**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

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| IN RE: | ) | Misc. No. 08-442 (TFH) |
| GUANTANAMO BAY DETAINEE LITIGATION | ) | Civil Action No. 02-CV-0828 (CKK) |

**OPPOSITION TO PETITIONERS' MOTION FOR AN EMERGENCY INJUNCTION**

**INTRODUCTION**

Respondents hereby oppose the motion of Fayiz Mohammed Ahmed Al Kandari and Fouad Mahmoud Al Rabiah ("petitioners") for an emergency injunction prohibiting personnel associated with the Office of Military Commissions ("OMC") from having any communications with Petitioners relating to the grounds for their confinement at the United States Naval Base at Guantanamo Bay, Cuba ("Guantanamo Bay"), including any matters for which military commission charges may be brought. *See* Petitioners' Emergency Motion ("Pets. Mot.") at 1. Petitioners allege that such contacts violate the so-called "no-contacts" rule set forth in Rule 4.2. *See id.* at 7-15.

Petitioners' motion should be denied for several independent jurisdictional reasons. First, the Court lacks jurisdiction to consider the petitioners' motion because it seeks to enjoin an aspect of the military commission process for which Congress withdrew jurisdiction under section 3 of the Military Commissions Act of 2006 ("MCA"), Pub. L. No. 109-366, § 3, 120 Stat. 2600. Congress, in enacting the MCA, funneled challenges such as Petitioners' claims here, into a forum that is fully competent to consider these claims: first, the military court itself, with military appeals; and second, review by an Article III court, the District of Columbia Circuit, with an opportunity, of course, to petition the Supreme Court for certiorari review. In doing so,

Congress precluded this Court from considering claims, including claims couched as a collateral attack under habeas, "relating to the prosecution, trial, or judgment of a military commission . . . including challenges to the lawfulness of procedures of military commissions." 10 U.S.C. § 950j(b). Second, Congress expressly withdrew jurisdiction in this Court over challenges wholly outside of the core habeas function of challenging the legality of detention and over which the MCA § 7(a), 120 Stat. 2600 (codified at 28 U.S.C. § 2241(e), withdrew jurisdiction. This remains so notwithstanding the Supreme Court's decision in *Boumediene v. Bush*, 128 S.Ct. 2229 (June 12, 2008). Finally, jurisdiction is lacking to provide interim injunctive relief of a character beyond the allegations in the initiating pleading, here the operative petition.[1]

Notably, Petitioners' focus is on a separate proceeding ancillary or collateral to the instant habeas proceeding—the military commission process—and persons associated with that separate proceeding—personnel of the OMC or "anyone else acting on behalf or the direction of the Office of the Chief Prosecutor of Military Commissions"—rather than the instant habeas case. Indeed, Petitioners make no allegations of why an injunction is necessary to protect Petitioners' core habeas rights in *this* case. But even putting aside the serious jurisdictional questions, an

[1] Given the exigencies of the accelerated briefing schedule set by the Court and the clear authority establishing the lack of jurisdiction and because "the requirement that jurisdiction be established as a threshold matter 'springs from the nature and limits of the judicial power of the United States' and is 'inflexible and without exception,'" *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94-95 (1998) (quoting *Mansfield, C. & L.M. Ry. Co. v. Swan*, 111 U.S. 379, 382 (1884)), Respondents have not addressed the merits of Petitioners' request for injunctive relief. Indeed, the Court should not entertain the merits of the emergency motion because "[w]ithout jurisdiction the court cannot proceed at all in any cause. Jurisdiction is the power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause." *Id.* at 94 (quoting *Ex parte McCardle,* 74 U.S. 506, 514 (1868)). In the event the Court finds (contrary to all authority) that it does have jurisdiction to entertain the instant motion, Respondents respectfully request the opportunity to file a supplemental brief addressing the merits *vel non* of Petitioners' motion.

injunction would be inappropriate here because: (i) petitioner has made no specific allegations of irreparable harm or any effect on in this habeas proceeding coming from these alleged communications; (ii) without accepting that the Government has acted improperly with regard to communications with Petitioners, the Court would have the inherent authority to take whatever corrective measures may be appropriate in this habeas case, should the court find (contrary to any evidence suggested by Petitioners) that Petitioners' habeas case has been prejudiced; and (iii) while the court lacks jurisdiction over the military commission process, should the petitioner be charged in the future, the military commission would have the same authority to review petitioners' claims and take whatever action is appropriate. Petitioners' motion should clearly be denied.[2]

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[2] Moreover, respondents note, in any event, that at least some of the facts underlying the purported "emergency motion" as related in Petitioners' papers are many weeks, if not months, old given Petitioners' acknowledgment that "Petitioners filed an Emergency Petition for Writ of Mandamus in the U.S. Court of Military Commission Review," a motion that was denied in March 2008, *see* Pets. Mot. at 4-5, and that Petitioners did not engage in consultation before filing the emergency motion. The timing of these events presents a serious question of whether equity would appropriately aid Petitioners in any event. *See, e.g.*, *Tenacre Found. v. INS*, 892 F. Supp. 289, 294 n.5 (D.D.C.) ("[P]laintiff waited seven months after receiving the denial notice from the AAU before filing suit, and plaintiff waited another month after filing suit to file a motion for preliminary injunction . . . the time lapse undermines any assertions that plaintiff will suffer irreparable harm if the Court does not grant preliminary injunctive relief."). Nor do Petitioners identify imminent threatened harm. Finally, the Government disputes Petitioners' reading of Rule 4.2 on the merits and notes that many courts have recognized in the criminal context that prosecutors may engage in communications with unindicted criminal defendants, even if they otherwise have counsel in other matters. *See, e.g.*, *United States v. Balter*, 91 F.3d 427, 435 (3d Cir. 1996) (holding that Rule 4.2 would not prevent government attorneys from "communicat[ing] with a suspect as part of a pre-indictment criminal investigation"); *United States v. Johnson*, 68 F.3d 899, 902 (5th Cir. 1995) ("[T]he Texas State Bar Rule and the American Bar Association Model Rule that prohibits a prosecutor from contacting someone known to be represented by an attorney . . . do not apply to government conduct prior to indictment . . . ."); *United States v. Ford*, 176 F.3d 376, 382 (6th Cir. 1999) (recognizing that prosecutors are "authorized by law" to place an undercover informant in the cell of a represented suspect to investigate an uncharged matter); *United States v. Escobar*, 842 F. Supp. 1519, 1527 (E.D.N.Y. 1994) (holding that custodial communications prior to indictment did not violate Rule

