No. 21-339

In the Supreme Court of the United States

ALI HAMZA SULIMAN AL BAHLUL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ELIZABETH B. PRELOGAR
Solicitor General
Counsel of Record
MATTHEW G. OLSEN
Assistant Attorney General
JOSEPH F. PALMER
DANIELLE S. TARIN
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTIONS PRESENTED

1. Whether the convening authority of the military commission that tried petitioner was an inferior officer under the Appointments Clause, U.S. Const. Art. II, § 2, Cl. 2.

2. Whether the Secretary of Defense had statutory authority to appoint the convening authority in petitioner's proceeding before a military commission.

ADDITIONAL RELATED PROCEEDINGS

United States Court of Military Commission Review:

United States v. *Al Bahlul*, No. CMCR 09-001 (Sept. 9, 2011) (decision affirming order of military commission)

Al Bahlul v. *United States*, No. CMCR 16-002 (Mar. 21, 2019) (decision following remand by court of appeals)

Al Bahlul v. *United States*, No. CMCR 21-003 (Oct. 5, 2021) (order granting petitioner's extension request following second remand by court of appeals)

United States Court of Appeals (D.C. Cir.):

Al Bahlul v. *United States*, No. 11-1324 (Jan. 25, 2013) (panel decision)

Al Bahlul v. *United States*, No. 11-1324 (July 14, 2014) (en banc decision remanding to original panel)

Al Bahlul v. *United States*, No. 11-1324 (June 12, 2015) (panel decision following remand by en banc court)

Al Bahlul v. *United States*, No. 11-1324 (Oct. 20, 2016) (en banc decision remanding to Court of Military Commission Review)

Al Bahlul v. *United States*, No. 19-1076 (Aug. 4, 2020) (panel decision following remand to Court of Military Commission Review), rehearing en banc denied (Jan. 21, 2021), reconsideration en banc of denial of rehearing en banc denied (Mar. 29, 2021)

Supreme Court of the United States:

Al Bahlul v. *United States*, No. 16-1307 (Oct. 10, 2017) (denying petition for a writ of certiorari)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Constitution, statutes, and rules:

In the Supreme Court of the United States

No. 21-339

ALI HAMZA SULIMAN AL BAHLUL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-35a) is reported at 967 F.3d 858. Prior opinions of the court of appeals are reported at 840 F.3d 757, 792 F.3d 1, and 767 F.3d 1; a prior order of the court of appeals is not published in the Federal Reporter but is available at 2013 WL 297726. The opinion of the United States Court of Military Commission Review (Pet. App. 42a-86a) is reported at 374 F. Supp. 3d 1250; an earlier opinion of that court is reported at 820 F. Supp. 2d 1141.

JURISDICTION

The judgment of the court of appeals (Pet. App. 36a-37a) was entered on August 4, 2020. A petition for rehearing was denied on January 21, 2021 (Pet. App. 38a-39a). On March 19, 2020, this Court extended the time within which to file any petition for a writ of certiorari due on or after that date to 150 days from the date

of the lower-court judgment, order denying discretionary review, or order denying a timely petition for rehearing. The petition for a writ of certiorari was not filed until August 24, 2021, and is out of time under Rules 13.1 and 13.3 of the Rules and orders of this Court. The jurisdiction of this Court is invoked under 10 U.S.C. 950g(e) and 28 U.S.C. 1254(1).

STATEMENT

Following a trial by military commission at Guantánamo Bay, Cuba, petitioner was convicted of conspiracy to commit offenses triable by military commission, in violation of 10 U.S.C. 950v(b)(28) (2006); solicitation of others to commit offenses triable by military commission, in violation of 10 U.S.C. 950u (2006); and providing material support for terrorism, in violation of 10 U.S.C. 950v(b)(25) (2006). Pet. App. 2a-4a. Petitioner was sentenced to life imprisonment. *Id.* at 5a. The Court of Military Commission Review (CMCR) affirmed. *Ibid.* The court of appeals ultimately affirmed petitioner's conspiracy conviction, reversed petitioner's convictions for solicitation and providing material support for terrorism, and remanded with respect to petitioner's sentence. *Id.* at 6a. This Court denied a petition for a writ of certiorari. 138 S. Ct. 313 (2017) (No. 16-1307).

On remand, the CMCR rejected petitioner's renewed challenges to his conspiracy conviction and reimposed a sentence of life imprisonment. Pet. App. 42a-46a. The court of appeals affirmed in part, reversed in part, and remanded to the CMCR for further consideration of petitioner's sentence. *Id.* at 1a-35a.

