[ORAL ARGUMENT NOT YET SCHEDULED]
No. 17-1179

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

IN RE: KHALID SHAIKH MOHAMMAD AND ALI ABDUL AZIZ ALI,
A/K/A AMMAR AL-BALUCHI, Petitioners

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

MARK S. MARTINS
Brigadier General, U.S. Army
Chief Prosecutor of Military Commissions

DANA J. BOENTE
Acting Assistant Attorney General
for National Security

MICHAEL J. O'SULLIVAN
Appellate Counsel
Office of the Chief Prosecutor
of Military Commissions

JOSEPH F. PALMER
DANIELLE S. TARIN
Attorneys
National Security Division
U.S. Department of Justice
Washington, D.C. 20530

CERTIFICATE OF PARTIES, RULINGS, AND RELATED CASES

I. PARTIES

Khalid Shaikh Mohammad and Ali Abdul Aziz Ali are the petitioners in this case. The United States is the respondent. In the United States Court of Military Commission Review (USCMCR), the United States was the appellant; and Khalid Shaikh Mohammad, Walid Muhammad Salih Mubarek bin 'Attash, Ramzi bin al Shibh, Ali Abdul Aziz Ali, and Mustafa Ahmed Adam al Hawsawi were the appellees.

II. RULINGS

The ruling under review in this case is the order of the USCMCR denying petitioners' motion to disqualify the appellate military judges from the panel assigned to hear the government's interlocutory appeal in petitioners' case. See Pet. App. A4-A22.

III. RELATED CASES

On August 9, 2017, this Court granted Mohammad's petition for a writ of mandamus compelling the disqualification of the civilian judge on the same USCMCR panel and vacating the USCMCR's merits judgment. In re Mohammad, No. 17-1156, 2017 WL 3401335 (D.C. Cir. Aug. 9, 2017) (per curiam).

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STATEMENT OF JURISDICTION

The jurisdiction of the military commission rests on 10 U.S.C. § 948d. The jurisdiction of the United States Court of Military Commission Review (USCMCR) rests on 10 U.S.C. § 950d(a)(1). This Court's jurisdiction is invoked under 10 U.S.C. § 950g and the All Writs Act, 28 U.S.C. § 1651.

ISSUES PRESENTED

1. Whether petitioners are entitled to a writ of mandamus ordering the military judges' disqualification from the USCMCR panel hearing the government's interlocutory appeal in petitioners' case, as well as vacating the USCMCR's merits judgment and its order denying disqualification, because 10 U.S.C. § 973(b)—which provides that, except as otherwise authorized by law, a military officer may not hold a "civil office" that requires a presidential appointment with Senate confirmation—prohibits a military officer from serving as a presidentially appointed judge on the USCMCR.

2. Whether petitioners are entitled to a writ of mandamus ordering the military judges' disqualification from the USCMCR panel hearing the government's interlocutory appeal in petitioners' case, as well as vacating the USCMCR's merits judgment and its order denying disqualification, because the appellate military judges—who are serving on the USCMCR by virtue of an

assignment by the Secretary of Defense and who were later appointed to the USCMCR by the President with the advice and consent of the Senate—are principal officers who cannot be freely removed in violation of the Commander-in-Chief Clause of the Constitution, art. II, § 2, cl. 1.

STATEMENT

I. Statutory Background

Congress established the USCMCR in the Military Commissions Act of 2009 (MCA), Pub. L. No. 111-84, div. A, tit. XVIII, 123 Stat. 2574. The USCMCR is an intermediate appellate tribunal for military commissions, performing a function analogous to the one served for courts-martial by the service courts of criminal appeals. See 10 U.S.C. § 950f(a). The USCMCR's decisions are reviewed by this Court. See In re Al-Nashiri, 791 F.3d 71, 74-75 (D.C. Cir. 2015).

The MCA authorizes both military officers and civilians to serve as judges on the USCMCR. 10 U.S.C. § 950f(b). The Secretary of Defense may "assign persons who are appellate military judges to be judges on the [USCMCR]." 10 U.S.C. § 950f(b)(2). A person so assigned must be a commissioned officer in the armed forces. Id. In addition, the President may "appoint, by and with the advice and consent of the Senate, additional judges," who are not required to be military officers. 10 U.S.C. § 950f(b)(3); see Nashiri, 791 F.3d at 74-75.

The USCMCR's jurisdiction is limited to reviewing military-commission proceedings. Because of that specialized docket, there are times when "the Court's judges may have very little to do." In re Khadr, 823 F.3d 92, 96 (D.C. Cir. 2016). "Consistent with that reality, the military judges who serve on the [USCMCR] also continue to serve on the military appeals courts from which they are drawn." Id.

II. Prior Related Proceedings

A. Military-Commission Cases in the D.C. Circuit

In November 2014, a military-commission defendant, Abd Al-Rahim Hussein Muhammed Al-Nashiri, petitioned this Court for a writ of mandamus seeking disqualification of the military USCMCR judges hearing an interlocutory appeal in his case. Nashiri argued that appellate military judges assigned to the USCMCR are principal officers under the Appointments Clause of the Constitution, art. II, § 2, cl. 2, who must be appointed by the President and confirmed by the Senate to their positions on that court. Nashiri, 791 F.3d at 73, 75. Nashiri also argued that the MCA circumscribes the President's authority to remove or to reassign the military judges to other military duties in violation of the Commander-in-Chief Clause. Id. at 75.