## BACKGROUND

The petitioners are two Kuwaiti nationals who have been detained as enemy combatants at Guantanamo Bay since 2002. This action was initiated on May 1, 2002, with the filing of a Complaint on behalf of twelve Kuwaiti nationals detained as enemy combatants at the United States Naval Base at Guantanamo Bay. On July 8, 2002, petitioners filed an Amended Complaint raising three claims for relief under the Fifth Amendment, the Alien Tort Statute, and the Administrative Procedure Act. Notably, the Amended Complaint did not seek petitioners' release from custody. Instead, it requested only that petitioners "meet with their families," "be informed of the charges, if any, against them," "designate and consult with counsel of their choice," and "have access to the courts or some other impartial tribunal." *See* Amended Complaint ¶ 40.[3] Petitioners also filed Applications for Writs of Habeas Corpus on July 27, 2004. *See* Dkt. no. 44.

The instant motion for a preliminary injunction concerns Petitioners' allegations that OMC personnel (and others), who engage in the investigation, prosecution, and trials of alien unlawful enemy combatants, are communicating with Petitioners outside of the presence of Petitioners' counsel in the separate habeas proceedings. On March 12, 2008, Petitioners sought a writ of mandamus from the United States Court of Military Commission Review to enjoin the OMC Prosecutor and other personnel from engaging in such communications. *See* Exhibit A hereto. That court dismissed the writ on jurisdictional grounds on March 21, 2008. *See* Pets.

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4.2); *New Jersey v. Porter*, 510 A.2d 49, 54 (N.J. Super. App. Div. 1986). These factors counsel against granting the present motion however the merits might otherwise be resolved.

[3] The Court, however, has always construed the Amended Complaint "as a petition for writ of habeas corpus." *Rasul v. Bush*, 215 F. Supp. 2d 55, 63-64 (D.D.C. 2002) ("Plaintiffs cannot escape having the Court convert their action into writs for habeas corpus . . . .").

Mot. at 5 and attachment thereto. Petitioners allege an additional communication occurred in May 2008 between Petitioners and an individual who identified herself as being with the Criminal Investigation Task Force. *Id.* Petitioners filed the instant motion on July 1, 2008.

## ARGUMENT

### THIS COURT LACKS JURISDICTION TO CONSIDER THE PETITIONERS' CHALLENGES TO ASPECTS OF THEIR DETENTION, AND THEIR MOTION SHOULD ACCORDINGLY BE DENIED.

This Court lacks jurisdiction to consider the petitioners' motion for injunctive relief for three independent reasons. First, through section 3 of the MCA, Congress removed from this Court jurisdiction to enjoin aspects of the military commission process, which would necessarily include Petitioners' proposed injunction against the communications with OMC personnel. Piecemeal ancillary litigation in the federal district court over every aspect of the miliary commission process is precisely what Congress sought to avoid in section 3. Second, both 28 U.S.C. § 2241(e)(1), as applied to Petitioners' ancillary challenge, and a distinct provision, 28 U.S.C. § 2241(e)(2), bar this Court's consideration of anything other than the core habeas function, *i.e.* inquiring into a detention's lawfulness. This remains so notwithstanding the Supreme Court's *Boumediene* decision, which addressed only the constitutional right to habeas as applied to challenge legality of detention in the face of Congress' withdrawal of statutory habeas jurisdiction under 28 U.S.C. § 2241(e)(1). Finally, it is well established that a Court may only grant preliminary injunctive relief of the same character as the final relief sought in an initiating pleading such as a complaint or petition.

#### I. Section 3 Of The MCA Withdraws This Court's Jurisdiction Over Claims Related To Military Commissions, Including Communications By OMC Personnel.

Section 3 of the MCA includes a channeling provision, 10 U.S.C. § 950j(b), that deprives

this Court of jurisdiction to consider the claims raised in Petitioners' emergency motion. Section 950j(b) provides that "no court, justice, or judge shall have jurisdiction to hear or consider any claim or cause of action whatsoever . . . *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 provision specifies that it applies "notwithstanding any other provision of law (including section 2241 of title 28 or any other habeas corpus provision)." *Id.* Congress did not simply deprive the courts of jurisdiction over such claims without recourse. Instead, section 950j(b) is a familiar statutory provision that serves to channel claims such as the ones raised by petitioner into the military commission process itself. *Cf. INS v. St. Cyr*, 533 U.S. 289, 313 (2001) (referring to exclusive review provision "as a 'zipper clause'" designed to "consolidate 'judicial review' of immigration proceedings into one action in the court of appeals"). Accordingly, claims that are subject to Section 3 are first to be considered by the military commission, *see*, *e.g.*, 10 U.S.C. §§ 949d(a), 949*l*(b); next such claims are reviewed in the Court of Military Commissions Review, 10 U.S.C. §§ 950c, 950f(c); and finally exclusive judicial review is available in the D.C. Circuit, with possible *certiorari* review by the Supreme Court. *See* 10 U.S.C. § 950g(c), (d). Congress' intent to limit district court jurisdiction over any claim "relating to" to military commission proceedings, such as the one here, cannot be clearer.

