IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ABD AL-RAHIM HUSSAIN MOHAMMED AL-NASHIRI, (ISN 10015), *Petitioner*, v. BARACK H. OBAMA, *et al*., *Respondents*.	Civil Action No. 08-cv-1207 (RWR)

RESPONDENTS' COMBINED OPPOSITION TO PETITIONER'S MOTION FOR PRELIMINARY INJUNCTION AND PETITIONER'S MOTION TO SUPPLEMENT AND MEMORANDUM IN SUPPORT OF RESPONDENTS' CROSS-MOTION TO HOLD PETITION IN ABEYANCE

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INTRODUCTION

Twice before Petitioner has brought—unsuccessfully—arguments virtually indistinguishable from those raised here, both in military commission proceedings, *see* AE 104F, Order ¶ 4 (Jan. 15, 2013) (Mem. in Supp. of Pet'r's Mot. for Prelim. Inj., Attach. C), and in federal court, *al-Nashiri v. MacDonald*, No. 3:11-cv-5907, 2012 WL 1642306 (W.D. Wash. May 10, 2012), *affirmed*, 741 F.3d 1002 (9th Cir. 2013). Notably, consistent with those previous results, every federal court that has been asked to enjoin ongoing prosecutions before a military commission convened pursuant to the Military Commission Acts of 2006 and 2009 has declined to short-circuit the congressionally mandated process. Rather, each court has held that defendants appearing before these military commissions receive procedural protections and independent appellate review sufficient to protect their rights and, so, face no irreparable injury warranting enjoining an ongoing prosecution. Accordingly, each has abstained under the principles of *Schlesinger v. Councilman*, 420 U.S. 738 (1975). There is no reason for this Court to do otherwise.

Petitioner Abd Al-Rahim Hussein Muhammed Abdu Al-Nashiri is currently facing trial before a military commission on numerous charges, including murder in violation of the law of war, for his role in several al Qaida terrorist attacks, among them the 2000 bombing of the *U.S.S. Cole* in which 17 American sailors died. As part of that trial, he is entitled to argue—as he does here—that his alleged offenses are not triable by military commission because they did not occur in the context of, or associated with, hostilities. If accepted by the commission—or, on appeal, by either the United States Court of Military Commission Review ("USCMCR") or the Court of Appeals for the D.C. Circuit—Petitioner's claims would require that the commission charges against him be dismissed. Consequently, this case falls squarely within the set of cases as to which *Councilman* instructs that the Court refrain from exercising its equitable jurisdiction. First, as with the military courts-martial system at issue in *Councilman*, Congress designed the military commission system to ensure the vindication of Petitioner's rights through procedural

protections that guarantee the fundamental fairness of the proceedings. Moreover, unlike the military defendant in *Councilman*, Petitioner is assured appellate review in an Article III court, the D.C. Circuit, if convicted. Second, the injury Petitioner faces—the burden of defending himself in a forum the jurisdiction of which he contests—is no different or greater than the rigors of trial faced by any criminal defendant, and is insufficient as a matter of law to justify a federal court's intervention in an ongoing criminal prosecution. Finally, the issue that Petitioner asks this Court to resolve—whether the offenses with which he is charged occurred in the context of, or associated with, a conflict subject to the laws of war—concerns matters on which the military commissions—as the congressionally designated trial forum— possess expertise that can inform any subsequent appellate review in the D.C. Circuit. Congress intended that the military commissions resolve these issues in the first instance, a legislative allocation of responsibility that a federal court is bound in equity to respect. Abstention under *Councilman*, therefore, is required, and Petitioner's Motion for Preliminary Injunction should be denied.

Further, because the issues raised in the proposed Supplemental Petition are identical to those raised in Petitioner's Motion for Preliminary Injunction, Petitioner's prayer for relief in the Supplemental Petition would be futile. Therefore, Petitioner's Motion to Supplement should be denied.

Finally, the same considerations that counsel this Court to abstain from exercising equitable jurisdiction to enjoin the military commission proceedings also counsel that it avoid other proceedings that require resolution of issues that substantially overlap with issues central to (and thus that could potentially interfere with) Petitioner's ongoing military commission proceedings. Respondents therefore respectfully move this Court to hold the habeas petition in abeyance, and stay all proceedings in this action, pending completion of the ongoing military commission proceedings against Petitioner and, should he be convicted, any subsequent appeals, as three other judges on this Court have done in similar circumstances.

This memorandum provides points and authorities in support of Respondents' Cross-Motion to Hold Petition in Abeyance and serves as the combined opposition to: (1) Petitioner's[1] Motion for Preliminary Injunction, in which he seeks to halt military commission proceedings, Mem. in Supp. of Pet'r's Mot. for Prelim. Inj. at 1 ("Pet'r Mem."), ECF No. 229; and (2) Petitioner's Motion to Supplement, in which he moves this Court to file a supplemental petition raising the "sole claim" that he cannot be tried by the military commission for "offenses that did not occur in a recognized field of hostilities," Pet'r Mot. to Supplement at 5, ECF No. 230.[2]

BACKGROUND

I. THE MILITARY COMMISSIONS ACT OF 2009

It is well-established that the "trial of unlawful combatants, by 'universal agreement and practice,' are 'important incident[s] of war.'" *Hamdi v. Rumsfeld*, 542 U.S. 507, 518 (2004) (plurality opinion) (citations omitted) (quoting *Ex Parte Quirin*, 317 U.S. 1, 28 (1942)). The Supreme Court has long recognized not only the authority to hold belligerents for the duration of ongoing hostilities, but the established "practice of trying, before military tribunals without a jury, offenses committed by enemy belligerents against the law of war." *Quirin*, 317 U.S. at 41. An "important incident to the conduct of war is the adoption of measures by the military command not only to repel and defeat the enemy, but to seize and subject to disciplinary measures those enemies who in their attempt to thwart or impede our military effort have violated the law of war." *Id.* at 28-29. As the Supreme Court explained, "[u]nlawful combatants are . . . subject to capture and detention, but in addition they are subject to trial and punishment

[1] On July 10, 2009, Scott Fenstermaker filed a Motion to Substitute Counsel and for Related Miscellaneous Relief seeking to remove the Court-appointed Federal Public Defender of Nevada from this proceeding. *See* ECF No. 148. That motion is fully briefed and remains pending before the Court notwithstanding the recent submissions substituting Nancy Hollander, Richard Kammen, and Michel Paradis as counsel of record for Petitioner, *see* ECF Nos. 212-13.

[2] Ordinarily Petitioner's Motion to Supplement would be addressed before his Motion for a Preliminary Injunction. Because the reasons for denying the Motion for Preliminary Injunction form the basis for denying the Motion to Supplement, the Government first addresses the injunction request. Similarly, because those reasons provide support for Respondents' Motion to Hold Petition in Abeyance, the Government addresses its motion last.

by military tribunals for acts which render their belligerency unlawful." *Id.* at 31; *see also id.* at 29 (asking whether it is "within the constitutional power of the national government to place petitioners upon trial before military commission" and concluding that it is).

Congress has invoked this well-settled power through the Military Commissions Act of 2009, Pub. L. No. 111-84, 123 Stat. 2190 (codified at 10 U.S.C. §§ 948a *et seq.*) ("2009 MCA" or "MCA"), which supersedes but substantially re-enacts the Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 ("2006 MCA"). Through the MCA, Congress authorized the President to establish military commissions to try alien unprivileged enemy belligerents for violations of the law of war and other offenses triable by military commission. 10 U.S.C. § 948b(a)-(b). The statute defines "unprivileged enemy belligerent" as an individual (other than someone qualifying under the Geneva Conventions as a prisoner of war) who: "(A) has engaged in hostilities against the United States or its coalition partners; (B) has purposefully and materially supported hostilities against the United States or its coalition partners; or (C) was a part of al Qaeda at the time of the alleged offense." *Id.* § 948a(7). An "alien" is "an individual who is not a citizen of the United States." *Id.* § 948a(1).

When the Government seeks to try an individual before a military commission under the MCA, the first step is the "swearing" of charges and specifications against the individual by a member of the armed forces having knowledge or reason to believe that the matters alleged are true. 10 U.S.C. § 948q. Upon receipt of the charges, the Secretary of Defense or his designee—known as the Convening Authority—considers the charges and supporting evidence provided by the prosecution, and decides the proper disposition of the charges. *See id.* § 948h. Only when the Convening Authority receives written advice from his legal advisor, and thereafter independently concludes that there are reasonable grounds to believe an offense triable by military commission has been committed and that the accused committed it, may the Convening Authority refer the charge and specification to trial by military commission. *See* Rules for

Military Commissions 401, 406, 601(d).[3] A military commission is presided over by an appointed military judge, who must also be a commissioned officer, *id.* § 948j(a)-(b), and is composed of at least five commissioned officers of the armed forces, except in capital cases, where in all but extraordinary circumstances the number may be no less than twelve, 10 U.S.C. §§ 948i(a), 948m(a), 949m(c).

