Case No. _____

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

In re MOHAMMED KAMIN,	*United States of America v. Mohammed Kamin*
Petitioner	Military Commissions Guantanamo Bay, Cuba

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 Mohammed Kamin, the accused in *United States of America v. Mohammed Kamin*.

(A)(2) Parties Appearing in This Court: Petitioner Mohammed Kamin, 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. This petition challenges the jurisdiction of the military commission to try or conduct any proceedings against Petitioner.

(C) Related Cases: There are three related cases pending in this Court: *In re Ramzi bin al Shibh*, No. 09-1238, *In re Mustafa al Hawsawi*, No. 09-1244, and *In re Abd al-Rahim Hussein Muhammed Abdu Al-Nashiri*, No. 09-1274.

RELIEF SOUGHT

Petitioner requests that the Court hold that the Military Commissions Act of 2009 is unconstitutional on its face and enjoin all proceedings against Petitioner in military commissions convened under its authority.

ISSUES PRESENTED

(1) Does the Military Commission Act of 2009, on its face, exceed Congress's constitutional power 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 2009, on its face, violate the equal protection component of the Fifth Amendment's Due Process Clause?

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I. INTRODUCTION AND OVERVIEW OF FACTS AND ARGUMENT

Petitioner is a citizen of Afghanistan. Petitioner was arrested in the city of Khowst, Afghanistan on or about May 14, 2003 by U.S. and Afghan forces. Shortly thereafter, he was transferred to the Collection Point facility (now know as the "Bagram Theater Internment Facility" (BTIF)) at the Bagram Air Base, Afghanistan, where he was held in the custody of the United States. In [redacted] 2004, Petitioner was transferred to the U.S. Naval Station, Guantanamo Bay, Cuba where he continues to be confined under the authority of the Commander, Joint Task Force-Guantanamo. As of the date of this filing, Petitioner has been confined as a prisoner of the United States for [redacted] consecutive days – approximately 6 ½ years.

Only aliens are subject to charges and trial by military commissions established under the Military Commissions Act of 2009, H.R. 2467, 111th Cong., § 1802 (November 2009), *codified at* 10 U.S.C. § 948a *et seq.* ("MCA"). Because the MCA's jurisdiction is predicated on invidious discrimination between non-citizen and citizen, it violates the law of war, the constitutional limits on Congress's power to authorize military commissions, and the equal protection component of the Fifth Amendment's Due Process Clause.

In the terms of Geneva Convention Common Article 3, commissions

convened under the MCA's authority are not "regularly constituted courts," and thus violate the law of war. In terms of the Constitution, Congress cannot legislate military commissions to try violations of the "Law of Nations" (of which the law of war is a part) under its Article I power to "Define and Punish . . . Offenses against the Law of Nations," Const., Art. I, § 8, cl. 10, that themselves violate the "Law of Nations." Because Petitioner has the right not to be charged or tried by a tribunal that is constitutionally *ultra vires*, the petition should be granted.

The purpose of the law of war, as agreed upon by treaty and developed by custom, is to prescribe rules and principles related to the justifications for war and to regulate conduct during an armed conflict. The law of war does not choose sides, nor does it prescribe victor's justice upon the defeated. The recognition of equality before the law was once a hallmark that distinguished the United States from its enemies. However, the MCA is an unconstitutional deviation from traditional United States military practice and doctrine.

Because the law of war applies equally to United States and foreign nationals, there has never been a principled basis for distinguishing between war crime trial procedures for alien enemy belligerents and citizen enemy belligerents. And in fact, as demonstrated below, since before the Founding the American

military has consistently tried both alien and citizen enemy belligerents before the same law of war military commissions.

In the midst of World War II, the Supreme Court held that an American citizen, Herbert H. Haupt, could be tried in the same law-of-war commission as his German confederates, *Ex parte Quirin*, 317 U.S. 1, 15-16 (1942). In sharp contrast, both Nazi Germany and Imperial Japan were following the opposite principle and limited the jurisdiction of their own law of war military tribunals to foreign nationals alone. *See 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"); *United States v. Shiguru Sawada, et al.*, Vol. 2 (1946) (military commission convened in Shanghai, China) (1946) (Statement of Itsuro Hata, at 1 (admitted into evidence at Tr. 153, attached to record following Tr. 154)) (limiting jurisdiction to combatants "other than Japanese nationals").