Petitioners do not dispute that these special channeling procedures apply. Indeed, Petitioners raised the precise issue presented here concerning communications with OMC personnel in the U.S. Court of Military Commission Review ("CMCR"), which dismissed the motion for lack of jurisdiction in March 2008. *See* Exhibit A hereto; *see also* Pets. Mot. at 4-5 & Exhibit 2 thereto. Petitioners' decision, months after the CMCR decision, to file a similar

"emergency motion" with this Court, does not avoid section 3's limitations. Congress spoke in broad terms in prohibiting "any claim . . . whatsoever" that "relat[es] to the prosecution, trial, or judgment of a military commission." A challenge, such as Petitioners' here, to the propriety of Petitioners' communications with OMC personnel plainly "relat[es] to" the commission's proceedings. Indeed, Petitioners' own allegations assert that the OMC is preparing to formally charge them and thus the communications must relate to those proceedings for the obvious reason that neither the prosecution nor trial can commence unless the commission first establishes its jurisdiction over the defendant. Indeed, the relief sought here—an injunction barring certain communications with OMC personnel—cannot plausibly be treated as a claim unrelated to the military commission proceedings. Jurisdiction is therefore lacking over Petitioners' claims because they relate to such proceedings.[4]

The MCA "allow[s] the [defendants] to assert . . . all[] of the legal claims they seek to advance" before an Article III court. *Boumediene*, 128 S. Ct. at 2271. Petitioners nowhere allege that they cannot bring their claims concerning the propriety of communications in the military commission in the event that they are charged or that, if convicted, they can then appeal any decision of the military commission through the courts. Indeed, the court of appeals has

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[4] The absence of formal charges against Petitioners does not allow this Court to exercise original jurisdiction and thereby oust the court of appeals of its eventual jurisdiction to review any ultimate decision that may be rendered on Petitioners' claim. To the contrary, the D.C. Circuit has held that "where a statute commits review of agency action to the Court of Appeals, any suit seeking relief that might affect the Circuit Court's future jurisdiction is subject to the exclusive review of the Court of Appeals." *Telecommunications Research & Action Center v. FCC*, 750 F.2d 70, 75 (D.C. Cir. 1984). A contrary rule would defeat the court of appeals' exclusive statutory authority to review the merits of military commission's ruling in conflict with congressional intent. *See id.* at 76. The D.C. Circuit's jurisdiction thus "cuts off original jurisdiction in other courts in all cases covered by that statute," *id.* at 77, including Petitioners' challenges to the communications with OMC personnel.

jurisdiction to consider "matters of law," including whether any conviction is consistent with military commission "standards and procedures"; whether the conviction is consistent with the "laws of the United States"; and whether the conviction is consistent with the "the Constitution." 10 U.S.C. § 950g(b) & (c). Ultimately, the military commission—and thereafter the U.S. Court of Military Commission Review and D.C. Circuit (if a conviction results)—can directly consider Petitioners' claims concerning the propriety of the alleged communications between OMC personnel and Petitioners. Indeed, given Petitioners' allegations those forums are the most appropriate ones to address those claims rather than to have this Court, in habeas proceedings separate from any future the military commission proceedings, address the issue in the first instance. Review of Petitioners' challenge, however, would not be ripe until the conclusion of the military commission process because it will depend on actions that may or may not be taken during the commission, including actions with respect to actual evidence used at trial and the prospect of possible acquittal.[5]

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[5] Indeed, the rationale for abstention is particularly strong in this case. *See New v. Cohen*, 129 F.3d 639, 644 (D.C. Cir. 1997) (*Schlesinger v. Councilman*, 420 U.S. 738 (1975), bars federal courts from "entertain[ing] habeas petitions by military prisoners unless all available military remedies have been exhausted"). As *Hamdan* recently explained, abstention is called for because "federal courts should respect the balance that Congress struck between military preparedness and fairness to individual service members when it created 'and integrated system of military courts and review procedures, a critical element of which is the Court of Military Appeals, consisting of civilian judges 'completely removed from all military influence or persuasion.'" *Hamdan*, 126 U.S. at 2770. Here, of course, where Congress has created a review structure, including review in the D.C. Circuit, that policy choice is reflected in the strongest terms and "should [be] respect[ed]." *Id.* Further this case does not involve the sort of constitutionally-based challenge to the military court's personal jurisdiction over the petitioner that might make abstention inappropriate. *See New*, 129 F.3d at 644 (*Councilman* abstention doctrine requires a federal court to await the final outcome of court-martial proceedings in the military justice system before entertaining an action by the subject of the court-martial absent "substantial arguments" denying the right of the military to try him at all). The alleged ethical issue arising out of OMC communications with Petitioners cannot be characterized as jurisdictional in any respect and thus abstention would apply in any event over Petitioners'

Moreover, the Supreme Court's recent decision in *Boumediene*, which concerned part of section 7 of the MCA, does not alter this conclusion. *Boumediene* has no application for the simple reason that it addresses only the sufficiency of the combination of CSRT proceedings and the review accorded under the Detainee Treatment Act. Section 3 of the MCA, however, sets forth wholly separate procedures for military commission proceedings, which afford greater substantive and procedural safeguards, that are then combined with more rigorous direct and judicial review provisions. Indeed, to the extent that *Boumediene* has any application to the alternate section 3 track, *Boumediene*'s reasoning strengthens the conclusion that those procedures are constitutional. *See*, *e.g.*, *Boumediene*, 128 S.Ct. at 2270-71.

