IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN RE: GUANTANAMO BAY DETAINEE LITIGATION	Misc. No. 08-442 (TFH)
OMAR KHADR, et al. Petitioners, v. GEORGE W. BUSH, et al. Respondents	No. 04-cv-1136 (JDB)

OPPOSITION TO MOTION FOR JUDGMENT ON THE PLEADINGS AND CROSS-MOTION TO DISMISS PETITIONER'S HABEAS CASE WITHOUT PREJUDICE OR TO HOLD THE PETITION IN ABEYANCE PENDING COMPLETION OF MILITARY COMMISSION PROCEEDINGS

Petitioner Omar Khadr has moved this Court for judgment on the pleadings or for summary judgment in his habeas case based upon his status as a juvenile. He has also sought an injunction halting his military commission proceedings on this same basis. We oppose this motion because the government may lawfully hold and try him for violations of the law of war irrespective of whether his combatant or criminal acts occurred while he was a minor. But even before reaching that question, this Court should deny the motion for an injunction for lack of jurisdiction and based on well-established abstention principles, as Judge Robertson recently did in another case where a petitioner sought to enjoin his military trial. *Hamdan v. Gates*, — F. Supp. 2d —, 2008 WL 2780911 (D.D.C. July 18, 2008) (*Hamdan II*). This Court should also dismiss without prejudice or hold this matter in abeyance pending the outcome of criminal proceedings that have been brought against him.

OVERVIEW

I. Petitioner has been charged with criminal violations of the law of war pursuant to the Military Commissions Act of 2006 (MCA), 10 U.S.C. §§ 948a, *et seq*. The trial would occur before a military commission convened pursuant to an Act of Congress, in which he will be guaranteed an impartial judge and jury, 10 U.S.C. § 949f, the presumption of innocence until proven guilty beyond a reasonable doubt, *id.* § 949*l*, the assistance of defense counsel, *id.* § 949c, the right to be present, *id.* § 949d(b), the right to discovery (including a right to exculpatory evidence), *id*. § 949j, the right to take depositions, *ibid*., the right to call witnesses, *ibid.*, and a full panoply of other substantive and procedural rights that are carefully described in the MCA. Such rights for an alien charged with crimes in violation of the law of war are utterly unprecedented and far exceed the protections given to the defendants in *Ex parte Quirin*, 317 U.S. 1 (1942), *In re Yamashita*, 327 U.S. 1 (1946), and *Johnson v. Eisentrager*, 339 U.S. 763 (1950), cited approvingly by the Supreme Court in *Boumediene v. Bush*, 128 S. Ct. 2229, 2259-60, 2271 (2008).

Before trial, an accused is entitled to have the military commission itself make its own independent determination of unlawful enemy combatancy, *see* 10 U.S.C. § 948d, a determination made in the context of the commission's robust, adversarial proceedings. Petitioner may, and has, claimed in those proceedings that he does not qualify for trial or as an enemy combatant based upon his juvenile status, and the military judge – one of the same judges who presides in court martial cases – has rejected that claim. *United States v. Khadr*, No. D-022, Order at 3 (Apr. 30, 2008) (attached as Ex. A). As the D.C. Circuit made clear in addressing a premature appeal in Khadr's own military commission case, if Khadr is ultimately convicted, he may seek review in the D.C. Circuit, as a matter of right, of the legal and factual bases for the initial unlawful enemy combatancy

determination, and for the conviction itself, including challenges to the military commission's personal jurisdiction such as the one made here. *See Khadr v. United States*, 529 F.3d 1112, 1118 (D.C. Cir. 2008).

A. This Court lacks jurisdiction to consider petitioner's motion to enjoin proceedings because Congress has specifically determined that challenges such as petitioner's be heard first by a military commission, with review by the Article III courts to follow *after* adjudication, not before. *See* 10 U.S.C. § 950j(b). Indeed, the D.C. Circuit last year denied a motion filed by Khadr to stay his military commission proceedings (based on the same claim Khadr raises here, that he cannot properly be tried because he was a juvenile at the time of his offenses), holding that the court "is without jurisdiction to grant the requested relief" under 10 U.S.C. § 950j(b). *Khadr v. Gates*, No. 07-1156, Order at 1 (D.C. Cir. May 30, 2007) (attached as ex. B). As the district court observed in *Hamdan II*, "[w]here both Congress and the President have expressly decided when Article III review is to occur, the courts should be wary of disturbing their judgment." 2008 WL 2780911, at *7. Like the claims raised by petitioner in prior D.C. Circuit actions and those raised by *Hamdan II* before Judge Robertson, petitioner's claims "are all claims that should or must be decided in the first instance by the Military Commission, and then raised before the D.C. Circuit, as necessary, on appeal." *Hamdan II*, 2008 WL 2780911 *at *6.*

Moreover, it would be inappropriate for this Court to exercise jurisdiction on petitioner's challenge to his military commission. As the Supreme Court reiterated unanimously in *Munaf v. Green*, 128 S. Ct. 2207 (2008), on the same day it decided *Boumediene*, "the orderly administration of criminal justice may 'require a federal court to forgo the exercise of its habeas corpus power.'" *Id.* at 2220 (quoting *Francis v. Henderson*, 425 U.S. 536, 539 (1976)). Given Congress' enactment

of the MCA, which unquestionably confers jurisdiction on the military court to try petitioner and sets forth in great detail elaborate procedures for his trial (including an appeal as of right to the D.C. Circuit), petitioner cannot and does not seriously challenge "the right of the military to try [him] at all." *Councilman*, 420 U.S. at 763. As such, just as Judge Robertson concluded, "[t]he Supreme Court's decision in [*Schlesinger v. Councilman*, 420 U.S. 738 (1975),] requires federal courts to give 'due respect to the autonomous military judicial system created by Congress'" by abstaining. *Hamdan II*, 2008 WL 2780911 *at *6*.

B. Petitioner's claim also fails on the merits – petitioner may properly be tried for criminal violations under the Military Commissions Act even though he was under eighteen when he committed crimes in violation of the law of war. Nothing in the MCA limits its applicability to those who commit crimes in violation of the law of war when they are adults, and applying the Act to individuals under age eighteen is consistent with historical practice and background principles of international law. The Optional Protocol to the Convention on the Rights of the Child, upon which petitioner heavily relies, does not purport to limit when a juvenile may be prosecuted for crimes in violation of the law of war. Instead, it restricts states from recruiting or using child soldiers. The Juvenile Delinquency Act, also relied upon by petitioners, does not apply in these circumstances – indeed, there are military law precedents going back over fifty years that establish that the law does not apply in the military context.

II. A. Not only should this Court decline to enjoin his criminal trial, it should dismiss his habeas petition without prejudice, or hold it in abeyance, pending the completion of military commission proceedings. Given that petitioner has been criminally charged, there is nothing unusual about requiring him to first exhaust his criminal proceedings before seeking habeas relief.

That is the norm in American jurisprudence. *See* 28 U.S.C. § 2254; *Younger v. Harris*, 401 U.S. 37 (1971); *Schlesinger v. Councilman*, 420 U.S. 738 (1975). Moreover, there is substantial overlap between the issues presented in petitioner's habeas petition and his military commission case—issues that will likely be vetted in his criminal proceedings and on appeal as of right upon any conviction to the D.C. Circuit. As such, just as a habeas court may not properly interfere with ongoing military commission proceedings, *see Hamdan II*, 2008 WL 2780911, the Court also should properly abstain from consideration of petitioner's habeas case pending resolution of criminal charges before the military commission. Indeed, given the volume of Guantanamo habeas cases pending in the district court, judicial and party resources would be far better spent addressing the cases of petitioners who have not been criminally charged, and whose cases will not be heard in the adversarial system of criminal trials and judicial review specifically authorized by Congress in the Military Commissions Act. The Government, therefore, respectfully requests that petitioner's habeas case be dismissed without prejudice or held in abeyance pending resolution of the military commission proceedings.

B. On the merits, the United States is authorized to detain a juvenile who was captured on the battlefield in Afghanistan in the course of attacking and killing U.S. soldiers on behalf of al Qaeda. No obligation of the United States under domestic or international law requires the Government to release Khadr simply because he was under the age of eighteen when he took part in hostilities and killed a U.S. soldier in combat.

The Authorization for the Use of Military Force (AUMF) authorizes the President to use all necessary and appropriate force in fighting al Qaeda, including the detention of al Qaeda combatants pending the conclusion of active hostilities. Nothing in that statute, or subsequent enactments

relating to enemy combatants, excludes juveniles from the scope of the President's power. Khadr's age did not preclude him from being treated as a member of al Qaeda and even if it did, he would still be subject to military detention as an enemy combatant who had engaged in hostilities by attacking U.S. soldiers on behalf of al Qaeda. The President's detention authority extends to individuals who associate themselves with enemy forces for the purpose of committing hostile acts against U.S. forces. The law of war also permits a military force to detain individuals who, although not formal members of an enemy force, nevertheless take up arms to fight with the enemy force.

The circumstances in which Congress enacted the AUMF – where it was widely known that our enemies employed juvenile soldiers – further support the conclusion that the President may detain juvenile enemy combatants. Historical practice, contemporary practice, and international law also all fully support the President's authority to detain juvenile enemy combatants.

BACKGROUND

A. On September 11, 2001, Usama Bin Laden and his terrorist network, al Qaeda, operating out of Taliban-controlled Afghanistan, attacked the United States. Nearly three thousand Americans were killed in what was the worst attack on American soil by a foreign aggressor in our nation's history. On September 18, 2001, Congress adopted the Authorization for the Use of Military Force, which authorized the President to use "all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001" and those who harbored the attackers. Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001). Within weeks, American forces were deployed in Afghanistan.

In 2006, Congress enacted the MCA, establishing a detailed regime governing the

establishment and conduct of military commissions. *See* 10 U.S.C. §§ 948a-950p. The MCA provides for war crimes trials by military commission of unlawful enemy combatants, 10 U.S.C. § 948c, defined in part as any person who "has engaged in hostilities or who has purposefully and materially supported hostilities against the United States . . . who is not a lawful enemy combatant." 10 U.S.C. § 948a(1). A military commission is made up of at least five members who are military officers, 10 U.S.C. §§ 948i, 948m, and is presided over by a military judge, 10 U.S.C. § 948j, the same judges who preside over courts-martial. The defendant is appointed military defense counsel and may also retain private civilian counsel. 10 U.S.C. §§ 948k, 949c. The defendant is presumed innocent unless proven guilty beyond a reasonable doubt. 10 U.S.C. § 949l(c).

The defendant has broad appellate rights. 10 U.S.C. § 950b(b). If convicted, the defendant may appeal to the Court of Military Commission Review, an intermediate military court. 10 U.S.C. § 950f. The defendant may next appeal to the D.C. Circuit,10 U.S.C. § 950g, which has "exclusive jurisdiction to determine the validity of a final judgment rendered by a military commission"; it may review "matters of law" (including the legal sufficiency of the evidence supporting the conviction) and may further consider "whether the final decision was consistent with the standards and procedures specified in this chapter" and with "the Constitution and the laws of the United States." 10 U.S.C. § 950g(a)-(c). Commission proceedings commence upon the swearing of charges against an accused, notice of those charges to the accused, and referral of those charges to a military commission. *See* 10 U.S.C. § 948q; Manual for Military Commissions, Rule 401(b).

