[NOT SCHEDULED FOR ORAL ARGUMENT]

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

OMAR KHADR,	)	
Petitioner,	)	
v.	)	No. 07-1156
ROBERT M. GATES, Secretary of Defense,	)	
Respondent.	)	

OPPOSITION TO PETITIONER'S EMERGENCY MOTION
TO STAY MILITARY COMMISSION PROCEEDINGS

Respondent Secretary of Defense hereby opposes petitioner Omar Khadr's emergency motion to stay military commission proceedings.[1] As discussed below: (1) under the governing statutes, this Court lacks jurisdiction to enjoin such proceedings; (2) this Court's legitimate jurisdiction will not be threatened if the military commission proceedings move forward now; and (3) Khadr's argument that he cannot validly be labeled an enemy combatant because he committed war crimes while he was a minor is mistaken.

Khadr is charged with "unlawfully and intentionally murder[ing] U.S. Army Sergeant First Class Christopher Speer" in July 2002, in Afghanistan. Emerg. Mot., Ex. J. Charges also include that Khadr built and planted land mines designed to kill U.S. troops, and that he committed these acts "without enjoying combatant immunity." *Ibid.* Khadr is currently scheduled to be arraigned by a military commission on June 4, 2007. Emerg. Mot., Ex. K.

In his emergency motion, Khadr asks this Court to enjoin his military commission proceedings while this Court considers his challenge to the determination by a Combatant Status Review Tribunal ("CSRT") that he is an "enemy combatant."

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[1]There are questions regarding whether Khadr's attorneys are authorized to represent him in filing the instant proceeding. A recent news report asserts that Khadr has terminated representation by U.S. civilian attorneys, and has refused to meet with them. Michelle Shepard, *Khadr Meets Canadian Lawyers in Guantanamo*, Toronto Star, May 24, 2007, *available at* http://www.thestar.com/article/217603. Accordingly, before this Court acts on the emergency motion, counsel should provide evidence supporting authorization to file this proceeding.

Congress has, however, barred jurisdiction over the relief Khadr seeks.

The Military Commissions Act of 2006 ("MCA") (Pub. L. No. 109-366, 120 Stat. 2600) precludes this Court from exercising jurisdiction over Khadr's effort to enjoin the military commission proceedings. Section 3 of the MCA generally bars any court, justice, or judge from exercising jurisdiction over "any claim or cause of action whatsoever * * * relating to the prosecution, trial, or judgment of a military commission under this chapter." MCA § 3; 10 U.S.C. § 950j(b). The only exception is the one provided in the MCA: this Court has jurisdiction to review a military commission decision, but only *after* a "final judgment" of the commission has been rendered. See 10 U.S.C. § 950g(a). These jurisdiction-limiting provisions establish that this Court has no jurisdiction to issue the injunction sought by Khadr.

Khadr cannot evade these plain jurisdictional restrictions on review of military commission proceedings by asserting jurisdiction under the Detainee Treatment Act of 2005 ("DTA") (Pub. L. No. 109-148, 119 Stat. 2680), which provides jurisdiction for this Court to review the validity of enemy combatant determinations by CSRTs. Those review provisions do not authorize or allow this Court to review military commission proceedings, and do not authorize this Court to order them halted. Moreover, this Court's jurisdiction to review the CSRT decision covering Khadr will in no way be threatened if the military commission proceeds; if this Court later finds that the CSRT decision was flawed, Khadr could rely on that decision to challenge

the personal jurisdiction of the military commission, whether or not the commission trial had proceeded to judgment.

Finally, the balance of harms tips decidedly against the issuance of an injunction. The prosecution of individuals suspected of war crimes and other crimes triable by military commissions is an important aspect of the global war on terror. After the Supreme Court's decision in *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2761 (2006) in June 2006, Congress swiftly enacted the MCA to address the problems identified in *Hamdan*, and, shortly thereafter, the Secretary of Defense promulgated the rules and procedures for military commissions, all in an effort to ensure that combatants accused of triable crimes be brought to justice as quickly as possible. Enjoining military commission proceedings now would harm these interests and hamper the Government's efforts, while constituting a significant intrusion into areas within the province of the Executive Branch. The potential violation of the separation of powers principle would be particularly egregious here because the Legislative Branch has specifically divested this Court of the power to act in this circumstance.

