Docket No. 14-1227
[ORAL ARGUMENT SCHEDULED FOR FEBRUARY 23, 2016]

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

IN RE OMAR AHMED KHADR

On Petition for a Writ of Mandamus and Prohibition
Disqualifying Judge William B. Pollard, III from Serving on the
United States Court of Military Commission Review

BRIEF OF ETHICS BUREAU AT YALE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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I. Parties and *Amici* Appearing Below

All parties, intervenors, and *amici* appearing in the proceedings below are listed in the Brief of Petitioner.

II. Parties and *Amici* Appearing in this Court

All parties, intervenors, and *amici* appearing in this Court are listed in the Brief of Petitioner.

III. Rulings under Review

References to the rulings at issue appear in the Brief of Petitioner.

IV. Related Cases

This case has not previously been filed with this Court or any other court. Ethics Bureau at Yale is not aware of any related cases in this Court or any other court.

Dated: November 24, 2015

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GLOSSARY

ABA... American Bar Association

Code of Conduct.................................... Code of Conduct for United States Judges

DoD .... Department of Defense

DoDI .... Department of Defense Instructions

EBaY ....Ethics Bureau at Yale

HQE...Highly Qualified Expert

Model Code .... ABA Model Code of Judicial Conduct

USCMCR .... United States Court of Military Commission Review

STATEMENT OF IDENTITY, INTEREST IN CASE, AND SOURCE OF AUTHORITY TO FILE

Pursuant to Fed. R. App. P. 29(a) and Circuit Rule 29(b), *amicus* certifies that all parties have consented to the filing of this brief.

Ethics Bureau at Yale ("EBay"), a clinic composed of fourteen law school students supervised by an experienced practicing lawyer and lecturer, drafts *amicus* briefs in cases concerning professional responsibility; assists defense counsel with ineffective assistance of counsel claims relating to the professional responsibility of lawyers; and offers ethics advice and counsel on a pro bono basis to not-for-profit legal service providers, courts, and law school clinics.

EBaY respectfully submits this brief as *amicus curiae* because it has an abiding interest in ensuring that the applicable rules of judicial conduct preserve the right of every criminal defendant to a fair prosecution by a rule-abiding minister of justice. *Amicus* believes that the ethical violations in this case require that Judge Pollard be recused not only to preserve the integrity of the proceedings at issue, but also to avoid undermining public confidence in the legal system.

STATEMENT OF AUTHORSHIP AND FINANCIAL CONTRIBUTIONS

Pursuant to Fed. R. App. P. 29(c)(5), *amicus* certifies that this brief was authored by *amicus* and counsel listed on the front cover. This brief was not written in whole or in part by counsel for any party, and no person or entity other than the *amicus* and its counsel has made a monetary contribution to the preparation and submission of this brief.

ARGUMENT

I. Judge Pollard's Private Practice of Law Violates the Applicable Rules of Judicial Ethics.

The rules of judicial ethics that apply in this case prohibit the practice of law by sitting federal judges. This is a core governing principle because the practice of law by judges threatens the independence and impartiality of the judiciary. Recognizing this threat, federal law proscribes the practice of law by all federal judges, save for part-time magistrates. The Code of Conduct for United States Judges and the American Bar Association ("ABA") Model Code of Judicial Conduct also prohibit the practice of law by judges in most circumstances and set stringent rules to govern the exceptions. Even in the strictly limited circumstances in which part-time judgeships are tolerated, such judges must follow exacting standards of conduct that Judge Pollard has not met.

A. Statutes and Ethical Standards Prohibit the Private Practice of Law by Federal Judges.

Various statutes and canons prohibit the practice of law by members of the federal judiciary. The U.S. Code criminalizes the practice of law by "[a]ny justice or judge appointed under the authority of the United States" as a high misdemeanor. 28 U.S.C. § 454 (2012). The only exception to this ban exists for part-time magistrate judges. 28 U.S.C. § 632 (2012). The broad scope of the prohibition on the practice of law by judges, coupled with the criminal penalty for its violation, underscores the historical importance of this rule to judicial

legitimacy. As the District Court has observed, "From the early days of the Republic, limitations have been placed on the independence of any individual federal judge in order to assure the integrity and independence of the judicial branch. . . . [In 1812,] Congress . . . made it a 'high misdemeanor' for a judge to practice law." *Hastings v. Judicial Conference of U.S.*, 593 F. Supp. 1371, 1379-80 (D.D.C. 1984), *aff'd in part & vacated in part*, 770 F.2d 1093 (D.C. Cir. 1985) (citations omitted).

Indeed, Congress proscribed the practice of law by judges to complement the protections of judicial integrity enshrined in the Constitution.

> Congress supplemented . . . constitutional measures [granting judges lifetime tenure and Congress the impeachment power] almost immediately with various statutory limitations on the independence of individual judges. . . . Some examples . . . include criminalization of bribery, the recusal requirement, and the prohibition on the practice of law by judges.

McBryde v. Comm. to Review Circuit Council Conduct & Disability Orders of Judicial Conference of U.S., 83 F. Supp. 2d 135, 153-54 (D.D.C. 1999), *aff'd in part & vacated in part*, 264 F.3d 52 (D.C. Cir. 2001) (citations omitted). Thus, one of the most basic tenets of judicial ethics, in terms of historical pedigree, is the firewall between practitioners and adjudicators.

The Code of Conduct for United States Judges ("Code of Conduct") reiterates the ban on the practice of law by judges. The Code of Conduct directs that "[a] judge should not practice law." Code of Conduct, Canon 4A(5). Canon 3C

sets forth a broad standard that governs judicial disqualification: "A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned." Code of Conduct, Canon 3C.

