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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

(A)(1) Parties Appearing Below: There is not currently a court or commission below. The United States, through the Department of Defense, has filed charges against Petitioner, which are pending review by the Convening Authority for the Military Commissions at Guantanamo Naval Base, Cuba. The Convening Authority will determine whether to refer these charges as capital in the military commissions.

Pending referral, per his own Order, the final arbiter of matters relating to communications and access to counsel is the Commander, Joint Task-Force Guantanamo (JTF-GTMO), who issued the Orders that are the subject of this Petition. See Exhibit A, Introduction and Background, para. 1(g), ("The Commander, JTF-GTMO, or his designee, is the final arbiter for issues arising from this Order, except to the extent that the matter is within the authority of a detailed military judge, pursuant to the authority granted by the Military Commissions Act, the Manual for Military Commissions and the Regulation for Trial by Military Commission.").

(A)(2) Parties Appearing in This Court: Petitioner Mr. Mustafa al Hawsawi and, should a responsive pleading be ordered by the Court, the United States of

America, appearing *pro forma* on behalf of Commander, Joint Task Force-Guantanamo (JTF-GTMO) pursuant to Circuit Rule 21(b).

(B) Rulings Under Review: Orders of the Commander, JTF-GTMO, who is final arbiter below of the questions now being presented to this Court.

(C) Related Cases: Petitioner's co-defendants in the pending charges before the Convening Authority are: Mr. Khalid Sheikh Mohammed, Mr. Walid bin 'Attash, Mr. Ramzi bin al Shibh, and Mr. Ammar al Baluchi (aka "Ali Abdul Aziz Ali"). It is expected that within the same week the present Petition is filed, these co-defendants will be filing a complaint in the Federal District Court below.

Unlike Petitioner, co-defendants are represented by civilian learned counsel, as well as military counsel; civilian counsel are filing in the District Court on behalf of their respective clients. Civilian defense counsel are not required to seek permission of the Judge Advocate General of the U.S. Navy before filing in federal district court.

RELIEF SOUGHT

Petitioner requests that the Court hold the subject Orders of Commander, Joint Task Force –Guantanamo, are unconstitutional under the First and Sixth Amendment, that they violate the statutory right to counsel under the Military Commissions Act of 2009, and that this Court enjoin enforcement of said Orders.

ISSUE PRESENTED

Is the effective assistance of counsel under the Sixth Amendment, the First Amendment, the right of access to court, or the statutory right to counsel under the Military Commissions Act, violated by Joint Task Force-Guantanamo's Orders Governing Written Communications Management for Detainees Involved in Military Commissions, and Governing Logistics of Defense Counsel Access to Detainees Involved in Military Commissions, where these Orders invade the attorney-client and work-product privilege?

I. INTRODUCTION AND OVERVIEW OF FACTS AND ARGUMENTS

This is a capital case. Petitioner has been in U.S. custody [REDACTED]. He was brought to the custody of Joint Task Force-Guantanamo in September 2006. In May 2011, the U.S. government issued military commissions charges against Petitioner, alleging involvement in the events of September 11, 2001.

Petitioner's counsel, undersigned, has been detailed to represent Petitioner since September 6, 2009. Counsel is Petitioner's lead defense attorney, serving as both Petitioner's learned counsel and military counsel in this potential death penalty case. *See* 10 U.S.C. § 948a(b)(2)(C). Counsel is located in the continental United States. As a result of the geographical distance between counsel and Petitioner, both depend heavily on written correspondence in order to communicate.

The Commander, Joint Task Force Guantanamo (JTF-GTMO) issued Orders on 27 December 2011, governing communications and meetings with any detainee involved in military commissions, including Petitioner. Under the Orders discussed herein, Petitioner is effectively unable to engage in any written correspondence or exchange any written materials with counsel because abiding by these Orders will result in violations of Petitioner's constitutional and statutory rights,

This case involves the basic right of the Petitioner to engage in confidential correspondence and communications with his detailed U.S. Navy attorney who is also his learned counsel in this capital case. Over the past three months, Joint Task Force-Guantanamo Bay ("JTF-GTMO"), the Department of Defense ("DoD") component responsible for the detention of Guantanamo Bay detainees, has lurched from one legal mail policy to another, each more intrusive to the attorney-client relationship than the last. Like the preceding policies, the Orders currently in force makes such confidential communications impossible.

Mandamus and prohibition are extraordinary remedies to be applied only in extraordinary circumstances. The situation facing petitioner, however, is indeed extraordinary. His constitutional and statutory rights to counsel, in a capital military commissions case, are being infringed by Orders now in effect. Petitioner, moreover, has no recourse for ensuring protection of his rights, other than through the present Petition: because the charges against him have not been referred for trial, there is no military judge assigned to his case from whom relief may be sought; and because he is represented solely by military learned counsel who is required to seek permission of the Navy Judge Advocate before any federal filing, Petitioner is unable to file a complaint in federal district court, with his co-defendants, who are represented by civilian learned counsel. Upon undersigned

counsel's request to appear in federal district court , the Navy Judge Advocate declined to grant permission and instead directed counsel to seek relief in this Court.

II. STATEMENT OF FACTS AND SUMMARY OF THE CASE

Petitioner has been in custody at JTF-GTMO since September 2006, and represented by counsel since April 2008. The U.S. Government brought charges against him on May 31, 2011, in the Guantanamo military commissions, for his alleged complicity in the attacks of September 11, 2001. In preferring the charges, the prosecution asked that the Convening Authority for the Military Commissions (CA) refer the case as capital. If the CA designates the case as capital, Petitioner will be subject to the possibility of execution in the event of conviction.¹ Petitioner's Counsel, undersigned, is located in the continental United States; because of the travel required to meet in person, and the infrequency of flights to Guantanamo, Petitioner and Counsel depend heavily on written correspondence in order to maintain communications.

A. Background Leading to the JTF-GTMO Orders

The Orders challenged here are in effect now. As a direct result of these Orders having been implemented on 27 December 2011, Petitioner is unable to meet or communicate with military defense counsel assigned to him.

On 27 December 2011, the Commander, Joint Task Force-Guantanamo

¹ In 2008, Petitioner's case was previously referred capital, based on allegations nearly identical to the currently pending charges. The earlier charges were dismissed in January 2010, following a change in presidential administrations.

(JTF-GTMO), Rear Admiral (RDML) David B. Woods issued two orders governing communications and meetings with any detainees held at Guantanamo Naval Base, Cuba. See Attachment A ("Order Order Governing Written Communications Management for Detainees Involved in Military Commissions," hereinafter, "legal mail Order"); Attachment B ("Order Governing Logistics of Defense Counsel Access to Detainees Involved in Military Commissions," hereinafter, "client visits Order").

1. Practices Prior to the Recently-Issued JTF-GTMO Order Governing Mail

Issuance of the two recent JTF Orders governing Communications and Logistics followed a series of other rules and JTF guidelines that attempted to govern mail and client visits, with increasing levels of invasion of the attorney-client relationship in the last three months.

a. The 2008 Buzby Memo

In May 2008, a prior JTF Commander, Rear Admiral Mark H. Buzby, issued a policy governing legal mail, legal visits, and related matters, known as the "Buzby Memo." Attachment C The Buzby Memo set forth a complex, multi-layered scheme for evaluating whether a detainee is entitled to receive documents as legal mail.

