Case No. _____

IN THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

In re RAMZI BIN AL SHIBH, Petitioner	*United States of America v. Khalid Sheikh Mohammed, et al.* Military Commissions Guantanamo Bay, Cuba

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PETITION FOR WRIT OF MANDAMUS AND WRIT OF PROHIBITION

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

(A)(1) Parties Appearing Below: Parties appearing below include the United States of America and the accused in *United States of America v. Khalid Sheikh Mohammed*: Khalid Sheikh Mohammed, Walid Muhammad Salih Mubarak Bin 'Attash, Petitioner Ramzi Bin Al Shibh, Ali Abdul Aziz Ali, and Mustafa Ahmed Adam Al Hawsawi. The Office of the Chief Defense Counsel, Office of Military Commissions, Department of Defense, has appeared as *amicus curiae* in the proceedings below.

(A)(2) Parties Appearing in This Court: Petitioner Ramzi Bin Al Shibh, and, should a responsive pleading be ordered by the Court, the United States of America, appearing *pro forma* on behalf of the Military Judge pursuant to Circuit Rule 21(b).

(B) Rulings Under Review: None. The Military Judge has declined to rule on the defense motions raising the jurisdictional arguments presented in this Petition.

(C) Related Cases: There are no related cases pending in this Court. Petitioner has a habeas corpus petition pending before the District Court for the District of Columbia. *Ramzi Bin Al Shibh v. Barack Obama*, No. 06-1725 (D.D.C.) (EGS).

RELIEF SOUGHT

Petitioner requests that the Court hold that the Military Commissions Act of 2006 is unconstitutional, declare all proceedings before the military commission to be a nullity, and enjoin further proceedings therein.

ISSUES PRESENTED

(1) Does the Military Commission Act of 2006, on its face or, in the alternative, as applied in the military commission proceedings below, exceed Congress's constitutional powers to convene law-of-war military commissions under the Define and Punish Clause (Const., Art. I, sec. 8, cl. 10)?

(2) Does the Military Commissions Act of 2006, on its face, violate the equal protection component of the Fifth Amendment's Due Process Clause?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

UNITED STATES CONSTITUTION

STATUTES

CASES

SUPREME COURT CASES

CIRCUIT COURT CASES

DISTRICT COURT CASES

MILITARY COURT CASES

MILITARY COMMISSION CASES

COURT RULES

INTERNATIONAL LAW

PERIODICALS

BOOKS

MISCELLANEOUS

I. INTRODUCTION AND OVERVIEW OF FACTS AND ARGUMENT

We demonstrate in this Petition that the Military Commissions Act of 2006, Pub. L. 109-366, 17 (October 2006) ("MCA"), on its face and as applied in this case, exceeds the constitutional limits on Congress's power to authorize military commissions. In the terms of Geneva Convention Common Article 3, the commission in this case is not a "regularly constituted court." Because Petitioner has the right not to be tried by a tribunal that has been *ultra vires* from its inception, the petition should be granted and the case should be dismissed.

Mandamus and prohibition are remedies to be applied only in extraordinary circumstances. The situation facing Petitioner is indeed extraordinary, however. Not only is the MCA unconstitutional on its face, but the proceedings themselves have been "irregular" in every sense. In fact they have been a travesty of justice, a "system" -- in the military judge's own words -- "in which uncertainty is the norm and where the rules appear random and indiscriminate." Military Judge Ruling D-126, at 3.

The reason for this state of affairs, moreover, is clear: These cases were never intended to do justice. Instead, what the government has sought, and to date received, is not a legitimate judicial proceeding but a political show trial.

The process has been corrupted by illegitimate political considerations at every step. Political distortions of the judicial process begin with the MCA itself.

The provision limiting its jurisdiction to aliens (the basis of the facial challenge *infra)* was designed to avoid the political consequences of imposing the MCA's facially unconstitutional procedures like this on American citizens. §§ 948c, 948d(a). No other American criminal court system is so obviously founded on such politicized and illegitimate premises.

However unfair (and unconstitutional) the MCA may be as a facial matter, the concrete reality of the commissions system has been even worse. Central Intelligence Agency ("CIA") interference with the defense function has been an integral part of this system, with devastating effects on the fairness of the proceedings. Most recently, the FBI began an investigation of military defense counsel that has calculatedly employed heavy-handed investigative techniques that have destroyed attorney-client relationships and the ability of some counsel to perform their defense responsibilities. The investigation was almost certainly instigated by the CIA, since it is being overseen by the agency of the Department of Justice to which the CIA reports. Peter Finn, Detainees Shown CIA Officers' Photos: Justice Dept. Looking Into Whether Attorneys Broke Law at Guantanamo, *Washington Post* (August 21, 2009). This gross interference in the defense teams' attorney-client relationships is part of a pattern of CIA interference with the commissions. Defense counsel are never certain, and have no way of being certain, whether they are disclosing information that the CIA views as classified

when they are speaking in court or filing motions, leading to a chilling effect and aborted arguments of counsel and the accused, as the CIA rules, in the moment, what matters may be discussed in court and what may not.

Apart from CIA interference, bias and politics pervade the Department of Defense and the Office of Military Commissions. The Convening Authority, who is responsible, *inter alia*, for ruling on defense requests for resources, has to date denied *every single one* of the Petitioner and his co-accuseds' 12 requests for expert assistance, including – in this capital case – all requests for mitigation specialists and mental health experts. Incredibly, among these denials was a request for a mental health expert made by Petitioner -- whom the government has conceded from the outset suffers from a psychotic disorder – that was denied *after* the military judge had determined to hold a competence hearing in his case. That decision is only one instance in a pattern of demonstrably politicized decision making that has governed the allocation of defense resources in commission cases.

The rule of law has fared no better in the commission proceeding itself. On their first appearance, three of the five accused in this case were found competent to waive their right to counsel and proceed *pro se* on the basis of *pro forma* allocutions that asked not a single question of them or their attorneys about their current mental states, notwithstanding assertions of longstanding abuse and torture in U.S. custody, the abysmal quality of the translation, and non-responsive answers

by the accused. Since the initial appearance, from hearing to hearing, it has been a matter of chance whether the *pro se* accuseds' right of self-representation will be honored, whether purported classification rules will be enforced, or whether the military judge will abide by his own orders. The only consistent rule has been inconsistency, for the convenience of the government.

The absence of rules has suited the prosecution's overarching strategy, which has been to avoid all regular trial process and proceed directly to execution. The government has been explicit about this goal. It has consistently argued that, rather than decide any motions, the military judge should wait until Petitioner is found competent. This strategy is leading to hearings orchestrated by the Convening Authority, the military judge, and the CIA to ensure that competency is determined without defense access to essential information, to necessary experts, or to the resources indispensable to a meaningful investigation. If allowed to proceed in this vein, the government will succeed in circumventing justice by engineering Petioner's waiver of all rights and a summary execution. The prosecution assured the military judge that by following this strategy "[Petitioner bin al Shibh's] case would likely neither be long nor particularly stressful." Attachment KK, at 3.

The military judge has capitulated to the government's plan. At the government's request, the commission has declined to rule on defense motions that

go to the constitutionality of the MCA and the accuseds' right not to be tried, motions to dismiss individual charges, and motions to clarify whether the Constitution will apply in Guantanamo. As a result of the military judge's *de facto* collusion with the government, nothing of substance has been decided in the 15 months since the arraignment. Nothing about this case bears any resemblance to the orderly and regular criminal process that occurs in federal and state courts.

Nevertheless, the process has served the government's true interest: Engaging in a show trial where the accused are given soap-boxes to air their political grievances with the United States and proclaim their guilt in front of the press and invited 9/11 victims, and then shepherded to their executions. That is why the prosecution has consistently interjected itself into defense attorney-client relationships and argued strenuously for the accuseds' compelled attendance at these hearings and their opportunity to be heard. To cite only the most recent example, a motion hearing (held on July 16, 2009) scheduled to address narrow discovery topics became, at the unilateral request (and improper communication with the accused) by the government, a renewed opportunity for the accused to appear, make statements, and dismiss their remaining standby counsel. It has been the show that mattered, not the pursuit of justice.

Petitioner and defense counsel are not the only ones to recognize the fundamental flaws in the MCA's commission system. The President himself

issued a stay of all proceedings upon taking office on January 20, 2009, pending review and revision of the Act and the rules promulgated under its authority. Congress as well is currently considering major revisions to the Act. Yet, even the Presidential stay has been manipulated for the political convenience of the government. Some commission cases – like this one – have been allowed to continue despite the fact that fundamental decisions have been made during the ostensible "stay" (such as accuseds' waiver of counsel at the July 16 hearing), while in others (for example, *United States v. al Nashiri*), the stay has been observed by the withdrawal of charges. The case of *al Nashiri* is particularly telling, because the withdrawal occurred within hours of the military judge's decision to hold an evidentiary hearing on al Nashiri's current conditions of confinement, a hearing that threatened to expose evidence of his detention and abuse at a CIA "black site." *United States v. al Nashiri*, D-002 Ruling on Defense Motion to Discontinue [REDACTED] (February 5, 2009); *United States v. al Nashiri*, Withdrawal of Charges (February 5, 2009) (both available on Military Commissions website, www.defenselink.mil/news/commissionsalnashiri.html).

