

IN RE BIN LEP

) IN THE UNITED STATES COURT OF
) MILITARY COMMISSION REVIEW
)
) RESPONDENT’S OPPOSITION
) TO PETITION FOR A WRIT OF
) MANDAMUS
)
) U.S.C.M.C.R. Case No. 23-004
)
) Arraigned at Guantanamo Bay, Cuba
) on August 30–31, 2021
)
) Before a Military Commission
) convened by
) Colonel Jeffrey D. Wood, USA
)
) Presiding Military Judge
) Lieutenant Colonel Wesley A. Braun, USAF
)
) DATE: August 4, 2023

**TO THE HONORABLE, THE JUDGES OF
THE UNITED STATES COURT OF MILITARY COMMISSION REVIEW**

TABLE OF CONTENTS

TABLE OF AUTHORITIES	iii
STATEMENT OF THE CASE.....	1
OVERVIEW	1
STATEMENT OF FACTS	1
I. BACKGROUND	1
II. PETITIONER’S ARRAIGNMENT	3
III. PETITIONER’S MOTION TO ORDER A NEW ARRAIGNMENT	5
IV. THE COMMISSION’S RULING AND FINDINGS OF FACT	5
V. PROCEEDINGS AFTER THE COMMISSION’S RULING	12
VI. DETAILING OF MILITARY JUDGES	14
ARGUMENT	15
I. PETITIONER CANNOT SATISFY THE THREE <i>CHENEY</i> CONDITIONS FOR ISSUANCE OF A WRIT OF MANDAMUS	16
II. PETITIONER HAS AN ALTERNATIVE MEANS OF OBTAINING RELIEF: DIRECT APPEAL FROM FINAL JUDGMENT	18
A. Mandamus Is Inappropriate in the Presence of an Obvious Means of Relief: Direct Appeal After Final Judgment.....	18
B. Petitioner’s Arguments Lack Merit	20
1. <i>LRM v. Kastenberg</i>	21
2. <i>Howell v. United States</i>	23
3. <i>Hasan v. Gross</i>	25
4. <i>Ali v. United States</i>	26
C. Petitioner Has Failed To Satisfy the First <i>Cheney</i> Condition	28
III. PETITIONER CANNOT SHOW A CLEAR AND INDISPUTABLE RIGHT TO ISSUANCE OF THE WRIT.....	29

A. Petitioner’s Arraignment Was Legally Sufficient Because It Satisfied the Fundamental Fairness Standard	30
B. The Commission’s Findings of Fact Undermine Petitioner’s Claims	35
C. The Authorities Petitioner Cites Do Not Support His Claims	36
1. <i>Arizona v. Fulminante</i>	36
2. <i>United States v. Cronin</i>	37
3. <i>United States ex rel. Negron v. New York</i>	37
4. <i>Valenzuela-Gonzalez v. U.S. Dist. Ct.</i>	38
IV. MANDAMUS IS NOT APPROPRIATE UNDER THE CIRCUMSTANCES	39
A. The All Writs Act Is Not a Substitute for the Normal Appellate Process	39
B. Petitioner Fails To Show that Mandamus Is Appropriate Under the Circumstances	41
1. <i>Colonial Times, Inc. v. Gasch</i>	42
2. <i>Schlagenhauf v. Holder</i>	43
3. This Case Does Not Present an Issue of First Impression	43
CONCLUSION.....	44

TABLE OF AUTHORITIES

	Page
CASES	
<i>Al-Hela v. Biden</i> , 66 F.4th 217 (D.C. Cir. 2023)	30
<i>Ali v. United States</i> , 398 F. Supp. 3d 1200 (U.S.C.M.C.R. 2019).....	19, 21, 26–27
<i>Al-Iraqi v. United States</i> , 455 F. Supp. 3d 1273 (U.S.C.M.C.R. 2020).....	26
<i>Allied Chem. Corp. v. Daiflon Inc.</i> , 449 U.S. 33 (1980).....	20
<i>Arizona v. Fulminante</i> , 499 U.S. 279 (1991).....	36, 37
<i>Bankers Life & Cas. Co. v. Holland</i> , 346 U.S. 379 (1953).....	19, 28, 39
<i>Belize Social Dev. Ltd. v. Gov’t of Belize</i> , 668 F.3d 724 (D.C. Cir. 2012).....	16
<i>Berger v. United States</i> , 255 U.S. 22 (1921)	25
<i>Brooks v. Tennessee</i> , 406 U.S. 605 (1972).....	37
<i>Cheney v. U.S. District Court</i> , 542 U.S. 367 (2004).....	<i>passim</i>
<i>Clinton v. Goldsmith</i> , 526 U.S. 529 (1999)	40
<i>Cobell v. Norton</i> , 334 F.3d 1128 (D.C. Cir. 2003)	25
<i>Colonial Times, Inc. v. Gasch</i> , 509 F.2d 517 (D.C. Cir. 1975)	42–43
<i>EV v. United States</i> , 75 M.J. 331 (C.A.A.F. 2016).....	23, 40
<i>Ex parte Bradley</i> , 74 U.S. (7 Wall.) 364 (1868).....	40
<i>Ex parte Burr</i> , 22 U.S. (9 Wheat.) 529 (1824)	40
<i>Ex parte Fahey</i> , 332 U.S. 258 (1947)	16
<i>Ex parte Rowland</i> , 104 U.S. 604 (1881).....	20
<i>Ferguson v. Georgia</i> , 365 U.S. 570 (1961).....	37
<i>Flanagan v. United States</i> , 465 U.S. 259 (1984).....	18
<i>Garland v. Washington</i> , 232 U.S. 642 (1914)	38

<i>Gideon v. Wainwright</i> , 372 U.S. 335 (1963)	36
<i>Hamdan v. Rumsfeld</i> , 548 U.S. 557 (2006)	29, 30, 35
<i>Hamilton v. Alabama</i> , 368 U.S. 52 (1961)	37
<i>Hasan v. Gross</i> , 71 M.J. 416 (C.A.A.F. 2012)	21, 25–26
<i>Hawsawi v. United States</i> , 389 F. Supp. 3d 1001 (U.S.C.M.C.R. 2019).....	16
<i>Heckler v. Ringer</i> , 466 U.S. 602 (1984)	19, 20
<i>Herring v. New York</i> , 422 U.S. 853 (1975)	37
<i>Howell v. United States</i> , 75 M.J. 386 (C.A.A.F. 2016)	21, 23–25, 30
<i>In re Al-Baluchi</i> , 952 F.3d 363 (D.C. Cir. 2020)	29
<i>In re Ali</i> , 558 F. Supp. 3d 1167 (U.S.C.M.C.R. 2021)	29
<i>In re Al-Nashiri (Al-Nashiri I)</i> , 791 F.3d 71 (D.C. Cir. 2015).....	<i>passim</i>
<i>In re Al-Nashiri (Al-Nashiri II)</i> , 835 F.3d 110 (D.C. Cir. 2016)	29
<i>In re Al-Nashiri (Al-Nashiri III)</i> , 921 F.3d 224 (D.C. Cir. 2019).....	17, 19
<i>In re Al-Nashiri</i> , 577 F. Supp. 3d 1285 (U.S.C.M.C.R. 2021)	19, 20, 28
<i>In re Al-Tamir</i> , 993 F.3d 906 (D.C. Cir. 2021).....	29
<i>In re Cheney</i> , 406 F.3d 723 (D.C. Cir. 2005)	17
<i>In re Clinton</i> , 973 F.3d 106, 112 (D.C. Cir. 2020)	19
<i>In re Flynn</i> , 973 F.3d 74 (D.C. Cir. 2020)	16, 17, 19, 28, 41
<i>In re Khadr</i> , 823 F.3d 92 (D.C. Cir. 2016)	17, 29
<i>In re Papandreou</i> , 139 F.3d 247 (D.C. Cir. 1998).....	20
<i>In re Ralston Purina Co.</i> , 726 F.2d 1002 (4th Cir. 1984).....	20
<i>Kerr v. U.S. Dist. Court</i> , 426 U.S. 394 (1976).....	18, 20
<i>Khadr v. United States</i> , 529 F.3d 1112 (D.C. Cir. 2008).....	17

<i>Kouichi Taniguchi v. Kan Pac. Saipan, Ltd.</i> , 566 U.S. 560 (2012).....	3
<i>LRM v. Kastenber</i> , 72 M.J. 364 (C.A.A.F. 2013).....	21– 23
<i>Mohammad v. United States</i> , 393 F. Supp. 3d 1101 (U.S.C.M.C.R. 2019)	39
<i>Perovich v. United States</i> , 205 U.S. 86 (1907)	31
<i>Randolph v. HV</i> , 76 M.J. 27 (C.A.A.F. 2017)	23
<i>Rhines v. Weber</i> , 544 U.S. 269 (2005).....	16, 41
<i>Roche v. Evaporated Milk Ass’n</i> , 319 U.S. 21 (1943)	19, 28, 41
<i>Schlagenhauf v. Holder</i> , 379 U.S. 104 (1964).....	43
<i>Snyder v. Massachusetts</i> , 291 U.S. 97 (1934).....	38
<i>Sweeney v. United States</i> , 408 F.2d 121 (9th Cir. 1969)	38
<i>Tumey v. Ohio</i> , 273 U.S. 510 (1927)	36
<i>United States v. Ali</i> , 71 M.J. 256 (C.A.A.F. 2012)	23
<i>United States v. Bell</i> , 367 F.3d 452 (5th Cir. 2004).....	31, 33
<i>United States v. Coffman</i> , 567 F.2d 960 (10th Cir. 1977)	38
<i>United States v. Cook</i> , 48 M.J. 236 (C.A.A.F. 1998)	33
<i>United States v. Coronel-Quintana</i> , 752 F.2d 1284 (8th Cir. 1985).....	31
<i>United States v. Cronic</i> , 466 U.S. 648 (1984)	37
<i>United States v. Denson</i> , 603 F.2d 1143 (5th Cir. 1980)	29
<i>United States v. Donati</i> , 34 C.M.R. 15 (C.M.A. 1963).....	10
<i>United States ex rel. Bernardin v. Duell</i> , 172 U.S. 576 (1899)	19
<i>United States v. Geders</i> , 425 U.S. 80 (1976).....	37
<i>United States v. Gonzalez</i> , 339 F.3d 725 (8th Cir. 2003)	31, 32
<i>United States v. Jones</i> , No. NMCCA 201200264, 2015 CCA LEXIS 573 (N-M. Ct. Crim. App. Dec. 29, 2015).....	29

<i>United States v. Joshi</i> , 896 F.2d 1303 (11th Cir. 1990).....	8, 30, 31, 33
<i>United States v. Kemp & Assocs.</i> , 907 F.3d 1264 (10th Cir. 2018).....	40
<i>United States v. Lawrence</i> , 3 U.S. (3 Dall.) 42 (1795)	40
<i>United States v. Lim</i> , 794 F.2d 469 (9th Cir. 1986)	8
<i>United States v. Long</i> , 301 F.3d 1095 (9th Cir. 2002)	8
<i>United States ex rel. Negron v. New York</i> , 434 F.2d 386 (2d Cir. 1970).....	7, 8, 37–38
<i>United States v. Tapia</i> , 631 F.2d 1207 (5th Cir. 1980).....	30, 31
<i>United States v. Wolff</i> , 5 M.J. 923 (N-M. Ct. Crim. Rev. 1978).....	32
<i>Valenzuela-Gonzalez v. United States Dist. Court</i> , 915 F.2d 1276 (9th Cir. 1990)	38
<i>Valladares v. United States</i> , 871 F. 2d 1564 (11th Cir. 1989).....	8, 30, 33
<i>Ventura v. Donna (In re Donna)</i> , No. 16-91, 2016 Bankr. LEXIS 4486 (D.C. Bank. Ct. Dec. 27, 2016).....	3
<i>White v. Maryland</i> , 373 U.S. 59 (1963).....	37
<i>Will v. Calvert Fire Ins. Co.</i> , 437 U.S. 655 (1978).....	40
<i>Will v. United States</i> , 389 U.S. 90 (1967).....	16
<i>Williams v. Kaiser</i> , 323 U.S. 471 (1945).....	37

STATUTES AND RULES

10 U.S.C. § 866(c) (2012).....	25
10 U.S.C. § 948l.....	41
10 U.S.C. § 949a(b)(2).....	30
10 U.S.C. § 949d(a)(2).....	30
10 U.S.C. § 950c(a).....	20
10 U.S.C. § 950f(b).....	20

10 U.S.C. § 950f(c).....	17, 19, 20
10 U.S.C. § 950f(d).....	17
28 U.S.C. § 1651.....	39
Fed. R. Crim. P. 10	38
R.M.C. 502(e)(3)(A).....	41
R.M.C. 804(a)	30
R.M.C. 904.....	<i>passim</i>
R.M.C. 905(b).....	34
R.M.C. 909(a)	30, 33
R.T.M.C. ¶ 7-3	42

OTHER MATERIALS

Order, <i>In re Al-Baluchi</i> , No. 18-1152 (D.C. Cir. June 27, 2018), ECF No. 1737933	17
Order, <i>In re Al-Nashiri</i> , No. 21-001 (U.S.C.M.C.R. Sept. 20, 2021).....	19

STATEMENT OF THE CASE

This case is before the Court on a Petition for a Writ of Mandamus relating to Petitioner Mohammed Nazir Bin Lep's Motion To Order a New Arraignment, which the Military Commission (Larsen, J.) denied in its AE 0002.043 (TJ) Ruling on November 4, 2021. This Opposition is timely filed.¹

OVERVIEW

The Court should deny the Petition because Petitioner cannot satisfy the three conditions established by the Supreme Court in *Cheney v. U.S. District Court*² for issuance of a writ of mandamus. First, Petitioner has an alternative "adequate means" to seek review by raising his defective-arraignment claim on direct appeal from final judgment. Second, Petitioner cannot establish a "clear and indisputable" right to the relief he requests because the record refutes his claim that any alleged errors rendered his trial fundamentally unfair. Third, Petitioner has not shown mandamus is "appropriate under the circumstances," especially where he waited nearly two years to raise that issue in this Court, while he and his detailed defense counsel took steps to contest the charges referred against him and present a defense. Accordingly, the Court should deny the Petition.

