In the United States Court of Appeals for the
District of Columbia Circuit

Omar Khadr, Petitioner, v. Robert Gates, Secretary of Defense, Respondent, sued in his official capacity.	)	CASE NO: _____

PETITIONER'S EMERGENCY MOTION
TO STAY MILITARY COMMISSION PROCEEDINGS
AND TO EXCEED PAGE LIMITS

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Petitioner Omar Khadr is a Canadian citizen who has been in U.S. military custody since the age of 15, and who has been detained at Guantánamo Bay Naval Base since the age of 16. Absent the stay sought by this motion, he is now is days away from becoming the first person in modern history to be tried for alleged war crimes for conduct allegedly committed while a minor. Accordingly, by his attorneys, Khadr respectfully moves this Court for an order staying military commission proceedings against him, pending this Court's disposition of his Petition for Review of Combatant Status Review Tribunal ("Petition for Review"), and a short enlargement of the page limits applicable to this motion. Pursuant to Circuit Rule 27(h)(2), undersigned counsel conferred with government counsel who advised that the government will oppose the motion for stay. They further advised that although they would ordinarily not oppose the motion to enlarge, because of the short time for response they oppose the request here, and they request an equal enlargement should Petitioner's request be granted. Petitioner has no objection to the government's request and is filing this motion of 25 pages now rather than delay the time for the Court or counsel to consider the motion.

This motion is an emergency motion because the military commission proceedings are scheduled to commence on June 4, 2007, and accordingly relief is sought on or before June 1. The Petition for Review was filed concurrently with this motion. It challenges the decision of the Combatant Status Review Tribunal

("CSRT") of September 7, 2004, designating Khadr an "enemy combatant." Khadr's CSRT determination is "final."

This Court has "exclusive jurisdiction to determine the validity of any final decision of a Combatant Status Review Tribunal." Detainee Treatment Act of 2005 (DTA), Pub. L. No. 109-148, § 1005(e)(2)(A), 119 Stat. 2680, 2742 (2005), (codified at 10 U.S.C. § 801 note (supp. 2007)). This Court has the authority under the All Writs Act to stay the military commission proceedings to protect and preserve its jurisdiction. 28 U.S.C. § 1651(a); Hicks v. Bush, 397 F. Supp. 2d 36, 41 (D.D.C. 2005); see also Fed. R. App. P. 18.

Petitioner also seeks leave to exceed the page limits provided by Fed. R. App. P. 27(d)(2) to allow this motion to be filed. The motion concerns complex issues of U.S. law that are new to this Court and require adequate explanation. Including this request for enlargement, the motion is 25 pages.

PRELIMINARY STATEMENT

This case requires the Court's urgent attention – and differs from the scores of DTA cases now before this Court – because Khadr is one of the few Guantánamo detainees who was a minor at the time he was seized, and is one of only three detainees who have been referred to trial pursuant to the Military Commissions Act (MCA), Pub. L. No. 109-366, 120 Stat. 2600, (codified at 10 U.S.C. § 948a et seq. (2000)), and now faces imminent commission proceedings.

Khadr will show through his Petition for Review that he may not be tried by military commission because the military commission lacks personal jurisdiction over him. Moreover, under the unique statutory procedures of the DTA and MCA, this Court has exclusive jurisdiction to review and cure the jurisdictional defect. Failure to stay the military commission proceeding will deprive this Court of the ability to exercise its jurisdiction and will deprive Khadr of his right under the DTA to review and effective remedy in this Court. In short, absent a stay, Khadr will suffer irreparable injury, the touchstone for a stay, while the government will suffer none if a stay is issued. See Al Sharbi v. Bush, 430 F. Supp. 2d 1, 2 (D.D.C. 2006); Hicks, 397 F. Supp. 2d at 40.

Moreover, there is a substantial likelihood Khadr will succeed on the merits of his Petition for Review. While applicable law requires special procedures for children, and should preclude designating a juvenile like Khadr as an unlawful enemy combatant, the CSRT treated Khadr no differently than the adult detainees. The CSRT procedures also permitted the introduction of evidence obtained in violation of treaty obligations concerning torture. Because the standards applied were not "consistent with the . . . laws of the United States," DTA § 1005(e)(2)(C)(ii), this Court should vacate the CSRT's determination, leaving the military commission without jurisdiction.

