[NOT SCHEDULED FOR ORAL ARGUMENT]
No. 18-1279

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

IN RE: ABD AL-RAHIM HUSSEIN MUHAMMED 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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INTRODUCTION

Petitioner Abd Al-Rahim Al-Nashiri is an alien detained by the Department of Defense at Guantanamo Bay, Cuba, who has been charged with capital offenses triable by military commission under the Military Commissions Act of 2009 (MCA) (10 U.S.C. § 948a et seq.). Petitioner seeks an order from this Court staying further proceedings in the United States Court of Military Commission Review (USCMCR) or the military commission pending this Court's disposition of his petition for a writ of mandamus to the USCMCR. The mandamus petition seeks vacatur of orders issued by the military judge who formerly presided over pretrial proceedings in the military commission, on the ground that the military judge should have disqualified himself when he applied for a position as an Immigration Judge. As explained below, this Court should deny the stay because petitioner has not shown any reasonable likelihood of success on the merits of his underlying mandamus petition. In addition, petitioner has not shown any irreparable injury that would result from allowing proceedings in the USCMCR and the military commission to continue.

STATEMENT

In September 2011, a military commission was convened to try petitioner on nine charges, including terrorism, murder in violation of the law of war, attacking

civilians, hazarding a vessel, and attacking civilian objects. The charges arise out of petitioner's alleged leadership role in the bombing of the *USS Cole* that killed seventeen American sailors in October 2000. See In re Al-Nashiri, 835 F.3d 110, 113-14 (D.C. Cir. 2016).

In October 2017, three civilian attorneys, who had been representing petitioner in the military commission for several years, sought to withdraw as defense counsel, citing alleged government intrusions into confidential attorney-client communications at Guantanamo Bay.[1] See Opinion at 11, United States v. Nashiri, No. 18-002 (USCMCR Oct. 11, 2018) ("USCMCR Op."). The military commission judge, Colonel Vance H. Spath, after considering classified briefing from the parties, ruled that the allegations were unfounded and that there was no good cause for withdrawal. Id. at 11-13. Despite the military judge's orders, petitioner's civilian defense counsel refused to continue representing him and stopped appearing at military commission proceedings. The military judge ordered the case abated indefinitely. Id. at 15-17.

[1] Unclassified filings in the military commission case can be accessed by visiting the Office of Military Commissions website, https://www.mc.mil/CASES/MilitaryCommissions.aspx, and clicking on the link for "USS Cole: Abd al-Rahim Hussein Muhammed Abdu Al-Nashiri (2)." Filings in the interlocutory appeal before the United States Court of Military Commission Review are also available at http://www.mc.mil/Cases.aspx?caseType=cmcr.

The government filed an interlocutory appeal in the USCMCR. See 10 U.S.C. § 950d. While that appeal was pending, Colonel Spath, due to his impending retirement from the military, was replaced as the military judge presiding over petitioner's military commission by Colonel Shelly Schools. Detailing Memorandum for Colonel Shelly W. Schools, United States v. Al-Nashiri, Appellate Exhibit 302A (Oct. 15, 2018) (detailing Colonel Schools as military judge effective Aug. 6, 2018).

On September 13, 2018, petitioner filed a motion, in the government's pending interlocutory appeal in the USCMCR, asking that court to vacate Judge Spath's rulings in the underlying military commission case. Petitioner alleged that Judge Spath, while presiding over the military commission, had sought a post-retirement position as an Immigration Judge and that this application required Judge Spath's disqualification and vacatur of orders he had issued in the case. The government opposed the motion, arguing inter alia that petitioner's claims should be adjudicated in the first instance in the military commission. See Gov't Resp. at 11, United States v. Al-Nashiri, No. 18-002 (Sept. 18, 2018) (noting that there was "no underlying ruling" from the commission and "no record for this Court to examine").

On September 28, 2018, the USCMCR denied the motion. See Order, United States v. Al-Nashiri, No. 18-002 (USCMCR Sept. 28, 2018). The court construed petitioner's motion as a petition for a writ of mandamus and found that petitioner had failed to satisfy the mandamus standard. The court noted that, because none of petitioner's contentions had been raised before the military commission (which at that time was abated), "we have no factual record or findings of the military judge at the trial level . . . for this Court to review." Id. at 2.

On October 4, 2018, petitioner filed the underlying petition for a writ of mandamus in this Court.

