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BY FAX AND EMAIL

Jeh C. Johnson, Esq.
General Counsel
United States Department of Defense
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Dear Mr. Johnson:

On behalf of the Association of the Bar of the City of New York (the "Association"), we write to express our concern with the Protective Order and Procedures for Counsel Access to Detainees Subject to Military Commission Prosecution at the United States Naval Station in Guantanamo Bay, Cuba, dated March 4, 2011 (the "Protective Order"). We urge you to delay the effective date of the Protective Order until the matters raised in this letter as well as in the Chief Defense Counsel's Memorandum for the Convening Authority dated March 15, 2011 (the "OCDC Memorandum") can adequately be addressed. The Association is most concerned with the Protective Order's provisions that threaten the attorney-client relationship by dramatically restricting and burdening communication between an attorney and his or her client, and by requiring counsel, under certain circumstances, to forfeit the protections of the attorney-client privilege in order to provide representation consistent with the terms of the Protective Order.

The Association has carefully reviewed the OCDC Memorandum, and many of the concerns raised in this letter echo or expand upon the issues raised by the Chief Defense Counsel. In particular, we focus upon the regulations set forth in the Protective Order that, in our view, so infringe on the attorney-client relationship as to make effective and zealous advocacy impossible, and undermine the fundamental fairness of military commission prosecutions. We do not discuss those procedural matters raised by the OCDC Memorandum, as we lack familiarity with the existing procedures established within the Office of Military Commissions (OMC) and the Joint Task Force-Guantanamo (JTF-GTMO). Our silence on procedural matters does not constitute an endorsement of those procedures.

Although the Protective Order purports to adopt provisions from the Protection Order issued in the Guantanamo habeas corpus litigation, the military commission cases are criminal in nature. As a result, the latter involve rights and protections with respect to the attorney-client relationship not present in civil (habeas) litigation. That difference is amplified exponentially by

the prospect of capital prosecutions in the military commissions, which cases only add to counsel's obligations pursuant to the American Bar Association Guidelines with respect to defense of a capital case.

As you know, the Association has long been committed to studying, addressing, and promoting the rule of law and, when appropriate, law reform. Over the past decade, the Association has been educating the bar and public about legal issues relating to the war on terrorism, the pursuit of suspected terrorists, and the treatment of detainees. The principal lesson we have derived from our work is that full and faithful respect for the rule of law strengthens our country. Our system of justice – based on time-tested constitutional and international norms – is a source of strength, not vulnerability.

An Independent, Vigorous Defense Bar is Fundamental to the Legality, Credibility, and Legitimacy of Military Commissions

In light of the recent announcement by Attorney General Holder that Khalid Sheikh Mohammed and other accused 9/11 plotters will be tried before a military commission, it is imperative that the military commission system be accepted as fair, lawful, and credible. *See* Statement of the Attorney General on the Prosecution of the 9/11 Conspirators (Apr. 4, 2011). Achieving this goal will be difficult, especially in light of the controversy, false starts, and legal uncertainty that have plagued the military commission system since President Bush's original order establishing them in November 2001. In the nine and a half years since President Bush's order, much progress has been made, thanks in large part to the Supreme Court's ruling in *Hamdan v. Rumsfeld*, 584 U.S. 557 (2006), and the Obama Administration's and Congress' generally constructive work in the Military Commissions Act of 2009, 10 U.S.C. §§ 948a et seq. (2009). At the same time, it is clear that very substantial challenges remain before the nation and the world can have confidence that the military commission system is workable, legitimate, and fair. The Association has expressed the view that "if we must have military tribunals," the government should avoid provisions "that deviate from [standards] in federal courts or for courts martial under the Uniform Code of Military Justice." Letter from Association President Patricia M. Hynes to President-Elect Barack Obama (Nov. 25, 2008).

In order to advance the process of establishing a just, lawful, and credible regime of military commissions, the Defense Department should be open to the comments and concerns of all interested parties, including the Chief Defense Counsel and members of the civilian bar, including the members of the Association. The importance of establishing the basic rules governing military commission practice, including the Protective Order, in a collaborative and transparent manner cannot be overstated. Constructive input from all interested parties will reduce the risk that the commissions are hobbled by legal deficiencies and will help achieve the goal of a fair and legitimate system that adheres to the basic principles of our civilian criminal justice system.

An ancient principle on which our legal system rests is the sanctity of the attorney-client privilege. *See* Geoffrey C. Hazard Jr., *A Historical Perspective on the Attorney-Client Privilege*, 66 Cal. L. Rev. 1061, 1070 (1978) (Professor Hazard dates the attorney-client privilege to the Roman Civil Code, and in this country cites its most conspicuous origins in John Adams's representation of the British soldiers charged in the Boston massacre); *see also United States v. Marrelli*, 15 C.M.R. 276, 281 (C.M.A. 1954) ("This [attorney-client] privilege—one of the oldest

and soundest known to the common law—exists for the purpose of providing a client with assurances that he may disclose all relevant facts to his attorney safe from fear that his confidences will return to haunt him."). Any significant undermining of this bedrock privilege would inflict serious damage to the military commission system. If detainees learn they cannot trust the privacy of their communications with counsel, the system will cease to function effectively and any judgments it renders will be viewed as illegitimate and vulnerable to appellate reversal. Moreover, the Protective Order creates serious ethical dilemmas for defense counsel who are governed by modern codes of professional conduct. *See* American Bar Association, Model Rules of Professional Conduct, Rule 1.6 and comment 3 (2009).

