

**MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY, CUBA**

UNITED STATES OF AMERICA

v.

**ABD AL RAHIM HUSSAYN
MUHAMMAD AL NASHIRI**

AE 458UU

Government Notice
Pursuant to AE 458 Regarding
In re Al-Nashiri, No. 23-1159 (D.C. Cir.)

5 July 2023

1. Notice

Pursuant to AE 458 Trial Conduct Order, the Government notifies the Commission that, on 3 July 2023, the Government filed the “Response of the United States to Petitioner’s Emergency Motion for a Stay of Proceedings and Petitioner’s Motion for an Abeyance” with the U.S. Court of Appeals for the District of Columbia Circuit. *See* Attach. B.

2. Attachments

- A. Certificate of Service, dated 5 July 2023.
- B. Response of the United States to Petitioner’s Emergency Motion for a Stay of Proceedings and Petitioner’s Motion for an Abeyance, *In re Al-Nashiri*, No. 23-1159 (D.C. Cir. July 3, 2023), ECF No. 2006182.

Respectfully submitted,

//s//

Michael J. O’Sullivan
Trial Counsel

John B. Wells
Managing Assistant Trial Counsel

ATTACHMENT A

CERTIFICATE OF SERVICE

I certify that on the 5th day of July 2023, I filed AE 458UU, **Government Notice** Pursuant to AE 458 Regarding *In re Al-Nashiri*, No. 23-1159 (D.C. Cir.) with the Office of Military Commissions Trial Judiciary and served a copy on counsel of record.

//s//

Michael J. O'Sullivan
Trial Counsel

ATTACHMENT B

[NOT SCHEDULED FOR ORAL ARGUMENT]
No. 23-1159

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

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

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

RESPONSE OF THE UNITED STATES TO
PETITIONER'S EMERGENCY MOTION FOR A STAY OF PROCEEDINGS
AND PETITIONER'S MOTION FOR AN ABEYANCE

AARON C. RUGH
Rear Admiral, U.S. Navy
Chief Prosecutor of Military Commissions

MATTHEW G. OLSEN
Assistant Attorney General
for National Security

HARIDIMOS V. THRAVALOS
Appellate Counsel
Office of the Chief Prosecutor
of Military Commissions

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

INTRODUCTION

Petitioner Abd Al-Rahim Hussein Al-Nashiri seeks a stay of military commission proceedings concerning law-of-war charges against him pending this Court's review of his mandamus petition, which seeks the disqualification of Judge Lanny J. Acosta, Jr., and the dismissal of his military commission case. Petitioner also seeks an order holding his mandamus petition in abeyance while the United States Court of Military Commission Review (USCMCR) considers a similar mandamus petition and stay motion filed by petitioner in that court. Before the USCMCR ruled on the stay motion petitioner filed there, petitioner also sought a stay in this Court. The USCMCR has since denied the stay motion. Pet.'s Rule 28(j) Ltr. (D.C. Cir. filed June 22, 2023) (attachment) ("USCMCR Stay Ruling").

The government does not oppose petitioner's abeyance motion. But this Court should deny petitioner's stay motion because petitioner has not shown any reasonable likelihood of success on the merits of his underlying mandamus petition. Petitioner claims that Judge Acosta must be disqualified because his post-retirement application for employment as the Clerk of Court for the Air Force Trial Judiciary raises a conflict of interest. But petitioner is incorrect, and thus does not have a clear and indisputable right to mandamus relief, because the law is clear that a judge's job application requires recusal when the prospective employer is a party

to the case. Judge Acosta’s prospective employer—the Air Force Trial Judiciary, headed by the Chief Trial Judge who hires the Clerk of Court—is not a party to petitioner’s military commission case. It is not a party in any case. It is a separate and neutral system of military courts, comprised of military judges whose primary duty is to adjudicate criminal cases originating in the Air Force while presiding over courts-martial. As a judiciary, it does not have any interest in the outcome of the cases it adjudicates, much less petitioner’s military commission case. Indeed, the Air Force Trial Judiciary’s role in military commissions is that (1) it may be consulted by the Air Force Judge Advocate General before the Air Force Judge Advocate General nominates a military judge to the pool of judges who are eligible to serve as military commission judges, and (2) the sitting members of the Air Force Trial Judiciary may themselves be nominated to that pool by the Air Force Judge Advocate General.