1. On September 11, 2001, the al Qaeda terrorist organization attacked the United States and killed nearly 3000 people. Gov't C.A. Br. 4. In response, Congress

authorized the President to use "all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001." Authorization for Use of Military Force, Pub. L. No. 107-40, § 2(a), 115 Stat. 224. The President issued a military order authorizing military commissions to try noncitizens for certain offenses. See *Al Bahlul* v. *United States*, 767 F.3d 1, 6 (D.C. Cir. 2014) (en banc).

In *Hamdan* v. *Rumsfeld*, 548 U.S. 557 (2006), this Court held that the military-commission system that the President had established contravened statutory restrictions on military-commission procedures in the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 801 *et seq.* 548 U.S. at 613-633, 635. Four Justices joined opinions inviting Congress to clarify the authority of military commissions. See *id.* at 636 (Breyer, J., joined by Kennedy, Souter, Ginsburg, JJ., concurring) ("Nothing prevents the President" from seeking from Congress "legislative authority to create military commissions of the kind at issue here."); see also *id.* at 655 (Kennedy, J., concurring in part) (stating that "Congress, not the Court, is the branch in the better position to undertake the 'sensitive task of establishing a principle not inconsistent with the national interest or with international justice'" (citation omitted)).

In response, Congress enacted the Military Commissions Act of 2006 (2006 MCA), Pub. L. No. 109-366, 10 U.S.C. 948a *et seq*. The 2006 MCA established a military-commission system "to try alien unlawful enemy combatants engaged in hostilities against the United States for violations of the law of war and other offenses triable by military commission." 10 U.S.C.

948b(a) (2006). It codifies specific war crimes, including murder of protected persons, attacking civilians, and terrorism. See 10 U.S.C. 950v(b)(1), (2), and (24) (2006). The 2006 MCA also prohibits conspiring to commit one or more of the codified substantive offenses if the person charged "knowingly does any overt act to effect the object of the conspiracy." 10 U.S.C. 950v(b)(28) (2006). Congress subsequently replaced the 2006 MCA with the Military Commissions Act of 2009 (2009 MCA), Pub. L. No. 111-84, 123 Stat. 2190, with certain relevant changes noted below.

Under the 2006 MCA, a military commission "may be convened by the Secretary of Defense or by any officer or official of the United States designated by the Secretary for that purpose." 10 U.S.C. 948h (2006). The 2006 MCA refers to the person who convenes a military commission under Section 948h as "the convening authority." See, *e.g.*, 10 U.S.C. 950b, 950f(c) (2006) (emphasis omitted). Among other functions, the convening authority details the commission's members, refers charges to the commission, and reviews any conviction and sentence. 10 U.S.C. 948i, 950b (2006). The convening authority may dismiss any charge on which an accused was found guilty; convict the accused only of a lesser included offense; and approve, disapprove, suspend, or commute (but not enhance) the sentence rendered by the commission. 10 U.S.C. 950b (2006); see Pet. App. 4a.

If the convening authority approves a finding of guilt, the convening authority's decision must be reviewed by the CMCR unless the accused was not sentenced to death and waives the right of review. 10 U.S.C. 950c(a) and (b). Under the 2006 MCA, the CMCR's review was limited to "matters of law." 10 U.S.C. 950b(c)(2)(C),

950f(d) (2006). Under the 2009 MCA, however, the CMCR may affirm findings of guilt and sentences only if the CMCR concludes that those findings and sentences are "correct in law and fact," and only if it "determines, on the basis of the entire record, [that the findings and sentences] should be approved." 10 U.S.C. 950f(d). In conducting that review, the CMCR "may weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact, recognizing that the military commission saw and heard the witnesses." *Ibid.*

After exhausting those procedures, a convicted defendant may file a petition for review in the D.C. Circuit, 10 U.S.C. 950g(a), followed by a petition for a writ of certiorari in this Court, 10 U.S.C. 950g(e).

2. Petitioner, a native of Yemen, went to Afghanistan in the late 1990s to join al Qaeda. Pet. App. 2a. He swore an oath of loyalty to al Qaeda leader Osama bin Laden, received paramilitary training, and eventually led al Qaeda's propaganda efforts. *Id.* at 2a-3a. Those efforts included a video that petitioner created for bin Laden highlighting the October 2000 attack on the American destroyer *USS Cole*. *Id.* at 3a. Petitioner's video celebrated the attack and called for jihad against the United States. *Ibid.*

Petitioner also served as bin Laden's personal assistant and public-relations secretary. Pet. App. 3a. Before al Qaeda's September 11, 2001, terrorist attacks on the United States, petitioner arranged loyalty oaths for two of the hijackers. *Ibid.* Immediately after the attacks, petitioner operated the radio that bin Laden used to track the news of the attacks. *Ibid.*

Petitioner fled to Pakistan, where he was captured in December 2001. Pet. App. 3a. Petitioner was turned

over to United States custody and later detained at Guantánamo. *Ibid.*

3. In 2007, the Secretary of Defense designated Susan Crawford, the former Chief Judge of the United States Court of Appeals for the Armed Forces (CAAF), as the convening authority for military commissions. Pet. App. 4a; Gov't C.A. Br. 3, 10 & n.2. Crawford had been appointed to the CAAF by the President with the advice and consent of the Senate. Gov't C.A. Br. 48. At the time of her designation, Crawford was serving as a Senior Judge of the CAAF, as well as a Defense Department employee in the Senior Executive Service. Pet. App. 4a-5a.

