The United States hereby opposes petitioner's September 9, 2009 motion for a stay of all proceedings before a military commission, including a competency hearing scheduled for September 21, and for a petition for a writ of mandamus and prohibition. First, this Court plainly lacks jurisdiction under 10 U.S.C. §§ 950j(b) & 950a(g)(1)(B) to entertain claims relating to the prosecution of petitioner by military commission at this juncture. See Khadr v. United States, 529 F.3d 1112 (D.C.Cir. 2008). This Court will have jurisdiction to review each of petitioner's legal claims in the event he is convicted, final judgment is entered, and appeal to the Court of Military Commission Review is exhausted. Second, the "extraordinary and drastic" injunctive relief petitioner now seeks -- an order that would permanently enjoin his prosecution by military commission -- is unwarranted and inappropriate. See Munaf v. Geren, 128 S.Ct. 2207, 2219 (2008). Indeed, last January the district court rejected a similar effort by this same petitioner to stay his competency hearing, see Bin Al Shibh v. Gates (Case 1:06-cv-01725-EGS) (D.D.C. 2009), and similar efforts by other Guantanamo Bay detainees to halt their military commission trials have likewise been rejected. See Hamdan v. Gates (Case 1:04-cv-01519-JR) (D.D.C. 2008). Third, this Court should abstain from interfering with ongoing military commission proceedings under the doctrine announced in Schlesinger v. Councilman, 420 U.S. 738 (1975), so that the specialized system of justice established by Congress to adjudicate this case can perform its assigned task and address petitioner's claims in the first instance. Fourth, and finally, petitioner's allegations regarding alleged

constitutional defects in the Military Commissions Act (MCA) are without merit.

Although the United States opposes for these reasons the petitioner's request from this Court for an indefinite stay of military commission proceedings, the United States intends separately to seek a 60-day continuance of the presently-scheduled mental competency hearings from the military judge.1 This motion will be based on impending changes to the MCA and upcoming decisions by the Attorney General in consultation with the Secretary of Defense concerning the forum in which these cases will be prosecuted. The prospect that, within 60 days, the MCA may be substantially amended, and that a decision might be made to prosecute the petitioner in federal court, are additional reasons why this Court should decline at this time to consider the request for extraordinary relief to stop further military commission proceedings.

STATEMENT[2]

A. Military Commissions Act of 2006

In Hamdan v. Rumsfeld, 548 U.S. 557 (2006), the Supreme Court held that the President needed, and lacked, congressional authorization to convene military commissions to try persons for violations of the laws of war using procedures that deviated from those in the Uniform Code of Military Justice (UCMJ). The President

1 The United States will provide this Court with a copy of this motion upon its filing.

2 Although petitioner's filing included some citations to attachments, they have not been provided to the Court and are not a part of the record in this case as ordinarily required under Federal Rule of Appellate Procedure 10(a), (c). Respondent has therefore prepared the following statement of facts in the absence of an official record.

"return[ed] to Congress to seek the authority" necessary for such commissions, and Congress responded swiftly and clearly, enacting the Military Commissions Act of 2006 ("MCA") only months later. See Pub. L. 109-366 (Oct. 17, 2006), codified at 10 U.S.C. §948a et. seq.

The MCA established a detailed regime governing the establishment and conduct of military commissions. See 10 U.S.C. §§ 948a-950p. The MCA provides for the trial by military commission of "alien unlawful enemy combatants", 10 U.S.C. § 948c, defined as a person who "has engaged in hostilities or who has purposefully and materially supported the hostilities against the United States . . . who is not a lawful enemy combatant." 10 U.S.C. § 948a(1).[3] A military commission is made up of at least five members who are military officers, 10 U.S.C. §§ 948i, 948m, and is presided over by a military judge, 10 U.S.C. § 948j, the same judges who preside over courts-martial. The defendant is appointed military defense counsel and may also retain private civilian counsel. 10 U.S.C. §§ 948k, 949c. The accused is presumed innocent unless his guilt is established beyond a reasonable doubt. 10 U.S.C. § 949*l*(c). All military commission proceedings must take place in the presence of the accused unless, after the accused is warned, he persists in conduct that would justify

[3]A lawful enemy combatant is defined as, among other things, the "member of the regular forces of a State party engaged in hostilities against the United States" or a "member of a militia, volunteer corps, or organized resistance movement belonging to a State party engaged in such hostilities, which are under responsible command, wear a fixed distinctive sign recognizable at a distance, carry their arms openly, and abide by the law of war." 10 U.S.C. § 948a(2).

exclusion to ensure the physical safety of individuals or to prevent disruption of the proceedings. 10 U.S.C. § 949d(b), (e).

If convicted, the accused may appeal to the Court of Military Commission Review, an intermediate military court. 10 U.S.C. § 950f. The defendant then may appeal to the United States Court of Appeals for the District of Columbia Circuit, 10 U.S.C. § 950g, which has "exclusive jurisdiction to determine the validity of a final judgment rendered by a military commission"; it may review "matters of law" and consider "whether the final decision was consistent with the standards and procedures specified in this chapter" and with "the Constitution and the laws of the United States." 10 U.S.C. § 950g(a)-(c). Finally, he may seek certiorari review by the Supreme Court. 10 U.S.C. § 950g(d).

