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

IN RE RAMZI BIN AL-SHIBH,	)	
Petitioner	)	No. 09-1238
UNITED STATES OF AMERICA	)	
Respondent	)	

PETITIONER'S REPLY TO OPPOSITION OF THE UNITED STATES
TO MOTION TO STAY THE PROCEEDINGS AND
A WRIT OF MANDAMUS AND PROHIBITION

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MISCELLANEOUS

In this Reply, Petitioner briefly addresses arguments that were not previously addressed and/or require further discussion. Additionally, Petitioner acknowledges that on September 17, 2009, the military judge granted the Government's Motion for a 60-day continuance of petitioner's competency hearing, now scheduled to begin no earlier than November 16, 2009. *See* Government 28(j) Letter, dated September 17, 2009. However, the military judge also ordered a hearing to be held in Guantanamo Bay on September 21, 2009, to allow the *pro se* co-accuseds the opportunity to join or oppose the continuance. As such, there remains the possibility that additional proceedings may be held on substantive matters of critical importance to Petitioner prior to the competency hearing that would result in irreparable harm to him.

The continuance of the proceedings does not obviate the urgency for this Court to protect its own jurisdiction and enjoin the military commission proceeding. Rather, justice demands that the fundamental flaws in the military commissions' jurisdiction must be addressed before additional "irregular" proceedings are held.

I. STATEMENT OF FACTS

A. The Absence of a Full Record Effectively Precludes this Court from an Adequate Consideration of the Petition

The military judge's irregular denial of the defense request to release the record in this case resulted in needless factual disputes about the record that could

have been avoided. In court-martial practice, it is customary for a trial judge to release to a higher court the transcripts (authenticated or not), where needed in a direct appeal, interlocutory appeal, or extraordinary writ. *See* Attachment VV (Declaration of Col. Tellitocci, JA, USA).

The government grossly mischaracterizes the record in this case, and its ability to do so underscores the legal black hole in which the Petitioner finds himself: the government is free to manipulate the process, even before this Court, since the military judge has refused to release the transcripts of proceedings. *See* Petitioner's Notice Regarding Status of Exhibits, Attachment C (*United States v. Mohammed et al.*, Ruling in D-129). The result is disputes about the record that this Court cannot adjudicate.

For example, contrary to the government's assertion about the record of the *Faretta* inquiry at arraignment, there was no "exhaustive" questioning of the accuseds. *See Faretta v. California*, 422 U.S. 806 (1975). Rather, the military judge glaringly failed to ask any questions of any accused regarding their mental state, despite the years of incommunicado detention they had endured at "black sites" run by the CIA, a matter they mentioned to the judge on the record. Attachment NN (transcript of 5 June 2008), at 56, (Mr. Sheikh Mohammed, mentioning torture endured), 123-24 (Petitioner, discussing black sites and mistreatment), 131-32 (Mr. Ali, discussing five years of torture suffered). During

his colloquy with the accuseds, the judge also omitted asking the very basic question whether any accused was taking medications. Even when counsel for Petitioner raised concerns about engaging in a *Faretta* inquiry with Petitioner who was taking anti-psychotic medication, the judge ignored counsels' objections and proceeded with his explanation of *Faretta* rights; he did not ascertain whether Petitioner understood the explanation, and allowed concerns about classified evidence to dictate the terms of his allocution. *See* Attachment NN (transcript of 5 June 2008), at 123 ("what I'd like to do is try and stay away from the areas that are going to cause us to have to interrupt the proceedings")

Additional inaccuracies, distortions and half-truths abound. Contrary to the government's averment in its brief, counsel for Petitioner have not been ordered to provide interrogatories to medical personnel who treated Petitioner while he was in CIA custody. Opposition of the United States to Petition for Writ of Mandamus and Writ of Prohibition ("Opp."), at 10. The military judge mentioned the possibility of such interrogatories but never issued an order, and never ruled on the motion in question (a motion for the defense to interview personnel who saw or treated Petitioner while in CIA custody, *United States v. Mohammed, et al.*, Defense Motion D-075 (classified)). The government is correct that petitioner has been authorized certain experts. What the government does not mention is that two of the three experts were just recently authorized (neuroimaging specialist –

August 7, 2009; sleep expert – July 31, 2009) – that is, more than a year after the military judge ordered a competency evaluation of Petitioner. All of the matters the government misstates further demonstrate how Petitioner's defense has been thwarted by the government's refusal to grant access to evidence, and the military judge's refusal to rule on motions. Because the transcripts and pleadings have been withheld, however, this Court is unable to review and act on the underlying facts. This fact alone is enough to warrant a stay of all proceedings until the Court can obtain the record.

