IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMMAR AL-BALUCHI *a/k/a Ali Abdul Aziz Ali*, Petitioner, v. JIM MATTIS, Secretary of Defense, *et al.*, Respondents.	)	Civil Action No. 08-cv-2083 (PLF)

RESPONDENTS' REPLY IN FURTHER SUPPORT OF THEIR CROSS-MOTION TO HOLD PETITION IN ABEYANCE PENDING COMPLETION OF MILITARY COMMISSION PROCEEDINGS

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Petitioner asks this Court to disregard the abstention principles enunciated in *Schlesinger v. Councilman*, 420 U.S. 738 (1975) and *In re al Nashiri*, 835 F.3d 110 (D.C. Cir. 2016), *cert. denied*, 138 S. Ct. 354 (Mem.) (2017) ("*In re al-Nashiri II*"), as well as the decisions of several Judges of this Court, and deny Respondents' cross-motion to hold his habeas petition in abeyance pending resolution of his military commission proceedings notwithstanding the fact that in the nearly ten years that his petition has been pending he has asserted little to no interest in having the Court adjudicate its merits. Indeed, Petitioner's actions to date, and in particular, his motion to permanently enjoin his military commission, make clear that Petitioner has and will continue to use this habeas proceeding to assert claims that have the potential to interfere with his military commission proceedings and are more properly raised before the military commission that has been convened to try him for violations of the laws of war and other capital offenses related to the terrorist attacks of September 11, 2001. The Court should reject Petitioner's transparent efforts to circumvent the law of the Circuit and the comprehensive system of justice Congress has designed to try alien unprivileged enemy belligerents, and grant Respondents' motion to hold Petitioner's habeas petition in abeyance pending resolution of his military commission.

ARGUMENT

I. *Councilman* And *In re al-Nashiri II* Instruct The Court To Abstain in Petitioner's Habeas Case Pending Completion Of His Military Commission Prosecution.

As Respondents fully explained in their opening brief, Resp'ts' Cross-Mot. to Hold Pet. in Abeyance Pending Completion of Military Commission Proceedings (ECF No. 204-1) (Apr. 30, 2018) ("Resp'ts' Br."), the D.C. Circuit has determined that the military-commission system created by Congress is adequate to fairly and fully protect defendants' rights in prosecutions of Guantanamo detainees in that system for violations of the laws of war. *In re al-Nashiri II*, 835 F.3d at 121-23. In particular, as the Supreme Court had in *Councilman*, the D.C. Circuit

emphasized the need to consider the entire Article I system's structure – including its appellate review procedures involving an Article III court (the D.C. Circuit) – when the Court found the military commission system established by the Military Commissions Act ("MCA"), Pub. L. No. 111-84, 123 Stat. 2190 (codified at 10 U.S.C. §§ 948a *et seq.*), adequate to protect a defendant's rights. *In re al-Nashiri II*, 835 F.3d at 123 ("We therefore conclude that . . . the MCA's 'integrated system of military courts and review procedures' . . . is sufficiently adequate to point in favor of abstention.") (quoting *Councilman*, 420 U.S. at 758). The D.C. Circuit also found that even when a federal court may have jurisdiction to adjudicate a habeas petitioner's rights, there exists an important countervailing interest that compels the court to defer exercising that jurisdiction.[1] *In re al-Nashiri II*, 835 F.3d at 124-28. Consequently, the D.C. Circuit, extended the well-settled doctrines of *Younger v. Harris*, 401 U.S. 37 (1971) (federal courts should not interfere with pending state court prosecutions), and *Councilman* (federal courts should not interfere with pending courts-martial), to the military commission system authorized by the MCA. *In re al-Nashiri II*, at 121-28.

Petitioner asserts that the abstention principles articulated in *Councilman* and *In re al-Nashiri II* are inapplicable to his capital military commission prosecution for two reasons: (1) he

[1] For the reasons explained in Respondents' Memorandum in Opposition to Petitioner's Motion for Permanent Injunction or Mandamus with Respect to His Unlawful Capital Military Commission (ECF No. 203), at 9-11, 28 U.S.C. § 2241(e)(2) withdraws jurisdiction over Petitioner's claims against his military commission. Petitioner's assertion that his claims sound in habeas because he could obtain relocation out of "pre-Commission" detention in which he is currently held ignores the fact that Petitioner is held in Camp VII with other high-value detainees, including detainees who are not being tried by military commission, unlike the detainee in the *Hamdan* case cited by Petitioner. *See* Resp'ts' Opp'n to Pet'r's Mot. to Preserve Evidence (ECF No. 175) (Apr. 17, 2015), at 10. Likewise, Congress has channeled Petitioner's claims against his military commission to the Court of Appeals, either on mandamus, if appropriate, or ultimately on appeal. *See* Resp'ts' Mem. in Opp. to Mot. for Permanent Inj. or Mandamus (ECF No. 203) (Apr. 30, 2018), at 11-12 (citing *Telecomms. Research & Action Ctr. v. F.C.C.*, 750 F.2d 70, 77 (D.C. Cir. 1984)).

is not a member of the United States military, Pet'r Resp. to Cross-Mot. to Hold Pet. in Abeyance (ECF No. 207) (July 13, 2018) ("Pet'r Opp'n"), at 11-13, and (2) the MCA's automatic, non-waivable appeal procedures prohibit him from promptly and certainly vindicating his rights; thus threatening him with an injury that is not incidental to every criminal proceeding, *id.* at 13-14. Both arguments are without merit.

