[ORAL ARGUMENT NOT YET SCHEDULED]

No. 09-5328

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

OBAYDULLAH *et al.*,
Petitioners-Appellants,

v.

BARACK OBAMA *et al.*,
Respondents-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE RESPONDENTS-APPELLEES

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Appellees respectfully submit this Certificate as to Parties, Rulings and Related Cases:

(A) Parties and Amici

Petitioners-appellants are Obaydullah and Sami Al Hajj, as next friend of Obaydullah. Respondents-appellees are Barack Obama, President of the United States, and Robert M. Gates, Secretary of Defense of the United States of America.

(B) Ruling Under Review

The ruling under review is Judge Richard J. Leon's August 6, 2009, order denying petitioner's renewed motion to vacate the existing stay of the habeas proceedings. This order is unreported and appears in the Joint Appendix at page 193.

(C) Related Cases

Several appeals of stay orders issued in Guantanamo habeas cases are pending before this Court. In *Yoyej v. Obama*, No. 09-5274 (D.C. Cir.), the petitioner appealed from a district court order staying his habeas proceedings in light of a determination by the Guantanamo Review Panel that the petitioner was approved for transfer. Briefing in this appeal is complete, and oral argument has not yet been scheduled. Several other appeals before this Court raise the same issue in *Yoyej*, but the identities of those cases cannot be revealed without divulging protected

information. These cases are listed on page 1 of the respondents-appellees' sealed supplemental addendum filed in *Yoyej v. Obama*, No. 09-5274 (D.C. Cir.).

s/ Sydney Foster
Sydney Foster

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GLOSSARY

CSRT	Combatant Status Review Tribunal
MCA	Military Commissions Act

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STATEMENT OF JURISDICTION

Petitioner Obaydullah invoked the district court's jurisdiction under 28 U.S.C. § 2241. On August 6, 2009, the district court entered the order that is the subject of this appeal, which denied petitioner's renewed motion to vacate the existing stay of the habeas case. JA 193. On September 10, 2009, petitioner filed a timely notice of appeal. *See* JA 187. For the reasons described below (pp. 11-15), however, the district court order is not a final order appealable under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

After military commission charges were sworn against petitioner, the district court stayed petitioner's habeas case. Petitioner did not object to the imposition of the stay but subsequently filed two motions to vacate the stay and now appeals from the denial of the second of these motions. The issues presented are:

1. Whether this Court lacks appellate jurisdiction over this appeal because the denial of the motion to lift the stay is not final.

2. Whether the district court abused its discretion in declining to lift the stay when military commission charges have been sworn against petitioner and when, since petitioner filed his appeal, the Attorney General has determined that prosecution is appropriate in petitioner's case and that a military commission is the proper venue for such a prosecution.

STATEMENT OF THE CASE

Petitioner Obaydullah is a detainee at Guantanamo Bay, Cuba, who sought habeas corpus relief in the district court in 2008. While that case was pending, charges were sworn against petitioner for offenses triable by military commission, and the district court stayed petitioner's case. *See* JA 189. Petitioner subsequently filed two motions to vacate the stay, both of which were denied. *See* JA 191, 193. Petitioner appeals from the denial of his second motion to vacate the stay.

STATUTORY AND REGULATORY PROVISIONS

The statutory and regulatory provisions at issue in this appeal are attached as an addendum to this brief. Included in the addendum are relevant provisions of the Military Commissions Act, 10 U.S.C. §§ 948a *et seq.*, and Executive Order No. 13,492, § 2(d), 74 Fed. Reg. 4897, 4898 (Jan. 22, 2009).

STATEMENT OF THE FACTS

I. Statutory Background

A. The Military Commissions Act ("MCA"), 10 U.S.C. §§ 948a *et seq.*,[1] establishes "procedures governing the use of military commissions to try alien unprivileged enemy belligerents for violations of the law of war and other offenses triable by military commission." *Id.* § 948b(a). The procedures governing these military commissions are set forth in both the Act and in the Rules for Military Commissions. *See* Rule for Military Commissions 101(a). When the Government seeks to try a detainee before a military commission, the first step that must be completed is the "swearing" of charges against the detainee. 10 U.S.C. § 948q. Next, the Secretary of Defense or his designee — known as the "Convening Authority" —

[1]The Military Commissions Act was enacted in 2006, *see* Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (Oct. 17, 2006), and amended in 2009, *see* Military Commissions Act of 2009, Pub. L. No. 111-84, Title XVIII,123 Stat. 2190, 2574-614 (Oct. 28, 2009). Unless otherwise noted, all citations are to the current version of the statute.

considers the charges and decides whether each charge should be dismissed or "referred" to a military commission. *See id.* § 948h.

B. On January 22, 2009, the President issued an Executive Order providing for a "prompt and thorough review" of the appropriate disposition of each Guantanamo detainee by a number of review participants led by the Attorney General. Executive Order No. 13,492, § 2(d), 74 Fed. Reg. 4897, 4898 (Jan. 22, 2009) ("Executive Order"). To implement the Executive Order, the Attorney General established the Guantanamo Review Task Force and a senior-level Guantanamo Review Panel. The interagency Task Force is responsible for examining the relevant information on all of the Guantanamo detainees and making recommendations to the Review Panel on the proper disposition of each detainee. The Review Panel consists of senior-level officials from each of the agencies identified in the Executive Order. Review Panel members consider the recommendations of the Task Force on a regular basis and have delegated authority from their respective agency heads to decide the disposition of each detainee. JA 111.

Under the Executive Order, the review participants are charged with considering, among other things, "whether the Federal Government should seek to prosecute the detained individuals for any offenses they may have committed, including whether it is feasible to prosecute such individuals before a court established pursuant to Article III of the United States Constitution." Executive Order § 4(c)(3),

74 Fed. Reg. at 4899. If the review participants conclude that prosecution is appropriate, the detainee's case is referred to the Department of Justice for a final determination regarding whether the detainee should be prosecuted and, if so, whether the prosecution is appropriately pursued in federal court or before a military commission. *See* Dep't of Justice, Dep't of Defense, *Memo: Determination Of Guantanamo Cases Referred For Prosecution, available at* http://www.justice.gov/opa/documents/taba-prel-rpt-dptf-072009.pdf; *see also* JA 113-114. During the pendency of this review, the Executive Order directed the Secretary of Defense to "immediately take steps sufficient to ensure that . . . no charges are . . . referred to a military commission." Executive Order § 7, 74 Fed. Reg. at 4899. In accordance with this mandate, the Secretary of Defense directed the Convening Authority to "cease referring cases to military commissions" so that the review ordered by the President could be completed. JA 52.

II. Factual Background

Petitioner Obaydullah is a detainee at the United States Naval Base in Guantanamo Bay, Cuba. In July 2008, petitioner filed the instant habeas case. *See* JA 1.

In September 2008, charges were sworn against petitioner for violations of 10 U.S.C. § 950v(b)(28) (2006) (currently codified at 10 U.S.C. § 950t(29)) (conspiracy) and 10 U.S.C. § 950v(b)(25) (2006) (currently codified at 10 U.S.C. § 950t(25))

(providing material support for terrorism). The conspiracy charge specifies that petitioner "did conspire [to] . . . intentionally cause[] serious bodily injury to one or more persons in violation of the law of war, murder in violation of the law of war, and provid[e] material support to terrorism." Charge Sheet at 3, *United States v. Obaidullah*, *available at* http://www.defense.gov/news/commissionsobaidullah.html. In particular, petitioner was charged with storing and concealing anti-tank mines and other explosive devices and with having in his possession instructions describing how to wire and detonate explosives. *Id.* The material support for terrorism charge echoes the conspiracy charge, but adds the allegation that petitioner "knew or intended that said material support and resources were to be used in preparation for and in carrying out a terrorist act." *Id.* at 4.

In light of the military commission charges, the district court stayed petitioner's habeas case, without objection by petitioner. JA 189; JA 27. Before the Convening Authority arrived at a determination of whether to refer any of the charges against petitioner to a military commission, the Secretary of Defense issued the January 2009 directive to the Convening Authority to cease referring charges to military commissions to allow for the completion of the review directed by the President. Petitioner subsequently filed a motion to vacate the stay of his habeas petition, but on April 22, 2009, the court denied the motion.

In the April 22, 2009, order denying petitioner's motion to vacate the stay, the district court ordered the Government to submit a status report in July 2009 "regarding the status of the military commission process as it applies to petitioner." JA 191. Later, in response to a motion by petitioner, the court also ordered the Government to include two additional pieces of information in the July 2009 status report: "(1) whether or not the Guantanamo Review Task Force has made a recommendation to the Review Panel regarding the petitioner, and (2) whether or not the Review Panel has reached a decision to transfer or release petitioner." JA 192.

The Government's July 2009 status report indicated that the Guantanamo Review Task Force had made a recommendation to the Guantanamo Review Panel regarding petitioner. JA 168. To protect the internal deliberative processes of the Executive Branch, the status report did not reveal whether the Review Panel had made any determinations regarding petitioner. JA 168. The status report indicated, however, that "[w]hen appropriate," the Government would "convey additional information regarding the status of Petitioner's review by way of *ex parte* submissions without notice to Petitioner, in accordance with the Protective Order entered in this case." JA 168.[2]

[2] The Government filed one *ex parte* status report during the course of the proceedings in district court. That status report is part of the district court record and will be filed with this Court *ex parte* and under seal.