This political manipulation now threatens to culminate in a *faux* competence hearing for Petitioner, orchestrated by the prosecution and controlled by the CIA, to cover up facts crucial to determining Petitioner's competence – the details of his physical and psychological abuse at the hands of the CIA -- rather than make a

legitimate or reliable decision. It is therefore imperative that this Court address the fundamental flaws in the military commission's jurisdiction and Petitioner's right not to be tried in proceedings that amount to a sham political trial. These flaws were raised below but have never been addressed, so it is left to this Court to rule on the constitutional and jurisdictional issues presented here, in order to protect its own jurisdiction.

II. STATEMENT OF FACTS AND SUMMARY OF THE CASE[1]

A competency hearing for the Petitioner is imminent in this case: 21 September 2009 at Guantanamo Bay, Cuba ("GTMO"). Attachment A. Concerns about Petitioner's competency to stand trial are uncontested. Petitioner has been in U.S. custody since September 2002. The CIA held him incommunicado until he was transferred to Department of Defense (DoD) custody in GTMO in September 2006. The charges were referred for a joint, capital trial on 9 May 2008. Over objection from counsel, the military judge arraigned the Petitioner on 5 June 2008 and engaged in a counsel election colloquy with him, even though counsel informed the judge, as they had learned just the night before, that Petitioner was being administered a psychotropic medication. The judge's colloquy with

[1] All the transcripts, and nearly all the pleadings, referenced herein, per the orders of either the Convening Authority or the Military Judge, are not releasable. In accordance with applicable protective orders, therefore, the defense has filed referenced parts of the record in this case with the Senior Security Advisor (SSA) for the Commissions. The Petitioners respectfully invite the Circuit's Court Security Officer to obtain the referenced records from the SSA.

Petitioner regarding his right to counsel, however, demonstrated that Petitioner was not able to intelligently make a decision regarding this right. On 1 July 2008, the Military Judge ordered that a mental health evaluation be conducted on Petitioner.[2] *See* Attachments B (partially classified), C. The RMC 706 Board, composed of two board-certified military psychiatrists, released its report on 16 October 2008. *See* Attachment D (Report of Inquiry Into the Mental Capacity of Ramzi bin al Shibh, dated 16 October 2008). The Board found that "…the accused has had a severe mental disease or defect in the recent past, and that it is very likely that at the time of this Board, the accused continued to have a severe mental disease." The clinical psychiatric diagnosis is, "Axis I: Delusional Disorder, Persecutory Type," that "has the potential to impair his ability to conduct or cooperate intelligently in his defense, and which also may have led him to refuse an interview by the Board. Without an interview of the accused, the Board cannot give a definitive opinion with regard to this part…" *Id.*

A. Even With an Uncontested Diagnosis of Mental Illness, Petitioner is Denied Expert Assistance

The Convening Authority ("CA"), Ms. Susan Crawford, who is charged with resourcing, ostensibly impartially, all military commissions, twice denied the

[2] Rule for Military Commission 706 governs mental competency assessments to stand trial, and the process as referred to as a "RMC 706 Board."

defense request for the assistance of a forensic psychologist.[3] Attachment E, F. The CA has a record of systematically denying defense expert requests, and has done so with zeal in this case, where Petitioner has not been afforded any of the assistance he has requested (including that of a mitigation specialist). Attachment G.[4] The military judge thereafter deferred ruling on the defense motion to compel this mental health expert, opting instead to wait for the RMC 706 Board to submit its report. More than 50 days after the judge himself ordered a mental health assessment of Petitioner, the defense remained without an expert consultant and was required to conduct an examination of Petitioner's current conditions of confinement without expert assistance. Furthermore, the defense was, over its objections, compelled to proceed in several commission hearings even as Petitioner's competency has remained undetermined.

The defense was finally afforded the assistance of a mental health consultant after four months of litigation, 127 days following the commission's initial order for a competency assessment of Mr. bin al Shibh. The Military Judge's order

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[3] The CA's refusal to grant the defense the assistance of a forensic psychologist occurred despite the fact that a competency hearing was docketed and several government doctors diagnosed Petitioner as suffering from a psychotic disorder. The Convening Authority authorized funding only for 40 hours of consultation after being ordered by the military judge to provide an expert to the defense. For further discussion of the CA's record, *see infra,* Statement of Facts, Section B.

[4] Since her appointment in February 2007, the CA has denied 84 percent of expert requests from defense counsel in military commissions. The few granted experts occurred predominantly in *United States v. Omar Khadr,* where the Canadian government has been actively involved.

appointing the defense psychologist, however, precludes to this day (without explanation) the defense expert from meeting with Petitioner and from testifying at the competency hearing. Attachment H

B. Despite a Pending Competency Hearing, the Accused is Repeatedly Denied Access to Information and Records Regarding His Mental Health History

Beginning in June 2008, immediately after arraignment, the defense repeatedly sought production of records and access to witnesses relevant to Petitioner's mental health. Until a ruling on 24 July 2009 (following the most recent hearing in this case), the defense was only permitted to interview physicians who treated Petitioner after he was transferred to DoD custody in September 2006; these physicians have been identified solely by pseudonym (e.g., "Dr. A") and information about their qualifications, including their *curriculum vitae*, has been denied to the defense. Attachment I. It was not until July 2009 that the Commission finally agreed to hear and grant, in part, a defense request to interview other DoD personnel who provided medical treatment to Petitioner. At present, counsel for Petitioner continue to be denied access to interview any person who had any contact with Petitioner during the four years he was in the custody of the CIA, from September 2002 – September 2006. Attachment J. The defense also has only been provided summaries of medical records from that time. Similarly, the defense has been denied any information or viewing of Petitioner's conditions of

confinement during the four years he was in CIA custody, and the judge has ruled that interrogation techniques employed on Petitioner are not relevant to a determination of his mental state. Attachments J, K.

The delays and outright refusals to provide basic discovery for the competency process occur while the CA, ostensibly charged with resourcing the defense, engages in systematic denials of the most fundamental requests for assistance. The systematic nature of these denials is evident in the simple statistics: of the 56 total defense requests for expert assistance filed to-date in the referred commission cases, the CA has only granted nine (including one that the military judge already approved in that case). *See* Proposals for Reform of the Military Commissions System, 111th Cong. (July 30, 2009)(statement of Col. Peter Masciola, Chief Defense Counsel, Office of Military Commissions) Seven of these nine occurred in a single case, *United States v. Omar Khadr.*[5] The CA disapproved every request for expert assistance that Petitioner or his co-accused submitted in the present case.

[5] Mr. Khadr, a Canadian citizen not charged with a capital offense, received special attention because of the Canadian government's close involvement with his case. *See United States v. Omar Khadr*, Hr'g Tr. 600-01 (not released to the public), August 13, 2008 (testimony of Brig. Gen. Thomas Hartmann, then-legal advisor to the CA, discussing meetings and regular updates he provided to representatives of the Canadian government)

C. This Case Confronts Counsel with Insurmountable Obstacles to the Defense Function

Three of the co-accused in this case were permitted (over repeated objections, *see, e.g.,* Attachment NN, at 16-17; 28-29; 94-95; 98-101), to proceed *pro se*, despite the military judge asking them no questions regarding their mental health status, even after the judge heard assertions of abuse and torture while in CIA custody. Attachment NN, at 28-29, 32-63 (colloquy of Mr. Mohammed), 64-97 (colloquy of Mr. bin 'Attash), 129-56 (colloquy of Mr. Ali). While Mr. bin al Shibh's competency determination remained pending and with discovery and defense resource motions yet to be litigated, the Military Judge scheduled a hearing for the week of 22 September 2008, to address "law motions." Attachments L; M.

This order to proceed with motions was issued despite extensive briefing, in the months following arraignment, regarding the obstacles to the progress of the case. These motions addressed the continual need for experts to be appointed to permit assembly of an adequate capital defense team because the CA systematically denied expert requests; the commission's tardy or non-receipt of pleadings from the *pro se* accused; facilities failures that prevented counsel from reviewing any notes taken during client meetings in their own offices; debilitating logistical obstacles in getting to GTMO that severely restricted counsels' ability to meet with the accused; the government's refusal to establish a secure phone line for counsel to communicate from the U.S. to GTMO with clients, as was

established for habeas counsel. Attachment O. Finally, problems with the translation of documents and interpreters at the hearings have severely handicapped the accuseds' ability to follow the proceedings and track the pleadings filed. Attachment NN, at 17-26, 31, 38-39, 143, 191. The problems with translations and interpreters have continued to linger throughout this commission case, and the concerns expressed have either been ignored or not yet ruled upon. Attachment PP, at 1-2, 38, 44-45, 77-81, 83-85, 114, 172-73, 183, 214-20; Attachment RR, at 4, 12, 29-30, 37, 57, 59, 63, 65; Attachments P; Q; R; S, T.

