

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
EASTERN DIVISION
NO. 5:09-HC-02169-BO

TIMOTHY HENNIS,)	
)	
Petitioner,)	
)	
v.)	MEMORANDUM IN OPPOSITION
)	TO PETITIONER'S RENEWED
LTG FRANK HEMLICK,)	REQUEST FOR A STAY
COLONEL PATRICK PARRISH,)	
GENERAL LLOYD J. AUSTIN, II.)	
THE HONORABLE JOHN McHUGH)	
)	
Respondents.)	

Respondents, by and through the United States Attorney for the Eastern District of North Carolina, submit this memorandum in opposition to Petitioner's renewed request for a stay.

NATURE OF RELIEF REQUESTED

On March 2, 2010, the Petitioner's court-martial proceedings resumed at Fort Bragg, North Carolina. The military judge denied Petitioner's oral request to further delay the court-martial, absent an order from this Court enjoining the military from proceeding. As a result, Petitioner filed a renewed request for this Court to stay the court-martial proceedings.

Respondents oppose Petitioner's renewed request for an emergency stay of the court-martial proceedings for two reasons. First, the injunctive relief Petitioner requests is precluded by the abstention doctrine discussed in Younger v. Harris, 401 U.S. 37 (1971) and Schlesinger v. Councilman, 420 U.S. 738 (1975).

Second, Petitioner fails to assert any authority or justification to warrant this Court taking the extraordinary measure of enjoining the court-martial. See Docket Doc. 23.

ARGUMENT

I. Supreme Court Precedent Establishes This Court Should Refrain From Enjoining Petitioner's Court-Martial¹

As stated in Respondents' memoranda and oral argument, long standing precedent directs this Court should refrain from enjoining the court-martial proceedings. See Docket Doc. 10, 17 (referring to Schlesinger v. Councilman, 420 U.S. 738 (1975); Dooley v. Ploger, 491 F.2d 608 (4th Cir. 1974)). Petitioner's only challenge to the military's jurisdiction is based on the factual circumstances surrounding his re-enlistment date.² See Docket Doc. 6, 15. Factual jurisdictional questions do not amount to extraordinary circumstances that warrant this Court's intervention. Id. As a result, the Supreme Court and Fourth Circuit both reversed district courts that enjoined military

¹ As per this Court's order on March 1, 2010, Docket Doc. 22, Respondents will further elaborate on the abstention doctrine in the supplemental brief, however, it is necessary to address the issue in this memorandum because it is equally applicable to Petitioner's request to temporarily stay the court-martial proceedings as it is to his request to permanently enjoin the court-martial proceedings.

² At oral argument, Petitioner conceded that his petition does not raise any issues concerning the Fifth Amendment of the U.S. Constitution or assert any double jeopardy claims.

trials prior to the completion of the court-martial proceedings. See Councilman, 420 U.S. at 758; Ploger, 491 F.2d at 613.

The abstention doctrine promulgated by the Supreme Court in Younger v. Harris, provides that a federal court is prohibited from enjoining a state criminal proceeding without a showing of "extraordinary circumstances" that would warrant federal intervention. 401 U.S. at 37, 45, 53-54. The Supreme Court based its ruling upon considerations of equity and comity. Id. at 43-44; accord Councilman, 420 U.S. at 755-56. So long as the state court provides an adequate forum to raise and adjudicate the federal claim or defense (i.e., a "single suit would be adequate to protect the rights asserted"), Younger establishes that the federal courts may not exercise their equity powers to intervene in a parallel prosecution because the accused has an "adequate remedy at law" by exhaustion of the available trial court and appellate channels. Id.

The Supreme Court later applied the Younger-abstention doctrine in other contexts, including intervening in military courts-martial. In Schlesinger v. Councilman, the Court held that the considerations of equity and comity set forth in Younger and similar cases "apply in equal measure to the balance governing the propriety of equitable intervention in pending court-martial proceedings." 420 U.S. at 757. The Court then went on to hold that federal district courts must decline from

intervening in a military prosecution when a serviceman seeking an injunction can show no harm "other than that attendant to the resolution of his case in the military court system." Id. at 758; see also McLucas v. DeChamplain, 421 U.S. 21, 33 (1975); Younger, 401 U.S. at 46 ("Certain types of injury, in particular, the cost, anxiety, and inconvenience of having to defend against a ... criminal prosecution, could not by themselves be considered 'irreparable' in the special legal sense of that term.").