Legislative reform of the Military Commissions Act is now pending before the Congress. On 23 July, the Senate passed significant changes to the law as part of the Defense Authorization Act for FY 2010. S.1390, Title X, Subtitle D, §§ 1031 *et seq.*, Roll call Vote No. 242, 115 Cong. Rec. 112 at S.8023 (July 23, 2009). Conferees from the Senate and House are expected to meet in late September or early October to consider these reforms. The full Congress is likely to pass the Defense Authorization bill sometime in October or November. Meanwhile, the Departments of Justice and Defense have established a protocol for deciding whether certain detainees held at Guantanamo Bay, including the petitioner, should be prosecuted, and if so, whether

the prosecution should occur in a military commission or in federal court. Teams of prosecutors from the two Departments are now reviewing the cases and will be making recommendations shortly. Within the next 60 days, the Attorney General, after consulting with the Secretary of Defense, will determine whether petitioner's case should be prosecuted in an Article III court or remain before a military commission.

B. Facts Relating to Petitioner

Within days of the September 11th 2001 attacks on New York City, Washington, D.C., and the hijacking of Flight 93 over the skies of Pennsylvania, the petitioner, Ramzi Bin al Shibh, was identified as a potential co-conspirator in the attacks and a member of al Qaeda. He was taken into custody in September 2002 and transferred to the custody of the United States, and in September 2006 was transferred to Guantanamo Bay, Cuba. In early 2007, a three- member Combatant Status Review Tribunal determined that he was an enemy combatant and member of al Qaeda.

On May 9, 2008, capital charges were referred against petitioner and four others, including Khalid Sheikh Mohammed, alleging a conspiracy consisting of 169 overt acts to murder 2,973 persons, in violation of 10 U.S.C. §950v(b)(28); attacking civilians, in violation of 10 U.S.C. §950v(b)(2); attacking civilian objects, in violation of 10 U.S.C. §950v (b)(3); intentionally causing serious bodily injury, in violation of 10 U.S.C. §950v(b)(13); murder in violation of the law of war, in violation of 10

U.S.C. §950v(b)(15); destruction of property in violation of the law of war, in violation of 10 U.S. C. §950v9b)(16); hijacking or hazarding a vessel or aircraft, in violation of 10 U.S.C. §950v(b)(23); terrorism, in violation of 10 U.S.C. §950v(b)(24); and providing material support to terrorism, in violation of 10 U.S.C. §950v(b)(25).

The petitioner was arraigned on June 5, 2008, at Guantanamo Bay. There have been ten military commission sessions held in this case to date. During the initial session, as is the practice in military courts, the defendants were asked to make elections regarding counsel. Following a lengthy explanation concerning the defendants' rights to counsel, which included an exhaustive Faretta inquiry[4], three of the defendants (Khalid Sheikh Mohammed, Walid Muhammad Salih Mubarak Bin Attash, and Ali Abdul Aziz Ali) elected to represent themselves. Ultimately, after advising each of these defendants of the benefits of proceeding with representation, the military judge determined that each of the three had made a knowing, voluntary and intelligent waiver of counsel. The military judge directed that standby counsel remain on the case and that civilian counsel provided to each of the accused by the American Civil Liberties Union (ACLU) could remain on the case as civilian consultants. However, the petitioner and Mustafa al Hawsawi were denied the right to

[4] See, Faretta v. California, 422 US 806 (1975), holding that a waiver of the right to assistance of counsel will only be accepted if the military judge finds that the accused is competent to understand the disadvantages of self-representation and that the waiver is voluntary and informed. While the waiver discussed in Faretta was grounded in the defendant's constitutional right to counsel, the right in the military commissions is grounded in the statute.

represent themselves until such time as the military judge was satisfied that each had the mental capacity to do so.

During a colloquy with the military judge, petitioner indicated that he wished to represent himself. Detailed military defense counsel, however, alerted the military judge that petitioner might be under the influence of medication that could impede his ability to make an intelligent decision regarding counsel rights. The military judge directed that counsel provide him with more information regarding the petitioner's medical condition and deferred ruling on petitioner's request to represent himself. The military judge noted that:

> The reason I'm going to postpone [making a decision regarding your decision to represent yourself] is because one of my jobs is before I let someone represent themselves, I have to make sure and make a finding that their election is knowing and voluntary and with full understanding of the things that are at stake here. There are quite a number of indications that you understand perfectly well what is going on. But given the very serious nature of this case, I think it's important that we address this medication issue.

The petitioner said he understood but maintained that he did not want lawyers forced on him.

On July 1, 2008, the Military Judge ordered a mental health evaluation of petitioner, pursuant to Rule for Military Commissions (RMC) 706,[5] to determine whether he currently suffers from a mental defect that would affect his ability to

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[5] RMC 706 provides that the Military Judge may order a mental examination of the accused after referral of charges. The RMC 706 Board must consist of one or more persons and each member shall be either a physician or a clinical psychologist.

represent himself.[6] After considering medical records, portions of the record of trial, records from the Detainee Information Management System, statements that petitioner gave to FBI investigators after his arrival at Guantanamo Bay, and interviews with a number of individuals familiar with petitioner, the RMC 706 Board, which consisted of a Board-certified general and forensic psychiatrist and a Board-certified general psychiatrist, issued its findings on October 16, 2008.