Indeed, with respect to military prosecutions, the MCA provides the adequate, alternative remedy for considering the claims barred by section 950j(b) that was lacking in its provisions governing review of enemy combatant determinations. The primary difference between the two regimes is the presence of counsel—and much more robust adversary proceedings—in the military commission provisions that work to cure the defects identified by the Court in *Boumediene*. *Boumediene* recognized that Congress could limit access to the habeas writ, citing *Felker v. Turpin*, 518 U.S. 651, 662-64 (1996), in circumstances where a "trial has been held." 128 S. Ct. 2264; *id*. at 2267 ("habeas court's role" is "most extensive" in "cases of pretrial and noncriminal detention"). Like other provisions designed to channel and streamline prisoner claims, section 950j(b) does not "eliminate[] traditional habeas corpus relief." 128 S. Ct. at 2265. Instead, it limits – by precluding collateral attack – the claims it identifies that can be brought in the military commission forum itself. *See id.* at 2268 ("the necessary scope of habeas

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clearly unripe claims.

review depends in part upon the rigor of earlier proceedings," an idea that "accords with our test for procedural adequacy in the due process context").

Military commission proceedings, in conjunction with review by an Article III court, comprise a sufficient habeas substitute for considering the covered claims. The touchstone for an adequate substitute is to provide "the prisoner . . . a meaningful opportunity to demonstrate that he is being held pursuant to 'the erroneous application or interpretation' of relevant law." *Boumediene*, 128 S. Ct. at 2266 (quoting *St. Cyr*, 533 U.S. at 302). The most "relevant consideration in determining the [habeas] courts' role is whether there are suitable alternative processes in place to protect against the arbitrary exercise of governmental power." *Id*. at 2275. "What matters is the sum total of procedural protections afforded to the detainee at all stages, direct and collateral." *Id*. at 2269. Here, Congress put such processes in place in authorizing the military commissions.

First, petitioner has the tools needed in the military commission proceedings "to rebut the factual basis for the Government's" charges. *Id.* at 2269. Unlike the process at issue in *Boumediene*, the defendant has "the assistance of counsel." *Id*.; *see* 10 U.S.C. § 949c(b) (accused "shall be represented by military counsel" and "may be represented by civilian counsel if retained by the accused"). Further, unlike the process at issue in *Boumediene*, the defendant in military commission proceedings is "aware of the most critical allegations" against him, *i.e.*, the criminal charges and the proof submitted to establish them. *Boumediene*, 128 S. Ct. at 2269; *see* 10 U.S.C. § 948q(b) ("the accused shall be informed of the charges against him"); *see also* 10 U.S.C. § 949d(f) (procedures for using classified information at trial). Moreover, unlike the procedures at issue in *Boumediene*, where there were "in effect no limits on the admission of hearsay," *Boumediene*, 128 S. Ct. at 2269, the defendant in military commission proceedings is

given an opportunity to challenge the use of hearsay evidence. *See* 10 U.S.C. § 949a(b)(2)(E) (hearsay evidence may be admitted only after it is "ma[de] known to the adverse party, sufficiently in advance to provide the adverse party with a fair opportunity to meet the evidence" and will not be admitted if "the party opposing the admission of the evidence demonstrates that the evidence is unreliable or lacking in probative value"). In sum, the proceedings are not "'closed and accusatorial,'" *Boumediene*, 128 S. Ct. at 2270, but are open and adversary. *See* 10 U.S.C. § 949d(d) (proceedings may only be "close[d] to the public" in certain limited circumstances). As the *Boumediene* Court recognized, military courts like the commissions "ha[ve] an adversarial structure that [was] lacking" in the CSRT process. 128 S. Ct. at 2271.

Second, the review procedures confer upon an Article III court "some authority to assess the sufficiency of the Government's evidence against the detainee." *Boumediene*, 128 S. Ct. at 2270. Specifically, in conducting its legal review, the court of appeals can evaluate the legal sufficiency of the evidence – it is authorized to consider whether the commission's "final decision was consistent with the standards and procedures" for military commissions (10 U.S.C. § 950g(c)(1)), including the standard that the "accused . . . be presumed to be innocent until his guilt is established by legal and competent evidence beyond a reasonable doubt." 10 U.S.C. § 949*l*(c)(1).[6] In providing for review by an Article III court, Congress provided protection to the accused that goes above and beyond the procedures in the UCMJ, which do not provide for such review as of right. *See* 10 U.S.C. §§ 867-867a. This direct appellate review in a "court of

[6] The D.C. Circuit may also be authorized to review factual sufficiency pursuant to the Detainee Treatment Act, as amended by the MCA. *See* DTA § 1005(e)(3)(D) (scope of review). While the MCA limits review by the D.C. Circuit to "matters of law," the DTA contains no similar limitation. *Cf. Boumediene*, 128 S. Ct. at 2272 ("[a]ssuming" that similar review language in DTA with respect to enemy combatant determinations "can be construed to allow the Court of Appeals to review or correct the CSRT's factual determinations").

record," *i.e.*, and Article III court of general jurisdiction, is a critical factor in determining whether Congress has provided an adequate habeas substitute. *See Boumediene*, 128 S. Ct. at 2268 (placing importance on whether "relief is sought from a sentence that resulted from the judgment of a court of record").

Third, the court of appeals has ample authority to order the defendant released from criminal custody. The court of appeals is charged with "determin[ing] the validity of a final judgment rendered by a military commission." 10 U.S.C. § 950g. Because it is that judgment of conviction (10 U.S.C. § 949m(a)) which forms the basis of criminal detention, there is no doubt that the court of appeals has the authority to terminate criminal detention. Likewise, if the court of appeals were to determine that the commission lacked jurisdiction, it would necessarily vacate the judgment of conviction which would also work to terminate criminal detention.

## II. Notwithstanding *Boumediene*, Section 7 Of The MCA Deprives This Court Of Jurisdiction To Consider Any Challenge Other Than To The Core Habeas Inquiry Over The Lawfulness of Detention.

Through section 7 of the MCA, Congress expressly withdrew from this Court's jurisdiction two independent and enumerated types of actions that individuals detained by the United States as enemy combatants could bring. Specifically, Congress carved out of this Court's jurisdiction claims concerning statutory habeas corpus generally:

> No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.

