UNITED STATES
COURT OF MILITARY COMMISSION REVIEW

THE MIAMI HERALD, ABC, INC., ASSOCIATED PRESS, BLOOMBERG NEWS, CBS BROADCASTING, INC., FOX NEWS NETWORK, THE MCCLATCHY CO., NATIONAL PUBLIC RADIO, THE NEW YORK TIMES, THE NEW YORKER, REUTERS, TRIBUNE CO., DOW JONES & COMPANY, INC., AND THE WASHINGTON POST,	)	ORDER
Petitioners	)	WRIT OF MANDAMUS
v.	)	CMCR Case NO. 13-002
UNITED STATES,	)	March 27, 2013
Respondent	)	

BEFORE:

GALLAGHER, PRESIDING JUDGE
GREGORY, KRAUSS, WARD, SILLIMAN, Judges

Per Curiam:

On February 14, 2013, citing the All Writs Act, 28 U.S.C. § 1651(a),[1] Petitioners filed a writ of mandamus seeking: (1) vacation of so much of the Protective Order in the joint military commission trial of Khalid Shaikh Mohammad, Walid Muhammad Salih Mubarek Bin 'Attash, Ramzi Binalshibh, Ali Abdul Aziz Ali, and Mustafa Ahmed Adam al Hawsawi (*United States v. Khalid Shaikh Mohammad et al*) at Guantanamo Bay, Cuba that:

> (a) authorizes the automatic closure of proceedings and sealing of records when any classified information is disclosed, without any judicial

[1] The All Writs Act, 28 U.S.C. § 1651(a), provides that "courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

> determination of a compelling need for secrecy, (b) closes proceedings and seals records concerning information that is publicly known and (c) censors from the proceedings the thoughts and memories of defendants concerning their post-capture treatment; and (2) directing the Commission that it may close a proceeding or seal a record only upon findings that disclosure of specific, non-public information poses a substantial probability of harm to national security or personal safety.

Petitioners' Brief at 7.

On December 6, 2012, the Military Commission Judge issued a Protective Order, and made findings that "this case involves classified national security information . . . the disclosure of which would be detrimental to national security." Respondent's Brief at x (quoting December 6, 2012 Protective Order at 1; App. 321). On February 9, 2013, the Military Commission Judge considered defense motions to amend the Protective Order, and he issued a supplemental ruling and Amended Protective Order #1. Respondent's Brief at x (citing AE 013Z; AE 013AA; App. 341-362). AE 013AA is the Military Commission Judge's 18-page "Amended Protective Order To Protect Against Disclosure of National Security Information." App. 345-362.

This controversy is not ripe for our review. The judge has issued a protective order in accordance with Military Commission Act (MCA) Sec. 949p-3, 10 U.S.C. §949p-3. Petitioners have not alleged a single instance where the Military Commission Judge has improperly applied Amended Protective Order #1 to deny Petitioners access to information, sufficient to warrant the sort of extraordinary relief petitioners seek. *See* MCA Sec. 949d(c). *See generally Clapper v. Amnesty International*, 133 S. Ct. 1138 (2013); *Cheney v. United States*, 542 U.S. 367 (2004); *Am. Civil Liberties Union v. U.S. Dep't of Def.*, 628 F.3d 612 (D.C. Cir. 2011) (discussing classified information and Freedom of Information Act).

We emphasize the limited scope of our holding. We are not ruling on the merits of the parties claim that there is writ jurisdiction under the All Writs Act, 28 U.S.C. § 1651(a).

ORDER

Upon consideration of the briefs filed by the parties, including Petitioners' reply brief, as well as the appendix filed by Respondent, it is

ORDERED that Petitioners' motion for oral argument is **DENIED**.

FURTHER ORDERED that Petitioners' writ of mandamus is **DENIED**.

SILLIMAN, JUDGE, CONCURRING:

I concur with the Order of the Court. I write separately because I believe the Court needs to address the issue of whether 28 U.S.C. § 2241(e)(2) constrains our jurisdiction to act on this petition for mandamus under the All Writs Act, 28 U.S.C. § 1651(a).