At the hearing in September 2008, matters scheduled were quickly eschewed without notice to the defense. The first day of hearings was lost as government entities quibbled to determine what agency or department had the authority to forcibly compel Mr. bin al Shibh's presence at the hearing. Attachment PP, at 1-28.

When the hearing resumed the next day, the military judge changed the docketed motions and ordered counsel for Petitioner to argue critical motions relating to competency that had specifically been omitted from the docketing order, including a motion related to conditions of confinement and a classified discovery motion. *See* Attachment M and Attachment QQ, at 103, 119.

D. The Government Operates to Control the Agenda, and the Commission Has Abdicated its Responsibility to Determine Jurisdiction

Throughout these proceedings, there has been a concerted effort to interfere with the attorney-client relationship and the defense function. Even as Petitioner's competency to stand trial remained undetermined, the military judge persisted in ordering the filing of "law motions," and scheduled a hearing for December to address the law motions filed to-date, and discovery matters. Attachments M, U. Because the defense had only just been authorized a defense mental health specialist, and because access to vital witnesses pertinent to the competency assessment remained to be adjudicated, counsel for Petitioner filed a motion to abate the law motions hearing until his competency could be determined. The motion was never docketed. Attachment V. When raised at the December hearing, the motion was summarily denied. Attachment RR, at 47-50.

At this same hearing, the military judge once again changed the hearing agenda without notice, entertaining a motion recently filed, purportedly by all five co-accuseds. Counsel for Petitioner objected to the reading of this motion as a communication from a represented accused that had not been filed by or through counsel, as required under commission rules for represented accused. Attachment RR, at 16. Overruling this objection, the judge read the motion in open court as a statement from all five accused, including those represented by counsel; in the

motion, the accused sought to withdraw from all previously filed motions, and to enter guilty pleas. The judge proceeded to inquire with each of the *pro se* accused about their withdrawal from the filed motions, approved their withdrawal, and agreed to take their guilty pleas that day. Attachment RR, at 47-50. However, the Commission raised the issue whether it could accept a guilty plea to a capital offense, and whether the death penalty would still be a possible punishment. Attachment RR, at 51. After the military judge ordered briefing on this issue, the *pro se* accused elected not to enter pleas that day. Attachment OO, at 51-54; Attachment W.

The following day the prosecution moved for leave not to answer any remaining law motions the defense had filed. Although it had strenuously pushed for hearings to take place even as the competency process proceeded, the prosecution now sought to delay hearings on any law motions until competency determinations for Messrs. Bin al Shibh and al Hawsawi were completed. Attachment X. In its request, the Government commented:

> Both accused, at various sessions of this commission, have expressed a desire to represent themselves, waive all motions, and plead to the offenses for which they are charged. Because of the clear intentions of both of these accused, the Prosecution requests that it not be required to file responses to motions that may never need to be litigated, so that the Prosecution can focus its efforts on other issues related to the trial.

Despite the defense not having an opportunity to respond, the Commission granted the government's request to defer its responses, including those addressing the commission's jurisdiction. At present, none of the law motions have been argued or ruled on, including eleven motions challenging the commission's jurisdiction to hear this case at all.

The government's assertion of control over hearing agendas, and the military judge's acquiescing to this control, was most evident at the latest hearing in this case, on 16 July 2009. The hearing was ostensibly scheduled to address limited matters, namely discovery issues relating to the competency hearings of Messrs. bin al Shibh and al Hawsawi. Attachment A. Nonetheless, upon its request, the government was permitted to refuse to answer defense motions affecting the competency process.[6] Attachment Y. The judge's order also specified that the *pro se* accused would not be heard from, and that counsel matters would not be addressed at this session. Notwithstanding the purportedly limited purpose of the 16 July hearing, at the outset of the hearing, the government was allowed to raise an oral motion for the accused to make five minutes statement regarding any matter they wished. Despite a previous instruction that, as a matter of practice, the

[6] The motions the government did not have to answer were motions to: disqualify the CA from taking further action in this case due to her record of denying all defense requests for assistance; to authorize Petitioner the assistance of a capital mitigation specialist; to compel examination of Petitioner's conditions of confinement prior to Guantanamo (at so-called "black sites").

Commission would not entertain oral motions, Attachment OO, at 32), this government motion was granted.

The purpose of the government's motion was to entice the appearance of the accuseds to the hearing, since they had all elected not to attend after the Commission authorized their absence. Although the military judge allowed only the *pro se* accused to be informed that they could make five minute statements, the government informed *all* of the accused of this option. The government's improper communication with the represented accused led to witness testimony about the circumstances of these contacts.

As this collateral evidentiary hearing proceeded, *pro se* accused requested to cross-examine the witnesses and were not allowed; standby counsel for other *pro se* accused, however, were permitted to examine witnesses. Hr'g Tr. 1115 (Jul 16, 2009)(classified). Despite objection by one *pro se* accused, the military judge offered no explanation for the discrepancy in treatment or violation of the *pro se* accuseds' right to participate.

Then, at the close of the hearing, the military judge ignored his own docketing order, addressing counsel matters by granting a motion to relieve standby counsel -- even though counsel was not in attendance because he relied on the military judge's earlier docketing order limiting the scope of the hearing to matters that did not concern his client. Thus, the most recent hearing in this case

exemplified, in an egregious manner, the pattern of misleading the defense about matters that would be addressed, and continuing to do away with the role of defense counsel.

E. The Interests of Intelligence Agencies Control These Proceedings, Thwarting the Defense and Judicial Functions

From the beginning of this case, the role of intelligence agencies and classification rules has been foremost in dictating the course of proceedings. Any statement by the accused is presumptively classified. Attachment NN, at 1. The proceedings are broadcast with a delay in the audio feed of the closed-circuit broadcast, and the CIA security specialists determine whether to cut the feed. *Id.* at 2.

During a hearing for Mr. Ali, on 9 July 2008, his defense counsel objected to the presence of agents of the CIA sitting in the rear of the courtroom, as their presence impacted the voluntariness of waiver of counsel analysis and created a coercive and intimidating environment for Ali. Mr. Ali had also raised the same objection at the arraignment hearing. Attachment NN, at 134. The military judge acknowledged the presence of "a number of people" in the courtroom who were "associated with the controlling and safeguarding of the classified materials that might come into play here," and that they would be present at every session, but otherwise declined to address the issue. Attachment OO, at 2-3. The defense

subsequently objected to the presence of CIA officials in a joint motion. *See* Attachment Z. That motion has never been entertained.

In the latest hearing, held on 16 July 2009, during argument by counsel for the Petitioner on a motion to compel assistance of a sleep deprivation expert, the audio feed to the public from the courtroom was terminated. The military judge instructed that the security officer seated next to him would leave the courtroom to make a phone call to unnamed persons. The security officer returned a few minutes later, whispered to the judge, and the judge then instructed counsel to discuss only matters that occurred after September 2006, the month when Petitioner arrived at GTMO and entered DoD custody. Hr'g Tr. 1118-21 (Jul 16, 2009)(classified)

Control of classified information in this case is also used as a sword against the defense. For example, in one instance the prosecution incorrectly assumed that Petitioner's counsel had disclosed classified information to attorneys representing Petitioner in habeas proceedings, in contravention of the numerous protective orders in this case. Operating on these false assumptions, prosecutors initiated an official inquiry. Attachment AA. Counsel were required to address this matter while also pursuing the defense of Petitioner. Attachment BB. More recently, the Federal Bureau of Investigation entered defense office spaces to interrogate

defense counsel regarding a purported violation of classified information rules. Peter Finn, *supra*, Washington Post, August 21, 2009.

The security classification rules that so strictly control the defense and hearings in this case, however, do not apply when the government does not wish them to apply. For example, when the commission had ordered a 120 day continuance of this case as a result of the President's Executive Order (E.O. 13492, 78 Fed Reg. 4897 (January 27, 2009)), the military judge nonetheless accepted the filing of a pleading on behalf of all five accused. *See United States v. Mohammed, et al.*, D-101. This pleading, presumptively classified TS//SCI (codeword), was filed and publicly released before defense counsel representing two of the accused were notified. Attachment CC, DD. The military judge effectively dismissed defense counsels' objection with the assertion that when a document is filed, "the public should generally be able to determine for itself the correctness of a judicial decision in determining a party's substantive rights, absent some evidence release could reasonably affect the outcome of the trial." Attachment DD, at ¶ 3-4. This was a remarkable explanation, given that the accuseds' statements are all presumptively classified, and given the extraordinarily prejudicial content of the accuseds' statement. S*ee* William Glaberson, Detainees Say They Planned Sept. 11, N.Y. Times, March 9, 2009, at A1.