B. Khadr, who was born in Canada, lived primarily in Pakistan and Afghanistan. *See* Mot., ex. 2, at ¶¶ 4-5. His father was a senior al Qaeda member. *Id.* ¶ 5. In the summer of 2002, a few weeks before his sixteenth birthday, Khadr received "basic training" from al Qaeda forces on the

use of rocket-propelled grenades, rifles, pistols, hand grenades, and explosives. *Id.* ¶ 10. Khadr was captured by U.S. forces on July 27, 2002, after a firefight in which he and his fellow fighters killed three soldiers in the U.S.-led coalition and seriously injured several other U.S. service members. *Id.* ¶ 12. Khadr is currently detained at the U.S. Naval Station at Guantanamo Bay, Cuba.

In April 2007, charges against petitioner were referred for prosecution before a military commission. Those charges specified five offenses: murder in violation of the law of war, 10 U.S.C.§950v(b)(15), attempted murder in violation of the law of war, 10 U.S.C. § 950t, conspiracy, 10 U.S.C. § 950v(b)(28), providing material support for terrorism, 10 U.S.C. § 950v(b)(25), and spying, 10 U.S.C. § 950v(b)(27). See Mot., ex. 2, at ¶¶ 25-34.[1]

In January 2008, Khadr moved the military judge to dismiss the charges for lack of jurisdiction, based on the fact that Khadr was fifteen years old at the time he killed Sergeant Speer. *See Khadr*, No. D-022, Defense Motion (filed Jan. 18, 2008), *available at* http://www.defenselink.mil/news/commissionsKhadr.html. The military judge rejected Khadr's

[1]A copy of the charge sheet is posted on the DefenseLink information page at http://www.defenselink.mil/news/Apr2007/Khadrreferral.pdf, hereinafter referred to as "Charge Sheet." The murder charge specifies that Khadr, "without enjoying combatant immunity, unlawfully and intentionally murder[ed] U.S. Army Sergeant First Class Christopher Speer . . . by throwing a hand grenade at U.S. forces." Charge Sheet, p. 4. The attempted murder charge specified that Khadr, "without enjoying combatant immunity, attempt[ed] to commit murder . . . by converting land mines into improvised explosive devises and planting said . . . devices in the ground with the intent to kill U.S. or coalition forces." *Id.* The conspiracy and material support charges specified that Khadr conspired with al Qaeda leadership by receiving "one month of . . . basic training from an al Qaeda member," by "conducting surveillance and reconnaissance against the U.S. military," by obtaining land mine training and converting land mines into improvised explosive devices, by engaging the U.S. military with "small arms fire, killing two Afghan Militia Force members," and by throwing grenades at coalition forces and killing Sergeant Speer and injuring others. *Id.* at 5-6. The spying charge specified that Khadr, "at the direction of a known al Qaeda member . . . and in preparation for operations targeting U.S. forces . . . conducted surveillance of U.S. forces and made notations as to the number and types of vehicles, distances between vehicles, approximate speed of the convoy, time, and direction of the convoys." *Id.* at 7.

claim in a written decision. The military judge first reasoned that in the MCA, it was "clear that Congress did not . . . limit the jurisdiction of a military commission so that persons of a certain age could not be tried." *Khadr*, No. D-022, Order at 3 (attached as Ex. A). Next, the judge concluded that the Juvenile Delinquency Act (JDA) does not apply to proceedings brought pursuant to the MCA before a military commission because a commission is not a "court of the United States" as the phrase is used in the JDA (18 U.S.C. § 5032). *Id.* at 3-4. The military judge next concluded that no international law requirements precluded Khadr's trial *Id.* at 5-6.

Petitioner has previously brought two cases in the D.C. Circuit relating to the military commission's jurisdiction. In one, filed under the Detainee Treatment Act, he sought to enjoin the commission proceedings in 2007 based on his juvenile status. The court of appeals denied his motion to enjoin those proceedings, holding that the "court is without jurisdiction to grant the requested relief" under 10 U.S.C. § 950j(b). *Khadr v. Gates*, Order at 1 (D.C. Cir. May 30, 2007) (attached as Ex. B). In the second, petitioner prematurely sought review of a ruling of the United States Court of Military Commission Review related to the commission's personal jurisdiction over petitioner. The D.C. Circuit dismissed that case as premature, explaining that Khadr's challenge to the commission's personal jurisdiction "is reviewable on appeal from final judgment." *Khadr*, 529 F.3d at 1117. In this habeas action, petitioner is now making his *third* attempt to collaterally attack and halt military commission proceedings.

ARGUMENT

I. Petitioner Has Not Carried His Burden of Showing That He is Entitled to the Extraordinary Relief of an Injunction to Enjoin his Military Trial.

As the Supreme Court reiterated in a recent habeas challenge, an injunction is "an 'extraordinary and drastic remedy,'" that is "never awarded as of right." *Munaf*, 128 S. Ct. at 2219.

Rather, the movant must, "by a clear showing, carr[y] the burden of persuasion." *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (citation and quotation marks omitted). To obtain a permanent injunction, the petitioner must establish not only that he prevails on the merits, but also that he has "suffered an irreparable injury," that "considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted," and that "the public interest would not be disserved by a permanent injunction." *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006).

A. Petitioner Cannot Prevail on the Merits.

Petitioner cannot prevail on the merits for three separate reasons. First, this Court lacks jurisdiction to consider petitioner's claims or issue the injunction sought. Second, even if jurisdiction were proper, this Court would be required to abstain. Finally, petitioner's claim that he cannot be prosecuted for actions that took place when he was fifteen years old lacks merit.

1. This Court Has No Jurisdiction to Consider Petitioner's Claim that Military Commission Proceedings Should be Enjoined.

a. Petitioner cannot prevail on the merits because 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 petitioner's motion for an injunction. 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)." *Ibid*. Instead, section 950g confers "exclusive appellate jurisdiction" on the District of Columbia Circuit to "determine the validity of a final judgment rendered by a military commission." 10 U.S.C.

§ 950g(a).

In enacting section 950j(b), Congress did not deprive the courts of all jurisdiction over such claims. Instead, section 950j(b) and 950g serve to channel claims such as the one raised by petitioner into the military commission process itself and subsequent appeals to the D.C. Circuit, a practice that is a familiar method of making judicial review more efficient and limiting collateral actions. *See Telecommunications Research & Action Center v. FCC*, 750 F.2d 70, 75 (D.C. Cir. 1984) ("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"); 8 U.S.C. § 1252(a)(5) (eliminating habeas review of removal orders and channeling review to court of appeals); *Ruiz-Martinez v. Mukasey*, 516 F.3d 102, 114 (2d Cir. 2008) (collecting cases). *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 950j(b) must first be considered by the military commission, *see, e.g.*, 10 U.S.C. §§ 949d(a), 949*l*(b); next, such claims may be reviewed in the Court of Military Commissions Review, 10 U.S.C. §§ 950c, 950f(c); and finally review is available in the D.C. Circuit, with possible *certiorari* review by the Supreme Court, 10 U.S.C. § 950g(c), (d).

Petitioner does not dispute that section 950j(b) sweeps broadly (Mot. at 12), but he claims that it preserves claims that are "jurisdiction-related." *Id.* at 19. He suggests that otherwise, the provision would violate the Suspension Clause. These arguments are mistaken. First, 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 to the commission's jurisdiction over

petitioner plainly "relat[es] to" the "trial" before the commission." The relief sought here is to enjoin trial. In *Hamdan II*, the court rejected an argument similar to petitioner's, concluding that section 950j(b) was "intended to deprive the federal courts of all habeas jurisdiction over [military commissions in] Guantanamo." 2008 WL 2780911, at * 4.

If petitioner is found guilty, he has full appellate rights first to the Court of Military Commissions Review and then to the D.C. Circuit. 10 U.S.C. §§ 950f(d), 950g(b). In conducting its review, the court of appeals can evaluate petitioner's claim that, because he was a minor when he committed crimes in violation of the law of war, his conviction would have to be vacated – the reviewing courts may consider legal issues as well as whether the commission's "final decision was consistent with the standards and procedures" for military commissions (10 U.S.C. § 950g(c)(1)).

Indeed, the D.C. Circuit has held, with respect to this very petitioner, that the military commission's personal jurisdiction "is reviewable on appeal from final judgment." *Khadr*, 529 F.3d at 1117. The court of appeals then held that it *lacked* jurisdiction to immediately review petitioner's personal jurisdiction claims, but must await the conclusion of the military trials and military appeals. *Id*. It would thus be entirely inappropriate for this Court to address personal jurisdiction in a collateral attack, in direct contravention of Congress's channeling provision as well as the D.C. Circuit's *Khadr* decision.

b. Section 950j(b) raises no substantial Suspension Clause issue for two reasons. First, the constitutional right to habeas corpus is concerned with the core habeas right to be free from unlawful detention, not the alleged right to *challenge* a trial in advance. *See Munaf*, 128 S. Ct. at 2221. Second, section 950j(b), in conjunction with section 950g, channels judicial review of petitioner's claims into the D.C. Circuit, and that review is a wholly adequate substitute for habeas.

i. The Suspension Clause is concerned with the core habeas right to be free from unlawful detention. It is well-established that a habeas action has historically been understood as a vehicle for challenging only the fact or duration of detention. *See Munaf*, 128 S. Ct. at 2221. The *Boumediene* Court recognized this essential function of habeas, which at its core exists to test the legality of detention. 128 S. Ct. at 2240 (remanding to consider "questions regarding the legality of the detention"). As the Court previously explained, "the essence of habeas corpus is an attack by a person in custody upon the legality of that custody." *Preiser v. Rodriguez*, 411 U.S. 475, 484 (1973); *see Boumediene*, 128 S. Ct. at 2277 ("first principles" secured by habeas are "freedom from arbitrary and unlawful restraint"); *id*. at 2247 ("The Clause protects the rights of the detained by affirming the duty and authority of the Judiciary to call the jailer to account.").

Indeed, *Munaf*—decided the same day as *Boumediene*—emphasized that "[h]abeas is at its core a remedy for unlawful executive detention. The typical remedy for such detention is, of course, release." *Munaf*, 128 S. Ct. at 2221 (citation omitted). Accordingly, the *Munaf* Court held that "habeas is not appropriate" when the goal is not "release." *Ibid*.; *see also id*. at 2228 (Souter, J., concurring) ("habeas is aimed at securing release, not protective detention"); *cf. Aguilar v. United States Immigration and Customs Enforcement*, 510 F.3d 1, 11 (1st Cir. 2007) (distinguishing between permissible habeas challenge to detention and impermissible collateral attack on removal proceedings through habeas). It is this core constitutional function of habeas that was left intact after Congress repealed statutory habeas for Guantanamo detainees. *Boumediene*, 128 S. Ct. at 2278 (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.").

In holding that the Suspension Clause applies to those detained at Guantanamo, the

Boumediene Court concluded that petitioners "are entitled to the privilege of habeas corpus to challenge the legality of their detention," when they have not had the benefit of an adversarial proceeding to determine their status. 128 S. Ct. at 2262. And in evaluating whether the DTA provided an adequate substitute, the Court asked whether the "Court of Appeals has jurisdiction . . . to inquire into the legality of the detention." *Id*. at 2265.