28 U.S.C. § 2241(e)(2) states:

> (2) Except as provided in [section 1005(e)(2) and (e)(3) of the Detainee Treatment Act of 2005], no court, justice, or judge shall have jurisdiction to hear or consider any other action against the United States or its agents relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien who is or was detained by the United States and has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.

"The amendment made by [Military Commission Act § 7(a)] . . . *shall apply to all cases, without exception*, . . . which relate to any aspect of the detention, transfer, treatment, *trial*, or conditions of detention of an alien detained by the United States since September 11, 2001." *Boumediene v. Bush*, 553 U.S. 723, 736-37 (2008) (emphasis added; quoting 120 Stat. 2636).

Petitioners seek mandamus regarding certain provisions of the "Amended Protective Order To Protect Against Disclosure of National Security Information," AE 013AA, issued by a Military Commission Judge, a matter which clearly relates "to any aspect of the . . . trial . . . of an alien who . . . has been determined by the United States to have been properly detained as an enemy combatant. . . ." 28 U.S.C. § 2241(e)(2).

In *Al-Zahrani v. Rodriguez*, 669 F.3d 315 (D.C. Cir. 2012), the Court of Appeals for the District of Columbia Circuit, our superior court, affirmed that although the Supreme Court declared 28 U.S.C. § 2241(e)(1) unconstitutional in *Boumediene v. Bush*, 553 U.S. 723 (2008), it saw no need to discuss the second provision § 2241(e)(2)[2], and that provision is therefore deemed to be current applicable law. *Al-Zahrani*, 669 F. 3d at 319 ("We therefore presume that the Supreme Court used a scalpel and not a bludgeon in dissecting §7 of the MCA, and we uphold the continuing applicability of the bar to our jurisdiction over 'treatment' cases.").

A literal reading of 28 U.S.C. § 2241(e)(2) establishes that there is no writ jurisdiction to intervene in a military commission trial. As the Court of Appeals for the District of Columbia Circuit declared in *Kiyemba v. Obama*, "any other action" in § 2241(e)(2) means that all actions "other than a petition for a writ of

[2] "In view of our holding we need not discuss the reach of the writ with respect to claims of unlawful conditions of treatment or confinement." *Boumediene v. Bush*, 553 U.S. 723, 792 (2008).

habeas corpus" are barred from our jurisdiction. 561 F.3d 509, 513 (D.C. Cir. 2009).

In recognizing this restrictive statutory provision, our Court adopted, in 2007 and again in 2008, Rule of Practice 21(b), which the Petitioners now ask that we suspend. Petition at 10. That rule reads:

> (b) Petitions for extraordinary relief will be summarily denied, unless they pertain to a case in which there is an approved finding of guilty and appellate review has not been waived. The CMCR's authority is limited to interlocutory appeals by the United States under MCA § 950d and RMC 908, cases referred to it pursuant to MCA § 950f and RMC 1111, and petitions for new trial referred to it pursuant to RMC 1210.

Petitioners cite the All Writs Act as the sole basis for mandamus jurisdiction. Petitioners' Brief at 8-9. Respondent concedes jurisdiction stating, "[i]n light of *ABC, Inc. v. Powell*, 47 M.J. 363 (1997), Respondent does not dispute the Court's jurisdiction to hear this Petition for a writ of mandamus." Respondent's Brief at v. In *Powell*, the Court of Appeals for the Armed Forces premised jurisdiction on the All Writs Act and ordered a closed Uniform Code of Military Justice (UCMJ) Article 32 investigation to be open to the public "absent cause shown that outweighs the value of openness." *Id*. at 364-65 (citations omitted).