In 2008, Crawford convened a military commission to try petitioner under the 2006 MCA for conspiracy, solicitation, and providing material support for terrorism. Pet. App. 5a. The substantive offenses underlying the conspiracy charge were murder of protected persons, attacking civilians, attacking civilian objects, murder and destruction of property in violation of the law of war, terrorism, and providing material support for terrorism. *Ibid.* The conspiracy charge and the other charges were based largely on the same conduct, including petitioner's military training at an al Qaeda camp, swearing loyalty to bin Laden, performing personal services for bin Laden, preparing the *Cole* video, carrying of weapons and a suicide belt to protect bin Laden, arranging for two of the 9/11 hijackers to swear loyalty to bin Laden, and preparing the hijackers' "Martyr Wills." *Id.* at 85a; *Al Bahlul*, 767 F.3d at 7-8 & n.2.

Petitioner refused to participate in the proceedings before the military commission. Pet. App. 5a. He instructed his counsel to waive all pretrial motions and to abstain from making objections. *Ibid.* Petitioner pleaded

not guilty but admitted all of the factual allegations against him, except for wearing a suicide belt. *Ibid.*

The military commission convicted petitioner of all the charges and sentenced him to life imprisonment. Pet. App. 5a. Crawford approved the findings and sentence. The CMCR, applying the "plenary, *de novo* power of review" provided for in the 2009 MCA, affirmed. *United States* v. *Al Bahlul*, 820 F. Supp. 2d 1141, 1158 (CMCR 2011) (citation omitted); see *id.* at 1155-1264.

4. Petitioner's appellate counsel filed a petition for review in the court of appeals.* Following a panel decision vacating all three convictions, the court of appeals granted rehearing en banc, vacated petitioner's solicitation and material-support convictions as outside the scope of crimes prosecutable under the 2006 MCA, rejected petitioner's statutory and ex post facto challenges to his conspiracy conviction, and returned the case to the original panel for consideration of petitioner's remaining challenges to his conspiracy conviction. Pet. App. 5a-6a.

In a divided decision, the panel again vacated petitioner's conspiracy conviction, on the theory that petitioner's military-commission trial violated unforfeitable structural separation-of-powers principles. Pet. App.

---

* While petitioner's appeal was pending in the court of appeals, petitioner wrote a letter to the court of appeals stating that he had never authorized the appeal and that he wanted it withdrawn. 11-1324 Pet. C.A. Ltr. (May 2, 2013). The court ordered petitioner's counsel to obtain written authorization for the appeal. 11-1324 C.A. Order (May 14, 2013). Counsel was unable to obtain such written authorization but represented that petitioner had orally authorized the appeal. As described by counsel, that authorization was limited to litigation in the court of appeals and did not extend to seeking this Court's review. See 11-1324 C.A. Resp. to Order 3-5 (June 26, 2013).

6a n.4. The court of appeals again granted rehearing en banc, affirmed petitioner's conspiracy conviction, and remanded to the CMCR to determine the effect, if any, of the vacatur of petitioner's solicitation and material-support convictions on his sentence. *Id.* at 6a. This Court denied a petition for a writ of certiorari. 138 S. Ct. 313 (2017) (No. 16-1307).

5. Following the court of appeals' remand to address petitioner's sentence, petitioner contended before the CMCR, for the first time, that Crawford's appointment as the convening authority was unlawful on various grounds. Pet. App. 6a. The CMCR deemed petitioner's challenges to the convening authority's appointment to be jurisdictional and accordingly considered them notwithstanding petitioner's failure to assert them earlier and notwithstanding the limited scope of the court of appeals' remand. *Id.* at 53a-61a. It rejected those challenges on the merits. *Id.* at 62a-80a.

