

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

ABD AL RAHIM HUSSEIN AL NASHIRI,)	
	)	CIVIL ACTION
	)	(HABEAS CORPUS)
<i>Petitioner,</i>)	
v.	)	No. 08-Civ-1207 (RCL)
	)	Misc. No. 08-mc-442 (TFH)
DONALD TRUMP, <i>et al.</i> ,)	
	)	<i>before</i>
<i>Respondents.</i>	)	Judge Royce C. Lamberth
)	

MOTION FOR A TEMPORARY RESTRAINING ORDER

COMES NOW, pursuant to Fed. R. Civ. P. 65(b) and LCvR 65.1(a), and Petitioner moves this Honorable Court for a Temporary Restraining Order against Respondents until such time as this Court can enter a final order on Petitioner’s Motion for a Preliminary Injunction, filed this same day. In support of this motion, Petitioner relies upon the attached memorandum of law. A proposed order is attached.

Respectfully submitted,

Dated: November 1, 2017

/s/ Michel Paradis
Michel Paradis (D.C. Bar #499690)
U.S. Department of Defense
Military Commission Defense Organization
1620 Defense Pentagon
Washington, DC 20301

Counsel for Petitioner

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

ABD AL RAHIM HUSSEIN AL NASHIRI,)	
	)	CIVIL ACTION
	)	(HABEAS CORPUS)
<i>Petitioner,</i>)	
v.	)	No. 08-Civ-1207 (RCL)
	)	Misc. No. 08-mc-442 (TFH)
DONALD TRUMP, <i>et al.</i> ,)	
	)	<i>before</i>
<i>Respondents.</i>	)	Judge Royce C. Lamberth
)	

ORDER

It is hereby ORDERED that Petitioner’s motion for a temporary restraining order, filed with this Court on November 1, 2017, is GRANTED.

ORDERED that Respondents shall immediately take steps sufficient to ensure that all proceedings of before any military commissions to which charges have been referred against Petitioner but in which no judgment has been rendered are halted until such time as this Court issues a final order on Petitioner’s Motion for a Preliminary Injunction, filed with this Court on November 1, 2017.

Dated:

Judge Royce C. Lamberth
United States District Judge

CERTIFICATE OF SERVICE

I certify that on November 1, 2017, I caused the foregoing to be served on Respondent's counsel via this Court's ECF software.

Dated: November 1, 2017

/s/ Michel Paradis
Michel Paradis (D.C. Bar #499690)
U.S. Department of Defense
Military Commission Defense Organization
1620 Defense Pentagon
Washington, DC 20301

Counsel for Petitioner

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

ABD AL RAHIM HUSSEIN AL NASHIRI,)	
	)	CIVIL ACTION
	)	(HABEAS CORPUS)
)	
<i>Petitioner,</i>)	
)	
v.	)	No. 08-Civ-1207 (RCL)
	)	Misc. No. 08-mc-442 (TFH)
DONALD TRUMP, <i>et al.</i> ,)	
)	
	)	<i>before</i>
<i>Respondents.</i>	)	Judge Royce C. Lamberth
)	

**MEMORANDUM OF LAW
IN SUPPORT OF PETITIONER'S MOTION
FOR A TEMPORARY RESTRAINING ORDER**

INTRODUCTION

Petitioner is currently a capital defendant before a military commission convened in Guantanamo Bay, Cuba. On October 11, 2017, Petitioner's longstanding, capitally qualified counsel, Mr. Richard Kammen, was lawfully excused from further duties in Petitioner's case by Brig. Gen. John Baker, USMC, Chief Defense Counsel of the Military Commissions Defense Organization. Col Vance Spath, the military commission judge detailed to preside over Petitioner's case, subsequently ruled that Mr. Kammen's absence was improper and on October 31, 2017, ordered the sole remaining attorney on the case, LT Alaric Piette, USN, to represent Petitioner. This was despite the fact that LT Piette is unqualified to serve as the sole counsel in a capital cases under the relevant provisions of the Military Commissions Act of 2009, 10 U.S.C. § 949a(b)(2)(C)(ii), and the implementing regulations promulgated by the Secretary of Defense. Rule for Military Commissions 506(b) (2010).

Commencing Thursday, November 2, 2017, Col Spath intends to begin over two weeks of pre-trial hearings in which crucial witnesses are expected to testify and significant pre-trial motions will be litigated. Trans. 10049 (Ex. D) ("We will be here Thursday...we will be here Thursday with the government's witness, who flew down here on an airplane."). Petitioner therefore requests that this Court preserve the *status quo* by temporarily restraining Respondents from continuing these proceedings until the merits of his separately filed motion for a preliminary injunction is decided — specifically the merits of Petitioner's right to learned counsel claim.

BACKGROUND

A more complete statement of facts is provided in Petitioner's Motion for a Preliminary Injunction, filed with this motion. Of relevance to Petitioner's motion for a temporary restraining order, Petitioner is a detainee at Guantanamo Bay Naval Station, who has been capitally charged before a military commission pursuant to the Military Commissions Act of 2009, 123 Stat. 2190 §§ 1801-1807 (codified at 10 U.S.C. §§ 948a, *et seq.*). From 2009 to 2017, Mr. Richard Kammen served as defense counsel to Petitioner. Mr. Kammen, who is an experienced death penalty litigator, was designed as a "learned counsel," as required by 10 U.S.C. § 949a(b)(2)(C)(ii), and the implementing regulations promulgated by the Secretary of Defense. Rule for Military Commissions ("R.M.C.") 506(b) (2010). Brig. Gen. John Baker, USMC, the Chief Defense Counsel for the Military Commissions Defense Organization, detailed two additional civilian attorneys to Petitioner's case. Four military attorneys have also been detailed to Petitioner's defense team, but at the time of this filing only one of them, LT Alaric Piette, USN, JAGC, has formed an attorney-client relationship with Petitioner and appeared on his behalf.

On October 4, 2017, Col Spath issued a docketing order that scheduled approximately three weeks of hearings relating to Petitioner's death penalty litigation. (Ex. B). On October 6, 2017, Mr. Kammen, as well as the two civilian counsel on Petitioner's trial team, determined that they were unable to continue to represent Petitioner for ethical reasons and applied to General Baker to withdraw pursuant to R.M.C. 505(d)(2)(B). General Baker agreed that good cause existed to excuse them and accepted their withdrawal requests on October 11, 2017. None of the remaining military defense counsel have ever served on a capital case and are unqualified to serve as "learned counsel." On October 16, 2017, the only remaining detailed

counsel, LT Piette, filed a motion to abate the proceedings, citing the lack of learned counsel. (Ex. A).

On October 27, 2017, Col Spath issued an order denying LT Piette's motion for an abatement. Specifically, Col Spath ruled that he disagreed with General Baker's finding of good cause to excuse the civilian attorneys and appeared to dispute General Baker's authority to excuse them without his consent. (Ex. C). Col Spath then ordered the excused counsel to travel to Guantanamo to appear at a series of hearings scheduled to begin this week.

On October 31, 2017, Col Spath called the commission to order after being informed that the excused counsel, including Mr. Kammen, had not travelled to Guantanamo Bay. During the hearing on October 31, 2017, Col Spath issued several orders, including one directing LT Piette to proceed with the representation of Petitioner in the absence of learned counsel, including the cross-examination of witnesses. The first hearing with LT Piette as the sole defense counsel is currently scheduled for Thursday, November 2, 2017, during which witness testimony is expected to be litigated. Petitioner has not waived his right to learned counsel and does not wish to proceed pro se.

Pursuant to F.R.C.P. 65(b)(A), LT Alaric Piette has submitted an affidavit (Ex. E) concerning two topics: (1) his qualifications, and (2) swearing to the accuracy (to the best of his memory) of the transcript (Ex. D). Pursuant to F.R.C.P. 65(b)(B), undersigned counsel affirms that he has notified Respondent of this motion by filing it on the Court's ECF software.

ARGUMENT

Under Fed. R. Civ. Pro. 65(b), a temporary restraining order may be issued if:

(A) specific facts in an affidavit or a verified complaint clearly show that immediate and irreparable injury, loss, or damage will result to the movant before the adverse party can be heard in opposition; and

(B) the movant's attorney certifies in writing any efforts made to give notice and the reasons why it should not be required.

A temporary restraining order is issued “to preserve the *status quo* for a limited period of time until the Court has the opportunity to pass on the merits of the demand for a preliminary injunction.” *Human Touch DC, Inc. v. Merriweather*, 15-CV-00741, 2015 WL 12564162, at *2 (D.D.C. May 18, 2015) (quoting *Barrow v. Graham*, 124 F.Supp.2d 714, 715–16 (D.D.C. 2000)). However, “the Court must still consider the traditional four-part test for injunctive relief even at the TRO stage.” *Bradshaw v. Veneman*, 338 F. Supp. 2d 139, 141 (D.D.C. 2004). The requirements of the test are:

[T]he movant demonstrates (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.

Human Touch DC, Inc., 2015 WL 12564162, at *2 (citing *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008)). Here, preliminary relief is appropriate because every relevant factor weighs strongly in Petitioner's favor.

A. Likelihood of Success on the Merits.

Petitioner stands accused before a military commission in Guantanamo on capital charges. The relevant statutory provision in the Military Commissions Act of 2009, 10 U.S.C. § 949a(b)(2)(C)(ii), requires that he be represented in those proceedings “by at least one additional

counsel who is learned in applicable law relating to capital cases.” The Secretary of Defense, in turn, has determined that this right to learned counsel is absolute. R.M.C. 506(b).¹

Col Spath has made clear that he intends to violate Petitioner’s fundamental statutory and regulatory counsel rights, beginning with a hearing scheduled to take place on Thursday, November 2, 2017, and continuing thereafter, to include the cross-examination of key witnesses for the defense and prosecution. *See* Trans. 10049 (Ex. D) (“We will be here Thursday...we will be here Thursday with the government’s witness, who flew down here on an airplane.”). Petitioner has therefore demonstrated a strong likelihood of success on the merits based on the clear statutory and regulatory requirement that he be represented by qualified counsel.

B. Irreparable Injury to Petitioner.

Petitioner will suffer irreparable harm if relief is denied. His capital case will proceed without the assistance of qualified counsel as required by law. “Time and again the [Supreme] Court has condemned procedures in capital cases that might be completely acceptable in an ordinary case.” *Caspari v. Bolden*, 510 U.S. 383, 393 (1994). Specifically, he faces the imminent prospect of being deprived of his right to counsel in proceedings on Thursday, November 2, 2017. The hearings scheduled over the next two weeks will involve the cross-examination of key witnesses and the litigation of motions of potentially dispositive importance.

For example, Mohammed Al-Darbi is a Guantanamo detainee who is ostensibly the prosecution’s star witness. His testimony is scheduled to being taken over the next two weeks in a taped deposition that the prosecution intends to present at Petitioner’s trial should Mr. Al-Darbi

¹ “In any case in which the trial counsel makes a recommendation to the convening authority pursuant to R.M.C. 307(d) that a charge be referred to a capital military commission, or in which the convening authority refers a charge to a capital military commission, the accused has the right to be represented in accordance with section (a) above, and by at least one additional counsel who is learned in applicable law relating to capital cases.”

released from Guantanamo before Petitioner's trial is expected to begin in 2020. The cross-examination of Al-Darbi is likely to be the only cross-examination of the only live witness to implicate Petitioner in any crimes. And Petitioner's counsel can proffer that this witness has information that is helpful to Petitioner both respecting his innocence of the charges against him as well as mitigating evidence. As reflected in LT Piette's accompanying affidavit, LT Piette himself knows he that he is not competent to cross-examine this witness, which involves the analysis of 2,500 pages of classified and unclassified information including over 200 statements given by Mr. Al-Darbi to government investigators. (Ex. E).

Likewise, the motions currently scheduled to be heard over the next two weeks involve motions to exclude major "hearsay witnesses." Litigation concerning one of these motions, which itself was filed years ago, involves a named co-conspirator, who is the subject of an indictment in the Southern District of New York. For reasons that must be elicited during this hearing, the United States has not sought to extradite this hearsay witness from Yemen. Preparation for this hearing would take an experienced capital lawyer weeks of preparation. Col Spath intends to give LT Piette approximately 48-hours to prepare. where Government witnesses will testify and be open to cross-examination. Indeed, the Government's star cooperating witness is scheduled to testify in a taped deposition to be used in lieu of testimony at any future trial.

Petitioner therefore faces the imminent prospect of being denied, through no fault of his own, his right to learned counsel at multiple critical stages of his capital trial. That harm is irreparable and warrants the momentary suspension of proceedings that Petitioner has requested in order to ensure that it is not imposed unlawfully. *See United States v. Decoster*, 624 F.2d 196, 201 (D.C. Cir. 1976).

C. No Hardship to Respondents

Issuance of a temporary restraining order to halt proceedings before the military commission until a review of the merits of his preliminary injunction will cause no legally cognizable prejudice to Respondents. Witnesses will continue to be as available to Respondents now as they will be in the few weeks it will take this Court to decide Petitioner's preliminary injunction motion. No evidence is imminently likely to disappear or degrade in value. Indeed, this case has already entered its ninth year of pre-trial proceedings and Petitioner has been in U.S. custody, without any meaningful judicial review, for fifteen years. Should Respondents prevail on the merits of Petitioner's preliminary injunction motion, the proceedings will be able to resume with minimal disruption.

D. The Public Interest.

The public interest will be furthered by the issuance of a temporary restraining order. The public has an interest in ensuring that the due process rights of capital defendants are adhered to, and specifically that such defendants be represented by qualified counsel. That public interest is manifest by the determination of both the Congress and the Secretary of Defense that such counsel is necessary in these proceedings. In the Military Commissions Act of 2009, Congress chose to codify—in a separate section of the statutory text—the “Sense of Congress on Military Commission System.” 10 U.S.C. 47A § 1807. There, Congress declared, “It is the sense of Congress that— (1) the fairness and effectiveness of the military commissions system under chapter 47A of title 10, United States Code (as amended by section 1802), will depend to a significant degree on the adequacy of defense counsel and associated resources for individuals accused, particularly in the case of capital cases....” *Id.* To proceed without learned counsel frustrates the public interest as expressed by Congress.

CONCLUSION

For the foregoing reasons, Petitioner asks this Court enter a temporary restraining order to preserve the *status quo* and halt the proceedings that are due to commence on Thursday, November 2, 2017, until such time as this Court has the opportunity to decide Petitioner's motion for a preliminary injunction.

Respectfully submitted,

Dated: November 1, 2017

/s/ Michel Paradis
Michel Paradis (D.C. Bar #499690)
U.S. Department of Defense
Office of the Chief Defense Counsel
1620 Defense Pentagon
Washington, DC 20301

Counsel for Petitioner

EXHIBITS

A. AE389 (October 16, 2017)

B. AE388 (October 4, 2017)

C. AE389F (October 27, 2017)

D. Unofficial Unauthenticated Transcript of Proceedings (October 31, 2017)

E. Sworn statement of LT Alaric Piette, USN, JAGC

CERTIFICATE OF SERVICE

I certify that on November 1, 2017, I caused the foregoing to be served on Respondent's counsel via this Court's ECF software.

Dated: November 1, 2017

/s/ Michel Paradis
Michel Paradis (D.C. Bar #499690)
U.S. Department of Defense
Military Commission Defense Organization
1620 Defense Pentagon
Washington, DC 20301

Counsel for Petitioner

Exhibit A

**MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY, CUBA**

<p>UNITED STATES OF AMERICA</p> <p>v.</p> <p>ABD AL-RAHIM HUSSEIN MUHAMMED ABDU AL-NASHIRI</p>	<p>AE 389</p> <p>Defense Motion to Abate Proceedings Pending the Detailing of Learned Counsel</p> <p>16 October 2017</p>
---	---

1. Timeliness: This motion is filed within the timeframe established by Rule for Military Commission (“R.M.C.”) 905 and pursuant to Military Commissions Trial Judiciary Rule of Court (“RC”) 3.7.c.(1).

2. Relief Requested: The defense respectfully requests that these proceedings be held in abatement pending learned counsel being detailed and the conditions that led to the withdrawal of the previous learned counsel are remedied.

3. Overview: Mr. Al-Nashiri’s prior detailed learned counsel, as well as his two civilian counsel, have withdrawn from representing him in this matter due to their inability to comply with their obligations under the Model Rules of Professional Conduct based on the conduct of the government writ large and the Rulings of this Commission. Mr. Al-Nashiri has the right to be represented by at least one counsel learned in applicable law relating to capital cases since the government is seeking to have him executed under the color of law, and he has that right at all stages of the proceedings. Until a new learned counsel is detailed—which cannot happen until the

underlying conditions that led to the withdrawal of the prior learned counsel are resolved—the proceedings must be abated.

4. Burden of Proof and Persuasion: The defense bears the burden of persuasion by a preponderance of the evidence. R.M.C. 905(c)(2)(A).

5. Statement of Facts:

The Convening Authority referred charges against Mr. Al-Nashiri to a capital military commission on 15 September 2011. Mr. Richard Kammen was detailed to represent Mr. Al-Nashiri as learned counsel, pursuant to R.M.C. 506(b), and filed his Notice of Appearance and Agreement on 23 December 2008. (Attachment B). On 6 October 2017, Mr. Kammen, as well as the two detailed civilian counsel in this case, determined that they were unable, consistent with their ethical obligations, to continue to represent Mr. Al-Nashiri in this capital military commission and requested to withdraw pursuant to R.M.C. 505(d)(2)(B). Brigadier General (BGen) John Baker, the Chief Defense Counsel, and the only authority competent to excuse defense counsel, agreed and accepted their withdrawal requests, and excused Mr. Kammen and the other civilian counsel from Mr. Al-Nashiri's case on 11 October 2017. *See* AE 339J, AE 339K, and AE 339L.

Four military lawyers have been detailed by the Chief Defense Counsel to represent Mr. Al-Nashiri before this capital military commission: Lieutenant (LT) Alaric Piette, JAGC, USN; Major (Maj) Timothy McCormick, USMC; Major (Maj) Kenitra Fewell, JAGC, USAF; and Major (Maj) Brett Robinson, JAGC, USAF. Of these lawyers, only two have the appropriate security clearances as of this writing (LT Piette and Maj Robinson) and only one has formed an attorney-client relationship with Mr. Al-Nashiri and entered a Notice of Appearance (LT Piette). None of

these remaining defense counsel have tried a capital case and, as such, none are qualified as learned counsel pursuant to R.M.C. 506(b).