28 U.S.C. § 2241(e)(1). Congress separately withdrew federal court jurisdiction concerning any other aspects of the detention outside of the core habeas function, such that:

> [N]o court, justice, or judge shall have jurisdiction to hear or consider any other action against the United States or its agents relating to *any aspect of the*

> *detention, transfer, treatment, trial, or conditions of confinement of an alien* who is or was detained by the United States and has been determined by the United States to have been properly detained as an enemy combatant . . . .

28 U.S.C. § 2241(e)(2) (emphasis added). Under the recent decision in *Boumediene*, it is clear that the Supreme Court did not invalidate the MCA except to the extent that it precluded courts from exercising core habeas functions, *i.e.*, challenging the legality of the detention itself. Petitioners' claims here indisputably fall outside the *Boumediene* holding because they do not concern the core habeas function. They do not challenge the legality of petitioners' detention, but rather an issue ancillary to that detention—communications with OMC personnel. Jurisdiction is therefore lacking and the motion must be denied.

### A. *Boumediene* Did Not Invalidate The MCA Except To The Extent That It Precluded Courts From Exercising Core Habeas Functions.

In *Boumediene*, the Supreme Court held that Guantanamo Bay detainees have a constitutional right to seek habeas corpus protected by the Suspension Clause, and that, as applied to detainees who are being held on the basis of an enemy combatant determinations by a CSRT and whose habeas challenge goes to the legality of their detention, section 7 operates as an unconstitutional suspension of the writ. This holding is limited in two important respects.

First, *Boumediene* holds that the first part of Section 7 of the MCA, 28 U.S.C. § 2241(e)(1), is unconstitutional in some circumstances, but only insofar as it denies habeas review to detainees who have available to them only the CSRT process and their who raise a core habeas challenge, *i.e.*, to challenge the legality of their *detention*. *See Boumediene*, 128 S.Ct. at 2269 ("The habeas court must have sufficient authority to conduct a meaningful review of both the cause for detention and the Executive's power *to detain*.") (emphasis added). Put another way, to the extent a petitioner seeks habeas relief concerning collateral or ancillary issues not

directly connected to the legality of detention, *Boumediene*'s holding does not invalidate the jurisdiction limiting provision of § 2241(e)(1). The result in *Boumediene* thus can be read not as a facial invalidation of § 2241(e)(1), but an invalidation of § 2241(e)(1) only as applied to the particular factual situation presented, as it was never established that "no set of circumstances exists under which [section 7] would be valid." *See United States v. Salerno*, 481 U.S. 739, 745 (1987). Indeed, it is indisputable that the challenge presented by the *Boumediene* petitioners was not the right to raise a habeas challenge to some ancillary issue, such as the Petitioners here seek to do, but rather to challenge to the legality to the fact of their detention at all. *See Ayotte v. Planned Parenthood*, 546 U.S. 320, 328-29 (2006) ("[T]he 'normal rule' is that 'partial, rather than facial, invalidation is the required course,' such that a 'statute may . . . be declared invalid to the extent that it reaches too far, but otherwise left intact.'").

Indeed, with regard to how much of § 2241(e)(1) remains operative following *Boumediene*, a reviewing court has an obligation to preserve as much of a statute as is legally permissible. Thus, "a court should refrain from invalidating more of the statute than is necessary," and "whenever an act of Congress contains unobjectionable provisions separable from those found to be unconstitutional, it is the duty of [the] court to so declare, and to maintain the act in so far as it is valid." *Wyoming v. Oklahoma*, 502 U.S. 437, 460 (1992) (quoting *Regan v. Time*, 468 U.S. 641, 652 (1984) (plurality opinion).[7] Thus, because Acts of Congress are valid to the extent they operate constitutionally, the Court's holding must be applied with an eye to

[7] Additionally, *Boumediene*'s reasoning does not necessarily require the conclusion that Section 7 is invalid with respect to those charged by a military commission, who have much broader, and fully adequate, administrative proceedings available to them under the Military Commissions Act. *See supra* Part I (arguing that military commission procedures are sufficient to constitute an adequate substitute for habeas as to claims covered by Section 950j(b) and raised by petitioner in his motion).

"limit[ing] the solution to the problem." *Ayotte*, 546 U.S. at 328-39. At bottom, because the problem alleged in *Boumediene* as to § 2241(e)(1) concerned only a core habeas challenge to the legality of detention made by a petitioner with access only to the CSRT process, and not to an ancillary issue not dealing with the legality of detention and related to a possible future military commission proceeding that is separate from the habeas proceeding, § 2241(e)(1) remains operative here and removes jurisdiction with regard to the instant challenge.

Second, *Boumediene*'s holding does not invalidate the second part of section 7. Indeed, the Court expressly noted that it was not deciding whether Guantanamo detainees have a constitutional right to bring non-core habeas type claims, such as conditions of confinement claims—one type of claim barred by § 2241(e)(2). *See Boumediene*, 128 S.Ct. at 2274 ("[W]e need not discuss the reach of the writ with respect to claims of unlawful conditions of treatment or confinement."). But even after *Boumediene*, Congress' withdrawal of federal court jurisdiction over "any other action . . . relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement" remains operative to deprive this Court of jurisdiction over petitioners' claims, which are ancillary to the core habeas issue.