No such standard has ever been applied to defense filings. Numerous defense motions that involve no classified matters and raise legal claims have yet to be released. *See, e.g.,* D-012, D-051-054, D-056-057, D-063-065, D-067.[7] Indeed, the very transcripts in this case are either not releasable and/or classified. *See, supra,* note 1.

In another instance, the government sought to shore up its opposition to a defense motion to transfer Petitioner to less onerous conditions of confinement with the filing of a declaration that purported to describe in detail, the Petitioner's conditions of confinement. *See United States v. Mohammed, et al.,* Declaration of CDR Jeffrey K Hayhurst (filed in support of Govt. Response to D-119). That declaration was not deemed to be classified, even though defense counsel had been instructed that their notes from viewing Petitioner's conditions of confinement were to be treated as classified.

The selective application of classification rules was evident from the very onset of this case, when defense counsel were precluded from meeting with their clients because the government had not yet completed counsels' background

[7] These motions seek, for example: to dismiss for lack of personal jurisdiction for failure to determine unlawfulness of combatancy status; to dismiss charges for violation of statute of limitations; to dismiss capital referral for violation of the Equal Protection Clause; to cease interference with defense function by barring CIA employees from courtroom; to dismiss for violation of the Equal Protection component of the Due Process Clause; to dismiss for unlawful influence on the process by the President of the United States.

investigations. On the day of arraignment, however, when some accused would be appearing in court without all of their detailed military defense counsel, these military counsel were suddenly informed they had been granted interim clearances – for the day. And thus, these counsel could sit at counsel table with their erstwhile client, whom they had just met minutes before the hearing, creating the appearance, although not the reality, of meaningful representation. Attachment NN, at 17, 157.

F. While Refusing to Entertain Critical Issues of Jurisdiction and Motions, the Military Judge Persists in Holding a Competency Hearing

The military judge has refused to hear motions directly relevant to substantive and procedural matters surrounding the adjudication of the competency question. They included a request to determine whether the Constitution applies (Attachment EE); a request to transfer Petitioner to communal living, so as to determine whether this change would improve his mental condition (Attachment FF (classified in part)); a request for appointment of a mitigation specialist to assist defense counsel with the mounting evidence of mental health issues (Attachment GG); a request for the designation of a "privilege team" to the defense to provide guidance relating to classification issues (Attachment HH); a defense motion to disqualify the convening authority, whose decision-making regarding the provision of defense resources, and specifically expert assistance from mental health

specialists where mental health was in question, demonstrated a bias against resourcing the defense (Attachment II); a request for the appointment and compensation of an attorney qualified to represent an accused in a capital case. (Attachment JJ)

Meanwhile, in response to the request to move Petitioner to communal living, the government revealed a disturbing underlying strategy, more linked to a desired outcome than to any interest in a just process:

> It also bears noting that the accused has been consistent in his desire to represent himself in these proceedings, plead guilty and proudly assert responsibility for the attacks that killed 2,973 people on September 11, 2001. Should he be allowed to do so, his case would likely neither be long nor particularly stressful. KK, at 3.

Notably, of a total of 133 substantive motions filed in this case, only thirty-nine have been ruled upon. Fifty-eight filed motions have not been ruled upon or set for argument, including all jurisdictional motions. Recent defense motions to continue the competency hearing have all been denied. Military Judge Ruling D-126, MM.

III. JURISDICTION

A. This Court has Jurisdiction to Issue Writs of Mandamus and Prohibition in Aid of its Appellate Jurisdiction[8]

The MCA vests this Court with "exclusive appellate jurisdiction" to determine the validity of final judgments rendered by military commissions. 10 U.S.C. § 950g. The All Writs Act, 28 U.S.C. 1651, gives this Court the power to issue all writs, including writs of mandamus and prohibition, as necessary or appropriate in aid of its appellate jurisdiction. *Roche v. Evaporated Milk Assn.,* 319 U.S. 21, 26 (1943).

This Court is the proper forum irrespective of the fact that the MCA also vests review authority in the Court of Military Commission Review ("CMCR"). 10 U.S.C. § 950f. The CMCR Rules of Practice specifically state that "[p]etitions

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[8] Given that Petitioner's primary claim is a challenge to the commission's subject matter jurisdiction, Petitioner believes that mandamus is the appropriate vehicle for requesting this Court "to confine an inferior court to a lawful exercise of its prescribed jurisdiction," *Doe v. Exxon Mobil Corp.*, 473 F.3d 345, 353 (D.C. Cir. 2007), *cert. denied*, 128 S.Ct. 2931 (2008) (*quoting Mallard v. U.S. Dist. Court for the S. Dist. of Iowa*, 490 U.S. 296, 308 (1989)). Moreover, *Khadr v. United States*, 529 F.3d 1112 (D.C. Cir. 2008), casts significant doubt about the availability of the collateral order doctrine under the MCA. *See id*., at 1116 ("the 'final judgment' [required to establish appellate jurisdiction under the MCA] must be 'approved by the convening authority' to satisfy the statute."). The Court of Military Commission Review ("CMCR") entertains interlocutory appeals only from the government. *See* CMCR Rule of Court 21(b) (2007). Finally, because the Military Judge never ruled on the defense motions that raised the issues argued in this Petition, there was no "final judgment" from which Petitioner could have appealed. Nevertheless, should the Court find appeal under the collateral order doctrine to be the more appropriate vehicle for addressing Petitioner's claims in this Court, Petitioner requests that this petition be treated as an appeal.

for extraordinary relief will be summarily denied…." CMCR Rule of Practice 21(b) (2007). As such, this Court is the first appellate court for which the seeking of extraordinary relief is not futile. *Houghton v. Shafer*, 392 U.S. 639, 640 (1968).

"Mandamus, prohibition and injunction against judges are drastic and extraordinary remedies." *Ex parte Fahey*, 332 U.S. 258, 259 (1947). Nevertheless, Courts with appellate jurisdiction can and should utilize their power to constrain lower courts "where appeal is a clearly inadequate remedy." *Id*. at 260. "The traditional use of the writ in aid of appellate jurisdiction both at common law and in the federal courts has been to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so." *Roche*, 319 U.S. at 26; *see also Cheney v. U.S. Dist. Court for Dist. of Columbia*, 542 U.S. 367, 380 (2004); *Doe,* 473 F.3d at 353.

Assuming this Court finds the MCA to be facially unconstitutional, *see* Section IV.B.2 *infra*, mandamus and prohibition are appropriate remedies to bar further proceedings by a military commission that is entirely without subject-matter jurisdiction. *Roche*, 319 U.S. at 26; *cf. Hamdan v. Rumsfeld*, 548 U.S. 557, 589 (2006) ("Hamdan and the Government both have a compelling interest in knowing in advance whether Hamdan may be tried by a military commission that arguably is without any basis in law."). Military courts similarly recognize that mandamus is an appropriate remedy where the Petitioner's claim is predicated on a

right not to be tried for lack of subject-matter jurisdiction. *Murray v. Haldeman*, 16 M.J. 74, 76-7 (C.M.A. 1983).

Even if this Court does not entertain a facial challenge to the MCA, writs of mandamus and prohibition are necessary and appropriate when the conduct of an inferior court becomes so arbitrary and capricious as to constitute legal proceedings in name only. Extraordinary writs have become "an established remedy to oblige inferior courts and magistrates to do that justice which they are in duty, and by virtue of their office, bound to do." *Virginia v. Rives*, 100 U. S. 313, 323 (1879); *see also Pulliam v. Allen*, 466 U.S. 522, 537 (1984) (when "an injunction against a judicial officer was necessary to prevent irreparable injury to a Petitioner's constitutional rights, courts have granted that relief."); *cf. Work v. U.S. ex rel. Rives*, 267 U.S. 175, 184 (1925) (mandamus is appropriate when agency rulings become "arbitrary and capricious").

As is detailed at length in the Section II, *infra*, this proceeding has been nothing if not arbitrary and capricious. Even the presiding military judge in this case has found that the proceedings have degenerated into "a system in which uncertainty is the norm and where the rules appear random and indiscriminate." Military Judge Ruling D-126, at 3. This is precisely the circumstance where writs of mandamus and prohibition are necessary to remedy the "abdication of the judicial function depriving the parties of a trial before the court on the basic issues

involved in the litigation." *La Buy v. Howes Leather Company*, 352 U.S. 249, 257 (1957). It is equally established in military jurisprudence that a defendant is "entitled to extraordinary relief to preserve the integrity of the courts-martial system." *Dunlap v. Convening Authority*, 48 C.M.R. 751, 756 (C.M.A. 1974), *overruled on other grounds by United States v. Banks*, 7 M.J. 92 (C.M.A, 1979).

