09-1244

Case No. 09-[illegible]

IN THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA



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| In re<br>MUSTAFA AHMED AL HAWSAWI,<br>Petitioner | *United States of America v. Khalid Sheikh Mohammed, et al.*<br><br>Military Commissions<br>Guantanamo Bay, Cuba |

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PETITION FOR WRIT OF MANDAMUS OR WRIT OF PROHIBITION

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## CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

(A)(1) Parties Appearing Below: Parties appearing below include the United States of America and the accused in *United States of America v. Khalid Sheikh Mohammed:* Khalid Sheikh Mohammed, Walid Muhammad Salih Mubarak Bin 'Attash, Rami Bin Al Shibh, Ali Abdul Aziz Ali, and petitioner Mustafa Ahmed Adam Al Hawsawi. The Office of the Chief Defense Counsel, Office of Military Commissions, Department of Defense, has appeared as *amicus curiae* in the proceedings below.

(A)(2) Parties Appearing in This Court: Petitioner Mustafa Ahmed Adam Al Hawsawi, and, should a responsive pleading be ordered by the Court, the United States of America, appearing *proforma* on behalf of the Military Judge pursuant to Circuit Rule 21(b).

(B) Rulings Under Review: None. The Military Judge has declined to rule on the defense motions raising the jurisdictional arguments presented in this petition.

(C) Related Cases: There is one related case pending in this Court: *In re Ramzi Bin Al Shibh*, No. 09-1238 (D.C. Cir. filed Sept. 9,2009).

## RELIEF SOUGHT

Petitioner requests this Court to issue an emergency stay as set out in the accompanying petition and a "supervisory" writ either preventing the Military Judge from proceeding further (prohibition) or compelling the Military Judge to grant a motion for dismissal (mandamus).

## ISSUES PRESENTED

(1) Does the Military Commissions Act of 2006, as applied in the capital proceedings below, in a system where "uncertainty is the norm and the rules appear random and indiscriminate," render the military commissions structurally defective to a degree that violates the Eighth Amendment and therefore disqualifies it from being a "regularly constituted court" as required by the Supreme Court?

(2) Does the Military Commissions' s intended adjudication of a capital defendant's competency to stand trial, without affording him the appointment of capitally-qualified counsel, the assistance of a defense team member qualified to screen and assess the defendant's symptoms of mental illness, the appointment of a defense forensic expert to examine the defendant and testify at any competency hearing, and access to all available records in the government' s possession relating to the defendant' s psychiatric and medical history violate due process and the Eighth Amendment?

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## I. Introduction

The Military Commission in Guantanamo Bay, Cuba, is poised to adjudicate the mental competency of a capitally charged defendant without first providing him the benefit of appointed, capitally-qualified counsel; appointment and examination by a qualified defense mental health expert; appointment of a defense forensic mental health expert to testify at a scheduled competency hearing; or access to medical and psychiatric records, including records documenting the infliction of torture that likely precipitated or exacerbated the effects of mental illness.

According to the government's accusations and public disclosures, petitioner and his four co-defendants were fully functioning and presumptively competent individuals prior to their capture by government agents and allies. At least one of the co-accused is reported to have requested a lawyer and the right to remain silent at the time of his apprehension. More recently, however, after being held incommunicado by the Central Intelligence Agency (CIA) for several years, all five of the accused have expressed a desire to waive counsel, plead guilty and be executed.

During the defendants' intervening imprisonment by the **CIA,** their captors were authorized to employ coercive interrogation techniques that were specifically designed to profoundly disrupt the defendants' senses or personality and induce a

state of learned helplessness and defenseless compliance by wearing down the defendants' resistance and free will through means that included threats of imminent death. By the government's own official descriptions, the authorized methods of interrogation constituted torture within the meaning of 18 U.S.C. §§ 2340, *et seq*. As to at least two of the accused, the apparent effects of such maltreatment – including the medical necessity to medicate Mr. Bin al Shibh with psychotropic drugs – have created substantial doubts that they are mentally competent to stand trial.

The Military Judge has consistently refused to provide these questionably competent capital defendants the minimal tools necessary to assess their adjudicatory competence. The Military Judge also has consistently refused to ameliorate the government's continuing infliction of treatment that is designed to and does in fact replicate the circumstances of the initial torture and cause the defendants to experience further psychic trauma. The persistent refusal to observe fundamental safeguards in the prosecution of a death penalty case is the only consistency found in the Military Commission proceedings and is a direct result of the lack of any predicable rules, and the ability of the prosecution to ride roughshod over the defendants' Eighth Amendment and due process rights.

The Military Judge recently acknowledged that the Military Commission is "a system in which uncertainty is the norm and where the rules appear random and

indiscriminate." The systemic *ad hoc* nature of the Commission requires that it be declared a nullity immediately. Although the pervasive uncertainty acknowledged by the Military Judge demonstrates the clear structural error and unconstitutional invalidity of such a purported judicial system, future appellate remedies are inadequate to avoid irreparable harm – to both the defendants and the integrity of American law.

The medically predictable outcome of petitioner's treatment by the Commission thus far has been to convince him that no rules and no lawyers can or will protect him from the whims of the prosecutors, and that the only recourse to end his ongoing retraumatization is to waive counsel, plead guilty and seek the government's assistance in committing suicide. The Commission's pervasive absence of rules and the impending, inadequate proceedings to determine petitioner's competence compels this Court's immediate intervention.

The absence of rules renders the Commission structurally defective to a degree that violates the Eighth Amendment and therefore disqualifies it from being a "regularly constituted court" as required by the Supreme Court in *Hamdan v. Rumsfeld*, 548 U.S. *557*, 631-32 (2006) (plurality); *Id.*, at 642-43 (Kennedy, J., concurring). Accordingly, it is wholly without jurisdiction over the prosecution of a capital case and this Court should issue an emergency stay as set out in the accompanying petition, and a "supervisory" writ either preventing the Military

Judge from proceeding further (prohibition) or compelling the Military Judge to grant a motion for dismissal (mandamus).

## II. Statement of Facts and Procedural History

According to public sources, including statements by government officials, petitioner was apprehended by agents of the United States on March 1, 2003. He was then held incommunicado under the custody and control of the Central Intelligence Agency (CIA), until his transfer in 2006 to detention facilities under the jurisdiction of the Department of Defense (DOD) at the United States Naval Base at Guantanamo Bay, Cuba. Petitioner's detention by the CIA exposed him to interrogation methods during the time the CIA was authorized by the Bush Administration's Office of Legal Counsel to employ techniques that amounted to torture.

