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EDITORIAL

Este necesară o imunitate sporită pentru magistraţi? Există garanţii adecvate pentru asigurarea independenţei magistraţilor ori sunt necesare garanţii suplimentare?

Alinel Bodnar,
Judecător, Judecătoria sectorului 3 București

1. În ședința Comisiei juridice a Camerei Deputaților, din data de 18.03.2021, a fost adoptat raportul privind Proiectul de lege pentru desființarea Secției pentru Investigarea Infracțiunilor din Justiție, propunându-se introducerea la art. 95 din Legea nr. 303/2004 a unui nou alineat, respectiv „*judecătorii și procurorii pot fi trimiși în judecată pentru săvârșirea unei infracțiuni contra înfăptuirii justiției, de corupție și de serviciu ori a unei infracțiuni asimilate infracțiunilor de corupție numai cu încuviințarea Secției pentru judecători sau, după caz, a Secției pentru procurori a Consiliului Superior al Magistraturii*".

În continuare vor fi analizate constituționalitatea acestui alineat, dar și mecanismele ce pot asigura magistraților o *protecție adecvată împotriva presiunilor*, luând în considerare considerentele Hotărârii nr. 23 din 11.02.2021, adoptate de Plenul Consiliului Superior al Magistraturii[1], unde s-a reținut că „*pentru a nu lipsi principiul independenței justiției de o garanție legală, este absolut necesară reglementarea unor mecanisme care să asigure protecția adecvată a judecătorilor și procurorilor împotriva oricăror presiuni*".

[1] http://www.cdep.ro/proiecte/2021/100/00/8/csm66.pdf, p. 1

2. Încuviințarea prealabilă trimiterii în judecată are o *natură juridică mixtă*, îmbrăcând forma unui *act de acuzare*, a unui *act de sesizare* a instanței de judecată, dar și a unui *act de înfăptuire a justiției*, venind în completarea acestora.

Pentru a se pronunța cu privire la încuviințarea trimiterii în judecată, Secțiile Consiliului Superior al Magistraturii vor fi chemate să decidă asupra aspectelor pentru care s-a dispus, de către procuror, trimiterea în judecată, precum și cu privire la învinuirea adusă inculpatului, acestea fiind practic transformate în organe judiciare.

Astfel, ulterior rezolvării cauzei de către procuror și emiterii rechizitoriului în conformitate cu prevederile art. 327 din Codul de procedură penală, Secția pentru judecători/procurori din cadrul Consiliului Superior al Magistraturii va fi obligată să analizeze materialul de urmărire penală, sens în care va verifica dacă procurorul a apreciat corect că a) sunt respectate dispozițiile legale care garantează aflarea adevărului; b) urmărirea penală este completă/incompletă; c) există probele necesare și legal administrate; d) fapta există/nu există, a fost/nu a fost săvârșită de magistrat; e) magistratul răspunde/nu răspunde penal, *urmând ca, în baza propriei evaluări, să încuviințeze sau nu trimiterea în judecată*.

Instituirea obligației de încuviințare a trimiterii în judecată, de către un organ administrativ, *desființează, în fapt, controlul ierarhic din cadrul Ministerului Public*, prevăzut de art. 132 alin. (1) din Constituție. În concret, o parte din atribuțiile de control ale legalității efectuării urmăririi penale și trimiterii în judecată sunt transferate unui organ administrativ. Or, procurorul trebuie să fie independent și toate soluțiile emise trebuie să fie verificate doar în cadrul controlului ierarhic sau de către instanțele de judecată competente.

De asemenea, secțiile Consiliului Superior al Magistraturii vor face o analiză proprie, înaintea celei făcute în conformitate cu prevederile art. 126 alin. (1) din Constituția României de Înalta Curte de Casație și Justiție și celelalte instanțe judecătorești stabilite de lege și *vor rezolva acțiunea penală*, deși nu vor pronunța una dintre soluțiile prevăzute de art. 396 din Codul de procedură penală.

3. Prin impunerea unui astfel de filtru suplimentar, în afara competențelor date de Constituția României exclusiv Ministerului Public și instanțelor judecătorești, independența justiției este grav afectată. Această încuviințare nu poate fi considerată o garanție, de natură să asigure o protecție adecvată judecătorilor și procurorilor împotriva oricăror presiuni, ci reprezintă o imixtiune în activitatea instanțelor de judecată și o afectare a competențelor constituționale acordate acestora și parchetelor. Mai mult, se transmite un semnal de neîncredere în justiția înfăptuită de instanțe, iar supremația legii într-un stat de drept nu mai poate fi asigurată de instanțele judecătorești competente, atât timp cât parcursul unui proces penal este împiedicat de un organ administrativ.

Consiliul Superior al Magistraturii trebuie să își limiteze competențele la atribuțiile sale administrative în legătură cu organizarea și funcționarea instanțelor și parchetelor, admiterea în magistratură și promovarea judecătorilor și procurorilor, precum și la atribuțiile jurisdicționale, numai atunci când funcționează ca instanță de judecată disciplinară, prin secțiile sale. Nu există nicio justificare pentru a se acorda „garantului independenței justiției" dreptul de a funcționa ca o instanță extraordinară, în altă materie decât domeniul răspunderii disciplinare a judecătorilor și procurorilor.

Or, primind competența de a efectua astfel de verificări, în cadrul procedurii de încuviințare a trimiterii în judecată a magistraților, secțiile dobândesc prin lege

statutul de *instanțe extraordinare*, ceea ce vine în flagrantă contradicție cu dispozițiile art. 126 alin. (5) teza I din Constituția României, conform cărora, „*este interzisă înființarea de instanțe extraordinare*". Art. 134 alin. (2) din Constituția României limitează, fără echivoc, competența Consiliului Superior al Magistraturii, statuând că „îndeplinește *rolul de instanță de judecată*, prin secțiile sale, *în domeniul răspunderii disciplinare* a judecătorilor și a procurorilor, potrivit procedurii stabilite prin legea sa organică". Astfel, competența este clar limitată, rezultând fără niciun dubiu că secțiile nu pot îndeplini rolul de instanță de judecată decât în domeniul răspunderii disciplinare. În toate celelalte cazuri, art. 126 alin. (1) din Constituția României prevede că „*justiția se realizează prin Înalta Curte de Casație și Justiție și prin celelalte instanțe judecătorești stabilite de lege*".

4. Chiar dacă, potrivit art. 66 alin. (1) din Legea nr. 47/1992 privind organizarea și funcționarea Curții Constituționale, este necesară încuviințarea trimiterii în judecată și în cazul judecătorilor Curții Constituționale, spre deosebire de Consiliul Superior al Magistraturii, potrivit art. 3 alin. (2) și (3) din Legea nr. 47/1992, în exercitarea atribuțiilor care îi revin, Curtea Constituțională este singura în drept să hotărască asupra competenței sale, iar competența Curții Constituționale nu poate fi contestată de nicio autoritate publică. Or, dincolo de faptul că o astfel de „imunitate" nu se justifică obiectiv nici în cazul judecătorilor Curții Constituționale, competența instanței constituționale neputând fi contestată, aceasta nu poate fi dată ca exemplu pentru a se aprecia că este constituțional ca inclusiv Consiliul Superior al Magistraturii să încuviințeze trimiterea în judecată a magistraților.

5. Obligativitatea încuviințării prealabile încalcă și prevederile art. 21 alin. (1) din Constituția României privind dreptul de acces la justiție al persoanelor vătămate/interesate, deoarece, în cazul în care nu se încuviințează trimiterea în judecată, aceste persoane nu au niciun remediu procesual efectiv, prin intermediul căruia să conteste soluția, fiind astfel încălcate prevederile art. 13 din Convenția Europeană a drepturilor omului. Mai mult, nu există nicio prevedere legală prin care să fie stabilite criteriile în baza cărora se va emite această încuviințare, rămânând astfel strict la latitudinea unui organ administrativ, care va putea decide în mod subiectiv și discreționar, ceea ce înseamnă că hotărârea ar putea fi arbitrară.

6. De asemenea, *pe de o parte*, încuviințarea trimiterii în judecată va putea fi asociată cu pronunțarea unui *verdict de vinovăție*, iar instanța care va judeca dosarul va avea o presiune în plus, atât timp cât judecătorii/procurorii din secțiile Consiliului Superior al Magistraturii au decis că sunt îndeplinite condițiile pentru trimiterea în judecată și că procesul penal își poate urma cursul. *Pe de altă parte*, soluția de respingere a cererii de încuviințare va fi privită ca un *verdict de nevinovăție*, deoarece ancheta penală se va opri, transmițându-se mesajul aparent că magistratul anchetat este nevinovat, deși, în realitate, se va naște o stare de incertitudine, atât timp cât vinovăția sau nevinovăția magistratului în privința căruia s-a emis rechizitoriul nu a fost stabilită printr-o hotărâre definitivă. Or, numai în fața instanțelor de judecată poate fi stabilită în mod definitiv vinovăția sau nevinovăția unei persoane, nu și în fața unui organ administrativ. Prin urmare, acest filtru administrativ este de neconceput într-un stat de drept consolidat, în care independența justiției este respectată și promovată.

7. Având în vedere statutul constituțional al magistraților și întrucât organele judiciare trebuie să îndeplinească exigența independenței, care se determină și în funcție de *existența unei protecții adecvate împotriva presiunilor exterioare*, sunt necesare anumite garanții, însă acestea nu pot goli de conținut, nici măcar parțial, rolul pe care îl au instanțele și magistrații într-un stat de drept.

Totodată, nu trebuie pierdut din vedere faptul că, într-un moment în care încrederea în justiție a avut atât de mult de suferit din cauza unor speculații și atacuri nejustificate sau din cauza inundării spațiului public cu tot felul de subiecte privind existența unei așa-zise frici obscure și neidentificate că în justiție ar exista presiuni din partea procurorilor și că s-ar săvârși mari abuzuri, *este necesar să reflectăm cu atenție asupra unor soluții echilibrate, care să garanteze cât mai eficient independența magistraților*.

Atât lipsa totală a imunității, cât și reglementarea unei imunități extinse, pot fi piedici pentru buna funcționare a justiției. Este astfel evident că independența justiției nu poate fi înțeleasă și acceptată fără existența unor garanții, dar în cazul în care imunitățile sunt prea extinse, se naște riscul ca acestea să se transforme în privilegii nejustificate. Or, imunitatea nu trebuie să fie un privilegiu personal, ci îi garantează magistratului că își poate exercita atribuțiile constituționale în mod liber și în deplină independență, fără a fi supus unor proceduri arbitrare. Astfel, imunitatea nu înseamnă impunitate, ci doar posibilitatea de exercitare a atribuțiilor în mod liber, conform propriei conștiințe, fiind o protecție oferită magistraților pentru a le garanta independența raționamentului și pentru a evita orice forme de abuz.

Imunitatea trebuie să protejeze magistratul de unele situații (de neacceptat într-un stat de drept), în care există riscul să fie scos dintr-un dosar, putându-se imagina situații în care se iau măsuri preventive, cu scopul de a-i inhiba sau de a le scădea legitimitatea publică și a le fi afectată reputația profesională. Prin urmare, *scopul imunității este acela de protecție a magistratului împotriva unor abuzuri flagrante*, nu de a fi o piedică în calea trimiterii în judecată, ulterior administrării tuturor probelor, imunitatea fiind o chestiune distinctă de problema aprecierii probelor și stabilirii vinovăției.

8. Imunitatea magistraților, în forma în vigoare în prezent, este o garanție adecvată, care răspunde dezideratului cetățeanului de a beneficia de o justiție independentă. Astfel, conform art. 95 alin. (1) din Legea nr. 303/2004, „*judecătorii și procurorii pot fi percheziționați, reținuți sau arestați numai cu încuviințarea Secției pentru judecători sau, după caz, a Secției pentru procurori a Consiliului Superior al Magistraturii*”.

Această imunitate operează în cazurile în care se va constata că există indicii temeinice în sensul că demersul judiciar îndreptat împotriva magistratului este grav viciat ori că există o încercare de intimidare sau de scoatere a magistratului dintr-un dosar ori că, în aparență, nu sunt suficiente probe pentru a convinge un observator obiectiv că se impune luarea unor măsuri preventive împotriva magistratului.

Competența secțiilor de a încuviința percheziția, reținerea și arestarea, nu poate fi pusă pe același nivel cu încuviințarea trimiterii în judecată, acesta nefiind un argument temeinic în sprijinul modificării propuse. *Pe de o parte*, măsurile preventive pot fi dispuse dacă există probe sau indicii temeinice din care rezultă că s-a săvârșit o infracțiune, măsura fiind necesară în scopul asigurării bunei desfășurări a procesului penal. *Pe de altă parte*, trimiterea în judecată se dispune atunci când urmărirea penală

este completă, există probele necesare și se constată că fapta există și a fost săvârșită de persoana trimisă în judecată. Astfel, standardul de probațiune este diferit, iar urmărirea penală poate fi efectuată și fără luarea unor măsuri preventive, acestea nefiind esențiale pentru urmărirea penală și sesizarea instanței de judecată. Or, trimiterea în judecată este obligatorie atunci când sunt îndeplinite condițiile prevăzute la art. 327 pct. 1 din Codul de procedură penală, iar după emiterea rechizitoriului doar instanțele de judecată se pot pronunța și stabili dincolo de orice îndoială rezonabilă vinovăția sau nevinovăția magistratului acuzat de săvârșirea unei infracțiuni.

9. Totuși, dacă garantul independenței justiției a reținut, în Hotărârea nr. 23 din 11.02.2021[2], că „*Soluția normativă propusă nu este, însă, însoțită de instituirea unor garanții menite să dea eficiență principiului independenței justiției prin asigurarea unei protecții adecvate a judecătorilor și procurorilor împotriva unor eventuale presiuni exercitate asupra lor.*", trebuie să vedem dacă pot exista și alte mecanisme ce pot asigura o protecție adecvată magistraților.