This Court denied the petition, holding that Nashiri had not established the "clear and indisputable" right required for mandamus relief. Id. at 85-86. This

Court did not decide whether USCMCR judges are, in fact, principal officers. Id. It also did not decide whether, if they are, the Appointments Clause requires judges previously appointed as commissioned military officers by the President with the advice and consent of the Senate to be appointed a second time specifically to the USCMCR. Id. But this Court observed that "the President and the Senate could decide to put to rest any Appointments Clause questions regarding the [US]CMCR's military judges" by nominating and confirming them under 10 U.S.C. § 950f(b)(3). Id. at 86.

"The President chose to take that tack" as a prophylactic measure, without conceding that it was constitutionally required. In re Al-Nashiri, 835 F.3d 110, 116 (D.C. Cir. 2016), petition for cert. pending, No. 16-8966 (filed Jan. 17, 2017). In April 2016, the Senate confirmed the two military judges on Nashiri's panel to the USCMCR. Id. The same day it also confirmed the two military judges on petitioners' panel to the USCMCR. See Motion To Lift the Stay of the Proceedings and Review the Existing Motions Briefing Anew, United States v. Al Nashiri, USCMCR No. 14-001 (filed Apr. 29, 2016).

A few weeks later, Nashiri moved the USCMCR to disqualify the military judges on his panel based on 10 U.S.C. § 973(b)(2), which provides that, unless "otherwise authorized by law," a military officer may not hold a "civil office" that

"requires an appointment by the President by and with the advice and consent of the Senate." Nashiri argued that Section 973(b)(2) barred military officers from being appointed as USCMCR judges. The USCMCR denied the motion, holding that military officers' service on the USCMCR is "authorized by law" because the MCA specifically authorizes military officers to be judges on that court. Pet. App. A17 (citing 10 U.S.C. § 950f(b)(2)). The USCMCR also held, in the alternative, that a USCMCR judgeship is not a "civil office" covered by Section 973(b)(2) because "[d]isposition of violations of the law of war by military commissions is a classic military function." Id.

Nashiri sought a writ of mandamus from this Court based in part on his claim that Section 973(b)(2) bars military officers from being appointed to the USCMCR. See Brief for Petitioner at 25-31, In re Al-Nashiri, No. 16-1152 (D.C. Cir. May 24, 2016). Three days later, this Court denied the petition in a unanimous per curiam order. Order, Nashiri, No. 16-1152 (D.C. Cir. May 27, 2016), ECF No. 1615339 (per curiam). This Court found that Nashiri "ha[d] not shown a 'clear and indisputable' right to the extraordinary relief he seeks." Id. (quoting Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271, 289 (1988)).

B. Court-Martial Cases in the Service Courts of Appeals

As mentioned above, the military judges who serve on the USCMCR also continue to serve on the military appeals courts from which they are drawn. After the USCMCR military judges were re-confirmed to be USCMCR judges, service members—whose convictions in military courts-martial were reviewed by an appellate panel that included a military judge who was also serving on the USCMCR—sought discretionary review in the U.S. Court of Appeals for the Armed Forces (CAAF). Those service members argued that they were entitled to a new hearing before the relevant military criminal court of appeals (CCA) because the military judges' simultaneous service on the USCMCR, after their appointment to the USCMCR by the President, violated 10 U.S.C. § 973(b) and the Appointments Clause. The CAAF rejected those arguments in United States v. Ortiz, 76 M.J. 189 (CAAF 2017), petition for cert. pending, No. 16-1423 (filed May 19, 2017).

In Ortiz, the CAAF held that the petitioner was not entitled to relief under 10 U.S.C. § 973(b). Id. at 191-92. The court concluded that even if the judge's position on the USCMCR were a "civil office," and even if his appointment to that office were not "otherwise authorized by law" under 10 U.S.C. § 973(b)(2)(A), any violation of Section 973(b) would not affect the judge's service on the CCA. Id.

The court observed that although Section 973(b) prohibits military officers from holding certain civil offices, it "neither requires the retirement or discharge of a service member who occupies a prohibited civil office, nor operates to automatically effectuate such termination." Id. at 192. Thus, even if Section 973(b) "prohibit[ed] [the relevant judge] from holding office at the USCMCR," it would not "prohibit[] [him] from carrying out his assigned military duties at the CCA." Id. The CAAF also noted that Ortiz's challenge was foreclosed by Section 973(b)'s savings clause, which provides that "[n]othing in this subsection shall be construed to invalidate any action undertaken by an officer in furtherance of assigned official duties." 10 U.S.C. § 973(b)(5); see Ortiz, 76 M.J. at 192.[1]

III. Procedural Background

On April 4, 2012, the Convening Authority for Military Commissions under the MCA referred seven charges against petitioners and three other defendants for a

