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COURT SECURITY OFFICER  
SSO W. J. G. S.  
DATE 11/20/07

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

In re MOHAMMED KAMIN,	)	
	)	
	)	Case No. _____
Petitioner	)	
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PETITIONER'S EMERGENCY MOTION FOR STAY OF MILITARY  
COMMISSION PROCEEDINGS PENDING REVIEW OF PETITION FOR  
A WRIT OF MANDAMUS AND WRIT OF PROHIBITION

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**PETITIONER'S EMERGENCY MOTION  
FOR STAY OF MILITARY COMMISSION PROCEEDINGS  
PENDING REVIEW OF PETITION FOR A WRIT OF MANDAMUS  
AND WRIT OF PROHIBITION**

**1. Relief Sought**

Pursuant to Fed. R. App. P. 8(a)(2) and Circuit Rules 8(a)(1) and 27(f), Petitioner Mr. Mohammed Kamin, by and through detailed counsel, respectfully moves this Court to stay all further proceedings of his military commission case, including the pretrial motions hearing presently scheduled to begin on December 15, 2009 at Guantanamo Bay, Cuba, pending resolution of the Petition for Writ of Mandamus and Writ of Prohibition ("Petition" – filed herewith and incorporated herein). If the Court grants the requested stay, Petitioner respectfully requests that consideration of his Petition be expedited.

Relief has not been sought in the Court of Military Commission Review ("CMCR"), 10 U.S.C. § 950f, as 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).

## 2. Grounds for Relief

### A. It is likely that Petitioner will prevail on the merits.

In his Petition, Mohammed Kamin demonstrates that because the Military Commissions Act of 2009, H.R. 2467, 111<sup>th</sup> Cong., § 1802 (November 2009), *codified at* 10 U.S.C. § 948a *et seq.* (“MCA”), predicates jurisdiction by discriminating 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. Additionally, the MCA is an unconstitutional deviation from traditional United States military practice and doctrine.

Petitioner raises novel constitutional questions to the first appellate court in which the requested relief is immediately available. Under the present circumstances, “[t]here is substantial equity, and need for judicial protection, whether or not movant has shown a mathematical probability of success.” *Wash. Metro. Area Transit Comm’n v. Holiday Tours, Inc.*, 559 F.2d 841, 844 (D.C. Cir. 1977) (denying motion to vacate the District Court’s order staying its permanent injunction). Despite a recognition that “[m]andamus, prohibition and injunction against judges are drastic and extraordinary remedies,” *Ex parte Fahey*, 332 U.S. 258, 259 (1947),

Petitioner has the weight of legal precedent and history on his side, making it likely that he will prevail on the merits of his Petition.

**B. Petitioner will suffer irreparable injury if relief is withheld.**

The stay is sought to maintain the status quo while this Court reviews the Petition for Writ of Mandamus and Prohibition. The harm that Petitioner stands to suffer is significant if military commission proceedings are not halted. As this Court has previously found, “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.” *Hamdan v. Rumsfeld*, 415 F.3d 33, 36 (D.C. Cir. 2005), *rev’d on other grounds*, 548 U.S. 557 (2006).

Requiring an individual to submit to a procedure that may be facially unlawful will cause him a “significant and irreparable injury.” *Rafeedie v. INS*, 880 F.2d 506, 517-18 (D.C. Cir. 1989). In *Rafeedie*, this Court affirmed a preliminary injunction that prevented an alien from having to participate in a summary exclusion proceeding, holding that Petitioner Rafeedie “would be irreparably and seriously injured” merely by being forced to participate in this possibly inapplicable procedure.” *Id.*

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 Executive Order 13492 and seek to amend the law applicable to trial by military commission. *See* 74 Fed. Reg. 4897 (Jan. 27, 2009). The "stay" of Petitioner's military commission case ended on November 16, 2009.

Until November 18, 2009, Petitioner was not on notice whether he would continue to be subject to trial by military commission and, if so, what procedural and substantive rules would apply to such proceedings. As in *Rafedie*, Petitioner will be "irreparably and seriously injured" if forced to proceed any further in his military commission case.

The MCA was signed by the President on October 28, 2009. It provides that pending cases, such as Petitioner's case, may continue forward under the procedures and requirements of the previous statute, the MCA of 2006, as long as they are not inconsistent with MCA of 2009, until the earlier of: (A) the date of the submittal by the Secretary of Defense to the Committees on Armed Services of the Senate and House of Representatives the revised rules for military commissions prescribed by the Secretary for purposes of chapter 47A of title 10, United States Code; or (B) the date that is 90 days after the date of the enactment of MCA 2009 (26 January 2010). *See* MCA 2009, § 1804(d)(2)(A)-(B).

Prior to the military judge docketing the hearing for December 15, 2009, Petitioner noted the dilemma he faces in that it was unlikely that the revised Manual for Military Commissions (“Manual”), which will include the Rules for Military Commissions, would 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. *See* Defense Status Report, November 6, 2009, ¶ 3.h (Petition, Attachment I). The military judge’s response to this dilemma was that the parties could simply re-litigate any motions, issues, or rulings that are materially changed by the promulgation of the revised Manual. On November 20, 2009, counsel for Petitioner was informed by the Deputy Chief Defense Counsel that the Department of Defense General Counsel’s Office established a timeline to revise the Manual and that it will not be completed until some date in January 2010. *See* Declaration of Michael J. Berrigan, dated 30 November 2009 (Petition, Attachment J).