The CMCR rejected petitioner's view of 10 U.S.C. 948h's authorization of the Secretary to designate an "officer or official of the United States" as the convening authority, *ibid.*, as limited solely to persons who are commissioned or warrant officers in the military or civilian "officer[s] of the United States for Appointments Clause purposes." Pet. App. 70a (citation omitted); see *id.* at 68a-73a. The CMCR also rejected petitioner's contention that the convening authority was a principal officer under the Appointments Clause who must be, but was not, appointed by the President with the advice and consent of the Senate. Applying this Court's decision in *Edmond* v. *United States*, 520 U.S. 651 (1997), which held that civilian judges on the Coast Guard Court of Criminal Appeals were "inferior officers" under the Appointments Clause, the CMCR explained

that the convening authority was likewise an inferior officer because she was administratively supervised by the Secretary of Defense, she could be removed by the Secretary without cause, and her decisions were subject to review by the CMCR. Pet. App. 76a; see *id.* at 76a-80a.

6. The court of appeals affirmed in part, reversed in part, and remanded for further consideration of petitioner's sentence. Pet. App. 1a-35a. As relevant here, the court recognized that the convening authority is an inferior officer under the Appointments Clause and that Section 948h authorized the Secretary of Defense to appoint such an officer. *Id.* at 12a-30a.

The court of appeals observed that, under *Edmond*, a constitutional "officer"—a person who exercises significant authority under the laws of the United States—is "inferior" for purposes of the Appointments Clause if she is subject to direction and supervision at some level by presidentially appointed, Senate-confirmed officers. Pet. App. 20a. And the court explained that the convening authority was an inferior officer under *Edmond* because her "decisions are not final and are subject to review by the CMCR; the Secretary maintains additional oversight by promulgating rules and procedures; and the Convening Authority is removable at will by the Secretary." *Id.* at 21a. The court rejected petitioner's contention that the convening authority's ability to make certain determinations (*e.g.*, to modify charges, overturn a verdict, or commute a sentence) without independent review, or a statute insulating the convening authority's "judicial acts" from interference by the Secretary, foreclosed classification as an inferior officer. *Id.* at 24a; see *id.* at 22a-24a. The court highlighted analogous features of the judges of the Coast Guard

Court of Criminal Appeals that this Court in *Edmond* had held to be inferior officers. *Id.* at 25a-26a.

The court of appeals additionally rejected petitioner's alternative argument that the 2006 MCA failed to vest the Secretary with constitutionally necessary appointment authority, which was premised on the theory that the statute did not "create 'a freestanding office' to which an inferior officer could be appointed," but merely "describe[d] a duty that can be delegated to existing constitutional officers." Pet. App. 26a (citation omitted); see *id.* at 26a-30a. The court explained that the "text and structure of the 2006 MCA" made clear that Congress had "exercised its broad power to vest the appointment of the Convening Authority in the Secretary." *Id.* at 28a. The court observed that the 2006 MCA had "establish[ed] and defin[ed] the office of the Convening Authority in considerable detail" and that "several sections" of the statute "refer[] to the Convening Authority by name and us[e] the definite article 'the,'" which "strongly suggest[ed] that the Convening Authority is a distinct office and not simply a duty to be performed by existing officers." *Ibid.* The court additionally noted that the 2006 MCA "specifically provides that the Secretary will choose the person to fill that office." *Ibid.*

ARGUMENT

Petitioner principally contends (Pet. 1-3, 19-24) that the Court should grant the petition, vacate the judgment of the court of appeals, and remand (GVR) for further consideration of his Appointments Clause challenge in light of *United States* v. *Arthrex*, 141 S. Ct. 1970 (2021), which concluded that the unreviewable authority of administrative patent judges conducting inter partes review of patent claims could not be exercised by

an inferior officer, see *id.* at 1978-1986. But a GVR in light of *Arthrex* is unwarranted because the court of appeals correctly recognized that this Court's decision in *Edmond* v. *United States*, 520 U.S. 651 (1997)—which *Arthrex* identified as articulating the "governing test" for distinguishing principal from inferior officers, 141 S. Ct. at 1982, which *Arthrex* itself applied, see *id.* at 1980-1983, and which held that comparable civilian officials (judges of the Coast Guard Court of Criminal Appeals) were not principal officers—compels the rejection of petitioner's Appointments Clause challenge to the convening authority for his military commission.

Petitioner alternatively renews his contention (Pet. 24-31) that Congress in the 2006 MCA failed to vest the Secretary of Defense with statutory authority to make the necessary appointment of the convening authority. The court of appeals correctly rejected that contention, and its conclusion does not conflict with any decision of this Court or another court of appeals. Further review is not warranted.