B. Any Hearing Held in this Case will Result in Irreversible Decisions and Therefore Must be Stayed

As Petitioner demonstrated in his brief, impactful events have occurred in this case, even while the Executive Order requiring a halt of proceedings has been in place. Pet., at 13-18. If this Court were able to review the record, it would be fully aware of the manner in which hearings in this case do not ultimately address the originally advertised purpose of the given hearing. *Id.* Hearings held even while Petitioner's competency assessment has been pending have allowed co-accused to fire their counsel, a most fundamental decision in any criminal process; have permitted Petitioner to make public statements (Pet., at 14-15); and have led to precluding the defense from accessing evidence and witnesses (Pet., at 10-12) relevant to Petitioner's competency – evidence that is only getting more stale with the passage of time.

The military judge's recent decision to grant the continuance perpetuates the troubling norm of uncertainty that has plagued this case from its inception. On August 20, 2009, the military judge denied petitioner's motion to continue the case indefinitely until the Executive Branch completed its review of his case, noting that the defense had not made a "compelling argument why the Commission should not begin" taking evidence regarding petitioner's competency. *See* Attachment MM, ¶ 4. One month later, the Government made the defense's same argument for a continuance (an argument the Government had opposed when the defense made it), and the military judge acquiesced to the government's request. The "random and indiscriminate" rulings of the military commission thus appear to depend upon the party raising the issue, not the merit of the argument.

II. JURISDICTION

A. The final judgment rule does not bar this petition.

Respondent first argues that the petition is barred by the provision of the MCA limiting this Court's appellate review to final judgments of the military commission. Opp., at 11-12 (*citing* 10 U.S.C. § 950g(a)(1)(A)&(B)). That provision governs this Court's appellate jurisdiction, but not its mandamus jurisdiction. Courts of Appeals in general are limited to appellate review of "final decisions" of district courts. *See* 28 U.S.C. § 1291. That provision has never been construed to prohibit Courts of Appeals from issuing writs of mandamus in the

absence of a "final decision." *Ex parte U.S.*, 287 U.S. 241, 245-6 (1932); *see also e.g. In re Abdu*, 247 U.S. 27 (1918) (entertaining on the merits a mandamus petition seeking writ ordering lower court to file the trial record so that appeal could be taken).

A primary justification for an appellate court's power to take jurisdiction over lower court proceedings, despite the absence of a final order, is that, without such power, the Court's regular appellate jurisdiction could be "thwarted by unauthorized action of the district court obstructing the appeal," *Roche v. Evaporated Milk Ass'n*, 319 U.S. 21, 25 (1943). That is certainly occurring in this case. Regardless of whether there has been a final judgment, this Court has the power to issue the writ "to confine an inferior [military commission] to a lawful exercise of its prescribed jurisdiction," *Roche*, 319 U.S. at 26, as well as to exercise its supervisory power over an inferior military commission. *See NACDL v. United States Department of Justice*, 182 F.3d 981, 986 (D.C. Cir. 1999).

Despite respondent's heavy reliance on the opinion, *Khadr v. United States*, 529 F.3d 1112 (D.C. Cir. 2008), it is inapposite. *See* Opp., at 12. The accused in *Khadr* sought review of what he believed was a "final judgment" of the military commission rejecting his argument that the commission lacked personal jurisdiction over him. The Court rejected that claim and also held that it was unreviewable under the collateral order doctrine as well. 529 F.3d at 1117, 1118.

In other words, mandamus jurisdiction – in particular, the Court's power to entertain a challenge to the military commission's "lawful exercise of its prescribed [subject matter] jurisdiction," *Roche*, 319 U.S. at 26 – was not at issue.[1]

B. Section 950j(b) does not bar this petition.

As Petitioner argued in his brief, to the extent that 10 U.S.C. § 950j(b) strips this Court of its jurisdiction to determine its own and the lower court's jurisdiction, it is an unconstitutional infringement on the Court's core Article III power. Pet., at 30-32. Respondent's sole response is that even if § 950j(b) does strip this Court of the power to determine the military commission's jurisdiction, petitioner's constitutional claims can be addressed by this Court after appeal to the CMCR. Opp., at 14-17.