Pursuant to a referral of charges authorized on May 9, 2008 by the Convening Authority (CA) Susan J. Crawford *(see* 10 U.S.C. § 948h), petitioner was charged with, *inter alia,* capital crimes specified in Part IV of the Manual for Military Commissions, as authorized by the Military Commissions Act of 2006, Pub. L. 109-366 (October 2006) ("MCA") *(see* 10 U.S.C. §§ 948a, *et seq.). United States v. Khalid Sheikh Mohammed, et al.* The CA explicitly authorized government prosecutors to seek the death penalty for petitioner and his four co-accused.

On May 14, 2008, the Military Judge ordered that an initial proceeding be conducted on June 5, 2008, ostensibly to comply with the requirement that the accused be arraigned within thirty days of service of the charges (which had not been served); to advise and ascertain whether the accused intended to exercise their right to counsel; and to determine which, if any counsel, would be representing the accused. [D-002-006 Ruling] Between May 16 and 19, 2008, the military lawyers who were detailed by the DOD Office of Military Commissions to represent the five accused all requested a continuance of the June 5 arraignment citing, among other grounds, the fact that counsel did not have the assistance of capitally qualified co-counsel and that the restrictions placed on access to their putative clients had precluded an adequate opportunity to consult and form an attorney-client relationship before the arraignment.

More specifically, on May 19, 2008, detailed lead military counsel for petitioner explicitly informed the Military Judge that counsel had not been able to meet with petitioner before the CA's referral of charges; that since the referral of the capital charges counsel had been able to meet with petitioner on two occasions; and these limited meetings did not afford counsel – an American military officer who was required to wear his uniform when meeting with petitioner – an adequate opportunity to establish a trusting relationship with petitioner. (AE 019) Counsel also informed the Military Judge, without contradiction from the prosecution, that

he had not been provided with any discovery, including the contents of a "referral binder" mentioned in the **CA's** May 19 order that referred the multiple charges alleging a complex conspiracy. By operation of government-imposed security and classified information regulations, assigned co-counsel could not meet with petitioner at all; lead counsel could not inform co-counsel of any information obtained during his brief meetings with petitioner; and there were no "secured facilities" in either Guantanamo Bay or the military defense offices in Washington, D.C., which counsel needed in order to work with and discuss classified materials necessary to prepare petitioner's case.

Under these circumstances, the time constraints created by the Military Judge's order for a June 5, 2008 arraignment, threatened to confront petitioner and his co-accused with the decision whether to accept representation by a hostile government's uniformed military officers, some of whom they had never met, and all of whom had been denied access to the evidence underlying the CA's decision to refer the capital charges.

On May 21, 2008, the charges were formally served on petitioner and his co-accused, and the following day, May 22, 2008, the Military Judge denied the detailed military lawyers' request for a continuance. [D-002-006 Ruling]

On June 4, 2008, in what became a recurring pattern and dynamic of the proceedings, the prosecution requested, and the Military Judge immediately

granted, a restrictive protective order that, *inter alia*, treated all utterances of the accused, in and out of court, as constituting presumptively classified information; effectively preventing the defendants from consulting with any lawyers or being evaluated by any forensic expert who had not completed a months-long security clearance process; and empowered a CIA agent to control the flow of information in the courtroom, including censoring the sum and substance of counsel's arguments to the court.

Since that date, adherence to the purported security precautions has been manipulated at the whim and for the benefit of the prosecution. To head off a possible continuance of the June 5 proceedings based on the inability of all counsel to comply with the government's eleventh hour imposition of a requirement for security clearance, some counsel were permitted a "one-day" clearance to permit them to be present at the arraignment. Despite the fact such counsel thereby had access to any highly sensitive, "top secret'' information a defendant might have imparted, by the next day the same attorneys could not talk to their clients.

At the arraignment on June 5, 2008, the Military Judge proceeded to accept waivers of counsel from the accused based on their stated decision to proceed ***pro se***. The Military Judge did so without benefit of sufficient colloquy to discern whether any of the accused appreciated the difficulty of self-representation under the circumstances of this case, which included, *inter alia*, voluminous classified

discovery materials to which the accused would not have access, language barriers and the potential impairment of cognitive functioning resulting from their extended period of solitary confinement and other maltreatment. In particular, bowing to the government's professed security concerns, the Military Judge would not permit the accused even to raise the subject, let alone describe the effects, of their mistreatment by the **CIA.** Thus, the Military Judge permitted the government to preempt any disclosure or consideration of whether the CIA's compliance-inducing methods affected the informed or voluntary nature of the defendants' purported decisions.

The Military Judge was prevented from accepting a waiver of counsel by petitioner and one of his co-accused, Rami Bin al Shibh, only due to the strenuous intervention of counsel who pointed out the existence of factors, including Mr. al Shibh's required regimen of antipsychotic medication, which called into doubt the quality and voluntariness of their decision-making. Additional information regarding Mr. al Hawsawi's functioning and inability to respond to the Military Judge's questioning is contained in transcripts that the military court has refused to release. (See Order on D 129 issued September 15, 2009).

While the questions regarding petitioner's and Mr. al Shibh's capacity to waive counsel thereafter remained pending, their detailed military lawyers tried without success to secure the minimal prerequisites for a competent capital case

defense – including, but not limited to the ability to make ***ex parte*** requests for expert services, the assistance of capitally qualified co-counsel, and authorization for the assistance of other persons qualified to develop a capital defense case – as well the basic tools necessary for the representation of any criminal defendant; e.g., such as reasonable access to their client and a reliable translation of the proceedings for his and an appellate court's review.

During proceedings conducted on September 22 and 23, 2008, petitioner's detailed military counsel, Major Jon Jackson, informed the Military Judge that petitioner was not able to understand approximately a quarter of the court proceedings because of incomprehensible interpretation. Due to erroneous interpretation, approximately half of what petitioner himself said to the Military Judge about attorney-client confidentiality concerns, and about his worry that he will not be able to obtain from the government documents related to his own torture, was unintelligible.