First, as Petitioner concedes, the D.C. Circuit rejected the argument that *Councilman* was only applicable to military commissions designed to try U.S. service members. *See* Pet'r Opp'n at 11-12; *In re al-Nashiri II*, 835 F.3d at 126. Petitioner's argument, accordingly, is foreclosed. *See United States v. Torres*, 115 F.3d 1033, 1036 (D.C. Cir. 1997) (district courts are obligated to apply controlling Circuit precedent unless that precedent has been overruled by the Court of Appeals *en banc* or by the Supreme Court).

Second, Petitioner's argument that his military commission is not adequate to fully vindicate his rights is also foreclosed. The D.C. Circuit's holding that military commissions convened pursuant to the MCA are "sufficiently adequate to point in favor of abstention," 835 F.3d at 123, was made in the context of a collateral challenge to an MCA-authorized capital military commission, *see id.* at 114, just as is the case here. Notably, this holding, as it relates to the MCA's review procedures, is consistent with the Supreme Court's preference for automatic appellate review – particularly with respect to military commission judgments and death sentences. *See, e.g.*, *Hamdan v. Rumsfeld*, 548 U.S. 557, 616 (2006) (plurality opinion) (majority noting that intervention in pre-MCA military commission warranted because, among other things, defendant "ha[d] no automatic right to review of the commission's 'final decision'"); *Gregg v. Georgia*, 428 U.S. 153, 198 (1976) (plurality opinion) (noting that an automatic appeal is an "important additional safeguard" against arbitrarily imposed death sentences).

In addition, Petitioner's second argument is premised on the theory that, in the wake of his prior detention, having to endure a trial and, if convicted and sentenced to death, a long delay in imposition of the death sentence due to a non-waivable appellate process, constitutes cruel and unusual punishment, thereby injuring him in a manner that is not incidental to typical criminal proceedings.[2] *See* Pet'r Opp'n at 14. But the D.C. Circuit has concluded that alleged harms that are grounded in a Guantanamo detainee's allegations regarding treatment during his detention are "'attendant to resolution of his case in the military court system' and, as a result, do not render abstention inappropriate." *In re al-Nashiri*, 835 F.3d at 129 (quoting *Councilman*, 420 U.S. at 758). The Court explained that such allegations are about a Guantanamo detainee's "particular vulnerabilities to a trial by a military commission" and "say nothing about the competence of the military commission itself[.]" *Id.* The Fourth Circuit has reached a similar conclusion. *See Hennis v. Hemlick*, 666 F.3d 270, 279 (4th Cir. 2012), *cert. denied*, 556 U.S. 104 (2012) (rejecting argument that abstention was inappropriate because court-martial defendant had already experienced five-years of criminal proceedings, including the imposition of a death sentence, and anticipated a long appellate process if he was convicted and sentenced to death as a result of his new trial).

Furthermore, Petitioner's theory that the risk of facing a long delay before execution violates the constitutional and statutory prohibitions against cruel and unusual punishment is based on *Soering v. United Kingdom*, 161 Eur. Ct. H.R. (ser. A) (1989), a decision of the European Court of Human Rights that is not binding on this Court. The *Soering* court held that delays in the

[2] Petitioner's assertion that Respondents have conceded his factual assertions regarding his prior detention is baseless. As Respondents' arguments make clear, resolution of Petitioner's factual assertions is simply not required given that Petitioner's assertions are insufficient to warrant departure from the abstention called for under *In re al-Nashiri II*.

implementation of death sentences in the United States due to lengthy appellate review processes constitutes inhumane and degrading punishment such that extradition is not appropriate. *Id.* at 439. Petitioner, however, points to no authority in the United States that has adopted *Soering's* holding. Indeed, two Circuits have expressly rejected it. *See Chambers v. Bowersox*, 157 F.3d 560, 570 (8th Cir. 1998), *cert. denied*, 527 U.S. 1029 (1999); *McKenzie v. Day*, 57 F.3d 1461, 1466-68 (9th Cir. 1995), *opinion adopted on reh'g en banc*, 57 F.3d 1493 (9th Cir. 1995).

Accordingly, the prescriptions of *Councilman* and *In re al-Nashiri II* are fully applicable here and instruct this Court to abstain from further habeas proceedings until completion of Petitioner's military commission.

II. An Exception From Abstention Is Not Warranted Because Petitioner Has Not Raised A Substantial Question Regarding A Right Not To Be Tried.

Petitioner's attempt to shoehorn his cruel and unusual punishment, double jeopardy, and outrageous government conduct claims into an exception to abstention also falls flat. As Respondents explained in their opening brief, exceptions to abstention are both "few" and "narrow," and must be grounded on a right not be tried at all. *See* Resp'ts' Br. at 21-22. Were the rule otherwise, it would render meaningless the Supreme Court's holding in *Councilman* that the "cost, anxiety, and inconvenience" of having to defend a prosecution is insufficient to justify an exception to abstention. 420 U.S. at 755; *In re al-Nashiri II*, 835 F.3d at 128. Accordingly, the D.C. Circuit has admonished that, absent an express right-not-to-be-tried, any exception to *Councilman* abstention requires an "extraordinary circumstance" that presents both a "great and immediate" injury and renders the coordinate tribunal incapable of fully and fairly adjudicating the federal issues before it. *In re al-Nashiri II*, 835 F.3d at 128.