Dincolo de retorica existentă în spațiul public, trebuie identificate soluții echilibrate pentru creșterea încrederii în puterea judecătorească, fără a institui privilegii și imunități, care să fie percepute de populație ca un adăpost pentru persoanele care comit fapte penale. Societatea are așteptarea ca magistrații să fie persoane oneste și de bună-credință, motiv pentru care, limitele imunității trebuie să fie reglementate astfel încât să asigure echilibrul între garantarea independenței magistraților și necesitatea tragerii la răspundere a celor care comit fapte antisociale. Bunul mers al unui sistem de justiție integru depinde de calitatea umană și profesională implicată, însă pentru a preîntâmpina unele situații excepționale, sunt necesare garanții eficiente pentru a preveni și descoperi eventualele presiuni sau abuzuri, iar remediile să fie aplicate rapid și să corecteze eficient orice disfuncționalitate.

10. *O primă garanție* suplimentară pentru judecătorii și procurorii anchetați ar fi aceea ca independența procurorilor să fie întărită, consolidându-se rolul acestora într-un stat de drept. În această privință, în Avizul nr. 12 (2009) al CCJE s-a arătat că independența procurorilor, „*fiind asemănătoare cu independența garantată judecătorilor, nu este o prerogativă sau un privilegiu conferit acestora, ci o garanție în interesul unei justiții echitabile, imparțiale și eficiente*". Astfel, garantul independenței justiției trebuie să găsească soluții apte să întărească independența procurorilor ce vor ancheta și judecătorii suspectați de fapte penale, nu să fie preocupat de reglementarea unor imunități care vor depinde de un organ administrativ ce poate interfera nepermis într-o anchetă penală.

O a doua garanție ar fi aceea ca procurorii competenți să efectueze urmărirea penală a unui magistrat să fie cei care își desfășoară activitatea într-un parchet din circumscripția oricăreia dintre curțile de apel învecinate cu curtea de apel în a cărei circumscripție își desfășoară activitatea magistratul suspectat că a săvârșit o faptă prevăzută de legea penală. În acest fel, în considerarea principiilor imparțialității justiției și a protejării intereselor legitime ale persoanelor vătămate, pot fi înlăturate îndoielile cu privire la imparțialitatea procurorilor.

O a treia garanție ar fi aceea ca suspendarea obligatorie din funcție a

[2] http://www.cdep.ro/proiecte/2021/100/00/8/csm66.pdf, p. 1

magistratului să aibă loc doar după pronunțarea unei sentințe, în primă instanță, iar până la acest moment procesual (dacă tot se dorește creșterea rolului garantului independenței justiției), secțiile Consiliului Superior al Magistraturii să aibă facultatea de a aprecia dacă se impune suspendarea din funcție, atunci când circumstanțele cauzei relevă că există elemente de natură să aducă atingere prestigiului justiției. Faptul că art. 62 alin. (1) lit. a) din Legea nr. 303/2004 prevede că magistratul este suspendat din funcție, prin efectul aprecierii procurorului care a dispus trimiterea în judecată și a confirmării judecătorului de cameră preliminară, nu înseamnă că trebuie instituită „garanția" ca *un organ administrativ să confirme ori să infirme trimiterea în judecată*.

ATITUDINI

Judicial Disclosure and the Judicial Mystique

Michel Paradis*

Abstract:

Judges in the American legal system are expected to be neutral. To this end, judges are required to recuse themselves whenever their impartiality might reasonably be questioned. Yet, this requirement is by and large designed to be self-policed. This self-policing structure is-a deviation from the ordinary presumptions of adversarial litigation, not the least because it depends upon the presumption that judges are disinterested about whether they are improperly interested. To compensate for this, a robust body of common law has developed that requires judges to disclose facts about themselves that might affect their neutrality, even if they do not believe that recusal is required.

The nature of judicial disclosure obligations is surprisingly under-theorized both in the case law and the scholarly literature. The case law, especially, has been prone to ground the bases and limits of judges' disclosure obligations on formalistic and often quite specious arguments that, this essay concludes, tend to reach a defensible result for misguided and often contradictory reasons.

This essay further concludes that the extent of a judicial actor's disclosure requirements tends to be inversely correlated with the durability of their judicial status. The more robust a judicial actor's claim to judicial status, the more the judicial actor is protected from disclosure by what I call the "judicial mystique," the presumption that the judge is the mere embodiment of rules governed state power and may therefore be interchanged with any other judge without an appreciable effect on the outcome of any given case. Hence, Supreme Court judges disclose very little about themselves, whereas arbitrators are subject to exceptionally rigorous disclosure obligations.

The essay then considers the peculiar place of military judges along this continuum and offers-a close reading of the D.C. Circuit's decision in In re Al-Nashiri,

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921 F.3d 224 (D.C. Cir. 2019), which vacated the rulings of a military judge, in part, because of his failure to disclose the extent to which he was seeking post-retirement employment from the Department of Justice in a high-profile case.

Rezumat:

Este de așteptat ca judecătorii din sistemul judiciar american să fie neutri. În acest scop, aceștia sunt obligați să se abțină ori de câte ori imparțialitatea lor ar putea fi pusă în mod rezonabil, la îndoială. Cu toate acestea, cerința este în general concepută pentru a fi verificată din oficiu. Această cerință de autoverificare este o abatere de la prezumțiile obișnuite ale proceselor contradictorii, nu în ultimul rând deoarece depinde de prezumția că judecătorii sunt dezinteresați asupra aceea ce îi interesează în mod necorespunzător. Pentru a compensa acest lucru, s-a dezvoltat un corp robust de reguli de drept comun care cer judecătorilor să dezvăluie fapte despre ei înșiși care le-ar putea afecta neutralitatea, chiar dacă nu cred că este necesară recuzarea.

Natura obligațiilor de divulgare judiciară este surprinzător de subteoretizată, atât în jurisprudență, cât și în doctrină. În special, jurisprudența a fost înclinată să întemeieze cadrul și limitele obligațiilor de divulgare a judecătorilor pe argumente formaliste și adesea destul de specioase care, conchide acest eseu, tind să ajungă la un rezultat defensiv din motive greșite și adesea contradictorii.

Acest eseu concluzionează în continuare că amploarea cerințelor de divulgare din partea unui participant judiciar tinde să fie invers corelată cu durabilitatea statutului lor judiciar. Cu cât pretenția unui participant judiciar la statutul judiciar este mai robustă, cu atât este mai protejat de dezvăluire de către participantul judiciar prin ceea ce se denumește „mistică judiciară", prezumția că judecătorul este simpla întruchipare a regulilor guvernate de puterea de stat și, prin urmare, poate fi schimbat cu orice alt judecător fără un efect apreciabil asupra soluției unei cauze date. Așadar, judecătorii Curții Supreme dezvăluie foarte puțin despre ei înșiși, în timp ce arbitrii sunt supuși unor obligații de divulgare excepțional de riguroase.

Eseul ia în considerare locul aparte al judecătorilor militari și oferă o lectură atentă a deciziei circuitului D.C. în cauza In re Al-Nashiri, 921 F.3d 224 (DC Cir. 2019), care a anihilat deciziile unui judecător militar, în parte, din cauza omisiunii de a face publică măsura în care căuta un loc de muncă după pensionare la Departamentul de Justiție, într-un post de rang înalt.

Keywords: judicial ethics, legal ethics

I. Introduction

Judicial neutrality is said to be the bedrock of the American legal system.[3] It is a principal safeguard of fairness. It signals the appearance of fairness and thereby bolsters the public's faith in the stability of the country's rule of law, which depends upon the belief that judicial decisions are decided on principle, not personal caprice. If state power is rule governed, the thinking goes, its modalities should obey Leibnitz' *salva veritate* principle.[4] Those wielding state power in the particular case must be

[3] See, e.g., Marshall v. Jerrico, Inc., 446 U.S. 238, 242 (1980).

[4] Gottfried Leibniz, Logical Papers, ed. G. Parkinson (Oxford: Clarendon Press 1966), at 52; see also H. Ishiguro, Leibniz's Philosophy of Logic and Language (Cambridge: Cambridge University Press 1990), at 18.

interchangeable without meaningfully affecting the result.

A variety of rules and rituals, therefore, aim to depersonalize the judiciary. In addition to a rigorous confirmation process, life tenure, and salary protection, federal judges typically are addressed by impersonal titles, such as "your honor" or "the court," wear trademark black robes, and sit by designation of a lottery system that randomly selects the cases on their dockets. All of these rules and rituals aim to foster what I call the "judicial mystique"—a presumption that the judge deciding a case is the mere embodiment of the state and not a person with individual interests, biases, relationships, appetites, and foibles.

But, of course, judges are people. Hence, the rules of judicial ethics compel judges to disqualify themselves when any of those undesirable human traits might compromise a reasonable person's belief in the fiction that they are algorithmically executing the subroutines of the law.[5] By statute, specifically 28 U.S.C. § 455, federal judges and their quasi-judicial Article I counterparts are obliged to disqualify themselves when they are biased or where there is an unavoidable appearance of bias, such as when they themselves or a close relative have an "interest that could be substantially affected by the outcome of the proceeding."[6] Judges also have an ongoing obligation to inform themselves about their and their close relations' relationships and interests, which could—if discovered — yield such an appearance.[7]

The nature of judicial disclosure obligations is surprisingly under-theorized both in the case law and the scholarly literature.

One of the more anomalous aspects of the federal judicial ethics regime, however, is the expectation that judicial ethics will be self-policing.[8] The federal statutes governing recusals put the burden on judges to act sua sponte.[9] Recusals done in response to party-driven motion practice are ordinarily decided by the very judge accused of being too biased to hear the case fairly.[10] If judges refuse to recuse themselves when they should, their decisions are not immediately appealable.[11] Instead, parties who fear a judge's bias must file writs of mandamus, which are governed by extraordinarily deferential legal standards, and come to the reviewing court in a formal posture that literally asks whether the judge below failed to do something that they clearly and indisputably should have done sua sponte.[12]

The presumption that judicial ethics are self-policing is a surprisingly

[5] CODE OF CONDUCT FOR UNITED STATES JUDGES Canon 2 (2019); see also Hughes v. Black, 160 A.2d 113, 116 (Me. 1960) (noting that a judge's pecuniary interests, bias, and prejudice may be causes for disqualification).
[6] 28 U.S.C. § 455(b).
[7] Id. § 455(c).
[8] See Liljeberg v. Health Servs. Acquisition Corp., 486 U.S. 847, 867-68 (1988); Davis v. Bd. of Sch. Comm'rs, 517 F.2d 1044, 1051 (5th Cir. 1975).
[9] 28 U.S.C. § 455(b).
[10] Amanda Frost, Keeping Up Appearances: A Process-Oriented Approach to Judicial Recusal, 53 U. KAN. L. REV. 531, 571-72 (2005).
[11] See, e.g., Mischler v. Bevin, 887 F.3d 271, 271 (6th Cir. 2018) (per curiam); United States v. Phillips, 420 F. App'x 269, 269 (4th Cir. 2011) (per curiam).
[12] See, e.g., In re Kensington Int'l Ltd., 368 F.3d 289, 300-01 (3d Cir. 2004).

underexplored exception to the ordinary norms of adversarial litigation. And nowhere is that more apparent than the standards governing when judges must disclose facts about themselves to litigants, a problem that is largely untheorized in academic literature, except when it turns up as relevant to topical problems, such as judges' use of social media.[13] No federal statute imposes any case-specific disclosure requirements. Rather, such judicial disclosure requirements have been implied as a matter of common law.[14] Personal disclosure of any kind, of course, inevitably compromises the Jupiterian aura that the judiciary often credits as a major source of its political legitimacy. As a consequence, disclosure requirements have been enforced in often unpredictable ways that reflect a tension between the preservation of the judicial mystique — i.e. the presumption of a judge's impersonal neutrality that aims to foster the appearance of fairness—and the adversarial system's expectation that candor about all relevant truths is elemental to actual fairness.

A review of the governing ethical standards, including the case law and forum-specific rules and practices, suggests that the durability of an individual's judicial status is a leading determinant of how this tension between mystique and candor is resolved. Hence, arbitrators—both by association rules and by Supreme Court case law—have broad disclosure obligations.[15] Life-tenured federal judges, by contrast, are trusted to disclose less.[16] Supreme Court justices barely disclose anything at all.[17]

The inverse correlation between the durability of individuals' judicial status and their disclosure obligations is an intuitive result. The more structural, professional, and social protections someone enjoys when engaging in the judicial task, the more trust in their ability to self-police seems warranted and the greater the cost to the judicial mystique (and hence the appearance of fairness) that will come from denuding their personal lives. The fewer such protections, the less trust is warranted, and the appearance of fairness increasingly depends not upon a presumptive mystique, but upon the confidence in the adversarial process' ability to sus out whether a particular judge has something to hide.

This Article principally considers the place of the military judiciary on this continuum.[18] On the one hand, military judges are government officials who have taken on more and more of the trappings of the judicial mystique, such as the wearing of black robes.[19] On the other hand, military judges are not actually "judges" in the sense of having any special judicial status.[20] They have no life tenure, no salary protection, and the Supreme Court has squarely held that they are, at bottom, just military officers temporarily assigned to performing judicial duties.[21]

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[13] See Katrina Lee, Your Honor, on Social Media: The Judicial Ethics of Bots and Bubbles, 19 NEV. L.J. 789, 816-17 (2019); Benjamin P. Cooper, Judges and Social Media: Disclosure as Disinfectant, 17 SMU SCI. & TECH. L. REV. 521, 530-32 (2014); John G. Browning, Why Can't We Be Friends? Judges' Use of Social Media, 68 U. MIA. L. REV. 487, 511-13 (2014); James Podgers, It's Not Easy Being Social, ABA J., May 2013, at 58; Ruth V. Glick & Laura J. Stipanowich, Arbitrartor Disclosure in the Internet Age, 67 DISP. RESOL. J., Feb.–Apr. 2012, at 22, 25-26.

