No. _____

IN THE SUPREME COURT
OF THE UNITED STATES

In re OMAR KHADR,	)	Proceedings below:
	)	*United States of America v. Omar Khadr*
Petitioner	)	Military Commissions Guantanamo Bay, Cuba

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EMERGENCY PETITION FOR WRIT OF MANDAMUS TO THE
UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

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QUESTION PRESENTED

(1) Petitioner is to be put on trial by military commission, facing a possible life sentence on August 10, 2010. On March 23, 2010, Petitioner filed a Petition for a Writ of Mandamus and Prohibition challenging the constitutionality of the Military Commissions Act of 2009 and the validity of his proceedings along with an Emergency Motion for a Stay of proceedings pending decision on the petition in the Court of Appeals for the District of Columbia. To date the Court of Appeals has failed to rule on the Emergency Motion, while a critical suppression hearing was held and trial has become imminent. Under these circumstances, should the Court issue a writ of mandamus requiring that the Court of Appeals to rule on Petitioner's Emergency Motion so that this Court may consider the issue in the event of denial, thereby preserving its jurisdiction over stay decisions below?

(2) Should this Court exercise its discretion to impose a stay of the commission proceedings until the court of appeals' decides the merits of Petitioner's underlying Petition for Mandamus and Prohibition currently pending before that court?

PARTIES TO THE PROCEDING AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 14.1, the following list identifies all of the parties appearing here and in the court below.

The Petitioner here and in the United States Court of Appeals for the District of Columbia Circuit is Omar Khadr, a citizen of Canada who is currently detained at Guantanamo Bay. The Respondents here are the United States, the Honorable Douglas Ginsburg, Judge on the United States Court of Appeals for the District of Columbia Circuit, the Honorable Thomas Griffith, Judge on the United States Court of Appeals for the District of Columbia Circuit, and the Honorable Brett Kavanaugh, Judge on the United States Court of Appeals for the District of Columbia Circuit.

Pursuant to Rule 29.6, Petitioner states that no parties are corporations.

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JURISDICTION[1]

The Military Commissions Act of 2009, Pub. L. 111-84, Title XVIII (2009) ("MCA"), vested the Court of Appeals for the District of Columbia Circuit with "Exclusive Appellate Jurisdiction" to determine the validity of final judgments rendered by military commissions. 10 U.S.C. § 950g(a) (2009). This Court, in turn, has certiorari jurisdiction over the Court of Appeals in military commission cases. 10 U.S.C. § 950g(e) (2009). Accordingly, this Court has authority under the All Writs Act, 28 U.S.C. § 1651, to issue writs of mandamus to the court of appeals in order to prevent its appellate jurisdiction from being thwarted. *Roche v. Evaporated Milk Assn.,* 319 U.S. 21, 26 (1943); *McClellan v. Carland*, 217 U.S. 268, 280 (1910).

The procedural posture of this action is ripe for mandamus intervention by this Court. Petitioner filed an Emergency Motion for a Stay on March 23, 2010, seeking a stay of military commission proceedings against him until the court decided the merits of his contemporaneously-filed petition for a writ of mandamus and prohibition. Inexplicably, although both were fully briefed by April 19, 2010 pursuant to the Court of Appeals' expedited briefing schedule, a period of over four months has elapsed where the Court of Appeals has failed to decide the Emergency Motion or the Petition, while the suppression hearing that Petitioner sought to have stayed has proceeded apace, and his trial, scheduled to begin on August

[1] Petitioner has on even date herewith applied to the Chief Justice, sitting as Circuit Justice for the Court of Appeals for the District of Columbia, to stay the commission proceedings pending the court of appeals' decision on the underlying mandamus petition, and in the alternative to order the court of appeals to decide the motion. (*See* Appendix A). Petitioner believes that in the unusual posture of this case, both an application to the Chief Justice for a stay and the instant Petition for Mandamus are appropriate and alternative avenues for seeking relief. On one hand, the requested relief is to require the Court of Appeals to decide motion to stay before the movant suffers the very harm that will render the render the relief moot, which sounds in mandamus. On the other, the relief pertains directly to the potential issuance of a stay of proceedings by the court of appeals, relief that ordinarily addressed the Circuit Justice. Hence Petitioner makes two alternative filings.