The RMC 706 Board concluded that, because petitioner refused to be interviewed, it could not make a definitive diagnosis. However, the RMC 706 Board concluded that the petitioner had a delusional disorder, persecutory type, but that he possessed "the present ability to consult with his lawyers with a reasonable degree of understanding"; "has a rational as well as factual understanding of the proceedings against him"; and "sufficient mental capacity to understand the nature of the proceedings against him."

At a hearing on September 23, 2008, the petitioner again reiterated his desire to represent himself. He expressed displeasure at his counsel's representation of him and claimed that she was "acting against [him]" and that she had lied on more than one occasion to him. At a hearing on December 8, 2008, the petitioner again stated his

[6] The July 1, 2008 Order requested separate and distinct findings with respect to the following questions: 1) Is the accused presently suffering from a mental disease or defect? If so, what is the clinical psychiatric diagnosis; and 2) Does the accused have the present ability to consult with his lawyers with a reasonable degree of cognitive understanding and does he have a rational as well as a factual understanding of the proceedings against him? If so, does the accused have sufficient mental capacity to understand the nature of the proceedings against him (trial by commission) and to conduct or cooperate intelligently in the defense?

desire to proceed pro se, but the military judge denied his request until conclusion of a competency hearing.

From approximately July 2008 to the present, the parties have been engaged in extensive litigation related to the mental competency determination of petitioner. Petitioner's detailed defense counsel have filed numerous motions seeking to compel the discovery of classified and unclassified materials and seeking access to hundreds of personnel that may have had contact with petitioner during his time in U.S. custody. Counsel for petitioner have been provided with thousands of pages of discovery that include the complete medical records of petitioner while in U.S. custody. Because some of the medical records were contained within classified documents, the prosecution sought and obtained approval to provide alternatives to the classified documents in the form of summaries, pursuant to Military Commissions Rule of Evidence 505, the analog to the federal court procedures authorized by Section 4 of the Classified Information Procedures Act ("CIPA"). See CITE.

Contrary to their assertions, defense counsel have also had access to a sleep expert, a neuro-imaging specialist, and a psychologist, all at Government expense. See, Attachment 1, Affidavit of Susan J. Crawford, Convening Authority, Office of Military Commissions. Petitioner's expert Dr. Amador met with petitioner in January 2009. Because petitioner failed to participate in the mental health examination, certain expert testimony may be prohibited. Military Commissions Rule of Evidence

302(d), like its counterpart in federal law, provides that the military judge may prohibit expert medical testimony if the accused refuses to cooperate in a mental examination.

In addition to being granted access to every medical doctor who treated petitioner since September 2006, counsel for petitioner sought access to each psychiatric technician and medical corpsman that assisted any physician in treating petitioner since his transfer to Guantanamo Bay. The Military Judge authorized access to those technicians or corpsmen that any physician relied upon in preparing a written report of petitioner for one year before the scheduled mental competency determination. See, Attachment 2, D-078 Ruling. The Military Judge also offered petitioner the option of providing written interrogatories to any medical personnel that treated petitioner prior to his transfer to Guantanamo Bay in September 2006 to obtain additional information that petitioner's counsel deemed relevant. To date, petitioner's counsel have failed to provide any such interrogatories.

The military judge scheduled petitioner's competency hearing to be held on January 19, 2009. On January 13, 2009, petitioner filed an emergency motion in his habeas case asking the district court to enjoin the hearing. Al-Shibh v. Obama, No. 06-1725, dkt. 82 (filed Jan. 13, 2009). After a hearing, the district court denied petitioner's motion. Al-Shibh, Order, dk 85 (D.D.C. Jan. 16, 2009) (Sullivan, J.). The January 2009 competency hearing was later continued by the Military Judge,

and proceedings were stayed pending review under Executive Order 13,492.

In an order entered June 11, 2009, the competency hearing was rescheduled to "proceed on or about 21-25 September 2009." Petitioner filed a motion to delay the competency hearing indefinitely on August 18, 2009. On August 20, 2009, the Military Judge denied petitioner's motion. See, Ruling D-131-132. On September 9, 2009, Petitioner filed a petition for a writ of mandamus claiming that the military commission proceedings were void and a motion seeking a stay of all military commission proceedings.[7] We respond herein to petitioner's claims.

ARGUMENT

I. THE MANDAMUS PETITION SHOULD BE DENIED

A. No Statute Confers Jurisdiction on this Court, and Two Provisions of the MCA Foreclose the Assertion of Jurisdiction

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). Two separate provisions of the MCA expressly foreclose this Court from entertaining petitioner's claims at this juncture.

First, the MCA provides that the "Court of Appeals for the District of Columbia

[7] Petitioner's habeas counsel have indicated that they plan to file a second emergency motion in District Court to enjoin the upcoming competency hearing in the habeas case. That motion is expected to be filed on Wednesday, September 16, 2009.

