

01 Nov 11

From: Counsel for High-Value Detainees
To: Deputy Secretary of Defense for Detainee Affairs

Subj: REQUEST TO CEASE AND DESIST ON-GOING ATTORNEY-CLIENT PRIVILEGE VIOLATIONS AND FOR COMPLIANCE WITH DOMESTIC AND INTERNATIONAL LAW STANDARDS REGARDING DETENTION CONDITIONS

1. Counsel for Messrs. Al-Hawsawi, Bin al Shibh, Bin-Attash, Mohammed, Al-Nashiri and Al-Libi request that you direct Commander Joint Task Force Guantanamo (JTF-GTMO) immediately remedy detention practices violative of domestic and international humanitarian law. Furthermore, counsel request that you cease and desist the seizure, opening, translating, reading and reviewing of attorney-client privileged communications. The current JTF practice and policy is illegal and violates the attorney-client privilege. It undermines any notion of "fairness, transparency and justice." The review and censorship of legal materials will effectively grind litigation to a halt by barring legally required attorney-client communications.
2. We sent you multiple communications over the last year, regarding on-going problems with your detention policy and conditions. The problems with legal materials were brought to your direct attention more than five months ago, and again two weeks ago when you were copied on correspondence to JTF-GTMO. We have received no response to any of our letters. The resolution of all these concerns is vital to any potential for a fair and expeditious trial of the pending capital cases. Absent a meaningful response and the institution of remedies, the on-going concerns will be litigated to the fullest extent.
3. Equally distressing, are the JTF-GTMO procedures calculated to disrupt communications between attorneys and clients. These procedures involve the seizure, opening, translating and reading of privileged attorney-client communications -- policies and practices that amount to impermissible content review. Privileged attorney-client correspondence has been seized.
4. The policies and practices are unlawful and will effectively stall this case: these procedures violate the attorney-client confidentiality privilege. The Military Commissions Rules of Evidence, in Rule 502, specifically protect attorney-client privileged material from disclosure to anyone aside from the client and his legal team. Furthermore, state and Dept. of Defense professional rules of responsibility preclude lawyers from revealing confidential information relating to the representation of a client.¹ By confiscating attorney-client materials, opening, translating and reviewing it, the JTF-GTMO is blatantly violating long-standing confidentiality rules. As a direct result of JTF-GTMO's unlawful policy with respect to legal materials, counsel are in the untenable position of having either to violate professional ethical standards in order to communicate with our clients, or cease communicating with our clients. In effect, therefore, JTF's unlawful policy severs the attorney-client relationship; it renders it impossible for defense counsel to maintain confidential communications with our clients.

¹ See, e.g., SECNAVINST 5803.1C, Rule 1.6

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5. Violations of the attorney-client privilege are acutely egregious in the context of death penalty litigation, where the Supreme Court has long held that heightened Due Process applies.² Ethical standards mandate that counsel in capital cases are responsible for making “every effort to establish a relationship of trust with the client.”³ The elimination of the attorney-client privilege, as is occurring now through JTF-GTMO’s practice and policies, destroys the attorney-client relationship. The ABA requires counsel in death penalty cases to communicate with the client regarding potential legal issues, the development of a defense theory, and presentation of the defense case.⁴ The matters to be discussed are therefore wide-ranging; a far broader scope of communications is necessary – even required – in order to develop an adequate defense and ensure professional duties are met.⁵ Under JTF-GTMO’s policy of opening, reviewing, translating, reading and copying attorney-client communications, counsel involved simply cannot meet their professional obligations.⁶

6. It is important to note that the legal materials discussed are not classified. Undersigned counsel, moreover, all have the appropriate security clearances and are aware of the responsibilities involved in handling classified information. Therefore, beyond our existing professional ethical obligations as licensed attorneys, we are cognizant of these other obligations.

7. Under the ABA Guidelines for the Performance of Counsel in Capital Cases, we are to communicate with you regarding the preservation of the attorney-client privilege and necessary safeguards to our clients’ rights.⁷ We therefore hereby impress upon you that a) our clients’ privileged communications have been violated by the confiscation of legal materials; b) the violation is on-going, since privileged materials have been read and are being retained and reviewed by JTF personnel; c) there is an urgent need to remedy what violations can be remedied at this point, so as to ensure that attorney-client communications can take place unfettered. A failure to act on this concern belies any claim to transparency and fairness.

² See *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976).

³ ABA Guidelines for the Performance of Counsel in Death Penalty Cases, Guideline 10.5 (2003).

⁴ See *id.*

⁵ Anything in the life of a defendant that might militate against the appropriateness of the death penalty for that defendant is relevant mitigation evidence. See *Eddings v. Oklahoma*, 455 U.S. 104, 113-15 (1982); *Lockett v. Ohio*, 438 U.S. 586, 604 (1978).


⁶ Of note, too: The rule of professional responsibility with respect to the protection of client confidentiality applies not only to lawyers engaged in representing the client, but to any lawyer professionally connect to the represented individual. Therefore, counsel for JTF are in violation of their professional standards because they are complicity in the implementation and administration of this unlawful policy.

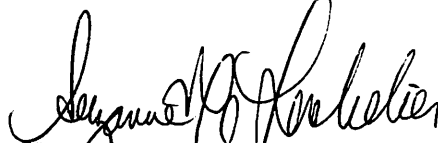
⁷ See, *supra*, ABA Guidelines, Guideline 10.5B(2).

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8. We therefore respectfully request that you provide an immediate response to this correspondence, indicating the remedial measures that will be implemented to resolve these on-going concerns. As noted at the outset of this letter, we also ask that you direct Commander, JTF-GTMO, to cease and desist from opening, reviewing, translate, reading and copying legal materials. The urgency is particularly critical in view of the pending litigation of capital cases.

Very Respectfully,



CDR Walter Ruiz, USN



CDR Suzanne Lachelier, USN



LTC Michael Acuff, USA



Maj Sterling Thomas, USAF


LCDR Stephen Reyes, USN


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cc: CDR, Joint Task Force-Guantanamo
Convening Authority, Military Commissions