No. 16-8966

IN THE SUPREME COURT OF THE UNITED STATES

ABD AL-RAHIM AL-NASHIRI, PETITIONER

v.

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether, during an ongoing military-commission prosecution, (a) a federal court should abstain from adjudicating a collateral attack on the commission's jurisdiction to consider the particular charges against a defendant, and (b) no "extraordinary circumstances" in petitioner's case make abstention inappropriate.

2. Whether the court of appeals erred in its understanding of what must be shown to establish a "clear and indisputable" right to mandamus relief.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-78) is reported at 835 F.3d 110. The opinion and order of the district court (Pet. App. 79-88) is reported at 76 F. Supp. 3d 218.

JURISDICTION

The judgment of the court of appeals was entered on August 30, 2016. A petition for rehearing was denied on October 19, 2016 (Pet. App. 97). The petition for a writ of certiorari was filed on January 17, 2017. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner is an alien detained by the Department of Defense at Guantanamo Bay, Cuba, who has been charged with capital offenses triable by military commission under the Military Commissions Act of 2009 (MCA), Pub. L. No. 111-84, Div. A, Tit. XVIII, 123 Stat. 2574 (10 U.S.C. 948a et seq.). Petitioner sought a writ of habeas corpus in district court; the district court abstained from adjudicating petitioner's claims while the military commission's proceedings were ongoing; Pet. App. 79-88; and petitioner appealed. Petitioner separately sought a writ of mandamus in the court of appeals to compel dismissal of the military-commission charges. The court of appeals affirmed and denied mandamus. Id. at 1-78.

1. The charges against petitioner arise out of his alleged leadership role, under the direction of Osama bin Laden, in the attempted bombing of the USS The Sullivans and the bombings of the USS Cole and the French supertanker M/V Limburg. The charges set forth the following allegations: In 1997 or 1998, petitioner met with bin Laden and other senior al Qaeda members to plan a "boats operation" to attack ships near the Arabian Peninsula. Pet. App. 3. While bin Laden was planning the boats operation, he was also coordinating the "planes operation" that would later unfold on September 11, 2001. Ibid. At bin Laden's direction, petitioner prepared to execute the boats operation by surveilling Yemen's Port of Aden, recruiting co-conspirators, obtaining and storing

explosives, and purchasing a boat and other materials. Id. at 3-4; see Gov't C.A. Br. 8-9.

In January 2000, petitioner's co-conspirators, under petitioner's direction, steered an explosives-filled boat toward the USS The Sullivans while it was refueling in Aden Harbor. Pet. App. 4. The attack failed when the boat foundered in the surf, but petitioner and his co-conspirators salvaged the boat and explosives. Ibid. Petitioner returned to Afghanistan to meet with bin Laden and obtain explosives training from an al Qaeda expert. Ibid.

By the summer of 2000, petitioner had returned to Yemen to prepare a second attack. Pet. App. 4. Petitioner and his co-conspirators repaired and tested the attack boat, filled it with explosives, and arranged to videotape the impending attack. Ibid.

In October 2000, suicide bombers selected by petitioner and following his instructions piloted the explosives-packed boat in Aden Harbor to the USS Cole. Pet. App. 4-5. The bombers made friendly gestures to crew members and steered the boat alongside the Cole before detonating the explosives. Id. at 5. The explosion tore a 30-foot hole in the side of the Cole, killing 17 crew members and injuring at least 37 others. Ibid.

Later, in 2001 and 2002, petitioner planned another maritime bombing, which led to the attack on the French supertanker M/V Limburg near the port of Al Mukallah, Yemen. Pet. App. 5; Gov't C.A. Br. 11. In October 2002, suicide bombers under petitioner's direction detonated an explosives-laden boat alongside the ship,

killing one crewmember, injuring 12 others, and causing about 90,000 barrels of oil to spill in the Gulf of Aden. Pet. App. 5.

2. Although petitioner was captured in late 2002 and has been detained since that time, see Pet. App. 5, 80, this case as it comes to this Court concerns the ongoing military-commission proceedings against petitioner that were initiated in 2011 under the MCA after the 2009 enactment of that statute. Cf. id. at 81-82, 89.[1] Over 2600 filings have since been made in those proceedings, most of which have been given an Appellate Exhibit (AE) designation and are publicly available at the Office of Military Commission website. See Office of Military Commissions, USS Cole: Abd al-Rahim Hussein Muhammed Abdu Al-Nashiri, http://www.mc.mil/Cases.aspx?caseType=omc&status=1&id=34.

a. The current military-commission system is "the product of an extended dialogue" among the political Branches and this Court. Pet. App. 6 (citation omitted). After the Court in Hamdan v. Rumsfeld, 548 U.S. 557 (2006), determined that an earlier military-commission process created by the Executive Branch exceeded then-existing statutory authority, id. at 590-595, 613, 620-635, Congress enacted the MCA to authorize the President to establish military commissions to try alien unprivileged enemy belligerents

[1] Petitioner was initially charged in late 2008 under the 2006 predecessor to the current MCA, but those charges were dismissed without prejudice in early 2009. Pet. App. 80-81; cf. id. at 20, 23 (discussing 2006 statute).

for violations of the law of war and other offenses. 10 U.S.C. 948b(a) and (b), 948c; see Pet. App. 6-7. Among other things, the MCA establishes "enhanced procedural protections and rigorous review mechanisms for military commissions." Pet. App. 20; see, e.g., 10 U.S.C. 949a(a) and (b) (specifying certain trial rights and generally requiring use of the rules for general courts-martial with limited exceptions); see also, e.g., 10 U.S.C. 948q-949o, 950a-950j (2012 & Supp. III 2015).