Given these dual requirements, it is unsurprising that only one non-express exception to abstention has been identified. To come within the exception, often referred to as the status

exception, a defendant must raise a "substantial argument[]" regarding a coordinate tribunal's personal jurisdiction to try the defendant. *Councilman*, 420 U.S. at 758-59. But not all personal jurisdiction claims fall within the exception. *See In re al-Nashiri II*, 835 F.3d at 134 ("[W]e cannot conclude that the status exception covers *all* non-trivial jurisdictional challenges that a military-commission defendant might raise."). The exception is limited to the question of whether the Constitution delegated to Congress the power to subject a class of persons to trial by a non-Article III tribunal. *See Councilman*, 420 U.S. at 758-759 (distinguishing prior cases such as *Reid v. Covert*, 354 U.S. 1 (1957), and *U.S. ex rel. Toth v. Quarles*, 350 U.S. 11 (1955), barring the trial by courts-martial of non-service members because Article I did not grant power to authorize the military to try non-combatant civilians). None of Petitioner's claims raise a substantial question regarding Congress' power to subject him to trial by military commission such that he has a right not to be tried at all. Petitioner's claims, therefore, do not and cannot warrant an exception to abstention. The Court should adhere to the prescriptions of *Councilman* and *In re al-Nashiri II* and hold Petitioner's habeas petition in abeyance pending completion of his military commission proceedings.

A. Petitioner's Argument Regarding His Status Does Not Warrant an Exception to Abstention.

Petitioner does not dispute his status as an alien unprivileged enemy belligerent in the context of this proceeding.[3] Rather, he argues that his status as an alien unprivileged enemy belligerent is not material to the question of whether his claims fall within the scope of an exception to abstention given the capital nature of his military commission. Pet'r Opp'n at 19. The mere fact that Petitioner is facing capital charges with the attendant mandatory review process, however,

[3] In July 2007, a Combatant Status Review Tribunal determined Petitioner was detainable as an "enemy combatant" under the Authorization for Use of Military Force. *See* Ex. A.

does not change the Court's abstention analysis. *See, e.g.*, *In re al-Nashiri II*, 835 F.3d at 128-35 (evaluating whether claims of Guantanamo detainee facing capital charges in a MCA-authorized military commission satisfied the requirements for an exception to abstention). The MCA confers jurisdiction to military commissions to try both non-capital and capital offenses. *See* 10 U.S.C. §§ 948c, 948d.[4]

Petitioner alternatively argues abstention is not appropriate because of his "status as a person whom the United States has subjected to an ordeal of savage tortures," and as such, his claims are "fundamentally similar to the claims raised in cases like *Reid* and *Toth*," where the status exception to abstention was first explained. Pet'r Opp'n at 20. But both *Reid* and *Toth* involved challenges by United States citizen defendants that turned on their status as civilians not subject to military prosecution. *See Councilman*, 420 U.S. at 759. That concept is inapposite here because petitioner does not dispute his status as an alien unprivileged enemy belligerent or Congress's constitutional power to subject such persons to trial by military commission. *See* Pet'r Opp'n at 19.

Finally, Petitioner argues that his "status as a person whom the United States has subjected to an ordeal of savage tortures," Pet'r Opp'n at 20, constitutes an "extraordinary circumstance[]" warranting an exception to abstention because "his past treatment . . . is integrally connected" with his claim that his military commission's mandatory review procedures for death sentences are unlawful. Pet'r Opp'n at 21-22. This argument is meritless. Allegations about a defendant's "particular vulnerabilities to a trial by a military commission" do not constitute an "extraordinary

[4] Section 948c provides that "[a]ny alien unprivileged enemy belligerent is subject to trial by military commission as set forth in this chapter." Section 948d provides that "[a] military commission under this chapter shall have jurisdiction to try persons subject to this chapter for any offense made punishable by this chapter . . . and may . . . adjudge any punishment not forbidden by this chapter, including the penalty of death when specifically authorized under this chapter."

circumstance" warranting an exception to abstention because they "say nothing about the competence of the military commission itself." *In re al-Nashiri II*, 835 F.3d at 129. Nor does having to face a possible death sentence and, if convicted and sentenced to death, a lengthy appellate review process implicate an "extraordinary circumstance" warranting an exception from abstention – even where a defendant alleges past harms. *Hennis*, 666 F.3d at 279-80; *see also Gregg*, 428 U.S. at 187 (affirming constitutionality of the death penalty), 198 (expressing preference for automatic appellate review procedures for death sentences). Consequently, the status exception first introduced in *Reid* and *Toth*, and subsequently delineated in *Councilman* and *In re al-Nashiri II*, is inapplicable here.

B. Petitioner's Cruel and Unusual Punishment Claim Does Not Raise a Substantial Question Regarding Whether his Military Commission is *Ultra Vires* and Thus Lacks Jurisdiction To Try Him In The First Instance.

Petitioner also contends that abstention is not appropriate because his military commission is not convened in conformity with the MCA and, as a result, lacks personal jurisdiction. Pet'r Opp'n at 14-15. In particular, he argues that the MCA bars the imposition of a capital sentence because such a sentence, given his alleged treatment during detention and the risk that he will have to endure a lengthy, non-waivable appeal process, violates the Act's prohibition against cruel and unusual punishment and thus renders his military commission *ultra vires*. *Id.* This claim does not raise a substantial question regarding a right not to be tried by a military commission.