Finally, the public interest supports a stay. Congress has explicitly entrusted this Court with the authority and responsibility to check the legality of CSRT proceedings. An important aspect of this responsibility is to enforce the special protections afforded to children. This review would be rendered a nullity if the commission were allowed to proceed. To protect this Court's exclusive jurisdiction, and for the reasons discussed below, the Court should stay proceedings concerning Khadr before the military commission pending disposition of the Petition for Review. In the alternative, a temporary stay should be ordered while the Court considers entry of a plenary stay.

STATEMENT OF FACTS

On July 27, 2002, when Khadr, a Canadian citizen, was 15 years old, United States forces detained him near the city of Khost, Afghanistan. Charge Sheet (Feb. 2, 2007), attached as Ex. A. After holding him for three months in Afghanistan and possibly elsewhere, the United States transferred Khadr to the Guantánamo Bay Naval Base, where he has been held since. Id. Throughout his detention, Khadr has been subject to interrogation, including physical and psychological abuse that rose to the level of torture, without regard to Khadr's youth. Request for Classification Review in O.K. v. Bush, 04-CV-01136 (JDB) (Dec. 30, 2004) (summarizing Khadr's mistreatment), attached as Ex. B.

On July 7, 2004, the Deputy Secretary of Defense instituted the CSRT process by ordering that CSRTs be convened "to review [each] detainee's status as an enemy combatant," Order Establishing Combatant Status Review Tribunal § d (July 7, 2004), attached as Ex. C, while making clear that each detainee subject to the order – including Khadr – had already "been determined to be an enemy combatant through multiple levels of review by officers of the Department of Defense." Id. § a.

Khadr's CSRT convened on August 17, 2004. J.M. McGarrah, Director, Combatant Status Review Tribunals, Appointment of Combatant Status Review Tribunal #5 (Aug. 17, 2004), attached as Ex. D. On September 7, 2004, Khadr's CSRT concluded that he was an enemy combatant. [Name Redacted], Colonel, USAF Tribunal President, Combatant Status Review Tribunal Decision Report Cover Sheet, Tribunal Panel #5 § 2, attached as Ex. E. On September 10, 2004, the Director of the CSRTs, Rear Admiral James M. McGarrah, concurred in and declared the CSRT decision for Khadr "final." Review of Combatant Status Review Tribunal for Detainee ISN # [Redacted], attached as Ex. F.

The government charged Khadr on November 7, 2005 – over three years after his initial detention – and referred those charges to a military commission on November 23, 2005. Charge Sheet (Nov. 7, 2005), attached as Ex. G; Referral, Military Commission Case 05-0008 (Nov. 23, 2005), attached as Ex.

H. However, that military commission was halted after preliminary proceedings because of the Supreme Court's decision in Hamdan v. Rumsfeld, 126 S. Ct. 2749 (2006), invalidating the military commission system. See John D. Altenburg, Jr., Appointing Authority for Military Commissions, Order (Jun. 10, 2006), attached as Ex. I. Following enactment of the MCA, the government issued charges against Khadr in February 2007 and revised them in April 2007. Charge Sheet (Feb. 2, 2007), attached as Ex. A; Charge Sheet (Apr. 5, 2007), attached as Ex. J.

On April 24, 2007, the Convening Authority for Military Commissions referred multiple charges and specifications against Khadr as an "alien unlawful enemy combatant" for trial by military commission. Block VI Referral (Apr. 24, 2007), attached as Ex. K. A scheduled preliminary appearance before the military judge was continued at Khadr's counsel's request to June 4, 2007.[1] E-mail from Peter E. Brownback III, Military Judge, to LTC Mike Chappell, Department of Defense (Apr. 27, 2007, 14:49:00 EST) (issuing a continuance in United States v. Khadr), attached as Ex. L.

ARGUMENT

I. A STAY IS NEEDED NOW.

[1] Petitioner's prior habeas corpus application was considered by this Court as part of Boumediene v. Bush, 476 F.3d 981 (2007), and the Supreme Court denied his petition for certiorari on April 30, 2007, No. 06-1169.

A. Only This Court, And Not The Military Commission, Can Correct The Erroneous CSRT Determination On Which The Commission's Personal Jurisdiction Over Khadr Rests.

The MCA was enacted in late 2006 to provide a statutory basis for trials of Guantánamo detainees by military commission. Under the MCA, military commissions have jurisdiction solely over alien "unlawful enemy combatants." See 10 U.S.C. §§ 948b(a)-(b), 948c, 948d(a). Under the MCA, a finding by a CSRT "that a person is an unlawful enemy combatant is dispositive for purposes of jurisdiction for trial by military commission under this chapter." Id. § 948d(c). Because the CSRT's decision is "dispositive," the military commission may not review or reverse it for purposes of personal jurisdiction. Khadr's sole recourse is to this Court under the DTA.