On the other hand, being subjected to a trial by a military commission under the scheme envisioned by Congress is not irreparable harm, any more than a criminal defendant awaiting the conclusion of the criminal proceeding against him faces such harm. Khadr, if convicted, will have the fully adequate remedy of appellate review

not only in a military appellate court, but also in this Court.

Accordingly, this Court lacks jurisdiction to grant the relief requested and must deny Khadr's emergency request to enjoin his military commission proceedings.

BACKGROUND

Petitioner Omar Khadr, a Canadian national, was seized in Afghanistan in July 2002. Emerg. Mot., Ex. A. He was transferred to Guantanamo Bay Naval Base, where a CSRT confirmed his status as an enemy combatant, based on its determination that he is "a member of, or affiliated with, al Qaida." See *id.*, Ex. E.

Evidence presented to the CSRT included Khadr's admissions that he: (1) threw a grenade that killed a U.S. soldier; (2) attended an al Qaeda training camp in Kabul, which included weapons training; and (3) worked as a translator for al Qaeda to coordinate land mine missions as acts of terrorism. CSRT Rec. Ex. R-1.[2] In addition, evidence was presented that Khadr had participated in military operations against U.S. forces, including conducting surveillance to collect information on U.S. convoy movements, and planting land mines directed at U.S. military convoys. *Ibid.*

In 2005, the President designated Khadr for trial by a military commission, and the Government charged him. Military commission proceedings began in January 2006, but were terminated in light of the Supreme Court's decision in *Hamdan*, 126

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[2]Khadr's CSRT record was filed with the district court in connection with his habeas petition. *See O.K. v. Bush*, No. 04-CV-1136 (D.D.C.).

S. Ct. at 2761. In February 2007, new counts were sworn against him under the MCA, including charges of murder, attempted murder, and providing material support for terrorism. Emerg. Mot., Ex. A. Revised charges were sworn in April 2007. Emerg. Mot., Ex. J. Khadr is scheduled to be arraigned on these charges before a military commission on June 4, 2007. *Id.*, ex. K.

ARGUMENT

An "injunction is an extraordinary and drastic remedy, one that should not be granted unless the movant, by a clear showing, carries the burden of persuasion." *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997). The preliminary injunction factors govern adjudication of "a motion to stay an administrative order." *Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 599 F.2d 841, 841 n.1 (D.C. Cir. 1977). Those factors are: "(1) Has the petitioner made a strong showing that it is likely to prevail on the merits of its appeal? * * * (2) Has the petitioner shown that without such relief, it will be irreparably injured? * * * (3) Would the issuance of a stay substantially harm other parties interested in the proceedings? * * * (4) Where lies the public interest?" *Id.* at 842. Khadr has not met his burden.

I. KHADR HAS NOT SHOWN A LIKELIHOOD OF SUCCESS

A. This Court Lacks Jurisdiction to Halt Khadr's Military Commission.

1. As noted earlier, this Court lacks jurisdiction to stop military commission proceedings.

Khadr invoked this Court's jurisdiction under the DTA provision governing review of final CSRT determinations. Pet. at 1. Under that provision, this Court's jurisdiction is limited in scope: "to determine the validity of any final decision of a Combatant Status Review Tribunal that an alien is properly detained as an enemy combatant." DTA § 1005(e)(2)(A). The DTA does not authorize this Court to stay military commission proceedings.

Moreover, the MCA explicitly bars this Court's jurisdiction to review the military commission proceedings until they are completed. The MCA provides:

> Except as otherwise provided in this chapter and *notwithstanding any other provision of law* (including section 2241 of title 28 or any other habeas corpus provision), *no court, justice, or judge shall have jurisdiction to hear or consider any claim or cause of action whatsoever*, including any action pending on or filed after the date of the enactment of the Military Commissions Act of 2006, *relating to the prosecution, trial, or judgment of a military commission* under this chapter, including challenges to the lawfulness of procedures of military commissions under this chapter.

10 U.S.C. § 950j(b) (emphasis added). The MCA also confers upon this Court "exclusive jurisdiction to determine the validity of a final judgment rendered by a

military commission." 10 U.S.C. § 950g(a).