This response misses the constitutional significance of subject matter

[1] In any event, were there in fact a ruling to appeal from here (as petitioner explained in his opening brief, there can be no final judgment because the military judge acceded to the government's requests and never ruled on petitioner's jurisdictional motions), petitioner's facial challenge to the MCA would also satisfy the requirements for appeal under the collateral order doctrine. If the military judge rejected petitioner's jurisdictional challenge, it would have "'conclusively determine[d] the disputed question,'" *Khadr*, 529 F.3d at 413 (*quoting Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978)), and "resolve[d] an important issue completely separate from the merits of the action," *id*. – the military commission's power to take jurisdiction in the first instance – that was "effectively unreviewable on appeal from a final judgment," *id*., because, as we explain in Section C, *infra*, the right petitioner invokes here is his right not be tried at all. *See Hamdan v.Rumsfeld*, 415 F.3d at 36 ("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"); *Rafeedie v. INS*, 880 F.2d 506, 517-18 (D.C. Cir. 1989).

limitations on jurisdiction. As the Supreme Court has repeated emphasized, "[w]ithout jurisdiction the court cannot proceed at all in any cause." *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 94 (1998) (*quoting*, *Ex parte McCardle*, 74 U.S. 506, 514 (1868)). Subject matter jurisdiction is a "threshold" requirement that "spring[s] from the nature and limits of the judicial power of the United States." *Steel Co.*, 523 U.S. at 94-5 (*quoting Mansfield, C. & L.M.R. Co. v. Swan*, 111 U.S. 379, 382 (1884)). Thus, where a court lacks subject matter jurisdiction, "the only function remaining to the court is that of announcing the fact and dismissing the cause." *Ex parte McCardle*, 74 U.S. at 514.

The government's contention that it is a matter of constitutional indifference whether this Court has the power to "confine an inferior court to a lawful exercise of its prescribed jurisdiction" before or after trial, *Roche*, 319 U.S. at 26, turns the doctrine on its head. On its view, the subject matter requirement would no longer limit a court's power because a court that lacked subject matter jurisdiction, and refused to entertain a challenge to its jurisdiction at trial, would nevertheless be permitted to "proceed . . . in any cause" through trial, verdict, and appeal before this Court would have the opportunity to declare that it had exceeded its powers. A Congressional statute that strips this Court of its inherent power to ensure its own and lower courts compliance with the Constitution is an unconstitutional

infringement on a co-equal branch's constitutional prerogatives and obligations.[2]

C. There are no grounds for *Councilman* abstention.

Respondent devotes six pages to arguing that the Court should abstain under *Schlesinger v. Councilman*, 420 U.S. 738 (1975). Opp., at 18-23. Both this Court and the Supreme Court have already decided, however, that *Councilman* abstention is in inappropriate where, as here, the accused is not a member of the armed forces and his claim is that he has the right not to be tried at all by the tribunal. *Hamdan v. Rumsfeld*, 415 F.3d 33, 36 (D.C. Cir. 2005), *rev'd on other grounds*, 548 U.S.

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[2] Respondent's heavy reliance on *Khadr* for this point is again misplaced. Opp. 17. *Khadr* contains language suggesting that jurisdiction is an issue that can be raised after final verdict, and therefore is not subject to the collateral order doctrine. 529 F.3d at 1117-8. But it is clear from context that the Court is referring to personal jurisdiction, not subject matter jurisdiction. For purposes of determining an immediately appealable "right not be tried at all," the Supreme Court has distinguished personal jurisdiction on the basis that it is instead a "right not to be subject to a binding judgment of the court," *Van Cauwenberghe v. Biard*, 486 U.S. 517, 527 (1988), which can be vindicated (unlike a genuine "right not to be tried") on appeal from final judgment. Not only was *Khadr* itself a personal jurisdiction case, *see* 529 F.3d at 1113-4, but the cases it cites for this proposition are all personal jurisdiction cases. *Id*., at 1118 (*citing Van Cauwenberghe*, *supra*; *Lauro Lines S.R.L. v. Chasser*, 490 U.S. 495 (1989); *United States v. Levy*, 947 F.2d 1032 (2d Cir.1991); *United States v. Layton*, 645 F.2d 681 (9th Cir.1981); *United States v. Sorren*, 605 F.2d 1211 (1st Cir.1979)). Of the cited cases, only *Layton* purports to be about subject matter jurisdiction. However, two of the three claims made by Layton concerned the question of whether 18 U.S.C. §§ 1117 and 1118 required the presence of the defendant in the United States at the time of indictment, a claim that sounds in personal rather than subject matter jurisdiction. His third claim was that 18 U.S.C. § 351 lacked extraterritorial reach, which could be interpreted as either a personal or subject matter claim. 645 F.2d at 682. *Layton*, which was decided before the Supreme Court's more recent subject matter jurisdiction jurisprudence, also suggests that personal jurisdiction is equally or

557 (2006); *Hamdan v. Rumsfeld*, 548 U.S. 557, 589 n.20 (2006).