Brigadier General Baker has begun the process of finding and detailing new learned counsel. (Attachment C). No learned counsel is currently detailed to this case.

A hearing in this case is scheduled for three weeks, beginning 30 October 2017. AE 356G. Mr. Al-Nashiri will not have a learned counsel by that time.

6. Argument:

R.M.C. 506(b) codifies Mr. Al-Nashiri's "right to be represented" by at least one lawyer who is "learned in applicable law relating to capital case" in "any case" in which the "convening authority refers a charge to a capital military commission." This right terminates only "at such time as all charges for which the death penalty is authorized are dismissed or referred as non-capital offenses."

At this time, Mr. Al-Nashiri's case is referred to a capital military commission. As such, he has a right to a learned counsel. None of the charges for which the death penalty is authorized have been withdrawn nor have they been referred as non-capital offenses. As such, Mr. Al-Nashiri's right to be represented by learned counsel has not been terminated. Thus, his representation at the upcoming hearings is required to include a learned counsel. Because no learned counsel is currently detailed, nor will one be detailed by the start date for the next hearing, 30 October 2017, the hearing must be continued.

Representation encompasses more than having a lawyer stand next to someone in court. Adequate representation requires diligent preparation, at the very minimum. New learned counsel will need time to acquaint herself or himself with the facts of the case, the posture of the case, and

to meet with and develop an attorney-client relationship (if possible) with Mr. Al-Nashiri. Only then could they be considered to be representing their client.

Additionally, representation includes the filing of motions, investigation, and trial preparation. Mr. Al-Nashiri, as part of his right to have learned counsel, is required to have learned counsel representing him in motions practice. As such, the current Detailed Defense Counsel, cannot file or respond to substantive motions until learned counsel is detailed.

For these reasons, a mere continuance of the October/November hearings is not adequate. An abatement of the proceedings until a learned counsel has been detailed and is prepared to represent Mr. Al-Nashiri is necessary.

7. Oral Argument: The defense does not request oral argument on this motion.

8. Witnesses: None.

9. Conference with Opposing Counsel: The government opposes this motion.

10. List of Attachments:

- A. Certificate of Service, dated 16 October 2017
- B. Richard Kammen's Notice of Appearance and Agreement, dated 23 December 2008
- C. 11 October 2017 Chief Defense Counsel's Memorandum to the Convening Authority providing notice of the requirement of outside learned counsel for Mr. Al-Nashiri, including referenced Enclosures
- D. Proposed Draft Order

Respectfully submitted,

/s/ Alaric Piette

ALARIC PIETTE

LT, JACG, USN

Detailed Defense Counsel

ATTACHMENT

A

CERTIFICATE OF SERVICE

I certify that on the 16th day of October 2017, I filed the forgoing document with the Office of Military Commissions Trial Judiciary and served a copy on all counsel of record.

/s/ Alaric Piette
ALARIC PIETTE
LT, JAGC, USN
Detailed Defense Counsel

ATTACHMENT B

UNITED STATES OF AMERICA	)	CIVILIAN DEFENSE COUNSEL
	)	NOTICE OF APPEARANCE
v.	)	AND AGREEMENT
Abd al-Rahim Hussein Muhammed Abdu)	
Al-Nashiri	)	December 23, 2008
)	
)	
)	

1. Pursuant to procedures of court/instruction for counsel, I, Richard Kammen, hereby provide notice to the Military Judge of my appearance on behalf of Abd al-Rahim Hussein Muhammed Abdu Al-Nashiri. My address, phone number and email address are:

Richard Kammen
Gilroy Kammen
One Indiana Square #150
Indianapolis, Indiana 46204
(317) 236-0400 (office)
(317)339-8499-Cell
Email: richard@kammenlaw.com

I am an active member in good standing licensed to practice in the following jurisdictions: State of

2. I have attached MC Form 9-2, Affidavit and Agreement by Civilian Defense Counsel.



COUNSEL NAME

**Figure 9.2. Affidavit and Agreement by Civilian Defense Counsel
(MC Form 9-2)**

AFFIDAVIT AND AGREEMENT BY CIVILIAN DEFENSE COUNSEL

Pursuant to the Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600, *codified in part at* 10 U.S.C. § 948a. *et seq.*, the Manual for Military Commissions promulgated January 18, 2007, and Chapter 9 of the Regulations for Trial by Military Commission, I Richard Kammen, make this Affidavit and Agreement for the purposes of applying for qualification as a member of the pool of civilian defense counsel available to represent the accused before military commissions and serving in that capacity.

- I. Oaths or Affirmations. I swear or affirm that the following information is true to the best of my knowledge and belief:
 - A. I have read and understand the Secretary's Manual for Military Commissions, and all other Military Commissions Regulations, Orders, Instructions and Directives applicable to trial by military commissions. I will read all amendments, rescissions or promulgations pertinent to the aforementioned.
 - B. I am aware that my qualification as a civilian defense counsel does not guarantee my access to any information subject to the national security privilege under 10 U.S.C. § 949d(f).

- II. Agreements. I hereby agree to comply with all applicable regulations and rules for counsel, including any rules of court governing proceedings, and specifically agree, without limitation, to the following:
- A. I will notify the Chief Defense Counsel and, as applicable, the relevant military judge immediately if, after the execution of this Affidavit and Agreement but prior to the conclusion of proceedings (defined as the review and final decision of the Court of Military Commission Review), there is any material change in any of the information provided in my application, including this Affidavit and Agreement, for qualification as member of the civilian defense counsel pool. I understand that such notification shall be in writing and shall set forth the substantive nature of the changed information.
- B. I will be well prepared and will conduct the defense zealously, representing the accused throughout the military commission process, from the inception of my representation through the completion of any post-trial proceedings as detailed in 10 U.S.C. §§ 950a-950j and R.M.C. 1101-1209. Prior to undertaking representation of the accused, I will ensure that I can commit sufficient time and resources to handle the accused's case expeditiously and competently. In making this assessment, I am aware that the military judge may deny any request for a delay or continuance of proceedings based on reasons relating to matters that arise in the course of my law practice or other professional or personal activities that are not related to military commission proceedings, if in the military judge's determination such a continuation would unreasonably delay the proceedings.

C. The defense team shall consist entirely of myself, detailed defense counsel, and other personnel provided by the Chief Defense Counsel, the military judge, or the convening authority. I understand I must include the justification for particular individuals to be added to the defense team in a request to the Chief Defense Counsel, the military judge, or the convening authority as appropriate, and I will state any special requests regarding access to the accused, classified information, as defined at 10 U.S.C. § 948a(4), or privileged under 10 U.S.C. § 949d(f), R.M.C. 701, and Mil. Comm. R. Evid. 505, or the ability to enter into a confidential relationship. Regarding entering into a confidential relationship, I understand that those determined eligible to receive attorney confidences or attorney work product containing facts specific to the case will be required to complete an affidavit similar to this Form prior to receiving any attorney confidences or attorney work product containing facts specific to the case. I further understand that those I request to have access to the accused, other detainees, or classified information will be required to obtain a security clearance and be specifically approved for access to each individual or item of classified information requested, prior to access being granted. I understand that nothing in this agreement allows me to disregard any laws, rules, regulations, or instructions governing the handling of classified information or privileged information. I will make no claim against the U.S. Government for any fees or costs associated with my conduct of the defense or related activities or efforts.

D. Recognizing that my representation does not relieve detailed defense counsel of duties specified in 10 U.S.C. § 949c(b) and R.M.C. 502(d)(6), I will work cooperatively with such counsel to ensure coordination of efforts and to ensure such counsel is capable of conducting the defense independently if necessary.

E. During my representation of an accused before a military commission, I will comply with the following restrictions on my travel and communications:

1. I will not discuss, transmit, communicate, or otherwise share documents or information that are classified or protected prior to their use at trial, with anyone except as is necessary to represent my client before a military commission. In the case of doubt regarding whether I may share information about a case with another, I understand that I have an affirmative duty to request clarification from the Deputy General Counsel (Personnel and Health Policy) or military judge before discussing, transmitting, communicating, or otherwise sharing documents or information. I understand that nothing in this agreement allows me to disregard any laws, rules, regulations, or instructions governing the handling of classified information and material, or other protected information.

2. I understand that once proceedings have begun, I may be required by the military judge to remain at the site of the proceedings until he or she approves my departure.

3. I understand I will obtain prior approval from the convening authority

for a country clearance for travel to Guantanamo Bay, Cuba.

- F. At no time, to include any period subsequent to the conclusion of the proceedings, will I make any public or private statements regarding any closed sessions of the proceedings or any document or material constituting classified information under 10 U.S.C. § 948a(4) or subject to the national security privilege under 10 U.S.C. § 949d(f), R.M.C. 701, and Mil. Comm. R. Evid. 505. This restriction does not apply to discussions with other members of the defense team or the Chief Defense Counsel who are appropriately authorized to receive the specific classified information and privileged information in question, when such disclosure is related to the defense efforts on behalf of the accused during military commission proceedings or subsequent review. I understand that nothing in this agreement allows me to disregard any laws, rules, regulations, or instructions governing the handling of classified or privileged information.
- G. I understand and agree to comply with all rules, regulations and instructions governing the handling of classified information and material or other privileged information.
- H. I understand that there may be reasonable restrictions on the time and duration of contact I may have with my client, as imposed by the convening authority, the military judge, detention authorities, or regulation.
- I. I understand that communications with an accused are not protected if they would facilitate criminal acts or a conspiracy to commit criminal acts, or if

those communications are not related to the seeking or providing of legal services to the client.

J. I agree that I shall reveal to the Chief Defense Counsel, and any other appropriate authorities, information relating to the representation of my client to the extent that I reasonably believe necessary to prevent the commission of a future criminal act that I believe is likely to result in death or substantial bodily harm, or significant impairment of national security.

K. I understand and agree that nothing in this Affidavit and Agreement creates any substantive, procedural, or other rights for me as counsel or for my client(s).

/s/ Richard Kammer

Print Name: Richard Kammer

Address: One Indiana Square
#150
Indianapolis, IN 46204

Date: 12/23/08

STATE OF INDIANA)

COUNTY OF MARION)

Sworn to and subscribed before me, by Richard Kammer this 23rd day of December, 2008

Notary Fausattibior

My commission expires: 10-29-2014

ATTACHMENT C



DEPARTMENT OF DEFENSE
CHIEF DEFENSE COUNSEL FOR MILITARY COMMISSIONS
1620 DEFENSE PENTAGON
WASHINGTON, DC 20301-1620

11 October 2017

MEMORANDUM FOR THE CONVENING AUTHORITY

SUBJECT: Notice of the Requirement of outside Learned Counsel for Mr. al Nashiri

Earlier today, I excused Mr. Richard Kammen, as he requested, for good cause. A copy of my excusal letter is attached. While Mr. Kammen has been excused, he will continue to perform and bill for services under his existing Memorandum of Understanding "to the extent reasonably practicable to protect [his] client's interests" and "allow[] time for employment of other counsel." See Model Rules of Professional Responsibility 1.16(d).

In accordance with RTMC 9-1(a)(6), I am notifying you that it is not practical for me to detail an attorney assigned to, or employed by, the Military Commissions Defense Organization (MCDO) as learned counsel for Mr. al Nashiri as the MCDO does not currently have an available conflict-free counsel qualified as learned in the law relating to capital cases. Accordingly, I have begun the process of locating a qualified outside learned counsel to serve as Mr. al Nashiri's learned counsel and I will submit a request for funding approval as soon as I have identified such counsel.

If you have any questions about this matter, please contact me at (571) 245-9780 or by e-mail at john.baker@osd.mil.

A stylized signature of J. G. Baker, consisting of several overlapping, curved lines that suggest the shape of the name.

J. G. BAKER
Brigadier General, U.S. Marine Corps
Chief Defense Counsel for
Military Commissions

Attachment:
As stated

cc:
DGC (P&HP)
Nashiri Defense Team
Mr. al Nashiri
MCDO Admin



DEPARTMENT OF DEFENSE
CHIEF DEFENSE COUNSEL FOR MILITARY COMMISSIONS
1620 DEFENSE PENTAGON
WASHINGTON, DC 20301-1620

Al-Nashiri (10015)
11 October 2017

MEMORANDUM FOR MR. RICHARD KAMMEN

SUBJECT: Excusal as Learned Counsel in the Military Commissions Case of *United States v. Abd al-Rahim Hussein Muhammed Abdu Al-Nashiri (10015)*

Ref: (a) R.M.C. 505(d)(2)

1. I received your 6 October 2017 request to withdraw as Mr. Al-Nashiri's learned counsel for good cause.

2. Rule for Military Commission (R.M.C.) 505(d)(2) states in relevant part:

After an attorney-client relationship has been formed between the accused and detailed defense counsel ..., an authority competent to detail such counsel may excuse or change such counsel only: (i) Upon request of the accused or application for withdrawal by such counsel; or (ii) For other good cause shown on the record.

3. I have reviewed your attached request to withdraw as learned counsel for Mr. Al-Nashiri, the applicable statute and regulations governing military commissions, the relevant rules for professional responsibility, and applicable case law. Additionally, I have considered all the information I know about this matter – both classified and unclassified. After careful reflection on the same, I find good cause to approve your request to withdraw as learned counsel for Mr. Al-Nashiri based on the distinct circumstances of this case. Accordingly, pursuant to R.M.C. 505(d)(2) you are excused as his learned counsel. Consistent with MCRC 4.4, you must file a written notice of this excusal with the military judge.

A handwritten signature in black ink, appearing to read "J. G. Baker", is positioned above the typed name and title.

J. G. BAKER
Brigadier General, U.S. Marine Corps
Chief Defense Counsel for
Military Commissions

Attachment:
As stated

cc:
DGC (P&HP)
Nashiri Defense Team
Mr. al Nashiri
MCDO Admin

KAMMEN & MOUDY

Attorneys at Law

135 N. PENNSYLVANIA STREET, SUITE 1175

INDIANAPOLIS, IN 46204

RICHARD KAMMEN
JOSHUA MOUDY

TELEPHONE (317) 236-0400

FACSIMILE (317) 638-7976

Grace Atwater

October 6, 2017

Dear Brigadier General Baker:

I submit this letter to you pursuant to your supervisory authority over the “proper representation of all accused referred to a trial before a military commission appointed pursuant to the M.C.A.” R.T.M.C. 9-1(a)(2); R.T.M.C. 9-3(a). I have come to the conclusion that I am ethically obligated to withdraw as Learned Counsel for Mr. Abdul Rahim al-Nashiri before the military commission in Guantanamo.

The attached document(s) reflect why good cause for my withdrawal exists. Specifically, the Indiana Rules of Professional Conduct, by which I am bound, require me to:

- (a) provide my client with competent representation, Ind. R. Prof. Conduct 1.1;
- (b) communicate matters to my client to the extent reasonably necessary to allow him to make informed decisions regarding the representation, Ind. R. Prof. Conduct 1.4; and
- (c) protect my client’s confidences unless he gives his informed consent to my disclosure of those confidences, Ind. R. Prof. Conduct 1.6.

Based on facts that I know, both classified and unclassified, extraordinary circumstances exist which prevent me from meeting my obligations under these rules.

This is further confirmed by the attached opinion letter from Ms. Ellen Yaroshefsky, a lawyer and a nationally recognized expert in legal ethics. Professor Yaroshefsky’s opinion is based solely on a condensed and unclassified summary of some of the relevant facts. Of course, you have a greater understanding of the entire universe of facts creating my ethical obligation to withdraw.

Therefore, pursuant to R.M.C. 505(d)(2)(B), I hereby submit my application to withdraw for good cause.

Very Respectfully,

/s/Richard Kammen_____

Richard Kammen
Attorney at Law

Richard@Kammenlaw.com

Ellen Yaroshefsky

Attorney

670 West End Avenue, #6A ■ New York, NY 10025

Yaroshef@gmail.com

516-463-5882

October 5, 2017

Mr. Rick Kammen
Kammen and Moudy
135 N. Pennsylvania Street, Suite 1175
Indianapolis, Indiana 46204

Re: Guantanamo Military Commission Case
Charges Against Abd al-Rahim Hussayn Muhammed al-Nashiri

Dear Mr. Kammen:

This letter is in response to your request for an opinion regarding your ethical obligations in this matter.

You have advised me that you are learned counsel (death penalty counsel) for Mr. al-Nashiri who is charged with capital crimes before a Military Commission in Guantanamo Bay. You provided me with the facts set forth below as well as a document, attached hereto, entitled "Governmental Interference with Attorney-Client Communications, Intrusions Into Attorney-Client Relationships, Undisclosed Monitoring, and Infiltration of Defense Teams" (Exhibit A). You are admitted to practice in Indiana.

I have no personal knowledge of the facts of this case. In rendering my opinion, I rely upon the facts set forth below and the document provided (Exhibit A). Some of the facts below contain references to redacted material because some of the information is classified information.

My opinion is predicated upon the standards of care and governing standards of professional conduct set forth in the Model Rules of Professional Conduct (governing lawyers in the various branches of the U.S. military), Indiana Rules of Professional Conduct and that of every state in the country, as well as related ethics opinions and case law. I have also relied upon

standard treatises in the area of legal ethics. The ethical and fiduciary duties identified below are firmly established. My opinion is expressed to a reasonable degree of professional certainty.

My Qualifications

I am the Howard Lichtenstein Professor of Legal Ethics and the Director of the Monroe H. Freedman Institute for the Study of Legal Ethics at the Maurice A. Deane School of Law at Hofstra University in New York.

My qualifications to serve as an expert witness on legal ethics are set forth more fully in my curriculum vitae, attached as Exhibit B. It describes my educational background, legal experience, bar admissions, academic affiliations, professional activities, bar committee memberships, publications and participation as a lecturer at bar seminars, CLE panels and at other organizations on matters related to professional responsibility.