[14] See infra Part II.

[15] See infra Part III.B.

[16] See infra Part III.A.

[17] See infra note 68 and accompanying text.

[18] See infra Part III.C.

[19] See infra Part III.C.

[20] Weiss v. United States, 510 U.S. 163, 175-76 (1994).

[21] Id.

The practical result of this ambiguous judicial status is that military justice practice now takes for granted that a military judge is subject to comparatively rigorous disclosure obligations. Not only do military judges routinely provide detailed service records before proceedings begin, they submit to voir dire by counsel for both sides and invite motions to disqualify as one of the first orders of business.[22] Military judges therefore begin proceedings with virtually no presumption of judicial status, which makes sense given the formal and practical realities. Rather, their judicial status is earned through this crucible of disclosure and interrogation. And it can accordingly be lost when they fail to be candid about facts that might call their neutrality into account.

To illustrate, this Article offers the reader a deep dive into the case of In re Al-Nashiri.[23] In the spring of 2019, the Circuit issued a writ of mandamus to retroactively disqualify a military judge and to vacate years' worth of his rulings.[24] It did this, even under the stringent mandamus standard, because the military judge had been secretly negotiating for an immigration judge appointment from the Attorney General, whilst the Justice Department was prosecuting a capital case before him in the Guantanamo military commissions.[25]

Lest the reader think I am shirking my own scholarly duty to disclose, I was counsel for the petitioner who prevailed in the case. This Article will not, therefore, go into matters that would implicate privileged materials, such as attorney-client communications, litigation strategy, or my view of the effect of the decision on the Al-Nashiri case, which at the time of this writing remains ongoing. I am also constrained in my ability to relay certain facts about the case because I am both governed by the case's protective order and because of my security clearance obligations. Finally, the reader should assume that I am biased in thinking that the D.C. Circuit came to the correct conclusion.

Despite my shortcomings as author, it is nevertheless worthwhile to consider the Al-Nashiri case in detail and what it reveals about judges' ethical duty to disclose information about themselves, both in general and in the military justice system specifically. It offers one of the rare opportunities where a federal circuit court of appeals has been able to inspect the more prosaic aspects of how military justice actually operates. It also is revealing for the roads not taken, specifically the arguments proffered by the government to distinguish the civilian and military systems that the Circuit ultimately rejected in favor of requiring military judges to adhere to robust principles of self-disclosure.

This Article will therefore begin with a general discussion of judges' disclosure obligations, including their origins, scope, and rationales.[26] It will then proceed to lay out the fairly convoluted background of the Al-Nashiri case, which ultimately led it to go before the D.C. Circuit.[27] Finally, it will offer a close reading of the Circuit's reasoning, with particular emphasis on the arguments the Circuit rejected.[28]

[22] See RULES FOR COURTS-MARTIAL 902(d)(1)–(2) (2019) [hereinafter RCM].
[23] 921 F.3d 224 (D.C. Cir. 2019).
[24] Id. at 240.
[25] Id. at 237.
[26] See infra Parts II–III.
[27] See infra Parts IV–V.
[28] See infra Part V.

II. THE LEGAL BASIS OF JUDICIAL DISCLOSURE OBLIGATIONS

The federal disqualification statute, 28 U.S.C. § 455, imposes no express disclosure obligations on federal judges.[29] Beyond the general employment disclosures otherwise compelled by law, such as annual financial disclosures,[30] a federal judge's obligation to disclose potential grounds for disqualification to litigants has been fashioned as a matter of common law.[31]

These common law disclosure requirements have, in part, been formalistically implied into the language of § 455.[32] Specifically, § 455(e) provides various grounds on which an otherwise mandatory judicial disqualification may be waived by the parties after "a full disclosure on the record of the basis for disqualification."[33] That the parties may waive such grounds, the reasoning goes, implies that the parties are in a position to make a knowing and intelligent balancing of the all the relevant facts, which, in turn, implies that the judge has made those facts available for the parties to evaluate. This chain of implications does not actually follow, though, for at least three reasons.

First, facts warranting a judge's disqualification might be discovered through the parties' own initiative. A judge's various financial interests and potentially disqualifying relationships are often going to be matters of accessible public record. Upon the discovery of such facts, parties can raise and waive the grounds for disqualification on the record in the absence of the judge's taking any initiative or making any personal disclosure.[34] As will be seen in the discussion of the Al-Nashiri case, the defendant's counsel discovered the facts warranting disqualification solely based upon public records[35] and the D.C. Circuit rejected the government's offer to have the military judge testify to adduce additional, potentially mitigating facts.[36]

Second, the only ground for disqualification that can be waived is the general disqualification provision of § 455(a), which simply asks whether the judge's "impartiality might reasonably be questioned."[37] Waiver is not permissible, and hence no disclosures to inform that waiver are required, if the case implicates one of § 455(b)'s non-waivable grounds for disqualification, which include the often highly subjective claims of "personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding."[38]

Third, § 455 only requires a waiver from the parties when the relevant facts,

[29] United States v. Bosch, 951 F.2d 1546, 1555 n.6 (9th Cir. 1991).

[30] 5 U.S.C. app. §§ 101–102; see also Duplantier v. United States, 606 F.2d 654, 657-59 (5th Cir. 1979).

[31] See, e.g., In re Kensington Int'l Ltd., 368 F.3d 289, 313-14 (3d Cir. 2004); Bosch, 951 F.2d at 1555 n.6; United States v. Schreiber, 599 F.2d 534, 537 (3d Cir. 1979); JEFFREY M. SHAMAN ET AL., JUDICIAL CONDUCT AND ETHICS 146-47 (2d ed. 1995); MODEL CODE OF JUD. CONDUCT Canon 3E (AM. BAR ASS'N 1990).

[32] See, e.g., Bosch, 951 F.2d at 1555-56; United States v. Murphy, 768 F.2d 1518, 1537 (7th Cir. 1985); see also Leslie W. Abramson, Appearance of Impropriety: Deciding When a Judge's Impartiality "Might Reasonably Be Questioned", 14 GEO. J. LEGAL ETHICS 55, 61 n.34 (2000) ("Disclosure is a necessary prerequisite to a waiver of disqualification.").

[33] 28 U.S.C. § 455(e).

[34] See, e.g., CHARLES GARDNER GEYH, JUDICIAL DISQUALIFICATION: AN ANALYSIS OF FEDERAL LAW 72-73 (Kris Markarian ed., 2d ed. 2010); In re Al-Nashiri, 921 F.3d 224, 227 (D.C. Cir. 2019).

[35] Al-Nashiri, 921 F.3d at 227.

[36] See Brief of the United States in Opposition at 50-51, In re Al-Nashiri, 921 F.3d 224 (D.C. Cir. 2019) (No. 18-1279).

[37] 28 U.S.C. § 455(a), (e).

[38] Id. § 455(b), (e).

in fact, would otherwise compel a judge's disqualification.[39] The statute, in other words, says nothing about the disclosure of facts that are only arguably disqualifying. Rather, § 455 is premised on judges' capacity to self-police. Judges must disqualify themselves and if they do not, in situations where disqualifying facts become known, aggrieved litigants have no right to interlocutory appeal.[40] Instead, they must resort to the extraordinary remedy of mandamus to compel judges to disqualify themselves.[41] But if the judge is the only individual aware of the relevant facts, and if that judge determines, in good faith, that the arguably disqualifying facts do not actually require disqualification, then no waiver is statutorily necessary and, hence, no disclosure is necessary.[42]

What, then, are the bases for imposing broader disclosure requirements on federal judges than are strictly compelled by § 455? The most obvious is a largely unstated due process rationale. A federal judge is an agent of the government and, when the government purports to impose the law's burdens on individuals, there are a variety of circumstances where due process requires transparency: the traditional notice and an opportunity to be heard.[43]

In criminal cases, due process compels Brady obligations that temper the government's prosecutorial zeal by requiring the sua sponte disclosure of information that might bear on the basic fairness of the judicial process.[44] A judge who has undisclosed reasons to be inclined to rule for the government on the admission of a piece of evidence, for example, is substantively identical to a prosecutor who fails to disclose information that would tend to make that same evidence inadmissible. In either case, criminal defendants are prevented from a fair opportunity to protect their rights from hidden risks.

Related, but distinct in terms of the equities at stake, considerations of judicial administration also warrant the judiciary's raising the floor set by Congress in § 455.[45] The Supreme Court has regularly identified an inherent "supervisory power [that] serves the 'twofold' purpose of deterring illegality and protecting judicial integrity."[46] The judiciary has an institutional interest in bolstering its members' reputation for integrity, lest it risk the credibility, and ultimately the enforceability, of its own judgements.[47] And so, while Congress may be content to allow individual judges to police their own conduct, the

[39] Id. § 455(a), (e).
[40] See, e.g., Mischler v. Bevin, 887 F.3d 271, 271-72 (6th Cir. 2018) (per curiam); United States v. Phillips, 420 F. App'x 269, 269 (4th Cir. 2011) (per curiam); United States v. Brakke, 813 F.2d 912, 913 (8th Cir. 1987) (per curiam).
[41] See Cobell v. Norton, 334 F.3d 1128, 1137, 1139 (D.C. Cir. 2003); In re Kempthorne, 449 F.3d 1265, 1269 (D.C. Cir. 2006); In re Brooks, 383 F.3d 1036, 1041 (D.C. Cir. 2004).
[42] Cf. United States v. Murphy, 768 F.2d 1518, 1537, 1539-40 (7th Cir. 1985).
[43] See, e.g., Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 542 (1985); Grannis v. Ordean, 234 U.S. 385, 394-95 (1914).
[44] See Brady v. Maryland, 373 U.S. 83, 86-88 (1963); Mooney v. Holohan, 294 U.S. 103, 108, 111-12 (1935).
[45] See Hollingsworth v. Perry, 558 U.S. 183, 196 (2010) (taking for granted the Supreme Court's "significant interest in supervising the administration of the judicial system" that was "particularly acute when those rules relate to the integrity of judicial processes."); Cupp v. Naughten, 414 U.S. 141, 146 (1973) ("[A]ppellate court[s] will, of course, require the trial court to conform to constitutional mandates, but it may likewise require it to follow procedures deemed desirable from the viewpoint of sound judicial practice although in nowise commanded by statute or by the Constitution.").
[46] United States v. Payner, 447 U.S. 727, 736 n.8 (1980).
[47] See Hollingsworth, 558 U.S. at 196-97.

institutional judiciary has every incentive to take steps to assuage public skepticism over the capacity of any governmental actor to reliably self-police.

While corrupt judges are likely to be the most salient cases-in-point against self-policing, uncovering bad faith actors is not actually the best rationale of judicial administration for tempering self-policing with disclosure requirements. A corrupt judge is unlikely to be compelled to honestly abide by disclosure requirements any more than any other ethical standard. Rather, disclosure requirements temper good faith defects in self-policing. These include the influence of cognitive biases that would lead judges to simply overestimate the appearance of their own fairness, as well as features of the American judicial process that make it difficult for any judge to fairly assess whether their own disqualification is warranted.

One feature of the judicial process that is a major obstacle to effective self-policing is a methodological byproduct of § 455's self-policing structure. Because disqualification is self-policing, judicial recusals are rarely explained in published orders. When judges disqualify themselves, the recusal is apt to be simply noted in a minute order at the same time a new judge is assigned.

One famous example arose out of Elk Grove Unified School District v. Newdow,[48] the Pledge of Allegiance case that reached the Supreme Court in 2004.[49] Justice Antonin Scalia had made a speech criticizing activist litigants who challenged the inclusion of phrases such as "In God We Trust" on currency and "under God" in the Pledge of Allegiance.[50] This, for obvious reasons, called into question Justice Scalia's willingness to evaluate the Newdow case disinterestedly, and the respondent moved for Justice Scalia to recuse himself.[51] No ruling was ever issued from the Court. Instead, in subsequent orders and the ultimate opinion, it was simply noted that, "Justice Scalia took no part in the consideration or decision of this case."[52]

Merits decisions on disqualification issues, therefore, tend to be in cases in which a judge has denied a disqualification motion, such as the lengthy memorandum opinion issued by Justice Scalia the same year as Newdow, declining to recuse himself from a case involving Vice President Dick Cheney.[53] This practice necessarily bulks the extant case law with cases in which myriad fine distinctions and rationales for not recusing can be found.

The reliance on mandamus actions to challenge judges' refusal to disqualify also colors the case law with the stringency of the mandamus standard of review. Appellate cases in which disqualification has been compelled necessarily all involve a finding that a judge's refusal to disqualify was so clearly and indisputably wrong as to warrant extraordinary relief.[54] The most authoritative exemplars of disqualifying conduct, therefore, necessarily tend toward the most extreme. Combine the few precedential touchstones for identifying when disqualification is appropriate with judicially crafted doctrines that presume a judge's

[48] 542 U.S. 1 (2004).
[49] Id. at 5.
[50] Associated Press, Scalia Attacks Church-State Court Rulings, N.Y. TIMES, Jan. 13, 2003, at A19.
[51] See generally Suggestion for Recusal of Justice Scalia, Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1 (2004) (No. 02-1624).
[52] Newdow, 542 U.S. at 18.
[53] See generally Cheney v. U.S. Dist. Ct. for D.C., 541 U.S. 913 (2004).
[54] See, e.g., In re Al-Nashiri, 921 F.3d 224, 233 (D.C. Cir. 2019).

fairness[55] and impose a duty to sit,[56] and a judge left to self-police has every reason to resolve all doubts against disqualification.