The remainder of this letter identifies specific areas of the Association's concern that restrict counsel's ability to fully execute his or her duties as counsel to detainees. We urge the Department of Defense and the Convening Authority to reconsider these severe restrictions on counsel's ability to communicate freely with his or her client and others in related matters and to revise those procedures that present counsel with the untenable choice between complying with the Protective Order or complying with the applicable Rules of Professional Conduct. Most importantly, we urge the Department of Defense and the Convening Authority to meet with and consider the suggestions of the Chief Defense Counsel in formulating a final Protective Order that is workable for all parties and does not so impinge upon the attorney-client relationship.

Specific Areas of Concern Regarding the Protective Order

Restrictions on Substance of Attorney-Client Communications

The Protective Order contains many procedures that so limit counsel's ability to communicate with his or her client as to render the attorney-client relationship all but meaningless. Where counsel is prohibited from presenting, discussing and inquiring into critical information with his or her client – including information allegedly received by the government from the client – counsel will be unable to effectively test theories, set strategy and advocate zealously. This is the effect of the Protective Order. For example, Paragraph 29 provides in relevant part:

> Detainee's counsel shall not disclose to a detainee classified information which was not provided by that detainee directly to detainee's counsel during the course of communications (i.e., Legal Mail and detainee's counsel meetings). Statements of the detainee that detainee's counsel acquires from classified documents cannot be shared with the detainee absent authorization from the appropriate government agency authorized to declassify the classified information."

(Protective Order ¶ 29). *Accord* Protective Order ¶79 ("Detainee's counsel may not divulge classified information not learned from the detainee to the detainee.").

The Association understands these provisions to prohibit counsel from, *inter alia*, inquiring into statements alleged to have been made by the client during interrogation by the government, as well as any allegations relating to the client's conduct made by others that are disclosed to counsel by the prosecution. It would be impossible to prepare a defense where counsel cannot test the truthfulness of allegations or search for possible innocent explanations for alleged conduct. Indeed, the client's statements that are embargoed may themselves be exculpatory, or lead to exculpatory witnesses and evidence. The Protective Order further silences counsel by prohibiting

him or her from explaining to the client the very reason *why* he or she may not directly inquire into certain information (i.e., because it is classified). Counsel is prohibited from making any "[p]ublic or private statements disclosing any classified information or documents accessed pursuant to this Protective Order, including the fact that any such information or documents are classified." (Protective Order ¶ 31).

We are also concerned that the Protective Order restricts counsel from discussing with his or her client certain relevant information "unless directly related to counsel's defense of a detainee in the military commission cases" which may nevertheless be critical to the investigation or strategy of the representation. *See* Protective Order ¶ 68(g)(1-4) ("[W]ritten and oral communications with a detainee . . . shall not include any of the following information, in any form, unless directly related to counsel's defense of a detainee in the military commission cases: 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; Information relating to current political events in any country; . . . or Information relating to the status of other detainees.").

As a threshold matter, it is unclear what standard applies for determining what is "directly" related to a client's case. The uncertainty over this key term creates tension with the obligation to provide a zealous defense, as lawyers may fear to tread too close to a line that may be demarcated by the prosecution.

Also, while such information may not be "directly" related to counsel's defense, it may be indirectly related, such that it might generate investigatory or evidentiary leads, or may be essential to making critical strategic decisions. If counsel cannot pursue relevant leads or examine relevant evidence, counsel cannot provide effective representation, and the fairness of the ultimate proceeding is undermined.

The Association is troubled by the monitoring of attorney-client communications by the Convening Authority. *See* Protective Order ¶ 75 (communications subject to contemporaneous monitoring and recording) and ¶ 67a(1)(a) (counsel must specify in advance the language to be used with his or her client, which shall be used "to the maximum extent possible"). It is axiomatic that the confidentiality of attorney-client communications is absolutely essential to the proper functioning of a fair and impartial adversarial system. *Compare* Protective Order ¶ 87e ("No oral communications between counsel and the detainees will be heard."). The Association urges that the protection offered by Paragraph 87e be strictly maintained with respect to all attorney-client communications.