Briefly, I have taught courses in the field of lawyer regulation for the past twenty-three years and was named to my current position in 2016. Before that I was the Director of the Jacob Burns Ethics Center at the Benjamin N. Cardozo School of Law School from 1994-2016. I have published numerous articles in the field and have produced materials for the American Bar Association and other organizations. I have spoken widely on legal ethics including continuing legal education programs before numerous bar associations, lawyer associations, and law schools.

I serve on the New York State Bar Association Committee on Standards for Attorney Conduct as well as the Committee for Professional Responsibility of the Association of the Bar of the City of New York. I am co-chair of the Ethics Advisory Committee of the National Association of Criminal Defense Lawyers. I am also the ethics advisor to the Prosecutorial and Judicial Complaint Center of the New York State Association of Criminal Defense Lawyers. I am on the Board of Advisors of the New York County Lawyers Ethics Institute and a member of its Professional Ethics Committee. I served as co-chair of the ethics committee of the Criminal Justice Section of the American Bar Association.

I regularly consult with lawyers and law firms on a wide range of matters related to legal ethics. I have served as an ethics expert in litigation.

Factual Basis

You have provided the following facts:

- Mr. al Nashiri is charged with capital crimes before a military Commission in Guantanamo Bay. Mr. al-Nashiri was charged in 2008, and his case has been pending since 2011.
- The attached Exhibit A “Governmental Interference with Attorney-Client Communications, Intrusions Into Attorney-Client Relationships, Undisclosed Monitoring, and Infiltration of Defense Teams” established that prior to 2017, there was a significant history of actual and attempted governmental intrusion into the attorney-client relationships, including the placement of listening devices in attorney-client meeting rooms.
- On June 14, 2017, the Chief Defense Counsel, Brig. Gen. John Baker, USMC, issued a memo, notifying defense counsel that he recently came into possession of information raising concerns that defense attorney-client confidentiality had been and/or would be breached again. As a result, he advised all defense counsel to discontinue attorney-client meetings with their clients until they could “know with certainty that improper monitoring of such meetings is not occurring.”
- In late June, 2017, prosecutors represented to the military judge presiding over the Nashiri case that the general’s concerns did not affect the spaces in which Al-Nashiri meets with counsel. However, as reflected in pleadings filed with the US Supreme Court, defense counsel obtained information “then [REDACTED] contradicting the prosecution’s assurances.”
- Furthermore, the Chief Defense Counsel, who is aware of the redacted facts, described above recently stated publicly, “nothing has changed to cause me to change my advice. Indeed, the more I learn, the more resolute I have become in my position.”
- After Mr. al-Nashiri’s defense team received General Baker’s advice in June 2017, it filed a series of motions seeking discovery, an evidentiary hearing, and permission to inform the client about the risks to attorney-client confidentiality. These motions like the redacted information contradicting the prosecution’s assurances are classified.

- Despite the request for further discovery, to present evidence and to make argument, the military judge issued a series of rulings the body of which are classified.
- The military judge denied the requests for discovery as well as the request to have a hearing to determine the extent to which defense attorney-client confidentiality had been or would be in the future compromised. The Judge denied these requests even though the prosecution's previous assurances had been contradicted.
- The Judge also prohibited Mr. al-Nashi's defense lawyers from informing the client of the General Baker's concerns or the facts underlying those concerns because the information is classified and the military judge has no authority to permit disclosure to someone (Mr. al-Nashiri) who has no clearance.
- You state that "We have no other means by which to assess the level of risk of intrusion into attorney-client confidentiality." You assess that risk to be substantial and ongoing, based upon past practice by the government, (Exhibit A), the evaluation of the Chief Defense Counsel, and classified information within your possession.
- Following the Chief Defense Counsel's advice not to utilize attorney-client meeting spaces in Guantanamo, neither you nor your team have had a substantive meeting with the client since June of 2017.
- Mr. Al Nashiri has expressed concern about the lack of any substantive meeting. You have advised him in sum and substance that the defense is precluded from explaining anything regarding the situation to him, including obtaining his informed consent to the risks of disclosure of his confidences.
- In response to Mr. Al Nashiri's inquiries, the defense has had to tell him "that with respect to our visits, the situation has become even more complicated as a result of rulings that we ethically need to share with him but are precluded from doing so." Your recent correspondence with him included the following statement: "But as for now, for reasons that you absolutely need to know, and have a right to know, but that we are not allowed to tell you, it is necessary that we not visit with you."

Opinion

The conduct of military and civilian lawyers who appear before the Military Commission is governed by Model Rule of Professional Conduct (“MRPC”) and the Rules for Military Commission (“RMC”) as well as the Rules of Professional Conduct of the individual state where the lawyer is admitted to practice. You are admitted to practice in Indiana and subject to the Indiana Rules of Professional Conduct. (“IRPC”). In this matter, the applicable MRPC and IRPC are the same.

A bedrock professional obligation is that the lawyer shall provide competent representation to a client. MRPC 1.1; IRPC 1.1; RMC 502 (5) (specifying duties of defense counsel). Competent representation includes the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation. The accompanying commentary to MRPC 1.1 provides that “[c]ompetent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation.” Lawyers must obtain necessary and sufficient information to provide sound and informed advice to a client. Thus, the lawyer must undertake “depth and quality” [in an] investigation to ensure compliance with the law.” *Upjohn v. United States* 449 U.S. 383 (1981).

Essential to competent representation is the lawyer’s corollary duty to maintain confidential communication. The foundation of the attorney-client relationship is the free exchange of information and the frank and full disclosure necessary to provide effective representation. Without this free exchange and promise of confidentiality, especially through language and cultural barriers, the ability to provide competent counsel is seriously impaired. This foundational duty of confidentiality, dating from the common law, has been recognized as fundamental to any representation throughout modern history. See e.g. *In re Seslar*, 15 N.J. 393, 105 A. 32d 395 (1954) (discussing the common law history of the attorney-client privilege).

This duty of confidentiality is in the legal ethics rules of all jurisdictions in the United States and reflected in the RMCs. It requires that the lawyer maintain confidentiality of all information related to representation, both attorney-client privileged information and other “information related to the representation of a client.” MRPC 1.6(a); IRPC 1.6 (a). (See *United States v. Markham*, 60 M.J. 198, 209 (C.A.A.F.) (explaining that the “attorney-client privilege is

a rule of evidence that applies in judicial proceedings while the rule of confidentiality is a mandate of professional ethics that applies beyond the courtroom doors.”). RMC Rule 502 (d)(7) provides that “Defense counsel must: guard the interests of the accused zealously within the bounds of the law...and may not disclose the accused’s secrets or confidences except as the accused may authorize.”

The lawyer may not reveal confidential information without informed consent of the client or except as authorized by specified exceptions to the confidentiality rules. None of those exceptions are applicable here.

Part and parcel of your ethical duty in this case is to obtain sensitive information necessary to this representation and to provide assurances to the client that the information will be kept confidential – and not shared with the government. Even in circumstances where a confidential meeting space is secured, a lawyer will often have difficulty discussing sensitive information and obtaining the client’s trust. In charges that could result in the death penalty, the fact that the government is privy to the lawyer-client discussions chills any substantive communication. Without the assurance of confidentiality, the client may be reluctant to reveal information to the lawyer and the lawyer cannot seek to obtain such information from a client.

A lawyer is ethically prohibited from communicating with the client, notably about sensitive matters, when that lawyer believes that there is a substantial and ongoing risk that the government can listen to the communication. Once a lawyer or a client “believe that the government is listening, there will be no free exchange of information and the client’s defense is harmed.” *National Association of Criminal Defense Lawyers Ethics Advisory Opinion* 02-02 at 5, n. 4 (2002) (hereinafter “NACDL”). NACDL issued three opinions about the fundamental ethical obligations of civilian counsel in Military Commissions in 2001, 2002 and 2012, *NACDL Ethics Advisory Op.* 02-01 (November 2002); *NACDL Ethics Advisory Op* 03-04 (August 2003); *NACDL Ethics Advisory Op.*12-01 (February2012). Each of these opinions affirms the fundamental ethical obligation of defense counsel to ensure and protect client confidential communications.

Not only must a lawyer be competent, but the lawyer had a duty of loyalty to the client. The lawyer is the client’s fiduciary and deals with matters “most confidential and vital to the client.” *Restatement of the Law Governing Lawyers*, §16. Assurances of loyalty are essential

and that duty prohibits the lawyer from harming the client. Thus, the lawyer is prohibited from using or disclosing sensitive information about the client and the lawyer has “an ethical duty... to take affirmative action to protect the confidentiality of attorney client communications from government surveillance. *NACDL Ethics Advisory Op.* 02-01 at 1 (Nov 2002).

Consistent with these ethical duties is your obligation of diligence. “A lawyer shall act with reasonable diligence and promptness in representing a client. “IRPC 1.3; MRPC 1.3. Thus, the duties of competence and diligence require you to undertake action to challenge the substance of orders or practices that prevent a lawyer from providing competent representation and assuring confidentiality. *NACDL Ethics Advisory Op.* 12-01 at 2 (February 2012) (duty to challenge orders that interfere with ethical obligations). You have fulfilled this obligation by undertaking necessary steps to seek to end the surveillance, initially by attempting to discover the extent of it. You have filed a series of motions seeking discovery and an evidentiary hearing, and have made arguments to the military judge to attempt to remedy this lack of ability to communicate confidentially with your client. The military judge denied the requests for discovery as well as the request to have a hearing to determine the extent to which attorney-client confidentiality had been or would be in the future compromised. The Judge denied these requests even though the prosecution's previous assurances about confidentiality were later contradicted. You were prohibited from informing Mr. al-Nashiri of General Baker’s concerns about intrusion into the attorney-client relationship or the facts underlying those concerns because the information is classified and the military judge has no authority to permit disclosure to Mr. al-Nashiri who does not have clearance. There is no available judicial or other recourse to challenge your inability to communicate confidentially with your client.

Moreover, classified information prevents you from explaining to your client the reasons for lack of confidentiality. Consequently, you cannot even meet with your client in confidence to discuss the reasons that you cannot provide competent representation. Your client has enquired about the fact that you have not met with him. You cannot comply with your ethical duty to communicate with your client under these circumstances.

MRPC 1.4 provides that:

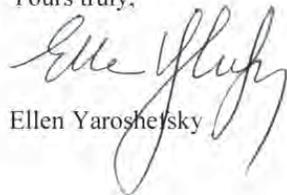
- (a) A lawyer shall:
 - (1) promptly inform the client of any decision or circumstances with respect to which the client's informed consent . . . is required[.]”
 - (2) reasonably consult with the client about the means by which the client’s objectives are to be accomplished;
 - (3) keep the client reasonably informed about the status of the matter;
 - (4) promptly comply with reasonable requests for information;
- (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

The current situation set forth in the facts causes you to violate your duty of communication to your client. This situation is untenable.

This ethical quandary is profound and not reconcilable with your ethical obligation under the IRPC and the MRPC to act diligently and competently, to maintain confidentiality, and adhere to the duties of loyalty and communication.

You cannot, consistent with your ethical obligation continue to represent Mr. al-Nashiri. Rule 1.16 (a) (1) of Professional Conduct mandates that you withdraw from representation. It provides that a lawyer “shall withdraw from representation of a client if the representation involves a violation of the rules of professional conduct or other law.” You are required to withdraw as his counsel because continued representation will result in a violation of IRPCs and MRPCs 1.1, 1.3 1.4 and 1.6.

Yours truly,



Ellen Yaroshefsky

Over time, JTF-GTMO personnel seize privileged mail in defendants' cells so often that defense counsel characterize the seizures as "systematic."⁴

November 2011

Defense counsel send the latest in a long series of requests to the Deputy Secretary of Defense for Detainee Affairs to stop reviewing attorney-client privileged communications.⁵ Counsel predict, "The review and censorship of legal materials will effectively grind litigation to a halt by barring legally required attorney-client communications."⁶

December 2011

The Commander of Joint Task Force-Guantanamo issues orders requiring military officials to review all legal correspondence between defense counsel and their clients.⁷ Counsel who do not agree to comply cannot visit their clients, and are placed in "the untenable position of either choosing to comply with the ethical rules applicable to them in military commissions, or violating those rules in order to communicate with their clients."⁸

⁴ Joint Defense Counsel Letter to Charles Hagel, Secretary of Defense; Subject: Requests to Improve the Conditions of Confinement in Guantanamo (20 May 2013), at 3m=, available at <https://ia600404.us.archive.org/15/items/703318-2013-05-20-joint-letter-to-sec-hagel-pii-redacted/703318-2013-05-20-joint-letter-to-sec-hagel-pii-redacted.pdf> (hereinafter "Joint Defense Counsel Letter to Secretary Hagel (20 May 2013)"). See also OSCE Human Rights Situation GTMO (November 2015), at 178 (citing interviews with defense counsel).

⁵ Letter from Counsel for High-Value Detainees to Deputy Secretary of Defense for Detainee Affairs, Subject: Request to Cease and Desist On-Going Attorney-Client Privilege Violations and For Compliance With Domestic and International Law Standards Regarding Detention Conditions, 1 November 2011, available at <http://media.miamiherald.com/smedia/2011/11/01/17/45/10ijo.So.56.pdf>.

⁶ Letter from Counsel for High-Value Detainees to Deputy Secretary of Defense for Detainee Affairs, Subject: Request to Cease and Desist On-Going Attorney-Client Privilege Violations and For Compliance With Domestic and International Law Standards Regarding Detention Conditions, 1 November 2011, available at <http://media.miamiherald.com/smedia/2011/11/01/17/45/10ijo.So.56.pdf>.

⁷ JTF-GTMO Commander, "Memorandum For: See Distribution; Order Governing Written Communications Management for Detainees Involved in Military Commissions, (27 December 2011), available at JTF-GTMO Commander, "Memorandum For See Distribution - Order Governing Logistics of Defense Counsel Access to Detainees Involved in Military Commissions", 27 December 2011, available at https://www.aclu.org/files/assets/gitmo_orders_20111227.pdf.

⁸ United States Military Commission, *United States of America v. Mohammad et al.*, AE 008 (MAH), avai

January 2012

The Chief Defense Counsel determines that defense counsel in *US v. Mohammad, et al*, cannot adequately safeguard attorney-client privileged communications, and issues an ethics instruction prohibiting defense counsel from using the Guantanamo legal mail system for privileged communications. Defense counsel are unable to exchange confidential written communications with their clients for almost two years,⁹ and face-to-face client meetings become substantially less effective.¹⁰ A military commissions order in *US v. Mohammad, et al* regarding privileged written communications management is not adopted until November 2013.¹¹

Also in January 2012

JTF-GTMO's chief staff attorney reportedly discovers the rooms in which defense counsel had been meetings clients for years are wired with microphones that look like smoke detectors. The chief of the guard force reportedly assures him nobody at Guantanamo was turning on the microphones to listen in on privileged attorney-client meetings.¹² The prison camp commander is reportedly left unaware of the discovery,¹³ as are defense counsel.

March 2012

The prison camp commander writes Southern Command that "no microphones are installed" in attorney/client meeting rooms "to ensure privacy between the attorney and client is maintained."¹⁴

⁹ LAWFARE Another Order in the 911 Case, This One On Legal Mail, available at <https://www.lawfareblog.com/another-order-911-case-one-legal-mail#>.

¹⁰ United States Military Commission, *United States of America v. Mohammad et al*, AE 008 (MAH), at 9.

¹¹ United States Military Commission, *United States of America v. Mohammad et al*, AE 018U, 6 November 2013.

¹² Carol Rosenberg, "Attorney-client meeting room was bugged, Navy lawyer testifies at Guantánamo", Miami Herald website (12 February 2013) available at <http://www.miamiherald.com/news/nationworld/world/americas/guantanamo/article1947210.html>

¹³ Carol Rosenberg, "Attorney-client meeting room was bugged, Navy lawyer testifies at Guantánamo", Miami Herald website (12 February 2013) available at <http://www.miamiherald.com/news/nationworld/world/americas/guantanamo/article1947210.html>

¹⁴ Carol Rosenberg, "Attorney-client meeting room was bugged, Navy lawyer testifies at Guantánamo", Miami Herald website (12 February 2013) available at

May 2012

At arraignment, defense attorneys for accused charged in *US v. Mohammad, et al* argue describe how they were unable to confidentially communicate with their clients during the period in which the Convening Authority decided whether to move forward with capital charges.¹⁵

January 2013

An unknown government entity interrupts a military commission hearing by remotely silencing the courtroom audio feed. The act is tantamount to censoring the proceedings, a function reserved for the judge.¹⁶

Defense counsel discover that courtroom microphones can capture confidential conversations between attorneys and their clients, even when purposefully muted by attorneys.

February 2013

The commander of the detention camp acknowledges under oath that he had known for more than a year that several attorney-client meeting rooms contained cameras and dummy smoke detectors serving as listening devices.¹⁷

The Government argues in court there was no effort to conceal the devices, and their purpose was clearly labeled.¹⁸ The military judge ordered JTF-GTMO to immediately dismantle the listening devices.

<http://www.miamiherald.com/news/nationworld/world/americas/guantanamo/article1947210.html>

¹⁵ Lawfare, Another Order in the 9/11 Case, This One On Legal Mail (6 November 2013) available at <https://www.lawfareblog.com/another-order-911-case-one-legal-mail#>.

¹⁶ <http://www.newyorker.com/news/daily-comment/a-red-light-at-guantnamo>

¹⁷ KSM II (TRANS13February2013-AM2), at 2203.

¹⁸ Carol Rosenberg, "Attorney-client meeting room was bugged, Navy lawyer testifies at Guantánamo", Miami Herald website (12 February 2013) available at <http://www.miamiherald.com/news/nationworld/world/americas/guantanamo/article1947210.html>

Defense counsel describe the “crippling” impact of the spying revelation on the effective assistance of counsel and the right to a fair trial, “grounds alone which would justify appellate reversal of any military commissions conviction.”¹⁹ Defense counsel have no ability to independently investigate disclosures or whether intelligence agencies were involved.