As an initial matter, as explained *supra* n.4, Petitioner's military commission is specifically authorized under the MCA to impose the death penalty in cases such as Petitioner's. 10 U.S.C. § 948d. Thus, there can be no argument that Petitioner's military commission is as a general matter "irregularly constituted," that is, not regularly constituted, and so rendered *ultra vires* under the MCA such that it cannot try Petitioner. As explained in Respondents' opening brief, *see, e.g.*,

Resp'ts' Br. at 25, Petitioner provides no basis to argue that his claims cannot be considered before his duly constituted military commission in the first instance.

As Petitioner notes, *In re al-Nashiri II* acknowledged the Supreme Court's *dicta* in *Hamdan*, 548 U.S. at 589 n.20, discussing the possibility that an exception to abstention would arise in circumstances where a defendant alleges his military commission was not "regularly constituted" and is thus *ultra vires*. 835 F.3d at 133-34. But the Court of Appeals did not attempt to define the parameters of the possible exception or otherwise extend an exception beyond the confines discussed above, that is, where Congress is not authorized to subject a class of individuals to trial by military commission. *Id.* As Respondents noted in their opening brief, Resp'ts' Br. at 24, the *In re al Nashiri II* Court simply concluded that an exception to abstention was not warranted because, among other things, the petitioner did not "argue that the commissions created by the 2009 MCA *generally* lack jurisdiction over defendants because they are so procedurally deficient that they are *wholly* ultra vires." *In re al-Nashiri II*, 835 F.3d at 134 (emphasis added).

Taking a cue from the D.C. Circuit's limited discussion of a possible *ultra vires* exception, Petitioner first argues that his cruel and unusual punishment claims demonstrate his military commission is "wholly *ultra vires*." Pet'r Opp'n at 20. But, assuming this is the standard by which the possible exception is to be evaluated, Petitioner's argument is untenable in light of the D.C. Circuit's finding that the military commission system established by the MCA is adequate to protect a defendant's rights. *See In re al-Nashiri II*, 835 F.3d at 123. Also, given that Petitioner predicates his claims on allegations regarding his treatment during an earlier phase of detention,[5]

[5] *See, e.g.*, Pet'r Opp'n at 17 (Petitioner's claims "rest . . . on the fact that in the wake of the treatment to which the government subjected him, both a death sentence *and* the largely non-waivable review time between the imposition and execution of that sentence would be unlawful.").

his claims are irreconcilable with the D.C. Circuit's holding that a defendant's "particular vulnerabilities to a trial by a military commission" do not constitute an "extraordinary circumstance" warranting an exception to abstention because they "say nothing about the competence of the military commission itself," *id.* at 129.

Recognizing this fatal flaw, Petitioner next asserts that *In re al-Nashiri II* did not hold that a possible *ultra vires* exception to abstention is only available where a defendant claims that MCA-authorized military commissions are so procedurally deficient that they generally lack jurisdiction.[6] Pet'r Opp'n at 20. Although Petitioner is correct that the D.C. Circuit observed that the "precise contours" of a possible *ultra vires* exception to abstention "are unclear," *In re al-Nashiri II*, 835 F.3d at 133, the Court's decision to leave the parameters of the possible exception undefined does not mean that any allegation that a military commission is *ultra vires* will fall within its scope. Indeed, the Court specifically held that the status exception to abstention does not "cover[] *all* non-trivial jurisdictional challenges." *Id.* at 134. In so doing, it emphasized that the possible exception is constrained by the dual requirements set forth above. *Id.* And here, Petitioner's cruel and unusual punishment claim does not meet this standard: it does not constitute an "extraordinary circumstance[]" that "present[s] [both] the threat of 'great and immediate' injury and render" his military commission "incapable of fairly and fully adjudicating the federal issues before it" such that Petitioner has a right not to be tried. *Id.* at 128 (quoting *Kugler v. Helfant*, 421 U.S. 117, 123-24 (1975)).

[6] Petitioner concedes that the cases he principally relies on in support of his assertion that his military commission is *ultra vires* and that, as a result, he has a right not be tried, do not involve anything close to the circumstances presented here. *See* Pet'r Opp'n at 17-18; *see also id.* at 15 (discussing cases).

First, as Respondents explained in their opening brief, Petitioner's attempt to lay claim to rights under the Fifth and Eighth Amendments is inconsistent with Circuit precedent. *See* Resp'ts' Br. at 26-27. Petitioner's argument that the majority in *al Bahlul v. United States*, 767 F.3d 1 (D.C. Cir. 2014), held that Guantanamo detainees may invoke rights under the Constitution beyond those contained in the Suspension Clause, Pet'r Opp'n at 25, blatantly ignores the fact that the majority in *al Bahlul* did not opine on the question of whether a Guantanamo detainee may assert rights under the Fifth or Eighth Amendments. *See al Bahlul*, 767 F.3d at 18. It is well established that "[c]onstitutional rights are not defined by inferences from opinions which did not address the question at issue." *Latif v. Obama*, 677 F.3d 1175, 1184 (D.C. Cir. 2011) (quoting *Texas v. Cobb*, 532 U.S. 162, 169 (2001)). Where the Court of Appeals has addressed the issue, it has determined, in *Rasul v. Meyers*, 563 F.3d 527, 530 (D.C. Cir. 2009), and *Kiyemba v. Obama*, 555 F.3d 1022, 1026 (D.C. Cir. 2009), *vacated and remanded*, 559 U.S. 131 (2010), *reinstated in relevant part*, 605 F.3d 1046, 1047-48 (D.C. Cir. 2010), *cert. denied*, 563 U.S. 954 (2011), that aliens detained at Guantanamo may not invoke rights under the Fifth and Eighth Amendments in habeas. *See* Resp'ts' Br. at 26-27; *see also Ali v. Trump*, Civil No. 1:10-cv-01020 (RJL), slip op. at 13-14 (D.D.C. Aug. 10, 2018) ("[D]istrict courts in this Circuit have *uniformly* refused to recognize due process claims by Guantanamo Bay detainees."). And there can be no "great and immediate" harm, *In re al-Nashiri II*, 835 F.3d at 128, where there is no cognizable right.

