NOT SCHEDULED FOR ARGUMENT

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

MOHAMMAD KAMIN Petitioner	)	
V.	)	No. 09-1294
UNITED STATES OF AMERICA Respondent	)	

OPPOSITION OF THE UNITED STATES TO PETITIONER'S
EMERGENCY MOTION FOR A STAY

The United States, by its undersigned counsel, hereby opposes the motion of petitioner Mohammad Kamin (hereafter "Kamin") for a stay of pending military commission proceedings, including a motions hearing, now scheduled for December 16th, 2009, at Guantanamo Bay, Cuba.[1] In the first place, the Court lacks jurisdiction under the Military Commissions Act ("MCA") to entertain Kamin's claims at this juncture and he has failed to demonstrate why issuance of an extraordinary writ in aid of this Court's eventual appellate jurisdiction is warranted.

[1] Hereafter "Pet." is the abbreviation for Kamin's Mandamus Petition. "Mot." is the abbreviation for his Stay Motion.

Moreover, Kamin has utterly failed to demonstrate either that, absent issuance of a stay, he will suffer irreparable harm for which there is no adequate legal remedy, or that he is likely to succeed on the merits of his Constitutional challenge to the MCA. The Motion should therefore be denied.

STATEMENT OF THE FACTS

Kamin, an Afghani national, was captured in Khowst, Afghanistan on May 14, 2003. At the time of his apprehension by coalition forces, he was serving as a weapons and equipment courier and as a scout for Al Qaeda or its affiliates and had in his possession a GPS system containing the coordinates for sensitive "waypoints." Kamin led his captors to his residence where they recovered anti-tank mines and other weapons. Kamin was detained at Bagram in late May 2003, and transferred to Guantanamo Naval Base in September 2004.

On March 11, 2008, Kamin was charged under the MCA with a Charge containing six specifications alleging the provision of material support for terrorism, in violation of 10 U.S.C. former § 950v(b)(25) (now 10 U.S.C. § 950t(25)(A)). The Charge and its specifications were referred to a military commission on April 4, 2008, and Kamin was arraigned on them on May 21, 2008. Pet. Att. A.

On January, 22, 2009, President Obama issued Executive Order 13492.

Section 4 of the EO directed a comprehensive interagency review of the status of each individual detained at Guantanamo Bay to determine whether they should be transferred or released, prosecuted, or whether another lawful means for their disposition should be selected. Section 7 of the EO directed the Secretary of Defense to ensure that "during the pendency of the Review . . . all proceedings of . . . military commissions to which charges have been referred but in which no judgment has been rendered . . . are halted."[2] In accordance with the Order, the Secretary of Defense directed the Chief Prosecutor of the Office of Military Commissions to seek a 120 day continuance in all pending cases, including that involving Kamin, in order to permit the those responsible for conducting the review required by Section 4 of the EO to make their determinations. Accordingly, the prosecutor in this case sought and obtained a continuance until May 20, 2009. Pet. Att. B. On May 15, 2009, the review directed by EO 13492 had not yet been completed with respect to any of the pending cases. Consequently, in accordance with the EO, the government sought and obtained further continuances until September 17, 2009, and until November 16, 2009 (Pet. Att. E). The review described in section 4 of EO 13492 has not yet been completed with respect to

[2] That Order has been construed to permit certain limited activities, designed to preserve the status quo, to continue.

Kamin.

On November 18, 2009, the military judge assigned to Kamin's case conducted a pretrial hearing within the limits of what is permitted under the EO at the time, and scheduled a further hearing to address pending pretrial motions to commence on December 16, 2009.[3]

On November 30, 2009, Kamin filed in this Court a petition for a writ of mandamus accompanied by an "Emergency Motion to Stay" further military commission proceedings, pending disposition of the mandamus petition. More specifically, the Petition replicated in almost verbatim fashion a similar petition filed by Ramzi Bin Al Shibh, now pending before this Court in No. 09-1238. It claimed that the MCA was unconstitutional because it confined the jurisdiction of military commissions to alien enemy combatants and did not expose citizens to such proceedings. The Stay motion alleged that, as a consequence of what Kamin claimed to constitute a jurisdictional deficiency, he would suffer irreparable injury should the military commission trial proceed. Kamin also maintained that he is threatened with injury because, in the wake of the enactment of a revised Military Commissions Act of 2009, the Manual for Military Commissions is pending