Ironically, it is now the international community that embraces the traditional American position and requires equal treatment of aliens and citizens in military tribunals as a fundamental and customary principle of the law of war, while it is the United States that, against its own military tradition and legal precedent, has

adopted the opposite view in the MCA. As demonstrated herein, this reversal not only violates the law of war, it exceeds Congress's power to authorize law of war military commissions, which is itself limited by the law of war.

II. STATEMENT OF FACTS AND SUMMARY OF THE CASE

On March 11, 2008, the Government preferred one Charge of Providing Material Support for Terrorism against Petitioner, supported by six Specifications, in violation of 10 U.S.C. § 950v(b)(25), pursuant to the authority prescribed in the Military Commissions Act of 2006. On April 4, 2008, the Convening Authority, Hon. Susan J. Crawford, referred the Charge for trial by military commission convened by her order 07-06, dated November 13, 2007. *See* Charge Sheet (Attachment A); Convening Order 07-06 (Attachment B). Petitioner was arraigned before the military judge on May 20, 2008.

On January 22, 2009, the President signed Executive Order 13492 ("Review and Disposition of Individuals Detained at the Guantanamo Bay Naval Base and Closure of Detention Facilities"), ordering an interagency review of the status of each individual currently detained in Guantanamo and directed the Secretary of Defense to "ensure that during the pendency of the Review ... all proceedings of such military commissions to which charges have been referred but in which no judgment has been rendered ... are halted." 74 Fed. Reg. 4897, § 7 (Jan. 27, 2009).

Beginning on January 23, 2009, the Government has requested and been granted three consecutive continuances of Petitioner's military commission case, for a total of three hundred (300) days of additional delay, so that it could review Petitioner's status in accordance with the President's Order and seek to amend the law applicable to trial by military commission. *See* Commission Rulings, P-001, dated 9 February 2009 (Attachment C), P-002, dated 23 July 2009 (Attachment D), P-003, dated 1 October 2009 (Attachment E).

In Response to the Government's First Motion for Continuance, Petitioner correctly predicted, "[m]oreover, and more troubling, the government can offer the Commission no assurance that it will be prepared to move forward in Mr. Kamin's case at the conclusion of the requested 120-day period." Defense Response, P-001, dated January 30, 2009, ¶ 6.V.c (Attachment F). Likewise on September 23, 2009, Petitioner opposed the Government Third Motion for Continuance and requested the Commission abate the proceedings and order the charges withdrawn and dismissed with prejudice, noting that "60-days hence the government will be required to request yet another continuance while commission rules are being modified and reviewed commission charges are plotted." *See* Defense Response, P-003, ¶¶ 2, 6.1.a (Attachment G).

On November 12, 2009, the Government provided notice that it "may swear an additional charge" against Petitioner. On November 13, 2009, the Attorney General held a press conference to announce the disposition and forum selection for cases involving detainees held at Guantanamo Bay. *See* "Attorney General Announces Forum Decisions for Guantanamo Detainees."[1] On this date, there were ten Guantanamo detainees facing charges that remained referred for trial by military commission. Following the Attorney General's press conference, the Departments of Justice and Defense announced the disposition of all referred military commission cases except one – Petitioner, Mohammed Kamin. Upon query to the Prosecution, no information was provided regarding the status of the Review over Petitioner's case.

Two days after the expiration of the Government's 300-day continuance, the Commission held a hearing on November 18, 2009 to address numerous issues pending. *See* Docket Order, MJ 005, dated 10 November 2009 (Attachment H).

[redacted] (Attachment I). At

[1] *Available at* http://www.justice.gov/ag/speeches/2009/ag-speech-091113.html (last checked, November 24, 2009)

the conclusion of the hearing, the military judge established deadlines for additional pleadings and scheduled the next hearing to begin on December 15, 2009. Although Petitioner did not object to the deadlines, it was noted the revised Manual for Military Commissions ("Manual"), which will include the Rules for Military Commissions, was not likely to be completed by the next hearing and that Petitioner would be forced to proceed without the benefit of knowing what law will govern his proceedings. [redacted] (Attachment J).

