
SEPARATION OF POWERS — APPOINTMENTS CLAUSE — D.C. CIRCUIT FURTHERS UNCERTAINTY IN APPOINTMENTS CLAUSE TEST FOR EXECUTIVE BRANCH REASSIGNMENTS. — *In re al-Nashiri*, 791 F.3d 71 (D.C. Cir. 2015).

The Constitution's Appointments Clause provides that the President, "by and with the Advice and Consent of the Senate, shall appoint . . . Officers of the United States," except that "Congress may by Law 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."¹ The Constitution thus creates a sphere of shared responsibility in staffing the federal government.² But it also carves out instances in which the burden of joint responsibility can be streamlined: the appointments of "inferior officers." The text on its face contains several ambiguities; for example, it fails to define what makes an officer³ "inferior." And it is silent about the extent to which Congress may add duties to an existing office, whether appointed officers can take on different roles without reappointment, and who can remove appointed officers and on what grounds. Last June, in *In re al-Nashiri*,⁴ the D.C. Circuit grappled with these ambiguities and was ambivalent on the question of whether inferior officers may be reassigned to fulfill principal officer duties without reappointment. But to avoid compromising the interests protected by the Appointments Clause, the relevant precedent should be read narrowly.

In the wake of the September 11 attacks, President George W. Bush instituted military commissions to try suspected terrorists.⁵ The Military Commissions Act of 2006⁶ (MCA) subsequently prescribed the structure and procedures of the commissions and established the Court of Military Commissions Review (CMCR), an intermediate appellate court whose decisions are reviewed by the D.C. Circuit.⁷ President

¹ U.S. CONST. art. II, § 2, cl. 2.

² See Ronald J. Krotoszynski, Jr., *Transcending Formalism and Functionalism in Separation-of-Powers Analysis: Reframing the Appointments Power After Noel Canning*, 64 DUKE L.J. 1513, 1517 (2015) ("In this specific context, the Framers did not *separate* powers, but instead *blended* them."). For an overview of the historical and philosophical underpinnings of the Appointments Clause, see Russell L. Weaver, "Advice and Consent" in *Historical Perspective*, 64 DUKE L.J. 1717, 1722–30 (2015).

³ The leading case sketching the boundary between officers and employees under the Appointments Clause is *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam), which found that officers "exercis[e] significant authority pursuant to the laws of the United States," *id.* at 126.

⁴ 791 F.3d 71 (D.C. Cir. 2015).

⁵ See Stephen I. Vladeck, *Military Courts and Article III*, 103 GEO. L.J. 933, 945–48 (2015) (explaining military commissions and their deployment in the Guantánamo context).

⁶ Pub. L. No. 109-366, 120 Stat. 2600 (codified as amended in scattered sections of 10, 18, 28, and 42 U.S.C.).

⁷ 10 U.S.C. §§ 950f–g (2012); *In re al-Nashiri*, 791 F.3d at 74.

Obama's push for reform of Guantánamo resulted in amendments to the MCA in 2009, which expanded the authority of the CMCR to review all matters of fact and law⁸ and altered the court's composition to include civilian judges in addition to military judges.⁹ Civilian CMCR judges are appointed like Article III judges: by the President with the advice and consent of the Senate.¹⁰ Military judges are not. Instead, the CMCR's military judges are commissioned military officers serving as appellate judges in the courts-martial context who are then re-assigned to the CMCR by the Secretary of Defense.¹¹

Abd al-Rahim Hussein Muhammed al-Nashiri (Nashiri) is a Guantánamo Bay detainee and alleged member of al-Qaeda accused of terrorism and related war crimes, including masterminding the bombings of the U.S.S. *Cole* and a French oil tanker, the *M/V Limburg*.¹² In 2011, the Defense Department commenced military commission proceedings against Nashiri.¹³ In 2014, the military trial judge dismissed the *M/V Limburg* charges.¹⁴ The Government appealed the order.¹⁵ The appeal came before a CMCR panel of one civilian and two military judges.¹⁶ Nashiri moved to recuse the military judges, arguing that they were assigned to the CMCR in violation of the Appointments Clause, and that the requirement of "good cause" or "military necessity" to remove the judges interfered with the Commander-in-Chief Clause.¹⁷ When the CMCR denied his motion, Nashiri petitioned the D.C. Circuit for a writ of mandamus to force the recusal of the military judges.¹⁸

The D.C. Circuit denied the mandamus petition.¹⁹ Writing for the panel, Judge Henderson²⁰ concluded that, while the court indeed had

⁸ 10 U.S.C. § 950f(d); *In re al-Nashiri*, 791 F.3d at 74.

