[ARGUMENT NOT YET SCHEDULED]
UNITED STATES COURT OF APPEALS
***for the* District of Columbia Circuit**

In re: ABD AL-RAHIM HUSSEIN AL-NASHIRI,	No. 18-1279 **PETITIONER'S REPLY BRIEF IN SUPPORT OF HIS PETITION FOR A WRIT OF MANDAMUS AND PROHIBITION** Dated: November 28, 2018

Michel Paradis
CAPT Brian Mizer, USN, JAGC
LT Alaric Piette, USN, JAGC
U.S. Department of Defense
Military Commission Defense Organization
1620 Defense Pentagon
Washington, DC 20301

Counsel for Petitioner

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REPLY

Petitioner sought a writ from this Court after learning the military commission judge, who presided over his capital prosecution for years, was secretly negotiating with Respondents for employment and after the CMCR denied relief, holding no "reasonable and informed observer would question the judge's impartiality." *United States v. Al-Nashiri*, Case No. 18-002, Order (Sep. 28, 2018) (cleaned up). Respondents' primary objection to this Court's granting relief is Petitioner's supposed need to develop the record below. Because Petitioner could only estimate how long these negotiations had been going on, Respondents contended the basis of his claim was mere "speculation and insinuation." Resp. 33.

As Petitioner argued in support of the stay that this Court entered on November 7, 2018, these additional facts were not essential to his right to relief. Secretly negotiating with a party for a job is clear judicial misconduct, whether those negotiations lasted a week or a year. And that clear misconduct warranted the vacatur of the proceedings below. The only relevance the granular details of Col Spath and Respondents' negotiations had was in potentially limiting the scope of the remedy by, for example, vacating only proceedings conducted after negotiations began.

Thanks only to a reporter's FOIA request, we now know the granular details. Col Spath first submitted his application package to Respondents on November 19, 2015. We also now know that he traded on the fact that he was the military

commission judge in Petitioner's case to make himself a more attractive hire; that he parroted the prosecution's talking point that Petitioner was "the alleged Cole bombing mastermind;" that he used a decision in Petitioner's case as his writing sample; that he solicited letters of recommendation from a then-sitting judge on the Court of Military Commission Review (CMCR); that he negotiated extensively with Respondents for three years; that his then-inexplicable insistence on haste throughout 2017 came as Respondents pressured him to commit to a start-date, including a warning in August 2017 that his job prospects were in jeopardy if he did not act more promptly; and that he and Respondents not only kept all of this information hidden, but that Col Spath deliberately misled Petitioner, the CMCR, and the public to obscure this years-long effort from scrutiny.

While these most recent revelations far exceeded anything Petitioner had "speculated or insinuated," they simply confirm what Petitioner has argued from the outset. Col Spath disqualified himself from presiding over Petitioner's case the moment he made himself a suppliant to Respondents for employment. The scale and willfulness of that misconduct was unknown. But Petitioner has argued since his first filing that this misconduct caused him irreparable harm, including the collapse of his capital defense team, and permanently damaged the integrity of these proceedings. The only adequate remedy to remove the taint of that misconduct and to deter similar misconduct in the future is vacatur.

Given how heavily Respondents' opposition was based upon the supposed need for a more granular factual record, Petitioner invited Respondents' counsel to file a supplemental brief as soon as the FOIA documents came to light. Respondents declined that invitation. Petitioner will therefore respond to their remaining arguments in opposition, which do not alter the conclusion that vacatur is both necessary and appropriate.

Respondents' contention that Petitioner can seek adequate alternative remedies from the military commission, Resp. 29-31, is legally foreclosed on the issues for which unbiased judicial discretion are most essential. The new military commission judge cannot revisit any issue, of law or fact, affected by the CMCR's expansive exercise of "pendent jurisdiction" in the prosecution's third interlocutory appeal. And she is statutorily barred from reconsidering the approximately thirty orders Col Spath issued granting the prosecution permission to withhold classified evidence. 10 U.S.C. § 949p–4(c). Complete relief, therefore, can only come from this Court.

Respondents also contend that Petitioner has not made a "clear and indisputable" case on the merits. Resp. 43. For all the reasons given in Petitioner's prior briefing, the negotiation for post-judicial employment is governed by bright line ethical standards that Col Spath comprehensively violated.

All Respondents are left with then is a general plea that vacating the proceedings below will "entail enormous cost." Resp. 50. As an initial matter,

Respondents overstate these costs and fail to account for the costs of pressing ahead with the compromised proceedings below. But to the extent vacatur will impose any costs, Respondents and Col Spath are to blame. Had Respondents disclosed their negotiations with Col Spath, this issue would have been resolved years ago. And given the extent of the misconduct at issue here and the damage it has done both to Petitioner and the integrity of these proceedings, the only prudent remedy is to vacate the proceedings below to give this case a fresh start.