These principles do not entail any constitutional right to mount a pre-trial challenge to military commission proceedings. To the contrary, the *Boumediene* Court reaffirmed the well-established requirement that "defendants in courts-martial [must] exhaust their military appeals before proceeding with a federal habeas corpus action." 128 S. Ct. at 2274; *cf*. *id.* at 2268 (in cases involving state-court criminal proceedings, "the prisoner should exhaust adequate alternative remedies before filing for the writ in federal court") (citing *Ex parte Royall*, 117 U.S. 241, 251-52 (1886)). In sum, the core purpose of constitutional habeas is to test the legality of detention, not to challenge a trial in advance. While petitioner is also challenging the legality of his detention as an enemy combatant, an issue addressed below, with respect to his military trial, he is seeking an injunction that would halt proceedings in advance of the trial itself. *See* Motion, Proposed Order (seeking order that "[a]ny trial of Petitioner by a military tribunal . . . is hereby enjoined"). Thus, as the court observed in *Hamdan II*, "the application of habeas corpus that [petitioner] wishes to advance . . . is different form the one recognized in *Boumediene*." 2008 WL 2780911 at *5. Although Judge Robertson did not decide the constitutionality of section 950j(b), he correctly noted that whereas "*Boumediene* dealt with a challenge to detention," "the gist of the challenge presented in this motion for a preliminary injunction is to the jurisdiction of the Military Commission, an issue farther removed from the 'historical core' of the Writ than was the case in *Boumediene*." *Id*. And

because pre-trial challenges are removed from the "historical core" of the writ, Section 950j(b) is fully consistent with the Suspension Clause. *See, e.g.*, *Felker v. Turpin*, 518 U.S. 651, 664 (1996) ("judgments about the proper scope of the writ are 'normally for Congress to make'").

ii. There is a second reason why section 950j(b) does not suspend the writ: with respect to military prosecutions, the MCA provides the adequate, alternative remedy for considering the claims channeled by section 950j(b) to post-trial review that was lacking in the provisions addressed by *Boumedeine*. More specifically, petitioner cannot show that habeas is needed to obtain judicial review of his claim that he cannot be convicted for crimes in violation of the law of war committed while he was a minor. Military commission proceedings are vastly different than the CSRT procedures found wanting by the Supreme Court in *Boumediene*. First and foremost they are adversarial, which itself is a dispositive difference. *See Boumediene*, 128 S. Ct. at 2259-60 (citing approvingly military trial with a "rigorous adversarial process" to test the legality of detention in *Eisentrager*). Petitioner has had a fully-adversarial opportunity to challenge the commission's jurisdiction before the military judge, *see Khadr*, No. D-022, Order (attached as Ex. A); *see also Kahdr*, 529 F.3d at 1117-18, and the commission's jurisdictional determination will be subject to judicial review in the D.C. Circuit following any conviction. Additionally, because those who are charged by military commission are provided "adequa[te] . . . process through which [their] status determination [is] made," subject to judicial review, that process not only is an adequate substitute for habeas, but also renders the Suspension Clause wholly inapplicable under the *Boumediene* Court's three-factor test. *Boumediene*, 128 S. Ct. at 2259 (distinguishing *Eisentrager*'s conclusion that the Suspension Clause does not apply because, in that case, "there had been a rigorous adversarial process to test the legality of their detention," namely, a "trial by military commission

for violations of the laws of war").[2] Indeed, in *Hamdan II*, Judge Robertson explained that the Suspension Clause issue "is by no means controlled by the four corners of *Boumediene*." *Hamdan II*, 2008 WL 2780911 at *5.

Boumediene itself recognized that Congress could limit access to the habeas writ, in circumstances where a "trial has been held." 128 S. Ct. at 2264 (citing *Felker*, 518 U.S. at 662-64). Moreover, like other provisions designed to channel and streamline challenges, section 950j(b) does not "eliminate[] traditional habeas corpus relief." *Id*. at 2265. Instead, by precluding collateral attack, it simply requires that petitioner's legal claims be brought in the military commission forum in the first instance, with appeal to the D.C. Circuit to follow. *See Boumediene*, 128 S. Ct. at 2268 ("the necessary scope of habeas review in part depends upon the rigor of any earlier proceedings," an idea that "accords with our test for procedural adequacy in the due process context").

Section 950j(b) thus does not violate the Suspension Clause. Military commission proceedings, in conjunction with review by an Article III court, comprise a sufficient habeas substitute. 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

[2]The three factors are the "citizenship and status of the detainee and the adequacy of the process through which that status determination was made," the "nature of the sites where apprehension and then detention took place," and the "practical obstacles inherent in resolving the prisoner's entitlement to the writ." *Id.*

detainee at all stages, direct and collateral." *Id*. at 2269. Here, Congress has afforded more than adequate procedures.

First, in the military-commission proceedings, petitioner could and did readily raise his claim relating to his age when he committed his crimes. Unlike under the CSRT process at issue in *Boumediene*, a military-commission defendant has "the assistance of counsel." *Id*.; *see* 10 U.S.C. § 949c(b). Further, unlike the CSRT process at issue in *Boumediene*, the defendant in military commission proceedings is "aware of the most critical allegations" against him and he is obviously aware of his own age at the time of the charged offenses. *Boumediene*, 128 S. Ct. at 2269; *see* 10 U.S.C. § 948q(b) ("the accused shall be informed of the charges against him"). In sum, the proceedings are not "'closed and accusatorial,'" *Boumediene*, 128 S. Ct. at 2270, but "ha[ve] an adversarial structure that [was] lacking" in the CSRT process, *id*. at 2271. *See* 10 U.S.C. § 949d(d).

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 just as a federal court may do so in reviewing a state court judgment. *See Jackson v. Virginia*, 443 U.S. 307, 324 (1979). In providing for appellate review by an Article III court as of right, Congress granted protection to the accused that goes above and beyond the procedures in the UCMJ, which provides only for a petition for certiorari to the Supreme Court. *See* 10 U.S.C. §§ 867-867a. This direct appellate review in a "court of record," *i.e.*, an 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 punitive 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. If such a judgment were declared invalid – for lack of jurisdiction, for legal reasons, or for failure of proof – then the only lawful basis for punitive detention would be vitiated.

Finally, the military-commission statute "allow[s] the [defendants] to assert . . . all[] of the legal claims they seek to advance" before an Article III court, including the claim that a defendant cannot be convicted for criminal conduct taking place while he was a minor. *Boumediene*, 128 S. Ct. at 2271. And indeed, petitioner has advanced this claim in the military commission proceedings. *Khadr*, No. D-022, Order (attached as Ex. A). The court of appeals has jurisdiction to consider "matters of law," including whether the 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). Petitioner's claim is therefore fully cognizable on direct review if he should be convicted. This is radically different from the commission previously before the Supreme Court – where review lay only with the Executive as of right. *See Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2788 (2006) (*Hamdan I*). Indeed, as we have explained, the court of appeals has already held that it may consider the military commission's personal jurisdiction in petitioner's own case. *Khadr*, 529 F.3d at 1118 ("This Court will have opportunity to review . . . whether the commission properly determined its jurisdiction and acted in conformity with the law"). He therefore has not shown that section 950j(b) violates the Suspension Clause as applied to his claims.

The result is no different because petitioner characterizes his claim as "jurisdictional." Such

challenges are fully cognizable in commission proceedings and by the court of appeals thereafter. *Khadr*, 529 F.3d at 1118. Indeed, if the rule were different, the Supreme Court's abstention jurisprudence—crystallized in *Schlesinger v. Councilman*, 420 U.S. 738 (1975)—whereby the court will abstain from review of military-criminal proceedings until a judgment is final— would work an unconstitutional suspension of the writ. Moreover, the same logic would invalidate abstention under *Younger v. Harris*, 401 U.S. 37 (1971), so long as the challenge to state court criminal proceedings could be couched in the language of "jurisdiction." But the norm in criminal proceedings is that even "jurisdictional" challenges can be reviewed only post-conviction.

Councilman was itself a case where the petitioner claimed that he had been charged for a crime that was "not within the military court-martial jurisdiction." *Councilman*, 420 U.S. at 740. As the Supreme Court has explained, in another case where military court jurisdiction was challenged, an exhaustion requirement in the context of a military prosecution "is [in] no sense a suspension of the writ of habeas corpus." *Gusik v. Schilder*, 340 U.S. 128, 132 (1950). Instead, it is entirely appropriate for a court to decline to resolve "the collateral attack of military judgments" when there is "an available procedure . . . to rectify the alleged error." *Id*. at 131-32.[3] And if courts

[3]*See Kinsella v. United States ex rel. Singleton*, 361 U.S. 234, 236 (1960) (petitioner first "challenged the jurisdiction of the court-martial over her" in those proceedings and, after exhausting military appeals, "filed this petition for habeas corpus"); *Grisham v. Hagan* 361 U.S. 278, 278 (1960); *Burns v. Wilson*, 346 U.S. 137, 138 (1953) ("petitioners exhausted all remedies available to them under the Articles of War for review of their convictions by the military tribunals"); *Gusik*, 340 U.S. at 129 ("[a]fter conviction by the court-martial petitioner exhausted all his remedies" and "[w]hen he secured no relief from the military authorities he filed this petition in which he challenges the jurisdiction of the court-martial both under the Articles of War and the Constitution"); *id*. at 131 (normally, court would "not have been justified in entertaining the petition unless the remedy afforded by the Article [of War] had first been exhausted"); *Duncan v. Kahanamoku*, 327 U.S. 304, 310-11 (1946) (both petitioners convicted by military tribunals); *Yamashita*, 327 U.S. at 5 (petitioner had been "found guilty of the offense as charged" prior to petitioning for habeas); *Ex parte Reed*, 100 U.S. 13, 20 (1879) (habeas challenging jurisdiction of court-martial sought after

may permissibly channel review through exhaustion and abstention doctrines imposed under their own equity power, then so too may Congress, exercising its power to define and punish violations fo the law of nations, including the laws of war. *Cf. Avocados Plus Inc. v. Veneman*, 370 F.3d 1243, 1247 (D.C. Cir. 2004) ("If the statute does mandate exhaustion, a court cannot excuse it."). Indeed, even outside the wartime context, there is nothing unusual or anomalous about statutory exhaustion requirements in habeas. *See* 28 U.S.C. § 2254(b)(1)(A); *see also Gusik*, 340 U.S. at 131-32 ("The policy underlying that rule [that a habeas court will not interfere when a state court provides a remedy] is as pertinent to the collateral attack of military judgments as it is to collateral attack of judgments rendered in state courts."). And none of the handful of cases that considered collateral jurisdictional challenges while military proceedings were ongoing did so in the face of a statute expressly authorizing commission proceedings and requiring review to be channeled through the military proceedings.[4] Here as in *Hamdan II*, the petitioner may raise his claims in the military commission. "A real judge is presiding over the pretrial proceedings in [petitioner's] case and will preside over the trial . . . . If the Military Commission judge gets it wrong, his error may be corrected by the CMCR. If the CMCR gets it wrong, it may be corrected by the D.C. Circuit. And if the D.C. Circuit gets it wrong, the Supreme Court may grant a writ of certiorari." *Hamdan II*, 2008 WL 2780911 at *7.

A key element cited by courts conducting immediate jurisdictional review through habeas proceedings was their concern that no impartial tribunal was otherwise open petitioners to address

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petitioner found guilty and sentenced by court-martial).