Although the parties have agreed that our Court has jurisdiction over the writ filed by petitioners under the All Writs Act, our superior court has clearly stated that parties cannot confer jurisdiction through a concession in a brief because only Congress can confer jurisdiction in a case such as this:

> Thus, once Congress determined the limits of this Court's jurisdiction in the Military Commissions Act . . . the Executive Branch [cannot] expand those limits. The statute requires a final judgment by a military commission, approved by the convening authority, for which all administrative review has been exhausted, 10 U.S.C. § 950g(a)(1), and requires that Executive Branch rules and regulations not be contrary to or inconsistent with those statutory requirements, 10 U.S.C. § 949a(a). The regulations and notice given Khadr did not change the statutory preconditions to our jurisdiction. Because they have not yet been met in this case, the Military Commissions Act does not give us jurisdiction.

Khadr v. United States, 529 F.3d 1112, 1117 (D.C. Cir. 2008) (internal caselaw citations and quotation marks omitted).

"[M]ilitary courts, like Article III tribunals, are empowered to issue extraordinary writs under the All Writs Act. . . . a court's power to issue any form of relief—extraordinary or otherwise—is contingent on that court's subject-matter jurisdiction over the case or controversy." *United States v. Denedo*, 556

U.S. 904, 911 (2009) (citing *Noyd v. Bond*, 395 U.S. 683, 695, n. 7 (1969)). Subject to constitutional limitations, Congress decides "the subject-matter jurisdiction of federal courts. . . . This rule applies with added force to Article I tribunals, such as the [CMCR], NMCCA and CAAF, which owe their existence to Congress' authority to enact legislation pursuant to Art. I, § 8 of the Constitution." *Id.* at 912 (citing *Clinton v. Goldsmith*, 526 U.S. 529, 533-34 (1999); internal citations omitted)).

Our superior court in *Al-Zahrani* specified that jurisdiction must first be established before reaching the merits of a case or controversy. "Because a federal court without jurisdiction cannot perform a law-declaring function in a controversy, the Supreme Court [has] held that Article III jurisdiction is always an antecedent question to be answered prior to any merits inquiry."[3]

The impact of 28 U.S.C. § 2241(e)(2) upon any claimed subject-matter jurisdiction over this case under the All Writs Act must be answered first, making unnecessary any consideration of other mandamus issues under *Cheney v. United States*, 542 U.S. 367 (2004). I respectfully submit that Congress has explicitly stripped our Court of such jurisdiction under the All Writs Act or otherwise.

FOR THE COURT:

Mark Harvey
Clerk of Court, U.S. Court of Military Commission Review

[3] *Al-Zahrani*, 669 F.3d 315, 318 (D.C. Cir. 2012) (internal quotation marks and citations omitted). In 2008, the Court of Appeals for the District of Columbia Circuit made a similar determination in a military commission case when it concluded that it did not have jurisdiction to review our Court's grant of a government interlocutory appeal of a military commission decision stating:

> Because Article III courts are courts of limited jurisdiction, we must examine our authority to hear a case *before* we can determine the merits. As the party claiming subject matter jurisdiction, Khadr has the burden to demonstrate that it exists. He contends that jurisdiction is proper under the Military Commissions Act of 2006 and under the collateral order doctrine. We disagree.

Khadr v. United States, 529 F.3d 1112, 1115 (D.C. Cir. 2008) (emphasis added, internal citations and quotation marks omitted). *See also Ashcroft v. Iqbal*, 556 U.S. 662, 671 (2009) ("We first address whether the Court of Appeals had subject-matter jurisdiction . . . . Respondent disputed subject-matter jurisdiction in the Court of Appeals, but the court hardly discussed the issue. We are not free to pretermit the question. Subject-matter jurisdiction cannot be forfeited or waived and should be considered when fairly in doubt." (citations omitted)). "Before considering whether mandamus relief is appropriate [by determining whether the "right to issuance of the writ is clear and indisputable" and that "no other adequate means to attain the relief exist[s]]; however, we must be certain of our jurisdiction." *In re Asemani*, 455 F.3d 296, 299 (D.C. Cir. 2006) (citations omitted).