III. JURISDICTION

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

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 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).

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 CMCR entertains interlocutory appeals only from the government. *See* CMCR Rule of Court 21(b) (2007).

"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 v. Exxon Mobil Corp.*, 473 F.3d 345, 353 (D.C. Cir. 2007), *cert. denied*, 128 S.Ct. 2931 (2008).

Assuming this Court finds the MCA to be facially unconstitutional, mandamus is the appropriate remedy to bar 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).

Petitioner notes 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 charged or 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 is being harmed by being charged and made subject to trial by a tribunal that is acting beyond its constitutional power to do so. As for (3), no military commission has ruled on these jurisdictional issues at all. 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, including those cited as related cases pending before this Court, 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. The constitutional argument made herein is one that, to counsels' knowledge, has never been raised before (except in the other mandamus petitions arising from the military

commissions that have been filed in this Court and that raise the same issues), 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. 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, because Petitioner is not a member of the United States armed forces. *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).

"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, including the charges leveled against Petitioner, are therefore constitutionally *ultra vires*, and abstention is inappropriate. *See Hamdan*, 548 U.S. at 585 n.16; *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).[2]

IV. ARGUMENT

The discrimination against aliens in the MCA's personal jurisdiction is illegal in three respects. First, it violates international law, as definitively interpreted by the Supreme Court. By virtue of its discrimination against aliens, MCA military commissions are not "regularly constituted courts" within the meaning of Common Article 3 of the Geneva Conventions. (Point A.1.).

Second, the discrimination against aliens violates the constitutional constraints on Congress's power to authorize law-of-war military commissions. Congress is empowered to establish law of war military commission jurisdiction over war crimes by Constitution Article I, § 8, cl. 10, which permits Congress to "define and punish . . . Offenses against the Law of Nations." *Hamdan*, 548 U.S. at

[2] 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, being subject to a criminal trial in an Article I court under a facially unconstitutional statute clearly qualifies under this test. It implicates separation of power issues; it will decrease the "efficiency of government" insofar as any guilty verdict and sentence imposed are doomed to reversal, rendering the trial itself a futile exercise; and such an *ultra vires* trial would indisputably enhance "the government's advantage over the individual." *Id.*

601; *Quirin*, 317 U.S. at 28; *In re Yamashita*, 327 U.S. 1, 7 (1946). The limits of that power are determined by reference to the "Law of Nations," which, as explained under Point A.1., includes the requirement that military commissions be "regularly constituted courts." Thus, because military commissions convened under the MCA are not "regularly constituted courts," they exceed Congress's powers and are unconstitutional on that basis, apart from any individual rights held by Petitioner. (Point A.2.).

Third, the MCA's personal jurisdiction limitation facially violates the equal protection component of the Due Process Clause, and is unconstitutional on that basis as well. (Point B.).

A. The MCA Is Unconstitutional on Its Face Under the Define and Punish Clause

It is rare that a statute is so constitutionally defective that it is void on its face.[3] 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*, 552 U.S. 442, 128 S.Ct. 1184, 1190 (2008), or has a "plainly

[3] The fact that the President signed the MCA into law, as part of the National Defense Authorization Act for Fiscal Year 2010, does not immunize it from judicial review, nor does it mean the President believes that every provision contained within this multi-provisional statue is constitutional. *See, e.g., INS v. Chadha*, 462 U.S. 919, 942, n. 13 (1983) ("it is not uncommon for Presidents to approve legislation containing parts which are objectionable on constitutional grounds.").

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). 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), military commissions convened under the MCA's authority lack jurisdiction from the outset. 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 v. Marathon Oil Co.*, 526 U.S. 574, 583 (1999) (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.").[4]

[4] Cases like *Kiyemba v. Obama*, 555 F.3d 1022 (D.C. Cir. 2009), *cert. granted*, — S.Ct. —, 2009 WL 935637 (October 20, 2009) and *Rasul v. Myers*, 563 F.3d 527, 529 (D.C. Cir. 2009), *cert. petition filed*, 78 USLW 3099 (August 24, 2009) (No. 09-227), which suggest that aliens in Guantanamo Bay lack Due Process rights, are

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." 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."