Similarly, the ABA Model Code of Judicial Conduct ("Model Code"), which has been adopted by 32 states, *see State Adoption of Revised Model Code of Judicial Conduct*, Am. Bar. Ass'n (Nov. 2, 2015), *available at* http://www.americanbar.org/groups/professional_responsibility/resources/judicial_ethics_regulation/map.html, also admonishes, "A judge shall not practice law." ABA Model Code of Judicial Conduct ("Model Code") R. 3.10 (1990). The Model Code applies to "anyone who is authorized to perform judicial functions," including magistrate judges and administrative law judges, Model Code, Application sec. I(B), and its violation may result in sanctions, Model Code, Scope ¶ 6.

Allowing judges to practice law threatens the integrity of the judiciary by creating opportunities for impropriety and partiality. First, judges who engage in private legal practice demean the dignity of their judicial office. Canon 4 of the Code of Conduct prohibits such conduct, admonishing that "a judge should not participate in extrajudicial activities that detract from the dignity of the judge's office." Code of Conduct, Canon 4, Pmbl. A judge who maintains a law practice on the side must, like every other lawyer, solicit clients. The need to drum up

business turns judges into salesmen, degrading the stature of their judicial office and creating tempting opportunities to impermissibly market their judgeships as commodities.

Second, when a judge appears in a courtroom as a litigant, he creates doubt about the impartiality of the proceedings. For example, Advisory Opinion No. 72 of the Judicial Conference Committee on Codes of Conduct opines that former judges who have returned to the practice of law must forgo the honorific "Judge" in court proceedings and filings. The Opinion explains:

> A litigant whose lawyer is called "Mr.," and whose adversary's lawyer is called "Judge," may reasonably lose a degree of confidence in the integrity and impartiality of the judiciary. In addition, application of the same title to advocates and to the presiding judicial officer can tend to demean the court as an institution.

Comm. on Codes of Conduct, *Advisory Opinion No. 72: Use of Title "Judge" by Former Judges* (June 2009), *in* 2B Guide to Judiciary Policy ch.2, at 72-1 (2015), *available at* www.uscourts.gov/file/1903/download; *see also* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 95-391 (Apr. 24, 1995) (stating that "there appears to be no reason for . . . use of the title ['Judge' by a lawyer] other than to create . . . an expectation [about the results a lawyer can achieve] or to gain an unfair advantage over an opponent"). In fact, this Court applied Advisory Opinion No. 72 in denying the *unopposed* motion of retired federal jurists for leave to file brief *amici curiae* in *Boumediene v. Bush*, 476 F.3d 934, 934-35 (D.C. Cir.

2006). If the use of the word "Judge" by a retired jurist gives this Court ethical pause, then surely the participation of a sitting judge in litigation goes far beyond the realm of permissible extrajudicial activity.

Although the U.S. Code, Code of Conduct, and Model Code make narrow exceptions for part-time judges, none of these exemptions apply to Judge Pollard's position. Federal law creates only one exception to the prohibition found in 28 U.S.C. § 454; this exception applies narrowly to part-time magistrate judges, 28 U.S.C. § 632 (2012), and clearly does not cover Judge Pollard's position. The Code of Conduct exempts from Canon 4A(5) only those judges who "serve[] part-time . . . [and are] permitted by law to devote time to some other profession . . . and whose compensation for that reason is less than that of a full-time judge." Code of Conduct, Compliance with the Code of Conduct, Sec. A. The Model Code does not define "part-time judge," instead providing rules "in general terms because of the widely varying forms of judicial service." Model Code, Application, Sec. I(A). Thus, both the Code of Conduct and the Model Code rely on the underlying statute that created the judgeship to establish affirmatively when part-time service is "permitted by law." Code of Conduct, Compliance with the Code of Conduct, Sec. A. The Military Commissions Act of 2009, which created the court on which Judge Pollard sits, contains no such permission for part-time service. Pub. L. No. 111-84,

§ 1802, 123 Stat. 2574, 2574-2612 (2009) (codified as amended in scattered sections of 10 U.S.C.).

Furthermore, ABA Ethics Opinions favor a narrow reading of the part-time judge exception. Various opinions characterize the creation of low-level, part-time judgeships as the last resort of under-funded localities. One opinion notes, "In superior courts of general jurisdiction, [the practice of law by judges] should never be permitted. In inferior courts in some states, it is permitted because the county or municipality is not able to pay adequate living compensation for a competent judge." ABA Comm. on Prof'l Ethics, Formal Op. 322 (May 18, 1969); *accord* ABA Comm. on Prof'l Ethics, Informal Op. C-759(a) (Aug. 24, 1964). This condition certainly does not characterize Judge Pollard's position. Far from a part-time job in a local court on a shoestring budget, an Article 1 USCMCR civilian judgeship requires nomination by the President and the advice and consent of the Senate. 10 U.S.C. § 950f (2012).

B. Even if Judge Pollard Were Not Barred from the Private Practice of Law, His Conduct Creates Conflicts Requiring his Disqualification.

Judges with permission to practice law part-time must diligently detect and avoid conflicts of interest. The ABA warns that when the creation of a part-time judgeship becomes regrettably necessary, the judge-turned-lawyer "is in a position of great delicacy and must be scrupulously careful to avoid conduct in his practice

whereby he utilizes or seems to utilize his judicial position to further his professional success." ABA Comm. on Prof'l Ethics, Formal Op. 322. Even if Judge Pollard's position could qualify for part-time status under the Code and Canons, which it clearly does not, he has not structured his law practice to meet the high ethical bar required of such jurists.

First, Judge Pollard's advertisements for his legal practice impermissibly tout his judicial credentials. His Duane Morris LLP biography web page notes that "the Obama administration appointed him to preside in trials involving the detainees at Guantanamo Naval Base in Cuba." *William B. Pollard III*, Duane Morris, http://www.duanemorris.com/attorneys/williambpollard.html (last visited Nov. 2, 2015) [hereinafter *Duane Morris Biography*]. Canon 2B of the Code of Conduct condemns such statements, warning that a judge should not "lend the prestige of the judicial office to advance the private interests of the judge." Code of Conduct, Canon 2B.