The MCA commission extends to trials for any of the 32 offenses codified in the MCA (*e.g.*, murder in violation of the law of war, terrorism, etc.), *see* 10 U.S.C. § 950t; offenses under 10 U.S.C. § 904 (aiding the enemy) and *id.* § 906 (espionage); or any offense made punishable by the law of war, 10 U.S.C. § 948d. Only offenses "committed in the context of and associated with hostilities" are triable by military commission, *id.* § 950p(c), with "hostilities" defined as "any conflict subject to the laws of war," *id.* § 948a(9). The MCA provides that jurisdiction exists to try persons for these offenses "whether such offense was committed before, on, or after September 11, 2001." *Id.* § 948d. The MCA expressly provides that "[a] military commission is a competent tribunal to make a finding sufficient for jurisdiction." 10 U.S.C. § 948d; *see also* R.M.C. 201(b) ("A military commission always has jurisdiction to determine whether it has jurisdiction.").

In addition, the MCA provides defendants a panoply of procedural protections to ensure the fundamental fairness of the proceedings, including, for example: the right to have military defense counsel appointed,[4] 10 U.S.C. § 948k; the right to retain private civilian counsel, *id.* § 949c; the right to an impartial judge and trier of fact, *see id.* § 949f(a) (allowing the accused to challenge for cause the military judge and the members of the military commission); the presumption of innocence until proven guilty beyond a reasonable doubt, *id.* § 949*l*; the right to

[3] Rules of procedure for military commissions are set forth in the Rules for Military Commissions, Part II of the Manual for Military Commissions (2012) (published pursuant to 10 U.S.C. § 949a), available at http://www.mc.mil/Portals/0/pdfs/2012ManualForMilitaryCommissions.pdf, hereinafter referred to as "R.M.C."

[4] In Petitioner's case, the right to an additional counsel (including a civilian) who is learned in the law relating to capital cases. 10 U.S.C. § 959a(b)(2)(C)(ii).

be present during trial, *id.* § 949a(b)(2)(B); and rights to discovery, to disclosure of exculpatory evidence, and to call witnesses, *id.* § 949j.

If convicted by a military commission, a defendant may invoke an extensive appellate review process. First, the Convening Authority must review any conviction. The Convening Authority has the discretion to dismiss any charge on which an accused was found guilty; to convict the accused instead of a lesser included offense; and to approve, disapprove, suspend, or commute (but not enhance) the sentence rendered by the commission in whole or in part. 10 U.S.C. § 950b(c). After review by the Convening Authority, cases are automatically referred, absent an express waiver by the accused, for review by a panel of no less than three appellate military judges of the USCMCR. *Id.* §§ 950c, 950f. Of note, USCMCR review is not waivable in capital cases. *Id.* § 950c(b)(1). The USCMCR may affirm only those verdicts of guilt and the resulting sentences as it "finds correct in law and fact . . . on the basis of the entire record," and in doing so is authorized to "weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact . . . ." *Id.* § 950f(d).

Most importantly, after review by the USCMCR, an accused who has been found guilty of any offense has an appeal as of right to the U.S. Court of Appeals for the District of Columbia Circuit, to which Congress has extended "*exclusive jurisdiction* to determine the validity of a final judgment rendered by a military commission (as approved by the convening authority and, where applicable, the [USCMCR])." *Id.* § 950g(a), (c) (emphasis added). The scope of the D.C. Circuit's review encompasses all "matters of law, including the sufficiency of the evidence to support the verdict." *Id.* § 950g(d). Beyond the D.C. Circuit, review is available in the Supreme Court by writ of certiorari. *Id.* § 950g(e).

II. PETITIONER'S MILITARY COMMISSION AND RELATED PROCEEDINGS

A. Swearing and Referral of Charges Against Petitioner

Petitioner is a Saudi national currently detained at the U.S. Naval Station at Guantanamo Bay, Cuba[5] and facing charges before a military commission convened pursuant to the MCA. The current charges pending against Petitioner, who faces a maximum penalty of death, were sworn on September 15, 2011, and relate to his alleged role in three terrorist attacks perpetrated by al Qaida: (1) the 2000 attempted bombing of the United States Navy destroyer USS The Sullivans (DDG 68); (2) the 2000 bombing of the United States Navy destroyer USS Cole (DDG 67) that killed seventeen American sailors; and (3) the 2002 bombing of a French oil tanker that killed one crew member. *See* Attach. A (Al-Nashiri Charge Sheet, as amended by Convening Authority for referral) ("Charge Sheet"). The charges also allege that Petitioner "assisted in [an] al Qaida plot, simultaneous attacks on United States embassies in Kenya and Tanzania in East Africa." *Id.* at 7, Charge V ¶ 5. On September 28, 2011, the Convening Authority convened a military commission for the trial of Petitioner and referred the sworn charges, as amended, to the commission. Attach. B (Directions of Convening Authority).

There have been extensive proceedings before the military commission in the more than two-and-a-half years since charges were referred: Petitioner has filed more than 220 motions; the government has filed more than 60, and the commission has held 27 days of hearings and issued at least 150 orders.[6] Of particular relevance here is Petitioner's motion to dismiss, filed before the commission in August 2012, in which he raised the same underlying claim he raises here, that "none of the allegations occurred in the context of or were associated with a conflict subject

[5] Petitioner is detained pursuant to the 2001 Authorization for the Use of Military Force, as informed by the law of war, which permits the United States to detain persons who were part of or substantially supported al Qaida, Taliban, or associated forces. Pub. L. No. 107-40, § 2(a), 115 Stat. 224 (2001); *see also* National Defense Authorization Act of 2012, Pub. L. No. 112-81, § 1021(a), (b)(2), 125 Stat. 1298, 1562; *Al-Adahi v. Obama*, 613 F.3d 1102, 1103 (D.C. Cir. 2010). Petitioner has challenged the legality of his detention in this habeas action.

[6] To view the docket for Petitioner's military commission proceedings, open http://www.mc.mil/CASES/MilitaryCommissions.aspx in a web browser and click the link on that page labeled *USS Cole: Abd al-Rahim Hussein Muhammed Abdu Al-Nashiri (2)*.

to the law of war." Pet'r Mem. at 7. The military commission judge found that the nexus to hostilities "is a question of fact and an element of proof, which must be carried by the government" and denied Petitioner's motion "without prejudice, with leave to file for reconsideration at an appropriate time." AE 104F ¶ 4 (Pet'r Mem., Attach. C).

B. Petitioner's Unsuccessful Suit for Declaratory Judgment Raising the Same Claims Raised Here

Petitioner's motion to dismiss before the military commission was not the first time he sought to end the military commission proceedings on the same grounds he presents here. In 2012, the Honorable Judge Robert J. Bryan, United States District Judge for the Western District of Washington, dismissed an action filed by Petitioner in that court "seeking a declaration that the military commission does not have jurisdiction to hear the charges against him because the events giving rise to the charges 'did not occur, as a matter of law, in the context of and [were] not associated with hostilities.'" *Al-Nashiri*, 2012 WL 1642306 at *1 (quoting Complaint, Dkt. No. 1). The court held that it lacked subject-matter jurisdiction to hear the complaint and that, even if it possessed jurisdiction, it would abstain under *Councilman*. *Id.* at *11. The dismissal for lack of subject-matter jurisdiction was upheld by the Ninth Circuit Court of Appeals, which declined to address the *Councilman* issue as unnecessary for resolution of the case. *Al-Nashiri v. MacDonald*, 741 F.3d 1002, 1007 (9th Cir. 2013) (holding that Petitioner's challenge fell within the jurisdiction-stripping provision of the MCA, 28 U.S.C. § 2241(e)(2)) .

ARGUMENT

I. THE PRINCIPLES OF COMITY ARTICULATED IN *COUNCILMAN* REQUIRE THAT THE COURT DECLINE TO ENJOIN PETITIONER'S ONGOING MILITARY COMMISSION PROCEEDINGS.

Habeas "is, at its core, an equitable remedy." *Schlup v. Delo*, 513 U.S. 298, 319 (1995). Here, *Councilman* instructs that the Court should abstain from exercising its equitable

jurisdiction to enjoin Petitioner's ongoing military commission proceedings.[7] Congress has established a military commission system that grants alien unprivileged enemy belligerents facing trial an array of procedural protections and rights, including appointed military counsel, the right to retain private counsel, and the right to seek discovery. Most importantly, an accused has the right to appeal any adverse decision to the D.C. Circuit, an Article III tribunal completely independent of military control or influence. There is no reason to believe that this integrated system of military trial and Article III review is anything less than fully capable of vindicating Petitioner's rights.