Shortly before the Government submitted its July 2009 status report, petitioner filed a renewed motion to vacate the stay. JA 117. In August 2009, the court denied this motion, JA 193, and petitioner now appeals from that order. Since petitioner filed his opening brief in this appeal, the Executive Order review of petitioner's case has been completed, and the Attorney General has determined that petitioner's case is appropriate for prosecution and that a military commission is the appropriate venue for such a prosecution. Prior to the filing of this brief, this decision has not been made public. Now that the Attorney General has made this decision, the Convening Authority must decide whether to refer charges against petitioner to a military commission.

SUMMARY OF ARGUMENT

Petitioner is a Guantanamo detainee who has been charged under the Military Commissions Act with offenses triable by a military commission. Shortly after these charges were sworn, the district court stayed petitioner's habeas case. The swearing of charges triggered review by the Convening Authority to determine whether to refer any of the charges to a military commission, but before the Convening Authority decided whether to refer petitioner's charges, the President issued an Executive Order requiring an interagency task force to conduct a review of the appropriate disposition of all Guantanamo detainees. The Secretary of Defense ordered the Convening Authority to cease referring charges to military commissions so that this review could

be completed. Petitioner subsequently filed two motions to vacate the stay, both of which were denied. Petitioner now appeals from the second of these orders.

That Executive Order review as to petitioner here is now complete, and the Attorney General has determined that prosecution in a military commission is appropriate for petitioner. Thus, the prior cause of delay in the decision as to whether to refer the charges in this case has been lifted. The Convening Authority will now determine whether to refer charges against petitioner to a military commission.

As an initial matter, this court lacks jurisdiction over this appeal because the district court order denying petitioner's motion to lift the stay is not appealable under the collateral order doctrine. To be appealable under that doctrine, an order must "conclusively determine the disputed question," but the order here is "inherently tentative" because it is subject to change if the district court concludes that military commission proceedings are not going to proceed against petitioner, or that such proceedings are not going to commence quickly enough. *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468, 469 n.11 (1978).

In any event, the district court properly determined that a stay in this case was warranted. Under *Schlesinger v. Councilman*, 420 U.S. 738 (1975), a court must generally stay habeas proceedings pending the conclusion of any ongoing military commission proceedings. Such a stay is grounded in considerations of comity and ensures that federal courts do not needlessly interfere with military objectives or with

Congress's assessment that military courts subject to review by independent civilian judges should decide issues within their jurisdiction.

Here, the district court issued the stay before the Convening Authority referred petitioner's charges to a military commission. The district court's decision to stay the case in that context was not an abuse of discretion. Petitioner's habeas case is likely to interfere significantly with any military commission proceeding that might take place, and given that the Convening Authority is now authorized and required to issue a decision about whether military commission proceedings will commence against petitioner, the district court's decision to deny petitioner's motion to lift the stay was not an abuse of discretion.

STANDARD OF REVIEW

Whether an order declining to lift a stay is a final appealable decision is a question of law subject to de novo review. *See Eldred v. Reno*, 239 F.3d 372, 374 (D.C. Cir. 2001). District court orders declining to lift stays are reviewed for abuse of discretion. *See Clinton v. Jones*, 520 U.S. 681, 706-07 (1997); *McSurely v. McClellan*, 426 F.2d 664, 671 (D.C. Cir. 1970).

Where, as here, the district court has not issued a written explanation of its order, this Court may still defer to the district court's conclusion that a stay was warranted and to any other conclusions implicit in that conclusion. If this Court determines that it cannot affirm the district court's decision without an explanation of

the court's reasoning, it should remand to the district court to set forth its reasons. *See Blue Cross & Blue Shield of Ala. v. Unity Outpatient Surgery Ctr., Inc.*, 490 F.3d 718, 725 (9th Cir. 2007) (remanding appeal of stay order to district court for explanation by the district court of grounds for the stay).

ARGUMENT

I. THE ORDER DECLINING TO LIFT THE STAY IS NOT AN APPEALABLE FINAL ORDER.

The order declining to lift the stay of petitioner's habeas proceedings is an interim case-management order and does not present an appealable "final decision[]" under 28 U.S.C. § 1291. In general, for a decision to be "final," it must "end[] the litigation on the merits and leave[] nothing for the court to do but execute the judgment." *Catlin v. United States*, 324 U.S. 229, 233 (1945). The order declining to lift the stay in this case plainly does not end the litigation on the merits, nor does petitioner argue that it does. Petitioner contends instead that the order is appealable under the collateral order doctrine, which excepts a "small class" of interlocutory decisions from the final judgment rule if they "[1] conclusively determine the disputed question, [2] resolve an important issue completely separate from the merits of the action, and [3] [are] effectively unreviewable on appeal from a final judgment." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978); *see also Mohawk Indus., Inc. v. Carpenter*,130 S. Ct. 599, 2009 WL 4573276, at *5 (2009) (emphasizing that

the "collateral order doctrine . . . must never be allowed to swallow the general rule that a party is entitled to a single appeal" (internal quotation marks omitted)).[3]

If the Convening Authority refers charges against petitioner to a military commission, and if it is clear that the district court is staying the habeas case until the conclusion of those military commission proceedings, then petitioner's argument that an order refusing to lift the stay is appealable would be substantially stronger than it is in the case's present posture. At that point, the denial of a motion to vacate the existing stay may "conclusively determine the disputed question," *Coopers & Lybrand*, 437 U.S. at 468, because there may be "no basis to suppose that the District Judge contemplated any reconsideration of his decision." *Moses H. Cone*, 460 U.S. at 12-13 (holding that a stay pending the resolution of ongoing litigation is appealable). Because such a decision also would "resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on

[3] Petitioner does not contend, in the alternative, that this Court has jurisdiction under the "effectively out of court" doctrine, *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 8-10 (1983), nor could he. That doctrine renders a stay order appealable only in the limited circumstances where the stay order "amounts to a dismissal of the suit," *id.* at 10. As explained below, however, the district court entered the stay — and denied petitioner's motions to vacate the stay — based on its understanding that petitioner is likely to be tried in a timely fashion before a military commission. If the factual premise for the district court's stay order changes, the stay is subject to being lifted, and petitioner's habeas case will proceed.

appeal from a final judgment conclusive," it may be appealable under the collateral order doctrine. *Coopers & Lybrand*, 437 U.S. at 468.

Here, however, the denial of petitioner's motion to vacate the existing stay is "inherently tentative," *Coopers & Lybrand*, 437 U.S. at 469 n.11, and thus does not at this time satisfy the first requirement of the collateral order doctrine that it "conclusively determine[d] the disputed question," *id.* at 468. The stay was based on the court's assessment that military commission proceedings against petitioner were likely to commence and that it would be inappropriate to litigate the habeas case during the pendency of those proceedings. The district court is monitoring the case, however, and has issued orders requiring the Government to report on "the status of the military commission process as it applies to petitioner." JA 191; *see also* JA 192 (ordering the Government to report on "whether or not the Guantanamo Review Task Force has made a recommendation to the Review Panel regarding the petitioner" and "whether or not the Review Panel has reached a decision to transfer or release petitioner"). Likewise, the district court can order further status reports as necessary.

If changed circumstances suggest that military commission proceedings are unlikely to happen at all or are unlikely to begin in a timely fashion, the district court may lift the stay. Now that the Attorney General has decided that petitioner's case is appropriate for prosecution before a military commission, petitioner's case will be returned to the Convening Authority for a determination of whether petitioner's

charges should be referred to a military commission. If, however, the Convening Authority is unduly delayed in making this determination, the district court can reconsider and exercise its discretion to lift the stay. *See Lockyer v. Mirant Corp.*, 398 F.3d 1098, 1103 (9th Cir. 2005) (an indication of "circumstances that might result in [a stay's] modification" suggests the stay is not "conclusive"). *Accord* Order of Dec. 17, 2009, *Balzuhair v. Obama*, D.C. Cir. No. 09-5156 (unpublished, attached) (dismissing, for lack of appellate jurisdiction, appeal of stay of Guantanamo habeas case pending the submission of evidence that the petitioner authorized appointed counsel to represent him).[4]

Petitioner nonetheless argues that the order declining to lift the stay here is conclusive because the district court has now declined to vacate the stay on two occasions. *See* Petitioner's Br. 19-21. Although the court declined to lift the stay in April 2009 and then again in August 2009, these decisions reflect not the district court's unwillingness *ever* to vacate the stay but rather the court's assessment that as

[4] Another case pending before this Court raises a related question about appellate jurisdiction over appeals from stays of Guantanamo habeas proceedings. In *Yoyej v. Obama*, No. 09-5274 (D.C. Cir.), the district court stayed a detainee's habeas case in light of a determination by the Guantanamo Review Panel that the detainee was approved for transfer. *See* Corrected Brief for Respondents-Appellees, at 10-16, *Yoyej v. Obama*, No. 09-5274 (D.C. Cir. Dec. 17, 2009). The stay order in that case, like the stay order in the present case, is subject to modification — there, if the Government is not pursuing petitioner's transfer with sufficient speed and diligence. *See id.* at 12-13.

of April 2009 and August 2009, the factual underpinning for the stay — that a decision would be made in a timely fashion about whether military commission proceedings against petitioner would commence — had not changed.

