

FAWZI KHALID ABDULLAH	)	IN THE COURT OF MILITARY
FAHAD AL ODAH,	)	COMMISSION REVIEW
	)	
FAYIZ MOHAMMED AHMED	)	
AL KANDARI,	)	Government's Opposition to the
	)	Petitioners' Motion for Leave to File
KHALID ABDULLAH MISHAL	)	Emergency Petition for Writ of
AL MUTAIRI, and	)	Mandamus and for Other Appropriate
	)	Relief and Motion for Leave to Attach
FOUAD MAHMOUD AL RABIAH,	)	Declaration of Matthew J. MacLean
	)	
<i>Petitioners</i>	)	
	)	
v.	)	CMCR Case No. 08-001
	)	
COLONEL LAWRENCE MORRIS,	)	
Chief Prosecutor of Military	)	
Commissions	)	
	)	
<i>Respondent</i>	)	20 March 2008

**TO THE HONORABLE, THE JUDGES OF THE  
COURT OF MILITARY COMMISSION REVIEW**

The Government (“Respondent”) respectfully requests that this Court deny in full Petitioners’ Motion for Leave to File Emergency Petition for Writ of Mandamus and for Other Appropriate Relief and Motion for Leave to Attach Declaration of Matthew J. MacLean, and the Emergency Petition for Writ of Mandamus and for Other Relief. This Court does not have the jurisdiction to hear this case pursuant to the laws and rules governing this Court.

The Military Commissions Act of 2006 (“MCA”) authorized the creation of this Court as a court of limited jurisdiction. *See* 10 U.S.C. § 950f(a); Rule for Military Commissions (“RMC”) 1201(a). In a subsection entitled “CASES TO BE REVIEWED,” the MCA provides “the accused” with the right to appeal to this Court *only* in a “case that is referred to the Court by the convening authority under section 950c of this title.” 10 U.S.C. § 950f(c); *see also* RMC 1201(c). And under section 950c of the MCA, the

convening authority may refer a case for this Court’s review on behalf of “the accused” *only* if “the final decision of a military commission (as approved by the convening authority) includes a finding of guilty.” 10 U.S.C. § 950c(a); *see also* RMC 1111. Here, of course, the petitioners are not “accused” of anything, much less have they been found “guilty” under “the final decision of a military commission.” And it should therefore go without saying that the convening authority has no “final decision” to “approve,” much less has the convening authority referred any case to this Court for review. In short, the petitioners fail to meet each and every statutory prerequisite to this Court’s jurisdiction—and they offer nary a single statutory argument or citation to the contrary.

Rather than citing a single statutory provision that could even conceivably justify their invocation of this Court’s jurisdiction, the petitioners instead invoke the All Writs Act, 28 U.S.C. § 1651,<sup>1</sup> notwithstanding the fact that “it is firmly established that section 1651 does not expand the jurisdiction of a court,” *Telecomms. Research & Action Center v. F.C.C.*, 750 F.2d 70, 76 (D.C. Cir. 1984) (“*TRAC*”). *See* Petition for Emergency Writ of Mandamus and Other Appropriate Relief at 2-3. The All Writs Act “is to be used ‘sparingly and only in the most critical and exigent circumstances.’” *Wisconsin Right to Life, Inc. v. Federal Election Comm’n*, 542 U.S. 1305, 1306 (2004) (Rehnquist, C.J., in chambers) (quoting *Ohio Citizens for Responsible Energy, Inc. v. NRC*, 479 U.S. 1312, 1313 (1986) (Scalia, J., in chambers); *accord Fishman v. Schaffer*, 429 U.S. 1325, 1326 (1976) (Marshall, J., in chambers). Moreover, a writ can be issued under the Act *only*

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<sup>1</sup> It is entirely unclear that the All Writs Act applies to this Court at all. The Act applies only to “courts established by Act of Congress.” 28 U.S.C. § 1651(a). And as noted above, this Court was “established” by the Secretary of Defense, albeit pursuant to a statutory authorization. *See* RMC 1201(a) (“Within the Office of the Secretary of Defense there is a Court of Military Commission Review, as authorized in 10 U.S.C. § 950f.”). Even assuming, however, that this Court may issue writs pursuant to the All Writs Act in appropriate cases, this is not one of them.

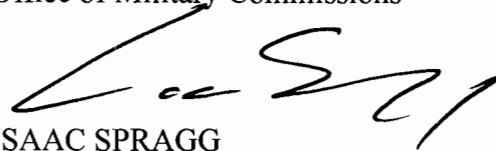
where the petitioner is currently before an inferior court over which this Court has appellate jurisdiction. *See, e.g., McClellan v. Carland*, 217 U.S. 268, 280 (1910) (emphasizing that the writ is potentially available only where there is an ongoing “case” that “is within the appellate jurisdiction of a higher court”). Here, of course, there is no military-commission case brought against the petitioners, and this Court therefore has absolutely no jurisdiction—not even “prospective” jurisdiction—to “protect” through the issuance of a writ. *See Clinton v. Goldsmith*, 526 U.S. 529, 534-35 (1999) (emphasizing that a court may issue a writ under the All Writs Act only “in aid” of its jurisdiction, and holding that the Act is inapplicable where—as here—there is no such underlying jurisdiction); *cf. TRAC*, 750 F.2d at 76. Indeed, the petitioners have cited no case (and the Government has found none) that suggests the All Writs Act authorizes a judge or justice to issue writs where the petitioners are involved in no ongoing litigation whatsoever in the court or agency below. Were it otherwise, of course, the Act would transform every court created by Congress into a roving commission that could invoke the powers of judicial process at will, on behalf of any purported petitioner on the planet. The incongruence of that result—and the petitioners’ open embrace of it—simply underscores the meritless premise of the relief requested.

Accordingly, the petitioners' motions must be denied, the Clerk should return the documents to the petitioners.<sup>2</sup>

Respectfully submitted,



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CPT, JA, USA  
Office of Military Commissions



ISAAC SPRAGG  
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<sup>2</sup> In the event the Court finds (contrary to all authority) that it *does* have jurisdiction to entertain the instant Writ, Respondent respectfully requests the opportunity to file a supplemental brief addressing the merits *vel non* of Petitioners' complaint.

### Certificate of Service

I certify that a copy of the foregoing was sent via email to David J. Cynamon and Matthew J. MacLean (Counsels for Petitioners) at [david.cynamon@pillsburylaw.com](mailto:david.cynamon@pillsburylaw.com) and [matthew.macleam@pillsburylaw.com](mailto:matthew.macleam@pillsburylaw.com) on the 20<sup>th</sup> day of March 2008.

A handwritten signature in black ink, appearing to read 'KAP', with a long horizontal stroke extending to the right.

KEITH A. PETTY  
CPT, JA, USA  
Office of Military Commissions