⁹ 10 U.S.C. § 950f(b); *In re al-Nashiri*, 791 F.3d at 74–75.

¹⁰ 10 U.S.C. § 950f(b)(3); *In re al-Nashiri*, 791 F.3d at 74.

¹¹ 10 U.S.C. § 950f(b)(2); *In re al-Nashiri*, 791 F.3d at 75. Original appointments of many commissioned military officers are made by the President with the advice and consent of the Senate, while some are made by the President alone. 10 U.S.C. § 531(a).

¹² *In re al-Nashiri*, 791 F.3d at 75.

¹³ *Id.*

¹⁴ *Id.* The charges were dismissed on the theory that neither France nor the other countries with ties to the *M/V Limburg* were parties to the armed conflict between al-Qaeda and the United States at the time of the bombing, so the offense was beyond the jurisdiction of U.S. military commissions. See Marty Lederman, *The Jurisdictional Issue Delaying the al-Nashiri Military Commission: Saudi Defendant + French Ship + Malaysian Shipper + Iranian Oil + Bulgarian Casualty = Trial in a U.S. Military Commission?*, JUST SECURITY (Oct. 3, 2014, 3:32 PM), <http://www.justsecurity.org/15258/issue-delaying-al-nashiri> [<http://perma.cc/EG8A-EJ2Z>].

¹⁵ *In re al-Nashiri*, 791 F.3d at 75.

¹⁶ *Id.*

¹⁷ See *id.*

¹⁸ *Id.*

¹⁹ *Id.* at 86.

²⁰ With Judge Henderson on the panel were Judges Rogers and Pillard.

the power to issue a writ of mandamus, to do so would not be proper.²¹ She explained that mandamus is typically appropriate only if three conditions are satisfied: (1) there are “no other adequate means to attain the relief” sought;²² (2) the petitioner shows that his “right to issuance of the writ is clear and indisputable”; and (3) the issuing court is “satisfied that the writ is appropriate under the circumstances.”²³ The court determined that Nashiri failed to meet the first two mandamus requirements,²⁴ and rejected Nashiri’s urging that it use advisory mandamus,²⁵ a species of the writ specifically for issues of first impression or novel issues of law.²⁶ The court cited both a trend against the use of advisory mandamus and its inapplicability here because, according to the court, advisory mandamus requires the petitioner to show irreparable harm just like traditional mandamus does.²⁷

Critically, the court did not stop at the first mandamus factor, although that would have been dispositive. Instead, the court dove into an analysis of Nashiri’s inability to show a “clear and indisputable” right to mandamus by examining the merits of Nashiri’s Appointments Clause argument.²⁸ The MCA contemplates two modes of filling the seats of the CMCR: (1) “[t]he Secretary of Defense may assign persons who are appellate military judges,”²⁹ and (2) “[t]he President may appoint, by and with the advice and consent of the Senate, additional judges.”³⁰ Nashiri argued that the statute’s first appointment mechanism is unconstitutional because CMCR judges are principal officers and, as such, their appointments are not eligible to be vested in a head of a department like the Secretary of Defense.³¹

²¹ *Id.* at 75. For a discussion of the significance of the court’s choice to deny Nashiri’s petition through mandamus, rather than jurisdictional, analysis, see Steve Vladeck, *Argument Recap: The Critical Difference in How al-Nashiri Loses*, LAWFARE (Feb. 10, 2015, 2:03 PM), <http://www.lawfareblog.com/argument-recap-critical-difference-how-al-nashiri-loses> [http://perma.cc/S7B3-W5WP].

²² *In re al-Nashiri*, 791 F.3d at 78 (quoting *Cheney v. U.S. Dist. Court*, 542 U.S. 367, 380 (2004)).

²³ *Id.* (quoting *Cheney*, 542 U.S. at 381).

²⁴ *See id.*

²⁵ *Id.* at 81.

²⁶ *See* 16 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3934.1 (3d ed.), Westlaw (database updated Apr. 2015).