[4]*See Hamdan I*; *Reid v. Covert*, 354 U.S. 1, 5 (1957); *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 13 (1955); *McElroy v. United States ex rel. Guagliardo*, 361 U.S. 281, 282-83 (1960).

petitioners' claims on appeal as of right. *See Hamdan I*, 126 S. Ct. at 2770 (noting an important factor in determining whether to abstain was the availability of a "military court system established by Congress—with its substantial procedural protections and provision for appellate review by independent civilian judges [that] 'will vindicate service-men's constitutional rights."); *Burns*, 346 U.S. at 139; *see id*. at 140 (observing that the Supreme Court "ha[s] exerted no supervisory power over the courts which enforce" military law); *Quirin*, 317 U.S. at 46-47 (noting the governing military procedures might "preclude a later opportunity to test the lawfulness of the detention"). Here, these concerns are inapplicable given the statutorily authorized review of claims subject to section 950j(b) in the D.C. Circuit. *See* 10 U.S.C. § 950g.[5]

2. Even if the Court has Jurisdiction, *Councilmen* Requires that the Court Abstain.

Even if this Court has jurisdiction to grant the injunction sought, abstention is appropriate under the Supreme Court's decision in *Councilman* because this Court must give "due respect to the autonomous military judicial system created by Congress." *New v. Cohen*, 129 F.3d 639, 643 (D.C. Cir. 1997). Indeed, in light of the substantial procedural safeguards codified by Congress in a comprehensive military court system and Congress' clear intent to foreclose collateral attacks to that system, it would be anomalous not to abstain.[6]

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[5]If section 950j(b) were viewed as otherwise raising serious Suspension Clause concerns, that provision could readily be construed at least to require *exhaustion* of military procedures and direct review in the D.C. Circuit, prior to the commencement of any habeas proceedings. Such a construction would obviate any possible Suspension Clause concerns.

[6]*Steel Company v. Citizens for a Better Environment*, 523 U.S. 83, 89-90 (1998), does not prohibit the Court from addressing abstention prior to the jurisdictional arguments presented in Section I.A. Because abstention is a threshold ground of decision, the Court can, if it so chooses, resolve this case on abstention grounds without deciding the jurisdictional issues discussed above. *See, e.g., Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574 (1999).

a. In *Hamdan I*, the Supreme Court explained that "as a matter of comity, federal courts should normally abstain from intervening in pending court-martial proceedings against members of the Armed Forces." 126 S. Ct. at 2770. As Judge Robertson subsequently concluded in *Hamdan II*, *Councilman*'s "central rationale is applicable here." 2008 WL 2780911, at *6. Thus, "federal courts should respect the balance that Congress struck between military preparedness and fairness to individual service members when it created 'an 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.'" *Ibid*. (quoting *Councilman*, 420 U.S. at 758). The problems with the prior military commissions system—that it was "not autonomous, and it was not created by Congress," 344 F. Supp. 2d at 157—have now been solved. Indeed, four members of the Supreme Court's *Hamdan I* majority specifically recognized that "Congress . . . has the power and prerogative to" authorize a military commission trial system. 126 S. Ct. at 2800 (Kennedy, J., concurring in part); *see also id*. at 2799 (Breyer, J., concurring) ("Nothing prevents the President from returning to Congress to seek the authority he believes necessary"). And with the President and Congress acting in concert to authorize commission proceedings and to channel judicial review through those proceedings, their authority "is at its maximum, for it includes all that [the President] possesses in his own right plus all that Congress can delegate." *Youngstown Sheet & Tube, Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring). Indeed, all three branches of government are in concert on this score: as Judge Robertson recently observed, a petitioner such as Hamdan or Khadr "is to face a military commission . . . designed . . . by a Congress that . . . act[ed] according to guidelines laid down by the Supreme Court." *Hamdan II*, 2008 WL 2780911 at *6. And "[w]here both Congress and the

President have expressly decided when Article III review is to occur, the courts should be wary or disturbing their judgment." *Id*. at *7.

In the MCA, Congress created an autonomous military judicial system to try unlawful enemy combatants, with a right of appeal to an Article III court. The review provided here is even more "removed from all military influence or persuasion" than was the case in *Councilman* and other cases involving court-martial proceedings: whereas those procedures provided for "appellate review by independent civilian judges," *Hamdan I*, 126 S. Ct. at 2770, the MCA provides for review by an Article III court (10 U.S.C. § 950g), the most "independent review" forum possible. *Id*. at 2771; *see Boumediene*, 128 S. Ct. at 2268 (requiring the prisoner to "exhaust adequate alternative remedies before filing for the writ in federal court" is "justified because . . . . the prisoner already has had a chance to seek review of his conviction in a federal forum through a direct appeal"); *see also Hamdan II*, 2008 WL 2780911 at *2 ("[O]ne of the most substantial improvements under the MCA is in the structure for review of convictions."). If anything, Congress' decision to channel review to a *superior* federal court should militate even more strongly in favor of abstention. *See Telecomm. Research & Action Ctr.*, 750 F.2d at 75 ("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").

In fact, in providing the requisite congressional authorization, the MCA also fully addressed other structural and procedural flaws identified in *Hamdan I*. For example, whereas the prior tribunal convened to try petitioner was not part of the integrated system of military courts with independent review panels that Congress has created, *see Hamdan I*, 126 S. Ct. at 2771 (noting that the prior review bodies "lack[ed] the structural insulation from military influence that characterizes

the Court of Appeals for the Armed Forces, and thus bear insufficient conceptual similarity to state courts to warrant invocation of abstention principles"), now the military commission judges are the same military judges who sit for courts-martial, and a final decision of the military commission may now be appealed as of right to the D.C. Circuit,[7] 10 U.S.C. § 950g(a), with Supreme Court review available by writ of certiorari, *id.* § 950g(d). Similarly, whereas petitioner in *Hamdan I* argued that he would be excluded from his own trial, *see Hamdan I*, 126 S. Ct. 2788, and denied access to certain evidence against him, *id.* at 2787, the MCA grants that same accused the right to "be present at all sessions of the military commission," 10 U.S.C. § 949a(b)(1)(B), and to have access to all the evidence admitted before the trier of fact, *see id.* § 949a(b)(1)(A).

Following *Hamdan*, Congress has now "stepped up to its responsibility, acting according to guidelines laid down by the Supreme Court." *Hamdan v. Rumsfeld*, 464 F. Supp. 2d 9, 18 (D.D.C. 2006). There can be no serious doubt as to the validity of the present military commission system; and thus, abstention is required, not only by statute but also under *Councilman*.

b. As the Supreme Court recognized in *Hamdan I*, abstention is appropriate unless a petitioner makes a "substantial argument[] denying the right of the military to try them at all" because the "legal challenge 'turn[s] on the status of the person[] as to whom the military asserted its power.'" 126 S. Ct. at 2770 n. 16 (quoting *Councilman*, 420 U.S. at 759). However, the invocation of "jurisdictional" challenges is not talismanic. Indeed, given the statutory channeling provisions, abstention should be required even for challenges cast in jurisdictional terms.

Petitioner asserts that the military commission lacks "jurisdiction based on [petitioner's]

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[7] Previously, under the DTA, D.C. Circuit review was automatic only with respect to a capital case or a case in which the alien was sentenced to a term of imprisonment of 10 years or more. *See* DTA, § 1005(e)(3) (2005).

juvenile status." Mot. at 12. But such a claim is still fit for resolution first in the military proceedings. First, the D.C. Circuit has already declined to consider claims relating to personal jurisdiction raised by petitioner himself. *Khadr*, 529 F.3d at 1117. This Court should not undercut that sensible ruling by declining to abstain. Second, Judge Robertson recently held that abstention was appropriate even where the petitioner had raised personal jurisdictional challenges. 2008 WL 2780911 at *7. Judge Robertson reasoned that Hamdan's arguments were "not substantial," that the arguments "can be addressed, if necessary, following judgment in accordance with § 950g" pursuant to "the D.C. Circuit's decision in *Khadr*," and that "[w]here both Congress and the President have expressly decided when Article III is to occur, the courts should be wary of disturbing their judgment." *Id.*

Rather than raising "substantial argument[] denying the right of the military to try them at all" petitioner asserts only that he may not be tried for offenses committed while he was a minor. Mot. at 2435. But this contention is insubstantial for the reasons explained below. It is also not the sort of argument that should evade Congress's well-constructed plan of post-conviction appellate review – exhaustion in the habeas context is well established, and those principles apply with full force domestically when the claim is an entitlement to special criminal treatment as a juvenile. *See* 28 U.S.C. § 2254(b)(1)(A); *Roach v. Angelone*, 176 F.3d 210, 214 (4th Cir. 1999) ("[a]fter exhausting all state collateral remedies" petitioner "filed his petition for a writ of habeas corpus" alleging that the "procedure by which Virginia transferred [him] . . . for trial as an adult" violated the Constitution); *Cf. J. P. v. DeSanti*, 653 F.2d 1080, 1083 (6th Cir. 1981) (*Younger* abstention applies in juvenile proceedings). Thus, petitioner's argument rests on getting immediate federal court review that would be unavailable to a juvenile in the United States who faced state criminal

proceedings as an adult.

Moreover, *Councilman* itself makes clear that abstention is appropriate here even if the claim can be describes as one relating to the commission's "personal jurisdiction." First, the determination that petitioner may be convicted of crimes in violation of the law of war committed while a minor lies at the core of a military court's expertise – *i.e.*, when a person kills U.S. forces on behalf of the enemy in violation of the laws of war, it is for the military courts to resolve whether petitioner is criminally culpable based on his status as a minor when he engaged in criminal conduct. *See Councilman*, 420 U.S. at 759 (observing that another reason the court declined to abstain was because the court "'did not believe that the expertise of military courts extended to the consideration of constitutional claims of the type presented'").

Moreover, petitioner does not and cannot allege that "Congress had no constitutional power to subject [him] to the jurisdiction" of a military tribunal *Councilman*, 420 U.S. at 759. Instead, he points only to various statutes and treaties that he argues (erroneously) preclude the United States from imposing criminal liability for crimes in violation of the law of war if they were committed as a minor. Thus, this is not a case where "[t]he issue presented concerned not only the military court's jurisdiction, but *also* whether under Art. I, Congress could allow the military to interfere with the liberty of civilians even for the limited purpose of forcing them to answer to the military justice system." *Councilman*, 420 U.S. at 759 (emphasis added).

For purposes of this motion, the only question is whether petitioner should get special treatment for having engaged in otherwise unlawful belligerence as a minor. There is no constitutional or other impediment in putting that question first to the military commission itself, and then to the D.C. Circuit. Indeed, that court already has found "no substantial public interest"

in hearing petitioner's personal jurisdiction claims prior to trial. *See Khadr*, 529 F.3d at 1118 (reasoning that "[t]here is no substantial public interest at stake in this case that distinguishes it from the multitude of criminal cases for which post-judgment review of procedural and jurisdictional decisions has been found effective"). Moreover, *Boumediene* itself confirms that in the normal course, habeas review is appropriate only after an exhaustion of other remedies. *See* 128 S. Ct. at 2275-76.

In sum, petitioner provides no reason to displace the military court in conducting its assigned role or to preempt the appellate review to which petitioner is entitled under the MCA. Abstention is clearly warranted and the petitioner's motion must therefore be denied.

3. Petitioner's Claim that He May Not Be Criminally Tried for Offenses Committed When He Was Fifteen Is Meritless.

a. The MCA Establishes Jurisdiction Over All Unlawful Enemy Combatants, Regardless of Age.