Petitioner cites *In re General Motors Corp. Engine Interchange Litigation*, 594 F.2d 1106 (7th Cir. 1979), to support his claim of finality here. In *General Motors Corp.*, the Seventh Circuit illustrated the conclusiveness of the order at issue by noting that the court had denied reconsideration of the order on two occasions. The order at issue, however, was of an entirely different nature than the stay orders here. The district court order in that case approved a settlement for a subclass, and thus by the order's very nature, there was no expectation that the district court would revisit its decision. Indeed, with respect to the subclass action, only the "ministerial task of executing [the] judgment" remained before the district court. *Id.* at 1118. Here, by contrast, the stay of petitioner's habeas case is inherently tentative because it may be lifted upon a showing that military commission proceedings will not proceed, or are unlikely to proceed in the reasonably near future. Thus, this is not a case where the district court stay is conclusive and final. The appeal should, accordingly, be dismissed for want of appellate jurisdiction.[5]

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[5] We demonstrate below that the district court did not abuse its discretion in sustaining the stay. For these same reasons, the district court's order does not present an "extraordinary situation[]" of a court acting outside its authority, thereby warranting (continued...)

II. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION WHEN IT DENIED PETITIONER'S RENEWED MOTION TO VACATE THE STAY.

A district court is vested with "broad discretion to stay proceedings as an incident to its power to control its own docket." *Clinton v. Jones*, 520 U.S. 681, 706-07 (1997); *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936) (same, observing that relevant considerations include "economy of time and effort for [court], for counsel, and for litigants"). This determination "calls for the exercise of judgment, which must weigh competing interests and maintain an even balance." *Landis*, 299 U.S. at 254-55. As the Supreme Court has explained, "'[e]specially in cases of extraordinary public moment, [a plaintiff] may be required to submit to delay not immoderate in extent and not oppressive in its consequences if the public welfare or convenience will thereby be promoted.'" *Clinton*, 520 U.S. at 707 (alterations in original) (quoting *Landis*, 299 U.S. at 256).

The district court properly exercised its broad discretion in refusing to lift the stay of petitioner's habeas case at this time. At the time the court issued the stay, military commission charges against petitioner had been sworn. Subsequently, however, the Convening Authority was ordered to cease referring charges to military

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[5](...continued)
a writ of mandamus. *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 289 (1988).

commissions to provide time for the Executive Order review. Now, we can publicly report that the Attorney General has determined that petitioner's case is appropriate for prosecution and that a military commission is the appropriate venue for such prosecution. It thus now falls to the Convening Authority to decide whether to refer charges against petitioner to a military commission. *See* 10 U.S.C. § 948h. If charges are referred to a military commission, it is clear, as explained below, that the parallel habeas case is properly stayed under *Schlesinger v. Councilman*, 420 U.S. 738 (1975), during the pendency of military commission proceedings. Furthermore, the district court's decision to commence the stay prior to the referral of charges was not an abuse of discretion.

A. A Stay Of Petitioner's Habeas Case Is Warranted During The Pendency Of Any Military Commission Proceedings.

The district court stay order here is premised on the assumption that if the Convening Authority refers military commission charges against petitioner, then it would be appropriate to stay this parallel habeas case pending final resolution of the military commission case. As we explain below, the district court's assumption is correct.

1. In *Councilman*, the Supreme Court instructed that "considerations of comity" dictate that "federal courts normally will not entertain habeas petitions by military prisoners unless all available military remedies have been exhausted." 420 U.S. at

756, 758. *Councilman* held that federal courts should normally not intervene in a pending court-martial proceeding against members of the Armed Forces, identifying two principal rationales that together favored abstention pending the completion of ongoing court-martial proceedings, both of which apply *a fortiori* here, where the military seeks to adjudicate war crimes before military commissions governed by statute. *See Hamdan v. Rumsfeld*, 548 U.S. 557, 586 (2006) (describing *Councilman*'s two primary rationales); *New v. Cohen*, 129 F.3d 639, 643 (D.C. Cir. 1997) (same).

First, the Supreme Court explained that the need for protection against judicial interference with the "primary business of armies and navies to fight or be ready to fight wars" "counsels strongly against the exercise of equity power" to intervene in an ongoing court-martial. *Councilman*, 420 U.S. at 757. In particular, the Court observed that interference by federal courts with the military judicial system would impinge on the military's ability to "insist upon a respect for duty and a discipline without counterpart in civilian life." *Id.* Although "the peculiar demands" of military discipline "are not implicated" in the Guantanamo context, "the deficiency is supplied by factors equally compelling." *Id.* (noting that although federalism interests do not justify abstention in the court martial context, military discipline concerns do). Indeed, a military commission proceeding adjudicating the charges sworn against petitioner would implicate military exigencies of the highest order — enforcing the law of war against an enemy force that is targeting civilians for mass death — a task surely as

exigent as maintaining discipline in the Nation's own troops. *See Yamashita v. Styer*, 327 U.S. 1, 11 (1946) (trial and punishment for war crimes is "part of the conduct of war operating as a preventive measure against such violations"). As was noted in a recent district court decision that addressed abstention in the MCA context and was issued since the Supreme Court decided *Boumediene v. Bush*, 128 S. Ct. 2229 (2008), "*Councilman* involved court-martial proceedings against a U.S. service member, to be sure, and not a military commission, but its central rationale is applicable here." *Hamdan v. Gates*, 565 F. Supp. 2d 130, 136-37 (D.D.C. 2008).

Second, the *Councilman* Court emphasized that abstention would properly respect the balance Congress struck between "military necessities" and "ensuring fairness to servicemen charged with military offenses" 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 influenced or persuasion.'" *Councilman*, 420 U.S. at 757-58; *Hamdan*, 548 U.S. at 586. Comity requires federal courts to give "due respect to the autonomous judicial system created by Congress," *New*, 129 F.3d at 643, and the military commission system petitioner would be subject to is worthy of such respect because it was created by Congress and it gives detainees an appeal as of right to the this very Court. Hence, "direct review of the military commission's final judgment is entrusted to Article III judges who are unquestionably 'removed from all military influence or

persuasion' as *Councilman* requires." *Khadr v. Bush*, 587 F. Supp. 2d 225, 231 (D.D.C. 2008) (quoting *Councilman*, 420 U.S. at 758).

This case is thus very different from the context faced by the Supreme Court in *Hamdan*, where the Supreme Court held that abstention in favor of the Guantanamo military commission proceedings that predated the Military Commissions Act of 2006 was not warranted. *See Hamdan*, 548 U.S. at 587-88. The military commissions system at issue in *Hamdan* was created by order of the President, and final decisions of those military commissions were not subject to review as of right by a civilian court, thus leading the Court to conclude that "these review bodies clearly lack the structural insulation from military influence . . . and thus bear insufficient conceptual similarity to state courts to warrant invocation of abstention principles." *Id.* The Court was careful to observe, however, that it "certainly [was] not foreclos[ing] the possibility that abstention may be appropriate in some cases seeking review of ongoing military commission proceedings." *Id.* at 590. Abstention is appropriate in this case because, unlike in *Hamdan*, the military commission system at issue here was enacted by Congress and is subject to review as of right by this very Court. *See Khadr*, 587 F. Supp. 2d at 232-33; *Hamdan*, 565 F. Supp. 2d at 136.

Petitioner cites the decision of this Court in *Hamdan* for the proposition that "*Councilman* has 'little to tell . . . about the proceedings of military commissions against alien prisoners'" and that "abstention under *Councilman* [does] not apply to

[a] Guantanamo detainee's challenge to military commission proceedings because concerns related to preservation of military discipline and order were not at issue." Petitioner's Br. 36-37 (quoting *Hamdan v. Rumsfeld*, 415 F.3d 33, 36 (D.C. Cir. 2005), *rev'd on other grounds*, 548 U.S. 557 (2006)). This Court's statements in *Hamdan* were made, however, about a very different military commissions regime, one that was created by the Executive and included review mechanisms that the Supreme Court held were insufficiently insulated from the Executive's influence. And to the extent that these statements reflected this Court's judgment that *Councilman* abstention could never apply to a military commissions regime, they were contradicted by the Supreme Court's decision in *Hamdan*.

That *Councilman* abstention is warranted during the pendency of military commission proceedings brought under the MCA is underscored by the fact that abstention also eliminates the potential for conflicting findings and rulings that could otherwise arise, thereby creating friction between the judiciary and the military justice system created by Congress. *See Steffel v. Thompson*, 415 U.S. 452, 462 (1974) (noting that abstention avoids "duplicative legal proceedings" and "disruption" in parallel proceedings). Petitioner's habeas petition challenges whether the Government has the legal authority to detain him. To determine whether petitioner is lawfully detained, the district court must determine whether petitioner

> planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001 . . . [or] harbored those responsible for those attacks [or was] part of, or substantially supported, Taliban or al-Qaida forces or associated forces that are engaged in hostilities against the United States or its coalition partners.

Respondents' Memorandum Regarding The Government's Detention Authority 2, filed in *In re Guantanamo Bay Detainee Litigation*, D.D.C. Nos. 08-442 *et al.* (Mar. 13, 2009), *adopted as interpreted*, *Gherebi v. Obama*, 609 F. Supp. 2d 43 (D.D.C. 2009).