Finally, we note that the invocation of this Court's mandamus jurisdiction is not based on its "supervisory power" over the lower tribunal, *NACDL v. United States Department of Justice*, 182 F.3d 981, 986 (D.C. Cir. 1999), but on the most traditional employment of the writ, the Court's core authority to determine and protect its own jurisdiction. Nevertheless, the test that the Court has employed to determine the appropriateness of issuing the writ under its supervisory powers is satisfied here as well. That test is comprised of five factors: (1) whether the party seeking the writ has any other adequate means, such as a direct appeal, to attain the desired relief; (2) whether that party will be harmed in a way not correctable on appeal; (3) whether the district court clearly erred or abused its discretion; (4) whether the district court's order is an oft-repeated error; and (5) whether the district court's order raises important and novel problems or issues of law. *Id*.

All of these factors are satisfied in this case. As for (1), direct appeal after final judgment cannot attain the required relief, because the right invoked is the right not to be put on trial by a tribunal that lacks subject matter jurisdiction over

the proceeding, nor can the relief be attained by interlocutory appeal, for reasons stated *supra*. As for (2), for the same reason, Petitioner will be harmed first of all by being put on trial by a tribunal that is acting beyond its constitutional power to do so, as well as, in the instant posture, being required to proceed with a sham competence hearing that threatens to prejudice him independent of the fundamental jurisdictional flaw. As for (3), the military commission has not ruled on these jurisdictional issues at all, despite their being raised early in the litigation by Petitioner and his co-accused, and despite the military judge's independent obligation to consider his own subject matter jurisdiction regardless of those motions, *see Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 94-5 (1998) – a *per se* abuse of discretion. As for (4) and (5), the defect in the commission's subject matter jurisdiction is "oft-repeated" because it infects every commission case under the MCA, and by the same token, raises an important – because it nullifies all proceedings under the MCA, not only Petitioner's – and novel issue of law, in that the constitutional argument is one that, to counsels' knowledge, has never been raised before and that does not rest on Petitioner's individual constitutional rights but the constitutional Section 8 "enumerated power" which authorizes (or rather, fails to authorize) Congress's enactment of the MCA in the first instance.

B. 10 U.S.C. §950j(b) Does Not Preclude Federal Jurisdiction Over Petitioners' Claims

1. Section 950j(b) Does Not Divest This Court of Jurisdiction

The plain language of 10 U.S.C. § 950j(b) does not divest this Court of its jurisdiction to determine its own or the military commission's jurisdiction, as requested in this Petition. The prohibitory language in the first half of the sentence ("no court, justice, or judge shall have jurisdiction to hear or consider any claim or cause of action whatsoever"), while sweeping, is limited by the second half, which explains that only those claims "relating to the *prosecution*, *trial*, or *judgment*" including "challenges to the lawfulness of *procedures* of military commissions" are prohibited. *Id.* (emphasis added). Thus, the section on its face does not impose any bar on facial challenges to the constitutionality of the MCA or to military commissions' subject-matter jurisdiction. *See Khadr v. Bush*, 587 F.Supp.2d 225, 234 (D.D.C. 2008) (§ 950j(b) did not bar jurisdiction because Petitioner's claim "was entirely independent from the prosecution, trial, or judgment of a military commission.").

Apart from its plain language, interpretation of the provision should be guided by the constitutional avoidance doctrine. As demonstrated in the next section, to the extent that § 950j(b) purports to strip this Court of its obligation to determine its own jurisdiction and that of the military commission, it is unconstitutional. Thus, if an alternative construction of the provision is "fairly

possible," *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 348 (1936) (Brandeis, J., concurring), the court must interpret it to exclude from its reach this Court's core constitutional obligation to determine its own jurisdiction. *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988); *National Mining Ass'n v. Kempthorne*, 512 F.3d 702, 711 (D.C. Cir.), *cert denied*, 129 S.Ct. 624 (2008).

2. Section 950j(b) is Unconstitutional if It Divests This Court of Jurisdiction to Determine Its Own Jurisdiction

This Petition requests this Court to find that the military commission lacked subject-matter jurisdiction over Petitioner's case because the commission's authorizing statute, the MCA, is unconstitutional on its face. To the extent that § 950j(b) strips this Court of its inherent power to decide its own and the military commission's subject matter jurisdiction by considering this argument, it violates the separation of powers doctrine and the Court's constitutional obligation to "say what the law is," *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

At every stage of a proceeding, a federal court has an obligation to determine its own subject-matter jurisdiction as a predicate for deciding any other issue on the merits, regardless of whether the parties raise the issue. *Steel Co.*, 523 U.S. at 94-5. That rule is a constitutional constraint imposed by the separation of powers doctrine to ensure that federal courts do not overstep their authority to decide only matters allotted to them by the Constitution or Congressional enactment. *Id.*, at 94.

Under the same separation-of-powers doctrine, "'every federal appellate court has a special obligation to 'satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review'" for the purpose of "'correcting the error of the lower court in entertaining the suit.'" *Arizonans for Official English v. Arizona*, 520 U.S. 43, 73 (1997) (*quoting Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 541 (1986) (*quoting United States v. Corrick*, 298 U.S. 435, 440 (1936))).

The separation of powers doctrine also prohibits Congress from enacting legislation that infringes on the constitutional obligations and prerogatives of the federal courts to exercise their jurisdiction in appropriate cases. *United States v. Klein*, 80 U.S. 128, 147 (1871). A law that strips Article III courts of their jurisdiction to determine their own jurisdiction is such a case. It violates the separation of powers doctrine from both sides: Federal courts are prevented from carrying out their obligation to keep their jurisdiction within its constitutional limits, and Congress oversteps its constitutional authority by interfering with the core duties of a co-equal branch. Thus, to the extent that § 950j(b) divests this Court of the power to decide its own and the military commission's original subject matter jurisdiction, it is unconstitutional.[9]

[9] Because this petition challenges the subject matter jurisdiction of the military commission and not its personal jurisdiction, it is distinguishable from the petition for emergency relief that this Court denied under § 950j(b) in *United States v. Omar Khadr*, 07-1156 (D.C. Cir., filed 5/23/07). *Khadr*, 07-1156 (Order denying

Finally, to apply § 950j(b) to this Petition would violate *Marbury v. Madison*, *supra*. If the MCA is facially unconstitutional, an interpretation of § 950j(b) that precludes this Court from addressing the commission's jurisdiction would in effect prevent the Court from "say[ing] what the law is," *Marbury*, 5 U.S. at 177, because it would be deprived of the power to pass on the constitutionality of the statute. Accordingly, § 950j(b) cannot be construed to strip this Court of its power to entertain and grant relief under this petition.[10]

Petitioner's Emergency Motion To Stay Military Commission Proceedings) (D.C. Cir., filed 5/30/27) (Docket # 1043521). Mr. Khadr's motion claimed that he had the "right not to be tried" by the military commission because it lacked personal jurisdiction over him by virtue of the Juvenile Delinquincy Act, 18 U.S.C. § 5031, et seq. This Court held summarily that under § 950j(b) it had no jurisdiction over Mr. Khadr's claim. Khadr Order, *supra*. By contrast, Petitioner's "right not to be tried" here is based on the military commission's lack of subject matter jurisdiction – that is, its absence of any power, consistent with the Constitution, to engage in any proceedings at all, including the proceedings necessary to determine whether it has personal jurisdiction over him. Such was not the case in *Khadr* claim which, *a fortiori*, presupposed that the military commission had the power to determine the scope of its personal jurisdiction, and therefore subject matter jurisdiction over the underlying cause. The distinction between personal jurisdiction and subject matter jurisdiction is fundamental, because the latter concerns the structural constraints on the court's power to act at all, without regard for the status of the parties. *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 583 (1999); *Steel Co.*, 523 U.S. at 94.

[10] In another jurisdiction-stripping context, courts have held that even if a statute strips federal courts of their jurisdiction to review agency findings, it does not strip them of their power to resolve "substantial constitutional questions." *See, e.g.*, *Calcano-Martinez v. I.N.S.*, 533 U.S. 348, 350 n.2 (2001) (noting the government's concession in this regard); *Assad v. Ashcroft,* 378 F. 3d 471, 475 (5th Cir. 2004); *Ramirez-Perez v. Ashcroft*, 336 F. 3d 1001, 1005 (9th Cir. 2003).

C. Abstention Is Not Required Or Appropriate

Abstention is not required or appropriate where an accused seeks to enjoin military commission proceedings for lack of jurisdiction. *See Hamdan*, 548 U.S. at 586-590. As this Court has previously explained in connection with judicial intervention into on-going military commission processes, the abstention doctrine recognized in *Schlesinger v. Councilman*, 420 U.S. 738 (1975), and applied by this Court in *New v. Cohen*, 129 F.3d 639 (D.C. Cir. 1997), does not apply in this context. *Hamdan v. Rumsfeld*, 415 F.3d 33, 36 (D.C. Cir. 2005), *rev'd on other grounds*, 548 U.S. 557 (2006).