Circuit shall have exclusive jurisdiction to determine the validity of a final judgment rendered by a military commission (as approved by the convening authority) under this chapter," except that "[t]he court of appeals may not review the final judgment until all other appeals under this chapter have been waived or exhausted." 10 U.S.C. § 950a(g)(1)(B). Thus, as this Court explained in Khadr v. United States, 529 F.3d 1112 (D.C.Cir. 2008), "[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." Id. at 1117. In this case – as in Khadr – there had not yet been a trial and prosecution, much less a conviction, a review of the findings and sentence by the convening authority, and an affirmance of that conviction by the intermediate appellate court (the Court of Military Commission Review). Petitioner has made no attempt to explain why Khadr does not govern this case. This Court's decision in Khadr squarely applies and requires denial of the request for an injunction and dismissal of the mandamus petition.

Second, section 3(a)(1) of the MCA, captioned "PROVISIONS OF CHAPTER SOLE BASIS FOR REVIEW OF MILITARY COMMISSION PRODEDURES AND ACTIONS" also provides:

> Except as otherwise provided in this chapter and notwithstanding any other provision of law (including section 2214 of title 28 or any other habeas corpus provision), no court, justice or judge shall have jurisdiction to hear or consider any claim or cause of action whatsoever,

> including any action pending on or filed after the date of the enactment of the Military Commissions Act of 2006, relating to the prosecution, trial, or judgment of a military commission under this chapter, including challenges to the lawfulness of procedures of military commissions under this chapter.

28 U.S.C. § 950j(b). As the district court observed in denying a similar motion seeking to enjoin military commission proceedings, the language of the statute "withdraws jurisdiction over 'any claim or cause of action whatsoever . . . relating to the prosecution, trial or judgment of a military commission.'" Hamdan v. Gates, (D.D.C. 2008). The sole exception to this bar is jurisdiction "otherwise provided in this chapter," which includes review by this Court of final judgments under 10 U.S.C. 950a (g)(1)(B) after all other appeals have been exhausted.8

Petitioner also maintains that the application of § 950j(b) to what he terms

[8] It is noteworthy that, in requesting extraordinary relief from this Court, the petitioner has bypassed the Court of Military Commission Review (CMCR), which has jurisdiction to hear initial appeals from final judgments of military commissions before they are heard by this Court. CMCR Rule 21(b) does state that all "[p]etitions for extraordinary relief will be summarily denied, unless they pertain to a case in which there is an approved finding of guilty and appellate review has not been waived." However, this rule does not, as the petitioner argues, mean that extraordinary relief may be sought from this Court. To the contrary, the reason for this rule and the reason this Court lacks jurisdiction to hear this petition are one and the same -- Congress has chosen to limit the availability of all appellate review in this context to that which is specifically authorized by the MCA, "notwithstanding any other provision of law," including the All Writs Act, 28 U.S.C. § 1651. Thus, as is the case in this Court, extraordinary relief from the CMCR is barred because "CMCR's authority is limited to interlocutory appeals by the United States under MCA § 950d and RMC 908, cases referred to it pursuant to MCA § 950f and RMC 1111, and petitions for new trial referred to it pursuant to RMC 1210." CMCR Rule 21(b).Where, as here, the statute expressly precludes consideration of the petitioner's claim in any forum until a final judgment has been entered, it should not be read as an invitation to create interlocutory jurisdiction where it does not exist. In this case, the MCA clearly regulates the appropriate timing for "challenges to the lawfulness of procedures of military commissions" under the MCA, whether in the CMCR or in the Court of Appeals for the District of Columbia Circuit. §§ 950g-f. To bring such a challenge in either forum, the petitioner must wait until after a final adjudication of guilt. 10 U.S.C. §§ 950g-f.

"jurisdictional" claims is unconstitutional because it effectively divests the Article III courts of the ability to determine their own jurisdiction, and "from saying what the law is" with respect to claims relating to their own jurisdiction or that of the military commission. Mandamus Pet. at 3-31. But section 950j(b) does no such thing. Instead, in concert with section 950a(g)(1)(B), it merely requires that this Court defer the adjudication of such claims until and a final judgment, and the Court of Military Commission Review has affirmed the conviction after having had the opportunity to address such claims.

Nor is there merit to petitioner's claim that Section 950j(b) is inapplicable to his claim that the MCA is unconstitutional because the bar applies only to claims involving trial procedures and not to facial challenges to the constitutionality of the MCA. There is no textual basis for this argument in the statute, which bars this court from entertaining "any claim or cause of action whatsoever," including but not limited to those enumerated in the statute. In any event, a challenge to the commission's jurisdiction over the defendant is plainly one that "relates to" the trial or prosecution of the defendant for the obvious reason that, in order to try a defendant, the commission must first consider and establish its own jurisdiction over him.

B. Mandamus Is An Extraordinary Remedy Not Warranted Here

Even if this court had mandamus jurisdiction, a writ of mandamus is not

warranted here.[9] This Court 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, 260 (1947)). "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 attain the relief exist[s].'" 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 starts from the premise that issuance of the writ is an extraordinary remedy, reserved 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). Mandamus is not a mechanism to frustrate the regulatory scheme established by Congress. Cf. Air Line Pilots Ass'n, 750 F.2d at 88.