²⁷ *See In re al-Nashiri*, 791 F.3d at 81.

²⁸ *See id.* at 82–85.

²⁹ 10 U.S.C. § 950f(b)(2) (2012).

³⁰ *Id.* § 950f(b)(3).

³¹ *See In re al-Nashiri*, 791 F.3d at 82. This inferior-principal distinction is key. If CMCR judges are *inferior* officers, Congress clearly has the authority to vest their appointment in the Secretary of Defense, the head of a department. Commissioned military officers are generally considered to be inferior officers. *Weiss v. United States*, 510 U.S. 163, 182 (1994) (Souter, J., concurring) (“Military officers performing ordinary military duties are inferior officers Though military officers are appointed in the manner of principal officers, no analysis permits the conclusion that each of the more than 240,000 active military officers . . . is a principal officer.” (citation omitted)).

Responding to Nashiri's argument that CMCR judges are principal officers, Judge Henderson discussed two analogs that appear in the federal case law: the Court of Criminal Appeals (CCA) judges in *Weiss v. United States*,³² revisited in *Edmond v. United States*,³³ and the Copyright Royalty Judges in *Intercollegiate Broadcasting System, Inc. v. Copyright Royalty Board*.³⁴ The court looked to two indicators of inferiority: direct supervision through review of the officers' decisions and indirect supervision through removability.³⁵ The court noted that while the CMCR judges are directly supervised by the D.C. Circuit, not by the executive branch, an at-will removal provision may render an officer inferior even absent direct executive supervision.³⁶ But the CMCR military judges are removable by the Secretary of Defense only for "good cause" or "military necessity."³⁷ The court suggested that this case would nevertheless be uncertain because the "military necessity" removal provision might provide enough discretion to the Secretary of Defense to act as a functional stand in for at-will removal.³⁸

But even if it were clear that CMCR judges are principal officers, the court argued, commissioned officers already appointed by the President and confirmed by the Senate might not need reappointment to the CMCR.³⁹ This was the focus of *Weiss*. There, the Supreme Court determined that officers reassigned to the CCA did not need a second appointment, in part because their duties on the CCA were "germane" to their roles as commissioned military officers.⁴⁰ Although the D.C. Circuit acknowledged arguments to the contrary, it chose to leave open the possibility that *Weiss* might apply to military judges and that, therefore, such judges might not require CMCR reappointment.⁴¹

Ultimately, the court found that resolving Nashiri's challenge would require it to answer novel Appointments Clause questions.⁴²

³² 510 U.S. 163.

³³ 520 U.S. 651 (1997).

³⁴ 684 F.3d 1332 (D.C. Cir. 2012).

³⁵ See *In re al-Nashiri*, 791 F.3d at 82–84. Various theories of removal power have been offered by the courts and scholars, such as the theory that removal is incidental to the appointments power and the theory that removal power is inherent in the President's duty, under the Vesting and Take Care Clauses, to execute the law. See Patricia L. Bellia, *PCAOB and the Persistence of the Removal Puzzle*, 80 GEO. WASH. L. REV. 1371, 1377–89 (2012). In the context of distinguishing inferior and principal officers, removal serves as a proxy for supervision. See *In re al-Nashiri*, 791 F.3d at 83–84.

³⁶ See *In re al-Nashiri*, 791 F.3d at 83–84.

³⁷ *Id.* at 75 (quoting 10 U.S.C. § 949b(b)(4) (2012)).

³⁸ See *id.* at 83–84.

³⁹ *Id.* at 84–85.

⁴⁰ *Weiss v. United States*, 510 U.S. 163, 176 (1994); see also *id.* at 174–76.

⁴¹ See *In re al-Nashiri*, 791 F.3d at 85.