Under the MCA, the military commission must make the related determination as to whether petitioner is an "unprivileged enemy belligerent," which the statute defines as

> an individual (other than a privileged belligerent) who —
> (A) has engaged in hostilities against the United States or its coalition partners;
> (B) has purposefully and materially supported hostilities against the United States or its coalition partners; or
> (C) was a part of al Qaeda at the time of the alleged offense under this chapter.

10 U.S.C. § 948a(7) (defining "unprivileged enemy belligerent"); *id.* § 948c (providing that "any alien unprivileged enemy belligerent is subject to trial by military commission"); *id.* § 948d (granting jurisdiction over "persons subject to [the MCA]"). A habeas court's ruling on whether an individual is lawfully detained, and any factual conclusions drawn in issuing that ruling, may affect and interfere with the military commission's ruling on whether the individual satisfies the statutory definition of an

"unprivileged enemy belligerent." *Cf. Al-Bihani v. Obama*, No. 09-5051, slip op. at 9 (D.C. Cir. Jan. 5, 2010); *Al Odah v. Bush*, 593 F. Supp. 2d 53, 58 (D.D.C. 2009) (concluding that a habeas court's ruling on lawful detention would interfere with a military commission's determination of whether the individual was an "unlawful enemy combatant" under the MCA of 2006); *Khadr*, 587 F. Supp. 2d at 231 (same).

2. Petitioner does not seriously dispute that the two rationales underlying *Councilman* apply with equal force in the context of military commissions brought pursuant to the MCA. Instead, he argues that *Councilman* abstention is inapplicable on several other grounds.

First, petitioner contends that *Councilman* abstention "does not apply here because Mr. Obaydullah does not seek to *enjoin* his military commission proceeding through the federal courts" but rather "seeks only to vindicate his Constitutional right to the writ of habeas corpus." Petitioner's Br. 37. *Councilman* drew no such distinction, however, relying on habeas cases in arriving at its holding and stating clearly that "when a serviceman charged with crimes by military authorities can show no harm other than that attendant to resolution of his case in the military court system, the federal district courts must refrain from intervention by way of injunction *or otherwise*." *Councilman*, 420 U.S. at 758 (emphasis added).

Second, citing *Parisi v. Davidson*, 405 U.S. 34 (1972), petitioner argues that the district court erred in abstaining because the remedy of release is not available in

military commission proceedings. *See* Petitioner's Br. 37-38. In *Parisi*, the habeas petitioner had sought a discharge from service on the ground that he was a conscientious objector, but after completing several layers of administrative review, that request was denied. Petitioner subsequently refused to board a plane to Vietnam, resulting in the initiation of court martial proceedings against him for disobeying a lawful order. The Supreme Court held that, notwithstanding the pending court martial proceedings, petitioner could challenge the administrative denial of his request for conscientious objector status through habeas, stating that this conclusion was supported by the fact that the military tribunal could not award the service member the relief he sought in habeas — conscientious objector discharge. *Parisi*, 405 U.S. at 41.

As this Court noted in *New v. Cohen*, however, "the Court in *Parisi* made it clear that the decision, which merely 'recognize[d] the historic respect in this Nation for valid conscientious objection to military service,' was narrow and 'should not be understood as impinging upon the basic principles of comity.'" 129 F.3d at 642-43 (quoting *Parisi*, 405 U.S. at 46) (alteration in original). *Parisi* "[did] not concern a federal district court's direct intervention in a case arising in the military court system," 405 U.S. at 41, because the court martial proceedings were for violation of a lawful order, whereas petitioner's habeas proceeding challenged whether petitioner had been properly denied conscientious objector status.

Here, by contrast and as already explained, the central inquiry in petitioner's habeas case — whether his executive detention is lawful — may overlap with a significant inquiry in petitioner's military commission case — whether he is an "unprivileged enemy belligerent" as that term is defined by the MCA. Indeed, if the military commission holds that a detainee is *not* an "unprivileged enemy belligerent," that ruling (if sustained) and any factual conclusions drawn in issuing that ruling, could have bearing on the Executive's authority to detain the petitioner under the law of war. *See* 10 U.S.C. § 950j (finality of military commission proceedings, findings, and sentences). Any habeas rulings would therefore constitute a "direct intervention" into petitioner's military commission proceedings and would be inappropriate. *See Al Odah*, 593 F. Supp. 2d at 59 (holding that a stay of a habeas case is appropriate once charges have been referred to a military commission, notwithstanding the fact the remedy of release was unavailable in the military commission proceedings).

Third, petitioner contends that *Boumediene* removed the district court's authority to issue a *Councilman* stay in any pending Guantanamo habeas case. *See* Petitioner's Br. 31-32, 38-39. But *Boumediene* did not address the appropriateness of abstaining under *Councilman* during the pendency of military commission proceedings. Instead, the Supreme Court addressed this question in *Hamdan*, which held that *Councilman* abstention was inappropriate in favor of military commission proceedings created by the Executive that provided for review that was not

sufficiently insulated from the military. *Hamdan*, 548 U.S. at 587-88. *Hamdan* explicitly noted, however, that it was not foreclosing the possibility that abstention *would* be proper in the case of a military commissions regime enacted by Congress that guaranteed independent review by civilian judges. *See id.* at 590. Congress responded by enacting the Military Commissions Act of 2006, and since that statute was passed and since the Supreme Court issued its decision in *Boumediene*, the *Hamdan* district court has held that abstention in favor of MCA military commissions is warranted. *See Hamdan v. Gates*, 565 F. Supp. 2d 130, 136-37 (D.D.C. 2008).

Moreover, the *Boumediene* Court was addressing whether the detainees in that case were required to seek review in the court of appeals of their Combatant Status Review Tribunal ("CSRT") determinations before proceeding with their habeas petitions. The Court held they were not. *Boumediene*, 128 S. Ct. at 2274-75. But CSRTs were governed by administratively-created rules that provided procedural protections for detainees that were deemed inadequate by the Supreme Court. *See id.* at 2241 (CSRTs were governed by Department of Defense rules); *id.* at 2269 (noting several deficiencies in the CSRTs, including that detainees were not permitted the assistance of counsel). Thus, *Boumediene*'s holding that detainees need not exhaust these limited CSRT proceedings did nothing to overrule the longstanding precedent that habeas cases are properly stayed pending the resolution of proceedings in military

commissions created by Congress and governed by rules providing defendants with substantial procedural protections such as the right to counsel, 10 U.S.C. § 949c.[6]

Consistent with this reading of *Boumediene*, every post-*Boumediene* district court to have issued a written opinion addressing whether to abstain in favor of MCA military commission proceedings that are ongoing has abstained. *See Al Odah*, 593 F. Supp. 2d at 60-61 (granting stay of habeas proceedings effective upon the referral of charges to a military commission); *Khadr*, 587 F. Supp. 2d at 230-34 (staying habeas proceedings during pendency of military commission proceedings); *Hamdan*, 565 F. Supp. 2d at 136-37 (holding that *Councilman* abstention was appropriate during the pendency of military commission proceedings).[7]

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[6] In addition, the habeas cases of the petitioners in *Boumediene* had been pending for up to six years without any action, *see Boumediene*, 128 S. Ct. at 2275, whereas petitioner's habeas case has been pending for less than 18 months.

[7] In addition to the three cases in which the district court has reached this question in a written decision, we note that there are two cases in which the district court has orally ruled on this question. Judge Sullivan presided over both cases and denied the Government's motions to stay those habeas cases during the pendency of military commissions proceedings. *See Al-Shibh v. Obama*, D.D.C. No. 06-1725 (Government's stay motion filed Aug. 12, 2008 (Docket No. 46)); *Al Sharbi v. Obama*, D.D.C. No. 05-2348 (Government's stay motion filed Aug. 12, 2008 (Docket No. 54)). In one of those cases, the parties subsequently filed a joint motion to stay the case pending the outcome of the review ordered by the President's Executive Order, and the court granted that stay, which has been in effect since April 2009. *See* Minute Orders of Apr. 16, 2009; Sept. 23, 2009; and Nov. 18, 2009, *Al-Shibh v. Obama*, D.D.C. No. 06-1725 (attached).

Finally, several decisions in the district court have held that stays are not warranted prior to the referral of military commission charges or during the pendency

(continued...)

B. The District Court Did Not Abuse Its Discretion In Concluding That Petitioner's Case Should Be Stayed In Anticipation Of Military Commission Proceedings.