First, the two comity considerations applied in *Councilman* and *New* do not apply to military commission trials of alien combatants, insofar as they concern the military's need for good order and discipline. *Hamdan*, 415 F.3d at 36. Second, and equally pertinent to this case, the abstention doctrine has never applied to a claim by a criminal defendant that he has the right not to be tried at all. "The theory is that setting aside the judgment after trial and conviction insufficiently redresses the defendant's right not to be tried by a tribunal that has no jurisdiction." *Id*., at 36-7. Petitioner's claim here is that he has the "right not to be tried by a tribunal that has no jurisdiction," and thus there is no basis for abstention. *See also Ex parte Quirin*, 317 U.S. 1 (1942) (entertaining jurisdictional challenge to on-going military commission).

IV. ARGUMENT

A. The Proceedings Below Are Ultra Vires Because the MCA Is Unconstitutional Both on Its Face, and as Applied in Petitioner's Case

It is rare that a statute is so constitutionally defective that it is void on its face. In general, a statute will survive facial challenge if it can be applied constitutionally in any situation, *Washington State Grange v. Washington State Republican Party*, — U.S. —, 128 S.Ct. 1184, 1190 (2008), or has a "plainly legitimate sweep." *Id*. (cite omitted). The MCA fails that test, because no one – citizen or alien – may constitutionally be subject to an MCA military commission's jurisdiction.

"Without jurisdiction the court cannot proceed at all in any cause. . . . [W]hen it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause." *Ex parte McCardle*, 74 U.S. 506, 514 (1868). Here the military commission lacked jurisdiction from the outset because the MCA exceeds the "enumerated power" that grants Congress authority to establish law-of-war military commissions in the first instance. *M'Culloch v. Maryland*, 17 U.S. 316, 404 (1819). Moreover, because this jurisdictional defect is a matter of exceeding constitutional power rather than individual right, the case must be dismissed regardless of whether Petitioner possesses individual rights under the Due Process Clause. *See Ruhrgas AG*, 526 U.S. at 583 (regardless of

party's "individual rights," independent obligation on courts at "the highest level" to "keep the federal courts within the bounds the Constitution and Congress have prescribed.").

Cases like *Kiyemba v. Obama*, 555 F.3d 1022 (D.C. Cir. 2009), *cert. petition filed*, 77 U.S.L.W. 3577, No. 08-1234 (April 3, 2009) and *Rasul v. Myers*, 563 F.3d 527, 529 (D.C. Cir. 2009), *cert. petition filed* August 24, 2009) (No. 09-227), which hold that aliens in Guantanamo Bay lack Due Process rights are therefore inapposite. The defect in the MCA is a matter of the structural limitations of the Constitution, to which Petitioner's individual rights are irrelevant. *Ruhrgas AG*, 526 U.S. at 583.

The enumerated power at issue here is the Define and Punish Clause. That clause grants the power to "define and punish . . . Offenses against the Law of Nations," Const., Art. I, § 8, cl. 10. As a matter of its plain text and historical understanding at the Founding and since, the constitutional limits on legislation enacted under its authority are determined by reference to the "Law of Nations." (Section IV.A.1.)

The MCA exceeds these limits because, insofar as it facially discriminates between aliens and citizens, it violates the "Law of Nations" as authoritatively determined by the Supreme Court in *Hamdan*, *supra* – in particular, that part of the

"Law of Nations" that requires that military commissions constitute "regularly constituted courts." (Section IV.A.2.)

Apart from its facial invalidity, the MCA is also unconstitutional as applied in these cases. By the very meaning of its terms, no "regularly constituted court" can proceed on the utterly irregular basis that has characterized these proceedings. (Section IV.A.3.)

1. The Define and Punish Clause Incorporates the Law of Nations as a Limit on Congress's Power to Convene Law-of-War Military Commissions

In *Hamdan*, the Supreme Court held that Congress, in enacting the pre-amendment Uniform Code of Military Justice ("UCMJ"), 10 U.S.C. § 821 (2005), had authorized the President to convene law-of-war military commissions only to the extent that they complied with the "'rules and precepts of the law of nations,' . . . including, *inter alia*, the four Geneva Conventions signed in 1949." 548 U.S. at 613 (*quoting Quirin*, 317 U.S. at 28). *Hamdan* was thus a statutory decision. 548 U.S. at 635. Nevertheless, the Court also made it clear that the Constitution has not issued Congress a "blank check," *compare id*., at 636 (Breyer, J., concurring), to enact military commission in any form it desires. *Id*., at 637 (Kennedy, J., concurring) (noting that "conformance with the Constitution" required); *id*., at 653 (Kennedy, J., concurring) (requiring "a new analysis consistent with the Constitution" if Congress changed the law); *see also Quirin*, 317 U.S. at 28

(Congress may establish law-of-war commission jurisdiction "so far as it may constitutionally do so"); *id*., at 30 (same).

The principle that Congress can "exercise only the powers granted to it" by the Constitution, *M'Culloch*, 17 U.S. at 404, applies to Congress's war powers generally, *Lichter v. United States*, 334 U.S. 742, 779 (1948); *United States v. Robel*, 389 U.S. 258, 263 (1967), and to the establishment of military commissions in particular. *Hamdan,* 548 U.S. at 591; *Quirin*, 317 U.S. at 25; *Ex parte Milligan*, 71 U.S. 2, 121 (1866). The Supreme Court has therefore struck down statutes establishing military tribunal jurisdiction that exceeds the legitimate scope of the enumerated Article I power that purports to authorize them. Thus, when Congress extended court-martial jurisdiction to former service members, the Court held that Congress's Art. I, § 8, cl. 14 power to "make Rules for the Government and Regulation of the land and naval forces" did not include the power to subject ex-service members to military jurisdiction and struck the statute. *United States ex rel. Quarles v. Toth*, 350 U.S. 11, 14-15 (1955). Similarly, when Congress attempted to bring the spouses of service members within the jurisdiction of courts-martial, the Court held that the clause 14 power "by its terms, limit[s] military jurisdiction to members of the 'land and naval Forces,'" and overturned

the legislation. *Reid v. Covert*, 354 U.S. 1, 22 (1957) (plurality); *see also id*., at 67 (Harlan, J., concurring).[11]

Because commissions under the MCA are law-of-war military commissions, s*ee e.g.* 10 U.S.C. § 948b(a), the authority to establish them derives from the Define and Punish Clause, Art. I, § 8, cl. 10. *Hamdan*, 548 U.S. at 601; *Quirin*, 317 U.S. at 28; *In re Yamashita*, 327 U.S. 1, 7 (1946). Accordingly, when evaluating the constitutionality of the MCA, it is the scope of the Define and Punish Clause that determines its validity in the first instance. *Steel Co.*, 523 U.S. at 94.

The specific substantive limits the Define and Punish Clause imposes on the jurisdiction of law-of-war military commissions are determined first from the plain text of the Constitution. If the power to convene military commissions is an exercise of Congress's power to "define and punish . . . Offenses against the Law of Nations," then it must be the "Law of Nations" that sets the limits. That is, along with the jurisdictional limit on *what* crimes Congress has the power to "define" under this clause, *see Quirin*, 317 U.S. at 27-8, the "Law of Nations" also

[11] Notably, in both *Reid* and *Covert*, the Court interpreted the scope of the Clause 14 power in light of the effect that the extension of jurisdiction would have on the affected persons' other individual constitutional rights, including their right to be tried before an Article III judge and jury and the procedural safeguards of the Bill of Rights. *Reid*, 354 U.S. at 22; *Quarles*, 350 U.S. at 15. Such individual rights are even more clearly sacrificed under the MCA.

places restrictions on the jurisdiction and procedures established by Congress to determine *how* it will decide who to "punish" for these crimes.[12]

Apart from the Constitution's plain text, historical evidence from both before and after the Founding demonstrates that the "Law of Nations" was understood to limit the procedures to which captured enemy combatants could be subject in connection with their commission of war crimes. This was the understanding, for example, of General George Washington when he convened a special military board in September 1780 to determine whether Major John André, the traitor Benedict Arnold's British contact, was a spy. When the board recommended that André be sentenced to death, General Washington accepted its recommendation, but only after ensuring that the procedures – specifically, the means of punishment – conformed with the "practice and usage of War." 20 *Writings of George Washington* 134 n.16 (J. Fitzpatrick, ed.) (1937) (rejecting André's request to be shot rather than hung because "the practice and usage of War

[12] Indeed, it could hardly be otherwise. Assuming *arguendo* that Petitioners possess no individual Due Process rights, that cannot mean that there are no constitutional constraints on the commission process. Consider, for example, if Congress, instead of authorizing the admission of statements procured from the accused by cruel, inhumane and degrading treatment, 10 U.S.C. § 948r(c), mandated that accused who were unwilling to testify against themselves must be tortured until they were willing to do so. Would a presiding military judge have to stand by and assent when the government put this procedure into action? Assuming *arguendo*, again, that the accused enjoy no individual constitutional protections, then on what grounds could the military judge overrule the procedure if not on the basis that the Constitution does not authorize Congress to enact such a statute?

were against his request"); Louis Fisher, *Military Tribunals and Presidential Power: American Revolution to the Present* 12-13 (2005); *Quirin*, 317 U.S. at 31 n.9. During the same period, the Continental Congress similarly acknowledged the limitations that the "law and usage of nations" imposed on its legislation. *See, e.g.,* Resolution of the Continental Congress, 1 Journ. Cong. 450 (21 August 1776) (reproduced at W. Winthrop, *Military Law and Precedents, 2nd ed.* ("Winthrop") 765 (1920)) (authorizing trial of spies "according to the law and usage of nations"). The binding effect of the Law of Nations with regard to criminal prosecutions generally – even in federal court – was similarly recognized in the early Republic. *See e.g,. Henfield's Case*, 11 F.Cas. 1099 (1793). *See generally* Beth Stephens, "Federalism and Foreign Affairs: Congress's Power to 'Define and Punish . . . Offenses Against the Law of Nations'," 42 Wm. & Mary L. Rev. 447, 463-477 (2000) (discussing acceptance of Law of Nations as binding at time of Founding and adoption of Define and Punish Clause).