The Supreme Court's rationale for invalidating § 2241(e)(1), as applied, has no application to § 2241(e)(2). The *Boumediene* majority discusses the detainees' constitutional right to bring only core *habeas* actions—challenging the lawfulness of detention—as opposed to the broader class of "any other action . . . relating to any aspect of the detention." *See, e.g.*, *id.* at 2262 ("Petitioners, therefore, are entitled to the privilege of habeas corpus *to challenge the legality of their detention*.") (emphasis added). Unlike § 2241(e)(1) however, § 2241(e)(2) does not impair the Guantanamo detainees' ability to pursue a writ of habeas corpus. Rather, it expressly limits *other* types of actions that Guantanamo detainees might bring. Indeed, the Court

explicitly distinguished between habeas actions governed by § 2241(e)(1), and *other*, *non-habeas* actions governed by § 2241(e)(2), by recognizing that "[t]he structure of the two paragraphs [i.e. (e)(1) and (e)(2)] implies that habeas actions are a type of action 'relating to an aspect of the detention, transfer, treatment, trial, or conditions of confinement'" *See id.* at 2243. Because § 2241(e)(2) addresses "other action[s]" and not any constitutional habeas right the detainees may hold, the Suspension Clause provides no basis for invalidating it.

Additional evidence that *Boumediene* did not reach § 2241(e)(2) comes from the Court's discussion of what is constitutionally required in habeas proceedings. That discussion does not suggest that Guantanamo detainees have a right to challenge "other action[s]" related to "aspects" of their detention. Instead, the Court's discussion is phrased in terms limiting a detainee's habeas action narrowly to a challenge of his status or custody. *See*, *e.g.*, *Boumediene*, 128 S.Ct. at 2266 ("We do consider it uncontroversial, however, that the privilege of habeas corpus entitles the prisoner to a meaningful opportunity to demonstrate that he is being held pursuant to 'the erroneous application or interpretation' of relevant law."); *id.* at 2269 ("The habeas court must have sufficient authority to conduct a meaningful review of both the cause for detention and the Executive's power to detain."); *id.* at 2273 (detainee must have opportunity to present "reasonably available evidence demonstrating there is no basis for his continued detention"). None of the language suggests that a petitioner's *constitutional* habeas rights include a right to challenge any other aspect related to their detention beyond its legality. Thus, the Court's holding that the Suspension Clause requires invalidation of section 7 of the MCA as applied to aliens detained at Guantanamo should be read to apply only to the first part of section

7, *i.e.,* § 2241(e)(1), and only as discussed above, *see supra* pp. 13-14.[8]

A contrary conclusion would require this Court to conclude that while the Supreme Court *expressly* held that § 2241(e)(1) is unconstitutional as applied to Guantanamo detainees, who have only had the benefit of CSRT procedures, it determined *sub silentio* the constitutionality of 28 U.S.C. § 2241(e)(2). But if the Court had intended to pass on § 2241(e)(2)'s constitutionality, the only rationale that might have supported that conclusion would have been if the Court had determined that conditions of confinement claims are encompassed in the detainees' constitutional right to habeas, so that elimination of jurisdiction over those claims jeopardized their constitutional habeas right. But, as noted above, the Court expressly stated that it was *not* deciding that issue.[9] *See Boumediene*, 128 S.Ct. at 2274.

While the continuing vitality of § 2242(e)(2) is therefore clear, if any doubt remained as noted above, the Court must consider its duty to preserve as much of a statute as is constitutional.

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[8] Although the Court's opinion refers generally to section 7, without identifying a particular subsection of 28 U.S.C. § 2241(e), *see, e.g.*, *Boumediene*, 128 S.Ct. at 2274 ("MCA § 7 thus effects an unconstitutional suspension of the writ."); *id.* at 2274 ("The only law we identify as unconstitutional is MCA §7, 28 U.S.C.A. § 2241(e) (Supp. 2007)"), that is an insufficient basis for construing the Court's opinion to invalidate *all* of section 7. This is particularly so because the Court's rationale for invalidating § 2241(e)(1) has no application to § 2241(e)(2). In fact, at one point in its opinion, the Court seems to acknowledge that its reference generally to section 7 is simply short-hand for referring to § 2241(e)(1). *See id.* at 2265 (stating that § 7 is the source of the relevant "jurisdiction-stripping language," but citing specifically to subsection § 2241(e)(1)).

[9] Moreover, the fact that the constitutionality of § 2241(e)(2) was never challenged in *Boumediene* further supports the argument that the Court's holding does not invalidate that provision. *See Belbacha* v. *Bush*, 520 F.3d 452, 455 (D.C. Cir. 2008) ("In [the court of appeals' decision in] *Boumediene* we held that § 7(a)(1) [28 U.S.C. § 2241(e)(1)] of the MCA does not violate the Suspension Clause of the Constitution"). It would be odd to interpret the Court's decision in *Boumediene* as not only having reached the constitutionality of § 2241(e)(2), *sua sponte* and for the first time on appeal, but also to have determined that the provision is unconstitutional, without any explanation as to why.

*See Tilton* v. *Richardson*, 403 U.S. 672, 684 (1971) ("'The unconstitutionality of a part of an act does not necessarily defeat . . . the validity of its remaining provisions. Unless it is evident that the Legislature would not have enacted those provisions which are within its power . . . the invalid part may be dropped if what is left is fully operative as a law.'")). Indeed, because § 2241(e)(2) is severable, there is no obstacle to continuing to apply that provision, despite *Boumediene*'s holding that § 2241(e)(1) cannot validly withdraw the privilege of the writ of habeas corpus as applied to detainees at Guantanamo who have only the benefit of CSRT procedures. *See Ayotte*, 546 U.S. at 330 ("After finding an application or portion of a statute unconstitutional, we must next ask: Would the legislature have preferred what is left of its statute to no statute at all?").[10] Section 2241(e)(2) is thus severable and should remain in force. *Alaska Airlines, Inc.* v. *Brock*, 480 U.S. 678, 685 (1987) ("[T]he unconstitutional provision must be severed unless the statute created in its absence is legislation that Congress would not have enacted"); *News America Pub., Inc.* v. *F.C.C.*, 844 F.2d 800, 802 (D.C. Cir. 1988) (presumption is in favor of severability).