These precedents precisely fit the circumstances of the instant case. As stated in Respondents' previous briefs to this Court, a jurisdictional challenge that Petitioner can and already has raised through military channels does not amount to extraordinary circumstances when there is no other constitutional question before the Court. See id.; Docket Doc. 10, 17. Any harm Petitioner claims he will suffer from sitting through a court-martial does not amount to irreparable harm. See Councilman, 420 U.S. at 758; Dooley, 491 F.2d at 613. The Fifth Circuit also followed the Younger abstention doctrine in a case involving a jurisdictional challenge to a pending court-martial:

Abstention is particularly appropriate in this case because an individual's status is a question of fact which the military courts are more intimately familiar with than the civil courts. Whether [Petitioner] was discharged depends largely upon the interpretation of military forms and standard operating procedures with which [federal courts] are comparatively less well-versed. In such matters, it is proper to defer to the military courts. Schlesinger v. Councilman, 420 U.S. 738, 756 (1975).

Lawrence v. McCarthy, 344 F.3d 467, 473 (5th Cir. 2003).

Therefore, this Court should reject Petitioner's unsupported request for an emergency stay, and follow the long line of precedent establishing that this Court must abstain from enjoining or intervening in Petitioner's court-martial and dismiss the habeas petition.

Petitioner will be afforded the opportunity to have the jurisdictional issue fully and fairly considered by the military trial and appellate courts. See Docket Doc. 10 at 3-6 (explaining 10 U.S.C. §§ 866, 867). If convicted, Petitioner can raise his jurisdictional challenge through the normal military appellate process. Then, and only then, should this Court review Petitioner's habeas claim. Therefore, this Court's review of Petitioner's jurisdictional challenge is premature, and this Court should refuse Petitioner's request to halt the court-martial proceedings.

II. Petitioner Failed To Establish The Four Factors Necessary To Enjoin The Court-Martial Proceedings

Petitioner's request for an emergency stay of the court-martial proceedings should be construed as a request for a preliminary injunction.³ See Nken v. Holder, --- U.S. ---, 129

³ Petitioner did not specify whether he requested this Court issue a stay pursuant to Fed. R. Civ. P. 62 which governs stays of proceedings to enforce a judgment, or Fed. R. Civ. P. 65, injunctions and restraining orders.

S. Ct. 1749, 1760-62 (2009), remanded, 585 F.3d 818 (4th Cir. 2009)(comparing a request for a stay versus a preliminary injunction). Therefore, the proper analysis would be to require Petitioner to satisfy all four prerequisites to preliminary injunctive relief, including establishing a clear showing that he is likely to succeed on the merits of the habeas petition. See Winter v. Natural Resources Defense Council, Inc., --- U.S. --- , 129 S. Ct. 365, 374-76 (2008); The Real Truth About Obama, Inc. v. Fed. Election Comm'n, 575 F.3d 342, 346, 351 (4th Cir. 2009). However, regardless of whether this Court determines the request is for a preliminary injunction or a stay of an order, Petitioner cannot meet his burden of proof for the four factor tests.

A. Petitioner's Request To Enjoin The Court-martial Should Be Considered A Request For A Preliminary Injunction To Stay Court-Martial Proceedings

1. Petitioner Requests To Stop The Court-martial Proceeding Rather Than Staying A Judgment, Therefore The Petitioner's Requests A Preliminary Injunction

Habeas petitions requesting district courts to enjoin court-martial proceedings traditionally have been construed as requests for a preliminary injunction. See, e.g., McLucas v. DeChamplain, 421 U.S. 21 (1975); Councilman, 420 U.S. at 758; Lawrence v. McCarthy, 344 F.3d 467 (5th Cir. 2003); Wickham v. Hall, 706 F.2d 713 (5th Cir. 1983); Watada v. Head, 530 F. Supp. 2d 1136 (W.D. Wash. 2007); see also Younger v. Harris, 401 U.S. 37 (1971) (holding the federal court should abstain from issuing an

injunction to stay state court proceedings). As stated at oral argument, Respondents maintain that Petitioner's request for this Court to issue an "emergency stay" should be construed as a request for this Court to issue a preliminary injunction to halt the court-martial proceedings.