The MCA provides that military commissions "shall have jurisdiction to try persons subject to [the MCA]," 10 U.S.C. 948d -- i.e., "alien unprivileged enemy belligerent[s]," 10 U.S.C. 948c -- a category that includes an alien who was "a part of al Qaeda at the time of the alleged offense," 18 U.S.C. 948a(7)(C). Such persons may be tried "for any offense made punishable" by the MCA, other specified provisions, or "the law of war," "whether such offense was committed before, on, or after September 11, 2001." 10 U.S.C. 948d.

The MCA identifies 32 offenses "triable by military commission," 10 U.S.C. 950t, including murder in violation of the law of war and other offenses for which petitioner has been charged. See, e.g., 10 U.S.C. 950t(2)-(3), (15), (23), and (24). An offense "is triable by military commission under [the MCA] only if the offense is committed in the context of and associated with hostilities." 10 U.S.C. 950p(c). "Hostilities" in this context means "any conflict subject to the laws of war." 10 U.S.C. 948a(9).

Any conviction by a military commission is subject to multiple layers of review. First, the convening authority has discretion to dismiss any charge on which the commission found the accused guilty; to convict the accused only of a lesser included offense; and to approve, disapprove, suspend, or commute (but not enhance) any sentence rendered by the commission. 10 U.S.C. 950b(c)(2) and (3). Second, if the convening authority approves a guilt finding, it must refer the case to the United States Court of Military Commission Review (USCMCR), unless the accused expressly waives his right to review and only a non-capital sentence has been imposed. 10 U.S.C. 950c(a) and (b). The USCMCR may affirm a finding of guilt and a sentence on appeal only if it determines they are "correct in law and fact" and "should be approved" in light of "the entire record." 10 U.S.C. 950f(d).

A convicted defendant may then petition for review in the D.C. Circuit, which has "exclusive jurisdiction to determine the validity of a final judgment rendered by a military commission" (as approved by the convening authority and sustained by the USCMCR). 10 U.S.C. 950g(a). Such review by the court of appeals extends to all "matters of law, including the sufficiency of the evidence to support the verdict." 10 U.S.C. 950g(d). The MCA, however, expressly prohibits review of a final judgment by the D.C. Circuit "until all other appeals under [the MCA] have been waived or exhausted." 10 U.S.C. 950g(b).

b. In September 2011, a military commission was convened to try petitioner on nine charges, including terrorism, murder in violation of the law of war, attacking civilians, hazarding a vessel, and attacking civilian objects. In re al-Nashiri, 791 F.3d 71, 75 (D.C. Cir. 2015). In August 2012, petitioner moved to dismiss those charges based on his contention that the MCA authorizes a charge "only if the offense is committed in the context of and associated with hostilities," 10 U.S.C. 950p(c), and that his alleged conduct occurred before "hostilities" between the United States and al Qaeda. See Pet. App. 89. Cf. id. at 56 (summarizing government's contention that hostilities with al Qaeda have existed since at least 1998); Gov't C.A. Br. 5-7, 31-36 (same). In January 2013, a military judge denied petitioner's motion without prejudice. Pet. App. 89-96. The judge explained that (1) as a question of law, the political Branches (in, inter alia, the MCA) had determined that hostilities existed before the September 11, 2001 attacks, id. at 91-96, and (2) the existence of hostilities on the dates of petitioner's alleged conduct was a question of fact to be established by the government at trial, id. at 90-91, 95.

In early 2015, the military judge granted petitioner's request to hold the military-commission proceedings in abeyance pending the government's two interlocutory appeals from adverse orders to the Court of Military Commission Review. Pet. App. 8. Later in 2015, the D.C. Circuit rejected petitioner's request for mandamus relief disqualifying the military judges on his panel. In re al-Nashiri,

791 F.3d at 73, 75. In June and July 2016, the Court of Military Commission Review resolved the interlocutory appeals in the government's favor. United States v. Al-Nashiri, 222 F. Supp. 3d 1093 (2016); United States v. Al-Nashiri, 191 F. Supp. 3d 1308 (2016). The commission then granted the government's request to resume the litigation of petitioner's case, Pet. App. 9-10, which is ongoing.

3. a. Meanwhile, petitioner attempted in multiple federal courts to halt the military-commission proceedings. First, in 2011, petitioner filed an action in the Western District of Washington seeking a declaratory judgment that the military commission lacked jurisdiction over his offense conduct because that conduct occurred before "hostilities" with al Qaeda. See Al-Nashiri v. MacDonald, 741 F.3d 1002, 1004 (9th Cir. 2013). The district court dismissed the action for want of jurisdiction, and the Ninth Circuit affirmed. Id. at 1006, 1010.

b. Shortly thereafter, in 2014, petitioner filed a supplemental habeas petition in an ongoing federal habeas action in the District of Columbia, seeking a declaration that his alleged conduct did not occur in the context of "hostilities" and an injunction enjoining the military-commission proceedings. Pet. App. 11, 79; see id. at 98-117 (supplemental habeas petition).

The district court granted the government's motion to hold the habeas petition in abeyance pending petitioner's trial by military commission and thus denied petitioner's request for a preliminary injunction. Pet. App. 79-88. The court concluded that abstention

was appropriate under the principles articulated in Schlesinger v. Councilman, 420 U.S. 738 (1975). The court determined that "traditional principles of comity and judicial economy support abstaining from exercising equitable jurisdiction over [petitioner's] habeas petition during the pendency of his military commission trial," Pet. App. 79-80, explaining that resolving petitioner's "hostilities"-based contentions would "necessarily overlap[] with a prime determination the military commission must make" and "interfere with the military commission trial," id. at 84-85.