10, 2010, is imminent. This has deprived Petitioner of both the requested relief and the ability to make application to this Court in case of denial. The Court of Appeals' failure to rule is therefore ripe for review and disposition under this Court's All Writs Act jurisdiction.[2]

RELEVANT LEGAL PROVISIONS

Military Commissions Act of 2009, 10 U.S.C. § 950g:

> (a) EXCLUSIVE APPELLATE JURISDICTION. -- Except as provided in subsection (b), the United States Court of Appeals for the District of Columbia Circuit shall have exclusive jurisdiction to determine the validity of a final judgment rendered by a military commission (as approved 9 by the convening authority and, where applicable, the United States Court of Military Commission Review) under this chapter.

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[2] In the alternative Petitioner requests that the Court issues the writ under its supervisory power over the inferior federal courts. *Hollingsworth* v. *Perry*, --- U.S. ---, 130 S.Ct. 705, 709-10 (2010). We note that in the unique circumstances of this case, because of the court of appeals' failure to rule, there is no decision below that can strictly speaking be analyzed under the *Hollingsworth* analysis, and that the Court's inability to evaluate such a decision is the very reason calling for the issuance of the writ. Nevertheless, the *Hollingsworth* standard would be satisfied even if the court of appeals had denied Petitioner's stay motion: The legitimacy of the as-yet untested Military Commissions Act of 2009 is an issue of pressing importance, and one that should be resolved before further accused are put on trial which will potentially be overturned *in toto* by a ruling that the Act itself is unconstitutional. Given this public importance and the merits of Petitioner's constitutional argument, which has never been addressed by this Court, and which is based on the limits of Congress Article I, section 8 power to legislate under the Define and Punish Clause, the Petition poses the very strong likelihood that at least four Justices will vote to issue a writ of certiorari, and that at least five will vote in favor of Petitioner's position. Most important with regard to the issuance of the writ requested here, unless this Court requires the Court of Appeals to act on Petitioner's Emergency Motion, because Petitioner's claim is that he has the right not to stand trial at all in a system that is constitutionally *ultra vires* on its face, the Court will lose the possibility of ruling on this critical issue, because it will have become moot by the onset of Petitioner's trial. For the same reason, the potential harm to Petitioner is enormous – subjection to a trial on a potential life sentence that is entirely illegitimate and should not even have been charged, much less tried. Finally, the harm to the government is *de minims*: Petitioner has been in government custody since 2002 (when he was 15 years old), and the criminal proceedings against him have been pending for five years, including two suspensions of over a year requested by the government. A brief delay while the court of appeals decides whether these proceedings should be stayed will do it no harm. *Id*.

. . . . .

(e) REVIEW BY SUPREME COURT.—The Supreme Court may review by writ of certiorari pursuant to section 1254 of title 28 the final judgment of the United States Court of Appeals for the District of Columbia Circuit under this section.

STATEMENT

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

On March 23, 2010, Petitioner filed for a writ of mandamus and prohibition in the United States Court of Appeals for the District of Columbia, seeking a permanent injunction of his trial by military commission on the basis that the Military Commissions Act of 2009 was unconstitutional on its face. *In re Omar Khadr*, Petition for Writ of Mandamus and Writ of Prohibition, No. 10-1067 (D.C. Cir. docketed March 23, 2010) ("Petition"). In it, Petitioner demonstrates that he cannot be tried by the military commission convened for the purposes of his trial because the Military Commissions Act of 2009 is unconstitutional on its face. It exceeds the limitations of the enumerated power granting Congress the authority to establish law-of-war military commissions in the first instance, the Define and Punish Clause. Accordingly, the proceedings against him are unconstitutional and *ultra vires*, and Petitioner has the right not to stand trial by a military commission convened under the Act.