Counsel for petitioner and the co-accused asked for a stay of the proceedings until the government obtained competent interpreters. Failing that, they asked for the transcripts of each day's proceedings to be made available in English and Arabic so that they could go over the transcripts with their clients and make corrections for the record. The government strenuously opposed the request, stating that it was sufficient for the defendants to be present and observe the

proceedings. One prosecutor said "they are here all day, they know what is going on." Despite ongoing objections to incompetent translations, the lack of an accurate record continues to defeat meaningful appellate review.

On November 24, 2008, petitioner's military counsel made a request pursuant to Rules for Military Commissions (RMC) 706 for an inquiry into petitioner's mental competence to stand trial.

On December 8,2008, the Military Judge publicly disclosed the substance of a letter purportedly from all five of the accused, including petitioner, indicating their request to withdraw all pending motions, and to "confess" to the Commission. The Military Judge made the disclosure despite the fact that petitioner was represented by counsel, despite counsel having made a sufficient showing to establish doubt as to petitioner's mental competency, and despite the presumptive classified nature of any of the accused's statements. The Military Judge then indicated an intention to entertain the request only as to the ***pro*** *se* defendants, because of pending questions regarding the competence of petitioner and Rami Bin al Shibh to waive counsel and stand trial. The remaining ***pro*** *se* defendants thereupon indicated they would defer their request to plead guilty until all five could do so together.

On December 9, 2008, the Military Judge officially ordered an inquiry into petitioner's mental competency to stand trial, based upon the showing made in counsel's request of November 24,2008. (D077)

Having been effectively educated by the Military Judge to the fact that obtaining guilty pleas from all five defendants was conditioned upon a determination that petitioner and Mr. Bin al Shibh were competent, the prosecution immediately requested to be excused from answering or further litigating any pending defense legal challenges to the Commission. Although the prosecution previously sought to litigate the motions during the pendency of the competency proceedings, it abruptly changed course. In light of the "clear intentions of both" petitioner and Mr. Bin al Shibh, the government requested "that it not be required to file responses to motions that may never need to be litigated, so that the Prosecution can focus its efforts on other issues related to the trial." (D-071)

Without affording the defense an opportunity to respond, the Military Judge granted the government's response to defer action on the defense motions. **As** a result, the Commission has heard no argument and has not rendered a decision on any of the defense law motions, including eleven motion that challenge the Commission's jurisdiction over this case; and thus could moot the necessity of subjecting petitioner to the ordeal of competency litigation.

On December 17, 2008 the **CA,** Susan Crawford, selected new members of the Military Commissions and stated that "All military commission cases scheduled for trial on or after 1 January 2009 . . . are hereby withdrawn and referred to trial by military commission." This action is known as a "re-referral," and, under the plain language of the MCA, effectively would restart each case at the pre-arraignment stage, and require re-appointment of the judges for each case, and put the prior rulings and schedule of the court, filing deadlines, and the record of the case in question.

On January 13, 2009 the Military Judge gave all counsel two days to brief the question whether "first order of business" at a hearing scheduled for January 19,2009, should be a re-arraignment of the accused.

On January 19, 2009 the Military Judge listened to argument from both parties and ultimately adopted the government's position that the **CA** had erred in characterizing her own action. The Military Judge also announced that the schedule for the January 20 and 21would include some time with just the attorneys for the two defendants whose competency was in question, petitioner and Mr. bin al Shibh.

On the evening of January 19, 2009, defense counsel were informed of the content of the Executive Orders that were eventually issued on January 22 and January 24, 2009, stating the President's intention to seek a halt in all Military

Commission proceedings, and to order a cessation of any new referrals or swearing of charges in Military Commissions.

On the morning of January 21, the Military Judge convened the Commission and the prosecution, as expected, requested a 120-day continuance. The Military Judge inquired of the ***pro*** *se* defendants, who stated that they preferred to stay at Guantanamo and proceed with the Military Commission. The Court then granted the continuance. The Military Judge stated that some matters concerning the discovery requested for the competency determinations might proceed during the continuance.

Subsequently, the Military Judge ordered an interim hearing on July 16, 2009, on discovery matters, including requests for experts and disputes about documents, related to the competency inquiries in petitioner's case and that of Rami bin al Shibh. The Judge issued an Order setting the parameters of the hearing in writing several weeks before the hearing, and clarified the role of the three ***pro*** *se* defendants and their standby attorneys:

> While Messrs. Sheikh Mohammed, Bin 'Attash and Ali (Al-Baluchi) *may* attend, the Military Commission *will hear only* from the prosecution and detailed military defense counsel for Messrs. Al Shibh and Al Hawsawi and *only as to issues* related to the RMC 909 [competency] hearing. *No other matters* will be addressed at this session.

Order P-010 (Commission Ruling Regarding Prosecution Motion for Additional 120-Day Continuance), June 11,2009, at p. 3 (emphasis added).

Although the prosecutor acknowledged that nothing of substance would be decided on July 16, due to the stay of proceedings in deference to the presidential Executive Orders, the government nevertheless assembled a group of 9/11 family members to attend the proceedings. Pursuant to the Military Judge's written order, the defendants chose not to come to court. For apparent political or publicity reasons, the prosecutor then suddenly decided that he preferred to have all of the defendants paraded into the courtroom, and sought permission to make an oral motion for modification of the court's weeks-old order. Ignoring the purported rule that required all motions to be timely noticed and in writing, the Military Judge permitted the prosecutor to request modification of the order.

The prosecutor sought to justify reversal of the court's order to require the attendance of the accused by reciting facts indicating his disturbing familiarity with the dynamics of attorney-client relations on several of the defense teams – stating at one point that the clients "had not met with their lawyers for weeks." The judge agreed to change his order, and to require the accused to be present in court – upon pain of "forced cell extraction" if they refused.

The Military Judge and prosecutor then discussed possible inducements that might lure the defendants into court and avoid the necessity of an "extraction." The prosecutor and the Military Judge eventually agreed to offer any defendant who came to court the opportunity to speak for up to five minutes on any motion

pending before the court. This stratagem again reversed the Military Judge's previous order for no reason other than to serve the prosecution's whim.

Following a recess during which the offer to speak for five minutes was conveyed to the defendants, court resumed with three co-defendants, including petitioner, then present. When petitioner attempted to address the court, however, he was informed that there had been some confusion, and the invitation to speak was not meant for him: he was still represented by counsel and it would have been a breach of ethics and law for the Judge and the prosecutor to invite the defendant to speak uncounseled prior to determination of his competency.