I. STANDARD OF REVIEW.

The parties agree on the basic elements of the mandamus standard but disagree on how strict Petitioner's burden is. Respondents assert that relief must be denied if Petitioner "cannot cite any precedent that clearly and indisputably requires disqualification here." Resp. 50 (*quoting In re Al-Nashiri*, 791 F.3d 71, 85-86 (D.C. Cir. 2015)). For the reasons given below and in his prior briefing, Petitioner surmounts even this strict standard. But he feels compelled to note that this Court has expressly rejected the heightened stringency Respondents now demand, particularly in cases involving judicial disqualification.

In *United States v. Fokker Servs. B.V.*, 818 F.3d 733 (D.C. Cir. 2016), which Respondents do not cite, this Court granted mandamus relief on an open question of first impression, holding that "we have never required the existence of a prior opinion addressing the precise factual circumstances or statutory provision at issue in order to find clear error justifying mandamus relief." *Id.* at 749–50. And in *In re*

Mohammad, 866 F.3d 473 (D.C. Cir. 2017), which Respondents also fail to distinguish, this Court ruled on a wholly novel question of judicial disqualification in the military commissions context.

Mohammed is particularly important here, insofar as questions of judicial disqualification present a special case in the law of mandamus. As the Supreme Court held a century ago, disqualification is one of the few grounds where "remedy by appeal is inadequate." *Berger v. United States,* 255 U.S. 22, 36 (1921). This is because "ordinary appellate review following a final judgment is insufficient to cure the existence of actual or apparent *bias*—with actual bias because it is too difficult to detect all of the ways that bias can influence a proceeding and with apparent bias because it fails to restore public confidence in the integrity of the judicial process." *Mohammad*, 866 F.3d at 475 (cleaned up). Because judicial misconduct casts "a shadow not only over the individual litigation but over the integrity of the federal judicial process as a whole," courts have accordingly been more "liberal in allowing the use of the extraordinary writ of mandamus[.]" *Union Carbide v. U.S. Cutting Service*, 782 F.2d 710, 712 (7th Cir. 1986).

Respondents nevertheless assert that "the mandamus standards must be strictly enforced in the military commission context" and contend that unusual strictness is compelled by 10 U.S.C. § 950g(a). Resp. 26. But this section is substantively identical to the comparable provision of the Uniform Code of Military Justice, 10 U.S.C. § 867(c). And the military justice system applies a more

liberal standard in granting writs than this Court generally does, particularly on matters of judicial disqualification. *See*, *e.g.*, *Hasan v. Gross*, 71 M.J. 416, 417 (C.A.A.F. 2012). Applying an unusually strict mandamus standard here therefore is unsupported by the statutory text and would thwart Congress' stated desire for the military commission's "pre-trial, trial, and post-trial procedures" to generally conform to those governing courts-martial. 10 U.S.C. §§ 948b(c); 949a(a).

II. THE RECORD IS MORE THAN SUFFICIENT TO SUPPORT MANDAMUS.

1. Respondents' principal argument against relief is that Petitioner "jumped the gun" in filing in this Court. Resp. 31. Respondents argue that a petitioner "must raise his disqualification claim in the first instance in the trial court," and support this requirement by this Court's supposed refusal "to consider disqualification claims raised for the first time on appeal." *Id*. at 30.

This supposed requirement simply does not exist. This Court, and other courts, have addressed judicial disqualification questions raised for the first time on appeal, including interlocutory appeals, if that was when the facts giving rise to the claim first came to light. This is because "public confidence in the courts requires that bias questions be disposed of at the earliest possible opportunity." *Al-Nashiri*, 791 F.3d at 79 (cleaned up).

Hence, in *Microsoft*, this Court decided a judicial disqualification claim raised for the first time on appeal because there, like here, the judge in question

"ensured that the full extent of his actions would not be revealed until this case was on appeal." *United States v. Microsoft*, 253 F.3d 34, 108 (D.C. Cir. 2001). In *Ligon v. City of New York*, 736 F.3d 118, 124 (2d Cir. 2013), the Second Circuit disqualified a district judge in the course of the interlocutory appeal of an injunction, despite the fact that no party had sought recusal below. And in *Mangini v. United States*, 314 F.3d 1158, 1160 (9th Cir. 2003), the Ninth Circuit vacated a judgment where additional facts were submitted on appeal, even though the Circuit found that the district court was correct to deny an earlier motion to disqualify based on the more limited record before it below.

Respondents rely upon *United States v. Barrett*, 111 F.3d 947, 951-52 (D.C. Cir. 1997), as supposedly creating the need to raise disqualification claims in the first instance before a trial court. But that case had nothing to do with the issue presented here. That case dealt with a criminal defendant who waited until his case was on direct appeal to raise recusal for the first time. It was, in short, a case about forfeiture, not venue.