District courts are vested with "broad discretion to stay proceedings." *Clinton v. Jones*, 520 U.S. 681, 706-07 (1997). In determining whether to issue a stay, a district court "must weigh competing interests" and may consider factors such as the "economy of time and effort for [court], for counsel, and for litigants." *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936). A detainee's habeas case should not be stayed, however, where there is no reason to anticipate a military commission proceeding or where military commission proceedings are not expected to commence in an appropriately timely fashion. *Cf. Harris Cty. Comm'rs Ct. v. Moore*, 420 U.S. 77, 84 (1975) (holding that abstention under *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496 (1941), is unnecessary if parallel proceedings have been "long

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[7](...continued)
of the review mandated by the President's Executive Order, but, significantly, these denials of the Government's stay motions were all without prejudice to the Government's refiling those motions once charges had been referred and military commission proceedings were active. *See* Order of May 26, 2009, *Al Qosi v. Obama*, D.D.C. No. 04-1937 (Docket No. 124) (attached) (charges had been sworn but not referred); *Al Halmandy v. Obama*, No. 05-2385, 2009 WL 1078660 (D.D.C. Apr. 22, 2009) (same); Order of Apr. 15, 2009, *Alsawam v. Obama*, D.D.C. No. 05-1244 (Docket No. 150) (attached) (same); *Al Darbi v. Obama*, No. 05-2371, 2009 WL 949088 (D.D.C. Apr. 7, 2009) (charges had been referred and military commission proceedings had begun but were then stayed during the pendency of the review ordered by the President in the Executive Order). These decisions thus contemplate a stay pending the completion of ongoing military commission proceedings.

delayed"); *Steffel v. Thompson*, 415 U.S. at 462 (noting that the rationale supporting abstention under *Younger v. Harris*, 401 U.S. 37 (1971), is undercut when there is no pending state proceeding).

Here, however, the Attorney General has now determined that prosecution before a military commission is appropriate for petitioner's case and thus the obstacle that was preventing the Convening Authority from exercising her duty to determine whether to refer petitioner's charges to a military commission has been removed.[8] Because of the potential conflicts that could arise from parallel proceedings (discussed above, pp. 21-23), *Councilman* abstention will be fully warranted upon the referral of charges. The district court did not abuse its discretion in continuing the stay in anticipation of the referral of charges at this time.

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[8] The Executive Order mandating review of the disposition of Guantanamo detainees directed the Secretary of Defense to "take steps sufficient to ensure that during the pendency of [this review], no charges are . . . referred to a military commission," Executive Order 13,492, § 7, 74 Fed. Reg. 4897, 4899 (Jan. 22, 2009), and thus the Secretary of Defense directed the Convening Authority to "cease referring cases to military commissions" in order "to provide the Administration sufficient time to conduct a review of detainees held at Guantanamo." JA 52. Now that the Attorney General has determined that military commission prosecution is appropriate for petitioner, the review contemplated by these orders has concluded. The rationale underlying the two orders no longer bars the Convening Authority from referring petitioner's charges to a military commission, although there may be a need for an additional order from the Secretary of Defense clarifying that the Convening Authority has the authority to refer petitioner's charges to a military commission. If so, such an order will be issued promptly.

As petitioner notes, *see* Petitioner's Br. 32-33, 41-42, several recent district court decisions have declined to stay habeas proceedings pending the conclusion of military commission proceedings that have not yet commenced or have been stayed pending the Executive Order review. *See Al Odah*, 593 F. Supp. 2d at 60-61 (granting a stay that became effective "only upon the referral of charges" in a case where charges had been sworn but not referred); *Al Halmandy v. Obama*, No. 05-2385, 2009 WL 1078660 (D.D.C. Apr. 22, 2009) (denying without prejudice a stay in a case where charges had been sworn but not referred and stating that the Government may re-file the motion if charges are referred); Order of Apr. 15, 2009, *Alsawam v. Obama*, D.D.C. No. 05-1244 (Docket No. 150) (attached) (same); *Al Darbi v. Obama*, No. 05-2371, 2009 WL 949088 (D.D.C. Apr. 7, 2009) (denying without prejudice a stay in a case where charges had been referred to a military commission and military commission proceedings had begun but had then been stayed in light of the Executive Order review, noting that the motion could be considered again "if and when petitioner is slated to be tried"). [9]

As already noted, these decisions provide strong support for the proposition that, at least as of the point at which charges are referred to a military commission,

[9] As noted earlier, *see supra* note 7, several other district court cases have also addressed the question of whether it is appropriate to stay habeas cases pending the completion of military commission proceedings.

habeas proceedings should be stayed under *Councilman*, pending the completion of those proceedings. And although these decisions concluded that a stay was not warranted until military commission proceedings were active, it does not follow that the district court's contrary conclusion was an abuse of discretion, as both rulings could have been within the bounds of the court's discretion.

CONCLUSION

For the foregoing reasons, this appeal should be dismissed for lack of appellate jurisdiction, or, in the alternative, the denial of the motion to lift the stay of the habeas proceedings should be affirmed.[10]

Respectfully submitted,

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[10] In light of the new information — the Attorney General's determination — this Court could also, in the alternative, remand the matter to the district court to reexamine whether to maintain the stay in light of the latest facts. *Cf. Landis*, 299 U.S. at 258-59 (remanding to the district court for a determination of whether it should continue to stay the case in light of changed circumstances). We believe, however, that such a remand is unnecessary and that the district court's order should be affirmed.

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 29(d) and Fed. R. App. P. 32(a)(7)(B) because the brief contains 7575 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and D.C. Cir. R. 32(a)(2). I hereby certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the typestyle requirements of Fed. R. App. P. 32(a)(6) because it has been prepared with Word Perfect 12 in 14-point Times New Roman font.

s/ Sydney Foster
Sydney Foster

CERTIFICATE OF SERVICE

I hereby certify that on January 6, 2010, I filed and served the foregoing Brief For The Respondents-Appellees with the Clerk of the Court by causing a copy to be electronically filed via the appellate CM/ECF system. I also hereby certify that on January 7, 2010, I will cause eight copies to be delivered to the Court via hand delivery. I also hereby certify that all participants are registered CM/ECF users and will be served via the CM/ECF system.

s/ Sydney Foster
Sydney Foster

ADDENDUM: STATUTORY AND REGULATORY PROVISIONS

ADDENDUM: STATUTORY AND REGULATORY PROVISIONS
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10 U.S.C. § 948a

In this chapter:

(1) Alien.--The term “alien” means an individual who is not a citizen of the United States.

(2) Classified information.--The term “classified information” means the following:

(A) Any information or material that has been determined by the United States Government pursuant to statute, Executive order, or regulation to require protection against unauthorized disclosure for reasons of national security.

(B) Any restricted data, as that term is defined in section 11 y. of the Atomic Energy Act of 1954 (42 U.S.C. 2014(y)).

(3) Coalition partner.--The term “coalition partner”, with respect to hostilities engaged in by the United States, means any State or armed force directly engaged along with the United States in such hostilities or providing direct operational support to the United States in connection with such hostilities.

(4) Geneva Convention Relative to the Treatment of Prisoners of War.--The term “Geneva Convention Relative to the Treatment of Prisoners of War” means the Convention Relative to the Treatment of Prisoners of War, done at Geneva August 12, 1949 (6 UST 3316).

(5) Geneva Conventions.--The term “Geneva Conventions” means the international conventions signed at Geneva on August 12, 1949.

(6) Privileged belligerent.--The term “privileged belligerent” means an individual belonging to one of the eight categories enumerated in Article 4 of the Geneva Convention Relative to the Treatment of Prisoners of War.

(7) Unprivileged enemy belligerent.--The term “unprivileged enemy belligerent” means an individual (other than a privileged belligerent) who--

(A) has engaged in hostilities against the United States or its coalition partners;

(B) has purposefully and materially supported hostilities against the United States or its coalition partners; or

(C) was a part of al Qaeda at the time of the alleged offense under this chapter.

(8) National security.--The term "national security" means the national defense and foreign relations of the United States.

(9) Hostilities.--The term "hostilities" means any conflict subject to the laws of war.

10 U.S.C. § 948c

Any alien unprivileged enemy belligerent is subject to trial by military commission as set forth in this chapter.

10 U.S.C. § 948d

A military commission under this chapter shall have jurisdiction to try persons subject to this chapter for any offense made punishable by this chapter, sections 904 and 906 of this title (articles 104 and 106 of the Uniform Code of Military Justice), or the law of war, whether such offense was committed before, on, or after September 11, 2001, and may, under such limitations as the President may prescribe, adjudge any punishment not forbidden by this chapter, including the penalty of death when specifically authorized under this chapter. A military commission is a competent tribunal to make a finding sufficient for jurisdiction.

10 U.S.C. § 948h

Military commissions under this chapter may be convened by the Secretary of Defense or by any officer or official of the United States designated by the Secretary for that purpose.

10 U.S.C. § 948q

(a) Charges and specifications.--Charges and specifications against an accused in a military commission under this chapter shall be signed by a person subject to chapter 47 of this title under oath before a commissioned officer of the armed forces authorized to administer oaths and shall state--

(1) that the signer has personal knowledge of, or reason to believe, the matters set forth therein; and

(2) that such matters are true in fact to the best of the signer's knowledge and belief.

(b) Notice to accused.--Upon the swearing of the charges and specifications in accordance with subsection (a), the accused shall be informed of the charges and specifications against the accused as soon as practicable.

10 U.S.C. § 950j

The appellate review of records of trial provided by this chapter, and the proceedings, findings, and sentences of military commissions as approved, reviewed, or affirmed as required by this chapter, are final and conclusive. Orders publishing the proceedings of military commissions under this chapter are binding upon all departments, courts, agencies, and officers of the United States, subject only to action by the Secretary or the convening authority as provided in section 950i(c) of this title and the authority of the President.

10 U.S.C. § 950t

The following offenses shall be triable by military commission under this chapter at any time without limitation:

(1) Murder of protected persons.--Any person subject to this chapter who intentionally kills one or more protected persons shall be punished by death or such other punishment as a military commission under this chapter may direct.