Moreover, the core issue Petitioner raises here—whether the offenses with which he is charged occurred in the context of or were associated with a conflict subject to the laws of war—is also central to the charges he faces in the military commission and, as required by the terms of

[7] Although the Court need not reach other jurisdictional questions because the *Councilman* issue is dispositive, Respondents do not concede that this Court has jurisdiction to grant the preliminary injunction sought. The relevant inquiry is whether "petitioners' claims [are] the sort that may be raised in a federal habeas petition under [28 U.S.C.] section 2241." *Aamer v. Obama*, 742 F.3d 1023, 1030 (D.C. Cir. 2014). Challenges to the fact or duration of detention "lie at the heart of habeas corpus." *Id.* at 1030 (citing *Preiser v. Rodriguez*, 411 U.S. 475, 484 (1973)). In this Circuit, habeas extends to claims challenging conditions of confinement, *id.* at 1032, and "is available not only to an applicant who claims he is entitled to be freed of all restraints, but also to an applicant who protests his confinement in a certain place, or under certain conditions, that he claims vitiate the justification for confinement," *Creek v. Stone*, 379 F.2d 106, 109 (D.C.Cir.1967).

But the relief Petitioner seeks in his Motion for Preliminary Injunction and in his Supplemental Petition does not go to any aspect of his confinement, nor does he allege that his confinement will change in place, character, condition, or *duration* if the relief he seeks is granted. *See* Pet'r Mot. for Prelim. Inj., Proposed Order, ECF No. 228 (seeking the Court to require Respondents to ensure that no additional charges are sworn or referred against Petitioner and that all ongoing Military Commission proceedings are halted); Supp. Pet., ECF No. 233, 14 (seeking a writ of habeas corpus to enjoin Respondents from trying Petitioner before a military commission, a declaratory judgment concerning the existence of an armed conflict, and a writ of mandamus directing Respondents to rescind the orders that established the military commission). *Contrast Hamdan v. Rumsfeld*, 344 F. Supp. 2d 152, 173 (D.D.C. 2004) (ordering that the petitioner not be tried before pre-MCA military commission and that he be "released from the pre-Commission detention wing of Camp Delta [at Guantanamo] and returned to the general population" of detainees "unless some reason other than the pending charges against him requires different treatment"), *rev'd*, 415 F.3d 33 (D.C. Cir. 2005) *rev'd and remanded*, 548 U.S. 557 (2006). Because the MCA vests exclusive jurisdiction over challenges to military commission proceedings in the D.C. Circuit, 10 U.S.C. § 950g, if any Court were to have jurisdiction over Petitioner's challenge, it would be the D.C. Circuit on mandamus in relation to its exclusive jurisdiction. *See Telecomms. Research & Action Ctr. v. F.C.C.*, 750 F.2d 70, 74-77 (D.C. Cir. 1984).

The Court need not reach this question, however, because the issue of *Councilman* abstention is sufficient to dispose of the Motion for Preliminary Injunction without addressing the merits. *See Sinochem Int'l Co. Ltd. v. Malay. Int'l Shipping Corp.*, 549 U.S. 422, 431 (2007) ("[A] federal court has leeway to choose among threshold grounds for denying audience to a case on the merits." (internal quotation marks and citation omitted)).

the MCA, will be adjudicated as part of those proceedings. Indeed, the military judge presiding over the commission has already determined that jurisdiction has been established, but that the government has the burden to demonstrate beyond a reasonable doubt that each of the offenses was committed in the context of and associated with hostilities. AE 104F (Pet'r Mem., Attach. C). Congress has decided that this issue—and any jurisdictional implications that may result—should be decided by a military commission in the first instance. Respect for Congress's judgment that military commissions possess the requisite expertise to properly fulfill their role, as trial forums, to adjudicate the existence of "hostilities" and "armed conflict" under the international law of war, and considerations of comity for the congressionally mandated tribunal, dictate that the commission be allowed to render a final judgment before this or any other court decides the issue.

Finally, Petitioner alleges no great and immediate harm that, if it exists, warrants judicial intervention in the normal course of proceedings in his military commission: although Petitioner contests the commission's jurisdiction over the *offenses* with which he has been charged, he raises no argument that Congress lacks constitutional power to subject *him* to the jurisdiction of a military court. *Councilman* abstention is therefore appropriate here.[8]

A. Principles of *Councilman* Abstention

The question of the Court's equitable jurisdiction in this case is concerned "not with whether the claim falls within the limited jurisdiction conferred on the federal courts, but with

[8] Most of the arguments of *amici curiae* David Glazier and Retired Military Admirals et al. have not been asserted by Petitioner in this Court. *See, e.g.*, Proposed Br. for *Amici Curiae* Retired Military Admirals et al. 9-13 (arguing that the commission proceedings violate due process retroactivity and ex post facto principles); Proposed Br. for *Amicus Curiae* David Glazier 10-11 (arguing that acts of terrorism are not acts of war under international law). Although the Government disagrees with these arguments, this brief does not address them because they have not been raised by Petitioner himself and thus are not properly before this Court. *See In re Verizon Internet Servs., Inc.*, 240 F. Supp. 2d 24, 42 (D.D.C. 2003) (Bates, J.) (declining to address an issue briefed in full by *amici* but addressed only by "two sentences and a footnote" in the allied party's brief because, "[u]nless raised by the parties, a court normally should not entertain statutory or constitutional challenges asserted solely by *amici*") *rev'd on other grounds sub nom. Recording Indus. Ass'n of Am., Inc. v. Verizon Internet Servs., Inc.*, 351 F.3d 1229 (D.C. Cir. 2003). Most of the remaining *amici* arguments relate to the merits of Petitioner's argument concerning the connection of his offenses to hostilities, an argument that, as explained herein, this Court should not reach.

whether consistently with the principles governing equitable relief the court may exercise its remedial powers." *Councilman*, 420 U.S. at 754. In *Councilman*, the Supreme Court addressed that question in the context of a suit brought by an active-duty officer seeking to enjoin ongoing court-martial proceedings arising from his alleged off-base sale and possession of marijuana. 420 U.S. at 739-40, 761. Councilman argued that the court-martial lacked jurisdiction to try him because the charges against him were not "service connected," and therefore that he would "suffer great and irreparable damage," and "(might) be deprived of his liberty without due process," if his court-martial were not enjoined. *Id.* at 741-42. The Supreme Court rejected Councilman's arguments, holding that "the balance of factors governing exercise of equitable jurisdiction by the federal courts normally weighs against intervention, by injunction or otherwise, in pending court-martial proceedings." *Id.* at 740.

The Court first rejected Councilman's argument that he would incur "great and irreparable damage" if his court-martial proceeded. *Id.* at 754 (internal quotations omitted). Rather, observing that Councilman might be acquitted of the charges against him, and that a conviction, if any, might be reversed on appeal, the Court concluded that "Councilman was 'threatened with (no) injury other than that incidental to every criminal proceeding brought lawfully and in good faith,'" *id.*, which could not by itself "be considered 'irreparable' in the special legal sense of that term." *Id.* at 754-755 (quoting *Douglas v. City of Jeannette*, 319 U.S. 157, 164 (1943) (alteration in original), and *Younger v. Harris*, 401 U.S. 37, 46 (1971)).

The Court next concluded that the same "considerations of comity" that "preclude equitable intervention" by federal courts into state criminal prosecutions "except in extraordinary circumstances," and "unless the harm sought to be averted is 'both great and immediate,'" and "'cannot be eliminated by . . . defense against a single criminal prosecution,'" *Councilman*, 420 U.S. at 756 (quoting *Fenner v. Boykin*, 271 U.S. 240, 243 (1926)), "apply in equal measure to the balance governing the propriety of equitable intervention in pending court-martial proceedings."

Id. at 757. Also applicable, the Court stated, are the considerations that "underlie the requirement of exhaustion of administrative remedies," specifically, "the need to allow agencies" possessed of "special competence" to "develop the facts" and "apply the law in which they are peculiarly expert." *Id.* at 756. In the case of military personnel being subjected to courts-martial, that expertise, and the need to avoid undue interference, arose from the specialized "laws and traditions" developed during the military's long history, and the respect for duty and discipline on which the military must insist in order to "perform its vital role." *Id.* at 757.

Of particular relevance for purposes of this case, the Court observed further that, in enacting the Uniform Code of Military Justice, "Congress attempted to balance these military necessities against the equally significant interest of fairness to servicemen charged with military offenses," and to that end "created an integrated system of military courts and review procedures, a critical element of which [was] the Court of Military Appeals, consisting of civilian judges completely removed from all military influence or persuasion." *Id.* at 757-58 (internal quotation marks and citations omitted). The Court explained that the judgment of Congress embodied in this scheme, that "the military court system generally is adequate to and responsibly will perform its assigned task . . . must be respected," and accordingly "it must be assumed that the military court system will vindicate servicemen's constitutional rights." *Id.* at 758. The Court held therefore "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." *Id.* at 758.