By this point in the proceedings, petitioner had been told first that he would not be allowed to speak and did not have to come to court (i.e., by the Military Judge's written order conveyed to him in writing and by his attorneys); then, that he should come to court, and would be allowed to make a five-minute speech (i.e., by Military Judge's order on oral motion of the prosecutor); and, finally, that the opportunity to address the court for five minutes did not apply to him (i.e., communicated by the Judge personally, after petitioner had come to court). The arbitrary and bewildering sequence of events caused petitioner to become more visibly agitated than at any point in the preceding thirteen months of proceedings, and compelled him to be removed from the courtroom.

The Military Judge eventually took up the competency related discovery matters for which the proceedings purportedly had been scheduled. Because previous motions to present the case for defense experts on an *ex parte* basis had been denied, and due to the limitations on the disclosure of information imposed by the protective orders, the detailed military counsel for Ramzi bin al Shibh, Cmdr. Suzanne Lachelier, had to justify her request for a defense expert without being able to reveal whether the basis for it was either (1) provided by her client or (2) related at all to his torture history.

Cmdr. Lachelier's attempt to justify a defense request for the assistance of a mental health expert with expertise in the long-term cognitive effects of sleep deprivation were disrupted by a government-activated censoring mechanism in the courtroom. The audio feed of Cmdr. Lachelier's comments to the public gallery was silenced and a rotating red light began flashing. The disruption signified a determination by a government agent that Cmdr. Lachelier had compromised the security of classified information by arguing "the government cannot hide behind the fact that [redacted]..." Cmdr. Lachelier waited for the audio feed to be restored, and resumed her argument, but the audio was again interrupted and the red light began to flash. Cmdr. Lachelier objected: "Judge how can I be expected to know what is permitted and what is not? The rules are written in sand and the government can change them whenever it wants."

Neither the government nor the Military Judge disputed Cmdr. Lachelier's characterization of the prosecution's unbridled power to make *ad hoc* revisions to the rules. Instead, as if to underscore the point, the Judge responded only by saying "Mr. Powell needs to speak to someone." At that point the "court security officer" – believed by all to be an employee of the CIA – left his post by the Judge's side, and walked out of the court. The courtroom – including the Judge, prosecutors and defense lawyers – waited in silence for Mr. Powell's return. When Mr. Powell reappeared, he walked directly to the Judge and whispered to him. The judge, without consulting counsel, then parroted Mr. Powell's apparent instructions to Cmdr. Lachelier: "You can talk about post-September 2006. Anything prior to that, just refer to the written record."

It was after the proceedings on July 16, 2009, that the Military Judge frankly acknowledged that there were no rules governing the proceedings below. The Military Judge bluntly described the Commissions as "a system in which *uncertainty is the norm and where the rules appear random and indiscriminate.*" [Order of July 13, 2009; emphasis added] The Military Judge nevertheless has denied a motion for continuance of the competency hearing to allow counsel a reasonable opportunity to prepare, and on September 8, 2009, indicated that the

hearing on petitioner's competence first scheduled for the week of September 21 would proceed in mid-October 2009.'

In granting counsel's request for a competency evaluation, the Military Judge's Order of December 9, 2008, purported to require that the inquiry be accomplished "with a medically competent and thorough examination to answer the specified questions" regarding petitioner's competency, including "[a] thorough review of available medical and mental health records of the accused." (D077) The Military Judge, however, has denied petitioner (1) the appointment of a qualified clinical and/or forensic mental health expert to personally examine petitioner and testify at the competency hearing; (2) any access to records in the government's possession regarding petitioner's medical and psychiatric history during the time he was in CIA custody and subject to government authorized torture; and (3) any information regarding the particular circumstances of petitioner's confinement and mistreatment while in the custody of the CIA.

Since the date of the arraignment on June 5, 2008, petitioner has not had the assistance of appointed, capitally-qualified counsel or any other component of minimally adequate capital case representation, including the assistance of a

[1] Mr. Al Hawsawi's counsel have been notified via email that Mr. Al Hawsawi's competency hearing will be continued until mid-October 2009 because of a delay in the competency examination and that an order will be forthcoming. **As** on this filing, an order has not been issued.

defense team member who is trained to screen individuals for mental or psychological disorders or impairments. *See* Revised American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, Guidelines 4.1 and 10.4 (available at www.abanet.org/deathpenalty).

## III. Jurisdiction

### A. This Court May Issue Extraordinary Writs in Aid of its Appellate Jurisdiction under the All Writs Act?

This Court has jurisdiction to issue "supervisory" writs of mandamus or prohibition under the All Writs Act, 28 U.S.C. 1651; *La Buy v. Howes Leather Co.*, 352 U.S. 249, 257 (1957). Petitioner hereby adopts the jurisdictional argument in Section III.A of Brief of Petitioner at 24-28, *In re Bin Al Shibh*, No. 09-1238 (D.C. Cir. Sept. 9, 2009), for the proposition that this Court may issue extraordinary writs where an inferior military tribunal has exceeded its jurisdiction in a way that

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[2] Although *Khadr v. United States*, 529 F.3d 1112 (D.C. Cir. 2008), casts doubt on the availability of the collateral order doctrine in the MCA context, out of an abundance of caution to protect petitioner's rights, counsel maintains that this method of review is appropriate. Therefore, should this Court determine that collateral order relief is the proper remedy, counsel seeks to treat the instant action as an appeal of all orders subjecting petitioner to a "system in which uncertainty is the norm and where the rules appear random and indiscriminate"; and which deny him the basic tools necessary to prepare a capital case defense, including the thorough investigation of his relevant mental status. All of the criterion for relief under *Cohen v. Beneficial Industrial Loan* ***Corp.,*** 337 U.S. 541, 546-47 (1949), are satisfied for the reasons set forth in Section IV, ***supra.***

defeats appellate review if a writ does not issue.[3] *See Maryland v. Soper*, 270 U.S. 9, 28 (1929) (mandamus a proper exercise of an appellate court's "in aid of" jurisdiction where an inferior tribunal "is wholly without jurisdiction"); *Stein v. KPMG*, 486 F.3d 753, 759 (2d Cir. 2007) (holding that "mandamus is available to confine courts to their designated jurisdiction" in a criminal proceeding); *In re Justices of the Supreme Ct. of P.R.*, 695 F.2d 17, 21 (1st Cir. 1982) ("Mandamus traditionally has issued to correct essentially 'jurisdictional' errors; the conventional office of the writ is to restrain lower courts from acting in clear excess of their jurisdiction."); *Bailey v. Sharp*, 782 F.2d 1366, 1367 (7th Cir. 1986) (holding that an appellate court must issue mandamus when a district court grants a new trial without having jurisdiction to do so).