⁴² See *id.* (“[W]hat role, if any, does ‘germaneness’ play in the constitutional analysis? Does the Appointments Clause require germaneness for inferior-to-inferior assignments? If not, would germaneness nonetheless cure any Appointments Clause question with an inferior-to-principal

According to the court, the existence of those questions undermined the “clear and indisputable” right to relief required for mandamus.⁴³ Finally, the court suggested that the political branches could stave off Appointments Clause challenges by simply renominating and reconfirming the judges, whether or not this was constitutionally required.⁴⁴

The court’s analysis of whether CMCR judges are principal or inferior officers, the key question in the case, suggested that the court would find the CMCR judges to be principal officers, even though that answer was not sufficiently “clear and indisputable” to be the basis for a grant of mandamus. Perhaps because the analysis tended toward that conclusion, the court then turned to why, even if the CMCR judges are principal officers, *Weiss* might make reappointment unnecessary. While its discussion of *Weiss* highlighted the gaps that case left open, *Weiss* should be limited to reassignments to inferior-officer duties and therefore should not apply to the CMCR judges. If the CMCR judges are inferior officers, the Secretary may appoint them. But if they are principal officers, *Weiss* should not be extended to potentially weaken the Appointments Clause’s protections.

Though the inferior-principal distinction is murky, the *Nashiri* court’s opinion suggests that CMCR judges are principal officers. The 1997 follow-up to *Weiss* — *Edmond v. United States* — dealt with the appointment of civilian judges to the CCA.⁴⁵ According to *Edmond*, an inferior officer is one whose work is *directed* and *supervised* by a principal officer.⁴⁶ CMCR judges are ostensibly “supervised” in two ways: their decisions are reviewable by the D.C. Circuit,⁴⁷ and the Secretary of Defense may remove them for “good cause” or “military ne-

assignment? Are the duties of a CMCR military judge germane to the duties of a commissioned military officer?”).

⁴³ See *id.* at 85–86.

⁴⁴ See *id.* at 86.

⁴⁵ 520 U.S. 651, 653 (1997).

⁴⁶ *Id.* at 663; see also Nick Bravin, Note, *Is Morrison v. Olson Still Good Law? The Court’s New Appointments Clause Jurisprudence*, 98 COLUM. L. REV. 1103, 1106 (1998) (“*Edmond* . . . departed from the balancing approach employed in *Morrison* and articulated in its stead a bright-line test.”).

⁴⁷ See 10 U.S.C. § 950g(a) (2012). Interestingly, on the point of Congress’s insistence in the MCA on substantive review by the D.C. Circuit and not by the Court of Appeals for the Armed Forces (CAAF) (the military appellate court within the executive branch that reviews CCA decisions), Professor Steve Vladeck notes that “many have long assumed that this was a strategic move by Congress to put the commissions under the purview of the then-more-conservative D.C. Circuit.” Steve Vladeck, *al-Nashiri Argument Preview: The CMCR’s Appointments Clause Problem*, LAWFARE (Feb. 3, 2015, 8:17 AM), <http://www.lawfareblog.com/al-nashiri-argument-preview-cmcrcs-appointments-clause-problem> [<http://perma.cc/S5XN-EP42>]. If those assumptions are correct, Congress’s politically motivated move actually created the constitutional defect. If reviewed by the CAAF, CMCR judges would be directly analogous to *Edmond*’s CCA judges, and therefore would be inferior officers who could be appointed by the Secretary of Defense.

cessity.”⁴⁸ But *Edmond* was clear that supervision must reside *within* the executive branch.⁴⁹ The *Edmond* Court also noted that removal “is a powerful tool for control.”⁵⁰ The military judges in *Edmond* were inferior officers, removable at will, and supervised within the executive branch by the Court of Appeals for the Armed Forces (CAAF).⁵¹ The *Nashiri* court’s claim that CMCR judges *might* be inferior officers despite supervision outside of the executive branch and lack of at-will removal stems from the MCA’s “military necessity” removal provision. While courts are likely to give substantial, if not nearly unlimited, discretion to the executive branch to determine military necessity,⁵² it is nevertheless unconvincing that military necessity is equivalent to at-will removal. Even if the executive would always prevail in court, the provision would require the Secretary of Defense to defend removal decisions on grounds unrelated to the executive’s right to direct executive branch officers. At-will removal itself can be thought of as a stand in for executive branch supervision required by the Appointments Clause,⁵³ and allowing quasi-at-will removal as a further stand in for at-will removal threatens accountability and may impede the President’s duty to execute the law.

After finding that the CMCR judges *might* be principal officers, the D.C. Circuit applied *Weiss*, arguing that its “germaneness” test might cure an inferior-to-principal reassignment.⁵⁴ As Justice Souter’s concurrence in *Weiss* noted, though, this arrangement would threaten the dual constitutional objectives of protecting against any branch’s self-aggrandizement and providing the public a clear line of accountability.⁵⁵ Although *Weiss* itself was not explicitly limited to inferior-to-inferior reassignments, it should be limited in exactly that way.