In so holding, the *Councilman* Court found that earlier precedents allowing collateral relief for civilians before exhaustion of remedies in the military system were inapplicable, because "[i]n those cases, the habeas petitioners were civilians who contended that Congress had no constitutional power to subject them to the jurisdiction of courts-martial." *Id.* at 759. Thus, the Court explained, intervention was appropriate in those earlier cases because it would have

been "'especially unfair to require exhaustion . . . when the complainants raised substantial arguments denying the right of the military to try them at all,'" and because "[t]he constitutional question presented turned on the status of the persons as to whom the military asserted its power," a question to which "'the expertise of military courts [did not] extend[ ].'" *Id.* (quoting *Noyd v. Bond*, 395 U.S. 683, 696 n.8 (1969)). The Court thus drew a sharp distinction between challenges asserting that the military justice system had no jurisdiction over the *person* being tried and challenges alleging that the *offense charged* was not amenable to military prosecution. "There [was] no question," the Court observed, "that [Councilman was] subject to military authority and in proper cases to disciplinary sanctions levied through the military justice system," and it saw "no injustice in requiring [him] to submit to a system established by Congress and carefully designed to protect not only military interests but his legitimate interests as well." *Id.* at 759-60. This was all the more so where the issue raised by Councilman in his collateral attack—whether the offenses with which he was charged were service-connected—"turn[ed] on the precise set of facts in which the offense has occurred" and on "matters as to which the expertise of military courts is singularly relevant, and their judgments indispensable to inform any eventual review in Art. III courts." *Id.* at 760.

B. *Councilman* and the MCA

Every judge to consider the question—including three judges on this Court and a the district judge who dismissed Petitioner's prior declaratory judgment action that raised the same claims he raises here—has recognized the strong parallels between the military courts at issue in *Councilman* and the MCA-authorized military commissions here. Consequently, each of these courts has abstained under the principles of *Councilman* where, as here, a detainee has sought to enjoin or declare invalid an ongoing MCA-authorized military commission. *See Al-Nashiri*, 2012 WL 1642306; *Khadr v. Obama*, 724 F. Supp. 2d 61, 64-70 (D.D.C. 2010) ("*Khadr III*") (Bates, J.); *Al Odah v. Bush*, 593 F. Supp. 2d 53, 57-60 (D.D.C. 2009) (Kollar-Kotelly, J.);

Khadr v. Bush, 587 F. Supp. 2d 225, 230-34 (D.D.C. 2008) ("*Khadr II*") (Bates, J.); *Hamdan v. Gates*, 565 F. Supp. 2d 130, 136-37 (D.D.C. 2008) ("*Hamdan II*") (Robertson, J.). *But cf. Hamdan v. Rumsfeld*, 548 U.S. 557, 586 (2006) ("*Hamdan I*") (declining to abstain from exercising equitable jurisdiction over a military commission convened under executive, not congressional, authority prior to passage of the MCA).

As in those decisions, so, too, *Councilman* is dispositive here. First, here, as there, the challenged prosecution is taking place within "an integrated system of military courts and review procedures," established by Congress, that balances military necessity and "the equally significant interest of ensuring fairness" to the accused, most critically by providing for independent review by civilian judges insulated from military persuasion and influence (here, the Article III D.C. Circuit; in *Councilman*, the Article I Court of Military Appeals). Under such circumstances the Court may assume, indeed, should assume, that the military court system—with its "provision for appellate review by independent civilian judges"—will vindicate the rights of the accused. *Hamdan I*, 548 U.S. at 586; *see also Councilman*, 420 U.S. at 757-58.

As importantly, the issues raised by the Petitioner's collateral attack involve "matters of judgment that . . . will turn on the precise set of facts in which the offense has occurred," matters on which military courts possess expertise that may inform any subsequent review in an Article III court. *See Councilman*, 420 U.S. at 760. And insofar as the questions presented also concern matters that Congress has entrusted to the military commissions for initial decision, the Court should respect the judgment of Congress that the military commissions "generally [are] adequate to and responsibly will perform [their] assigned task." *Id.* at 758. All these factors strongly favor *Councilman* abstention in this case.

Finally, Petitioner has alleged no harm other "than that attendant to resolution of his case in the military court system," *Councilman*, 420 U.S. at 754, 758, if his trial is allowed to proceed.

As *Councilman* held, such harm is simply not to "be considered 'irreparable' in the special legal sense of that term." *Id*. at 755.

1. Congress has established a robust military commission system, integrated with independent judicial review, fully capable of vindicating Petitioner's rights.

The Congressionally established system of military commissions before which Petitioner is to be tried is fully analogous to the system of courts-martial at issue in *Councilman.* First, Petitioner's trial will occur in a system established by Congress that is designed to protect both the military's and Petitioner's interests. Specifically, Petitioner is guaranteed the assistance of an appointed military counsel and the right to retain civilian counsel, 10 U.S.C. §§ 948k, 949c; the right to challenge for cause any and all members of the commission and the appointed judge, *see id.* § 949f; the presumption of innocence, *id.* § 949l (c)(1); rights to discovery, to exculpatory evidence, and to call witnesses, *id.* § 949j; and the right to be present during trial, *id.* § 949a(b)(2)(B). Most critically, this system includes an appeal of right "with respect to matters of law, including the sufficiency of the evidence to support the verdict," to the D.C. Circuit—"consisting of civilian judges 'completely removed from all military influence or persuasion,'" *Councilman*, 420 U.S. at 758—to determine the validity of a final judgment rendered by a military commission and approved by the Convening Authority. 10 U.S.C. § 950g.

This Congressional authorization and these statutorily established protections readily distinguish Petitioner's military commission from the Executive Branch-authorized tribunals at issue in *Hamdan I.* There, the Supreme Court declined to abstain because the tribunal was not "part of [an] integrated system of military courts . . . that Congress ha[d] established" and the system of review "clearly lack[ed] the structural insulation from military influence that characterizes the Court of Appeals for the Armed Forces [the successor to the Court of Military Appeals in *Councilman*]." 548 U.S. at 587-88. In contrast, the protections available to Petitioner demonstrate, as in *Councilman*, "that the military court system" Congress has fashioned under

the MCA "generally is adequate to and responsibly will perform its assigned task" of "ensuring fairness" to the accused. 420 U.S. at 757-58. As in *Councilman*, "this congressional judgment must be respected," and this Court "must . . . assume[ ] that the military court system will vindicate [defendants'] constitutional rights." *Id.* at 758.

Notably, the district judge who originally enjoined the military commission proceedings at issue in *Hamdan I* held that the 2006 MCA cured the infirmities identified by the Supreme Court in *Hamdan I*. *See Hamdan II*, 565 F. Supp. 2d 130 (Robertson, J.). As a result of the passage of the 2006 MCA, Judge Robertson reversed his prior ruling (in which he refused to abstain under *Councilman*) instead holding that both Congress's authorization and the statutorily required appeal as of right to an Article III court disposed of his prior concerns:

> Considerations of comity were inapplicable when Hamdan's petition was first before me in 2004 because, as I said then, "whatever can be said about the Military Commission established under the President's Military Order, it is not autonomous, and it was not created by Congress." *Hamdan [v. Rumsfeld]*, 344 F. Supp. 2d [152,] 157 [(D.D.C. 2004)]. With the enactment of the MCA, that is no longer the case: "Hamdan is to face a military commission . . . designed . . . by a Congress that . . . act[ed] according to guidelines laid down by the Supreme Court." *Hamdan [v. Rumsfeld]*, 464 F. Supp. 2d [9,] at 18 [(D.D.C. 2006)]. Additionally, because the MCA gives Hamdan an appeal of right to an Article III court, direct review will be even more "removed from all military influence or persuasion" than in *Councilman*.

Hamdan II, 565 F. Supp. 2d. at 136; *see also Khadr II*, 587 F. Supp. 2d at 231 (finding that "[t]he system established by the [2006] MCA is worthy" of the "'respect [due] to the autonomous military judicial system created by Congress'" because "direct review of the military commission's final judgment is entrusted to Article III judges who are unquestionably 'removed from all military influence or persuasion'") (quoting *New v. Cohen*, 129 F.3d 639, 643 (D.C. Cir. 1997) and *Councilman*, 420 U.S. at 758); *Al Odah*, 593 F. Supp. 2d at 58 ("Abstention reflects the appropriate level of deference for a system enacted by Congress, signed into law by the President, and designed in accordance with the Supreme Court's precedents.").

The same reasoning applies to commission proceedings brought under the 2009 MCA, and compels the conclusion that abstention is required in this case. *Khadr III*, 724 F. Supp. 2d at 68 (applying *Councilman* abstention because "[t]he review procedures created by the Military Commissions Act of 2009 have 'the structural insulation from military influence that characterizes the Court of Appeals for the Armed Forces,' and thus bear sufficient 'conceptual similarity to state courts to warrant invocation of abstention principles'" (quoting *Hamdan I*, 548 U.S. at 587-88)); *see also Al-Nashiri*, 2012 WL 1642306 at *10 (finding that "Congress has created a specific forum for Al-Nashiri to obtain relief, if he is so entitled").