Here, Petitioner filed a disqualification motion with the CMCR because that is where the case was when the misconduct was discovered and because the misconduct at issue directly impacted the questions then under review by the CMCR. The CMCR denied all relief on the merits. And that left this Court as the only venue in which relief could be sought.

2. Lacking any caselaw, Respondents make two practical arguments for why judicial disqualification claims should be raised in the first instance before a trial court. The first is that trial courts may be able to craft remedies that obviate the need for mandamus. Resp. 35-36. The second is that trial courts are in the best position to develop a factual record. Resp. 30-32. Both arguments are sensible in the abstract. But neither has any relevance here.

For the reasons explained in §II *infra*, the new military commission judge lacks the power to order adequate remedies even if she were so inclined.

Respecting the state of the record, Respondents variously contend that there "is no factual record for this Court to review," Resp. 31, and that Petitioner's case is based on nothing more than "speculation and insinuation" and "media reports." *Id*. 33. But Respondents can point to no unresolved question of fact that would call Petitioner's clear and indisputable right to relief into doubt.

From the day Petitioner filed his motion in the CMCR, it has been known that Col Spath negotiated with Respondents for post-judicial employment, which he then received, while he was presiding over Petitioner's capital prosecution. He did this despite the regular appearance before him of attorneys from the very governmental department in which he now works and despite the Attorney General, who appointed him, taking an personal interest in Petitioner's case. And he actively concealed all of these facts until after his retirement and post-judicial

employment were secured. These facts were all subject to judicial notice and were all Petitioner needed to prevail.

To the extent it was, as Respondents contended, "unclear at this point how many of Col Spath's orders are potentially implicated," Resp. 36, that was solely because Respondents had refused to turn over documents in their possession. But it is not unclear now. As Petitioner noted in his motion to supplement his petition attachments, a reporter for McClatchy filed a FOIA request with the Justice Department for records relating to Col Spath's hiring. That request resulted in a 311-pages of public records that show Col Spath applying to Respondents for employment on November 19, 2015. Application Materials (Attachment B-1).

What is more, the FOIA records make clear that Col Spath's made the fact that he was presiding over Petitioner's case the central argument for why he should be hired. Col Spath's resume advertised that he was "handpicked to preside over Cole bombing case at Guantanamo Bay, Cuba." Col Vance Spath, Curriculum Vitae (undated) (Attachment C-1). "*Currently*," he wrote, "I am the presiding judge for … the military commissions proceedings for the alleged 'Cole bombing' mastermind at Guantanamo Bay, Cuba. … The case at Guantanamo Bay, Cuba, has significant media and federal government interest[.]" Application Materials (Attachment B-2). (emphasis added). And in touting his *current* role as the judge in Petitioner's case, he repeatedly referred to Petitioner as the "alleged Cole bombing mastermind," a prosecution talking point.

To make up for his lack of experience with immigration law, Col Spath analogized immigration cases to Petitioner's case and how it had given him "a mastery of complex international law and procedure … and the protections an illegal combatant enjoys under U.S. law." Application Materials (Attachment B-4). He stressed the impact of his role at length, compared Petitioner's case to the September 11th case, (*id*. B-6), and even included a ruling as his writing sample. (*Id*. B-11).

Col Spath sought out recommendations from at least four government employees, military and civilian, who would feature his role in Petitioner's case. This included a judge on the CMCR, which at that moment was deciding two interlocutory appeals the prosecution had brought in Petitioner's case, and who made a point of noting that "As Chief [Air Force] Appellate Judge, I continue to oversee his work." Application Materials (Attachment B-9).

The prominence of place Col Spath put on his role in Petitioner's case did not go unnoticed. Respondents' memorandum endorsing his appointment heavily relied upon it, noting "Although Mr. Spath does not have significant immigration experience, he has presided over cases involving many complex issues, including areas of international law and procedure." Memorandum for the Attorney General (May 18, 2018) (Attachment D-1). Respondents' human resources staff accommodated Col Spath's frequent requests to postpone his start-date because he was "called to active duty for work on a Guantanamo Bay case. Due to the need for

him on the case he says that this is what has prevented him from coming on board with EOIR sooner." Email Correspondence (Attachment A-30). And they recognized that his presiding over Petitioner's case was so high-profile that the Secretary of Defense had to personally approve his retirement. (*Id*. A-20).

These documents also show that Col Spath's negotiations with Respondents influenced his behavior on the bench. On March 20, 2017, for example, Respondents formally offered him the immigration judge position. Memorandum for the Attorney General (May 18, 2018) (Attachment D-1). A few weeks later, Col Spath issued his "aggressive" trial schedule. Pet. 14.