The Model Code aligns with the Code of Conduct, requiring that "[a] judge shall not abuse the prestige of judicial office to advance the personal or economic interests of the judge or others, or allow others to do so." Model Code R. 1.3. The official Comment to Rule 1.3 provides an example, noting that "it would be improper for a judge to allude to his or her judicial status to gain favorable treatment in encounters with traffic officials." Model Code R. 1.3, Cmt 1. If a

judge may not mention his occupation to a traffic cop to avoid a fifty-dollar ticket, he surely cannot openly advertise such credentials to potential corporate law-firm clients worth millions in business revenue.

Second, Judge Pollard's participation in private cases to which the United States is party casts doubt on both his impartiality as a judge and his loyalty as a litigator. He practices in areas of law in which he is likely to litigate against the United States government while simultaneously presiding over cases to which the United States is party. Judge Pollard's law firm biography notes his "leading roles in . . . white-collar criminal cases . . . and regulatory investigations" and his experience in "[U.S. Securities and Exchange Commission] enforcement actions, money laundering and asset forfeiture disputes, [and] securities law disputes." *Duane Morris Biography*. His dual role as litigator and adjudicator should not only concern the parties who appear before him, but it should also worry the clients he represents. Beholden to the government for his continued employment in a prestigious judicial office, Judge Pollard may be less apt to aggressively and zealously litigate against the government on behalf of his clients. The incentive to stay his own hand in private representation creates an impermissible concurrent conflict of interest in violation of the ABA model rules governing lawyers, which identifies a conflict wherever "there is a significant risk that the representation . . .

will be materially limited . . . by a personal interest of the lawyer." ABA Model Rules of Prof'l Conduct R. 1.7(a)(2) (1983).

The rules governing the behavior of part-time magistrate judges provide a useful metric by which to assess Judge Pollard's conduct. The ABA has opined that a part-time magistrate judge may not "use his official position in any way to promote his law practice." ABA Comm. on Ethics & Prof'l Responsibility, Informal Op. 1473 (July 20, 1981). Judge Pollard has not followed this dictate. Additionally, 28 U.S.C. § 632 (2012) provides that part-time United States Magistrate Judges "may not serve as counsel in any criminal action in any court of the United States." Judge Pollard has not followed this dictate either.

If such behavior is impermissible for a part-time magistrate, whose decisions only serve as non-binding recommendations to a district judge, then certainly such conflicts of interest are unacceptable for a judge on the appellate-level USCMCR, whose decisions receive a level of deference from this Court. 10 U.S.C. § 950g(d) (2012). The conflicts of interest arising from Judge Pollard's private practice of law categorically prevent him from fulfilling his duty of impartiality as a judge of the United States.

II. As an At-Will Employee, Judge Pollard Faces an Impermissible Financial Conflict of Interest.

Judges may not adjudicate cases if the outcome would affect their pecuniary interests. The U.S. Code requires

> [a]ny justice, judge, or magistrate judge of the United States . . . [to] disqualify himself . . . [where] [h]e knows that he . . . has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding.

28 U.S.C. § 455 (2012). The Code of Conduct echoes this dictate almost verbatim. Code of Conduct, Canon 3C(1)(c).

The Supreme Court has consistently refused to allow judges to preside over cases that implicate their financial interests. In *Tumey*, it noted this principle's deep roots in Anglo-American legal history. *Tumey v. Ohio*, 273 U.S. 510, 525 (1927) ("There was at the common law the greatest sensitiveness over the existence of any pecuniary interest however small or infinitesimal in the justices of the peace."). *Tumey* concerned a mayor, sitting as judge, who would receive a personal salary supplement only by imposing penalties on defendants. *Id.* at 521-23. Chief Justice Taft, writing for a unanimous Court, held that the mayor's "direct, personal, substantial pecuniary interest in reaching a conclusion against [the defendant] in his case" violated constitutionally guaranteed due process rights. *Id.* at 523.

The Supreme Court recently reaffirmed *Tumey* in *Caperton*, which held that a judge must recuse himself from a case involving a significant campaign contributor. *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 886-87 (2009). The Court explained that "there is a serious risk of actual bias . . . when a person with a personal stake in a particular case had a significant and disproportionate influence

in placing the judge on the case." *Id.* at 884. Beyond judges' "direct pecuniary interest," the Court also expressed concern with any "more general . . . interests that tempt adjudicators to disregard neutrality." *Id.* at 878 (discussing *Tumey*).

Judge Pollard's employment status violates these clear rules of judicial ethics and contravenes Supreme Court precedent. Despite the fact that he is an Article I judge, appointed by the President and confirmed by the Senate, the Department of Defense allows him to serve as an at-will employee. Judge Pollard serves on the USCMCR as a Highly Qualified Expert ("HQE"), a particular kind of "special government employee," pursuant to 5 U.S.C. § 9903 (2012). Pet'r's Br. 11. This arrangement generates two conflicts of interest.

Tenuous Tenure. First, the Department of Defense may fire or refuse to rehire Judge Pollard without cause. He serves "at the will of the appointing official and may be terminated at any time." U.S. Dep't of Def., Instr. 1400.25, DoD Civilian Personnel Management System: Employment of Highly Qualified Experts (HQEs), vol. 922, encl. 3, § 7(b) (Apr. 3, 2013) [hereinafter DoDI 1400.25], *available at* http://www.dtic.mil/whs/directives/corres/pdf/140025_vol922.pdf. Additionally, as an HQE, Judge Pollard may serve for a maximum of five years with the possibility of a one-year extension "if the Secretary determines that such action is necessary to promote the Department of Defense's national security missions." 5 U.S.C. § 9903(c)(2) (2012); *see also* DoDI 1400.25, § 4(a) ("HQEs

shall be appointed to . . . advance the DoD national security mission.”). Defendants before the USCMCR will be entirely justified in questioning Judge Pollard’s ability to evaluate their cases fairly when angering the prosecution may very well cost him his job. *Cf. Humphrey’s Executor v. United States*, 295 U.S. 602, 629 (1935) (“[O]ne who holds his office only during the pleasure of another cannot be depended upon to maintain an attitude of independence against the latter’s will.”).