In this case, the systemic Eighth Amendment and Due Process violations identified in Section IV.A, *supra*, demonstrate that these military commissions do not even come close to qualifying as a "regularly constituted court," as required by the *Hamdan* Court (see Section IV.B, *supra)*, and are therefore entirely without jurisdiction to try petitioner for a capital offence. Thus a "supervisory" writ of

[3] Petitioner maintains that writs of mandamus and prohibition "may go *only* in aid of appellate jurisdiction," *Parr v. United States*, 351, U.S. 513, 520 (1956) (emphasis added), and that this *is* the essential function of a "supervisory" writ of mandamus or prohibition. In short, a "supervisory" writ is – and must be – a writ in aid of appellate jurisdiction.

mandamus or prohibition is necessary and appropriate to protect this Court's appellate jurisdiction.

### B. 10 U.S.C. §950j(b) Does Not Preclude Federal Jurisdiction Over Petitioner's Claims.

For the reasons stated therein, petitioner fully adopts the arguments in of Brief of Petitioner at 29-32, *In re Bin Al Shibh,* No. 09-1238 (D.C. Cir. Sept. 9, 2009), that (1) the plain language of §950j(b) does not divest this Court of jurisdiction over the instant petition, and (2) section 950j(b) is an unconstitutional violation of the separation of powers if it divests this Court of jurisdiction.

### C. Abstention is Not Required or Appropriate.

For the reasons stated therein, petitioner fully adopts the arguments in Section III.C of Brief of Petitioner at 33, *In re Bin Al Shibh,* No. 09-1238 (D.C. Cir. Sept. 9, 2009), that abstention is not required or appropriate.

## IV. Argument

The degree of irreparable harm and the evisceration of appellate review should a writ not issue demonstrates petitioner's entitlement to invoke the Court's mandamus power. **As** this Court explained in *National Ass'n of Criminal Defense Lawyers, Inc. v. U.S. Dept. of Justice,* 182 F.3d, 981, 986 (1999), the determination whether to issue a writ of mandamus is guided by consideration of the following criteria:

1. whether the party seeking the writ has any other adequate means, such as a direct appeal, to attain the desired relief;
2. whether that party will be harmed in a way not correctable on appeal;
3. whether the district court clearly erred or abused its discretion;
4. whether the district court's order is an oft-repeated error; and
5. whether the district court's order raises important and novel problems or issues of law.

**As** discussed below, the defeat of appellate review and the manifest irreparable harm to petitioner satisfy the first two mandamus criteria discussed by the Court in *National Ass'n of Criminal Defense Lawyers, Inc.* In turn, the remaining three requirements are met by the clear error of subjecting a capitally charged defendant to procedures governed by "indiscriminate" and unknowable rules, which fail to provide him access to minimally necessary legal and expert services; the frequent and pervasive recurrence of the error is conclusively demonstrated by the Military Judge's acknowledgement of system uncertainty and indiscriminant rules; and the *sui generis* nature of such a freakish system for imposing the death penalty presents legal issues that are at once important and novel.

Section IV.A describes how the intended functioning of the military commissions has led to the inevitable contamination of the proceedings from beginning to end. Section IV.B contends that this contamination - the commission's ubiquitous structural defects - disqualify it from being a "regularly constituted court" as required by the Supreme Court in *Hamdan*, 548 U.S. at 631-2

(2006) (plurality); *id.*, at 642-3 (Kennedy, J., concurring). Because a tribunal that is not a "regularly constituted court'' is wholly without jurisdiction to proceed and the proper subject of an extraordinary writ (see Section III.A, *infra)*, Section IV.C argues that this Court should issue a "supervisory" writ of mandamus or prohibition based on the criteria established in *National **Ass'n** of Criminal Defense Lawyers, Inc*, 182 F.3d, at 986.

### A. Structural Defects in the Military Commissions Contaminate the Proceedings from Beginning to End.

The Commissions' failure to provide notice and enforcement of the rules in these capital proceedings is a violation of the defendants' rights under the due process clause and the Eighth Amendment. Further, the systemic failure to afford petitioner the necessary tools – including capitally skilled counsel who are qualified to investigate and litigate mental health issues, confidential evaluation by qualified clinicians and access to relevant clinical data – and all other requested experts - to the defense in a death penalty prosecution constitutes a structurally defective proceeding rendering meaningless the right to counsel.

The Military Judge's description of the abject uncertainty and indiscriminate rules that pervade the Military Commissions accurately acknowledges that the at their core, the proceedings are a lawless, *ad hoc* prosecution, in which rules are not only arbitrary and capricious, but change without notice to the defense for the convenience of the military judge and on the whim of the prosecution. The

government has aggressively exploited the uncertain and random nature of the proceedings to interfere with defense counsel's representation of their clients and fmstrate the search for the truth. Indeed, the prosecution has made no bones about the fact that its goal is to push forward with a precipitous determination of petitioner's and his co-accused's competency so they may waive counsel, plead guilty and seek execution; which will thereby moot not only the pending challenges to the legality of the Commission but the obligation of the government to disclose the details of the defendants' torture by government officials. The facts discussed above confirm that at virtually every juncture the Military Judge has accommodated the prosecution's strategy.

It is in this stacked-deck environment that Mr. al Hawsawi's competency remains in question and will be determined at a hearing in mid-October 2009. Irrespective of the date, it is clear to any minimally experienced and qualified capital defense attorney that the Commission has not enabled petitioner or his legal team to be meaningfully prepared to litigate the issue.

**A** qualified capital litigator would be reasonably informed that Mr. al Hawsawi likely suffers from significant mental disorders that were caused or exacerbated by the maltreatment to which he was exposed while in CIA custody. At a minimum, no competent capital defense attorney would voluntarily permit the question of petitioner's competency to be determined without first having access to

all information regarding the nature, severity and duration of petitioner's mistreatment, as well as any and all documentation of petitioner's baseline functioning before the mistreatment, his reaction to it, and changes in his subsequent functioning.