Contemporaneous British treatises and practice confirm the American understanding. *See e.g.* Charles Clode, The Administration of Justice Under Military and Martial Law 366-7 (2nd ed. 1874) (formal opinion of the King's Advocate, Attorney- and Solicitor General, and Advocate and Counsel for the Admiralty dated January 24, 1801, opining that, to determine procedures due prisoner of war charged violation of law of war by violating his parole, "we

conceive we ought to be able to refer either to some clear authority in the text writers upon the Law of Nations, or to some more uniform practice in the conduct of nations which would fully justify the proceeding") (App. Tab N); *see also* 4 William Blackstone, Commentaries *66 ("The law of nations is a system of rules . . . established by universal consent among the civilized inhabitants of the world; in order to decide all disputes, to regulate all ceremonies and civilities, and to insure the observance of justice and good faith").

In short, contemporaneous with the Founding, American law and military practice as well as British law and practice all held that procedures afforded to unlawful enemy combatants were to conform to the Law of Nations.

Subsequent history demonstrates that this understanding provided the foundation for the Define and Punish Clause insofar as it authorized the establishment of military commissions. That was the understanding during and after the Civil War, for example, when the employment of military commissions was at its height. *See* United States Attorney General James Speed, "Military Commissions," 11 Atty. Gen. Op. 297, 298-9 (July 1865) (Define and Punish Clause basis for establishing military commissions); *id*., at 300 ("When war is declared, it must be, under the Constitution, carried on according to the known laws and usages of war among civilized nations. Under the power to define these laws, Congress cannot abrogate them or authorize their infraction."); *United States*

v. Reiter, 27 F.Cas. 768, 769 (No. 16,146) (La. Provisional Ct. 1865) (provisional court's jurisdiction "depends for its existence on the law of nations, and on that part of the law of nations relating to war"). The Supreme Court's most recent cases on military commissions similarly assume or suggest that the law of war exerts an independent force on the constitution and jurisdiction of commissions. *Hamdan*, 548 U.S. at 598-613; *Yamashita*, 327 U.S. at 18-20 (considering applicability of 1929 Geneva Convention); *Quirin*, 317 U.S. at 27-36; *Madsen*, 317 U.S. at 354-5.

In sum, there is an unbroken tradition dating from before the Founding that construes the power of Congress to regulate the procedures used to try individuals charged with "offenses against the Law of Nations" to be limited by the same "Law of Nations" that limits Congress's authority to "define" and to "punish" such offenses.

2. The MCA is Unconstitutional on its Face Because the Military Commissions it Establishes are Not "Regularly Constituted Courts"

In *Hamdan*, the Supreme Court held that Geneva Convention Common Article 3, which requires criminal trials to be conducted before "a regularly constituted court affording all the judicial guarantees which are recognized as indispensible by civilized peoples," is part of the "law of nations." *Id*., at 631-2 (plurality); *id*., at 642-3 (Kennedy, J., concurring). The Court went on to hold, in a

definitive interpretation of the "law of nations," that "a military commission 'can be ''regularly constituted'' by the standards of our military justice system only if some practical need explains deviations from court-martial practice,'" *id*., at 632-3 (plurality; *quoting* Kennedy, J., concurring, *id*., at 645); *id*., at 645 (Kennedy, J., concurring). Despite the fact that the MCA declares itself to be a "regularly constituted court," 10 U.S.C. § 948b(f), it is in patent violation of Common Article 3 as construed by the Supreme Court.[13] Accordingly, it exceeds Congress's powers.

Numerous provisions of the MCA attest to its failure to "afford[] all the judicial guarantees which are recognized as indispensable by civilized peoples," ranging from the provisions contemplating the admissibility of statements obtained by cruel, inhumane or degrading treatment and unreliable hearsay, to its attempt to overcome the *Ex Post Facto* clause by statutory fiat. 10 U.S.C. §§ 948r(c), 949a(b)(2)(E), 950p. Many of these guarantees are embodied in Article 75 of Protocol I to the Geneva Conventions of 1949 (1977), which further defines the meaning of "regularly constituted court" in Common Article 3. *Hamdan*, 548 U.S. at 633 (plurality). *See* Protocol I, Art. 75(4)(c), (4)(f) and (4)(g). The United

[13] Congress's declaration that the commissions constitute "regularly constituted courts" does not control. It is the province of the judiciary, not Congress, to "say what the law is," *Marbury*, 5 U.S. at 177, a judicial power that applies equally to the interpretation of treaties. *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 353-4 (2006).

States has not ratified Protocol I but recognizes the guarantees of Article 75 as binding customary international law. *Hamdan*, 548 U.S. at 633 (plurality).

Most significant, however, are the provisions that subject aliens alone to MCA jurisdiction, 10 U.S.C. §§ 948c, 948d(a) and (c), because the pre-amendment UCMJ made no such distinction either under its regular "good order and discipline" jurisdiction or special law of war jurisdiction. *Compare* 10 U.S.C. §§ 948c, 948d(a) and (c) *with* 10 U.S.C. §§ 802, 803, and 817-821 (2005). The MCA's discrimination between aliens and citizens can therefore be justified only if "some practical need explains [these] deviations from court-martial practice.'" *Hamdan*, 548 U.S. at 632-3 (plurality; *quoting* Kennedy, J., concurring, *id*., at 645).

The Supreme Court long ago held, however, that American citizens may be subjected to law-of-war military commission jurisdiction to the same extent as aliens. *Quirin*, 317 U.S. at 15-16. *Quirin* upheld the use of the military commission procedure against the American citizen Haupt as well as against his alien co-conspirators. *Id*., at 37-38; *see also Hamdi v. Rumsfeld*, 542 U.S. 507, 519 (2004) ("There is no bar to this Nation's holding one of its own citizens as an enemy combatant."). Citizens are just as capable of joining al Qaeda as non-citizens, and "if released, would pose the same threat of returning to the front during the ongoing conflict." *Id., at* 519.

Quirin's holding, moreover, is consistent with the unbroken history of American law-of-war military commissions, which prior to enactment of the MCA – and fully consistent with court-martial practice – have never made a jurisdictional distinction on the basis of national origin, and have in fact tried American citizens as violators of the law of war. Indeed, Americans were tried before the Founding by what we would now call a law-of-war military commission. The American Joshua Hett Smith, for example, was tried in 1780 as a co-conspirator of Major John André in a "special court-martial," that, according to William Winthrop, was in fact a military commission. Winthrop, *supra*, at 58-9; *see also* William Birkhimer, *Military Government and Martial Law* 351 (3rd ed. 1914), at ¶333. During the Mexican War, at least one American was tried by General Winfield Scott's "Councils of War" (generally considered to be the first fully-developed law-of-war military commissions, *see Hamdan*, 548 U.S. at 590). David Glazier, "Precedents Lost: the Neglected History of the Military Commission," 46 Va. J. Int'l L. 5, 37 (2005).

The Civil War presents a special case because the military commissions employed by the Union included martial law, occupation and law-of-war jurisdiction in one forum. *Hamdan*, 548 U.S. at 590-1. Nevertheless, in Winthrop's list of the crimes subject to the Civil War military commission's specific law-of-war jurisdiction, a significant number apply to activities that

involved "aiding the enemy" and similar conduct, which of necessity had to be committed by Union rather than Confederate citizens. Winthrop, *supra*, at 71-2. During the next major episode of military commission use, the Philippine insurrection following the Spanish-American War, three Americans were tried under the Philippine commissions' law of war jurisdiction. Glazier, "Precedents Lost," 46 Va. J. Int'l L. at 52. And, as *Quirin* demonstrates, the World War II commissions made no distinction between citizens and aliens.