1. Military Commissions Established Under the MCA Violate the Law of Nations Because they are Not "Regularly Constituted Courts"

As recently as World War II, the law of war allowed unlawful enemy combatants to be summarily executed without trial for violations of the law of war. *See e.g., Trial of Wilhelm List and Others (The Hostage Trial)*, 8 L. Rpts. of Trials of War Criminals 34, 57 (U.N. War Crimes Comm'n 1948). That is no longer the prevailing view of civilized peoples. Under the Geneva Conventions and

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therefore inapposite. Apart from its violation of the Due Process Clause guarantee of equal treatment before the law, 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.

customary international law, even unprivileged enemy belligerents are entitled to trial procedures before they can be punished for war crimes. Common Article 3 of the Geneva Conventions of 1949 prohibits, in relevant part, "the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples."

In *Hamdan*, the Supreme Court held that Geneva Convention Common Article 3 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).[5] The MCA is in patent violation of Common Article 3 as construed by the Supreme Court.

Most significantly, the provisions that subject aliens alone to MCA jurisdiction, 10 U.S.C. §§ 948b(a) and 948c, deviate entirely from the Uniform Code of Military Justice ("UCMJ"), which makes no such distinction under either

[5] Indeed, because Justice Kennedy declined to reach the other issues decided by the plurality, this was the Court's only holding on the merits and the grounds for voiding the military commissions established by President Bush by Executive Order on November 13, 2001.

its regular "good order and discipline" jurisdiction or its special law of war jurisdiction. *Compare* 10 U.S.C. §§ 948b(a) and 948c *with* 10 U.S.C. §§ 802, 803, and 817-821 (2008). 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).

There is no such practical need, however. The Supreme Court long ago held that American citizens may be subjected to law-of-war military commission jurisdiction to the same extent as aliens. *Quirin*, 317 U.S. at 37-38. *Quirin* upheld the use of the military commission procedure against the American citizen, Herbert H. Haupt, as well as against his alien co-conspirators. *Id.*; *see also id.* at 44 ("Under the original statute authorizing trial of alien spies by military tribunals, the offenders were outside the constitutional guaranty of trial by jury, not because they were aliens but only because they had violated the law of war by committing offenses constitutionally triable by military tribunal."); *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."). U.S. 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.* That is the lesson of the federal

prosecutions of American citizens for criminal conduct that is indistinguishable from the conduct charged against accused in the military commissions. *See, e.g., United States v. John Walker Lindh*, 227 F.Supp.2d 565 (E.D.Va. 2002) (the so-called "American Taliban" case); *United States v. Jose Padilla*, 2007 WL 1079090 (S.D. Fla. 2007) (the so-called "dirty bomber," tried on unrelated charges); "Long Island Man Helped Qaeda, Then Informed," *The New York Times* (July 23, 2009), at p. A1 (describing federal case against Bryan Neal Vinas, who, along with other assistance to al Qaeda, allegedly "tried to kill American soldiers in a Qaeda rocket attack against a military base.").

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 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. W. Winthrop, Military Law and Precedents, 2nd ed. 832 (1920); *see also* William Birkhimer, Military Government and Martial Law 351 (3rd ed. 1914),

at pg. 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).

During the next major episode of military commission use following the Civil War,[6] the Philippine insurrection that occurred in the wake of 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* illustrates, the World War II commissions made no distinction between citizens and aliens.

The Government can provide no compelling argument as to why legal precedent and military tradition should be elbowed aside, or that any "practical need explains the deviations" between the MCA, which limits its jurisdiction to aliens, and court-martial jurisdiction, which does not. Military commissions established

[6] The Civil War presents a special case because of the status of "citizenship" for enemy combatant purposes was complicated by the internal nature of the conflict, and 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 crimes subject to Civil War military commission's 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 839-40.

under the MCA are therefore not "regularly constituted courts" within the meaning of Common Article 3 and thus violate the Law of Nations.[7] *Hamdan*, 548 U.S. at 632-3 (plurality); *id.* at 645 (Kennedy, J., concurring).