The text of the MCA unequivocally establishes military commission jurisdiction over all alien unlawful enemy combatants, regardless of age. See 10 U.S.C. § 948c. Congress created unqualified jurisdiction over all "unlawful enemy combatants." The MCA defines an "unlawful enemy combatant" as "a person who has engaged in hostilities or who has purposefully and materially supported hostilities against the United States or its co-belligerents who is not a lawful enemy combatant (including a person who is part of the Taliban, al Qaeda, or associated forces)." 10 U.S.C. § 948a(1)(A)(i) (emphasis added); *see also* id. § 948a(3) (defining an "alien" as "a person who is not a citizen of the United States"). The MCA thus creates jurisdiction over "a person," and it does so without limiting the meaning of "a person" to those who have attained a certain minimum age. Notably, Congress could have—but did not—define an "unlawful enemy combatant" or an

"alien" as "an adult person."

The UCMJ precedents on which petitioner relies are not relevant here. *See* Mot. at 27. The MCA clearly specifies that the UCMJ "does not, by its terms, apply to trial by military commission except as specifically provided in this chapter." 10 U.S.C. § 948b(c). Petitioner cannot properly read (Mot. at 27) substantive UCMJ limits into the MCA based upon the fact that Congress specified that the "procedures for military commissions set forth in this chapter are based upon the procedures for trial by general courts-martial under chapter 47 of this title." 10 U.S.C. § 948b(c). An age limit on criminal liability is not a criminal "procedure," but a substantive defense to criminal liability. Thus, the UCMJ precedents are inapplicable.

UCMJ precedents are also inapposite since they rest on the authority of a minor to enter into "a contractual relationship" to "chang[e] his status to that of a member of the [United States] military." *United States v. Blanton*, 23 C.M.R. 128, 130 (C.M.A. 1957). Such reasoning has no applicability to the question of when our enemies should be held criminally culpable for committing crimes in violation of the law of war. Indeed, the *Blanton* line of cases turned on the fact that Congress had unequivocally prohibited individuals under the age of 18 (or 17, with their parents' permission) from becoming members of the Armed Forces. *Blanton*, 23 C.M.R. at 131 (quoting Act of June 28, 1947, 61 Stat. 191). Because the UCMJ affords jurisdiction only over a "member of the armed forces," *id*., and because Congress deemed individuals under the ages of 17-18 incompetent to become "members" of the armed forces, the *Blanton* court held that such individuals were outside the jurisdiction of the court-martial system. *Id*. Here, however, the MCA without limitation provides jurisdiction over "person[s]." *See* 10 U.S.C. § 948a(1)(A)(i). And unlike the UCMJ, the MCA does not require unlawful enemy combatants to establish a "contractual relationship" to

become "members" of any particular organization. *See Blanton*, 23 C.M.R. at 130.

The history of the MCA confirms that Congress intended all "unlawful enemy combatants" to fall within military-commission jurisdiction, regardless of age. In November 2005—almost a full year before the MCA's enactment—the Government charged petitioner for trial by military commission under the President's original military commission order. Congress therefore knew that the Government intended to prosecute petitioner for his unlawful activities—but Congress did not impose any age-specific exclusions in the MCA's jurisdictional requirements.

Moreover, in enacting the MCA, Congress knew how to exclude individuals from trial by military commission. *See, e.g.*, 10 U.S.C. § 948a(2)(A) (excluding one who has attained status as "a member of the regular forces of a State party engaged in hostilities against the United States") (emphasis added). Congress's failure to exclude individuals under the age of 18 from trial by military commission speaks volumes. *See, e.g., TRW Inc. v. Andrews*, 534 U.S. 19, 28 (2001) ("'Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent.'") (quoting *Andrus v. Glover Constr. Co.*, 446 U.S. 608, 616-17 (1980)).

b. The Optional Protocol to the Convention on the Rights of the Child Does Not Purport to Apply Here.

The Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict ("Optional Protocol") does not purport to restrict the MCA's coverage and in any event is not enforceable by the judiciary. The Protocol serves a simple function – to restrict State parties from recruiting child soldiers – that is in no way implicated by petitioner's prosecution.

i. As an initial matter, the Optional Protocol is not self-executing and therefore cannot be

enforced in court. *See Medellin v. Texas*, 128 S. Ct. 1346, 1356 (2008) ("[W]hile treaties may comprise international commitments[,] they are not domestic law unless Congress has either enacted implementing statutes or the treaty itself conveys an intention that it be 'self-executing' and is ratified on these terms.") (internal quotation marks and citation omitted). The text of the Optional Protocol explicitly envisions that the age restrictions imposed by the treaty will be carried out through implementing legislation and governmental action. *See* Optional Protocol, Art. 4(2) & 6(1). Thus, the age restriction provisions of the Protocol are not self-executing, and no implementing legislation exists to permit enforcement of it in this forum.

Moreover, the Protocol "does not create privately enforceable rights or provide for a private cause of action in domestic courts," *Medellin*, 128 S. Ct. at 1357 n.3. The text of the Optional Protocol calls for parties to enact implementing legislation and other measures and does not create private rights enforceable in court. Thus, the provision banning the recruitment and use of juvenile combatants by non-state armed forces provides that "State Parties shall take all feasible measures to prevent such recruitment and use, including the adoption of legal measures necessary to prohibit and criminalize such practices." Art. 4(2). Similarly, Article 6(1) of the Protocol provides that "[e]ach State Party shall take all necessary legal, administrative, and other measures to ensure the effective implementation and enforcement of the provisions of this Protocol within its jurisdiction." Other Articles similarly envision that additional steps will need to be taken in order to effectuate the Optional Protocol. See, e.g., Art. 7(1) ("States Parties shall cooperate in the implementation of the present Protocol"); Art. 6(3) ("States Parties undertake to make the principles and provisions of the present Protocol widely known and promoted by appropriate means"). In sum, the treaty creates no individual rights, much less rights enforceable in court.

Also, contrary to petitioner's claim (Mot. at 37), the Optional Protocol is not incorporated into the AUMF. Instead, it is wildly implausible that Congress, in authorizing the President "to use all necessary and appropriate force against" al Qaeda, thereby intended to provide for private rights to judicially enforce treaties that are not self-executing and that create no enforceable individual rights. Moreover, petitioner's claimed right of release from military prosecution and detention — which has not been recognized by *any* court of which we are aware — does not rise to the level of "universal agreement and practice" necessary to become part of the law of war, *see Hamdan I*, 126 S. Ct. at 2780.

ii. In any event, the Protocol does not prohibit the United States from prosecuting Khadr for violations of the law of war. To the contrary, the Protocol simply restricts ratifying nations from using child soldiers; it requires the signatories to ensure that individuals under the age of 18 are not "compulsorily recruited" into the armed forces, Optional Protocol, Art. 2; that such individuals "do not take a direct part in hostilities," *Id.*, Art. 1; and that ratifying nations "raise the minimum age for . . . voluntary recruitment" above the previous minimum of fifteen. *Id.*, Art. 3. None of these provisions purport to limit criminal jurisdiction over war crimes committed by minors.

Moreover, in its instrument of ratification, the United States emphasized that (i) the Protocol governs only the membership in the armed forces, *see* Senate Exec. Session, Convention on the Rights of the Children in Armed Conflict, Treaty Doc. 106-37A, 148 Cong. Rec. S5716-04, S5717 (June 18, 2002) ("Senate Report"), and that (ii) federal law already ensured our Nation's compliance with each of the Protocol's requirements by prohibiting the coerced enlistment of individuals under the age of 18 into our Armed Forces, *see id.* (citing 10 U.S.C. § 505(a)).

Article 4 of the Protocol contains obligations for ratifying nations to help prevent the

recruitment and use of children by "armed groups." Nothing in Article 4, however, prevents a ratifying nation from prosecuting members of such groups for their illegal acts. In its ratification of the Protocol, the United States emphasized its "understanding" that "the term 'armed groups' in Article 4 of the Protocol means nongovernmental armed groups such as rebel groups, dissident groups, and other insurgent groups." *See* Senate Report § 2(4), 148 Cong. Rec. at S5717. In its "Initial Report" on the Protocol, the United States further explained that it already complies with Article 4 because federal "law already prohibits insurgent activities by nongovernmental actors against the United States, irrespective of age. U.S. law also prohibits the formation within the United States of insurgent groups, again irrespective of age, which have the intent of engaging in armed conflict with foreign powers." Initial Report of the United States of America to the UN Committee on the Rights of the Child Concerning the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, art. 4, ¶ 29, U.N. Doc. CRC/C/OPAC/USA/1 (2007) ("Initial Report") (citing 18 U.S.C. §§ 960, 2381, et seq.).

Article 7 requires ratifying nations to use "multilateral, bilateral or other programmes," such as a "voluntary fund," in order to "cooperate . . . in the rehabilitation and social reintegration of persons who are victims of acts contrary to the Protocol." Article 7 does not address whether minors may be criminally charged, and the United States has explained that it complies with this provision by providing financial and technical assistance through the Agency for International Development and the Department of Labor.[8] Petitioners identify nothing in the text or history of the Optional

[8] *See* Initial Report of the United States of America to the UN Committee on the Rights of the Child Concerning the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, art. 4, 35-36 (2007), *available at* http://www.state.gov/g/drl/rls/83929.htm.

Protocol to suggest that the United States (or any other State party) understood its obligations to provide financial and programmatic assistance to be tantamount to a jurisdictional bar against the prosecution of juvenile combatants who violate the laws of war.

The Protocol's ratification history confirms that the treaty imposes limits on a ratifier's recruitment and use of "child soldiers," but does nothing to limit its ability to prosecute other States' or groups' war crimes. Senators considering the Protocol repeatedly noted its limited impact given the United States's laws and practice relating to the recruitment of and use of children in armed conflict. *See* Senate Exec. Rpt. 107-4 to Accompany Treaty Doc. 106-37, Senate Foreign Relations Committee (June 12, 2002) ("Executive Report"); *id.* at 20, 24, 26, 28, 33, 36, 50, 62, 67-68, 80 (responses of Departments of State, Defense, and Justice to questions for the record from Senator Biden). Furthermore, they stated repeatedly that the United States could violate the Protocol only by violating its own laws and policies regarding the recruitment and use of juveniles in the United States military. *See id*. at 44-45, 49.

Moreover, the United Nations committee responsible for monitoring the implementation of the Protocol has taken the view that children under the age of 18 "can be formally charged and subject to penal law procedures," so long as they are older than the minimum age of criminal responsibility. United Nations Committee on the Rights of the Child, General Comment No. 10: Children's Rights in Juvenile Justice, ¶ 31 Doc. CRC/C/GC/10 (Apr. 25, 2007). The Committee then stated that age 12 is the "internationally acceptable" minimum age of criminal responsibility. Id. ¶ 32.[9] Similarly, Additional Protocol I specifically contemplates prosecution of juveniles for "an

[9]Petitioner notes that this committee recommended that child soldiers not be tried by military tribunals. Mot. at 33. But this recommendation did not purport to interpret any treaty obligation imposed by the Optional Protocol or any other provision. In any event, while the committee

offense related to the armed conflict." Art. 77(5).