[1] The CAAF also held that the judges' simultaneous service on the CCA and the USCMCR did not violate the Appointments Clause. Ortiz, 76 M.J. at 192-93. The court assumed without deciding that the judges of the USCMCR are principal officers but rejected the argument that it would violate the Appointments Clause for a person who serves as a principal officer on the USCMCR to serve on the CCA, where he is subject to supervision by other officers. Id. The court explained that even if an officer appointed to the USCMCR is a principal officer when acting in his capacity as a judge on that court, "[w]hen [the officer] sits as a CCA judge, he is no different from any other CCA judge." Id. at 193. The court thus saw "no Appointments Clause problem" with simultaneous service. Id.

joint trial by a capital military commission. See Brief on Behalf of Appellant at 2, United States v. Mohammad, No. 17-002 (USCMCR Apr. 24, 2017).[2] The charges stem from their alleged role in the September 11, 2001 terrorist attacks that killed 2,976 persons. Id. at 2-7. On April 7, 2017, the military judge dismissed with prejudice the non-capital charges on the ground that prosecution for those offenses was time-barred. See id. at 9-10. The government brought an interlocutory appeal of that dismissal in the USCMCR. See 10 U.S.C. § 950d. The USCMCR panel comprised three judges: one civilian judge and two military judges. The two military judges were serving on the USCMCR by virtue of an assignment by the Secretary of Defense, followed by an appointment to the USCMCR by the President with the advice and consent of the Senate. On June 29, 2017, the USCMCR reversed the dismissal. Pet. App. A24.

A. Petition Seeking Disqualification of the Civilian Judge on the Panel

While the government's interlocutory appeal was pending, petitioner Mohammad filed a motion in the USCMCR seeking disqualification of the civilian judge on the appellate panel primarily on the basis of public statements the judge had made as a law professor before serving on the USCMCR. The judge denied the

[2] The Brief on Behalf of Appellant 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.

motion. Petitioner Mohammad asked this Court to issue a writ of mandamus compelling the judge's disqualification and vacating the USCMCR's merits judgment. On August 9, 2017, this Court granted the petition and vacated the merits judgment. In re Mohammad, No. 17-1156, 2017 WL 3401335, at *3.

B. Petition Seeking Disqualification of the Military Judges on the Panel

Petitioner Mohammad also filed a motion in the USCMCR seeking disqualification of the military judges who were serving on his panel. See Pet. App. A4. He contended that their service on the USCMCR violated 10 U.S.C. § 973(b), the Commander-in-Chief Clause, and the Fifth and Eighth Amendments to the Constitution.[3] Id. The other four appellees, including petitioner Ali, joined the motion. Id. at A5.

The USCMCR denied the motion on June 21, 2017.[4] The court reaffirmed its prior holdings that "a USCMCR appellate military judge position is not a 'civil office' prohibited under 10 U.S.C. § 973(b)"; that "USCMCR military appellate

[3] Petitioner Mohammad also contended that the panel was not properly constituted because an earlier provision of the MCA, which had since been amended, required a minimum of three military judges on each panel. See Pet. App. A4 n.1 (explaining that "[t]he December 31, 2011 statutory substitution resolved this issue"). Petitioners do not raise that claim here.

[4] The panel that decided the disqualification motion consisted of military judges Paulette Burton and James Herring, Jr., and civilian judge Scott Silliman. Petitioners have not challenged that decision either in the USCMCR or in this Court based on Judge Silliman's participation.

judges are 'authorized by law' and therefore they are not subject to the civil-office prohibition"; and that "assignment of military appellate judges to the USCMCR does not violate the Commander-in-Chief Clause of Article II Section 2 of the U.S. Constitution." Id. In particular, the court explained that a USCMCR judgeship is not a "civil office" covered by Section 973(b)(2) because "[i]t is beyond dispute that military commissions are primarily a military function with a direct connection to the law of war." Id. at A9.

On July 21, 2017, petitioners filed the instant petition for a writ of mandamus and prohibition in this Court. Pet. 1. The petition seeks an order from this Court (1) prohibiting the presidentially appointed military judges on the USCMCR from serving as members of the three-judge panel assigned to hear the government's interlocutory appeal before that court; (2) vacating the USCMCR's June 21, 2017 order denying petitioners' motion to disqualify the military judges from the case; and (3) vacating the USCMCR's June 29, 2017 merits judgment, which has since been vacated by this Court on other grounds on August 9, 2017. Petitioners contend that the military judges' service on the USCMCR violates 10 U.S.C. § 973(b) and the Commander-in-Chief Clause of the Constitution.

ARGUMENT

Because issuing a writ of mandamus is a "drastic and extraordinary" remedy, "only exceptional circumstances amounting to a judicial usurpation of power or a clear abuse of discretion will justify [its] invocation." Cheney v. United States Dist. Court, 542 U.S. 367, 380 (2004) (internal quotation marks and citation omitted). The writ will therefore issue only when the petitioners demonstrate that (1) there is "'no other adequate means to attain'" the requested relief; (2) the petitioners' "'right to issuance of the writ is clear and indisputable'"; and (3) "'the writ is appropriate under the circumstances.'" Belize Social Dev. Ltd. v. Gov't of Belize, 668 F.3d 724, 729-30 (D.C. Cir. 2012) (quoting Cheney, 542 U.S. at 380-81).