Contemporaneously with the Petition, Petitioner filed an Emergency Motion for Stay of Military Commission Proceedings Pending Review of Petition for Writ of Mandamus and Writ of Prohibition ("Emergency Motion"), seeking a stay of military commission proceedings, specifically including the scheduled suppression hearing and trial, so that the Court of Appeals could hear the merits of the Petition before it was rendered moot by the commencement of his trial. On March 26, 2010, the Court of Appeals ordered an expedited briefing schedule for the briefing of the Petition and Emergency Motion. The government filed its opposition on April 9, 2010, and Petitioner filed a reply brief on April 19, 2010. The Petition and Emergency Motion were therefore fully briefed nine days before the April 28 start date of the suppression hearing.

After a series of pre-trial hearings, the military judge postponed the trial date to August 10, 2010. The suppression hearing remained scheduled for April 28, 2010. As of the date of the instant filing, the Court of Appeals has taken no action on the Emergency Motion or the Petition, despite the fact that Petitioner's suppression hearing is nearly finished and his trial is imminent. With less than two weeks before a military panel will be assembled for his trial, Petitioner seeks a writ of mandamus to the Court of Appeals, ordering that it to decide the Emergency Motion forthwith, so that if it is denied a timely application may be made to this Court before Petitioner's trial commences on August 10, 2010, and his request to stay the trial becomes moot.[3]

REASONS FOR GRANTING THE PETITION

"Mandamus, prohibition and injunction against judges are drastic and extraordinary remedies." *Ex parte Fahey*, 332 U.S. 258, 259 (1947). This case, however, presents traditional and clear-cut circumstances in which a writ is required to protect this Court's jurisdiction. The

[3] In the alternative, Petitioner requests that the Court itself stay the military commission proceedings until the court of appeals decides the merits of the Petition for Writ of Mandamus and Prohibition currently pending before it, for the reasons stated below. *See* note 3, *infra*.

lower court has failed rule on a motion that is appealable to this Court (in the form of an application, *see* Sup. Ct. R. 20), thus thwarting the Court's appellate jurisdiction. The potential harm to the Petitioner if the writ is not granted is great – subjection to a trial that could lead to a life sentence, without a timely decision by the Court of Appeals on his underlying petition for mandamus, which demonstrates Petitioner's constitutional entitlement not to be tried at all. The precedent supporting issuance of the writ to the Court of Appeals is unequivocal. And the relief requested is minimal – Petitioner requests no substantive holding on his underlying constitutional claims from this Court, but simply an order to the Court of Appeals to rule on his Emergency Motion so Petitioner can apply for, and this Court will have the opportunity to consider, the imposition of its own stay in the event that the Emergency Motion is denied.

Both the Emergency Motion and the Petition have been pending before the court of appeals since March 23, 2010. They were fully briefed by April 19, 2010, nine days before the suppression hearing was scheduled to begin on April 28. The Court of Appeals could have denied the Emergency Motion at any time since that date if it so chose. Had it done so, Petitioner could have applied to this Court, through the Chief Justice (the Circuit Justice for the Court of Appeals for the District of Columbia), for reversal and a stay by the Court while the Court was in session. Because it did not, Petitioner must file this request for extraordinary relief during the summer recess to preserve his right to the due judicial consideration of his constitutional claims. [4]

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[4] In the alternative, apart from the narrow mandamus relief to which Petitioner is entitled, there are very good reasons for the Court to exercise its discretion under the All Writs Act and impose its own stay on proceedings until the court of appeals rules on Petitioner's underlying petition. It is clear that the Court has such power, even where no stay was first sought in the lower court, *see Western Airlines Inc.* v. *International Brotherhood of Teamster*, 480 U.S. 1301, 1304-5 (1987) (O'Connor, Circuit Justice); and where the court of appeals has denied the requested stay. *See Heckler* v. *Lopez*, 463 U.S. 1328, 1330 (1983) (Rehnquist, Circuit Justice); *I.N.S. v. Legalization*

Assistance Project of Los Angeles County Federation, 510 U.S. 1301, 1302 (1993) (O'Connor, Circuit Justice). Entering its own stay of proceedings in these circumstances, when Petitioner has in fact sought a stay and the lower court's denial is constructive rather than official, is thus well-within this Court's power. It is also the only way to ensure that Petitioner's important and substantial constitutional claims receive orderly appellate consideration in the Court of Appeals, and that this Court's certiorari jurisdiction to hear and adjudicate Petitioner's claims is preserved.