This policy, however, was not applied in such a way as to intrude on confidential communications. Under the procedures that were practiced for more than three years, commissions counsel were required to mark each page of any document going to a detainee with counsel's name and Petitioner's detainee number. If there were any questions about any document found in a detainee's possession, therefore, the counsel with whom the document originated could be sought out. Using these procedures without incident, detailed military lawyers for the most part, corresponded effectively with their clients through secure channels established by the Department of Defense and implemented with the cooperation of JTF-GTMO.²

b. October 2011: The "Baseline Review"

In October 11, 2011, however, JTF-GTMO began an unprecedented manner of enforcing the Buzby Memo. [REDACTED]

[REDACTED]

² In fact, the Staff Judge Advocate for the JTF Commander informed Petitioner's counsel, and also testified at a hearing in the al Nashiri case, that the later review conducted of all detainees' legal materials was not provoked by any incident and yielded no significant contraband. Att. D, ¶4.

[REDACTED] the Buzby Memo. Exhibit D, ¶4

JTF-GTMO's search [REDACTED]—euphemistically called the “baseline review”—

[REDACTED] Neither

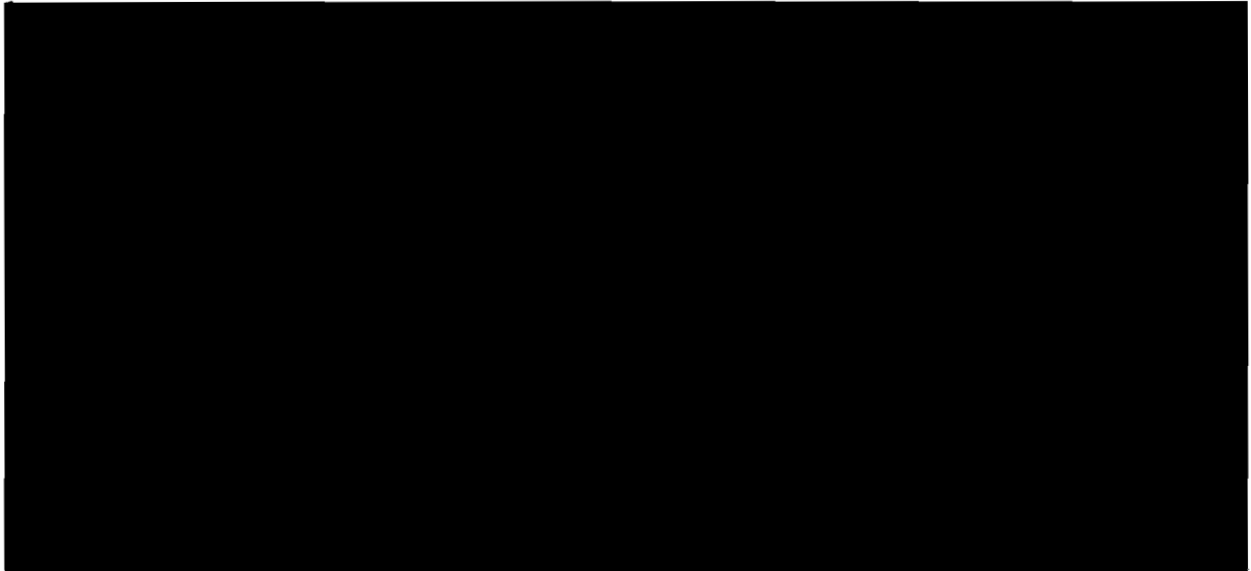
Petitioner nor his defense counsel was told in advance of this search and seizure.

Petitioner's counsel was advised, after the fact, that legal materials were search and items that were deemed “not directly related” to plaintiffs' representation were seized; the Staff Judge Advocate (SJA) for JTF-GTMO supervised the search conducted by unknown presumed members of the JTF command.

In a case that is currently before a military commission, *United States vs. Al Nashiri*, the military judge hearing that case reacted swiftly to JTF-GTMO's threat to the confidentiality of legal mail. Finding the purported distinction between “cursory review” and “reading” to be blurry, Att. E, at 115, 123, Military Judge Pohl concluded: “The government procedures that were employed during the baseline review infringes on the attorney-client privilege.” Att. E, at 168. Judge Pohl ordered that Mr. al Nashiri's counsel must mark privileged communications as such, and that JTF-GTMO must respect those markings without further review. Att. E, at 169. Military Judge Pohl's ruling governed only Mr. al Nashiri.

c. Defense Counsel's Attempts at Resolution, Following the "Baseline Review"

During the week of October 24-28, 2011, Petitioner met with met counsel for JTF-GTMO in an attempt to resolve the issues with respect to its handling of legal materials. Notwithstanding counsel's efforts, on November 1, 2011, counsel was informed that all legal materials would be reviewed. [REDACTED]



d. JTF-GTMO's "Revision Policy" of November 2011

In November 2011, JTF-GTMO developed another system for handling materials going to detainees facing military commissions. On November 22, RDML Woods issued a new policy ("Revision Policy") for all detainees, ostensibly based on JTF-GTMO's reading of Military Judge Pohl's ruling in *United States v. al Nashiri*. Att. F

The Revision Policy defined "privileged communications" as "original handwritten or typed correspondence between defense counsel and their detainee-clients bearing the signature of the defense counsel, as well as other attorney-generated legal materials (for example, draft filings) directly related to the defense." Att. F, ¶ 2. Under the memo, "non-privileged communications" included "print media such as newspapers, magazines, on-line publications; pictures, diagrams, and third party communications." Att. F, ¶ 7. All of these materials were to be sent to Petitioner through unprivileged the U.S. Postal service, from the United States; counsel could not hand-deliver these items at Guantanamo.³

When counsel sought to visit Petitioner in Guantanamo, he found that JTF-GTMO considered the Revision Policy to restrict not only mail, but any materials attorneys wanted to hand-carry to legal visits with their clients. Att. D, ¶9. Materials that counsel sought to bring to Petitioner were read, and documents constituting work-product were refused until counsel "certified" that the document was produced by counsel and his team. Att. D, ¶ 9. Citing the Revision Policy, JTF-GTMO refused to allow counsel to bring to their legal visits materials such as

³ Mail going through the Pentagon's U.S. Postal service channels takes four to six weeks to arrive at Guantanamo.

the Convening Authority's approval letter for the assignment of a mitigation expert to Petitioner's case; a transcript of the hearing related to the legal mail policy, from the commissions case of *United States v. al Nashiri*; public versions of briefs on the legal mail issue filed with the military commissions⁴; the unclassified version of counsel's letter to the Deputy Secretary of Defense protesting the legal mail policies; and the November 22 policy itself. Att. D, ¶ 10. Counsel for Petitioner again communicated his objections to JTF-GTMO. Exhibit Att. D, ¶ 9. And, in the only current commissions case before a judge, Mr. al-Nashiri's counsel filed another motion.⁵

B. The JTF-GTMO Orders of December 2011

1. The JTF-GTMO Order Governing Communications

a. Definitions of Controlled Materials Under the Orders

The legal mail Order dictates that materials sent to detainees involved in Military Commissions fall into four categories. Counsel are required to mark each

⁴ An amicus brief which a co-defendant's counsel sought to submit to his client was refused; counsel was told to send it through the U.S. Postal service, notwithstanding the fact that the Revision Policy claimed it would treat draft pleadings as privileged communications.