Petitioners contend that this Court should disqualify the military judges on their USCMCR panel based on alleged violations of 10 U.S.C. § 973(b) and the Commander-in-Chief Clause. This Court has already denied mandamus relief as to both of those claims in Nashiri. See Nashiri, 791 F.3d at 82 (noting that Nashiri raised both Appointments Clause and Commander-in-Chief Clause challenges to the military judges serving on the USCMCR and concluding that "only Nashiri's Appointments Clause challenge gives us pause"); Order, Nashiri, No. 16-1152 (D.C. Cir. May 27, 2016), ECF No. 1615339 (per curiam) (denying mandamus petition raising the Section 973(b) claim). Petitioners do not attempt to distinguish

or otherwise explain why this Court's prior decisions do not control the outcome here. In any event, even if petitioners' claims were not foreclosed by this Court's decisions in Nashiri, petitioners cannot satisfy the exacting criteria for obtaining the writ.

I. Petitioners Cannot Establish a Clear and Indisputable Right to Relief

A. It Is Not Clear and Indisputable that Section 973(b)(2) Bars Military Officers from Being Appointed to the USCMCR

1. This Court Has Previously Concluded There Is No Clear and Indisputable Right to Mandamus Relief Based on a Claim that Section 973(b)(2) Bars Military Officers from Being Appointed to the USCMCR

Petitioners claim that Section 973(b)(2) bars military officers from being appointed to the USCMCR. Nashiri raised the same claim in a petition for a writ of mandamus filed last year. Brief for Petitioner at 25-31, Nashiri, No. 16-1152 (D.C. Cir. May 24, 2016) ("Section 973(b) therefore categorically prohibits the 'appointment' of any military officer to the office of CMCR Judge under §950f(b)(3)."). This Court denied the petition, holding that Nashiri "ha[d] not shown a 'clear and indisputable' right to the extraordinary relief he seeks." Order, Nashiri, No. 16-1152 (D.C. Cir. May 27, 2016), ECF No. 1615339 (per curiam) (quoting Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271, 289 (1988)). Petitioners fail to identify any distinguishing circumstance or intervening

law that would support a different conclusion here.

2. Section 973(b) Does Not Bar a Military Officer from Serving on the USCMCR

Even if petitioners' claims were not foreclosed by this Court's decisions in Nashiri, petitioners' statutory claim is meritless. Section 973(b) provides that, "[e]xcept as otherwise authorized by law," military officers may not "hold, or exercise the functions of, a civil office" that "requires an appointment by the President by and with the advice and consent of the Senate." 10 U.S.C. § 973(b)(2)(A)(ii). Petitioners assert that Section 973(b) bars a military officer from serving on the USCMCR after being appointed to that court by the President and that this alleged violation requires vacatur of the USCMCR's decision in their case. Pet. 13-22.

Petitioners are incorrect for four independent reasons: (a) military officers are "authorized by law" to serve as judges on the USCMCR; (b) the position of USCMCR judge is not a "civil office" under Section 973(b); (c) an appointment by the President, with the advice and consent of the Senate, is not "require[d]" for a military officer to serve on the USCMCR; and (d) petitioners would not be entitled to relief even if they were correct that service on the USCMCR violates Section 973(b) because the statute expressly provides that it shall not "be construed to invalidate any action undertaken by an officer in furtherance of assigned official

duties," 10 U.S.C. § 973(b)(5).

a. Military Officers Are "Authorized by Law" To Serve as USCMCR Judges

Section 973(b)(2) does not prohibit a military officer from holding a covered civil office if the officer is "authorized by law" to do so. 10 U.S.C. § 973(b)(2)(A). The MCA expressly authorizes the Secretary of Defense to assign "appellate military judges" to the USCMCR and requires that "[a]ny judge so assigned shall be a commissioned officer of the armed forces." 10 U.S.C. § 950f(b)(2); see Khadr, 823 F.3d at 96 ("The [MCA] authorizes both military judges and civilians to serve on the [USCMCR]."). By providing that one of the two mechanisms for USCMCR judges to be selected applies only to military officers, Congress made clear that military officers are "authorized by law" to serve on that court. Consistent with that statutory authorization, the overwhelming majority of the USCMCR's judges have been military officers. Khadr, 823 F.3d at 96.

Petitioners contend that the MCA is insufficiently clear and unambiguous to provide the necessary "authoriz[ation] by law" for military officers to serve on the USCMCR. See Pet. 13-14, 19-21. But nothing in Section 973(b)(2) imposes or suggests the clear-statement rule that petitioners advocate. And even if such clarity were necessary, it would be supplied by the MCA's express requirement that all judges assigned to the USCMCR under Section 950f(b)(2) must be military

officers, as well as by other provisions of the MCA that plainly contemplate that USCMCR judges may be military officers.

Petitioners appear to acknowledge that Section 950f(b)(2) clearly and unambiguously authorizes military officers to be assigned to be judges on the USCMCR. But they suggest that similar authorization is absent from Section 950f(b)(3), which allows the President to "appoint, by and with the advice and consent of the Senate, additional judges to the [USCMCR]." In other words, petitioners suggest that military officers are authorized to serve as "judges" assigned to the USCMCR under Section 950f(b)(2) (and thus may do so consistent with Section 973(b)), but are not authorized to serve as "additional judges" appointed to the USCMCR under Section 950f(b)(3). See Pet. 18-22.

Petitioners' attempt to distinguish between "judges" and "additional judges" lacks any statutory basis. Section 950f creates a single office—"judge[] on [the USCMCR]." 10 U.S.C. § 950f(a). It then provides that "[j]udges on the Court shall be assigned or appointed" in either of two ways. 10 U.S.C. § 950f(b)(1). The availability of two modes of designation does not transform one statutory office into two. Judges designated under Section 950f(b)(3) are numerically "additional," but substantively identical, to judges designated under Section 950f(b)(2). And because Congress expressly provided that "appellate military judges" may serve as

"judges on the [USCMCR]," 10 U.S.C. § 950f(b)(2), their service in that office is "authorized by law" regardless of the mechanism by which they are designated to serve.

b. The Position of a USCMCR Judge Is Not a "Civil Office"

Even if military officers were not "authorized by law" to serve as USCMCR judges, their service in that position would not violate Section 973(b) because the position of USCMCR judge is not a "civil office" within the meaning of Section 973(b)(2). As the USCMCR explained, adjudication of violations of the law of war by military commissions is "a classic military function." Pet. App. A17; see William Winthrop, Military Law and Precedents 835 (2d ed. 1920) (noting that "military commissions . . . have invariably been composed of commissioned officers of the army"). Although USCMCR judges do not themselves preside over military commissions, they review military commissions' dispositions, a function that is consistent with the well-recognized role of military officers in administering the law of war and that in no way threatens the "civilian preeminence in government" that Section 973(b)(2) is designed to protect. Riddle v. Warner, 522 F.2d 882, 884-85 (9th Cir. 1975).

Petitioners err in assuming (Pet. 15-17) that a position's function is irrelevant and that a position qualifies as a "civil office" under Section 973(b) whenever a

civilian can hold that office. See Riddle, 522 F.2d at 884-85 (holding that the office of notary public is not a "civil office" because military judge advocates have traditionally served as notaries within the military and because service in that office does not undermine the purposes of Section 973(b)). Petitioners also ignore the requirement that the position must be civil, not military. The various opinions on which petitioners rely addressed civil positions. See Pet. 16-17. And unlike those positions, USCMCR judges do not hold a "civil office" because, as military officers serving on the USCMCR by virtue of an assignment by the Secretary of Defense, they act pursuant to military, rather than civil, authority. See Pet. App. A8 (noting the MCA's express requirement that all judges assigned to the USCMCR under Section 950f(b)(2) must be military officers); cf. United States v. Burns, 79 U.S. 246, 252 (1870) (explaining that the Secretary of War is not "in the military service" but is a "civil officer with civil duties to perform, as much so as the head of any other of the executive departments").

Petitioners also assert that the USCMCR's decisions in this case and in Nashiri are inconsistent with the CAAF's decision in Ortiz. Pet. 15-16. No such inconsistency exists. The USCMCR held that a military judge's service on the USCMCR does not violate Section 973(b) because a USCMCR judgeship is not a "civil office" and because such service is in any event "specifically authorized" by

the MCA. Pet. App. A7-A10, A17. The CAAF did not disagree with either of those holdings. To the contrary, it expressly stated that it "d[id] not decide" those issues. Ortiz, 76 M.J. at 193. Instead, the CAAF simply held that the petitioner would not be entitled to a rehearing before the CCA even if the appellate military judge's simultaneous service on the USCMCR violated Section 973(b). Id. at 191-93. The fact that the USCMCR and the CAAF rejected these statutory arguments on alternative and independent grounds does not make their decisions inconsistent. Even if it did, that kind of inconsistency would not entitle petitioners to mandamus relief. See Cheney, 542 U.S. at 380 (explaining that, to obtain mandamus relief, petitioners must show the court's action amounts to a "judicial usurpation of power . . . or a clear abuse of discretion") (internal quotation marks and citation omitted). Regardless, the CAAF's decision in Ortiz provides no support for petitioners' arguments challenging the decision below.

Finally, petitioners are incorrect in asserting that "this Court has opined that the position of USCMCR judge under § 950f(b)(3) is unambiguously and exclusively a civil office." Pet. 18. According to petitioners, in Khadr, 823 F.3d at 96, this Court held "that the determinative issue is the means by which the President 'appoint[s] civilians to serve as judges on the Court.'" Pet. 18. But in Khadr this Court decided the different question whether the petitioner was entitled to a writ of

mandamus ordering a civilian judge on the USCMCR to remove himself from the case because he maintained a private law practice, allegedly violating a rule of practice and federal statutes that are not at issue here. Khadr, 823 F.3d at 95. Finding that the government raised "substantial" arguments to the contrary, this Court held that the petitioner failed to establish a clear and indisputable right to relief. Id. at 100. Although this Court has addressed the Section 973(b) claim petitioners renew here, the Nashiri Court rejected that claim, citing the same failure to establish a clear and indisputable right to relief that was fatal to the mandamus petition in Khadr. See Order, Nashiri, No. 16-1152 (D.C. Cir. May 27, 2016), ECF No. 1615339 (per curiam).

c. The Office of USCMCR Judge Does Not Require a Presidential Appointment with Senate Advice and Consent

Section 973(b) only applies to offices that "*require*[] an appointment by the President by and with the advice and consent of the Senate." 10 U.S.C. § 973(b)(2)(A)(ii) (emphasis added). There is no statute requiring military officers serving on the USCMCR to be appointed by the President with the advice and consent of the Senate. Accordingly, petitioners' claim depends on the premise that it is "clear and indisputable" that the Constitution requires such an appointment. But the Nashiri Court explicitly rejected that premise. Nashiri, 791 F.3d at 85-86 (finding it is not clear and indisputable that appointing military judges as USCMCR

judges is constitutionally required). For that reason, this Court's holding in Nashiri compels denial of petitioners' statutory claim.