While the Protective Order suggests that it merely replicates provisions of Special Administrative Measures ("SAMs") that may be imposed within the Bureau of Prisons, *see* 28 C.F.R. § 501.3(a), in fact the Protective Order reflects a significant expansion of the carefully calibrated procedures outlined in the regulations governing SAMs. For instance, SAMs permit monitoring of attorney-client communications only in exceptional situations where notice is given to counsel and the inmate that "reasonable suspicion exists to believe that a particular inmate may use communications with attorneys or their agents to further or facilitate acts of terrorism." 28 C.F.R. § 501.3(d). To our knowledge, this provision has been invoked only rarely and its legality has not been tested. *See* Richard B. Zabel & James J. Benjamin, Jr., Human Rights First, *In Pursuit of Justice: Prosecuting Terrorism Cases in the Federal Courts*, at 125 & n.366 (2008).

To the extent the Protective Order envisions broader monitoring of attorney-client communications, it reflects an unwarranted departure from the regime of SAMs. Similarly, the provision that requires defense counsel to obtain (advance) approval for all materials reviewed with the client at meetings is not, to our knowledge, consistent with any rules or practice in the federal system. Even assuming the integrity of the Privilege Team – which should not be an arm of the Convening Authority, but rather entirely separate from the prosecution function – the mere fact of the requirement will preclude development of an authentic and productive attorney-client relationship.

The Association also must register its concern over the Protective Order's restrictions on counsel's communications with third parties who have sufficient security clearance, including counsel in related proceedings (e.g., *habeas*) as well as counsel for other detainees in related procedures. The restrictions imposed prevent counsel from disclosing certain important information to these third parties, and further restrict counsel from disclosing that information for any purpose other than the direct litigation of the prosecution in question. *See* Protective Order ¶ 38 **(**"A detainee's counsel shall not disclose the contents of any protected documents or information to any person, including counsel in related cases brought by Guantanamo Bay detainees" except as otherwise authorized") and ¶ 42 **(**"Protected information shall be used only for purposes directly related to these cases and not for any other litigation or proceeding, except by leave of the military commission or the Convening Authority.") Counsel's ability to communicate with counsel in related proceedings – whether for the same client in ancillary proceedings or other detainees in military commission prosecutions – is often necessary to the full exploration of a client's defense and a full execution of counsel's duties. Restrictions on these communications prevent counsel from providing an effective, zealous defense required to make these prosecutions fair, just and reliable. In the federal courts, the prevailing standard is the same as it is in any classified context: the information can be shared with those sufficiently cleared persons with a "need to know." There is no reason why defense counsel in the military commissions should be controlled by a different standard. Moreover, the creation and generalized regulation of a new category of "protected" information (different from classified information) is a deviation from federal practice that we believe is not constructive.

Finally, the Association is concerned by the Protective Order's provision precluding counsel from making any statements about classified information once that information has independently entered the public domain without having been declassified; from making any statements revealing personal knowledge about the status of information; or "disclosing that counsel had personal access to classified or protected information confirming, contradicting, or otherwise relating to the information already in the public domain." (Protective Order ¶ 31).

These and other restrictions that require counsel to act or refrain from acting but which do not provide the specific guidance necessary are overbroad, vague and lack the type of notice necessary given the very severe potential penalties counsel may face should it be determined that counsel has violated one of these many provisions. *See* Protective Order ¶ 51.

Absence of Privilege Protection in Classification Determinations of Detainee Communications

The Association is troubled by the Protective Order's requirement that counsel forfeit the protections of the attorney-client privilege with respect to certain critical communications. That is, the Protective Order mandates that counsel treat all information learned or obtained from, or generated during meetings with, a high-value detainee (HVD) as presumptively classified at the TS/SCI level. *See, e.g.*, Protective Order ¶¶ 68f, 71. The only mechanism by which counsel can obtain either declassification or a determination of its appropriate security, a step necessary to counsel's making use of that information in the context of the representation, is by presenting that information – including in the form of attorney work product ordinarily subject to its own protections – to the appropriate government agency, which destroys the privileged nature of those communications. *Id.* ¶ 80. The Association is concerned that compliance with these requirements will cause counsel to violate the applicable Rules of Professional Conduct.

The Association urges the Convening Authority to accept the Chief Defense Counsel's proposal set forth in Paragraph 5 of the OCDC Memorandum as an alternative for providing both privilege and classification review. This suggested alternative – which would also address the Association's concern that, in this context, the Privilege Team is an agent of the Convening Authority – enjoys broad support from SOUTHCOM, JTF-GTMO, and OMC-P, has been effective in the *habeas* context, and, most importantly, will allow counsel to maintain privileged communications consistent with the Rules of Professional Conduct that are fundamental to the function of defense counsel and, in turn, the fair adjudication of these cases.

Conclusion

The Association urges the effective date of the Protective Order be delayed until the concerns raised in this letter as well as in the OCDC Memorandum can adequately be addressed. The Association further urges that the Convening Authority collaborate with the Office of the Chief Defense Counsel to create a Protective Order that ensures the security of those involved in military commission prosecutions and protects national security information in the context of fair and just military commission prosecutions.

Very truly yours,

Samuel W. Seymour