⁵ Mr. al Nashiri's motion is scheduled to be heard before Military Judge Pohl on January 17, 2012.

page of materials included in attorney-client communications with the appropriate designation for each category. The Order requires each category to be treated differently with respect to whether it is delivered to the detainee as legal mail or non-legal mail, or not delivered at all (if it is determined to be "contraband").

One category involves "Lawyer-Client Privileged Communications."⁶ Att. A, ¶ 2(e), at 4. This definition of "Lawyer-Client Privileged Communications" is an extraordinarily narrow category of attorney communications, far narrower than the types of materials protected by the attorney-client privilege or materials that attorneys are obligated to keep confidential under the Rules of Professional Conduct. For example, "Lawyer-Client Privileged Communications" under the Order do not include "third-party communications" or "print media" Att. A, ¶ 6(f)(2)(b), regardless of whether such materials are attached to a related letter from

⁶ The relevant paragraph of the Order provides:

e. Lawyer-Client Privileged Communications:

(1) Defined as communications that are privileged within the meaning of MCRE 502, which may include original handwritten or typewritten correspondence between a Detainee-Accused and his Defense Counsel bearing the signature of the Defense Counsel (or a representative of the Defense Counsel encompassed by MCRE 502) or the Detainee-Accused, as is appropriate for the particular communication.

(2) Attorney Work Product is encompassed within Lawyer-Client Privileged Communications.

counsel, or brought into a client meeting by the attorney for purposes of discussion.

The next category is entitled "Other Case Related Material."⁷ Such material includes, *inter alia*, discovery materials and military commission records and filings, when releasable to the detainee. Att. A, ¶ 2(f)(1).

The third category the Order creates is "Military Commissions Non Legal Mail and Material," which is defined as "[a]ll correspondence, documents, media in any form, or similar material" that are not Lawyer-Client Privileged

⁷ Other Case Related Material is defined in the Order as:

f. Other Case-Related Material:

(1) Defined as communications between a Defense Counsel and a Detainee Accused that are related to the Detainee-Accused's military commission proceeding but are not privileged within the meaning of MCRE 502. This includes discovery and related material when releasable to the Detainee-Accused, and records of commission proceedings, including court filings when releasable to the Detainee-Accused.

(2) Documents initially identified as Other Case-Related Material that are subsequently incorporated by Defense Counsel or the Detainee-Accused into work product or lawyer-client communications or that are aggregated to support a particular communication or reflect the lawyer's mental impressions or strategy, may become Lawyer-Client Privileged Communications under MCRE 502. If such material is already in the possession of the Detainee-Accused, JTF-GTMO personnel are not responsible for retrieving documents previously submitted as "Other Case-Related Material," or re-marking them in conformity with ¶4 below.

Communications or Other Case-Related Material. Att. A, ¶ 2(g).⁸

Finally, the Order creates a category of material defined as "Contraband."⁹

⁸ At Paragraph 2.g, the Order states that "Military Commissions Non-Legal Mail and Material" is "All correspondence, documents, media in any form, or similar material that do not fall within ¶¶2.e or 2.f above."

⁹ Regarding Contraband, the Order states as follows:

(3) Examples of Contraband include:

- (a) Information relating to any ongoing or completed military, intelligence, security or law enforcement operations, investigations or arrests or the results of such activities by any nation or agency;
- (b) Current political or military events in any country; historical perspectives or discussions on jihadist activities, including information generated or distributed by or on behalf of foreign terrorist organizations, individuals or groups engaged in terrorist activities, to include material such as "Inspire" magazine;
- (c) Information about security procedures or changes to security procedures at JTF-GTMO or the U.S. Naval Station at Guantanamo Bay; information about the physical layout of the detention facilities;
- (d) Information about the operation of or changes to the detention facility;
- (e) Information about present and former detention personnel or other U.S. Government personnel (including their names, locations or assignment history); and
- (f) Information regarding the status of other Detainees (including former Detainees) at Guantanamo and information regarding any detention of Detainees; and classified, Controlled Unclassified Information or Sensitive but Unclassified Information that has not been approved by the Government for release to the Detainee-Accused.

The Order goes on to broadly state:

- (4) The following types of information are *not* Contraband if Defense

This category includes not only physical contraband that might be expected in this category (e.g., weapons, cigarettes, money, paperclips, etc....), but also "any physical item or *prohibited information* that [defendant], or his designee, has deemed to be impermissible or inappropriate for a Detainee to possess, be informed of (orally or in writing) or view" (subject to an exception described below). Prohibited information is not classified information (which by definition cannot go to a detainee). Rather, "prohibited information," which "may exist in any form, including correspondence, documents, electronic media, or similar material" is defined by the JTF, in his sole discretion. Att. A, ¶ 2(h)(1). Certain classes of information that would otherwise be contraband are not treated as such if "Defense Counsel reasonably believe they are directly related to the military commission proceeding involving the Detainee-Accused" Att. A, ¶ 2(h)(4). The Order further states, however, that two categories of "prohibited information

Counsel reasonably believe they are directly related to the military commission proceeding involving the Detainee-Accused:

- (a) Information relating to any ongoing or completed military, intelligence, security, or law enforcement operations, investigations, or arrests, or the results of such activities, by any nation or agency;
- (b) Information relating to current political events in any country;
- (c) Information concerning living conditions of Detainees at JTF-GTMO; and
- (d) Information relating to the status of other Detainees, including former Detainees.

(emphasis in original)

contraband” are not subject to this exception and will always be treated as contraband: “historical perspectives or discussions on jihadist activities, including information generated or distributed by or on behalf of foreign terrorist organizations, individuals or groups engaged in terrorist activities” and “[i]nformation about present and former detention personnel or other U.S. Government personnel” Att. A, ¶¶ 2(h)(3)(b) and (e).

b. The “Privilege Team” Concept Under the Communications Order

The Order purports to establish a Privilege Team¹⁰ that would review materials going to the detainees, to ascertain that these materials are categorized in accordance with the Order’s definitions. Att. A, ¶ 5. This Privilege Team is expected to be “comprised of one or more DoD attorneys and one or more intelligence or law enforcement personnel.” The Privilege Team members are to be “bound by a non-disclosure agreement to preserve the lawyer-client and other related legally-recognized privileges to the fullest extent possible in a manner consistent with [the Communications Order].” Att. A, ¶ 2(d).