Bonuses from a Litigant. Second, the Department of Defense controls Judge Pollard’s bonuses. The Secretary determines his eligibility for lucrative “retention incentive[s].” DoDI 1400.25, encl. 3, § 8(d). Conditioning bonus eligibility on DoD approval constrains Judge Pollard’s independent judgment, putting a thumb on the scale in favor of the DoD’s interests and violating Judge Pollard’s duty to serve as a neutral and detached decision-maker.

Judge Pollard’s employment arrangement inappropriately deviates from the norm of judicial independence in Article I courts. Congress consistently grants Article I judges robust tenure protections in order to insulate them from bias that would otherwise arise when their agency employers come before them as litigants. For example, Administrative Law Judges can only be removed for good cause, 5 U.S.C. § 7521 (2012), and they are excluded from the standard Executive Branch performance appraisal system, 5 U.S.C. § 4301 (2012); 5 C.F.R. § 930.211(a)

(2015) (exempting Administrative Law Judges from "[p]rocedures for adverse actions" that apply to other civil service employees).

Congress created tenure protections for judges on the USCMCR as well. Actions taken by members of military commissions may not be considered in performance evaluations for promotions, 10 U.S.C. § 949b(c) (2012), and USCMCR judges may not be reassigned involuntarily except for "military necessity" or "good cause," 10 U.S.C. § 949b(b)(4) (2012). Mirroring these protections, Congress requires that civilian members of the USCMCR receive presidential appointment and Senate confirmation. 10 U.S.C. § 950f(b)(3) (2012). Judge Pollard's negotiated employment arrangement, however, has created a truly anomalous situation: while his military colleagues enjoy insulation from performance reviews and protections against involuntary transfer, Judge Pollard depends on the Secretary of Defense for both performance-based bonuses and continued at-will employment. Surely Congress did not intend to protect the judicial independence of only some, but not all, of the judges on the USCMCR.

Judge Pollard's conflicts of interest clearly violate ethical rules, Court precedent, and Congressional intent. The DoD's relationship with Judge Pollard goes far beyond "a significant and disproportionate influence in placing" him on the bench, *Caperton*, 556 U.S. at 884; worse yet, the Secretary of Defense has authority to fire Judge Pollard, refuse to extend his tenure, and deny him bonuses.

Judge Pollard's total lack of judicial independence denies litigants the protection that Congress provides to parties appearing in front of other Article I courts and, most significantly, the protection that Congress surely intended to provide to defendants before the USCMCR.

III. Evaluated by the Objective Standard, the Actual and Perceived Impropriety of Judge Pollard's Conduct Requires His Disqualification.

Rules of judicial ethics compel judges to avoid impropriety or the appearance of impropriety. Federal law mandates that a judge must be recused "in any proceeding in which his impartiality might reasonably be questioned." 28 U.S.C. § 455(a) (2012). Both the Code of Conduct and the Model Code echo this requirement. *See* Code of Conduct, Canon 3C(1) ("A judge shall disqualify himself . . . in a proceeding in which the judge's impartiality might reasonably be questioned . . . ."); Model Code R. 1.2 ("A judge . . . shall avoid impropriety and the appearance of impropriety.").

The Court of Military Commission Review has explicitly adopted the disqualification requirements of Canon 3C. Court of Military Commission Review Rules of Practice R. 24, *available at* http://www.mc.mil/LinkClick.aspx?fileticket=hd1VnXaxXU0%3d&tabid=112&mid=445. Because Canon 3C provides a non-exhaustive list of instances in which judges must disqualify themselves, the rest of the Code of Conduct contextualizes Canon 3C's disqualification standard and

serves as persuasive authority regarding the judicial ethics governing the USCMCR.

It does not matter if Judge Pollard *actually* modifies his judicial behavior based on his conflicted private practice of law or tenuous employment status. *See Caperton*, 556 U.S. at 881 (stating that the question is "not whether the judge is actually, subjectively biased"). Instead, what matters is that Judge Pollard's extrajudicial interests create incentives that one may reasonably expect to influence how he adjudicates cases. *See Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 859-60 (1988) (noting that an assessment under § 455(a) "does not depend upon whether or not the judge actually knew of facts creating an appearance of impropriety, so long as the public might reasonably believe that he or she knew"). Thus, there is an objective standard for recusal: to wit, whether a reasonable and informed person would question a judge's impartiality or integrity. *United States v. Microsoft Corp.*, 253 F.3d 34, 114-15 (D.C. Cir. 2001); *see also* Code of Conduct, Canon 2A, Cmt. ("An appearance of impropriety occurs when reasonable minds . . . would conclude that the judge's honesty, integrity, impartiality, temperament, or fitness to serve as a judge is impaired.").

The objective standard serves two purposes. First, the it obviates the need to make unreliable subjective evaluations of bias. The actual effects of conflicts of interest are almost impossible to detect. The Court explained in *Caperton* that the

objective assessment must turn on a "realistic appraisal of psychological tendencies and human weakness" to determine if the conflict poses "a risk of actual bias or prejudgment." *Caperton*, 556 U.S. at 883-84 (quoting *Withrow v. Larkin*, 421 U.S. 35, 47 (1975)).