Where claimed injuries are of the type that are properly heard on appeal, the Court will not address the merits of the petitioner's argument. See, e.g., Mallard, 490 U.S. at 309; Kerr, 426 U.S. at 403; In re Executive Office of the President, 215 F.3d at 23. Telecomm. Research & Action Center v. FCC, 750 F.2d 70, 78 (D.C. Cir. 1984) ("TRAC") ("Mandamus is an extraordinary remedy that is not available when review

9 "Before considering whether mandamus relief is appropriate," the Court must first "be certain of [its] jurisdiction." In re Asemani, 455 F.3d at 299 (citing In re Executive Office of the President, 215 F.3d 20, 25 (D.C. Cir. 2000)). Here, as we have explained, the MCA specifically precludes the exercise of jurisdiction until after a final judgment has been issued in the military commission process. Thus, "no court, justice or judge shall have jurisdiction to hear or consider any claim or cause of action whatsoever" (28 U.S.C. § 950j(b)), including a claim for mandamus. relief under the All Writs Act, 28 U.S.C. § 1651.

by other means is possible."). Thus, even in cases where a jurisdictional challenge is raised, "appellate courts are reluctant to interfere" when the jurisdictional question is "reviewable in the regular course of appeal." Roche v. Evaporated Milk Ass'n, 319 U.S. 21, 26 (1943). Mandamus is not a "substitute for appeal . . . even though hardship may result from delay and perhaps unnecessary trial.'" Doe v. Exxon Mobil Corp., 473 F.3d 345, 353 (D.C. Cir. 2007). Here, there is no doubt that petitioner's constitutional challenges to the MCA can be reviewed by this Court after a final judgment, if petitioner is convicted. Accordingly, the exercise of mandamus jurisdiction is not appropriate.

Petitioner argues that direct appeal after a final judgment in this case will not provide appropriate relief because he is invoking the right not to be tried by a tribunal that lacks subject matter jurisdiction. The Supreme Court has spoken forcefully against federal court intervention in analogous circumstances where a petitioner claims his very prosecution would violate his constitutional rights. See, e.g., Watson v. Buck, 313 U.S. 387, 400 (1941) ('No citizen or member of the community is immune from prosecution, in good faith, for his alleged criminal acts. The imminence of such a prosecution *even though alleged to be unauthorized and hence unlawful* is not alone ground for relief in equity which exerts its extraordinary powers only to prevent irreparable injury to the plaintiff who seeks its aid.' Beal v. Missouri Pacific Railroad Corp., 312 U.S. 45, 49. [(1941)]" (emphasis added)). Again, petitioner

fails to distinguish both this Court's prior decision in Khadr v. United States, 529 F.3d 1112 (D.C.Cir. 2008) and the District Court's opinion in United States v. Hamdan, 565 F. Supp. 2d 130, 134-35 (D.D.C., 2008), both of which refused to interfere in military commission proceedings even though the defendants raised constitutional and jurisdictional challenges to those proceedings. As this Court explained in Khadr, "'the denial of a claim of lack of jurisdiction is not an immediately appealable order' because 'the right not to be subject to a binding judgment may effectively be vindicated following final judgment.'" Khadr, 529 F.3d at 141 (quoting Van Cauwenberghe v. Baird, 486 U.S. 517, 527 (1988)). These holdings demonstrate that this Court should not issue the extraordinary remedy sought by petitioner.

Petitioner has been charged in a military commission for war crimes and currently a mental competency determination is pending before the military judge. Depending on the outcome of that issue, the claims raised by petitioner in this Court regarding the military judge's handling of the mental competency issue may well be rendered moot. Petitioner's counsel argues that his constitutional challenges to the MCA should be resolved by the military judge first, in advance of the competency hearing. However, the military judge determined that, because of petitioner's election to represent himself and dismiss his detailed military defense counsel, the issue of his mental competency must first be resolved. The fact that this interferes with petitioner's counsel's trial strategy, or that petitioner does not agree with discovery

decisions made by the military judge in connection with the competency hearing, hardly forms the basis for issuance of an extraordinary writ by this Court.

In short, there is no reason for this Court to step in and disrupt these ongoing proceedings in contravention of well-settled principles of equitable jurisdiction. The Supreme Court has held that when the federal equity power is sought to be invoked against criminal prosecutions, the harm in having to defend against a single criminal prosecution cannot be considered "irreparable" justifying interference. See, Younger v. Harris, 401 U.S. 37, 40 (1971). "The maxim that equity will not enjoin a criminal prosecution summarizes the centuries of weighty experience in Anglo-American law." Stefanelli v. Mindard, 342 U.S. 117, 120 (1951). It would be improvident for an appellate court to wade into this prosecution before the parties have been provided ample opportunity to develop the factual record. Accordingly, even were there mandamus jurisdiction, its exercise would be wholly inappropriate here.

