AMERICAN CONSTITUTIONALISM

VOLUME I: STRUCTURES OF GOVERNMENT

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Supplementary Material

Chapter 11: The Contemporary Era – Judicial Power and Constitutional Authority

**In re Al-Nashiri, No. 14-1203** (D.C. Cir., 2015)

*The enemy combatants detained in Guantanamo Bay are examined by military commissions. Those military commissions were initially established by presidential order, but were eventually reconstituted by congressional statute in the 2006 Military Commissions Act and again in the 2009 Military Commissions Act. The newly established Court of Military Commission Review (CMCR) serves as an intermediate appellate court supervising the work of the military commissions, with appeals from the CMCR going to the U.S. Court of Appeals for the District of Columbia. The CMCR is composed of both civilian judges (who are nominated by the president and confirmed by the Senate) and military judges (who are military officers assigned to the court by the Secretary of Defense and removable only for good cause).*

*Abd al-Rahim Hussein Muhammed al-Nashiri is a Saudi national being held in Guantanamo Bay. He was accused of being a member of the al-Qaeda terrorist group and orchestrating the bombing of two naval ships and the attempted bombing of another, before being captured in the United Arab Emirates in 2002. The United States government charged him with several criminal offenses, including terrorism and murder in violation of the law of war. He was put on trial before a military commission for crimes that potentially carried the death penalty. The charges involving one naval ship was dismissed by the trial judge, and the government appealed to the CMCR. The CMCR formed a panel with two military judges and one civilian judge to hear the case. Nashiri moved to recuse the two military judges on the grounds that their appointment violated federal constitutional provisions requiring Senate confirmation of judges and presidential authority to control military officers. The CMCR denied the motion, and Nashir sought a writ of mandamus and prohibition from the D.C. circuit court to disqualify the military judges. A unanimous panel denied the petition for the writ, concluding that such an intervention at this stage of the proceedings was not justified and that the constitutional issues were better addressed after a decision was issued by the CMCR.*

HENDERSON, JUDGE.

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We first address our jurisdiction. The All Writs Act allows us to issue “all writs necessary or appropriate in aid of [our] jurisdiction[].” It is not, however, “an independent grant of appellate jurisdiction.” In other words, there must be an “independent” statute that grants us jurisdiction before mandamus can be said to “aid” it. We have such a statute here: the 2009 MCA [Military Commissions Act] gives this Court “exclusive jurisdiction to determine the validity of a final judgment rendered by a military commission.” Accordingly, we can issue a writ of mandamus *now* to protect the exercise of our appellate jurisdiction *later*. . . .

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We are . . . mindful of the final-judgment rule that the Congress included in the 2009 MCA. Although it does not defeat our jurisdiction, the rule serves an important purpose that would be undermined if we did not faithfully enforce the traditional prerequisites for mandamus relief. . . .

Mandamus is proper only if three conditions are satisfied:

First, the party seeking issuance of the writ must have no other adequate means to attain the relief he desires. . . . Second, the petitioner must satisfy the burden of showing that his right to issuance of the writ is clear and indisputable. Third, even if the first two prerequisites have been met, the issuing court, in the exercise of its discretion, must be satisfied that the writ is appropriate under the circumstances.

*Cheney v. U.S. District Court for the District of Columbia* (2004). We conclude that Nashiri does not satisfy the first and second requirements.

As we often caution, “[m]andamus is a ‘drastic’ remedy, ‘to be invoked only in extraordinary circumstances.’” . . . Otherwise, the writ could “be used as a substitute for the regular appeals process.” . . .

Mandamus is inappropriate in the presence of an obvious means of review: direct appeal from final judgment. . . . Here, for instance, the 2009 MCA empowers this Court to review all “matters of law” once a military commission issues a final judgment and both the convening authority and the CMCR [Court of Military Commission Review] review it. . . . Given the availability of ordinary appellate review, Nashiri must identify some “irreparable” injury that will go unredressed if he does not secure mandamus relief. He makes two attempts to do so. Both fail.

First, Nashiri draws an analogy to judicial disqualification, pointing out that this Court has entertained mandamus petitions when a judicial officer declines to recuse himself. But Nashiri misses the “irreparable” injury that justified mandamus in those cases: the existence of actual or apparent *bias*. With actual bias, ordinary appellate review is insufficient because it is too difficult to detect all of the ways that bias can influence a proceeding. . . . Nashiri does not allege that the military judges on the CMCR are biased against him – in fact or apparently. And our recusal cases do not support his petition. . . .

Second, Nashiri contends that, absent mandamus relief, he will suffer irreparable injury in the form of “the sui generis harms associated with defending against capital charges.” He, in effect, wants us to create a “death penalty” exception to the traditional rules of mandamus. We decline the invitation. Such an exception would contradict the bedrock principle of mandamus jurisprudence that the burdens of litigation are normally not a sufficient basis for issuing the writ. . . .

Granted, in *United States v. Harper*, 729 F.2d 1216 (9th Cir. 1984), the Ninth Circuit relied on the “substantial hardship” of a capital trial to support its decision to issue a writ of mandamus. But the constitutionality of the death penalty was the *subject* of the mandamus petition in that case. Specifically, the Harper court used mandamus to strike down the death-penalty provision of the Espionage Act. Here, however, Nashiri challenges the composition of an intermediate appellate tribunal. We fail to see how granting his petition would spare him the burdens of capital prosecution. Even if the military judges were disqualified and an all-civilian panel of the CMCR affirmed the dismissal of the . . . charges, Nishiri has yet to even begin defending against the capital charges stemming from the bombing of the U.S.S. *Cole* and the attempted bombing of the U.S.S. *The Sullivans*. Thus, capital prosecution is inevitable for Nashiri, with or without mandamus. . . .

Finally, Nashiri contends that, even absent irreparable harm, we should exercise our mandamus power to resolve the constitutional status of military judges on the CMCR – a pure question of law that could affect many cases. In other words, he wants us to use the writ in an “advisory” capacity. . . . Even if we were willing, we are *unable* to use advisory mandamus here because it would circumvent the no-other-adequate-means requirement. . . .

Additionally, the use of advisory mandamus in this case would conflict with the constitutional avoidance doctrine, a “time-honored practice of judicial restraint.” Nashiri’s petition presents two constitutional questions of first impression and “[c]ourts do not reach out to decide such questions.” Because Nashiri may ultimately be acquitted of the charged offenses, we may never need to resolve his constitutional challenges to the 2009 MCA. We should plainly not enter the fray now. . . .

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There may be another reason to pump our judicial brakes. Once this opinion issues, the President and the Senate could decide to put to rest any Appointments Clause questions regarding the CMCR’s military judges. They could do so by re-nominating and re-confirming the military judges to be *CMCR judges*. Taking these steps – whether or not they are constitutionally required – would answer any Appointments Clause challenge to the CMCR.

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*Denied*.