In late June 2017, Respondents offered him a start-date of September 18, 2017, which he tentatively accepted pending "confirmation from the Air Force." Email Correspondence (Attachment A-3). The Air Force evidently required more time to prepare his replacement (the current military commission judge, Col Shelly Schools, USAF) and so in mid-July, he attempted to delay his start-date further, saying "I remain detailed to a case at Guantanamo Bay, Cuba which requires significant time to hand to another trial judge." (*Id*. A-10). Subsequent email traffic between Respondents' human resources staff stated, "Spath is still in negotiations … He said there was some kind of issue with the military finding a replacement for him. … We've had some issues with this candidate." (*Id*. A-8). Four days later, Col Spath denied the first of Petitioner's motions seeking to prevent the monitoring of his attorney-client communications. AE369VV (Aug. 1, 2017).

The following day, Col Spath asked Respondents to postpone his start-date to "May 15, 2018 or later." Email Correspondence (Attachment A-11). This same week, Petitioner's trial counsel discovered a hidden microphone in their attorney-client meeting room and the other facts contained in the still-classified Dolphin Declaration. Over the course of the next two weeks, they provided Col Spath the Dolphin Declaration and filed a series of motions seeking to compel discovery into the source of the microphone and seeking interim remedies to secure their attorney-client communications. Pet. 8-9.

As these motions were being filed, Respondents' human resources staff told Col Spath that "Management did not agree to his terms." Email Correspondence (Attachment A-12). He was informed that his requests for additional delay were not being well taken, that he was not guaranteed the position, and that his application would be re-reviewed in January/February 2018. (*Ibid.*). A few weeks later, he summarily denied Petitioner's motions relating to the monitoring of his communications, holding as a matter of law that counsel for the prosecution's assertion that they personally were not privy to Petitioner's attorney-client communications dispensed with the need for any further inquiry or relief. Pet. 9.[1]

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[1] Respondents now claim this microphone was a disconnected "legacy microphone." Resp. 12-13. But their only source supporting this claim, including their quotations, are a brief Respondents filed in the CMCR last spring, wherein they made these claims about the nature of the microphone for the very first time and without any evidentiary support.

Col Spath's dickering over his start-date continued for the remainder of the year, as most of Petitioner's trial counsel withdrew, as Col Spath unlawfully imprisoned the Chief Defense Counsel, and as he pressed forward with weeks of one-sided evidentiary hearings, where Petitioner's sole attorney was an inexperienced Navy lieutenant only five years out of law school. Col Spath ultimately asked for a start-date of July 8, 2018, and Respondents notified him that it agreed on the afternoon of February 15, 2018. At 8:02PM the same evening, Col Spath confirmed. Email Correspondence (Attachment A-18). The following morning, he abated proceedings in Petitioner's case. Pet. 21.

3. As stated above and in Petitioner's prior briefing, none of these newly disclosed facts are essential to his success on the merits. That Col Spath secretly negotiated with Respondents for employment for any period of time is clear judicial misconduct. But these documents, which are subject to judicial notice, confirm that Petitioner is not engaging in "speculation and insinuation." Col Spath traded on the fact that he was "currently" presiding over Petitioner's case to score a job with Respondents and succeeded. No further fact-finding is necessary.

However, to the extent this Court finds the record inadequate, Petitioner asks this Court to appoint a special master pursuant to Fed. R. App. Pro. 48. *See*, *e.g.*, *In re Certain Complaints Under Investigation by an Investigating Committee*, 783 F.2d 1488, 1499 (11th Cir. 1988); *USNMCCR v. Carlucci*, 26 M.J. 328 (C.M.A. 1988) (appointing a special master to investigate allegations of misconduct by

military judges). Proceedings before a special master will be more efficient than remanding to the new military commission judge, who has no experience managing the unique logistical burdens associated with Guantanamo.

Furthermore, as indicated above, it appears that the new military commission judge was Col Spath's handpicked successor as both Chief Trial Judge of the Air Force and military commission judge in Petitioner's case. Email Correspondence (Attachment A-10). Under military law, where judges are "handpicked" and the normal safeguards of random case assignment do not exist, it is well-settled that disqualified judges may not participate in the selection of their successors, "whether the judge's role is significant or minimal." *United States v. Roach*, 69 M.J. 17, 20 (C.A.A.F. 2010). Accordingly, should this Court deem additional fact-finding necessary, such an inquiry should not be conducted by Col Spath's protégé and successor. Instead, for the sake of public confidence alone, this Court should appoint a special master.

III. PETITIONER CANNOT SEEK ADEQUATE RELIEF FROM THE MILITARY COMMISSION.

Respondents contend that Petitioner can file motions for "reconsideration by a new military judge of any adverse pretrial decisions rendered by Col Spath." Resp. 35. But a mandamus petitioner is not required to pursue remedies that are "either foreclosed or futile." *Monmouth Med. Ctr. v. Thompson*, 257 F.3d 807, 815 (D.C. Cir. 2001). And this supposed alternative avenue for relief asks Petitioner to

attempt a futile task before returning to this Court with the same record that is before it today.