1. As a threshold matter, the petition for a writ of certiorari is untimely. The court of appeals issued its order denying petitioner's petition for rehearing en banc on January 21, 2021. Pet. App. 38a-39a. This Court's order of March 19, 2020, provided that "the deadline to file any petition for a writ of certiorari due on or after the date of this order is extended to 150 days from the date of the lower court judgment, order denying discretionary review, or order denying a timely petition for rehearing." 3/19/20 Order 1 (citing Sup. Ct. R. 13.1, 13.3). The Court's order of July 19, 2021, prospectively rescinded that March 19, 2020, order but stated that, "in any case in which the relevant lower court judgment, order denying discretionary review, or order

denying a timely petition for rehearing was issued prior to July 19, 2021, the deadline to file a petition for a writ of certiorari remains extended to 150 days from the date of that judgment or order." 7/19/21 Order 1. In petitioner's case, the 150th day following the court of appeals' denial of his petition for rehearing was June 20, 2021 (a Sunday). The petition for a writ of certiorari, however, was not filed until August 24, 2021—more than two months out of time.

Petitioner contends (Pet. 7-8) that his petition nevertheless should be deemed timely because he filed it within 150 days of March 29, 2021—the date on which the court of appeals denied a motion that he filed seeking reconsideration of its denial of his petition for rehearing en banc, Pet. App. 40a-41a. That contention lacks merit. The Court's orders refer to a "timely petition for rehearing" as the only postjudgment filing in a court of appeals whose denial would defer the commencement of the 150-day filing period beyond the date of the court's judgment. 3/19/20 Order 1; 7/19/21 Order 1. Here, therefore, petitioner's 150-day period to file a petition began when the court of appeals denied rehearing on January 21, 2021. Petitioner's subsequent filing of a motion for reconsideration of the denial of rehearing had no effect on the deadline.

Contrary to petitioner's assertion (Pet. 7-8), the court of appeals' denial of petitioner's reconsideration motion did not restart the time for filing a petition for a writ of certiorari. The court's denial of that motion did nothing to alter the court's earlier denial of rehearing, or even to demonstrate that the court had reconsidered whether rehearing was warranted. See *Federal Trade Comm'n* v. *Minneapolis-Honeywell Regulator Co.*, 344 U.S. 206, 211-212 (1952) ("Only when the lower

court changes matters of substance, or resolves a genuine ambiguity, in a judgment previously rendered should the period within which an appeal must be taken or a petition for certiorari filed begin to run anew." (footnotes omitted)).

Petitioner's reliance (Pet. 3) on *Hibbs* v. *Winn*, 542 U.S. 88 (2004), is misplaced. In *Winn*, this Court held that, if a court of appeals sua sponte recalls its mandate and directs the parties to brief whether the case should be reheard en banc, such action tolls the period for filing a petition for a writ of certiorari. *Id.* at 97-99. That holding is now reflected in Rule 13.3, which equates the denial of "an untimely petition" that a court of appeals "appropriately entertains" with the denial of a timely one. Sup. Ct. R. 13.3. Here, however, the court of appeals did not, by denying petitioner's motion requesting that the court reconsider its denial of rehearing, indicate that the court in fact agreed to reconsider the merits of that earlier denial of rehearing.

Although this Court has discretion to consider an untimely petition for a writ of certiorari in a criminal case if "the ends of justice so require," *Schacht* v. *United States*, 398 U.S. 58, 64 (1970); see *Bowles* v. *Russell*, 551 U.S. 205, 212 (2007), petitioner has provided no sound reason for excusing his late filing in this case. He asserts (Pet. 8) only that, if he had filed a petition for a writ of certiorari in the two months between his filing in the court of appeals of his motion for reconsideration of the denial of rehearing and the court's denial of that motion, his petition for a writ of certiorari would have been "premature." But even assuming arguendo that petitioner's own filings in the lower courts would have been an obstacle to plenary review if the petition had been filed during that window, petitioner still had nearly three

months after the denial of his motion for reconsideration to file his petition. Yet petitioner waited nearly five months (two months after the deadline) to file his petition.

Petitioner's untimely request for this Court's intervention is particularly unwarranted because the proceedings below have not yet concluded. See, *e.g.*, *American Constr. Co.* v. *Jacksonville, Tampa & Key W. Ry. Co.*, 148 U.S. 372, 384 (1893); see also Stephen M. Shapiro et al., *Supreme Court Practice* § 4.18, at 4-54 to 4-58 (11th ed. 2019). The court of appeals remanded for further consideration of the effect on the sentence that petitioner received for his conviction on the conspiracy count of the court's earlier vacatur of his convictions on two other counts. See p. 9, *supra*. If petitioner ultimately is dissatisfied with the sentence imposed on remand on the remaining count of conviction, and if that sentence is upheld in any subsequent appeal, he will be able to raise his current claims, together with any other claims that may arise with respect to his sentence, in a single petition for a writ of certiorari. See *Major League Baseball Players Ass'n* v. *Garvey*, 532 U.S. 504, 508 n.1 (2001) (per curiam); Shapiro § 4.18, at 4-58.