4. Petitioner appealed and separately petitioned the court of appeals for a writ of mandamus. The court of appeals affirmed the district court's ruling and denied mandamus relief. Pet. App. 1-78.

a. The court of appeals held that the abstention principles in Councilman apply to the military-commission proceedings here. Pet. App. 13-36. The court explained that Councilman applied to the court-martial context the same basic abstention principles that Younger v. Harris, 401 U.S. 37 (1971), used to limit federal-court interruption of state criminal proceedings. Pet. App. 15-17; see id. at 40-41. Whereas Younger abstention builds upon (1) the principle that courts should not enjoin criminal prosecutions "where an adequate remedy at law exists" and (2) a federalism-based "comity" principle favoring the completion of state prosecutions without federal interruption, the court of appeals explained, Councilman determined that "'equally compelling'" factors exist in

the court-martial context: the "adequacy of the court-martial system in protecting service-members' rights" and "the military interests advanced by allowing courts-martial to proceed uninterrupted." Id. at 16-17 (quoting Councilman, 420 U.S. at 757). The court of appeals reasoned that abstention is similarly warranted here if a federal court is "assured" that "sufficiently 'compelling' factors" exist showing (1) "the adequacy of the alternative system in protecting the rights of defendants" and (2) "the importance of the interests served by allowing that system to proceed uninterrupted." Id. at 21-23.

The court of appeals held that both factors are present in the military-commission context. Pet. App. 23-36. First, the court found the MCA's military-commission process to be adequate, explaining that the process includes "a number of significant procedural and evidentiary safeguards" that petitioner does not dispute would allow the "full[] adjudicat[ion of] his defense that his conduct occurred outside the conduct of hostilities"; the review structure for military commissions is "more insulated from military influence" than it was for the court-martial involved in Councilman because the judges of the D.C. Circuit, unlike those of the Court of Appeals for the Armed Forces, enjoy Article III's guarantee of life tenure and salary protection, id. at 25-26; and the MCA's review provisions, which include a right to review by an Article III court, are "virtually identical to the review system" approved by Councilman, id. at 23. See id. at 23-27. Second, the court

determined that sufficiently important interests warrant abstention. Id. at 27-36. The MCA's review regime, the court reasoned, reflects a determination by the political Branches in this national-security context after Hamdan that "judicial review should not take place before [the military-commission system] has completed its work." Id. at 27, 31-32.

The court of appeals rejected petitioner's contention that "extraordinary circumstances" in his case make abstention unwarranted. Pet. App. 37-43. The court explained that, under the Younger principles upon which Councilman built, an exception to abstention for "'extraordinary circumstances'" exists when those circumstances "both [1] present the threat of 'great and immediate' injury" that would be "irreparable" and "[2] render the alternative tribunal 'incapable of fairly and fully adjudicating the federal issues before it.'" Id. at 37, 40-41 (quoting Kugler v. Helfant, 421 U.S. 117, 123-124 (1975)). Petitioner's contention that he would suffer irreparable psychological harm and be forced to disclose his defense if tried by military commission, the court concluded, was insufficient. Id. at 37-38. The court explained that "the cost, anxiety, and inconvenience of having to defend" against a criminal prosecution cannot "be considered irreparable" in this context, id. at 38 (quoting Councilman, 420 U.S. at 755), and, in any event, petitioner had failed to show that "he will not be given a fair hearing in the military commission," id. at 39-40.

In so ruling, the court of appeals explained that petitioner has not argued that Congress acted unconstitutionally in authorizing military commissions or in making him subject to trial by commission based on his status as an "alien unprivileged enemy belligerent"; that "any procedures" to be used are unconstitutional or "will prevent him from fully litigating his jurisdictional defense"; or that delaying habeas review would unlawfully suspend the writ. Pet. App. 42; see id. at 50. The court thus "emphasize[d]" that, under the MCA, petitioner "will be able to make his 'hostilities' argument" on review, including in a later "appeal as of right" to an Article III court (the D.C. Circuit). Id. at 13, 30.

b. The court of appeals likewise declined to grant mandamus relief because petitioner failed to show a "clear and indisputable" entitlement to relief based on his hostilities argument. Pet. App. 54-59. The court explained that, whatever the proper resolution of the parties' disputes about how to determine whether hostilities existed at the time of petitioner's alleged offenses, the four-Justice plurality and the three-Justice dissent in Hamdan "make clear" that the answers "are open questions" that "are not clear and indisputable." Id. at 56-58.

c. Judge Tatel dissented from the majority's abstention holding, but not from its denial of mandamus. Pet. App. 60-78. He acknowledged that the majority presented "a strong case" for abstention in the military-commission context, but he explained that, in his view, the case for abstention is undermined by material

differences between the prosecutions of service-members by courts-martial addressed in Councilman and the prosecutions of "non-servicemember[s] [by] military commissions" here. Id. at 60-63. Judge Tatel further concluded that, even if abstention were generally appropriate, petitioner's allegations of severe mistreatment while in United States custody and the harmful effect he asserts a trial by military commission would cause -- if credited by the district court in the habeas proceeding after fact-finding proceedings -- present extraordinary circumstances making abstention unwarranted. Id. at 63-78.