(2) Attacking civilians.--Any person subject to this chapter who intentionally engages in an attack upon a civilian population as such, or individual civilians not taking active part in hostilities, shall be punished, if death results to one or more of the victims, by death or such other punishment as a military commission under this chapter may direct, and, if death does not result to any of the victims, by such punishment, other than death, as a military commission under this chapter may direct.

(3) Attacking civilian objects.--Any person subject to this chapter who intentionally engages in an attack upon a civilian object that is not a military objective shall be punished as a military commission under this chapter may direct.

(4) Attacking protected property.--Any person subject to this chapter who

intentionally engages in an attack upon protected property shall be punished as a military commission under this chapter may direct.

(5) Pillaging.--Any person subject to this chapter who intentionally and in the absence of military necessity appropriates or seizes property for private or personal use, without the consent of a person with authority to permit such appropriation or seizure, shall be punished as a military commission under this chapter may direct.

(6) Denying quarter.--Any person subject to this chapter who, with effective command or control over subordinate groups, declares, orders, or otherwise indicates to those groups that there shall be no survivors or surrender accepted, with the intent to threaten an adversary or to conduct hostilities such that there would be no survivors or surrender accepted, shall be punished as a military commission under this chapter may direct.

(7) Taking hostages.--Any person subject to this chapter who, having knowingly seized or detained one or more persons, threatens to kill, injure, or continue to detain such person or persons with the intent of compelling any nation, person other than the hostage, or group of persons to act or refrain from acting as an explicit or implicit condition for the safety or release of such person or persons, shall be punished, if death results to one or more of the victims, by death or such other punishment as a military commission under this chapter may direct, and, if death does not result to any of the victims, by such punishment, other than death, as a military commission under this chapter may direct.

(8) Employing poison or similar weapons.--Any person subject to this chapter who intentionally, as a method of warfare, employs a substance or weapon that releases a substance that causes death or serious and lasting damage to health in the ordinary course of events, through its asphyxiating, bacteriological, or toxic properties, shall be punished, if death results to one or more of the victims, by death or such other punishment as a military commission under this chapter may direct, and, if death does not result to any of the victims, by such punishment, other than death, as a military commission under this chapter may direct.

(9) Using protected persons as a shield.--Any person subject to this chapter who positions, or otherwise takes advantage of, a protected person with the intent to shield a military objective from attack. or to shield, favor, or impede military operations, shall be punished, if death results to one or more of the victims, by death or such other punishment as a military commission under this chapter may direct,

and, if death does not result to any of the victims, by such punishment, other than death, as a military commission under this chapter may direct.

(10) Using protected property as a shield.--Any person subject to this chapter who positions, or otherwise takes advantage of the location of, protected property with the intent to shield a military objective from attack, or to shield, favor, or impede military operations, shall be punished as a military commission under this chapter may direct.

(11) Torture.--

(A) Offense.--Any person subject to this chapter who commits an act specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control for the purpose of obtaining information or a confession, punishment, intimidation, coercion, or any reason based on discrimination of any kind, shall be punished, if death results to one or more of the victims, by death or such other punishment as a military commission under this chapter may direct, and, if death does not result to any of the victims, by such punishment, other than death, as a military commission under this chapter may direct.

(B) Severe mental pain or suffering defined.--In this paragraph, the term "severe mental pain or suffering" has the meaning given that term in section 2340(2) of title 18.

(12) Cruel or inhuman treatment.--Any person subject to this chapter who subjects another person in their custody or under their physical control, regardless of nationality or physical location, to cruel or inhuman treatment that constitutes a grave breach of common Article 3 of the Geneva Conventions shall be punished, if death results to the victim, by death or such other punishment as a military commission under this chapter may direct, and, if death does not result to the victim, by such punishment, other than death, as a military commission under this chapter may direct.

(13) Intentionally causing serious bodily injury.--

(A) Offense.--Any person subject to this chapter who intentionally causes serious bodily injury to one or more persons, including privileged belligerents, in violation of the law of war shall be punished, if death results to one or more of the victims, by death or such other punishment as a military commission under this chapter

may direct, and, if death does not result to any of the victims, by such punishment, other than death, as a military commission under this chapter may direct.

(B) Serious bodily injury defined.--In this paragraph, the term "serious bodily injury" means bodily injury which involves--

(i) a substantial risk of death;

(ii) extreme physical pain;

(iii) protracted and obvious disfigurement; or

(iv) protracted loss or impairment of the function of a bodily member, organ, or mental faculty.

(14) Mutilating or maiming.--Any person subject to this chapter who intentionally injures one or more protected persons by disfiguring the person or persons by any mutilation of the person or persons, or by permanently disabling any member, limb, or organ of the body of the person or persons, without any legitimate medical or dental purpose, shall be punished, if death results to one or more of the victims, by death or such other punishment as a military commission under this chapter may direct, and, if death does not result to any of the victims, by such punishment, other than death, as a military commission under this chapter may direct.

(15) Murder in violation of the law of war.--Any person subject to this chapter who intentionally kills one or more persons, including privileged belligerents, in violation of the law of war shall be punished by death or such other punishment as a military commission under this chapter may direct.

(16) Destruction of property in violation of the law of war.--Any person subject to this chapter who intentionally destroys property belonging to another person in violation of the law of war shall [FN1] punished as a military commission under this chapter may direct.

(17) Using treachery or perfidy.--Any person subject to this chapter who, after inviting the confidence or belief of one or more persons that they were entitled to, or obliged to accord, protection under the law of war, intentionally makes use of that confidence or belief in killing, injuring, or capturing such person or persons shall be punished, if death results to one or more of the victims, by death or such other punishment as a military commission under this chapter may direct, and, if death does not result to any of the victims, by such punishment, other than death, as a

military commission under this chapter may direct.

(18) Improperly using a flag of truce.--Any person subject to this chapter who uses a flag of truce to feign an intention to negotiate, surrender, or otherwise suspend hostilities when there is no such intention shall be punished as a military commission under this chapter may direct.

(19) Improperly using a distinctive emblem.--Any person subject to this chapter who intentionally uses a distinctive emblem recognized by the law of war for combatant purposes in a manner prohibited by the law of war shall be punished as a military commission under this chapter may direct.

(20) Intentionally mistreating a dead body.--Any person subject to this chapter who intentionally mistreats the body of a dead person, without justification by legitimate military necessary, shall be punished as a military commission under this chapter may direct.

(21) Rape.--Any person subject to this chapter who forcibly or with coercion or threat of force wrongfully invades the body of a person by penetrating, however slightly, the anal or genital opening of the victim with any part of the body of the accused, or with any foreign object, shall be punished as a military commission under this chapter may direct.

(22) Sexual assault or abuse.--Any person subject to this chapter who forcibly or with coercion or threat of force engages in sexual contact with one or more persons, or causes one or more persons to engage in sexual contact, shall be punished as a military commission under this chapter may direct [FN1]

(23) Hijacking or hazarding a vessel or aircraft.--Any person subject to this chapter who intentionally seizes, exercises unauthorized control over, or endangers the safe navigation of a vessel or aircraft that is not a legitimate military objective shall be punished, if death results to one or more of the victims, by death or such other punishment as a military commission under this chapter may direct, and, if death does not result to any of the victims, by such punishment, other than death, as a military commission under this chapter may direct.

(24) Terrorism.--Any person subject to this chapter who intentionally kills or inflicts great bodily harm on one or more protected persons, or intentionally engages in an act that evinces a wanton disregard for human life, in a manner calculated to influence or affect the conduct of government or civilian population by intimidation

or coercion, or to retaliate against government conduct, shall be punished, if death results to one or more of the victims, by death or such other punishment as a military commission under this chapter may direct, and, if death does not result to any of the victims, by such punishment, other than death, as a military commission under this chapter may direct.

(25) Providing material support for terrorism.--

(A) Offense.--Any person subject to this chapter who provides material support or resources, knowing or intending that they are to be used in preparation for, or in carrying out, an act of terrorism (as set forth in paragraph (24) of this section), or who intentionally provides material support or resources to an international terrorist organization engaged in hostilities against the United States, knowing that such organization has engaged or engages in terrorism (as so set forth), shall be punished as a military commission under this chapter may direct.

(B) Material support or resources defined.--In this paragraph, the term "material support or resources" has the meaning given that term in section 2339A(b) of title 18.

(26) Wrongfully aiding the enemy.--Any person subject to this chapter who, in breach of an allegiance or duty to the United States, knowingly and intentionally aids an enemy of the United States, or one of the co-belligerents of the enemy, shall be punished as a military commission under this chapter may direct.

(27) Spying.--Any person subject to this chapter who, in violation of the law of war and with intent or reason to believe that it is to be used to the injury of the United States or to the advantage of a foreign power, collects or attempts to collect information by clandestine means or while acting under false pretenses, for the purpose of conveying such information to an enemy of the United States, or one of the co-belligerents of the enemy, shall be punished by death or such other punishment as a military commission under this chapter may direct.

(28) Attempts.--

(A) In general.--Any person subject to this chapter who attempts to commit any offense punishable by this chapter shall be punished as a military commission under this chapter may direct.