Second, an objective evaluation gives appropriate weight to the harm that the appearance of impropriety does to public confidence. *See In re Sch. Asbestos Litig.*, 977 F.2d 764, 776 (3d Cir. 1992), *cited with approval in Cobell v. Norton*, 334 F.3d 1128, 1139 (D.C. Cir. 2003). As the Supreme Court observed in *Liljeberg*, the core purpose of § 455(a) is "to promote public confidence in the integrity of the judicial process." *Liljeberg*, 486 U.S. at 860. Similarly, the commentary to Canon 2A stresses that "[p]ublic confidence in the judiciary is eroded by irresponsible or improper conduct by judges." Code of Conduct, Canon 2A, Cmt. The Preamble to the ABA Model Code of Judicial Conduct also embraces this principle, declaring that judges should "aspire at all times to conduct that ensures the greatest possible public confidence in their independence, impartiality, integrity, and competence." Model Code, Pmbl.

Courts rely on public confidence to ensure respect for and compliance with their decisions. As the Code of Conduct observes, "Deference to the judgments and rulings of courts depends on public confidence in the integrity and independence of

judges." Code of Conduct, Canon 1, Cmt. Judges must scrupulously adhere to ethical standards because the authority and legitimacy of the judiciary depend on it.

These concerns take on even greater weight when the court system in question is an unfamiliar one that has proven (and remains) highly controversial, lacking deep roots of acceptance. *See Hamdan v. Rumsfield*, 548 U.S. 557, 567 (2006) (finding that "the military commission convened to try Hamdan lacks the power to proceed because its structure and procedures violate both the UMCJ and the Geneva Conventions."); *see also Boumediene v. Bush*, 553 U.S. 723, 788-92 (2008) (finding unconstitutional the provisions of the Military Commissions Act of 2006, passed in the wake of *Hamdan*, that did not allow Guantanamo prisoners habeas rights in U.S. federal courts). Concerns over the legitimacy of military commissions led Congress to pass the Military Commissions Act of 2009, which founded the USCMCR and established it as an Article I court. 10 U.S.C. § 948b (2012).

Judge Pollard might actually believe he can remain impartial in the face of his strong countervailing incentives. But an objective observer would be compelled to doubt his impartiality and question the propriety of the arrangement under which he serves. No reasonable person could conclude that an individual in Judge Pollard's position, whose private law practice receives both financial and reputational benefits from his judicial employment, and whose judicial tenure and

bonuses are controlled by the Secretary of Defense, could serve impartially or render independent decisions. In short, this case does not just reflect the appearance of partiality: it is the living embodiment of partiality itself. Only Judge Pollard's recusal from this case can cure the harm Petitioner will incur.

CONCLUSION

For the foregoing reasons, the petition should be granted.

Respectfully submitted,

November 24, 2015

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Dated: November 24, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

U.S. Court of Appeals Docket Number 14-1227.

I hereby certify that I electronically filed the foregoing Brief of *Amicus Curiae* with the Clerk of Court for the United States Court of Appeals for the District of Columbia Circuit by using the CM/ECF system on November 24, 2015.

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

Dated: November 24, 2015

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STATUTES AND REGULATIONS

*Except for the following, all applicable statutes, etc., are contained in the Brief for Petitioner.

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5 U.S.C. § 7521 2
5 C.F.R. § 930.211 2
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5 U.S.C. § 4301

For the purpose of this subchapter—

(1) "agency" means—

(A) an Executive agency; and

(B) the Government Publishing Office;

but does not include—

(i) a Government corporation;

(ii) the Central Intelligence Agency, the Defense Intelligence Agency, the National Geospatial-Intelligence Agency, the National Security Agency, or any Executive agency or unit thereof which is designated by the President and the principal function of which is the conduct of foreign intelligence or counterintelligence activities; or

(iii) the Government Accountability Office;

(2) "employee" means an individual employed in or under an agency, but does not include—

(A) an employee outside the United States who is paid in accordance with local native prevailing wage rates for the area in which employed;

(B) an individual in the Foreign Service of the United States;

(C) a physician, dentist, nurse, or other employee in the Veterans Health Administration of the Department of Veterans Affairs whose pay is fixed under chapter 73 of title 38;

(D) an administrative law judge appointed under section 3105 of this title;

(E) an individual in the Senior Executive Service or the Federal Bureau of Investigation and Drug Enforcement Administration Senior Executive Service;

(F) an individual appointed by the President;

(G) an individual occupying a position not in the competitive service excluded from coverage of this subchapter by regulations of the Office of Personnel Management; or

(H) an individual who (i) is serving in a position under a temporary appointment for less than one year, (ii) agrees to serve without a performance evaluation, and (iii) will not be considered for a reappointment or for an increase in pay based in whole or in part on performance; and

(3) "unacceptable performance" means performance of an employee which fails to meet established performance standards in one or more critical elements of such employee's position.

5 U.S.C. § 7521
(a) An action may be taken against an administrative law judge appointed under section 3105 of this title by the agency in which the administrative law judge is employed only for good cause established and determined by the Merit Systems Protection Board on the record after opportunity for hearing before the Board.

(b) The actions covered by this section are—
(1) a removal;
(2) a suspension;
(3) a reduction in grade;
(4) a reduction in pay; and
(5) a furlough of 30 days or less;
but do not include—
(A) a suspension or removal under section 7532 of this title;
(B) a reduction-in-force action under section 3502 of this title; or
(C) any action initiated under section 1215 of this title.

5 C.F.R. § 930.211
(a) Procedures.
An agency may remove, suspend, reduce in level, reduce in pay, or furlough for 30 days or less an administrative law judge only for good cause established and determined by the Merit Systems Protection Board on the record and after opportunity for a hearing before the Board as prescribed in 5 U.S.C. 7521 and 5 CFR part 1201. Procedures for adverse actions by agencies under part 752 of this chapter do not apply to actions against administrative law judges.