Second, Petitioner cites no authority that suggests that the provisions of the MCA[7] or the Detainee Treatment Act[8] prohibiting cruel or unusual punishment provide Petitioner with a right not to be tried. And as Respondents point out in their opening brief, Petitioner also fails to explain

[7] *See* 10 U.S.C. § 949s.

[8] *See* 42 U.S.C. § 2000dd(d).

why his military commission is incapable of adjudicating his statutory claims in the first instance. *See* Resp'ts' Br. at 28. Instead, as discussed above, Petitioner merely repeats his request that this Court do what no court in the United States has ever done – adopt the holding in *Soering v. United Kingdom*, 161 Eur. Ct. H.R. (ser. A) (1989). *See* Pet'r Opp'n at 25-26. Petitioner's constitutional and statutory cruel and unusual punishment claims do not, therefore, provide him with a right not to be tried. As such, they do not raise a substantial question regarding whether his military commission is *ultra vires*.

C. Petitioner's Double Jeopardy Claim Does Not Raise a Substantial Question Regarding a Right Not To Be Tried.

Petitioner contends that his attempt to invoke one of the few express exceptions to abstention – double jeopardy – is sufficient to render abstention inappropriate because his double jeopardy claim does not need to be "compelling" to be "colorable." Pet'r Opp'n at 28-29. Even under the "lenient" colorable standard, *United States v. Andrews*, 146 F.3d 933, 937 (D.C. Cir. 1998), however, Petitioner's allegation that he will be subject to multiple punishments for the same offense if he is required to, in the wake of his alleged prior treatment, defend against his capital charges and, if convicted and sentenced to death, endure a mandatory appellate review process, does not constitute a colorable argument that he has a right not to be tried.

First, assuming Petitioner can lay claim to rights under the Fifth Amendment's Double Jeopardy Clause, Petitioner's argument that he does not need to show that jeopardy previously attached and was terminated ignores the fact that "[t]he Clause protects only against the imposition of multiple *criminal* punishments for the same offense . . . and then only when such occurs in successive proceedings." *Hudson v. United States*, 522 U.S. 93, 99 (1997) (citations omitted); *see also North Carolina v. Pearce*, 395 U.S. 711, 713-14 (1969) (applying multiple punishment component of the Clause to the retrials of two defendants); *Sefass v. United States*, 420 U.S. 377,

393 (1975) (observing that the "fundamental principle" of the Clause is "that an accused must suffer jeopardy before he can suffer double jeopardy"). Claims based on allegations regarding pretrial detention are thus outside the scope of the Clause. *See United States v. Warneke*, 199 F.3d 906, 908 (7th Cir. 1999) (pretrial detention of criminal defendant pursuant to statute did not trigger the attachment of jeopardy).

Second, the "constitutional guarantee against multiple punishments for the same offense" requires nothing more than "fully credit[ing]" a punishment that that has "already [been] exacted" when "imposing [a] sentence upon a new conviction for the same offense." *Pearce*, 395 U.S. at 718-19. As Petitioner notes, Pet'r Opp'n at 30, the Court of Appeals for the Armed Forces has concluded that the same holds true for the protection against multiple punishments embodied in the Uniform Code of Military Justice ("UCMJ"), 10 U.S.C. § 844.[9] *See United States v. Rosendahl*, 53 M.J. 344, 346-47 (C.A.A.F. 2000) (discussing *Pearce*, 395 U.S. 711). But "determining the proper credits" for a prior punishment occurs "[a]fter" a defendant is convicted and "the sentence is adjudged." *Rosendahl*, 53 M.J. at 348; *see also Pearce*, 395 U.S. at 719 (holding that upon reconviction, a court must subtract the time served pursuant to the first sentence from "whatever new sentence is imposed"). *Rosendahl* and *Pearce* make clear that the remedy for an alleged violation of the constitutional and statutory protections against multiple punishment rests in appeal. *See Murphy v. Commonwealth of Virginia*, 896 F. Supp. 577, 582 (E.D. Va. 1995) ("If an accused is facing multiple convictions (and, therefore, multiple punishments) in violation of the Double Jeopardy Clause, he may appeal those convictions to obtain full relief.").

[9] For purposes of this Reply, Respondents assume that the MCA's Former Jeopardy provision, 10 U.S.C. § 949h, could also be interpreted to include the protection against multiple punishments.

Accordingly, a claim based on the possibility of being punished multiple times for the same offense does not implicate a right not to be tried. *See* Resp'ts' Br. at 29-31.

Finally, as with Petitioner's other attempts to qualify for an exception to abstention, his double jeopardy claims are based on the European Court of Human Rights' decision in *Soering v. United Kingdom*. But, as discussed above, Petitioner points to no authority that has applied *Soering's* holding generally, much less in the double jeopardy context. As such, a claim based on *Soering's* holding is not colorable.