Petitioner’s motion also fails because he cannot show any irreparable harm in the absence of a stay where the USCMCR and this Court may vacate any of Judge Acosta’s orders if either court determines that Judge Acosta should be disqualified. *See* USCMCR Stay Ruling 2 (denying petitioner’s stay motion and noting that it has the power to vacate, or to authorize reconsideration of, Judge Acosta’s rulings and orders as a remedy if petitioner’s mandamus petition is

granted). This Court should also deny petitioner’s motion because a stay would harm the government and would not serve the public interest. Judge Acosta has informed the parties that he is leaving the case by the end of September, so a stay would lead to further delay because it could prevent the appointment of a new judge and prevent that judge from becoming familiar with the extensive history of this litigation and from setting a schedule for future proceedings. In contrast, petitioner’s alleged harm—participating in military commission hearings and filing motions that Judge Acosta may rule on—does not constitute irreparable injury as a matter of law.

STATEMENT

I. Proceedings in the Military Commission

Petitioner is an alien detained by the Department of Defense at Guantánamo Bay, Cuba, charged under the Military Commissions Act of 2009 (10 U.S.C. § 948a *et seq.*) (MCA) with nine offenses stemming from his alleged leadership role in the October 2000 bombing of the USS COLE, the bombing of the *MV Limburg*, and the attempted bombing of the USS SULLIVANS. *See In re Al-Nashiri*, 835 F.3d 110, 113-14 (D.C. Cir. 2016) (“*Al-Nashiri II*”). On February 12, 2019, Judge Acosta was detailed to preside over petitioner’s military commission

case. R351;¹ *see* R4 (noting that Judge Acosta is also the Chief Judge of the Military Commissions Trial Judiciary). On January 6, 2023, Judge Acosta notified the parties that he intended to retire from active-duty service in the U.S. Army, and thus would become ineligible to serve as a military commissions judge, effective September 30, 2023. R65, R351. As a colonel on active duty in the U.S. Army, Judge Acosta would begin receiving Department of Defense (DOD) retirement pay immediately upon his retirement.

On April 18, 2023, Judge Acosta “learned of and applied for” post-retirement civilian employment as the “Clerk of Court for the Air Force Trial Judiciary.” R351 (noting that “[t]he position is also described as an ‘Attorney Advisor’” to the Air Force Trial Judiciary). According to the job description, the Clerk of Court’s primary responsibility is to “provid[e] highly specialized consultation and advice to military judges regarding procedural, evidentiary and sentencing issues as they arise prior to and during courts-martial and administrative hearings.” R136. The hiring official for the position is the Chief Trial Judge of the Air Force Trial Judiciary. R351. The next day, April 19, Judge Acosta told the parties that he had applied for the position. R351. On May 26, he also told the

¹ Citations to R__ refer to the Record filed by petitioner.

parties that he had accepted a tentative offer for the position on May 11. R181, R351.

Judge Acosta offered the parties four opportunities to conduct in-person *voir dire* (on April 19, April 20, April 21, and June 12) regarding his search for post-retirement employment, and he accepted questions from the parties in writing. R1-63, R321, R339. During *voir dire*, Judge Acosta said that the only application he submitted for post-retirement employment was for the Clerk of Court position at the Air Force Trial Judiciary and that he did not, and did not intend to, apply for any position at the Department of Justice. R3, R12, R27-28, R52. He also said that, in his application to the Air Force Trial Judiciary, he did not provide any details about his decisions in petitioner's military commission case but rather generally described the duties of a military commission judge and the Chief Judge of the Military Commissions Trial Judiciary. R3-9 (confirming that Judge Acosta did not mention petitioner's case in his application); *see* R351, R353 n.3 (same).