(B) Scope of offense.--An act, done with specific intent to commit an offense under this chapter, amounting to more than mere preparation and tending, even

though failing, to effect its commission, is an attempt to commit that offense.

(C) Effect of consummation.--Any person subject to this chapter may be convicted of an attempt to commit an offense although it appears on the trial that the offense was consummated.

(29) Conspiracy.--Any person subject to this chapter who conspires to commit one or more substantive offenses triable by military commission under this subchapter, and who knowingly does any overt act to effect the object of the conspiracy, shall be punished, if death results to one or more of the victims, by death or such other punishment as a military commission under this chapter may direct, and, if death does not result to any of the victims, by such punishment, other than death, as a military commission under this chapter may direct.

(30) Solicitation.--Any person subject to this chapter who solicits or advises another or others to commit one or more substantive offenses triable by military commission under this chapter shall, if the offense solicited or advised is attempted or committed, be punished with the punishment provided for the commission of the offense, but, if the offense solicited or advised is not committed or attempted, shall be punished as a military commission under this chapter may direct.

(31) Contempt.--A military commission under this chapter may punish for contempt any person who uses any menacing word, sign, or gesture in its presence, or who disturbs its proceedings by any riot or disorder.

(32) Perjury and obstruction of justice.--A military commission under this chapter may try offenses and impose such punishment as the military commission may direct for perjury, false testimony, or obstruction of justice related to the military commission.

Executive Order 13,492, 74 Fed. Reg. 4897 (Jan. 22, 2009)

Review and Disposition of Individuals Detained At the Guantánamo Bay Naval Base and Closure of Detention Facilities

The President

By the authority vested in me as President by the Constitution and the laws of the United States of America, in order to effect the appropriate disposition of individuals currently detained by the Department of Defense at the Guantánamo Bay Naval Base (Guantánamo) and promptly to close detention facilities at Guantánamo, consistent with the national security and foreign policy interests of the United States and the interests of justice, I hereby order as follows:

Section 1. Definitions. As used in this order:

(a) "Common Article 3" means Article 3 of each of the Geneva Conventions.

(b) "Geneva Conventions" means:

(i) the Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, August 12, 1949 (6 UST 3114);

(ii) the Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, August 12, 1949 (6 UST 3217);

(iii) the Convention Relative to the Treatment of Prisoners of War, August 12, 1949 (6 UST 3316); and

(iv) the Convention Relative to the Protection of Civilian Persons in Time of War, August 12, 1949 (6 UST 3516).

(c) "Individuals currently detained at Guantánamo" and "individuals covered by this order" mean individuals currently detained by the Department of Defense in facilities at the Guantánamo Bay Naval Base whom the Department of Defense has ever determined to be, or treated as, enemy combatants.

Sec. 2. Findings.

(a) Over the past 7 years, approximately 800 individuals whom the Department of Defense has ever determined to be, or treated as, enemy combatants have been detained at Guantánamo. The Federal Government has moved more than 500 such detainees from Guantánamo, either by returning them to their home country or by releasing or transferring them to a third country. The Department of Defense has determined that a number of the individuals currently detained at Guantánamo are eligible for such transfer or release.

(b) Some individuals currently detained at Guantánamo have been there for more than 6 years, and most have been detained for at least 4 years. In view of the significant concerns raised by these detentions, both within the United States and internationally, prompt and appropriate disposition of the individuals currently detained at Guantánamo and closure of the facilities in which they are detained would further the national security and foreign policy interests of the United States and the interests of justice. Merely closing the facilities without promptly determining the appropriate disposition of the individuals detained would not adequately serve those interests. To the extent practicable, the prompt and appropriate disposition of the individuals detained at Guantánamo should precede the closure of the detention facilities at Guantánamo.

(c) The individuals currently detained at Guantánamo have the constitutional privilege of the writ of habeas corpus. Most of those individuals have filed petitions for a writ of habeas corpus in Federal court challenging the lawfulness of their detention.

(d) It is in the interests of the United States that the executive branch undertake a prompt and thorough review of the factual and legal bases for the continued detention of all individuals currently held at Guantánamo, and of whether their continued detention is in the national security and foreign policy interests of the United States and in the interests of justice. The unusual circumstances associated with detentions at Guantánamo require a comprehensive interagency review.

(e) New diplomatic efforts may result in an appropriate disposition of a substantial number of individuals currently detained at Guantánamo.

(f) Some individuals currently detained at Guantánamo may have committed offenses for which they should be prosecuted. It is in the interests of the United States to review whether and how any such individuals can and should be prosecuted.

(g) It is in the interests of the United States that the executive branch conduct a prompt and thorough review of the circumstances of the individuals currently detained at Guantánamo who have been charged with offenses before military commissions pursuant to the Military Commissions Act of 2006, Public Law 109-366, as well as of the military commission process more generally.

Sec. 3. Closure of Detention Facilities at Guantánamo. The detention facilities at Guantánamo for individuals covered by this order shall be closed as soon as practicable, and no later than 1 year from the date of this order. If any individuals covered by this order remain in detention at Guantánamo at the time of closure of those detention facilities, they shall be returned to their home country, released, transferred to a third country, or transferred to another United States detention facility in a manner consistent with law and the national security and foreign policy interests of the United States.

Sec. 4. Immediate Review of All Guantánamo Detentions.

(a) Scope and Timing of Review. A review of the status of each individual currently detained at Guantánamo (Review) shall commence immediately.

(b) Review Participants. The Review shall be conducted with the full cooperation and participation of the following officials:

(1) the Attorney General, who shall coordinate the Review;

(2) the Secretary of Defense;

(3) the Secretary of State;

(4) the Secretary of Homeland Security;

(5) the Director of National Intelligence;

(6) the Chairman of the Joint Chiefs of Staff; and

(7) other officers or full-time or permanent part-time employees of the United States, including employees with intelligence, counterterrorism, military, and legal expertise, as determined by the Attorney General, with the concurrence of the head of the department or agency concerned.

(c) Operation of Review. The duties of the Review participants shall include the following:

(1) Consolidation of Detainee Information. The Attorney General shall, to the extent reasonably practicable, and in coordination with the other Review participants, assemble all information in the possession of the Federal Government that pertains to any individual currently detained at Guantánamo and that is relevant to determining the proper disposition of any such individual. All executive branch departments and agencies shall promptly comply with any request of the Attorney General to provide information in their possession or control pertaining to any such individual. The Attorney General may seek further information relevant to the Review from any source.

(2) Determination of Transfer. The Review shall determine, on a rolling basis and as promptly as possible with respect to the individuals currently detained at Guantánamo, whether it is possible to transfer or release the individuals consistent with the national security and foreign policy interests of the United States and, if so, whether and how the Secretary of Defense may effect their transfer or release. The Secretary of Defense, the Secretary of State, and, as appropriate, other Review participants shall work to effect promptly the release or transfer of all individuals for whom release or transfer is possible.

(3) Determination of Prosecution. In accordance with United States law, the cases of individuals detained at Guantánamo not approved for release or transfer shall be evaluated to determine whether the Federal Government should seek to prosecute the detained individuals for any offenses they may have committed, including whether it is feasible to prosecute such individuals before a court established pursuant to Article III of the United States Constitution, and the Review participants shall in turn take the necessary and appropriate steps based on such determinations.

(4) Determination of Other Disposition. With respect to any individuals currently detained at Guantánamo whose disposition is not achieved under paragraphs (2) or (3) of this subsection, the Review shall select lawful means, consistent with the national security and foreign policy interests of the United States and the interests of justice, for the disposition of such individuals. The appropriate authorities shall promptly implement such dispositions.

(5) Consideration of Issues Relating to Transfer to the United States. The Review shall identify and consider legal, logistical, and security issues relating to the potential transfer of individuals currently detained at Guantánamo to facilities within the United States, and the Review participants shall work with the Congress on any legislation that may be appropriate.

Sec. 5. Diplomatic Efforts. The Secretary of State shall expeditiously pursue and direct such negotiations and diplomatic efforts with foreign governments as are necessary and appropriate to implement this order.

Sec. 6. Humane Standards of Confinement. No individual currently detained at Guantánamo shall be held in the custody or under the effective control of any officer, employee, or other agent of the United States Government, or at a facility owned, operated, or controlled by a department or agency of the United States, except in conformity with all applicable laws governing the conditions of such confinement, including Common Article 3 of the Geneva Conventions. The

Secretary of Defense shall immediately undertake a review of the conditions of detention at Guantánamo to ensure full compliance with this directive. Such review shall be completed within 30 days and any necessary corrections shall be implemented immediately thereafter.

Sec. 7. Military Commissions. The Secretary of Defense shall immediately take steps sufficient to ensure that during the pendency of the Review described in section 4 of this order, no charges are sworn, or referred to a military commission under the Military Commissions Act of 2006 and the Rules for Military Commissions, and that all proceedings of such military commissions to which charges have been referred but in which no judgment has been rendered, and all proceedings pending in the United States Court of Military Commission Review, are halted.

Sec. 8. General Provisions.

(a) Nothing in this order shall prejudice the authority of the Secretary of Defense to determine the disposition of any detainees not covered by this order.