On October 11, 2018, the USCMCR issued its opinion on the merits of the government's interlocutory appeal. USCMCR Op. at 2-38. As relevant here, the USCMCR held that the military judge had authority to determine whether good cause exists to excuse defense counsel and that no good cause warranting excusal of defense counsel had been shown in petitioner's case. Id. at 2, 35-37. The USCMCR noted that "the door is not closed to [petitioner] on this issue" and that petitioner could present evidence of intrusions into his attorney-client relationship to the new military commission judge to allow her to "make findings and consider an appropriate remedy." Id. at 31 & n.22. The USCMCR accordingly reversed the

abatement order and ordered trial proceedings to resume. Id. at 2, 38.

Petitioner moved for reconsideration and reconsideration en banc. The USCMCR set a briefing schedule for the motion, directing briefing to be completed, without further extension, by November 7, 2018. See Order, United States v. Al-Nashiri, No. 18-002 (USCMCR Oct. 23, 2018); see also USCMCR Rule of Practice 20(g) ("The timely filing of a request for reconsideration does not stay the decision of the CMCR.").

On October 15, 2018, petitioner moved the USCMCR to stay its proceedings pending this Court's resolution of the petition for a writ of mandamus. That motion remains pending.

ARGUMENT

A stay pending appeal, like other forms of preliminary injunction, is "an extraordinary remedy" that is "never awarded as of right." Winter v. Nat. Res. 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). 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).

This Court should not intervene at this interlocutory stage of the military commission proceedings unless petitioner demonstrates that such intervention is necessary to protect this Court's ultimate jurisdiction to review any final military commission judgment. See In re Al-Nashiri, 791 F.3d 71, 75-76 (D.C. Cir. 2015). Although Congress granted the USCMCR jurisdiction over certain interlocutory appeals, this Court's jurisdiction is limited to "determin[ing] the validity of a final judgment rendered by a military commission," as approved by the convening authority, once "all other appeals under this chapter have been waived or exhausted." 10 U.S.C. § 950g(a)-(b); see also id. § 950g(d) (this Court "may act . . . only with respect to the findings and sentence as approved by the convening authority and as affirmed or set aside . . . by the [USCMCR]"); In re Al-Nashiri, 835 F.3d at 124 ("By providing for direct Article III review of Al-Nashiri's jurisdictional challenge on appeal from any conviction in the military system, Congress and the President implicitly instructed that judicial review should not take place before that system has completed its work."); Khadr v. United States, 529 F.3d 1112, 1116 (D.C. Cir. 2008) (by deferring review "until after a military

commission has found guilt and announced a sentence," the Military Commissions Act "clarifies that the 'final judgment' contemplated by the statute is very 'final'"). Although this Court has held that it has jurisdiction to issue extraordinary writs in interlocutory military commission appeals to protect the Court's post-judgment jurisdiction, this Court has strictly enforced the rigorous standards for such writs in light of the explicit final judgment requirement in the MCA. See In re Al-Nashiri, 791 F.3d at 78 (recognizing that the MCA's final-judgment rule "serves an important purpose that would be undermined if [the Court] did not faithfully enforce the traditional prerequisites" for an extraordinary writ).

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

Petitioner cannot establish a likelihood of ultimate success in obtaining the writ of mandamus he seeks. The writ will issue only if petitioner can demonstrate that there is no other adequate means to attain the requested relief, that his right to issuance of the writ is clear and indisputable, and that the writ is appropriate under the circumstances. In re Al-Nashiri, 791 F.3d at 78.

Mandamus is a "drastic remedy," available only as a last resort when there is "no other adequate means to attain the relief [petitioner] desires." In re Al-Nashiri, 791 F.3d at 78 (internal citation and quotation marks omitted). Here, mandamus is unavailable because petitioner has an obvious alternative means of review:

petitioner can raise his claims in the still-pending military commission, which he has never done, and then seek any available appellate remedies *after* the military commission, with a newly assigned military judge, has developed a record, made findings, and issued a ruling.

Petitioner cannot invoke the last resort of mandamus when he has not even tried the first resort of raising his claims at the trial level. See, e.g., In re White, 46 F. App'x 179, 180 (4th Cir. 2002) (denying mandamus petition seeking to compel the district court to hold a hearing because the issue "should be raised in the district court in the first instance"). This Court has made clear that petitioner may not use mandamus "as a substitute for the regular appeals process." In re Al-Nashiri, 791 F.3d at 78. Here, petitioner has attempted to use mandamus as a substitute for the regular trial process as well.