Accordingly, the MCA precludes jurisdiction to consider any claim whatsoever relating to a military commission until a commission issues a final judgment. The MCA thus manifestly bars jurisdiction over Khadr's motion here, and nothing in the DTA can or does affect that bar.

2. Khadr cites only the All Writs Act (28 U.S.C. § 1651(a)) as a source of authority for this Court to enjoin his military commission; that statute provides that federal courts "may issue all writs necessary or appropriate in aid of their respective jurisdictions." But the MCA specifically repeals federal court jurisdiction over military commission proceedings "notwithstanding any other provision of law." 10 U.S.C. § 950j(b). Thus, this Court cannot properly invoke the All Writs Act as a basis for reviewing military commission proceedings.

In any event, while the All Writs Act "authorizes employment of extraordinary writs, it confines the authority to the issuance of process 'in aid of' the issuing court's jurisdiction." *Clinton v. Goldsmith*, 526 U.S. 529, 534 (1999). Thus, "the express terms of the Act confine the power of the [court] to issuing process 'in aid of' its existing statutory jurisdiction; the Act does not enlarge that jurisdiction." *Id.* at 534-35. When an issue that is the subject of a request for a writ is "beyond the [appellate court's] jurisdiction to review [it is] * * * beyond the 'aid' of the All Writs Act in reviewing it." *Id.* at 535.

Here, the military commission proceedings are plainly beyond this Court's DTA jurisdiction, which authorizes this Court to review only whether an enemy combatant status determination by a CSRT "was consistent with the standards and procedures specified by the Secretary of Defense, * * * including the requirement that the conclusion of the Tribunal be supported by a preponderance of the evidence," and is consistent with the Constitution and laws of the United States, where applicable. DTA § 1005(e)(2)(C). Nothing in Khadr's military commission proceedings will prevent this Court from conducting its entirely independent function of conducting CSRT review under the DTA. Enjoining the commission proceedings is therefore in no way necessary to protect this Court's DTA jurisdiction.

3. Khadr cannot manufacture jurisdiction by citing the portion of the MCA specifying that "[a] finding * * * by a Combatant Status Review Tribunal * * * that a person is an unlawful enemy combatant is dispositive for purposes of jurisdiction for trial by military commission under this chapter." 10 U.S.C. § 948d(c). This provision plainly does not confer jurisdiction on this Court or broaden its authority in reviewing a CSRT determination under the DTA. Instead, it serves a simple practical purpose – to avoid relitigation of a detainee's status in military commission proceedings if a CSRT has already made a determination with respect to that status. See Manual for Military Commissions ("MMC"), Rule for Military Commission ("RMC") 202 note ("Because the C.S.R.T. process provides detainees with the

opportunity to challenge their status, the M.C.A. recognizes that status determination to be dispositive for purposes of the personal jurisdiction of a military commission"). And, while a determination by a CSRT that a detainee is an enemy combatant is "dispositive for purposes of jurisdiction for trial by military commission," it is not the only means by which a military commission's jurisdiction may be determined – jurisdiction may also be established if the Government demonstrates independently to the military commission that the detainee is an unlawful enemy combatant. See 10 U.S.C. §§ 948d(a) & (c).

If the Government relied on the CSRT determination to establish personal jurisdiction in the military commission, but this Court were at some point to set aside that determination, Khadr would have ample remedies under the rules governing military commission proceedings. The Rules for Military Commissions provide that the defendant can move to dismiss "at any stage of the proceedings" if "[t]he Military Commission lacks jurisdiction to try the accused." RMC 907. Khadr therefore could move to dismiss his military commission prosecution or vacate any resulting conviction on the ground that the commission had no personal jurisdiction over him. The military judge then could consider whether dismissal was appropriate or whether the Government had otherwise shown, or could independently show, that Khadr was an alien unlawful enemy combatant subject to the jurisdiction of the commission. See 10 U.S.C. § 948d(a); RMC 202, Note ("The M.C.A. does not require that an

individual receive a status determination by a C.S.R.T. or other competent tribunal before the beginning of a Military Commission proceeding. If, however, the accused has not received such a determination, he may challenge the personal jurisdiction of the commission through a motion to dismiss."). A determination of jurisdiction by a military commission would be reviewable by both the Court of Military Commission Review and by this Court *after* final judgment under the review scheme for military commission judgments established by the MCA. See 10 U.S.C. §§ 950f & 950g.