ARGUMENT

Petitioner contends that abstention doctrines should not apply to his challenge to the military commission's jurisdiction over the offenses for which he is charged (Pet. 21-29), and that in any event extraordinary circumstances make abstention unwarranted here (Pet. 29-33). Petitioner further contends (Pet. 33-37) that the court of appeals erroneously applied the clear-and-indisputable-right-to-relief standard when denying his mandamus petition. The court of appeals correctly held that abstention was appropriate while petitioner's military-commission prosecution remains ongoing and that petitioner failed to show a "clear and indisputable" right to mandamus relief. That decision does not conflict with any decision of this Court or of any other court of appeals. No further review is warranted.

1. a. The abstention principles reflected in Schlesinger v. Councilman, 420 U.S. 738 (1975), apply where, as here, a defendant collaterally challenges the jurisdiction of a military commission over the particular offenses for which he is charged, the defendant can fully and fairly raise that defense before the commission, and the statute authorizing the commission adequately provides for a right to judicial review. The court of appeals correctly applied those principles to affirm the district court's abstention decision. Pet. App. 15-18, 21-23.

This Court has long recognized that courts of equity "should not act to restrain a criminal prosecution[] when the moving party has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief." Younger v. Harris, 401 U.S. 37, 43-44 (1971). The "underlying reason" for that general abstention principle is to "avoid a duplication of legal proceedings and legal sanctions where a single suit would be adequate to protect the rights asserted." Id. at 44. In the context of a request to enjoin an ongoing state prosecution, the Court in Younger explained that that basic rationale is "reinforced" by considerations of "'comity'" reflecting a "proper respect for state functions" in our federal system. Ibid.

Those abstention principles, however, extend beyond state prosecutions. In Councilman, the Court applied the same "maxim of equitable jurisdiction" against enjoining ongoing prosecutions, 420 U.S. at 755, to hold that, while court-martial proceedings are on-

going, federal courts must abstain from adjudicating a collateral challenge to a court-martial's jurisdiction to try a service-member for particular offenses, even though the accused argued that the specific offenses were not "service connected" and were therefore beyond the court-martial's jurisdiction, id. at 741-742, 749, 754. See id. at 753-763.

Councilman recognized that the federalism-based comity concerns in Younger were "not implicated" in the court-martial context, but it reasoned that "equally compelling" factors were present. 420 U.S. at 757. "Congress," this Court explained, had "created an integrated system of military courts and review procedures," including a court of military appeals composed of civilian judges, which reflected Congress's "recogni[tion]" of the special needs relevant to military discipline and its "balanc[ing]" of those needs against the need to "ensur[e] fairness to servicemen." Id. at 757-758. "[T]he view that the military court system generally is adequate to and responsibly will perform its assigned task," the Court reasoned, is "implicit in the congressional scheme." Id. at 758. Councilman thus concluded that "this congressional judgment must be respected" by the Judiciary, which must "refrain from intervention" in ongoing court-martial proceedings. Ibid.

The court of appeals here determined that the same principles apply to prosecutions by military commission under the MCA. As in Councilman, the court of appeals reasoned, abstention is warranted by "'equally compelling' factors" that exist where, as here, a

court is "assured of both the adequacy of the alternative system in protecting the rights of defendants" and "the importance of the interests served by allowing that system to proceed uninterrupted." Pet. App. 21 (quoting Councilman, 420 U.S. at 757).

The court of appeals correctly concluded that the MCA provides both adjudicatory procedures that are sufficient to protect the rights of those tried by military commission, Pet. App. 25-26, and an appropriate system of appellate review, id. at 23-25. Significantly, petitioner has not argued that "any evidentiary or procedural defects will prevent the military commission and various appellate bodies from fully adjudicating his [hostilities-based] defense." Id. at 26. Indeed, the MCA's "review structure" is even "more insulated from military influence" than the court-martial process in Councilman because the MCA provides an appeal as of right to a court (the D.C. Circuit) whose judges enjoy Article III protections. Id. at 25; see id. at 13.

Furthermore, the MCA and the inter-Branch dialogue leading to its enactment reflect the important interests served by allowing the MCA's congressionally specified adjudicatory system to proceed uninterrupted. "[T]he view that the [MCA's adjudicatory] system generally is adequate to and responsibly will perform its assigned task" is itself "implicit in the congressional scheme." See Councilman, 420 U.S. at 758. That conclusion is reinforced, as the court of appeals explained, by the historical context here. The MCA was enacted as a direct response to Hamdan v. Rumsfeld, 548

U.S. 557 (2006), which deemed abstention unwarranted in the context of an earlier military-commission process created under Executive Branch directions that exceeded then-existing statutory authority, id. at 587, 590-595, 613, 620-635. See Pet. App. 18-20. Later, "Congress -- with the approval of two Presidents -- exercised its legitimate prerogatives when it decided, in response to Hamdan, that the ordinary federal court process was not suitable for trying certain enemy belligerents," id. at 28, choosing instead to establish by statute a military-commission process that included "enhanced procedural protections and rigorous review mechanisms," id. at 20. In doing so, Congress authorized review as of right by an Article III court, 10 U.S.C. 950g(a), but specifically postponed such review until all other appeals under the MCA have been completed, 10 U.S.C. 950g(b), thus confirming what was implicit in Councilman: Article III courts should await the completion of military-commission proceedings before intervening. Pet. App. 29-31. Just as in Councilman, that "congressional judgment must be respected" by Article III courts, which should "refrain from intervention" in the ongoing proceedings. Councilman, 420 U.S. at 758.

b. Petitioner does not dispute that the MCA reflects the political Branches' considered judgment, enacted in law, that Article III courts should defer review until after military-commission proceedings have completed. Nor does petitioner dispute the importance of deferring to that judgment in this national-security context. Petitioner instead raises a series of discrete

arguments against abstention in military-commission contexts, none of which have merit or warrant further review.