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[10] The text and history of section 7 of the MCA demonstrate that Congress surely intended § 2241(e)(2) to survive, even if the elimination of habeas jurisdiction in § 2241(e)(1) could not. In enacting the MCA, Congress sought to eliminate jurisdiction over ancillary issues, precisely to prevent the Executive Branch from having to divert significant resources during the duration of an armed conflict to respond to those claims. *See, e.g.*, 152 Cong Rec. S10403 (daily ed. Sept. 28, 2006) (Sen. Cornyn) ("[O]nce . . . section 7 is effective, Congress will finally accomplish what it sought to do through the [DTA] last year. It will finally get the lawyers out of Guantanamo Bay. It will substitute the blizzard of litigation instigated by *Rasul v. Bush* with a narrow DC Circuit-only review of the [CSRT] hearings."); 152 *id.* at S10367 (Sen. Graham) (citing one petitioner's motion for preliminary injunction regarding conditions of confinement as an examples of a claim that should be barred); *see also* 151 *id.* at 12656–57 (daily ed. Nov. 10, 2005) (Sen. Graham) (noting that DTA was intended to limit detainees' right to "challenge their status"); 151 *id.* at S12659-60 (Sen. Kyl) (stating that DTA would grant detainees "substantial rights to contest their status but not the right to clog up Federal courts" with medical malpractice claims and complaints about food).

### B. The Right to Seek a Writ of Habeas Corpus Recognized in *Boumediene* Does Not Encompass a Right to Challenge Ancillary Issues, Such as Petitioners' Challenge to the OMC Communications at Issue.

Section 2241(e)(1) still validly removes jurisdiction of issues ancillary to and beyond the core habeas function of challenging legality of detention and section 2241(e)(2) remains fully operative. Consequently, there is no federal court jurisdiction over "any other action" concerning "any aspect" of Petitioners' detention, treatment or confinement, including this action concerning who in the OMC may or may not communicate with Petitioners or over the subject of any such communications, except insofar as such actions may be constitutionally protected under *Boumediene*'s interpretation of the Suspension Clause. Therefore, under § 2241(e)(1) as applied to this claim and under § 2241(e)(2), Petitioners cannot state cognizable habeas claims, such as a challenge to communications with OMC personnel, unless their constitutional right to habeas corpus encompasses those claims.

The elimination of jurisdiction over such ancillary claims, however, could not constitute a Suspension Clause violation because they do not go to the core of habeas—legality of detention—challenge addressed by the Supreme Court in *Boumediene*. A habeas action has historically been understood as a vehicle for challenging one thing only—the fact of detention or its duration. Nothing else. That is, the Great Writ concerns only relief that, if granted, will result in the petitioner's *release* from confinement, not with other ancillary issues. Petitioners' claims here, which concern communications between OMC personnel and Petitioners, are far from the heart of habeas—a remedy for unlawful detention—and do not seek release from confinement. Jurisdiction is therefore lacking to consider them.

The Supreme Court has been unwilling to water down the constitutional writ from its core purpose to cover ancillary issues in the way Petitioners seek such as, for example,

conditions of confinement. *See Bell* v. *Wolfish*, 441 U.S. 520, 526 n.6 (1979) ("[W]e leave to another day the question of the propriety of using a writ of habeas corpus to obtain review of the conditions of confinement, as distinct from the fact or length of the confinement itself."); *see also Wilkinson v. Dotson*, 125 S. Ct. 1242, 1250 (2005) (Scalia, J., concurring) (condition-of-confinement claims in habeas would "utterly sever the writ from its common-law roots"); *Brown v. Plaut*, 131 F.3d 163, 168-69 (D.C. Cir. 1997) (indicating that requiring the use of habeas corpus for conditions claims would extend the writ beyond its core). Indeed, the courts of appeals have expressly held that such ancillary claims that do not seek accelerated release from custody are not within the scope of the writ. *See*, *e.g.*, *Pischke* v. *Litscher*, 178 F.3d 497, 499 (7th Cir. 1999) (stating that habeas action is proper "only if the prisoner is seeking to 'get out' of custody in a meaningful sense") *Doe* v. *Pennsylvania Bd. of Probation & Parole*, 513 F.3d 95, 100 n.3 (3d Cir. 2008) (noting that habeas is limited to "[a]ttacks on the fact or duration of the confinement"); *Hutcherson* v. *Riley*, 468 F.3d 750, 754 (11th Cir. 2006) (same). Similarly, in *Miller v. Overholser*, 206 F.2d 415 (D.C. Cir. 1953), the D.C. Circuit recognized that a habeas action "is not the correct remedy" for challenging "discipline or treatment," *id.* at 419-20.

Thus, even before the MCA, a detainee could not have challenged ancillary issues, such as Petitioners' claims here concerning communications, under statutory habeas jurisdiction. And if statutory habeas jurisdiction prior to the MCA did not encompass such challenges, *a fortiori* the writ as it existed at common-law in 1789 would not have permitted such claims. *See Rasul*, 542 U.S. at 474 ("habeas statute clearly has expanded habeas corpus 'beyond the limits that obtained during the 17th and 18th centuries'"). Although the Supreme Court in *Boumediene* noted that the Court has not "foreclose[d] the possibility that the protections of the Suspension Clause have expanded along with post-1789 developments," *Boumediene*, Slip Op. at 15, there is

nothing in the Court's opinion to suggest that the detainees' constitutional habeas rights extend beyond the common-law writ as it existed in 1789, or require them to be able to challenge their conditions of confinement. Indeed, the Supreme Court expressly declined to address whether the constitutional writ of habeas corpus encompasses claims regarding unlawful conditions of confinement. *See id.* at 64. Thus, the Suspension Clause should be read, at most, to protect the common-law writ as it existed in 1789. In any event, however, even if the writ protected by the Suspension Clause has expanded along with the habeas statute, the habeas statute has not been interpreted to allow challenges to ancillary issues, as explained above.[11] Accordingly, the MCA's elimination of jurisdiction over ancillary claims or claims collateral to the core habeas function challenging lawfulness of detention brought by Guantanamo detainees does not implicate the Suspension Clause.