There is also the simple fact that judges' vast discretionary power over litigants is apt to chill any reasonable attorney's willingness to impugn the judge's partiality. Despite what judges say in the abstract, any litigator who has pressed a disqualification motion has seen the defensive sourness such motions provoke, making even otherwise good-tempered judges—who ordinarily live comfortable lives of presumed authority and deference—palpably bristle. As Amanda Frost noted in a broader analysis of judicial recusal, lawyers have every reason to hesitate, not simply because a claim of disqualifying bias might dispose the judge against a client, but also because lawyers are repeat players and rightfully worry about poisoning their relationships with judges before whom they regularly appear.[57] The inherent awkwardness of this situation is recognized (albeit implicitly) by the Federal Court Appeals Manual, when it acknowledges "the lawyer will probably have insufficient information to feel comfortable in asserting without reservation that the judge should have been disqualified."[58]

Courts have therefore read a judge's duty to disclose more broadly than the text of § 455 would require and to include the disclosure of facts that could arguably be disqualifying, even if the particular judge does not believe that they are.[59] Yet, the judiciary has done this, at least for life-tenured federal judges, strictly within the logic of judicial self-policing.[60]

A principal means by which this has been accomplished has been by, in essence, making a disqualifying fact out of the failure to disclose an arguably disqualifying fact itself.[61] In other words, judicial candor has been treated as a proxy for whether judges truly believe there are reasonable questions about their partiality. The disclosure itself has been, therefore, treated as having an inoculating effect on any suggested bias.

One of the clearest examples of this is United States v. Mikhel,[62] 60 wherein the Ninth Circuit rejected a disqualification argument when a district judge had "promptly and clearly disclosed" his exploration of a post-judicial job in a U.S. Attorney's Office and "immediately withdrew his application when defendants filed their motion [objecting]."[63]

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[55] See, e.g., Schweiker v. McClure, 456 U.S. 188, 195-96 (1982); Withrow v. Larkin, 421 U.S. 35, 47 (1975); United States v. Denton, 434 F.3d 1104, 1111 (8th Cir. 2006).

[56] See, e.g., United States v. Caramadre, 807 F.3d 359, 374 (1st Cir. 2015); United States v. Holland, 519 F.3d 909, 912 (9th Cir. 2008); Sensley v. Albritton, 385 F.3d 591, 598-99 (5th Cir. 2004); United States v. Snyder, 235 F.3d 42, 45-46 (1st Cir. 2000); Switzer v. Berry, 198 F.3d 1255, 1257-58 (10th Cir. 2000).

[57] Frost, supra note 8, at 567-68.

[58] DAVID G. KNIBB, FEDERAL COURT OF APPEALS MANUAL § 5.2 (2d ed. 1990) (emphasis added).

[59] See, e.g., Liljeberg v. Health Servs. Acquisition Corp., 486 U.S. 847, 865 (1988) ("[I]t is critically important in a case . . . to identify the facts that might reasonably cause an objective observer to question [a judge's] impartiality."); Parker v. Connors Steel Co., 855 F.2d 1510, 1524 (11th Cir. 1988) ("The test is whether an objective, disinterested, lay observer fully informed of the facts underlying the grounds on which recusal was sought would entertain a significant doubt about the judge's impartiality."); United States v. Mikhel, 889 F.3d 1003, 1027 (9th Cir. 2018) ("The reasonable person is not someone who is hypersensitive or unduly suspicious, but rather is a well-informed, thoughtful observer.'') (citations and quotations omitted).

[60] Frost, supra note 8, at 569-70.

[61] See, e.g., Liljeberg, 486 U.S. at 867-68; Parker, 855 F.2d at 1525; cf. In re Inquiry Concerning a Judge, 478 S.E.2d 186, 188 (N.C. 1996); State v. Perkins, 686 P.2d 1248, 1257 (Ariz. 1984).

[62] 889 F.3d 1003 (9th Cir. 2018).

[63] Id. at 1025-28.

Federal judges, in other words, are allowed to explore alternative employment opportunities, so long as they are upfront about that fact and take steps to ensure that no one could construe such a job search as having any influence on the judge's handling of a particular case.

Judicial candor, the thinking goes, implies judicial disinterest. A judge's willingness to come forward with facts that are arguably disqualifying implies that the facts do not actually compromise the judge's integrity and hence are not actually disqualifying. An opinion from the Ethics Committee of the California Judges Association explained this inference well:

[D]isclosure in an abundance of caution will assuage any doubt in most cases. A party or attorney learning of this affiliation directly from the judge is far less likely to question the judge's impartiality than one who learns about it later from another source. By clearing the air, the judge dispels any potential doubt about impartiality.[64]

Similar rationales have been given for imposing stringent disclosure requirements in cases where litigants have been a judge's campaign supporters in states with judicial elections.[65] Such sunlight is believed to temper the suspicions that such systems inevitably raise about political corruption on the theory that everything is out in the open. A judge's failure to disclose an arguably disqualifying fact, by contrast, at least raises the possibility of an intent to conceal.[66] Just as the legal system depends upon the fiction that the litigants do not (or should not) care who the judge deciding the case is, it equally assumes a disinterest on the part of the judge in presiding.[67] A judge who conceals facts that might arguably compel their disqualification suggests that the judge wants to preside over the case. While the truth is undoubtedly that nearly every judge has preferences regarding the kinds of cases they would rather preside over, the idea that a judge would withhold information that could affect that choice makes it more difficult differentiate between decisions a judge has made based upon their good faith interpretation of the law from those animated by their personal interest in being the one to interpret the law.

III. THE SCOPE OF JUDICIAL DISCLOSURE OBLIGATIONS

The question of how arguable a ground for disqualification must be to compel disclosure has, in turn, depended on the durability of the judge's judicial status. The less durable a judge's judicial status, the less confidence there is in the reliability of their ability to self-police.[68] The less confidence in the reliability of self-policing, the greater reliance on the adversarial process, and hence the greater demands for disclosure to facilitate parties' capacity to litigate.[69]

[64] Cal. Judges Ass'n Comm. on Jud. Ethics, Op. 45, at 5-6 (1997).

[65] See, e.g., Cal. Judges Ass'n Comm. on Jud. Ethics, Op. 48, at 4-6 (1999); State Bar of Mich., Op. JI-79, at 2 (1994) (stating that a judge has an affirmative duty to disclose when a member of the judge's reelection campaign committee appears for a party); Nev. Standing Comm. on Jud. Ethics and Election Pracs., Op. JE02-001, at 3-4 (2002) (stating that if an attorney has contributed an extraordinary amount to the judge's campaign or has served as the judge's campaign chair, treasurer, or other position, the judge must disclose the participation and afford the parties an opportunity to request disqualification); Letter from Fred L. Fox, Chairman, Jud. Investigation Comm. of W. Va. (December 13, 1995) (on file with the Judicial Investigation Commission of West Virginia) (stating that a judge must disclose relationship when attorneys who are members of the judge's campaign committee appear in cases).

[66] United States v. Martinez, 667 F.2d 886, 888-90 (10th Cir. 1981); Lingenfelter v. Lingenfelter, No. 15AP0062, 2017 WL 277541, at *1, *5–6 (Ohio Jan. 23, 2017).

[67] See Abramson, supra note 30, at 70.

[68] See infra Part III.A–C. 67.

[69] See infra Part III.A–C.

A. Article III Judges

For justices of the Supreme Court, for whom judicial status is arguably at its most durable, recusal matters are entirely left to self-policing.[70] For lower-level federal judges, courts have imposed sua sponte obligations to disclose.[71] But they have cabined the scope of adversarial litigation regarding judicial disqualification by equally declining to give parties any right to compel federal judges to make potentially disqualifying disclosures.[72]

The Tenth Circuit had the opportunity to opine on this question closely in 2004 and identified various policy rationales for rejecting any general entitlement to discovery from federal judges.[73] The issue arose in a mandamus petition filed in a dispute over the ownership of The Salt Lake Tribune, which mainly sought to compel U.S. District Court Judge Ted Stewart to disclose the extent of his relationship with the Church of Jesus Christ of Latter-Day Saints.[74]

The Circuit's principal stated rationale for rejecting such discovery requests was the fear that compelling judicial disclosures could run afoul of the rule against judges testifying in cases before them.[75] This rationale has difficulty surviving scrutiny, however, as anything other than a specious formalism. A judge disclosing facts from the bench is not "testifying" as a witness. And to the extent a judge's personal representations on the record constitute any kind of testimony, it is not being submitted "at the trial." As the Second Circuit has characterized it, the prohibition on judicial testimony is focused on "situations where the judge presiding at the trial forsakes the bench for the witness stand or engages in equivalent conduct."[76] The concern is over the jurors, who might give undue weight to the facts offered by the person who sits in the seat of authority and whose instructions they have sworn to obey. A judge offering facts at a pre-trial hearing on a collateral issue, by contrast, is not testifying at the "trial" any more than announcing findings of fact relevant to motions in limine would be or, for that matter, making sua sponte disclosures of arguably disqualifying facts would be. The Tenth Circuit's more sincere rationale is mentioned briefly a few lines later in its opinion: Compelling a federal judge to provide discovery or—yegads!—submit to voir dire would be "unseemly."[77] As explained in a district court opinion which the Tenth Circuit cites at length, giving litigants disclosure rights against judges would not only harm the judicial mystique, it would "invite manipulated harassment by any lawyer unscrupulous enough to willingly embark on a course of conduct designed to disqualify an otherwise impartial judge whose views are thought to be adverse to the interests of the client."[78]

This, of course, does not fully account for circumstances where the judicial mystique is protecting an "unscrupulous" judge. The Supreme Court, for its part, has permitted discovery against judges who have already been shown to be corrupt.[79] In Bracy, the Court held that a judge's conviction for bribery, among other things, pierced the judicial mystique by rebutting the presumption that he was

[70] See, e.g., Cheney v. U.S. Dist. Ct. for D.C., 541 U.S. 913, 915-16 (2004).
[71] See supra Part II.
[72] See, e.g., United States v. Pollard, 959 F.2d 1011, 1031 (D.C. Cir. 1992); supra Part II.
[73] In re McCarthey, 368 F.3d 1266, 1270 (10th Cir. 2004).
[74] Id. at 1268.
[75] Id. at 1270.
[76] United States v. Sliker, 751 F.2d 477, 499 (2d Cir. 1984).
[77] McCarthey, 368 F.3d at 1270 (quoting Cheeves v. S. Clays, Inc., 797 F. Supp. 1570, 1582 (M.D. Ga. 1992)).
[78] Cheeves, 797 F. Supp. at 1583.
[79] Bracy v. Gramley, 520 U.S. 899, 909 (1997).

dutifully performing his public duties.[80] But what about the judge for whom evidence of corruption has not yet come to light?

The Tenth Circuit wrestled with this problem somewhat and suggested that litigants are free to investigate judges and even go so far as to subpoena individuals or corporations that litigants believe may have information affecting a judge's impartiality.[81] They are just not entitled to seek discovery from judges themselves.

Again, though, the Tenth Circuit's reasoning appears rather flimsy under scrutiny. For one thing, relying on the litigant's seeking out third-party discovery is, at the very least, in tension with the settled proposition that litigants are entitled to rely upon judges to self-police.[82] Moreover, the Eleventh Circuit, in a frequently cited case, has held that "[s]uch investigations, of course, would undermine public confidence in the judiciary and hinder, if not disrupt, the judicial process—all to the detriment of the fair administration of justice."[83] Would judges really prefer litigants regularly peppering the participants in their personal lives with subpoenas over receiving those discovery requests directly?

The Tenth Circuit, in holding that litigants have no general discovery rights against a federal judge, really just concluded that the preservation of the judicial mystique is simply worth the cost. It may be that there are unscrupulous federal judges, but litigants and the public are better off accepting that risk because, as was stated perhaps most famously in the Supreme Court's opinion in United States v. Morgan, the "examination of a judge [as to their motives] would be destructive of judicial responsibility."[84]

It is easy to discount the fashioning of rules and doctrines that insulate the federal judiciary from adversarial discovery as self-serving. Obviously federal judges have no interest in authorizing broad discovery rights against themselves and have clear institutional and personal interests in preserving the authority that inheres to the judicial mystique.

But there are solid policy rationales for insulating federal judges from becoming the routine subjects of discovery litigation. For one, the kinds of activities and relationships that would give rise to disqualification in the run-of-the-mill case will be generally transparent. Federal judges' annual disclosures reveal their financial holdings and extra-judicial activities.[85] Federal judges are prohibited from most forms of outside employment and the practice of law.[86] And while most federal judges enjoy considerable public anonymity, the rigors of the confirmation process make most of their professional, educational, and academic backgrounds matters of often voluminous public record.[87]

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[80] Id.

[81] See In re McCarthey, 368 F.3d 1266, 1270 (10th Cir. 2004).

[82] See Am. Textile Mfrs. Inst., Inc. v. The Ltd., Inc., 190 F.3d 729, 742 (6th Cir. 1999).

[83] Porter v. Singletary, 49 F.3d 1483, 1489 (11th Cir. 1995).

[84] United States v. Morgan, 313 U.S. 409, 422 (1941).

[85] The financial disclosures for any federal judge can be requested via form AO 10A. See Financial Disclosure Report Request, U.S. CTS., https://www.uscourts.gov/forms/otherforms/financial-disclosure-report-request (last visited Nov. 20, 2020).

[86] CODE OF CONDUCT FOR UNITED STATES JUDGES Canon 4 (2019).

[87] The Senate Judiciary Committee maintains extensive records on all judicial nominees to reach the committee. See Judicial Nominations, COMM. ON THE JUDICIARY, https://www.judiciary.senate.gov/nominations/judicial (last visited Nov. 20, 2020).

Most of what is truly unknown about federal judges—hidden facts that might give rise to an arguable ground for disqualification—is therefore likely to arise out of a judge's private and family life. And it takes little imagination to see how the routine litigation of federal judges' private lives could foster a cynical legal realism that would erode, rather than bolster, the public's confidence in the judiciary's legitimacy.

In practical terms, federal judges are also civil servants. They are poorly paid compared to their professional peers and they are no less entitled, as citizens, to basic personal privacy.[88] Encouraging litigants to air any aspect of a judge's private life that could potentially bear upon their decision-making is simply not an indignity that the most qualified members of the bar would routinely wish to endure, and the interests of sound judicial administration correctly take account of policies that could weaken the judiciary's prospective candidate pool.