D. Petitioner's Allegations of Outrageous Government Conduct Do Not Provide Him With a Right Not to Be Tried.

Once again, Petitioner fails to demonstrate that his claim of outrageous government conduct (assuming he has a cognizable due process right upon which such a claim would be based) provides him with a right not to be tried, and thus constitutes an "extraordinary circumstance[]" warranting an exception from abstention. *See* Pet'r Opp'n at 26-28. Indeed, Petitioner concedes that "courts have rarely found the government's conduct sufficiently egregious to justify a due process remedy" for alleged misconduct. *Id.* And he fails to address, let alone, explain, why his military commission is incapable of fairly and fully adjudicating his claim. *See In re al-Nashiri II*, 835 F.3d at 128.

Nevertheless, Petitioner urges this Court to conclude that his outrageous government conduct claim warrants an exception to abstention. He points to a Ninth Circuit case as proof that the outrageous government conduct doctrine continues to be viable. *See* Pet'r Opp'n at 27 (citing *United States v. Black,* 733 F.3d 294 (9th Cir. 2013)). Although the case demonstrates that the doctrine has not been rejected by the Ninth Circuit, it does not support Petitioner's assertion that an exception to abstention is warranted here because the Court in that case did not conclude that the defendant had a right not to be tried based on the alleged government misconduct. *Black,* 733

F.3d at 298 (noting that the doctrine involves an "extremely high standard" for a defendant to meet). Indeed, none of the cases upon which Petitioner relies dismissed an indictment as a remedy for an alleged due process violation. *See United States v. Boone*, 437 F.3d 829, 842 (8th Cir. 2006); *United States v. Toscanino*, 500 F.2d 267 (2d Cir. 1974) (remanding case to district court for factual findings); *United States v. Toscanino*, 398 F. Supp. 916, 917 (E.D.N.Y. 1975) (denying motion to dismiss indictment on remand); *United States v. Cordero*, 668 F.2d 32, 36-37 (1st Cir. 1981) (rejecting claims premised on *Toscanino* brought by defendant seeking release from custody based on allegation that he was illegally transferred to the United States prior to trial).

Petitioner's assertion that the doctrine is applicable to circumstances where the purported misconduct occurred after the alleged crime(s) is also without support. *See Black*, 733 F.3d at 302 (observing that outrageous government conduct may occur where government agents "engineer[] and direct[] a criminal enterprise from start to finish," "use excessive physical or mental coercion to convince an individual to commit a crime," and "generat[e] . . . new crimes merely for the sake of pressing criminal charges") (citations omitted); *Boone*, 437 F.3d at 842 ("[T]he rule that outrageous government conduct can foreclose criminal charges has been applied by our court almost exclusively to situations involving entrapment[.]"); *see also Rochin v. California*, 342 U.S. 165, 172-74 (1952) (holding that police officers' conduct in procuring evidence against a defendant "shock[ed] the conscience," violated due process, and warranted reversal of his conviction); *United States v. Padilla*, No. 04-60001, 2007 WL 1079090, at *3 n.6 (S.D. Fla. Apr. 9, 2007) (rejecting defense where alleged misconduct was "perpetrated after the commission of [defendant's] alleged crimes" while the defendant was in military custody). Petitioner has thus failed to demonstrate how his outrageous government conduct claim provides him with a right not to be tried such that an exception to abstention is warranted.

III. Abstention Does Not Violate the Suspension Clause.

Petitioner's argument that abstaining from further proceedings in this case would violate the Suspension Clause is foreclosed by *In re al-Nashiri II*, which held that "a deferment of resort to the writ until other corrective procedures are shown to be futile is in no sense a suspension of the writ of habeas corpus." 835 F.3d at 130 (quoting *Gusick v. Schilder*, 340 U.S. 128, 132 (1950)). Petitioner's attempt to evade this holding is unavailing. For the reasons discussed above, *see supra* at 7-8, Petitioner's allegations regarding his "particular vulnerabilities" to a military commission convened to try him for capital offenses do not render his military commission *ultra vires* and, thus, the MCA's corrective procedures "futile." *See In re al-Nashiri II*, 835 F.3d at 129 (concluding that a defendant's "allegations [] about his particular vulnerabilities to a trial by a military commission at Guantanamo Bay . . . say nothing about the competence of the military commission itself[.]"); *id.* at 131 (holding the MCA procedures, including the right to appeal to the D.C. Circuit if convicted, constitute "substantial 'other corrective procedures.'"). Accordingly, holding Petitioner's habeas petition in abeyance until the completion of his military commission proceedings would not constitute a suspension of the writ.

IV. Adjudicating The Claims Currently Before This Court Risks Interference With Petitioner's Ongoing Military Commission Proceedings.

As Respondents explained in their opening brief, Resp'ts' Br. at 40-43, staying this case during the pendency of Petitioner's military commission proceedings would avoid the possibility of proceedings and rulings in this habeas case interfering with Petitioner's military commission proceedings. The potential for interference rises in at least four ways. First, and most significantly, Petitioner's own motion for a permanent injunction to halt his military commission prosecution, by itself, establishes the prerequisite potential interference to justify a stay. Second, a ruling by this Court as to whether Petitioner was part of al-Qaida at the time of his capture could potentially

impact the military commission's exercise of jurisdiction of Petitioner as an "alien unprivileged enemy belligerent." *See* 10 U.S.C. §§ 948c, 948d; *see also Khadr v. Bush*, 587 F. Supp. 2d 225, 231 (D.D.C. 2008) ("*Khadr II*") (Bates, J.) (noting that abstention was appropriate because the "question of enemy combatancy can be raised in the military commission proceeding," and "any ruling[] by this Court on th[at] claim[] would necessarily affect, and possibly interfere with, the military commission proceedings"). Third, a decision by this Court on the merits of the habeas petition, including the issuance of any factual findings supporting such a decision, could interfere with Petitioner's military commission prosecution because the Government's evidence in this case, as presented in the Factual Return, overlaps substantially with the military commission charges. *See* Resp'ts' Br. at 42 (describing how Petitioner's alleged actions in relation to the terrorist attacks of September 11, 2001, are central to both proceedings).