"One must be careful . . . not to play word games with the concept of a 'right not to be tried.'" *Midland Asphalt Corp. v. United States*, 489 U.S. 794, 801 (1989). This is such a case, however. The MCA is unconstitutional on its face insofar as its jurisdictional sections discriminate between aliens and citizens. Accordingly, the military commission convened under its authority lacks both subject matter jurisdiction (because it exceeds Congress's powers to convene military commissions under the Define and Punish Clause) and personal jurisdiction (because the constitutionally flawed provision determines who may be tried by commission). Any proceedings under its authority are therefore constitutionally *ultra vires*, and abstention is inappropriate. *Hamdan v. Rumsfeld*, 548 U.S. 557, 585 n.16 (2006) *Hamdan*, 415 F.3d at 36 ("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"); *Rafeedie v. INS*, 880 F.2d 506, 517-18 (D.C. Cir. 1989).[3]

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more fundamental than subject matter jurisdiction. *Id*., at 683.

[3] Petitioner's right not to stand trial also satisfies the additional requirement that subjection to trial would "imperil a substantial public interest." *Will v. Hallock*, 546 U.S. 345, 353 (2006). Interests satisfying this test include "honoring the separation of powers, preserving the efficiency of government and the initiative of its officials, respecting a State's dignitary interests, and mitigating the government's advantage over the individual." *Id*., at 352-3. With the exception of the concern for a state's dignitary interests, standing for a capital criminal trial in an Article I court under a facially unconstitutional statute clearly qualifies under this test. It

III. ARGUMENT

A. The Define and Punish Clause limits the jurisdiction of military commissions so as to bar distinctions based on alienage.

Respondent does not and cannot dispute the historical evidence demonstrating the prevailing view among military commanders, legal authorities, and the legislative branch at the time of the Founding that the Law of Nations governed procedures applicable to factual determinations and treatment of enemy combatants suspected of committing law of war violations. Respondent does not and cannot dispute the Supreme Court's binding holding in *Hamdan*, *supra*, that the Law of Nations incorporates the "regularly constituted court" requirement of Geneva Conventions Common Article 3. It does not and cannot dispute the Supreme Court's further holding 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).

Instead, the government contends (1) that the plain language of the Define and Punish Clause does not support the claim that the Constitution incorporates the Law of Nations as a check on the procedural requirements of law-of-war trials; and

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implicates separation of power issues; it will decrease the "efficiency of government" insofar as any guilty and death verdicts are doomed to reversal, rendering the trial itself a futile exercise; and such an *ultra vires* capital trial would indisputably enhance "the government's advantage over the individual." *Id*.

(2) that the crime of "spying" belies Petitioner's historical claim that military courts of the United States, including military commissions, have never made jurisdictional distinctions based on alienage. Opp. 25-28.

As to (1), the plain language of the Define and Punish Clause does in fact support the proposition that procedures employed to try law of war violations are subject to the Law of Nations. The Clause authorizes two discreet Congressional powers – the power to "define" and the power to "punish." The power to "define" clearly goes to the nature of the substantive crimes that may be tried on the authority of the clause. *See Ex parte Quirin*, 317 U.S. 1 (1942). The power to "punish," however – which must be distinct to give each word of the clause its own significance – embraces more than just the defining of substantive crimes. The power to punish necessarily incorporates the requirement of determining *who* to punish, which in turn requires procedures in order to make that determination.

Moreover, the government's position cannot be reconciled with the problem of how trials of law of war violators are to be regulated as a constitutional matter if not by the Law of Nations. Without some constraint imposed by the Clause itself, the government has no answer to how a judge could act in the face of a Congressional statute that authorized torture as a trial procedure. (Pet. 39 n.12.) Without Due Process rights and other individual constitutional protections – which

the government has consistently taken the position do not protect the accused in these proceedings – a judge would be unable to prohibit the torture from going forward absent constraints imposed by the Clause itself.