March 2013

Defense counsel discover, through a series of IT-related failures, that some unknown amount of privileged work product had been disclosed to the prosecution, IT personnel not bound by non-disclosure agreements, and other unknown entities. The failures demonstrate that irrespective of its privileged nature, defense counsel computer data is not segregated or treated differently than data belonging to other computer system users. Defense counsel have no ability to independently investigate these disclosures, whether to mitigate harm, evaluate remediation, look for other disclosures, or reliably reassure their clients that, going forward, privileged work product will be protected.

- Defense counsel learn that despite assurances to the contrary, active monitoring of their internet use is not conducted differently than for other system users, allowing IT technicians outside MCDO to monitor defense counsel on-line. The failure is revealed when a defense team member opens a web page and immediately receives a phone call about sidebar content from an unknown IT technician.
-
- A huge number of defense computer files unaccountably disappear from network systems, including materials as highly sensitive as letters between counsel and their clients. Files from defense counsel are unaccountably placed in other organizations’ computer folders. Some defense team members are unable to access their files or edit shared files. The situation worsens over time.²⁰
- Following broad searches of archived electronic communications on behalf of the prosecution, IT technicians send the prosecution what may have been hundreds of thousands of internal defense emails.²¹ The Chief

¹⁹ Joint Defense Counsel Letter to Secretary Hagel (20 May 2013).

²⁰ Lawfare, 9/18 Session #2: the Chief Defense Counsel on IT (18 September 2013), available at <https://www.lawfareblog.com/918-session-2-chief-defense-counsel-it>.

²¹ The searches yield hundreds of thousands of results, contained in an undetermined number of emails.

Prosecutor guarantees that “[a]t no time did any prosecutor actually view the content of any privileged defense communications”.²²

April 2013

The in light of these IT-related failures, the Chief Defense Counsel determines that defense counsel cannot adequately safeguard attorney-client privileged communications. The CDC issues an ethics instruction prohibiting defense counsel from using Defense Department computer networks, including email, to transmit privileged or confidential information. Efforts to mitigate the risk of improper disclosure more than triple the amount of time necessary for defense counsel to draft and file pleadings.²³

April 2013

The military judge in *US v al Nashiri* abates proceedings for two months due to the Government intrusions into defense e-mails.²⁴

May 2013

After receiving no response to thirteen (13) letters addressed to the Deputy Assistant Secretary of Defense for Rule of Law and Detainee Policy, defense counsel write directly to the Secretary of Defense to address, inter alia, the systematic seizure of attorney-client privileged materials. Counsel ask the Secretary of Defense to cease the daily searches of legal bins and “order an immediate investigation into the identity of the persons responsible for ordering these seizures of attorney-client privileged materials as well as the purpose for the seizures.”²⁵

²² OSCE Human Rights Situation GTMO (November 2015), at 2-3 (quoting Chief Prosecutor Mark Martins Remarks at Guantanamo Bay (10 June 2013), available at <http://www.lawfareblog.com/wp-content/uploads/2013/06/Chief-Prosecutor-Statement>).

²³ OSCE Human Rights Situation GTMO (November 2015), at 179-180.

²⁴ Washington Post, Guantanamo dogged by new controversy after mishandling of e-mails (11 April 2013), available at https://www.washingtonpost.com/national/guantanamo-dogged-by-new-controversy-after-mishandling-of-e-mails/2013/04/11/1973bf9a-a2dd-11e2-82bc-511538ae90a4_story.html?utm_term=.aa852f0cda5c.

²⁵ Joint Defense Counsel Letter to Secretary Hagel (20 May 2013).

"This systematic pattern of harassment, degradation, and unauthorized seizures of attorney client privileged materials has degraded the trust and respect necessary to establish and maintain an effective attorney client relationship. These unprecedented violations destroy the prisoner's confidence in the confidentiality and sanctity of defense work product and discourage them from leaving their cells to attend meetings with their attorneys since their cells are tossed whenever they do so."²⁶

August 2013

The judge in *US v al Nashiri* accepts over defense objections, JTF-GTMO assertions that attorney-client meetings were not monitored over the previous two years, and decides there no need to consider whether meetings were monitored in the years prior.²⁷ As for future monitoring:

"In the absence of evidence of past monitoring, issuing an order prohibiting future monitoring would constitute judicial overreach and issuance of an advisory opinion. The JTF Commander and his subordinates have a preexisting legal duty not to monitor attorney-client communications, and issuing an order requiring them to execute their duties would be superfluous."²⁸

November 2013

After two years of litigation, the judge in *US v. Mohammad, et al* issue an order regarding privileged written communications management.²⁹

²⁶ Joint Defense Counsel Letter to Secretary Hagel (20 May 2013), at 5.

²⁷ *US v. Al-Nashiri*, AE 149K, "Order - Defense Motion for Appropriate Relief: Determine the Extent of Past Monitoring at Camp Echo II and Order that No Future Monitoring Occur in JTF-GTMO Facilities", 5 August 2013.

²⁸ *US v. Al-Nashiri*, AE 149K, "Order - Defense Motion for Appropriate Relief: Determine the Extent of Past Monitoring at Camp Echo II and Order that No Future Monitoring Occur in JTF-GTMO Facilities", 5 August 2013, at 4.

²⁹ United States Military Commission, *United States of America v. Mohammad et al.*, AE 018U, 6 November 2013.

Late 2013

The FBI successfully recruits an informant on Mr. bin al Shibh's legal team.

April 2014

The FBI tries to recruit a second informant. Defense counsel discover the first informant. Court proceedings abate pending an investigation. The judge appoints a special counsel to investigate the matter.

February 2015

During Pre-trial hearings for *US v. Mohammad, et al*, resume.³⁰ Mr. bin al Shibh immediately identifies a defense team interpreter in the military commission courtroom who had previously worked at a CIA black site where Mr. bin al Shibh was tortured.³¹

August 2015

OSCE representatives who are conducting a comprehensive human rights assessment of the situation of detainees at Guantánamo receive assurances from the US that:

- "[T]here are currently no listening devices in rooms used for attorney-client meetings [and] that private conversations between counsel and their client in the courtroom remain private and are not recorded, transmitted or shared with anyone outside the privileged attorney-client relationship."³²
- "[T]he prosecution is not involved in reviewing any detainee's legal mail, does not communicate with JTFGTMO personnel concerning the review of materials, and is not privy to the information contained in the legal mail."³³

³⁰ Reuters, How a Simple Phone Call Changed the Course of Justice at GITMO (12 October 2015) available at <http://www.newsweek.com/ramzi-bin-al-shibh-gitmo-379202>. █

³¹ <http://www.independent.co.uk/news/world/americas/coincidence-or-infiltration-trial-of-alleged-911-plotters-halted-after-accused-recognises-10034863.html> [cite something else - can't get pdf] █

³² OSCE Human Rights Situation of Detainees at Guantánamo (November 2015), at para. 402, citing US comments to the draft report that were submitted on 6 August 2015. Id at para. 96.

³³ OSCE Human Rights Situation of Detainees at Guantánamo (November 2015), at fn 1036 citing US comments to the draft report that were submitted on 6 August 2015. Id at para. 96.

June 2017

The government acknowledges having “unintentionally” eavesdropped on attorney-client communications at Guantanamo.³⁴

³⁴ <http://www.miamiherald.com/news/nation-world/world/americas/guantanamo/article159333239.html>

EXHIBIT B

ELLEN YAROSHEFSKY

Howard Lichtenstein Distinguished Professor of Legal Ethics
Executive Director of the Monroe Freedman Institute for the Study of Legal Ethics
Maurice A. Deane School of Law
Hofstra University
121 Hofstra University
Hempstead, NY 115549
(516) 463-5882
yaroshef@hofstra.edu

ACADEMIC EMPLOYMENT

Hofstra University School of Law <i>Howard Lichtenstein Distinguished Professor of Legal Ethics</i> <i>Executive Director of the Monroe H. Freedman Institute for the Study of Legal Ethics</i> Teaches a range of courses in Legal Ethics, Criminal Procedure, Access to Justice Develop symposia and ethics programs Directs the Freedman Fellowship Program	2016-Present
Benjamin N. Cardozo School of Law <i>Executive Director, Jacob Burns Ethics Center in the Practice of Law</i> <i>Clinical Professor of Law</i> Taught a range of courses in Legal and Judicial Ethics, Evidence, and Wrongful Convictions Youth Justice Clinic. Developed symposia and ethics programs. Directed and taught Cardozo's Intensive Trial Advocacy Program.	1994-2016
Columbia Law School <i>Adjunct Professor of Law</i> Course: Professional Responsibility	Spring 2014 Spring 2015
Fordham School of Law <i>Adjunct Professor of Law</i> Course: Ethics in Criminal Advocacy	Fall 2001 Fall 2010

PROFESSIONAL SERVICE

New York State Bar Association Committee on Standards of Attorney Conduct (COSAC)	2003- Present
New York County Lawyers Association Professional Ethics Committee	2008-Present
New York Civil Liberties Union	2015-Present

Board Member National Association of Criminal Defense Lawyers Co-chair, Ethics Advisory Committee	2003-Present
American Bar Association Criminal Justice Section Co-chair of Ethics, Gideon and Professionalism Committee	2006 -2014
New York State Joint Commission on Public Ethics (JCOPE) Commissioner	2012-2014
Association of the Bar of the City of New York Criminal Courts Committee	2008-2011
New York County Lawyers Association Justice Center Advisory Board	2004 -2007
Association of the Bar of the City of New York Committee on Professional Responsibility	2002-2004 1994 -1998
National Conference of Bar Examiners MPRE Drafting Committee	2002
Center for Constitutional Rights Executive Committee Board Member	2001-2015
Legal Services for New York City LSNY Planning Process Advisory Committee	2001- 2002

PUBLICATIONS

Ministers of Justice and Mass Incarceration, (with Lissa Griffin) Georgetown J. Legal Ethics 301 (2017)

Prosecutorial Accountability 2.0, (with Bruce A. Green), 92 NOTRE DAME L. REV. 51 (2016).

New Models for Prosecutorial Accountability, 2016 CARDOZO L. REV. de novo 132 (2016).

Changing the School to Prison Pipeline: Integrating Trauma Informed Care in the New York City School System, in Collected Essays Impact: Threat of Economic Inequality, 1 N.Y Law School Impact Center for Public Service Law J. 99 (2015) (with Anna Shwedel)

Ethical Issues in Class Action Representation, Institute for Law and Economic Policy Conference Materials (2015)

Waiting for the Elevator: Talking About Race, 27 Georgetown J. Legal Ethics 1023 (2014)

Defense Lawyering and Wrongful Convictions (with Laura Schaefer), Allison D. Redlich, James R. Acker, Robert J. Norris & Catherine L. Bonventre (eds.), *Examining Wrongful Convictions: Stepping Back, Moving Forward* (Durham, NC: Carolina Academic Press) (2014)

Ethics in Criminal Advocacy, *The State of Criminal Justice 2013* (American Bar Association) (coauthored with Peter A. Joy)

50th Anniversary of Brady: Cognitive Bias and Beyond, *The Champion*, June 2013

New Orleans Prosecutorial Disclosure in Practice After Connick v. Thompson, 25 *Georgetown J. Legal Ethics* 913 (2012)

Ethics in Criminal Advocacy, *The State of Criminal Justice 2012* (American Bar Association) (coauthored with Peter A. Joy)

Prosecution Ethics in Context (with Bruce A. Green), in *Lawyers in Practice* (Leslie C. Levin and Lynn Mather (eds.), University of Chicago Press (2012)

Prosecutorial Disclosure Obligations, 62 *Hastings L.J.* 1321 (2011)

Ethics in Criminal Advocacy, *The State of Criminal Justice 2011* (American Bar Association) (coauthored with Peter A. Joy)

Foreword: New Perspectives on Brady and Other Disclosure Obligations: What Really Works, 31 *Cardozo L. Rev.* 1943 (2010)

Enhancing the Justice Mission in the Exercise of Prosecutorial Discretion, 19 *Temple Pol. and Civ. Rts. L. Rev.* 343 (2010)

My Client, the Cooperator Lied: Now What? Commentary Symposium, Criminal Law Defense, Ethics, and the Client Who Plans to Lie, 7 *Ohio St. J. Crim. Law* 659 (2010)

Ethics in Criminal Advocacy, *The State of Criminal Justice 2009* (American Bar Association) (coauthored with Peter A. Joy)

Prosecutorial Discretion and Post-Conviction Evidence of Innocence, 6 *Ohio State J. Crim. L.* 467 (2009) (coauthored with Bruce A. Green)

Ethics and Plea Bargaining, American Bar Association Criminal Justice Symposium (Fall 2008)

Ethics in Criminal Advocacy, *The State of Criminal Justice 2008* (American Bar Association) (coauthored with Bruce A. Green)

Zealous Lawyering Succeeds Against All Odds: Major Mori and the Legal Team for David Hicks at Guantanamo Bay, Symposium Issue, 13 *Roger Williams L. Rev.* 469 (2008)

Military Lawyering at the Edge of the Rule of Law at Guantanamo: Should Lawyers Be Permitted to Violate the Law, 36 *Hofstra L. Rev.* 563 (2008)

State of Washington v. Sherrie Lynn Allery, Victory Despite Conviction in Michael E. Tigar and Angela J. Davis (eds.), Trial Stories, 13 (2008)

Secret Evidence is Slowly Eroding the Adversary System, 34 Hofstra L. Rev. 1063 (2006)

Classified Information and the Courts, Secret Evidence and the Courts in the Age of National Security, 5 Cardozo Public Law, Policy and Ethics Journal 1 (2006)

Conference Overview and Summary, The New York City Housing Court in the 21st Century, 3 Cardozo J.Pub. Policy, Law and Ethics Journal 591 (2006) (with Marilyn Flood)

Wrongful Convictions: It Is Time to Take Prosecution Discipline Seriously, Symposium, 8 U.D.C. Law Review 275 (2004)

Introduction to the Cooperating Witness Conundrum, 23 Cardozo Law Review 747 (2002)

Session Four: Special Issues in Assisted Settlement, A Symposium: Ethical Issues in Settlement Negotiations, 52 Mercer Law Review 947 (2001)

Unethical Clauses in Settlement Agreements, New York Employment Law and Practice Vol 2, No. 1 (2000)

Litigation Ethics: Course Materials for Continuing Legal Education, Materials on Client and Witness Perjury, ABA Section of Litigation, (2000)

Cooperation with Federal Prosecutors: Experiences of Truth Telling and Embellishment, 68 Fordham Law Review 917 (1999)

Advertising: Targeted Mailings for Personal Injury and Criminal Clients, New York Professional Responsibility Reporter (June 1998)

How Future Lawyers Learn, Federal Bar Council News (1997)

Balancing Victim's Rights and Vigorous Advocacy for the Defendant, N.Y.U. Annual Survey of American Law 135 (1989)

The Tucson Trial and Its Legal Consequences of Asylum Seekers, 9 Proceedings of the National Legal Conference on Immigration and Refugees (1986)

PRESENTATIONS IN PROFESSIONAL & ACADEMIC PROGRAMS (since 2003)

One the Rocks: Hot Topic Ethical Issues, White Collar Seminar, National Association of Criminal Defense Lawyers (9/17)

Top Ten Ethical Rules for White Collar Lawyers, White Collar West Coast Conference, National Association of Criminal Defense Lawyers (6/17)

What Constitutes A Cert. Worthy Petition to the Supreme Court, Second Circuit Court, United States Courthouse (5/17)

Ethical Issues in the Practice of Criminal Law, New York City Bar (5/17)

Current Ethics Issues in Commercial Litigation, Commercial and Federal Litigation Section, NY State Bar Association (5/17)

Ethical Issues in Mental Hygiene Legal Service, Second Department Continuing Legal Education Program (4/17)

Ethics in Antitrust Litigation, 65th ABA Annual Antitrust Law Spring Meeting (3/17)

Ethics and Professionalism: Best Practices for Attorneys 2017, New York City Bar (3/17)

Ethical Issues in the Practice of Law, The Presidential Inauguration and the Unfolding Era, City University of New York Law School (1/17)

New ABA Model Rule of Professional Conduct against Harassment and Discrimination: Understanding the Rule in Detail, Practising Law Institute (12/16)

Current Ethical Issues in Immigration, Annual 11/16)

What's in a Name? Or a Number?: Attorney Advertising and Ratings, New York State Bar Association (10/16)

Medical Marijuana in New York, New York State Bar Association (10/16)

30th Annual Metropolitan New York Trainer, New York University Law School (3/16)

Ethical Issues in Criminal Practice, The Legal Aid Society (12/15)

Twenty Five Years of Wrongful Convictions Conference, Northeastern School of Law (9/15)

Ethics in Juvenile Defense, National Juvenile Defender Center, Georgetown Law School (4/15)

Navigating the Complex Ethical Issues, Cannabis Business, Law and Ethics (4/15)

Ethical Issues in Class Actions, Institute for Law and Economic Policy (4/15)

Legal and Ethical Obligations in Discovery, Public Defender of the Ninth Judicial Circuit (3/15)

Ethical Obligations of Judges and Prosecutors, ABA Tenth Annual Summit on Indigent Defense Improvement, Thurgood Marshall School of Law (2/15)

Ethical Issues in Indigent Immigration Cases, Brooklyn Defender Services (2/15)

Ethics in Forensic Science, Virtual Lunch Series, American Association of American Law Schools (12/14)

Ethics Seminar, White Collar Crime Seminar, National Association of Criminal Defense Lawyers (11/14)

Ethical Issues in Forensic Science, New York State Bar Association Criminal Justice Section Fall Meeting (10/14)

Protecting the Sixth Amendment 50 Years Later: Current Issues in Ethics and Technology, Second Circuit Judicial Council (6/14)

Ethical Obligations in Dealing with Child Victims: Role and Responsibilities of System Actors, American Bar Association Criminal Justice Section (5/14)

Ethical Issues for the Defense Relating to Forensic Science, 14th Annual Public Defender Retreat (4/14)

Race and Access to the Justice System, Georgetown University Law Center (3/14)

Ethical Choices in Dealing with Crime Victims: What is the Prosecutor, Defender and Judge To Do? American Bar Association Criminal Justice Section (2/14)

Ethical Choices Regarding Discovery and Forensic Science, New York State Bar Association Criminal Justice Section Fall Meeting (10/13)