(b) Status during removal proceedings.
In exceptional cases when there are circumstances in which the retention of an administrative law judge in his or her position, pending adjudication of the existence of good cause for his or her removal, is detrimental to the interests of the Federal Government, the agency may:
(1) Assign the administrative law judge to duties consistent with his or her normal duties in which these circumstances would not exist;
(2) Place the administrative law judge on leave with his or her consent;
(3) Carry the administrative law judge on annual leave, sick leave, leave without pay, or absence without leave, as appropriate, if he or she is voluntarily absent for reasons not originating with the agency; or
(4) If the alternatives in paragraphs (b)(1) through (b)(3) of this section are not available, the agency may consider placing the administrative law judge in a paid non-duty or administrative leave status.

(c) Exceptions from procedures. The procedures in paragraphs (a) and (b) of this section do not apply:

(1) In making dismissals or taking other actions under 5 CFR part 731;

(2) In making dismissals or other actions made by agencies in the interest of national security under 5 U.S.C. 7532;

(3) To reduction in force actions taken by agencies under 5 U.S.C. 3502; or

(4) In any action initiated by the Office of Special Counsel under 5 U.S.C. 1215.

10 U.S.C. § 948b

(a) Purpose.

This chapter establishes procedures governing the use of military commissions to try alien unprivileged enemy belligerents for violations of the law of war and other offenses triable by military commission.

(b) Authority for Military Commissions Under This Chapter.

The President is authorized to establish military commissions under this chapter for offenses triable by military commission as provided in this chapter.

(c) Construction of Provisions.

The procedures for military commissions set forth in this chapter are based upon the procedures for trial by general courts-martial under chapter 47 of this title (the Uniform Code of Military Justice). Chapter 47 of this title does not, by its terms, apply to trial by military commission except as specifically provided therein or in this chapter, and many of the provisions of chapter 47 of this title are by their terms inapplicable to military commissions. The judicial construction and application of chapter 47 of this title, while instructive, is therefore not of its own force binding on military commissions established under this chapter.

(d) Inapplicability of Certain Provisions.

(1) The following provisions of this title shall not apply to trial by military commission under this chapter:

(A) Section 810 (article 10 of the Uniform Code of Military Justice), relating to speedy trial, including any rule of courts-martial relating to speedy trial.

(B) Sections 831(a), (b), and (d) (articles 31(a), (b), and (d) of the Uniform Code of Military Justice), relating to compulsory self-incrimination.

(C) Section 832 (article 32 of the Uniform Code of Military Justice), relating to preliminary hearing.

(2) Other provisions of chapter 47 of this title shall apply to trial by military commission under this chapter only to the extent provided by the terms of such provisions or by this chapter.

(e) Geneva Conventions Not Establishing Private Right of Action.
No alien unprivileged enemy belligerent subject to trial by military commission under this chapter may invoke the Geneva Conventions as a basis for a private right of action.

10 U.S.C. § 949b
(a) Military Commissions.
(1) No authority convening a military commission under this chapter may censure, reprimand, or admonish the military commission, or any member, military judge, or counsel thereof, with respect to the findings or sentence adjudged by the military commission, or with respect to any other exercises of its or their functions in the conduct of the proceedings.
(2) No person may attempt to coerce or, by any unauthorized means, influence—
(A) the action of a military commission under this chapter, or any member thereof, in reaching the findings or sentence in any case;
(B) the action of any convening, approving, or reviewing authority with respect to their judicial acts; or
(C) the exercise of professional judgment by trial counsel or defense counsel.
(3) The provisions of this subsection shall not apply with respect to—
(A) general instructional or informational courses in military justice if such courses are designed solely for the purpose of instructing members of a command in the substantive and procedural aspects of military commissions; or
(B) statements and instructions given in open proceedings by a military judge or counsel.

(b) United States Court of Military Commission Review.—
(1) No person may attempt to coerce or, by any unauthorized means, influence—
(A) the action of a judge on the United States Court of Military Commissions Review in reaching a decision on the findings or sentence on appeal in any case; or

(B) the exercise of professional judgment by trial counsel or defense counsel appearing before the United States Court of Military Commission Review.

(2) No person may censure, reprimand, or admonish a judge on the United States Court of Military Commission Review, or counsel thereof, with respect to any exercise of their functions in the conduct of proceedings under this chapter.

(3) The provisions of this subsection shall not apply with respect to—

(A) general instructional or informational courses in military justice if such courses are designed solely for the purpose of instructing members of a command in the substantive and procedural aspects of military commissions; or

(B) statements and instructions given in open proceedings by a judge on the United States Court of Military Commission Review, or counsel.

(4) No appellate military judge on the United States Court of Military Commission Review may be reassigned to other duties, except under circumstances as follows:

(A) The appellate military judge voluntarily requests to be reassigned to other duties and the Secretary of Defense, or the designee of the Secretary, in consultation with the Judge Advocate General of the armed force of which the appellate military judge is a member, approves such reassignment.

(B) The appellate military judge retires or otherwise separates from the armed forces.

(C) The appellate military judge is reassigned to other duties by the Secretary of Defense, or the designee of the Secretary, in consultation with the Judge Advocate General of the armed force of which the appellate military judge is a member, based on military necessity and such reassignment is consistent with service rotation regulations (to the extent such regulations are applicable).

(D) The appellate military judge is withdrawn by the Secretary of Defense, or the designee of the Secretary, in consultation with the Judge Advocate General of the armed force of which the appellate military judge is a member, for good cause consistent with applicable procedures under chapter 47 of this title (the Uniform Code of Military Justice).

(c) Prohibition on Consideration of Actions on Commission in Evaluation of Fitness.

In the preparation of an effectiveness, fitness, or efficiency report or any other report or document used in whole or in part for the purpose of determining whether

a commissioned officer of the armed forces is qualified to be advanced in grade, or in determining the assignment or transfer of any such officer or whether any such officer should be retained on active duty, no person may—

(1) consider or evaluate the performance of duty of any member of a military commission under this chapter; or

(2) give a less favorable rating or evaluation to any commissioned officer because of the zeal with which such officer, in acting as counsel, represented any accused before a military commission under this chapter.

ABA Model Code of Judicial Conduct Rule 1.2
Promoting Confidence in the Judiciary. A judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety.

