No. _____

IN THE SUPREME COURT
OF THE UNITED STATES

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| In re OMAR KHADR,<br><br>Applicant | Proceedings below:<br><br>*United States of America v. Omar Khadr*<br><br>Military Commissions<br>Guantanamo Bay, Cuba |

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EMERGENCY APPLICATION FOR STAY OF PROCEEDINGS
PENDING THE FILING AND DISPOSITION OF A PETITION FOR A WRIT CERTIORARI

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## APPLICATION FOR STAY

To the Honorable, the Chief Justice of the United States, sitting as Circuit Justice for the Court of Appeals for the District of Columbia.

Background of the Application

Applicant, Omar Khadr, was captured at the age of fifteen by U.S. forces during combat operations in Afghanistan in 2002. Applicant was transferred thereafter to the detention facility at the U.S. Naval Station at Guantanamo Bay, Cuba. In 2005, charges were referred against him for trial by military commission. After a series of delays, including over a year suspension of proceedings pursuant to Executive Order No. 13492, 74 Fed. Reg. 4897 (Jan. 22, 2009), the military judge presiding over Petitioner's case scheduled a critical suppression hearing to begin on April 28, 2010, and in the same order scheduled his trial to begin on July 15, 2010.

On March 23, 2010, he filed a Petition for Writ of Mandamus and Prohibition asking the United States Court of Appeals for the District of Columbia Circuit to enjoin further proceedings against him on the ground that the Military Commissions Act of 2009 is constitutionally *ultra vires* and that therefore no proceedings may be held under its authority. On the same date, he filed an Emergency Motion requesting a stay of proceedings pending the court of appeals' decision on the petition for mandamus, specifically requesting, *inter alia*, a stay of the suppression hearing in his case scheduled for April 28, 2010, and trial. The Court of Appeals ordered expedited briefing, which was completed by April 19, 2010.

On August 2, 2010, Applicant filed an application for a stay with the Chief Justice, seeking a stay of his imminent trial by military commission until such time as the Court of Appeals for the District of Columbia Circuit ruled on the underlying petition. Contemporaneous with that application, Petitioner filed for a Writ of Mandamus from the full Court seeking to

compel the Court of Appeals to rule on the Emergency Motion and/or the underlying petition. On August 4, 2010, the Court of Appeals denied the Petition in a *per curiam* order and dismissed the Emergency Motion as moot.

Applicant now seeks a stay of the military commission proceedings so that applicant can have two weeks in which to prepare and file a petition for writ of certiorari to this Court from the Court of Appeals denial.

## RELIEF REQUESTED

In these circumstances, Applicant requests the following relief:

(1) A stay of commission proceedings pending the filing and disposition of a petition for a writ of certiorari from the Court of Appeals *per curiam* order below.

## REASONS FOR GRANTING THE APPLICATION

Entering a brief stay of military commission proceedings in order to afford applicant the opportunity to file and this Court to dispose of a writ of certiorari from the order below is the only way to ensure that Applicant's important, novel, and substantial constitutional claims receive due consideration by this Court and that irreparable harm is avoided. *See Hollingsworth v. Perry*, --- U.S. ---, 130 S.Ct. 705, 709-10 (2010).

If a stay is not granted, Applicant's right not to be put on trial will be rendered meaningless, a possibility that this Court recognizes as one of the few bases for its intervention before trial in a criminal prosecution. *See Drope v. Missouri*, 420 U.S. 162 (1975) (right not to be tried while incompetent); *Abney v. United States*, 431 U.S. 651 (1977) (double-jeopardy), *Helstoski v. Meanor*, 442 U.S. 500 (1979) (privileges and immunities); *see also 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"). And this Court has long recognized the psychological effects, anxiety, and other deleterious consequences of criminal trial, especially one that can result in a life sentence. *See Abney*, 431 U.S. at 662. The government, on the other hand, would suffer the minimal harm of another relatively brief continuance of the proceedings – something that has happened numerous times previously in this case, including over a year-long hiatus at the government's request. A brief stay is necessary to prevent irreparable harm and if a stay is not granted, the relief requested will be moot. *See also Republican State Central Committee of Arizona v. Ripon Soc. Inc.*, 409 U.S. 1222, 1225 (1972) (Rehnquist, Circuit Justice) (stay granted in part of because important issue otherwise mooted).

Applicant's underlying mandamus petition raised issues of the greatest public importance. If successful, the Military Commissions Act of 2009 will be held to be unconstitutional on its face, and all commission proceedings held under the authority of the Act – not only Applicant's – will be null and void. There is thus an imperative need to decide this issue as soon as possible, not only to vindicate Applicant's rights but to avoid the possibility that all intervening military convictions will be overturned *in toto* between now and the time this Court ultimately reaches the merits of Applicant's argument.

For that reason, along with the novelty and merits of Applicant's constitutional arguments, it is highly likely that at least four Justices would vote to issue the writ of certiorari on the underlying petition. In light of the merits of Applicant's arguments, and despite the high threshold for declaring a Congressional act unconstitutional on its face, Applicant submits that it is also likely that five Justices would ultimately agree with Applicant's position and rule in his favor. The argument Applicant makes is complex and based in large part on detailed surveys of

the historical background of the Define and Punish Clause, Const. Art. I, § 8, cl. 10, and the historical practice and jurisdiction of military commissions since the Revolutionary War. A stay is necessary because a complete petition for writ of certiorari, which Applicant could file with this Court in as little as two weeks from today, is the only means by which the Court will be able to adequately evaluate the merits of the underlying argument for its own consideration. That said, the argument may fairly be summarized as follows:

The Military Commissions Act of 2009 limits the jurisdiction of military commissions convened under its authority to non-citizen unlawful enemy belligerents. The uniqueness of that jurisdictional limitation in American military history cannot be overstated. Without exception, since the Revolutionary War, both the ordinary courts-martial system and the "law-of-war" military commissions, *see Hamdan* v. *Rumsfeld*, 548 U.S. 557, 596 (2006) (distinguishing law-of-war commissions from others), have tried Americans alongside aliens. In fact, Americans have been tried by law-of-war commission in every military action in which they have been employed since the Revolutionary War. (The underlying petition as well as a full petition for writ of certiorari has comprehensive historical citations that establish this point). Indeed, while this Court was holding that Americans could be tried by American military commission no less than aliens, *Ex parte Quirin*, 317 U.S. 1, 15-16 (1942), America's enemies were applying the very jurisdictional limitation to non-nationals adopted by Congress in the Military Commissons Act. *Trial of Wilhelm Von Leeb and Thirteen Others (The German High Command Trial)*, 12 L. Rpts. of Trials of War Criminals 1, 37 (U.N. War Crimes Comm'n 1949) (Night and Fog Decree; limiting jurisdiction of tribunals to "criminal acts committed by non-German civilians"); Military Law of the Japanese Expeditionary Army in China, Art. 1 ("This military law shall apply to all persons other those of Japanese citizenship within the zone of military operation of the Imperial

Army.") (attached as Enclosure No. 1 to Statement of Major Itsuro Hata, Prosecution Exh. No. 25, admitted Tr. 190 and attached following, *United States v. Shiguru Sawada, et al.*, Vol. 2 (1946) (military commission convened in Shanghai, China) (1946).

More important to the merits of the ultimate petition, the Military Commission Act's jurisdictional limitation is constitutionally *ultra vires* because it exceeds the power granted to Congress to convene military commissions by the Define and Punish Clause, Const. Art. I, sec. 8, cl. 10. (That the Define and Punish Clause is the enumerated power governing the jurisdiction of statutory military commissions is demonstrated by extensive historical analysis in the underlying petition and will be fully provided in a petition for writ of certiorari.) In this sense, the argument is parallel to the holding of *Reid* v. *Covert*, 354 U.S. 1 (1957), which held that Congress exceeded limitations on ordinary military jurisdiction imposed by its enumerated power to establish ordinary military tribunals, "[t]o make Rules for the Government and Regulation of the land and naval Forces," art. I, §8, cl. 14, when it extended courts-martial jurisdiction to include civilian dependents of service members.

Applicant then shows, through historical analysis, that the specific limitations on military jurisdiction imposed by the Define and Punish Clause are the limitations imposed by "the Law of Nations." That is to say, the jurisdictional limitations imposed by the Clause are as those that it imposes on the substantive limitation on Congress's power to "define and punish . . . Offenses." *See United States v. Furlong*, 5 Wheat. 184, 198 (1820); *see also United States v. Arjona*, 120 U.S. 479, 488 (1887).

With regard to the limitations imposed by the Law of Nations, this Court has held (a) that Common Article 3 of the Geneva Conventions is part of the law of war (which is part of the "Law of Nations"); and (b) that, with regard to the legitimacy of law-of-war military tribunals,

Common Article 3 requires, at a minimum, that "some practical need explains [military commission] deviations from court-martial practice.'" *Hamdan*, 548 U.S. at 632-3 (plurality; quoting Kennedy, J., concurring, id., at 645); *id.*, at 645 (Kennedy, J., concurring).

Court-martial practice, however, has never limited its jurisdiction to non-citizens, either under its regular "discipline and good order" jurisdiction or under its special law-of-war jurisdiction (*see* Uniform Code of Military Justice, Article 18, 10 U.S.C. §818; *see generally* 10 U.S.C. §§ 802, 803, and 817-821 (2008) (jurisdictional provisions)). Nor has it ever been so limited (non-citizens have long served and fought along-side American servicemen and women), nor have military commissions so limited their jurisdiction. And this Court has held specifically that American citizens may be tried in the same law-of-war commissions as aliens. *Quirin*, *supra*; *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."). The reason for this non-discrimination principle is fundamental: From the outset, the law of war has applied to Americans and aliens alike, because its rationale has been that reciprocity with regard to the enemy is the best and only legal guarantee that war will not descend to barbarism on either side.

It is therefore far too late in the day for the government to claim that some "practical need" justifies an alienage distinction that both this Court and the military have long rejected. For that reason, the jurisdictional provision of the Military Commission Act of 2009 violates the law of war, and therefore the limitation on Congressional power imposed by the Define and Punish Clause. Because it is the jurisdictional provision that is invalid, no one, including Applicant in this case, may be tried under its authority, the Act is therefore void on its face, see *Washington State Grange v. Washington State Republican Party*, — U.S. —, 128 S.Ct. 1184 (2008), all of the commission proceedings against him, including the trial currently scheduled for

August 18, 2010, are constitutionally *ultra vires*, and the trial and other proceedings should be permanently enjoined.

## CONCLUSION

In light of the novelty and merit of Applicant's underlying arguments, the requested stay of commission proceedings should be granted so this Court has the opportunity to consider the merits of Applicant's arguments in an orderly fashion under its certiorari jurisdiction.

Dated: August 5, 2010

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I, LTC Jon Jackson, duly appointed as counsel for Petitioner, hereby certify that on this 5th day of August, 2010, three copies of the Emergency Application for Stay of Proceedings in the United States Court of Appeals for the District of Columbia in the above-entitled case were mailed, first class postage prepaid to:

Solicitor General of the United States
U.S. Department of Justice
950 Pennsylvania Avenue, NW Room 5614
Washington, DC 20530
OFFICIAL BUSINESS

Counsel for the respondents herein. I further certify that all parties required to be served have been served.

Dated: 5 August 2010

Respectfully submitted,

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