Petitioner contends (Pet. 24-25) that abstention is unwarranted because this Court addressed collateral challenges to military commissions in Ex parte Quirin, 317 U.S. 1 (1942), and Hamdan. But both decisions involved materially different legal regimes under which the accused had no right to appeal to judges insulated from military influence. See Hamdan, 548 U.S. at 587 (military-commission process created by Executive Branch was not a process that "Congress has established" and authorized review only by panel of "military officers designated by the Secretary [of Defense]"); Quirin, 317 U.S. at 23 (addressing lawfulness of military commission convened by Executive Order that "denied access to the courts" without discussing abstention).[2] Hamdan not only had no occasion

[2] The absence of any right to appeal for the Nazi-saboteur defendants in Quirin was particularly significant given the extraordinarily rapid pace of the proceedings and implementation of their resulting sentence. The Quirin defendants were captured in June 1942; their trial by military commission commenced on July 8; and, by July 27, "the case had been closed except for arguments of counsel." Quirin, 317 U.S. 21-23. Thereafter, the defendants petitioned for habeas relief, id. at 23; and, on July 28, the district court denied relief. Ex parte Quirin, 47 F. Supp. 431 (D.D.C. 1942). This Court, on July 29, heard oral argument during a special session and, on Friday, July 31, issued a per curiam opinion affirming the district court. 317 U.S. at 5-6, 18-20 & note. The following Monday, August 3, the military commission found the defendants guilty and sentenced them to death. Morris D. Davis, The Influence of Ex parte Quirin and Courts-Martial on Military Commissions, 103 Nw. U. L. Rev. Colloquy 121, 124 (2008). The President subsequently approved the sentences for six defendants, who were executed on August 8, 1942, just one month after the proceedings began. See ibid. Given that extraordinarily

to consider whether a statutory grant of a right of "limited" judicial review might warrant abstention, 548 U.S. at 588 n.19, but the Court itself also emphasized that its decision did not "foreclose the possibility that abstention may be appropriate in some cases seeking review of ongoing military commission proceedings," id. at 590. Hamdan instead simply deemed abstention unwarranted where the government had not identified an "'important countervailing interest'" to justify it, id. at 589 (citation omitted), and distinguished Councilman as a case in which abstention was "justified by [the Court's] expectation that the military court system established by Congress -- with its substantial procedural protections and provision for appellate review by independent civilian judges" -- would be able to vindicate the accused servicemember's rights, id. at 586. Congress, in response to Hamdan, has now established such a military-commission system under the MCA that provides a right to review by an Article III court for alien unprivileged enemy belligerents like petitioner. As explained above, that post-Hamdan process justifies abstention.

Invoking United States ex rel. Toth v. Quarles, 350 U.S. 11 (1955), and the plurality opinion in Reid v. Covert, 354 U.S. 1 (1957), petitioner appears to argue (Pet. 23, 27) that this Court

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expedited schedule and in the absence of any post-judgment right to appeal, it would have been impractical to defer habeas review until all proceedings had ended. By contrast, petitioner has a statutory right to several layers of review, including an appeal as of right to the D.C. Circuit, before a capital sentence may be carried out.

has intervened in similar pending military prosecutions. But both Quarles and Reid involved legal challenges by United States citizen defendants that "'turn[ed] on the[ir] status" as civilians not subject to military prosecution, i.e., they argued that the "military tribunal [lacked] personal jurisdiction over [them]." Hamdan, 548 U.S. at 585 n.16 (quoting Councilman, 420 U.S. at 759) (emphasis added). A defendant's assertion of such a "right not to be tried" at all by a tribunal is effectively unreviewable if delayed until after the trial has ended. See Midland Asphalt Corp. v. United States, 489 U.S. 794, 800-801 (1989). But that concept is inapposite here because petitioner has not "challenge[d] his status as an alien unprivileged enemy belligerent who is subject to detention and to trial by military commission." Pet. App. 50. Indeed, Councilman itself explained that Quarles and Reid "are not applicable" in cases like this, where a defendant "is subject to military authority" and merely contests military jurisdiction over "the offenses with which he is charged." 420 U.S. at 759-760. Such challenges to a military authority's "power to impose any punishment" are appropriately considered after the completion of the proceedings that will decide whether to impose such punishment. Id. at 760.

Petitioner similarly argues (Pet. 26) that "abstention doctrines do not apply when a tribunal is proceeding 'ultra vires and thus lacks jurisdiction'" (quoting Hamdan, 548 U.S. at 589 n.20). But petitioner omits the end of the pertinent quotation from Hamdan, which shows that Hamdan simply acknowledged that abstention

can be unwarranted when a defendant shows that the tribunal "lacks jurisdiction over him." 548 U.S. at 589 n.20 (emphasis added). Indeed, Hamdan's discussion of an "ultra vires" military commission refers to "a military tribunal [that] lacks personal jurisdiction over [the accused]" and therefore "fall[s] within the exception [from abstention]" reflected in Quarles and Reid that "Councilman recognized." Ibid. Because petitioner simply challenges the particular charges against him without arguing that the military commission "lacks jurisdiction over him" (ibid.), see Pet. App. 50, that exception is inapposite here.[3]

In an apparent attempt to distinguish Councilman, petitioner asserts (Pet. 25-26) that "none of the traditional bases for

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[3] Petitioner's reliance (Pet. 28) on Boumediene v. Bush, 553 U.S. 723 (2008), is unavailing for similar reasons. Boumediene addressed the territorial reach of the constitutional privilege of habeas corpus, id. at 739-771, and what characteristics a congressionally mandated substitute remedy must have so as not to constitute an unconstitutional suspension of the writ, id. at 771-792. The Court did so in the context of habeas petitioners who sought review of determinations of their "status" as enemy combatants who could lawfully be detained for the duration of a conflict. Id. at 732-733. Those issues are not pertinent to the abstention question here.