As for (2), the government simply misconstrues the crime of spying. The spying statute to which it refers, which applies to "all persons not members of, nor owing allegiance to" the United States, in fact does cover American citizens – those who do not "owe allegiance to" the United States by joining with the enemy. That is the meaning that has always been attributed to this language and the rule that has always applied to the crime of spying. Winthrop himself, the government's sole authority for this proposition, says that "to be charged with the offence of the spy, it is not essential that the accused be a member of the army or resident of the country of the enemy: he may be a citizen or even a soldier of the nation or people against whom he offends." W. Winthrop, *Military Law and Precedents* 767 (2nd *ed.* 1920); *see also id*., at 771. And Americans have in fact been tried as spies. *Id*., at 771 n.37. Thus, while it may be true that violations of laws of war are often committed by "the nation's enemies" (Opp. 28), the government fails to recognize that citizens can change their allegiance and become "enemies" as well. *See, e.g.*, *Hamdi v. Rumsfeld*, 542 U.S. 507, 519 (2004).

B. Due Process Violation has been Conceded by Respondent.

Respondent has not replied at all to petitioner's argument that the MCA

violates the equal protection component of the Fifth Amendment Due Process Clause. Pet., at 50. Whatever the reasons for this omission, petitioner submits that the failure even to acknowledge the argument represents a concession of its merit.[4]

_____/S/_____
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[4] Petitioner notes that the lead named attorney on respondent's brief, David Kris, testified before the Senate Armed Services Committee on July 7, 2009 that the United States takes the position that the fundamental requirements of the Due Process Clause – which presumably include its equal protection component, *see Bolling v. Sharpe*, 347 U.S. 497 (1954) – apply to military commission proceedings. *See Hearing to Receive Testimony on Legal Issues Regarding Military Commissions and The Trial of Detainees for Violations of the Law of War*, 111th Cong. 11 (2009) ("Mr. Kris: Our analysis, Senator, is that the due process clause applies to military commissions and imposes a constitutional floor on the procedures that would govern such commissions, including against enemy aliens.").

CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of September 2009, I hand-delivered a copy of **Petitioner's Reply to Opposition of the United States to Motion to Stay the Proceedings and Writ of Mandamus and Prohibition**, to the Court Security Officer, at the following address:

Christine E. Gunning
U.S Department of Justice
20 Massachusetts Avenue, NW
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Attachment VV

DECLARATION OF COLONEL MARK TELLITOCCI

Pursuant to 28 U.S.C. § 1746, I, Mark Tellitocci, hereby declare:

1. I am the Chief of the Defense Appellate Division (DAD) in the United States Army. I have been in my current position for 14 months, and before that I served in DAD for 25 months as the Deputy Chief. . .I have been on active duty in the U.S. Army Judge Advocate General's (JAG) Corps for 20 years and during this time my practice has been primarily in the area of criminal law. I am, however, unfamiliar with the processes and procedures utilized by the current Military Commissions system.

2. In my current position I am responsible for the proper representation of all soldiers in the appeals of their court-martial convictions to the Army Court of Criminal Appeals (ACCA) and the Court of Appeals for the Armed Forces (CAAF). In addition, I am responsible for providing counsel to represent petitioners who file petitions for extraordinary writs in relation to their court-martial proceedings with ACCA, CAAF and other appropriate courts of competent jurisdiction under the All Writs Act, 28 U.S.C. § 1651. I have a military attorney who works for me assigned to be the Extraordinary Writs Coordinator for my office and we maintain files containing copies of all extraordinary writs filed in the last ten years.

3. Based on my tenure at Army DAD, my review of our extraordinary writ files and my career as an Army JAG, I am very familiar with the process of interlocutory appeals and extraordinary writs. In these cases, transcripts are often not required, but when they are, I am unaware of a single instance where a military judge has refused to release transcripts of court-martial proceedings (draft or otherwise) and copies of motions and pleadings filed with a court-martial to a higher level court reviewing the matter under a petition for an extraordinary writ.

4. Based on my training and experience, were a military judge to attempt to act in such a manner as to deny a superior court the records needed to carry out its proper legal review mission, the military judge should expect to be ordered to release the transcripts and records by the superior court forthwith. A military judge should expect this because the ability of superior courts to review the records of trial level proceedings, whether on direct appeal, by interlocutory appeal or by extraordinary writ, is a critical component of our military justice system.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on the 17th of September 2009.

Mark Tellitocci
Colonel, U.S. Army
Chief, Defense Appellate Division