An injunction is a means by which this Court tells a party what to do or not to do. Nken, 129 S. Ct. at 1757. "When a court employs the extraordinary remedy of an injunction, it directs conduct of a party, and does so with the backing of its full coercive powers." Id. By contrast, a stay operates to suspend implementation of a court's judgment pending review on appeal. See Nken, 129 S. Ct. at 1758; Fed. R. Civ. P. 62.

A stay pending appeal certainly has some functional overlap with an injunction, particularly a preliminary one. Both can have the practical effect of preventing some action before the legality of that action has been conclusively determined. But a stay achieves this result by temporarily suspending the source of authority to act - the *order or judgment in question* - not by directing an actor's conduct. A stay "simply suspend[s] judicial altercation of the status quo," while injunctive relief "grants judicial intervention that has been withheld by lower courts."

Nken, 129 S. Ct. at 1758 (emphasis added).

The Petitioner is not requesting a stay pending an appeal of a judgment; he requests this Court issue a preliminary injunction, ordering Judge Parrish (a named Respondent and party to this action) to halt the court-martial proceedings while this Court considers Petitioner's collateral attack on the court-

martial. Petitioner seeks a preliminary injunction by requesting "an order *altering* the legal status quo" by stopping the court-martial proceedings which the military courts refused to enjoin based on his jurisdictional claim. Nken, 129 S. Ct. at 1758 (quoting Turner Broadcasting System, Inc. v. FCC, 507 U.S. 1301, 1302 (1993)). Petitioner clearly seeks a coercive order against the Government, which the Supreme Court considers a request for a preliminary injunction. See Nken, 129 S. Ct. at 1757.

2. Standard For Preliminary Injunction

"A preliminary injunction is an extraordinary remedy afforded prior to trial at the discretion of the district court that grants relief *pendente lite* of the type available after the trial." Real Truth About Obama, Inc., 575 F.3d at 345.

"[P]reliminary injunctions are extraordinary remedies involving the exercise of very far-reaching power to be granted only sparingly and in limited circumstances." Direx Israel, Ltd. v. Breakthrough Med. Corp., 952 F.2d 802, 816 (4th Cir. 1991).

In its recent opinion in Winter, the Supreme Court articulated clearly what must be shown to obtain a preliminary injunction, stating that the plaintiff [or in this case Petitioner] must establish "[1] that he is likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an injunction is in the public interest." Winter, 129 S. Ct. at 374. And all four requirements must be satisfied.

Obama, 575 F.3d at 346.

The Fourth Circuit took note of three changes regarding the Supreme Court's analysis for preliminary injunctions. Real Truth About Obama, Inc., 575 F.3d at 345-46 (citing Winter, 129 S.Ct. at 376). First, the Supreme Court "rejected a standard that allowed the plaintiff to demonstrate only a 'possibility' of irreparable harm because that standard was 'inconsistent with our characterization of injunctive relief as an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief.'" Id. (referring to Winter, 129 S.Ct. at 375-76). Additionally, the second factor requires the Petitioner to show he is likely to be irreparably harmed absent preliminary relief, rather than balancing the irreparable harm to the respective parties. Real Truth About Obama, Inc., 575 F.3d at 347. Finally, the Supreme Court "emphasized the public interest requirement, stating, '[i]n exercising their sound discretion, courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction.'" Real Truth About Obama, Inc., 575 F.3d at 347 (referring to Winter, 129 S. Ct. at 376-77).

In sum, a preliminary injunction requires Petitioner to affirmatively establish all four factors of the test, with a clear showing that he will likely succeed on the merits of the Petition.

3. Standard For A Staying A Judgment

The Supreme Court recently upheld the traditional standard of review for issuing a stay which requires courts to consider four factors:

[1] whether the stay applicant has made a strong showing that he is likely to succeed on the merits; [2] whether the applicant will be irreparably injured absent a stay; [3] whether issuance of the stay will substantially injure the other parties interested in the proceeding; and [4] where the public interest lies.

Nken, 129 S. Ct. at 1760-62 (quoting Hilton v. Braunskill, 481 U.S. 770, 776 (1987)).