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

In *Hamdan*, the Supreme Court held that Congress, in enacting the pre-amendment 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

[7] The MCA'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). The United States has not ratified Protocol I but recognizes the guarantees of Article 75 as binding customary international law. *Id.*, at 633 (plurality).

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 most fundamental constitutional limitation on the establishment of military commissions is determined by the enumerated power that authorizes Congress to legislate military commissions in the first instance. 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).

Consistent with this principle, the Supreme Court has struck down other statutes establishing military tribunal jurisdiction that exceed the legitimate scope of the enumerated Article I power that purports to authorize them. When Congress extended court-martial jurisdiction to former service members, for example, 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. *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).[8]

The enumerated power that grants Congress authority to establish law of war military commissions is the Define and Punish Clause, Art. I, § 8, cl. 10. *See Hamdan*, 548 U.S. at 601; *Quirin*, 317 U.S. at 28; *In re Yamashita*, 327 U.S. 1, 7 (1946); *see also* War Crimes Act of 1996, H.R. Rep. No. 104-698 (1996), at 7 (citing *Quirin* and *Yamashita* for proposition that "[t]he constitutional authority to enact federal criminal laws relating to the commission of war crimes is undoubtedly the same as the authority to create military commissions."). The commissions established by the MCA are law of war military commissions, *See, e.g.*, 10 U.S.C. § 948b(a). Accordingly, when evaluating the constitutionality of military commissions established by the MCA, it is the scope of the Define and Punish Clause that determines their validity *ab initio*.

That scope is determined in the first instance from the text of the Constitution. Because the plain language of the Define and Punish Clause

[8] Notably, in both *Reid* and *Quarles*, 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

authorizes two powers – the power to "define" and the power to "punish" – each word must be given its full weight and evaluated individually. *Richfield Oil Corp. v. State Bd. of Equalization*, 329 U.S. 69, 77-78 (1946).

The power to "punish . . . Offenses against the Law of Nations" therefore differs from the power to "define." The "Law of Nations" limits Congress's power to "define" crimes under the Define and Punish Clause, *see United States v. Arjona*, 120 U.S. 479, 488 (1887), and therefore the substantive jurisdiction of military commissions – which are established under the authority of the Clause, *Hamdan*, 548 U.S. at 601; *Quirin*, 317 U.S. at 28; *Yamashita*, 327 at 7 – to try such crimes. *Quirin*, 317 U.S. at 28 (noting Congress's constitutional "authority to define and punish offenses against the law of nations by sanctioning, within constitutional limitations, the jurisdiction of military commissions to try persons for offenses which, according to the rules and precepts of the law of nations, and more particularly the law of war, are cognizable by such tribunals").

The power to "punish," however, has a different focus. While the "define" language limits Congress's power to establish military commissions' substantive jurisdiction – that is, to *what* crimes are triable by military commission – the power to "punish" implicates the scope of Congress's authority to determine *who* may be punished by military commission, because it is individuals who are subject to

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Rights. *Reid*, 354 U.S. at 22; *Quarles*, 350 U.S. at 15.

"punishment," not the Congressionally-enacted crimes of general applicability controlled by the "define" language. *United States v. Brown*, 381 U.S. 437, 445 (1965) (noting "the Framers' belief that the Legislative Branch is not so well suited as politically independent judges and juries to the task of ruling upon the blameworthiness of, and levying appropriate punishment upon, specific persons"). In other words, by limiting Congress to "punish[ing] . . . Offenses against the Law of Nations," the Clause delimits the legitimate scope of law of war military commissions' personal jurisdiction, in addition to the limitations it imposes on their substantive jurisdiction under the "define" language.

Accordingly, just as the Define and Punish Clause limits the substantive jurisdiction of law of war military commissions to violations of the "Law of Nations," it is the "Law of Nations" that determines the constitutional limits and requirements of the personal jurisdiction of law of war military commissions as well.