4. Contrary to Khadr's claim, the Manual for Military Commissions does not support his argument. Khadr selectively quotes that Manual in urging that it envisions this Court staying military commission proceedings while a petition for review filed under the DTA is resolved. Emerg. Mot. at 7. In fact, the Manual makes clear that a "determination by the [CSRT that a detainee is an enemy combatant] shall apply for purposes of Military Commission jurisdiction *without regard to any pending petitions for review or other appeals*." RMC 202(b) (emphasis added). The Manual simply does not, as Khadr contends, "specifically contemplate a stay by this Court." Emerg. Mot. at 8. To the contrary, the Manual anticipates just the opposite in specifying that an "appeal of a finding by a Combatant Status Review Tribunal * * * shall not constitute a basis for departing from [the] time" limits for conducting the arraignment before the military commission. RMC 707(b)(4)(F).

Khadr nevertheless contends that a federal court stay is "contemplate[d]" because a different subsection of Manual, Rule 707, states that time limits will not run for "periods of time during which appellate courts have issued stays in the proceedings." RMC 707(c). But this provision does not reference nor could it possibly contemplate this Court staying military commission proceedings in a DTA action, given that the previous subsection unequivocally states that such a proceeding will not halt commission proceedings. Instead, the reference in that subsection is to stays issued as part of the interlocutory appeals of military commission decisions, which are authorized in a variety of situations. See RMC 908(c)(3) (if there is an interlocutory appeal of certain evidentiary or other orders, "Military Commission * * * may proceed * * * pending * * * review [of the interlocutory appeal] * * * unless either court orders the proceedings stayed"); see also RMC 908(b)(8); RMC 912(b) (proceedings may be stayed to allow commission membership to be challenged).

5. There are strong practical reasons to allow military commission proceedings to go forward while this Court considers a petition under the DTA to review the underlying CSRT enemy combatant determination.

First, a stay would prevent the military commission from itself addressing its jurisdiction, which is within its authority. As we have explained, while the Government may rely on the CSRT determination to establish personal jurisdiction, jurisdiction may also be established independently in the military commission

proceedings. Thus, a wholesale stay of the commission proceedings to await a CSRT review decision by this Court would never be warranted. Indeed, this Court can review a commission's independent jurisdictional decision only after a final judgment of conviction by the military commission. In such circumstances, this Court has jurisdiction to "determine the validity of a final judgment rendered by a military commission," and "may not review the final judgment until all other appeals * * * have been waived or exhausted." 10 U.S.C. § 950g.

Second, the military commission proceedings should be speedy. It is a bedrock principle of criminal law that charges against an accused should be resolved promptly. In the context of military commissions, the rules thus set time limits to ensure that charges are resolved in a timely manner. RMC 707 (requiring arraignment within 30 days of service of charges, discovery "as soon as practicable," and assembly of the commission within 120 days). As we have explained, those rules bar delay because of a pending DTA petition. All parties benefit from resolution of these issues in a timely manner and concerns about delay are heightened here where questions have been raised as to whether counsel is in fact acting on behalf of the petitioner. See supra, n.1. Cf. *Boumediene v. Bush*, 127 S. Ct. 1478 (2007) (Stevens, J., concurring in denial of certiorari) (expressing concern over possibility of "delayed proceedings under the" DTA).