"A stay is an 'intrusion into the ordinary processes of administration and judicial review.'" Nken, 129 S. Ct. at 1757 (quoting Virginia Petroleum Jobbers Assn. v. Federal Power Comm'n, 259 F.2d 291, 925 (D.C. Cir. 1958)). A stay "is not a matter of right, even if irreparable injury might otherwise result" to Petitioner. Nken, 129 S. Ct. at 1757, 1760 (quoting Virginian R. Co. V. United States, 272 U.S. 658, 672 (1926)).

"It is instead 'an exercise of judicial discretion,' and '[t]he propriety of its issue is dependent upon the circumstances of the particular case.'" Nken, 129 S. Ct. at 1760 (quoting Virginian R. Co., 272 U.S. at 672-73). Petitioner, as the party requesting a stay, bears the burden of showing that the circumstances justify an exercise of that discretion. Nken, 129 S. Ct. at 1761

(referring to Clinton v. Jones, 520 U.S. 681, 708 (1997)).

Petitioner failed to meet that burden.

The first factor, a strong showing of a likelihood of success on the merits, requires more than a mere possibility that relief will be granted. Id. at 1761. Similarly, simply showing some possibility of irreparable injury fails to satisfy the second factor. See Winter, 129 S. Ct. at 375. "Once an applicant satisfies the first two factors, the traditional stay inquiry calls for assessing the harm to the opposing party and weighing the public interest." Nken, 129 S. Ct. at 1762. The third and fourth factors, harm to the opposing party and the public interest, merge when the Government is the opposing party. Id. "A court asked to [grant a request for a] stay ... cannot simply assume that ordinarily, the balance of hardships will weigh heavily in the applicant's favor.'" Id. Petitioner fails to satisfy any of the factors when considered individually, as well as when the relative hardships are balanced.

4. Comparing Factors For An Injunction Versus A Stay

There is substantial overlap between the factors governing stays and preliminary injunctions, "not because the two are one and the same, but because similar concerns arise whenever a court order may allow or disallow anticipated action before the legality of that action has been conclusively determined." Nken,

129 S. Ct. at 1758, 1761 (referring to the four factors of a preliminary injunction detailed in Winter, 129 S. Ct. at 376-77).

The following table quotes the Supreme Court's recent rulings regarding the four factors for federal courts to consider when issuing a stay or a preliminary injunction. Compare Nken v. Holder, 129 S. Ct. at 1760-62, with Winter v. Natural Resources Defense Council, Inc., 129 S. Ct. at 374-76.

Stay	Preliminary Injunction
Whether the stay applicant has made a strong showing that he is likely to succeed on the merits	Whether Petitioner has established that he is likely to succeed on the merits
Whether he will be irreparably injured absent a stay	That he is likely to suffer irreparable harm in the absence of preliminary relief
Whether issuance of the stay will substantially injure the other parties	That the balance of equities tips in his favor
Where the public interest lies	That an injunction is in the public interest

While the difference between a stay and a preliminary injunction may seem like pure semantics in this case, the subtle difference places an additional burden on the Petitioner for a preliminary injunction. Regardless, Petitioner cannot meet the four requirements of a stay or of a preliminary injunction.

B. Petitioner Cannot Meet The Requisite Four Factors To Warrant This Court Enjoining or Staying The Court-Martial

1. Petitioner Failed To Establish That He Will Likely Succeed On The Merits Of The Habeas Petition

Petitioner fails to present the necessary "strong showing" that he will likely succeed on the merits of the habeas petition to grant a stay, and cannot meet the requisite "clear showing" for a preliminary injunction. Nken, 129 S. Ct. at 1761 (citing the standard that to grant a stay, it is not enough that the chance of success on the merits be "better than negligible" as set forth in Sofinet v. INS, 188 F.3d 703, 707 (7th Cir. 1999)); Winter, 129 S. Ct. at 375-76. Petitioner fails to assert any authority for this Court to intervene, and he disregards the abstention doctrine established by the Supreme Court in Younger and Councilman. As explained in Respondents' briefs and at oral argument, Petitioner did not raise a constitutional issue or establish an exception to the abstention doctrine that would warrant this Court entertaining the merits of the habeas petition. See Doc. 10, 17.