⁴⁸ See 10 U.S.C. § 949b(b)(4).

⁴⁹ *Edmond*, 520 U.S. at 665 (“What is significant is 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*.” (emphasis added)). It is important to note that this is somewhat incongruous with the multifactor test of *Morrison v. Olson*, 487 U.S. 654 (1988), and, notably, that the lone dissenter in *Morrison* was Justice Scalia, who later authored the majority opinion in *Edmond*. Professor Akhil Reed Amar has argued that *Morrison* was outright wrongly decided because the necessary supervision should be thought of as supervision within the executive branch. See Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 802–12 (1999).

⁵⁰ *Edmond*, 520 U.S. at 664.

⁵¹ *Id.*

⁵² See *In re al-Nashiri*, 791 F.3d at 83–84 (“This additional removal authority is non-trivial; we would likely give the Executive Branch substantial discretion to determine what constitutes military necessity.”).

⁵³ See *Edmond*, 520 U.S. at 664 (noting that although the Judge Advocate General’s supervision over CCA judges was not complete, the ability to “remove a [CCA] judge from his judicial assignment without cause . . . [was] a powerful tool for control”).

⁵⁴ *In re al-Nashiri*, 791 F.3d at 84–85.

⁵⁵ *Weiss v. United States*, 510 U.S. 163, 187–88 (1994) (Souter, J., concurring).

The complexity of *Weiss* warrants a brief review. The *Weiss* Court found the reassignment at issue in that case to be constitutional for two reasons. First, the Court found no evidence that the assignment mechanism threatened either of the values — accountability and anti-self-aggrandizement — that the Appointments Clause seeks to protect.⁵⁶ Second, although the Court declined to hold that the principle was constitutionally *required*,⁵⁷ it nevertheless engaged in the *Shoemaker v. United States*⁵⁸ “germaneness” analysis.⁵⁹ Because all commissioned military officers participate in the military justice system in a variety of ways, judicial duties were “germane” to their original appointment.⁶⁰ Accordingly, the Court unanimously held that reassignment as a CCA judge did not require reappointment.⁶¹

But, as Judge Henderson noted, “*Weiss* is more complicated . . . than the Court’s unanimity might ordinarily suggest.”⁶² Most importantly, Justice Souter’s concurrence argued that it was critical to the analysis that CCA judges are inferior officers because an inferior-to-principal reassignment “would raise a serious Appointments Clause problem.”⁶³ Justice Souter argued that allowing inferior-to-principal reassignment would abrogate the constitutional mandate that the President and Congress jointly staff critical executive branch positions.⁶⁴ The difficulty in

⁵⁶ See *id.* at 174 (majority opinion).

⁵⁷ Justices Scalia and Thomas wrote separately to note that they believed that the germaneness principle is constitutionally required, despite the majority’s failure to hold as much. *Id.* at 195–96 (Scalia, J., concurring in part and concurring in the judgment). Their concern was a formalist one: an appointed officer taking on new and nongermane duties is tantamount to “assuming a new ‘Offic[e]’ within the meaning of Article II, and the appointment to that office would have to comply with the strictures of Article II.” *Id.* at 196 (alteration in original). The CCA judges in *Weiss* were assigned by the Judge Advocate General — not a position in which Congress may vest appointment power, *even for* inferior officers. Therefore, if the duties were not germane, there would be a constitutional problem because the assignment would constitute a *different* office. See *id.*

⁵⁸ 147 U.S. 282 (1893).

⁵⁹ See *Weiss*, 510 U.S. at 173–76.

⁶⁰ See *id.* at 175–76.

⁶¹ See *id.* at 181; see also *id.* at 199 (Scalia, J., concurring in part and concurring in the judgment).

⁶² *In re al-Nashiri*, 791 F.3d at 85.

⁶³ *Weiss*, 510 U.S. at 191 (Souter, J., concurring). Recall that commissioned military officers performing ordinary duties are *inferior* officers. See *supra* note 31.