It is for this reason that these courts have been unanimous in declining to exercise equitable jurisdiction to enjoin ongoing military commission proceedings brought under the MCA. The cases Petitioner cites, *see* Pet'r Mem. at 20-22, in his attempt to overcome this consensus are inapplicable here because they all concerned military commissions convened pursuant to inherent executive authority, rather than pursuant to a Congressionally enacted statute that guarantees procedural rights and independent judicial review. *See Hamdan I*, 548 U.S. at 586-88 (enjoining military commission that was not "part of [an] integrated system of military courts . . . that Congress ha[d] established" and the system of review "clearly lack[ed] the structural insulation from military influence that characterizes the Court of Appeals for the Armed Forces"); *Hicks v. Bush*, 397 F. Supp. 2d 36, 43 (D.D.C. 2005) (enjoining military commission convened by executive order during pendency of Supreme Court case that would address whether those military commissions "violate[ ] the separation of powers based on a lack of sufficient congressional authorization"); *Quirin*, 317 U.S. at 23, 25 (using habeas proceedings to affirm convictions by military commission convened pursuant to presidential proclamation with no independent review).[9]

[9] The commission system at issue in *Quirin* denied those facing trial the right to "seek any remedy . . . in the courts of the United States" except at the discretion of the Attorney General and Secretary of War. 7 Fed. Reg. 5101; *see also Quirin*, 317 U.S. at 22 n.3.

None of these cases addressed equitable jurisdiction over a military commission created by Congress with the panoply of protections and independent judicial review provided for in the MCA. Four justices, each of whom joined the majority opinion in *Hamdan I*, noted that the Court's decision not to abstain in that pre-MCA case was required because "Congress has denied the President the legislative authority to create military commissions of the kind at issue here. Nothing prevents the President from returning to Congress to seek the authority he believes necessary." *Hamdan I*, 548 U.S.at 636 (Breyer, J., concurring). As Judge Robertson noted in *Hamdan II*, the commissions created under the MCA were worthy of the principles of comity underlying *Councilman* because, "[t]he President accepted that invitation and, in October 2006, Congress enacted the Military Commissions Act." *Hamdan II*, 565 F. Supp. 2d at 131.

2. Resolving the merits of Petitioner's claims would require this Court to address issues that Congress has entrusted in the first instance to the military commissions.

There is only one issue arising from Al-Nashiri's objections to the jurisdiction of the military commission convened to try him: whether the alleged offenses occurred in the context of and were associated with a conflict subject to the laws of war. *See* Pet'r Mem. at 18. This issue has been, and will continue to be, addressed in the first instance by the military commission, which is expressly charged by Congress under the MCA with determining whether it has jurisdiction in a particular case. 10 U.S.C. § 948d. The alleged defect in jurisdiction that Petitioner raises turns on whether, among other things, an "offense is committed in the context of and associated with hostilities," meaning a conflict subject to the laws of war. *Id.* §§ 948a(9), 950p(c). The military commission has already rejected Petitioner's motion to dismiss the charges that raises the same issue Petitioner raises here, *see* p. 7, *supra*, a decision that will be subject to review by the USCMCR and, ultimately, the D.C. Circuit, should the accused be found guilty and exercise his right to appeal, 10 U.S.C. § 950g.[10] Therefore, if Al-Nashiri is convicted,

[10] In addition to its relevance to the grounds on which Petitioner seeks a preliminary injunction, the issue of whether the conduct comprising an offense occurred in the context of and was associated with hostilities is an

the military commission will by necessity have found that his offenses occurred within the context of and were associated with hostilities, and this finding will be subject to review by the Convening Authority and the USCMCR and the D.C. Circuit.

For this Court to consider and rule on those same issues would be duplicative of proceedings before the military commission, the USCMCR, and the D.C. Circuit, and as such would be wasteful of judicial resources. *See Khadr II*, 587 F. Supp. 2d at 231. Moreover, such duplication is especially to be avoided where, as here, Congress has expressly empowered the military commission to hear challenges such as the ones Petitioner raises. "Comity demands that we give due respect to the military tribunal to carry out its congressionally prescribed responsibilities." *New*, 129 F.3d at 645 (dismissing collateral attack on pending court-martial proceedings on *Councilman* grounds). Application of the doctrine of comity "eliminates needless friction between the federal civilian and military judicial systems[ ] and gives due respect to the autonomous military judicial system created by Congress," respect due in part because it is "clear that military courts are capable of . . . considering challenges to their jurisdiction." *Id.* at 643, 645 (citing *Councilman*, 420 U.S. at 760).

Lastly, Congress designed the military commission system to ensure that when an Article III court does consider Petitioner's jurisdictional objections, it will have the benefit of the military commission's findings and expertise. *Cf. Councilman*, 420 U.S. at 758. The relevance of these matters is demonstrated by the filings on this issue before the military commission. For example, the Government's opposition to Petitioner's motion to dismiss notes that one issue that would need to be resolved is whether the hostilities with al Qaida involve separate geographical conflicts or one global conflict with a transnational enemy. Gov't Resp. To Def. Mot. to

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element of each charge against Petitioner that the military commission will hear. *See* Charge Sheet; Manual for Military Commissions ("MMC"), Part IV ("Crimes and Elements"), § 5, ¶¶ (2), (3), (13), (15), (17) (23), (24) (listing an element relating to hostilities for each charge). Petitioner is also charged with two inchoate offenses, attempted murder in violation of the law of war and conspiracy to commit terrorism and murder in violation of the law of war. *See* Charge Sheet. The underlying offenses for these charges each contain a nexus-to-hostilities element. MMC, Part IV, § 5, ¶¶ (24), (15).

Dismiss, AE 104A at 7, (Sep. 13, 2012) (Attach. C). And as the military judge noted in his opinion designating the nexus-to-hostilities question a mixed question of fact and law that was only partly jurisdictional, "in determining the question of hostilities . . . the enemy gets a vote." AE 104F ¶ 3(a), (b) (Pet'r Mem., Attach. C). Thus, the ultimate question Petitioner poses here is intricately entangled with questions that Congress has committed in the first instance to the military commission's expertise; it will not be resolved merely by a self-serving selection of press clippings and War Powers Resolution letters, *see* Pet'r Mem. at 3-6.[11] As a result this Court should abstain from considering Petitioner's claims before the military commission has had a chance to bring that expertise to bear on its congressionally assigned task.

3. The harms Petitioner alleges are not "irreparable."

Councilman found inadequate as a basis for an injunction the only harm that Petitioner alleges here, namely that he may face a trial by a tribunal that lacks jurisdiction over the offense with which he has been charged. 420 U.S. at 758; *see also Khadr III*, 724 F. Supp. 2d at 69 n.11 (finding that petitioner would not "be irreparably harmed by permitting the military commission," convened under the MCA, "to fully adjudicate the charges against him in the first instance"); *Al Odah v. Bush*, 593 F. Supp. 2d 53, 58 (D.D.C. 2009) ("The Court is also persuaded that Petitioners are not irreparably harmed by this Court's abstention while military commissions [established under the 2006 MCA] proceed with the charges against Petitioners."). It is likewise an inadequate basis for this Court to intervene in Petitioner's pending military prosecution.

a. Petitioner's arguments regarding harm fit squarely within *Councilman*.

Petitioner does not here challenge that he is an alien unprivileged enemy belligerent and, so, falls within the class of people triable by military commission under the MCA. Rather he alleges that, as a matter of law, he cannot be found guilty of the offenses for which he has been

[11] Resolution of this motion represents a small fraction of the effort and resources already expended in Petitioner's military commission proceedings. The parties have filed over 280 motions (more than 220 of which were Petitioner's alone) that have resulted in more than 150 orders, and there have been 27 days of hearings. *See* note 6, *supra*.

charged because an element is lacking. In this regard, this case falls squarely within the facts of *Councilman*. There, the plaintiff, a military officer, was concededly subject to trial by courts-martial in general, but nevertheless contended that the offense with which he was charged—selling illegal drugs off-base—was not "service connected" and hence not triable by courts-martial. Under *Councilman*, a challenge to jurisdiction over the offense—as opposed to a challenge that the individual cannot be tried by the tribunal at all—requires abstention. Such arguments—the type of argument Petitioner makes here—must be heard in the first instance by the relevant military court.

Put another way, the narrow "status-of-the-person" exception to *Councilman* abstention applies only when a petitioner raises a substantial constitutional question regarding Congress's power to subject *him* to a military court's jurisdiction and when that question "turn[s] on the status of the person[ ] as to whom the military assert[s] its power." *Councilman*, 420 U.S. at 758; *see also Hamdan I*, 548 U.S. at 585 n.16; *Al Odah*, 593 F. Supp. 2d at 59-60; *Khadr II*, 587 F. Supp. 2d at 234; *Hamdan II*, 565 F. Supp. 2d at 136. That exception does not apply, however, to the circumstances of this case, because Petitioner's challenge relates to the *offenses* with which he is charged, not to his status as a person subject to trial before a military commission—that is, an alien unprivileged enemy belligerent. He argues that the offenses with which he has been charged "occurred at a time and place when neither America nor Yemen was 'at war.'" Pet'r Mem. at 18 (characterizing this as the "single claim[] which forms the basis of [his] supplemental petition"). If (hypothetically) the Court accepted Petitioner's invitation, and concluded that his offenses were in fact committed at a time and in the midst of hostilities, then the sole challenge he raises here would be answered, without reference to and regardless of his personal status. Thus, the jurisdictional issue that Petitioner seeks to raise does not "turn[ ] on the status of the person[ ]" accused, or the constitutional power of Congress to subject *him* to the

jurisdiction of a military court. *Councilman*, 420 U.S. at 759. Accordingly, Petitioner is not entitled to have his objection to trial by military commission heard by this Court.