C. The Abstention Doctrine Bars Consideration of Petitioner's Claims

Well-settled principles of abstention also counsel against entertainment of petitioner's claims at this juncture. In Schlesinger v. Councilman, 420 U.S. 738 (1975), the defendant, an Army officer pending trial by court-martial for possession of marijuana, claimed that the court-martial lacked subject matter jurisdiction over the offense, and obtained an order from a federal district court enjoining the proceeding, that was subsequently affirmed. On review, the Supreme Court reversed. It held

that, "when a serviceman charged with crimes by military authorities can show no harm other than that attendant to resolution of his case in the military court system, the federal district courts must refrain from intervention, by way of injunction or otherwise." It therefore required the defendant to exhaust his appellate remedies within the military court system, including review by the Court of Military Appeals (now the U.S. Court of Criminal Appeals for the Armed Forces) – an Article I court -- as a condition precedent to seeking equitable relief in the federal court system. Id. at 758. In particular, it reasoned that, implicit in the Congressional scheme embodied in the [Uniform Code of Military Justice] is the view that the military court system generally is adequate to and will perform its assigned task." 420 U.S. at 758.

Moreover, the Court observed that, where Congress has established a judicial structure possessing special competence to perform assigned tasks, "practical considerations" militate in favor of permitting such courts to "develop the facts, to apply the law in which they are particularly expert, and to correct their own errors." Id. at 756. Such an approach, it reasoned, "ensures that whatever judicial review is available will be informed and narrowed by the agencies' own decisions." Id.; see also New v. Cohen, 129 F.3d 639, 643 (D.C.Cir. 1997) (holding that this Court "must give due respect to the autonomous military judicial system created by Congress."). Finally, the Court distinguished, for purposes of the abstention doctrine, cases in which, in contrast to Councilman's claim that the court-martial lacked subject matter

jurisdiction, the defendants contended that the military lacked personal jurisdiction over them (because they were civilians).

Here, by petitioner's own admission, his principal jurisdictional claim does not involve *personal jurisdiction*, but, as in Councilman, a claim that the military commission lacked subject matter jurisdiction because the MCA is unconstitutional. See Petition for Mandamus at 32 n. 9, 33. This case is therefore governed by the Councilman abstention doctrine. Most significantly, in enacting the MCA, Congress, established a detailed system for independent appellate review, a factor that counseled heavily in favor of abstention doctrine in Councilman. The MCA first provides that an independent military judge, insulated from the influence of superiors, preside over all proceedings by a military commission. See 10 US.C. § 848j. Moreover, it established a Court of Military Commission Review (see 10 U.S.C. § 950f) consisting of three member panels with jurisdiction to address alleged errors of law. Further, as noted above, the legislation establishes a right of appeal to this Court following issuance of a final judgment and review by the CMCR. 28 U.S.C. § 950(g). Finally, it grants the Supreme Court jurisdiction to entertain by writ of certiorari the final judgments of this Court. See 28 U.S.C. § 950g(d).

As the Councilman Court reasoned, the availability of such review with respect to legal and factual claims, particularly by a trained military judge and an intermediate appellate court, established by Congress, ensures that legal and factual claims will

first be addressed by tribunals with particular expertise in addressing them. Not only does the application of such a scheme comport with the express intent of Congress, it ensures that, when judicial review is available, it will be informed by a thorough development of the facts and explication of the law by a specialized system of courts and will often avoid "duplicative proceedings" as a consequence of the resolution of such matters by such tribunals.[10]

In Hamdan v. Rumsfeld, 548 U.S. 557 (2006), the Court rejected the government's argument that Councilman required abstention from intervention in military commission proceedings pending their completion. Distinguishing that case from Councilman, the Hamdan Court reasoned that the bases for abstaining in that case were inapplicable. First, because Hamdan was not a member of the Armed Forces, concerns relating to interference with military discipline were inapplicable. Second, in contrast with the court-martial proceedings to which Councilman was subject, the tribunal was "not part of the integrated system of military courts, complete with independent review panels that Congress had established." Thus, it observed that under the extant Executive Order governing military commission proceedings, "the defendant has no right to appeal any conviction to . . . civilian judges" such as the Court of Appeals for the Armed Forces, an Article I Court. 548 U.S. at 587.

[10] Many of the procedural claims petitioner asserts involve alleged procedural irregularities by the participants in the proceedings of the military commission. Such claims first require an explication of the operative facts, a matter for the military judge in the first instance. And, following such factual determinations and rulings of law, the Court of Military Commission Review, possesses particular competence to address and, if necessary, correct any alleged errors.

The Hamdan Court's rationale for declining to apply the Councilman abstention doctrine to military commission proceedings is manifestly inapplicable to the current military commission system enacted under the MCA. As explained above, not only does the MCA, enacted in the wake of the Hamdan decision, grant the defendant the right of review by a specialized military court, it also includes a provision for appellate review by an Article III court and, ultimately certiorari jurisdiction by the Supreme Court. Consequently, the MCA's judicial review structure militates even more strongly in favor of abstention than was the case in Councilman, where there was neither a mechanism for review by an Article III court nor an opportunity to obtain Supreme Court review via certiorari.