STATEMENT OF FACTS

I. BACKGROUND

Respondent United States charged Petitioner with multiple offenses under the Military Commissions Act of 2009 ("M.C.A.")³ relating to terrorist attacks against the United States and

¹ See Order: Panel Designation and Briefing Schedule at 1 (July 6, 2023).

² See 542 U.S. 367, 380 (2004).

³ 10 U.S.C. § 948a, *et seq.*

its coalition partners,⁴ including the 2002 bombings in Bali, Indonesia of Patty's Pub, the Sari Club, and near the United States Consulate, which killed 202 people—including 7 Americans—and injured at least 28 others,⁵ and the 2003 bombing outside the J.W. Marriot in Jakarta, Indonesia, which killed 11 people and injured 3 others.⁶

On January 21, 2021, the Convening Authority referred charges to a joint trial by military commission.⁷ Petitioner received two versions of the referred charge sheet: one in English, and one in Bahasa Malay, his native language.⁸

On April 16, 2021, the Commission set arraignment for Petitioner and his two co-Accused (Mr. Encep Nurjaman and Mr. Mohammed Farik Bin Amin) for August 30, 2021.⁹ Notably, the Commission had previously scheduled the arraignment to occur on February 22, 2021, but it was rescheduled to August 30, 2021 due to COVID-related matters.¹⁰

⁴ Referred Charge Sheet, *United States v. Nurjaman, et al.* (Mil. Comm'n Jan. 21, 2021) (App. 1). All "App." citations are to the Appendix in Support of Respondent's Opposition to Petition for a Writ of Mandamus (Aug. 4, 2023).

⁵ *Id.* at 24–32 (App. 24–App. 32).

⁶ *See id.* at 33–34 (App. 33–App. 34).

⁷ *See id.* at 2 (App. 2).

⁸ AE 0002.041 (GOV) at 1, Gov't Resp. to AE 0002.037 (LEP), Def. Mot. To Order a New Arraignment, *United States v. Nurjaman* (Mil. Comm'n Sept. 28, 2021) (App. 91); *see also* Referred Charge Sheet (English) (App. 1–App. 34); Referred Charge Sheet (Bahasa Malay) (App. 35–App. 62).

⁹ *See* AE 0002.008 (TJ) at 2, Amended Arraignment Order (Corrected Copy), *United States v. Nurjaman* (Mil. Comm'n Apr. 16, 2021) (Pritchard, J.) (App. 64).

¹⁰ *See* AE 0002.043 (TJ) at 2 Ruling: Def. Mot. To Order a New Arraignment, *United States v. Nurjaman* (Mil. Comm'n Nov. 4, 2021) (Larsen, J.) (App. 141).

On August 27, 2021, two Commission interpreters (“IN-I”¹¹ and “MA-I”¹²) swore an “oath that their interpretation would be honest and accurate.”¹³ During a pretrial conference, Petitioner raised a concern over statements IN-I allegedly made in the presence of a defense investigator.¹⁴ In response, the Commission invited Petitioner to submit potential voir dire questions for the interpreters.¹⁵ Mr. Nurjaman and Mr. Bin Amin accepted the Commission’s invitation;¹⁶ Petitioner did not.¹⁷

II. PETITIONER’S ARRAIGNMENT

On August 30–31, 2021, the three Accused were arraigned by the Commission in Guantanamo Bay, Cuba.¹⁸ During those proceedings, IN-I and MA-I interpreted¹⁹ the English spoken in the courtroom into Bahasa Malay for Petitioner and Mr. Bin Amin, and into Bahasa

¹¹ IN-I identifies the Indonesian interpreter.

¹² MA-I identifies the Malay interpreter.

¹³ AE 0002.043 (TJ) at 8 (App. 147).

¹⁴ *Id.* at 4 (App. 143).

¹⁵ *Id.* at 3 (App. 142).

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ In this Opposition, Respondent will use the terms “interpreter,” “interpret,” “interpreted,” and “interpretation,” except where the words “translator,” “translate,” “translated,” and “translation” appear in quotations. *See Ventura v. Donna (In re Donna)*, No. 16-91, 2016 Bankr. LEXIS 4486, at *7 (D.C. Bank. Ct. Dec. 27, 2016) (App. 424) (“The law recognizes that interpreters of oral language and translators of written documents are different.”); *Kouichi Taniguchi v. Kan Pac. Saipan, Ltd.*, 566 U.S. 560, 571 (2012) (“The references to technical terminology in the Court Interpreters Act further suggest that Congress used ‘interpreter’ in a technical sense, and it is therefore significant that relevant professional literature draws a line between ‘interpreters,’ who ‘are used for oral conversations,’ and ‘translators,’ who ‘are used for written communications.’”) (citation omitted).

Indonesian for Mr. Nurjaman.²⁰ The Commission conducted voir dire of both interpreters.²¹ After discussing their education, training, certifications, qualifications, and court interpretation experience, both interpreters confirmed that there was nothing “in [their] personal or professional life that would affect [their] ability to interpret truly these proceedings.”²² The Commission found both interpreters were “certified correctly and . . . properly sworn” in accordance with the Rules for Military Commissions (“R.M.C.”).²³

During the arraignment, Petitioner raised concerns about the accuracy of MA-I’s Bahasa Malay interpretation.²⁴ In response, the Commission directly addressed Petitioner several times to ensure that he understood the matters being discussed, the nature of the proceedings, and the rights afforded to him.²⁵ Each time, Petitioner affirmed to the Commission—in English—that he understood what was happening.²⁶ After the arraignment, the Commission asked each Accused if he understood what had occurred, and each Accused—including Petitioner—answered affirmatively and expressed to the Commission that he had no questions about “anything we have covered over the last two days.”²⁷

²⁰ See generally Unofficial/Unauthenticated Transcript (“Tr.”) at 7–9 (App. 227–App. 229).

²¹ *Id.* at 15–22 (App. 235–App. 242).

²² *Id.* at 19–20, 22 (App. 239–App. 240, App. 242).

²³ *Id.* at 32 (App. 252).

²⁴ *Id.* at 9–10 (App. 229–App. 230).

²⁵ *Id.* at 9–11, 13, 23, 42–47, 49, 57, 61, 109–111, 176–79 (App. 229–App. 231, App. 233, App. 243, App. 262–App. 267, App. 269, App. 277, App. 281, App. 329–App. 331, App. 396–App. 399).

²⁶ *Id.* at 23, 43–57, 60–61, 109–10, 177–78 (App. 243, App. 263–App. 277, App. 280–App. 281, App. 329–App. 330, App. 397–App. 398).

²⁷ *Id.* at 178 (App. 398).

When the Commission called upon Petitioner and his co-Accused to enter pleas, all three deferred their pleas.²⁸

III. PETITIONER'S MOTION TO ORDER A NEW ARRAIGNMENT

On September 14, 2021, Petitioner filed a Motion To Order a New Arraignment.²⁹ On September 28, 2021, Respondent opposed.³⁰ On September 30, 2021, Petitioner replied.³¹

IV. THE COMMISSION'S RULING AND FINDINGS OF FACT

On November 4, 2021, the Commission (Larsen, J.) denied Petitioner's motion for a new arraignment, holding Petitioner had "failed to convince" the Commission that Petitioner: (1) "did not understand the proceedings"; (2) "did not have a conflict free government-provided defense interpreter"; and (3) "had questions about the arraignment that only counsel could answer."³² Thus, Petitioner "failed to show the proceedings were fundamentally unfair."³³

In reaching the conclusion that Petitioner had not met his burden in the motion for a new arraignment, the Commission made several findings of fact. The Commission found that, on August 29, 2021, the parties and the Military Judge conducted a R.M.C. 802 conference during which they discussed the status of the interpreters.³⁴ During the conference, "the Commission provided all Parties the opportunity to submit written questions to the Commission for use in the

²⁸ See Tr. at 175–76 (App. 395–App. 396).

²⁹ See AE 0002.037 (LEP), Def. Mot. To Order a New Arraignment, *United States v. Nurjaman* (Mil. Comm'n Sept. 14, 2021) (App. 66).

³⁰ See AE 0002.041 (GOV), Gov't Resp. to AE 0002.037 (LEP), Def. Mot. To Order a New Arraignment, *United States v. Nurjaman* (Mil. Comm'n Sept. 28, 2021) (App. 91).

³¹ See AE 0002.042 (LEP), Def. Reply to AE 0002.041 (GOV), Gov't Resp. to AE 0002.037 (LEP), Def. Mot. To Order a New Arraignment, *United States v. Nurjaman* (Mil. Comm'n Sept. 30, 2021) (App. 109).

³² See AE 0002.043 (TJ) at 11 (App. 150).

³³ *Id.*

³⁴ *Id.* at 3 (App. 142).

voir dire of the commission interpreters. Counsel for Mr. Nurjaman and Mr. bin Amin submitted proposed voir dire questions.”³⁵ Petitioner’s counsel “was satisfied with the questions submitted by the other Accused.”³⁶

The Commission found that, “[p]rior to the arraignment portion of the proceedings, the Commission conducted voir dire of the two commission interpreters assigned by the [Convening Authority], to ascertain their qualifications and address potential personal bias concerns raised in the defense’s proposed questions.”³⁷ The Commission also found that “[t]he Commission’s voir dire of the interpreters included questions regarding their background, education, qualification, and potential personal bias. After an extensive discussion with each interpreter, the Commission made findings on the record that both interpreters were qualified to interpret their respective languages, and had been properly sworn.”³⁸ The Commission further found that the interpreters had “no personal bias that prevented the [C]ommission interpreters from performing their sworn duty.”³⁹

The Commission found that “[d]uring the proceedings, [Petitioner] and Mr. bin Amin expressed concerns about the quality of the Malaysian translation. At one point, [Petitioner] claimed that he only understood 30 percent and that the ‘speech [of the interpreter was] not in order.’”⁴⁰ When Petitioner and Mr. bin Amin raised these concerns, “the Commission made inquiries to ensure the Commission Interpreters were accurately interpreting the proceedings and

³⁵ *Id.* (citations omitted).

³⁶ *Id.* (citation omitted).

³⁷ *Id.* (citations omitted).

³⁸ *Id.* at 4 (citation omitted) (App. 143).

³⁹ *Id.* (citation omitted).

⁴⁰ *Id.* (citation omitted).

that each Accused understood the proceedings.”⁴¹ The Commission found that Petitioner “chose to switch from the Malaysian interpretation to the Indonesian interpretation. Upon notification from [Petitioner’s] defense team of the switch, the Commission asked [Petitioner] whether he was able to understand the Indonesian translation,” to which Petitioner responded, “Yes.”⁴²

The Commission found that “[t]hroughout the two-day proceedings, [Petitioner] responded to multiple questions from the Commission. These responses ranged from a simple ‘yes’ to responses seeking clarification of legal terms.”⁴³ Mr. Bin Amin “similarly responded to multiple questions from the Commission, asking at one point for the Commission to repeat a question he did not understand.”⁴⁴

The Commission found that “[d]uring the arraignment proceeding, the Commission engaged in multiple discussions with each Accused ensuring that each Accused understood the proceedings. After the arraignment, the Commission asked each Accused if they understood the proceedings. Each Accused answered, ‘Yes.’”⁴⁵ The Commission “asked each Accused if they had any questions about ‘anything we have covered over the last two days?’ Each Accused responded ‘No.’”⁴⁶

The Commission reasoned that while Petitioner’s argument was based on *United States ex rel. Negron v. New York*,⁴⁷ “the facts of *Negron* are distinguishable from the situation at hand.

⁴¹ *Id.* (citation omitted).

⁴² *Id.* (citations omitted).

⁴³ *Id.* (citation omitted).

⁴⁴ *Id.* at 4–5 (citation omitted) (App. 143–App. 144).

⁴⁵ *Id.* at 5 (citations omitted) (App. 144).

⁴⁶ *Id.* (citation omitted).

⁴⁷ 434 F.2d 386 (2d Cir. 1970).