The Manual for Military Commissions ("MMC"), adopted by the Secretary of Defense to govern military commissions, affirms that the exclusive forum to challenge the commission's personal jurisdiction based on the "dispositive" CSRT determination is this Court and not the military commission.

> Military commissions have personal jurisdiction over alien unlawful enemy combatants. *See* 10 U.S.C. § 948c. The M.C.A. recognizes, however, that with respect to individuals detained at Guantanamo Bay, the United States relies on the Combatant Status Review Tribunal ("C.S.R.T.") process to determine an individual's combatant status. ***The C.S.R.T. process includes a right of appeal to the United States Court of Appeals for the District of Columbia Circuit. Because the C.S.R.T. process provides detainees with the opportunity to challenge their status, the M.C.A. recognizes that status determination to be dispositive for purposes of***

> ***personal jurisdiction of a military commission***. . . . If, however, the accused has not received such a [C.S.R.T.] determination, he may challenge the personal jurisdiction of the commission through a motion to dismiss.

MMC Part II, Rule 202(b) Discussion (emphasis added), attached as Ex. M. Thus, only if the individual has not been through the CSRT process may he challenge personal jurisdiction before the military commission. In all cases where the CSRT made a determination – including this one – the military commission is powerless to reach a different decision on personal jurisdiction, and the individual can only test the military commission's power to try him by recourse to this Court.

B. Only This Court, And Not The Military Commission, Can Stay Proceedings Pending DTA Review Of The CSRT Determination On Which The Commission's Personal Jurisdiction Rests.

This Court has the power to protect its jurisdiction by issuing a stay pending review. 28 U.S.C. § 1651(a) (2000). Although this case is not strictly a review of agency action, Fed. R. App. P. 18 also provides for a stay pending review in analogous circumstances.

Moreover, the MMC specifically contemplates a stay by this Court and disables the military commission from staying its own proceedings pending review of a DTA petition. Specifically, the MMC provides: "Delay occasioned by the accused's appeal of a finding by a [CSRT] . . . that the accused is an unlawful enemy combatant ***shall not*** constitute a basis for departing from any time limit set forth in section (a) of this rule." MMC Part II, Rule 707(b)(4)(F) (emphasis

added), attached as Ex. M.[2] In contrast, "***[a]ll periods of time during which appellate courts have issued stays*** in the proceedings" fall within the category of "***excludable delay***." Id. 707(c) (emphasis added). Because the MMC plainly anticipates a stay from this Court without allowing the military commission to stay its own proceedings, seeking a stay from the commission is not necessary in these circumstances.

II. THIS COURT SHOULD ENJOIN MILITARY COMMISSION PROCEEDINGS AGAINST KHADR PENDING REVIEW OF THE CSRT'S DECISION UNDER THE DTA.

A stay is appropriate where, as here, (1) Petitioner has shown a substantial likelihood of success on the merits; (2) Petitioner would suffer irreparable harm if the stay is denied; (3) a stay would not substantially harm the respondent; and (4) the public interest would be furthered by a stay. Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir. 1977); Hicks, 397 F. Supp. 2d at 40, 45 (staying military commission proceedings). Khadr's showing on all factors is far more than required for a stay under this Court's "sliding scale." Serono Labs. Inc. v. Shalala, 158 F.3d 1313, 1318 (D.C. Cir. 1998); see, e.g., Holiday Tours, 559 F.2d at 845 (affirming injunction even where petitioner might be "less likely than not to prevail on the merits").

[2] The first deadline set by section (a) is to arraign the accused within 30 days of service of charges, see MMC 707(a)(1), which is precisely what is scheduled for June 4, 2007.

A. Khadr Is Likely To Prevail On The Merits Because The CSRT's Failure To Treat Him As A Child Violates Applicable Law.

This Court may invalidate a CSRT decision if it finds that: (1) the CSRT's status determination was contrary to the standards and procedures that the Secretary of Defense specified; or (2) those standards and procedures are inconsistent with any applicable laws or constitutional provisions. DTA § 1005(e)(2)(C). Because it failed to account for Khadr's status as a child at the time of the alleged offenses, the CSRT failed to comply with applicable law, rendering its decision invalid.[3]

1. The Application Of CSRT Procedures To Khadr Is Inconsistent With The Juvenile Delinquency Act.

The Juvenile Delinquency Act sets forth specific and carefully considered procedures for the federal detention and prosecution of children. 18 U.S.C. § 5031, et seq. (2000) ("JDA"). Because Khadr's CSRT did not comply with the JDA, its determination must be vacated.