The Hamdan Court also recognized, however, that, even if comity principles militate in favor of abstention – which is the case here – abstention may be inapplicable where the defendant "has raised a substantial argument that the military commission lacks authority to try him" Hamdan, 548 U.S. at 588 n.20. As that Court explained, "we do not apply Councilman abstention when there is a substantial question whether a military tribunal *has personal jurisdiction* over the defendant." Id. at 586 n. 16 (emphasis added). See Councilman, 420 U.S. at 759 (noting that abstention not warranted where the defendant's status as a civilian raised a substantial constitutional question whether he was subject to the jurisdiction of a court martial.)

Even if, contrary to petitioner's own characterization of his jurisdictional claim, it was one involving personal rather than subject matter jurisdiction, he fails to raise any "substantial argument," Hamdan, 548 U.S. at 588 n. 20, requiring an exception to the abstention doctrine. First, to the extent that petitioner's complaints relate to the military judge's alleged mishandling of his competency and jurisdictional claims, and the government's alleged refusal to provide him necessary resources, such matters can hardly be characterized as structural defects in the MCA which -- as a constitutional matter -- divest the commission from asserting jurisdiction over him. Instead, they are matters that are still under advisement by the military judge. If and when petitioner is convicted, such issues can be raised in due course before the CMCR and, eventually, before this Court. Nor does petitioner's claim that the MCA is per se unconstitutional because it confines the scope of its jurisdiction to unlawful *alien* enemy combatants require deviation from the abstention doctrine. This argument in no way casts doubt on the commission's personal jurisdiction over the petitioner.

D. Insofar as the MCA Confines Jurisdiction to Aliens, It Does Not Contravene the Constitution

The MCA provides that "[a]ny alien unlawful enemy combatant is subject to trial by military commission under this chapter." 10 U.S.C. § 948(c). Petitioner maintains (Pet. 36-47) that, insofar as Section 948c confines the jurisdiction of military commissions to aliens and does not also subject citizens to such proceedings, it contravenes the Constitution and that, consequently, it creates a jurisdictional

defect that renders the MCA void *ab initio*. More specifically, petitioner's argument proceeds in the following steps: (1) Congress' authority to convene military commission proceedings is confined and limited by its authority under Art. I, § 8 cl. 10 of the Constitution with authorizes it "to define and punish . . Offenses against the Law of Nations." Pet. 38; (2) the law of nations embraces not only substantive offenses subject to trial by military commission but also the procedures governing the prosecution of such cases (id. at 38-41); (3) under Hamdan, the requirement contained in Common Article III of the 1949 Geneva Conventions that violations of the law of war must be prosecuted by "regularly constituted courts" governs military commission proceedings (id at 42); (4) a military commission proceeding can be regularly constituted only if deviations from court-martial practice are supported by a demonstrable reason for the distinction (id. at 43); and (5) that, because aliens alone are subject to military commission jurisdiction, which is not the case in court-martial practice, they do not qualify as regularly constituted courts under Common Article III and, therefore contravene the Constitution.

The time and space allotted to file this response to the petition does not permit the government to address petitioner's "unequal treatment" claim, predicated upon alienage, in detail at this juncture.[11] Suffice it to say, however, that petitioner's convoluted reasoning is flawed at many steps of this multi-layered analysis.

[11] A more thorough treatment of this claim must await plenary briefing if petitioner is convicted and he seeks post-conviction review in this Court. Should the Court desire more than cursory treatment of the issue at this juncture, we respectfully request that it invite further briefing.

First, contrary to petitioner's submission, nothing in the "define and punish" language of Article I, §8, cl. 10 of the Constitution suggests that the Constitution effectively incorporates the law of nations with regard to *the procedures* under which law of war violations must be tried. As Colonel William Winthrop explained in his seminal treatise on military law, rather than military commissions being predicated upon the "define and punish" clause of Article I, Section 8 of the Constitution (upon which petitioner relies):

> in general, it is those provisions of the Constitution which empower the Congress to "declare war" and "raise armies" and which, in authorizing the initiation of *war* authorize the employment of all necessary and proper agencies for its due prosecution, from which [the military commission] derives its original sanction. Its authority is thus the same as the authority for making and waging war and for the exercise of military government and martial law.

William Winthrop, Military Law and Precedents (2d ed. 1886) (1920 reprint). None of the Constitutional provisions upon which Colonel Winthrop relied as sources of authority to convene military commission proceedings suggests conformity with any particular procedural formula, consistent with the law of nations, much less that such proceedings contain a non-discrimination clause guaranteeing equal treatment to citizens and aliens alike.

On the contrary, with respect to the offense of spying – clearly a crime punishable during war – the Continental Congress, confined the prosecution for that offense to aliens, providing that "all persons *not members of, nor owing allegiance*

to any of the United States of America . . . who shall be found lurking as spies in and about the fortifications or encampments of the Armies of the United States, or any of them, shall suffer death, according to the law of nations . . . ." W. Winthrop, supra, at 765, quoting I Journal of the Continental Congress 450 (Resolution of the Continental Congress., Aug. 21, 1776). The Articles of War of 1806 contained a similar provision, confining prosecution for the crime of spying in time of war to "all persons not citizens of, or owing allegiance to, the United States of America . . . . ." See W. Winthrop, supra, at 766, citing Art. 101, § 2 Articles of War of 1806 (reproduced in W. Winthrop, supra, at 985). That provision remained in place until the inception of the Civil War. Id. at 766. The practice of distinguishing between citizens and aliens for the purpose of fixing the jurisdiction of military courts, which both antedated and followed enactment of the Constitution itself, constitutes strong evidence that such distinctions were understood to be fully consistent with the contemporaneous understanding of the Constitution, including the power of Congress to define and punish violations of the Law of Nations and to declare war. See Hampton & Co. v. United States, 276 U.S. 394, 412 (1928).