Instead, the Petitioner merely repeated that this Court should apply the 1949 ruling in Hirshberg v. Cooke, 336 U.S. 210 (1949), to the facts in this case.⁴ The Petitioner failed to

⁴ Respondents will fully address the government's position regarding the jurisdictional issues surrounding the August 1986 ETS date in the supplemental brief to be provided by March 8, 2010. For the purposes of this opposition to Petitioner's request

address the fact that even if this Court found a break in service occurred for one day in June 1989, Congress specifically revised the Uniform Code of Military Justice Article 3(a) to cure the Hirshberg gap. See Willenbring v. Neurator, 48 MJ 152, 158 (1998) (containing Chief Judge Robinson Everett's description of the history of Article 3(a) in order to close the loophole caused by the Hirsberg decision). Hirshberg was decided on statutory rather than constitutional grounds, and those statutes have since changed. Id. The impact of Hirshberg was promptly considered in hearings before the House Armed Services Committee and considered when later versions of the UCMJ were developed. The primary purpose of Article 3(a) was to close the "loophole" caused by the rule that if someone were to re-enlist after their ETS date, the military would lose jurisdiction for the day between the honorable discharge and the re-enlistment.

Petitioner's reliance on Hirshberg does not provide any likelihood of success for his habeas petition because Article 3(a) cures any loss of jurisdiction due to a break in service. UCMJ article 3(a) provides that court-martial jurisdiction is retained in Petitioner's case because: (1) murder is punishable by more than five years of confinement; (2) Petitioner conceded at oral argument that he cannot be tried by the state of North

for an emergency stay, Respondents will narrow the discussion to Petitioner's failure to show a likelihood of success on the merits of the habeas petition as a matter of law.

Carolina on account of double jeopardy, therefore, the military is the only sovereign which can prosecute him for these crimes; (3) Petitioner is subject to the UCMJ as a retiree, and (4) the offense of murder is not barred by the statute of limitations.

Therefore, whether this court agrees with Respondents' assertion that Petitioner re-enlisted prior to his ETS date,⁵ or if the court determines the ETS date had passed, no genuine issue of material fact exists because UCMJ article 3(a) provides that the military retains court-martial jurisdiction. Therefore, Petitioner's habeas claim will fail and Respondents should be granted judgment as a matter of law.

⁵ The government maintains there is no interpretation of the facts regarding Petitioner's ETS date which would change the legal conclusion that the military at least maintained jurisdiction pursuant to UCMJ article 3(a). Respondents also contend that there are multiple reasons why August 1986 cannot serve as the final ETS date prior to the June 13, 1989, re-enlistment. First, Petitioner signed an application to re-enlist, thereby agreeing as a matter of contract that his ETS date was properly adjusted to June 17, 1989. Secondly, if the Court was to attempt to reconstruct the facts as if Petitioner had never been incarcerated, he would have been required to re-enlist or elect to leave the military prior to August 1986. However, since he was incarcerated, that never occurred. Finally, Petitioner accepted a constructive promotion of December 1, 1988. Therefore, he must also accept that the 1988 Army Regulation 600-200, para. 7-33, required his ETS date to be extended one year, to December 1, 1989. Therefore, his discharge on June 12, 1989, and re-enlistment on June 13, 1989, would have occurred prior to his ETS date.

2. Petitioner Will Not Be Irreparably Injured Since The Only Harm Is The Attendant Resolution Of The Court-Martial

This Court has recognized that Petitioner "must satisfy a higher standard of irreparable harm than in the non-military context, 'given the federal courts' traditional reluctance to interfere with military matters.'" McBride v. West, 940 F. Supp. 893, 896 (E.D.N.C. 1996) (citing Guerra v. Scruggs, 942 F.2d 270, 274 (4th Cir. 1991)). Petitioner is not in pre-trial confinement. He is free to conduct his normal business. The only harm Petitioner has suggested has been his requirement to go through the court-martial proceedings. However, the precedent for the last thirty-five years has consistently held that "such harm" does not rise to irreparable harm. See Councilman, 420 U.S. at 758.

The Supreme Court established in Councilman that "[w]hen 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." 420 U.S. at 758 (emphasis added). Since Petitioner only alleges that the military lacks jurisdiction – a claim for which Petitioner has an adequate remedy at law through the military justice system – any harm he may experience by sitting through

the court-martial does not amount to irreparable harm.

Councilman, 420 U.S. at 758; see also Dooley, 491 F.2d at 613.