The JDA applies to any person under the age of 21 whom the Government alleges committed a "violation of a law of the United States . . . prior to his eighteenth birthday which would have been a crime if committed by an

[3] Because this is an application for stay, the discussion of the merits is necessarily abbreviated. Petitioner reserves the right to present in the case on the merits other issues, including without limitation the failure to provide the status tribunal required by Article 5 of the 1949 Geneva Convention Relative to Treatment of Prisoners of War, to assert rights under the Constitution and other applicable law, and to amplify the arguments presented here.

adult." 18 U.S.C. §§ 5031-32 (2000). Khadr, who is now 20, is charged with having committed numerous violations of United States law before his eighteenth birthday that would be crimes if committed by an adult. See Charge Sheet (Apr. 5, 2007), attached as Ex. J. No provision of the JDA (or any other applicable law) would except Khadr from application of the JDA.

That Khadr was seized in Afghanistan and is detained at Guantánamo Bay does not exclude him from the scope of the act. See, e.g., United States v. D.L., 453 F.3d 1115 (9th Cir. 2006) (alien juvenile caught at border crossing); United States v. Juvenile (RRA-A), 229 F.2d 737 (9th Cir. 2000) (same); United States v. Juvenile Male, 939 F.2d 321 (6th Cir. 1991) (juvenile held on military base outside of state court's jurisdiction).

Importantly, the military regards the JDA as applicable overseas to the prosecution of juveniles. See Operational Law Handbook 139 (2006), attached as Ex. N. Moreover, the presumption against extraterritoriality does not apply to persons within "the territorial jurisdiction" of the United States, including detainees held within the complete jurisdiction and control of the United States at Guantánamo Bay. Rasul v. Bush, 542 U.S. 466, 480 (2004). The JDA, like the habeas corpus statute at the time of Rasul, "draws no distinction between Americans and aliens held in federal custody." Id. There is equally "little reason to think that Congress intended the geographical coverage of the statute to vary

depending on the detainee's citizenship." Id. In fact, the provisions of the JDA are recognized as applying equally to undocumented aliens and to citizens. United States v. Doe, 862 F.2d 776, 779 (9th Cir. 1988).

Where the JDA applies, as here, the Attorney General is required to issue a certification as to the propriety of a federal forum. 18 U.S.C. § 5032 (2000). Absent that certification or delivery of the juvenile to state authorities, "any proceedings against him shall be in an appropriate district court of the United States." Id. The JDA further requires that juveniles accused of crimes be made aware of their rights, that their parents or guardians be notified, and that they be brought before a magistrate within a reasonable time after being taken into custody. Id. § 5033.

The CSRT standards and procedures used in Khadr's case were clearly inconsistent with these protections. Khadr was held for years without charge or notice to a parent or guardian, was never brought before a magistrate, and was neither surrendered to state authorities nor brought to "an appropriate district court of the United States." No provision of the CSRT standards and procedures takes any account of the JDA or of Khadr's juvenile status. See Gordon England, Deputy Secretary of Defense, Implementation of Combatant Status Review Tribunal Procedures for Enemy Combatants Detained at Guantánamo Bay Naval Base, Cuba Enclosure (1), § G(7) (Jul. 29, 2004), attached

as Ex. O. Because the standards and procedures were thus inconsistent with U.S. law in Khadr's case, his CSRT determination is invalid under the DTA. DTA § 1005(e)(2).

2. The Application Of CSRT Procedures To Conclude That A Child Is An Unlawful Enemy Combatant Is Inconsistent With The MCA.

The CSRT's sole function is to assess whether an individual is an "unlawful enemy combatant." See 10 U.S.C. § 948d(a); DTA § 1005. A child cannot be an "unlawful enemy combatant" within the meaning of the MCA. Applying CSRT procedures to Khadr to conclude that he is an "unlawful enemy combatant" for acts allegedly committed when he was 15 or younger is inconsistent with U.S. law – namely, the MCA – and thus invalid under the DTA.

i. "Unlawful Enemy Combatant" As Used In The MCA Is Limited To Adults.

a. The MCA Contains An Implicit Age Requirement For Jurisdiction.