Petitioner's argument (Pet. 42) that the military commissions are unlawful because they do not qualify as a "regularly constituted court" under Common Article III of the 1949 Geneva Conventions is also in error. In enacting the MCA, Congress expressly concluded that "a military commission established [thereunder] is a

regularly constituted court, affording all the necessary judicial guarantees which are recognized as indispensable by civilized peoples' for purposes of Common Article 3 of the Geneva Conventions." 10 U.S.C. § 948b(f). Although petitioner now maintains that, such a pronouncement is not binding on the judiciary (Pet. 43), as Justice Kennedy explained in his concurring opinion, at bottom the phrase "regularly constituted courts," depends upon legislatively articulated standards "deliberated upon and chosen in advance of crisis, under a system where the single power of the Executive is checked by other constitutional mechanisms." Id. at 637 (Kennedy, J. concurring in part). In short, in enacting the MCA and in establishing military commissions as "regularly constituted courts" as part of an integrated system of justice separate and distinct from the UCMJ, the President and Congress accomplished precisely what the Hamdan Court invited it to do. See also id. at 636 (Breyer, J. concurring) (noting that "[n]othing prevents the President from returning to Congress to seek the authority he believes necessary" to establish military commissions). A federal statute enacted after the Geneva Conventions, and purporting to interpret them, is controlling on this question.

Even if it were not, the requirements of Common Article III have been fully satisfied here. In the first place, as the plurality opinion in Hamdan observed, the phrase in that Article requiring that a military tribunal afford "all the judicial guarantees which are recognized by civilized peoples" incorporates only "the barest

of those trial protections that have been recognized by customary international law." 548 U.S. at 633. No reasonable argument can be advanced that the MCA fails to satisfy that minimal requirement; on the contrary, it far exceeds it. The distinction between citizens and aliens made by the MCA in time of armed conflict is not in conflict with any such "trial protection." Rather, it involves a fundamental jurisdictional assumption which is as old as the nation itself: that violations of the law of war are ordinarily perpetrated by the nation's enemies, who are ordinarily not persons owing allegiance to the United States and who, consequently, are properly subject to a different regime from that of even disloyal citizens during time of war. See Harisiades v. Shaugnessy, 342 U.S. 580, 587 (1951) ("War, of course, is the most usual occasion for extensive resort to the power" to treat aliens differently).

Moreover, the Supreme Court has made clear that, even in time of peace, federal policies regarding aliens are entitled to a great degree of deference. See, e.g., Nyquist v. Mauclet, 432 U.S. 1, 7 n.8 (1977) ("Congress, as an aspect of its broad power over immigration and naturalization, enjoys rights to distinguish among aliens that are not shared by the States."); Mathews v. Diaz, 426 U.S. 67, 80 (1976) ("The fact that an Act of Congress treats aliens differently from citizens does not in itself imply that such disparate treatment is 'invidious'"). As the Court observed in Diaz;:

> [A]ny policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, *the war power,* and the maintenance of a republican form of government. Such matters are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference. . . . Any rule of

> constitutional law that would inhibit the flexibility of the political branches of government to respond to changing world conditions should be adopted only with the greatest caution.

Diaz, 426 U.S. at 81 & n.17 (emphasis added: internal quotation marks and citations omitted).

II. PETITIONER HAS NOT SHOWN THAT HE IS ENTITLED TO THE EXTRAORDINARY RELIEF OF A PRELIMINARY INJUNCTION

This Court should simply dismiss the mandamus petition for the reasons just explained. In any event, it should not grant petitioner's motion to enjoin the military commission proceedings pending resolution of the petition. A "preliminary injunction is an 'extraordinary and drastic remedy.'" Munaf v. Geren, 128 S. Ct. 2207, 2219 (2008). Petitioner must show "a likelihood of success 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). The court must also consider the injury caused by issuance of the injunction and the public interest. Id.

Petitioner cannot establish any of the preliminary injunction factors. Petitioner cannot show he is likely to succeed on the merits for the reasons just explained: this Court lacks jurisdiction; even were there jurisdiction, mandamus is not warranted; abstention is appropriate; and petitioner's constitutional claim fails on the merits. Moreover, petitioner's claim of irreparable injury is insubstantial because his legal claims can be fully considered on appeal from final judgment. See Khadr, 529 F.3d at 141. Finally, the public interest is not served by an injunction that would not give

"due respect to the . . . military judicial system created by Congress." New, 129 F.3d at 643.

CONCLUSION

For the foregoing reasons, the petition for a writ of mandamus and motion for a stay should be denied.

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Respectfully submitted,

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