Most notably, the defendant in *Negron* was not provided any real-time interpretation of the proceeding and was only provided two brief summaries of the testimony over a four-day trial.”⁴⁸ In contrast, during the arraignment before “this Commission, a commission interpreter provided real time interpretation for the entirety of the proceedings.”⁴⁹ The Commission reasoned that “the issue for this motion is not the lack of interpretation as in *Negron*, but rather the adequacy of the interpretation.”⁵⁰ The Commission observed that “[w]hen determining the adequacy of interpretation, courts have consistently found ‘while the general standard for interpreters requires continuous word-for-word translation, occasional lapses in the standard will not necessarily contravene a defendant’s constitutional rights.’”⁵¹ The Commission stated that “[t]he ultimate question is whether any inadequacy in the interpretation made the arraignment proceedings ‘fundamentally unfair.’”⁵² The Commission observed that Petitioner’s counsel had argued that the arraignment was “replete with evidence that [Petitioner] . . . did not reliably understand what was said by the military judge or by anyone else in the courtroom.”⁵³ The Commission stated that “[t]his assertion, however, ignores the full record of the proceedings. The record demonstrates the Commission’s willingness to take the time necessary to ensure each Accused understood their rights and the charges against them.”⁵⁴ The Commission “conducted both scripted and unscripted

⁴⁸ AE 0002.043 (TJ) at 5–6 (citations omitted) (App. 144–App. 145).

⁴⁹ *Id.* at 6 (App. 145).

⁵⁰ *Id.*

⁵¹ *Id.* (citing *United States v. Long*, 301 F.3d 1095, 1105 (9th Cir. 2002); *United States v. Joshi*, 896 F.2d 1303 (11th Cir. 1990); *United States v. Lim*, 794 F.2d 469 (9th Cir. 1986); *Valladares v. United States*, 871 F. 2d 1564 (11th Cir. 1989)).

⁵² *Id.* (quoting *Valladares*, 871 F.2d at 1565–66).

⁵³ *Id.*

⁵⁴ *Id.*

colloquies with each Accused throughout the hearing to ensure each understood their right to counsel, right to be present at open hearings, the charges against them and their rights at the arraignment.”⁵⁵

The Commission found that “[b]oth [Petitioner] and Mr. bin Amin responded to the Commission’s questions throughout the entire proceeding. [Petitioner] asked clarifying questions that demonstrated understanding of the proceedings and his rights and Mr. bin Amin asked for a question to be repeated when he did not understand.”⁵⁶ The Commission reasoned that “[s]uch responses belie the contention that the Accused did not understand the arraignment proceedings to such a degree that the arraignment was fundamentally unfair.”⁵⁷

The Commission observed that Petitioner’s counsel “contend that any response provided by [Petitioner] at the arraignment was unreliable, arguing that Mr. Bin Lep may not have ‘felt able to safely disagree with the military judge.’”⁵⁸ The Commission found that Petitioner’s “interaction with the Military Judge throughout the proceedings, to include his willingness to request clarification of questions, does not support this contention.”⁵⁹

The Commission observed that Petitioner “argue[d] that the Commission’s failure to allow voir dire into Commission Interpreters’ (specifically the Indonesian interpreter) bias irrevocably tainted the proceedings.”⁶⁰ The Commission also observed that, although “counsel were not permitted to individually voir dire the Commission Interpreters, counsel for all Parties were

⁵⁵ *Id.*

⁵⁶ *Id.* at 6–7 (citations omitted) (App. 145–App. 146).

⁵⁷ *Id.* at 7 (citations omitted) (App. 146).

⁵⁸ *Id.* (citation omitted).

⁵⁹ *Id.*

⁶⁰ *Id.*

provided an opportunity to propose voir dire questions. The Commission considered Defense Counsels' proposed voir dire questions and conducted voir dire of the interpreters accordingly."⁶¹ The Commission "inquired into the Commission Interpreters' education and training, certifications and qualifications, court interpretation experience, and personal bias. During voir dire, both Commission Interpreters confirmed that there is nothing in their 'personal or professional life that would affect [their] ability to interpret truly these proceedings.'"⁶² The Commission found that "both interpreters had been 'certified correctly and . . . properly sworn' thereby meeting the requirements set forth in the R.M.C.""⁶³

The Commission found that "the facts in the present case are analogous to the facts presented in [*United States v.*] *Donati*."⁶⁴ The Commission found that "the interpreters took a similar oath that their interpretation would be honest and accurate, they performed their interpretation faithfully, and, moreover, there has not been a sufficient showing that challenges the quality or accuracy of their interpretation. Therefore, there is no basis to disqualify the Commission Interpreters."⁶⁵ The Commission further found that Petitioner failed to provide any "evidence that the alleged bias of the commission interpreter impacted the interpreter's translation during the arraignment and therefore, fails to meet the burden of proof pursuant to R.M.C. 905(c)(1)."⁶⁶

⁶¹ *Id.*

⁶² *Id.* at 7–8 (citations omitted) (App. 146–App. 147).

⁶³ *Id.* at 8 (citation omitted) (App. 147).

⁶⁴ *Id.* (citing *United States v. Donati*, 34 C.M.R. 15 (C.M.A. 1963)).

⁶⁵ *Id.* at 8–9 (App. 147–App. 148).

⁶⁶ *Id.* at 9 (App. 148).

Regarding Petitioner's allegation that the Government-Provided Defense Interpreters labored under a conflict of interest, the Commission found that "[t]he alleged interference underpinning this concern, however, was not with [Petitioner's] contracted defense interpreter. In fact, in a subsequent pleading, Counsel for [Petitioner] stated, 'we don't believe that the Government-contracted translator has yet done anything wrong. She is a tremendous asset for [Petitioner's] defense, a fantastic teammate, [who] has developed a rapport with'"⁶⁷ Petitioner and Petitioner's counsel stated that "their concerns [were] based on what *could* or *might* happen versus what [had] actually happened."⁶⁸ The Commission found that Petitioner "fail[ed] to demonstrate that [his] existing government-provided defense interpreter was indeed conflicted, and could not provide in-court attorney-client communication for the limited purpose of the arraignment."⁶⁹ The Commission found "that an interpreter was available for [Petitioner] and Mr. bin Amin, there existed no actual conflict of interest, and the Defense chose not to utilize their interpreter."⁷⁰

Regarding the amount of time Petitioner and his co-Accused had to prepare for the arraignment, the Commission found that "[e]ach Accused had from at least 16 April 2021 (when the arraignment was first scheduled for 30 August 2021) to 30 August 2021 to prepare for the arraignment. A trial guide was provided to the parties prior to commencement of the arraignment proceedings."⁷¹ The Commission found that "[c]ounsel had ample opportunity, and were in fact ordered by the Commission to meet with their respective clients in person and/or via [Secure Video

⁶⁷ *Id.* at 10 (citations omitted) (App. 149).

⁶⁸ *Id.* (citation omitted).

⁶⁹ *Id.* (citation omitted).

⁷⁰ *Id.* at 11 (App. 150).

⁷¹ *Id.*

Teleconference].”⁷² The Commission found that “[h]aving been in receipt of the charges and specifications in both English and their native language, and on notice of a pending arraignment hearing, the Commission can only assume that each Defense team discussed matters pertinent to the arraignment with their client.”⁷³

Finally, the Commission found that “[i]n light of the straightforward nature of an arraignment, and the long period the Parties had to prepare, the Commission is satisfied that the rights of the Accused were not violated during the proceedings.”⁷⁴ The Commission also found that the Accused “failed to convince the Commission that the Accused did not understand the proceedings, did not have a conflict free government-provided defense interpreter, and had questions about the arraignment that only counsel could answer, [and therefore] the Accused have failed to show the proceedings were fundamentally unfair.”⁷⁵ The Commission further found that “the requirements of R.M.C. 904 have been met, and each Accused has been properly arraigned.”⁷⁶

V. PROCEEDINGS AFTER THE COMMISSION’S RULING

On December 9, 2021, the Commission issued a scheduling order reminding the parties of the upcoming February–March 2022 sessions and ordering Respondent and Petitioner to provide notice to the Commission of the status of their interpreter support.⁷⁷

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ See AE 0028.001 (TJ), Scheduling Order, *United States v. Nurjaman* (Mil. Comm’n Dec. 9, 2021) (Larsen, J.) (App. 181). While the notices were pending, Mr. Bin Amin moved the Commission requesting reconsideration of the denial of the request for a new arraignment and a hearing to order a new arraignment or, in the alternative, a hearing to determine the sufficiency of the August 30–31, 2021 arraignment proceedings. See AE 0002.044 (AMI), Mr. Bin Amin’s Mot. for a Hearing with Witnesses To Determine the Sufficiency of the 30 and 31 August Proceedings,

On January 6, 2022, Petitioner filed a notice with the Commission stating that he did not have the necessary interpreter support to conduct attorney-client communications because Petitioner had not received assurances that the interpreter provided by the Office of Military Commissions (“OMC”) was sufficiently independent.⁷⁸ Respondent filed its notice on January 10, 2022, stating that, although Respondent was making progress towards securing additional interpreters, Respondent could only secure one Indonesian interpreter and one Malay interpreter for the February–March 2022 sessions.⁷⁹ After both notices were filed, the Commission ordered Respondent to provide an updated interpreter support plan that included “at least 2 interpreters for each language who will be available to support the Commission during the [February–March 2022 sessions].”⁸⁰ Per the Commission’s order, Respondent responded on February 1, 2022, stating that “despite OMC’s efforts to identify additional interpreters to support the 28 February–4 March 2022 hearing, it ha[d] been unable to identify two additional interpreters with appropriate security clearances.”⁸¹ The notice also stated OMC’s recommendation that the Malay interpreter interpret

United States v. Nurjaman (Mil. Comm’n Dec. 28, 2021) (App. 152). Although reconsideration was granted based on new evidence, the Commission ultimately denied the request for a new arraignment or hearing [REDACTED] August 30–31, 2021 arraignment proceedings. See AE 0002.050 (TJ) at 5–6, Ruling: Mr. Bin Amin’s Mot. for a Hearing with Witnesses To Determine the Sufficiency of the 30 and 31 August Proceedings, *United States v. Nurjaman* (Mil. Comm’n Mar. 30, 2022) (Larsen, J.) (App. 175–App. 176).

⁷⁸ See AE 0028.002 (LEP) at 1–2, Def. Not. of Interpreter Support Status, *United States v. Nurjaman* (Mil. Comm’n Jan. 6, 2022) (App. 183–App. 184). The Defense stated that they would use the OMC-provided interpreter for non-privileged communications. *Id.* at 2 (App. 184).

⁷⁹ See AE 0028.006 (GOV) at 2, Gov’t Not. Regarding Status of Commission Interpreter Support, *United States v. Nurjaman* (Mil. Comm’n Jan. 20, 2022) (App. 191).

⁸⁰ See AE 0028.007 (TJ) at 2–3, Order, *United States v. Nurjaman* (Mil. Comm’n Jan. 19, 2022) (Larsen, J.) (App. 201–App. 202).

⁸¹ See AE 0028.009 (GOV) at 2, Gov’t Not. of Updated Interpreter Support Plan, *United States v. Nurjaman* (Mil. Comm’n Feb. 11, 2022) (App. 205).

consecutively rather than simultaneously.⁸²

⁸³ Petitioner objected to Respondent's proposed interpreter plan challenging the Malaysian interpretation.⁸⁴

On February 11, 2022, the Commission suspended the February–March 2022 sessions based on the Government's proposed plan to use only one interpreter for each language.⁸⁵ Although the “independent assessment” of the Malay interpretation at arraignment found the Malay interpreter to “have a good command of both English and Malay languages,” and the Commission had twice⁸⁶ found the interpretations to be legally sufficient, the Commission disagreed with the Government's proposed plan to proceed with only one interpreter per language.⁸⁷

VI. DETAILING OF MILITARY JUDGES

On January 22, 2021, the Chief Trial Judge of the Military Commissions Trial Judiciary (“Chief Trial Judge”), Colonel Douglas K. Watkins, U.S. Army, detailed Colonel Charles L.

⁸² *Id.*

⁸³ AE 0002.050 (TJ) at 3–4 (App. 173–App. 174).

⁸⁴ See AE 0028.012 (LEP) at 1–2, Def. Not. of Objection to Government's Interpreter Support Plan, *United States v. Nurjaman* (Mil. Comm'n Feb. 14, 2022) (App. 210–211).

⁸⁵ See AE 0028.015 (TJ) at 3, Order, *United States v. Nurjaman* (Mil. Comm'n Feb. 11, 2022) (Larsen, J.) (App. 219).

⁸⁶ See, e.g., AE 0002.043 (TJ) at 11 (App. 150); AE 0002.050 (TJ) at 3–4 (App. 173–App. 174).