Along with the text, it is the historical understanding of law of war tribunal procedure and jurisdiction that is controlling for constitutional purposes. *See Quirin*, 317 U.S. at 41 (citing 1806 and 1776 spying statutes that prescribed trial by court-martial "according to the law and usage of nations" as evidence that the constitutional jury rights did not apply to "trial by military tribunals . . . of offenses

against the law of war committed by enemies not in or associated with our Armed Forces," and holding that this "is a construction of the Constitution which has been followed since the founding of our government"). For purposes of this Petition, the historical evidence discussed in Section A.1., *supra*, demonstrates that, since before the Founding, the jurisdiction of law of war military commissions has been limited to unprivileged enemy belligerents who violated the law of war without regard to their nationality. *See also* Winthrop, *supra*, at 838 (common law of military commissions limited personal jurisdiction to "[i]ndividuals of the enemy's army who have been guilty of illegitimate warfare or other offences in violation of the laws of war . . . [including] those, for example, who have assumed the role of the spy"); *id.*, at 767 ("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.").

Other historical evidence from both before and after the Founding similarly demonstrates that the "Law of Nations" was understood to place limits on the process to which captured enemy combatants could be subject in law-of-war military tribunals. First, as a general matter, the Law of Nations was accepted as legally binding at the time of the Founding and the adoption of the Define and

Punish Clause. 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). Specifically with regard to law of war military tribunals, this was the view of General George Washington, for example, 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 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 Winthrop, *supra*, at 765 (authorizing trial of spies "according to the law and usage of nations"). The authority of the law of nations and its binding

effect, even with regard to criminal prosecutions in federal court, was also recognized in the early Republic. *See, e.g., Henfield's Case*, 11 F.Cas. 1099 (1793) (grand jury charge explaining that law of nations authorized Presidential executive order criminalizing violations of United States neutrality in the war between France, Britain, and the Netherlands); *United States v. Furlong*, 5 Wheat. 184 (1820) (holding Congress could not criminalize murder on the high seas as "piracy" because piracy had a well settled meaning under international law.). Thus, contemporaneous with the Founding, American law and military practice held that the trial process afforded to unprivileged enemy belligerents charged with violations of the law of war was 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 is the 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").

Finally, the Supreme Court's most recent cases on military commissions demonstrate the Court's assumption that, since the Founding, the law of war has imposed an independent limitation on the validity of commissions. *See Quirin*, 317 U.S. at 28 ("Congress has explicitly provided, *so far as it may constitutionally do so*, that military tribunals shall have jurisdiction to try offenders or offenses against the law of war in appropriate cases . . . [and] has thus exercised its authority to define and punish offenses against the law of nations by sanctioning, *within constitutional limitations*, the jurisdiction of military commissions to try persons for offenses which, according to the rules and precepts of the law of nations, and more particularly the law of war, are cognizable by such tribunals.")(emphasis added); *Hamdan*, 548 U.S. at 593 (plurality) (stating that *Quirin*'s holding that Congress had authorized use of military commissions included "the express condition that the President and those under his command comply with the law of war" in light of "the Court's inquiry, following its conclusion that Congress had authorized military commissions, into whether the law of war had indeed been complied with in that

case"); *id.* at 641 (Kennedy, J., concurring) ("If the military commission at issue is illegal under the law of war, then an offender cannot be tried 'by the law of war' before that commission."); *Yamashita*, 327 U.S. at 18-20 (considering applicability of 1929 Geneva Convention as only potential limitation on procedures afforded to General Yamashita); *Madsen v. Kinsella*, 343 U.S. 341, 354-5 (1952). In sum, there is an unbroken tradition dating from before the Founding that construes the power of Congress to regulate the process used to try and "punish" 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" such offenses.