A juvenile cannot be an "unlawful enemy combatant" under the MCA or DTA. To interpret the law otherwise would lead to absurd results, allowing a CSRT to determine that a child of any age qualified as an unlawful enemy combatant triable by military commission, whether a 15-year-old because she fed her Al-Qaeda father or a five-year-old because he carried goods in his wagon while being led by his Taliban father. "All laws are to be given a sensible construction;

and a literal application of a statute, which would lead to absurd consequences, should be avoided whenever a reasonable application can be given to it, consistent with the legislative purpose." United States v. Katz, 271 U.S. 354, 357 (1926) (limiting the literal reach of a criminal statute); United States v. Castle, 925 F.2d 831, 836 (5th Cir. 1991) (exempting foreign officials from conspiracy prosecutions based on otherwise absurd results); see also United States v. Palmer, 16 U.S. 610, 631 (1818) (Marshall, C.J.) ("The words 'any person or persons' are broad enough to comprehend every human being. But general words must not only be limited to cases within the jurisdiction of the state, but also to those objects to which the legislature intended to apply them.").

Moreover, classifying juveniles as "unlawful enemy combatants" would contravene military law. The Uniform Code of Military Justice ("UCMJ"), like the MCA and DTA, has no explicit minimum age provision limiting the personal jurisdiction of courts martial and military commissions. Nonetheless, the United States Court of Military Appeals ("USCMA") has construed the UCMJ to include one. United States v. Blanton, 7 C.M.A. 664, 667 (1957). A person is "deemed incapable of changing his status to that of a member of the military establishment" before the age of enlistment, and a court martial cannot exercise jurisdiction over an individual who had not validly changed his status to one subject to military law. Id. at 666; see United States v. Brown, 23 C.M.A. 162,

165 (1974) (dismissing for lack of jurisdiction a violent robbery charged at age 17 where defendant was 16 at time of enlistment).

Congress specifically considered UCMJ procedures when crafting the MCA: "The procedures for military commissions set forth in this chapter are based upon the procedures for trial by general courts-martial under [the UCMJ]." 10 U.S.C. § 948b(c). Although judicial precedent under the UCMJ is not binding, id., where Congress incorporates portions of a prior law, it is presumed to have had knowledge of relevant interpretations of the incorporated law. Lorillard v. Pons, 434 U.S. 575, 581 (1978). Just as a 15-year old cannot validly change his status so as to bring him within the jurisdiction of a court martial, a 15-year old is not capable of changing his status to "unlawful enemy combatant" so as to bring him within the jurisdiction of a military commission. Under any reasonable construction, Khadr was below the minimum age for treatment as an "unlawful enemy combatant" under United States law.[4]

b. International Law At The Time Of The Adoption Of The MCA Militates Against Construing The MCA And DTA To Apply To Children.

[4] Apart from the UCMJ, in the United States "[t]he age of 18 is the point where society draws the line for many purposes between childhood and adulthood." Roper v. Simmons, 543 U.S. 551, 574 (2005). The relevant age is the age at the time of the alleged offense, not trial. Id. at 578; supra p. 10-11 (JDA).

Absent a stay, Khadr is poised to become the first person in modern history, anywhere in the world, to be tried for alleged war crimes for conduct allegedly committed as a child. No international criminal tribunal, from Nuremberg forward, has prosecuted a child for alleged violations of the laws of war. The Rome Statute of the International Criminal Court: A Commentary, Vol. I, 533-34 (Antonio Cassese et al. eds. 2002). Among modern tribunals, only the Special Court for Sierra Leone can bring children accused of violating the laws of war before it, and then only for the purposes of "promoting his or her rehabilitation, reintegration into and assumption of a constructive role in society." Statute of the Special Court, annexed to the Agreement between the United Nations and the Government of Sierra Leone on the Establishment of the Special Court for Sierra Leone, signed on January 16, 2002, art. 7. The International Criminal Court expressly lacks the jurisdiction to try children. Rome Statute of the International Criminal Court, art. 26.