As Petitioner noted in his prior briefing, the CMCR's rush to issue its merits decision and its expansive interpretation of "pendent jurisdiction" have legally foreclosed the reconsideration of some of the most significant issues in Petitioner's case by force of the mandate rule and the CMCR's ruling that its "holdings are now the law-of-the-case and the law of the military commissions even if we did not have pendent jurisdiction to decide them in addressing the merits of appellant's appeal of the abatement order." *United States v. Nashiri*, Case No. 18-002, Opinion, at 37 (U.S.C.M.C.R., Oct. 12, 2018). The military commission judge can no more countermand that directive or vacate the decisions of its superior court than the CMCR can overrule this Court.

As Respondents note, the CMCR also has retained jurisdiction over "the issue of [Petitioner's] representation." Resp. 31. Precisely what this means is unclear. But insofar as Col Spath's misconduct directly caused Petitioner's previous trial team to collapse, the military commission judge is precluded from reconsidering any rulings affecting that issue as well.

Finally, and most significantly, Petitioner is barred by statute from seeking reconsideration of any of Col Spath's *ex parte* rulings permitting the prosecution to withhold otherwise relevant classified evidence. 10 U.S.C. § 949p–4(c). Petitioner has identified approximately thirty such rulings issued since November 2015, when

Col Spath began his employment negotiations. These rulings are the product of an *ex parte* litigation process, colloquially called the "505 process," that depended entirely on Col Spath's individual discretion. *Id*. §949p–4(b).

What is especially troubling here is that the FOIA documents reveal that Col Spath issued the vast majority of his 505 rulings (by Petitioner's count twenty-five) in a flurry after Attorney General Sessions first agreed to his appointment in March 2017. Indeed, nearly *half* of Col Spath's 505 rulings were issued after Respondents warned him in August 2017 that postponing his start-date jeopardized his hiring for the position. Email Correspondence (Attachment A-12).

The rulings, therefore, that depended the most on the judge's ability to hold "the balance nice, clear, and true between the State and the accused," *Tumey v. Ohio*, 273 U.S. 510, 532 (1927), and that were the most susceptible to improper time pressure, are the very orders that Petitioner cannot seek to have reconsidered. Over and above all of the other prejudice Petitioner can point to, Col Spath's misconduct has irreparably harmed his ability to muster facts in his defense in a capital trial. Only this Court, by vacating the proceedings below and giving this case a fresh start, can provide an adequate remedy for that judicial misconduct.

IV. SECRETLY NEGOTIATING WITH A PARTY FOR A JOB IS CLEAR JUDICIAL MISCONDUCT.

On the merits, Respondents boldly claim that Petitioner has "not cited any authority requiring disqualification in the circumstances of this case." Resp. 43. To

the extent there is no caselaw on when military commission judges may leverage the fact that they are currently presiding over high-profile capital cases as part of secret negotiations for Attorney General appointments, that is because the circumstances of this case are so extraordinary. But the actual and apparent bias such misconduct engenders is clearly forbidden by the Canons of Judicial Conduct, the Due Process Clause, the Rules for Military Commissions, and the current Guide to Judiciary Policies and Procedures (2014) ("Judicial Guide").

Respondents neither cite nor distinguish the Judicial Guide or its lengthy section on "Pursuit of Post-Judicial Employment." 2B Guide to Judiciary Policy, Committee on Codes of Conduct Advisory Opinion No. 84: Pursuit of Post-Judicial Employment (2016). A cursory inspection of this section makes clear and indisputable all the ways Col Spath violated the most self-evident responsibilities of judicial service. He made himself a suppliant to a party for employment. He let his career ambitions influence his handling of a capital case. And he actively concealed the facts until after he had secured his new job and left the bench.

Respondents cite two federal district court cases and one state supreme court case to make it appear that this kind of conduct is acceptable. Resp. 45-46. But none of these cases stand up to scrutiny. The two federal cases decided recusal motions based upon publicly disclosed relationships between judges and politicians involved in their *past* pursuit of judicial appointments. And the state case was a 4-3 decision from the Minnesota Supreme Court, declining to disqualify a judge who

applied for work in another jurisdiction's district attorney's office, which had no interest in the cases before the judge. *Troxel v. State*, 875 N.W.2d 302, 316 (Minn. 2016). None of these cases, in other words, involved a judge secretly negotiating for a job with a party in a pending case.

Respondents finely parse the two most relevant cases – *Pepsico* and *Scott* – in an attempt to make the law appear less clear than it is. With respect to *Pepsico v. McMillen*, 764 F.2d 458 (7th Cir. 1985), Respondents claim that its reasoning was limited to cases "handled by a private law firm." Resp. 43. But this is plainly false. And the section of the Judicial Guide on the "Pursuit of Post-Judicial Employment" states explicitly that the phrase "law firm" in its guidance is intended to "apply to other potential employers." *See also Scott v. United States*, 559 A.2d 745, 756 n.23 (D.C. 1989) (en banc) ("The ethical considerations underlying the Canons are no less applicable to the U.S. Department of Justice than to a private law firm.").

Respondents attempt to distinguish *Scott* on the ground that judicial ethics only regulate negotiations with government offices "directly related to the operations of the United States Attorneys' offices." Resp. 44 (cleaned up). This too parses *Scott* too finely and, in any event, is readily satisfied here.

Respondents strain to minimize the Justice Department's involvement in this case. Resp. 45. But one need only scan the record to see how deep that involvement is and how, at every hearing, various components of the Justice

Department appeared as parties before Col Spath. Pet. 39-40.[2] The head of the prosecution team in Petitioner's case is a Justice Department attorney, AE338H (Feb. 22, 2017), a fact Col Spath understood, explicitly referring to this lawyer as the "lead prosecutor." Trans. 7513. And multiple Attorneys General have taken a personal interest in Petitioner's case.

Respondents attempt to minimize the Attorney General's interest in this case as simply that of "an official who arguably has an interest in the successful prosecution of accused enemy belligerents[.]" Resp. 48. But this vastly understates former-Attorney General Sessions' personal interest in this case. As Petitioner and *amicus* noted, former-Attorney General Sessions, who personally appointed Col Spath as an immigration judge, advocated for the military commissions generally and in Petitioner's case in particular. Pet. 39.[3] He also intervened to scuttle plea

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[2] As noted at Pet. 40, the Secretary of Defense has defined the term "party" to include "[a]ny trial or assistant trial counsel representing the United States, and agents of the trial counsel [i.e., FBI agents] when acting on behalf of the trial counsel with respect to the military commission in question." R.M.C. 103(24)(B). Even if this Court limited itself to a formal assessment of the Departmental affiliations of the participants, therefore, it cannot be seriously disputed that the Justice Department was a "party" to Petitioner's case.

[3] In fact, the very decision to prosecute Petitioner in a military commission instead of the Southern District of New York was made by the former Attorney General, not the Defense Department. Attorney General Announces Forum Decisions for Guantanamo Detainees (Nov. 13, 2009) *available at* https://www.justice.gov/opa/speech/attorney-general-announces-forum-decisions-guantanamo-detainees

negotiations that had begun in the summer of 2017 between the former-Convening Authority, Harvey Rishkoff, and the capital defendants in the military commissions, including Petitioner. Carol Rosenberg, *Lawyer floated life-sentence plea deal for alleged 9/11 plotter. The deal vanished*, Miami Herald (Nov. 16, 2018).[4] And contrary to what they have argued here, Respondents counsel in the military commissions have not only admitted the Attorney General's personal involvement in these cases, they have insisted upon it, arguing that "the Convening Authority was obligated to consult with the Attorney General on this issue and did so," part-and-parcel of "the Attorney General's legitimate role in the consideration of pre-trial agreements." *United States v. Mohammed*, AE555WW 3 n.4, 20 (Sept. 27, 2018) (Attachment E-3; E-8).

The clearest evidence, however, that Col Spath not only engaged in judicial misconduct but knew that he was engaging in judicial misconduct are the lengths he went to conceal and misdirect. A judge is obliged to notify the parties of information "relevant to a possible motion for disqualification, even if the judge believes there is no basis for disqualification." ABA Model Code of Judicial Conduct, Rule 2.11, cmt. 3 (2014); *see also Porter v. Singletary*, 49 F.3d 1483, 1489 (11th Cir. 1995). And Col Spath was well aware that his future career plans

[4]https://www.miamiherald.com/news/nation-world/world/americas/guantanamo/article221759560.html

were an issue affecting his neutrality. When Col Spath took over Petitioner's case in the summer of 2014, he was squarely asked "How much longer do you have before you retire?" He responded, "Great question. Statutorily, seven and a half years. Absent a selective early retirement board or some unforeseen circumstance, that's how long I can stay." Trans. 4646.

Yet, Col Spath continued to maintain the pretense, well into his negotiations with Respondents, that his lack of career ambitions meant that he didn't "have a dog in the fight." Trans. 11072. In fact, the day he abated proceedings, he claimed to have spent the previous evening agonizing. He claimed that what he characterized as misconduct by Petitioner's former counsel had shaken him so profoundly that, "it might be time for me to retire, frankly. That decision I'll be making over the next week or two. … I'll just ponder it as we go forward." Trans. 12374. At no point did he mention the fact that at 8:02pm that same evening, he sent an email to Respondents confirming a July 2018 start-date.