Petitioner's attempts to evade this conclusion are to no avail. First, the use of "triable" in 10 U.S.C. § 950p(c) does not imply that Petitioner has "a right not to be tried at all" for the offenses with which he is charged, *see, e.g.*, Pet'r Mem. at 21. "Triable by a military court" is merely terminology, first used by the Supreme Court in *Relford v. Commandant*, 401 U.S. 355, 367 (1971), to indicate that an offense is "service-connected," and, therefore, that it falls within the jurisdiction of military courts. But as *Councilman* itself shows, whether an offense is service-connected, and therefore "triable by a military court," is a question that does *not* fall within the limited exception to *Councilman* abstention. *Councilman*, 420 U.S. at 760; *see also Hamdan I*, 548 U.S. at 585 n.16 ("[S]ubstantial arguments denying the right of the military to try *them* at all" means, in context, that "we do not apply *Councilman* abstention when there is a substantial question whether a military tribunal has *personal jurisdiction* over the defendant.") (emphases added).

In delineating the extent of the status-of-the-person exception, the Supreme Court in *Councilman* distinguished earlier cases upon which Petitioner now attempts to rely. *Councilman*, 420 U.S. at 758-59 (rejecting plaintiff's reliance on *Reid v. Covert*, 354 U.S. 1 (1957) (plurality opinion), and *McElroy v. United States ex rel. Guagliardo*, 361 U.S. 281 (1960)). Petitioner's attempt to rely on those same cases, Pet'r Mem. at 22, fails for the same reason. The issue in those cases was the military's ability to assert personal jurisdiction over civilians. *Id.* As noted above, this argument failed in *Councilman* because there was no question—nor did that plaintiff argue—that he was not in the military and, so, not generally subject to the Uniform Code of Military Justice and to courts-martial adjudicating alleged violations of that code. So, too, here. Petitioner does not contend for purposes of his preliminary injunction motion that he has been misclassified as an alien unprivileged enemy

belligerent. Accordingly, he is fully subject to the MCA as to both its substantive criminal provisions and its procedural, commission-related provisions. *See, e.g.*, *Khadr III*, 724 F. Supp. 2d at 65, n.4 (abstaining under *Councilman* despite petitioner not being a member of the military).

In summary, Petitioner has not raised a challenge to the military commission's personal jurisdiction over him, and *Councilman* requires abstention as to other jurisdictional challenges.[12] At the time *Councilman* was decided, the question of whether an offense was "service connected" was considered a constitutional jurisdictional question. *Councilman*, 420 U.S. at 741; *O'Callahan v. Parker*, 395 U.S. 258, 272 (1969) (holding that the service-connection requirement arises from Art. III § 2 and the Fifth and Sixth Amendments to the Constitution);[13] *cf.* Pet'r Mem. at 12 (arguing that Petitioner's trial by military commission "presumptively violates the Constitution's explicit reservation of the power to try 'all crimes' to the courts of law") (quoting *Ex parte Milligan*, 71 U.S. (4 Wall. 2), 127-28, (1866)). The Court in *Councilman* nonetheless held that the service-connectedness of a charged offense is a question that should be resolved in the first instance by a military court, drawing a sharp distinction between jurisdictional questions that turned on whether the military court has the power to try the "persons as to whom the military asserted its power" and those that turned on the nature of the offense and whether it was "service connected." 420 U.S. at 759. As Petitioner's challenge is of the same type raised in *Councilman*—Petitioner alleges the offenses are not connected to a conflict subject to the laws of war; *Councilman* alleged the offenses with which he was charged

[12] Indeed, courts have recognized in other contexts the danger of an overbroad conception of the "right not to stand trial." "[V]irtually every right that could be enforced appropriately by pretrial dismissal might loosely be described as conferring a 'right not to stand trial.'" *Liberal v. Estrada*, 632 F.3d 1064, 1089 (9th Cir. 2011) (quoting *Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 873 (1994)) (internal citations and quotation marks omitted). "But if immediate appellate review were available every such time, Congress's final decision rule would end up a pretty puny one." *Digital Equip. Corp.*, 511 U.S. at 872.

[13] Although the Supreme Court overturned *O'Callahan* in *Solorio v. United States*, 483 U.S. 435 (1987), the significance of *O'Callahan* to the analysis of *Councilman* remains.

were not service-connected—the challenge does not fall under the limited exception to *Councilman* abstention.

b. Proceedings involving capital charges are not evaluated differently under *Councilman*.

That the charges against Petitioner carry a potential death penalty does not change the *Councilman* analysis. *Councilman* itself acknowledged that the "inevitable injury . . . incident to any criminal prosecution" is "often of serious proportions." 420 U.S. at 754. Furthermore, the only court of appeals to have considered the argument that "'death is different' and that [a] death sentence implicates an extraordinary circumstance mandating federal court intervention under *Councilman*" has rejected it. *Hennis v. Hemlick*, 666 F.3d 270, 280 (4th Cir. 2012); *cf. Foster v. Kassulke*, 898 F.2d 1144, 1145-46 (6th Cir. 1990) (abstaining under *Younger v. Harris*, 401 U.S. 37 (1971), regarding ongoing appeal of death penalty convictions).

The cases Petitioner cites to the contrary address issues too far removed from the circumstances now before the Court to provide any guidance. Several of the cases Petitioner cites involve *post*-conviction review of sentences, *see* Pet'r Mem. at 23-24 (citing *Caspari v. Bohlen*, 510 U.S. 383 (1994); *Gardner v. Florida*, 430 U.S. 349 (1977); *Fay v. Noia*, 372 U.S. 391, 439 (1963), *abrogated on other grounds by Coleman v. Thompson*, 501 U.S. 722 (1991)), and so do not justify *pre*-trial intrusion into proceedings that this Court "must . . . assume[] . . .will vindicate" Petitioner's rights, *see Councilman*, 420 U.S. at 758. Indeed, the Supreme Court in *Fay* made it clear that the possibility of a death sentence normally is not sufficient to justify disregarding exhaustion requirements in habeas proceedings. *See Fay*, 372 U.S. at 439-40. Here, the possibility of a death sentence in the commission proceeding does not justify an exception to the normal exhaustion requirements under *Councilman*.

Those cases that Petitioner cites that do address pre-trial review, Pet'r Mem. at 24, are entirely dissimilar to the circumstances of this case. *United States v. Quinones* turned on the fact that the petition made a pre-trial "facial challenge to the death penalty." 313 F.3d 49, 59 (2d Cir.

2002). Here, Petitioner's argument is to the statute as applied and, as discussed *supra* Section I.B.2, is not a "pure question of law," *id.*, 313 F.3d at 59. *United States v. Harper* also involved a facial challenge to the death penalty, a challenge with which even the government agreed, such that a writ of mandamus prohibiting the death penalty in the case was appropriate. 729 F.2d 1216, 1223 (9th Cir. 1984). Petitioner's challenge to his military commission is altogether different. Notably, the court in *Harper* held that a pre-trial order upholding the constitutionality of the death penalty provision of the Espionage Act, and thus requiring the defendant to defend himself against capital charges, did not implicate "rights . . . [that] would be significantly undermined if appellate review . . . were postponed until after conviction and sentence." *Id.* at 1220-21.

The case Petitioner primarily relies upon to establish his alleged injury, *see* Pet'r Mem. at 23, 24-25, involved administrative immigration removal proceedings, not a capital criminal trial. *See Rafeedie v. I.N.S.*, 880 F.2d 506, 517-18 (D.C. Cir. 1989). There, the court enjoined what it characterized as a "secret proceeding in which neither the substance underlying the charges against him nor the reason for any final order of exclusion need ever be disclosed," but the court refused to enjoin a proceeding in which the plaintiff would "have an opportunity to rebut the evidence against him, and an [Immigration Judge] independent of the [Immigration and Naturalization Service] [would] evaluate the Service's arguments and reach a decision on the record." *Id.* The proceedings enjoined in *Rafeedie* are nothing like the proceedings authorized by the MCA, *see* Section I.B.1, *supra*.

c. Petitioner's alleged psychological harm does not warrant a different result.