Because the Court of Appeals' failure to rule has *de facto* if not *de jure* denied Petitioner's Emergency Motion to stay the proceedings, there is a very substantial likelihood at this late date that the Court of Appeals will also not decide the underlying petition before Petitioner's trial commences on August 10. Yet Petitioner's claim in the underlying petition is that he has a right not be tried at all in the commission. Thus, if the Court of Appeals fails to act on the underlying petition, that petition will become moot and this Court's review of Petitioner's important constitutional claims will be frustrated, solely by virtue of the court of appeals' failure to grant the stay. *See Republican State Central Committee of Arizona v. Ripon Soc. Inc.*, 409 U.S. 1222, 1225 (1972) (Rehnquist, Circuit Justice) (stay granted in part of because important issue otherwise mooted).

Moreover, petitioner will suffer very significant harm if the Court of Appeals fails to rule on the merits of his underlying petition before trial. His constitutional right not to be put on trial will be rendered meaningless, a possibility that this Court recognizes as one of the few bases for for its intervention before trial in a criminal prosecution. *See Drope v. Missouri*, 420 U.S. 162 (1975) (right not to be tried while incompetent); *Abney v. United States*, 431 U.S. 651 (1977) (double-jeopardy), *Helstoski v. Meanor*, 442 U.S. 500 (1979) (privileges and immunities); *see also Hamdan* v. *Rumsfeld*, 548 U.S. 557, 589 (2006) ("Hamdan and the Government both have a compelling interest in knowing in advance whether Hamdan may be tried by a military commission that arguably is without any basis in law"). And this Court has long recognized the psychological effects, anxiety, and other deleterious consequences of criminal trial, especially one that can result in a life sentence. *See Abney*, 431 U.S. at 662. The government, on the other hand, would suffer the minimal harm of another relatively brief continuance of the proceedings – something that has happened numerous times previously in this case, including a year-long hiatus in prosecution instigated by the government itself.

Equally important, Petitioner's arguments below are likely to succeed, will have an enormous impact on the constitutional viability of the military commissions system as a whole, and have never been addressed by this Court before. In brief, Petitioner shows (a) that the Define and Punish Clause, U.S. Const. art. I, §8, cl. 10, is the enumerated power authorizing Congress to enact law-of-war military commissions to try "Offenses against the Law of Nations," *id*.; (b) that as such, the Clause imposes limits on the scope and nature of the jurisdiction of military commissions so enacted, *compare e.g. Reid* v. *Covert*, 354 U.S. 1 (1957) (Congress exceeded limitations on ordinary military jurisdiction imposed by its enumerated power to "[t]o make Rules for the Government and Regulation of the land and naval Forces," U.S. Const art. I, §8, cl. 14, when it extended courts-martial jurisdiction to include civilian dependents of service members); and, finally, (c) that the Military Commissions Act of 2009 exceeds those limits, based on the historical background of the adoption of the Define and Punish

A Writ of Mandamus is Necessary to Compel the Court of Appeals to Decide the Emergency Motion for a Stay of Proceedings

"Repeated decisions of this court have established the rule that this court has power to issue a mandamus, in the exercise of its appellate jurisdiction, and that the writ will lie in a proper case to direct a subordinate Federal court to decide a pending cause." *Knickerbocker Ins. Co. v. Comstock*, 16 Wall. 258, 270 (1872).

Where a lower court's failure to act obstructs litigants from having their claims adjudicated and ultimately brought before a higher court, this Court and the courts of appeals have consistently issued writs of mandamus so that the legal process can proceed. In *Ex parte Crane*, 5 Pet. 190 (1831), this Court issued a writ of mandamus to compel a lower court to render its judgment, because failing to do so prevented the petitioner from pursuing an appeal. Chief Justice Marshall, writing for the Court, held that "We cannot perceive a reason why the single

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Clause, the consistent jurisdictional practices of American military commissions since before the Revolutionary War, and this Court's precedents on military commissions' jurisdiction and status as creatures of the law of war. Accordingly, Petitioner shows that because Congress was without authority in the first instance to enact the military commission in which Petitioner is now being prosecuted, that commission is constitutionally *ultra vires* and Petitioner has the right not to be put on trial before it. Moreover, because Petitioner's argument is a purely legal challenge to the face of the statute, *every* individual charged in the military commissions has the same right not to be tried there. The issues raised in Petitioner's underlying petition are thus not only meritorious but of the greatest possible importance to the military commissions system and the public and political controversies to which it has given rise.