In sum, it is too late in the day for the government to argue that any "practical need explains the deviations" between the MCA's jurisdictional limitation to aliens and court-martial jurisdiction, which does not. Military commissions established under the Act are therefore not "regularly constituted courts" within the meaning of Common Article 3.[14] *Hamdan*, 548 U.S. at 632-3 (plurality); *id*., at 645 (Kennedy, J., concurring).

Accordingly, because the MCA's jurisdictional limitation to aliens is void on its face, no person, citizen or alien, may lawfully be tried under its provisions. Nor can the jurisdictional limitation be severed from the remainder of the statute, first, because personal jurisdiction is a general prerequisite to subjection to the

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[14] The Act's distinction between aliens and citizens also violates the equal protection principle of Article 75 of Protocol I to the Geneva Conventions, which guarantees that all persons "shall enjoy, as a minimum, the protection provided by this Article without any adverse distinction based upon . . . national or social origin." *See Hamdan*, 548 U.S. at 633 (plurality) (Article 75 an authoritative guide to Common Article 3).

remainder of the MCA's procedures and rules, and second, because it is abundantly clear on the face of the law and from the legislative record that Congress would not have passed the MCA without the limitation of its procedures to aliens alone. *New York v. United States*, 505 U.S. 144, 186 (1992); *see e.g.* 152 Cong. Rec. S10,250 (statement of Sen. Warner) (reassuring Congress that Act applies only to aliens); *id*. at S10,251 (statement of Sen. Graham) (same). The MCA must therefore be struck in its entirety.

3. The MCA is Unconstitutional as Applied

Apart from the facial unconstitutionality of the MCA, the commission proceedings below plainly and egregiously fail the test of being a "regularly constituted court." The minimal requirement of any "regularly constituted court" – more fundamental even than the requirement that it generally comport with court-martial procedures – is that it satisfy the rule of law, *Hamdan*, 548 U.S. at 635 ("[I]n undertaking to try Hamdan and subject him to criminal punishment, the Executive is bound to comply with the Rule of Law that prevails in this jurisdiction"), a standard that is not met by these proceedings. .

The procedural irregularity in these cases rises far above the level of simple appealable error. *Hamdan*, 548 at 633 n.65 (fact that commission's "rules and procedures are subject to change midtrial" is evidence of "irregular constitution"); *see also id*., at 613 (noting rule changes after Hamdan's trial had begun); *id*., at 645

(Kennedy, J., concurring) (noting "the possibility . . . of midtrial procedural changes could by itself render a military commission impermissibly irregular"). Irregularity of the most fundamental type – the lack of legality and notice – has been the norm in these proceedings, as the Military Judge conceded in describing them as "a system in which uncertainty is the norm and where the rules appear random and indiscriminate." Military Judge Ruling D-126, at 3.

The fact that these are capital prosecutions only underlines the stunning nature of this admission. The Supreme Court has long held that capital cases "require[] a greater degree of accuracy and fact finding than would be true in a non-capital case." *Gilmore v. Taylor*, 508 U.S. 333, 342 (1993); *see also Simmons v. South Carolina*, 512 U.S. 154, 172 (1994) (Souter, J., concurring) ("need for heightened reliability" in capital cases). Capital case procedures are thus held to a higher standard of reliability than are noncapital procedures. *Beck v. Alabama*, 447 U.S. 625, 638 (1980) (heightened reliability required at both the guilt and sentencing phases); *Reid*, 354 U.S. at 77 (Harlan, J., concurring) ("I do not concede that whatever process is 'due' an offender faced with a fine or a prison sentence necessarily satisfies the requirements of the Constitution in a capital case."); *id*., at 45-46 (Frankfurter, J., concurring) (same).

Fair notice of the procedures is the minimal requirement of any criminal process, but especially a capital one. *Lankford v. Idaho*, 500 U.S. 110, 121 (1991)

("the concept of fair notice is the bedrock of any constitutionally fair procedure"). "Fair notice" has been entirely lacking here. Indeed, even the most discretionary of sentencing procedures – the decision whether to grant clemency – requires more due process than has been provided to Petitioner in this case, in which politics and the CIA's agenda has driven the decision making more than the law. *See Ohio Adult Parole Authority v. Woodard*, 523 U.S. 272, 289 (1988) (O'Connor, concurring in part) (clemency procedures in which "a state official flipped a coin," or "the State arbitrarily denied a prisoner any access to its clemency process" would violate due process).

From the politically-driven decision making within the Department of Defense in the allocation of defense resources[15] and selective compliance with the

[15] Apart from its other failures, the Department of Defense's deliberate indifference to the special needs of the defense in a capital case makes it virtually impossible for the defense to comply with the minimum standards for capital representation. The American Bar Association Guidelines "set forth a national standard of practice for the defense of capital cases in order to ensure high quality legal representation for all persons facing the possible imposition or execution of a death sentence by any jurisdiction," (ABA Guidelines 1.1 (A)) and establish minimal standards for assessing the effective representation of capitally-charged defendants. *Wiggins v. Smith*, 539 U.S. 510, 524 (2003) (*citing Strickland v. Washington*, 466 U.S. 668, 688 (1984), and *Williams v. Taylor*, 529 U.S. 362, 396 (2000)); *see also Rompilla v. Beard*, 545 U.S. 374, 387 n.7 (2005). Even in cases where the defendant's competency is not in doubt – as it is in this case – the ABA Guidelines mandate the assistance of a defense team member who is trained to screen individuals for mental or psychological disorders or impairments. See ABA Guidelines 4.1 and 10.4. The Commission's denial of a mitigation specialist and other requested experts prevents counsel from performing the duties required under the ABA Guidelines and recognized by the Supreme Court as essential to the defense function in a capital case.

President's stay, to the CIA's control of the proceedings through manipulation of the classification rules, to intentional interference with the defense function (up to and including CIA-instigated criminal investigations), to judicial orders that are followed or ignored at whim by the military judge and government, to defense motions that are ignored rather than ruled upon at the request of the government – literally nothing about these proceedings has been "regular." In the face of a record so distorted by non-judicial, illegitimate, and often invisible (in the form of CIA influence) factors, the Court's exercise of its ordinary appellate review jurisdiction will be futile. Accordingly, in aid of its own jurisdiction, the commission proceedings in their entirety should be declared a nullity and further proceedings should be enjoined.

B. The MCA Violates the Equal Protection Principle of the Fifth Amendment Due Process Clause[16]

It is inconceivable that American citizens accused of capital or other serious crimes could be subjected to the lawless proceedings described herein. Indeed, American citizens could not be treated in this manner, because on its face and by purposeful design, the MCA applies solely to alien enemy belligerents. 10 U.S.C. §§ 948c, 948d(a); *see also*, among many other examples from the legislative

[16] We acknowledge the holdings in *Kiyemba*, *supra*, and *Rasul*, *supra*, that the Due Process Clause does not protect aliens located in Guantanamo Bay. We respectfully submit that this holding is inconsistent with *Boumediene v. Bush*, — U.S. —, 128 S.Ct. 2299 (2008) and should be overruled.

history, 152 Cong. Rec. S10,250 (statement of Sen. Warner) (reassuring Congress that Act applies only to aliens); *id*. at S10,251 (statement of Sen. Graham) (same). By contrast, American enemy belligerents may only be tried in federal court or in regular court-martial proceedings under the special law-of-war court-martial jurisdiction, which applies to "persons" without regard to national origin. 10 U.S.C. § 818. American enemy belligerents are thus entitled to the full protections of the Constitution or the regular military justice system that tries American service members, while aliens are relegated to a criminal justice system that is specifically designed to deny them those rights.

Given the facially and avowedly discriminatory legislative purpose of limiting its personal jurisdiction in this manner, the MCA is in patent violation of the equal protection component of the Due Process Clause. *See Bolling v. Sharpe*, 347 U.S. 497 (1954). The law has been clear since 1886 that the equal protection principle protects aliens from discriminatory prosecution based on their nationality, even on an as-applied basis. *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886). Nor can the distinction survive strict scrutiny in the military commission context. *See Quirin*, 317 U.S. at 15-16 (Americans equally subject to military commission jurisdiction as aliens); *see also* historical discussion in Point IV.A.2, *supra*.

A fortiori, facial discrimination against aliens in a criminal statute (unrelated to subjects to which alien status is relevant) violates the fundamental rights

guaranteed by the Due Process Clause of the Fifth Amendment. *United States v. Armstrong*, 517 U.S. 456, 465 (1996) ("A criminal law may not be 'directed so exclusively against a particular class of persons ... with a mind so unequal and oppressive' that the system of prosecution amounts to 'a practical denial' of equal protection of the law" (*quoting Yick Wo,* 118 U.S. at 373-4)).

CONCLUSION

For the foregoing reasons, Petitioner requests that the Court declare all proceedings before the military commission to be a nullity and to enjoin further proceedings.

Respectfully submitted,

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