And if that were not enough, when the CMCR directed him to answer whether certain administrative actions would prompt him to lift his abatement, he responded that they "will not resolve what this Commission views as an existential threat to its ability to bring this case to trial." Case No. 08-002, Response to Order (CMCR, Mar. 26, 2018) (Attachment F-1). This was the very day he sent Respondents an email asking, "What do I owe you for the 9 July start?" Email Correspondence (Attachment A-17).

V. THE ONLY ADEQUATE AND APPROPRIATE REMEDY IS VACATUR OF PROCEEDINGS.

As Petitioner argued before, the standard remedy for the kind of judicial misconduct at issue here is vacatur. Pet. 47-48. This was the remedy in *Scott*, even though there was no showing of prejudice and even though the issue arose from nothing more than the judge's "inadvertent lack of appreciation of the significance of his conduct." *Scott*, 559 A.2d at 754-55. Respondents nevertheless oppose relief because any error should be deemed harmless and because "[v]acating [Col Spath's] rulings or dissolving the military commission would entail enormous cost to the parties and to the judicial system." Resp. 50.

To be sure, the Supreme Court has recognized that mere technical violations of the federal recusal statute may be treated as harmless error, when "committed by busy judges who inadvertently overlook a disqualifying circumstance." *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 862 (1988). But in so holding, the Court was contemplating disqualifying conduct that was "insubstantial" and "excusable." *Id*. at 867. And it emphasized that, in the main, it is "appropriate to vacate the judgment unless it can be said that [objecting party] did not make a timely request for relief, or that it would otherwise be unfair to deprive the prevailing party of its judgment." *Id*. at 868.

Here, Petitioner raised the issue as promptly as possible and Respondents fail to show unfairness to anyone, beyond abstract complaints of "cost," if this Court applies the usual remedy of vacatur. This case is still, after all, in its pre-trial

phase. And unlike the two cases Respondents rely upon to substantiate their worries over cost, Resp. 51, this is not a mutli-litigant complex case, where vacating the rulings of a judge found in technical breach of the recusal statute risks prejudicing numerous parties with divergent interests.

Col Spath's misconduct was also neither a technical breach, nor inadvertent, nor insubstantial, nor excusable. And Respondents were not only a party to his misconduct, they stonewalled basic requests for information. It was only the serendipity of a reporter's FOIA request that allowed the full extent of Col Spath's misconduct to come to light. And so to the extent there will be any "costs" associated with vacating the proceedings below, those costs fall on Respondents, who could have protected against them over three years ago.

Respondents also fail to account for the significant costs to the legal system if this Court allows this case to continue in its compromised state. There are now hundreds of rulings potentially tainted by Col Spath's misconduct, many involving matters of judicial discretion. If, as Respondents propose, Petitioner's new trial defense team, which is still not fully constituted, must make the re-litigation of all of those rulings its first order of business, years will likely be spent attempting to scrub the record of Col Spath's taint. And even assuming that effort reaches some end point and a trial is ultimately completed, any record on appeal will be riven with the spots the military commission judge and the parties missed. This "substantial uncertainty" in cases of actual and apparent bias makes vacatur the

only adequate remedy because "until the taint of bias is removed, there is no basis for any conclusion whatsoever about the merits." *Floroiu v. Gonzales*, 498 F.3d 746, 748 (7th Cir. 2007).

Vacatur is also the only remedy that will have any "prophylactic value" for the kind of misconduct at issue here. *Scott*, 559 A.2d at 755; *see also Potashnick v. Port City Constr.*, 609 F.2d 1101, 1115 (5th Cir. 1980). For all of Respondents' reliance on *Liljeberg*, they fail to mention that the Supreme Court held that vacatur was appropriate, even though the trial judge had simply failed to conduct a sufficiently thorough conflict-check, because vacatur would encourage greater diligence and "may prevent a substantive injustice in some future case by encouraging a judge or litigant to more carefully examine possible grounds for disqualification and to promptly disclose them when discovered." *Liljeberg*, 486 U.S. at 868. Particularly given the fact that the misconduct at issue here only came to light after the judge departed (indeed the judge's departure was an element of the misconduct), anything short of vacatur would encourage judges to opportunity shop with the parties before them, knowing that the worst that could happen would be their hortatory disqualification from a case they had already left behind.