For example, the Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, Text Revised (DSM-IV-TR), published by the American Psychiatric Association, describes symptoms of mental disorders such as Posttraumatic Stress Disorder (PTSD), which would be expected to result from the infliction of the type of interpersonal physical and psychological abuse authorized for CIA interrogations during petitioner's incommunicado confinement. **As** described in memoranda from the Office of Legal Counsel and the CIA Inspector General's report, the interrogation techniques included those which, by design, were calculated to disrupt profoundly the senses or personality of the detainees and thereby wear down their resistance. *See Bradbury memo, May 10, 2004,* at 7, 10 and 12. More particularly, the interrogation techniques included the threat of imminent bodily injury and annihilation, so as to activate deeply rooted psychological and physiological responses that are subcortically triggered during life-threatening experiences. Petitioner's captors were aware that these are autonomic sensations that cannot be ameliorated by assures that the detainee will not actually be killed. *Id.*, at 15-16.

Recently released government documents also reveal that CIA interrogators and clinical staff conducted and recorded data from contemporaneous physical and psychological evaluations of the detainees throughout the torture sessions. The accumulated data include descriptions of the techniques employed as well as their physical and psychological repercussions. *Id.* at 7. (and IG report) Counsel's obligation to obtain and assess such data is well established by the general duty to not only obtain all evidence related to the defendant's mental state and functioning, but to pursue investigatory leads suggested by the evidence in counsel's possession. *See* ***Wiggins,*** *Strickland.* That duty has special force in the investigation of a defendant's competence because the Supreme Court has recognized that resolution of the question is informed foremost by the nature, severity and prognosis of any mental illness. Mental competency is not a unitary question, but one which requires examination of the waxing and waning nature of certain illness and the domains of functioning which they affect. *See Indiana v. Edwards*, 554 U.S. ___, 128 S.Ct. 2379, 2386 (2008).

Despite the crucial importance of having access to medical and clinical records documenting the type of mistreatment that was likely to have been inflicted on petitioner, and the physical and psychological impact of such treatment, this is precisely the type of information that the Military Judge has excluded from competency hearings before the Commission. Thus, the Military Judge ruled, in an

August 6, 2009, Order, that "evidence of specific techniques employed by various governmental agencies to interrogate the accused is . . . not essential to a fair resolution of the incompetence determination hearing in this case." D-082 Military Commission Order Regarding Disclosure of Interrogation Techniques Applied by the United States During Questioning of Rami bin al Shibh at 2, *United States v. Khalid Sheikh Mohammed, et al.*, (Aug. 6, 2009), *available at* http://www.defenselink.mil/news/commissionsCo-conspirators.html.

Worse still, such rulings are part of a larger pattern of denying counsel the basic building blocks necessary to construct their defense. The CA and Military Judge have effectively preempted Mr. Hawsawi's ability to seek or obtain access to expert assistance and the other resources necessary for a reliable competency evaluation. The Convening Authority has to date denied *all but one* of the petitioner and his co-accuseds' 13 requests for expert assistance, including requests for mitigation specialists and mental health experts. In fact in the entire Military Commissions, of the 56 defense requests for experts, *46* have been denied, and seven of the granted requests were in a single case, that involving Omar Qadr, on whose behalf the Canadian government has been vigilant in pressuring the commissions.

The Commission and Military Judge have also effectively prohibited counsel from communicating with the court *exparte* to detail and justify the necessity for

expert assistance. Often the basis for specific experts and for the particular mitigation specialist or investigator is grounded in matters revealed by talking to or observing the client. As a result of the Commissions and Military Judge's refusal, counsel is forced to choose between revealing this confidential information to the prosecution, and risk destroying the trust necessary to the establishment of an attorney client relationship, or forgo ancillary services he or she requires to provide competent representation.

Even while denying these requests, the Commission has continued to hold and schedule competency hearings; addressing the very issues that require specialized capital case and mental health litigation expertise, and evaluation of the client and consultation with a mental health expert. Although the ABA Guidelines 4.1 and 10.4, as well as Supreme Court precedent, require that the defense team include a member who is trained to screen individuals for mental or psychological disorders or impairments, the Commission has not afforded petitioner a legal team member with such qualifications. Similarly, while the Commission belatedly granted petitioner's request for forensic psychological services, the **CA** has precluded any defense expert from examining petitioner or testifying at the hearing, Thus, the crucial question of petitioner's mental competency is being determined without defense access to essential information, to necessary experts, or to the resources indispensable to meaningful preparation of the case.

These failures constitute a structural defect requiring immediate relief. A structural defect or systemic failure is one that infects "the framework within which the trial proceeds" rather than an error in the process of the trial itself; a structural defect contaminates the proceedings from beginning to end. *Arizona v. Fulminante*, 499 U.S. 279, 309-10 (1991). The systematic denial of basic defense resources critical to the development of the defense case blocks the defendant's ability to have a fair day in court, converting the proceedings into a sham. In this structurally defective environment, this Court must intervene to prevent irreparable harm to the litigants.

### B. The Systemic and Pervasive Defects Render the Military Commissions Irreversibly "Irregular" Such that the Commission Proceedings Fail the Test of Being a "Regularly Constituted Court" as Required by Hamdan.

The *Hamdan* Court held that military commissions must be conducted before "a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples." *Hamdan*, at 631-2 (plurality); *id.*, at 642-3 (Kennedy, J., concurring). The minimal requirement of any "regularly constituted court" is that it satisfies the rule of law. *Hamdan*, 548 U.S. at 635 ("[I]n undertaking to try Hamdan and subject him to criminal punishment, the Executive is bound to comply with the Rule of Law that prevails in this jurisdiction"). The structural defects identified in Section IV.A, *infra*, demonstrate that these military commissions plainly and egregiously fail this test.

Despite the fact that the MCA declares the military commissions to be "regularly constituted courts,"[4] 10 U.S.C. § 948b(f), the procedural and substantive operation of this commission is admittedly "a system in which uncertainty is the norm and where the rules appear random and indiscriminate." D-126 Military Commission Order Regarding Defense Motion for Appropriate Relief: Delay of Any Further Proceedings at 3, *United States v. Khalid Sheikh Mohammed, et al.*, (13 July, 2009), *available at* http://www.defenselink.mil/news/commissionsCo-conspirators.html. The fact that these are capital prosecutions only underlines the stunning nature of this admission. The systemic pattern of denying basic defense resources to petitioner and his co-defendants, including clinical evaluation by and expert testimony from a forensic mental health professional, undoubtedly attest to the commission's failure to "afford[] all the judicial guarantees which are recognized as indispensable by civilized peoples." This pattern is the predictable result of a fabricated system of criminal justice designed to secure death sentences by evading basic guarantees of the rule of law required by the Supreme Court in *Hamdan*.