[3] The OMC prosecutors will take all appropriate steps to ensure that no matters are heard at the December 16, 2009 hearing that they believe would violate the Executive Order.

revision. Consequently – he maintains – he has no way of ascertaining at this juncture what rules of procedure will eventually govern his trial. Neither of these reasons comes close to warranting intervention by this Court at this preliminary stage of the pending military commission proceedings. The motion for a stay should therefore be denied.

ARGUMENT

I. THE COURT LACKS JURISDICTION TO GRANT KAMIN RELIEF UNDER BOTH THE MCA AND THE ALL WRITS ACT

As this Court recently explained, "'[b]ecause Article III courts are courts of limited jurisdiction, [they] must examine [their] authority to hear a case before they can determine the merits.'" Khadr v. United States, 529 F.3d 1112, 1116 (D.C. Cir. 2008) (quoting United States v. British Am. Tobacco Australia Servs., Ltd., 437 F.3d 1235 (D.C. Cir. 2006)). This Court lacks authority to entertain Kamin's claims at this preliminary stage of proceedings.

A. The Court Lacks Jurisdiction Under the MCA

On October 28, 2009, Congress reenacted the MCA as part of the National Defense Authorization Act For Fiscal Year 2010, Pub. L. 111-84, Div. A tit. XVIII, 123 Stat. 2190. Although the legislation, designated the "Military Commission Act of 2009," adopted many of the provisions of its predecessor, it constitutes a wholesale substitution within Title 10, Chapter 47A for that Act. One of its

amended provisions defines the appellate jurisdiction of this Court as follows:

> The United States Court of Appeals for the District of Columbia Circuit may act under this section only with respect to the findings and sentence as approved by the convening authority and as affirmed or set aside as incorrect in law by the United States Court of Military Commission Review, and shall take action only with respect to matters of law, including the sufficiency of evidence to support the verdict.

10 U.S.C. § 950g(d). This Court plainly cannot exercise its appellate jurisdiction under Section 950g(d) at this juncture either to review the merits of Kamin's claims or to grant preliminary injunctive relief in anticipation of doing so. As this Court explained in Khadr, 529 F.3d at 1117, in construing and applying the almost identical precursor jurisdictional statute, "[t]he statute requires a final judgment by a military commission, approved by the convening authority, for which all administrative review has been exhausted" as "preconditions to [its] jurisdiction." In this case – as in Khadr – there has not been trial and prosecution, much less a conviction, a review of the findings and sentence by the convening authority and an affirmance of the conviction by the Court of Military Commission Review. Accordingly, the Court plainly lacks jurisdiction over Kamin's petition under the MCA.

B. This Case Presents No Occasion For the Exercise of Jurisdiction Under The All Writs Act.

Nor does the All Writs Act, 28 U.S.C. 1651, afford a basis for this Court's

intervention in order to preserve its eventual ability to assert its jurisdiction under the MCA in the event of Kamin's ultimate conviction. See Roche v. Evaporated Milk Ass'n., 319 U.S. 21, 24 (1943). None of the factors identified in Roche as justifying the "extraordinary remedy" (id. at 26) of mandamus relief are present here. First, Kamin's claim that his prosecution before an MCA constitutes unlawful discrimination against aliens does not involve an issue that would obstruct an eventual appeal or result in thwarting appellate review absent immediate intervention. Ibid. As explained, any intervening judicial decision to the contrary will – at its very worst for Kamin – simply result in allowing the prosecution to proceed to conviction, and permit this Court (in the event of affirmance by the CMCR)) to entertain the claim in the ordinary course of appellate review.

