IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

MEMORANDUM OF LAW
IN SUPPORT OF PETITIONER'S MOTION
FOR A PRELIMINARY INJUNCTION

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Executive Materials

Miscellaneous

INTRODUCTION

Petitioner is a capital defendant slated for trial 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 General Baker's order excusing Mr. Kammen was improper and on October 31, 2017, Col Spath ordered the sole remaining attorney on the case, LT Alaric Piette, USN, to continue to represent Petitioner alone. 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 ("R.M.C.") 506(b) (2010). An injunction is necessary to ensure that Petitioner is not deprived of his statutory and regulatory rights to qualified counsel in a capital case through no fault of his own.

BACKGROUND

Petitioner was seized by local authorities in Dubai in late 2002 and transferred to the custody of the Central Intelligence Agency ("CIA"). For the next four years, he was held incommunicado in secret "black sites" as part of the CIA's Rendition Detention and Interrogation ("RDI") Program. During this time, CIA agents subjected Petitioner to extreme forms of torture and abuse. In the fifteen years that Petitioner has been detained, he has had no

contact with the outside world except for his attorneys, periodic monitored telephone conversations with his family, and meetings with the Red Cross.

Respondents have never alleged petitioner's involvement in the September 11th attacks, the war in Afghanistan, or any other hostilities. In September 2006, however, Respondents brought Petitioner to Guantanamo to be held as a so-called "enemy combatant." In 2008, the Department of Defense ordered Petitioner to stand trial before a military commission for his alleged involvement in the plot to bomb the USS COLE in Yemen in October 2000 and a plot to bomb a French oil tanker in Yemen in 2002. These initial charges carried the death penalty and largely mirrored a capital indictment that has been pending in the Southern District of New York since 2003. These charges were withdrawn in 2009 following President Barack Obama's taking office and an initiation of an agency review of the military commissions. In 2011, the charges were again brought against Petitioner under the Military Commissions Act of 2009, 123 Stat. 2190 §§ 1801-1807 (codified at 10 U.S.C. §§ 948a, *et seq*.) ("2009 Act"), and his case has remained in pre-trial proceedings ever since.

Under 10 U.S.C. § 949a(b)(2)(C)(ii), and the regulations promulgated by the Secretary of Defense, Rule for Military Commission ("R.M.C.") 506(b) (2011), Petitioner is entitled to be represented by counsel learned in the law of capital litigation, so-called "learned counsel." Mr. Richard Kammen, a well-respected capital defense lawyer served as learned counsel for Petitioner in the military commission proceedings since 2008. Mr. Kammen has acted as learned counsel in over thirty federal capital cases, several of which have been tried to verdict.

Prior to October 11, 2017, Petitioner's trial defense team was comprised of Mr. Kammen, two other civilian lawyers employed by the Department of Defense, and LT Alaric Piette, USN. LT Piette is a Navy Judge Advocate, who graduated from law school in 2012, has limited

litigation experience, and has never tried a homicide case. (Dkt. 278-2, at 101-102). LT Piette joined the defense team in July 2017 and has now appeared at two hearings on Petitioner's behalf. (*Ibid*.)

On October 6, 2017, Mr. Kammen and the two other civilian defense counsel submitted applications to the Chief Defense Counsel, Brig. Gen. John Baker, USMC, to withdraw from representing Petitioner on the grounds that their continued involvement in this case violated the ethical rules to which they are subject. (Dkt. 278-2, at 20). The Chief Defense Counsel is an office created by Congress, 10 U.S.C. § 948k(d), to administer the provision of legal defense services to defendants before military commissions. The Chief Defense Counsel is a general officer nominated by the President and confirmed by the Senate, 161 Cong. Rec. S4555 (daily ed., Jun. 23, 2015) (confirmation as Chief Defense Counsel and Brigadier General), after being selected by a joint selection board. Under the applicable regulations, the Chief Defense Counsel serves in a role similar to that of a federal district judge under the Criminal Justice Act, respecting the supervision of defense counsel who appear before military commissions. *See* Reg. T. Mil. Comm. 9-1, *et seq*. He is the sole actor within the military commission system empowered to assign defense counsel (a process called "detailing"), to supervise defense counsel, and to excuse defense counsel. The relevant rule regarding the excusal of defense counsel states:

> 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.

R.M.C. 505(d)(2).

The precise reasons Petitioner's civilian counsel applied to withdraw remain classified. Under a protective order issued by the military commission, Petitioner's counsel is forbidden

from providing this Court with military commission documents that are classified. Petitioner's military commission counsel previously filed a motion seeking relief from this protective order in order to provide classified military commission documents to this Court via the Court Security Officer. That motion, however, was denied. AE013A (Aug. 19, 2014) *archived at* https://perma.cc/J4H7-3SV4.

What can be said in this unclassified pleading, however, is that on June 14, 2017, General Baker issued a memorandum, which advised defense counsel that he had recently received information indicating that the meeting spaces in which military commission defendants met with their lawyers could not guarantee confidentiality. He cautioned counsel to "not conduct any attorney-client meetings at Guantanamo Bay, Cuba until they know with certainty that improper monitoring of such meetings is not occurring." He then continued:

> At present, I am not confident that the prohibition on improper monitoring of attorney-client meetings a GTMO as ordered by the commission is being followed. My loss of confidence extends to all potential attorney-client meeting locations at GTMO. Consequently, I have found it necessary as part of my supervisory responsibilities under 9-1a.2 and 9-1a.9 of the Regulations for Trial by Military Commission to make the above-described recommendations to all MCDO defense counsel. Whether, and to what extent, defense teams follow this advice is up to the individual defense team.

Brig. Gen. John Baker, USMC, *Improper Monitoring of Attorney-Client Meetings* (June 17, 2017) *archived at* https://perma.cc/ZG78-PPFE.[1]

[1] This June 2017 discovery followed a longstanding pattern of similar irregularities in military commission proceedings over the past decade. In October 2011, for example, the JTF-GTMO guard staff confiscated privileged legal materials from the detainees' cells. The Legal Department at the Naval Base read defense counsel's correspondence and in January 2012, the Chief Defense Counsel issued an ethics instruction prohibiting defense counsel from using the Guantanamo legal mail system for privileged communications as incapable of safeguarding attorney client-privileged communications. As a consequence, defense counsel were unable to exchange confidential written communications with their client for almost two years until a consent order regarding privileged written communications management was entered.

After receiving this memorandum, Petitioner's military commission defense counsel filed a motion with Col Vance Spath, who is presently detailed as the military commission judge presiding over Petitioner's trial, seeking permission to notify Petitioner of the nature of General Baker's concerns. Counsel for the prosecution objected on the ground that this relief would entail providing classified information to Petitioner, who does not have a security clearance. The prosecution also assured Petitioner's counsel that the intrusion issue did not affect the spaces in which Petitioner met with his counsel. Col Spath therefore denied Petitioner's motion on the ground that he was not authorized to approve the disclosure of classified information to individuals without security clearance and because of the prosecution's representations that the issue did not affect Petitioner's meeting spaces.

The confidentiality of in-person attorney-client meetings has also been routinely compromised. In January 2012, JTF-GTMO's chief staff attorney reportedly discovered the rooms in which defense counsel had been meeting with their clients were wired with microphones hidden inside smoke detectors. The prison camp commander was apparently unaware of this discovery and defense counsel did not become aware of it until December 2012, when an attorney traced the brand name of one of the smoke detectors to a surveillance company. The following month, it was discovered that the Expeditionary Legal Center ("ELC") courtroom was wired to record sounds as quiet as a whisper anywhere in the room, even when counsel's table microphones were purposely muted. And reflecting the fact that this monitoring was actually ongoing, an unidentified third-party, outside of the ELC, cut the public audio feed of the proceedings during one proceeding without the knowledge or approval of the presiding military commission judge.

Even attorney-client work product has not been immune from improper intrusion. In March 2013, defense counsel discovered, through a series of IT related failures, that some unknown amount of privileged work product had been provided to counsel for the prosecution, IT personnel not bound by non-disclosure agreements, and other unknown entities in the government. It was also discovered, despite assurances to the contrary, that active content monitoring of defense counsel's internet usage was being undertaken on a government-wide basis. As a consequence of this and other similar episodes, the Chief Defense Counsel issued an ethics instruction prohibiting defense counsel from using Department of Defense computer networks, including email, to transmit privileged or confidential information. Efforts to mitigate the risk of improper disclosure more than tripled the amount of time necessary to draft and file pleadings. And the previous military commission judge presiding over Petitioner's case was forced to abate the proceedings for two months as a result.

Petitioner can proffer to this Court that his counsel subsequently discovered evidence that unambiguously contradicted the prosecution's previous assurances. The factual basis for this representation is classified and Petitioner's counsel is currently unsure of whether it may be provided to this Court. Petitioner's undersigned counsel can represent to this Court, however, that the evidence is compelling and would provide no reasonable attorney with confidence that they could maintain attorney-client confidentiality, when meeting in such spaces.

Upon discovering this evidence, Petitioner's trial counsel again sought intervention from Col Spath. Specifically, Petitioner sought discovery to investigate the extent of the intrusions into his attorney-client meeting spaces and the opportunity to seek orders preventing further intrusions. Petitioner's trial counsel also sought, in the interim, permission to conduct attorney-client meetings in a designated area of the Expeditionary Legal Center courtroom complex in Guantanamo, where confidentiality could be more reasonably assured.

On September 20, 2017, Col Spath denied Petitioner's requests for discovery and other relief. These rulings are classified. Undersigned counsel has reviewed them, however, and can relate to this Court that Col Spath concluded, as a matter of law, that Petitioner's entitlement to attorney-client confidentiality extends only to the prohibition on counsel for the prosecution using his attorney-client communications as evidence. In other words, Col Spath determined that Petitioner had no expectation of confidentiality when conferring with counsel, except insofar as his communications might be used against him in the military commission proceedings. And because of Col Spath's previous ruling, Petitioner's trial defense counsel could not even inform Petitioner of the broader risks to confidentiality.

Mr. Kammen brought Col Spath's orders to General Baker, who has the necessary security clearances to review both the orders themselves as well as the underlying classified facts.

Mr. Kammen noted his concerns that proceeding in a capital case, where attorney-client confidentiality was so circumscribed, might be unethical under the Indiana Rules of Professional Responsibility. Similar ethical concerns were raised by Petitioner's other trial defense counsel. The two other civilians on his case were admitted in Indiana and Illinois, respectively. LT Piette was subject to the ethical rules of the State of Virginia as well as the Navy.

Pursuant to the governing procedures applicable to the Indiana Bar, Mr. Kammen sought an ethics opinion from Professor Ellen Yaroshefsky. Professor Yaroshefsky is the Howard Lichtenstein Distinguished Professor of Legal Ethics and Executive Director of the Monroe Freedman Institute for the Study of Legal Ethics at Hofstra University School of Law. Mr. Kammen provided Prof. Yaroshefsky unclassified facts of the kind provided here. Prof. Yaroshfsky's legal analysis evaluated the Indiana Rules of Conduct, the Model Rules of Professional Conduct, which govern lawyers in the various branches of the United States military, and national ethics opinions and case law. Prof. Yaroshefsky concluded that Mr. Kammen's continued representation of Petitioner would be unethical:

> You cannot, consistent with your ethical obligation continue to represent Mr. 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.

(Dkt. 278-2, at 29).

On October 11, 2017, General Baker excused Mr. Kammen and the two other civilian attorneys as defense counsel.[2] General Baker based his decision on the "good cause" provision of

[2] LT Piette has not yet sought to withdraw. LT Piette is currently evaluating his own ethical obligations vis-à-vis the issue of attorney-client confidentiality, which due to the Navy's supervision, requires administrative review that is not yet complete.

R.M.C. 505(d)(2), quoted above. In reaching this conclusion, General Baker relied upon Prof. Yaroshefsky's opinion as well as "all of the information I know about this matter – both classified and unclassified." (Dkt. 278-2, at 19). General Baker then filed a notice with the Convening Authority (the Department of Defense office responsible, *inter alia*, for the administration of the military commissions) that he had "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." (Dkt. 278-2, at 18).

On October 13, 2017, LT Piette filed notices with the military commission of the civilian counsels' excusal. LT Piette also moved to abate the proceedings until General Baker had located new learned counsel. (Dkt. 278-2, at 2). On October 16, 2017, Col Spath issued a "Briefing Order," which without elaboration, asserted that he had not found "good cause" to excuse civilian defense counsel, including Mr. Kammen. On October 20, 2017, counsel for the prosecution objected to LT Piette's motion to abate. In the prosecution's view, there was no reason to abate the proceedings because Mr. Kammen and his colleagues had no "good cause" for excusal and should therefore return as counsel for Petitioner. On October 24, 2017, General Baker filed a response on the issue of his authority to excuse learned counsel and other civilian counsel. Then on October 27, 2017, Col Spath issued an order denying LT Piette's motion to abate. While not purporting to vacate General Baker's order of excusal, Col Spath asserted – without citing any relevant authority – that he had the authority to countermand General Baker's findings of good cause. (Dkt. 278-2, at 57).

On the morning of October 29, 2017, General Baker informed the Chief Prosecutor, BG Mark Martins, USA, that none of the excused counsel would be traveling to Guantanamo Bay for the previously scheduled hearings. Once on island, Col Spath issued an order for briefing on how

the hearings should proceed in the absence of learned counsel to represent the accused. LT Piette filed a notice with the military commission that because he was not qualified to be learned counsel, he could not take a position on any matter other than the need to have learned counsel detailed to the case. Counsel for the prosecution demanded that the hearings proceed in the absence of learned counsel.[3] The prosecution further asked Col Spath to hold the excused counsel in contempt for failing to appear.

On the morning of October 31, 2017, Col Spath convened a hearing of the military commission. After noting that the excused counsel were not present and that he disagreed with General Baker's finding of good cause to excuse them, Col Spath announced that he intended to proceed with the scheduled hearing, irrespective of whether Petitioner was represented by learned counsel:

> MJ [Col Spath]: … I would get familiar with *Strickland* [*v. Washington*, 466 U.S. 668 (1984)], and I would get familiar with learned counsel being available to the extent practicable, because we are moving forward this week. We are going to have a witness testify on Thursday or Friday that came down on the flight, and next week we are going to be moving through the al Darbi deposition issues and through the al Darbi cross-examination, and then we are going to move into the other things that are on the docket. And I would suggest if anyone disagreed with my ruling on an abatement that they file a writ. We all know the process here, and I don't have to explain it.

Trans. 10028 (Dkt. 278-2, at 77). Col Spath ordered General Baker to testify about his decision to excuse Mr. Kammen, which General baker objected to on grounds of privilege. Col Spath then attempted to order General Baker "to rescind the direction you gave when you excused both learned outside – appointed learned counsel and the two civilians." Trans. 10042 (Dkt. 278-2, at

[3] Most of those witnesses testimony related to pre-trial matters, such as admissibility of certain evidence. One witness, a detainee in Guantanamo who may be released before trial is expected to commence in 2020, is scheduled to testify in a videotaped deposition that the prosecution intends to use in lieu of live testimony at any military commission trial on the merits.

91). General Baker refused this order as *ultra vires* and Col Spath announced that he was going to convene a contempt proceeding against General Baker on Wednesday, November 1, 2017.[4]

Col Spath then announced his intention to continue to move forward, potentially through trial, even if Petitioner remains unrepresented by learned counsel. Trans. 10048 (Dkt. 278-2, at 97). LT Piette protested this decision, but was rebuffed:

> DDC [LT PIETTE] … [A]s the only counsel in this room who has been detailed specifically to defend Mr. al Nashiri, I aim to defend him. And I cannot do that without a learned counsel because, by statute, he has to have one.
>
> MJ [Col SPATH]: We have already dealt with that.
>
> DDC [LT PIETTE]: Yes, Your Honor.
>
> MJ [Col SPATH]: The issue is resolved. You are welcome to file a writ. You've got your chief appellate counsel here, apparently, to make an appearance on the record to a case that he's not detailed to. I would file a writ, and maybe the C.M.C.R. will step in quickly, or maybe they won't. Maybe three weeks from now they will step in and say, Spath, you got it wrong again, like I have twice already. Sorry. And we will come back and do it again. But again, your order is easy. We will be here Thursday -- we will be here at noon tomorrow and we will be here Thursday with the government's witness, who flew down here on an airplane. You can engage in the direct or you can waive it affirmatively on the record. But again, I would read those cases after *Strickland*, understand where we are at, and understand that I find learned counsel are not practicable in the near term, if ever, by the actions of General Baker.

Trans. 10048-49 (Dkt. 278-2 at 97-98). Following this hearing, Petitioner's counsel immediately drafted this motion for a preliminary injunction as well as a motion for a temporary restraining order seeking an order preventing Col Spath from proceeding to trial while Petitioner remains unrepresented by qualified counsel.

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[4] Col Spath does not appear to have the authority to hold individuals in contempt for violating his orders. Under the applicable statute, 10 U.S.C. § 950t(31), contempt before a military commission is limited to "any person who uses any menacing word, sign, or gesture in its presence, or who disturbs its proceedings by any riot or disorder." 10 USC § 950t(31). Under the previously identical provision of the U.C.M.J, 10 U.S.C. § 848 (2006), contempt did not apply to the "Violation of [a military judge's] orders." Manual for Courts-Martial, R.C.M. 809, *discussion* (2008); *see also United States v. Scaff*, 29 M.J. 60, 66 (C.M.A. 1989).

ARGUMENT

"The primary purpose of a preliminary injunction is to preserve the object of the controversy in its then existing condition – to preserve the *status quo*." *Aamer v. Obama*, 742 F.3d 1023, 1041 (D.C. Cir. 2014) (quotation omitted). "A plaintiff seeking a preliminary injunction must establish [1] that he is likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an injunction is in the public interest." *Id*. at 1038 (quotations omitted). Here all four factors favor the entry of injunctive relief to protect Petitioner's statutory and regulatory right to learned counsel as Respondents seek to impose the death penalty on him. Col Spath had no authority to overrule the judgment of Congress and the Secretary of Defense that capitally charged military commission accused must be represented by qualified learned counsel. And Respondents' efforts to drive ahead in the absence of such counsel will irreparably harm petitioner and the public reputation of the justice system more broadly.

I. Petitioner is likely to prevail on the merits because both the governing statute and its implementing regulations afford him the right to representation by counsel qualified in the law of capital defense.

The Military Commissions Act is explicit: "[T]he procedures and rules of evidence in trials by military commission under this chapter shall include, at a minimum, the following rights of the accused: … to be represented before a military commission in accordance with clause (i) and, to the greatest extent practicable, by at least one additional counsel who is learned in applicable law relating to capital cases[.]" 10 U.S.C. § 949a(b)(2)(C)(ii). Pursuant to that mandate, the Secretary of Defense promulgated the Rules for Military Commissions, providing for an unqualified right to learned counsel in all capital cases:

> 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.

R.M.C. 506(b). Respondents nevertheless seek to proceed in Petitioner's case, despite the fact that the only attorney presently capable of representing Petitioner joined the bar in 2012 and, as Col Spath himself recognized, is in no way qualified to serve as learned counsel in a capital case.

Col Spath's precise reasons for allowing this case to proceed in the absence of learned counsel are unclear. Col Spath has not memorialized his directive to proceed in any written order. Based on his oral remarks on the record, it appears that Col Spath is relying upon a clause within 10 U.S.C. § 949a(b)(2)(C)(ii), which states that the Secretary's rulemaking must afford Petitioner the right to learned counsel "to the greatest extent practicable[.]" Specifically, Col Spath notified LT Piette that he intended to proceed in the absence of learned counsel because "I find learned counsel are not practicable in the near term, if ever, by the actions of General Baker." Trans. 10049 (Dkt. 278-2, at 98).

Col Spath's curtailment of Petitioner's right to learned counsel, based upon his unilateral determination that providing Petitioner learned counsel was not "practicable," is wrong for at least two reasons. The first, and foremost, is that it contradicts the Secretary of Defense's judgment that such a right to learned counsel is unqualified and extends to "*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[.]" R.M.C. 506(b) (emphasis added). Col Spath, whose legal status is the rough equivalent of an Administrative Law Judge, *cf. Landry v. F.D.I.C.*, 204 F.3d 1125, 1132 (D.C. Cir. 2000), has no authority to ignore the Secretary's rulemaking, not the least to strip a capital accused of his counsel rights.

Second, Col Spath's apparent belief in his authority to make unilateral practicability determinations simply misreads the statute. Section 949a(b)(2)(C)(ii) is not a general statement of rights of the accused. Rather its place within the Military Commissions Act is in the section giving the Secretary of Defense the authority to promulgate "Rules." *Id*. §949a(a). The subsection affording Petitioner his statutory right to learned counsel is, in turn, an "Exception" to the Secretary's otherwise broad rulemaking discretion; specifying that the Secretary, in promulgating those rules, "shall include, at a minimum, the following rights of the accused," including the right to representation by capitally qualified counsel. To the extent that exception is subject to any practicability qualification, it falls to the Secretary in the course of rulemaking to make a determination of impracticability, not the military commission judge's *ad hoc* bench orders in a moment of pique. *Cf. Hamdan v. Rumsfeld*, 548 U.S. 557, 620-21 (2006) (discussing UCMJ's delegation of authority to the President to make rules for military commission that are consistent with the UCMJ and uniform with courts-martial to the extent "practicable").

Petitioner is therefore likely – indeed certain – to prevail on the merits of his claim that the denial of learned counsel violates his clear statutory and regulatory rights. The only possible impediment to this Court's entry of a preliminary injunction enforcing that right is the Circuit's holding that this Court must generally abstain from challenges to military commission proceedings, which do not relate to personal jurisdiction. *In re Al-Nashiri*, 835 F.3d 110 (D.C. Cir. 2016). Petitioner acknowledges this obstacle. However, in addition to challenges to personal jurisdiction, the Circuit also acknowledged that a narrow set of procedural claims may also be raised pre-trial; specifically those which "argue that the commissions created by the 2009 MCA generally lack jurisdiction over defendants because they are so procedurally deficient that they are wholly *ultra vires*." *Id*. at 134. The Circuit also recognized that abstention was inapplicable

where a Petitioner "identified flaws in that system that would prevent him from fully litigating his defenses. Indeed, case law indicates that abstention is appropriate only where a plaintiff has 'a full and fair opportunity to litigate' his claims in the alternative forum." *Id*. at 121, n4.

To the extent any procedural deficiency could ever render a proceeding wholly ultra vires, it is the claim presented here. Petitioner has a statutory and regulatory right to qualified counsel. Respondents intend to deny him that clear right during critical stages of a capital proceeding, including the cross-examination of witness, the litigation of motions during pre-trial proceedings, and according to Col Spath, through the trial itself. *United States v. Wade*, 388 U.S. 218, 227-288 (1967); *see also United States v. Ash*, 413 U.S. 300, 322 (1973) (Stewart, J., concurring) ("Pretrial proceedings are 'critical,' then, if the presence of counsel is essential 'to protect the fairness of the trial itself.'"). The Supreme Court has held that the right to qualified counsel is indispensable, particularly when having qualified counsel matters most, such as when witnesses are called. *Coleman v. Alabama*, 399 U.S. 1, 9 (1970).

Those traditional concerns are only heightened by the nature of the counsel deprivation at issue here. As Congress and the Secretary recognized, capital cases are qualitatively different from ordinary criminal prosecutions, not the least becaquse they involve "trial tactics that are designed to avoid the death penalty but that have the consequence of making conviction more likely." *United States v. Quinones*, 313 F.3d 49, 59 (2d Cir. 2002); *see also United States v. Harper*, 729 F.2d 1216, 1223 (9th Cir. 1984). The qualifications of learned counsel are different in kind and require a type of legal judgment that a lawyer of ordinary competence simply will not possess five years out of law school. *See American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, 31 Hofstra L. Rev. 913, 1028 (2003).

If there was any procedural right that implicated a capital accused's ability to "fully litigate his defenses," it is the right to qualified counsel. And that right, which is protected by statute and regulation, is being denied. And it is being denied not because of anything Petitioner did. Instead, the denial of his right to fully litigate his defense is rooted in nothing more than Col Spath's disagreement with how General Baker, as Chief Defense Counsel, exercised his authority over the counsel under his supervision.

II. Without an injunction, Petitioner will be irreparably deprived of his right to qualified counsel in a capital case.

The irreparable harms Petitioner faces are significant. Col Spath has announced on the record his intention to proceed not just through the witnesses that are expected to be called over the next few weeks, but all the way to final judgment, regardless of whether Petitioner is afford his statutory and regulatory rights to learned counsel. Trans. 10048 (Dkt. 278-2, at 97). Such a blanket denial of the right to counsel in a capital case is extraordinary. Petitioner's right to qualified counsel in a capital case should not be denied because of a bureaucratic standoff for which he has no responsibility and no means of resolving.

The absence of an attorney at any critical stage of a criminal proceeding is a *per se* category of harm. "The right to have counsel provided is so fundamental that, like the admission in evidence of a coerced confession, or trial before an interested judge, the violation of the constitutional right mandates reversal 'even if no particular prejudice is shown and even if the defendant was clearly guilty.'" *United States v. Decoster*, 624 F.2d 196, 201 (D.C. Cir. 1976) quoting *Chapman v. California*, 386 U.S. 18, 43 (1967) (Stewart, J., concurring). Accordingly, "[a]ctual or constructive denial of the assistance of counsel altogether is legally presumed to result in prejudice." *Strickland v. Washington*, 466 U.S. 668, 692 (1984).

Here, LT Piette fails "the threshold criteria of competence in the law" governing his representation of Petitioner. *See Solina v. United States*, 709 F.2d 160 (2d Cir. 1983). And Petitioner presently has no counsel who meet the statutory and regulatory qualifications to proceed in his case, which is no different than his having no counsel at all. LT Piette's mere presence at counsel table does not cure the fact that Petitioner remains effectively unrepresented. That is a category of *per se* injury that is irreparable, particularly in a capital case. "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). When the Supreme Court first invalidated military jurisdiction over civilians, Justice Harlan concurred separately to emphasize that "[s]o far as capital cases are concerned, ... the law is especially sensitive to demands for that procedural fairness which inheres in a civilian trial[.]" *Reid v. Covert*, 354 U.S. 1, 77 (1957) (Harlan, J., concurring). While the military commission fails in many respects to afford the procedural fairness of a civilian trial, Congress and the Secretary of Defense have both determined that qualified counsel in capital cases is a procedural fairness that the military commissions cannot do without. Yet, that is precisely what Col Spath anticipates, not simply over the next few weeks, but through Petitioner's trial and sentencing.

Exacerbating the harms Petitioner faces if he is forced to proceed without qualified counsel, Col Spath's has repeatedly cited to *Strickland* in an apparent effort to intimidate LT Piette into proceeding despite his lack of qualifications. Should LT Piette refuse to proceed or perform deficiently under these circumstances, Col Spath has made clear his intent to characterize any deficiencies in LT Piette's performance as part of a defense "strategy" for the appellate record. Tr. 10048 (Dkt. 278-2, at 97).

III. Respondents will suffer no harm if this Court issues an injunction to protect Petitioner's counsel rights.

The issuance of a preliminary injunction will do no harm to Respondents' legitimate interests. The only burden that an injunction will place on Respondents is to ensure that Petitioner has the qualified counsel to which he is entitled by law. Affording Petitioner such counsel will not only serve Respondents' interest in ensuring compliance with federal law, it will ensure that any conviction and sentence that Respondents might ultimately obtain from Petitioner's military commission is not infected with reversible error of the most profound kind.

IV. The public interest is served by ensuring Petitioner is represented by qualified counsel.

The interests of Petitioner and the public are aligned. The public, like Petitioner, has an interest in ensuring that the due process rights of capital defendants are adhered to, that such defendants be represented by qualified counsel, and that any conviction and death sentences that military commissions may impose are not compromised by the near-certain prospect of appellate reversal for the denial of unambiguous counsel rights. That public interest is made manifest by the determination of both the Congress and the Secretary of Defense that such counsel is necessary for military commission proceedings. Indeed, 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 … 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…." *Ibid*. To proceed without learned counsel frustrates the public interest as expressed by Congress.

CONCLUSION

For the foregoing reasons, Petitioner asks this Court to enjoin Respondents from conducting further military commission proceedings against Petitioner until such time as he is represented by qualified counsel.

Respectfully submitted,

Dated: November 1, 2017

/s/ Michel Paradis
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Counsel for Petitioner

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

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