[4] Congress's declaration that the commissions constitute "regularly constituted courts" does not control. It is the province of the judiciary, not Congress, to "say what the law is," *Marbury v. Madison*, 5 U.S. 137, 177 (1803), a judicial power that applies equally to the interpretation of treaties. *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 353-4 (2006).

The procedural irregularity in the commissions thus rises far above the level of simple appealable error. *Hamdan*, 548 at 633 n.65 (fact that commission's "rules and procedures are subject to change midtrial" is evidence of "irregular constitution"); *see also Id.*, at 613 (noting rule changes after Hamdan's trial had begun); *Id.*, at 645 (Kennedy, J., concurring) (noting "the possibility . . . of midtrial procedural changes could by itself render a military commission impermissibly irregular"). Irregularity of the most fundamental type – the lack of legality and notice – has been the norm in these proceedings. In short, these commission proceedings are so far removed from the rule of law that this Court must not allow them to continue. Therefore, for the reasons discussed in part III(c), *infra*, this Court should enjoin all future proceedings in order to prevent further irreparable harm to Petitioner.

### C. This Court Should Grant a Writ of Mandamus or Prohibition to Halt Prosecution to Prevent Irreparable Harm to Petitioner.

#### 1. The Ongoing Exacerbation of Petitioner's Symptoms and Harm to the Attorney Client Relationship is Not Correctable on Appeal and this Court's Immediate Intervention is Necessary to Provide the Only Adequate Relief.

Mr. al Hawsawi has indicated in a letter, submitted by the co-defendants to the Military Judge, that he wishes to represent himself, plead guilty, ask for a death sentence, and waive all appeals so that he may be martyred. Even in the absence of the showing counsel made to the Military Judge in November 2008, the nature

of petitioner's stated intentions are adequate to have triggered a competency inquiry. *See, e.g., Rees v. Peyton,* 384 U.S. 312 (1966). The circumstances of petitioner's custodial treatment, limited access to assigned counsel, and experiences in an unpredictable and hostile judicial setting would lead experienced capital lawyers to understand petitioner's purported desires as being manifestations of depression, hopelessness and despair.

Whether that is the case, whether some other condition prevents his rational participation in the proceedings, or whether he is in fact competent to stand trial are all important questions deserving a careful and sensitive inquiry. By contrast, the fundamental deficiencies in the Commission proceedings will ensure only that the questions cannot be answered fairly or reliably, with no guaranty that a complete record will reach the appellate court.

**As** a result of the failure by the Commission and Military Judge to afford basic resources necessary to prepare the defense, Mr. al Hawsawi has had counsel only in name, and counsel who are being prohibited from providing meaningful assistance to Mr. al Hawsawi's defense. **As** a further consequence of their inability to perform these functions, counsel are also unable to meaningfully advise or build a relationship with Mr. al Hawsawi. The uncertainty that contaminates all aspects of the Commission raises a substantial probability that if the Commission is permitted to proceed, Mr. al Hawsawi will be unable to effectively challenge the

government's evidence, and Mr. al Hawsawi will be found competent even if he is not. An incompetent accused will be found competent, will represent himself, ask for and receive a death verdict, and will attempt to waive his appellate rights.

The ability of an appellate court to correct such an unseemly spectacle will be, at best, limited to returning the parties to *status quo ante*. Future appellate remedies cannot offer remediation of the ongoing distress petitioner will suffer as a mentally incompetent ***pro*** se defendant, nor can such remedies address increasing paranoia and alienation petitioner is likely to develop with regard to any appointed counsel.

As most recently demonstrated by the events of July 16, 2009, the harm caused to a defendant of questionable competence as a result of the prosecution exploiting the Commission's indiscriminate and ever-changing rules is irreparable. The continuing denial of access to legal counsel and mental health professionals who are necessary to a fair and accurate determination of petitioner's competency, even as the Military Commission subjects him to a confusing whirl of mock proceedings is virtually guaranteed to exacerbate and solidify petitioner's inability rationally to participate in the proceedings or cooperate with counsel.[5] The danger

[5] In the current posture the government is seeking to "convert the appointment of counsel into a sham and nothing more than a formal compliance with the Constitution's requirement that an accused be given the assistance of counsel." *Avery v. Alabama, 308* U.S. 444, 446 (1940). **As** the Supreme Court in *Avery*

of irreparable harm is evidenced in the degree to which the government's ability to exert complete and arbitrary control over the defendants – including forced extractions and forced sensory deprivation during transfer for court appearances and attorney visits – significantly recreates the traumatic conditions of petitioner's confinement and likely abuse while in CIA custody.

**2. The Commission and Military Judge have clearly erred and the errors are pervasive in all of the death penalty cases pending before the Commission.**

Rather than a system where "uncertainty is the norm," Mr. al Hawsawi is entitled to a system that provides him with adequate notice of events. *See Lankford v. Idaho,* 500 U.S. 110, 121 (1991). The systemic uncertainty and indiscriminate decision-making in the Military Commissions interferes with all aspects of the accused's ability to consult with counsel, receive the benefit of necessary expert services, choose whether to appear at the proceedings, adjudicate their mental competency, investigate the degree to which government mistreatment has impaired their mental competence – and decide whether and when the death penalty even applies.

Both the due process clause and the Eighth Amendment require fair notice and enforcement of the rules in capital cases. *See Lankford* ***supra*** ("the concept of

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made clear, "The Constitution's guarantee of assistance of counsel cannot be satisfied by mere formal appointment." *Id.* (footnote omitted).

fair notice is the bedrock of any constitutionally fair procedure"). The barest of minimal due process guarantees do not tolerate the establishment of tribunals in which "uncertainty is the norm," or which are governed by rules that fairly "appear random and indiscriminate." *See Ohio Adult Parole Authority v. Woodard*, 523 U.S. 272, 289 (1988) (O'Connor, concurring in part) (even "some *minimal* procedural safeguards [that] apply to clemency proceedings" could be violated by indiscriminate decision-making in which "a state official flipped a coin," or "the State arbitrarily denied a prisoner any access to its clemency process").