Nor is this a case in which mandamus jurisdiction is necessary to confine the military commission to a lawful exercise of its prescribed jurisdiction. Id. at 26. Kamin has advanced no argument suggesting that the MCA does not, by its terms, embrace the offenses of which he stands charged, that the procedures leading to the swearing of the Charge was improper, or that the military judge cannot lawfully assert jurisdiction over the alleged offense under the plain terms of the MCA. And Kamin's status as an "alien unprivileged enemy belligerent" (10 U.S.C. § 948c) or, in the terms of the precursor statute, an "alien unlawful enemy combatant" (former

10 U.S.C.§ 948b) making him subject to the jurisdiction of the MCA, is a factual matter that has yet to be litigated before the military commission. The question of personal jurisdiction is therefore not ripe for scrutiny by this Court in any event.

But, even if this Court could otherwise exercise mandamus jurisdiction in aid of its eventual jurisdiction to review a potential appeal, it has repeatedly emphasized that "[m]andamus is an extraordinary remedy 'reserved for really extraordinary cases.'" In re Bituminous Coal Operators' Ass'n., 949 F.2d 1165, 1167 (D.C.Cir. 1991) (quoting Ex Parte Fahey, 332 U.S. 258,m 260 (1974). Thus, "[a] petitioner seeking mandamus must show" both that "his 'right to issuance of the writ is clear and indisputable'" and also "that 'no other adequate means to obtain the relief exists.'" In re Asemani, 455 F.3d 296, 299 (D.C.Cir. 2006) (quoting In re; Sealed Case, 151 F.3d 1059, 1063 (D.C.Cir. 1998). This Court's "consideration of any and all mandamus actions [therefore] starts from the premise that issuance of the writ is an extraordinary remedy, resorted only for the most transparent violations of a clear duty to act" (In re Bluewater Network & Ocean Advocates, 234 F.3d 1305, 1315 (D.C.Cir. 2000)), a matter that Kamin's convoluted arguments concerning the alleged unconstitutionality of the MCA has yet to establish. Moreover, "mandamus may not be resorted to as a mode of review where a statutory method of review has been prescribed or to review an appealable decision of record." Roche, 319 U.S. at

29. As the Roche Court explained (id. at 30), "[w]here the appeal statutes establish the conditions of appellate review, an appellate court cannot rightly exercise its discretion to issue a writ whose only effect would be to avoid these conditions and thwart the Congressional policy against piecemeal appeals in criminal cases." Ibid., citing Cobbledick v. United States, 309 U.S. 323 (1940). In enacting the MCA, Congress has accomplished exactly that – confining this Court's appellate jurisdiction to claims that survive final judgment and review by an intermediate appellate court and providing for the review of all such issues in a single proceeding. There is absolutely no reason for this Court to disregard that legislatively prescribed scheme by entertaning Kamin's claim in advance of a conviction and affirmance by the CMCR.

II. PETITIONER IS NOT ENTITLED TO A STAY IN ANY EVENT

If we are correct that this Court lacks jurisdiction to entertain Kamin's petition for mandamus relief at this juncture, it follows that the Court should dismiss the mandamus petition at this juncture. In any event, however, it should not grant Kamin's motion to enjoin any military commission proceedings pending resolution of the petition. As Kamin acknowledges (Pet. 8), a "preliminary injunction is an 'extraordinary and drastic remedy.'" Munaf v. Green, 128 S.Ct. 2207, 2219 (2008). In order to entitle himself to such relief, a petitioner must

demonstrate "a liklihood on the merits" (id.) and "irreparable injury were an injunction not granted." Arkansas Dairy Co-op Ass'n. V. United States, 573 F.3d 815, 821 (D.C. Cir. 2008). For reasons that closely replicate Kamin's lack of entitlement to mandamus relief, his petition for a stay fails on both counts.