The asserted role of the Privilege Team with respect to attorney-client communications is to inspect the incoming materials for physical contraband and to ensure that each page of non-contraband is marked as “Attorney-Client

¹⁰ No such Privilege Team has been established, as of the time of this filing. Att. D

Privileged Communications," "Other Case-Related Material," or "Military Commissions Non-Legal Mail and Material." Att. A, ¶ 6(a) - (e). The Communications Order states that the inspection "shall not include a review of the substantive content of the Incoming Mail." Att., ¶ 6(f). The Order, however, also contemplates that the Privilege Team will inspect the contents as well as the markings of at least some communications. The inspection "enables the Privilege Team to flag for different processing any items that appear to violate this Order that are apparent (in plain view) from the inspection for Physical Contraband," Att. A, ¶ 6(f), to wit, "material that is not correctly marked." Att., ¶ (6(f)(2).

Although couched as a "plain view" exception to the general rule, in practice virtually all materials delivered to the client will be in plain view insofar as every page and item of legal mail must be marked by category and inspected by the Privilege Team. The Order's examples of materials that the Privilege team may determine are incorrectly marked provide evidence of the level of scrutiny that a "plain view" reading would require. They include "third-party communications" Att. A, ¶ 6(f)(2)(a). These cannot be determined as incorrectly marked unless first identified (a) to be a "communication" to the detainee and not some other type of document; and (b) sent or authorized by a "third-party," which requires inspection

of the signature (or other indicator of the sender's identity), and ascertaining that the sender is not a member of the detainee's legal team.

The determination of whether an attorney-client communication is an interpretive judgment. The Privilege Team must compare the content of the communication to its understanding of the distinctions between "Lawyer-Client Privileged Communications," "Other Case-Related Material," "Military Commissions Non-Legal Mail and Material," and "prohibited information Contraband." Some of the determinations will require close examination of the content of the communication. For example, under the Order's definitions, attorney-client communications that fall within the category of "Other Case-Related Material" may in fact be "Lawyer-Client Privileged Communications" where they are "subsequently incorporated by Defense Counsel or the Detainee-Accused into work product or lawyer-client communications or . . . are aggregated to support a particular communication or reflect the lawyer's mental impressions or strategy" are to be treated as Lawyer-Client Privileged Communications." Att. A, ¶ 2(f)(2). Of necessity, where the Privilege Team believes that an item of "Other Case-Related Material" is mismarked as "Lawyer-Client Privileged Communication," it cannot make that determination until it has reviewed the item's content sufficiently to conclude that the item does not "support [another

privileged] communication” or “reflect the lawyer’s mental impressions or strategy” when aggregated with other items.

In addition, the Order contemplates that the Privilege Team inspection will at least sometimes be detailed enough to discover “information that reasonably could be expected to result in immediate and substantial harm to the national security, imminent acts of violence, or future events that threaten national security, or that presents a threat to the operation of the detention facilities or to U.S. Government personnel.” Att. A, ¶ 5(d).

c. Consequences Under the Order of Inappropriate Marking of Attorney-Client Communications

For any material going to detainees from counsel, defense counsel are expected to first sort, mark and package the materials in accordance with the categories defined in JTF’s Order. Att. A, ¶ 6(a)-(e). The materials so marked then go to the Privilege Team for review, and discussion with defense counsel about any of the material the Privilege Team may identify as improperly sorted.

When the Privilege Team determines that communications have been marked improperly, they are not delivered to the detainee. Att. A, ¶ 6(f)(2). This includes “Other Case-Related Material” marked as “Lawyer-Client Privileged Communication” (Att. A, ¶ 6(f)(2)(a)) and “prohibited information Contraband”

that defense counsel mark as falling under either of the non-contraband categories. (§ 6(f)(3)).

As to these “mismarked” materials, the Privilege Team is directed to “consult” with defense counsel “in an effort to address the apparent problem(s).” Att. A, § 6(g). If “discussions” with defense counsel convince the Privilege Team that the materials are marked properly and not “prohibited information Contraband,” the materials are delivered to the client. Att. A, § 6(g)(1). If the discussions do not convince the Privilege Team, the materials are returned to the defense attorney or retained by JTF-GTMO, and the Privilege Team provides “a written explanation regarding why it was not processed for delivery to the Detainee-Accused.” Att. A, § 6(g)(2) and (3).

“Discussions” between the Privilege Team and defense counsel about whether particular communications are marked inappropriately or constitute “prohibited information Contraband” require discussion of the contents of those communications. For example, such discussions will include argument over whether a particular communication has been “incorporated by Defense Counsel or the Detainee-Accused into work product or lawyer-client communications,” or is “aggregated [with other communications] to support a particular communication or reflect the lawyer’s mental impressions or strategy.” Att. A, § 2(f)(2).

The Privilege Team decision is final, subject only to the provision of paragraph 1(g) of the Order making defendant, RDML Walsh, "the final arbiter for issues arising from this Order." Att. A, ¶ 1(g)

The Order also provides that Privilege Team is to keep a log of all materials that defense counsel seeks to send to a client detainee. While the Order states that this log is not intended to contain information about the content of any material, it also states that the Privilege Team is to log "information about Contraband or other unauthorized material that was placed into the meeting process by Defense Counsel or Defense Personnel." Att. A, ¶ 5(c)

2. The JTF-GTMO Order Governing Logistics

The Logistics Order (Attachment B) reiterates all the same categories of materials defined in the Communications Order. Att. B, ¶¶2(d)-(h). This Order provides that "All written material Defense Counsel, Defense Personnel, and/or a Detainee/Accused bring into and out of a meeting must be processed and handled in accordance with" the Communications Order. Att. B, ¶5(a). This broad language means that even attorney notes and notes between counsel and client must be submitted to the Privilege Team devised under the Communications Order.

In paragraph 4(e), the Logistics Order in effect sets up defense counsel against client: it creates an obligation for defense counsel to turn over to JTF-GTMO any materials obtained from client, if those materials are "non legal mail or material" that came from client but did not originate with defense counsel. Att. B, ¶4(e)¹¹

The Logistics Order also dictates the procedures and requirements related to, *inter alia*, defense counsel and expert consultants' meetings with their clients. Furthermore, it requires that "Detainee-Accused and Defense Counsel will speak in the same language or languages during visits to the maximum extent possible," Att. B, ¶ 9, without regard for the special requirement in capital cases of open, detailed, and unfettered discussion of life history and sensitive personal matters with the client. It also requires "at least one properly detailed Defense Counsel" to be present at every client meeting, without regard to the special requirement in capital cases of frequent and extensive client contacts with mitigation specialists and other expert consultants. Att. B, ¶ 6(a). This order also requires that defense

¹¹ Specifically, this provision of the Logistics Order says: In the event any, Non-Legal Mail or Material from a Detainee-Accused to individuals other than his Defense Counsel (including family, friends, or attorneys other than Defense Counsel) are given to Defense Counselor included with Lawyer-Client Privileged Communications or Other Case-Related Material, Defense Counsel shall return the documents to military personnel at JTF-GTMO for processing. Att. B, ¶4(e).

counsel disclose the purpose of all medical consultants' visits with the clients, Att. B, ¶10, without regard to the fact such disclosure reveals defense strategies and theories, especially in capital cases. Furthermore, in order to meet with Petitioner, counsel must sign an affirmation, acquiescing to all the terms of the Order, regardless of the ethical conflicts it presents to counsel in carrying out effective representation that respects the privileged nature of attorney-client communications. Att. B, ¶ 4(b)

C. The Current Status of Communications and Logistics with Petitioner

Drafts of the Order Governing Communications was sent to defense counsel around 7:30 p.m. on December 20th, 2011. The DoD General Counsel's office who had provided the draft orders asked that any comments be turned in by 3 p.m. on December 22nd, specifying that the final Orders would be signed on the 23rd. On December 21st, after 9:15 p.m., DoD General Counsel's office sent to the Chief Defense Counsel the draft Order Governing Logistics.