Boumediene did note that abstention was not an appropriate option in that case, because enemy-combatant determinations concern the "'status'" of detainees that justifies their detention (triggering the exception to abstention recognized in Councilman) and because delaying habeas review would accordingly amount to a "de facto suspension" of the writ. 553 U.S. at 771 (citation omitted). But as previously discussed, petitioner has not disputed his "status" as an alien unprivileged enemy belligerent "who is subject to detention and to trial by military commission," Pet. App. 50, and petitioner has not argued that "delaying habeas review in his case amounts to an unlawful suspension of the writ," id. at 42.

comity" exist, emphasizing that Councilman involved the prosecution of a "service-member" and the need to allow military disciplinary proceedings to continue interrupted. But petitioner cites nothing to support his narrow view of relevant "comity" considerations. Principles of "comity" are implicated not only by relations between separate sovereigns but also "among the respective branches of the Federal Government." First Nat'l City Bank v. Banco Nacional de Cuba, 406 U.S. 759, 762 (1972) (plurality opinion of Rehnquist, J.). "Councilman itself was an outgrowth of Younger abstention, which dealt with ongoing criminal proceedings in state courts and had nothing to do with military discipline," Pet. App. 33; see id. at 40-41 (citing cases), thus illustrating that abstention accommodates not only federalism-based comity concerns but also "considerations inherent in the separation of powers and the limitations envisioned by Article III," Zivotofsky ex rel. Zivotofsky v. Clinton, 566 U.S. 189, 206 (2012). Indeed, petitioner does not identify any specific error in the D.C. Circuit's conclusion that abstention is supported by "inter-branch comity" concerns and the need to give appropriate respect to "the prerogatives of coordinate branches of government," Pet. App. 34, whose determination about "the timing of Article III review" was "based on those branches' assessment of national security needs," id. at 31.

Petitioner contends (Pet. 28) that the D.C. Circuit erred by focusing on the statutory process rather than "the on-the-ground performance of the system that Congress and the Executive have

established." Pet. App. 27. But Councilman teaches that "it must be assumed" that such a statutory system can vindicate the accused's rights, because "implicit in the congressional scheme" is the view that its adjudicatory system is adequate to that task and "this congressional judgment must be respected." 420 U.S. at 758 (emphasis added). As the D.C. Circuit explained, such a judgment must be respected at least where, as here, the accused fails to identify any particular shortcomings that would "render the congressional scheme unlawful" or prevent him "from fully defending himself." Pet. App. 27.

Petitioner ultimately argues (Pet. 29) that "no speedy trial requirements" govern his trial by military commission and that the delays in his trial are "inimical to habeas corpus." Both contentions are incorrect. The Rules for Military Commissions impose timing requirements -- with exceptions providing reasonable flexibility -- generally analogous to the framework in the Speedy Trial Act of 1974, 18 U.S.C. 3161 et seq. See R. Mil. Comm'ns 707(a)(2), (b)(4), and (c), 911 (requiring the assembly of a military commission, which is analogous to the empaneling of a jury for trial, within 120 days of the service of the charges, subject to listed exceptions). In any event, as the court of appeals explained, no delays in the military commission's proceedings here have been unreasonable or excessive: It was petitioner who moved to abate proceedings during the government's interlocutory appeals, Pet. App. 8, 53; did not oppose a nearly year-long stay of those

appeals; and then opposed the government's motion to lift that stay, id. at 9. See id. at 52-53. Shortly before the court of appeals issued its decision, petitioner again moved to abate the military-commission proceedings pending resolution of an appeal in an entirely different military case. See AE 357 (filed Aug. 23, 2016). And although petitioner belatedly asserted at oral argument that the D.C. Circuit's review of his case might not occur until 2024, the court appropriately declined to base its decision on that assertion because petitioner failed to offer any basis for it at oral argument. Pet. App. 53.[4]

c. Petitioner alternatively argues (Pet. 29-33) that, even if abstention is generally appropriate while military-commission proceedings are ongoing, "extraordinary circumstances" make abstention unwarranted here. That contention is incorrect and does not warrant review.