Prosecutorial Disclosure Obligations, Fifth Circuit Judicial Conference, (5/13)

Ethics in Plea Bargaining and Discovery, Chief Justice's Indigent Defense Summit, Virginia State Bar (5/13)

Basics of Criminal Law for the Criminal and Civil Lawyer, New York State Bar Association, (4/13)

Criminal Law and Ethics: The Present State of Brady, A View from Both Sides, New York County Lawyers Association, (4/13)

50th Anniversary of Gideon v. Wainwright, American Constitution Society, Cardozo Law School (3/13)

Gideon in the 21st Century, American Bar Association Criminal Justice Section Roundtable, (2/13)

Workshop Presentation, The National Institute for Teaching Ethics and Professionalism, (6/12)

Ethics and Open Source Software, Practicing Law Institute, (11/11)

Challenging Ethical Dilemmas: Candor, Client Competency and the Use of Social Networking, New York County Lawyers Criminal Trial Advocacy Institute, (11/11)

Legal and Ethical Implications for Defense Counsel, Prosecutors and the Court in Cutting Edge Forensic Science Issues: Discovery and Disclosure Obligations, New York State Bar Association, (11/11)

Attorney Advertising, Social Media and Ethics, National Advertising Division Annual Conference, (10/11)

Ethics for Corporate Counsel, New York State Bar Association Corporate Counsel Section, (11/10)

Ethical Considerations for Using Technology in Your Practice American Bar Association Section on Litigation, 11th Annual Women in Product Liability Conference (11/10)

Prosecutorial Ethics, Sixth Annual Defending the White Collar Case (9/10)

Ethical Issues in Prison Actions, Prison Law 2009, Practicing Law Institute (9/10)

Difficult Ethical Choices, Office of Legal Counsel, Second Circuit Court of Appeals (7/10)

Prosecutors and Their Disclosure Duties, American Bar Association Professional Responsibility Annual Conference (6/10)

Litigating Under the New Ethics Rules: A Close Look at Rule 3.3 and Gender Bias in the Courthouse, New York Women's Bar Association (5/10)

Update on Legal Ethics in Investigation, National Employment Lawyers Association Spring Conference (5/10)

Ethical Issues with Blogging, Friending and Tweeting, Association of the Bar of the City of New York (3/10)

Ethical Issues in Criminal Defense Practice, 24th Annual Metropolitan New York Trainer (3/10)

Ethics for Corporate Counsel, New York State Bar Association Third Corporate Counsel Institute (11/09)

Ethical Implications of Open Source Strategies, Open Source Software, Practicing Law Institute, (11/09)

The New New York Rules of Professional Conduct in Criminal Practice, Citibar Center for Continuing Legal Education (11/09)

Examining Modern Approaches to Prosecutorial Discretion, Keynote Address, Temple University Beasley School of Law Political and Civil Rights Law Review Annual Symposium (10/09)

Racial Issues, Confidentiality and Other Ethical Dilemmas, 2009 Annual Criminal Defense Conference, Milwaukee, Wisconsin (9/09)

Ethical Issues in Prison Actions, Prison Law 2009, Practicing Law Institute (9/09)

Ethical Issues in Special Education, Seventh Annual School Law Institute, Practicing Law Institute, (5/09)

Past, Present and Future of Guantanamo, CSPAN, April 2009

Ethical Implications of Open Source Strategies, Open Source Software, Practicing Law Institute, (11/08)

Confidentiality and Its Limits, *Legal Ethics in New York*, Lorman Educational Services, New York (9/08)

Ethical Issues in Client Representation at Guantanamo, Association of Professional Responsibility Lawyers, (5/08)

The Prosecution Ethic, Symposium in Tribute to Seattle-King County Prosecutor Norm Maleng, Seattle Washington (5/08)

The Bi-Annual Criminal Justice Retreat: A Summit on the Prosecution Function, Association of the Bar of the City of New York (4/08)

Ethical Issues in Direct and Cross Examination, American Bar Association Criminal Justice Section, (4/08)

Ethical Issues in Witness Preparation, Commercial and Federal Litigation Section, New York State Bar Association, (1/08)

What Every Attorney Must Know About Ethics, Practicing Law Institute (12/07)

Ethics and Professionalism in Plea Negotiation: Best Practices and Worst Pitfalls, American Bar Association Criminal Justice Section 2007 Fall Conference, Washington, D.C., (11/07)

Business and Ethical Implications of Open Source Strategies, Open Source Software, Practicing Law Institute, (11/07)

Confidentiality and Conflicts, Back to Business, Proskauer Rose LLP, (11/07)

Lawyering and Terrorism Cases, Legal Dilemmas in a Dangerous World: Law Terrorism and National Security, Roger Williams University School of Law, (11/07)

Lawyering at the Edge of the Rule of Law, Ethics Conference: Lawyering at the Edge, Hofstra Law School (10/07)

Ethics in Employment Law, Jackson Lewis Women's Employment Law Conference, New Jersey (10/07)

Zealous Representation: Ethical Limits and Trial Techniques, New York State Bar Association (5/07)

Ethical Practices in Start-Ups and Smaller Firms, Association of the Bar of the City of New York, (5/07)

Ethics for the Immigration Lawyer, Federal Bar Association, New Jersey 26th Annual Hon. William H. Strasser Immigration Conference, (5/07)

Ethical Issues in Special Education, Fifth Annual School Law Institute, Practicing Law Institute, (5/07)

Potential Criminal Exposure of Attorneys, Professional Responsibility and Risk Management Conference, New York (10/06)

Attorney-Client Privilege, Inadvertent Disclosure and Document Retention, Jackson Lewis Women's Employment Law Conference, New Jersey (10/06)

Ethical Issues for Intellectual Property Lawyers, The Copyright Society of the USA, New York (9/06)

Ethical Issues in Advising the Self Represented, New York Family Court (9/06)

Ethical Issues for the Entertainment Lawyer, Association of the Bar of the City of New York Center for Continuing Legal Education, (6/06)

Prosecution Ethics, American Bar Association Professional Responsibility Conference, Vancouver, B.C. (6/06)

Ethical Issues for Employment Lawyers, National Employment Lawyers Association, (5/06)

Ethical Issues in Special Education, Sixth Annual School Law Institute, Practicing Law Institute, (5/06)

Lawyers in the Dock: When Does Good Lawyering Become Criminal Conduct, Association of the Bar of the City of New York Center for Continuing Legal Education, (2/06)

Prosecution Ethics, Association of Professional Responsibility Lawyers, (2/06)

The Law and Ethics of Criminal Defense in Terrorism Cases, Association of American Law Schools, (1/06)

Bridge the Gap, Practicing Law Institute, (12/05)

Secret Evidence is Eroding the Adversary System, Lawyers' Ethics in an Adversary System, 2005 Legal Ethics Conference, Hofstra Law School, (11/05)

The Changing Legal Profession, Legal Ethics in the New Millennium, American Association of Law Schools Professional Responsibility Conference, (6//05)

Ethical Issues in Special Education, Fifth Annual School Law Institute, Practicing Law Institute, (4//05)

Ethical Issues in Pro Bono Work, City Bar Center for Continuing Legal Education, (6/05)

Ethical Dilemmas for Financial Services Attorneys, SIA Compliance and Legal Division, (6/05)

Ethics for the Immigration Lawyer, City Bar Center for Continuing Legal Education, (3/05)

Ethical Considerations for Corporate Investigations, City Bar Center for Continuing Legal Education, (9/04)

Timely Ethical Issues: Cooperating Witnesses, Federal Bar Council, (11/04)

Ethical Issues for the Entertainment Lawyer, City Bar Center for Continuing Legal Education, (6/04)

Ethics for the Immigration Lawyer, City Bar Center for Continuing Legal Education, (3/04)

Ethical Issues in Dealing with the Difficult Client, New York Employment Lawyers Annual Conference, (11/03)

Internet Ethics, New York County Lawyers Association, (10/03)

The Evolving Defense Function in the Wake of Sarbanes-Oxley, New York Council of Defense Lawyers 2003 Biennial Retreat, with SEC Commissioner Harvey Goldschmid, SDNY Judge Jed Rakoff and New York State Attorney General Eliot Spitzer, (10/03)

Child Abuse, Neglect & the Foster Care System - The Attorney's Role & Responsibilities 2003, Practicing Law Institute, (3/03)

LEGAL EMPLOYMENT

Ethics Consultant Advise and represent lawyers and judges on matters pertaining to the law governing lawyers; expert witness.	2008-Present
Clayman and Rosenberg , New York, NY <i>Of Counsel</i> Advised and represented lawyers and legal organizations on matters pertaining to the law governing lawyers; expert witness.	2006 - 2008
Hinshaw & Culbertson LLP , New York, NY <i>Of Counsel</i> Advised and represented lawyers and legal organizations on matters pertaining to the law governing lawyers; expert witness	2004 - 2006
Private Practice , New York, NY Criminal, civil rights and constitutional rights litigation	1988 - 2000
Center for Constitutional Rights , New York, NY National practice in civil rights and international human rights.	1982 - 1988
Gibbs, Douglas, Theiler, Yaroshefsky and Drachler , Seattle, WA Criminal defense and civil rights litigation	1980 - 1982
Seattle-King County Public Defender , Seattle, WA Criminal defense litigation	1976 - 1980
Puyallup Indian Tribe , Tacoma, WA <i>Staff Attorney</i> Provided general legal counsel to tribe on land rights and economic development.	1975 - 1976

BAR ADMISSIONS

New York and Washington State Courts Second and Ninth Circuit Courts of Appeals	Various U.S. District Courts U.S. Supreme Court
--	--

EDUCATION

Rutgers School of Law, Newark, New Jersey	J.D. 1975
Douglass College for Women Rutgers University, New Brunswick, New Jersey	B.A. 1969

HONORS

<i>“Eric Neisser Award for Outstanding Public Service,”</i> Rutgers University School of Law	Sept 2005
<i>“Outstanding Contribution in the Field of Criminal Law Education” Award</i> New York State Bar Association, Criminal Justice Section	January 2000
Monrad G. Paulsen Award (with other members of the clinical faculty) <i>“In recognition of devoted service to the ideals and purposes of Legal Education”</i>	June 1998
American Immigration Lawyers Association Award	June 1991
Steps to End Family Violence Award	May 1991

ATTACHMENT D

**MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY, CUBA**

<p>UNITED STATES OF AMERICA</p> <p>v.</p> <p>ABD AL-RAHIM HUSSEIN MUHAMMED ABDU AL-NASHIRI</p>	<p>AE 389</p> <p>Draft Order</p> <p>Defense Motion to Abate Proceedings Pending the Detailing of Learned Counsel</p> <p>16 October 2017</p>
---	---

1. On 11 October 2017, the Chief Defense Counsel, pursuant to his sole discretion and authority under Rule for Military Commission 505(d)(2)(B), excused Mr. Richard Kammen, Ms. Mary Spears, and Ms. Rosa Eliades.
2. Mr. Al-Nashiri has the right to be represented by a counsel learned in the law regarding capital trials pursuant to Rule for Military Commission 506(b).
3. Mr. Richard Kammen was Mr. Al-Nashiri's sole counsel learned in the law regarding capital trials.
4. Mr. Al-Nashiri currently is not represented by a counsel learned in the law regarding capital trials.
5. The defense now seeks an Order to Abate the Proceedings Until a Learned Counsel is Detailed.
6. AE 389 is hereby **GRANTED**.

So **ORDERED** this ___ day of October, 2017.

Exhibit B

**MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY, CUBA**

UNITED STATES OF AMERICA

v.

**ABD AL-RAHIM HUSSEIN
MUHAMMED ABDU AL-NASHIRI**

AE 388

DOCKETING ORDER
(October/November 2017 Hearing)

4 October 2017

1. As directed in AE 356G, a hearing in this case will take place **30 October – 17 November 2017**, at the U.S. Naval Station, Guantanamo Bay, Cuba.¹

a. The Commission will begin the session with a discussion of the proposed 2018 hearing schedule. During the first week of the session, the Commission will receive testimony of witnesses referenced in AE 327E and oral argument on fully-briefed, pending issues, including those related to the deposition of Mr. Ahmed Mohammed Haza al-Darbi.² If required, The Commission will conduct hearings under the provisions of Military Commission Rule of Evidence (M.C.R.E.) 505(h) during this week. Pursuant to M.C.R.E. 505(h)(1)(C), such hearing will be closed to the public. If all issues relating to the deposition are resolved, the cross examination portion of the deposition of Mr. al-Darbi will begin. The Accused will be present at the deposition, unless he chooses to waive his presence or is otherwise properly excluded. The Military Judge will continue to serve as the deposition officer and the deposition will be closed to the public in accordance with AE 369M and 369FF.³ The deposition will be recorded and transcribed in the same manner as the earlier portions of the deposition.

b. During the second week of the session, parties should be prepared to continue deposition of Mr. al-Darbi and to address any issues that may arise from the deposition.

¹ AE 356B, Scheduling Order (Amended), dated 17 March 2017.

² AE 327E, Order, Defense Motion to Compel Witnesses to Testify at the Hearing on AE 327: Defense Motion to Suppress Custodial Statements Made by Mr. Jamal al-Badawi, dated 21 September 2017.

³ AE 369M, Order, Government Motion to Conduct a Deposition of a Certain Witness, dated 17 March 2017 and AE 369FF, Order, Government Motion to Close the Deposition and Set a Schedule for Requests for Use or Declassification of Evidence for Use at the Deposition Ordered in AE 369M, dated 12 June 2017.

c. During the third week of the session, the Commission will receive testimony regarding the pre-admission of evidence, in accordance with the Commission's order in AE 207C.⁴

2. A Rule for Military Commission (R.M.C.) 802 Conference will be held on **29 October 2017** at 1700 in the Deliberation Room on the first floor in AV-34 to discuss administrative matters.

3. The hearing will begin at **1200 on 30 October 2017**. The Accused must be present for the beginning of the session on **30 October 2017** and will be reminded of his right to be present during interlocutory proceedings, in accordance with this Commission's order in AE 099F.

4. The parties should be prepared to argue all pending motions for which the briefing cycle has been completed prior to 30 October 2017. During this session the Commission may receive evidence and hear argument on the following motions:

- a. AE 369R - Motion to Compel Production of Discovery Related to Mr. al-Darbi;
- b. AE 327 – Motion to Strike Statements;
- c. AE 335C - Motion to Compel Witnesses to Testify on AE 335;
- d. AE 335 - Motion to Strike Custodial Statements and Derivative Evidence;
- e. AE 353F - Motion to Compel Production of Evidence Disclosed in AE 353E;
- f. AE 353 - Motion to Dismiss for *Brady/Giglio* Violations;
- g. AE 283F - Motion for Clarification and Reconsideration;
- h. AE 324G - Motion for Clarification and Reconsideration;
- i. AE 325C - Motion for Clarification and Reconsideration;
- j. AE 326D - Motion for Clarification and Reconsideration;
- k. AE 336C - Motion for Clarification and Reconsideration; and
- l. AE 207F – Motion to Compel Production of Witness.

⁴ AE 207, Government Motion *in Limine* For the Commission To Admit Evidence, filed 4 February 2014; AE 207C, Order, Government Motion *in Limine* For the Commission To Admit Evidence, dated 16 September 2014.

5. The time which has transpired since arraignment until the beginning of the October 2017 session shall be considered excludable delay in accordance with R.M.C. 707(b)(4)(E)(i) and R.M.C. 707(c). I find that the interests of justice have been served by granting continuances for the resolution of interlocutory and other pretrial issues, and that the resolution of these issues outweighs the interests of the public and the accused in a prompt trial.

So **ORDERED** this 4th day of October, 2017.

//s//
VANCE H. SPATH, Colonel, USAF
Military Judge
Military Commissions Trial Judiciary

Exhibit C

**MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY, CUBA**

<p>UNITED STATES OF AMERICA</p> <p>v.</p> <p>ABD AL-RAHIM HUSSEIN MUHAMMED ABDU AL-NASHIRI</p>	<p>AE 389F</p> <p>Ruling</p> <p>Defense Motion to Abate Proceedings Pending the Detailing of Learned Counsel</p> <p>27 October 2017</p>
---	---

1. Background

a. On 16 October 2017, after the Chief Defense Counsel purportedly acted to excuse three of the Accused’s counsel, including Learned Counsel Mr. Richard Kammen, the Defense filed a motion to abate the proceedings until new learned counsel can be appointed.¹ As good cause for excusal, Mr. Kammen stated in a letter to the Chief Defense Counsel that Mr. Kammen is ethically obligated to withdraw based on matters the Commission previously addressed in AE 369YYY and AE 369ZZZ.² Based on the Chief Defense Counsel’s interpretation of Rule for Military Commission (R.M.C.) 505(d)(2)(B), once he makes an independent determination that there is good cause, he may excuse counsel, as his authority to do so is “unilateral, unreviewable,” and thus completely free from any judicial determination at any time. (AE 389A at 6-11).

b. In its response, the Government argues that the Chief Defense Counsel’s position does not comport with practices and regulations in any jurisdiction, military or civilian, for excusal of counsel

¹ AE 389, Defense Motion to Abate Proceedings Pending the Detailing of Learned Counsel, filed 16 October 2017 at 1. For ethical reasons which are claimed to affect the ability for any attorney to represent the Accused, the Chief Defense Counsel excused Mr. Richard Kammen, Ms. Mary Spears and Ms. Rosa Eliades. See AE 389C, Chief Defense Counsel’s Response to Briefing Order of 16 October 2017, filed 24 October 2017, at 2. The ability of Lieutenant Alaric Piette, the Accused’s detailed military counsel, to represent the Accused is not addressed in any relevant filings.