Finally, there is nothing unusual about preliminary legal issues not being

addressed piecemeal prior to the conclusion of proceedings. This procedure is common in federal courts, including in criminal practice. See *In re Sealed Case*, 131 F.3d 208, 210 (D.C. Cir. 1997) ("Normally, interlocutory appeal is very restricted in criminal cases"). Indeed, in the criminal context, appellate courts "den[y] interlocutory review over questions of personal jurisdiction." *Id.* at 212 (citing *United States v. Levy*, 947 F.2d 1032 (2d Cir.1991) and *United States v. Sorren*, 605 F.2d 1211 (1st Cir.1979)).[3]

In sum, the bifurcation of review created by the DTA and the MCA has the following effect: when there has been a conviction by a military commission whose jurisdiction rested solely on a CSRT determination and that CSRT determination is overturned by this Court pursuant to review under the DTA, the conviction will not be allowed to stand, unless there was sufficient evidence before the commission to establish the independent ground for the commission's jurisdiction. As we explained, the military commission rules require "dismiss[al] at any stage of the proceedings if

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[3]Federal habeas courts will not "abst[ain] when there is a substantial question whether a military tribunal has personal jurisdiction over the defendant." *Hamdan*, 126 S.Ct. at 2770. But this is not a case involving abstention or habeas. Congress has plainly repealed habeas jurisdiction. See *Boumediene v. Bush*, 476 F.3d 981, 988 (D.C. Cir. 2007). Further, the principle that a court will not abstain rests in part on the inability of federal courts to review the decisions of military tribunals. *Schlesinger v. Councilman*, 420 U.S. 738, 746 (1975). That concern does not arise here given that this Court is statutorily authorized to review convictions imposed by the military commissions. See 10 U.S.C. § 950g. Indeed, here Congress has withdrawn court jurisdiction prior to a final commission judgment (see 10 U.S.C. §§ 950g(a), 950j(b)), thereby effectively mandating abstention.

* * * [t]he Military Commission lacks jurisdiction to try the accused." MMC, Part II, § 907. Accordingly, Khadr's claim for emergency relief here in order to assertedly protect this Court's power to review his CSRT enemy combatant determination is without merit.

6. Khadr's argument that he has a right not to be tried must also fail, as such a right must "rest[] upon an explicit statutory or constitutional guarantee that trial will not occur." *Midland Asphalt Corp. v. United States*, 489 U.S. 794, 801 (1989). Khadr has no constitutional right not to stand trial before a military commission. See *Boumediene*, 476 F.3d at 991. And because Congress specified in the MCA that review of commission decisions would come after the commission has rendered its judgment, there is no statutory right that a trial not occur. This is thus not an instance in which there is a right to "test the military commission's power to try [Khadr] by recourse to this Court." Emerg. Mot. at 8.

B. Khadr Is Not Likely to Succeed on the Merits of His DTA Petition.

Khadr was found to be an enemy combatant by a CSRT in September 2004. As noted above, this Court's review of that determination is limited to whether the CSRT proceedings were inconsistent with "the standards and procedures specified by the Secretary of Defense" or whether "the use of such standards and procedures" was inconsistent with "the Constitution and laws of the United States," to the extent that they apply. DTA § 1005(e)(2)(C).

Khadr claims that the "standards and procedures" used did not comply with applicable federal law because "they failed to account for Khadr's status as a child at the time of the alleged offenses." Emerg. Mot. at 10. But Khadr can cite to no provision of the DTA imposing such a requirement. Further, he points to no applicable federal law requiring special consideration in CSRT proceedings simply because he was under 18 when he committed the acts underlying his enemy combatant classification. As such, Khadr is unlikely to succeed in the merits of his claim. Further, to the extent that Khadr raises arguments that, because he was under 18 when he attacked U.S. troops, he cannot legally be convicted by his military commission, he is free to raise these arguments before the commission and this Court, as it carries out its review function.

1. Khadr asserts that, under whatever "standards or procedures" are used, no CSRT could validly find him to be an enemy combatant, because, he asserts, the MCA, military law as reflected by the Uniform Code of Military Justice ("UCMJ"), and international law prohibit such a classification of persons under 18. Mot. at 13-18. Khadr's argument is wrong.

Nothing in the text or legislative history of the MCA supports Khadr's position, as he himself acknowledges. Mot. at 13. Khadr nevertheless urges that the MCA should be interpreted in the manner he suggests to avoid "absurd results." Mot. at 13. It is hardly absurd to detain Khadr away from the battlefield as an "enemy

combatant" when he murdered a U.S. soldier and planted land mines in order to kill more, notwithstanding that he was under 18. Nor, contrary to what Khadr contends, is it inconsistent with the MCA for his CSRT to have determined him to be an enemy combatant based on acts committed when he was under 18. Mot. at 18-19. The MCA contains no such requirement.