On April 20, petitioner submitted a discovery request to the government seeking information related to Judge Acosta's job application. R67. In turn, the government submitted a formal written request to the Department of the Air Force's Office of The Judge Advocate General, and to the Air Force Trial Judiciary, so that the government could produce to petitioner information that was

responsive to the discovery request. R68. On May 25 and 26, the government provided to petitioner the responsive information that it had received, including Judge Acosta’s application materials and correspondence between Judge Acosta and the Chief Judge of the Air Force Trial Judiciary, who is the hiring official for the Clerk of Court position. R89-159, R351. In the correspondence, the Chief Judge of the Air Force Trial Judiciary reassured Judge Acosta that, in his view, “[t]here’s nothing about [Judge Acosta’s] commissions work that would create a conflict.” R159.

On May 25, petitioner moved to disqualify Judge Acosta based on petitioner’s claim that the job application created a conflict of interest. R160. Petitioner primarily relied on this Court’s 2019 decision granting petitioner mandamus relief and vacating orders issued by a prior military commission judge who presided over petitioner’s case. *In re Al-Nashiri*, 921 F.3d 224 (D.C. Cir. 2019) (“*Al-Nashiri IIP*”). While presiding over petitioner’s case, Judge Vance Spath applied for, and eventually obtained, an appointment by the Attorney General as an immigration judge. This Court held that Judge Spath’s application created a disqualifying conflict requiring vacatur of his orders from the date of his initial application because the prospective employer (the Attorney General) was also a party to the military commission case, where the Attorney General consulted

on military commissions procedures, defended any military commissions convictions on appeal, and assigned an attorney from the Department of Justice to the trial team prosecuting petitioner. *Id.* at 236-37. According to petitioner, that decision compelled Judge Acosta’s disqualification as well. The government disagreed and opposed the disqualification motion. R182.

On June 12, Judge Acosta denied the disqualification motion. R357. First Judge Acosta determined that *Al-Nashiri III* was distinguishable because unlike the hiring official there (the Attorney General), the hiring official here (the Chief Judge of the Air Force Trial Judiciary) “is not a party to and does not have a direct interest associated with this military commission.” R354-55. Judge Acosta also observed that “a civilian employee in the Air Force Office of The Judge Advocate General . . . acted as the qualifying authority in approving the Trial Judiciary’s hiring decision” but found that this employee also has no direct interest or involvement in petitioner’s military commission case. R354.

Next Judge Acosta rejected petitioner’s argument that the entire Air Force is a party to the case. Judge Acosta explained that although one of the prosecutors is an Air Force officer, so too is one of petitioner’s defense counsel. R355; *see* R353 (observing that “uniformed Air Force lawyers are also detailed to *defend* [petitioner]”). According to Judge Acosta, no reasonable observer “would

conclude that military defense counsel are conflicted on every case,” and thus could not zealously defend their client, merely because they are employed by the Air Force. R355. Judge Acosta added that petitioner’s argument is incorrect for the additional reason that it would invalidate key provisions of the MCA. Judge Acosta explained that the MCA requires military judges to be commissioned officers but that, under petitioner’s argument, “any military judge would be disqualified from presiding over a military commission by virtue of being an officer in the armed forces.” R355.

Finally, Judge Acosta observed that, as a commissioned military officer in the Army, he has been employed by the DOD in a broad sense for nearly 25 years and, in that time, “has presided over hundreds of criminal trials and proceedings in the military justice and military commission system.” R355-56. Judge Acosta determined that no reasonable, fully informed observer would question his impartiality on the ground that “he applied for post-retirement employment within the same department that has already employed him for the past quarter of a century.” R356. Judge Acosta explained that “[t]o conclude otherwise would again suggest that the entire military commission system and, by extension, the military justice system, are riddled with institutional bias because military judges are ALL employed by the DOD.” R356. He added that “[i]f applying to work for

the DOD is grounds for recusal, then employment by the DOD as a military judge in the first instance would arguably” constitute “grounds for recusal from any court-martial or military commission where the United States or the DOD is considered a party, which is to say all of them.” R356. Concluding that petitioner’s argument thus proved too much, Judge Acosta denied the motion.