Finally, prudential considerations also militate issuance of the stay at this time. If the Court grants only the minimal relief sought here and requires the court of appeals to rule on the Emergency Motion, within the next week the court of appeals must decide the motion and, if denied, Petitioner will have to return to this Court seeking the same stay of proceedings that is requested here as alternative relief. That is likely to involve a substantial effort on the part of Petitioner's counsel at a time when Petitioner's criminal trial is about to begin, itself a very significant harm to Petitioner, and a situation that will cloud the legitimacy of the trial even as it proceeds. Petitioner believes that for reasons stated herein, the present record meets the requirements for immediate stay by this Court despite the court of appeal's failure to rule first, and the stay should be granted now.

case of a refusal by an inferior court to sign a bill of exceptions, and thus to place the law of the case on the record, should be withdrawn from that general power to issue writs of mandamus to inferior courts, which is conferred by statute." *Id.* at 194; *see also Ex parte United States*, 287 U.S. 241 (1932) (writ issued to district judge instructing him to issue a bench warrant); *Ex parte Bradstreet*, 32 U.S. 634 (1833); *Virginia v. Rives*, 100 U. S. 313, 323 (1879) (extraordinary writs have "very much extended in modern times, and now it may be said to be an established remedy to oblige inferior courts and magistrates to do that justice which they are in duty, and by virtue of their office, bound to do.").

Likewise in *Will v. Calvert Fire Ins. Co.*, 437 U.S. 655 (1978), this Court affirmed the Circuit Court's issuance of the writ of mandamus to a district judge, who deferred the adjudication of the petitioner's federal claims during the pendency of a state court action. This Court held that "There can be no doubt that, where a district court persistently and without reason refuses to adjudicate a case properly before it, the court of appeals may issue the writ 'in order that [it] may exercise the jurisdiction of review given by law.'" *Id*. at 661-62 (quoting *Knickerbocker*, 16 Wall. at 270). To hold otherwise, the Court has explained, would be to give the lower court a pocket-veto over the higher court's supervisory jurisdiction and result in an indefinite obstruction of the appellate process. *See Roche*, 319 U.S. at 25 ("Otherwise the appellate jurisdiction could be defeated and the purpose of the statute authorizing the writ thwarted by unauthorized action of the district court obstructing the appeal").

Following this Court's direction, the courts of appeal have issued writs of mandamus when the failure of a district court judge to rule on a dispositive motion prejudices the litigants'

ability to seek a timely appeal.[5] In *McClellan v. Young*, 421 F.2d 690 (6th Cir. 1970), for example, a district court had allowed four months to elapse before ruling on a prisoner's petition for habeas corpus. Citing *La Buy v. Howes Leather Co.*, 352 U.S. 249 (1957), the Sixth Circuit issued the writ and ordered the district judge to render his decision within ten days of the mandate being issued. *Id*. at 691; *see also In re Sharon Steel Corp*., 918 F.2d 434, 437 (3d Cir. 1990) (writ issued to a district judge who declined to rule on a dispositive motion, where "the district court's inaction [was] an unexplained abdication of judicial power" because the district judge "had a duty to dispose of that motion, a duty inherent in a judicial system which guarantees a conditional right to an appeal.").