In articulating the underlying abstention principles relevant here, Younger observed that abstention is sometimes unwarranted if "extraordinary circumstances" exist in which the risk of "irrepara-

[4] Petitioner subsequently attempted to substantiate his assertion after the court of appeals issued its decision by proffering a timeline in his panel-rehearing petition. The court did not need to consider such belated contentions because matters presented for the first time on rehearing "come[] too late." Bullock v. Mumford, 509 F.2d 384, 389 (D.C. Cir. 1974) (per curiam); see, e.g., United States v. Whitmore, 384 F.3d 836, 836-837 (D.C. Cir. 2004) (per curiam). Cf. United States ex. rel. Davis v. District of Columbia, 793 F.3d 120, 127 (D.C. Cir.) ("Generally, arguments raised for the first time at oral argument are forfeited."), cert. denied, 136 S. Ct. 699 (2015).

ble loss is both great and immediate" and it "plainly appears that [the accused's presentation of his defense in the underlying proceedings] would not afford adequate protection." 401 U.S. at 45 (citation omitted); see id. at 46 ("the threat to the [accused's] federally protected rights must be one that cannot be eliminated by his defense" in the underlying prosecution). Intervention in a tribunal's ongoing proceedings to avoid an irreparable harm is thus appropriate "[o]nly if 'extraordinary circumstances' render the [tribunal] incapable of fairly and fully adjudicating the federal issues before it." Kugler v. Helfant, 421 U.S. 117, 124 (1975). That principle reflects the "policy of equitable restraint" animating abstention, which rests "on the premise that ordinarily a pending [criminal] prosecution provides the accused a fair and sufficient opportunity for vindication" of his rights. Ibid.

The court of appeals thus correctly concluded that petitioner failed to identify "exceptional circumstances" warranting intervention in asserting that a trial by military commission will cause him "irreparable psychological harm" and "divulge his defense," Pet. App. 37-38. See id. at 37-43. First, as the court explained, "'the cost, anxiety, and inconvenience of having to defend'" against a criminal prosecution are not the type of "'irreparable'" injuries sufficient to discourage abstention, even though such harms are "often of serious proportions." Councilman, 420 U.S. at 754-755 (quoting Younger, 401 U.S. at 46); see Pet. App. 38. Second, assuming arguendo that petitioner's asserted harms are

"different in both kind and magnitude" from those normally experienced by a criminal defendant, the court of appeals correctly recognized that such harm is insufficient in itself to justify intervention, because petitioner has not shown (or argued) that the military-commission process is "'incapable of fairly and fully adjudicating the federal issues before it.'" Pet. App. 39 (quoting Kugler, 421 U.S. at 124).

Petitioner does not directly respond to the court of appeals' analysis. Petitioner instead focuses (Pet. 30-32) on his unadjudicated assertion that a capital trial by military commission would cause him significant psychological harm because, he contends, he is in a fragile mental state caused by his allegedly severe mistreatment while in United States custody. The government has not "conceded" (Pet. 32) petitioner's assertion that he would suffer such harm, and petitioner's contentions regarding mistreatment are the subject of ongoing military-commission proceedings.[5] But

[5] In the military-commission proceedings, the government has acknowledged that Central Intelligence Agency personnel subjected petitioner to Enhanced Interrogation Techniques (EITs) before he was delivered into the custody of the Department of Defense. 10/19/16 Gov't Response 2 (AE 354E). The military judge has granted petitioner extensive discovery from the government regarding his "conditions of confinement and detention" from 2002 and 2006 based on its understanding that petitioner was subjected to EITs before 2006 and its conclusion that discovery could support, inter alia, a "motion for appropriate relief" based on "outrageous government conduct." 6/24/14 Order 7-8 (AE 120AA); see id. at 8-10 (ordering disclosure of ten broad categories of discovery information). As of September 2016, the government had provided to petitioner's counsel more than 265,000 pages of discovery, including the materials relating to his treatment in custody. 9/30/16 Gov't

petitioner's assertions ultimately do not counsel in favor of interrupting his ongoing prosecution because they do not suggest that the military-commission process cannot fairly and fully adjudicate his claims. Indeed, petitioner has never disputed that he can "fully litigat[e] his jurisdictional defense" before the military commission and on MCA-authorized review, nor has he otherwise challenged "the competence of the military commission itself." Pet. App. 39-40, 42.

Citing Kugler, petitioner argues (Pet. 33) that a habeas court's intervention into his ongoing prosecution is "consistent with" this Court's decisions addressing "prosecutorial bad faith." But Kugler itself explained that "a showing of 'bad faith' or 'harassment' by [the] officials responsible for the prosecution" can justify a court's "equitable intervention" in the prosecution because it can show that the ongoing proceedings are "incapable of fairly and fully adjudicating" the defendant's case. Kugler, 421 U.S. at 124 (emphasis added). That "traditional narrow excep-

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Notice 1-3 (AE 120AAAAAA). The government is also providing petitioner with medical records, and the military judge has ordered that the government allow petitioner to undergo testing requiring the government to transport specialized medical equipment to Guantanamo Bay. See 3/17/17 Ruling 1-2 (AE 358D) (discussing provision of medical-records discovery); 4/9/15 Ruling 4 (AE 277M) (ordering MRI machine for brain-imaging scans). The commission system should be permitted to evaluate those materials and associated arguments about petitioner's treatment in custody and its effect on the military-commission proceedings in the first instance, particularly where, as here, petitioner has not disputed the competence of the military-commission process to consider such issues.

tion[]" to abstention, Huffman v. Pursue, Ltd., 420 U.S. 592, 602 (1975), is inapposite and does not support petitioner's proffered exception for psychological harms purportedly resulting from being tried before a military commission, Pet. App. 41.

2. Petitioner contends (Pet. 33-37) that the court of appeals erroneously denied mandamus relief by adopting a "uniquely restrictive" mandamus standard that conflicts with that applied by other courts of appeals. Petitioner is incorrect.

It is settled that a "writ [of mandamus] will issue only in extraordinary circumstances." Kerr v. United States Dist. Court, 426 U.S. 394, 403 (1976). As such, "the party seeking issuance of the writ [must] have no other adequate means to attain the relief he desires" and must, among other things, carry "'the burden of showing that his right to issuance of the writ is "clear and indisputable."'" Ibid. (citation and brackets omitted); accord Cheney v. United States Dist. Court, 542 U.S. 367, 380-381 (2004).