Even if this Court had not already decided the issue, it is far from "clear and indisputable" that the office of USCMCR judge "requires an appointment by the President by and with the advice and consent of the Senate." The MCA expressly provides that "[t]he Secretary of Defense may assign persons who are appellate military judges to be judges on the [USCMCR]." 10 U.S.C. § 950f(b)(2). That alternative mode of designating judges makes clear that the position of USCMCR judge does not "require" a presidential appointment. And although the President responded to this Court's decision in Nashiri by appointing military judges to the USCMCR with the advice and consent of the Senate, no court has held that such an appointment is constitutionally required. See Nashiri, 791 F.3d at 81-86 (declining to resolve that "question[] of first impression").

d. A Violation of Section 973(b) Would Not Entitle Petitioners to Relief

Even if Section 973(b) prohibits military officers from serving on the USCMCR, it is not clear and indisputable that a violation of Section 973(b) would entitle petitioners to an order disqualifying the military judges serving on the USCMCR or vacating the USCMCR's decisions. The Executive Branch is bound to comply with Section 973(b), and does so. But many statutes that are binding on

the Executive Branch do not create privately enforceable rights. And even when they do, Congress may limit private enforcement to particular contexts. Here, Section 973(b) prohibits military officers from serving in specified civil offices, but "nothing in the text suggests that it prohibits" an officer who assumes a prohibited civil office from carrying out his assigned official duties. See Ortiz, 76 M.J. at 192. And Section 973(b)'s savings clause expressly forecloses any attempt by petitioners to use that provision to overturn the USCMCR decisions in their case because it provides that "[n]othing in this subsection shall be construed to invalidate any action undertaken by an officer in furtherance of assigned official duties." 10 U.S.C. § 973(b)(5). The USCMCR military judges who participated in deciding the government's interlocutory appeal did so "in furtherance of [their] assigned official duties," and petitioners thus cannot invoke Section 973(b) to challenge the USCMCR's decisions.[5]

[5] Although Section 973(b)'s savings clause was added to the statute in 1983, this would not support an argument that the savings clause applies only to actions military officers took while holding a prohibited office before 1983. Although the legislative history of the amendment indicates that the savings clause was added in response to a 1983 Justice Department memorandum concluding that military officers could not be appointed as Special Assistant United States Attorneys, Congress did not limit the clause's application to that particular context or make it purely retroactive. To the contrary, Congress broadly provided that "[n]othing in [Section 973(b)] shall be construed to invalidate *any* action undertaken by an officer in furtherance of assigned official duties." 10 U.S.C. § 973(b)(5) (emphasis added).

B. It Is Not Clear and Indisputable that the Military Judges Cannot Be Reassigned in Violation of the Commander-in-Chief Clause

In Nashiri, this Court rejected the claim that the MCA restricts the President's authority to remove or to reassign USCMCR military judges to other military duties in violation of the Commander-in-Chief Clause. 791 F.3d at 82 (noting that Nashiri raised both Appointments Clause and Commander-in-Chief Clause challenges to the military judges and concluding that "only Nashiri's Appointments Clause challenge gives us pause"). Petitioners raise the same claim here, contending that the President's removal and reassignment authority is unconstitutionally restricted by the military judges' presidential appointments. This claim lacks merit.

To the extent petitioners' claim relies on the premise that it is "clear and indisputable" that USCMCR judges are principal officers, see Pet. 25-26, this Court has found that the question whether USCMCR military judges are principal or inferior officers is an "open question." See Nashiri, 791 F.3d at 85. That holding is alone sufficient to foreclose petitioners' claim.

Even if USCMCR judges were principal officers, petitioners acknowledge the question they raise is novel, asserting that "there is no precedent for military officers simultaneously serving as principal officers with the attendant tenure protections from the chain-of-command." Pet. 26. Petitioners do not cite any case

by any court that has ever even considered, much less upheld, a claim that an appointment by the President was invalid because it restricted his own authority as Commander-in-Chief. And even if petitioners' Commander-in-Chief Clause argument had merit, it is not "clear and indisputable" that the appropriate remedy would be disqualification of the military judges and vacatur of their orders, rather than invalidation of the tenure protections that allegedly run afoul of the President's authority. It is also not clear and indisputable that alien unprivileged enemy belligerents detained at Guantánamo Bay would have standing to obtain disqualification on the basis of a claim that a judicial appointment violated the Commander-in-Chief Clause. Given petitioners' failure to refer to any relevant precedent supporting their claim, they cannot show that USCMCR's denial of that claim amounts to a "judicial usurpation of power . . . or a clear abuse of discretion." Cheney, 542 U.S. at 380 (internal quotation marks and citation omitted).