Analytically, it also makes sense to draw a distinction between a judge's private dispositions, habits, and affiliations and the more finite set of material interests for which disclosure could offer some meaningful benefit. The disclosure of facts that simply reveal the judge to be a human being do not offer the possibility of obtaining greater decisional neutrality, since they will necessarily be replaced by another human being.

For instance, when the California same-sex marriage cases were on appeal, it was discovered that U.S. District Judge Vaughn Walker, the judge who had struck down California's ban on same-sex marriage at the district court level, privately identified as gay man.[89] Judge Walker was not married, and there was no indication that he ruled the way he did in order to facilitate his desire to get married.[90] But it was also undeniable that he could stand to personally benefit from the long term policy implications of his ruling, both in terms of having the option to marry in the future and, more broadly, of being able to live his life as a gay man without the societal stigma that laws such as the marriage ban fostered.

While tasteless, therefore, it was perfectly rational for the same-sex marriage opponents to challenge Judge Walker's ruling on the ground that he had a legal duty to disclose his sexual orientation. When the issue was put before a different district court judge to decide, however, the court held that Judge Walker was under no obligation to disclose his sexual orientation,[91] a decision that was affirmed on appeal.[92] Judge Walker's silence about his sexual orientation, the district court held, was "by its very nature ambiguous, and thus is open to multiple interpretations. Another, and equally reasonable, way to interpret that silence is suggested by Ninth Circuit caselaw, which holds that it is to be presumed that any judge is impartial."[93]

While the result is correct, I would submit that this is another example of a judicial decision protecting a judge's privacy with specious formalism—indeed question begging—in a way that also misses the crucial point. Whatever Judge

[88] See, e.g., Scott Baker, Should We Pay Federal Circuit Judges More?, 88 B.U. L. REV. 63, 69, 71 (2008).

[89] Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 1003-04 (N.D. Cal. 2010) (striking down California's ban on same sex marriage); see also Jon Brooks, Judge Vaughn R. Walker, Who Ruled Against Proposition 8, Confirms He's Gay, KQED (Apr. 7, 2011), https://www.kqed.org/news/22950/judge-vaughn-r-walker-confirms-hes-gay.

[90] See Perry v. Schwarzeneggar, 790 F. Supp. 2d 1119, 1130-31 (N.D. Cal. 2011).

[91] See id. at 1132.

[92] Perry v. Brown, 671 F.3d 1052, 1095-96 (9th Cir. 2012).

[93] Perry, 790 F. Supp. 2d at 1131.

Walker's actual reasons for silence, sexual orientation is a personal characteristic that enjoys constitutional privacy protection, just as religious or political beliefs do.[94] Requiring someone to disclose facts about themselves that are within a zone of constitutionally-protected privacy necessarily chills the enjoyment of that privacy and, therefore, any rule that requires such disclosure should offer a compelling benefit to the cause of judicial neutrality.

The judicial mystique does not depend upon a blind presumption that judges are, in fact, impartial automata. Rather, in the Supreme Court's classic formulation, the presumption is that judges are individuals "of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances."[95] This undoubtedly requires a certain suspension of disbelief, and some judges are more intellectually disciplined than others. But judges registered to vote are not precluded from deciding election law cases; judges who adhere to religions are not barred from hearing religious freedom cases; judges who read newspapers are not precluded from deciding free press cases. It is not that these facts about a judge's personal life and beliefs present no risk of decisional bias, it is that they are (ironically enough) impersonal facts—descriptive classifiers that are true of everyone and about which no one is genuinely neutral.

Everyone, for example, has religious beliefs, to include the disbelief in religion. A judge's beliefs in favor of a religion might tip the balance in a case involving religious discrimination, but another judge's absence of religious beliefs or hostility to religion could just as easily result in a tipping the other way. Every judge has a sexual orientation. That sexual orientation is just as apt to make a judge sympathetic or unsympathetic to the cause of same-sex marriage.

The classic formulation from Tumey v. Ohio[96] is that any fact that would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law.[97]

But this is imprecise. Impersonal facts very well may lead a judge to tip the balance to some degree that cannot be overcome through intellectual discipline alone. But we ignore them because their existence is inescapable. They will make every judge prone to tipping the balance one way or the other. Replacing one judge for another does not eradicate the existence of such impersonal facts. It simply chooses the potential for bias in one direction against the potential for bias in the other.

The judicial mystique requires impersonal facts to be ignored, not because they do not exist, but because replacing one judge for another will not achieve greater impersonal neutrality in decision-making. Conscience and intellectual discipline are the sole safeguards against their influence because there is no viable alternative. And so, compelling a judge to disclose such facts does not even aid the adversarial process.

A judge's financial relationships with litigants, by contrast, not only create a potential for bias, but correcting for such personally specific facts can be readily

[94] See Romer v. Evans, 517 U.S. 620, 633-35 (1996) (holding that discrimination based on sexual orientation is unconstitutional).

[95] United States v. Morgan, 313 U.S. 409, 421 (1941).

[96] Tumey v. Ohio, 273 U.S. 510 (1927).

[97] Id. at 532.

achieved by selecting a new judge for whom such facts are not true. Hence, federal judges have an obligation to disclose personally specific facts that are arguably disqualifying because it gives the parties an opportunity to evaluate whether the decision-making process can be made more impersonal.[98]

B. Arbitrators

The adversarial process becomes more and more important to the preservation of judicial neutrality the less and less durable the judicial status is of the person carrying out the judicial role. The fewer structural, professional, and social protections are in place for the judge's neutrality, the less entitled they are to rely upon the judicial mystique, and the more the legitimacy of their decisions turns on the parties' ad hoc acceptance of their capacity for fairness.

The disclosure obligations imposed upon arbitrators, for example, are extremely stringent.[99] An arbitrator not only fails to enjoy any of the professional status or tenure protections enjoyed by a federal judge, the ad hoc character of arbitration proceedings, under which the arbitrator is paid to preside in that very litigation, means that an arbitrator has a clear personal interest in sitting as the arbitrator in that particular case.[100]

In contrast to disqualification questions surrounding federal judges, the federal courts have effectively invited litigation over arbitrator bias. This is remarkable all by itself. Arbitral awards are nearly bulletproof under the Federal Arbitration Act[101] and the Supreme Court has rejected nearly every ground that unhappy litigants have devised for challenging them.[102] But an arbitral award may be vacated if the arbitrator fails to fully disclose any potentially disqualifying information.[103]

The Supreme Court's decision in Commonwealth Coatings Corp. v. Continental Casualty Co.,[104] first holding arbitrators to stringent disclosure standards, was controversial.[105] The plurality treated the issue as governed by the ordinary rules of judicial conflicts of interest, applying the maxim from Tumey that disqualification is required whenever some fact might inhibit the judge from "hold[ing] the balance nice, clear and true."[106] A business conflict

[98] See, e.g., United States v. Schreiber, 599 F.2d. 534, 537 (1979).

[99] See generally David Allen Larson, Conflicts of Interest and Disclosures: Are We Making a Mountain out of a Molehill?, 49 S. TEX. L. REV. 879 (2008).

[100] See Roger J. Perlstadt, Article III Judicial Power and the Federal Arbitration Act, 62 AM. U. L. REV. 201, 205 (2012).

[101] See 9 U.S.C. § 10; see also Stephen A. Plass, Federal Arbitration Law and the Preservation of Legal Remedies, 90 TEMP. L. REV. 213, 250-52 (2018); Sarah Rudolph Cole, Curbing the Runaway Arbitrator in Commercial Arbitration: Making Exceeding the Powers Count, 68 ALA. L. REV. 179, 191-92 (2016); Stephen J. Ware, Vacating Legally-Erroneous Arbitration Awards, 6 Y.B. ON ARB. & MEDIATION 56, 75 n.57 (2014); Michael H. LeRoy, Are Arbitrators Above the Law? The "Manifest Disregard of the Law" Standard, 52 B.C. L. REV. 137, 174 (2011).

[102] See, e.g., GE Energy Power Conversion Fr. SAS v. Outokumpu Stainless USA, LLC, 140 S.Ct. 1637, 1642 (2020); Henry Schein, Inc. v. Archer & White Sales, Inc., 139 S.Ct. 524, 528 (2019); Epic Systems Corp. v. Lewis, 138 S.Ct. 1612, 1619 (2018); Kindred Nursing Ctrs. Ltd. v. Clark, 137 S.Ct. 1421, 1424-25 (2017); DIRECTV, Inc. v. Imburgia, 136 S.Ct. 463, 465-66 (2015); BG Grp., PLC v. Argentina, 572 U.S. 25, 29 (2014).

[103] See, e.g., Woods v. Saturn Distrib. Corp., 78 F.3d 424, 427 (9th Cir. 1996) ("In nondisclosure cases, vacatur is appropriate where the arbitrator's failure to disclose information gives the impression of bias in favor of one party."); Consolidation Coal Co. v. Local 1643, United Mine Workers, 48 F.3d 125, 130 (4th Cir. 1995).

[104] 393 U.S. 145 (1968).

[105] See id. at 147-49; see also Larson, supra note 97, at 888-89.

[106] Id. at 148; Tumey v. Ohio, 273 U.S. 510, 532 (1927).

itself, therefore, was held to be sufficient to warrant the arbitrator's disqualification.[107]

Justice White, joined by Justice Marshall, disagreed with this rationale and was uncomfortable with holding arbitrators to "the standards of judicial decorum of Article III judges, or indeed of any judges."[108] He reasoned that the fact that many arbitrators are not judges, but rather industry experts with myriad business relationships, is a feature, not a bug.[109] Arbitrators have no governmental duty to uphold the appearance of justice; they are there per the terms of a contract between parties.[110]

Justice White nevertheless concurred in the result, but only because of the arbitrator's failure to disclose the business conflict.[111] For him, disclosure was uniquely important, not because of the need for decorous impartiality, but so that the parties knew what they were getting.[112] In Justice White's view, "[A]rbitrators are not automatically disqualified by a business relationship with the parties before them if both parties are informed of the relationship in advance, or if they are unaware of the facts but the relationship is trivial."[113] Facts that might affect an arbitrator's decisions are simply material facts to a bargain.

The decision in Commonwealth Coatings, in turn, has driven extensive litigation and commentary debating the precise scope and nature of an arbitrator's disclosure obligations, since it is one of the vanishingly few ways unhappy litigants can seek to fight another day.[114] Relatedly, the courts have been especially strict in mediators' disclosure obligations "because parties are encouraged to share confidential information with mediators . . . [and] must have absolute trust that their confidential disclosures will be preserved."[115]

C. Military Judges

Where do military judges fall on this continuum? Like federal judges, military judges are government officials. They are oath-bound to do justice.[116] And in the modern era, military judges have even taken to wearing black robes.

Yet, beyond these trappings of the judicial mystique, their judicial status is actually fairly weak. While increasingly treated as distinct from the chain-of-command, military judges are not actually independent from it, and they are likely to expect to return to a more clearly subordinate role within the operational chain-of-command once their judicial assignment is over. More like arbitrators, military judges are and remain defined, not by their judicial status, but by their being career professionals within the small, close-knit subclass of the services' Judge Advocate General ("JAG") corps, where their most relevant qualification is not their dispassionate probity, but their intimate familiarity with the uniqueness of the culture and norms the court-martial system is designed to govern.[117]

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[107] Commonwealth Coatings Corp., 393 U.S. at 146-50.
[108] Id. at 150 (White, J., concurring).
[109] Id. at 150-52.
[110] See Commonwealth Coatings Corp. v. Cont'l Cas. Co., 393 U.S. 145, 150-51 (1968).
[111] Id. at 151-52.
[112] Id. at 151.
[113] Id. at 150.
[114] See, e.g., Larson, supra note 97, at 888-89; Merrick T. Rossein & Jennifer Hope, Disclosure and Disqualification Standards for Neutral Arbitrators: How Far to Cast the Net and What is Sufficient to Vacate Award, 81 ST. JOHN'S L. REV. 203, 209, 212, 216 (2007).
[115] CEATS, Inc. v. Cont'l Airlines, Inc., 755 F.3d 1356, 1363 (Fed. Cir. 2014); see also JAY E. GRENIG, ALTERNATIVE DISPUTE RESOLUTION § 4:41 (3d ed. 2020).
[116] See Military Judge's Oath- DA Form 3496, ARMY PUBL'G DIRECTORATE, https://armypubs.army.mil/pub/eforms/DR_a/pdf/A3496.pdf (last visited Nov. 20, 2020).
[117] See United States v. Quintanilla, 56 M.J. 37, 41 (C.A.A.F. 2001).

To qualify as a military judge, an officer has likely served for at least a decade in their service's JAG corps,[118] meaning they will have typically had three or more different legal assignments within what the Supreme Court has described as the separate "specialized society" of the United States Armed Forces.[119] Because the modern military strongly discourages specialization,[120] the military judge sitting on the bench will rarely have been a military judge for very long and, like any other assignment, will not be for much longer.[121] While many senior judge advocates do retire in military judge billets, it is not uncommon for a judge advocate to follow a military judge assignment with a posting as a staff judge advocate, which, in essence, is the senior legal advisor to a commander.[122] There is no Senate confirmation process that creates a clear break between the individuals' legal and judicial careers, and due to mandatory retirement after thirty years in service, military judges are apt to be considering post-military jobs while still in their mid-fifties.[123]

Disclosure therefore plays an unusually important role in ensuring that military judges act with dispassion and independence. The military justice system has, in the main, imposed a much broader duty on military judges to disclose. Prior military assignments are routinely made part of the record upon a military judge's being detailed to a case.[124] The parties are given an opportunity at the judge's first appearance on the bench to actually conduct voir dire.[125] And there are no similar doctrines foreclosing parties from seeking discovery relating to potential grounds for disqualification, though the military discovery process is far more cramped than it is in civilian courts, insofar as only military prosecutors are given the power to issue subpoenas.[126]

In the seminal case on judicial disclosure and misconduct heard by the Court of Appeals for the Armed Forces ("CAAF"), a military judge had an ex parte confrontation with a witness for the prosecution.[127] A review of the record shows that the confrontation was rather bizarre and evinced a certain lack of judicial demeanor that probably motivated the CAAF to look at the issues more carefully.[128] But it was not the judge's conduct toward the witness that CAAF ultimately held was disqualifying. Instead, it was the judge's failure to disclose the confrontation to defense counsel.[129]

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[118] See U.S. DEP'T OF THE ARMY, ARMY REG. 27-10 § 7.2 (Jan. 1, 2019) [hereinafter AR 27-10]. U.S. DEP'T OF THE ARMY, JALS PUBLICATION 1-1 (Personnel Policies) §§ 8-1, 8-2, 8-3 (May 1, 2018); U.S. DEP'T OF THE NAVY, COMMANDANT OF THE MARINE CORPS, MILITARY OCCUPATIONAL SPECIALTIES MANUAL, NAVMC 1200.1E C. 466 § 1127(8) (Mar. 19, 2019)

[119] See Weiss v. United States, 510 U.S. 163, 174 (1994) (quoting Parker v. Levy, 417 U.S. 733, 743 (1974)).