A month prior to Khadr's seizure in Afghanistan, the United States Senate unanimously gave its advice and consent to the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, GA Res. 54/263, U.N. Doc. A/RES/54/263, Annex (May 25, 2000) (entered into force Feb. 12, 2002) ("Child Soldier Protocol"); Treaty Doc. No. 106-37A, ratified, June 18, 2002, Cong. Rec. S5716 et seq. The Child Soldier Protocol

makes it illegal under any circumstances for non-state guerrillas "to recruit or use in hostilities persons under the age of 18," id. art. 4, and it further mandates that children under 18 years of age take no direct part in combat, id. art. 1. State Parties are obligated to "take all feasible measures to ensure that persons within their jurisdiction recruited or used in hostilities contrary to the present Protocol are demobilized or otherwise released from service." Id. at art. 6(3).[5]

Thus, special protection for children – and particularly for children who are conscripted into armed conflict – is an important part of international law. Given the United States' ratification of and advocacy for many of these treaties, it

[5] This special status of children in armed conflict and the need to distinguish them once captured is widely recognized in international humanitarian law. Worst Forms of Child Labour Convention (No. 182), June 17, 1999, 38 I.L.M. 1207 (the recruitment of children under the age of 18 for armed conflict is a form of "slavery"); World Declaration on the Survival, Protection and Development of Children and Plan of Action adopted by the World Summit for Children (1990); Convention on the Rights of the Child, Dec. 12, 1989, U.N.G.A. A/RES/44/25, 1577 U.N.T.S. 3; International Covenant on Civil and Political Rights, art. 24, Dec. 19, 1966, 999 U.N.T.S. 171; Additional Protocol to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, art. 77, 8 June 1977, 1125 U.N.T.S. 3 ("The Parties to the conflict shall provide them with the care and aid they require, whether because of their age or for any other reason.... If arrested, detained or interned for reasons related to the armed conflict, children shall be held in quarters separate from the quarters of adults..."); Declaration on the Protection of Women and Children in Emergency and Armed Conflict, G.A. Res 3318(XXIX), U.N. Doc. A/RES/3318(XXIX) (Dec. 14, 1974); Declaration of the Rights of the Child, G.A. Res 1386(XIV), U.N. Doc A/4354 (Nov. 20, 1959); Universal Declaration of Human Rights, art. 25(2), G.A. Res. 217 A(III), U.N. Doc A/810 (Dec. 10, 1948) ("Motherhood and childhood are entitled to special care and assistance."); Geneva Declaration of the Rights of the Child, Arts. 1, 38, Sept. 26, 1924 (League of Nations).

would be an absurd construction of the MCA and DTA to subject children to CSRT procedures and to military commission trials.

ii. Khadr's CSRT Determination Is Inconsistent With The MCA Because It Took No Account Of His Juvenile Status At The Time Of The Alleged Acts.

Khadr was no more than 15 years old at the time of all alleged acts for which he has been charged. See Charge Sheet (Feb. 2, 2007), attached as Ex. A. Accordingly, Khadr is not an "unlawful enemy combatant" under the MCA or DTA. Khadr's CSRT took no evident account of his age at the time of the alleged acts, at the time of his apprehension, or at the time of his CSRT hearing. There is no evidence that any participating member of the CSRT even considered Khadr's age an issue, much less made any age-specific inquiry. Nor was Khadr's age considered in legal review of the CSRT's decision. See James R. Crisfield Jr., Judge Advocate General's Corps, United States Navy, Legal Sufficiency Review of Combatant Status Review Tribunal For Detainee ISN #[redacted], attached as Ex. P (report of CSRT legal advisor affirming the "legal sufficiency" of proceedings).[6] This failure to take required account of Khadr's age led to an

[6] We do not know whether other government information discloses consideration of Petitioner's juvenile status. DTA petitioners' access to government information, as opposed to some more limited CSRT record, was argued before this Court on May 15, 2007, in Bismullah v. Gates and Parhat v. Gates, Nos. 06-1197 & 06-1397. We note and reserve the arguments for access to government information, without rehashing them here. Canadian authorities have also recently been ordered to disclose exculpatory and other information to Petitioner that may further support

invalid designation of him as an "unlawful enemy combatant" under the DTA. DTA § 1005(e)(2).

3. CSRT Procedures On Evidence Are Inconsistent With The Convention Against Torture, Particularly As Applied To A Child.

The procedures the government utilized in Khadr's CSRT are inconsistent with United States law, specifically the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), Dec. 10, 1984, S. Treaty Doc. No. 100-2 (1988), 1465 U.N.T.S. 85.

Contrary to the requirement of Article 15 of the CAT that State Parties "ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings," the CSRT rules allowed for the admission of evidence derived from torture (by U.S. or foreign forces) at the unbridled discretion of the CSRT, without any apparent screening mechanism. See Gordon England, Deputy Secretary of Defense, Implementation of Combatant Status Review Tribunal Procedures for Enemy Combatants Detained at Guantánamo Bay Naval Base, Cuba, Enclosure (1), § G(7) (Jul. 29, 2004), attached as Ex. O ("[t]he Tribunal shall be free to consider ***any information*** it deems relevant and helpful to a resolution of the issues before it." (emphasis added).