A. Kamin Is Unlikely to Achieve Success on the Merits

With respect to the first requirement, Kamin characterizes his argument that the MCA is unconstitutional because it confines jurisdiction to enemy combatants as "novel" (Mot. at 3) and he quite properly concedes that (with the exception of identical claims raised in this Court) the claim "has never been raised before." Pet. 10. Indeed, Kamin's argument is so "novel" that his petition fails to cite a *single source of authority* for the proposition that either the Due Process Clause of the Fifth Amendment or international law prohibits distinctions between enemy aliens and citizens in fixing the jurisdiction of military commissions. Instead, the best that can be said for Kamin's contention is that it is predicated upon anecdotal evidence showing a sporadic practice of subjecting aliens and citizens alike to military commission proceedings, principally during the Civil War and World War II. See Pet. at 28-29, citing, *inter alia*, Ex parte Quirin, 317 U.S. 1 (1942). But nothing in Kamins' exposition even suggests that non-discrimination between enemy aliens and citizens, with respect to military commission jurisdiction, was ever deemed by

any of the branches of the Federal Government to be required under either the Due Process Clause or international law. Instead, as we explained in responding to the petition in Bin Al Shibh, No. 09-1238, from which the instant claim was apparently lifted (see Gov't. Opposition to Petitioner's Motion for a Stay of Proceedings and for a Writ of Mandamus at 25-267)(citing W. Winthrop, Military Law and Precedent, 765 (1920 reprint)), since before enactment of the Constitution and for many years thereafter, jurisdiction by military courts over spying – an offense punishable under the law of nations – was confined to those not owing allegiance to the United States. Thus, neither the framers nor their successors perceived a constitutional infirmity with such a distinction or perceived that it violated the law of nations. And, as Justice Scalia observed, " [i]n more recent times . . . citizens have been charged and tried in Article III courts for acts of war against the United States, even while their non-citizen conspirators w[ere] . . . subjected to military process," a practice that continued through both World Wars. Hamdi v. Rumsfeld, 542 U.S. 507, 560 (2004) (Scalia, J., dissenting); see id. at 559 (distinguishing between the treatment of citizens and "enemy aliens" in time of war"). See also Johnson v. Eisentrager, 335 U.S. 758, 774 (1950) (noting that since the earliest days of the Republic, it has "never been supposed that a nation's obligations to its foes could ever be put on a parity with those of its defenders"). In short, what

Kamin acknowledges to be a "novel constitutional question[ ]" (Pet. 3) not only fails to present an issue on which ultimate success is likely, it lacks any demonstrable foundation in law.

B. Kamin Will Not Suffer Irreparable Injury If Injunctive Relief Is Denied.

But even if there were a colorable legal basis for Kamin's argument, he also cannot satisfy the requirement that he stands to suffer "irreparable injury" if injunctive relief is not granted. In this regard, Kamin maintains (Mot. 4; Pet. 10) that his equal treatment claim implicates his right not to be tried by a tribunal lacking jurisdiction to do so.

But, as this Court recently observed in Khadr, 529 F.3d 141 (quoting Van Cauwenberghe v. Baird, 486 U.S. 517, 527 (1988)), "'the denial of a claim of a lack of jurisdiction is not an immediately appealable order' because 'the right not be subject to a binding judgment may effectively be vindicated following judgment." Thus, in the event that Kamin is ultimately convicted by a military commission, his claim is subject to review by the CMCR and, should that court affirm his conviction, by this Court and possibly by the Supreme Court as well.

Further, as we observed earlier, Kamin's "jurisdictional" claim does not genuinely dispute the jurisdiction of the military commission – i.e., whether in enacting the MCA Congress vested it with the authority to assert jurisdiction over

him and the offenses with which he is charged. Instead, it addresses the constitutionality of the choice Congress had made by confining the jurisdiction of such tribunals to enemy aliens. The Supreme Court has rejected the proposition that, simply because such claims are captioned as "jurisdictional," they entitle the defendant in a criminal proceeding to pretrial injunctive relief. As it explained in Watson v. Buck, 313 U.S. 387 (1941):

> "[n]o citizen of the community is immune from prosecution, in good faith for his alleged criminal acts. The imminence of such prosecution *even though alleged to be unauthorized and hence unlawful* is not alone ground for relief in equity which exerts its extraordinary power only to prevent irreparable injury to the plaintiff who seeks its aid."