Petitioner's counsel, along with co-defendants' counsel, objected that the time given for comment was unreasonable and requested more time to review the document; counsel also asked to discuss the Orders with their clients, in light of the importance of the issues to the representation. Att. G. Substantively, counsel objected on a preliminary basis that the Orders:

- a. Create irresolvable professional-ethical conflicts for counsel because it requires him to violate his duties to maintain the confidentiality of privileged and case-related materials in order to carry out their ethical duty of communication with Petitioner;
- b. Violate plaintiffs' Sixth Amendment rights insofar as it requires disclosure of attorney-client privileged material as a condition of representation; and
- c. Establish an ostensible "privilege team" that fails to resolve counsel's ethical conflicts; fail to protect the confidentiality of attorney-client communications; and fails to protect plaintiffs' Sixth Amendment rights.
- d. Require the signing of affirmations that would demand Petitioner's counsel ratify the Orders so that he could engage in any further communications or meetings with Petitioner.
- e. Exceed the authority of the JTF-GTMO Commander, for he lacks authority to stand-up a privilege team; the privilege team in existence for GTMO detainee cases in federal habeas litigation answers to the judiciary, not to the Government.

RDML Woods signed them into effect on December 27th. Since then, no communications have been able to transpire between counsel and Petitioner, or any

other detainee: JTF-GTMO does not have in place the Privilege Team required by its own Order. As a result, JTF-GTMO is refusing to accept any materials from counsel addressed to Petitioner, legal or otherwise. Att. D, ¶¶ 11,12 The last communication Petitioner received from counsel was dated December 14, 2011. Att. D On December 23, 2011 a four page letter from counsel to Mr. Hawsawi was rejected for deliver by the Assistant Staff Judge Advocate. Att. D.

Counsel is scheduled to travel to Guantanamo to see his client the week of January 4th, the first available opportunity for travel there since the Order has been in effect. Att. D. With the Logistics Order now in place, counsel may not see petitioner without signing the affirmation required by the Order.

III. JURISDICTION

A. This Court Has Jurisdiction to Issue Writs of Mandamus and Prohibition¹²

The MCA vests this Court with "exclusive appellate jurisdiction" to determine the validity of final judgments rendered by military commissions. 10 U.S.C. § 950g. The All Writs Act, 28 U.S.C. 1651, gives this Court the power to issue all writs, including writs of mandamus and prohibition, as necessary or appropriate in aid of its appellate jurisdiction. *Roche v. Evaporated Milk Assn.*, 319 U.S. 21, 26 (1943).

This Court is the only possible forum for review of this Petition. Absent Petitioner's case being referred to a military commission, the JTF-GTMO Commander is the final arbiter here. *See generally, Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 277 (1988) The JTF Orders are tantamount to an agency ruling. *Cf. Work v. U.S. ex rel. Rives*, 267 U.S. 175, 184 (1925)

¹² The collateral order rule is not available here, since Petitioner's case is not before a military commission. Appellate jurisdiction under the MCA is triggered by the CA's final approval of a sentence. *See Khadr v. United States*, 529 F.3d 1112, 1116 (D.C. Cir. 2008) ("the 'final judgment' [required to establish appellate jurisdiction under the MCA] must be 'approved by the convening authority' to satisfy the statute."). The Court of Military Commission Review, moreover, entertains interlocutory appeals only from the government. *See CMCR Rule of Court 21(b)* (2008).

(mandamus is appropriate when agency rulings become "arbitrary and capricious").

While the MCA created the Court of Military Commission Review (CMCR), which, as a military court, could have authority to issue writs, *Dettinger v. United States*, 7 M.J. 216 (C.M.A. 1979), the Rules of Practice for the CMCR specifically state that "[p]etitions for extraordinary relief will be summarily denied..." CMCR Rule of Practice 21(b) (2008). Accordingly, this Court is the first appellate court for which the seeking of relief is not futile. *Houghton v. Shafer*, 392 U.S. 639, 640 (1968). The Judge Advocate General of the U.S. Navy, moreover, has effectively instructed counsel that filing in accordance with the judicial process established under MCA is military counsel's only recourse. Attachments H-K.¹³

Although mandamus, prohibition and injunction are "drastic and extraordinary remedies," courts with appellate jurisdiction can and should utilize their power "where appeal is a clearly inadequate remedy." *Ex parte Fahey*, 332 U.S. 258, 259-60 (1947). Mandamus relief is available to compel a federal official if: "(1) [the] individual's claim is clear and certain; (2) official's duty is nondiscretionary, ministerial, and so plainly prescribed as to be free from doubt; and (3) no other adequate remedy is available." *Patel v. Reno*, 134 F.3d 929, 931

¹³ See discussion, below.

(9th Cir. 1997); *see also*, *In re Braxton*, 258 F.3d 250, 261 (4th Cir. 2001); *Anderson v. Bowen*, 881 F.2d 1, 5 (2d Cir. 1989)(same); *Jones v. Alexander*, 609 F.2d 778, 781 (5th Cir. 1980)(same)

In this instance, the practices of JTF-GTMO have, for months now, been arbitrary and capricious. The violations are clear: patent infringement of the Sixth Amendment right to counsel, and of the right to counsel codified in the Military Commissions Act, encompassing an invasion of the attorney-client privilege in the preparation of a potential capital prosecution. In military jurisprudence, a defendant is "entitled to extraordinary relief to preserve the integrity of the court-martial system." *Dunlap v. Convening Authority*, 48 C.M.R. 751, 756 (C.M.A. 1974), *overruled on other grounds by United States v. Banks*, 7 M.J. 92 (C.M.A. 1979). No different a right applies here. Petitioner has no other avenue for recourse. This Court has authority to hear his Petition.

B. Alternatively, Petitioner Should be Authorized to File his Claims in Federal District Court, Along with his Co-Defendants' Civilian Learned Counsel

Undersigned counsel has filed in this Court following general instructions received from the Judge Advocate General (JAG), U.S. Navy. Attachments H-K. Learned counsel assigned to Petitioner's co-defendants are all civilian counsel, and as such they are not required to petition the JAG for permission to file in federal

court. These counsel, therefore, are filing in the District Court below the same constitutional and statutory claims as Petitioner.

The U.S. Congress codified not only a right to counsel in military commissions, 10 U.S.C. §§948k, 949c, but a right to learned counsel in potential death penalty cases prosecuted in commissions. *See* 10 USC §949a(b)(2)(C)(ii). Unquestionably, therefore, an accused facing potential capital charges before a military commission has a right to representation by counsel who is learned in the defense of death penalty cases, and that right is not limited by the fact that counsel wears a military uniform.