⁸⁷ *Id.*

Pritchard, U.S. Army, to be the Military Judge in Petitioner's Commission.⁸⁸

On May 6, 2021, Chief Trial Judge Watkins detailed Commander Hayes C. Larsen, U.S. Navy, to be the Military Judge in Petitioner's Commission.⁸⁹

On June 23, 2023, the Secretary of Defense designated Colonel Charles L. Pritchard, Jr., U.S. Army, as the new Chief Trial Judge, effective August 1, 2023.⁹⁰

On July 10, 2023, Chief Trial Judge Lanny J. Acosta, Jr., detailed himself to be the presiding judge in Petitioner's Commission on an "interim" basis "until a different judge is detailed" to Petitioner's Commission.⁹¹

On July 28, 2023, Chief Judge Acosta detailed Lieutenant Colonel Wesley A. Braun, USAF, to be the presiding judge in Petitioner's Commission.⁹²

ARGUMENT

In order for the Court to issue a writ of mandamus, Petitioner must satisfy all three conditions established by the Supreme Court in *Cheney v. U.S. District Court*.⁹³ Petitioner cannot satisfy any. Petitioner requests that the Court employ an extraordinary means (mandamus) to grant him an extraordinary request for relief (re-arraignment) for a commonplace claim of procedural

⁸⁸ See AE 0001.001, Memorandum for Colonel Charles J. Pritchard, USA, *United States v. Nurjaman* (Mil. Comm'n Jan. 22, 2021) (App. 177).

⁸⁹ See AE 0001.003, Memorandum for Commander Hayex C. Larsen, USN, *United States v. Nurjaman* (Mil. Comm'n May 6, 2021) (App. 178).

⁹⁰ Memorandum from Lloyd J. Austin III, Secretary of Defense, to Chief Trial Judge, Military Commissions Trial Judiciary, Subject: Designation of the Chief Trial Judge, Military Commissions Trial Judiciary (June 23, 2023) (App. 400).

⁹¹ See AE 0001.005 (TJ), Memorandum for Record, *United States v. Nurjaman* (Mil. Comm'n July 10, 2023) (App. 179).

⁹² See AE 0001.006 (TJ), Memorandum for Lieutenant Colonel Wesley A. Braun, USAF, *United States v. Nurjaman* (Mil. Comm'n July 28, 2023) (App. 180).

⁹³ 542 U.S. 367 at 380.

error relating to the interpretation of court proceedings—claims that appellate courts routinely consider and adjudicate on direct appeal. Moreover, Petitioner waited nearly two years after the Commission denied his motion to order a new arraignment. The Court should not reward Petitioner’s “dilatory litigation tactics.”⁹⁴

I. PETITIONER CANNOT SATISFY THE THREE *CHENEY* CONDITIONS FOR ISSUANCE OF A WRIT OF MANDAMUS

The writ of mandamus, codified at 28 U.S.C. § 1651, is one of “the most potent weapons in the judicial arsenal.”⁹⁵ Consequently, mandamus against a lower court is a “drastic” remedy reserved for “extraordinary causes.”⁹⁶ Accordingly, a “petition for a writ of mandamus may never be employed as a substitute for appeal.”⁹⁷

The Supreme Court has recognized that mandamus only applies where a petitioner satisfies the three conditions articulated in *Cheney v. U.S. District Court*.⁹⁸ First, “the party seeking issuance of the writ must have no other adequate means to attain the relief he desires.”⁹⁹ Second, the party seeking the writ must demonstrate “that his right to issuance of the writ is clear and indisputable.”¹⁰⁰ Third, the party must demonstrate that issuance of the writ is “appropriate

⁹⁴ *Rhines v. Weber*, 544 U.S. 269, 278 (2005).

⁹⁵ *Will v. United States*, 389 U.S. 90, 107 (1967).

⁹⁶ *Ex parte Fahey*, 332 U.S. 258, 259–60 (1947).

⁹⁷ *In re Flynn*, 973 F.3d 74, 78 (D.C. Cir. 2020) (en banc) (per curiam) (internal quotations and citations omitted).

⁹⁸ 542 U.S. at 380; *see also* *Belize Social Dev. Ltd. v. Gov’t of Belize*, 668 F.3d 724, 729–30 (D.C. Cir. 2012) (holding “the writ will only issue upon the satisfaction of [the] three conditions” the Supreme Court enumerated in *Cheney*); *see also* *Hawsawi v. United States*, 389 F. Supp. 3d 1001, 1006 (U.S.C.M.C.R. 2019) (same).

⁹⁹ *Cheney*, 542 U.S. at 380; *see also* Order, *In re Al-Baluchi*, No. 18-1152 (D.C. Cir. June 27, 2018), ECF No. 1737933 (App. 401) (denying a petition particularly because “petitioner has failed to demonstrate that he lacks an adequate alternative remedy”).

¹⁰⁰ *Cheney*, 542 U.S. at 381 (brackets and citation omitted).

under the circumstances.”¹⁰¹ Because issuing a writ of mandamus is such a “drastic and extraordinary” remedy, mandamus jurisdiction “is strictly confined,” “available only in ‘extraordinary situations,’ [and] relief is hardly ever granted.”¹⁰² The standard to obtain mandamus relief is “daunting,”¹⁰³ and a petitioner must “identify some ‘irreparable’ injury that will go unredressed if he does not secure mandamus relief now.”¹⁰⁴

The Court of Appeals has cautioned that the mandamus standard must be strictly enforced in the military commission context.¹⁰⁵ That caution is necessary to give effect to the strict final-judgment rule in the M.C.A., which limits this Court’s jurisdiction to “act[ing] only with respect to the findings and sentence as approved by the convening authority.”¹⁰⁶ As the Court of Appeals has recognized, the M.C.A.’s final-judgment rule “serves an important purpose that would be undermined if we did not faithfully enforce the traditional prerequisites” for an extraordinary writ.¹⁰⁷ Among other things, rigorous enforcement of the final-judgment rule “helps preserve the

¹⁰¹ *Id.* at 380–81 (citations omitted).

¹⁰² *In re Cheney*, 406 F.3d 723, 729 (D.C. Cir. 2005) (en banc).

¹⁰³ *In re Khadr*, 823 F.3d 92, 97, 100 (D.C. Cir. 2016) (Kavanaugh, J.).

¹⁰⁴ *In re Al-Nashiri (Al-Nashiri III)*, 921 F.3d 224, 237 (D.C. Cir. 2019) (citation omitted); *see also In re Flynn*, 973 F.3d at 79.

¹⁰⁵ *See In re Al-Nashiri (Al-Nashiri I)*, 791 F.3d 71, 78 (D.C. Cir. 2015).

¹⁰⁶ 10 U.S.C. § 950f(d); *see also id.* § 950f(c) (The U.S.C.M.C.R. “shall . . . review the record in each case that is referred to the Court by the convening authority.”); *Khadr v. United States*, 529 F.3d 1112, 1116 (D.C. Cir. 2008) (observing that by deferring review “until after a military commission has found guilt and announced a sentence,” the M.C.A. “clarifies that the ‘final judgment’ contemplated by the statute is indeed ‘final’”).

¹⁰⁷ *Al-Nashiri I*, 791 F.3d at 78; *see also Flanagan v. United States*, 465 U.S. 259, 263–64 (1984) (noting that the final-judgment rule is “crucial to the efficient administration of justice”).

respect due trial judges by minimizing appellate-court interference with the numerous decisions they must make in the prejudgment stages of litigation.”¹⁰⁸

Petitioner cannot satisfy the daunting standard for issuance of a writ of mandamus in this case for three reasons: (1) Petitioner has an adequate alternative means for relief through direct appeal from final judgment; (2) Petitioner cannot establish a clear and indisputable right to the relief he requests because the record refutes his claim that any alleged errors rendered his trial fundamentally unfair; and (3) Petitioner has not shown mandamus is appropriate under the circumstances, especially where he waited nearly two years to raise the issue in the Court, while he and his detailed counsel took steps to contest the charges and present a defense.

Because Petitioner has failed to satisfy any of the *Cheney* conditions—let alone all three—the Petition fails, and the Court should deny it.

II. PETITIONER HAS AN ALTERNATIVE MEANS OF OBTAINING RELIEF: DIRECT APPEAL FROM FINAL JUDGMENT

A. Mandamus Is Inappropriate in the Presence of an Obvious Means of Relief: Direct Appeal After Final Judgment

The Court should deny the Petition because Petitioner cannot demonstrate that there are “no other adequate means to attain the relief he desires.”¹⁰⁹ The question of what constitutes an adequate remedy is informed by the extent to which injury is “irreparable,” such that it “will go unredressed if he does not secure mandamus relief now.”¹¹⁰ Indeed, the Court of Appeals has stated that “[m]andamus is inappropriate in the presence of an obvious means of review:

¹⁰⁸ *Flanagan*, 465 U.S. at 263–64; *see also Al-Nashiri I*, 791 F.3d at 78 (recognizing that a “judicial readiness to issue the writ of mandamus in anything less than an extraordinary situation” would lead to the harms associated with “piecemeal appellate litigation”).

¹⁰⁹ *Cheney*, 542 U.S. at 380 (quoting *Kerr v. U.S. Dist. Court*, 426 U.S. 394, 403 (1976)) (internal quotation marks omitted).

¹¹⁰ *Al-Nashiri III*, 921 F.3d at 237 (citation omitted).

direct appeal from final judgment.”¹¹¹ Petitioner has failed to explain why direct appeal is not an adequate means of review of a claim of defective arraignment; consequently, the Petition amounts to a request for an impermissible interlocutory appeal.¹¹²

Mandamus is a remedy of last resort for a litigant who has “exhausted all other avenues of relief.”¹¹³ As the Court has previously observed, “[t]he gravity of the burdens imposed on criminal defendants . . . without more, generally do not suffice to bring a case within mandamus’s ambit.”¹¹⁴ “Moreover, the United States Supreme Court has recognized a ‘policy against piecemeal appellate

¹¹¹ *Al-Nashiri I*, 791 F.3d at 78 (citing *Roche v. Evaporated Milk Ass’n*, 319 U.S. 21, 27–28 (1943)); see also *In re Flynn*, 973 F.3d at 79 (citing *Al-Nashiri I*) (denying the petition for mandamus where the petitioner had an obvious alternative remedy and could not show irreparable injury that warranted mandamus relief); Order, *In re Al-Nashiri*, No. 21-001 (U.S.C.M.C.R. Sept. 20, 2021) (observing that “[m]andamus is inappropriate in the presence of an obvious means of review: direct appeal from final judgment” (citation omitted)). By contrast, as the Court of Appeals has noted, where a party cannot know *ex ante* if they can appeal an adverse decision, mandamus might remain a viable avenue for relief. See *In re Clinton*, 973 F.3d 106, 112, 121 (D.C. Cir. 2020) (granting petition for writ of mandamus to stop a district court’s deposition order, noting the petitioner lacked knowledge of whether she could appeal a contempt order if she refused to obey the district court’s discovery orders).

¹¹² See *Ali v. United States*, 398 F. Supp. 3d 1200, 1228 (U.S.C.M.C.R. 2019) (No. 19-002) (observing that an accused “has no interlocutory appellate rights under the Military Commission Act of 2009, 10 U.S.C. § 948a et seq. Thus, we may review [a military judge’s order] only through our post-conviction appellate jurisdiction, 10 U.S.C. § 950f(c), or our mandamus jurisdiction[.]”) (citing *Al-Nashiri I*, 791 F.3d at 75–76).

¹¹³ *Heckler v. Ringer*, 466 U.S. 602, 616 (1984); see also *United States ex rel. Bernardin v. Duell*, 172 U.S. 576, 582 (1899) (“Nothing is better settled than that the writ of mandamus will not ordinarily be granted if there is another legal remedy . . .”).

¹¹⁴ *In re Al-Nashiri*, 577 F. Supp. 3d 1285, 1294–95 (U.S.C.M.C.R. 2021) (No. 21-004) (quoting *In re Flynn*, 973 F.3d at 79–80 (citing *Al-Nashiri I*, 791 F.3d at 80; *Roche*, 319 U.S. at 30)) (quotation marks omitted); see also *Roche*, 319 U.S. at 30 (“[A criminal t]rial may be of several months’ duration and may be correspondingly costly and inconvenient. But that inconvenience is one which we must take it Congress contemplated in providing that only final judgments should be reviewable.”); *Bankers Life & Cas. Co. v. Holland*, 346 U.S. 379, 383 (1953) (“[E]xtraordinary writs cannot be used as substitutes for appeals, even though hardship may result from delay and perhaps unnecessary trial.” (citations omitted)).

review’—a policy generally undermined by granting mandamus.”¹¹⁵ If the courts exercised a “readiness to issue the writ of mandamus in anything less than an extraordinary situation,” it would defeat the “judgment of Congress that appellate review should be postponed until after final judgment.”¹¹⁶ The Court of Appeals has made clear that a petitioner may not use mandamus “as a substitute for the regular appeals process.”¹¹⁷ Thus, appellate review should come after, not before, the military commission has done its work.¹¹⁸

B. Petitioner’s Arguments Lack Merit

Petitioner fails to show why direct appeal from final judgment provides an inadequate opportunity for review of a claim of defective arraignment based on the alleged inadequacies of the interpreters. Except in cases where an accused waives his rights to appellate review by this Court,¹¹⁹ the M.C.A. requires the Court to “review the record in each case that is referred to [it] by the convening authority . . . with respect to any matter properly raised by the accused.”¹²⁰ Furthermore, the M.C.A. empowers the Court of Appeals to “review all ‘matters of law’ once a

¹¹⁵ *In re Al-Nashiri*, 577 F. Supp. 3d at 1294–95 (quoting *Allied Chem. Corp.*, 449 U.S. at 36 (per curiam); see also *In re Papandreou*, 139 F.3d 247, 250 (D.C. Cir. 1998) (“Lax rules on mandamus would undercut the [final judgment rule] and would lead to piecemeal appellate litigation.”)).