Finally, when the MCA was enacted, petitioner himself had been charged for crimes in violation of the law of war and could be expected to be charged again under the new statutory regime. Yet, as we explained, there was no exclusion of minors in the statute and, as petitioner concedes, the "President . . . signed the MCA with the specific understanding that the Act '[c]omplie[d] with both the spirit and the letter of our international obligations.'" Mot. at 34-35 (quoting White House Fact Sheet: The Military Commissions Act of 2006 (Oct. 17, 2006)) (alterations omitted). The President's view—that, consistent with the Protocol, Khadr is amenable to military commission jurisdiction—is entitled to "great weight." *See, e.g.*, *Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 184-85 (1982).[10]

In sum, no international obligation precludes petitioner's criminal prosecution.

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monitors the Optional Protocol, petitioner is mistaken in stating that it is "charged with the interpretation and application" of the Optional Protocol, *id.*; in fact, petitioner cites nothing in support of his claim that the committee has authority to issue binding interpretations of the Protocol.

[10]There is also a long history of prosecuting minors for war crimes. After World War II, the British Military Court at Borken, Germany prosecuted a 15-year-old member of the Hitler Youth for war crimes. *See* Trial of Johannes Oenning & Emil Nix, Case No. 67, XI L. Rep. Trials of War Criminals 74 (1945). Oenning was tried and convicted by a military court for his involvement in the murder of a Royal Air Force Officer. *Id.* at 74-75. Oenning's counsel unsuccessfully argued "that the youth had grown up under the Nazi régime and was a victim of its influence." Id. at 74. Similarly, in 1947, the Permanent Military Tribunal at Metz tried a German family—including three daughters under the age of 18 at the time of the offense—for war crimes. *See* Trial of Alois & Anna Bommer & Their Daughters, IX L. Rep. Trials of War Criminals 62 (1947). Two of the Bommer daughters were convicted as "war criminals" by the military tribunal and imprisoned, even though they were under the age of 18 at the time of their crimes. See id. at 66. More recently, the 2000 agreement between the United Nations and Sierra Leone, which created a Special Court for Sierra Leone to hear cases involving offenses committed during the Sierra Leone civil war, provided that individuals who were 15 years or older at the time of their crimes would be subject to prosecution. See Statute of the Special Court of Sierra Leone, art. 7, available at http://www.sc-sl.org/Documents/scsl-statute.html.

c. The Juvenile Delinquency Act is Inapplicable.

Petitioner invokes the Juvenile Delinquency Act ("JDA"), but that statute is inapplicable here. The JDA applies to proceedings brought in a "court of the United States." 18 U.S.C. § 5302. But as the military judge in petitioner's prosecution correctly concluded, a military commission is *not* a court of the United States within the meaning of the JDA. *See Khadr*, No. D-022, Order at 3-4 (attached as Ex. A).

For over fifty years, the courts have unanimously held that the JDA does not apply to the jurisdiction of military tribunals. These decisions confirm that Congress did not intend the JDA provisions to apply beyond the Article III courts. In *United States v. Nelson*, 2 C.M.R. (AF) 841 (1950), for example, the Judge Advocate General Board of Review of the Air Force held that the JDA does not apply to the general court-martial of a 16-year-old enlistee for robbery. The board emphasized that the JDA regulates only the jurisdiction of the federal courts, not a military court martial. *Id.*; *see also United States v. Baker*, 34 C.M.R. 91, 93 (C.M.A. 1963) ("[t]he plan and language of the Act indicate clearly it is limited to proceedings in the regular Federal courts," and not military tribunals); *United States v. West*, 7 M.J. 570, 571 (A.C.M.R. 1979) (collecting cases and emphasizing that "[f]ew aspects of military law have been clearer" than the inapplicability of the JDA to military tribunals).

Further, Congress passed the MCA against the well-settled background rule that the JDA applies only in Article III courts, which it presumptively intended to preserve. *See, e.g.*, *Am. Nat'l Red Cross v. S.G.*, 505 U.S. 247, 252 (1992) (holding Congress is presumed to legislate against the backdrop of well-settled judicial interpretations, which "place[] Congress on prospective notice of the language necessary and sufficient to" depart from them). Petitioner cites nothing to overcome

that strong interpretive presumption.[11]

In sum, petitioner has failed to show that he cannot be tried for crimes committed while he was fifteen years old.

B. The Balancing of Harms Tips Decidedly Against the Issuance of an Injunction

The injunction requested by petitioner also should be denied because granting it would result in substantial injury to respondents and be contrary to the public interest. Issuing an injunction would substantially defeat the public interest to try unlawful combatants such as petitioner by a military commission, duly authorized by Congress. Undoubtedly, the ability to try alien enemy combatants suspected of crimes in violation of the law of war in a timely fashion is an important part of the war effort, and the public has a strong interest in seeing such individuals brought to justice as soon as possible. *See Quirin*, 317 U.S. at 28-29 ("[a]n important incident to the conduct of war is the adoption of measures by the military command not only to repel and defeat the enemy, but to seize and subject to disciplinary measures those enemies who in their attempt to thwart or impede our military effort have violated the law of war"). For this Court to enjoin the ongoing military commission proceedings would harm those significant interests. Enjoining military commission proceedings would also exacerbate the burdens on the Government from conducting these kinds of trials, including the deployment of remote witnesses, many with sensitive responsibilities in an ongoing war, to document the circumstances of capture or the evidence collected regarding a petitioner. Moreover, "any time a State is enjoined by a court from effectuating statutes enacted by

[11]The JDA does confirm one thing – that there is nothing atypical about prosecuting an individual who commits a serious crime at the age of 15. 18 U.S.C. § 5302 (individual aged 15 or older who is alleged to have committed an act that would be a felony crime of violence if committed by an adult may be tried as an adult if it is "in the interest of justice" to do so).

representatives of its people, it suffers a form of irreparable injury." *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers). That is particularly so here where an injunction would prevent a wartime prosecution from proceeding pursuant to an act of Congress.

On the other hand, petitioner 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. In fact, petitioner has not addressed the remaining injunctive factors *at all* and thus has not attempted to show any harm stemming from the prosecution. In any event, as the D.C. Circuit explained with respect to a challenge to the commission's jurisdiction by *this same petitioner*, "[t]here is no substantial public interest at stake in this case that distinguishes it from the multitude of criminal cases for which post-judgment review of procedural and jurisdictional decisions has been found effective." *Khadr*, 529 F.3d at 1118. Thus, any harm to petitioner from being subjected to trial does not warrant the interlocutory intervention of an Article III court. The harms described by petitioner remain the same as those the Supreme Court considered and rejected as a basis for interlocutory collateral review in *Younger v. Harris*, 401 U.S. 37 (1971). *See Hollywood Motor Car. Co.*, 458 U.S. at 268 n.2 ("[b]earing the discomfiture and cost of a prosecution for crime even by an innocent person is one of the painful obligations of citizenship") (quoting *Cobbledick v. United States*, 309 U.S. 323, 325 (1940)).

The public interest also militates strongly against granting the injunction. Indeed, the D.C. Circuit held in petitioner's own case that there is "no substantial public interest" to "warrant our interruption of this criminal proceeding just because it is a military commission" in order to "ensur[e] that all [the] proceedings are just." *Khadr*, 529 F.3d at 1118. By contrast, there is a

significant public interest in avoiding unnecessary delay. In the days since the Supreme Court's decision in *Boumediene*, the Guantanamo habeas petitioners have urged the judges of this District to hasten the arrival of their day in court. For petitioner, that day has arrived; yet, he would have this Court *delay* an adjudication of the facts. However, "encouragement of delay is fatal to the vindication of the criminal law." *United States v. MacDonald*, 435 U.S. 850, 854 (1978). Rather, the "public has a strong interest in the prompt, effective and efficient administration of justice." *United States v. Poston*, 902 F.2d 90, 96 (D.C. Cir. 1990).

II. Because Criminal Charges Are Pending In The Military Commission Context, The Court Should Abstain At This Time From Consideration Of Petitioner's Habeas Claims Challenging the Legality of Preventive Detention.

In addition to seeking to halt his upcoming criminal trial, petitioner moves for a ruling that his preventive detention as an enemy combatant is illegal because he was a minor when he engaged in combatant activity. Mot. at 36-44. This claim has no merit, *see infra*, Part III, and this and other challenges to his preventive detention should not be considered while criminal proceedings are ongoing. Instead, this Court should hold this matter in abeyance or dismiss it without prejudice until the military proceedings have concluded.

Habeas "is, at its core, an equitable remedy." *Schlup v. Delo*, 513 U.S. 298, 319 (1995). Thus, the Supreme Court has "recognized that 'prudential concerns,' such as comity and the orderly administration of criminal justice, may 'require a federal court to forgo the exercise of its habeas corpus power.'" *Munaf*, 128 S. Ct. at 2220 (citations omitted). Indeed, as we have explained, the "orderly administration of criminal justice" usually requires federal courts to decline to consider habeas petitions prior to criminal trial, and instead require a petitioner to exhaust his remedies in the criminal process before seeking habeas relief. The same result is proper in this context, where

petitioner has been charged for violations of the law of war and is on the eve of trial before a military commission.

As we have explained in addressing petitioner's motion for an injunction, there is, of course, nothing unusual or anomalous about exhaustion requirements in the context of habeas review. *See* 28 U.S.C. § 2254(b)(1)(A); *Boumediene*, 128 S. Ct. at 2274 ("defendants in courts-martial [must] exhaust their military appeals before proceeding with a federal habeas corpus action"); *O'Sullivan v. Boerckel*, 526 U.S. 838, 842 (1999) (the "exhaustion doctrine . . . is now codified at 28 U.S.C. § 2254(b)(1)"); *see also Gusik*, 340 U.S. at 131-32 ("The policy underlying that rule [that a habeas court will not interfere when a state court provides a remedy] is as pertinent to the collateral attack of military judgments as it is to collateral attack of judgments rendered in state courts."). Here, because petitioner is awaiting criminal trial, it is entirely appropriate for the Court to require exhaustion of remedies in that criminal setting (which includes a right to appeal to the D.C. Circuit) before entertaining a habeas petition. *See Boumediene*, 128 S. Ct. at 2268 (noting the requirement that state prisoners "exhaust adequate alternative remedies before filing for the writ in federal court" because defendants were provided "with a fair, adversary proceeding").

In *Ex parte Royall*, for example, the Supreme Court established—through the exercise of its own equitable discretion—the principle that federal habeas courts should generally require exhaustion of the criminal process. 117 U.S. 241, 250-51 (1886). There, the prisoner, who was awaiting trial on charges that he had violated a Virginia statute, alleged that the statute was unconstitutional; however, the Court held that, based on principles of comity, dismissal was appropriate. *Id.* at 252 (recognizing "the forbearance which courts of co-ordinate jurisdiction, administered under a single system, exercise towards each other, whereby conflicts are avoided, by

avoiding interference with the process of the other, is a principle of comity, with perhaps no higher sanction than the utility which comes from concord"); *see also Younger*, 401 U.S. at 43-44 (recognizing the "longstanding public policy against federal court interference with state court proceedings" in part because "courts of equity should not act, and particularly should not act to restrain a criminal prosecution, when the moving party has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief").

These same principles apply to the military-commission proceedings involving petitioner. Because Congress has specifically authorized the military commissions and prohibited collateral challenges to them, as we have explained, *see* 10 U.S.C. §§ 950g, 950j, these same considerations of comity apply with even greater force, and require dismissal without prejudice, or holding petitioner's case in abeyance, until the completion of military-commission proceedings. *See Councilman*, 420 U.S. at 738; *New*, 129 F.3d at 643 (federal court must give "due respect to the autonomous military judicial system created by Congress"); *Hamdan II*, 2008 WL 2780911, at *7 ("Where both Congress and the President have expressly decided when Article III review is to occur, the courts should be wary of disturbing their judgment.").