In addition to the irreparable harm of merely being subjected to unconstitutional proceedings, the Government’s ongoing efforts to create from scratch a legal system and procedures to try Petitioner have resulted in a makeshift system that should be stayed by this Court. Unlike other criminal defendants in any Article III court or military court-martial (both

“regularly constituted courts”), Petitioner finds himself required to go forward<sup>1</sup> in facially unconstitutional proceedings, without the benefit of the Rules that determine how such proceedings are to be conducted and the legal standards for their outcome. This Court should issue a stay so that the larger, constitutional questions may be expeditiously resolved before Petitioner is subjected to additional *ultra vires* proceedings.

**C. There is no possibility of harm to other parties if relief is granted.**

Petitioner has been held in custody and confinement by the U.S. Government for over six and a half years. He was confined for almost five years *before* being charged with a criminal offense. As stated, the Government was granted a continuance of 300 consecutive days so that it could review the status of Petitioner as a detainee and amend the law that

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<sup>1</sup> Petitioner is required to continue forward because his only alternative is to, less than two weeks after the expiration of the Government's 300-day continuance, request from the Commission yet another continuance of the presently scheduled hearing on the grounds that the Secretary of Defense must be afforded time to draft and promulgate the revised Manual. Thus, Petitioner finds himself impaled with a Morton's Fork, *Burroughs v. Metro-Goldwyn-Mayer, Inc.*, 683 F.2d 610, 623, fn. 13 (2d Cir. 1982), of the Government's design: either go forward in unconstitutional proceedings, as scheduled, without the benefit of the rules in the Manual *or* seek additional delay, likely to amount to, at least, several additional months, while remaining in pretrial confinement on a foreign island, surrounded by military guards who do not speak his language, thousands of miles from his family.

will apply at his trial. Not until recently did Petitioner learn his fate – that he is to continue to be tried by military commission.

With that timeline as a comparison, it is certain that no harm will result to any party if the Court grants the relief sought in the present Motion in order to afford time to resolve the Petition. Certainly, the Government cannot claim that it suffers harm if the Commission case is temporarily stayed pending resolution of the novel constitutional question, and Petitioner has properly weighed the costs of additional delay to adjudicate this issue with the irreparable harm that would result from going forward in proceedings that are *ultra vires*. Additionally, if the Court grants the requested stay, Petitioner respectfully requests that consideration of his Petition be expedited. *See infra*, § 3.

**D. The public has a strong interest for the Court to rule upon the constitutionality of the MCA.**

“In every trial there is more at stake than just the interests of the accused ... a criminal trial is not a private matter.” *United States v. Taylor*, 569 F.2d 448, 452, fn. 2 (7<sup>th</sup> Cir. 1978) (quoting *Mayberry v. Pennsylvania*, 400 U.S. 455, 467-68 (1971) (Burger, C.J., concurring)). This is especially true of the case of Petitioner, and all military commission cases being tried in Guantanamo Bay. *See, e.g., Hamdan v. Gates*, Civil Action No. 04-1519-JR (2008) (“The eyes of the world are on Guantanamo Bay. Justice must be



done there, and must be seen to be done there, fairly and impartially.”); Matthew Bloom, Note, *I Did Not Come Here to Defend Myself: Responding to War on Terror Detainees’ Attempts to Dismiss Counsel and Boycott the Trial*, 117 Yale L.J. 70, 95 (Oct. 2007) (“The legitimacy of a system designed to handle high-visibility trials like those in the war on terror is particularly important to stability because of the trials’ salience in the public’s consciousness.”).

After lying dormant since World War II, military commissions were resurrected by Military Order of November 13, 2001. *See* 66 Fed. Reg. 57833 (November 16, 2001). Since their revival, military commissions have not been “fair, legitimate, and effective.” President Barack Obama, “Protecting our Security and our Values,” National Archives Museum, Washington, D.C. (May 21, 2009) (describing “the flawed Commissions of the last seven years.”). Thus, the public shares the Petitioner’s strong interest for the Court to rule upon the constitutional challenge to the MCA as soon as practicable and to prevent *any person* from being subjected to a flawed, unconstitutional forum that is not a “regularly constituted court.”

### **3. Conclusion**

Petitioner, by and through counsel, respectfully requests a stay of all proceedings of his pending military commissions case, including the pretrial

motion hearing scheduled to begin on December 15, 2009, so as to afford this Court an opportunity to review his Petition. If the Court grants the requested stay, Petitioner respectfully requests that consideration of his Petition be expedited. Petitioner has been in prison for over six and a half years and remained in confinement for the previous 300-days while the Government decided whether to go forward with the prosecution of his case. Thus, the review of his Petition should be resolved as soon as practicable to ensure that Petitioner does not spend one more day in detention than is necessary awaiting resolution of his Petition. An expedited resolution of the Petition would also follow the Supreme Court's mandate that "[w]hile some delay in fashioning new procedures is unavoidable, the cost of delay can no longer be borne by those who are held in custody." *Boumediene v. Bush*, 128 S.Ct. 2229, 2275 (2008).

Very Respectfully Submitted,



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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 **Emergency Motion for Stay of Military Commission Proceedings Pending Review 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  
20 Massachusetts Avenue, NW  
Washington, DC

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

Military Commissions Trial Judiciary  
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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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