Finally, only vacatur will create the fresh start that is necessary if the public is to have any confidence in these proceedings. This case, and Col Spath's conduct, has received extensive coverage in the press. *See*, *e.g.*, Carol Rosenberg, *War court judge pursued immigration job for years while presiding over USS Cole case*,

Miami Herald (Nov. 20, 2018); Amy Davidson Sorkin, *At Guantánamo, Are Even the Judges Giving Up?*, The New Yorker (Feb. 20, 2018);[5] Dave Phillips, *Many Say He's the Least Qualified Lawyer Ever to Lead a Guantánamo Case. He Agrees*, N.Y. Times (Feb. 5, 2018);[6] *Episode 45: An Inter-Jurisdictional Cluster-You-Know-What?*, National Security Law Podcast (Nov. 7, 2017);[7] Prof. Aaron O'Connell, Twitter (Nov. 4, 2017) (proposing to define the word "Spath" as "To Disregard law and the Constitution while angrily claiming to defend it.") (Attachment G); *Chaos in Guantanamo as Makeshift Legal Process Hits a Conflict*, The Rachel Maddow Show (Nov. 2, 2017).[8] In fact, the most recent ABA Journal featured Petitioner's case on its cover under the title, "Legal Ethics Questions and Accusations of Spying on the Defense have Stymied a Guantanamo Terrorism Trial,"[9] and included a section entitled "Judicial Temperament," reporting on Col Spath's emotional behavior on the bench.

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[5]https://www.newyorker.com/news/daily-comment/at-guantanamo-are-even-the-judges-giving-up

[6]https://www.nytimes.com/2018/02/05/us/guantanamo-lawyer-piette.html

[7]https://www.nationalsecuritylawpodcast.com/episode-45-an-inter-jurisdictional-cluster-you-know-what/

[8]https://www.msnbc.com/rachel-maddow/watch/chaos-in-guantanamo-as-makeshift-legal-process-hits-a-conflict-1086762051739

[9]http://www.abajournal.com/magazine/article/legal_ethics_guantanamo_terrorism_trial

As the Supreme Court has repeatedly held, "We must continuously bear in mind that to perform its high function in the best way justice must satisfy the appearance of justice." *Liljeberg*, 486 U.S. at 864 (quoting *In re Murchison*, 349 U.S. 133, 136 (1955) (citation omitted) (cleaned up); *Roach*, 69 M.J. at 21 ("The appearance of impartiality may be especially important in the military justice context."). Here, the appearance of bias is a direct function of actual bias and "[t]here is no way … to purge the perception of partiality in this case other than to vacate the judgment and remand the case to the district court for retrial by a different judge." *Preston v. United States*, 923 F.2d 731, 735 (9th Cir. 1991).

CONCLUSION

For the foregoing reasons, Petitioner asks this Court to vacate the proceedings below.

Respectfully submitted,

Dated: November 28, 2018

/s/ Michel Paradis

Michel Paradis
CAPT Brian Mizer, USN, JAGC
LT Alaric Piette, USN, JAGC
U.S. Department of Defense
Military Commission Defense Organization
1620 Defense Pentagon
Washington, DC 20301

Counsel for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that on November 28, 2018, copies of the foregoing Reply Brief were served on all relevant parties in the above captioned actions by electronic filing on the Court's ECF software.

Dated: November 28, 2018

/s/ Michel Paradis
Counsel for Petitioner

CERTIFICATE OF COMPLIANCE WITH RULE 32(A)

Certificate of Compliance with Type-Volume Limitation, Typeface Requirements, and Type Style Requirements

1. This brief complies with the type-volume limitations imposed by Fed. R. App. P. 32(a)(7)(B) as augmented by this Court's order granting Petitioner's motion to exceed the type-volume limitations, because:

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Dated: November 28, 2018

/s/ Michel Paradis
Counsel for Petitioner

CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

I. Parties and *Amici* Appearing Below

A. Abd Al-Rahim Hussein Al-Nashiri, *Appellee*
B. United States of America, *Appellant*

II. Parties and *amici* Appearing in this Court

A. Abd Al-Rahim Hussein Al-Nashiri, *Petitioner*
B. United States of America, *Respondent*
C. Ethics Bureau at Yale Law School, *Amicus Curiae*

III. Rulings under Review

This case involves a petition for a writ of mandamus and prohibition to the Department of Defense and, in the alternative, to the United States Court of Military Commission Review, which issued an order denying the relief requested on September 28, 2018.

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.

Dated: November 28, 2018

/s/ Michel Paradis
Counsel for Petitioner

LIST OF ATTACHMENTS

*Attachments marked with an * have been taken from the FOIA documents Petitioner submitted to this Court on November 20, 2018 and separately paginated for clarity of reference*

A. DOJ Email Correspondence (excerpts)*

B. Col Vance Spath, USAF, Application Materials (Nov. 19, 2015) (excerpts)*

C. Col Vance Spath, Curriculum Vitae (undated)*

D. Memorandum for the Attorney General (May 18, 2018)*

E. *United States v. Mohammed*, AE555WW (Sept. 27, 2018) (excerpts)

F. Case No. 08-002, Response to Order (CMCR, Mar. 26, 2018)

G. Prof. Aaron O'Connell, Twitter (Nov. 4, 2017)