IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ABD AL RAHIM HUSSEIN AL NASHIRI, *Petitioner*, *v.* BARAK OBAMA, *et al.*, *Respondents*.	**CIVIL ACTION** **(HABEAS CORPUS)** No. 08-Civ-1207 (RWR) Misc. No. 08-mc-442 (TFH) *before* Chief Judge Richard W. Roberts

MEMORANDUM OF LAW IN SUPPORT OF PETITIONER'S MOTION FOR A PRELIMINARY INJUNCTION

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INTRODUCTION

Respondents have asserted the authority to try Petitioner by military commission – and sentence him to death – for crimes they allege he committed during peacetime and in a place where the President affirmed, "America is not at war." This expansive assertion of military authority violates explicit statutory prohibitions Congress has imposed on what is triable by the military. And it defies 150 years of Supreme Court precedent that has forbidden the military from trying non-service members for crimes that did not occur during and in a theater of war. Petitioner, who is not alleged to have done anything on a battlefield or to have had any role in the September 11th attacks, seeks a writ of habeas corpus because trying him by military commission exceeds the limits Congress and the Constitution have put on the military's authority to act in place of the courts of law. He asks this Court to enter a preliminary injunction to prevent the irreparable harm that will result if the military tries him for crimes that are not triable at all.

The narrow interim relief sought here is warranted for four reasons. *First*, there is a high likelihood that Petitioner will succeed on the merits because an offense "is triable by military commission under [the Military Commissions Act] only if the offense is committed in the context of and associated with hostilities." 10 U.S.C. § 950p(c). As contemporaneous pronouncements by the President and Congress make clear, there was no armed conflict in Yemen at the time of the alleged crimes. *Second*, Petitioner will suffer irreparable harm if the military commission proceeds against him while his supplemental petition is adjudicated. *Third*, Respondents will not be harmed by temporarily preserving the *status quo* while the question of law at the center of this case is resolved. *Finally*, allowing the military to conduct a criminal trial that transgresses the explicit limits imposed by Congress and the Constitution is decidedly not in the public interest.

BACKGROUND

A. Statutory Scheme of the Military Commissions Act of 2009.

The Military Commissions Act of 2009, Pub. L. 111-84, 123 Stat. 2190 §§ 1801-1807 (codified at 10 U.S.C. §§ 948a, *et seq.*) ("2009 Act"), is the product of lawmakers' decade-long effort to balance military necessity against the constitutional requirement that the trial of all crimes occur in courts of law. It authorizes the President, through the Secretary of Defense and his delegees, to "establish military commissions," but only "for offenses triable by military commission as provided in this chapter." *Id*. §§ 948b(b), 948h. The Secretary of Defense has delegated this responsibility to the "Convening Authority," a civil servant in the Department of Defense. (Supp. Pet. ¶ 9).

The Convening Authority creates commissions *ad hoc* by issuing orders that allege charges against a specific accused. These orders designate a small pool of military officers, who act as an ersatz jury and recommend both a verdict and an upper bound of punishment. 10 U.S.C. § 948i. The Convening Authority then decides whether to approve the verdict and punishment recommended. *Id*. §950b(c). The trial itself is presided over by a "military judge," appointed by the officer that the Convening Authority has designed as the "Chief Trial Judge."

The 2009 Act contains three important limitations on what crimes are triable by military commissions. *First*, crimes committed by U.S. citizens are excluded from the commissions' jurisdiction outright. 10 U.S.C. § 948c. *Second*, to protect against double jeopardy, an accused may not be "tried by a military commission under this chapter a second time for the same offense." *Id*. §949h. *Third*, and of relevance to this case, "[a]n offense specified in this subchapter is triable by military commission under this chapter only if the offense is committed in the context of and associated with hostilities." *Id*. §950p(c). "Hostilities" is defined its legal sense as a "conflict subject to the laws of war." *Id*. §950a(9).

B. Status of Events in Yemen at Times Relevant to this Case.

At all times relevant to this case, the United States had its armed forces stationed in or near Yemen for peacetime training, cooperation, and logistical operations. Neither the President nor Congress ever found that this placed U.S. forces in an area of actual or likely hostilities. To the contrary, at all times relevant to the allegations against Petitioner, the President and Congress explicitly determined that Yemen was a nation at peace governed by peacetime laws.

The legal status of Yemen remained consistent in the period around the bombing of the USS COLE in October 2000. This incident is at the center of the allegations against Petitioner. Yet, President Clinton stated explicitly that he did not recognize the bombing as implicating the law of war. In his address to the nation, President Clinton made a special point of reminding the country of the sacrifices the Armed Forces make in times at peace:

> [E]ven when America is not at war, the men and women of our military risk their lives every day in places were comforts are few and dangers are many. No one should think for a moment that the strength of our military is less important in times of peace, because the strength of our military is a major reason we are at peace.

The President's Radio Address, 36 Wkly. Comp. Pres. Doc. 2464 (Oct. 14, 2000).

President Clinton reported to Congress on the actions the Administration took in response. At no point did he invoke the law of war or otherwise indicate that U.S. forces were in a theater of hostilities. Instead, this report stated that additional U.S. personnel were deployed to Yemen "solely for the purpose of assisting in on-site security ... forces will redeploy as soon as the additional security support is determined to be unnecessary." *Letter to Congressional Leaders Reporting on the Deployment of United States Forces in Response to the Attack on the USS COLE*, 36 Wkly. Comp. Pres. Doc. 2482 (Oct. 14, 2000) (Attachment H). Notably absent from the public record is any statement from the President or the Congress that the USS COLE incident occurred during a "conflict," "in the context of hostilities," or was "subject to the laws

of war" as required by §950p(c). Instead, the government's official response was to send the FBI to conduct a criminal investigation. This led to an indictment that was unsealed in the Southern District of New York in May 2003 and remains pending. *United States v. al-Badawi, et al.*, No. 98-CR-1023 (S.D.N.Y., unsealed May 15, 2003).

A year later, in response to the September 11th attacks, Congress passed the Authorization for the Use of Military Force ("AUMF"), Pub. L. 107-40, 115 Stat. 224 (codified at 50 U.S.C. § 1541, *note*). This was the first Congressional invocation of the war powers since the Gulf War in 1991. Jennifer K. Elsea & Matthew C. Weed, CRS Report for Congress RL31133, Declarations of War and Authorizations for the Use of Military Force: Historical Background and Legal Implications, at 12-14 (Jan. 11, 2013).

The AUMF granted the President the authority "to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons." AUMF § 2(a); *see also* Richard L. Grimmett, CRS Report for Congress, Authorization for Use of Military Force in Response to the 9/11 Attacks (P.L. 107-40): Legislative History, at 2 (Jan. 16, 2007) ("AUMF Legislative History") (describing the AUMF as authorizing "military action against those involved in some notable way with the September 11 attacks on the U.S."). Congress declined to enact a provision in the White House's proposed draft that would have expanded the scope of hostilities "to deter and pre-empt future acts terrorism and aggression." AUMF Legislative History at 2. Congress instead chose to authorize "military actions against only those international terrorists and other parties directly involved in aiding or materially supporting the September 11, 2001 attacks on the United States. The authorization was not framed in terms of use of military action against terrorists generally." *Id*.

The AUMF supplements and is codified as a note to the War Powers Resolution, Pub. L. 93-148, 87 Stat. 555 (codified at 50 U.S.C. §§ 1541, *et seq*.). AUMF § 2(b)(1). When drawing upon the AUMF to initiate hostilities in specific places, the President does so via War Powers Resolution reports. *See*, *e.g.*, *Letter to the Speaker of the House of Representatives and the President Pro Tempore of the Senate*, 37 Wkly. Comp. Pres. Doc. 1447 (Oct. 9, 2001) (hostilities in Afghanistan); *Letter to Congressional Leaders Reporting on the Deployments of United States Combat-Equipped Armed Forces Around the World*, 43 Wkly. Comp. Pres. Doc. 815 (Jun. 18, 2007) (hostilities in Somalia).

The President did not extend the AUMF's war-making authorities to Yemen at any time relevant to allegations against Petitioner. Indeed, in the months before and after Petitioner's seizure in Dubai, President Bush reported that the deployment of U.S. personnel in Yemen was strictly for "training and equipping their armed forces" and "providing oversight for urban and maritime counter-terrorism training with the Yemen special operations forces." *Letter to Congressional Leaders Reporting on the Deployment of Forces in Response to the Terrorist Attacks of September 11*, 38 Wkly. Comp. Pres. Doc. 1588 (Sept. 20, 2002); *Letter to Congressional Leaders Reporting on United States Efforts in the Global War on Terrorism*, 39 Wkly. Comp. Pres. Doc. 346 (Mar. 20, 2003). At no point did President Bush indicate that this placed these personnel "into hostilities or into [a] situation[] where imminent involvement in hostilities is clearly indicated by the circumstances."[1] 50 U.S.C. § 1543(a)(1).

[1] On September 19, 2003, nearly a year after Petitioner was in custody, the President notified Congress that "The United State forces headquarters element in Djibouti provides command and control support as necessary for military operations against al-Qaida and other international terrorists in the Horn of Africa region, including Yemen." *Letter to Congressional Leaders Reporting on Efforts in the Global War on Terrorism*, 39 Wkly. Comp. Pres. Doc. 1247 (Sept. 19, 2003) (Attachment M). This was the first time the President suggested that U.S. forces in Yemen were involved in any activities that could suggest the existence of hostilities.

Congress, for its part, did not recognize the existence of hostilities in Yemen, let alone the involvement of the United States in hostilities, until much later. The first explicit Congressional recognition of any armed conflict in Yemen was on November 5, 2009, when the Senate passed a resolution expressing concern over a rebel insurgency that it viewed as having commenced sometime in 2004. Supporting peace, security, and innocent civilians affected by conflict in Yemen, S. Res. 341, 111th Cong. (2009) (enacted).

C. Circumstances Leading to This Case.

Petitioner is a Saudi national. He was seized in 2002 by local authorities in the United Arab Emirates. (Supp. Pet. ¶ 13). He was thereafter taken into the custody of the Central Intelligence Agency ("CIA"), whose agents tortured him over the course of four years. (*Id*.). In May 2003, while Petitioner was in CIA custody, the United States named him as an unindicted co-conspirator in the indictment unsealed in the Southern District of New York. (*Id*.). This still-pending and death-eligible indictment alleges that he was part of a terrorist group in Yemen that conspired to bomb marine vessels, including the U.S.S. COLE. Petitioner has never been alleged to have had any involvement in the September 11th attacks, to have done anything in the context of and associated with the subsequent war in Afghanistan, or any other hostilities. In September 2006, Petitioner was publicly transferred to the U.S. Naval Station at Guantanamo Bay.

Over two years later, on December 19, 2008, the Convening Authority issued orders to create a military commission to try Petitioner for offenses largely drawn from the indictment pending in the Southern District of New York. (Supp. Pet. ¶ 14). This commission was scheduled to begin in February 2009. Following the inauguration of President Obama, however, military prosecutors sought a four-month continuance of the arraignment. (*Id*.). This continuance was denied to the extent it would violate the 30-day time-limit that the regulations put on

arraignments. (*Id*.). So, the Convening Authority disbanded the commission by withdrawing the charges without prejudice. (*Id*.). Three years later, the Convening Authority issued new orders creating a second military commission to try Petitioner. (*Id*. ¶ 23) (the "Nashiri Orders"). The Convening Authority appointed COL James Pohl, USA, as the Chief Trial Judge and had COL Pohl retained by the Army a yearly post-retirement contract to serve in that role. (*Id*. ¶ 24). COL Pohl then assigned himself to preside over Petitioner's military commission. (*Id*.).

On August 30, 2012, Petitioner asked COL Pohl to dismiss all charges on the ground that the Nashiri Orders were *ultra vires* because none of the allegations occurred in the context of or were associated with a conflict subject to the law of war as required by 10 U.S.C. § 950p(c). On January 15, 2013, COL Pohl ruled that the legality of the Nashiri Orders was self-evident because the Convening Authority had issued them without being personally countermanded by the now-sitting President. AE104F, Order ¶ 4(b) (Jan. 15, 2013) (Attachment C).

On November 3, 2011, Petitioner filed a declaratory judgment action in the Western District of Washington, where the Convening Authority's office was located, challenging the lawfulness of the Nashiri Orders. The district court dismissed the case on the ground that, *inter alia*, 28 U.S.C. § 2241(e)(2) stripped the federal courts of jurisdiction over non-habeas actions brought by Guantanamo detainees. *Al-Nashiri v. MacDonald*, 2012 WL 1642306 (W.D.Wa. 2012). Petitioner timely appealed. On December 20, 2013, the Ninth Circuit Court of Appeals affirmed, finding that §2241(e)(2) stripped the district court of jurisdiction over non-habeas actions. *Al-Nashiri v. MacDonald*, 741 F.3d 1002 (9th Cir. 2013).

On April 21, 2014, Petitioner filed a supplemental petition for a writ of habeas corpus in this Court, seeking judicial review of Respondents' effort to try him by military commission. This trial is presently scheduled to begin in October 2014.

ARGUMENT

"The primary purpose of a preliminary injunction is to preserve the object of the controversy in its then existing condition – to preserve the *status quo*." *Aamer v. Obama*, 742 F.3d 1023, 1041 (D.C. Cir. 2014) (quotation omitted). This protects parties who have a substantial claim on the merits but are likely to suffer the very harm they seek to avoid while the Court considers it. "A plaintiff seeking a preliminary injunction must establish [1] that he is likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an injunction is in the public interest." *Id*. at 1038 (quotations omitted).

All four factors weigh in favor of preserving the *status quo* while this Court adjudicates Petitioner's supplemental habeas petition. The 2009 Act clearly states that "[a]n offense specified in this subchapter is triable by military commission under this chapter only if the offense is committed in the context of and associated with hostilities." 10 U.S.C. § 950p(c). This limit on what is triable is based on over a century-and-a-half of precedent that prohibits the military from exercising jurisdiction over non-service members unless the offenses charged arise under the laws of war. The offenses Respondents seek to try are all alleged to have occurred in Yemen between 2000 and 2002, and predominately in 2000. *Every* public record on the legal status of events in Yemen at that time not only fails to show the existence of hostilities, but demonstrates the unambiguous determination by the political branches that events in Yemen were governed by the laws of peace, not the laws of war.

Without a preliminary injunction, Petitioner will suffer irreparable harm. Petitioner's trial by military commission is presently under orders to begin in October 2014. Between now and then, Petitioner will be brought before a series of pre-trial hearings in which he will be forced to

disclose critical aspects of his defense, to publicly relive past episodes of torture, and to prepare for a capital trial before an *ad hoc* military commission.

Respondents, on the other hand, are unlikely to suffer any substantial harm as a result of a temporary delay in proceedings. Respondents have no legitimate interest in conducting a military trial under such a dark jurisdictional cloud. In the unlikely event that Respondents prevail on the merits, they can simply resume the military commission proceedings against Petitioner.

The public interests served by a preliminary injunction in this case are compelling. The public has an urgent interest in ensuring that the military abides by the controls Congress and the Constitution have placed on its authority to remove capital prosecutions from the courts of law.

I. Petitioner is Likely to Prevail on the Merits.

Petitioner's supplemental petition for a writ of habeas corpus raises one of a small handful of claims that fall within the writ's historic core. *In re Yamashita*, 327 U.S. 1, 9 (1946) ("[T]he Executive branch of the government could not, unless there was suspension of the writ, withdraw from the courts the duty and power to make such inquiry into the authority of the commission as may be made by habeas corpus."). Respondents are seeking to try him under the law of war before an *ad hoc* military tribunal for crimes he allegedly committed far from any recognized theater of war. Doing so violates the explicit terms of a Congressional statute, the separation of powers between the judiciary and the military, and Petitioner's right to a regular trial before a court with jurisdiction over his alleged crimes. Petitioner has a substantial likelihood of success on the merits because his sole claim falls within a 150-year tradition of successful habeas corpus challenges to the precise form of Executive Branch overreaching at issue here.

A. Military Commissions Can Only Try War Crimes.

This case presents a clear violation of 10 U.S.C. § 950p(c). The 2009 Act only authorizes Respondents to "establish military commissions under this chapter for offenses triable by military commission as provided in this chapter," 10 U.S.C. § 948b(b) (2009), and "an offense specified in this subchapter is triable by military commission under this chapter only if the offense is committed in the context of and associated with hostilities." *Id*. §950p(c). Hostilities, for its part, is not defined in terms of mere terrorist violence. Instead, the 2009 Act is careful to define hostilities in its legal sense, as a "conflict subject to the law of war." *Id*. §948a(9); *see The Three Friends*, 166 U.S. 1, 63-64 (1897) (recognition of hostilities in a legal sense requires an official act by the government to "incur[] the restraints and liabilities incident to an acknowledgment of belligerency.").

This case also presents a violation of the long-recognized constitutional rule that Congress intended §950p(c) to codify. Indeed, the Supreme Court granted relief on this precise claim in the landmark habeas case from the Civil War, *Ex parte Milligan*, 4 Wall. 2 (1866) . In *Milligan*, the Union Army convened a military commission to try the members of a Confederate-affiliated terrorist group, the "Sons of Liberty." This group operated in Indiana at the height of the Civil War and the military tried its leadership for, *inter alia*, plotting to attack the Union Army in Indiana. Lambdin Milligan sought a writ of habeas corpus challenging the military's authority to remove his trial from the courts of law because the crimes he allegedly committed occurred outside the recognized theaters of the Civil War. The Supreme Court agreed. Despite the uncontested danger the "Sons of Liberty" posed to the security of Indiana and the Union's broader war effort, the Court unanimously invalidated the commission on the principle that military rule "is confined to the locality of actual war." *Milligan*, 4 Wall. at 127-28

The restriction of military jurisdiction to crimes committed in actual theaters of war is rooted in two interrelated considerations that go to the core of habeas review. The first is the fact that military commissions' sole function is to prosecute war crimes arising under the law of war. *Ex parte Quirin*, 317 U.S. 1, 28 (1942), *Yamashita*, 327 U.S. at 7; *Hamdan v. United States*, 696 F.3d 1238, 1245 (D.C. Cir. 2012). By definition, the law of war does not and cannot apply when and where there is no war. When the Supreme Court has reviewed military commissions' legality, the first and often only question is whether the commission has been convened to try "offenses constitutionally triable by military tribunal" under the law of war. *Quirin*, 317 U.S. at 43; *see also Johnson v. Eisentrager*, 339 U.S. 763, 786-87 (1950), *Yamashita*, 327 U.S. at 14; *Milligan*, 4 Wall. at 123-24. And when the military has sought to reach beyond that narrow grant of jurisdiction, the federal courts have been ready to provide the necessary check through writs of habeas corpus. *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006) (plurality op.) (invalidating military commission jurisdiction over offenses committed before the start of hostilities); *McElroy v. United States ex rel. Guagliardo*, 361 U.S. 281 (1960) (invalidating court-martial jurisdiction over military contractors deployed outside a theater of hostilities); *Reid v. Covert*, 354 U.S. 1 (1957) (invalidating court-martial jurisdiction over military dependents accompanying the military outside a theater of hostilities).

At bottom, the writ's guarantee of judicial review over whether an alleged offense occurred in a recognized battlefield is a simple reflection of the fact that habeas corpus is always available to challenge the jurisdiction of an inferior tribunal that is applying a body of law that does not govern the claims it is seeking to adjudicate. This familiar inquiry is consistently subject to collateral review and, in the criminal context, is at the heart of the writ of habeas corpus. *See*, *e.g*, *Strate v. A-1 Contractors*, 520 U.S. 438 (1997) (declaratory judgment to void tribal court

jurisdiction over civil actions arising on federal highways); *Duro v. Reina*, 495 U.S. 676 (1990) (habeas issued to void tribal court assertion of criminal jurisdiction); *Bowen v. Johnston*, 306 U.S. 19 (1939) (habeas to decide whether a murder committed in a national park was triable in state court); *Wildenhus's Case*, 120 U.S. 1, 17 (1887) (habeas to void a state's criminal jurisdiction when preempted by a treaty).

The second, and overriding, need for the writ in cases like this one is that the military trial of non-service members presumptively violates the Constitution's explicit reservation of the power to try "all crimes" to the courts of law. *Milligan*, 4 Wall. at 127-28. As the Supreme Court would hold during World War II reaffirming *Milligan*, "Legislatures and courts are not merely cherished American institutions; they are indispensable to our government. Military tribunals have no such standing." *Duncan v. Kahanamoku*, 327 U.S. 304, 322 (1946).

Military commission are *ad hoc* bodies convened within the Executive Branch and presided over by military officers appointed by the same individual, the Convening Authority, who decides whether the charges should be brought at all. Those officers are necessarily and by law beholden to the same chain-of-command that has already decided a defendant warrants trial and execution as a war criminal. Conducting criminal trials, even of their own members, is at best one of the military's ancillary duties. "[T]he business of soldiers is to fight and prepare to fight wars, not to try civilians for their alleged crimes." *Reid v. Covert*, 354 U.S. 1, 36 (1957) (plurality op.). The writ therefore ensures that the federal courts can resist encroachments by the very agents of the Executive Branch whose primary duties are obedience and expediency. *Toth v. Quarles*, 350 U.S. 11, 15-17 (1955).

To be sure, the Supreme Court has tolerated the use of military tribunals to try non-service members when the genuine military necessities of the battlefield leave no viable

alternative. *See*, *e.g.*, *Hamdan v. Rumsfeld*, 548 U.S. 557, 591 (2006); *Milligan*, 4 Wall. at 127. In that limited context, military commissions take procedural and evidentiary shortcuts that compromise truth finding but are required by "the unique circumstances of the conduct of military and intelligence operations during hostilities[.]" 10 U.S.C. § 949a(b)(1); *see also* H.R. Rep. No. 109-664(I) at 2 (2006) (describing the purpose of the Military Commissions Act of 2006 as providing "standards for the admission of evidence, including hearsay evidence and other statements, which are adapted to military exigencies[.]").

That battlefield necessity, however, depends on the crimes alleged having actually occurred on a recognized battlefield. A military commission's most important prerequisite is therefore that "the offense alleged must have been committed both in a theater of war and *during*, not before, the relevant conflict." *Hamdan*, 548 U.S. at 607 (emphasis in original); *id*. at 683-84 (Thomas, J., dissenting) (agreeing that a "commission may only assume jurisdiction of 'offences committed within the field of the command of the convening commander,' and that such offenses 'must have been committed within the period of the war.'").

There is no military necessity in a case like this one, where a crime scene was investigated by the FBI and criminal indictments not only can be but have been procured from a grand jury. As evidence by §950p(c) itself, Congress did "not transform the military commission from a tribunal of true exigency into a more convenient adjudicatory tool." *Hamdan*, 548 U.S. at 625. Petitioner's entitlement to the writ is both plain and substantial because no military necessity warrants dispensing with a regular trial in a court of law for crimes allegedly committed where no hostilities existed.

B. The Law of War Only Applies to Recognized Theaters of Hostilities.

Because war is "abnormal and exceptional," *Sutherland v. Mayer*, 271 U.S. 272, 287 (1926), the law strongly presumes the laws of war do not apply. *See Milligan*, 4 Wall. at 140 (Chase, C.J., concurring) ("We by no means assert that Congress can establish and apply the laws of war where no war has been declared or exists. Where peace exists, the laws of peace must prevail."). To overcome that presumption, the Constitution vests Congress with the power to declare war. U.S. Const., art. I § 8, cl. 11. For over two centuries, acts of Congress have been dispositive of where and when hostilities exist. *Talbot v Seeman*, 1 Cranch 1, 28-29 (1801) (Marshall, C.J.) (holding that acts of Congress "can alone be resorted to [in order to determine the existence and scope of hostilities] ... in which case the laws of war, so far as they actually apply to our situation, must be noticed.").

To be sure, the Supreme Court has also recognized that the President has some authority as Commander-in-Chief to determine whether hostilities exist at particular times and places during his or her term of office. *Lee v. Madigan*, 358 U.S. 228, 231 (1959); *The Prize Cases*, 2 Black 635, 671 (1862). But whether that determination comes from the Congress or the President, the courts have consistently held that *some* contemporaneous public determination by the political branches is a necessary condition for hostilities to exist and for the law of war to apply.[2]

[2] *See also The Three Friends*, 166 U.S. 1, 63-64 (1897) ("[I]t belongs to the political department to determine when belligerency shall be recognized, and its action must be accepted [by the courts] according to the terms and intention expressed."); *Masterson v. Howard*, 85 U.S. 99, 105 (1873) ("That was the first public act of the executive in which the existence of the war was officially recognized, and to its date the courts look to ascertain the commencement of the war."); *The Protector*, 79 U.S. 700, 702 (1871) (When called upon to answer a question that turns on the dates of hostilities "it is necessary, therefore, to refer to some public act of the political departments of the government to fix the dates."); *Padilla v. Rumsfeld*, 352 F.3d 695, 712 (2d Cir. 2003) *rev'd on other grounds* 542 U.S. 426 (2004) ("[W]hether a state of armed conflict exists against an enemy to which the laws of war apply is a political question for the President, not the courts."); *New York Life Ins. Co. v. Durham*, 166 F.2d 874, 875 (10th Cir. 1948) ("In deciding judicial questions concerning the commencement or termination of a state of

Indeed, under longstanding military law, a "time of war" is defined as "a period of war declared by Congress or the factual determination by the President that the existence of hostilities warrants a finding that a 'time of war' exists for purposes" of military justice. Manual for Courts Martial, pt. 2, Rule 103(19) (2012).

Historically, courts took judicial notice of various kinds of contemporaneous Presidential proclamations or declarations of war by Congress. Since the War Powers Resolution, however, the judicial task has become more straightforward. The War Powers Resolution formalized the political branches shared authority over the war powers by providing a set of time-sensitive administrative procedures that ensure transparency and accountability when U.S. forces are deployed abroad. *See* Cyrus Vance, *Striking the Balance: Congress and the President Under the War Powers Resolution*, 133 U. Penn. L. Rev. 79, 83-87 (1984).

Under the War Powers Resolution, the President reports to Congress whenever, *inter alia*, U.S. forces are present in an area of actual or likely hostilities. 50 U.S.C. § 1543(a). If they are, other aspects of the law are triggered, such as the need for further Congressional action. *Id*. §1544(a)-(b). The President has made more than 138 of these reports since the law was first enacted. Richard L. Grimmett, CRS Report for Congress, The War Powers Resolution: After Thirty-Eight Years (Sept. 5, 2012).

Congress, for its part, passes authorizations for the use force that are supplementary to and codified within the War Powers Resolution.[3] When the President relies upon one of these

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war, the Courts are generally required to refer to some public act of the political departments of the Government."); *Johnson v. Biddle*, 12 F.2d 366, 369 (8th Cir. 1926) ("The courts take judicial notice that the United States is or is not engaged in war.").

[3] *See*, *e.g.*, Multinational Force and Observers Participation Resolution, Pub. L. 97-132, 95 Stat. 1693 § 7(c) ("Sinai Resolution") (military action in the Sinai); Multinational Force in Lebanon Resolution, Pub. L. 98-119, 97 Stat. 805 §§ 2(b), 3, 4 (military action in Lebanon); Authorization for Use of Military Force Against Iraq Resolution, Pub. L. 102-1, 105 Stat. 3 § 2(c) ("Iraq

authorizations to initiate hostilities in a particular place, he submits War Powers Resolution reports to Congress invoking that authority.[4] Accordingly, though Congress did not specify geographical parameters on the use of the AUMF, the President has subsequently defined those parameters by submitting War Powers Resolution reports whenever its authorities have been invoked to define a new theater of potential hostilities.[5]

As would be expected, every court to consider the question over the past decade has looked to acts of Congress, specifically the AUMF and the Authorization for the Use of Military Force for Iraq, Pub. L. 107-243, 116 Stat. 1498 (codified at 50 U.S.C. § 1541, *note*), to define the scope of modern hostilities as reaching the September 11th attacks and the wars in Iraq and Afghanistan. *See*, *e.g.*, *Hamdan*, 549 U.S. at 594 ("the AUMF activated the President's war powers ... and that those powers include the authority to convene military commissions in appropriate circumstances"); *Rasul v. Bush*, 542 U.S. 466 (2004) ("Acting pursuant to [the AUMF], the President sent U.S. Armed Forces into Afghanistan to wage a military campaign

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Resolution") (military action against Iraq); Authorization for the Use of Military Force, Pub. L. 107-40, 115 Stat. 224 § 2(b) (military action in response to the September 11th attacks); Authorization for the Use of Military Force for Iraq, Pub. L. 107-243, 116 Stat. 1498 § 3(c) (military action against Iraq).

[4] *See*, *e.g.*, *Letter to Congress Reporting on the Deployment of U.S. Forces in the Multinational Force and Observers*, 18 Wkly. Comp. Pres. Doc. 349 (Mar. 19, 1982) (Attachment E) (the Sinai); *Letter to Congressional Leaders on the Persian Gulf Conflict*, 27 Wkly. Comp. Pres. Doc. 21 (Jan. 18, 1991) (Attachment F) (Kuwait and Iraq); *Letter to the Speaker of the House of Representatives and the President Pro Tempore of the Senate*, 37 Wkly. Comp. Pres. Doc. 1447 (Oct. 9, 2001) (Attachment I) (Afghanistan); *Letter to Congressional Leaders Reporting on the Commencement of Military Operations Against Iraq*, 39 Wkly. Comp. Pres. Doc. 348 (Mar. 21, 2003) (Attachment L) (Iraq).

[5] *See*, *e.g.*, *Letter to the Speaker of the House of Representatives and the President Pro Tempore of the Senate*, 37 Wkly. Comp. Pres. Doc. 1447 (Oct. 9, 2001) (Attachment I) (Afghanistan); *Letter to Congressional Leaders Reporting on United States Efforts in the Global War on Terrorism*, 39 Wkly. Comp. Pres. Doc. 246 (Mar. 20, 2003) (Attachment J) (the Philippines); *Letter to Congressional Leaders Reporting on the Deployments of United States Combat-Equipped Armed Forces Around the World*, 43 Wkly. Comp. Pres. Doc. 815 (Jun. 18, 2007) (Attachment N) (Somalia).

against al Qaeda and the Taliban regime that had supported it."); *Carter v. Halliburton*, 710 F.3d 171, 179 (4th Cir. 2013) ("Although not a formal recognition of war, the AUMF [for Iraq] signaled Congress's recognition of the President's power to enter into armed hostilities."); *Hamdan v. United States*, 696 F.3d 1238, 1240 (D.C. Cir. 2012) ("After al Qaeda's attacks on the United States on September 11, 2001, Congress authorized the President to wage war against al Qaeda. That war continues."); *United States v. Pfluger*, 685 F.3d 481, 483 n.3 (5th Cir. 2012) (stipulating that the AUMF and the AUMF for Iraq created a time of war for the purposes of the Suspension Act, 18 U.S.C. § 3287); *Al-Bihani v. Obama*, 619 F.3d 1, 24-26 (D.C. Cir. 2010) (Kavanaugh, J., concurring in the denial of rehearing *en banc*) (describing the AUMF as authorizing the President "to take at least those actions that U.S. Presidents historically have taken in wartime – including killing, capturing, and detaining the enemy.").

In rejecting Petitioner's challenge to his jurisdiction, COL Pohl ignored this traditional rule. Instead, he reasoned that the Convening Authority's very decision to convene a military commission to try Petitioner satisfies §950p(c) as well as the constitutional predicates for military jurisdiction, at least insofar as the now-sitting President has not personally countermand that decision. (Attachment C). Put differently, COL Pohl ruled that there are *no* conditions on military commission jurisdiction that are not satisfied by the mere fact that Respondents have asserted jurisdiction over a particular case. Such deference to the prerogatives of the chain-of-command is precisely the reason why habeas has always served a crucial role in compensating for military tribunals' institutional inability to check against overreaching. *See*, *e.g.*, *Hamdan*, 548 U.S. at 648-49 (Kennedy, J., concurring) (noting that the judicial officers lacked independence from the appointing authority); *Toth*, 350 U.S. at 17 ("military tribunals have not

been and probably never can be constituted in such way that they can have" genuine independence from the pressures of command).

C. Yemen was Not a Theater of Hostilities at Any Time Relevant to the Charges Against Petitioner.

In stark contrast to the status conferred on the September 11th attacks and the wars in Afghanistan and Iraq, the public record relating to Yemen not only fails to demonstrate that the law of war governed Petitioner's alleged conduct, it reflects an affirmative contemporary judgment by both the President and Congress that hostilities did not exist at all. No one has ever suggested that Petitioner had a role in the September 11th attacks or the conflict in Afghanistan. The most serious allegations against him relate to his alleged role in the USS COLE incident in October 2000. As judged by the then-sitting President, that crime occurred at a "time of peace," when "America [was] not at war." (Supp. Pet. ¶¶ 17-18). Indeed, the vast majority of the allegations against Petitioner occurred nearly a year before the AUMF was enacted.

The only post-AUMF allegations against Petitioner involve a plot to bomb a French oil tanker in Yemen at a time when U.S. forces were deployed in Yemen for training missions. (Supp. Pet. ¶¶ 20-21). This incident prompted no military action from the President, the Congress, or the government of France. Given the presence of U.S. military personnel, the War Powers Resolution would have obliged the President to report to Congress if hostilities either existed or were likely. Instead, even when reporting on this deployment six months after Petitioner was in custody, the President declined to find the actual or imminent possibility of hostilities in Yemen. (*Id*.).

Petitioner's likelihood of success on the merits is therefore substantial because the criminal acts he is alleged to have to have committed occurred at a time and place when neither America nor Yemen was "at war." That single claim, which forms the basis of his supplemental

petition, falls within the well-established rule of *Milligan* and its progeny as well as the explicit terms of §950p(c). Indeed, Petitioner's case is far more compelling than *Milligan* or *Hamdan*'s ever were. Lambdin Milligan supported a war for slavery that raged within a few miles of the Indiana border and resulted in the death of half-a-million Americans. Salim Hamdan was captured in November 2001 transporting weapons to the Taliban in Afghanistan and charged with being Usama bin Laden's getaway driver to Tora Bora after the September 11th attacks.

While the allegations against Petitioner are undoubtedly serious, he was seized by local authorities in a foreign commercial capital, taken into the custody of a civilian U.S. agency, and named in a criminal indictment in New York, all nearly four years before Respondents decided it would be more convenient to hold him in a military facility. If the government wishes to hold Petitioner criminally responsible for the allegations it has levied against him, allegations he has denied during more than a decade of custody, it need not – and cannot – resort to an *ad hoc* battlefield tribunal to prove he committed crimes that occurred nowhere near a battlefield.

II. Without a Preliminary Injunction, Petitioner Will be Irreparably Deprived of his Right Not to be Tried and Sentenced to Death by the Military.

Petitioner will suffer three distinct irreparable harms if Respondents are allowed to continue prosecuting him before a military commission while his challenge to that commission's very jurisdiction remains pending before this Court. *First*, and foremost, Petitioner will be permanently deprived of a recognized statutory and constitutional right not to be tried by the military for offenses that do not fall under the military's authority. *Second*, he will be deprived of the practical ability to mount an effective defense in a capital trial. *Third*, given the location and unusual character of these proceedings as well as the circumstances of Petitioner's prior custody, he will suffer unique and irreparable psychological harms.

A. Petitioner Will Lose His Statutory and Constitutional Right Not to be Tried if His Military Commission is Allowed to Proceed Without Jurisdiction.

If Petitioner is tried by a military commission for offenses that both the Congress and the Supreme Court have specifically stated are not triable, he will suffer a permanent loss of his right not to be tried. This is precisely the legal harm that this Court relied upon when it issued a preliminary injunction of the military commission in the *Hicks* case. "[T]he crux of the irreparable injury that petitioner faces if tried by a tribunal consequently deemed not to have jurisdiction over him … [is] the fact that he would have been tried by a tribunal without any authority to adjudicate the charges against him in the first place[.]" *Hicks v. Bush*, 397 F.Supp.2d 36, 42 (D.D.C. 2005). It is also the precise harm the D.C. Circuit identified in *Hamdan v. Rumsfeld*, where "[s]etting aside the judgment after trial and conviction insufficiently redresses the defendant's right not to be tried by a tribunal that has no jurisdiction." *Hamdan v. Rumsfeld*, 415 F.3d 33, 36 (D.C. Cir. 2005) *rev'd on other grounds* 548 U.S. 557 (2006) (citing *Abney v. United States*, 431 U.S. 651, 662 (1977)).

To be sure, not every objection an accused may have to his trial implicates a right not to be tried. And even when subject matter jurisdiction is at issue, the Supreme Court has suggested that a federal court might be justified in abstaining from pre-trial intervention where petitioners seek review of "military commissions convened on the battlefield." *Hamdan*, 548 U.S. at 590; *cf. Al-Maqaleh v. Gates*, 605 F.3d 84, 88 (D.C. Cir. 2010) (denying habeas review for Afghan detainees because, *inter alia*, "Afghanistan remains a theater of active military combat"). There may also be grounds to doubt that petitioners who are, in fact, captured on a recognized battlefield and charged for conduct committed on that battlefield can mount a pre-trial challenge to the constitutionality of the Congressional laws that authorize their trial by the military. *See Hamdan v. Gates*, 565 F.Supp.2d 130 (D.D.C. 2008) (abstaining from deciding the constitutional

challenges of an enemy combatant captured in Afghanistan to the Military Commissions Act); *but see Quirin*, 317 U.S. at 25 ("[T]here is certainly nothing in [Presidential Proclamation 2561, *Denying Certain Enemies Access to the Courts*, 7 Fed. Reg. 5101 (Jul. 2, 1942)] to preclude access to the courts for determining its applicability to the particular case. And neither the Proclamation nor the fact that they are enemy aliens forecloses consideration by the courts of petitioners' contentions that the Constitution and laws of the United States constitutionally enacted forbid their trial by military commission.").

Here, however, Petitioner has made a substantial showing that the constitutional and statutory prerequisites for military jurisdiction over battlefield conduct are completely absent. This is clear enough from Congress' considered choice to use the word "triable" in §950p(c), as opposed to "punishable" or "liable" or any other term that would afford an individual a right not to be convicted, as opposed to the right not to be tried at all. *See Abney*, 431 U.S. at 662, n.7 (pre-trial judicial review is necessary when a statute "conferred on it a right not to face trial at all unless" the terms of the statute were satisfied. "By permitting an immediate appeal under those circumstances, this Court made sure that the benefits of the statute were not 'canceled out.'). When the military's very assertion of jurisdiction exceeds the statutory and constitutional limits on what is triable by the military, that violates an "explicit statutory [and] constitutional guarantee that trial will not occur." *Midland Asphalt Corp. v. United States*, 489 U.S. 794, 801 (1989). Petitioner therefore asserts one of a small class of claims that implicate a "right not to be tried" that is irrevocably lost if it can be vindicated only after trial.

On three separate occasions, the Supreme Court has dealt with the claim raised here on pre-trial habeas. In *Hamdan*, one of the petitioner's primary challenges was to the military's jurisdiction over conduct alleged to have occurred prior to September 11, 2001. While the

majority decision relied on the commission's other statutory defects, a plurality looked to these "deficiencies in the time and place allegations" and found that they "underscore – indeed are symptomatic of – the most serious defect of this charge: The offense it alleges is not triable by law-of-war military commission." *Hamdan*, 548 U.S. at 600 (plurality op.). In *Reid*, the Court took up a pre-trial habeas challenge to whether military dependents were subject to military jurisdiction for capital crimes committed "outside an area where active hostilities were underway[.]" *Reid*, 354 U.S. at 35. The Court held that "we reject the Government's argument that present threats to peace permit military trial of civilians accompanying the armed forces overseas in an area where no actual hostilities are under way." *Id*. And in *McElroy v. Guagliardo*, 361 U.S. 281 (1960), the Court took up a pre-trial habeas challenge to whether military contractors were subject to military jurisdiction for non-capital crimes. Again, the Court granted relief, holding that the exercise of military jurisdiction over non-service members is, at most, only permissible for crimes committed "in the field," which the Court defined as "in a time of 'hostilities'[.]" *Id*. at 285-86.

All three were pre-trial habeas cases that asked the single question raised in this case: can the military assert jurisdiction over the crimes of a non-service member, which are alleged to have been committed abroad but outside an area of recognized hostilities. In each case, the Supreme Court granted relief because "[t]he exigencies which have required military rule on the battlefront are not present in areas where no conflict exists. Military trial of civilians 'in the field' is an extraordinary jurisdiction, and it should not be expanded at the expense of the Bill of Rights." *Reid*, 354 U.S. at 35 (plurality op.).

B. The Substantial Risk of Retrial in a Capital Case Imposes Irreparable Harms to Petitioner's Ability to Defend Himself.

Trial by a military commission that lacks all jurisdiction imposes irreparable practical harms that cannot be adequately remedied by the prospect of post-trial review. These practical harms are particularly significant when death is sought. When a tribunal lacks all jurisdiction, a successful post-trial appeal removes former jeopardy and puts the accused back at square one, "potentially subjecting him to a second trial before a different tribunal." *Hicks*, 397 F.Supp.2d at 42. If Petitioner prevails on the single question of law at the center of this case, either now or on appeal many years from now, he faces the prospect of retrial in the Southern District of New York. Postponing meaningful judicial review simply forces him to endure a gratuitous capital trial and years of post-trial delay before he is retried.

The irreparable practical harms this imposes have been recognized in far less extreme circumstances. In *Rafeedie v. I.N.S.*, 880 F.2d 506, 517-18 (D.C. Cir. 1989), the D.C. Circuit held that an individual facing a summary deportation proceeding "would be irreparably and seriously injured" if it turned out that the proceeding lacked jurisdiction over him. This was because forcing the petitioner to wait for *post hoc* review presented him with a Catch-22. If he fully defended himself in the deportation hearing, the government would "know his defense in advance of any subsequent … proceeding." *Id*. If he held back and bet on his jurisdictional challenge, "he risk[ed] forsaking his only opportunity to" defend himself on the merits. *Id*. If pretrial habeas review is foreclosed, Petitioner will irreparably lose these well-recognized "practical litigation advantage[s]," *Rafeedie*, 880 F.2d at 517.

Given the serious consequences if he is convicted, Petitioner does not have the same ability an ordinary military commission defendant might have to give up these practical litigation advantages. A judgment from the military commission risks not only a loss of liberty, but

execution. Though it borders on legal cliché, "death is different." *Gardner v. Florida*, 430 U.S. 349, 357-58 (1977) (plurality op.). "Time and again the [Supreme] Court has condemned procedures in capital cases that might be completely acceptable in an ordinary case." *Caspari v. Bolden*, 510 U.S. 383, 393 (1994) (quotations omitted). In fact, when the Supreme Court first invalidated military jurisdiction over service-members' dependents, Justice Harlan concurred separately to emphasize that "[s]o far as capital cases are concerned, ... the law is especially sensitive to demands for that procedural fairness which inheres in a civilian trial where the judge and trier of fact are not responsive to the command of the convening authority." *Reid*, 354 U.S. at 77 (Harlan, J., concurring).

The prospect of death presents "grisly choices" that distort a defendant's trial strategy in ways that cannot be sufficiently corrected by post-trial review. *See Fay v. Noia*, 372 U.S. 391, 439 (1963) *abrogated on other grounds by Coleman v. Thompson*, 501 U.S. 722 (1991). A defendant facing the death penalty faces unique "practical and legally-cognizable disadvantages" that result from being "forced into trial tactics that are designed to avoid the death penalty but that have the consequence of making conviction more likely." *United States v. Quinones*, 313 F.3d 49, 59 (2d Cir. 2002); *see also United States v. Harper*, 729 F.2d 1216, 1223 (9th Cir. 1984).

Every decision Petitioner makes in the military commission falls into the Catch-22 the D.C. Circuit identified in *Rafeedie*. As an ethical matter, "[b]ecause of the possibility that the client will be sentenced to death, counsel must be significantly more vigilant about litigating all potential issues at all levels in a capital case than in any other case." *American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, 31 Hofstra L. Rev. 913, 1028 (2003). Yet, looming in the background is the knowledge that prevailing on the issue raised here post-trial will leave him vulnerable to the indictment pending

in the Southern District of New York. Despite the fundamental jurisdictional doubts that hang over this case, Petitioner must mount a full and complete defense in Guantanamo at the same time the government can treat this military commission trial as a dress rehearsal.

C. Petitioner Faces Irreparable Psychological Harms if he is Subjected to a Gratuitous Death Penalty Trial.

At present, Petitioner and his counsel are prohibited by a protective order that COL Pohl issued from disclosing information to this Court that is classified, falls within certain subject-matter categories deemed presumptively classified, or is derived from certain sources. AE013F, Protective Order ¶ 29 (Dec. 12, 2011) (as amended). That includes all statements either representing or derived from the accused's thoughts, memories, and experiences. *Id*. ¶9(d)(vi).

On April 9, 2014, Petitioner filed a request with COL Pohl, requesting relief from the terms of his protective order. Petitioner asked permission to provide this Court a declaration from his learned capital counsel, Richard Kammen, and his lead military counsel, CDR Brian Mizer, USN, along with supporting documentation, under seal through the Court Security Officer. These declarations convey counsel's findings and impressions on the ways in which the lasting psychological consequences of torture have impaired their preparation of Petitioner's defense as well as the ways in which these impediments continue to be exacerbated by the procedural and logistical irregularities of the military commission process itself.

Taken together with Petitioner's substantial claim on the merits, Petitioner believes that he has shown sufficient irreparable harm to warrant a preliminary injunction without this declaration. Indeed, Petitioner has demonstrated the very harms that have supported interim relief in previous cases when success on the merits was more doubtful. *See*, *e.g.*, *Hicks*, 397 F.Supp.2d at 44 (finding that even though controlling case law "virtually eliminates petitioner's 'likelihood of success on the merits'," the balance of equities "favor interim relief," so that the

"court may grant injunctive relief when the moving party has merely made out a 'substantial' case on the merits."). However, should the balance of equities still be in doubt, Petitioner wishes to reserve his right to make a further showing of the unique and substantial harms to his mental health and future ability to protect his legal rights that result from the unusual character of his detention and the military commission proceedings themselves.

Types of harm that may not be significant for ordinary individuals can and do constitute irreparable harm where "the health of a legally incompetent or vulnerable person is at stake[.]" *Al-Joudi v. Bush*, 406 F.Supp.2d 13, 20 (D.D.C. 2005). Even for an ordinary capital defendant, "[e]nduring a trial that entails the possibility of a death penalty imposes a hardship 'different in kind' from enduring the discomfiture of any other trial. The emotional stress and strain of a trial in a capital case are extreme in character and *sui generis*." *Harper*, 729 F.2d at 1222-23. If Respondents are correct and Petitioner's military commission is lawfully constituted, the infliction of these significant and irreparable harms may be inevitable. But allowing an *ad hoc* death penalty trial to proceed, when there is a substantial likelihood that it will be vacated after-the-fact, threatens to inflict these *sui generis* harms gratuitously.

III. Respondents Suffer No Substantial Harm From a Temporary Stay of Military Commission Proceedings While This Court Decides the Single Question of Law at the Center of This Case.

Preserving the *status quo* while this Court resolves the single question of law at the center of this case will not harm Respondents, who can resume the military commission proceedings in the unlikely event that they can demonstrate that military trials for peacetime crimes are authorized by federal law. Petitioner has been in U.S. custody for over a decade. During that time, the government has been wholly unencumbered in its treatment of him and has made clear that it intends to continue to hold him indefinitely, even if he is acquitted. AE011A, Gov't Resp. (Oct.

27, 2011) (Attachment A) ("The [detention] status of the accused is a matter that will be addressed by appropriate components of the U.S. government, subject to habeas review by the federal courts, after the commission proceedings have been resolved[.]"); *cf. Hamdan*, 548 U.S. at 646 (Kennedy, J., concurring) ("regardless of the outcome of the criminal proceedings at issue, the Government claims authority to continue to detain him based on his status as an enemy combatant."); *Hicks*, 397 F. Supp. 2d at 42 ("Considering that Petitioner in this case has been held by the U.S. government since November of 2002 and in the event of an injunction that he will simply continue to be detained by the government, the Court fails to see how further delay will harm the government. … [T]he minor logistical reshuffling caused by an injunction [is not] injury to Respondents in any material fashion.").

However, to further ensure that Respondents are not harmed by temporarily preserving the *status quo*, the proposed preliminary injunction is narrowly tailored and its language is taken near verbatim from Respondents' 2009 Executive Order. E.O. 13492, *Review and Disposition of Individuals Detained at the Guantánamo Bay Naval Base and Closure of Detention Facilities* § 7 (Jan. 22, 2009).[6] In January 2009, military prosecutors relied on this executive order to argue for what would ultimately prove to be a three-year suspension of all proceedings. They maintained that a postponement pursuant to its terms served the "interests of justice because it will allow sufficient time for a comprehensive review of the current process and prevent decisions and actions that may be inconsistent with future adopted procedures; and prevent potentially futile expenditure of resources." Gov't Reply, P-002 (Jan. 28, 2009) (Attachment D).

[6] "*Military Commissions.* The Secretary of Defense shall immediately take steps sufficient to ensure that during the pendency of the Review described in section 4 of this order, no charges are sworn, or referred to a military commission under the Military Commissions Act of 2006 and the Rules for Military Commissions, and that all proceedings of such military commissions to which charges have been referred but in which no judgment has been rendered, and all proceedings pending in the United States Court of Military Commission Review, are halted."

Respondents have therefore demonstrated by their own conduct that the requested injunction will result in no significant prejudice to their legitimate legal interests. A brief suspension costs little in the short term and arguably saves the government the far greater expense of a pointless death penalty trial. As the Supreme Court recognized in *Hamdan*, the government equally benefits from "knowing in advance whether [the accused] may be tried by a military commission that arguably is without any basis in law." *Hamdan*, 548 U.S. at 589.

Petitioner does not anticipate that the resolution of his supplemental petition will require the three years that elapsed between the first and second military commissions Respondents created to try him. If the government places a newfound premium on prosecuting Petitioner swiftly, the indictment in the Southern District of New York remains available. *Cf. United States v. Ghailani*, 733 F.3d 29, 49 (2d Cir. 2013) (affirming the conviction of a detainee transferred from a military commission in Guantanamo to federal court for prosecution); U.S.D.O.J. Press Release No. 14-313, General Holder and Acting Assistant Attorney General Carlin on Conviction of Sulaiman Abu Ghayth (Mar. 26, 2014)[7] ("We never doubted the ability of our Article III court system to administer justice swiftly in this case, as it has in hundreds of other cases involving terrorism defendants. It would be a good thing for the country if this case has the result of putting that political debate to rest."). But if Respondents insist on maintaining a doubtful prosecution against him in a novel military commission system, they suffer no legitimate prejudice if this Court determines in advance whether utilizing that system is lawful.

[7] *Available at* http://www.justice.gov/opa/pr/2014/March/14-ag-313.html

IV. The Public has a Compelling Interest in Preventing Respondents From Exceeding the Limits that Congress and the Constitution have Placed on their Use of Military Commissions.

Congress has put express limits on what is "triable" by military commission and Respondents have "exceed[ed] limits that certain statutes, duly enacted by Congress, have placed on the President's authority to convene military courts." *Hamdan*, 548 U.S. at 636 (Kennedy, J., concurring). The balance of the public interest tips decidedly in favor of granting the preliminary injunction because doing so serves three important public interests.

First, the public has a compelling interest in preventing the military from exceeding the limits that Congress and the Constitution have put on its authority to act in place of the courts of law. "[N]o graver question was ever considered by this court, nor one which more nearly concerns the rights of the whole people" than the scope of the military's authority to remove a capital trial from a civilian court. *Milligan*, 4 Wall. at 118-19. Indeed, the Supreme Court has previously interrupted military commission proceedings against Nazi marines as well as Usama bin Laden's courier for this very reason. *Quirin*, 317 U.S. at 19 ("In view of the public importance of the questions raised by their petitions and of the duty which rests on the courts, in time of war as well as in time of peace, to preserve unimpaired the constitutional safeguards of civil liberty, … *the public interest required that we consider and decide those questions without any avoidable delay*.") (emphasis added); *Hamdan*, 548 U.S. at 567 ("[T]rial by military commission is an extraordinary measure raising important questions about the balance of powers in our constitutional structure.").

Second, without a preliminary injunction, Petitioner will be tried before an *ad hoc* military tribunal that lacks any colorable claim of jurisdiction over him. "It would not be in the public interest to subject Petitioner to a process which the highest court in the land may determine to be invalid. It is in the public interest to have a final decision, leaving no doubts as to

this key jurisdictional issue, before Petitioner's military commission proceedings begin." *Hicks*, 397 F.Supp.2d at 43. Going through the motions of these proceedings only to have them invalidated many years from now on post-trial appeal will undermine the public's confidence in the government's fidelity to the rule of law, if not the value of the rule of law itself.

Third, and finally, the public has a compelling interest in having a clear answer to the central question in this case. Petitioner's sole claim is that Respondents cannot supplant the courts of law in a case whose relevant times, places, persons, and events were not part of any conflict subject to the law of war. This is the claim on which the Supreme Court granted relief in *Milligan*. It was deemed fundamental by a majority in *Hamdan*. And Congress made it the predicate for an offense to be triable at all by military commission. 10 U.S.C. § 950p(c). If the traditional rule is applied, the answer in this case is as plain now as it was when the President said "America is not at war" more than a decade ago. If some new rule applies, then Petitioner's trial by military commission is a novel test case for the military's ability to revise the past for the convenience of the present. In other words, if the public acts of the sitting President and Congress are no longer a necessary condition for war, then the public should know that the military has and, in the future, will have the authority to rewrite history. Given the law of war's broadly sweeping implications for so many aspects of the legal system, the public is entitled to know what law governs their daily lives today.

As the significant public interests at stake in this case demonstrate, there "is no higher duty of a court, under our constitutional system, than a careful processing and adjudication of petitions for writs of habeas corpus[.]" *Harris v. Nelson*, 394 U.S. 286, 292 (1969). The requested preliminary injunction will give this Court time to carefully consider the merits and provide much needed legal certainty.

CONCLUSION

For the foregoing reasons, Petitioner asks this Court to enter the requested preliminary injunction. The need for clarity and certainty on the central question presented by Petitioner's habeas petition far outweighs any prejudice that could result from a momentary suspension of proceedings that the government itself elected to let languish for a decade.

Respectfully submitted,

Dated: April 21, 2014

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CERTIFICATE OF SERVICE

I certify that on April 21, 2014, I caused the foregoing to be served on Respondent's counsel by delivering four copies to the Court Security Officer pursuant to the Amended Protective Order for Habeas Cases Involving Top Secret/Sensitive Compartmented Information and Procedures for Counsel Access to Detainees at the United States Naval Station in Guantanamo Bay, Cuba, in Habeas Cases Involving Top Secret/Sensitive Compartmented Information, Case Nos. 08-MC-442-TFH (Dkt. Nos. 1481 and 1496) & 08-cv-01207-RJR (Dkt. Nos. 79 & 80) (D.D.C. 9 January 2009).

Dated: April 21, 2014

Respectfully submitted,

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