II. Proceedings in the USCMCR

Before Judge Acosta had the opportunity to rule on petitioner’s disqualification motion, petitioner filed a mandamus petition and a stay motion in the USCMCR on June 5, 2023. *See* Pet.’s Stay Mot. 4 (D.C. Cir. filed June 21, 2023). Petitioner urged the USCMCR to disqualify Judge Acosta and to vacate any rulings he issued after his alleged disqualification. Petitioner also moved the USCMCR to stay the military commission proceedings pending its resolution of the mandamus petition. *See id.* at 2. Hearings were scheduled to take place in Guantánamo Bay from June 12 through June 30, 2023, and again from August 21 through September 15, 2023. R66.

While the USCMCR reviewed the stay motion, the USCMCR imposed a limited administrative stay on June 7, which the court later clarified on June 9. Pet. 13. The USCMCR permitted the scheduled hearings to proceed and permitted Judge Acosta to develop the record, and then to rule, on the pending

disqualification motion. But the USCMCR ordered that “[t]he commission shall make no other rulings except those necessary for the taking of testimony and the receipt of exhibits on the motions currently pending before the commission and procedural issues necessary to conduct the hearing[s].” *Id.* at 14. Briefing on the stay motion was complete on June 14. *Id.*

Before the USCMCR ruled on the stay motion, petitioner filed in this Court a mandamus petition and a motion to stay the military commission proceedings. Pet.’s Stay Mot. 1. Petitioner also asked this Court to hold the mandamus petition in abeyance while the USCMCR reviewed the mandamus petition filed there. Pet.’s Abeyance Mot. 1 (D.C. Cir. filed June 21, 2023).

The USCMCR denied the stay motion on June 22, finding that petitioner failed to satisfy the stay requirements. *See* USCMCR Stay Ruling 1-2. The USCMCR noted in particular that “if the writ is granted, and the military judge is disqualified, we have the power to vacate his rulings and orders or authorize reconsideration as a remedy.” *Id.* at 2 (citing *Al-Nashiri III*, 921 F.3d at 240).

Briefing on the mandamus petition pending in the USCMCR was completed on June 23. Oral argument is scheduled for July 24.

ARGUMENT

A stay pending appeal 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 grant a motion for a stay pending appeal only where the movant shows (1) a substantial likelihood of success on the merits of the appeal; (2) that the movant will suffer irreparable injury if the stay is denied; (3) that granting the stay will not cause substantial harm to other parties; and (4) that the public interest will be served by granting the stay. *United States v. Philip Morris, Inc.*, 314 F.3d 612, 617 (D.C. Cir. 2003). A stay “is not a matter of right, even if irreparable injury might otherwise result.” *Nken v. Holder*, 556 U.S. 418, 433-34 (2009) (internal quotation marks omitted). Rather, a party seeking a stay must meet a “heavy burden.” *Id.* at 439 (Kennedy, J., concurring).

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

To meet the first prong, petitioner must make a “strong showing,” *Nken*, 556 U.S. at 434, that he is clearly and indisputably entitled to the disqualification of Judge Acosta and that mandamus is appropriate under the circumstances.

Petitioner has failed to satisfy either showing here.

The writ is a “drastic and extraordinary remedy” that is appropriate “only [in] exceptional circumstances amounting to a judicial usurpation of power or a

clear abuse of discretion.” *Cheney v. U.S. Dist. Court*, 542 U.S. 367, 380 (2004); *cf. United States v. Cordova*, 806 F.3d 1085, 1092 (D.C. Cir. 2015) (holding that, even on direct review, a judge’s denial of a motion to recuse is reviewed only “for abuse of discretion”). The standard for obtaining the writ is “daunting.” *In re Khadr*, 823 F.3d 92, 97, 100 (D.C. Cir. 2016). It requires petitioner to show that his right to relief is clear and indisputable, that there is no other adequate means to obtain relief, and that the writ is appropriate under the circumstances. *In re Al-Nashiri*, 791 F.3d 71, 78 (D.C. Cir. 2015) (“*Al-Nashiri I*”). The standard is no less daunting when the case involves a military commission proceeding. *Id.* (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).

A. Judge Acosta’s Application Does Not Warrant Disqualification

Like Article III judges, military commission judges must disqualify themselves ““in any proceeding in which their impartiality might reasonably be questioned.”” *Al-Nashiri III*, 921 F.3d at 234 (brackets omitted) (quoting 28 U.S.C. § 455(a)). In other words, a military commission judge must recuse himself if there “is a showing of an appearance of bias . . . sufficient to permit the average citizen reasonably to question a judge’s impartiality.” *Id.* That rule requires an

objective inquiry into whether a reasonable person, fully informed of the relevant facts and circumstances, would entertain a significant doubt about the judge's impartiality. See *Liteky v. United States*, 510 U.S. 540, 548 (1994). A judge "should be careful, however, to avoid providing litigants with a veto against unwanted judges." *In re Hawsawi*, 955 F.3d 152, 157 (D.C. Cir. 2020) (internal quotation marks omitted). A judge "is presumed to be impartial and the party seeking disqualification bears the substantial burden of proving otherwise." *United States v. Ali*, 799 F.3d 1008, 1017 (8th Cir. 2015) (internal quotation marks omitted).

To avoid a disqualifying appearance of bias, military commission judges, like other jurists, "may not adjudicate cases involving their prospective employers." *Al-Nashiri III*, 921 F.3d at 235. The risk "is that an unscrupulous judge may be tempted to use favorable judicial decisions to improve his employment prospects." *Id.* "And even in the case of a scrupulous judge with no intention of parlaying his judicial authority into a new job, the risk that he may appear to have done so remains unacceptably high." *Id.*

Applying this rule in *Al-Nashiri III*, this Court held that Judge Spath's application for a post-retirement position as an immigration judge created a disqualifying appearance of partiality because he presided over petitioner's case

where the potential employer (the Attorney General) also appeared as a party. *Id.* at 235-36. This Court explained that an “intolerable of appearance of partiality exist[ed]” in that circumstance because the party and the prospective employer were “one and the same.” *Id.* But no appearance of partiality exists here because, unlike in *Al-Nashiri III*, the prospective employer and the party are not the same.

The prospective employer here is the Air Force Trial Judiciary. The Air Force Trial Judiciary (specifically, the Chief Judge of the Air Force Trial Judiciary) is the hiring official for the Clerk of Court position Judge Acosta applied for. R351. The Chief Judge selects the Clerk of Court from the pool of applicants for the position. *See* R351. Then the qualifying authority, who is “a civilian employee in the Air Force Office of The Judge Advocate General,” determines whether the selected applicant meets the application requirements, for example, whether the applicant is a U.S. citizen and has a law degree from an accredited law school. *See* R78-79, R351, R354. Once the qualifying authority confirms that the selected applicant satisfies such requirements, a tentative job offer is extended to the applicant “by a Human Resources Specialist at the Air Force Personnel Center.” R351.