2. In any event, the decision below does not warrant further consideration. Contrary to petitioner's principal contention (Pet. 1-3, 19-24), no sound reason exists to GVR in this case in light of *Arthrex*, which reinforced the vitality of the very decision—*Edmond*—on which the court of appeals here relied.

Section 2106 of Title 28 provides that this Court may vacate a judgment and remand a case to the court of appeals for further proceedings "as may be just under the circumstances." 28 U.S.C. 2106. This Court accordingly has the discretion to GVR if there is a reasonable

probability that the "ultimate outcome of the litigation" would change because the decision below rests on a premise that the court of appeals, if given the opportunity, would be reasonably likely to reject in light of intervening legal developments. See *Lords Landing Vill. Condo. Council of Unit Owners* v. *Continental Ins. Co.*, 520 U.S. 893, 896 (1997) (per curiam) (quoting *Lawrence* v. *Chater*, 516 U.S. 163, 167 (1996) (per curiam)); see also *Lawrence*, 516 U.S. at 166-174. In this case, *Arthrex*'s conclusion that administrative patent judges' authority was "incompatible with their appointment" in a manner authorized for inferior officers has no reasonable probability of altering the court of appeals' determination that the convening authority is an inferior officer. 141 S. Ct. at 1985.

As the court of appeals explained, that determination follows directly from this Court's decision in *Edmond*. In that case, the Court held that civilian members of the Coast Guard Court of Criminal Appeals "are 'inferior Officers' within the meaning of" the Appointments Clause. *Edmond*, 520 U.S. at 666; see *id.* at 658-666. The Court explained that "inferior officers are officers whose work is directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate." *Id.* at 663 (internal quotation marks omitted). The Court observed that the Judge Advocate General exercised administrative oversight over the Coast Guard Court of Criminal Appeals judges, including through the power to remove judges without cause, *id.* at 664, and that the CAAF could reverse the Coast Guard Court of Criminal Appeals' decisions, *id.* at 664-665.

The court of appeals here correctly recognized that those same considerations establish that the convening

authority who convened petitioner's military commission was an inferior officer for similar reasons. Pet. App. 20a-24a. As the court explained, the convening authority's "decisions are not final and are subject to review by the CMCR; the Secretary maintains additional oversight by promulgating rules and procedures; and the Convening Authority is removable at will by the Secretary." *Id.* at 21a. Petitioner contends (Pet. 19) that the court of appeals applied a "balancing test" that this Court in *Arthrex* "eschewed." But petitioner's descriptions of both the decision below and *Arthrex* are mistaken. The court of appeals did not conduct a "balancing test," but instead found that three pertinent factors "drawn from *Edmond*"—whether the officer is (1) subject to oversight by a principal officer, (2) removable without cause, and (3) able to render a final decision on behalf of the United States, Pet. App. 20a—all supported inferior-officer status here. *Id.* at 21a-26a. And far from "eschew[ing]" *Edmond*'s approach, this Court in *Arthrex* invoked *Edmond* as the "starting point," 141 S. Ct. at 1980; described *Edmond* as articulating the "governing test," *id.* at 1982; and summarized *Edmond* in terms of the same three factors that the court of appeals applied here, see *id.* at 1980. To the extent petitioner interprets *Arthrex* to foreclose consideration of multiple criteria in distinguishing principal from inferior officers, he misreads the decision. See *id.* at 1985 ("[W]e do not attempt to 'set forth an exclusive criterion for distinguishing between principal and inferior officers for Appointments Clause purposes.'" (quoting *Edmond*, 520 U.S. at 661)).

Moreover, the specific attribute that *Arthrex* found to be "absent" in the case of administrative patent judges—"review by a superior executive officer" of the

judges' actions—is present and "significant" here. 141 S. Ct. at 1981. Just as the Coast Guard judges' decisions in *Edmond* were subject to review by the CAAF, the convening authority's decisions are subject to review by the CMCR. Unless the accused waives review, the convening authority is required to "refer" any "case in which the final decision of a military commission * * * (as approved by the convening authority) includes a finding of guilty * * * to the [CMCR]," 10 U.S.C. 950c(a), which will "review the record in each case" and "may affirm only such findings of guilty, and the sentence or such part or amount of the sentence, as the [CMCR] finds correct in law and fact and determines, on the basis of the entire record, should be approved," 10 U.S.C. 950f(c) and (d). In conducting that review, the CMCR "may weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact, recognizing that the military commission saw and heard the witnesses." 10 U.S.C. 950f(d); see *United States* v. *Al Bahlul*, 820 F. Supp. 2d 1141, 1158 (CMCR 2011) (describing this standard as an "awesome, plenary, *de novo* power of review" (citation omitted)). That is a significantly *more* rigorous standard than even the CAAF employs in reviewing decisions of the Coast Guard judges at issue in *Edmond*, 520 U.S. at 664-665.