¹¹⁶ *Heckler*, 466 U.S. at 616 (quoting *Kerr*, 426 U.S. at 403) (internal quotation marks omitted)).

¹¹⁷ *Al-Nashiri I*, 791 F.3d at 78; see also *In re Ralston Purina Co.*, 726 F.2d 1002, 1004 (4th Cir. 1984).

¹¹⁸ *Id.* (“The general principle which governs proceedings by mandamus is, that whatever can be done without the employment of that extraordinary remedy, may not be done with it.” (quoting *Ex parte Rowland*, 104 U.S. 604, 617 (1881))).

¹¹⁹ 10 U.S.C. § 950f(b).

¹²⁰ *Id.* § 950f(c); see also *id.* § 950c(a) (“Except as provided in subsection (b) [relating to waiver of right of review], in each case in which the final decision of a military commission under this chapter (as approved by the convening authority) includes a finding of guilty, the convening authority shall refer the case to the United States Court of Military Commissions Review”).

military commission issues a final judgment and both the convening authority and [the U.S.C.M.C.R.] review it.”¹²¹ That provision would allow the Court of Appeals to consider, in a post-judgment direct appeal, a claim that the interpreters did not adequately convey the meaning of the arraignment proceedings to Petitioner.

Moreover, the case law Petitioner cites does not support his claim. Petitioner cites *LRM v. Kastenberg*,¹²² *Howell v. United States*,¹²³ and *Hasan v. Gross*¹²⁴ in an attempt to circumvent the first *Cheney* condition.¹²⁵ Specifically, Petitioner cites these cases for the proposition that courts have “issued writs in cases where petitioners faced irreversible harm that could not be undone by the normal appellate review process.”¹²⁶ Petitioner also cites *Ali v. United States* for the proposition that the allegedly defective interpretation “cannot be remedied post-conviction.”¹²⁷ These cases, however, do not support Petitioner’s argument.

I. LRM v. Kastenberg

Petitioner asserts that “*LRM v. Kastenberg* was a writ on the victim’s right to be heard via legal counsel, a right which would be extinguished if the accused were acquitted.”¹²⁸ But Petitioner’s reliance on *LRM* is misplaced.

¹²¹ *Al-Nashiri I*, 791 F.3d at 79 (quoting 10 U.S.C. § 950g(a), (d)).

¹²² 72 M.J. 364 (C.A.A.F. 2013).

¹²³ 75 M.J. 386 (C.A.A.F. 2016).

¹²⁴ 71 M.J. 416 (C.A.A.F. 2012).

¹²⁵ Pet. at 17–18 (citing *LRM*, 72 M.J. at 366, 386; *Howell*, 75 M.J. at 389; *Hasan*, 71 M.J. at 417); see also *id.* at 29 (citing *LRM*, 72 M.J. at 372).

¹²⁶ *Id.* at 17 (citations omitted).

¹²⁷ *Id.* at 18 (citing *Ali*, 398 F. Supp. 3d at 1229).

¹²⁸ *Id.* (citing *LRM*, 72 M.J. at 366).

First, the issue the Court of Appeals for the Armed Forces (“C.A.A.F.”) analyzed in *LRM* is inapplicable here because *LRM* did not analyze whether the petitioner had satisfied the first *Cheney* condition to show that he had no adequate alternative to seek review. Instead, the question before the C.A.A.F. was whether the Air Force Court of Criminal Appeals (“A.F.C.C.A.”) had jurisdiction to hear the case, not whether the court should issue an extraordinary writ.¹²⁹ *LRM* held that the A.F.C.C.A. “erred by holding that it lacked jurisdiction to hear *LRM*’s petition for a writ of mandamus. The All Writs Act, 28 U.S.C. § 1651 (2006), and Article 66, [Uniform Code of Military Justice (“U.C.M.J.”)], 10 U.S.C. § 866 (2006), establish the [A.F.C.C.A.’s] jurisdiction.”¹³⁰ Because the C.A.A.F. did not address whether the court should issue the writ, it did not cite *Cheney* or apply the *Cheney* conditions.

Second, in asserting issuance of the requested writ is appropriate under the circumstances, Petitioner also emphasizes the C.A.A.F.’s prudential recognition that the substantive issues before it “‘present[ed] a novel legal question regarding the interpretation of’ a rule that affects other pending cases.”¹³¹ Again, however, that portion of the *LRM* analysis does not inform whether issuing an extraordinary writ is appropriate under these circumstances. Instead of a *Cheney* analysis, the C.A.A.F. was considering its own authority to act under Article 67, U.C.M.J., regarding matters of law that the A.F.C.C.A. did not address.¹³² Furthermore, even within the context of that analysis, the C.A.A.F. deemed exercise of its Article 67, U.C.M.J., authority appropriate where there was “no other meaningful way for the[] issues to reach appellate

¹²⁹ *LRM*, 72 M.J. at 368 (“Thus, the harm alleged has ‘the potential to directly affect the findings and sentence,’ and the CCA erred by holding that it lacked jurisdiction.”).

¹³⁰ *Id.* at 367.

¹³¹ Pet. at 29 (quoting *LRM*, 72 M.J. at 372).

¹³² *LRM*, 72 M.J. at 371–72.

review.”¹³³ Since *LRM* was decided, the C.A.A.F. has cabined this portion of *LRM* by limiting it to its specific facts.¹³⁴ In two separate cases, the C.A.A.F. has further stated that the holding in *LRM* regarding the C.A.A.F.’s jurisdiction over mandamus petitions arising under Article 67(a)(2) has been superseded by statute.¹³⁵

2. *Howell v. United States*

Petitioner similarly misplaces his reliance on *Howell*. Petitioner states that *Howell* “was a writ to prevent the military judge from ordering the convening authority to award sentencing credit.”¹³⁶ But the specific facts of *Howell* are significantly different from the facts of the Petition, and they do not support Petitioner’s contention. In *Howell*, the C.A.A.F. evaluated a petition for a writ of prohibition that the government sought after the accused’s first court-martial conviction was set aside.¹³⁷ As part of his sentence in his first court-martial, the accused was reduced from pay grade E-6 to E-1.¹³⁸ In the interim period between when his first conviction and sentence were

¹³³ *Id.* at 372.

¹³⁴ See *EV v. United States*, 75 M.J. 331, 334 (C.A.A.F. 2016) (“It may be argued that our decision in *LRM* . . . provides a basis for jurisdiction in this case. It does not. *LRM* was a case certified to us by the Judge Advocate General of the Air Force, and therefore stood on a wholly different jurisdictional basis from the present case.”).

¹³⁵ See *id.* at 334 (denying the petition because “*LRM* was decided before Congress had legislated in this area, either through the enactment of the substantive victims’ rights provisions of Article 6b or through the later enactment of the remedial provision at issue here. The *LRM* decision was rendered without the benefit of Congress’s direction in the matter. Congress having now legislated in the area, we are bound by the choices it made.”); *Randolph v. HV*, 76 M.J. 27, 29 (C.A.A.F. 2017) (“Jurisdiction is a question of law that this Court reviews de novo.” (first quoting *LRM*, 72 M.J. at 367; and then citing *United States v. Ali*, 71 M.J. 256, 261 (C.A.A.F. 2012))); *id.* at 30 (“[W]e pointed out just last term that ‘[t]he *LRM* decision was rendered without the benefit of Congress’s direction in the matter. Congress having now legislated in the area, we are bound by the choices it made.’” (quoting *EV v. United States*, 75 M.J. 331, 334 (C.A.A.F. 2016))).

¹³⁶ Pet. at 17–18 (citing *Howell*, 75 M.J. at 389).

¹³⁷ *Howell*, 75 M.J. at 388.

¹³⁸ *Id.*

set aside and the conclusion of his second court-martial, “in accordance with guidance from the Defense Finance and Accounting Service (DFAS), the command determined that Appellant was to be paid as an E-1 pending the rehearing results.”¹³⁹ After the convening authority referred the rehearing, the accused filed a motion seeking “payment as an E-6 pending the results of the rehearing.”¹⁴⁰ The military judge determined he could not order DFAS to pay the accused at the E-6 rate, so the only remedy he had was to award sentence credit under Article 13, U.C.M.J.¹⁴¹ At the rehearing, the accused was again convicted and sentenced, and part of his sentence was again reduction to E-1.¹⁴² After sentencing, but before the convening authority’s action, the government filed a petition for a writ of prohibition seeking vacatur of the military judge’s order granting sentencing credit under Article 13, U.C.M.J.¹⁴³

Ultimately, the C.A.A.F. found that the military judge “exceeded his authority by applying confinement credit to remedy conduct that did not violate Article 13, UCMJ.”¹⁴⁴ Thus, without a writ, the government could not have challenged the military judge’s ruling before the appellate court on direct appeal after the convening authority’s action to have the appellate court increase the adjudged sentence to compensate for the erroneously adjudicated credit. At the time the C.A.A.F. decided *Howell*, Article 66(c), U.C.M.J., provided authority for the service courts of criminal appeals to “act only with respect to the findings and sentence as approved by the

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 388–89.

¹⁴¹ *Id.* at 389.

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 394.

convening authority.”¹⁴⁵ Thus, absent the writ of prohibition, the government had no other adequate means of obtaining relief from the military judge’s erroneous ruling. In contrast with the Petition, however, nothing prevents an appellate court from finding on direct appeal after final judgment that Petitioner’s arraignment was insufficient and ordering it—and all subsequent session of court—be conducted again.

3. *Hasan v. Gross*

Petitioner also misplaces his reliance on *Hasan*. There, the C.A.A.F. determined that “it could reasonably appear to an objective observer that the military judge had allowed the proceedings to become a duel of wills between himself and Appellant rather than the adjudication of the serious offenses with which Appellant is charged.”¹⁴⁶

Thus, *Hasan* is not simply about “prevent[ing] the enforcement of the military judge’s order for the petitioner to shave his beard before the trial,” as Petitioner asserts,¹⁴⁷ but is instead a straightforward judicial disqualification challenge. And courts have long recognized that it is possible for a petitioner to satisfy the first *Cheney* condition when seeking a petition for a writ of mandamus based on judicial disqualification,¹⁴⁸ absent some other adequate means of attaining

¹⁴⁵ 10 U.S.C. § 866(c) (2012). *Howell* was decided before Congress amended Article 56(d), U.C.M.J., to expand the government’s appellate rights regarding sentencing under the appropriate circumstances.

¹⁴⁶ *Hasan*, 71 M.J. at 419 (C.A.A.F. 2012).

¹⁴⁷ Pet. at 18 (citing *Hasan*, 71 M.J. at 417).

¹⁴⁸ See, e.g., *Cobell v. Norton*, 334 F.3d 1128, 1139 (D.C. Cir. 2003) (“The ordinary route to relief from an adverse interlocutory order is to appeal from the final judgment. When the relief sought is recusal of a disqualified judicial officer, however, the injury suffered by a party required to complete judicial proceedings overseen by that officer is by its nature irreparable. As the Supreme Court has explained: ‘The remedy by appeal is inadequate. It comes after the trial and, if prejudice exist, it has worked its evil and a judgment of it in a reviewing tribunal is precarious. It goes there fortified by presumptions, and nothing can be more elusive of estimate or decision than a disposition of a mind in which there is a personal ingredient.’” (quoting *Berger v. United States*, 255 U.S. 22, 36 (1921)).

relief such as reconsideration.¹⁴⁹ But Petitioner does not seek disqualification of the Military Judge, merely vacatur of AE 0002.043 (TJ) and a new arraignment—and nothing precludes an appellate court from ordering such a remedy on direct appeal after final judgment.

4. *Ali v. United States*

Finally, Petitioner’s reliance on *Ali v. United States*¹⁵⁰ is also misplaced. There, this Court evaluated a mandamus petition where the petitioner sought to vacate an order of the military judge closing the proceedings of a military commission so the commission could hear testimony from a witness who had previously worked as an interpreter for the accused’s defense team.¹⁵¹ The prosecution had requested an order from the commission closing the session so the witness could testify in a closed session in order “to prevent the inadvertent disclosure of classified information and to protect the Interpreter and his or her identity, which is classified.”¹⁵² The commission granted the order, but the defense filed a petition with this Court seeking “a writ of mandamus directing the military judge presiding over his commission case to hold a public hearing in a pre-trial matter involving the unclassified testimony of a witness known as the ‘Interpreter.’”¹⁵³

Although Petitioner cites *Ali* for the proposition that “the harm of that inadequate interpretation at Petitioner’s arraignment is one that cannot be ‘un-rung’ after conviction,”¹⁵⁴

¹⁴⁹ See *Al-Iraqi v. United States*, 455 F. Supp. 3d 1273 (U.S.C.M.C.R. 2020) (No. 19-004) (holding that the petitioner could not satisfy the first *Cheney* condition because reconsideration de novo was an adequate alternative means to attain relief); see generally *In re Al-Tamir*, 993 F.3d 906 (D.C. Cir. 2021) (same).