Contrary to petitioner’s claim, the prospective employer for recusal purposes is not the entire Air Force, the entire Department of Defense, or the Secretary of

Defense. To identify the prospective employer for recusal purposes, this Court looks to the person who directly selects and supervises the applicant. *See Al-Nashiri III*, 921 F.3d at 235. That person is the appropriate focal point of the inquiry because the risk that the recusal rules seek to avoid is the risk that the applicant, in his current role as a judge, will tilt (or will appear to tilt) judicial decisions in favor of a party with the hopes that doing so will increase his chances of being selected for the job. *Id.*

In *Al-Nashiri III*, this Court concluded that the Attorney General was the prospective employer because he was “directly involved in selecting and supervising immigration judges.” *Id.* In doing so, this Court distinguished the Attorney General’s direct role in appointing immigration judges from, for instance, the hiring process for administrative law judges, “who are hired through a selection process administered by the Office of Personnel Management.” *Id.* The hiring process for the Clerk of Court is akin to the hiring process for administrative law judges in that the hiring process is administered by the Air Force Trial Judiciary and the Air Force Office of The Judge Advocate General, not the Secretary of Defense or the Secretary of the Air Force. As Judge Acosta explained, “the Secretary of Defense does not play a similar role [to the Attorney General] in the hiring of the Clerk of Court for the Air Force Trial Judiciary.” R354. Nor does the

Secretary of the Air Force. And although the qualifying authority is an employee in the Air Force Office of The Judge Advocate General, that employee does not select or supervise the Clerk of Court but rather performs an administrative role in the hiring process. *See* R351. The Clerk of Court is directly selected and supervised by the Chief Judge. The Air Force Trial Judiciary is therefore the employer here.

No disqualifying conflict of interest is raised by Judge Acosta's application to the Air Force Trial Judiciary because that employer is not a party to petitioner's military commission case. In *Al-Nashiri III*, this Court determined that the Attorney General was a party to petitioner's case because the Attorney General consults on military commission procedures, defends any military commission convictions on appeal, and had assigned an attorney from the Justice Department to the trial team prosecuting petitioner. 921 F.3d at 236-37. But the Air Force Trial Judiciary plays no such role in petitioner's case. Like the trial judiciaries of the Army and the Navy/Marine Corps, the Air Force Trial Judiciary's role in military commissions is that, in practice, it may be consulted by the Service Judge Advocate General before the Judge Advocate General nominates military judges to the pool of judges who are eligible to serve as military commission judges. *See* R10, R33, R53; *see also* Rule for Military Commissions (RMC) 503(b)(1)

(providing that the Judge Advocates General nominate military judges to the pool of judges who are eligible to serve as military commission judges); RMC 502(c)(1) (providing that the Judge Advocates General nominate military judges whom they determine are qualified for duty as a military judge “by reason of education, training, experience, and judicial temperament”) (citing 10 U.S.C. § 826).² Also, the sitting members of the Air Force Trial Judiciary are eligible to be nominated to that pool by the Air Force Judge Advocate General. Regulation for Trial by Military Commission (RTMC) ¶¶ 6-1, 6-2.³ The Air Force Trial Judiciary does not detail any military judges to military commission cases. *See id.* And it does not assign anyone to serve on the prosecution or defense teams within either the Office of the Chief Prosecutor (OCP) or the Military Commissions Defense Organization (MCDO). Simply put, it has no interest in the outcome of petitioner’s case.

Petitioner is also incorrect that the entire Air Force and the entire Department of Defense, including every DOD component (presumably including the U.S. Space Command and the Defense Commissary Agency), are parties to his

² The Rules for Military Commissions can be found at <https://www.mc.mil/Portals/0/pdfs/Manual%20for%20Military%20Commissions%202019%20Edition.pdf>.

³ The Regulation for Trial by Military Commission can be found at <https://www.mc.mil/Portals/0/2011%20Regulation.pdf>.

case. For example, the relevant ethics guidance for Article III judges does not treat the Justice Department in this way. It treats each individual U.S. Attorney's Office (USAO) as a separate party for recusal purposes. *See, e.g.*, Guide to Judiciary Policy, vol. 2, pt. B, at 121 (2019) (stating that when a law clerk has accepted or may accept an employment offer from a particular USAO, "[t]he judge should isolate the law clerk from cases in which that particular [USAO] appears").

Petitioner provides no sound reason why a different rule should apply to the Department of Defense. And although Judge Acosta suggested that the Secretary of Defense may be considered a party, the Secretary of Defense does not select the Clerk of Court and thus is not considered the employer for recusal purposes.