Contrary to petitioner's contention (Pet. 20-21), neither *Edmond* nor *Arthrex* requires that a subordinate can be considered an inferior officer only if a superior has plenary authority to countermand every single subsidiary determination that she makes. In *Edmond*, for example, neither the Judge Advocate General nor the CAAF had "complete" control over Coast Guard judges. 520 U.S. at 664. Instead, the Judge Advocate General could not "attempt to influence (by threat of removal or

otherwise) the outcome of individual proceedings" and had "no power to reverse decisions of the court," and although the CAAF had the power to reverse appellate decisions by the Coast Guard judges, it exercised a "narrow[]," deferential form of review. *Id.* at 664-665; compare 10 U.S.C. 949b(2)(B) (2009 MCA provision providing that "[n]o person may attempt to coerce, or, by any unauthorized means, influence * * * the action of any convening * * * authority with respect to their judicial acts"). This Court nonetheless found that the Coast Guard judges were inferior officers because their work was "directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate." *Edmond*, 520 U.S. at 663. *Arthrex*, in turn, concluded that the inferior-officer mode of appointment was inconsistent with the functions of administrative patent judges because no Executive official could review their "final decision[s]" on the ultimate issue of the validity of patent claims challenged in inter partes reviews—not because some individual determination that a judge might make in the course of his duties was not reviewable de novo. See 141 S. Ct. at 1981.

In addition, unlike the statutory scheme at issue in *Arthrex*—under which the PTO Director could determine whether to institute an inter partes review but could not adjudicate such a proceeding himself, and instead had to designate a panel of "at least 3 members of the Patent Trial and Appeal Board" to do so, 35 U.S.C. 6(c)—the statute here expressly authorizes the Secretary of Defense to act as the convening authority himself, 10 U.S.C. 948h. The Secretary thus may choose not to designate a different "officer or official of the United

States," *ibid.*, to be the convening authority for a particular proceeding at all—or may himself be able to replace the convening authority with another of his choosing. Cf. *Arthrex*, 141 S. Ct. at 1980 (recognizing that "[w]hat [wa]s significant" in *Edmond* was that "the judges of the Court of Criminal Appeals have no power to render a final decision on behalf of the United States unless permitted to do so by other Executive officers" (citation omitted)). The much greater independence of the administrative patent judges in *Arthrex* in no way casts doubt on the decision below.

3. In the alternative to a GVR in light of *Arthrex*, petitioner seeks plenary review of his contention (Pet. 24-31) that Congress did not actually vest the Secretary of Defense with statutory authorization to appoint the convening authority as an inferior officer. The court of appeals correctly rejected that contention, and its decision does not conflict with any decision of this Court or any other court of appeals.

Although the manner of appointment for principal officers—presidential nomination with the advice and consent of the Senate—"is also the default manner of appointment for inferior officers," the Appointments Clause permits Congress to "'vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.'" *Edmond*, 520 U.S. at 660 (quoting U.S. Const. Art. II, § 2, Cl. 2). As the court of appeals explained, Congress "exercised its broad power to vest the appointment of the Convening Authority in the Secretary" in its enactment of the 2006 MCA. Pet. App. 28a; see *id.* at 26a-30a.

The court of appeals correctly rejected petitioner's contention that the 2006 MCA did not "create a 'free-standing office' to which an inferior officer could be appointed" and "d[id] no more than describe a duty that can be delegated to existing constitutional officers." Pet. App. 26a. As the court observed, "[t]he text and structure of the 2006 MCA show that Congress established a new office—the Convening Authority—and tasked the Secretary with selecting the person to fill that office." *Id.* at 28a. Multiple sections of the 2006 MCA "refer[] to the Convening Authority by name," using the definite article, and describe in detail the functions to be performed by that officer. *Ibid.*; see, *e.g.*, 10 U.S.C. 948i(b) (2006) ("[T]he convening authority shall detail as members of the commission such members * * * [who] in the opinion of the convening authority, are best qualified for the duty."); see also 10 U.S.C. 950b(a), 950b(b) (2006). And "after establishing and defining the office of the Convening Authority in considerable detail," the 2006 MCA "specifically provides that the Secretary will choose the person to fill that office." Pet. App. 28a; see 10 U.S.C. 948h (2006) (providing that military commissions may be convened by the Secretary of Defense "or by any officer or official of the United States designated by the Secretary for that purpose"). Petitioner's contrary reading of the statute thus "flies in the face of [its] plain meaning." Pet. App. 29a.