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this Petition. See Khadr v. Canada (Justice) (2007 FCA 182), available at http://decisions.fca-caf.gc.ca/en/2007/2007fca182/2007fca182.html.

The United States has explicitly recognized that "Article 15 of the Convention is a treaty obligation of the United States, and the United States is obligated to abide by that obligation in Combatant Status Review Tribunals and Administrative Review Boards." List of issues to be considered during the examination of the second periodic report of the United States of America: Response of the United States of America 85 (May 5, 2006), http://geneva.usmission.gov/Press2006/CAT-May5.pdf; see also William J. Haynes II, General Counsel, Department of Defense, Military Commission Instruction No. 10 (Mar. 24, 2006) (acknowledging the United States' obligation under CAT Article 15). The failure to comply with these requirements is all the more troubling in this case, in which the Khadr's youth and related aspects of his juvenile status should have been considered in determining whether there were improper methods. Cf. Schneckloth v. Bustamante, 412 U.S. 218, 226 (1973) (age among factors in assessing whether testimony improperly coerced).

Because the CAT is a law of the United States with which CSRT procedures must comply, this Court is authorized by the DTA to review those procedures under the CAT's requirements, regardless of whether the CAT would otherwise be individually enforceable by Khadr. DTA § 1005(e)(2)(C)(ii). Having failed to satisfy the CAT's requirements, the use of those procedures was

inconsistent with United States law, rendering Khadr's CSRT determination invalid under the DTA. DTA § 1005(e)(2)(A).

B. Khadr Will Suffer Irreparable Harm If The Government Improperly Subjects Him To A Military Commission.

Khadr would suffer irreparable injury if a stay were denied and he were tried by a military commission with no jurisdiction over him. It could not be adequately redressed by monetary or other corrective relief; see Virginia Petroleum Jobbers Ass'n v. FPC, 259 F.2d 921, 925 (D.C. Cir. 1958); is "actual and not theoretical," Wisconsin Gas Co. v. FERC, 758 F.2d 669, 674 (D.C. Cir. 1985) (per curiam), and is "of such ***imminence*** that there is a 'clear and present' need for equitable relief to prevent irreparable harm." Id. (emphasis in original).

First, a trial by military commission with no rightful power over Khadr causes an injury that cannot be redressed later. As this Court previously noted as to a Guantánamo detainee, "setting aside the judgment after trial and conviction insufficiently redresses the defendant's right not to be tried by a tribunal that has no jurisdiction." Hamdan v. Rumsfeld, 415 F.3d 33, 36 (D.C. Cir. 2006), rev'd on other grounds, 126. S. Ct. at 2753. As the Hicks court concluded in rejecting the government's argument that a detainee would not suffer irreparable injury in such a case:

> Respondents miss the crux of the irreparable injury that Petitioner faces if tried by a tribunal consequently deemed not to have jurisdiction over him – the fact that he would have been tried by a

> tribunal without any authority to adjudicate the charges against him in the first place, potentially subjecting him to a second trial before a different tribunal.

Hicks, 397 F. Supp. 2d at 42 ("[p]roceedings which ultimately may be determined to be unlawful cannot be 'undone.'").[7] Moreover, the injury is more acute in this case, as the military commission would proceed without affording any protections in respect of Khadr's juvenile status.

Second, the threat of injury is actual and imminent. Khadr is scheduled to appear before the military commission on June 4, 2007. For reasons discussed earlier, this Court not only has exclusive jurisdiction but also is alone in being able to issue a stay pending resolution of the personal jurisdiction issue presented in the Petition for Review. Supra p. 8.