ABA Model Code of Judicial Conduct Rule 1.3 and Commentary (excerpt)
Avoiding Abuse of the Prestige of Judicial Office. A judge shall not abuse the prestige of judicial office to advance the personal or economic interests of the judge or others, or allow others to do so.

COMMENTARY

[1] It is improper for a judge to use or attempt to use his or her position to gain personal advantage or deferential treatment of any kind. For example, it would be improper for a judge to allude to his or her judicial status to gain favorable treatment in encounters with traffic officials. Similarly, a judge must not use judicial letterhead to gain an advantage in conducting his or her personal business.

ABA Model Code of Judicial Conduct Rule 3.10
Practice of Law. A judge shall not practice law. A judge may act pro se and may, without compensation, give legal advice to and draft or review documents for a member of the judge’s family, but is prohibited from serving as the family member’s lawyer in any forum.

ABA Model Code of Judicial Conduct Rule, Application (excerpt)
I. Applicability of This Code.

(A) The provisions of the Code apply to all full-time judges. Parts II through V of this section identify those provisions that apply to four distinct categories of part-time judges. The four categories of judicial service in other than a full-time capacity are necessarily defined in general terms because of the

widely varying forms of judicial service. Canon 4 applies to judicial candidates.

(B) A judge, within the meaning of this Code, is anyone who is authorized to perform judicial functions, including an officer such as a justice of the peace, magistrate, court commissioner, special master, referee, or member of the administrative law judiciary.

ABA Model Code of Judicial Conduct Rule, Preamble

[1] An independent, fair and impartial judiciary is indispensable to our system of justice. The United States legal system is based upon the principle that an independent, impartial, and competent judiciary, composed of men and women of integrity, will interpret and apply the law that governs our society. Thus, the judiciary plays a central role in preserving the principles of justice and the rule of law. Inherent in all the Rules contained in this Code are the precepts that judges, individually and collectively, must respect and honor the judicial office as a public trust and strive to maintain and enhance confidence in the legal system.

[2] Judges should maintain the dignity of judicial office at all times, and avoid both impropriety and the appearance of impropriety in their professional and personal lives. They should aspire at all times to conduct that ensures the greatest possible public confidence in their independence, impartiality, integrity, and competence.

[3] The Model Code of Judicial Conduct establishes standards for the ethical conduct of judges and judicial candidates. It is not intended as an exhaustive guide for the conduct of judges and judicial candidates, who are governed in their judicial and personal conduct by general ethical standards as well as by the Code. The Code is intended, however, to provide guidance and assist judges in maintaining the highest standards of judicial and personal conduct, and to provide a basis for regulating their conduct through disciplinary agencies.

ABA Model Code of Judicial Conduct Rule, Scope (excerpt)

[6] Although the black letter of the Rules is binding and enforceable, it is not contemplated that every transgression will result in the imposition of discipline. Whether discipline should be imposed should be determined through a reasonable and reasoned application of the Rules, and should depend upon factors such as the seriousness of the transgression, the facts and circumstances that existed at the time of the transgression, the extent of any pattern of improper activity, whether there have been previous violations, and the effect of the improper activity upon the judicial system or others.

ABA Model Rules of Professional Conduct Rule 1.7 (excerpt)
(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
(1) the representation of one client will be directly adverse to another client; or
(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

Code of Conduct for United States Judges Canon 1 and Commentary (excerpt)
Canon 1: A Judge Should Uphold the Integrity and Independence of the Judiciary
An independent and honorable judiciary is indispensable to justice in our society. A judge should maintain and enforce high standards of conduct and should personally observe those standards, so that the integrity and independence of the judiciary may be preserved. The provisions of this Code should be construed and applied to further that objective.

COMMENTARY

Deference to the judgments and rulings of courts depends on public confidence in the integrity and independence of judges. The integrity and independence of judges depend in turn on their acting without fear or favor. Although judges should be independent, they must comply with the law and should comply with this Code. Adherence to this responsibility helps to maintain public confidence in the impartiality of the judiciary. Conversely, violation of this Code diminishes public confidence in the judiciary and injures our system of government under law.

Code of Conduct for United States Judges Canon 2A and Commentary
Canon 2: A Judge Should Avoid Impropriety and the Appearance of Impropriety in all Activities
(A) *Respect for Law*. A judge should respect and comply with the law and should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

COMMENTARY

Canon 2A. An appearance of impropriety occurs when reasonable minds, with knowledge of all the relevant circumstances disclosed by a reasonable inquiry, would conclude that the judge’s honesty, integrity, impartiality, temperament, or

fitness to serve as a judge is impaired. Public confidence in the judiciary is eroded by irresponsible or improper conduct by judges. A judge must avoid all impropriety and appearance of impropriety. This prohibition applies to both professional and personal conduct. A judge must expect to be the subject of constant public scrutiny and accept freely and willingly restrictions that might be viewed as burdensome by the ordinary citizen. Because it is not practicable to list all prohibited acts, the prohibition is necessarily cast in general terms that extend to conduct by judges that is harmful although not specifically mentioned in the Code. Actual improprieties under this standard include violations of law, court rules, or other specific provisions of this Code.

Code of Conduct for United States Judges Canon 2B and Commentary
(B) *Outside Influence*. A judge should not allow family, social, political, financial, or other relationships to influence judicial conduct or judgment. A judge should neither lend the prestige of the judicial office to advance the private interests of the judge or others nor convey or permit others to convey the impression that they are in a special position to influence the judge. A judge should not testify voluntarily as a character witness.