Finally, habeas proceedings may also "produce rulings on the production of discovery and/or exculpatory information that diverge from those of the military commission[]." *Al Odah v. Bush*, 593 F. Supp. 2d 53, 59 (D.D.C. 2009) (Kollar-Kotelly, J.)); *see also Councilman*, 420 U.S. at 756-58. To be sure, Petitioner has sought in his military commission disclosure of information that is substantially similar to the material he is requesting in his Motion for Discovery filed in this Court. *Compare* Pet'r Mot. for Discovery (ECF No. 152) (seeking, among other things, documents pertaining to Petitioner's pre-Guantanamo detention and interrogation, Petitioner's statements and circumstances information, documents pertaining to Abdul Samad Din Mohammed, and the SSCI Report) *with United States v. Khalid Shaykh Mohammad, et al.*,[10] AE 112 Motion to Compel Discovery Related to White House and DOJ Consideration of the CIA Rendition, Detention, and

[10] To view the docket for Petitioner's military commission proceedings, open http://www.mc.mil/CASES/MilitaryCommissions.aspx in a web browser and click the link on that page labeled *9/11: Khalid Shaikh Mohammad et al. (2).*

Interrogation Program; AE 114 Motion to Compel Discovery of Information Related to Buildings in Which the Accused or a Potential Witness Has Been Confined; AE 190 Motion to Compel Production of Information Relating to Statements Made by Mr. al-Baluchi or Potential Witnesses at a Detention Facility; AE 194 Motion to Compel Discovery of Mr. al-Baluchi's Statements; AE 245 Motion to Compel Information Regarding Abdul Samad din Mohammed; AE 255 Motion to Compel Discovery Regarding Recordings of Mr. al-Baluchi; AE 286 Motion to Compel SSCI Report; AE 308 Motion to Compel Discovery Regarding CIA Rendition, Detention, and Interrogation Program. Consideration of the merits of Petitioner's discovery motion, therefore, would potentially result in rulings on the production of information and on other discovery issues that deviate from and possibly conflict with those of the military commission – the very outcome the Supreme Court sought to avoid in *Councilman*. *See Al Odah*, 593 F. Supp. 2d at 59 (citing *Councilman*, 420 U.S. at 756-58).

Contrary to Petitioner's assertion, Pet'r Opp'n at 31-32, Respondents are not required to show that interference *has* occurred. The potential that adjudication of a habeas claim will interfere is enough, and courts regularly use such conditional language when describing interference. *See Khadr v. Obama*, 724 F. Supp. 2d 61, 66 (D.D.C. 2010) ("*Khadr III*") (Bates, J.) ("could interfere"); *Khadr II*, 587 F. Supp. 2d at 231 ("possibly interfere with"); *Al Odah*, 593 F. Supp. 2d at 58-59 ("eliminates the potential," "may interfere," and "may also produce rulings"). Indeed, courts have found that civil proceedings that involve the same facts as an ongoing criminal prosecution interfere with those criminal proceedings simply because "they churn over the same evidentiary material." *Afro-Lecon, Inc. v. United States*, 820 F.2d 1198, 1204 (Fed. Cir. 1987) (citation omitted).

Further, Petitioner's contention that "for six years these two cases have proceeded in parallel . . . with no 'interference' resulting," Pet'r Opp'n at 31, conveniently ignores the fact that his habeas petition has effectively been stayed for the last six years given that this Court has not issued a substantive ruling during that time. This is, no doubt, due in large part to the pendency of Respondents' first motion to hold Petitioner's habeas petition in abeyance. *See* Resp'ts' Abeyance Mot. (ECF No. 130) (Sept. 6, 2012). Petitioner's argument also overlooks the fact that Petitioner has made no attempt to have this Court adjudicate the merits of his habeas petition in the decade it has been pending. Instead, Petitioner has filed several motions that, if granted, would either halt Petitioner's military commission altogether or permit his habeas counsel to use this Court to aid in his defense. *See, e.g.*, Mot. for Permanent Injunction (ECF Nos. 154, 200); Mot. for Discovery (ECF No. 152) (arguing requested discovery necessary for habeas counsel to ensure Petitioner maintains his ability to "assist his lawyers in . . . his on-going military proceedings"); Mot. to Modify Protective Order (ECF No. 156) (arguing certain provisions of Amended TS/SCI Protective Order should be modified to permit habeas counsel "to discuss . . . classified information pertaining to this case with . . . members of [Petitioner's] military defense team").

In Guantanamo cases where the Government has sought abeyance of a habeas petition to avoid interfering with an ongoing MCA-authorized military commission, it has been granted. *See al-Nashiri v. Obama*, 76 F. Supp. 3d 218, 223 (D.D.C. 2014) (Roberts, C.J.), *aff'd* 835 F.3d 110 (D.C. Cir. 2016), *cert. denied*, 138 S. Ct. 354 (Mem.) (2017); *Al Odah*, 593 F. Supp. 2d at 59; *Khadr v. Bush*, 587 F. Supp. 2d 225, 238 (D.D.C. 2008) (Bates, J.) ("*Khadr II*"); *see also Khadr III*, 724 F. Supp. 2d at 70. Petitioner has given this Court no reason to depart from these rulings. Abstention, therefore, is especially appropriate in this instance where Petitioner has asserted

requests that directly implicate ongoing military commission proceedings without bringing this Court any closer to resolving the merits of his habeas petition.

V. The Possibility That Petitioner Might Seek Additional Habeas Relief Does Not Warrant Deviating From The Settled Practice Of Staying Habeas Proceedings During The Pendency Of A Military Commission.

Petitioner argues that Respondents' motion to hold his habeas petition in abeyance "overlook[s] the fact that [he] intends to file a revised version of his motion for relief from unlawful conditions of his confinement, which he orally withdrew at the March 22, 2017[,] hearing before this Court." Pet'r Opp'n at 32. Respondents' motion does no such thing, as Petitioner did not and has not conferred with Respondents regarding his intent to renew his conditions of confinement motion, notwithstanding Local Civil Rule 7(m) which requires him to do so. This argument also rings particularly hallow given that he withdrew his challenge to his conditions of confinement more than a year ago, nearly three years after he filed it. Because Petitioner has yet to renew his conditions of confinement claims, they cannot support denying Respondents' abeyance motion.

Moreover, holding Petitioner's habeas case in abeyance until his military commission proceeding is completed would not deprive him of the right to raise such claims before this Court during the pendency of the stay, in appropriate circumstances warranting a departure from abstention. As Judge Bates explained in *Khadr II*, the Court may stay consideration of a habeas petition and any claims that "have been, will be or, at the very least, can be raised in the military commission proceeding and the subsequent appeals process[,]" but nevertheless may lift the stay under appropriate circumstances for the limited purpose of entertaining claims that do not interfere with or otherwise fall within the scope of the military commission proceeding. 587 F. Supp. 2d at 230 (observing that "abstention is appropriate only to the extent that this Court's consideration of petitioner's motion would interfere with the military commission proceeding; hence, the scope of

that proceeding is critical to the analysis"); *id*. at 234 (refusing to abstain as to one of petitioner's claims because it could not be raised before his military commission). Similarly, this Court may hold Petitioner's habeas case in abeyance and, should Petitioner follow through with his intent to file a motion challenging the conditions of his confinement, the Court may evaluate whether adjudicating that motion could potentially interfere with his military commission and, if appropriate, lift the stay for the limited purpose of considering the underlying merits of the motion. Simply put, the fact that Petitioner might someday file a particular request for relief from which this Court may choose not to abstain is not a sufficient reason for this Court to deny Respondents motion to hold the existing petition in abeyance, given that all of Petitioner's claims currently before this Court effectively "have been, will be, or can be raised in the military commission proceedings," *Khadr II*, 587 F. Supp. 2d at 238.

Nor would such a stay deprive Petitioner of access to habeas experts, such as Dr. Xenakis. As Respondents previously explained to Petitioner's counsel, requests for expert visits related to any habeas case have always been evaluated on a case-by-case basis, taking into account all applicable facts and circumstances, and Respondents will continue to evaluate these requests in the same manner if the stay is granted. And Petitioner can raise any specific access issue with the Court, as needed and appropriate, during the pendency of the stay. *See In re Guantanamo Bay Detainee Continued Access to Counsel*, 892 F. Supp. 2d 8 (D.D.C. 2012). Thus, an order directing Respondents to provide access to experts, such as Dr. Xenakis, in "at least substantially the same extent, and in at least substantially the same fashion, as before the abeyance period[,]" Pet'r Opp'n at 34, should the Court grant Respondents' abeyance motion, is unnecessary.

In summary, if Petitioner does file, after conferring with Respondents as required by Local Civil Rule 7(m), a renewed motion challenging the conditions of his confinement or a motion

related to his access to experts, this Court can then consider whether adjudicating the claim could potentially interfere with the military commission. Until then, the mere possibility that Petitioner may file such motions does not justify denying Respondents' motion to hold the habeas petition in abeyance pending resolution of Petitioner's military commission proceedings.

CONCLUSION

For the foregoing reasons, and those explained in Respondents' opening brief, the Court should grant Respondents' Cross-Motion to Hold Petition in Abeyance Pending Completion of Military Commission Proceedings.

Dated: August 10, 2018

Respectfully submitted,

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EXHIBIT A

Department of Defense
Office for the Administrative Review
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at U.S. Naval Base Guantanamo Bay, Cuba
1010 Defense Pentagon, Washington, D.C. 20301-1010

~~SECRET//NOFORN~~

ACTION MEMO

29 June 2007

FOR: Designated Civilian Official (DCO)

FROM: Convening Authority, Combatant Status Review Tribunal 6/20/07

SUBJECT: FINAL REVIEW OF COMBATANT STATUS REVIEW TRIBUNAL ICO AMMAR AL BALUCHI, ISN US9PK-010018DP (PAKISTAN)

- The Combatant Status Review Tribunal (CSRT) for Detainee ISN 10018 was completed on 30 March 2007. The Tribunal determined that this detainee meets the criteria for designation as an Enemy Combatant.

RECOMMENDATION: That the DCO, as the final review authority, approve the CSRT decision by initialing:

Approve the decision of the Combatant Status Review Tribunal _____ 7-16

Return the Record of Proceedings to the Tribunal for further proceedings_____

ATTACHMENTS:
TAB A Legal Sufficiency Review
TAB B Tribunal President's Report of Proceeding

Prepared by: Frank Sweigart, Convening Authority, [redacted]