In the MCA, Congress also explicitly contemplated compliance with the American Bar Association's Guidelines for the Performance of Counsel in Death Penalty cases. Indeed, Congress relied on those very Guidelines to instruct the Secretary of Defense as to the structure of the learned counsel requirements in the military commissions. *See* H.Rep. 111-288, sections 1801-07 (NDAA 2010).¹⁴

¹⁴ The Conference Report to the National Defense Authorization Act of 2010 mandates as follows:

The conferees further expect the Secretary [of Defense], in prescribing regulations under section 948k(c)(2) of title 10, United States Code [calling for regulations in the appointment of capital-qualified counsel], to give appropriate consideration to the American Bar

The ABA Guidelines state that: "Due to the irrevocable and extraordinary nature of the penalty, at every stage of the proceedings counsel must make extraordinary efforts on behalf of the accused [...] [T]hese efforts may need to include litigation or administrative outside the confines of the capital case itself." ABA Guideline 1.1. Therefore, the MCA contemplates that learned counsel, including learned counsel who happens to be military counsel as well, may be obligated to engage in the advocacy that is inherent in the defense of a capital case, including litigation outside the confines of the capital case.

The primary relief requested herein is that the new Orders be declared illegal and enjoined. However, should the Court determine that resolution of these issues may require factual inquiries that are more appropriate for a district court hearing, Petitioner requests in the alternative that the Court order that Petitioner's counsel be permitted to appear in district court to present the instant challenge.

Association's Guidelines for the Appointment and
Performance of Defense Counsel in Death Penalty Cases
(February 2003) and other comparable guidelines.

Of further note, Congress intended for the learned counsel provision in the MCA to have the "meaning that is commonly attributed to the same words in section 3005 of title 18, United States Code," the statute governing the appointment of capital counsel in federal court.

IV. ARGUMENT

A. The Sixth Amendment Guarantees the Rights to Effective Assistance of Counsel and to Privileged Communications with Counsel

As an accused in a potentially capital criminal proceeding, Petitioner has Sixth and Eighth Amendment rights to counsel. *See Rasul v. Bush*, 542 U.S. 466, 483, n.15 (2004). Under the Military Commissions Act of 2009, Petitioner also has a statutory right to counsel. *See* 10 U.S.C. §§ 948k, 949c(b), 949g(a); *see also Al Odah v. United States*, 346 F. Supp. 2d 1, 5 n.6 (D.D.C. 2004) (declining to address whether *Rasul*, 542 U.S. at 483 n.15, described a constitutional right to counsel for detainees because detainees clearly possessed a statutory right to counsel). The legal analysis of the attorney-client relationship is the same, whether the right to the relationship is constitutional or statutory in nature. *Al Odah*, 346 F. Supp. 2d at 11 n.12.

Notably for purposes of this Petition's discussion, where pretrial detainees such as Petitioner are concerned, "the presumptively innocent status of these individuals requires even closer scrutiny of limitations on their fundamental rights and liberties than is warranted when the same restrictions are placed on convicted inmates." *Taylor v. Sterrett*, 532 F.2d 462, 470, n.11 (5th Cir. 1976)

The right to effective assistance of counsel, and the right to privileged communications with counsel, are two rights of prisoners that are protected under the Sixth Amendment. “[C]ontact with an attorney and the opportunity to communicate privately is a vital ingredient to the effective assistance of counsel and access to the courts.” *Bach v. Illinois*, 504 F.2d 100, 1102 (7th Cir. 1974). Private communications between counsel and client are at the core of the Sixth Amendment right to the effective assistance of counsel. *People v. Savage*, 838 N.E.2d 247, 255 (2005) (“The essence of this right [to effective assistance of counsel] is privacy of communication with counsel.”)

“To provide effective assistance, a lawyer must be able to communicate freely without fear that his or her advice and legal strategy will be seized and used against the client in a criminal proceeding.” *United States v. Neill*, 952 F. Supp. 834, 839 (D.D.C. 1997) The right to confidential legal mail is a direct extension of those rights assured under the Sixth Amendment. A “prisoner’s interest in unimpaired, confidential communication with an attorney is an integral component of the judicial process, and, therefore, . . . as a matter of law, mail from an attorney implicates a prisoner’s protected legal mail rights.” *Sallier v. Brooks*, 343 F.3d 868, 877 (6th Cir. 2003)

The Sixth Amendment also applies to protect lawyer-client communications under the attorney-client privilege. *United States v. Melvin*, 650 F.2d 641, 645 (11th Cir. 1981) The attorney-client privilege covers communications between attorneys and clients, that is, communications from an attorney to a client and from a client to an attorney. The Supreme Court has explained that, "the privilege exists to protect not only the giving of professional advice to those who can act on it but also the giving of information to the lawyer to enable him to give sound and informed advice." *Upjohn Co. v. United States*, 449 U.S. 383, 390 (1981).

The attorney-client privilege enjoys long-standing recognition in military law. See *United States v. Fair*, 2 U.S.C.M.A. 521, 528 (1953) (finding that "The rule is designed to encourage full and unrestrained communication between client and attorney.") The Court of Military Appeals¹⁵ in *Fair* further noted that "The attorney-client privilege is, however, not designed solely to protect the client. Indeed, the privilege originally rested not with the client but with the attorney." *Id.* The client, and the lawyer on behalf of the client, may claim the privilege. See Mil. Comm. R. of Evid. 502(c).

Protection of the attorney-client privilege in military practice extends broadly, to cover communications *between* lawyer and client, whether originating

¹⁵ Now the Court of Appeals for the Armed Forces (CAAF)

from the client or from the attorney. See Mil. Comm. Rule of Evid. 502;¹⁶ see also, Mil R. Evid. 502. The military thus follows the rule in effect in the majority of federal and state courts. See, e.g., *United States v. Bauer*, 132 F.3d 504, 507 (9th Cir. 1997) ("the attorney-client privilege is a two-way street"); *Sprague v. Thorn Americas, Inc.*, 129 F.3d 1355, 1370-71 (10th Cir. 1997) (finding that both 10th Circuit and Kansas state law follow the broader approach, and holding that the privilege "protect[s] an attorney's communications to his client without the qualification that the communications must contain matters revealed by the client earlier to the attorney,"); *In re LTV Securities Litigation*, 89 F.R.D. 595, 602 (N.D. Tex. 1981) (noting the two approaches and endorsing the broader approach as more realistic)

¹⁶ Military Commission Rule of Evidence 502 provides:

General rule of privilege: A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client, (1) between the client or the client's representative and the lawyer or the lawyer's representative, (2) between the lawyer and the lawyer's representative, (3) by the client or the client's lawyer to a lawyer representing another in a common interest, and (4) between representatives of the client or between the client and a representative of the client, or (5) between lawyers representing the client.

The attorney-client privilege extends to information that an attorney gathers in his investigative role, as long as these investigative tasks are related to the rendition of legal services. *Dunn v. State Farm Fire & Casualty Co.*, 927 F.2d 869, 875 (5th Cir. 1991); *LTV Securities Litigation*, 89 F.R.D. at 603. "The privilege does not require the communication to contain purely legal analysis or advice to be privileged. Instead, if a communication between a lawyer and client would facilitate the rendition of legal services or advice, the communication is privileged." *Dunn*, 927 F.2d at 875. The facts that an attorney gathers and sends to his client are not privileged, but the communication of the facts is. See *Upjohn Co.*, 449 U.S. at 395 (explaining that the "protection of the privilege extends only to communications and not to facts"); *In re Grand Jury Subpoena*, 765 F.2d 1014, 1018 (11th Cir. 1985) (holding that although the fact that an attorney gave a client notice of a trial date is not privileged, the actual communication from attorney to client is privileged).

Correspondence that may not fall under the attorney-client privilege is covered by the attorney work-product privilege. "The work-product privilege protects any material obtained or prepared by a lawyer 'in the course of his legal duties, provided that the work was done with an eye toward litigation.'" *In re Sealed Case*, 29 F.3d 715, 718 (D.C. Cir. 1994) (quoting *In re Sealed Case*, 676 F.2d 793, 809 (D.C. Cir. 1982)). Even if the material the attorney obtains is purely

factual, "a lawyer's factual selection reflects his focus; in deciding what to include and what to omit, the lawyer reveals his view of the case." *Director, Office of Thrift Supervision v. Vinson & Elkins, LLP*, 124 F.3d 1304, 1308 (D.C. Cir. 1997). Because of the importance of protecting documents which "tend[] to reveal that attorney's mental processes." *Upjohn Co.*, 449 U.S. at 399, the work product privilege protects the correspondence of attorneys, as well as other documents they obtain because of the prospect of litigation. *In re Sealed Case*, 146 F.3d 881, 884 (D.C. Cir. 1988).

1. The JTF-GTMO Orders preclude privileged communications with counsel, invading the attorney-client privilege and thereby rendering counsel ineffective

By systematically reviewing legal mail from defense counsel, and defining "legal mail" as consisting only of letters from counsel to Petitioner, the JTF-GTMO orders invade the attorney-client privilege. Counsel must be able to reference in correspondence, and include in correspondence, whatever matters counsel in his professional judgment deems pertinent to the attorney-client relationship and development of a defense. JTF-GTMO's unilateral determination as to what communications fall under the attorney-client privilege, coupled with its arbitrary and capricious review of communications, precludes counsel from effectively representing Petitioner. JTF-GTMO is therefore infringing on Petitioner's Sixth Amendment rights. This infringement is particularly egregious

here, where Petitioner has not yet been tried. *See Taylor*, 532 F.2d at 470, n.11 (applying greater scrutiny to invasion of rights of pretrial detainees). All the more so, since Petitioner may also be facing a death sentence. *See Woodson v. North Carolina*, 428 U.S. 280, 305 (1976)(plurality). "[T]he penalty of death is qualitatively different from a sentence of imprisonment, however long...Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case." *Id.* The requisite reliability for a capital case is simply not achievable with JTF-GTMO's existing orders. And, as such, the effective assistance of counsel, which necessarily involves privileged communications between lawyer and client, is also not possible

B. Regulating a Prisoner's Ability to Communicate by Controlling Mail Implicates the Right of Access to Courts and the First Amendment

"The fundamental constitutional right of access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law." *Bounds v. Smith*, 430 U.S. 817, 828 (1977) This right of access to courts is implicated where the ability of an inmate to engage in private communications is jeopardized. *See Taylor*, 532 F.2d at 472-73.

Though constituting distinct rights, the law surrounding prisoners' right of access to courts has "become inextricably intertwined," with the law regarding First Amendment rights. *Brewer v. Williams*, 3 F.3d 816, 821 (5th Cir. 1993)

Thus, under settled precedent, interference with attorney mail also violates the First Amendment rights of the prisoner. *Al-Amin v. Smith*, 511 F.3d 1317, 1333 (11th Cir. 2008); *Jones*, 461 F.3d at 359; *Davis*, 320 F.3d at 351; *Knop v. Johnson*, 977 F.2d 996, 1012 (6th Cir. 1992); *see generally*, *Hudson v. Palmer*, 468 U.S. 517, 523 (1984)(in which the Supreme Court reaffirmed the right of free speech for prisoners) A First Amendment infringement can be found where an inmate's mail is opened and read in an arbitrary and capricious fashion. *See Parrish v. Johnson*, 800 F.2d 600, 604 (6th Cir. 1986); *see also*, *Merriweather v. Zamora*, 569 F.3d 307, 316-17 (6th Cir. 2009); *Sallier*, 343 F.3d at 873-74.

The law protects a prisoner's right to obtain materials that affect his case or impact his rights. "The right of a prisoner to receive materials of a legal nature, which have impact upon or import with respect to that prisoner's legal rights and/or matters, is a basic right recognized and afforded protection by the courts." *Kensu v. Haigh*, 87 F.3d 172, 174 (6th Cir. 1996), citing *Wolff v. McDonnell*, 418 U.S. 539 (1974). The protections and precautionary measures taken with regard to an inmate's mail are stem from his right of access to courts. A prisoner's "right of

access to the courts requires that incoming legal mail from his attorneys, properly marked as such, may be opened only in the inmate's presence and only to inspect for contraband." *Al-Amin v. Smith*, 511 F.3d at 1325; *see also Wolff v. McDonnell*, 418 U.S. at 577; *Jones v. Brown*, 461 F.3d 353, 358-59 (3rd Cir. 2006); *Kaufman v. McCaughtry*, 419 F.3d 678, 686 (7th Cir. 2005); *Sallier*, 343 F.3d at 877-78; *Davis v. Goord*, 320 F.3d 346, 351-52 (2nd Cir. 2003); *Powells v. Minnehaha County Sheriff Dep't*, 198 F.3d 711, 712 (8th Cir. 1999); *Bieregu v. Reno*, 59 F.3d 1445, 1458 (3rd Cir. 1995), *overruled in part on other grounds by Lewis v. Casey*, 518 U.S. 343 (1996); *Guajardo v. Estelle*, 580 F.2d 748, 757-58 (5th Cir. 1978); *Taylor*, 532 F.2d at 475 (holding that right of access to courts requires opening mail only in presence of prisoner, and then only to inspect for contraband; "it does not entail reading an enclosed letter.") Actually reading a prisoner's mail is an even more serious violation of a prisoner's rights than merely opening such mail outside his presence. *Bieregu*, 59 F.3d at 1456; *Lemon v. Dugger*, 931 F.2d 1465, 1467 (11th Cir. 1991)

1. JTF-GTMO's Orders allow for control of mail in such a manner that they violate the right of access to courts

JTF-GTMO's Orders so narrowly circumscribe what constitutes protected

mail that they allow for all but letters received directly from counsel to be read.¹⁷ The Orders entail far more than inspection for contraband therefore. *See Al-Amin*, 511 F.3d at 1325. The JTF's narrow reading of what materials constitute protected communications, moreover, does not reflect common understanding and practice. *See Taylor*, 532 F.2d at 475 (holding that an inmate's right of access to the courts requires that incoming prisoner mail from courts, attorneys, prosecuting attorneys, and probation or parole officers be opened only in the presence of the inmate). The Sixth Circuit also agrees with the analysis in *Taylor*. *See Sallier*, 343 F.3d at 877 (holding that mail from the courts to an inmate constitutes legal mail, protected under the right of access to the courts) JTF-GTMO's orders are so broadly written that, on their face, they violate the right of access to courts.

Furthermore, since sole and final discretion vested in the JTF-GTMO Commander to determine what materials fall into which categories under the Orders' definitions, the Orders are open to arbitrary and capricious enforcement. Such broad discretion in the hands of the detention authority violates the First Amendment. *See generally, Parrish*, 800 F.2d at 604.

¹⁷ And even letters from counsel have been read and excluded by JTF-GTMO personnel. *See Att. D.*

2. Existing Law Protects a Broad Class of Correspondence and Communications with Prisoners

Protected legal mail goes far beyond simply those communications that are covered by the attorney-client privilege – and far beyond the extremely narrow category of material that the JTF-GTMO Orders define as “legal mail” warranting protections.

Several courts have explicitly said that the protections for legal mail extend beyond the attorney-client privilege. Multiple courts have held that “legal mail” includes a prisoner’s correspondence with people in the legal system who are not attorneys at all, much less the prisoner’s attorney. *Jones*, 461 F.3d at 356 (courts and third parties); *Sallier*, 343 F.3d at 877 (courts); *Muhammad v. Pitcher*, 35 F.3d 1081, 1083 (6th Cir. 1994) (Attorney General’s Office); *Taylor*, 532 F.2d at 470 (courts, prosecuting attorneys, probation officers, government agencies, and the press). Accordingly, what constitutes legal mail – even for those already convicted of offenses – has been broadly defined. *See Kensu*, 87 F.3d at 174. (“Therefore, we today define “legal mail” to include delivery of legal materials to a prisoner, properly and clearly marked as legal materials, via the U.S. Postal Service or alternative private courier services, and hand delivery.”) In fact, the analysis of legal mail protections does not depend on whether any particular item of legal mail is confidential at all; it is the *policy* of opening legal mail that violates

the prisoner's rights. *Muhammad*, 35 F.3d at 1084. Protected legal mail includes "correspondence that impacts upon or has import for the prisoner's legal rights, the attorney-client privilege, or the right of access to the courts." *Sallier*, 343 F.3d at 874. Despite varying definitions of legal mail, "there is general agreement that mail from a prisoner's attorney is always included in such a definition." *Sallier*, 353 F.3d at 877.

Since the JTF-GTMO orders presumably do not allow for anything but letters from attorneys to go through unfettered to clients, the orders effectively censor communications and directly violate the recognized right of access to courts.¹⁸

3. JTF-GTMO's policy of reviewing mail, even through its erstwhile privilege team, does not comply with existing law

While prison officials may open mail in the presence of an inmate, *Wolff*, 418 U.S. at 577, this authority does not mean they may read any prisoner's correspondence. *Taylor*, 532 F.2d at 475. "The purpose of opening mail in the inmate's presence is to protect his attorney/client privilege and to protect the confidentiality of other legal matters." *Harrod v. Halford*, 773 F.2d 234, 235 (8th Cir. 1985) (per curiam). It matters not whether the mail is delivered by hand, via

¹⁸ On December 23, 2011 a four page letter from counsel to Mr. Hawsawi was rejected by CDR [REDACTED] Assistant Staff Judge Advocate. Att. D.

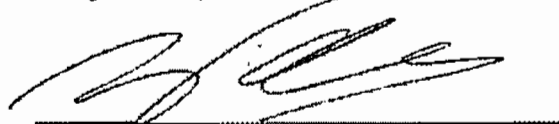
the U.S. Postal Service, or some other means, "it is the content and not the method of delivery which is the subject of the protected right." *Kensu*, 87 F.3d at 174. Moreover, the fact that officials reading the mail may be entirely trustworthy is irrelevant. *Taylor*, 532 F.2d at 476 ("The controlling factor is that attorneys or prisoners may fear that a prison employee who reads inmate correspondence will abuse the sensitive information to which they have access."); *see also*, *Smith v. Robbins*, 454 F.2d 696, 697 (1st Cir. 1972) The policy concern therefore, is the chilling effect on communications and the development of litigation and defense strategies of a third party's access to mail. *Taylor*, 532 F.2d at 476 ("the inhibitory effect of a jail official's access to information contained in this correspondence may diminish an inmate's lawful access to the courts.") Again, as noted above, such concerns about the protection of a detainee's rights are heightened where the detainee has yet to be tried. *Id.* at 470, n. 11.

The breadth of JTF-GTMO's Orders necessarily has a chilling effect on communications for Petitioner. Petitioner will have no right to be present when mail is opened. Under the Orders, moreover, mail that should be legally protected will be reviewed, translated (and thus read), copied and saved by government authorities. Confidentiality is compromised from the outset under the Orders as written, for the Privilege Team (should it come into existence) answers to the Government that is prosecuting Petitioner.

V. CONCLUSION

JTF-GTMO's Orders invade the attorney-client privilege and work-product privilege and thereby preclude the right to effective assistance of counsel, in violation of the Sixth Amendment. Furthermore, these orders infringe on the right of access to courts protected under the First and Sixth Amendments. Accordingly, a writ must issue, instructing that the Orders cannot be enforced as written.

Respectfully submitted,



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Military Commissions
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Telephone (703) 588-0430
Counsel for Petitioner

Dated: 4 January 2012

CERTIFICATE OF COMPLIANCE

I certify that the attached PETITION FOR WRIT OF MANDAMUS AND
WRIT OF PROHIBITION contains 9236 words.

This certification is executed on January 4, 2012, at Arlington, Virginia. I
declare under penalty of perjury that the foregoing is true and correct to the best of
my knowledge.

A handwritten signature in black ink, appearing to read 'Walter B. Ruiz', is written over a horizontal line.

WALTER B. RUIZ

CERTIFICATE OF SERVICE

I, the undersigned, declare that I am a United States citizen and over 18 years of age, and that I am the attorney of record for the Petitioner in this case.

I am a member in good standing of the Bar of the State of Florida, having been admitted before the Supreme Court of that State.

I have an application pending for admission before this Court.

My business address is 1099 14th St., NW, 2nd Fl., Washington, DC 20005.

On January 4, 2012, I caused to be served *by hand* the document described herein to:

Mr. Robert Easton

Office of the General Counsel, Department of Defense

1099 14th Street, NW, Washington DC 20005



for ADM David B. Woods, Commander

Joint Task Force-Guantanamo, Department of Defense

On January 4, 2012, I caused to be served *electronically* the document described herein to:

Staff Judge Advocate, Joint Task Force-Guantanamo

Joint Task Force-Guantanamo, Department of Defense

Ms. Karen Hecker

Office of the General Counsel, Department of Defense

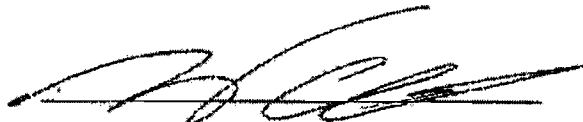
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A copy of: PETITION FOR WRIT OF MANDAMUS AND WRIT OF PROHIBITION;

This certification is executed on January 4, 2012, at Arlington, Virginia. I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.



WALTER B. RUIZ