It is well-established that the "trial of unlawful combatants, by 'universal agreement and practice,' are 'important incident[s] of war.'" *Hamdi v. Rumsfeld*, 542 U.S. 507, 518 (2004) (plurality). Thus, the Supreme Court has long recognized not only the authority to hold combatants for the duration of ongoing hostilities, but the established "practice of trying, before military tribunals without a jury, offenses committed by enemy belligerents against the law of war." *Quirin*, 317 U.S. at 41. An "important incident to the conduct of war is the adoption of measures by the military command not only to repel and defeat the enemy, but to seize and subject to disciplinary

measures those enemies who in their attempt to thwart or impede our military effort have violated the law of war." *Id.* at 28-29. As the Court in *Quirin* explained, "[u]nlawful combatants are . . . subject to capture and detention, but in addition they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful." *Id*. at 31.

Accordingly, at least as a matter of comity, for the same reason the Court should abstain from considering challenges to petitioner's military trial, the Court should likewise defer these proceedings pending such trial. Petitioner should first be required to exhaust the criminal process before the military commission, and may take an appeal to the D.C. Circuit upon any conviction to raise claims relating to the commission proceedings. In the meantime, the Court should abstain from reviewing his habeas challenge pending resolution of the criminal proceedings.

This principle applies with special force here, where the issues he seeks to have resolved may also be litigated in his military commission proceedings, *i.e.*, whether he may treated as an enemy combatant or an unlawful enemy combatant given that he was a minor when he engaged in his combatant acts. Rather than have two proceedings running in parallel, *Councilman* teaches that the habeas court should exercise its discretion to allow the criminal proceeding to run its course first. 420 U.S. 738. Indeed, the same principle applies with respect to collateral challenges to state-court proceedings—even when those challenges would not necessarily interfere with the criminal trial itself. *See Younger*, 401 U.S. at 43-44. Accordingly, in order to give "due respect to the autonomous military judicial system created by Congress," this Court should not impinge on the military commission process by addressing the legality of preventive detention. *New*, 129 F.3d at 643. Dismissal without prejudice is, accordingly, appropriate. *Lawrence v. McCarthy*, 344 F.3d 467, 474 (5th Cir. 2003) ("dismiss[ing] without prejudice" to "allow [] military [proceedings], both

judicial and administrative, to run their course"). In the alternative, this Court should hold this matter in abeyance until military commission proceedings have concluded.

As noted above, an accused is entitled to have the commission make its own, independent determinations of whether a charged defendant is an "unlawful enemy combatant," before trial may proceed. 10 U.S.C. § 948a(1). That determination is one that the D.C. Circuit itself has made clear – in a case involving this very petitioner – is reviewable upon conviction. *Khadr*, 529 F.3d at 1117. Accordingly, just as a central issue before the military commission was whether petitioner is an "unlawful enemy combatant," the central issue in petitioner's challenge to his preventive detention is whether he may be held as an enemy combatant. *See*, *e.g.*, *Hamdan II*, 2008 WL 2780911, at *5. The military commission process provides a fully-adequate means for petitioner to challenge his status as an unlawful enemy combatant, or to claim that he is not an enemy combatant at all. *See id.*; *see also Lawrence*, 344 F.3d at 473 (abstention appropriate in case where military tribunal must "make an initial [factual] determination regarding the scope of their jurisdiction" because "[w]e trust that the military courts are . . . up to the task" and "an individual's status is a question of fact which the military courts are more intimately familiar with than the civil courts"). Thus, given this process, and the fact that the same issues raised here can be considered in that military commission proceeding, it is appropriate for this Court to abstain pending resolution in that independent forum followed by review in the D.C. Circuit. *See Lawrence*, 344 F.3d at 474 (one primary reason courts "abstain []from exercising equitable jurisdiction" is to "avoid[] duplicative proceedings").

Because habeas proceedings would potentially duplicate military proceedings, they would impinge on the system Congress created for adjudicating the guilt of criminal suspects and, moreover, would waste the scarce resources of the parties and the court and risk inconsistent rulings.

This case is an exemplar of such duplication, as petitioner has sought to raise the issues relating to the commission's personal jurisdiction before the military commission (the proper forum); in this habeas case; in a DTA case, *see Khadr v. Gates*, No. 07-1156 (D.C. Cir. May 30, 2007) ("[t]his court is without jurisdiction" to "stay Military Commission proceedings" pursuant to "10 U.S.C. § 950j(b)"); and in a premature interlocutory appeal to the D.C. Circuit, *Khadr*, 529 F.3d 1112. However, the only avenue of review should be the one selected by Congress, namely, the military commission proceedings established by the MCA and the fully-adequate judicial review by the D.C. Circuit.

To the extent the petition raises issues that are not also before the military commission, there is no reason for the Court to address them at this time. Because proceedings would be, at least in part, duplicative, habeas review during the pendency of criminal charges would also impinge upon the scarce resources of the courts and the parties at a time when resources should be focused on the more than 200 cases involving detainees who are *not* charged for adversarial trial before a military commission. The Government, counsel for the detainees, and the judges of this Court have all undertaken significant efforts to facilitate expedited review of hundreds of pending Guantanamo habeas cases, consistent with the Supreme Court's direction that "[t]he detainees in these cases are entitled to a prompt habeas corpus hearing." *Boumediene*, 128 S. Ct. at 2275. Because the military-commission process provides for robust adversarial proceedings to address criminal charges brought under the MCA (with review, if the defendant is convicted, by the D.C. Circuit), the Court should focus its resources, and enable the parties to focus theirs, on the other habeas cases.

III. Petitioner's Motion for Judgment as a Matter of Law Should Be Denied Because Khadr is Properly Detained As an Enemy Combatant Notwithstanding That He Was A Minor At the Time He Committed Acts of Combatancy

In his motion, the *sole* basis on which petitioner challenges his preventive detention as an enemy combatant is his age — fifteen years old — at the time he was captured on the battlefield in Afghanistan while fighting as part of al Qaeda forces. Indeed, because petitioner was captured "following a firefight between U.S. forces and unknown Arab fighters" on a battlefield in Afghanistan (Mot. at 7), absent this argument, there seems to be little question that petitioner is an enemy combatant subject to detention so long as hostilities are ongoing. Petitioner nonetheless argues that, because he was under the minimum age of eighteen for recruitment into a non-state armed force, he cannot lawfully be detained as an enemy combatant. This argument lacks merit and is not a ground for judgment in favor of petitioner.

A. Congress empowered the President to use all necessary and appropriate military force against al Qaeda and Taliban forces, and did not exclude juveniles from the scope of that authority. Contrary to petitioner's argument, even if juveniles cannot legally obtain the status of formal "members" of enemy armed forces, detention of juveniles is authorized under the AUMF and the standards adopted by the Secretary of Defense. Such preventive detention is entirely consistent with historical practice and is specifically permitted by international treaties that explicitly address the issue — even if those combatants are juveniles at the time of their capture (or belligerency).

Congress authorized the President to use "all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001." Pub. L. No. 107-40, § 2, 115 Stat. at 224. Detention of enemy combatants is a "fundamental" and "accepted" measure of warfare, which "Congress has authorized the President to use" pursuant to the AUMF. *Hamdi*, 542 U.S. at 518 (plurality op.).

Nothing in the text of the AUMF or subsequent congressional enactments excludes juvenile combatants from the scope of the President's detention authority. Indeed, to the extent that other federal enactments shed light on the scope of the President's authority under the AUMF, they serve to underscore that the President's power to detain enemy combatants contains no implicit exception for juveniles. As we have explained, petitioner's situation is clearly encompassed by the statutory definition of "unlawful enemy combatant" in the MCA, *i.e.*, "a person who has engaged in hostilities or who has purposefully and materially supported hostilities against the United States or its co-belligerents who is not a lawful enemy combatant (including a person who is part of the Taliban, al Qaeda, or associated forces)." 10 U.S.C. § 948a(1)(A)(i); *see also* DTA § 1006(a) (setting out procedures to govern detention of "detainees held at Guantanamo Bay").

Significantly, the fact that an enemy combatant is under the age of eighteen when he attacks U.S. forces has no bearing on the Government's need to detain him pending the conclusion of active hostilities. The purpose of such detention is to "prevent captured individuals from returning to the field of battle and taking up arms once again." *Hamdi*, 542 U.S. at 518 (plurality op.).[12] If juvenile combatants were automatically entitled to release following their capture, they would almost certainly return to active combat or terrorist activities, thereby posing an ongoing threat to U.S. forces and nationals. As the controlling plurality in *Hamdi* explained, "[t]here can be *no doubt* that individuals who fought against the United States in Afghanistan as part of the Taliban, an

[12]To date, a number of individuals who were previously detained at Guantanamo as enemy combatants are confirmed or suspected of returning to terrorist activities after their release. *See* Defense Intelligence Agency, Defense Analysis Report - Terrorism, May 1, 2008. At least one of the juvenile enemy combatants who has been released from detention at Guantanamo was subsequently recaptured on the battlefield in Afghanistan. *See* United States Written Answers to Questions Asked By the Committee on the Rights of the Child, at 14 (May 13, 2008), *available at* http://www.state.gov/g/drl/hr/treaties/.

organization known to have supported the al Qaeda terrorist network responsible for those attacks, are individuals Congress sought to target in passing the AUMF." *Hamdi*, 542 U.S. at 518 (emphasis added); *see also id.* at 522 n.1 (recognizing that President's detention authority applies to individual who "carr[ied] a weapon against American troops on a foreign battlefield").

Petitioner's claim that the military lacks authority to detain him as an enemy combatant displays a fundamental misunderstanding of the purpose of such detention. Thus, petitioner suggests that, because he was indoctrinated into al Qaeda from an early age, with his involvement "intensifying into active one-on-one basic training" and active combat operations, his association with al Qaeda was not fully voluntary and his conduct was less culpable than that of adult combatants." *See* Mot. at 6. Even if petitioner's assertions of diminished culpability were correct, they would have no bearing on the question whether he is properly detained as an enemy combatant. *Cf. In re Territo*, 156 F.2d 142, 146 (9th Cir. 1946) (holding that soldier was properly captured by U.S. military forces and detained as prisoner of war despite the fact that he was "impressed against his will into the Italian Army"). The military has the right to detain an individual who fights against U.S. armed forces pending the conclusion of active hostilities to stop him from returning to the battlefield .

In any event, Khadr's past acts demonstrate the compelling need to prevent him from returning to active combat against U.S. forces. Khadr's family members have also publicly stated that, if released, Khadr will resume his self-proclaimed jihad and will "find [United States forces] again . . . and take his revenge." *Omar Khadr: The Youngest Terrorist?*, CBS, "60 Minutes," Nov. 18, 2007. The President is not disabled from detaining Khadr – who is now 21 years old – simply because he was fifteen at the time he attacked and killed a U.S. soldier in Afghanistan.

The background of the AUMF's enactment further supports the lawfulness of detaining petitioner. At the time Congress enacted the AUMF, it was commonly known that Taliban forces in Afghanistan included juveniles. In congressional hearings and floor debate during that period, various members of Congress decried the Taliban's use of juvenile combatants. *See, e.g.*, 147 Cong. Rec. S11105-02, S11108 (daily ed. Oct. 25, 2001) (statement of Sen. Feinstein) (describing long history of warfare in Afghanistan including the use of "child soldiers"); *see also* Senate Committee on Foreign Relations, Hearing on Protocols on Child Soldiers and Sale of Children (Treaty Doc. 106-37), at 20 (Mar. 7, 2002), Exec. Rep. 107-4.