Petitioner's mandamus petition conflicts with the bedrock principle that litigants must raise claims in the trial court before seeking appellate review, whether by mandamus or otherwise. That fundamental rule applies with particular force here, because the result of petitioner's decision to raise his claim for the first time on appeal is that there is no factual record whatsoever for this Court to review. Petitioner has jumped the gun by raising his claim in the first instance in appellate courts where there are no relevant facts in the record, and the underlying

proceeding, where such a record can be properly developed, is still pending. Appellate review should come after, not before, the military commission has done its work.

Petitioner has not pointed to any obstacle preventing him from raising his disqualification claims in the military commission when it resumes. Although the military commission proceedings were abated at the time petitioner raised his disqualification claim, that does not excuse him from raising those claims in the military commission now. The abatement order has now been reversed, and nothing prevents petitioner from raising his claims in the military commission once proceedings resume. The military commission can develop a record, make findings of fact, and issue an initial ruling. That ruling, if it is adverse to petitioner, can then be challenged on direct appeal or, if petitioner can show that the standards are met, by mandamus. That course is particularly appropriate here because the new military judge might narrow the scope of petitioner's claim, or moot it altogether, by reconsidering on the merits the decisions made by her predecessor.

The availability of an obvious means of review forecloses petitioner's attempt to show a likelihood of success on the merits of his mandamus petition. For that reason, his motion for a stay fails at the outset.

II. Petitioner Cannot Establish Irreparable Injury

Petitioner also cannot demonstrate any irreparable injury that would result from denial of a stay.

Petitioner contends (Motion at 6), relying on Cobell v. Norton, 334 F.3d 1128, 1139 (D.C. Cir. 2003), that his disqualification claim is "by its nature irreparable." But the "irreparable" injury that supported mandamus in that case was *allowing a case to proceed* under a disqualified judicial officer. See In re Al-Nashiri, 791 F.3d at 79; Cobell, 334 F.3d at 317 (holding that "the injury suffered by a party *required to complete* judicial proceedings overseen by [a disqualified] officer is by its nature irreparable") (emphasis added). Here, the allegedly disqualified judicial officer has already left the case. Petitioner is seeking to stay further proceedings by the new military judge, not the allegedly disqualified one. There is no risk that, absent a stay, petitioner would be required to continue proceedings overseen by a disqualified judge. Petitioner has therefore not shown any irreparable injury.

Petitioner also contends (Motion at 8-9) that, absent a stay, the USCMCR and the military commission might resolve various issues against him, including forcing petitioner "to proceed without learned counsel in a capital case," in violation of the Eighth Amendment. Petitioner does not explain how those adverse

rulings, if in fact they occur, would create injuries that could not be remedied by direct appeal after final judgment. See In re Al-Nashiri, 791 F.3d at 79 (recognizing that, because the MCA provides for direct review after final judgment of constitutional claims arising out of Nashiri's military commission trial, "Nashiri must identify some irreparable injury that will go unredressed" by that direct review). Petitioner cannot obtain a stay of underlying proceedings based on nothing more than the possibility that those proceedings might result in adverse rulings. Moreover, the Court should not issue a stay in this case based on issues separate from the disqualification claim petitioner raises here. To the extent petitioner believes he will be irreparably injured by a ruling relating to learned counsel, he can, if appropriate, bring a separate petition challenging such a ruling and seek an accompanying stay. He cannot obtain a stay in this case based on injuries arising from rulings that he has not yet challenged.

III. Petitioner Cannot Satisfy the Remaining Requirements for Obtaining a Stay

Petitioner fails to address the harm to the government and the public interest that would arise from further delays in the underlying military commission proceedings if petitioner's motion for a stay were granted. The public has an interest in avoiding unwarranted delays in the administration of justice. Petitioner provides no reason why this Court should stop the USCMCR's consideration of

petitioner's own motion for rehearing and further delay the resumption of military commission proceedings pending this Court's resolution of the petition for a writ of mandamus.

CONCLUSION

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

Respectfully submitted,

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DATED: November 1, 2018

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

CERTIFICATE OF SERVICE

U.S. Court of Appeals Docket Number 18-1279.

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 November 1, 2018.

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DATED: November 1, 2018

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