[120] See Ori Aronson, Out of Many: Military Commissions, Religious Tribunals, and the Democratic Virtues of Court Specialization, 51 VA. J. INT'L L. 231, 250-51 (2011) (discussing generalized fear of specialized judges due to the possibility of judges succumbing to personal special interests, sympathizing with particular groups, losing broad-sighted judicial experience, and eliminating judicial independence).

[121] See Weiss, 510 U.S. at 168-69, 176.

[122] See RCM, supra note 20, 103(18) (defining a staff judge advocate as a "judge advocate" and "principal legal advisor").

[123] 10 U.S.C. §§ 633, 634, 1251

[124] See, e.g., Questionnaire for Judicial Nominees-David Cleveland Joseph, U.S. SENATE COMM. ON THE JUDICIARY 4, https://www.judiciary. senate.gov/imo/media/doc/David%20Joseph%20SJQ%20-%20PUBLIC.pdf (last visited Nov. 20, 2020).

[125] See RCM, supra note 20, 902(d)(2).

[126] See id. 703(g)(3)(C)–(D).

[127] United States v. Quintanilla, 56 M.J. 37, 50 (C.A.A.F. 2001).

[128] Id. at 50-54.

[129] Id. at 80.

That failure to disclose, the Court held, "deprived the parties of an adequate foundation for their decisions on whether or not to request recusal," and made it harder for the military judge to evaluate "those facts crucial to determining whether there was a conflict or appearance of conflict requiring disqualification."[130] In other words, the failure to disclose was a problem, not because it reflected a guilty mind on the part of the judge, but because it hampered the opportunity for the adversarial process to test and establish the judge's neutrality.

IV. UNITED STATES V. AL-NASHIRI

The Al-Nashiri case arose out of the military commissions convened in Guantanamo Bay.[131] Numerous high-quality books and articles have been written about the military commissions, their legal foundations, and their history.[132] Some of these titles are included within the footnotes,[133] but will not be expanded upon here other than to say that following the September 11th attacks, and the opening of the prison for so-called "War on Terror" detainees at the Guantanamo Bay Naval Station, the Bush Administration adopted a policy of conducting military trials (termed "military commissions") for the ostensible purpose of prosecuting detainees for war crimes.[134]

The use of military commissions has a checkered history dating back to the Mexican War.[135] But, the Supreme Court has upheld their basic legality in a variety of contexts,[136] and the Bush Administration deemed them a desirable alternative to the federal court and ordinary court-martial system, in large measure to utilize rules of evidence that would permit criminal convictions based upon evidence derived from torture; cruel, inhumane, and degrading treatment; or other methods that would render evidence inadmissible before other tribunals.[137]

Abd Al-Rahim Al-Nashiri is a Saudi national who was alleged to have played a facilitating role in the attack on the USS Cole in Yemen in October 2000, in which seventeen U.S. sailors were killed.[138] Al-Nashiri was arrested in the United Arab Emirates in the fall of 2002 and soon thereafter taken into the custody of the Rendition Detention and Interrogation Program (colloquially called the "Torture Program") of the Central Intelligence Agency ("CIA").[139] In CIA custody,

[130] Id. at 79-80.

[131] In re Al-Nashiri, 921 F.3d 224, 226-27 (D.C. Cir. 2019).

[132] . See generally JESS BRAVIN, THE TERROR COURTS: ROUGH JUSTICE AT GUANTANAMO BAY (2013); GUANTÁNAMO AND BEYOND: EXCEPTIONAL COURTS AND MILITARY COMMISSIONS IN COMPARATIVE PERSPECTIVE (Fionnuala Ní Aoláin & Oren Gross eds., 2013); CAROL ROSENBERG, GUANTÁNAMO BAY: THE PENTAGON'S ALCATRAZ OF THE CARIBBEAN (2016); THE GUANTÁNAMO LAWYERS: INSIDE A PRISON OUTSIDE THE LAW (Mark P. Denbeaux et al. eds., 2009); PETER JAN HONIGSBERG, A PLACE OUTSIDE THE LAW: FORGOTTEN VOICES FROM GUANTÁNAMO (2019); ALLAN A. RYAN, THE 9/11 TERROR CASES: CONSTITUTIONAL CHALLENGES IN THE WAR AGAINST AL QAEDA (2015); JONATHAN MAHLER, THE CHALLENGE: HAMDAN V. RUMSFELD AND THE FIGHT OVER PRESIDENTIAL POWER (2008).

[133] See supra note 130.

[134] RYAN, supra note 130, at 90; BRAVIN, supra note 130, at 20.

[135] WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 832-34 (2d ed. 1920).

[136] See, e.g., Hamdan v. Rumsfeld, 548 U.S. 557, 594-95 (2006); Johnson v. Eisentrager, 339 U.S. 763, 786 (1950); In re Yamashita, 327 U.S. 1, 7 (1946); Ex parte Quirin, 317 U.S. 1, 27 (1942).

[137] See BRAVIN, supra note 130, at 22.

[138] See Charge Sheet, United States v. Al-Nashiri, 222 F. Supp. 3d 1093 (C.M.C.R. 2016) (No. CMCR 15-002), https://www.mc.mil/Portals/0/pdfs/alNashiri/Al%20Nashiri%20(AE001)%20Referred%20Charge%20Sheet.pdf [hereinafter Charge Sheet 2008].

[139] S. REP. NO. 113-288, at 66-73, 69 n.346 (2014).

Al-Nashiri was subjected to extreme forms of what a psychologist hired by the Defense Department described as "physical, psychological, and sexual torture."[140] Most of the details of this treatment remain highly classified, though Al-Nashiri is one of the principal subjects of the Senate Intelligence Committee's Torture Report.[141]

Capital charges were first levied against Al-Nashiri for his alleged role in the bombing of the USS Cole for trial by military commission in 2008.[142] That case was dismissed after the Obama Administration put a moratorium on the Guantanamo military commissions.[143] However, in 2011, he was charged again on substantively identical charges and that case has remained pending in pre-trial proceedings ever since.[144]

The decade in which the Al-Nashiri case has been in the pre-trial phase undoubtedly appears—and truly is—extraordinary. A notable fact about this period, however, is that between the arraignment in 2011 and the D.C. Circuit litigation, there had been only seventy-nine actual days of hearings.[145]

The reasons for the delay are various and are heavily driven by the fact that these proceedings must occur in Guantanamo, a remote island base with only modest long-term infrastructure.[146] For every hearing, a caravan of lawyers, judges, journalists, observers, and supporting personnel must be flown and temporarily housed on the island. This, in turn, makes the scheduling of hearings a massive logistical challenge and leads the system in general to being brittle in the face of novel obstacles, which, due to the system's peculiarities, are near constantly presented.

One such obstacle occurred in the summer of 2017, when Al-Nashiri's capital trial team discovered what the government continues to insist on calling "legacy microphones" in their attorney-client meeting rooms.[147] The inspection that led to the discovery of these microphones was itself prompted by the disclosure that the government had been surreptitiously recording one of the Guantanamo detainees' meetings with counsel in another location within the overall camp complex.[148]

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[140] Declaration of Dr. Sondra S. Crosby at 1-2, In re Al-Nashiri, 835 F.3d 110 (D.C. Cir. 2016) (Nos. 15-1023; 15-5020).

[141] S. REP. NO. 113-228, at 66-73, 424 n. 2380 (2014) (discussing the detention and interrogation of Al-Nashiri).

[142] Charge Sheet 2008, supra note 136.

[143] Withdrawal of Referral of Charges, United States v. Al-Nashiri, 222 F. Supp. 3d 1093 (C.M.C.R. 2016); Adam Levine, Charges Dropped Against Suspect in USS Cole Bombing, CNN (Feb. 5, 2009), https://www.cnn.com/2009/CRIME/02/05/uss.cole.bombing.

[144] Charge Sheet, United States v. Al-Nashiri, 222 F. Supp. 3d 1093 (C.M.C.R. 2016) (No. CMCR 15-002), https://www.mc.mil/Portals/0/pdfs/alNashiri2/Al%20Nashiri%20II%20 (Referred%20 Charges).pdf) [hereinafter Charge Sheet 2011]; Carol Rosenberg, Army Judge Proposes 2022 Trial in Guantánamo's Cole Bombing Case, N.Y. TIMES (Feb. 25, 2020), https://www.nytimes.com/2020/02/25/us/politics/uss-cole-bombing-trial.html.

[145] Jacques Singer-Emery, Oral Argument Summary: In re: Abd Al-Rahim Hussein Al-Nashiri, LAWFARE (Feb. 1, 2019, 9:29 AM), https://www.lawfareblog.com-oral-argument-summary-re/abdal-rahim-hussein-al-nashiri.

[146] See Shilpa Jindia, Secret Surveillance and the Legacy of Torture Have Paralyzed the USS Cole Bombing Trial at Guantánamo, THE INTERCEPT (Mar. 5, 2018, 10:18 AM), https://theintercept.com/2018/03/05/guantanamo-trials-abd-al-rahim-al-nashiri.

[147] Carol Rosenberg, Now We Know Why Defense Attorneys Quit the USS Cole Case. They Found a Microphone., MIA. HERALD, https://www.miamiherald.com/news/nationworld/world/americas/guantanamo/article203916094.html (Mar. 8, 2018, 2:39 PM).

[148] Memorandum from J.G. Baker, Chief Def. Couns. for Mil. Comm'ns, U.S. Dep't of Def., to Chief Prosecutor for Mil. Comm'ns Commander, Joint Task Force Guantanamo, U.S. Dep't of Def. at 10 (June 14, 2017), available at https://perma.cc/ZG78-PPFE.

The pervasiveness of surveillance equipment in what would ordinarily be private spaces is at least in part a result of the detention facilities' overriding mission. The prison facilities in Guantanamo were not initially created for the purpose of detaining criminal suspects awaiting trial. Rather, from its inception, the detention center was conceived of as a "Battle Lab" in the War on Terrorism, the principal purpose of which was intelligence collection.[149]

The discovery of hidden monitoring capabilities in what are held out to be attorney-client confidential spaces has therefore been remarkably routine, to include the discovery of decoy smoke detectors that contained hidden microphones in attorney-client meeting rooms.[150] When these prior discoveries were made, various defense teams in the military commissions sought and largely obtained relief to ensure the confidentiality of their attorney-client communications.[151]

When the Al-Nashiri team discovered more "legacy microphones" (the true nature and details of which remain classified) in the summer of 2017, they filed a series of motions with the military judge, Air Force Colonel Vance Spath, seeking relief.[152] Spath had been assigned in the summer of 2014 as the second military judge to preside over the Al-Nashiri case.[153]

To the surprise of nearly everyone, Spath hastily denied all of the defense's motions in a series of classified rulings, without taking argument.[154] Without getting into classified matters, the substance of those rulings was a holding that the Al-Nashiri defense team's right to privacy in their attorney-client meetings only protected them against intrusion by the government lawyers prosecuting the case.[155] In other words, Spath concluded that Al-Nashiri and his lawyers had no expectation of confidentiality against government monitoring generally, so long as the fruits of that monitoring were not used against Al-Nashiri at trial.[156]

Al-Nashiri's defense team was concerned that these rulings put them in an ethical bind, not the least because they were forbidden from disclosing the confidentiality vulnerabilities they had discovered to Al-Nashiri himself. Richard Kammen, who was Al-Nashiri's capital learned counsel and the leader of his defense team at the time, reached out to Hofstra Law School's Ellen Yaroshefsky for ethical guidance. Yaroshefsky, in turn, concluded that Kammen could not ethically proceed without being able to

[149] Michel Paradis, The Illiberal Experiment: How Guantánamo Became a Defining American Institution, in REIMAGINING THE NATIONAL SECURITY STATE: LIBERALISM ON THE BRINK 71, 81 (Karen J. Greenberg, ed., 2020)

[150] Defense Motion for Appropriate Relief: Determine the Extent of Past Monitoring at Camp Echo II and Order that No Future Monitoring Occur in JTF-GTMO Facilities: Defense Motion to Abate the Proceedings in Order to Resolve the Issue of Third Party Monitoring of Defense Communications and Censorship of Commissions Hearings at 3-4, United States v. Al-Nashiri, AE 149 (Mil. Comm'ns Trial Judiciary May 13, 2013) [hereinafter Defense Motion].

[151] Memorandum from J.G. Baker, Chief Def. Couns. for Mil. Comm'ns, U.S. Dep't of Def., to Chief Prosecutor for Mil. Comm'ns Commander, Joint Task Force Guantanamo, U.S. Dep't of Def. at 1 (June 14, 2017), https://perma.cc/ZG78-PPFE.

[152] See, e.g., Ruling: Defense Motion to Compel Production of Discovery Materials Related to Potential Intrusions into Attorney-Client Communications, United States v. Al-Nashiri, No. AE39YYY (Mil. Comm'ns Trial Judiciary Sept. 20, 2017) [hereinafter Ruling: Defense Motion].