² AE 369YYY, Classified Ruling , Defense Motion to Compel Production of Discovery Materials Related to Potential Intrusions into Attorney Client Communications, dated 20 September 2017; AE 369ZZZ, Classified Ruling, Defense Motion for Evidentiary hearing, or in the Alternative, Abatement of Proceedings, dated 20 September 2017

after appearances are entered.³ Moreover, the Government contends that the Chief Defense Counsel's authority to excuse Learned Counsel is circumscribed as Learned Counsel is not "detailed" as other military and federal employee counsel are, but rather contractually appointed and statutorily required for capital cases. (AE 389D at 11-14).

c. In his reply, the Chief Defense Counsel argues that the Government misinterpreted various provisions of the Rules for Military Commissions and advanced policy arguments which do not comport with the intent of the rules published by the Secretary of Defense.⁴

2. Law and Analysis

a. Generally, the "military judge controls the proceedings in a trial referred to his court from beginning to end." *United States v. Nivens*, 21 C.M.A. 420, 425 (C.A.A.F. 1972). Moreover, "a military judge is responsible for ensuring that the commission proceedings are conducted in a fair and orderly manner, without unnecessary delay or waste of time or resources." Discussion to R.M.C. 801.

b. After the formation of an attorney-client relationship between accused and detailed defense counsel, R.M.C. 505(d)(2)(B) permits an authority competent to detail defense counsel to excuse or change such counsel, "(i) upon request of the accused or application for withdrawal by such counsel; or (ii) for other good cause shown on the record." As written, R.M.C. 505(d)(2)(B)(i) appears to not require good cause shown when counsel makes an application for withdrawal, thus rendering R.M.C. 505(d)(2)(B)(ii) superfluous and making R.M.C. 505(d)(2)(B) the functional equivalent of R.M.C. 505(d)(2)(A), which applies only to situations before the formation of an attorney-client relationship. Further adding to the ambiguity is whether "detailed defense counsel"

³ AE 389D, Government Response to Chief Defense Counsel's Response to Briefing Order of 16 October 2017, filed 25 October 2017 at 8-9.

⁴ AE 389E, Chief Defense Counsel's Reply to Prosecution's Response to Briefing Order of 16 October 2017, filed 26 October 2017.

under R.M.C. 505(d)(2)(B) includes Learned Counsel, as Learned Counsel are “appointed” rather than “detailed.” R.C.M. 506(b); *see also* 10 U.S.C. § 948k. Completely absent from R.M.C. 505(d)(2)(B) is any language as to who determines whether good cause has been shown on the record.

c. To resolve the ambiguity inherent in R.M.C. 505(d)(2)(B), an examination of Rule for Courts-Martial (R.C.M.) 505(d)(2)(B) and applicable case law is required. The parties agree that R.M.C. 505(d)(2)(B) requires good cause shown and the provision for which the Chief Defense Counsel relies on is identical in R.C.M. 505(d)(2)(B)(iii). Yet, on its face, the R.C.M. does not answer the question of who determines whether good cause is shown on the record. Both parties rely on *United States v. Hutchins*, 69 M.J. 282 (C.A.A.F. 2011) to support disparate positions. However, that case addressed primarily the failure of the military judge to establish on the record the basis for withdrawal of counsel under R.C.M. 505 or 506. *Id.* at 288-290. In a subsequent case, the Navy-Marine Court of Criminal Appeals in *Hohman* noted in *Hutchins* the “military judge *failed to make a* good cause determination on the record,” a determination that “remains a fact specific determination which considers the impact of the severance on the client and the circumstances under which the relationship is extinguished.” *United States v. Hohman*, 2011 CCA LEXIS 14, *6-8 (N.M.C.A.A. 2011) (emphasis added).

d. The military case most directly on point is *United States v. Bevacqua*, 37 M.J. 996, (C.G.C.M.R. 1993). In that case, as in this one, the detailing authority unilaterally excused counsel without a good cause determination by the military judge. *Id.* at 998-999.⁵ The Court held that excusal of a defense counsel for good cause under R.C.M. 505(d)(2)(B)(iii) must be accomplished by the military judge on the record. *Id.* at 1003. In so holding, the Court reasoned:

⁵ Contrary to the Chief Defense Counsel’s position, the decision whether good cause exists to excuse counsel is “reviewable,” at least insofar as this and other appellate courts are concerned. *Id.* at 999.

After an attorney-client relationship is formed, however, the circumstances under which that relationship may be broken are limited. We believe the authority of the detailing officer/staff judge advocate to act in those circumstances is also circumscribed.

R.C.M. 505(d)(2)(B) says that the "authority competent to detail" counsel may excuse or change such counsel after formation of an attorney-client relationship only: (1) for good cause shown on the record, (2) upon request of the accused, (3) upon application for withdrawal by counsel under R.C.M. 506(c), or (4) under R.C.M. 506(b)(3), which provides for excusal of detailed defense counsel when a requested IMC has been made available. Although R.C.M. 505 indicates that these actions may be taken by the authority who details counsel, we believe that after the trial commences it is only the military judge who may sever the attorney-client relationship, except in the limited circumstance under R.C.M. 506(b)(3).

Even then, as we have indicated earlier, if the detailing authority decides to allow detailed counsel to continue as associate counsel, subsequent excusal must be for good cause shown on the record. In that event, we believe the military judge, not the staff judge advocate, is the appropriate authority to effect such action. This outlook is consistent with the view that the military judge controls the trial proceedings and ensures that the rights of the accused are protected.

Id. at 1001-1002. A cursory examination of numerous federal and state cases and rules, including the state by which the Learned Counsel is licensed to practice law, appear to universally stand for the obvious principle that after appearances have been made, the trial judge determines whether there is good cause to warrant withdrawal of counsel.⁶ Further, as the Accused's counsel brings forth the breach of ethical duties as justification for withdrawal, the decision to disqualify counsel also is

⁶ See, e.g., *Laster v. District of Columbia*, 460 F. Supp. 2d 111, 113 (D.D.C. 2006) ("The decision to grant or deny counsel's motion to withdraw is committed to the discretion of the district court.") (citing *Whiting v. Lacara*, 187 F.3d 317, 320 (2d Cir. 1999); *Fleming v. Harris*, 39 F.3d 905, 908 (8th Cir. 1994; and *Washington v. Sherwin Real Estate, Inc.* 694 F.2d 1081, 1087 (7th Cir. 1982)); *Stair v. Calhoun*, 722 F. Supp. 2d 258, 264 (E.D.N.Y.) (quoting *In re Albert*, 277 B.R. 38, 47 (Bankr. S.D.N.Y. 2002)) (The ultimate decision of whether to grant or deny a motion to withdraw as counsel "falls to the sound discretion of the trial court."); *United States v. Williams*, 717 F.2d 473, 475 (9th Cir. 1983) ("[A] trial court's decision to release counsel is an exercise of its discretion"); Rules of the U.S. District Court for the District of Columbia, Local Crim. R. 44.5(d) (2017) ("The Court may deny a motion to withdraw if the attorney's withdrawal would unduly delay trial of the case or be unfairly prejudicial to any party, or otherwise not be in the interests of justice"); Indiana Rules of Trial Procedure, Rule 3.1, Appearance ("A motion for withdrawal of representation shall be granted by the court unless the court specifically finds that withdrawal is not reasonable or consistent with the efficient administration of justice.")

within the discretion of the military judge. *See United States v. Humpherys*, 57 M.J. 83, 88 (C.A.A.F. 2002) (stating that counsel *may* be disqualified if a party-litigant brings an issue of conflict of interest or breach of ethical duties to the attention of the court); *United States v. Strother*, 60 M.J. 476, 478 (C.A.A.F. 2005) (holding a military judge's decision to disqualify counsel will be reviewed for an abuse of discretion.)

e. The Chief Defense Counsel argues that R.M.C. 505(d)(2)(B) empowers him alone to determine whether good cause exists that warrants excusal of counsel, an act which can halt the proceedings at any stage until counsel is replaced and prepared to proceed. This argument is untenable for several reasons. First, it removes control of the proceedings from the military judge, as well as renders impossible the military judge's responsibility to ensure fair and orderly proceedings free of "unnecessary delay or waste of time." *See* Discussion to R.M.C. 801. Second, it contradicts the established practices of military and civilian courts, which recognizes the judge's sole discretion in determining whether excusal is warranted after counsel has appeared in the case. Likewise, disqualification of counsel based on a breach of ethical duties is well established to be within the discretion of the military judge. Third, while the ambiguity in R.M.C. 505(d)(2)(B) is troublesome, it cannot be read so as to conflict with other provisions within the R.M.C., rendering some superfluous, or read in a way that may directly prejudice the Accused if no judicial oversight is permitted. As such, in conformity with federal and military case law, the Commission is the appropriate authority to determine if good cause is shown on the record to warrant excusal of counsel pursuant to R.M.C. 505(d)(2)(B).

3. Findings. The Commission finds no good cause exists to warrant the excusal of Learned Counsel or the two DOD civilian defense counsel from their duties to represent the Accused in this case. As the Commission has already ruled, thus far no evidence has been presented to demonstrate intrusions

in this case affecting this Accused which would ethically require the withdrawal or disqualification of Learned Counsel. Finally, the Commission finds, at this stage of the proceedings, the excusal of Learned Counsel, who has acted as lead attorney for the Accused for nine years, will prejudice the Accused's due process rights.⁷

4. Ruling. The Defense motion to abate is **DENIED**.

So **ORDERED** this 27th day of October, 2017.

//s//

VANCE H. SPATH, Colonel, USAF

Military Judge

Military Commissions Trial Judiciary

⁷ The Commission notes that under the Indiana Rules of Professional Conduct Rule 1.16(c), "A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation."

Exhibit D

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 [The R.M.C. 803 session was called to order at 1001, 31
2 October 2017.]

3 MJ [Col SPATH]: This commission is called to order.

4 Trial Counsel, Mr. Miller, let's account for the
5 government representatives and make any announcement regarding
6 the transmission of these proceedings.

7 TC [MR. MILLER]: Good morning, Your Honor. Present for
8 the prosecution are Brigadier General Mark Martins; myself,
9 Mark Miller; Colonel John Wells; and Major Michael Pierson.

10 In addition to detailed counsel, we have at the
11 counsel table Master Sergeant Vanessa Pichon, who is one of
12 our paralegals; Staff Sergeant Kevin Creel, again, a
13 paralegal; and our analyst, Parker Smith.

14 Additionally seated in the back, Your Honor, we have
15 Patrick O'Malley of the Federal Bureau of Investigation,
16 Joseph Castellano of the Federal Bureau Investigation, and
17 Supervisory Special Agent Amanda Strickland.

18 These proceedings are being transmitted by
19 closed-circuit television to the locations authorized in your
20 order. Thank you.

21 MJ [Col SPATH]: Thanks, Mr. Miller.

22 Lieutenant Piette, I see that learned counsel,
23 Mr. Kammen, and the two assistant defense counsel, Ms. Eliades

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 and Ms. Spears, are absent. Do you have any other members of
2 the defense team you need to account for on the record other
3 than yourself?

4 DDC [LT PIETTE]: Yes, Your Honor. Present for
5 Mr. al Nashiri are myself, Lieutenant Alaric Piette, JAG
6 Corps, United States Navy. I'm a lawyer within the meaning of
7 Article 27(b) of the Uniform Code of Military Justice. In
8 addition, we have present Ms. Brandi Janes; Ms. Kristina Hon;
9 Tech Sergeant Travis Gale; Mr. Roosevelt Roy; and the
10 translator. Additionally present is Brigadier General John
11 Baker, United States Marine Corps; Colonel Wayne Aaron, United
12 States Army; and Mr. Phil Sundel.

13 MJ [Col SPATH]: With regard to General Baker, Colonel
14 Aaron and Mr. Sundel, are they of record for Mr. al Nashiri?

15 DDC [LT PIETTE]: No, Your Honor. They are -- Brigadier
16 General John Baker is the chief defense counsel.

17 MJ [Col SPATH]: I understand. Is he entering an
18 appearance for Mr. al Nashiri or not?

19 DDC [LT PIETTE]: No, Your Honor.

20 MJ [Col SPATH]: Okay. And the same for the other two?

21 DDC [LT PIETTE]: Yes, Your Honor.

22 MJ [Col SPATH]: All right. Thanks.

23 Mr. al Nashiri, I'm going to talk to you about your

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 rights to be present and your right to waive your presence at
2 any hearing.

3 You have the right to be present during all sessions
4 of a commission; this includes any contempt proceedings
5 against anyone. If you request to absent yourself from any
6 session, such absence must be voluntary and of your own free
7 will.

8 Your voluntary absence from any session of the
9 commission is an unequivocal waiver of your right to be
10 present during the session. Your absence from any session may
11 negatively affect the presentation of the defense in your
12 case. Your failure to meet with and cooperate with your
13 defense counsel may also negatively affect the presentation of
14 your case.

15 Under certain circumstances your attendance at a
16 session can be compelled regardless of your personal desire
17 not to be present. The proceedings today constitute one of
18 those occasions, as we are going to be discussing the
19 circumstances that have led to you being in court without your
20 outside appointed learned counsel, Mr. Kammen, and two other
21 members of your defense team.

22 Do you understand what I have explained to you so
23 far?

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 ACC [MR. AL NASHIRI]: [Indicated a positive response.]

2 MJ [Col SPATH]: That is a positive response from
3 Mr. al Nashiri.

4 During past sessions I know you have indicated you
5 did not desire for me to take breaks during the prayer times.
6 Is it still your preference not to take breaks during prayer
7 time?

8 ACC [MR. AL NASHIRI]: Yes. Yes.

9 MJ [Col SPATH]: And that is again a positive response
10 from Mr. al Nashiri. Thank you.

11 So on Sunday afternoon we had an 802 session under
12 the Rules for Military Commissions. It was pretty short.
13 Detailed military counsel for Mr. al Nashiri was there, and
14 counsel for the prosecution were present as well. Mr. Kammen,
15 Ms. Spears, Ms. Eliades were absent, but for 802 sessions we
16 only need one counsel from either side anyway, so we went on
17 with the 802.

18 However, since they were absent, I informed the
19 parties we weren't going to convene on Monday as previously
20 scheduled, and I ordered parties to file pleadings with the
21 commission no later than noon on Monday. What I wanted from
22 both sides was their position on the way forward in light of
23 the absence of, again, appointed outside learned counsel.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 That was the extent of the 802 session.

2 Trial Counsel, want to add anything to my summary of
3 the 802 session?

4 TC [MR. MILLER]: No, Your Honor. Thank you.

5 MJ [Col SPATH]: Defense Counsel?

6 DDC [LT PIETTE]: Defense concurs; nothing to add.

7 MJ [Col SPATH]: So after that the government did provide
8 a filing -- they provided it before noon on yesterday -- which
9 I have been through. After the 802 on Sunday there was an
10 e-mail from detailed defense counsel indicating the way
11 forward was not to do anything because learned counsel isn't
12 here.

13 Through the attorney advisor that I have, we e-mailed
14 back to indicate if you are filing with the commission,
15 especially if the commission wants one, it should be in the
16 format required by the rules. We got another e-mail back
17 saying that the defense counsel wasn't going to do that.

18 Maybe I wasn't clear, so we will talk about that
19 later on what I expect counsel to do. We have a designated AE
20 for your response in the right format. We will talk about
21 that as we move on.

22 Yesterday afternoon General Baker requested to add a
23 supplement to one of his filings. We allowed him to do that.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 We got that last night.

2 Additionally, at some point yesterday I know my staff
3 sent an e-mail out at my direction notifying the parties what
4 time we were going to start today, at 10:00, and that was
5 after I got the government filing; and then indicating I
6 wished to have the chief defense counsel, General Baker,
7 available to provide testimony. It appears he is available
8 because I see him in the courtroom as well.

9 I will enter some findings of fact so that we, again,
10 have an understanding of why we are here, where we are at.
11 These have been proven to at least a preponderance of the
12 evidence. These findings of fact are relevant both to the
13 expected testimony of the chief defense counsel and the
14 absence of appointed outside learned counsel and detailed
15 civilian defense counsel, who are employees of the Department
16 of Defense.

17 On 23 December 2008 Mr. Richard Kammen was appointed
18 as the accused's outside learned counsel.

19 On 25 August 2015 the chief defense counsel,
20 Brigadier General Baker, detailed Ms. Mary Spears to the
21 accused's case as an assistant defense counsel.

22 On 18 November 2015 General Baker detailed Ms. Rosa
23 Eliades to the accused's case as another assistant defense

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 counsel.

2 On 11 May 2017 the government filed AE 369T, a
3 classified pleading. It provided notice to the commission and
4 the defense of a potential intrusion into attorney-client
5 communications between an attorney not part of
6 Mr. al Nashiri's team and not representing Mr. al Nashiri and
7 a detainee other than the accused. The disclosure by the
8 government was made voluntarily.

9 On 14 June 2017 the chief defense counsel sent a
10 memorandum to the chief prosecutor. The memorandum was titled
11 "Improper Monitoring of Attorney-Client Meetings." In the
12 memorandum the chief defense counsel informed the chief
13 prosecutor he had advised all defense counsel under his
14 supervision that they not conduct any attorney-client meetings
15 at Guantanamo Bay, Cuba until they know with certainty that
16 improper monitoring of such meetings is not occurring.

17 On 23 June 2017 the defense filed Appellate
18 Exhibit 369HH, a classified motion seeking to disclose
19 classified information to Mr. al Nashiri related to alleged
20 intrusions into attorney-client communications.

21 On 7 July 2017 I denied the motion because I am
22 statutorily prohibited from ordering the disclosure of
23 classified information, which everybody knows.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 On 14 July 2017 the defense filed Appellate Exhibit
2 369PP, a motion to compel production of discovery materials
3 related to potential intrusions into attorney-client
4 communications.

5 On 20 September 2017 I issued Appellate
6 Exhibit 369YYY. It was a classified ruling denying the motion
7 after I reviewed all of the information submitted thus far on
8 the issue, both classified and unclassified, and I found the
9 defense failed to carry its burden of proof to warrant
10 additional disclosure.

11 On 14 July 2017 the defense filed Appellate
12 Exhibit 369RR, a motion for an evidentiary hearing or, in the
13 alternative, abatement of the proceedings due to potential
14 intrusions into attorney-client communications.

15 On 20 September 2017, again after consideration of
16 all the classified and unclassified filings and the in-court
17 representations and a classified declaration submitted by the
18 government, I issued Appellate Exhibit 369ZZZ. It's a
19 classified ruling denying the motion and finding there wasn't
20 any basis to find there had been an intrusion into
21 attorney-client communications between this accused and this
22 defense team.