Petitioner concedes that "[m]andamus, prohibition and injunction against judges are drastic and extraordinary remedies." *Ex parte Fahey*, 332 U.S. at 259. Nevertheless, this Court's issuance of the writ has become necessary to preserve its own appellate jurisdiction. In the circumstances presented here, "appeal is a clearly inadequate remedy," *id*. at 260, insofar as it is the appeal itself that is obstructed by the Court of Appeals' failure to rule. For sure, the

[5] Petitioner has pursued his request for a stay of proceedings as expeditiously as was warranted and as he was able under the circumstances. The Emergency Motion was filed more than a month prior to the scheduled date of the suppression hearing. Briefing was completed on April 19. Petitioner assumed that a ruling on the Emergency Motion would be issued soon thereafter, sufficiently in advance of the hearing that the parties could make a determination how to respond to the decision. As the date of the hearing approached, Petitioner, through counsel, called the clerk's office in the court of appeals on a regular basis to inquire about the status of the motion. Given that a stay of the suppression hearing was among the specific relief Petitioner requested in his Emergency Motion, he expected, in good faith, that the court would decide the motion prior to the hearing, if only to deny it on the day before it began. After the suppression hearing began, counsel for Petitioner was entirely occupied by the conduct of hearing itself. Shortly after the hearing was continued until August 10, counsel issues developed, the civilian counsel were dismissed by the client, and below-signed military counsel, who to that point had been associate counsel to the lead civilian counsel, became lead counsel. Even so, Petitioner has filed this Petition with sufficient time for the Court to consider the instant Petition and grant the writ, and for the Court of Appeals thereafter to consider and rule on the Emergency Motion, which is neither legally nor factually complex, in time to stay the pending trial.

unwillingness of the Court of Appeals to rule on the Emergency Motion or the merits of the Petition ensures that a timely appeal will be impossible.

Petitioner has presented to the Court of Appeals "substantial arguments denying the right of the military to try [him] at all." *Hamdan*, 548 U.S. at n.16 (internal quotations omitted). Regardless of whether the Court of Appeals ultimately grants or denies the Emergency Motion or the Petition, retaining jurisdiction without ruling amounts to a pocket-veto of Petitioner's appellate right to apply to this Court for a stay, and thwarts this Court's appellate review. *La Buy*, 352 U.S. at 264

Alternatively, the Court Should Stay Proceedings Below Pending a Decision by the Court of Appeals on the Merits of Petitioner's Petition for Mandamus and Prohibition

In appropriate circumstances, Circuit Justices have the power to impose stays of orders by the courts of appeal even where no stay was first sought there, *see Western Airlines Inc.* v. *International Brotherhood of Teamster*, 480 U.S. 1301, 1304-5 (1987) (O'Connor, Circuit Justice); and may do so even where the court of appeals has denied the requested stay. *See Heckler* v. *Lopez*, 463 U.S. 1328, 1330 (1983) (Rehnquist, Circuit Justice); *I.N.S. v. Legalization Assistance Project of Los Angeles County Federation*, 510 U.S. 1301, 1302 (1993) (O'Connor, Circuit Justice). *A fortiori*, the full Court has the power itself to stay the proceedings in Petitioner's commission case until the Court of Appeals rules on his underlying petition.

CONCLUSION

Wherefore, this Court should issue a writ of mandamus to the Court of Appeals, ordering it to decide Petitioner's Emergency Motion forthwith.

Dated: August 2, 2010

Respectfully submitted,

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APPENDIX A

EMERGENCY APPLICATION FOR STAY OF PROCEEDINGS IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

No. _____

IN THE SUPREME COURT
OF THE UNITED STATES

In re OMAR KHADR, Petitioner	Proceedings below: *United States of America v. Omar Khadr* Military Commissions Guantanamo Bay, Cuba

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EMERGENCY APPLICATION FOR STAY OF PROCEEDINGS IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

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APPLICATION FOR STAY

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

Background of the Application

The background of this Application is unusual for reasons explained below. For those reasons, it is unclear whether this Application or a petition for mandamus is the appropriate vehicle for seeking the relief in this Court. Accordingly, Applicant has also filed on this date a Petition for Mandamus in this Court on this date, which is attached to this Application. (*See* APPENDIX A).