Moreover, as demonstrated in Point A.1., *supra*, the MCA's jurisdictional discrimination against aliens violates "the Law of Nations." In enacting the War Crimes Act of 1996, Congress recognized, by necessary implication, that both aliens and citizens could be tried in law of war military commissions authorized by the Define and Punish Clause when it established federal court jurisdiction for trying war crimes *committed against* Americans and *committed by* Americans. *See* 18 U.S.C. § 2441(b) ("[T]he person committing such war crime or the victim of such war crime is a member of the Armed Forces of the United States or a national of the United States."). Congress confirmed that its authority in doing so derived from the Define and Punish Clause, and that the same constitutional authority to

enact war crimes statutes that criminalize the conduct of both Americans and aliens is the same constitutional authority that authorized creation of law of war military commissions. *See* H.R. Rep. No. 104-698 (1996), at 7, *supra*. It therefore follows that, because Congress's constitutional authority to prescribe law of war military commission jurisdiction is limited by the Define and Punish Clause, which requires commissions to conform to the "Law of Nations," the MCA's jurisdictional limitation to aliens violates the Constitution as well as by virtue of the Law of Nations.

Accordingly, because its jurisdictional provisions are unconstitutional, no person, citizen or alien, may lawfully be tried under the MCA. A statute that is unconstitutional in all its applications is void on its face. *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 128 S.Ct. 1184, 1190 (2008). The MCA is therefore unconstitutional on its face and Petitioner is not subject to charges or trial by any military commission convened under its authority.[9]

[9] Nor can the jurisdictional limitation be severed from the remainder of the statute because personal jurisdiction is a general prerequisite to subjection to the remainder of the MCA's procedures and rules. *Legal Services Corp. v. Velazquez*, 531 U.S. 533, 560 (2001); *New York v. United States*, 505 U.S. 144, 186 (1992); *see also* 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).

B. The MCA is Unconstitutional on its Face Because It Violates the Equal Protection Principle of the Fifth Amendment Due Process Clause[10]

On its face and by purposeful design, the MCA applies solely to alien unprivileged enemy belligerents. 10 U.S.C. §§ 948b(a), 948c. By contrast, American unprivileged 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 unprivileged 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). *A*

[10] Petitioner acknowledges the suggestion in *Kiyemba*, *supra*, and *Rasul*, *supra*, that the Due Process Clause does not protect aliens located in Guantanamo Bay. Apart from the fact that these statements are dicta, we respectfully submit that they are

fortiori, it applies to a criminal jurisdictional statute that discriminates against aliens on its face. *See Washington v. Davis*, 426 U.S. 229, 241 (1976); *but see also id.* (citing *Yick Wo* as example of case in which facial discrimination not necessary to establish equal protection violation). 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). The historical evidence discussed in A.1., *supra*, that prior to the resurrection of military commissions in November 2001 and thereafter the enactment of the MCA, Americans had always been tried in law of war military commissions, similarly demonstrates that no "compelling government interest" justifies the MCA's jurisdictional distinction.

A fortiori, facial discrimination against aliens in a criminal statute (unrelated to subjects to which alien status is relevant, such as immigration) 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));

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inconsistent with *Boumediene v. Bush*, — U.S. —, 128 S.Ct. 2229 (2008), and should not be followed and/or should be overruled.

Zadvydas v. Davis, 533 U.S. 678, 693 (2001) (holding that the Due Process Clause "applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent.").

For this reason as well, the MCA is unconstitutional on its face, and Petitioner may not be charged or tried under its authority.

V. CONCLUSION

For the foregoing reasons, Petitioner requests that the Court declare the MCA to be unconstitutional on its face, to strike the charges against him, and to enjoin further proceedings under its authority.

Respectfully submitted,

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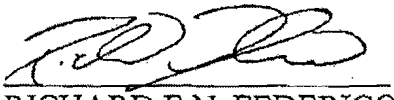
Dated: November 30, 2009

CERTIFICATE OF COMPLIANCE

I certify that the attached Petition for Writ of Mandamus and Writ of Prohibition contains 7,186 words.

This certification is executed on November 30, 2009, at Arlington, Virginia. I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.



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CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of November 2009, I caused to be hand-delivered copies of **Petition for Writ of Mandamus and Prohibition**, to the Court Security Officer, at the following address:

Christine E. Gunning
U.S Department of Justice
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Washington, DC

for clearance and service upon counsel for the Government, and the parties listed below:

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This certification is executed on November 30, 2009, at Arlington, Virginia. I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

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