Id. at 400 (quoting Beal v. Missouri Pac. R.R. Corp., 312 U.S. 45, 49 (1941) (empasis added); see also Younger v. Harris, 401 U.S. 37, 43 (1971) ("courts of equity should . . not act to restrain a criminal prosecution when the moving party has an adequate remedy at law and will not sustain irreparable injury if denied equitable enforcement"). These holdings confirm that the Court should not grant the extraordinary remedy of enjoining proceedings before the military commission simply because Kamin is capable of characterizing his claims as "constitutional" or "jurisdictional."[4]

[4] Although claiming that he is not invoking the doctrine of "supervisory mandamus," Kamin nonetheless suggests that the doctrine could properly be applied to his discriminatory treatment claim. Pet. 9-10. The doctrine of "supervisory mandamus," however, is properly confined to providing guidance to the district courts in resolving issues of first impression

Finally, in his motion for a stay, Kamin claims (Mot. (5-7) that he will suffer irreparable injury because he cannot be certain what rules of procedure will govern his case if and when it ultimately goes to trial. This, he maintains, is because, the 2009 MCA contains a provision that authorizes the Secretary of Defense to revise the Manual for Military Commissions, an Executive Order that contains the rules and procedures governing military commissions, in the wake of the statute's October 2009 revision. See 10 U.S.C. § 1804(d)(2). Speculating that the revised Manual would not be completed until January 2010 at the earliest, Kamin maintains that he may be required to go forward "without the benefit of the rules that determine how such proceedings are to be conducted and the legal standards for their outcome." Pet. 6. The short answer to this claim is that, at this juncture, the likelihood of prejudice is, itself, entirely speculative. Moreover, as Kamin acknowledges, upon expressing the same concern to the military judge assigned to his case, the court advised him that, should such an eventuality arise, he would be

---

involving the power of those courts. See, e.g., Pruett v. Warden, 133 F.3d 275, 280-281 (4th Cir. 1997). A military commission, created by Congress as part of the Department of Defense pursuant to its warmaking powers under Art. I, § 8 of the Constitution, can hardly be compared to a federal district court, established under Article III, § 2 as part of the judicial branch and subject to the supervision of the circuit court of appeals. Moreover, even in relation to a subordinate district court, a court of appeals cannot exercise supervisory power when to do so would "conflict [ ] with constitutional or statutory provisions." Bank of Nova Scotia v. United States, 487 U.S. 250, 254 (1988). Here, the exercise of supervisory mandamus jurisdiction would not only extend beyond the federal district courts, it would also require this Court act in a manner that conflicts with an act of Congress which expressly confines the jurisdiction of military commissions to aliens.

free to relitigate any motion, issue or ruling that could be affected by any such revision. Pet. 6. That opportunity should be fully sufficient to address and resolve any issue that might result from a possible rule revision potentially affecting Kamin's interests. And the ability to fashion an appropriate remedy for any claim resulting from either a rule change or ambiguity as to the application of a particular rule to military commission proceedings is a matter that is properly within the province of the military judge who possesses familiarity with the case and the legal and factual issues it involves. The prospect of a revision of the commission's procedural rules therefore presents no occasion for this Court to take the extraordinary step of intervening and enjoining the proceedings pending a revision of the Manual.

CONCLUSION

The Emergency Motion for a Stay should be denied.

Respectfully submitted,

/s/

John F. De Pue
Joanna Baltes
Attorneys
National Security Division
Department of Justice
Washington, D.C. 20530
Ph.(202) 616-0725

CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of December, 2009, I electronically served the foregoing Opposition of the United States to the Petitioner's Emergency Motion for a Stay to the following parties:

LCDR Richard E. N. Federicdo
Office of the Chief Defense Counsel
Office of Military Commissions
1600 Defense Pentagon
Room 3B688
Richard.Federico@osd.mil

/ s/
JOANNA P. BALTES
Counsel for the United States