[153] Memorandum from James L. Pohl, C.J., Mil. Comm'ns Trial Judiciary, to Colonel Vance H. Spath, U.S. Air Force (Jul. 10, 2014), https://www.mc.mil/Portals/0/pdfs/alNashiri2/Al%20Nashiri%20II%20(AE302).pdf.

[154] See Ruling: Defense Motion, supra note 150.

[155] Id. at 3. 154

[156] Id. at 2-3

have confidential communications with his client and that he should seek to withdraw.[157]

Kammen and the other civilian attorneys on the Al-Nashiri team duly submitted applications to withdraw to the Military Commissions' Chief Defense Counsel.[158] Under a peculiarity of the military commission rules that existed at the time, the Chief Defense Counsel had the sole authority to both assign and remove defense counsel from an ongoing case.[159] In Al-Nashiri's case, the Chief Defense Counsel, Brigadier General John Baker, reviewed the Yaroshefsky opinion, Spath's classified rulings, and other classified evidence in the defense team's possession, and granted the requests to withdraw.[160]

What followed was extraordinary, even for the Guantanamo military commissions. Within a week, Spath issued an order demanding a briefing on the lawyers' departure, implying that he had the extra-legal authority to countermand General Baker's order granting their withdrawal.[161] Spath then insisted on proceeding with hearings, at which Al-Nashiri's only attorney was a junior Navy judge advocate by the name of Alaric Piette, who had not applied to withdraw with the civilian attorneys because he was still awaiting instructions from the Navy.[162] At subsequent hearings, Spath ordered Baker to testify, and after Baker refused to do so, and also refused to rescind the order granting the lawyers' withdrawal, Spath ordered Baker to be arrested for contempt; Baker then sought a writ of habeas corpus and was released shortly thereafter. [163]

Spath directed Piette to represent Al-Nashiri on his own, which Piette declined to do because he was not qualified to be lead counsel in a capital case, and such counsel was required in Al-Nashiri's case.[164] Spath plowed ahead anyway as the prosecution called numerous witnesses and sought to litigate the admissibility of physical evidence.[165] All the while, Piette declined to take any positions in the absence of learned counsel.

Spath repeatedly and publicly berated Piette for refusing to proceed in the absence of learned counsel and repeatedly voiced his personal "frustration" with an ill-defined group that he and the prosecution derisively call "the defense community."[166] This defense community,

[157] Defense Motion to Abate Proceedings Pending the Detailing of Learned Counsel at 28, United States v. Al-Nashiri, AE 389 (Mil. Comm'ns Trial Judiciary Oct. 16, 2017).

[158] See, e.g., id. at 20.

[159] RULES FOR MILITARY COMMISSIONS 505(d)(2) (2010) [hereinafter RMC]; see also Defense Motion to Abate Proceedings Pending the Detailing of Learned Counsel, supra note 155, at 2.

[160] Defense Motion to Abate Proceedings Pending the Detailing of Learned Counsel, supra note 155, at 18.

[161] Baker v. Spath, No. 17-CV-02311, 2018 WL 3029140, at *1 (D.D.C. June 18, 2018); Appellee's Motion for Leave to File and Motion to Vacate the Rulings of the Military Judge and to Compel Discovery of Evidence Relating to Disqualification of the Military Judge and His Successor at 2-4, United States v. Al-Nashiri, No. 18-002 (Ct. Mil. Comm'n Rev. Sept 13, 2018) [hereinafter Appellee's Motion for Leave].

[162] Defense Motion to Abate Proceedings Pending the Detailing of Learned Counsel, supra note 168, at 2-4; Baker, 2018 WL 3029140 at *1.

[163] Baker, 2018 WL 3029140 at *1-2.

[164] Defense Motion to Abate Proceedings Pending the Detailing of Learned Counsel, supra note 168, at 2-3; 10 U.S.C. § 949a(b)(2)(C)(ii); RMC 506(b) (2010).

[165] See generally Unofficial/Unauthenticated Transcript of the Al-Nashiri (2) Motions Hearing, United States v. Al-Nashiri, No. 18-1279 (Feb. 13, 2018), https://www.mc.mil/Cases.aspx?caseType=omc&status=1&id=34 [hereinafter February 13 Transcript].

[166] See, e.g., Unofficial/Unauthenticated Transcript of the Al-Nashiri (2) Motions Hearing at 11,538-39, United States v. Al-Nashiri, No. 18-1279 (Feb. 12, 2018), https://www.mc.mil/Cases.aspx?caseType=omc&status=1&id=34 [hereinafter February 12 Transcript]; February 13 Hearing, supra note 163, at 11,910; Unofficial/Unauthenticated Transcript of the Al-Nashiri (2) Motions Hearing at 12,375-76, United States v. Al-Nashiri, No. 18-1279 (Feb. 16, 2018), https://www.mc.mil/Cases.aspx?caseType=omc&status=1&id=34 [hereinafter February 16 Transcript].

he contended, was engaged "in a revolution to the system."[167] He accused the defense community of ignoring the "rules,"[168] stating, "[I]magine what the Department of Defense would look like if we just violated orders willy-nilly as we went through the process? . . . Because we've seen what it would be like here in the commissions. Frankly, by the Military Commission Defense Office and their representatives."[169]

This bizarre spectacle continued for four months and, relevant to the discussion here, it was unclear why Spath was pressing ahead so aggressively given the absence of qualified counsel. During this time, Spath would engage in stream-of-consciousness colloquies with the counsel for the prosecution that veered between the rudiments of his authority as a military commission judge to Piette's efforts to secure replacement learned counsel.[170] Spath even mocked the then-classified discovery of the microphone in Petitioner's attorney-client meeting room as "fake news,"[171] ordered the arrest of Al-Nashiri's former civilian lawyers,[172] and criticized the press coverage of his increasingly bizarre behavior on the bench.[173]

Then, in mid-February 2018, after a thirty-minute invective against Al-Nashiri's lawyers and the Military Commission Defense Organization, Spath abruptly announced that he was indefinitely abating the case: "We are in abatement," he said from the bench, "We're out. Thank you. We're in recess."[174]

Al-Nashiri's prosecutors took an interlocutory appeal to the Court of Military Commission Review ("CMCR"),[175] a special military appeals court that was created in 2006 to hear direct appeals from military commissions.[176] In the summer of 2018, while that appeal was still pending, Spath unexpectedly resigned from the Air Force and ceased to be the military judge in the Al-Nashiri case.[177] Soon after, Spath was caught on camera at a reception for new immigration judges, being welcomed by then-Attorney General Jeff Sessions.[178] Spath's appointment by the Attorney General as an immigration judge was then publicly announced.[179]

Al-Nashiri sought relief in the CMCR, including discovery and the vacatur of any opinions that might be tainted by Spath's pursuit of his appointment as an

[167] February 16 Transcript, supra note 164, at 12,372-73.
[168] Id.
[169] Id. at 12,370.
[170] See, e.g., February 12 Transcript, supra note 164, at 11,541, 11,544-45, 11,548-49, 11555-56, 11563-64.
[171] Id. at 11,558.
[172] Carol Rosenberg, Military Judge Wants Civilian Attorneys Arrested for Quitting USS Cole Case, MIA. HERALD, https://www.miamiherald.com/news/nationworld/national/article199947919.html (Feb. 14, 2018, 2:45 PM).
[173] February 13 Transcript, supra note 163, at 11,924-25.
[174] February 16 Transcript, supra note 164, at 12,377.
[175] Government Certificate of Notice of Appeal at 1, United States v. Al-Nashiri, AE 395 (Mil. Comm'ns Trial Judiciary Feb. 21, 2018), https://www.mc.mil/Portals/0/pdfs/alNashiri2/Al%20Nashiri%20II%20(AE395).pdf.
[176] See 10 U.S.C. § 950f.
[177] See Carol Rosenberg, Controversial Guantánamo Judge Joins Jeff Sessions in Immigration Judge Ceremony, MCCLATCHY DC, https://www.mcclatchydc.com/news/nationworld/national/national security/article218303315.html (Sept. 25, 2018, 3:38 PM); Memorandum from James L. Pohl, C.J., Mil. Comm'ns Trial Judiciary, to Colonel Shelly W. Schools, U.S. Air Force (Aug. 6, 2018), https://www.mc.mil/Portals/0/pdfs/alNashiri2/Al%20Nashiri%20II%20(AE30 2A).pdf.
[178] Rosenberg, supra note 175.
[179] Notice, U.S. Dep't of Just., Exec. Off. for Immigr. Rev., Executive Office for Immigration Review Swears in 46 Immigration Judges (Sept. 28, 2018), https://www.justice.gov/opa/pr/executiveoffice-immigration-eview-announces-largest-immigration-judge-investiture-least.

immigration judge.[180] Al-Nashiri asserted that Spath had been operating under an undisclosed conflict of interest because for at least some period of time (unknown at the time), he had been negotiating with the Justice Department for this appointment at the very time he was presiding over the Al-Nashiri case, which was being led by Justice Department lawyers. When the CMCR perfunctorily denied Al-Nashiri's motion,[181] Al-Nashiri filed a writ of mandamus in the D.C. Circuit, which stayed the military commission proceedings while it examined the issue.[182]

While the petition was pending before the D.C. Circuit, a reporter for the Miami Herald received a cache of documents, based upon an earlier Freedom of Information Act request, relating to Spath's efforts to gain employment in the Justice Department.[183] The documents revealed that Spath had been secretly negotiating for employment since 2015.[184] In his application for the immigration judge appointment, Spath had highlighted the fact that he was "the presiding judge for . . . the military commissions proceedings for the alleged 'Cole bombing' mastermind at Guantanamo Bay, Cuba. . . . The case at Guantanamo Bay, Cuba, has significant media and federal government interest."[185] Spath even used a decision he had written in the Al-Nashiri case, that was favorable to the prosecution, as his writing sample.[186]

The cache of Freedom of Information Act documents further indicated that Spath's negotiations with the Justice Department had been directly influencing his conduct on the bench. Specifically, after Spath had been given a tentative offer for an appointment, his start date became a practical issue, in large part because his of continued service in the Al-Nashiri case.[187] As it happened, just as Al-Nashiri's defense team discovered the so-called "legacy microphone," the Justice Departments' human resources administrators warned Spath that any further postponement of his start date was likely to cause his offer to be rescinded.[188]

The influence of these negotiations was at its most glaring on the day Spath abated the proceedings in the Al-Nashiri case. The night before, Spath had received an email from the Justice Department confirming a July 2018 start date.[189] The following day, however, in the lead-up to his abatement ruling, Spath falsely claimed to have spent the previous evening agonizing over the future of the Al-Nashiri case.[190] He claimed that what he characterized as misconduct by Al-Nashiri's former counsel had shaken him so profoundly that, "it might be time for me to retire, frankly. That decision I'll be making over the next week or two. . .

[180] Rulings of the Military Judge and to Compel Discovery of Evidence Relating to Disqualification of the Military Judge and His Successor, United States v. Al-Nashiri, No. 18-002, (C.M.C.R. Sept. 13, 2018) [hereinafter Appellee's Motion for Leave].
[181] Order: Disqualification of Military Judge and Discovery at 2, United States v. Al-Nashiri, No. 18-002 (C.M.C.R. Sept. 28, 2018).
[182] See Order, In re Al-Nashiri, 921 F.3d 224 (D.C. Cir. 2019) (No. 18-1279) [hereinafter November 7 Order].
[183] See Carol Rosenberg, War Court Judge Pursued Immigration Job for Years While Presiding over USS Cole Case, MIA. HERALD, https://www.miamiherald.com/article221557485.html (Nov. 20, 2018, 3:25 PM).
[184] See id.
[185] Attachments to Petitioner's Reply Brief in Support of His Petition for a Writ of Mandamus and Prohibition at 37-38, In re Al-Nashiri, 921 F.3d 224 (D.C. Cir. 2019) (No. 18-1279) [hereinafter Attachments to Reply Brief].
[186] See id. at 46.
[187] See id. at 12-13.
[188] See id. at 14.
[189] See id. at 21.
[190] February 16 Transcript, supra note 164, at 12,367.

. I'll just ponder it as we go forward."[191] At no point did he mention that at 8:02 pm the night before, he had sent an email to the Justice Department confirming his July 2018 start-date as an immigration judge.[192]

V. IN RE AL-NASHIRI

The D.C. Circuit ruled in the strongest terms possible that Spath had "clear[ly] and indisputabl[y]" violated his ethical obligations as a judge.[193] Applying the governing objective standard, the Circuit held that Spath and the government's conduct would cause "a reasonable person to doubt a judge's neutrality."[194] While it held that Spath's application for a job with the Justice Department was sufficient to require his disqualification, Spath's failure to disclose his employment negotiations compounded his violation and proved decisive in overcoming the various fine distinctions that counsel for the government put forward to salvage Spath's neutrality.[195] As a consequence, the Circuit vacated all of Spath's rulings from the moment he applied to the Justice Department nearly four years earlier.[196]

A. Spath's Core Ethical Violation

In reaching the conclusion that Spath's conduct would lead an objective observer to doubt the integrity of the proceedings, the Circuit was demonstrably moved by the perceived egregiousness of the record before it. In a potent concluding passage of the opinion, the Circuit's exasperation was palpable:

Although a principle so basic to our system of laws should go without saying, we nonetheless feel compelled to restate it plainly here: criminal justice is a shared responsibility. Yet in this case, save for Al-Nashiri's defense counsel, all elements of the military commission system—from the prosecution team to the Justice Department to the CMCR to the judge himself—failed to live up to that responsibility.[197]

Spath's core ethical violation was his application for a job that required an appointment from the Attorney General whilst Justice Department lawyers led the prosecution of the Al-Nashiri case, and the Attorney General played a significant role—both by statute and regulation—in the administration of the Guantanamo military commissions. "The fact of Spath's employment application alone," the Court concluded, "would thus be enough to require his disqualification."[198]

While this straightforward result is intuitive, at the time of the Circuit's decision, there was actually no binding precedent directly on point. The circumstances in which judges have been subject to disqualification litigation because of their prospective employment negotiations have been exceedingly rare, and that posed a superficially significant obstacle to obtaining relief in the mandamus posture.