In any event, petitioners' claim also lacks merit because USCMCR judges may be reassigned by the President for cause. See Khadr, 823 F.3d at 98 (noting that the Department of Defense has expressly represented that presidentially appointed USCMCR judges "may be removed by the President only for cause"). Consistent with Section 949b(b)(4) of the MCA, which provides that military judges on the USCMCR are subject to reassignment for "good cause," the

President's authority assures that the Executive is able to remove these military officers or to reassign them to other duties when good cause so requires. This authority reinforces statutory protections from arbitrary removal, see, e.g., 10 U.S.C. § 949b(b)(2), while providing sufficient flexibility to accommodate military exigency and routine changes of duty in the ordinary course of a military career.

II. Petitioners Cannot Demonstrate There Are No Other Adequate Means To Obtain Relief

Petitioners fail to show there are no other adequate means to obtain relief because this Court can consider their statutory and constitutional challenges on direct appeal. As this Court held in Nashiri, "[m]andamus is inappropriate in the presence of an obvious means of review: direct appeal from final judgment." 791 F.3d at 78 (citing Roche v. Evaporated Milk Ass'n, 319 U.S. 21, 27-28 (1943)). If the judiciary exercised a "readiness to issue the writ of mandamus in anything less than an extraordinary situation," it would run the real risk of defeating the very policies sought to be furthered by the "judgment of Congress that appellate review should be postponed until after final judgment." Id. at 78 (quoting Kerr v. United States Dist. Court, 426 U.S. 394, 403 (1976)) (internal quotation marks omitted).

In the context of military commission proceedings, the 2009 MCA empowers this Court to review "all matters of law" once a military commission issues a final judgment and both the convening authority and the USCMCR review it. See

Nashiri, 791 F.3d at 79 (citing 10 U.S.C. § 950g(a), (d)). Petitioners' claims are reviewable by this Court on direct review, and therefore those claims are not a proper basis for seeking interlocutory mandamus relief. In Nashiri, this Court confronted a claim that the two appellate military judges assigned to an interlocutory appeal taken by the government in Nashiri's case were assigned to the USCMCR in violation of the Appointments Clause. See Nashiri, 791 F.3d at 75. The Nashiri Court denied mandamus relief because, among other reasons, Nashiri had failed to demonstrate "irreparable" injury that would go unredressed if he did not secure mandamus relief, "[g]iven the availability of ordinary appellate review" relating to his claim. Id. at 79 (internal quotation marks omitted). The Nashiri Court rejected Nashiri's analogy to judicial disqualification cases in which mandamus relief has been granted when a judicial officer declines to recuse himself in the face of claims involving the existence of actual or apparent bias against a party. Such cases, this Court found, involve irreparable injury "because it is too difficult to detect all of the ways that bias can influence a proceeding." Id. at 79 (citing Cobell v. Norton, 334 F.3d 1128, 1139 (D.C. Cir. 2003)).

In this case, petitioners' core argument that the military judges are barred from serving on the USCMCR is based on statutory and constitutional grounds. Petitioners' arguments that the military judges' service violates Section 973(b) and

the Commander-in-Chief Clause present questions of law and statutory interpretation that may be fully addressed on direct appeal. See Cobell, 334 F.3d at 1139 (distinguishing legal claims, which "may be fully addressed and remedied on appeal," from allegations that the judge was biased against a party). Because petitioners seek mandamus relief on the basis of legal arguments about the status of military judges on the USCMCR that could be resolved by this Court on direct review, and not on the basis of allegations (much less clear evidence) that the military judges are biased against petitioners, see Pet. 12, this Court should deny mandamus relief.

Petitioners contend they would suffer irreparable injury because the military judges have a "conflict of interest" in deciding the question whether they "are in violation of 10 U.S.C. § 973(b)(2)(A)(ii)." Pet. 9, 13. According to petitioners, the military judges "stand to be negatively affected financially, personally, and professionally if they are dismissed from the USCMCR."[6] Id. at 9. This argument did not prevail in Nashiri. See Brief for Petitioner at 35-37, No. 16-1152 (D.C. Cir. May 24, 2016) (arguing that the USCMCR military judges "have significant personal, professional, and financial incentives to avoid the conclusion that their

[6] Petitioners did not ask the military judges to recuse themselves from deciding the disqualification motion below. Pet. 12 n.4.

appointments were prohibited under §973(b)"). And it does not prevail here because it assumes that an officer's military appointment is automatically terminated when he accepts a prohibited civil office. As the CAAF found in Ortiz, the 1983 amendment to Section 973(b) repealed language in that provision that had automatically terminated an officer's military appointment when he accepted a prohibited office. 76 M.J. at 191-92. That language had provided that "[t]he acceptance of [a prohibited] civil office or the exercise of its functions by [a covered] officer terminate[s] his military appointment." 10 U.S.C. § 973(b) (1982). But "the current statute neither requires the retirement or discharge of a service member who occupies a prohibited civil office, nor operates to automatically effectuate such termination." Id. at 192.