23 On 14 August 2017 the defense filed Appellate Exhibit

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 369AAA. It was a motion to allow the accused to meet with his
2 counsel in the Expeditionary Legal Center rather than the
3 legal -- or rather than their usual meeting location.

4 On 25 October 2017 I denied Appellate Exhibit 369AAA
5 in Appellate Exhibit 3690000. In that ruling, I noted while
6 denying the motion, I certainly didn't object to the defense
7 utilizing the courtroom, or frankly any room, for
8 attorney-client meetings as that is something that they need
9 to work out with the confinement facility. It is not
10 something for me to be involved in in most instances, and I
11 have stayed out of it, as you all know, because I don't run
12 this facility. I would note there have been many meetings
13 here in the ELC between the defense counsel and their client
14 in this case.

15 On 4 October 2017 this commission issued Appellate
16 Exhibit 388, a docketing order setting forth the issues to be
17 addressed at this session. Some of the issues that we're
18 going to address include the issues related to the deposition
19 of Mr. al Darbi, the deposition of Mr. al Darbi, testimony of
20 witnesses that we have ordered in 327E, and testimony of
21 witnesses regarding the preadmission of evidence authorized in
22 207C.

23 On 6 October 2017 Mr. Kammen, Ms. Eliades and

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 Ms. Spears submitted a request to the chief defense counsel to
2 withdraw from their representation of the accused. Their
3 justification relied in significant part upon the chief
4 defense counsel's 14 June memorandum and a 5 October 2017
5 ethics opinion from Professor Ellen Yaroshefsky.

6 On 11 October 2017 the chief defense counsel notified
7 Mr. Kammen, Ms. Eliades and Ms. Spears that he had accepted
8 their request to withdraw from representing the accused, and
9 he released them for good cause shown on the record.

10 On 13 October 2017 the defense provided notice to the
11 commission of this purported withdrawal.

12 On 16 October 2017 the detailed defense counsel filed
13 Appellate Exhibit 389, a motion to abate proceedings pending
14 the detailing of a new learned counsel. On the same day this
15 commission issued Appellate Exhibit 389A -- just a second to
16 find my way in my notes -- which reiterated that Mr. Kammen,
17 Ms. Eliades and Ms. Spears remain counsel of record in the
18 case; ordered Mr. Kammen, Ms. Eliades and Ms. Spears to appear
19 at the next scheduled hearing of this commission unless
20 excused by me or the commission, invited the chief defense
21 counsel to file pleadings as to his perceived authority to
22 unilaterally and unreviewably excuse counsel, and set a
23 compressed briefing schedule.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 Between 20 October and 26 October 2017, the
2 government and the chief defense counsel filed pleadings
3 responsive to Appellate Exhibit 389A.

4 On 27 October 2017 this commission issued 389F
5 denying the abatement motion and specifically finding the
6 following:

7 One, no good cause exists to warrant the excusal of
8 Mr. Kammen, Ms. Eliades or Ms. Spears.

9 Two, no evidence has yet been presented to
10 demonstrate intrusions in this case affecting this accused
11 which would ethically require withdrawal or disqualification
12 of outside appointed learned counsel.

13 And three, the excusal of outside appointed learned
14 counsel at this stage would prejudice Mr. al Nashiri's due
15 process rights.

16 On the morning of 28 October 2017 the chief
17 prosecutor e-mailed the chief defense counsel attaching the
18 commission's ruling in Appellate Exhibit 389F and requesting
19 the chief defense counsel notify the government and commission
20 of the chief defense counsel's steps to ensure civilian
21 attorney compliance with applicable law and regulation by
22 participation in the R.M.C. 802 conference scheduled for
23 Sunday at 1700 and then being present for the next session on

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 the record today, the 31st of October, Monday morning -- or
2 yesterday, sorry, the 30th of October, Monday morning.

3 On the afternoon of 28 October 2017 the chief
4 prosecutor again e-mailed the chief defense counsel asking for
5 acknowledgment of receipt, making clear that suitable
6 arrangements were in effect to facilitate travel and
7 providing: "I trust that you are considering the very real
8 disturbance and disorder to the military commissions
9 proceedings that will be caused if they do not appear by the
10 continuing impact of your purported excusal of them." The
11 chief defense counsel acknowledged receiving the e-mail on
12 28 October 2017.

13 On 29 October 2017 at 0610 hours on the morning of
14 the scheduled departure to Guantanamo Bay, Cuba, the chief
15 defense counsel advised the chief prosecutor that he had been
16 informed that Mr. Kammen, Ms. Eliades and Ms. Spears do not
17 intend to travel to Guantanamo. That information was not
18 provided to the commission until after the charter flight had
19 landed at Guantanamo Bay.

20 On 29 October 2017, after we had arrived at
21 Guantanamo Bay, I conducted a session pursuant to the Rules
22 for Military Commission 802, and that is when I directed the
23 submission of the filings by 1200 on 30 October 2017

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 addressing the way forward that I discussed earlier.

2 As mentioned, detailed defense counsel submitted an
3 e-mail to my support staff by which he indicated the defense
4 position was that substantive proceedings cannot occur without
5 the presence of learned counsel. Through my staff, I reminded
6 the detailed defense counsel that I expected written pleadings
7 to be filed by the parties. And maybe I wasn't clear in the
8 802 session, so I will clear it up here in a little while.

9 Detailed defense counsel submitted a second e-mail.
10 In this e-mail he stated because learned counsel is not
11 present, the defense will not be making any new filings. I
12 would point out that the detailed defense counsel made a
13 filing in the case with just his signature on it where he
14 requested an abatement.

15 So that's where we are at and how we got here thus
16 far.

17 So first a couple questions as we kind of work
18 through the road ahead. Obviously we are going to call
19 General Baker here, and I have some questions for him, and I
20 will turn it over to both sides if they have any questions for
21 him.

22 One, I hope that the unclassified attachment, and I
23 believe it's -- let me find my note on that so I have it

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 right. You will know it right away; it is the unclassified
2 attachment wherein learned counsel -- it's Attachment A to the
3 original 389, where the learned counsel detailed to the ethics
4 advisor, who we will talk about as well, what his concerns
5 were. It is unclassified, and so I'm not going to ask your
6 client if you provided it to him, but I sure would hope you
7 provided it to your client so he understands, at least to the
8 point that is allowed, why we are here; along with an
9 unclassified decision or opinion by the ethics advisor. So
10 again, I'm not going to ask. That is up to you-all, but I
11 would do that.

12 The other piece is I would get familiar with
13 Strickland, and I would get familiar with learned counsel
14 being available to the extent practicable, because we are
15 moving forward this week. We are going to have a witness
16 testify on Thursday or Friday that came down on the flight,
17 and next week we are going to be moving through the al Darbi
18 deposition issues and through the al Darbi cross-examination,
19 and then we are going to move into the other things that are
20 on the docket.

21 And I would suggest if anyone disagreed with my
22 ruling on an abatement that they file a writ. We all know the
23 process here, and I don't have to explain it. But that

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 doesn't really get to some of the questions I need answered so
2 we can move forward. I see General Baker is here.

3 Trial Counsel, if you would swear General Baker in
4 and ask the initial questions.

5 [MR. SUNDEL]: Colonel, Philip Sundel with the ----

6 MJ [Col SPATH]: Come on up here.

7 So you are not an attorney of record for
8 Mr. al Nashiri. So what is your position?

9 [MR. SUNDEL]: I am not, sir. I am Acting General Counsel
10 for the Military Commissions Defense Organization, and I'm
11 just here to inform the military commission that pursuant to
12 Rule 501(b)(1), the chief defense counsel is invoking
13 privilege and will not testify.

14 MJ [Col SPATH]: Well, he will come up and invoke
15 privilege to each question I ask and then I will rule on
16 whether or not that information is privileged or I'm going to
17 pierce it. And I have some questions where he has filed an
18 affidavit, clearly waiving any privilege that he might be
19 claiming, because he filed it to the commission.

20 [MR. SUNDEL]: Your Honor, under 501(b)(1) he is invoking
21 his right to not testify. The extent of the nonprivileged
22 information has already been provided to the court. He has
23 nothing to add.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 MJ [Col SPATH]: And again, he will be able to say he is
2 not testifying to each question, just like we would do anyone
3 invoking their Fifth Amendment right. He can say it to each
4 question if he wants to. But I would suggest that y'all have
5 an honest discussion with yourselves about what is privileged
6 and what is not when you file an affidavit and make yourself a
7 witness about factual matters.

8 There are questions about that that don't involve
9 discussions, don't involve attorney work product; they
10 involve: Did you do this? Pretty easy. Is your signature on
11 it? And I also have some direction for him.

12 So he is going to come and get sworn in and testify.
13 You are welcome -- you can sit right there and you are welcome
14 to advise him if you disagree as we move forward. But I don't
15 plan to ask him anything that is even close to privileged
16 information. However ----

17 [MR. SUNDEL]: Colonel, under 5 ----

18 MJ [Col SPATH]: ---- is not representing the accused in
19 this case and he made himself a witness by issuing a ruling,
20 and a decision, to excuse counsel. And you know that.

21 [MR. SUNDEL]: Under 501(b)(1) ----

22 MJ [Col SPATH]: I appreciate you're going to keep saying
23 that.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 [MR. SUNDEL]: ---- he is refusing to be a witness. It is
2 not an invocation that needs to be made on the stand.

3 MJ [Col SPATH]: That is your interpretation ----

4 [MR. SUNDEL]: He is electing to refuse to be a witness.

5 MJ [Col SPATH]: That is your interpretation. Apparently
6 you all struggle with this. I get to interpret the law and I
7 get to rule.

8 [MR. SUNDEL]: Your Honor, if you ----

9 MJ [Col SPATH]: I get to interpret it. That is how it
10 works. And that is how it works anywhere. This isn't some
11 weird session, even down here, and I know you all do that.
12 This is a normal proceeding. And I am telling you that while
13 I appreciate what you are saying, he has filed, in this case,
14 making statements. That makes him different than someone who
15 has been quiet as a defense counsel. That makes him
16 different. He has chosen to make himself a witness in this
17 case. I didn't choose that.

18 [MR. SUNDEL]: Colonel, if you find that he has improperly
19 invoked his right to not be a witness, then we will take an
20 appeal, and he will not act as a witness until the appeal is
21 decided.

22 MJ [Col SPATH]: That is not one of the options, as you
23 know.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 [MR. SUNDEL]: We disagree.

2 MJ [Col SPATH]: You may go file a writ and you may
3 attempt to get a stay, if the court grants it. I'm very
4 amenable to the appellate courts. I've listened to them
5 frequently in my life and I have no problem. And that seems
6 to be the difference. When I get ordered by a court to do
7 something, I just do it, and then I take what action I can.

8 So if you look down at this, what is your belief that
9 he can simply refuse an order to come up here and testify?

10 [MR. SUNDEL]: Colonel, the harm of a privilege being
11 wrongfully pierced ----

12 MJ [Col SPATH]: What is your authority?

13 [MR. SUNDEL]: ---- is irrevocable, so he is entitled to
14 take an appeal from an order to testify despite a claim of
15 privilege, especially in open ----

16 MJ [Col SPATH]: What is your authority for that?

17 [MR. SUNDEL]: ---- court and subject to questioning by
18 parties.

19 MJ [Col SPATH]: What's your authority to do that? What's
20 your authority to that other than ----

21 [MR. SUNDEL]: My authority to that ----

22 MJ [Col SPATH]: ---- other than the rule that you cited
23 multiple times?

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 [MR. SUNDEL]: My authority to that is the Model Rules of
2 Professional Responsibility that say that an attorney is
3 obligated to pursue vehicles to challenge an order to pierce a
4 privilege until the highest court has decided the issue or
5 refused to accept the issue.

6 MJ [Col SPATH]: And again, I haven't pierced any
7 privilege yet. You -- you are way ahead of the course ----

8 [MR. SUNDEL]: Requiring him to be a witness after we have
9 invoked 501(b)(1), we believe, is the same thing.

10 MJ [Col SPATH]: What authority ----

11 [MR. SUNDEL]: There is too great a risk ----

12 MJ [Col SPATH]: ---- do you have -- what case, what
13 authority, what citation, other than, again, pointing me to
14 the general rule, where I haven't asked him to pierce
15 privilege? I have told you -- and are you his defense
16 counsel?

17 [MR. SUNDEL]: I am the acting general counsel for ----

18 MJ [Col SPATH]: I understand that.

19 [MR. SUNDEL]: ---- the Military Commissions Defense
20 Organization.

21 MJ [Col SPATH]: Are you his defense counsel?

22 [MR. SUNDEL]: This is an institutional claim.

23 MJ [Col SPATH]: And so if there is a privilege that I'm

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 piercing, I will be happy to talk to you about it, but I'm
2 not. I'm not. He filed things. What ----

3 [MR. SUNDEL]: The risk ----

4 MJ [Col SPATH]: ---- basis -- what authority do you have
5 that you file something with the court and that privilege
6 isn't waived as to the information in the filing? In the
7 filing.

8 [MR. SUNDEL]: Colonel, as long as we have not disclosed
9 privileged information in the filing ----

10 MJ [Col SPATH]: Right.

11 [MR. SUNDEL]: ---- then we have not pierced the
12 privilege.

13 MJ [Col SPATH]: I agree. But do you understand that --
14 did you -- did you file this? That is not privileged. It is
15 yes or no.

16 [MR. SUNDEL]: That is the extent of the nonprivileged
17 information. There is nothing ----

18 MJ [Col SPATH]: Again ----

19 [MR. SUNDEL]: ---- to add in addition to that.

20 MJ [Col SPATH]: ---- you haven't let me ask a question.
21 You've assumed that I'm trying to pierce a privilege that I'm
22 not. You have also stepped into the mix of somebody who has
23 filed things both with the prosecutor -- he sent an e-mail to

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 the prosecutor. Did you send the e-mail? When you said
2 this -- right? You said this publicly; thereby, no privilege,
3 I mean ----

4 [MR. SUNDEL]: Colonel ----

5 MJ [Col SPATH]: ---- you sent it to the chief prosecutor.

6 [MR. SUNDEL]: ---- the government constantly files
7 pleadings. That does not mean that no government information
8 is privileged.

9 MJ [Col SPATH]: You are correct.

10 [MR. SUNDEL]: The parties -- the parties do not waive a
11 privilege ----

12 MJ [Col SPATH]: And the government lets me know
13 frequently when they are asserting privilege. And then we
14 have a discussion about what we are going to do about that.
15 And frequently, it doesn't get disclosed.

16 All I'm saying to you is, under 501(d), you really
17 think you can say he is not testifying about nonprivileged
18 matters, so you are going to refuse an order from the
19 commission as well?

20 [MR. SUNDEL]: Yes.

21 MJ [Col SPATH]: Okay. Well, I'm going to have General
22 Baker refuse it, because you are not his lawyer. And I
23 appreciate your assertion.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 CDC [BGen BAKER]: Your Honor, can we take about a
2 five-minute recess?

3 MJ [Col SPATH]: Sure. We are in recess.

4 [The R.M.C. 803 session recessed at 1028, 31 October 2017.]

5 [END OF PAGE]

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 [The R.M.C. 803 session was called to order at 1042,
2 31 October 2017.]

3 MJ [Col SPATH]: The commission is called back to order.
4 The same parties who were present before are again present.

5 Mr. Sundel.

6 [MR. SUNDEL]: Philip Sundel again.

7 MJ [Col SPATH]: Is it Colonel or Mr. Sundel?

8 [MR. SUNDEL]: No, no, no. It's Mister. I'm sorry.

9 MJ [Col SPATH]: No, that's all right. I want to make
10 sure I hear you correctly.

11 [MR. SUNDEL]: We believe that ----

12 MJ [Col SPATH]: I understand. Here's the issue: You're
13 not a party of record. There has been no filing from you
14 telling me that you want to appear. I don't know how you have
15 standing to be here, and so I can't help you right now. What
16 you are doing is getting yourself cross-wise where there is no
17 order for you to violate.

18 General Baker is ordered to come testify. If he
19 refuses the order, we will deal with it. You are not his
20 defense counsel, you are not Mr. al Nashiri's lawyer, and you
21 haven't entered an appearance; and so you have no right of
22 standing. So go take your seat.

23 Trial Counsel, swear General Baker in and ask the

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 preliminary questions.

2 TC [MR. MILLER]: General Baker.

3 CDC [BGen BAKER]: Sir, before we do that, can I offer a
4 potential way ahead?

5 MJ [Col SPATH]: Sure.

6 CDC [BGen BAKER]: I am very concerned about getting into
7 privileged material, and I'm also concerned about the
8 complexity of the area of law of privilege. I mean, we are
9 talking about ----

10 MJ [Col SPATH]: I understand that.

11 CDC [BGen BAKER]: So it -- it could be -- it could help
12 us, all of us, get there if I knew basically what you wanted
13 to ask so that we can figure -- you know, we can figure out
14 the way forward.

15 MJ [Col SPATH]: You can take all the pauses you want.
16 And I don't even mind if you talk to the attorneys back there
17 if you have confusion or are worried about my questions. I
18 would hope over the time you have sat in this courtroom you
19 know that I recognize the importance of privilege ----

20 CDC [BGen BAKER]: Yes, sir.

21 MJ [Col SPATH]: ---- and recognize the importance of the
22 orderly administration of this.

23 CDC [BGen BAKER]: I do, sir. And I suggest ----

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 MJ [Col SPATH]: I appreciate that. And so I have the
2 same issue.

3 CDC [BGen BAKER]: I just ----

4 MJ [Col SPATH]: You are not an attorney of record.

5 CDC [BGen BAKER]: I get that. I just suggest that an
6 orderly process would be to know the subject areas that you
7 want to go so that we don't question, stop, 15-minute break,
8 question, stop.

9 MJ [Col SPATH]: I understand. I have worked on these
10 questions for quite some time, and I believe they are very
11 carefully crafted.

12 CDC [BGen BAKER]: Well, Your Honor, pursuant to Rule
13 501(b)(1), I am asserting my right to refuse to be a witness
14 in this case.

15 MJ [Col SPATH]: You do understand that that means there's
16 an actual claim of privilege over the questions I'm asking
17 you, not an absolute right not to testify? Do you understand
18 that?