A constitutionally adequate tribunal for the trial of capital cases, therefore, requires adequate notice of the substantive and procedural requirements governing the determination of guilt and penalty *(see, e.g., Maynard v. Cartwright,* 486 U.S. 356 (1988) (Eighth Amendment analysis applied to find state did not adequately inform sentencer of the finding necessary to impose death)), which in turn is necessary to vindicate a defendant's right to the effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686-687 (1984); *see Lankford*, 500 U.S. at 127. The applicable standard of fairness is animated by the Court's "death is…different" jurisprudence. *Id.* at 124-126 (citing to *Gardner v. Florida,* 430 U.S. 349, 357 (1977) (plurality opinion) ("death is different" jurisprudence emphasizes the special importance of fair procedure in a capital sentencing context).

Further, the failure to afford Mr. al-Hawsawi's, or any of his co-defendants, capitally-qualified counsel, a mitigation specialist and other defense team members with the expertise necessary for a reliable investigation and presentation of mental health issues "contaminates the proceedings from beginning to end" because it prohibits counsel from performing the duties required under the ABA Guidelines and recognized by the Supreme Court as essential to the defense function in a capital case. *Fulminante,* 499 U.S. at 309-310. The United States Supreme Court has long held that the proper standard for judging trial attorney performance is that of reasonably effective assistance, based on "reasonableness under prevailing professional norms." *Strickland v. Washington,* 466 U.S. 668, 688 (1984). "[P]revailing norms of practice as reflected in American Bar Association standards and the like . . . are guides to determining what is reasonable . . ." *Id.* In capital cases, the Court subsequently confirmed "the standards for capital defense work articulated by the American Bar Association (ABA) [are] standards to which we long have referred as 'guides to determining what is reasonable."' *Wiggins v. Smith* 539 U.S. 510, 524 (2003) (citing *Strickland,* 466 U.S. at 688, and *Williams v. Taylor,* 529 U.S. 362, 396 (2000); see *also Rompilla v. Beard,* 545 U.S. 374, 387, n. 7 (2005) (discussing and applying the "set of [ABA] guidelines specifically devoted to setting forth the obligations of defense counsel in death penalty cases"). The **ABA** Guidelines "set forth a national standard of practice for the defense of

capital cases in order to ensure high quality legal representation for all persons facing the possible imposition or execution of a death sentence by any jurisdiction." ABA Guidelines 1.1 (A).

Because the Convening Authority and Military Judge are denying the accused basic rights to notice and basic resources that are required in death penalty cases under Supreme Court precedent and the ABA Guidelines, the Convening Authority and Military Judge are violating their clear duties to act.

**3. These are important and novel issues of law.**

**As** this Court has previously noted, "[t]he eyes of the world are on Guantanamo Bay. Justice must be done there, and must be seen to be done there, fairly and impartially." *Hamdan v. Gates*, 565 F. Supp.2d 130, 137 (D.D.C. 2008).

However, in comparison to *Ohio Adult Parole Authority v. Woodard*, a "flip of the coin" would be an improvement over the purported rules in the current tribunal. A defendant who is seeking clemency, as in *Woodard*, already "has been fairly convicted and sentenced." *Id.*, at 289. Thus, *a fortiori*, the *minimal* due process, that Justice O'Connor and four other members of the *Woodard* Court recognized must be afforded in such situations, must also be available to an accused who stands clothed with the presumption of innocence before a military judge in this military commission.

These sham proceedings now threaten to culminate in a faux competence

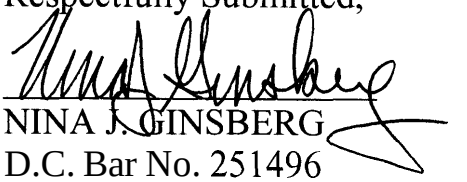
hearing for petitioner, orchestrated by the prosecution and controlled by the CIA, to cover up facts rather than make a legitimate or reliable decision about petitioner's competence. It is therefore imperative that this Court address the fundamental flaws in the military commission's procedures and petitioner's right not to be tried without the assistance of counsel in proceedings that amount to nothing more than a sham political trial.

**A** failure to grant mandamus may result in this case never being heard on appeal as an incompetent defendant may waive his right to appeal. This mandamus must be granted and these sham proceedings must be halted.

## V. Conclusion

For the foregoing reasons, a writ of mandamus or prohibition should be granted and the Military Commissions should be immediately halted.

Respectfully Submitted,



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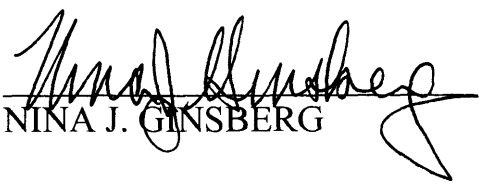
*Counsel for Petitioner*

## CERTIFICATE OF COMPLIANCE

I certify that the attached PETITION FOR WRIT OF MANDAMUS OR WRIT OF PROHIBITION

This certification is executed on September 17th, 2009, at Alexandria, Virginia. I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.



NINA J. GINSBERG

## CERTIFICATE OF SERVICE

I, the undersigned, declare that I am a United States citizen and over 18 years of age, that I am the attorney of record for the Petitioner in this case, and that I am a member of the Bars of the District of Columbia and the State of Virginia, having been admitted before the District of Columbia Court of Appeals and the Supreme Court of Virginia. My business address is 908 King Street, Suite 200 Alexandria, VA 22314.

On September 17th, 2009, I caused to be served by hand the document described herein to:

Clerk, Military Commissions
for Col. Stephen Henley, Military Judge
Office of the Convening Authority for the Military Commissions
200 Stovall Street
Alexandria, VA 22332

Clerk, Military Commissions
for Clay Trivett, Prosecutor
Military Commissions
Office of the Convening Authority for the Military Commissions
200 Stovall Street
Alexandria, VA 22332

Clerk, Military Commissions
CAPT Murphy, Chief Prosecutor
Office of the Convening Authority for the Military Commissions
200 Stovall Street
Alexandria, VA 22332

John F. De Pue
Joanna P. Baltes
United States Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530

A copy of: PETITION FOR WRIT OF MANDAMUS OR WRIT OF PROHIBITION.

This certification is executed on September 17th, 2009, at Alexandria, Virginia. I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

_____
NINA J. GINSBERG