Nor does the statute prohibit military judges from carrying out their assigned military duties on the USCMCR (or on a CCA). See id. When Congress repealed the automatic-termination language, it added the savings clause discussed above. See page 21, supra. The savings clause broadly provides that "[n]othing in [Section 973(b)] shall be construed to invalidate *any* action undertaken by an officer in furtherance of assigned official duties." 10 U.S.C. § 973(b)(5) (emphasis added); see Ortiz, 76 M.J. at 191-92. The USCMCR military judges participated in deciding the government's interlocutory appeal "in furtherance of [their] assigned

official duties" as appellate military judges pursuant to their assignment by the Secretary of Defense, and petitioners thus cannot invoke Section 973(b) to overturn the USCMCR's decisions. See Ortiz, 76 M.J. at 192 (denying petitioner's request for a new hearing in the CCA because Section 973(b) would not "prohibit[] [the military judge] from carrying out his assigned military duties at the CCA").

Petitioners also assert the military judges "have a conflict of interest when deciding any issue regarding the legitimacy of their appointment to the court." Pet. 10. But petitioners do not appear to contend that there is any Appointments Clause problem with the manner in which the military judges were appointed to the USCMCR. The government has consistently maintained that military officers do not require a separate appointment to serve as USCMCR judges because USCMCR judges are not principal officers. See Nashiri, 791 F.3d at 81, 85 (declining to resolve that "question[] of first impression"). But in any event, the military judges on the USCMCR have now been appointed to that court in the manner required by the Appointments Clause for principal officers: by the President with the advice and consent of the Senate. See Nashiri, 835 F.3d at 116. Those appointments "put to rest any Appointments Clause questions regarding the [US]CMCR's military judges." Nashiri, 791 F.3d at 86. Given the availability of ordinary appellate

review and petitioners' failure to identify irreparable injury justifying mandamus relief in this case, this Court should deny the petition.

III. Petitioners Cannot Show the Writ Is Appropriate Under the Circumstances

Petitioners fail to demonstrate any other reasons for this Court to exercise its discretion and award them mandamus relief. Petitioners are incorrect in contending that this Court applies an "unduly restrictive standard" that makes mandamus relief categorically unavailable in the absence of "controlling precedent." See Pet. 10-11. Petitioners appear to rely on this Court's decisions in Nashiri, in which the Court denied mandamus relief based on its determination that the questions raised in those petitions were "open." See Nashiri, 791 F.3d at 85-86; see also Nashiri, 835 F.3d at 136-38. But those conclusions were based on the absence not only of controlling case law, but of any constitutional or statutory provision or other authority supporting Nashiri's contention that his right to relief was clear and indisputable. Id.; see also United States v. Fokker Services, B.V., 818 F.3d 733, 749-50 (D.C. Cir. 2016) ("[W]e have never required the existence of a prior opinion addressing the precise factual circumstances or statutory provision at issue" to justify mandamus relief.). This Court should reach the same conclusion here. Petitioners cite no authority of any kind that supports their claim of a "clear and indisputable"

right. To the contrary, as explained above, the relevant precedents, including decisions by this Court and the CAAF, have rejected similar claims.

Petitioners also suggest that, in the absence of judicial intervention at this juncture, they, and future parties, must waste time briefing and arguing issues before a panel that may be improperly constituted. But because the parties have already submitted their briefs in the USCMCR, that alleged harm has already occurred in this case. Although this Court recently ordered vacatur of the USCMCR's merits judgment on other grounds, a new USCMCR panel could conduct a de novo review of the existing record, as it has done in another case. See Pet. App. A15-A18 (after military judges were re-confirmed as USCMCR judges, the USCMCR affirmed prior decisions based on the existing record); Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd., 796 F.3d 111 (D.C. Cir. 2015) (rejecting the argument that properly appointed decision makers must accept new submissions or risk having orders of the properly appointed decision makers tainted by objections to the appointment of their predecessors). In any event, the cost and delay caused by trial and the appellate process do not constitute sufficient reason for the grant of mandamus relief here. See DeGeorge v. United States Dist. Court, 219 F.3d 930, 935-36 (9th Cir. 2000) ("Being forced to stand trial," and the

"unnecessary cost and delay" that result from an erroneous trial court ruling, do not constitute "prejudice correctable through use of the writ of mandamus.").

CONCLUSION

Because petitioners fail to establish that they have satisfied the exacting criteria for obtaining a writ of mandamus, this Court should deny the petition.

Respectfully submitted,

MARK S. MARTINS
Brigadier General, U.S. Army
Chief Prosecutor of Military Commissions

DANA J. BOENTE
Acting Assistant Attorney General
for National Security

MICHAEL J. O'SULLIVAN
Appellate Counsel
Office of the Chief Prosecutor
of Military Commissions

JOSEPH F. PALMER
DANIELLE S. TARIN
Attorneys
National Security Division
U.S. Department of Justice

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DATED: August 25, 2017

/s/ Danielle S. Tarin
Danielle S. Tarin
Attorney for the United States

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U.S. Court of Appeals Docket Number 17-1179.

I hereby certify that I electronically filed the foregoing Opposition of the United States with the Clerk of the Court for the United States Court of Appeals for the D.C. Circuit by using the appellate CM/ECF system on August 25, 2017.

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/s/ Danielle S. Tarin
Danielle S. Tarin
Attorney for the United States