⁶⁴ Notably, after making a powerful argument for adherence to the Appointments Clause, Justice Souter applied the *Morrison* balancing test and found that because the analysis was inconclusive, the Court should defer to the political branches. See *Weiss*, 510 U.S. at 194 (Souter, J., concurring) (“Since the chosen method for selecting military judges shows that neither Congress nor the President thought military judges were principal officers, and since in the presence of doubt deference to the political branches’ judgment is appropriate, I conclude that military judges are inferior officers for purposes of the Appointments Clause.”). And, in a further twist, when the Court finally held in *Edmond* that military judges are inferior officers, Justice Souter again wrote a concurring opinion rejecting Justice Scalia’s bright-line approach in favor of the *Morrison* balancing test. See *Edmond v. United States*, 520 U.S. 651, 667–69 (1997) (Souter, J., concurring in

applying *Weiss* to the CMCR judges thus circles back to the critical inferior-principal officer distinction. *Weiss* dealt with CCA judges, who were later determined to be inferior officers in *Edmond*. But at the time of *Weiss*, their inferior status was uncertain, and the parties to *Weiss* did not thoroughly brief or argue the distinction. Because the issue was not essential, the majority avoided it altogether.⁶⁵ Nevertheless, reading *Weiss* to extend to principal officers likely violates the Constitution for the reasons discussed in Justice Souter's concurrence.

While the D.C. Circuit rejected mandamus, it seemed to believe that there was a significant constitutional defect.⁶⁶ The court's analysis is clearly addressed to the executive branch, urging it to fix the appointments problem so that final judgments are not subject to collateral attack.⁶⁷ And the executive branch has done just that. Three days after the opinion issued, the government prosecutor motioned to stay the proceedings at the CMCR "while it explore[d] options for re-nomination and re-confirmation of the military judges."⁶⁸ According to a motion to extend the stay, "the re-nomination and re-confirmation process" is "underway."⁶⁹ Thus, this case is unlikely to give the Supreme Court the opportunity to clarify *Weiss* and refute the D.C. Circuit's problematic assertion that *Weiss*'s reappointment analysis might apply to inferior officers assuming principal roles. Given the rarity with which appointments questions reach the Court, perhaps advisory mandamus would have been appropriate.⁷⁰

part and concurring in the judgment) ("I do not claim the convenience of a single sufficient condition What is needed, instead, is a detailed look at the powers and duties of these judges to see whether reasons favoring their inferior officer status within the constitutional scheme weigh more heavily than those to the contrary." *Id.* at 668.).

⁶⁵ See *Weiss*, 510 U.S. at 196 n.* (Scalia, J., concurring in part and concurring in the judgment) ("[W]hether the Appointments Clause permits conferring principal-officer responsibilities upon an inferior officer in a manner other than that required for the appointment of a principal officer . . . [was] in my view wisely avoided by the Court, since [it was] inadequately presented and not at all argued.").

⁶⁶ See *In re al-Nashiri*, 791 F.3d at 82 ("With these [mandamus] principles in mind, only Nashiri's Appointments Clause challenge gives us pause.").

⁶⁷ See *id.* at 86 ("Once this opinion issues, the President and the Senate could decide to put to rest any Appointments Clause questions . . . by re-nominating and re-confirming the military judges to be *CMCR judges*"); cf. *Ryder v. United States*, 515 U.S. 177, 188 (1995) (invalidating a conviction because the petitioner was "entitled to a hearing before a properly appointed panel").

⁶⁸ Unopposed Motion to Stay the Proceedings at 2, *United States v. Al-Nashiri*, No. 14-001 (C.M.C.R. June 26, 2015).

⁶⁹ Motion to Continue the Stay of the Proceedings at 4, *United States v. Al-Nashiri*, No. 14-001 (C.M.C.R. Nov. 13, 2015).

⁷⁰ Although the *Nashiri* court declined to exercise its advisory mandamus authority absent a showing of irreparable harm, see *In re al-Nashiri*, 791 F.3d at 81, the law in this area is not clearly settled. See *WRIGHT ET AL.*, *supra* note 26, at § 3934.1 n.5 ("Ordinarily mandamus . . . require[s] palpable error threatening irreparable harm. But advisory mandamus is available to address an unsettled issue of substantial public importance that is likely to recur if there is a risk that deferring review would potentially impair the opportunity for review.").