COMMENTARY

Canon 2B. Testimony as a character witness injects the prestige of the judicial office into the proceeding in which the judge testifies and may be perceived as an official testimonial. A judge should discourage a party from requiring the judge to testify as a character witness except in unusual circumstances when the demands of justice require. This Canon does not create a privilege against testifying in response to an official summons.
A judge should avoid lending the prestige of judicial office to advance the private interests of the judge or others. For example, a judge should not use the judge's judicial position or title to gain advantage in litigation involving a friend or a member of the judge's family. In contracts for publication of a judge's writings, a judge should retain control over the advertising to avoid exploitation of the judge's office.
A judge should be sensitive to possible abuse of the prestige of office. A judge should not initiate communications to a sentencing judge or a probation or corrections officer but may provide information to such persons in response to a formal request. Judges may participate in the process of judicial selection by cooperating with appointing authorities and screening committees seeking names for consideration and by responding to official inquiries concerning a person being considered for a judgeship.

Code of Conduct for United States Judges Canon 3C (excerpt)

(C) *Disqualification.*

(1) A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances in which:

(a) the judge has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(b) the judge served as a lawyer in the matter in controversy, or a lawyer with whom the judge previously practiced law served during such association as a lawyer concerning the matter, or the judge or lawyer has been a material witness;

(c) the judge knows that the judge, individually or as a fiduciary, or the judge's spouse or minor child residing in the judge's household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be affected substantially by the outcome of the proceeding;

(d) the judge or the judge's spouse, or a person related to either within the third degree of relationship, or the spouse of such a person is:

(i) a party to the proceeding, or an officer, director, or trustee of a party;

(ii) acting as a lawyer in the proceeding;

(iii) known by the judge to have an interest that could be substantially affected by the outcome of the proceeding; or

(iv) to the judge's knowledge likely to be a material witness in the proceeding; (e)the judge has served in governmental employment and in that capacity participated as a judge (in a previous judicial position), counsel, advisor, or material witness concerning the proceeding or has expressed an opinion concerning the merits of the particular case in controversy.

(2) A judge should keep informed about the judge's personal and fiduciary financial interests and make a reasonable effort to keep informed about the personal financial interests of the judge's spouse and minor children residing in the judge's household.

Code of Conduct for United States Judges Canon 4 Preamble

Canon 4: A Judge May Engage in Extrajudicial Activities that are Consistent with the Obligations of Judicial Office

A judge may engage in extrajudicial activities, including law-related pursuits and civic, charitable, educational, religious, social, financial, fiduciary, and governmental activities, and may speak, write, lecture, and teach on both law-related and nonlegal subjects. However, a judge should not participate in

extrajudicial activities that detract from the dignity of the judge's office, interfere with the performance of the judge's official duties, reflect adversely on the judge's impartiality, lead to frequent disqualification, or violate the limitations set forth below.

Code of Conduct for United States Judges Canon 4A and Commentary (excerpt)

(5) *Practice of Law*. A judge should not practice law and should not serve as a family member's lawyer in any forum. A judge may, however, act pro se and may, without compensation, give legal advice to and draft or review documents for a member of the judge's family.

COMMENTARY

Canon 4A(5). A judge may act pro se in all legal matters, including matters involving litigation and matters involving appearances before or other dealings with governmental bodies. In so doing, a judge must not abuse the prestige of office to advance the interests of the judge or the judge's family.

Code of Conduct for United States Judges Canon, Compliance with the Code of Conduct (excerpt)

Anyone who is an officer of the federal judicial system authorized to perform judicial functions is a judge for the purpose of this Code. All judges should comply with this Code except as provided below.

(A) Part-time Judge

A part-time judge is a judge who serves part-time, whether continuously or periodically, but is permitted by law to devote time to some other profession or occupation and whose compensation for that reason is less than that of a full-time judge. A part-time judge:

(1) is not required to comply with Canons 4A(4), 4A(5), 4D(2), 4E, 4F, or 4H(3);

(2) except as provided in the Conflict-of-Interest Rules for Part-time Magistrate Judges, should not practice law in the court on which the judge serves or in any court subject to that court's appellate jurisdiction, or act as a lawyer in a proceeding in which the judge has served as a judge or in any related proceeding.

U.S. Department of Defense, Instruction 1400.25, DoD Civilian Personnel Management System: Employment of Highly Qualified Experts (HQEs), vol. 922, § 4(a) (Apr. 3, 2013)

4. POLICY. It is DoD policy that:

a. HQEs shall be appointed to bring enlightened thinking and innovation to advance the DoD national security mission. HQEs are a temporary infusion of talent and provide non-permanent support for short-term endeavors.

U.S. Department of Defense, Instruction 1400.25, DoD Civilian Personnel Management System: Employment of Highly Qualified Experts (HQEs), vol. 922, encl. 3, § 7(b) (Apr. 3, 2013)

b. HQEs and HQE-SMs serve at the will of the appointing official and may be terminated at any time. When practicable, they should be given no less than 3-days notice of the termination.

U.S. Department of Defense, Instruction 1400.25, DoD Civilian Personnel Management System: Employment of Highly Qualified Experts (HQEs), vol. 922, encl. 3, § 8(d) (Apr. 3, 2013)

d. Additional Payments. Appointing officials may authorize an additional payment as a recruitment, relocation, or retention incentive payment consistent with paragraph 8.f. of this enclosure, or as a warfighting event payment in accordance with paragraph 8.g. of this enclosure, subject to the limitations pursuant to sections 9903(d) of Reference (c) and Section 104 of title 3, United States Code Reference (d):

(1) The total of all additional payments made under these provisions during any 12- month period may not exceed the lesser of:

(a) $50,125, which may be adjusted annually by the Secretary of Defense, with a percentage increase equal to one-half of 1 percentage point less than the percentage by which the Employment Cost Index, published quarterly by the Bureau of Labor Statistics, for the base quarter of the year before the preceding calendar year exceeds the Employment Cost Index for the base quarter of the second year before the preceding calendar year; or

(b) The amount equal to 50 percent of the employee's annual rate of basic pay.

(2) These additional payments may be paid to an HQE or HQE-SM who works a fulltime, part-time, or intermittent work schedule.