Applicant is an accused in an on-going military commission proceeding in Guantanamo Bay, Cuba. On March 23, 2010, he filed a Petition for Writ of Mandamus and Prohibition asking the court of appeals to enjoin further proceedings against him on the ground that the Military Commissions Act of 2009 is constitutionally *ultra vires* and that therefore no proceedings may be held under its authority. On the same date, he filed an Emergency Motion requesting a stay of proceedings pending the court of appeals' decision on the petition for mandamus, specifically requesting, *inter alia*, a stay of the suppression hearing in his case scheduled for April 28, 2010, and trial. (Hereafter the petition for mandamus in the court of appeals will not be capitalized and sometimes referred to as "the underlying petition" to distinguish it from the Petition for Mandamus filed in this Court.)

To date the court of appeals has not ruled on Applicant's Emergency Motion. As a result, the suppression hearing has been held, and trial is now imminent, scheduled for August 10, 2010, without a decision whether these proceedings should be stayed.

RELIEF REQUESTED

In these circumstances, Applicant requests the following relief:

(1) A stay of commission proceedings pending the court of appeals decision on the Applicant's underlying petition for mandamus in that court.

In the alternative, Petitioner request the following relief:

(2) An order to the court of appeals requiring it to decide the underlying petition for mandamus in suffient time for Applicant to re-apply to this Court.

(3) A stay pending this Court's decision on the Petition for Mandamus filed on this date in this Court.

Applicant has filed both this Application and the related Petition for Mandamus because the relief sounds in both application for stay and a request to order the court of appeals to perform its duty to decide a motion to stay in enough time to avoid the harm to the movant sought to be avoided by the motion.

REASONS FOR GRANTING THE APPLICATION

Applicant shows below that this Court has the power to intervene before the court of appeals itself rules on the underlying Emergency Motion to Stay; that four Justices would be likely vote for issuance of a writ of certiorari in his case; that five Justices would be likely to vote for Applicant's position on the merits were certiorari to be granted; and that the underlying petition's merits and importance merit relief at this time.

At the outset, while unusual, it is clear that the Court has the power to enter a stay even where no stay was first sought in the lower court, *see Western Airlines Inc.* v. *International Brotherhood of Teamster*, 480 U.S. 1301, 1304-5 (1987) (O'Connor, Circuit Justice); and where the court of appeals has denied the requested stay. *See Heckler* v. *Lopez*, 463 U.S. 1328, 1330 (1983) (Rehnquist, Circuit Justice); *I.N.S. v. Legalization Assistance Project of Los Angeles County Federation*, 510 U.S. 1301, 1302 (1993) (O'Connor, Circuit Justice). Entering its own

stay of proceedings in these circumstances, when Petitioner has in fact sought a stay and the lower court's denial is constructive rather than official, is thus well-within this Court's power. It is also the only way to ensure that Petitioner's important, novel, and substantial constitutional claims receive orderly appellate consideration in the court of appeals, and that this Court's certiorari jurisdiction to hear and adjudicate Petitioner's claims is preserved.

Applicant's underlying mandamus petition raises issues of the greatest public importance. If successful, the Military Commissions Act of 2009 will be held to be unconstitutional on its face, and all commission proceedings held under the authority of the Act – not only Applicant's – will be held null and void. There is thus an imperative need to decide this issue as soon as feasible, not only to vindicate Applicant's position but to avoid the possibility that all intervening military convictions will be overturned *in toto* when this Court ultimately considers Applicant's argument, likely years away after the convictions are considered by the Court on certiorari.

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

As for that position, the argument Applicant makes is complex and based in large part on detailed surveys of the historical background of the Define and Punish Clause, Const. Art. I, sec. 8, cl. 10, on one hand, and, on the other, of the historical practice and jurisdiction of military commissions since the Revolutionary War. That said, the argument may fairly be summarized as follows:

The Military Commissions Act of 2009 limits the jurisdiction of military commissions convened under its authority to non-citizen unlawful enemy belligerents. The uniqueness of that jurisdictional limitation in American military history cannot be overstated. Without exception, since the Revolutionary War, both the ordinary, courts-martial system and the jurisdiction of "law-of-war" military commissions, *see Hamdan* v. *Rumsfeld*, 548 U.S. 557, 596 (2006) (distinguishing law-of-war commissions from others), have tried Americans alongside aliens (extensive historical citations for this proposition are provided in the underlying petition). Indeed, while this Court was holding that Americans could be tried by American military commission no less than aliens, *Ex parte Quirin*, 317 U.S. 1, 15-16 (1942), America's enemies were applying the very jurisdictional limitation to non-nationals adopted by Congress in the Military Commissons Act. *Trial of Wilhelm Von Leeb and Thirteen Others (The Germani High Command Trial)*, 12 L. Rpts. of Trials of War Criminals 1, 37 (U.N. War Crimes Comm'n 1949) (Night and Fog Decree; limiting jurisdiction of tribunals to "criminal acts committed by non-German civilians"); Military Law of the Japanese Expeditionary Army in China, Art. 1 ("This military law shall apply to all persons other those of Japanese citizenship within the zone of military operation of the Imperial Army.") (attached as Enclosure No. 1 to Statement of Major Itsuro Hata, Prosecution Exh. No. 25, admitted Tr. 190 and attached following, *United States v. Shiguru Sawada, et al.*, Vol. 2 (1946) (military commission convened in Shanghai, China) (1946).

More important to the underlying petition in the court of appeals, the Military Commission Act's jurisdictional limitation is constitutionally *ultra vires*, because it exceeds the power granted to Congress to convene military commissions by the Define and Punish Clause, Const. Art. I, sec. 8, cl. 10. (That the Define and Punish Clause is the enumerated power

governing the jurisdiction of statutory military commissions is demonstrated by historical analysis in the underlying petition.) In this sense, the argument is parallel to the holding of *Reid* v. *Covert*, , 354 U.S. 1 (1957), which held that Congress exceeded limitations on ordinary military jurisdiction imposed by its enumerated power to establish ordinary military tribunals, "[t]o make Rules for the Government and Regulation of the land and naval Forces," art. I, §8, cl. 14, when it extended courts-martial jurisdiction to include civilian dependents of service members.

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

With regard to the limitations imposed by the Law of Nations, this Court has held (a) the Common Article 3 of the Geneva Conventions is part of the law of war (which is part of the "Law of Nations"); and (b) that, with regard to the legitimacy of law-of-war military tribunals, Common Article 3 requires, at a minimum, that "some practical need explains [military commission] deviations from court-martial practice.'" *Hamdan*, 548 U.S. at 632-3 (plurality; quoting Kennedy, J., concurring, id., at 645); *id.*, at 645 (Kennedy, J., concurring).

Court-martial practice, however, has never limited its jurisdiction to non-citizens, either under its regular "discipline and good order" jurisdiction or under its special law-of-war jurisdiction (*see* Uniform Code of Military Justice, Article 18, 10 U.S.C. §818; *see generally* 10 U.S.C. §§ 802, 803, and 817-821 (2008) (jurisdictional provisions)). Nor has it ever been so

limited (non-citizens have long served and fought along-side American servicemen and women), nor have military commissions so limited their jurisdiction. And this Court has held specifically that American citizens may be tried in the same law-of-war commissions as aliens. *Quirin*, *supra*; *see also Hamdi v. Rumsfeld*, 542 U.S. 507, 519 (2004) ("There is no bar to this Nation's holding one of its own citizens as an enemy combatant."). The reason for this non-discrimination principle is fundamental: From the outset, the law of war has applied to Americans and aliens alike, because its rationale has been that reciprocity with regard to the enemy is the best and only legal guarantee that war will not descend to barbarism on either side.

It is therefore far too late in the day for the government to claim that some "practical need" justifies an alienage distinction that both this Court and the military have long rejected. For that reason, the jurisdictional provision of the Military Commission Act of 2009 violates the law of war, and therefore the limitation on Congressional power imposed by the Define and Punish Clause. Because it is the jurisdictional provision that is invalid, no one, including Applicant in this case, may be tried under its authority, the Act is therefore void on its face, see *Washington State Grange v. Washington State Republican Party*, — U.S. —, 128 S.Ct. 1184 (2008), all of the commission proceedings against him, including the trial currently scheduled for August 18, 2010, are constitutionally *ultra vires*, and the trial and other proceedings should be permanently enjoined.

CONCLUSION

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

Dated: August 2, 2010

Respectfully submitted,

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