The Air Force should not be considered a party for the additional reason that, as Judge Acosta explained, judge advocates from the Air Force represent both the government *and petitioner*. R355. That is not true with respect to attorneys from the Justice Department who represent the government only. Also, the Air Force has not assigned any judge advocates directly to the prosecution team in petitioner's case. The Air Force nominates judge advocates to the Office of Military Commissions, based on staffing requests initiated by the prosecution and the defense and submitted through the Office of Military Commissions.

Nominated judge advocates are placed with OCP, MCDO, or the Office of Military

Commissions, as required, to fill predetermined military billets. If Air Force judge advocates are later detailed to a case as a prosecutor or as a defense attorney, they are detailed by the Chief Prosecutor and the Chief Defense Counsel, respectively.

RMC 501(b); RTMC ¶¶ 8-4.c., 9-1.a.4.

Petitioner's argument, if correct, would also lead to an absurd result. If petitioner were correct that the entire Department of Defense were both the party and the employer, then no military judge could ever preside over any case in the military justice system because they would all be disqualified. As Judge Acosta recognized, this conclusion "would . . . suggest that the entire military commission system and, by extension the military justice system, are riddled with institutional bias because military judges are ALL employed by the DOD." R356. Indeed, "[i]f applying to work for the DOD is grounds for recusal, then employment by the DOD as a military judge in the first instance could arguably" constitute "grounds for recusal from any court-martial or military commission where the United States or the DOD is considered a party, which is to say all of them." R356; *see generally Weiss v. United States*, 510 U.S. 163, 180 (1994); *United States v. Norfleet*, 53 M.J. 262, 268-70 (C.A.A.F. 2000). Petitioner's argument thus proves too much.

Finally, even if Judge Acosta were disqualified, petitioner is incorrect that dismissal would be an appropriate remedy. In *Al-Nashiri III*, where the disqualifying conflict was exacerbated by several factors not present here, this Court rejected petitioner's request for an order dissolving his military commission. *See Al-Nashiri III*, 921 F.3d at 237, 240 (noting that Judge Spath engaged in a covert, two-year negotiation regarding the immigration-judge position). This Court was "satisfied that a writ of mandamus directing vacatur of all orders entered by [Judge] Spath after" his application would "sufficiently scrub the case of judicial bias without imposing an unnecessarily 'draconian remedy'" that dissolving the commission would have imposed. *Id.* (quoting *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 862 (1988)). More recently, this Court rejected a similar request to dismiss another military commission case after the judge was disqualified. *In re Al-Tamir*, 993 F.3d 906, 911 (D.C. Cir. 2021). This Court found that de novo reconsideration of the disqualified judge's orders by a new judge was an adequate remedy for the disqualifying conflict. *Id.*

B. Disqualifying Judge Acosta Is Not Appropriate Under the Circumstances

Petitioner also cannot establish a likelihood of success on the merits because disqualifying Judge Acosta is not appropriate under the circumstances. This Court has recognized that "[a] judge's lack of candor about potential grounds for recusal

can of course produce an appearance of partiality.” *Hawsawi*, 955 F.3d at 152. This Court explained that if a judge lacks candor, “a reasonable observer might wonder whether the judge had done something worth concealing.” *Al-Nashiri III*, 921 F.3d at 237.

But no reasonable observer would conclude that Judge Acosta was attempting to conceal his application because he immediately notified the parties that he applied for the job the day after he learned of the job opening and submitted his application. R351. Judge Acosta then submitted himself to extensive questioning by the parties about his job search, giving them four opportunities to conduct in-person *voir dire* and accepting their questions in writing. R1-63, R321, R326, R339. Petitioner is incorrect that Judge Acosta “failed to disclose his tentative offer for employment and acceptance of the offer.” Pet.’s Stay Mot. 9. On May 26, Judge Acosta told the parties that he had accepted a tentative offer for the position on May 11. R181, R351. During *voir dire*, Judge Acosta explained that, during the intervening two weeks between May 11 and May 26, he was traveling on vacation and then was “do[ing] some retirement processing.” R22-23. In addition, the government provided to petitioner information that was responsive to the discovery request petitioner submitted to the government, including Judge Acosta’s application materials and correspondence with the hiring official.