The Court's decision in *Munaf v. Geren*, No. 06-1666 (Jun. 12, 2008)—decided the same day as *Boumediene*—further supports this understanding of the writ's scope. In *Munaf*, the Court emphasized that "[h]abeas is at its core a remedy for unlawful detention. . . . They typical remedy is, of course, release." *Munaf*, Slip Op. at 16 (citing *Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004) (plurality opinion)); *see also Preiser v. Rodriguez*, 411 U.S. 475, 484 (1973), *cited in Munaf*, Slip Op. at 16 ("[T]he traditional function of the writ is to secure release from illegal custody."). Accordingly, the Court refused to extend the relief that a habeas court could grant to the *Munaf* petitioners' collateral challenge to their transfer to Iraqi custody. *Munaf*, Slip Op. at

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[11] And even if the habeas statute were to permit ancillary claims, the Guantanamo detainees have no rights under the habeas statute. *See* MCA, § 7, 28 U.S.C. § 2241(e)(1); *Boumediene*, Slip Op. at 1 (Souter, J., concurring) ("Subsequent legislation eliminated the statutory habeas jurisdiction over these claims, so that now there must be constitutionally based jurisdiction or none at all."). There is absolutely no authority for the proposition that *constitutional* habeas corpus encompasses challenges to the conditions of confinement.

28 ("Habeas corpus does not require the United States to shelter such fugitives from the criminal justice system of the sovereign with authority to prosecute them."). As with the collateral claims at issue in *Munaf*, the Petitioners' pleas for relief here concern ancillary issues related to whether particular communications with OMC personnel are permissible and thus clearly fall well outside the core of a habeas corpus proceeding, and request a form of relief that may not be granted in habeas. Jurisdiction is therefore lacking and the motion should be denied.

## III. Petitioners' Motion For An Injunction To Halt Communications With OMC Personnel Is Beyond The Scope Of The Initiating Pleading.

Even beyond the jurisdiction limiting provisions at issue, an additional response to the demanded injunctive relief is that it is plainly beyond the scope of the initiating pleading in this case. The law is clear that preliminary injunction motions must seek relief consistent with and of the same character as the allegations in the initiating pleading, such as a Complaint or in this case the Petition, before the Court. *See De Beers Consol. Mines v. United States*, 325 U.S. 212, 220 (1945) (a "preliminary injunction is always appropriate to grant intermediate relief of the same character as that which may be granted finally"). "The purpose of interim equitable relief is to protect the movant, during the pendency of the action, from being harmed or further harmed in the manner in which the movant contends it was or will be harmed through the illegality alleged in the complaint." *Omega World Travel v. TWA*, 111 F.3d 14, 16 (4th Cir. 1997). In *Kaimowitz v. Orlando*, 122 F.3d 41, 43 (11th Cir.1997), for example, the Eleventh Circuit denied a preliminary injunction to protect plaintiff's First Amendment rights in a fraud case after concluding that the injunction "deals with a matter lying wholly outside the issues in the suit" and the requested preliminary relief "not of the same character that could be granted finally." *See also Devose v. Herrington*, 42 F.3d 470, 471 (8th Cir. 1994) (denying a preliminary injunction

because the "new assertions of mistreatment that are entirely different from the claim raised and the relief requested in his inadequate medical treatment lawsuit."). Recently, for example, plaintiffs challenging a terrorist designation imposed by the Department of the Treasury asked the U.S. District Court for the District of Oregon to enjoin alleged surveillance of plaintiffs and counsel that, if it existed, plaintiffs asserted would violate both attorney-client privilege and ethics rules. *See Al-Haramain Islamic Found. Inc. v. United States Dep't of Treasury*, 2008 WL 2381640, (D. Or. June 5, 2008). The *Al-Haramain* Court rejected the requested injunction, in part, because plaintiffs there sought an "injunction on matters 'lying wholly outside the issues in the suit.'" *Id.* at * 6.

The same is true here. The operative petition in this action does not seek injunctive relief as to communications with OMC personnel or, indeed, any other aspect of the military commission process. Rather, Petitioners' in this case seek a range of relief directed not at petitioners' release from custody, but only that Petitioners be permitted to meet with their families, informed of the charges, if any, against them, have access to the courts or some other impartial tribunal, and meet with counsel with regard to the *habeas* case. *See* Amended Complaint at ¶ 40.[12] That is to say that because the gravamen of the petition seeks final relief only against purported habeas proceedings and nothing with regard to the potential future military commission proceedings, which are separate and independent, the Court may only issue preliminary relief to the extent the equitable character of that relief is consistent with the final relief in the context of the habeas case. Accordingly, because the requested preliminary

[12] Indeed, it is noteworthy that because of the extant jurisdictional limitations of the MCA, petitioners could not properly add allegations concerning the allegedly inappropriate contacts regarding the military commissions where the results of military commission proceedings would not be reviewed in this Court.

injunctive relief is wholly outside the ambit of the requested final relief, and indeed directly relates to military commission proceedings that have not formally commenced and may never commence that are separate and independent from the instant habeas proceedings, the Court cannot issue the preliminary injunction because it is "not of the same character that could be granted finally." *See Kaimowitz*, 122 F.3d at 43; *see Reebok Intern. v. Marnatech Enterprises*, 970 F.2d 552, 560-61 (9th Cir. 1992) (noting that courts may issue preliminary injunctions where they are "a provisional remedy of the same equitable character as the final relief").

## CONCLUSION

For the reasons stated above, respondents respectfully request that the Petitioners' motion for preliminary injunction be denied for lack of jurisdiction. If the Court concludes that jurisdiction exists, it should provide Respondents additional time from the date of its resolution of the jurisdictional issue to provide briefing on the merits of Petitioners' motion.

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