Moreover, as the court of appeals recognized, construing the 2006 MCA as authorizing the Secretary to appoint the convening authority is consistent with the principle of constitutional avoidance. See Pet. App. 29a; see also *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988). Petitioner's approach "would unnecessarily

raise serious constitutional concerns," and "raise significant constitutional doubts," because it would suggest that Congress failed to provide the Secretary with constitutionally sufficient authorization to carry out a task that the statute assigns to him. Pet. App. 29a. At a minimum, the statute is "readily interpreted as a lawful exercise of Congress's power to vest the appointment power in a department head" and should be interpreted in that constitutionally valid manner. *Id.* at 28a.

Petitioner does not contend that the decision below conflicts with any decision of this Court. Instead, he asserts (Pet. 3, 25-29) that the decision below conflicts with Chief Justice Marshall's opinion in *United States* v. *Maurice*, 26 F. Cas. 1211 (C.C.D. Va. 1823), which held that, for purposes of a suit to enforce a purported officeholder's bond, the office of agent of fortifications had been created by congressionally approved and authorized Army regulations. To the extent that an asserted conflict with a decision of a single Justice riding circuit—which, as petitioner acknowledges (Pet. 27), this Court has "never squarely endorsed"—might warrant this Court's review, no such conflict exists here. In *Maurice*, Chief Justice Marshall "kn[e]w of no law which ha[d] authorized the secretary of war to make th[e] appointment" at issue, and he noted that "no statute" existed "which directly and expressly confer[red] the power." 26 F. Cas. at 1216. Here, in contrast, Congress expressly authorized the Secretary of Defense to "designate[]" "any officer or official of the United States" to serve as the convening authority of a military commission. 10 U.S.C. 948h.

The 2006 MCA does not call on courts to "infer[]" from Congress's "mere direction that a thing shall be done, without prescribing the mode of doing it," that

Congress intended "the establishment of an office for the purpose." *Maurice*, 26 F. Cas. at 1214. Instead, Congress identified a duty *and* explicitly empowered the Secretary to designate the person who shall perform the role of convening authority—*i.e.*, to appoint that officer. See *NLRB* v. *SW Gen., Inc.*, 137 S. Ct. 929, 946 (2017) (Thomas, J., concurring) (observing that, "[a]round the time of the framing, the verb 'appoint' meant," *inter alia*, "'to allot, assign, or *designate*,'" and that, "[w]hen the President 'directs' someone to serve as an officer pursuant to the [Vacancies Reform Act], he is 'appointing' that person as an 'officer of the United States' within the meaning of the Appointments Clause" (emphasis added; brackets omitted)). And that understanding of the 2006 MCA comports with this Court's relevant precedents. See, *e.g.*, *United States* v. *Nixon*, 418 U.S. 683, 694 (1974) (explaining that statutes authorizing the Attorney General to conduct criminal litigation and to appoint subordinate officers to assist him authorized appointment of a special prosecutor); *Burnap* v. *United States*, 252 U.S. 512, 515, 518 (1920) (statute authorizing department head to "employ" specified positions "confer[s] the power of appointment").

Petitioner separately contends (Pet. 5, 28-29) that the decision below conflicts with decisions from the CAAF. But neither decision that petitioner cites—*United States* v. *Janssen*, 73 M.J. 221 (C.A.A.F. 2014), and *United States* v. *Ryan*, 5 M.J. 97 (C.M.A. 1978)—addressed the 2006 MCA, much less held that it did not authorize the Secretary to appoint the convening authority. Those and other cases addressing a convening authority under the Uniform Code of Military Justice are inapposite. As the court of appeals explained, the

UCMJ "specifically lists existing officers who are permitted to perform the function of convening courts-martial," whereas the 2006 MCA, "in stark contrast," expressly "grants the Secretary the power to designate any officer or official to be 'the convening authority,' a new office created by the statute." Pet. App. 28a-29a.

4. In any event, this case would be an unsuitable vehicle for further review because, as the government explained below, at the time of her designation as the convening authority, Crawford was already serving as a senior judge of the CAAF, pursuant to a presidential appointment to the CAAF. Pet. App. 15a n.5 (noting the government's argument, but finding it unnecessary "to address the significance of [Crawford's] status as a senior judge of CAAF"). Although senior CAAF judges are not deemed to be officers or employees for purposes of conflict-of-interest rules except while performing duties as a senior judge, *ibid.* (citing 10 U.S.C. 942(e)(4)), that would not affect the issue here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ELIZABETH B. PRELOGAR
Solicitor General
Counsel of Record
MATTHEW G. OLSEN
Assistant Attorney General
JOSEPH F. PALMER
DANIELLE S. TARIN
Attorneys

NOVEMBER 2021