¹⁵⁰ Pet. at 18 (citing *Ali*, 398 F. Supp. 3d at 1229).

¹⁵¹ *Ali*, 398 F. Supp. 3d at 1210.

¹⁵² *Id.* (citation omitted).

¹⁵³ *Id.* at 149.

¹⁵⁴ Pet. at 18 (citing *Ali*, 398 F. Supp. 3d at 1229).

the Court's opinion was more nuanced. The Court recognized that "the law concerning the right to use mandamus to prevent the release of privileged testimony is instructive. The courts in these cases point to the loss of control over the information once made public. You cannot un-ring the bell."¹⁵⁵ Analyzing the first *Cheney* condition, the Court asked "whether a post-conviction appeal, if it occurs, provides an adequate remedy."¹⁵⁶ The Court concluded that direct appeal did not provide an adequate remedy in that case because "[t]he core value regarding the hearing at issue is the maintenance of '[p]ublic confidence in and respect for the' 9/11 prosecution"¹⁵⁷ and closed-session testimony would erode that public confidence.

Specifically, the Court found direct appeal after final judgment insufficient because "improperly requiring the Interpreter to testify in a closed session and then releasing a transcript as redacted by the government will likely leave lingering doubts in the public's mind that the classified redactions conceal government misconduct. Correcting this years later will not eradicate this skepticism."¹⁵⁸ Here, however, the arraignment was held in an open session, and members of the public and the press were able to view the proceedings.¹⁵⁹ Moreover, as the arraignment occurred nearly two years ago and the quality of the in-court interpretation has been thoroughly litigated in open sessions and reflected in public transcripts, no similar concern erodes the public's confidence.

¹⁵⁵ *Id.* at 1229 (citations omitted).

¹⁵⁶ *Id.* at 1228.

¹⁵⁷ *Id.* at 1229 (citation omitted).

¹⁵⁸ *Id.*

¹⁵⁹ *See* Tr. at 3 (App. 223) ("These proceedings are being transmitted via closed-circuit television to remote viewing sites at Fort Meade, Maryland, and the Pentagon in Arlington, Virginia, pursuant to the military judge's ruling on public access to open proceedings set forth in Appellate Exhibit 007.006.").

C. Petitioner Has Failed To Satisfy the First *Cheney* Condition

Finally, Petitioner concludes his discussion of the first *Cheney* condition by asserting that “the normal post-conviction appellate process is an inadequate means for Petitioner to attain relief, as the entirety of a potential decade-plus long trial would have to be wholly repeated were Petitioner’s claims held valid under such an appeal.”¹⁶⁰ Significantly, the cases Petitioner relies on for this conclusion do not support his argument. Moreover, Respondent is unaware of any cases that support his argument. Indeed, as the Court has previously observed, “[t]he gravity of the burdens imposed on criminal defendants . . . without more, generally do not suffice to bring a case within mandamus’s ambit.”¹⁶¹ In any criminal prosecution, there is always a risk that an appellate court will conclude on direct appeal after final judgment that the entire case must be re-litigated, but that risk is not unique to this case. Asserting that direct appeal after final judgment is inadequate without providing any authority that specifically says that a defective arraignment challenge cannot be resolved by an appellate court—and citing cases that do not support the argument—does not satisfy the first *Cheney* condition.

In sum, Petitioner cannot satisfy the first *Cheney* condition because he has an adequate alternative means to seek review: raising the alleged error on direct appeal from final judgment. Accordingly, the Petition fails.

¹⁶⁰ Pet. at 19.

¹⁶¹ *In re Al-Nashiri*, 577 F. Supp. 3d 1285, 1294–95 (U.S.C.M.C.R. 2021) (No. 21-004) (quoting *In re Flynn*, 973 F.3d at 79–80 (citing *Al-Nashiri I*, 791 F.3d at 80; *Roche*, 319 U.S. at 30)) (quotation marks omitted); see also *Roche*, 319 U.S. at 30 (“[A criminal t]rial may be of several months’ duration and may be correspondingly costly and inconvenient. But that inconvenience is one which we must take it Congress contemplated in providing that only final judgments should be reviewable.”); *Bankers Life & Cas. Co.*, 346 U.S. at 383 (“[E]xtraordinary writs cannot be used as substitutes for appeals, even though hardship may result from delay and perhaps unnecessary trial.” (citations omitted)).

III. PETITIONER CANNOT SHOW A CLEAR AND INDISPUTABLE RIGHT TO ISSUANCE OF THE WRIT

The Court should deny the Petition because Petitioner cannot show a “clear and indisputable” right to a new arraignment.¹⁶² Indeed, “even if [a reviewing court] ultimately agree[s] with [a petitioner] on the merits, mandamus would not lie” where “the answer [is] hardly ‘clear’ *ex ante*.”¹⁶³ As the Court of Appeals has recently noted, “[a] petitioner’s right to relief is clear and indisputable where he or she can point to cases in which a federal court has held that relief is warranted in a matter involving like issues and comparable circumstances.”¹⁶⁴ Accordingly, the Court of Appeals stated that it “will deny mandamus even if a petitioner’s argument, though packing substantial force, is not clearly mandated by statutory authority or case law.”¹⁶⁵ In contrast, “open questions are ‘the antithesis of the “clear and indisputable” right needed for mandamus relief.’”¹⁶⁶

¹⁶² *Cheney*, 542 U.S. at 381; *see also In re Khadr*, 823 F.3d at 97, 100 (rejecting a mandamus petition because the petitioner did not show a clear and indisputable right to the requested relief).

¹⁶³ *Al-Nashiri I*, 791 F.3d at 86.

¹⁶⁴ *In re Al-Baluchi*, 952 F.3d 363, 369 (D.C. Cir. 2020) (citations and quotations omitted).

¹⁶⁵ *Id.*; *see also In re Ali*, 558 F. Supp. 3d 1167, 1186 (U.S.C.M.C.R. 2021) (No. 21-002) (denying the petition for a writ of mandamus where it was “neither clear nor indisputable” that petitioner was entitled to relief, and observing that courts “will not issue [a writ of mandamus] to correct a duty that is to any degree debatable” (quoting *United States v. Denson*, 603 F.2d 1143, 1147 n.2 (5th Cir. 1980) (additional citations omitted))); *United States v. Jones*, No. NMCCA 201200264, 2015 CCA LEXIS 573, at *8 (N-M. Ct. Crim. App. Dec. 29, 2015) (App. 402) (“Clear and indisputable means there is no debate; any reasonable disagreement has been settled, and a consensus has taken hold.”), *rev’d on other grounds sub nom Howell v. United States*, 75 M.J. 386 (C.A.A.F. 2016).

¹⁶⁶ *In re Al-Nashiri (Al-Nashiri II)*, 835 F.3d 110, 137 (D.C. Cir. 2016) (observing that the Supreme Court Justices were divided in *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006), and that “[t]he debate in *Hamdan* indicates that whether hostilities against al Qaeda existed at the time of Al-Nashiri’s alleged offenses, and whether Al-Nashiri’s conduct in Yemen took place in the context of those hostilities, are open questions. And open questions are ‘the antithesis of the “clear and indisputable” right needed for mandamus relief.’” (citing *Al-Nashiri I*, 791 F.3d at 86)).

A. Petitioner's Arraignment Was Legally Sufficient Because It Satisfied the Fundamental Fairness Standard

An accused's "right to be present"—while not absolute—is “one of the most fundamental protections afforded not just by the Manual for Courts-Martial but also by the [U.C.M.J.] itself.”¹⁶⁷ Indeed, the M.C.A. states that generally, “any proceedings . . . shall be conducted in the presence of the accused”¹⁶⁸ because he has the right “[t]o be present at all sessions of the military commission.”¹⁶⁹ This includes his right to be physically in the courtroom,¹⁷⁰ to have the charges read to him,¹⁷¹ and to “understand the nature of the proceedings against him” so he can “conduct or cooperate intelligently in the defense of the case.”¹⁷²

Courts evaluate the performance of interpreters to see “whether any inadequacy in the interpretation ‘made the trial fundamentally unfair.’”¹⁷³ “‘Word for word translation’ is the ‘general standard,’” however, ‘minor deviations from this standard will not necessarily contravene

¹⁶⁷ *Hamdan*, 548 U.S. at 624.

¹⁶⁸ 10 U.S.C. § 949d(a)(2).

¹⁶⁹ *Id.* § 949a(b)(2). Especially considering these statutory protections that are afforded to Petitioner, whether a Guantanamo detainee separately enjoys certain constitutional rights need not and should not be addressed by this Court. *Cf. Al-Hela v. Biden*, 66 F.4th 217, 222 (D.C. Cir. 2023) (en banc) (holding that the court “need not decide whether due process protections apply to Guantanamo detainees, because even assuming the Due Process Clause applies, we find that the procedures employed by the District Court to adjudicate Mr. al-Hela’s habeas petition satisfy procedural due process”). As discussed in greater detail below, the interpreter’s performance in this case in no way infringed upon Petitioner’s right to a fundamentally fair trial, irrespective of the source of Petitioner’s rights.

¹⁷⁰ *See* R.M.C. 804(a) (“[T]he accused shall be present at the arraignment . . .”).

¹⁷¹ *See* R.M.C. 904 (“Arraignment . . . shall consist of reading the charges and specifications to the accused and calling on the accused to plead.”).

¹⁷² R.M.C. 909(a).

¹⁷³ *Joshi*, 896 F.2d at 1309 (quoting *Valladares*, 871 F.2d at 1566); *see also Valladares*, 871 F.2d at 1566 (“The ultimate question is whether any inadequacy in the interpretation ‘made the trial fundamentally unfair.’” (quoting *United States v. Tapia*, 631 F.2d 1207, 1210 (5th Cir. 1980))).

[even] a defendant's constitutional rights.”¹⁷⁴ This occurs when the accused “was inhibited from such comprehension of the proceedings or the testimony given against him in English to such an extent as to have made *the trial* fundamentally unfair.”¹⁷⁵ Because the trial court merits “wide discretion” in dealing with issues surrounding interpreters, “this decision should not be disturbed unless the trial court clearly abuses its discretion.”¹⁷⁶

In *United States v. Bell*, the court recognized that “interpreters present numerous trial difficulties” but found no error with the trial judge’s “wide discretion” in allowing the sister of one of the victims to serve as interpreter.¹⁷⁷ In *United States v. Gonzalez*, despite the court finding the use of uncertified interpreters “troubling,” it affirmed the conviction because the defendant “failed to show that the district court’s asserted error prejudiced him” or “affected his substantial rights.”¹⁷⁸ And in *Joshi*, the court found the defendant received a fundamentally fair trial even though the interpreter “had not translated to [him] nearly two and one half hours of video tape evidence that had been introduced against his coconspirators” because “any error resulting from this omission was cured by the government’s offer to provide the video recordings to [the defendant] so he could review them if he wished during a trial break.”¹⁷⁹

Here, even assuming Petitioner correctly identifies errors in the interpretation, any such errors did not render Petitioner’s arraignment—much less his trial—fundamentally unfair for

¹⁷⁴ *United States v. Bell*, 367 F.3d 452, 464 (5th Cir. 2004) (citation omitted).

¹⁷⁵ *Tapia*, 631 F.2d at 1210 (emphasis added).

¹⁷⁶ *United States v. Coronel-Quintana*, 752 F.2d 1284, 1291 (8th Cir. 1985) (citations omitted); see *Perovich v. United States*, 205 U.S. 86, 91 (1907) (noting the appointment and use of an interpreter “is a matter largely resting in the discretion of the trial court”).

¹⁷⁷ *Bell*, 367 F.3d at 464.

¹⁷⁸ *United States v. Gonzalez*, 339 F.3d 725, 729 (8th Cir. 2003) (citations omitted).

¹⁷⁹ 896 F.2d at 1310.

several reasons. First, Petitioner was physically present for the arraignment, “a formal and ritualistic [requirement] that [ensures] the accused is aware of the charges against him and that he is protected against a second prosecution for the same misconduct.”¹⁸⁰

Second, Petitioner understood the charges against him and what occurred during the proceedings because, despite Petitioner’s admission that he understood only about “70 percent” of the interpretation,¹⁸¹ he clearly—and repeatedly—told the Commission that he understood what was happening and had no questions about the charges or his rights.¹⁸² For example, during voir dire of the interpreters, Petitioner said he understood;¹⁸³ during voir dire of the Military Judge, Petitioner said he understood;¹⁸⁴ and when the Military Judge informed Petitioner of his right to waive his presence at future sessions, Petitioner said he understood.¹⁸⁵ When the Military Judge explained Petitioner’s right to counsel, Petitioner asked for further clarification of the difference between a civilian attorney and a detailed military attorney.¹⁸⁶ Subsequently, Petitioner engaged in similar exchanges with the Military Judge regarding the procedural guide,¹⁸⁷ and Petitioner’s understanding of the Bahasa Indonesian language.¹⁸⁸ Accordingly, like in *Gonzalez*, Petitioner failed to show prejudice.¹⁸⁹

¹⁸⁰ *United States v. Wolff*, 5 M.J. 923, 925 (N-M. Ct. Crim. Rev. 1978).