19 CDC [BGen BAKER]: I have -- and I will confess to having
20 done more than read the rule.

21 MJ [Col SPATH]: Look above. What privilege are you
22 claiming?

23 CDC [BGen BAKER]: The deliberative process privilege,

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 which is a common law privilege; the government information
2 privilege under 506; the attorney-client privilege under 502;
3 the attorney work product privilege under common law; and,
4 additionally, my obligation under my state ethics rules to
5 protect confidential information under Rule 1.6.

6 Again, Your Honor, this is super complicated.

7 MJ [Col SPATH]: This isn't. You have filed things here.
8 Here is the bottom line: You are ordered to come testify.
9 You can pause before you answer questions. You can assert a
10 privilege and tell me which one, not a blanket this one, this
11 one, this one, this. Each question, if you think there is a
12 privilege, you assert it, and then we will deal with whether
13 or not we get around it.

14 Your appellate counsel has said I have to wait until
15 the Supreme Court rules on it. That's silliness. That's not
16 how it works. I've ordered the disclosure of privileged
17 information right here. And I'm not suggesting I'm going to
18 do that, because I don't need privileged information to ask
19 you the questions I'm going to ask you and issue the order to
20 you I'm likely to issue.

21 CDC [BGen BAKER]: Your Honor, the -- you keep saying that
22 this filing makes me a witness. This is an averment of facts
23 that any ----

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 MJ [Col SPATH]: And you filed it with your name.

2 CDC [BGen BAKER]: -- in response to a request from you --
3 yes, absolutely.

4 MJ [Col SPATH]: With your name.

5 CDC [BGen BAKER]: And in any pleading that anybody files,
6 the lawyer that files that does not become a witness.

7 MJ [Col SPATH]: You're not an attorney of record.

8 CDC [BGen BAKER]: Your Honor, this was filed in response
9 to your invitation.

10 MJ [Col SPATH]: If you wanted to. You also have sent
11 e-mails to General Martins ----

12 CDC [BGen BAKER]: Absolutely.

13 MJ [Col SPATH]: ---- that have been attached. You also
14 have excused counsel. Not privileged there. Maybe some of
15 the discussion you had with those counsel, they may or may not
16 be privileged. That's a debate we could probably have. But I
17 don't care what your discussions were. I don't plan to ask
18 you about your discussion.

19 I plan to ask about the affirmative acts you took in
20 this case that are public knowledge and have been reported
21 both in the press and here through e-mail. That is not
22 privileged. Those are acts you took affecting this case.

23 And again -- and I plan to issue you an order from

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 the commission. You can choose to accept it or not and go
2 from there, but we're not going to spend all day doing this.

3 CDC [BGen BAKER]: Your Honor, again, under Rule 501(b)(1)
4 I refuse to appear as a witness.

5 MJ [Col SPATH]: All right. So, I'm ordering you to
6 testify. You are refusing to come up here, take the oath, and
7 testify; is that accurate?

8 CDC [BGen BAKER]: That is accurate; yes, sir.

9 MJ [Col SPATH]: All right. I'm also ordering you to
10 rescind the direction you gave when you excused both learned
11 outside -- appointed learned counsel and the two civilians.
12 Are you refusing to comply with that order as well? You
13 excused them; you released them.

14 CDC [BGen BAKER]: Yes, sir.

15 MJ [Col SPATH]: I'm ordering you to send them a note
16 saying you are not releasing them. I can't order Mr. Kammen
17 here. I know that. I know you've got two DoD employees that
18 work for you. I know what their government contract says.
19 But that is your choice as their supervisory attorney, and
20 everybody can deal with that, including your supervisor.

21 My question to you is: I'm ordering you to send them
22 a memo telling them their withdrawal is not approved because
23 you don't have the authority.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 CDC [BGen BAKER]: Oh, I'm definitely not going to ----

2 MJ [Col SPATH]: Okay.

3 CDC [BGen BAKER]: ---- I am definitely not -- Your Honor,
4 Rule 5-0 -- I understand your ruling. I understand your
5 ruling.

6 MJ [Col SPATH]: You don't, because you haven't done
7 anything to fix the ruling. How does this normally work? I
8 issue a ruling. You disagree with it -- or you all disagree
9 with it and we go to the appellate court and they tell me I'm
10 right or wrong. They do it every week. And I'm okay with it.
11 That is the normal process.

12 You interpreted a rule, and now there are two rulings
13 from this commission that tell you you got it wrong.

14 CDC [BGen BAKER]: Your Honor, if your -- if your order to
15 me is to -- I want to make sure that I understand what -- your
16 order to me. If your order to me is, General Baker, you must
17 rescind your action that you took on October 13th ----

18 MJ [Col SPATH]: Yes.

19 CDC [BGen BAKER]: ---- whatever the date -- whatever the
20 correct date is, excusing learned counsel and assistant
21 defense counsel, I refuse to follow that order.

22 MJ [Col SPATH]: And you are also refusing to testify.

23 CDC [BGen BAKER]: Yes, sir, pursuant to ----

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 MJ [Col SPATH]: I understand you are citing a rule. I
2 have ordered you to come up here and testify and take the
3 oath.

4 Okay. We'll talk more tomorrow.

5 Lieutenant Piette, I probably wasn't clear in the 802
6 session, so I'm going to make it reasonably clear. I expect a
7 filing. You can write "I'm not going to answer," you can
8 write whatever you want, but it goes on a heading so that it
9 is part of a record of trial that is public as opposed to an
10 e-mail to my staff. And maybe I didn't say that as clearly as
11 I should have at the 802 session.

12 So we have an AE number designated for your filing.
13 You have until 1600 today to issue a file -- or send a filing
14 in using that AE number in our 389 series. I can't be more
15 clear than that. Do you understand?

16 DDC [LT PIETTE]: Yes, sir, I understand your order.

17 MJ [Col SPATH]: All right. On Thursday -- we had a
18 witness travel down here. General Baker, the other, I think,
19 order -- again, you can certainly refuse to follow it -- is I
20 expect you to make arrangements for the two detailed military
21 civilian -- or detailed civilian counsel, since you are their
22 supervisor and they're employed by DoD, I expect you to
23 communicate to them the need to get themselves down here

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 posthaste.

2 CDC [BGen BAKER]: I understand your order.

3 MJ [Col SPATH]: Are you going to communicate that to
4 them?

5 CDC [BGen BAKER]: I need to think about that, Your Honor.
6 And ----

7 MJ [Col SPATH]: That's fine. Just let me know by 1600.
8 You can send an e-mail -- since you are not a party of record,
9 send an e-mail to the staff and let me know if you are
10 communicating it to them or you are not.

11 CDC [BGen BAKER]: Aye, sir. And if I communicate with
12 your staff, I will obviously copy the parties.

13 MJ [Col SPATH]: I understand. Do you believe -- well,
14 you won't answer any question so we can't even satisfy whether
15 or not you have supervisory authority over Mr. Kammen, because
16 you have decided not to testify about administrative matters;
17 your choice.

18 To the extent you believe you have supervisory
19 authority over Mr. Kammen, I expect you to communicate to him
20 we're moving forward, and that he would wisely probably also
21 make an effort to come here. But I understand I can't order
22 him to this island. There is nothing I can do about that.

23 CDC [BGen BAKER]: I understand, Your Honor.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 MJ [Col SPATH]: Same e-mail by 1600. Just let us know if
2 you are going to comply.

3 All right. Tomorrow at noon we are going to be in
4 session briefly. I anticipate we are going to have a contempt
5 hearing.

6 And then Thursday, 0900, we are going to start with
7 the witness who traveled down here. And we will do some other
8 administrative matters Thursday and Friday.

9 Tuesday next week we'll start the cross-examination
10 of al Darbi in the closed deposition, and we will just see
11 where we are after that.

12 Trial Counsel, what do you want to talk about? And I
13 will give it to you too, Defense Counsel.

14 ATC [Maj PIERSON]: Your Honor, prior to proceeding with
15 the cross-examination, the government does believe we will
16 still need a hearing under M.R.E. 505(h) as to classified
17 information that may be used as part of the cross-examination.

18 MJ [Col SPATH]: Makes sense. We will do that on Monday.

19 ATC [Maj PIERSON]: Thank you, Your Honor.

20 MJ [Col SPATH]: Defense Counsel? I feel sorry for the
21 position you have been put in.

22 DDC [LT PIETTE]: Roger that, Your Honor.

23 Respectfully, and this is regarding the order you

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 gave to have a filing by 1600. And I want to give the court a
2 heads up that it is my position, it is the defense's position
3 that right now Mr. al Nashiri has the statutory right to
4 learned counsel at all ----

5 MJ [Col SPATH]: You can stop. It says to the extent
6 practicable. I've already interpreted the statute. I mean,
7 that's simple for me. To the extent practicable he can have
8 learned counsel on matters of capital litigation.

9 What I'm talking about is a filing telling me what
10 our proposed way ahead is now that he is not here. And what
11 I'm talking about is your ability to do cross-examinations,
12 which you have done before, direct examinations, which you
13 have done before, and pretrial information and motions, which
14 you have done before.

15 If I'm wrong, your client will get a windfall because
16 I have ordered us to move forward without learned counsel.
17 But if you refuse, you too, at noon tomorrow, will be here for
18 a contempt hearing.

19 DDC [LT PIETTE]: Yes, Your Honor.

20 MJ [Col SPATH]: It's that simple. I've already
21 interpreted, and there will be a ruling, based on the
22 government's filing, about the ability to have learned
23 counsel.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 The chief defense counsel has decided that
2 Mr. al Nashiri does not need defense counsel here. That's his
3 choice. To the end -- in his filing, said it is not
4 practicable to get them here. Well, the law discusses just
5 that. It isn't practicable, and we are not going to wait
6 right now.

7 Hopefully, by the time we get to any findings case,
8 we will have learned counsel to assist you, or more counsel.
9 But we are going to continue to move forward. And if we need
10 to come back and redo some things, we've got all the time in
11 the world, as we've demonstrated for the last nine years.

12 So again, you are detailed counsel, and I have
13 interpreted the rule. So you can defy the order to be here;
14 you can sit here and do nothing. I would read Strickland and
15 some other cases where we have had defense counsel who feel
16 like you do, a judge's ruling was unfair and they didn't like
17 it so they didn't engage in an opening statement, closing
18 argument, crosses of witnesses, directs of witnesses, or
19 filing motions. And the appellate court said that is a
20 strategy. It's a strategy that may well work, but it didn't
21 work here, and they didn't find the counsel ineffective.

22 So that is your choice, and that is your issue.

23 DDC [LT PIETTE]: Yes, I understand, Your Honor. And as

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 the only counsel in this room who has been detailed
2 specifically to defend Mr. al Nashiri, I aim to defend him.
3 And I cannot do that without a learned counsel because, by
4 statute, he has to have one.

5 MJ [Col SPATH]: We have already dealt with that.

6 DDC [LT PIETTE]: Yes, Your Honor.

7 MJ [Col SPATH]: The issue is resolved. You are welcome
8 to file a writ. You've got your chief appellate counsel here,
9 apparently, to make an appearance on the record to a case that
10 he's not detailed to. I would file a writ, and maybe the
11 C.M.C.R. will step in quickly, or maybe they won't. Maybe
12 three weeks from now they will step in and say, Spath, you got
13 it wrong again, like I have twice already. Sorry. And we
14 will come back and do it again.

15 But again, your order is easy. We will be here
16 Thursday -- we will be here at noon tomorrow and we will be
17 here Thursday with the government's witness, who flew down
18 here on an airplane. You can engage in the direct or you can
19 waive it affirmatively on the record. But again, I would read
20 those cases after Strickland, understand where we are at, and
21 understand that I find learned counsel are not practicable in
22 the near term, if ever, by the actions of General Baker.

23 And again, maybe you have set your client up for

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 success if there is a conviction and the appeal will be a lot
2 easier for you.

3 DDC [LT PIETTE]: Yes, Your Honor, I understand. But just
4 as a ----

5 MJ [Col SPATH]: We're done.

6 DDC [LT PIETTE]: No.

7 MJ [Col SPATH]: Thursday, they are calling a witness, and
8 we are getting underway.

9 DDC [LT PIETTE]: I understand, Your Honor, and I will be
10 here ----

11 MJ [Col SPATH]: Noon tomorrow.

12 DDC [LT PIETTE]: ---- but what I am not going to do is
13 make any more pleadings, because I see the slippery slope that
14 happens when I make a motion ----

15 MJ [Col SPATH]: So in response to the pleading, you are
16 not going to file one?

17 DDC [LT PIETTE]: That's correct, Your Honor.

18 MJ [Col SPATH]: You are going to defy my order?

19 DDC [LT PIETTE]: Yes, Your Honor.

20 MJ [Col SPATH]: Okay. Then noon tomorrow I will see the
21 three of you.

22 DDC [LT PIETTE]: Thank you.

23 MJ [Col SPATH]: All right. We are in recess.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 [The R.M.C. 803 session recessed at 1059, 31 October 2017.]

2 [END OF PAGE]

3

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

Exhibit E

Affidavit of LT Alaric Piette, JAGC, USN

1. My name is Alaric Piette. I am a Lieutenant in the US Navy JAG Corps. I graduated from Old Dominion University in 2008. I attended Georgetown University Law Center from 2009-2012. In 2012 I was admitted to the Bar of Virginia.
2. Since graduation from law school I have been a member of the US Navy JAG Corps. During that time I have had the following different assignments: Naval Justice School (2013); First Tour Judge Advocate, Region Legal Service Office Mid Atlantic (2013-2015); Defense Counsel, Defense Service Office Southeast (2015-2017); Defense Counsel, Military Commissions Defense Organization (2017-Present).
3. Not all of these assignments were as a litigator. My tour at Region Legal Service Office was not as a trial lawyer. I served as a Legal Assistance attorney, a Staff Judge Advocate, and as a Defense Counsel for Administrative Separation Boards.
4. In my career I have never represented an individual charged with Murder, either as lead counsel or second chair.
5. I have never before been involved with a capital case in any capacity. Moreover, I have not attended any legal education training programs designed for capital counsel that deal with subjects other than capital jury selection.
6. I could not be appointed to a federal capital case as lead counsel, and likely not even as a second chair, in any federal district court due to my lack of experience in murder or homicide cases and due to my lack of training in the representation of persons charged with capital offenses.
7. I joined the Military Commissions Defense Organization in April 2017. Because I did not have the requisite security clearances I could not begin working with classified material until June 2017, and did not meet the client until July 2017.
8. Due to the issues involving lack of attorney-client confidentiality that led to Mr. Kammen (Former Learned Counsel) being excused, I have not met with Mr. Al-Nashiri outside of the courtroom or the ELC holding area. I have never had a substantive conversation regarding the case with Mr. Al-Nashiri and have only the most minimal attorney-client relationship.
9. With respect to Mr. al Darbi, it was always the plan for Mr. Kammen, who is a very experienced capital lawyer to cross-examine Mr. al Darbi. Only after and because of Judge Spath's decisions in classified rulings issued on 20 September 2017, was there any thought that Mr. Kammen and others might be required to leave the case.
10. I do not make these decisions as a matter of strategy. There can be no strategy when the lawyer has no choices. This was true regarding the excusal of Mr.

Kammen, Ms. Eliades, and Ms. Spears; and it is true for me. The defense team has not selected an approach to this case from a variety of available choices. The defense has acted in the only way they can ethically.

11. Preparation for Mr. al Darbi's cross-examination requires review of approximately 2500 pages of classified and unclassified discovery, including over two hundred separate statements Mr. al Darbi provided to the Government. Preparation for cross-examination would also require extensive review of Mr. al Darbi's direct testimony, which lasted four days. Most importantly, preparation for cross-examination would require an understanding of how Mr. al Darbi and his testimony fit into both the guilt phase and the potential penalty phase. I have only a limited understanding of this and do not believe that I can be prepared for cross-examination without a substantial period of time to devote to preparation and without knowledge, training, and experience in the defense of a capital case. Indeed, Mr. Kammen previously submitted pleadings suggesting that he would need 120 days to prepare for Mr. al Darbi's cross-examination.
12. I generally understand that Mr. al Darbi might have mitigating evidence relevant to Mr. Al-Nashiri, but because I do not have capital experience I do not have a clear understanding of what that is, and how to recognize it. Without this knowledge, it is all but guaranteed that I will not be able to conduct a cross-examination that is effective and consistent with the goals of the defense.
13. Similarly, I am unprepared to examine witnesses pertaining to AE 327, which pertains to hearsay testimony of Jamal al-Badawi. I understand that Mr. al-Badawi is a critical government witness although only his statements will be admitted. I have a limited understanding of how he fits into the case and what the theory of AE 327 is. This motion was written by and initially argued by other military lawyers who have long since left the case. I have not discussed this motion with them or any of the other lawyers who have recently left the case and I am not competent to question these witnesses.
14. I understand that the prosecution wishes to admit evidence during this hearing. It is my understanding that this admission of evidence into the record will essentially be part of the trial although the members (jury) will not be present. As I understand that, by statute, Mr. Al-Nashiri has a right to have learned counsel. I have only a limited conception of how testimony being elicited by the government to establish the foundation needed to admit the evidence during a pretrial hearing could be used to as mitigation in the punishment phase.
15. In summary, I am not competent to proceed in the absence of Learned Counsel and, if required to proceed, cannot provide effective assistance of counsel to the accused.
16. Finally, to be clear, I believe that I am subject to the same ethical problems that required Mr. Kammen, Ms. Eliades and Ms. Spears to seek excusal. I have sought

an opinion from US Navy JAGC Professional Responsibility Committee Code 13, but they refused to provide an opinion due to this being a matter pending litigation.

17. I have reviewed the Unofficial/Unauthenticated Transcript for this case, dated 31 October 2017. It is accurate to the best of my memory.

I, Lieutenant Alaric Piette, JAGC, USN, the undersigned, declare under the penalties of perjury under the laws of the United States that the foregoing is true and correct. *See* 28 U.S.C. § 1746.

Executed on 31 October 2017.

A handwritten signature in black ink, appearing to read 'A. Piette', written over a horizontal line.

Alaric A. Piette
LT, JAGC, USN