The UN Secretary General had reported to the Security Council on the use of juvenile combatants in Afghanistan, including students "as young as 14 years old" fighting on the side of Taliban forces. United Nations General Assembly Security Council, Report of the Secretary-General, The Situation in Afghanistan and its Implications for International Peace and Security 7, 9 (Sept. 21, 1999), U.N. Doc. S/1999/994, available at http://www.un.org/Docs/sc/reports/1999/sgrep99.htm. The prevalence of juvenile combatants in Afghanistan had also been publicized by non-governmental organizations, which reported how juvenile combatants had been used throughout the 20-year war in Afghanistan against Soviet forces and described the recruitment by the Taliban of young combatants from religious schools in Pakistan and Afghanistan. *See, e.g.*, Coalition to Stop the Use of Child Soldiers, *Child Soldiers Global Report 2001, available at* http://www.child-soldiers.org/library/global-reports?root_id=159 &directory_id=215.

Although the use of juveniles by the Taliban in Afghanistan was well-known at the time Congress enacted the AUMF, neither the text of the authorization nor its legislative history makes any special provision for juveniles. It is implausible, in the face of this evidence of widespread

public awareness of the use of juvenile combatants and Congress' obvious intent to authorize the use of all necessary force against the Taliban and al Qaeda, that Congress nevertheless intended silently to exclude juvenile combatants from the scope of the President's authority.[13]

Not only would the rule advocated by petitioner leave the United States unable to employ preventive detention as a means of protecting against these combatants, but it would also serve to encourage the further use by enemy forces of juveniles, who would not be subject to the normal wartime practice of preventive detention, and could quickly return to active hostilities even if captured. Surely Congress did not intend to handicap — and endanger — U.S. forces in this manner in their fight against al Qaeda and the Taliban.

B. The Executive is also authorized, under the AUMF and otherwise, to detain juveniles who are not formal members of enemy armed forces but who take up arms to fight on behalf of those forces. Even if Khadr were correct that his age precluded him from having the formal status of a "member" of al Qaeda forces (Mot. at 39) – a dubious proposition since al Qaeda does not adhere to the laws of war – the President would nevertheless be empowered to detain him as an enemy combatant.

Under the AUMF, the President's authority to detain enemy combatants encompasses not only formal members of enemy armed forces but also those individuals who "associate themselves" with the enemy with the intent to commit hostile acts against U.S. forces. *See Hamdi*, 542 U.S. at 519 (plurality op.). Petitioner cannot credibly assert that he did not associate himself with al Qaeda

[13] Juveniles have continued to fight on behalf of Taliban and al Qaeda forces in the years since Congress enacted the AUMF. Since 2002, the United States has captured and detained in the course of combat operations in Iraq and Afghanistan approximately 2,500 individuals who were under the age of 18 at the time of their capture. *See* Report by United States, Optional Protocol on the Involvement of Children in Armed Conflict, May 2008.

forces when he fought in battle as part of those forces. Petitioner committed multiple belligerent acts in support of al Qaeda, including killing a U.S. soldier with a hand grenade. Even if Khadr's juvenile status rendered him incapable of becoming an official "member" of al Qaeda, therefore, he was still subject to detention as an enemy combatant.

Limiting the President's authority to detain individuals who attack U.S. forces to those combatants who are formal "members" of undefined enemy armed forces would also be inconsistent with the law of war. Under the law of war, the authority to detain enemy combatants extends to individuals who are not formal members of the enemy force. The Supreme Court explicitly recognized in *Quirin*, 317 U.S. at 38-39, that those "who associate themselves with the military arm of the enemy government . . . are enemy belligerents within the meaning of . . . the law of war" even if "they have not actually committed or attempted to commit any act of depredation or entered the theatre or zone of active military operations." Similarly, the Geneva Convention Relative to the Treatment of Prisoners of War, August 12, 1949, provides for the detention of various classes of individuals who are not formal members of enemy armed forces. *See id.*, Art. 4(A).

Accordingly, the Executive has the authority to detain Khadr as an enemy combatant even if he lacks the formal status of a member of al Qaeda forces.

C. The conclusion that the President has authority under the AUMF and otherwise to detain juvenile enemy combatants also gains support from historical practice and the contemporary practice of other States. Juveniles fighting for the Viet Cong were held as enemy combatants by U.S. forces. *See* M. Prugh, Vietnam Studies: Law of War 67 (1975). The same was true in World War II, in which the armed forces on both sides included juveniles. The German Army contained a special division made up of individuals recruited from the Hitler Youth, many of whom were under the age

of 18, who fought at Normandy in 1944 and were later moved to Hungary to participate in the 1945 German offensive there. *See* H.W. Koch, *The Hitler Youth: Origins and Development, 1922-45* 245-248 (1976); C. Luther, *Blood and Honor: The History of the 12th SS Panzer Division 'Hitler Youth,' 1943-1945* 58-59, 240-241, 243 (1987). By 1944, members of the Hitler Youth between the ages of 14 and 16 were declared eligible for active service. *See* M. Kater, *Hitler Youth* 219-220 (2004). Juvenile combatants as young as ten years old manned the barricade erected in Munich against invading U.S. and allied forces – and were subsequently detained by those forces as prisoners of war. *See* Koch, *supra*, at 250. By the spring of 1945, the entire eastern front of the war was sustained in large part by Hitler Youth battalions. *See* Kater, *supra*, at 222. One commentator has estimated that, of the million Germans in the custody of victor nations at the end of World War II, "at least half had been in the Hitler Youth." *Id*. at 228-229; *see also id.* at 252 (describing 7,000 juvenile German soldiers held as prisoners of war in American camp in France). And, as we explained above, juveniles have also been prosecuted for war crimes. *See supra*, p 34 n.10.

The use of juveniles in active hostilities is not some historical curiosity. Between 2001 and 2004, armed hostilities involving people under the age of 18 occurred in more than 20 countries, including Afghanistan, Angola, Colombia, India, Iraq, Israel, Indonesia, Somalia, and Sudan. *See* Coalition to Stop the Use of Child Soldiers, *Child Soldiers Global Report 2004* 13, *available at* http://www.child-soldiers.org/ library/global-reports. Significantly, these juvenile combatants have frequently been subject to detention by opposing forces or peacekeeping troops. *See, e.g.*, *id.* at 36, 43-44, 88, 91-92, 97, 267, 304, 308, 319 (describing specific examples of countries detaining combatants under the age of 18). Both historical practice and the contemporary practice of other States are thus inconsistent with petitioner's argument that juvenile combatants, who can lawfully

be killed in battle, nevertheless cannot lawfully be detained in the midst of an active war to prevent them from returning to fight in support of the enemy.

D. Petitioner attempts to rely upon international protocols that the United States has not ratified (Mot. at 38 (citing Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, 8 June 1977 ("Additional Protocol I"), and the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, 8 June 1977 ("Additional Protocol II")). But not only are we not a party to these additional protocols,[14] petitioner entirely mischaracterizes these agreements. In reality, these treaties also recognize that juveniles may be held as enemy combatants.

Although the Additional Protocol I forbids the direct participation of individuals under fifteen years of age in active hostilities, it also plainly recognizes that underage combatants who fight in violation of this requirement and "fall into the power of an adverse Party" may be held as "prisoners of war." Art. 77(2), 77(3); see Art. 77(4) (recognizing that underage combatants may be "arrested, detained or interned for reasons related to the armed conflict"). Similarly, the Additional Protocol II recognizes that minors may be "persons deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained." Art. 5(1). Thus, even under the Additional Protocols, juveniles who participate in active hostilities in violation of applicable age

[14]Although the United States has signed the Additional Protocol I, the President has declined to submit it to the Senate for advice and consent. *See* Message from President Reagan Transmitting Protocol II to the U.S. Senate, *reprinted in* S. Treaty Doc. 100-2, at IV-V (1987). The United States has signed the Additional Protocol II and the President has submitted it to the Senate, *see id.*, but to date the Senate has not provided its advice and consent to ratification.

restrictions are subject to capture and detention as enemy combatants.[15]

E. Contrary to petitioner's claim (Mot. at 36), treaty restrictions on the recruitment of child soldiers pursuant to the Optional Protocol also have no bearing on whether a petitioner may lawfully be detained. The Optional Protocol is not addressed to the detention of the enemy, but to limiting the recruitment and use of underage soldiers by ratifying parties. Thus, just as nothing in the Optional Protocol precludes the criminal prosecution of petitioner, *see supra* pp. 30-35, nothing in the Protocol precludes the detention of those under eighteen who fight for the enemy. Indeed, Article 4(3) specifically provides that application of the article "shall not affect the legal status of any party to an armed conflict."

Invoking both Article 6 and 7, Khadr argues that he may not be detained with other adults because the only permissible purpose for detention of a juvenile combatant under the Optional Protocol is to demobilize, rehabilitate, and reintegrate that individual into civil society, but not to prevent his further participation in active hostilities. *See* Mot. at 41-42. There is no requirement in the Optional Protocol that a state party must house adult combatants who committed hostile acts while juveniles differently or "reintegrate" all juvenile combatants at the soonest possible date, no matter the magnitude of the risk that they pose upon their release. As explained above, such a construction would radically alter longstanding and persisting practice for the conduct of armed conflict.[16] *See supra*, pp. 51-52.

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[15]Petitioner also relies on the Convention on the Rights of the Child (Mot. at 42-43), another agreement the United States has not ratified and which therefore imposes no obligations enforceable or otherwise. *See* Senate Report § 2(1), 148 Cong. Rec. at S5717.

[16]In the analogous domestic context of juvenile criminal prosecution, the government is not required to discharge juvenile offenders at the soonest possible date, regardless of the risk of recidivism. Every State and the District of Columbia "permit[s] preventive detention of juveniles

In sum, the legality of the preventive detention of petitioner is not affected by petitioner's status as a juvenile at the time he committed his acts of combatancy.

CONCLUSION

For the foregoing reasons, this Court should deny petitioner's motion for judgment as a matter of law and for a permanent injunction and dismiss without prejudice the petition for habeas corpus or hold it in abeyance pending the completion of military commission proceedings.

Dated: September 15, 2008

Respectfully submitted,

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accused of crime" in order to further the "compelling state interest" of preventing those juveniles from committing additional crimes – a need that, as the Supreme Court has recognized, "is not dependent upon the age of the perpetrator." *Schall v. Martin*, 467 U.S. 253, 264-265 (1984).

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN RE:	)	
	)	Misc. No. 08-442 (TFH)
GUANTANAMO BAY DETAINEE LITIGATION	)	
	)	
OMAR KHADR, et al. Petitioners,	)	
v.	)	No. 04-cv-1136 (JDB)
GEORGE W. BUSH, et al. Respondents	)	

Upon petitioner's motion for a preliminary injunction and for judgment on the pleadings or for summary judgment, it is hereby ordered as follows:

Petitioner's motion for a preliminary injunction is denied.

Petitioner's motion for judgement on the pleadings or for summary judgment is denied.

Upon respondent's Motion for to dismiss without prejudice, it is hereby ordered as follows:

This case is dismissed without prejudice.

Date: _____

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UNITED STATES DISTRICT JUDGE