3. The Respondents Will Be Substantially Harmed
If The Court-martial Proceedings Are Further Delayed

Respondents would be substantially harmed if this Court were to stay the court-martial proceedings. A stay of Petitioner's court-martial would result in substantial harm to the government, including the cost and inconvenience to over 100 witnesses who are scheduled to testify. The government has arranged for over one hundred witnesses to testify at the court-martial currently in session. The funding, travel arrangements, and calendaring would have to be completely re-organized if the court-martial is stayed.

A stay would also establish a dangerous precedent permitting disruption to the court-martial proceedings and second guessing of the military decisions prior to the completion of exercising the full remedies available through the military appellate courts. This Court noted that the military's right to pursue military justice would be seriously threatened if requests for injunctions [or stays] became a matter of course. See McBride v. West, 940 F. Supp. at 896 (relying on Guerra v. Scruggs, 942 F.2d at 275). This Court and the Fourth Circuit recognize that "[t]he result would be judicial second-guessing of a kind that courts have been reluctant to engage in." Id. Caselaw clearly establishes that federal courts will not second-guess court-

martial findings when claims asserted in a habeas petition have been fully and fairly considered by military courts. See Burns v. Wilson, 346 U.S. 137, 139 (1953); Arman v. McKean, 549 F.3d 279 (3d Cir. 2008); Romey v. Vanyur, 9 F. Supp. 2d (E.D.N.C. 1998).

If this Court were to establish a precedent of granting a stay of court-martial proceedings based on routine jurisdictional challenges, the military faces the real threat of servicemembers regularly attempting to circumvent the military justice system. Military members could file motions challenging jurisdiction at the trial level and present them to the Army Court of Criminal Appeals (ACCA) and Court of Appeals for the Armed Forces (CAAF) as extraordinary writs. Because such members would face such an extremely heavy burden of establishing a clear and indisputable entitlement to extraordinary relief, ACCA and CAAF would likely deny such routine jurisdictional challenges. Servicemembers would immediately file habeas petitions requesting emergency stays or preliminary injunctions to enjoin the court-martial proceedings. This Court should not establish a precedent that relief will be granted as an interlocutory measure absent a substantial constitutional question beyond the routine jurisdictional challenge. Councilman, 420 U.S. at 758-59. In short, establishing precedent that would permit federal court intervention in court-martial proceedings would significantly

disrupt the Congressionally established military justice system by allowing servicemembers to circumvent the court-martial and military appellate process.

4. The Public Interest Demands Proceeding With Petitioner's Court-Martial

It is in the public's interest to "allow the military, in orderly fashion, to fully adjudicate claims of its own personnel, free of unnecessary interference by federal courts." McBride, 940 F. Supp. At 987. This case involves newly discovered DNA evidence in the heinous murders of Kathryn, Kara, and Erin Eastburn, three military family members. As such, it is in the public's interest for the military to proceed with the court-martial and ensure that justice is done.

Furthermore, this Court should be mindful of the strong public policies implicated by long-established principles of comity and separation of powers. In Younger, the Supreme Court discussed how, since our nation's founding, Congress has through legislative enactment established a public policy against federal court interference in state judicial proceedings. 401 U.S. at 43; 28 U.S.C. § 2283 ("A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."). In Councilman, the Supreme Court recognized that this same public policy of judicial non-interference should apply to military

courts-martial, holding that “[w]hile the peculiar demands of federalism are not implicated, the deficiency is supplied by factors equally compelling;” specifically the “long history” of “laws and traditions governing [military] discipline,” founded on “unique military exigencies,” that gave rise to the need to create a non-Article III military justice system within the executive branch. 420 U.S. at 757-58. Accordingly, all three coordinate branches of the federal government have recognized a strong public policy in favor of judicial non-interference in pending military courts-martial, and these judgments should be given effect by this Court, which should without qualification decline to intervene in this matter.

CONCLUSION

For all the reasons discussed above, the United States submits the Petitioner’s request for an emergency stay of the court-martial proceedings should be denied.

Respectfully submitted this 5th day of March 2010,

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CERTIFICATE OF FILING

I hereby certify that on this 5th day of March 2010, a copy of the foregoing "**OPPOSITION TO PETITIONER'S RENEWED REQUEST FOR AN EMERGENCY STAY**" was electronically filed. I understand that notice of this filing will be sent to all parties by operation of the Court's electronic filing system.

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