Letter to Secretary of Defense Jim Mattis from Capital Defense Attorneys and Law Professors

Dear Mr. Secretary:

We are writing to register our grave concerns regarding recent developments in the Guantanamo military tribunal prosecution of Abd Al Rahim Hussein Al-Nashiri. The undersigned capital defenders and law professors are particularly dismayed by actions that appear to target defense counsel, and that violate the requirement that a defendant facing the death penalty be represented by qualified counsel.

The Withdrawal of Long-Time Capital Counsel and the Military Judge's Response

In 2009, the Military Commission Act (MCA) was amended to require that any defendant facing the death penalty in the Guantanamo military commissions be represented by at least one "learned counsel," i.e., a lawyer with expertise in capital defense. R.M.C. 506. Mr. Al-Nashiri has long been represented by just such an experienced capital defense attorney, Rick Kammen, originally a member of the ACLU's John Adams Project, which was formed to assist military defense counsel with capital cases in the military commissions. Mr. Kammen was joined by civilian and military lawyers but remained Mr. Al-Nashiri's only learned counsel.

Last month, Mr. Kammen and two other civilian defense counsel asked the Military Commissions Chief Defense Counsel, Brigadier General John G. Baker, for permission to withdraw from the case, citing a major ethical conflict. They had discovered new information which remains secret, but which relates to an ongoing doubt that attorney-client meetings on Guantanamo are confidential. The civilian defense counsel could not share the information they discovered with their client. General Baker reviewed the facts and an opinion from a respected ethics expert, and on October 11, 2017, he granted permission for the withdrawal. He instructed counsel to inform the judge in the case, Colonel Vance Spath, and request time to obtain new learned counsel for Mr. Al-Nashiri.

Judge Spath held that the Chief Defense Counsel should not have permitted counsel to withdraw, denied the request for time to find learned counsel, and ordered the three civilian defense counsel to appear before him for a hearing. The defense lawyers did not travel to Guantanamo for the hearings scheduled to begin on October 30th. In open court, Judge Spath also ordered General Baker to rescind the permission he gave to the civilian defense counsel to withdraw. General Baker declined. The next day, November 1, 2017, Judge Spath initiated a contempt proceeding against General Baker. Judge Spath refused even to hear General Baker's argument that the military commission had no jurisdiction over him, found General Baker guilty of contempt, and ordered him confined to quarters for 21 days and fined $1,000. General Baker spent the next 48 hours in confinement.

A habeas petition was subsequently filed and argued in the federal district court in D.C. On November 3, 2017, in advance of the habeas ruling, the Convening Authority, Harvey

Rishikoff, reviewed Judge Spath's contempt ruling, deferred the remainder of General Baker's sentence, and released him "pending final action" on the contempt findings. Judge Lamberth then deferred his habeas ruling for a short time.

Violations of Military Commission Rules and the Requirement of Learned Counsel

The military judge's extreme response is unsupportable. It is true that the various iterations of the MCA and the subsequent implementing rules and regulations have produced a whole-cloth "system" of justice, with a patchwork set of rules. The government adds to the uncertainty by arguing that core constitutional rights do not apply in the military commissions, and there are virtually no precedents, no practice, and no jurisprudence to follow. It is clear, however, that the Rules for Military Commission grant authority to General Baker to excuse counsel in his sole discretion. R.M.C. 504 (b). Although Judge Spath relied on a provision of the Rules for Trial Judiciary that purport to grant him authority, those rules are statutorily subordinate to the Rules for Military Commission. (Regulations for Trial by Military Commission) R.T.M.C.1-1. Nowhere in the statute or rules is there any grant of authority to the military judge to hold contempt proceedings against a U.S. citizen. Nor does anything in the statute support the idea that General Baker's conduct in refusing to alter his professional decision could constitute contempt.

What is abundantly clear in the MCA is that a death-threatened defendant is entitled to a capitally qualified lawyer. The Rules mandate appointment of learned counsel at the time the prosecution asks for capital charges, and this requirement continues unless the death penalty is no longer an option. R.M.C. 506(b). The Convening Authority is not even permitted to refer capital charges – the military commission equivalent of an indictment – until capitally qualified counsel has been appointed. R.T.M.C. 3-3.a1.