R89-159, R351. Under these circumstances, Judge Acosta's application does not constitute a reasonable basis for the extraordinary remedy of mandamus.

II. Petitioner Cannot Establish Irreparable Injury

Petitioner also has not demonstrated that he would suffer irreparable injury if this Court's denies his stay motion. Petitioner contends that he could be harmed if Judge Acosta rules against him on pending legal challenges, in particular petitioner's motion to suppress certain evidence at trial. Pet.'s Stay Mot. 12. But any such rulings, if they occur, would not constitute *irreparable* harm because such rulings could be vacated if the USCMCR, or this Court, ultimately grants mandamus. *See Al-Nashiri III*, 921 F.3d at 226 (vacating orders from Judge Spath on mandamus review after finding that his job application created a disqualifying conflict); *see also* USCMCR Stay Ruling 2 (noting that "if the writ is granted, and the military judge is disqualified, [the USCMCR has] the power to vacate his rulings and orders or authorize reconsideration as a remedy"). Also, evidentiary rulings have no practical effect until trial. There is no trial date set at this time, and Judge Acosta, who is leaving the case by the end of September, will not preside over the trial. There is ample time for this Court to rule on petitioner's underlying mandamus petition before there is any possibility of irreparable harm. And the fact that petitioner may have to litigate in the meantime is insufficient as a matter of

law to constitute irreparable harm. *See Salazar ex rel. Salazar v. Dist. of Columbia*, 671 F.3d 1258, 1265 (D.C. Cir. 2012). As such, a stay is unwarranted.

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

Finally, both the government and the public will be harmed by entry of a stay. There is always a strong public interest in the resolution of a criminal case “free from unreasonable delay.” 18 U.S.C. § 3771(a)(7). But the interests here are stronger than in an ordinary criminal case.

First, petitioner is charged with serious law-of-war offenses for his alleged leadership role in the USS COLE bombing, which killed seventeen American sailors in October 2000. *See Al-Nashiri II*, 835 F.3d at 113-14. The victims’ interests in moving towards trial without unnecessary delay are weighty. Second, this military commission case has proceeded for more than a decade, and a stay could lead to further, unwarranted delays of petitioner’s trial. Judge Acosta has announced that he is retiring from the military and therefore leaving the case soon, but a stay could prevent the appointment of a new military judge for this case and prevent a new judge from becoming familiar with the extensive history of this litigation and from setting a schedule for future proceedings.

These harms to the government and the public interest present additional reasons to deny petitioner’s stay motion.

CONCLUSION

Petitioner's stay motion should be denied. The government does not oppose petitioner's abeyance motion.

Respectfully submitted,

AARON C. RUGH
Rear Admiral, U.S. Navy
Chief Prosecutor of Military Commissions

MATTHEW G. OLSEN
Assistant Attorney General
for National Security

HARIDIMOS V. THRAVALOS
Appellate Counsel
Office of the Chief Prosecutor
of Military Commissions

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

CERTIFICATE OF COMPLIANCE WITH VOLUME LIMITATION,
TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

1. This response complies with the volume limitation of Federal Rule of Appellate Procedure 27(d)(2)(A) because:

this response contains 5,199 words.

2. This response complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because:

this response has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point font size and Times New Roman type style.

DATED: July 3, 2023

/s/ Danielle S. Tarin

Danielle S. Tarin

Attorney for the United States

CERTIFICATE OF SERVICE

U.S. Court of Appeals Docket Number 23-1159.

I hereby certify that I electronically filed the foregoing Response 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 July 3, 2023.

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

DATED: July 3, 2023

/s/ Danielle Tarin

Danielle Tarin

Attorney for the United States