Unlike in the context of criminal punishment, where age arguably bears on moral culpability, it is utterly irrelevant to the purpose of detaining enemy combatants, which is to "prevent captured individuals from returning to the field of battle and taking up arms once again." *Hamdi v. Rumsfeld*, 542 U.S. 507, 518 (2004) (plurality op.). That need is no less pressing for a combatant younger than 18 years old than it is for a combatant 18 or older. Further, Khadr's case was well-known when both the DTA and MCA were enacted. Under those circumstances, Congress' decision not to impose any age limit in the face of such attention is of particular significance.

Khadr's reliance on the UCMJ is similarly misplaced. CSRT proceedings are not criminal proceedings and are not subject to the UCMJ. Furthermore, nothing in the UCMJ prohibits the classification of a person under age 18 as an enemy combatant. Indeed, as Khadr acknowledges, the UCMJ "has no explicit minimum age provision limiting the personal jurisdiction of courts martial and military commissions." Mot. at 14. The cases Khadr relies on to claim that there is such a

minimum age requirement were premised entirely on statutes setting a minimum age for enlistment in the U.S. armed forces. See *United States* v. *Blanton*, 7 C.M.A. 664, 666 (1957) ("We must, * * * look to the statutes to determine whether Congress has established a minimum age at which a person is deemed incapable of changing his status to that of a member of the military establishment."); *United States* v. *Brown*, 23 C.M.A. 162, 164 (referring to the "minimum statutory enlistment age"). By contrast, there is no statute barring Khadr's classification as an enemy combatant simply because he was under 18 when he attacked U.S. troops.

Moreover, the MCA expressly provides that the UCMJ "does not, by its terms, apply to trial by military commission except as specifically provided in this chapter," and that "the judicial construction and application of [the UCMJ] are not binding on military commissions established under this chapter." MCA § 3; 10 U.S.C. § 948b(c). Again, no provision of the MCA"specifically provide[s]" that a person cannot be determined to be an unlawful enemy combatant based on acts committed before the age of 18.

Khadr also attempts to invoke international law to support his claim. Mot. at 16. However, international law does not prohibit an individual under 18 from being prosecuted for war crimes; as Khadr himself recognizes, the treaty between the United Nations and Sierra Leone creating the Special Court for Sierra Leone, which

hears cases involving offenses committed during the Sierra Leone civil war, recognizes that those 15 years and older at the time of the commission of their crimes may be prosecuted before the court. See Statute of the Special Court of Sierra Leone, art. 7, *available at* http://www.sc-sl. org/scsl-statute.html.[4]

Furthermore, the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict ("Optional Protocol"), on which Khadr heavily relies, expressly recognizes that the armed forces of State parties may include persons who are younger than 18, if enlisted through voluntary recruitment. See Optional Protocol, art. 3.3, *available at* http://www.unhchr. ch/html/menu2/6/protocolchild.htm. The Optional Protocol thus acknowledges that persons under 18 may be amenable to military proceedings.

2. Khadr also urges that the standards and procedures of the CSRT were inconsistent with the Juvenile Delinquency Act ("JDA") (18 U.S.C. § 5031, *et seq.*). Mot. at 12. But it must be remembered that the question here does not relate to criminal prosecution at all, but instead whether a person may be removed from the battlefield and detained as an enemy combatant based on acts they commit when they

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[4] Contrary to Khadr's claim that the Special Court may hear such cases "*only* for the purposes of 'promoting his or her rehabilitation, reintegration, and assumption of a constructive role in society,'" the governing statute states that the Court must simply "*tak[e] into account* * * *" the desirability of promoting his or her rehabilitation, reintegration into and assumption of a constructive role in society." Statute of the Special Court of Sierra Leone, art. 7 (emphasis added).

are under age 18.