When civilian defense counsel withdrew, Mr. Al-Nashiri was left with a single military attorney cleared to represent him in the hearings. Lieutenant Piette, a 2012 law school graduate, has explained that he has no training or experience in murder cases, much less capital cases, save for his few months on Mr. Al-Nashiri's case. But not only did Judge Spath deny the request for more time to find learned counsel, he ordered an evidentiary hearing to go forward over the objection of Lieutenant Piette.

The hearing commenced on November 3, 2017, continued on the 7th, and is scheduled to resume on the 13th. The lieutenant repeatedly explained that he was not qualified or prepared to examine witnesses or conduct a capital defense without learned counsel. Judge Spath pressed the lieutenant, and opined that "[these are] things that don't relate to capital sentencing or motions that relate to capital issues" or "do not involve any applicable law relating to capital cases."

This language reveals the very ignorance of capital litigation that the MCA's learned counsel requirement is designed to address. The learned counsel statutory provision and the implementing rule recognize reality: death penalty cases need capitally qualified counsel. The

U.S. military requires capitally qualified counsel for capital military prosecutions, as does the Federal Death Penalty Act. The ABA Guidelines requirement for qualified counsel applies "from the moment the client is taken into custody and extend[s] to all stages of every case in which the jurisdiction may be entitled to seek the death penalty, including initial and ongoing investigation, pretrial proceedings, trial, post-conviction review, clemency proceedings and any connected litigation." Guideline 1.1(B).

There are very good reasons why capitally qualified lawyers must guide every decision a defense team makes, including being present for all witnesses. As the Supreme Court has determined in dozens of cases, "death is different." The Eighth Amendment can be satisfied only if a death sentence is the product of reliable procedures, from arrest to final resolution. In other words, the penalty phase of a capital trial is not the only time when a capital lawyer is needed. Among other things, counsel learned in capital law know that: they have an obligation to raise all issues, even those that appear frivolous, at both phases of trial and all pre-and post-trial opportunities; they are required to raise matters of international law; they must be experts in preserving disputed matters for the record; and they must raise all applicable constitutional and statutory issues. Learned counsel know that capital trials must not only satisfy the constitutional requirement of Due Process, but a separate and stronger Eighth Amendment requirement of heightened reliability. Capitally qualified lawyers know that virtually any aspect of the defendant's life can have powerful consequences for the eventual sentence. They have training and experience in harmonizing all relevant case law and theories. So, for example, the examination of a law enforcement officer may require a focus on the mitigating evidence the officer may have rather than a traditional attempt to impeach inculpatory testimony.

When the MCA was amended, Congress "strongly encourage[d] the Secretary of Defense to take appropriate steps to ensure the adequacy of representation for detainees, particularly in capital cases" in the military commissions. JOINT CONFERENCE STATEMENT, NDAA 2010. We are profoundly troubled by the fact that proceedings against Mr. Al-Nashiri are continuing in violation of the requirement that learned counsel represent him at all stages in the military commissions.

An Assault on The Defense Function On Guantanamo

These events would be outrageous even if they did not occur in the context of a series of assaults on defense counsel – but they do. In June, the Chief Defense Counsel warned all counsel of his concern that improper monitoring of attorney-client meetings was occurring on Guantanamo. Unauthorized seizure of attorney-client mail and privileged documents has occurred repeatedly in both capital trials, in violation of unenforced commission orders. In 2012 listening devices were found disguised as smoke detectors in attorney client meeting rooms. The FBI recruited a defense team member in the 9/11 capital case, and attempted to recruit another. Government agents secretly questioned the linguist of another of the capital defendants under pretext, and obtained confidential information. Two years later they did the same thing to a defense security officer. A linguist formerly employed by the CIA was placed

on a defense team, until the defendant complained that he recognized the linguist from the "black sites" where the defendants had been subject to rendition and torture, and could not trust him. The entire 9/11 capital trial was abated for more than a year during the pendency of an investigation of defense team members after the infiltration of the team by the FBI was discovered. And now a Marine general, a decorated combat veteran with an impeccable record of integrity, has been found in contempt and sentenced to confinement to quarters, for doing his job.

At the same time, the person least able to bear the consequences of these events is suffering the most prejudice. The undersigned capital defense lawyers and law professors question whether military commissions can ever be "a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples" as required by the Geneva Conventions and reinforced by the Supreme Court. We are forced to consider that the combined effect of continuing assaults on the independence of defense counsel may render justice wholly unattainable on Guantanamo.

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