Petitioner's unique alleged psychological condition[14] does not establish the kind of irreparable injury that would require an exception to *Councilman* abstention. The exception to

[14] There is no evidence presently before the Court concerning this alleged injury; rather, Petitioner seeks leave of the Court to submit such evidence at an indeterminate time in the future. Pet'r Mem. at 25. Aside from the issues related to the military commission protective order implicated by Petitioner's proposal, there is no need for

Councilman for a military tribunal's lack of personal jurisdiction over a defendant does not address such alleged harms. Similarly, *Councilman*'s doctrinal ancestor, *Younger v. Harris*, 401 U.S. 37 (1971), likewise has a narrow set of exceptions that are of no help to Petitioner, even by analogy: bad faith or harassment by prosecutors, a state law "flagrantly and patently violative of express constitutional prohibitions," or other extraordinary circumstances.[15] *Kugler v. Helfant*, 421 U.S. 117, 124 (1975) (internal quotations omitted) (citing *Younger v. Harris*, 401 U.S. at 53-54). The first two *Younger* exceptions do not apply here, and the extraordinary circumstances exception is extremely narrow.

Indeed, only circumstances that "render the state court incapable of fairly and fully adjudicating the federal issues before it" are considered "extraordinary" under *Younger*. *Kugler*, 421 U.S. at 124. "[W]hatever else is required, such circumstances must be 'extraordinary' in the sense of creating an extraordinarily pressing need for immediate federal equitable relief, not merely in the sense of presenting a highly unusual factual situation." *Id.*; *see also Top Shelf, Inc. v. Mayor & Aldermen for City of Savannah*, 832 F. Supp. 361, 364 (S.D. Ga. 1993) ("Cases discussing extraordinary circumstances under *Younger* indicate that the circumstances must be extraordinary indeed to warrant interference in state judicial proceedings."). To avoid abstention here, Petitioner "bears the burden of establishing that one of the exceptions applies." *Diamond "D" Const. Corp. v. McGowan*, 282 F.3d 191, 198 (2d Cir. 2002). Petitioner cites no case where a defendant has successfully invoked his psychological condition to justify a court's ignoring the general prohibition against enjoining ongoing prosecutions. Indeed, the only case he cites in this

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the Court to take such evidence, however, because this is not the kind of injury sufficient to overcome the bar to equitable jurisdiction set forth in *Councilman*. Should such evidence at some point become part of this case, Respondents reserve their right to respond further, as appropriate, including with relevant evidence and additional argument.

[15] *Councilman* can be viewed as an analog of *Younger*; where *Younger* requires federal courts to abstain from interceding in ongoing state prosecutions, *Councilman* requires federal courts to abstain from interceding in military trials. *See Davis v. Marsh*, 876 F.2d 1446, 1449 (9th Cir. 1989).

regard, Pet'r Mem. at 26, is *Al-Joudi v. Bush*, 406 F. Supp. 2d 13 (D.D.C. 2005), which did not address interference in an ongoing prosecution.

* * *

In sum, controlling principles of comity mandate the application of *Councilman* abstention in this case. Congress has established a military commission system fully equipped and prepared to vindicate rights of the accused by way of significant procedural protections, including review in the D.C. Circuit, that are guaranteed by statute. The issue that Petitioner asks this Court to resolve concerns matters that Congress intended the commissions, not Article III courts, to address in the first instance. Finally, Petitioner alleges no harm that will result from abstention by this Court, other than the burdens of trial that confront any criminal defendant; he raises no substantial question regarding the commission's jurisdiction over *him* that would excuse the Court from "the normal practice of abstention" in these circumstances. *Khadr II*, 587 F. Supp. 2d at 234. For these reasons, the Court must abstain from exercising equitable jurisdiction here.[16]

II. BECAUSE THE SUPPLEMENTAL PETITION WOULD BE FUTILE, THE COURT SHOULD DENY THE MOTION TO SUPPLEMENT.

"[A] district court has discretion to deny a motion to amend on grounds of futility where the proposed pleading would not survive a motion to dismiss." *Nat'l Wrestling Coaches Ass'n v.*

[16] For this reason, there is no need for the Court to determine whether Petitioner has established the four factors necessary for an injunction: (1) that he is likely to succeed on the merits, (2) that he is likely to suffer irreparable harm in the absence of the preliminary injunction, (3) that the balance of equities tips in his favor, and (4) that the public interest favors the injunction. *Winter v. Natural Res. Def. Council*, 555 U.S. 7, 20 (2008). In any event, Petitioner has not established any of these factors, let alone all of them. Because this Court cannot enjoin the proceedings, Petitioner cannot succeed on the merits. The injuries that Petitioner alleges—which arise from the basic fact of his prosecution in a congressionally created system of military courts with strong procedural protections and independent review in an Article III court—are not irreparable in the sense necessary to warrant injunctive relief. *See* Section I.B.3, *supra*. And because enjoining the military commission proceedings would thwart Congressional intent, deprive reviewing courts of the expertise of the military commission, and unduly interfere with an ongoing prosecution, *see* Sections I.B.1 and I.B.2, *supra*, neither the balance of equities nor the public interest favors an injunction. *See Khadr v. United States*, 529 F.3d 1112, 1118 (D.C. Cir. 2008) ("*Khadr I*") (explaining with respect to a challenge to a military commission's jurisdiction by another Guantanamo detainee that "[t]here is no substantial public interest at stake in this case that distinguishes it from the multitude of criminal cases for which post-judgment review of procedural and jurisdictional decisions has been found effective").

Dep't of Educ., 366 F.3d 930, 945 (D.C. Cir. 2004). The same standard applies to motions to supplement brought under FED. R. CIV. P. 15(d). *Tunica-Biloxi Tribe of La. v. United States*, 655 F. Supp. 2d 62, 65-66 (D.D.C. 2009) (denying Rule 15 motion to supplement where new allegations were futile because they did not show that plaintiff satisfied statutory exhaustion requirements). As discussed above, this Court lacks equitable jurisdiction to grant the injunctive relief the Supplemental Petition seeks while military commission proceedings are ongoing.[17] Nor would any issues raised by the Supplemental Petition remain for this Court to consider once the military commission proceedings and any subsequent appeals to the USCMCR and D.C. Circuit are complete: there would be no proceedings to enjoin, and any judgment to which Petitioner objects at that time would have already been reviewed by the same Court of Appeals that would review any decision issued by this Court concerning the Supplemental Petition.

Accordingly, Petitioner's proposed supplement to his Petition would be futile, and his Motion to Supplement should be denied.

III. THE COURT SHOULD STAY OR HOLD IN ABEYANCE THE ORIGINAL HABEAS PETITION PENDING THE OUTCOME OF THE MILITARY COMMISSION PROCEEDINGS.

For the same reason that it must decline to enjoin Petitioner's military commission prosecution, this Court should hold in abeyance Petitioner's habeas case so as to avoid interference with Petitioner's ongoing military commission proceedings, including any appeals. Other Judges of this District have ruled that Guantanamo detainee habeas petitions should be held in abeyance during the pendency of a military commission prosecution and any subsequent

[17] The Supplemental Petition also seeks a declaratory judgment. Although *Councilman* addressed a prayer for injunctive relief, its analysis is equally applicable to actions for declaratory relief. In *Samuels v. Mackell*, 401 U.S. 66 (1971), a companion case decided the same day as *Younger*, the doctrinal ancestor of *Councilman*, the Supreme Court considered whether the same considerations addressed in *Younger* "that require the withholding of injunctive relief will make declaratory relief equally inappropriate" with respect to ongoing prosecutions in state court. 401 U.S. at 69. The court held that "the same equitable principles relevant to the propriety of an injunction must be taken into consideration by federal district courts in determining whether to issue a declaratory judgment, and that where an injunction would be impermissible under these principles, declaratory relief should ordinarily be denied as well." *Id.* at 73. *See also Al-Nashiri*, 2012 WL 1642306 at *5 (applying *Councilman* abstention in Petitioner's prior lawsuit seeking declaratory judgment relief).

appeals. *See Al Odah v. Bush*, 593 F. Supp. 2d 53, 59 (D.D.C. 2009) (holding "the commissions are [] entitled to deference because the Court's habeas proceedings may interfere with those proceedings."); *Khadr II*, 587 F. Supp. 2d at 238 (granting stay during pendency of military commission proceedings); *see also Khadr III*, 724 F. Supp. 2d at 70 (denying motion to lift stay during pendency of military commission proceedings). A similar stay should issue here.[18]

As noted above, habeas "is, at its core, an equitable remedy." *Schlup*, 513 U.S. at 319. Thus, the Supreme Court has "recognized that ['prudential concerns,' such as comity and the orderly administration of criminal justice,] may 'require a federal court to forgo the exercise of its habeas corpus power.'" *Munaf v. Geren*, 553 U.S. 674, 693 (2008) (citations omitted, alteration in original). Indeed, comity-based considerations and the orderly administration of criminal justice ordinarily require federal courts to decline to consider a habeas petition or other requests for equitable relief prior to the conclusion of a criminal trial, "even in the context of military prisoners." *Al Odah*, 593 F. Supp. 2d at 57 (citing *Councilman*, 420 U.S. at 758).