¹⁸¹ Pet. at 8, 24 (citing Tr. at 110 (App. 330)).

¹⁸² See AE 0002.043 (TJ) at 5–7 (App. 144–App. 146).

¹⁸³ Tr. at 23 (App. 243).

¹⁸⁴ *Id.* at 110 (App. 330).

¹⁸⁵ *Id.* at 177 (App. 397).

¹⁸⁶ *Id.* at 43–44 (App. 263–App. 264).

¹⁸⁷ *Id.* at 54–55 (App. 274–App. 275).

¹⁸⁸ *Id.* at 109–11 (App. 329–App. 331).

¹⁸⁹ See *Gonzalez*, 339 F.3d at 729.

Third, the fact that Petitioner waited nearly two years to file the Petition shows its lack of merit. Petitioner is aware of his right to counsel and the nature of the charges because he spent those nearly two years working with his counsel, filing 43 classified and unclassified pleadings with the Commission to defend against the charges, totaling 777 pages.¹⁹⁰ Thus, like in *Bell*, any “difficulties” in the interpretation did not impede his ability to “conduct or cooperate intelligently in the defense of the case.”¹⁹¹

Fourth, when Petitioner told the Commission he understood what had occurred and had no questions—instead of objecting to the perceived inadequate interpretation—he tacitly approved the competency of the interpretation.¹⁹² In contrast, had Petitioner expressed confusion about his rights, the charges, or anything else that occurred during the arraignment, Respondent would have taken steps to remedy that issue, like in *Joshi*.¹⁹³ Instead, Petitioner chose to “remain silent” and only now “assert[s] a claim of inadequate translation,” which, as the court recognized, is “an open invitation to abuse.”¹⁹⁴ Indeed, the Commission specifically found that “the requirements of R.M.C. 904 have been met, and each Accused has been properly arraigned.”¹⁹⁵

¹⁹⁰ See Pleadings Filed by Petitioner Bin Lep Between September 1, 2021 and July 5, 2023, at 1–3 (Aug. 4, 2023) (App. 430–App. 432) (listing Petitioner’s military commission pleadings). These pleadings do not include the pleadings Petitioner filed with this Court, the U.S. District Court for the District of Columbia, and the Court of Appeals in Case Nos. 23-004 (U.S.C.M.C.R.), 20-cv-3344 (D.D.C.), 21-5014 (D.C. Cir.), 22-5026 (D.C. Cir.), and 22-5062 (D.C. Cir.).

¹⁹¹ 367 F.3d at 464; R.M.C. 909(a).

¹⁹² See *United States v. Cook*, 48 M.J. 236, 241 n.1 (C.A.A.F. 1998) (Crawford, J., dissenting) (recognizing “the maxim of Pope Boniface VIII: ‘Qui tacet, consentire videtur,’ or ‘He who is silent shows agreement.’”).

¹⁹³ See *Joshi*, 896 F.2d at 1310.

¹⁹⁴ *Valladares*, 871 F.2d at 1566.

¹⁹⁵ AE 0002.043 (TJ) at 11 (App. 150).

Finally, while Petitioner essentially makes the claim that his Commission is fundamentally unfair, he does not identify any concrete harm suffered as a result of any errors, anomalies, or irregularities in the arraignment.¹⁹⁶ Under R.M.C. 904, an arraignment is the “reading [of] the charges and specifications to the accused and calling on the accused to plead.” Here, there was no discernible practical consequence to Petitioner from the mere reading of the charges. Though Petitioner and his co-Accused were called upon to plea, all three deferred pleas,¹⁹⁷ an action that resulted in no prejudice to their cases. While certain pretrial motions are required to be made before entering a plea at an arraignment,¹⁹⁸ because Petitioner deferred his plea, he is still free to make motions before the entry of pleas. Indeed, the Military Judge advised defense counsel that the arraignment formally provided notice to the defense as to the charge sheet and “this locks the government . . . into the charges”¹⁹⁹ and invited counsel to make motions challenging the form, legality, and jurisdiction of the charge at a later session.²⁰⁰

Thus, Petitioner’s arraignment was simply an opportunity to have the charges read to him, and it resulted in no articulable harm to Petitioner’s case. This is not an instance in which Petitioner had been forced to take action based on information before him at the hearing, whether he understood or not. There were no decisions made by him at the time, such as a decision to file a motion or plead, that could not have been made later after further opportunity to consult counsel

¹⁹⁶ See, e.g., Pet. at 23–24 (cataloguing alleged errors in the interpretation).

¹⁹⁷ See Tr. at 175–76 (App. 395–App. 396).

¹⁹⁸ R.M.C. 905 requires the defense to make, *inter alia*, motions objecting to defects in the charges and specification, motions to suppress evidence compelling discovery, such as production of witnesses and documents, and motions for severance be made before entry of pleas. See R.M.C. 905(b).

¹⁹⁹ Tr. at 167 (App. 387).

²⁰⁰ *Id.* at 158 (App. 378).

and gain additional translation assistance if truly necessary. Petitioner remains free to raise and litigate motions, seek new counsel, and enter pleas during the pendency of the proceedings.

B. The Commission's Findings of Fact Undermine Petitioner's Claims

Petitioner argues that “[a]n accused has statutory and constitutional rights to be present” at “all critical stages of a proceedings [sic]” including arraignment.²⁰¹ Petitioner argues that the interpreters’ efforts were insufficient and constituted a constructive denial of his right to be present.²⁰² Petitioner argues that “[t]he insufficient translation compromised Petitioner’s present ability to understand the proceedings, thereby rendering his right to be present meaningless and violating ‘one of the most fundamental protections afforded’ to him.”²⁰³

The Commission, however, found facts that contradict Petitioner’s characterization of the arraignment. Specifically, the Commission found that: (1) the parties had been presented with ample time to prepare for the arraignment; (2) they had access to the charging documents to review ahead of time in both English and their native languages; (3) the parties were permitted to submit voir dire questions (although Petitioner declined to submit questions, stating that he was satisfied with his co-Accused’s questions); (4) the Commission conducted voir dire; (5) during voir dire, the Commission inquired into the interpreters’ qualifications, education, backgrounds, training, certifications, and possible reasons for bias; (6) Petitioner and his co-Accused had not provided evidence to persuade the Commission that the interpreters were biased; (7) the Commission engaged in several discussions with Petitioner and his co-Accused to ensure that they understood what was being said during the arraignment; (8) the record demonstrated the Commission’s

²⁰¹ Pet. at 19 (citations omitted).

²⁰² *Id.* at 20–21.

²⁰³ *Id.* at 21 (quoting *Hamdan*, 548 U.S. at 624).

willingness to take the time necessary to ensure that each Accused understood his rights and the charges against him; (9) the interpreters faithfully discharged their oaths to interpret truthfully and there was no basis to disqualify the interpreters; (10) Petitioner and his co-Accused had failed to persuade the Commission that they did not understand the proceedings; (11) the rights of Petitioner and his co-Accused were not violated; and (12) the arraignment was proper under R.M.C. 904.²⁰⁴

C. The Authorities Petitioner Cites Do Not Support His Claims

1. Arizona v. Fulminante

Petitioner argues that a defective arraignment constitutes a “structural defect,” meaning that “no specific showing of prejudice is required,” which satisfies the second *Cheney* condition.²⁰⁵ To support this claim, Petitioner cites *Arizona v. Fulminante*.²⁰⁶ In *Fulminante*, however, the Supreme Court did not say that defective arraignment was a “structural defect.” Instead, the Supreme Court distinguished admission of an involuntary confession, which the Supreme Court determined was not a “structural defect,” from “the total deprivation of the right to counsel” and the presence of “a judge who was not impartial,” which constituted “structural defects.”²⁰⁷ *Fulminante* does not mention an arraignment, and there is no evidence to suggest Petitioner did not have his counsel present or an impartial judge presiding. To the contrary, the record reflects

²⁰⁴ See *supra* notes 34–76 and accompanying text.

²⁰⁵ Pet. at 19.

²⁰⁶ *Id.* (citing *Arizona v. Fulminante*, 499 U.S. 279, 282 (1991)).

²⁰⁷ *Fulminante*, 499 U.S. at 309 (“The admission of an involuntary confession—a classic ‘trial error’—is markedly different from the other two constitutional violations referred to in the *Chapman* [v. *California*, 386 U.S. 18, 23 n.8 (1967)] footnote as not being subject to harmless-error analysis. One of those violations, involved in *Gideon v. Wainwright*, 372 U.S. 335 (1963), was the total deprivation of the right to counsel at trial. The other violation, involved in *Tumey v. Ohio*, 273 U.S. 510 (1927), was a judge who was not impartial. These are structural defects in the constitution of the trial mechanism, which defy analysis by ‘harmless-error’ standards.”).

that Petitioner's counsel were present and participating throughout the proceedings.²⁰⁸ Indeed, Petitioner has failed to identify any case that held that a defective arraignment rises to the level of a "structural defect."

2. *United States v. Cronic*

Similarly, Petitioner cites *United States v. Cronic*²⁰⁹ for the proposition that, "when a structural error is present, no specific showing of prejudice is required."²¹⁰ But *Cronic* identifies "the complete denial of counsel," not a deficient arraignment, as "a constitutional error of the first magnitude" such that "no amount of showing of want of prejudice would cure it."²¹¹ *Cronic* does not say that non-substantive errors in arraignment "would be constitutional error of the first magnitude" that relieves Petitioner of the requirement to show prejudice.

3. *United States ex rel. Negron v. New York*

Petitioner relies on *Negron* for the proposition that "as a 'matter of simple humaneness,' an accused 'deserve[s] more than to sit in total incomprehension' during a proceeding."²¹² But *Negron* is factually distinguishable from this case. In *Negron*, the defendant neither spoke nor understood any English, and his lawyer did not speak Spanish. That is significantly different than

²⁰⁸ See Tr. at 4 (App. 224) (recording the first time Petitioner's counsel raised the issue of the interpreters with the Military Judge, and the Military Judge's response thereto); *id.* at 179 (App. 399) (recording Petitioner's counsel's final statement at the close of the arraignment).

²⁰⁹ 466 U.S. 648 (1984).

²¹⁰ Pet. at 19 (citing *Cronic*, 466 U.S. at 659).

²¹¹ *Cronic*, 466 U.S. at 659. See also *id.* at 659 n.25 ("The Court has uniformly found constitutional error without any showing of prejudice when counsel was either totally absent, or prevented from assisting the accused during a critical stage of the proceeding.") (citing *Geders v. United States*, 425 U.S. 80 (1976); *Herring v. New York*, 422 U.S. 853 (1975); *Brooks v. Tennessee*, 406 U.S. 605, 612–13 (1972); *Hamilton v. Alabama*, 368 U.S. 52, 55 (1961); *White v. Maryland*, 373 U.S. 59, 60 (1963) (per curiam); *Ferguson v. Georgia*, 365 U.S. 570 (1961); *Williams v. Kaiser*, 323 U.S. 471, 475–76 (1945)).

²¹² Pet. at 20 (quoting *Negron*, 434 F.2d at 390).

Petitioner, who by his own account understood “about 70 percent”²¹³ of what had been said and told the military judge—in English—that he understood what had happened and had no questions about it. Moreover, the Commission held that *Negron* was distinguishable because the defendant there was not provided any real-time interpretation of the proceeding and was only provided two brief summaries of the testimony over a four-day trial.²¹⁴ In contrast, during Petitioner’s arraignment, “a commission interpreter provided real time interpretation for the entirety of the proceedings.”²¹⁵

4. *Valenzuela-Gonzalez v. U.S. Dist. Ct.*

Significantly, Petitioner claims that, “[a]bsent necessity, as opposed to convenience, a trial court’s mere ‘substantial compliance’ with procedural rules for arraignment is inadequate and thus violates such rules.”²¹⁶ Petitioner mischaracterizes the rule in *Valenzuela-Gonzalez*. There, the U.S. Court of Appeals for the Ninth Circuit noted that “[a]rraignment is not a procedure required by the due process clause of the fifth amendment.”²¹⁷ Furthermore, “[t]he sixth amendment right to confront witnesses is not implicated, since there are no witnesses.”²¹⁸ The Ninth Circuit “recognize[d] that *substantial compliance* with the ‘open court’ requirement of Rule 10 *may satisfy the rule*.”²¹⁹ The Ninth Circuit’s recognition that “substantial compliance” “may satisfy the rule”

²¹³ Pet. at 8, 24 (citing Tr. at 110 (App. 330)).

²¹⁴ AE 0002.043 at 6 (citations omitted) (App. 145).

²¹⁵ *Id.*

²¹⁶ Pet. at 27 (quoting *Valenzuela-Gonzalez v. U.S. Dist. Ct.*, 915 F.2d 1276, 1280–81 (9th Cir. 1990)) (emphasis added).

²¹⁷ *Valenzuela-Gonzalez*, 915 F.2d at 1280 (citing *Garland v. Washington*, 232 U.S. 642, 645 (1914); *United States v. Coffman*, 567 F.2d 960 (10th Cir. 1977)).

²¹⁸ *Id.* (citing *Snyder v. Massachusetts*, 291 U.S. 97, 107 (1934)).