C. Staying Military Commission Proceedings Against Khadr Will Not Harm The Government.

By contrast, staying the military commission proceedings will cause no material harm to the government. Khadr remains in the military's full custody and control pending this Court's review, and the military has not previously acted

[7] This is also like interlocutory review of claims of double jeopardy and sovereign or official immunity, where the court will generally intervene in trial court proceedings where the defendant is claiming a right not have to face proceedings of any kind in the tribunal at issue. See e.g., Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc., 506 U.S. 139, 144-47 (1993) (eleventh amendment sovereign immunity); Mitchell v. Forsyth, 472 U.S. 511, 530 (1985) (qualified immunity); Abney v. United States, 431 U.S. 651, 662 (1977) (double jeopardy); Jackson v. Justices of the Superior Court of Massachusetts, 423 F. Supp. 50, 52 (D. Mass. 1976) (same) (staying trial based on double jeopardy).

with any time sensitivity in bringing Khadr to trial. Although the United States first detained Khadr on July 27, 2002, the government waited over three years before bringing first charges against him. After the passage of the MCA created a new military commission process post-Hamdan in October 2006, the government waited a further six months before referring new charges to a military commission. In context, the time required for this Court's deliberation will not prejudice the government. See Jackson, 423 F. Supp. at 52 (staying criminal trial not great harm where state had already "voluntarily stayed these trials for more than a year").

Court-approved stays have been relatively common in the military commission process to date. See, e.g., Al Sharbi, 430 F. Supp. 2d at 2 (staying military commissions pending the Supreme Court's decision in Hamdan); Hicks, 397 F. Supp. 2d at 45 (same). Both the Al Sharbi and the Hicks courts rejected the government's claims of prejudice. Al Sharbi, 430 F. Supp. 2d at 2; Hicks, 397 F. Supp. 2d at 42-43. Indeed, both stays preserved judicial economy and avoided commission proceedings that would ultimately be held invalid. See Hamdan, 126 S. Ct. at 2786 (holding that the commission procedures were unlawful). And as noted earlier, the MMC specifically anticipates stays by this Court pending petitions for review of CSRT determinations without harm to the commission proceedings. Supra p. 8.

D. The Public Interest Weighs Substantially In Favor Of A Stay.

There is a strong public interest in ensuring that CSRT procedures conform to the law, as reflected by Congress's decision to craft a unique review process in this Court. DTA § 1005(e)(2)(A). It is notable that Khadr challenges the military commission's jurisdiction and the validity of the CSRT procedures as applied in the case of a child. No court has had occasion to rule on these matters yet. As the lower court in Hicks stated, "It is in the public interest to have a final decision, leaving no doubts as to this key jurisdictional issue, before Khadr's military commission proceedings begin." 397 F. Supp. 2d at 43.

The public interest in the United States' compliance with its treaty obligations also weighs strongly in favor of a stay of military commission proceedings. See, e.g., United States v. Michigan, 534 F. Supp. 668, 669 (W.D. Mich. 1982) (stating, in granting a preliminary injunction, that "the public interest would best be served by the protection of these treaty rights to the fullest extent possible"); cf. Beiser v. Weyler, 284 F.3d 665, 672 (5th Cir. 2002) (treaty violations raise concerns for reciprocal violations by other nations as to U.S. citizens). Continuing violations of applicable law damage the United States' international standing. See Carol Rosenberg and Lesley Clark, Gates: World Distrusts Terror Trials, Miami Herald, Mar. 30, 2007, at A3 (quoting Defense Secretary Gates as saying "No matter how transparent, no matter how open the trials . . . if they took place at Guantánamo, in the [eyes of the] international

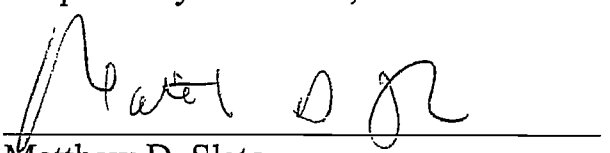
community, they would lack credibility.") A stay that would ameliorate any violations pending resolution of these issues would serve the public interest.

CONCLUSION

For all the foregoing reasons, the Court should stay the military commission proceedings against Khadr pending a final decision from this Court on his Petition for Review.

Dated: May 23, 2007

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, Erika J. Davis, managing clerk at the Washington, D.C. office of Cleary Gottlieb Steen & Hamilton LLP, hereby certify that:

On May 23, 2007, a original plus six copies of Petitioner Omar Khadr's Emergency Motion to Stay Military Commission Proceedings and to Exceed Page Limits, with attached Exhibits, have been delivered by hand to the party listed below:

U.S. Department of Justice
Litigation Security Section
Attn: Jennifer Campbell or Erin Hogarty
20 Massachusetts Avenue, N.W., Suite 5300
Washington, D.C. 20530

Ms. Campbell or Ms. Hogarty will serve this Emergency Motion to Stay Military Commission Proceedings and to Exceed Page Limits, with attached Exhibits, on Respondents' counsel and will file with the United States Court of Appeals for the D.C. Circuit.

Dated: May 23, 2007

Erika J. Davis