Citing Cheney, petitioner concedes (Pet. 34) that he must show a "clear and indisputable" right to relief, but he contends that courts of appeals have divided about how to apply that test in cases involving "questions of first impression." That contention rests on petitioner's assertion (Pet. 4, 35-36) that the D.C. Circuit has adopted an "impossibl[y] stringen[t]" test under which "any 'open question' of first impression is categorically unreviewable via mandamus."

That contention is incorrect. The D.C. Circuit holds that a "clear and indisputable" right to mandamus can be established if the petitioner shows "a clear legal error." United States v. Fokker Servs. B.V., 818 F.3d 733, 749 (2016) (citations omitted). The court of appeals has therefore emphasized that it has "never required" as a predicate for relief "a prior opinion addressing the precise factual circumstances or statutory provision at issue." Id. at 749-750; see In re Kellogg Brown & Root, Inc., 756 F.3d 754, 759, 762 (D.C. Cir. 2014) (granting mandamus notwithstanding the "[t]he District Court's novel approach" because the district court committed "clear legal error"), cert. denied, 135 S. Ct. 1163 (2015). Other D.C. Circuit decisions likewise do not reflect the categorical rule petitioner ascribes to them.[6] Petitioner ultimately cites no contrary decision reflecting his characterization of the D.C. Circuit's mandamus standard.[7]

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[6] See, e.g., In re Khadr, 823 F.3d 92, 99-100 (D.C. Cir. 2016) (finding no "'clear and indisputable' right to mandamus relief" where mandamus petitioner's arguments had "substantial force" but were counterbalanced by "substantial responses"); Doe v. Exxon Mobil Corp., 473 F.3d 345, 354-355 (D.C. Cir. 2007) (finding no "'clear and indisputable' right" to mandamus where multiple courts of appeals had rejected the mandamus petitioner's underlying argument in "very similar" contexts and petitioner cited no contrary authority involving "like issues and comparable circumstances"), cert. denied, 554 U.S. 909 (2008).

[7] Petitioner asserts (Pet. 4-5, 35) that, because of the D.C. Circuit's "impossibl[y] stringen[t]" test, the D.C. Circuit has denied "every mandamus petition to come up from the military commissions precisely because the system's novelty makes every question one of first impression." But since the certiorari

Petitioner's mistaken position itself stems from a misreading of the D.C. Circuit's decision in this case. The court here merely determined that petitioner had failed to show a "clear and indisputable" right to relief based on his timing-of-hostilities argument in light of the legal analysis reflected in Hamdan. Pet. App. 57-58. Hamdan's plurality opinion -- which observed that law-of-war offenses are committed only "during, not before, the relevant conflict" -- stated that the absence of alleged offense conduct after "the attacks of September 11, 2001, and the enactment of the [Authorization for Use of Military Force (AUMF), Pub. L. No. 107-40, 115 Stat. 224]," "cast doubt on the legality of the charge" against Hamdan. 548 U.S. at 598-600 & n.31 (opinion of Stevens, J.). That observation (in dicta), the D.C. Circuit concluded, might be read as "suggest[ing]" that "the conflict against al Qaeda began only after September 11, 2011, and the enactment of the AUMF." Pet. App. 57.

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petition was filed, the D.C. Circuit granted mandamus relief in the military-commission prosecution of Khalid Shaikh Mohammad -- disqualifying a judge on the USCMCR -- based on its determination that Mohammad established a "clear and indisputable entitlement to the writ." In re Mohammad, 866 F.3d 473, 2017 WL 3401335, at *1-*2 (2017) (per curiam). That case raised a question of first impression under the USCMCR's rules. And although the government argued that the particular facts in Mohammad did not establish a clear violation of relevant USCMCR rules, the D.C. Circuit's unambiguous view is that a clear legal error satisfies the "clear and indisputable" standard, even in a mandamus case in a novel context.

But the court of appeals also recognized that Justice Thomas's dissent in Hamdan, which spoke for three Members of the Court, more directly concluded that hostilities with al Qaeda existed since at least 1996. Pet. App. 57. The dissenting Justices in Hamdan concluded that the starting point of a conflict is determined "by the initiation of hostilities," 548 U.S. at 685; that "overwhelming evidence" -- including al Qaeda's 1996 declaration of war against the United States, the 1996 Khobar Towers bombing, the 1998 United States embassy bombings, and the United States' counterattacks beginning in 1998 -- showed that the "present conflict [with al Qaeda] dates at least to 1996," id. at 687-688; that significant deference is owed to "the Executive's judgments in this context"; and that the AUMF (enacted September 18, 2001) merely authorized the use of force and confirmed the President's war powers in the "ongoing conflict" with al Qaeda, id. at 684-685. See Pet. App. 57-58.

In light of that analysis, the D.C. Circuit -- without dissent -- correctly determined that petitioner's argument concerning the beginning of hostilities implicated "open questions" reflecting the absence of a "'clear and indisputable'" right to mandamus relief. Pet. App. 58 (citation omitted). Petitioner simply ignores the court of appeals' Hamdan-focused rationale, and he makes no independent attempt to show a "clear and indisputable" right to mandamus relief under any understanding of that standard. See Pet. 33-37. Petitioner instead contends (Pet. 36) that the court denied

relief simply "[b]ecause no Court had yet ruled on when hostilities in Yemen specifically began." Nothing in the D.C. Circuit's decision supports that view. In short, no further review is warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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