Even as to military justice matters, it is established that the JDA has no application. See *United States* v. *West*, 7 M.J. 570, 571 (ACMR 1979) ("[f]ew aspects of military law have been clearer than that the Federal Juvenile Delinquency Act has no application to proceedings under the Uniform Code of Military Justice"); *United States v. Baker*, 34 C.M.R. 91, 92, 14 USCMA 311, 312 (CMA, 1963) ("So far as the laws directly and specifically applicable to the military establishment are concerned, therefore, a seventeen-year-old person who commits an offense can be proceeded against in precisely the same way as an adult, except that he might be accorded some special consideration as to the sentence."). Given the established background of military law against which it enacted the DTA and the MCA, Congress plainly did not intend to impose the requirements of the Juvenile Delinquency Act on enemy combatant determinations.

Moreover, the JDA is concerned with criminal prosecutions of juvenile offenders, and thus does not apply to enemy combatant determinations made by a CSRT. See, *e.g.*, *United States* v. *Male Juvenile E.L.C.*, 396 F.3d 458, 461 (1st Cir. 2005) ("[t]he purpose of the federal juvenile delinquency process is to remove juveniles from the ordinary criminal process"). Indeed, "[t]he plan and language of the Act indicate clearly it is limited to proceedings in the regular Federal courts." *Baker*, 34 C.M.R. at 93. For instance, the JDA provides that a juvenile charged with

juvenile delinquency "shall not be proceeded against in *any court of the United States*" unless certain procedural requirements are met. 18 U.S.C. § 5032 (emphasis added).

The CSRT classification process is clearly not a criminal prosecution; it is an administrative military proceeding used to determine whether a person is an enemy combatant, and thus may properly be removed and detained away from the battlefield. *See Hamdi*, 542 U.S. at 518 (plurality op.). Nor is a CSRT a "court of the United States." Thus any proceedings before such tribunals are not subject to the JDA.

3. Finally, Khadr asserts that the CSRT procedures are inconsistent with Article 15 of the Convention Against Torture, claiming that the CSRT process improperly would have allowed the admission of evidence derived from torture. Significantly though, Khadr does not argue in his motion that his CSRT determination was actually based on evidence obtained by torture. If Khadr wishes later to raise such a claim in his DTA proceeding before this Court, he is free to do so, but he has not provided any basis at this stage for enjoining his military commission on this ground.

We nevertheless wish to emphasize that the United States neither practices nor condones torture, which is prohibited by the United States Code, treaties to which the United States is a party, and by the longstanding policy of this Nation. Consistent with that policy, in the context of the Government's detention and treatment of enemy

combatants at Guantanamo, any credible allegations of mistreatment are investigated and, as appropriate, punished and corrected. Moreover, in considering nontraditional forms of evidence, CSRT members are instructed to take into account the "reliability" of the evidence "in the circumstances." See, *e.g.*, CSRT Implementation Memorandum Encl. (1) ¶G(7). And, CSRT members are bound by oath to examine the evidence before them "impartially" and in light of their "professional knowledge, best judgment, and common sense," and to be guided by their "concept of justice." See CSRT Implementation Memorandum Encl. (8), p.2. Accordingly, as a general matter, the CSRT is charged with considering the reliability of evidence in the face of assertions that it was obtained through torture.

In any event, Congress has precluded most judicial claims based on the Convention Against Torture. The Senate ratified the Convention Against Torture with the express declaration that Article 15, on which Khadr relies, was not self-executing. See S. Exec. Rep. 101-30, at 31 (1990); 136 Cong. Rec. S17486-01, S17491-92 (Oct. 27, 1990); Declarations and Reservations at http://www.ohchr.org/english/countries/ ratification/9.htm#reservations; see also *Hoxha* v. *Levi,* 465 F.3d 554, 564 (3d Cir. 2006) (the CAT "is not self-executing, however, and therefore does not in itself create judicially enforceable rights"); *Renkel* v. *United States*, 456 F.3d 640, 644 (6th Cir. 2006) (same); *Wang* v. *Ashcroft,* 320 F.3d 130, 140 (2d Cir. 2003) (same).

Instead, the only claims that may be raised under the Convention are in the immigration context. Accordingly, subject to a narrow exception not applicable here, 8 U.S.C. §1252(a)(4) provides that, "[n]otwithstanding any other provision of law (statutory or nonstatutory) * * * a petition for review [of a removal order] filed with an appropriate court of appeals in accordance with this section shall be the *sole and exclusive means for judicial review* of *any cause or claim* under the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman, or Degrading Treatment or Punishment" (emphasis added). In sum, the Convention was not designed to be judicially enforceable in this context.

II. THE BALANCE OF HARMS TIPS DECIDEDLY AGAINST THE ISSUANCE OF AN INJUNCTION

The injunction requested by Khadr also should be denied because granting it would result in substantial injury to the public interest, which is being fulfilled by the respondent Secretary of Defense. The "capture, detention, and trial of unlawful combatants, by 'universal agreement and practice,' are 'important incident[s] of war.'" *Hamdi*, 542 U.S. at 518 (plurality op.) (quoting *Ex parte Quirin*, 317 U.S. 1, 28, 30 (1942)). To achieve this end, Congress has specifically authorized the military commission procedures that Khadr seeks to halt. Clearly, the ability to try alien enemy combatants suspected of war crimes in a timely fashion is an important part of the United States' war effort, and the public has a strong interest in seeing that

such individuals be brought to justice as soon as possible. For this Court to enjoin the ongoing military commission proceedings now (when Congress has provided that this Court has no power to do so) would harm those significant interests, as well as undermine the constitutional separation of powers principle. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring) (when "President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum").

On the other hand, Khadr has not shown that he will suffer irreparable harm that is "both certain and great" (*Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985)), if this Court does not enjoin his military commission proceedings. There is no irreparable harm to him. As noted before, there is no serious issue of the validity of the military commission. Additionally, as we have explained, Khadr's challenge, even if successful, would not establish that the military commission lacks jurisdiction; at most, it would simply require that jurisdiction must be demonstrated directly in that forum – a determination that could not be reviewed until after Khadr's military commission proceedings concluded.

The simple fact that Khadr is subject to a trial by military commission is not irreparable harm, just as a United States citizen who protests innocence still must face a criminal trial when there is probable cause for the charge against him, even if that

citizen can later mount a successful legal challenge on appeal.[5] As the Supreme Court has noted in the context of criminal trial of U.S. citizens, "[b]earing the discomfiture and cost of a prosecution for crime even by an innocent person is one of the painful obligations of citizenship." *United States v. Hollywood Motor Car. Co.*, 458 U.S. 263, 268 n.2 (1982). Khadr is not a citizen of this country, and, if convicted, he will have an adequate remedy through review by this Court.

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[5]On this point, *Hamdan* is distinguishable. This Court in *Hamdan* reasoned that "setting aside the judgment after trial and conviction insufficiently redresses the defendant's right not to be tried by a tribunal that has no jurisdiction." *Hamdan v. Rumsfeld*, 415 F.3d 33, 36 (D.C. Cir. 2006), *rev'd*, 126 S. Ct. 2749. The Supreme Court in *Hamdan* did not suggest that a trial by military commission would constitute irreparable harm, but stated that there was a "compelling interest" in addressing the legality of a military commission "in advance" of military commission proceedings. 126 S. Ct. at 2272. This Court spoke of a "right" not to be tried, while the Supreme Court stated there should be immediate review because the commission "arguably is without any basis in law and operates free from many of the procedural rules prescribed by Congress." 126 S. Ct. at 2272. Whatever reasoning is employed, there is no harm here where Congress has set down elaborate procedures and protections for those tried by military commissions and specifically provided that judicial review must await a final military commission judgment. 10 U.S.C. §§ 950b-950h. Thus, the harm identified in the *Hamdan* decisions simply does not exist here.

CONCLUSION

For the foregoing reasons, this Court should deny Khadr's extraordinary request to enjoin his military commission proceedings.

Respectfully submitted,

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MAY 2007

CERTIFICATE OF SERVICE

I hereby certify that on May 29, 2007, I caused copies of the foregoing "OPPOSITION TO PETITIONER'S EMERGENCY MOTION TO STAY MILITARY COMMISSION PROCEEDINGS" to be served upon counsel of record, by agreement of the parties, by e-mail transmission and by causing a copy to be sent by first class mail to:

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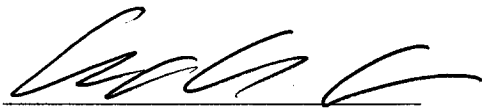

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