(b) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

ADDENDUM: UNPUBLISHED DECISIONS

ADDENDUM: UNPUBLISHED DECISIONS
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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IBRAHAM AHMED MAHMOUD AL QOSI, Petitioner, v. BARACK OBAMA, et al., Respondents.	)	Civil Action No. 04-1937 (PLF)

ORDER

This matter is before the Court on respondents' motion to dismiss or to hold the *habeas* petition in abeyance. Respondents argue that petitioner's case should be dismissed or be held in abeyance because he faces charges before a military commission and that he should be required to exhaust his criminal proceedings before seeking habeas relief.

In the time since respondents filed their motion, the military commission proceedings have been suspended. See Respondents' Reply at 1-2. On May 15, 2009, President Obama issued a statement indicating that the military commission proceedings will resume, but that the Department of Defense would seek additional continuances in several pending proceedings in order to "reform the military commission process." See Statement of President Obama on Military Commissions, The White House Office of the Press Secretary (May 15, 2009). There is no date certain upon which the military commission proceedings will resume. The petitioner therefore cannot exhaust his criminal proceedings without suffering further delay. See Order, Al Halmandy v. Obama, Civil Action No. 05-2385 at 1 (April 22, 2009); Order,

Alsawam v. Obama, Civil Action No. 05-1244 at 2-3 (April 15, 2009); Order, Al Darbi v. Obama, Civil Action No. 05-2371 at 1 (April 7, 2009).[1] Accordingly, it is hereby

ORDERED that respondents' motion [70] is DENIED without prejudice. Respondents may re-file the motion, if appropriate, upon resumption of prosecution of the charges against petitioner in a criminal forum, military or civilian.

SO ORDERED.

/s/
PAUL L. FRIEDMAN
United States District Judge

DATE: May 26, 2009

[1] The parties have been proceeding with discovery in the petitioner's case, as indicated in part, by the Court's Order of May 26, 2009 granting an extension of time in which petitioner may file his traverse until July 17, 2009.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

TARIQ MAHMOUD ALSAWAM, Petitioner, v. BARACK H. OBAMA, President of the United States, *et al*., Respondents.	Civil Action No. 05-1244 (CKK)
IN RE: GUANTANAMO BAY DETAINEE LITIGATION	Misc. No. 08-442 (TFH)

ORDER
(April 15, 2009)

Petitioner Tariq Mahmoud Alsawam ("Petitioner") is one of the detainees currently held by the United States Government at Guantanamo Bay, Cuba, pursuant to the Authorization for the Use of Military Force ("AUMF"), Pub. L. 107-40, 115 Stat. 224 (2001). Petitioner has filed a habeas petition, which is currently pending before this Court. On December 12, 2008, Petitioner was also charged with violations of the laws of war under the Military Commissions Act, 10 U.S.C. § 948a - 950w (the "MCA").

Currently pending before the Court is the Government's [91] Motion to Dismiss or, in the alternative, to Hold in Abeyance, Petitioner's habeas petition pending completion of his military commission proceedings. Petitioner filed an [101] Opposition to the Government's Motion on January 8, 2009. The Government declined to file a Reply. Accordingly, briefing on the Government's Motion is now complete.

Thereafter, on January 26, 2009, in light of the change in administrations, the Court issued a Minute Order addressing the Government's pending motion, which provided that:

> Before the Court issues a ruling on Respondents' Motion [], the Court shall require Respondents to submit a notice to the Court . . . indicating: (1) the current status of charges against Petitioner and whether any charges have, in fact, been referred to military commissions for further proceedings; and (2) whether there have been any changes in Respondents' position, as expressed in its Motion, of which the Court should be made aware.

1/26/09 Min. Order. As required, Respondents filed a [128] Notice to the Court providing the requested information. Respondents informed the Court that "charges are still pending against Petitioner Alsawam for violations of the laws of war under the [MCA] . . . but have not yet been referred by the Convening Authority to a military commission for prosecution." Gov't's Not. at 1. Further, the Government advised the Court that "the Secretary of Defense has directed the Convening Authority to cease referring cases to the military commissions to provide the Executive sufficient time to conduct a review of the detainees held at Guantanamo Bay pursuant to the President's January 22, 2009 Executive Order pertaining to the 'Review and Disposition of Individuals Detained at the Guantanamo Bay Naval Base and Closure of Detention Facilities.'" *Id.* at 1-2 (citing Exec. Order No. 13,492, 74 Fed. Reg. 4897 (Jan. 22, 2009)).

Respondents thus acknowledge that the charges against Petitioner have not yet been referred by the Convening Authority to a military commission for prosecution and that the military commission is now expressly prohibited from doing so. Although Respondents do not indicate whether the Secretary of Defense contemplates lifting this ban on referrals to military commissions at a future date or whether the prohibition is indefinite in nature, it is nonetheless apparent that a military commission is unlikely to be convened to consider Petitioner's charges in the immediate future. Indeed, as Petitioner's Opposition repeatedly emphasizes, a military commission may *never*

be convened. Pet'r's Opp'n at 2-3 (noting that the Rules for Military Commissions do not set a deadline for action by the Convening Authority); *see also* Rules for Military Commissions[1] 401(a) (Convening Authority may decide to dismiss any or all charges rather than refer them to a military commission). Petitioners argue that, "[t]o dismiss or stay their habeas petitions based on speculation about what might happen next would be inappropriate and inconsistent with" the Supreme Court's ruling in *Boumediene v. Bush*, 128 S. Ct. 2229 (2008). *Id.* at 4. The Government declined to file a reply and therefore does not provide a response to this contention. Regardless, the Court agrees with Petitioner. The Court therefore declines to consider the merits of the Government's Motion to Dismiss or, in the alternative, to Hold in Abeyance, Petitioner's habeas petition, in light of the utter uncertainty that any such military commission will ever, in fact, be convened.

Accordingly, it is this 15th day of April, 2009, hereby

ORDERED that the [91] Respondents' Motion to Dismiss Habeas Petition Without Prejudice or, Alternatively, to Hold Petition in Abeyance Pending Completion of Military Commission Proceedings is DENIED WITHOUT PREJUDICE. The Government may re-file its motion, if appropriate, upon referral of the charges sworn against Petitioner to a military commission.

SO ORDERED.

/s/
COLLEEN KOLLAR-KOTELLY
United States District Judge

[1] The Rules for Military Commissions are available on a website hosted by the Department of Defense, http://www.defenselink.mil/news/commissionsmanual.html.

U.S. District Court
District of Columbia (Washington, DC)
CIVIL DOCKET FOR CASE #: 1:06-cv-01725-EGS

AL-SHIBH et al v. BUSH et al
Assigned to: Judge Emmet G. Sullivan
Case in other court: 08-05414
Cause: 28:2241 Petition for Writ of Habeas Corpus (federa
Date Filed: 10/05/2006
Jury Demand: None
Nature of Suit: 530 Habeas Corpus (General)
Jurisdiction: U.S. Government Defendant

* * *

04/16/2009: MINUTE ORDER granting 92 Joint Motion to Stay. The parties shall file a Status Report on June 1, 2009. The April 21, 2009 Status Hearing is continued to June 11, 2009 at 1:00 p.m. Signed by Judge Emmet G. Sullivan on April 16, 2009. (AS) (Entered: 04/16/2009)

* * *

09/23/2009 MINUTE ORDER. Pursuant to the Joint Status Report submitted by the parties on September 23, 2009, it is hereby ORDERED that these proceedings shall remain stayed until further Order of the Court. It is further ORDERED that the parties shall file a joint status report by no later than November 18, 2009. It is further ORDERED that the Status Hearing previously scheduled for September 30, 2009 is continued to December 2, 2009 at 11:00 a.m. in Courtroom 24A. Signed by Judge Emmet G. Sullivan on September 23, 2009. (AS) (Entered: 09/23/2009)

* * *

11/18/2009 MINUTE ORDER. Upon consideration of 117 the Joint Status Report Requesting Continuation of Stay, the Court grants the request and ORDERS that the stay be continued until further Order of the Court. It is further ORDERED that the parties shall file a joint status report by no later than January 20, 2010. It is further ORDERED that the status hearing previously scheduled for December 2, 2009 is cancelled. Signed by Judge Emmet G. Sullivan on November 18, 2009. (AS) (Entered: 11/18/2009)

* * *

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 09-5156 **September Term 2009**

1:08-cv-01238-RWR

Filed On: December 17, 2009

Shawki Awad Balzuhair,

Appellant

v.

Barack Obama, et al.,

Appellees

BEFORE: Ginsburg, Brown, and Griffith, Circuit Judges

O R D E R

Upon consideration of the motion to dismiss, the response thereto, and the reply, it is

ORDERED that the motion be granted. The district court entered a stay to allow petitioner's counsel a further opportunity to comply with District Judge Hogan's order of July 29, 2008, which directs that, in all cases in which a detainee is represented by a next friend, "counsel shall file a signed authorization from the petitioner to pursue the action or a declaration by counsel that states that the petitioner directly authorized counsel to pursue the action and explains why counsel was unable to secure a signed authorization." Appellant has not demonstrated that the stay order in purpose or effect is a final decision appealable under 28 U.S.C. § 1291, see Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 10 (1983), or that it comes within the collateral order doctrine of Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541 (1949). This ruling is without prejudice to appellant's counsel's ability to seek appropriate relief from the district court, even in the absence of evidence of direct authorization of representation.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam