[ORAL ARGUMENT SCHEDULED FOR FEBRUARY 17, 2016]

NOS. 15-1023, 15-5020

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

ABD AL-RAHIM HUSSEIN MUHAMMED AL-NASHIRI,

Petitioner,

v.

BARACK OBAMA,

Respondent.

On Petition for a Writ of Mandamus and
Appeal from the U.S. District Court for the District of Columbia

BRIEF OF THE NATIONAL INSTITUTE OF MILITARY JUSTICE AS *AMICUS CURIAE* IN SUPPORT OF THE PETITIONER

STEPHEN I. VLADECK
4801 Massachusetts Avenue, N.W.
Room 350
Washington, DC 20016
(202) 274-4241
svladeck@wcl.american.edu

ERIC S. MONTALVO
THE FEDERAL PRACTICE GROUP
WORLDWIDE SERVICE
1150 Connecticut Avenue, N.W.
Suite 900
Washington, DC 20036
(202) 862-4360
emontalvo@fedpractice.com

Counsel for Amicus Curiae

November 30, 2015

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), the undersigned counsel of record certifies as follows:

A. Parties and *Amici Curiae*

All parties, intervenors, and *amici curiae* appearing in this Court are listed in the Brief of Petitioner. *Amicus curiae* National Institute of Military Justice ("NIMJ") is a District of Columbia nonprofit corporation. Pursuant to Rule 26.1, *amicus* certifies that, other than NIMJ, none of the entities filing this brief are corporate entities or are owned in whole or in part by other corporate entities.

B. Rulings Under Review

References to the rulings at issue appear in the Brief of Petitioner.

C. Related Cases

Counsel is unaware of any cases related to this appeal other than those listed in the Brief of Petitioner.

D. Relevant Statutes and Regulations

Counsel is unaware of any statutes or regulations related to this appeal other than those provided in the Brief of Petitioner.

Dated: **November 30, 2015** /s/ Eric S. Montalvo
Counsel for Amicus Curiae

COMPLIANCE WITH RULE 29

A. Consent to File

Pursuant to Fed. R. App. P. 29(a) and Circuit Rule 29(b), *amicus* certifies that all parties have consented to the filing of this brief.

B. Authorship and Funding

Pursuant to Fed. R. App. P. 29(c)(5), *amicus* certifies that this brief was authored by *amicus* and counsel listed on the front cover. No party or party's counsel authored this brief, in whole or in part. No party or party's counsel contributed money that was intended to fund preparing or submitting this brief. No other person besides *amicus* and their counsel contributed money that was intended to fund preparing or submitting this brief.

C. Not Practical To Join in Single Brief

Pursuant to Circuit Rule 29(d), *amicus* certifies that it is not practicable to join all other *amici* in this case in a single brief. We do not claim expertise in the other issues addressed by *amici*, and believe it would be inappropriate to address matters upon which we do not have particular expertise.

Dated: **November 30, 2015**

/s/ Eric S. Montalvo
Counsel for Amicus Curiae

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, undersigned counsel states that *amicus curiae* National Institute of Military Justice is not a publicly-held corporation, issues no stock, and does not have a parent corporation.

Dated: **November 30, 2015**

/s/ Eric S. Montalvo
Counsel for Amicus Curiae

TABLE OF CONTENTS

Page

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES i

COMPLIANCE WITH RULE 29 ii

CORPORATE DISCLOSURE STATEMENT iii

TABLE OF AUTHORITIES vi

GLOSSARY OF TERMS x

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 8

I. *COUNCILMAN* ABSTENTION DERIVES FROM TWO CONSIDERATIONS OF COMITY, NEITHER OF WHICH APPLY TO THE GUANTÁNAMO MILITARY COMMISSIONS 8

A. The Guantánamo Military Commissions Are Not Trying Servicemembers for Military Offenses 11

B. The Guantánamo Military Commissions Are Not Structurally Independent 12

II. EVEN IF ABSTENTION IN FAVOR OF THE GUANTÁNAMO MILITARY COMMISSIONS MIGHT EVER BE APPROPRIATE, IT IS NOT JUSTIFIED HERE 18

A. Petitioner's Challenge Goes to the Statutory (and Constitutional) Subject-Matter Jurisdiction of the Military Commissions 18

B. The Supreme Court Has Never Required a Civilian Court To Abstain From Deciding Such a Challenge 21

C. Abstention is Especially Inappropriate Given the Stay in the Court of Military Commission Review 23

CONCLUSION 27

TABLE OF AUTHORITIES*

Page(s)

CASES

Abney v. *United States*,
431 U.S. 651 (1977) 23

ACLU v. *United States*,
No. 13-003 (Ct. Mil. Comm'n Rev. Mar. 27, 2013) 17

Al Bahlul v. *United States*,
767 F.3d 1 (D.C. Cir. 2014) (en banc) 5, 17

Al Bahlul v. *United States*, 792 F.3d 1 (D.C. Cir. 2015),
reh'g en banc granted, No. 11-1324
(D.C. Cir. to be argued Dec. 1, 2015) 20

Al-Nashiri v. *Obama* ("*Al-Nashiri I*"),
76 F. Supp. 3d 218 (D.D.C. 2014) 2, 7, 8, 13, 21, 25

In re Al-Nashiri ("*Al-Nashiri II*"),
791 F.3d 71 (D.C. Cir. 2015) 18, 23

Boumediene v. *Bush*,
553 U.S. 723 (2008) 1, 25

Clinton v. *Goldsmith*,
526 U.S. 529 (1999) 1

Ctr. for Const'l Rights v. *United States*,
72 M.J. 126 (C.A.A.F. 2013) 15

* Authorities on which *amicus* principally relies are marked with asterisks (*).

Dynes v. *Hoover*,
61 U.S. (20 How.) 65 (1857)....................20, 22

Ex parte Quirin,
317 U.S. 1 (1942).................... 21

Hamdan v. *Gates*,
565 F. Supp. 2d 130 (D.D.C. 2008) 13

Hamdan v. *Rumsfeld*,
415 F.3d 33 (D.C. Cir. 2005).................... 11, 21

**Hamdan* v. *Rumsfeld*,
548 U.S. 557 (2006)....................1, 2, 3, 4, 5, 9, 10, 11, 12, 13, 15, 16

Khadr v. *Bush*,
587 F. Supp. 2d 225 (D.D.C. 2008) 13

Khadr v. *Obama*,
724 F. Supp. 61 (D.D.C. 2010).................... 13

Kiyemba v. *Obama*,
555 F.3d 1022 (D.C. Cir. 2009),
vacated, 559 U.S. 131 (2010),
reinstated on remand, 605 F.3d 1046 (D.C. Cir. 2010) (per curiam)... 16

McElroy v. *United States ex rel. Guagliardo*,
361 U.S. 281 (1960)....................22

Munaf v. *Geren*,
553 U.S. 674 (2008)....................26

**New* v. *Cohen*,
129 F.3d 639 (D.C. Cir. 1997)....................6, 9, 19

**Noyd* v. *Bond*,
395 U.S. 683 (1969)....................6, 10, 19

O'Callahan v. *Parker*,
395 U.S. 258 (1969) 20

**Obaydullah* v. *Obama*,
609 F.3d 444, 448 (D.C. Cir. 2010)................................... 3, 4, 9, 11, 24

Parisi v. *Davidson*,
405 U.S. 34 (1972) 7, 25

Parker v. *Levy*,
417 U.S. 733 (1974) 9

Rasul v. *Bush*,
542 U.S. 466 (2004) 1

Reid v. *Covert*,
354 U.S. 1 (1957) 22

**Schlesinger* v. *Councilman*,
420 U.S. 738 (1975) 2, 3, 8, 9, 10, 14, 22

Solorio v. *United States*,
483 U.S. 435 (1987) 20

United States ex rel. Toth v. *Quarles*,
350 U.S. 11 (1955) 22

United States v. *Denedo*,
556 U.S. 904 (2009) 5, 14, 17

United States v. *Hamdan*,
801 F. Supp. 2d 1247 (Ct. Mil. Comm'n Rev. 2011)................................ 1

Watada v. *Head*,
530 F. Supp. 2d 1136 (W.D. Wash. 2007)...23

In re Yamashita,
327 U.S. 1 (1946) 21

STATUTES

10 U.S.C. § 867a 14

Military Commissions Acts of 2006 and 2009 (“MCA”)
.... 1, 4, 12, 13, 14, 15, 16, 17, 19, 20
10 U.S.C. § 948a(9) 6, 19
10 U.S.C. § 948c 20
10 U.S.C. § 950g 5, 14
10 U.S.C. § 950p(c) 6, 19

War Crimes Act, 18 U.S.C. § 2441 12

28 U.S.C. § 1259 14

All Writs Act, 28 U.S.C. § 1651(a) 17

Military Justice Act of 1983, Pub. L. No. 98-209, 97 Stat. 1393 14

OTHER AUTHORITIES

Appellant’s Motion to Continue the Stay,
United States v. *Al-Nashiri*, No. 14-001
(Ct. Mil. Comm’n Rev. Sept. 18, 2015) 24

RULES

Ct. Mil. Comm’n Rev. R. 21(b) 17

GLOSSARY OF TERMS

CAAF .... Court of Appeals for the Armed Forces

CCA............................ (Service Branch) Court of Criminal Appeals

CMCR .... Court of Military Commission Review

MCA..........................Military Commissions Acts of 2006 and 2009

NIMJ .... National Institute of Military Justice

UCMJ .... Uniform Code of Military Justice

INTEREST OF *AMICUS CURIAE*

The National Institute of Military Justice ("NIMJ") is a District of Columbia nonprofit corporation organized in 1991 to advance the fair administration of military justice and foster improved public understanding of the military justice system. NIMJ's advisory board includes law professors, private practitioners, and other experts in the field, none of whom are on active duty in the military, but nearly all of whom have served as military lawyers — several as flag officers.

NIMJ appears regularly as an *amicus curiae* in the U.S. Supreme Court — in support of the government in *Clinton* v. *Goldsmith*, 526 U.S. 529 (1999), and in support of the petitioners in *Rasul* v. *Bush*, 542 U.S. 466 (2004), *Hamdan* v. *Rumsfeld*, 548 U.S. 557 (2006), and *Boumediene* v. *Bush*, 553 U.S. 723 (2008). NIMJ has also appeared as an *amicus* before the Court of Military Commission Review and before this court in numerous cases arising out of the Guantánamo military commissions.

Although NIMJ has generally avoided taking a position on the legality of the military commissions established by the Military Commissions Acts of 2006 and 2009 ("MCA"), it is impelled to file this brief because of its disagreement with the district court's decision to

abstain from deciding the merits of Petitioner's habeas petition under *Schlesinger* v. *Councilman*, 420 U.S. 738 (1975). *See Al-Nashiri* v. *Obama* ("*Al-Nashiri I*"), 76 F. Supp. 3d 218 (D.D.C. 2014). As *amicus* explains in the brief that follows, there are compelling reasons why, even if *Councilman* abstention should ever apply to military commissions, it should not apply to the commissions established by the MCA. Moreover, even if civil-court abstention in favor of MCA proceedings could ever be appropriate in the abstract, Petitioner's challenge to the jurisdiction of the commissions over pre-September 11 offenses is the precise type of claim the resolution of which the Supreme Court has consistently and repeatedly declined to leave to military courts in the first instance.

SUMMARY OF ARGUMENT

Abstention in favor of the Guantánamo military commissions under *Schlesinger* v. *Councilman*, 420 U.S. 738 (1975), is not appropriate either in general or as applied to Petitioner's case, specifically. *Councilman* abstention derives from "two considerations of comity that together favor abstention." *Hamdan* v. *Rumsfeld*, 548 U.S. 557, 586 (2006); *see also Obaydullah* v. *Obama*, 609 F.3d 444, 448 (D.C.

Cir. 2010). *First*, "military discipline and, therefore, the efficient operation of the Armed Forces are best served if the military justice system acts without regular interference from civilian courts." *Hamdan*, 548 U.S. at 586 (citing *Councilman*, 420 U.S. at 752). *Second*, "federal courts should respect the balance that Congress struck between military preparedness and fairness to individual service members when it created 'an integrated system of military courts and review procedures, a critical element of which is the Court of Military Appeals consisting of civilian judges completely removed from all military influence or persuasion . . . .'" *Id.* at 586 (quoting *Councilman*, 420 U.S. at 758) (further internal quotation marks omitted). So construed, "abstention in the face of ongoing court-martial proceedings is justified by [the Supreme 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 — 'will vindicate servicemen's constitutional rights.'" *Id.* (quoting *Councilman*, 420 U.S. at 758).

Although both principles of comity appeared necessary to the reasoning and result in *Councilman*, neither is implicated by collateral

pre-trial review of the Guantánamo military commissions. As in *Hamdan*, the first consideration of comity identified in *Councilman* does not apply here, since Petitioner "is not a member of our Nation's Armed Forces, so concerns about military discipline do not apply." *Hamdan*, 548 U.S. at 587; *see also Obaydullah*, 609 F.3d at 448 ("The situation in *Councilman* was, of course, quite different from the one here — the ongoing trial of a member of the Armed Forces before a court-martial as opposed to the possible future trial of an alien detainee before a military commission.").

As for *Councilman*'s second comity-based consideration, whereas the district court viewed the enactment of the MCA as tilting the scales decisively in favor of abstention, there are two separate reasons why the commissions created by the MCA still do not support the comity-based considerations upon which *Councilman* relied. First, the MCA does not make the military commissions *separate* from the civilian courts, as in *Councilman*, but rather directly *subservient* thereto. Insofar as the commissions are therefore bound by this court's case law, abstention would not accomplish anything, since the commission and the CMCR are both ultimately answerable on mandatory direct appeal to the same

authority as the district court — the D.C. Circuit. *See* 10 U.S.C. § 950g. Second, separate from the unique appellate structure of the MCA, there are serious questions about how well Congress in the MCA struck a "balance . . . between military preparedness and fairness," *Hamdan*, 548 U.S. at 586, given the continuing uncertainty surrounding the applicability of the Bill of Rights to the commissions; this court's unanimous reversal, under plain error review, of legal theories that had received unanimous support under de novo review within the commissions, *see Al Bahlul* v. *United States*, 767 F.3d 1, 27–31 (D.C. Cir. 2014) (en banc); and the commissions' inability to engage in the kind of self-correction that the Supreme Court has emphasized is vital to the structural independence of a court system, *see United States* v. *Denedo*, 556 U.S. 904 (2009).

Thus, the considerations of comity upon which *Councilman* relied simply are not present in the context of the Guantánamo military commissions — courts that are trying non-servicemember offenders for non-military offenses; that are subservient to (and not separate from) the civilian Article III courts; and that, charitably, have not instilled confidence in their ability adequately (or efficiently) to vindicate the

rights of defendants. Under those circumstances, the abstention principles recognized in *Councilman* should not apply to the Guantánamo military commissions.

Even if abstention in favor of the commissions is otherwise warranted, though, *Councilman* reaffirmed the long line of cases in which the Supreme Court has refused to abstain in favor of military tribunals — where the Court "did not believe that the expertise of military courts extended to the consideration of constitutional claims of the type presented," and where "it appeared especially unfair to require exhaustion of military remedies when the complainants raised substantial arguments denying the right of the military to try them at all." *Noyd* v. *Bond*, 395 U.S. 683, 696 n.8 (1969); *see also New* v. *Cohen*, 129 F.3d 639, 644 (D.C. Cir. 1997) ("[A] person need not exhaust remedies in a military tribunal if the military court has no jurisdiction over him."). Petitioner's challenge easily falls within this exception, since his challenge goes to the subject-matter jurisdiction of the commission — which, by statute, may only try offenses "committed in the context of and associated with any conflict subject to the laws of war." 10 U.S.C. §§ 948a(9); 950p(c). Whether or not Petitioner is *correct*

that the charged offenses all arose out of conduct that took place outside of "any conflict subject to the laws of war" (on which *amicus* takes no view), it is certainly the case that his argument to that effect is "substantial," that it goes to the military commission's "jurisdiction," and that it would, if proven, deny the right of the military to try him for such conduct at all. Under those circumstances, *Councilman* abstention is not appropriate.

But even if Petitioner's claim does not fall within that well-recognized exception to *Councilman* abstention, it is especially difficult to justify abstaining here, given the stay that remains in place in the CMCR after and in light of this court's decision in *Al-Nashiri I*. The stay of proceedings before the CMCR — soon to enter its seventh month and with no visible signs of progress toward its dissolution — certainly cuts against any argument that resolution of Petitioner's claims by this court (or by the district court, on remand) will somehow *further* delay Petitioner's trial. *See Parisi* v. *Davidson*, 405 U.S. 34, 41–42 (1972) ("Under accepted principles of comity, the court should stay its hand only if the relief the petitioner seeks . . . would also be available to him with reasonable promptness and certainty through the machinery of the

military judicial system in its processing of the . . . charge.”). Thus, although *amicus* takes no position on whether the proper remedy is a reversal and remand, or whether this court should simply reach the merits of Petitioner’s habeas petition for itself, there can be little question that the decision below must be reversed — and that the civilian courts should not abstain from deciding Petitioner’s habeas claim at this time.

ARGUMENT

I. *COUNCILMAN* ABSTENTION DERIVES FROM TWO CONSIDERATIONS OF COMITY, NEITHER OF WHICH APPLY TO THE GUANTÁNAMO MILITARY COMMISSIONS

In abstaining from reaching the merits of Petitioner’s habeas challenge to the jurisdiction of the Guantánamo military commissions , over pre-September 11 offenses, the district court relied upon *Schlesinger* v. *Councilman*, 420 U.S. 738 (1975), and the abstention doctrine to which it has since given its name. *See Al-Nashiri I*, 76 F. Supp. 3d at 222–23. As Justice Powell explained in *Councilman*, “when a serviceman charged with crimes by military authorities can show no harm other than that attendant to resolution of his case in the military

court system, the federal district courts must refrain from intervention, by way of injunction or otherwise." *Id.* at 758.

Critically, though, the *Councilman* Court's conclusion to this effect traced its origins to "two considerations of comity that together favor abstention." *Hamdan* v. *Rumsfeld*, 548 U.S. 557, 586 (2006); *see also Obaydullah* v. *Obama*, 609 F.3d 444, 448 (D.C. Cir. 2010). *First*, "military discipline and, therefore, the efficient operation of the Armed Forces are best served if the military justice system acts without regular interference from civilian courts." *Hamdan*, 548 U.S. at 586 (citing *Councilman*, 420 U.S. at 752). This was so, *Councilman* explained, because "the military must insist upon a respect for duty and a discipline without counterpart in civilian life. The laws and traditions governing that discipline have a long history; but they are founded on unique military exigencies as powerful now as in the past." *Councilman*, 420 U.S. at 757; *see also Parker* v. *Levy*, 417 U.S. 733, 743 (1974) ("This Court has long recognized that the military is, by necessity, a specialized society separate from civilian society."); *New* v. *Cohen*, 129 F.3d 639, 643 (D.C. Cir. 1997) ("[T]he doctrine of comity aids the

military judiciary in its task of maintaining order and discipline in the armed services.”).

As the younger Justice Harlan explained six years before *Councilman*,

> if we were to reach the merits of petitioner’s claim for relief pending his military appeal, we would be obliged to interpret extremely technical provisions of the Uniform Code which have no analogs in civilian jurisprudence, and which have not even been fully explored by the Court of Military Appeals itself. There seems little reason to blaze a trail on unfamiliar ground when the highest military court stands ready to consider petitioner's arguments.

Noyd v. *Bond*, 395 U.S. 683, 696 (1969). Thus, *Councilman* abstention was justified in part by the substantive *separateness* of courts-martial.

Second, “federal courts should respect the balance that Congress struck between military preparedness and fairness to individual service members when it created ‘an integrated system of military courts and review procedures, a critical element of which is the Court of Military Appeals consisting of civilian judges completely removed from all military influence or persuasion . . . .’” *Hamdan*, 548 U.S. at 586 (quoting *Councilman*, 420 U.S. at 758) (further internal quotation marks omitted). So construed, “abstention in the face of ongoing court-martial proceedings is justified by [the Supreme 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 — 'will vindicate servicemen's constitutional rights.'" *Id.* (quoting *Councilman*, 420 U.S. at 758). Thus, *Councilman* abstention was also justified by the structural *independence* of courts-martial.

Although both principles of comity appeared necessary to the reasoning and result in *Councilman*, neither is implicated by collateral pre-trial review of the Guantánamo military commissions.

a. The Guantánamo Military Commissions are Not Trying Servicemembers for Military Offenses

As in *Hamdan*, the first consideration of comity identified in *Councilman* does not apply here, because Petitioner "is not a member of our Nation's Armed Forces, so concerns about military discipline do not apply." *Hamdan*, 548 U.S. at 587; *see also Obaydullah*, 609 F.3d at 448 ("The situation in *Councilman* was, of course, quite different from the one here — the ongoing trial of a member of the Armed Forces before a court-martial as opposed to the possible future trial of an alien detainee before a military commission."); *Hamdan* v. *Rumsfeld*, 415 F.3d 33, 36 (D.C. Cir. 2005) ("*Councilman* and *New* hold only that civilian courts

should not interfere with ongoing court-martial proceedings against citizen servicemen. The cases have little to tell us about the proceedings of military commissions against alien prisoners."), *rev'd on other grounds*, 548 U.S. 557.

Although the *Hamdan* Court's analysis of *Councilman*'s first consideration of comity stopped there, this conclusion is only bolstered by the nature of the charges against Petitioner here — which, whatever their merits, could hardly be claimed to implicate "good order and discipline" within the ranks of the U.S. military. And unlike many (if not most) offenses under the Uniform Code of Military Justice (UCMJ), there is hardly any argument that the substantive law at issue in Petitioner's case is uniquely within the purview and expertise of *military* judges, since Congress has expressly authorized trial of such offenses in civilian courts, as well — through, inter alia, the War Crimes Act, 18 U.S.C. § 2441. Simply put, there is no especial reason why the Guantánamo military commissions are in a better position to answer the questions raised by Petitioner than the district court was.

b. The Guantánamo Military Commissions are Not Structurally Independent

The district court nevertheless held that abstention was warranted, focusing primarily on Congress's post-*Hamdan* enactment of the MCA, and how that factored in to *Councilman*'s second consideration of comity. As Judge Roberts concluded, "Al Nashiri's military commission trial will occur in a system established by Congress that constructs safeguards aimed at protecting Al Nashiri's interests. . . . [Thus, t]he military commission trial contains sufficient procedures and protection to warrant abstention by this court." *Al-Nashiri I*, 76 F. Supp. 3d at 223. To similar effect, the MCA was also central to the analysis of the other district court decisions abstaining in favor of the commissions. *See Khadr* v. *Obama*, 724 F. Supp. 61 (D.D.C. 2010); *Khadr* v. *Bush*, 587 F. Supp. 2d 225 (D.D.C. 2008); *Hamdan* v. *Gates*, 565 F. Supp. 2d 130 (D.D.C. 2008).

It was certainly relevant in *Hamdan* that, prior to the enactment of the MCA, "the tribunal convened to try Hamdan [wa]s not part of the integrated system of military courts, complete with independent review panels, that Congress has established." 548 U.S. at 587. But while the district court viewed the enactment of the MCA as tilting the scales decisively in favor of abstention, there are two separate reasons why the

commissions created by the MCA still do not support the comity-based considerations upon which *Councilman* relied.

First, and most importantly, Congress in the MCA gave *this* court supervisory (and mandatory) appellate jurisdiction over the commissions — including the power to review *all* questions of law arising out of military commission findings and sentences on appeal from the Court of Military Commission Review (CMCR). *See* 10 U.S.C. § 950g(d). In *Councilman*, by contrast, the court-martial was subject only to direct review by the intermediate Army Court of Criminal Appeals (Army CCA) and then the Article I Court of Military Appeals (today, the Court of Appeals for the Armed Forces, or "CAAF"), and *not* the Supreme Court.[2] Thus, the civilian courts in *Councilman* were abstaining in favor of the wholly separate trial and appellate structure that Congress had created expressly to preside over *military* appeals — a structure in which collateral challenges were the only avenue for

2. Congress did not invest the Supreme Court with appellate jurisdiction over the Court of Military Appeals (today's CAAF) until eight years after *Councilman*. *See* Military Justice Act of 1983, Pub. L. No. 98-209, § 10, 97 Stat. 1393, 1405–06 (codified as amended at 10 U.S.C. § 867a, 28 U.S.C. § 1259). And even today, that jurisdiction does not extend to all (or even most) courts-martial. *See United States* v. *Denedo*, 556 U.S. 904, 909–10 (2009).

judicial review outside the military justice system. *See* 420 U.S. at 746 ("Nor has Congress conferred on any Art. III court jurisdiction directly to review court-martial determinations. The valid, final judgments of military courts, like those of any court of competent jurisdiction not subject to direct review for errors of fact or law, have res judicata effect and preclude further litigation of the merits.").

Here, Congress did not make the military commissions *separate* from the civilian courts, but rather directly *subservient* thereto. Insofar as the commissions are therefore bound by this court's case law, abstention would not accomplish anything, since the commission and the CMCR are both ultimately answerable to the same authority as the district court — the D.C. Circuit, reviewing questions of law de novo. Otherwise, abstention would have the effect of requiring this court to defer to *its* inferior courts.

In addition, although there might be some uncertainty over the power of a lower federal court entertaining a claim for collateral relief to bind a court-martial, *see, e.g.*, *Ctr. for Const'l Rights* v. *United States*, 72 M.J. 126, 132 (C.A.A.F. 2013) (Baker, C.J., dissenting), there is no danger of inconsistent judgments under the MCA. By providing this

court with supervisory authority over the commissions, Congress expressly provided that *this* court's resolution of Petitioner's claims will bind the Guantánamo proceedings. *Cf. Hamdan*, 548 U.S. at 559 ("[T]he view that federal courts should respect the balance Congress struck when it created 'an integrated system of military courts and review procedures' is inapposite, since the tribunal convened to try Hamdan is not part of that integrated system.").

Second, separate from the unique appellate structure of the MCA, there are serious questions about how well Congress in the MCA struck a "balance . . . between military preparedness and fairness." *Hamdan*, 548 U.S. at 586. Among other things, it remains unclear whether and to what extent the Bill of Rights even *applies* to defendants in the military commissions, *cf. Kiyemba* v. *Obama*, 555 F.3d 1022, 1026–27 (D.C. Cir. 2009) (holding that the Due Process Clause does not apply to Guantánamo detainees), *vacated*, 559 U.S. 131 (2010), *reinstated on remand*, 605 F.3d 1046 (D.C. Cir. 2010) (per curiam). And this court, sitting en banc, has unanimously held that convictions for material support and solicitation — which were unanimously upheld under de novo review by multiple trial and appellate judges within the military

commission system — could not be sustained against an Ex Post Facto Clause challenge even under the highly deferential "plain error" standard. *See Al Bahlul* v. *United States*, 767 F.3d 1, 27–31 (D.C. Cir. 2014) (en banc).

Further undermining any suggestion that abstention is necessary to respect the balance Congress struck in the MCA is the absence of meaningful mechanisms within the military commissions for internal self-correction. As the Supreme Court explained in 2009 in affirming the power of the CCAs and CAAF to issue writs of error *coram nobis* under the All Writs Act, 28 U.S.C. § 1651(a), "The military justice system relies upon courts that must take all appropriate means, consistent with their statutory jurisdiction, to ensure the neutrality and integrity of their judgments." *Denedo*, 556 U.S. at 917.

Here, in contrast, the CMCR's own rules preclude the possibility of such relief, even in cases of manifest necessity. *See* Ct. Mil. Comm'n Rev. R. 21(b) ("Petitions for extraordinary relief will be summarily denied . . . ."), *available at* http://perma.cc/3AZE-9F92; *see also ACLU* v. *United States*, No. 13-003, slip op. at 2–5 (Ct. Mil. Comm'n Rev. Mar. 27, 2013) (Silliman, J., concurring) (arguing, prior to this court's

analysis in *In re Al-Nashiri* ("*Al-Nashiri II*"), 791 F.3d 71, 75–78 (D.C. Cir. 2015), that the CMCR lacks jurisdiction to issue extraordinary writs).

Thus, the considerations of comity upon which *Councilman* relied simply are not present in the context of the Guantánamo military commissions — courts that are trying non-servicemember offenders for non-military offenses; that are subservient to (and not separate from) the civilian Article III courts; and that, charitably, have not instilled confidence in their ability adequately (or efficiently) to vindicate the rights of defendants. Under those circumstances, *amicus* submits that the abstention principles recognized in *Councilman* should not apply to the Guantánamo military commissions.

II. EVEN IF ABSTENTION IN FAVOR OF THE GUANTÁNAMO COMMISSIONS MIGHT EVER BE APPROPRIATE, IT IS NOT APPROPRIATE HERE

a. Petitioner's Challenge Goes to the Statutory (and Constitutional) Subject-Matter Jurisdiction of the Military Commissions

Even if abstention in favor of the commissions might otherwise be warranted, though, *Councilman* reaffirmed the long line of cases in which the Supreme Court has refused to abstain in favor of military

tribunals — where the Court "did not believe that the expertise of military courts extended to the consideration of constitutional claims of the type presented," and where "it appeared especially unfair to require exhaustion of military remedies when the complainants raised substantial arguments denying the right of the military to try them at all." *Noyd*, 395 U.S. at 696 n.8; *see also New*, 129 F.3d at 152 ("[A] person need not exhaust remedies in a military tribunal if the military court has no jurisdiction over him.").

Here, there can be little question that Petitioner raises a "substantial argument[] denying the right of the military to try [hi]m at all," one that, if true, would mean that "the military court has no jurisdiction over him." After all, the gravamen of his complaint is that the charges against him arose out of conduct that are not triable by the MCA, which provides that "An offense specified in this subchapter is triable by military commission under this chapter only if the offense is committed in the context of and associated with hostilities." 10 U.S.C. § 950p(c); *see also id.* § 948a(9) (defining "hostilities" as "any conflict subject to the laws of war"). In other words, the MCA only confers

statutory subject-matter jurisdiction over offenses "committed in the context of and associated with any conflict subject to the laws of war."[3]

Whether or not Petitioner is *correct* that the charged offenses all arose out of conduct that took place outside of "any conflict subject to the laws of war" (on which *amicus* takes no view), it is certainly the case that his argument to that effect is "substantial," that it goes to the military commission's subject-matter jurisdiction, and that it would, if proven, deny the right of the military to try him for such conduct at all.[4]

---

3. Although Petitioner's challenge is to the *statutory* subject-matter jurisdiction of the military commission, insofar as the MCA could be read to authorize trials by military commission for offenses committed outside of the context of an "armed conflict," it would also raise constitutional questions akin to those currently before the en banc court in *Al Bahlul* v. *United States*, 792 F.3d 1 (D.C. Cir. 2015), *reh'g en banc granted*, No. 11-1324 (D.C. Cir. to be argued Dec. 1, 2015).

4. Nor is it any response that Petitioner, as an "alien unprivileged enemy belligerent," *see* 10 U.S.C. § 948c, remains subject to military commission trial under the MCA for *other* offenses. The longstanding exception to abstention reiterated in *Councilman* includes challenges to the subject-matter jurisdiction of military courts even in cases in which the military's jurisdiction over the *offender* is not in question. *See, e.g.*, *Dynes* v. *Hoover*, 61 U.S. (20 How.) 65, 81 (1857) ("Persons, then, belonging to the army and the navy are not subject to illegal or irresponsible courts martial. . . . In such cases, everything which may be done is void — not voidable, but void."); *cf. O'Callahan* v. *Parker*, 395 U.S. 258 (1969) (holding that the Constitution bars courts-martial of servicemembers for non "service-connected" offenses), *overruled by Solorio* v. *United States*, 483 U.S. 435 (1987).

b. The Supreme Court Has Never Required a Civilian Court To Abstain From Deciding Such a Challenge

In holding that abstention under *Councilman* was warranted, the district court gave short shrift to Petitioner's "substantial argument[] denying the right of the military to try [hi]m at all." Instead, the court focused on the conclusion that "Proceeding with the habeas petition . . . would interfere with the military commission trial." *Al-Nashiri I*, 76 F. Supp. 3d at 222. But the Supreme Court has never abstained from deciding a plaintiff's "substantial argument[] denying the right of the military to try [hi]m at all," no matter how much such a decision might interfere with the trial.

As this court explained in *Hamdan*, a number of Supreme Court decisions, especially *Ex parte Quirin*, 317 U.S. 1 (1942), provide "compelling historical precedent for the power of civilian courts to entertain challenges that seek to interrupt the processes of military commissions." 415 F.3d at 36. Although the Court in *Quirin* ultimately ruled for the government on the merits, it saw no reason to wait for the military commission to finish its work, given that the petitioners challenged whether "the military tribunals have lawful authority to hear, decide and condemn." *In re Yamashita*, 327 U.S. 1, 8 (1946).

To be sure, most of the exemplar cases cited by the *Councilman* Court in support of the exception to abstention for jurisdictional challenges to military tribunals involved suits by civilians seeking to challenge Congress's constitutional authority to subject *them* to trial by court-martial, regardless of their offense. *See, e.g.*, *McElroy* v. *United States ex rel. Guagliardo*, 361 U.S. 281 (1960); *Reid* v. *Covert*, 354 U.S. 1 (1957); *United States ex rel. Toth* v. *Quarles*, 350 U.S. 11 (1955); *see also Councilman*, 420 U.S. at 759 ("The constitutional question presented turned on the status of the persons as to whom the military asserted its power.").

But nothing in any of those decisions suggested that different considerations would apply when a military defendant seeks to challenge the military's authority to try the charged *offenses*. In both cases, the claim is that the military lacks lawful authority to try the case at hand — and so any resulting proceedings are not just voidable, but *void*. *See, e.g.*, *Dynes*, 61 U.S. (20 How.) at 81; *see also Councilman*, 420 U.S. at 748 & n.18. The exact same logic explains why *Councilman* does not apply to a claim by a servicemember (who is otherwise subject to military jurisdiction) that his impending trial by court-martial would

violate the Fifth Amendment's Double Jeopardy Clause. *See, e.g.*, *Watada* v. *Head*, 530 F. Supp. 2d 1136, 1147–49 (W.D. Wash. 2007) (citing *Abney* v. *United States*, 431 U.S. 651, 659 (1977)). So too, here, where "allowing the [military trial] to go forward would not aid the military in developing the facts, applying the law, or correcting their own errors." *Id.* at 1147–48. If Petitioner is correct, then the military commission lacks the power to do any of that. That is why no Supreme Court decision has ever required abstention in the face of such a jurisdictional challenge to a military prosecution — and why the district court was wrong to do so here. *See ante* at 20 n.4.

c. Abstention is Especially Inappropriate Given the Stay in the Court of Military Commission Review

Finally, even if abstention in favor of allowing the Guantánamo military commissions to resolve Petitioner's jurisdictional objection could ever be justified, it is especially difficult to justify here, given the stay that remains in place in the CMCR after and in light of this court's decision in *Al-Nashiri I*. As the government recently advised the CMCR, it is aiming to ameliorate the potential constitutional infirmity this court identified in the appointment of military judges to the CMCR by having the President re-nominate the military judges assigned to the

CMCR specifically to that post, subject to the renewed advice and consent of the Senate. *See* Appellant's Motion to Continue the Stay, *United States* v. *Al-Nashiri*, No. 14-001 (Ct. Mil. Comm'n Rev. Sept. 18, 2015), *available at* https://perma.cc/QZ4H-WY22. Given that no such nominations have yet been filed, it does not appear that a resumption of proceedings before the CMCR (and resolution of the government's interlocutory appeal of the trial court's dismissal of some of the charges against Petitioner) is remotely imminent.

But as this court pointed out in *Obaydullah*, "abstention is surely not appropriate where, as here, there is no military commission, let alone an ongoing proceeding; . . . [when] a trial before a military commission is only a possibility and only at some unspecified time in the future." 609 F.3d at 448. To be sure, unlike in *Obaydullah*, proceedings before the military commission itself in this case *are* active, and a trial before a military commission is more than "a possibility." But the stay of proceedings before the CMCR — soon to enter its seventh month and with no visible signs of progress toward dissolution — certainly cuts against any argument that resolution of Petitioner's claims by this court (or by the district court, on remand) will somehow

further delay Petitioner's trial. *See Parisi* v. *Davidson*, 405 U.S. 34, 41–42 (1972) ("Under accepted principles of comity, the court should stay its hand only if the relief the petitioner seeks . . . would also be available to him with reasonable promptness and certainty through the machinery of the military judicial system in its processing of the . . . charge."). Especially when measured against the duration of the pre-trial proceedings in this case thus far, the current delay gives a "hollow ring" to any suggestion that adjudication of Petitioner's habeas claim "is somehow precipitating the judiciary into reviewing claims that the military . . . could handle within some reasonable period of time." *Boumediene* v. *Bush*, 553 U.S. 723, 799–800 (2008) (Souter, J., concurring).

* * *

The district court abstained from resolving Petitioner's jurisdictional challenge to his trial by military commission solely based upon the concern that "Proceeding with the habeas petition . . . would interfere with the military commission trial." *Al-Nashiri I*, 76 F. Supp. 3d at 222. But the Supreme Court has never shied away from such interference (and has routinely engaged in it) when a petitioner mounts

a serious challenge to the subject-matter jurisdiction of the military court.

And in any event, the district court's concerns over interfering with the military commission trial are hard to square with the CMCR's still-pending stay of the government's interlocutory appeal. Whether or not *Councilman* abstention could ever be justified as applied to a collateral attack upon the Guantánamo military commissions, it certainly was not justified here, and the decision below should be reversed.[5]

5. *Amicus* takes no position on whether this court should therefore remand the merits of Petitioner's habeas claims to be decided by the district court in the first instance, or simply decide them in the context of this appeal. Certainly, insofar as this court desires to minimize any potential interference with the commissions, deciding Petitioner's claims on the merits at this stage may well be the appropriate course. *See Munaf* v. *Geren*, 553 U.S. 674, 691 (2008) ("There are occasions [in which lower courts decided cases on procedural grounds] when it is appropriate to proceed further and address the merits. This is one of them."). Either way, however, a conclusion that Petitioner's habeas claims should be resolved on the merits should moot Petitioner's petition for a writ of mandamus.

CONCLUSION

For the foregoing reasons, *amicus* respectfully submits that the district court's decision to abstain from ruling on the merits of Petitioner's habeas challenge should be reversed.

Dated: **November 30, 2015**

/s/ Eric S. Montalvo
THE FEDERAL PRACTICE GROUP
WORLDWIDE SERVICE
1150 Connecticut Avenue, N.W.
Suite 900
Washington, DC 20036
(202) 862-4360
emontalvo@fedpractice.com

STEPHEN I. VLADECK
4801 Massachusetts Avenue, N.W.
Room 350
Washington, DC 20016
(202) 274-4241
svladeck@wcl.american.edu

Counsel for Amicus Curiae

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

Pursuant to Rule 32(a) of the Federal Rules of Appellate Procedure, the undersigned counsel of record certifies as follows:

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because:

    a. This brief contains **5332** words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because:

    a. This brief has been prepared in a proportionally spaced typeface using *Microsoft Word 2010* in *Century Schoolbook*, 14-point font.

Dated: **November 30, 2015**

/s/ Eric S. Montalvo
Counsel for Amicus Curiae

CERTIFICATE OF SERVICE

I hereby certify that on November 30, 2015, a copy of the foregoing was filed electronically with the Court. Notice of this filing will be sent to all parties by operation of this Court's electronic filing system. Parties may access this filing through the Court's system.

Dated: **November 30, 2015**

/s/ Eric S. Montalvo
Counsel for Amicus Curiae