At the time the Circuit heard the Al-Nashiri case, there was only one federal circuit case, Pepsico, Inc. v. McMillen,[199] to address a comparable issue. Pepsico involved a headhunter appointed by the district court judge that had—unbeknownst to the judge—contacted a firm with a case before that judge after all of the judge's substantive

[191] Id. at 12,374.
[192] Attachments to Reply Brief, supra note 183, at 20.
[193] In re Al-Nashiri, 921 F.3d 224, 233-35, 241 (D.C. Cir. 2019).
[194] Id. at 234-35.
[195] See id. at 231, 237.
[196] See id. at 241.
[197] Id. at 239-40.
[198] Id. at 237.
[199] 764 F.2d 458 (7th Cir. 1985).

decisions had been rendered.[200] Judge Posner vacated and disqualified the district court judge, holding that it was improper to conduct any employment negotiations with a party—"preliminary, tentative, indirect, unintentional, [or] ultimately unsuccessful"—when a matter was still pending.[201]

The only other two cases directly on point were at the state level. One was a 2008 case from New Jersey, whose facts were similar to Pepsico.[202] The other, Scott v. United States,[203] was a thirty-year-old case from the District of Columbia Court of Appeals (coincidentally decided by thenChief Judge Judith Rogers, who ended up on the panel in the Al-Nashiri case).[204] Scott involved a judge who was seeking employment in the Department of Justice Executive Office for United States Attorneys.[205] Notably, the position in the Executive Office was administrative and involved no role in departmental litigation.[206] Nevertheless, Judge Rodgers wrote for a unanimous court that vacatur was required because "[o]ur criminal justice system is founded on the public's faith in the impartial execution of duties by the important actors in that system."[207] Relying on Pepsico, the Court held that negotiating with "a component of the Department of Justice," and in particular "a unit directly linked to the prosecutor's office," created the same incurable appearance of partiality as if the judge had been in analogous negotiations with "a large private law firm."[208]

While a straightforward application of Scott certainly made the basic result in Al-Nashiri unsurprising, neither Scott nor Pepsico were binding precedent, and both were at least arguably distinguishable on their facts. This is significant because, as noted above, Al-Nashiri needed to meet the extraordinarily high "clear and indisputable" standard that governs writs of mandamus generally and which the D.C. Circuit applies more strictly than any other circuit in the country.[209] In fact, the D.C. Circuit has held that a petitioner must cite binding precedent in their favor to prevail on a writ of mandamus.[210] Counsel for the

[200] Id. at 459-60.
[201] Id. at 461.
[202] DeNike v. Cupo, 958 A.2d 446, 449 (N.J. 2008).
[203] Scott v. United States, 559 A.2d 745 (D.C. Ct. App. 1989).
[204] Id.
[205] Id. at 747.
[206] See id.
[207] Id. at 748.
[208] Id. at 750.
[209] See In re Al-Nashiri, 921 F.3d 224, 233 (D.C. Cir. 2019). In the Second Circuit, the "clear and indisputable" standard is met on purely legal questions whenever a lower court clearly and indisputably "based its ruling on an erroneous view of the law." SEC v. Rajaratnam, 622 F.3d 159, 171 (2d Cir. 2010); see also Balintulo v. Daimler AG, 727 F.3d 174, 187 n.18 (2d Cir. 2013). Other circuits have taken divergent views. The Third Circuit requires a "clear error of law" or a "clear abuse of discretion." In re Wilson, 451 F.3d 161, 169 (3d Cir. 2006). The Fifth Circuit relies upon a "clear abuse of discretion" standard. In re Volkswagen of Am., Inc., 545 F.3d 304, 310 (5th Cir. 2008). The Sixth and Tenth Circuits rely upon a five-factor balancing test in which one factor weighing in favor of review is whether the petition "raises new and important problems, or legal issues of first impression." In re Life Invs. Ins. Co. of Am., 589 F.3d 319, 323 (6th Cir. 2009); In re Antrobus, 519 F.3d 1123, 1130 (10th Cir. 2008). The Seventh Circuit has not analyzed the question thoroughly but appears, like the D.C. Circuit, to refrain from deciding open questions altogether. See Abelesz v. Erste Grp. Bank AG, 695 F.3d 655, 665 (7th Cir. 2012). The Ninth Circuit requires a showing of "clear error," whereby the "absence of controlling precedent weighs strongly against a finding of clear error," but does not carry dispositive weight. Van Dusen v. U.S. Dist. Ct. for the Dist. of Ariz., 654 F.3d 838, 841, 845 (9th Cir. 2011). And while the Eleventh Circuit has not analyzed the question closely, it has, in practice, decided questions of first impression raised via mandamus. See In re Coffman, 766 F.3d 1246, 1248-49 (11th Cir. 2014).
[210] See NetCoalition v. SEC, 715 F.3d 342, 354 (D.C. Cir. 2013); see also Doe v. Exxon Mobil Corp., 473 F.3d 345, 355 (D.C. Cir. 2007).

government argued, not without reason, that the paucity of precedent combined with the unusual military justice posture undermined Al-Nashiri's assertion that Spath's misconduct was "clear and indisputable."[211]

On the merits,[212] the government's argument was that Spath could not have done anything wrong because "every court-martial judge would be disqualified in cases where he or she is an officer of the same armed service as the trial counsel or the defense counsel."[213] This followed, the government insisted, because of the nature of the military judge's status. Military judges are only judges in the functional sense; their professional status is as military officers and lawyers.[214] Under this reasoning, it should neither be surprising, nor controversial that a military judge would have future employment prospects within the government.

At oral argument in the D.C. Circuit, counsel for the government stated this contention plainly: "[T]he impartiality of military judges is not structural. They don't have tenure. They're subject to the same personnel procedures that govern other judge-advocate military officers. . . . Military judges routinely discuss in confidence what their next assignment might be."[215]

In response to these arguments, however, Judge Thomas Griffith interjected, "So you're saying this goes on all the time? . . . And if it did go on all the time, it's ok?"[216] In some respects, the Circuit actually agreed with the counsel for the government's basic premises. The Circuit emphasized that nothing in its ruling "requires the Defense Department to change the way it assigns military judges, or the Justice Department the way it hires immigration judges, or the CMCR the way it considers appeals."[217] The problem was not that Spath sought the post-retirement employment that he did; instead, the problem was in the way in which he went about getting the job and most especially his failure to disclose what he was doing.[218]

B. Spath's Failure to Disclose

From the outset, the government strenuously resisted the idea that Spath had disclosure obligations of any kind. In July 2018, Al-Nashiri's defense counsel submitted a discovery request to the prosecution, requesting information regarding Spath's employment search after rumors began to circulate that Spath had left the Air Force to become an immigration judge.[219] The prosecution responded that Al-Nashiri's lawyers had

[211] See Brief of the United States in Opposition at 42-50, In re Al-Nashiri, 921 F.3d 224 (D.C. Cir. 2019) (No. 18 1279).

[212] For strategic reasons, the government tried to avoid any discussion of Spath's conduct in its briefing to the Circuit. Rather, its principal contention was that the writ should not issue because the matter had not been heard in the first instance before the military commission itself. See id. at 29-35. This argument became untenable, however, after the briefing was completed, insofar as it was revealed that Spath's successor on the Al-Nashiri military commission had also applied for and was awaiting an appointment as an immigration judge. See In re Al-Nashiri, 921 F.3d 224, 231, 233 (D.C. Cir. 2019).

[213] See Appellant's Opposition to Appellee's Motion for Leave to File and Motion to Vacate the Rulings of the Military Judge and to Compel Discovery of Evidence Relating to Disqualification of the Military Judge and His Successor at 13-14, United States v. Al-Nashiri, 374 F. Supp. 3d 1190 (C.M.C.R. 2018) (No. 18-002) [hereinafter Appellant's Opposition].

[214] See Weiss v. United States, 510 U.S. 163, 169 175-176 (1994).

[215] Oral Argument at 34:45, In re Al-Nashiri, 921 F.3d 224 (D.C. Cir. 2019) (No. 18-1279), https://www.cadc.uscourts.gov/recordings/recordings2018.nsf/625AE18EB552B6EC8525838A005F5E88/$file/18-1279.mp3.

[216] Id. at 42:07.

[217] In re Al-Nashiri, 921 F.3d 224, 240 (D.C. Cir. 2019).

[218] Id. at 237.

[219] Appellee's Motion for Leave, supra note 159, at 4.

"fail[ed] woefully to establish the appearance of any conflict of interest or adverse consequence to warrant intrusion into the personal affairs of the former Military Judge."[220]

Spath, the government argued, was merely "moving from one judicial position in the Executive Branch to another judicial position in the Executive Branch."[221] That meant he was subject to various rules and regulations that admonished him to exercise independent judgement. The Air Force instructions governing judicial behavior, for example, state "an independent, fair, and competent judiciary will interpret and apply the laws that govern us."[222] The Military Commissions Act forbids any effort to unlawfully influence a judge's decisions.[223] Hence, the government contended, the "nature of the independence required for the exercise of judicial authority, regardless of whether it is in the context of a criminal or administrative case, provides sufficient insulation from the partial, partisan concerns identified in other cases that have addressed postjudicial employment."[224] The government, in short, argued that Spath's professional ambitions should be shielded, as any other ambitious judge's would be, from scrutiny by the judicial mystique.

This argument has a certain superficial appeal. The vast majority of military judges are looking forward to their next job, and the vast majority of those are looking forward to their next job in the government. Their judicial status is transparently contingent. Everyone knows that. Why, then, are not a military judge's professional ambitions examples of what is described above as "impersonal facts?"[225] If replacing one military judge for another will not squelch the existence of career ambitions, why should a military judge have to reveal the potentially embarrassing details of their job hunts?

The answer is that military judges are only weakly protected by the judicial mystique. At oral argument, counsel for the government attempted to defend Spath's conduct based upon the contention that "it's common for judges to be considered for positions within the Executive Branch, and there doesn't appear to be cases or a practice of judges recusing."[226] But Judge David Tatel interrupted him sharply:

I can tell you what many of us think about that. Which is that an inquiry from the Executive Branch to anyone of us about our interest in a job would cause an immediate recusal. I mean if the Executive Branch wants to offer a judge a job, they offer the job. Period. End of matter. I don't know that judges do that, I certainly wouldn't do it, and I don't think most of my colleagues would.[227]

Judge Tatel made a point of highlighting how un-judicial Spath's behavior had been. In particular, Judge Tatel stated that he was particularly disturbed by the fact that Spath had used his decisions in the Al-Nashiri case to bolster his immigration judge application and that Spath was "talking about retirement for years and never disclosed that to anybody."[228] He continued: "If

[220] Government Response to Defense Request for Discovery, United States v. Al-Nashiri, 374 F. Supp. 3d 1190 (C.M.C.R. 2018) (No. 18-002) (original emphasis).
[221] Appellant's Opposition, supra note 211, at 8.
[222] Memorandum from Christopher F. Burne, J. Advoc. Gen., U.S. Air Force 54 (May 15, 2018).
[223] 10 U.S.C. § 949b(a)(2).
[224] Appellant's Opposition, supra note 211, at 23.
[225] See supra Part III.A.
[226] Oral Argument at 47:44, In re Al-Nashiri, 921 F.3d 224 (D.C. Cir. 2019), https://www.cadc.uscourts.gov/recordings/recordings2018.nsf/625AE18EB552B6EC8525838A005 F5E88/$file/18-1279.mp3.
[227] Id. at 47:52.
[228] Id. at 45:08.

you're just applying the standards of judicial behavior . . . I just don't see how that passes the smell test."[229]

C. Spath's Failure to Disclose Was Proof of His Bias

Spath was certainly free to have professional ambitions, but Spath was equally on notice that his ambitions were a matter of concern. When he took over the Al-Nashiri case, he was squarely asked by Al-Nashiri's counsel, "How much longer do you have before you retire?"[230] Spath responded, "Great question. Statutorily, seven and a half years. Absent a selective early retirement board or some unforeseen circumstance, that's how long I can stay."[231]

Spath therefore knew that his professional ambitions were relevant to the integrity of his decision-making neutrality, and rather than notify the parties that the initial facts on which their assessment of his neutrality depended had changed, he actively misdirected from what he knew to be true. "Given this lack of candor," the Circuit concluded, "a reasonable observer might wonder whether the judge had done something worth concealing."[232]

By failing to disclose, Spath short-circuited the checks-and-balances of the adversarial process through which he could have established his neutrality and earned public confidence. He acted like someone who had something to hide. He acted like someone who thought his service on the Al-Nashiri case was a ticket to a better job in the government and was unwilling to do anything that could force him to give up that ticket until that better job was in hand.

What was more, Spath's concealment by its nature was one-sided. "[W]hile Spath made sure to tell the Justice Department about his assignment to Al-Nashiri's commission," the Circuit noted, "he was not so forthcoming with Al-Nashiri."[233] This created reasonable doubts about his ability to "hold the balance nice, clear and true"[234] as he decided the myriad complex issues in the Al-Nashiri case. As a result, such decisions became inherently unreliable as judicial decisions and had to be vacated.

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[229] Id. at 45:20.

[230] Unofficial/Unauthenticated Transcript of the Al-Nashiri (2) Motions Hearing at 4,646, United States v. Al-Nashiri, No. 18-1279 (Aug. 4, 2014), https://www.mc.mil/Cases.aspx?caseType=omc&status=1&id=34.

[231] Id.

[232] In re Al-Nashiri, 921 F.3d 224, 237 (D.C. Cir. 2019).

[233] Id.

[234] Tumey v. Ohio, 273 U.S. 510, 532 (1927).