The same result is called for in this case given that Petitioner is currently facing trial within a military commission system, "designed . . . by a Congress that . . . act[ed] according to guidelines laid down by the Supreme Court[,]" *Hamdan II*, 565 F. Supp. 2d at 136, for alleged violations of the law of war. As discussed above, Congress has invoked its well-settled power to try detainees accused of violating the law of war before military commissions. *See* Section I.B.1, *supra*. In doing so, Congress has provided accused detainees, such as Petitioner, with substantial procedural rights and independent appellate review by an Article III court. *See id.* This Court, therefore, in the interest of comity, should refrain from conducting further proceedings in Petitioner's habeas case so as to avoid interfering with the scheme of military justice that Congress has chosen. *Councilman*, 420 U.S. at 757; *New*, 129 F.3d at 643 (federal court must give "due respect to the autonomous military judicial system created by Congress"); *Hamdan II*,

[18] Pursuant to Local Rule 7(m), Respondents conferred with Petitioner's counsel via email on May 13, 2014. Petitioner opposes the motion.

565 F. Supp. 2d at 137 ("Where both Congress and the President have expressly decided when Article III review is to occur, the courts should be wary of disturbing their judgment."); *Al Odah*, 593 F. Supp. 2d at 58 (citations omitted) ("Abstention reflects the appropriate level of deference for a system enacted by Congress, signed into law by the President, and designed in accordance with Supreme Court precedents.").

Failure to stay Petitioner's habeas case during the pendency of his military commission proceedings could interfere with those proceedings. Petitioner's habeas challenge to the legality of his continued detention raises issues that substantially overlap with those in his military commission proceedings, including with regard to the central issue of his challenge to his detention—that is, whether Petitioner was, at the time of his capture, part of al Qaida, Taliban, or associated forces. See *Uthman v. Obama*, 637 F.3d 400, 401-02 (D.C. Cir. 2011); *Al-Adahi v. Obama*, 613 F.3d 1102, 1103 (D.C. Cir. 2010); *Awad v. Obama*, 608 F.3d 1, 11 (D.C. Cir. 2010); *Al Bihani v. Obama*, 590 F.3d 866, 872 (D.C. Cir. 2010). Indeed, the military commission is expressly charged under the MCA with determining whether it has jurisdiction in a particular case, 10 U.S.C. § 948d, an issue that turns on whether, among other things, the accused is an "alien unprivileged enemy belligerent." *Id.* § 948c. And an "unprivileged enemy belligerent" is defined under the MCA as an individual who is not a citizen of the United States, who is not a prisoner of war under the Third Geneva Convention, and who: "(A) has engaged in hostilities against the United States or its coalition partners; (B) has purposefully and materially supported hostilities against the United States or its coalition partners; or (C) was a part of al Qaeda at the time of the alleged offense." 10 U.S.C. § 948a(1), (6), (7); *see* Section I.B.2, *supra*. Thus, the central issue of Petitioner's habeas challenge to his detention has obvious potential overlap with the necessary jurisdictional determination of the military commission.

As the *Al Odah* Court observed, "the essential inquiry in Petitioner's habeas case[]—whether [he] [is] properly characterized as [an] unlawful enemy combatant—is the same inquiry

that the [military] commission[] may independently determine as part of [its] jurisdictional inquiry." 593 F. Supp. 2d at 59. If Petitioner is convicted in his commission proceeding, the military commission will necessarily have found that Petitioner is properly characterized as an alien unprivileged enemy belligerent, and this finding will be subject to review by the Convening Authority and the USCMCR, as well as the D.C. Circuit and, potentially, the Supreme Court. *See 10 U.S.C.* § 950g. For this Court to consider and rule on Petitioner's status for purposes of the habeas challenge to detention would potentially interfere with proceedings before the military commission, the USCMCR, and the D.C. Circuit. *See Khadr II*, 587 F. Supp. 2d at 231 (noting that *Councilman* abstention was appropriate because the "question of enemy combatancy can be raised in the military commission proceeding," and "any ruling[] by this Court on th[at] claim[] would necessarily affect, and possibly interfere with, the military commission proceeding").

Even if this Court did not make a determination regarding the legality of Petitioner's detention prior to resolution of the issue of Petitioner's status as an alien unprivileged enemy belligerent in the military commission, proceedings on the issue in this Court could nonetheless interfere with the commission proceedings by, for example, "produc[ing] rulings on the production of discovery and/or exculpatory information that diverge from those of the military commission[]," *Al Odah*, 593 F. Supp. 2d at 59, including the disclosure of classified information. Such interference is one of the outcomes *Councilman* sought to avoid. *Id.* (citing *Councilman*, 420 U.S. at 756-58); *see also Khadr III*, 724 F. Supp. 2d at 66. "Comity [therefore] demands that [the Court] give due respect to the military tribunal to carry out its congressionally prescribed responsibilities[,]" by abstaining from further consideration of Petitioner's habeas action. *New*, 129 F. 3d at 645; *see also Wallace v. Kato*, 549 U.S. 384, 393-94 (2007) (noting that "[i]f a plaintiff files a . . . claim related to rulings that will likely be made in a pending or anticipated criminal trial[], it is within the power of the district court, and in accord with common practice, to stay the civil action until the criminal case or the likelihood of a criminal

case is ended"); *Lawrence v. McCarthy*, 344 F.3d 467, 473 (5th Cir. 2003) (stating that abstention is appropriate to permit a military tribunal to determine its jurisdiction because "[w]e trust that the military courts are . . . up to the task" and "an individual's status is a question of fact which the military courts are more intimately familiar with than the civil courts").

This is all the more so considering that the factual allegations on which the Government bases its prosecution of Petitioner in the military commission case significantly overlap with the allegations set forth in the Government's factual return to justify his continued detention. *Compare, e.g.*, Charge Sheet, Charges I, II, III, IV, and V (alleging Petitioner conspired with Usama bin Laden and participated in the attack on the *U.S.S. Cole* by, among other things, directing two of his associates to operate and detonate an explosives-laden boat alongside the *U.S.S. Cole*) *with* Notice of Public Filing of Factual Return, Attach. 1 (ECF No. 152) (July 29, 2009), ¶¶ 19-20, 30 (alleging Petitioner was a close associate of bin Laden, he participated in the attacks on the *U.S.S Cole*, and two of his "operatives maneuvered the boat to the U.S.S. Cole and detonated the explosives in a suicide operation").[19] Because of this overlap, the potential for interference with the military commission's proceedings is correspondingly elevated, as is the importance of holding this case in abeyance. "[I]t has long been the practice" of federal courts "to 'freeze' civil proceedings when a criminal prosecution involving the same facts is warming up or under way" because "deferrable civil proceedings constitute improper interference with the criminal proceedings if they churn over the same evidentiary material." *Afro-Lecon, Inc. v. United States*, 820 F.2d 1198, 1204 (Fed. Cir. 1987) (citation omitted); *see also Brown v. U.S. Dep't of Justice*, 715 F.3d 662, 668 (D.C. Cir. 1983) (same). Given that both Petitioner's military commission and his habeas case would be "churn[ing] over the same evidentiary material[,]" *id.*, the risk that a ruling on the legality of Petitioner's detention, *see Khadr II*, 587 F.

[19] Additional argument regarding the overlap in issues can be addressed, if necessary, in a classified setting.

Sup. 2d at 231, or rulings on discovery issues, *see Al Odah*, 593 F. Supp. 2d at 59, would interfere with proceedings before Petitioner's military commission, is especially high.

Further, as discussed above, *see* Section I.B.3, *supra*, requiring Petitioner to "to fully adjudicate the charges against him [in the military commission system] in the first instance[,]" will not impose any "irreparabl[e] harm." *Khadr III*, 724 F. Supp. 2d at 69 n.11; *see also Al Odah*, 593 F. Supp. 2d at 58 ("The Court is also persuaded that Petitioners are not irreparably harmed by this Court's abstention while military commissions [established under the 2006 MCA] proceed with the charges against Petitioners."); *see also* Section I.B.3, *supra*.

In light of the principles of comity underlying the *Councilman* decision, this Court should hold this habeas action in abeyance pending resolution of Petitioner's military commission proceedings. Permitting Petitioner to pursue his habeas case could result in interference with his military commission proceedings by creating the potential for inconsistent rulings on substantive issues, discovery, and the disclosure of classified information—an outcome that *Councilman* sought to avoid—and is not necessary to avoid irreparable harm to Petitioner. For these reasons, the Court should abstain from exercising its equitable jurisdiction in Petitioner's habeas case, hold the petition in abeyance, and stay all proceedings in this action until such time as Petitioner's military commission proceedings and any subsequent appeals have concluded.

CONCLUSION

For the foregoing reasons, Respondents respectfully urge the Court to deny Petitioner's Motion for Preliminary Injunction and Motion to Supplement and to grant Respondent's motion to hold Petitioner's habeas petition in abeyance pending completion of his military commission proceedings.

May 15, 2014

Respectfully submitted,

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