²¹⁹ *Id.* (emphases added) (citing *Sweeney v. United States*, 408 F.2d 121 (9th Cir. 1969); Fed. R. Crim. P. 10, Advisory Committee Notes (“mere technical irregularity” does not warrant reversal)).

directly contradicts Petitioner's assertion that "mere 'substantial compliance'" is inadequate. Nowhere in *Valenzuela-Gonzalez* did the Ninth Circuit hold that "mere 'substantial compliance'" is inadequate.

Because Petitioner's arguments lack merit, he fails to show a clear and indisputable right to relief. Accordingly, the Petition fails.

IV. MANDAMUS IS NOT APPROPRIATE UNDER THE CIRCUMSTANCES

Finally, even assuming Petitioner could satisfy the first two *Cheney* conditions, the Court, in the exercise of its discretion, should deny the Petition because Petitioner cannot demonstrate that issuance of the writ of mandamus is "appropriate under the circumstances."²²⁰ Petitioner has the burden to demonstrate that mandamus would be appropriate by identifying "exceptional circumstances amounting to a judicial usurpation of power, or a clear abuse of discretion."²²¹ No such circumstances are present here, nor does Petitioner raise any.

A. The All Writs Act Is Not a Substitute for the Normal Appellate Process

Petitioner misapprehends the language of the All Writs Act, which provides that "[t]he Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."²²² Courts have explained what the term "in aid of [appellate] jurisdiction" means in the

²²⁰ *Cheney*, 542 U.S. at 381.

²²¹ *Id.*; see also *Mohammad v. United States*, 393 F. Supp. 3d 1101, 1106 (U.S.C.M.C.R. 2019) ("[T]he supplementary review power conferred on the courts by Congress in the All Writs Act is meant to be used only in the exceptional case where there is clear abuse of discretion or usurpation of judicial power." (quoting *Bankers Life & Casualty Co.*, 346 U.S. at 383 (internal quotation marks and citation omitted))); *id.* at 1107 ("Given its 'exceptional' nature, we cannot use mandamus to remedy anything less than a 'clear abuse of discretion or usurpation of judicial power.'" (quoting *Al-Nashiri I*, 791 F.3d at 82) (internal quotation marks omitted))).

²²² 28 U.S.C. § 1651.

mandamus context. General appellate jurisdiction over a trial court does not provide an unlimited ability to issue writs of mandamus for anything done by a trial court “in aid of” its appellate jurisdiction. Rather, the “traditional use of the writ in aid of appellate jurisdiction” has been “to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so.”²²³

But for more than two centuries, the Supreme Court has consistently reiterated the general rule that an appellate court must not use mandamus to control the discretion of trial judges or simply review alleged errors.²²⁴ When a trial court merely adjudicates an issue properly before it, it acts within its prescribed jurisdiction and appropriately exercises its authority and discretion. Thus, while such decisions may be reviewed on direct appeal, they do not constitute a basis for an appellate court to intervene before direct appeal “in aid of” its appellate jurisdiction.²²⁵

²²³ *Will v. Calvert Fire Ins. Co.*, 437 U.S. 655, 661 (1978) (quoting *Roche*, 319 U.S. at 26); see also *EV*, 75 M.J. at 333 (“[I]t is axiomatic that the All Writs Act is not an independent source of jurisdiction. It does not expand this Court’s jurisdiction, but only operates ‘in aid of’ our existing statutory jurisdiction.” (citing *Clinton v. Goldsmith*, 526 U.S. 529, 534–35 (1999)) (other citation omitted) (internal quotation marks omitted)).

²²⁴ See *Calvert Fire*, 437 U.S. at 665–66 (“Although the District Court’s exercise of its discretion may be subject to review and modification in a proper interlocutory appeal . . . we are convinced that it ought not to be overridden by a writ of mandamus.”); *Ex parte Bradley*, 74 U.S. (7 Wall.) 364, 377 (1868) (“For we agree that this writ does not lie to control the judicial discretion of the judge or court; and hence, where the act complained of rested in the exercise of this discretion, the remedy fails.”); *Ex parte Burr*, 22 U.S. (9 Wheat.) 529, 530 (1824) (denying mandamus over discretionary action by lower court and explaining that a reviewing court “will always feel the delicacy of interposing its authority” over discretionary lower court rulings, and should “do so only in a plain case” where “the conduct of the Circuit or District Court was irregular, or was flagrantly improper”); *United States v. Lawrence*, 3 U.S. (3 Dall.) 42, 53 (1795) (denying mandamus because “the District Judge was acting in a judicial capacity . . . and (whatever might be the difference of sentiment entertained by this Court) we have no power to compel a Judge to decide according to the dictates of any judgment, but his own”).

²²⁵ See *United States v. Kemp & Assocs.*, 907 F.3d 1264, 1277–78 (10th Cir. 2018) (finding that mandamus was not appropriate where the district court ruling was not a “gross abuse of discretion” because “to hold otherwise, our circuit could expect a flood of mandamus petitions, and our case would soon be cited for the proposition that the jurisdictional boundaries created by [the statute defining appellate jurisdiction] are easily eluded through the use of mandamus.”)

B. Petitioner Fails To Show that Mandamus Is Appropriate Under the Circumstances

Here, Petitioner does not attempt to meet his burden; instead, he justifies the writ by claiming the need for “clarifying precedent” to “ensure that the Government respects Petitioner’s procedural rights at every stage of the case.”²²⁶ This attempt to circumvent the normal appellate process fails for two reasons. First, “clarifying precedent” is unnecessary: case law, statutes, and rules and regulations already govern interpreter performance, and Petitioner sidesteps his burden of trying to show the Military Judge abused his discretion in concluding that any errors in the interpretation did not result in a fundamentally unfair trial.²²⁷ Second, that Petitioner waited nearly two years after a supposedly “insufficient, non-simultaneous translation of in-court proceedings” to file the Petition shows his intent to delay the proceedings rather than “ensur[ing] that the Government respects Petitioner’s procedural rights.”²²⁸ This Court should view Petitioner’s claim skeptically and not reward him for his “dilatory litigation tactics,”²²⁹ especially where case law clearly notes that a “petition for a writ of mandamus may never be employed as a substitute for appeal.”²³⁰

Thus, to grant the requested mandamus relief here seems not only to be without legal support, it also would be poor policy.”).

²²⁶ Pet. at 30.

²²⁷ See 10 U.S.C. § 948l; R.M.C. 502(e)(3)(A); Regulation for Trial by Military Commission ¶ 7-3 (2011); see also AE 0002.043 (TJ) at 11 (App. 150).

²²⁸ Pet. at 30.

²²⁹ *Rhines*, 544 U.S. at 278.

²³⁰ *In re Flynn*, 973 F.3d at 78 (internal quotations and citations omitted).

To date, military commission accused and their counsel have filed or joined 22 petitions for extraordinary relief with this Court, and they have filed 30 petitions for extraordinary relief with the Court of Appeals. See Petitions for Extraordinary Relief from Military Commission Accused and Their Counsel at 1–4 (Aug. 4, 2023) (listing petitions) (App. 433–App. 436). Of these 52 petitions for extraordinary relief, Petitioner has filed 2—comprising 1 with this Court and 1 with the Court of Appeals. See *id.* at 2, 4 (App. 434, App. 436).

Petitioner cites *Colonial Times, Inc. v. Gasch*²³¹ and *Schlagenhauf v. Holder*²³² for the proposition that “[m]andamus is appropriate under the circumstances when an appellate court must determine the application of a procedural rule in a new context ‘so as to avoid piecemeal litigation and to settle new and important problems.’”²³³ Neither case supports Petitioner’s claim.

I. Colonial Times, Inc. v. Gasch

Colonial Times predates *Cheney*, and the latter controls. Moreover, the facts of *Colonial Times* are distinguishable from this case. In *Colonial Times*, the petitioner was a publisher of a small-press “underground” newspaper that had been penalized by the U.S. Post Office for displaying on the cover “a sketch of an elderly woman, fully dressed, wearing a large lapel button expressing in harsh and graphic language disapproval of the District of Columbia food tax.”²³⁴ The petitioner filed a lawsuit seeking injunctive relief and sought to depose the Postal Service employees involved in the incidents alleged. The local court rules required that a judge issue a court order to proceed with the depositions, but the district court judge declined to issue that order.²³⁵ The petitioner then filed a petition with the Court of Appeals seeking mandamus relief. In evaluating the merits of this pre-*Cheney* mandamus petition, the Court of Appeals interpreted “subpart (b)(4)” of Federal Rule of Civil Procedure 30.²³⁶ The Court of Appeals observed that “[s]ubpart (b)(4) was added to Rule 30 in 1970 with a cryptic commentary,” and thus the question of how to interpret the new subpart was an issue of first impression within the circuit.²³⁷ The Court

²³¹ 509 F.2d 517 (D.C. Cir. 1975)).

²³² 379 U.S. 104 (1964).

²³³ Pet. at 29 (citing *Schlagenhauf*, 379 U.S. at 111; *Colonial Times*, 309 F.2d at 524).

²³⁴ *Colonial Times*, 509 F.2d at 519.

²³⁵ *Id.* at 520–21.

²³⁶ *Id.*

²³⁷ *Id.* at 520, 524.

of Appeals repeatedly emphasized that this question was an “issue of first impression.”²³⁸

2. *Schlagenhauf v. Holder*

Significantly, the *Colonial Times* court cited the Supreme Court’s 1964 decision in *Schlagenhauf v. Holder*, which held that “mandamus would lie to review an ‘issue of first impression’ in order to ‘settle new and important problems.’”²³⁹ Thus, the Court of Appeals concluded that “mandamus lies in [*Colonial Times*] because the issue of discovery involved is one of first impression and is important to the administration of discovery.”²⁴⁰

3. *This Case Does Not Present an Issue of First Impression*

In contrast with *Colonial Times* and *Schlagenhauf*, this case does not involve an issue of first impression. Questions of the sufficiency of an arraignment are not new, and, as described above, the Commission analyzed the sufficiency of Petitioner’s arraignment based on the controlling legal authority.²⁴¹ The Commission found that “R.M.C. 904 makes clear three requirements for a proper arraignment: 1) it shall be conducted in a military commission session; 2) it shall consist of reading the charges and specifications (the accused may waive the reading); and 3) the accused shall be called on to plead.”²⁴² The Commission found that all three “requirements of R.M.C. 904 have been met, and each Accused has been properly arraigned.”²⁴³

²³⁸ *Id.* at 524–25.

²³⁹ 379 U.S. at 111. Notably, *Cheney* effectively subsumed *Schlagenhauf*. *Cheney* did not overrule *Schlagenhauf* but instead relied on *Schlagenhauf* as an example of when the third *Cheney* condition would be satisfied: “the need to avoid ‘piecemeal litigation’ and to settle important issues of first impression in areas where this Court bears special responsibility.” *Cheney*, 542 U.S. at 391 (quoting *Schlagenhauf*, 378 U.S. at 111).

²⁴⁰ *Colonial Times*, 509 F.2d at 526.

²⁴¹ See *supra* notes 34–76 and accompanying text.

²⁴² AE 0002.043 (TJ) at 11 (App. 150).

²⁴³ *Id.*

In sum, Petitioner cannot show mandamus is “appropriate under the circumstances” of this case. Because Petitioner failed to carry his burden, the Petition fails.

CONCLUSION

Petitioner has failed to satisfy any of the three *Cheney* conditions required for issuance of a writ of mandamus. First, he has an adequate alternate means to seek review: direct appeal from final judgment. Second, he has failed to show that he has a “clear and indisputable” right to a new arraignment because he has failed to show any prejudice or impact on pretrial or trial proceedings. Third, he has failed to show that mandamus is “appropriate under the circumstances” where he waited nearly two years to bring the Petition.

For the foregoing reasons, the Court should deny the Petition.

Respectfully submitted,

//s//

MICHAEL J. O’SULLIVAN
HARIDIMOS V. THRAVALOS
BRYCE G. POOLE
Appellate Counsel

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

Appellate Counsel for the United States
Office of the Chief Prosecutor
Office of Military Commissions
1610 Defense Pentagon
Washington, D.C. 20301-1610
michael.j.osullivan14.civ [REDACTED]
[REDACTED]

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of U.S.C.M.C.R. Rule of Practice 15(g), because:

This brief contains 13,789 words.

2. The brief complies with the typeface and type style requirements of U.S.C.M.C.R. Rule of Practice 15(e) because:

This brief is written in 12-point Times New Roman font.

//s//

MICHAEL J. O'SULLIVAN
Appellate Counsel for the United States
Office of the Chief Prosecutor
Office of Military Commissions
1610 Defense Pentagon
Washington, D.C. 20301-1610
michael.j.osullivan14.civ [REDACTED]
[REDACTED]

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was sent by electronic mail to the Court and Counsel for Petitioner on August 4, 2023.

//s//

MICHAEL J. O'SULLIVAN
Appellate Counsel for the United States
Office of the Chief Prosecutor
Office of Military Commissions
1610 Defense Pentagon
Washington, D.C. 20301-1610
michael.j.osullivan14.civ [REDACTED]
[REDACTED]