court proceedings if petitioner's application for a stay were granted. The public has an interest in avoiding unwarranted delays in the administration of justice, and petitioner has provided no reason why this Court should delay the resolution of the interlocutory appeal before the USCMCR, where briefing is now complete, pending this Court's resolution of petitioner's meritless mandamus petition.

CONCLUSION

For the reasons set forth above, petitioner's motion for a stay should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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

I hereby certify that I electronically filed the foregoing Response of the United States with the Clerk of the Court for the United States Court of Appeals for the D.C. Circuit by using the appellate CM/ECF system on October 27, 2014.

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

DATED: October 27, 2014

/s/ Joseph Palmer
Joseph Palmer
Attorney for the United States