DEPARTMENT OF DEFENSE
OFFICE OF THE CHIEF DEFENSE COUNSEL
1600 DEFENSE PENTAGON
WASHINGTON, DC 20301-1600

March 15, 2011

MEMORANDUM FOR THE CONVENING AUTHORITY

SUBJECT: OCDC Objections to Protective Order and Procedures for Counsel Access of March 4, 2011

1. My office has received and reviewed the above referenced protective order and procedures for counsel access to detainees. As the Chief Defense Counsel, responsible for the supervision and resourcing of detailed defense counsel, on behalf of the entire office I object to significant portions of the protective order. Whereas I do not represent an individual client, I will confine my objections to those matters which I believe universally affect our Office. Nevertheless, I also believe that this protective order unreasonably and unlawfully interferes with the attorney client relationship between our lawyers and their clients, but I am confident that you can anticipate that this argument, and others, will be raised by detailed counsel. As is, the protective order is effectively unworkable; it does not conform to the business practices established within the Office of Military Commissions over the past few years and is inconsistent with the existing procedures and mechanism in place within both OMC and JTF-GTMO. Accordingly, I respectfully request you delay the effective date of this protective order until these issues can be adequately addressed.

2. I am extremely troubled by this protective order for three major reasons: First, I am troubled because there was absolutely no coordination done with the Office of the Chief Defense Counsel prior to the execution of this document which might have averted many of the objections we have to it. Second, I am troubled by the apparent inattentiveness to detail within the document itself in that it does not appear that the drafter had much familiarity with the practice of military commissions. Third, I am troubled by the construct of the privilege team and how its function significantly differs from that set out in the habeas order upon which it was apparently modeled. I address each of these concerns in more detail below.

3. This protective order was thrust upon us with no opportunity to review or comment. It is disheartening to have business conducted in this manner and it is counterproductive to do so. As you know, I participated in the Federal case against Ahmed Ghailani for about its first six months. The protective order that the U.S. Attorney submitted to Judge Kaplan for execution was first provided to the defense team and we were able to negotiate with them in various areas. Admittedly there were certain areas, from the government perspective, that were nonnegotiable but through this iterative process both sides were able to hammer out a number of issues that contributed to the smooth administration of these sensitive matters. Additionally, it has been common practice in previous military commission cases for the defense counsel to have the opportunity to review and discuss draft protective orders before the trial counsel submitted them to the military judge. Yet, we were not afforded this same consideration by you in the protective order at hand. Such consideration might have averted many of the troubling issues that this protective order raises.

4. This protective order appears to have been lifted almost verbatim from the habeas protective order by someone who had little familiarity with the practice of military commissions. It gives the impression that no one took the time to tailor this protective order to the actual business practices established within the Office of Military Commissions over the past several years, or considered how the constitutional constraints on a criminal prosecution differ from those applicable to habeas proceedings. The end result is a less than workable product, which, if implemented as currently written, would result in a significant waste of resources and would unnecessarily change the way business has been conducted for years. Here are but a few examples that stand out:

a. Paragraph 19 states that the government shall arrange one or more "secure areas" for detainee counsel's use. Paragraph 22 states "[n]o documents containing classified information may be removed from the secure area unless authorized ...." These provisions make sense in the habeas context where the civilian attorneys do not have access to their own accredited secure facilities or possess courier cards that permit transportation of classified information. They make no sense in the military commissions' context where our attorneys work in DoD-certified SCIFs and have the capability to appropriately store, access, and transfer classified information.

b. The protective order also ignores that the defense has access to classified means of communication such as SIPR, our point-to-point system, and our own courier physically located in Guantanamo Bay. For example, paragraph 69 requires that all outgoing mail be delivered to the privilege team for transportation to Washington D.C. for pick up by defense counsel. Additionally, paragraph 71 requires that materials brought out of meetings with HVD clients must be immediately provided to the privilege team in Guantanamo Bay, and the privilege team arranges transportation to Washington D.C. These provisions may make sense in a habeas context, but ignore that the Office of the Chief Defense Counsel maintains a classified communications system and our own courier located at Guantanamo Bay. *Guidance provided from your office since the issuance of this protective order suggests this may not have been intended, <u>but until we have a signed modification</u> we appear legally obligated to comply with the written terms of the protective order.*

c. Paragraph 67 addresses some of the logistics of counsel visits.
   1) 67a(1) states that counsel must provide notice as to the language they will be speaking in the meeting and that "counsel will speak in the same language during visits to the maximum extent possible." These are absurd requirements, unless the government is monitoring our communications – which paragraph 87e says you are not.
   2) Paragraph 67(d) requires counsel obtain country and theater clearance specific to each trip to Guantanamo Bay, and consequently provide at least 20-days advance notice of counsel visits. This requirement ignores the fact that all of our members, as well as civilian counsel assisting in these cases, already possess standing area and theater clearances of six months in duration for Guantanamo Bay. Surely the additional administrative burden of all of our personnel submitting for area and theater clearance for each visit was not intended.

d. Paragraph 70 requires that all materials brought into a meeting with a detainee have been previously submitted to, reviewed by, approved, and appropriately stamped by the Privilege Team. This provision provides no allowance or exception for the transport of time critical documents into a meeting between a detainee and his attorney(s). For example, the negotiation and settlement of pretrial agreements would be rendered nearly impossible under this construct. The similar provision in the habeas protective order includes similar constraints, but also an exception: "unless counsel receives prior approval from the Commander, JTF-Guantanamo."

5. For over two and a half years my predecessors and I have requested the designation of a privilege team, identical to that already provided to habeas counsel, that included the ability for our counsel to submit information learned from a detainee to the privilege team for a determination of its appropriate security classification and still retain the attorney client privilege. This request enjoyed the support of SOUTHCOM, JTF-GTMO, and OMC-P, <u>and again, is contained within the habeas protective order upon which this one is modeled</u>. Yet this ability to obtain classification review and still preserve the attorney-client privilege is glaringly absent from this protective order. This omission prevents my counsel from being able to carry out their responsibilities to diligently and zealously represent their clients. Further, your refusal to provide our counsel this mechanism only serves to increase the risk of unintentional releases and spillages of classified information. Without any clearly articulated classification guidance or a mechanism to have classification review conducted - our counsel are left in the dark guessing. This

could be of serious consequence especially in light of your reference to previously prosecuted defense counsel. Further, we have discovered that the habeas privilege team will now also be serving as the privilege team for military commissions, thus it appears nonsensical that we will not receive the same consideration as habeas counsel. The construct of the privilege team also presents significant ethical issues for our counsel. Under this protective order, defense counsel are directed to turn over attorney-client privileged communications for review by the privilege team. In the habeas context the privilege team is an arm of the Court. In the military commissions context, the privilege team appears to be an arm of the Convening Authority (at least until referral of charges.) This is problematic on many fronts when considering the prosecutorial and adversarial role of the Convening Authority in military commissions as well as the specific statutory prohibition against unlawful influence. Habeas counsel may file, ex parte, to a Federal District Court judge for relief or grievances under their protective order. In the absence of referred charges, this protective order provides no means of relief or grievance. Attorneys of this office have already expressed concerns to me about whether they may properly agree to the terms of this protective order under their applicable Rules of Professional Responsibility. The requested delay will permit counsel time to obtain ethics advice from their respective Services and licensing jurisdictions.

6. Again, the concerns raised in this correspondence only scratch the surface of the issues raised by this protective order. I urge you to delay the effective date of the protective order until all of these concerns can be fully addressed. I may be contacted regarding this request at (703) 588-0105 or Jeffrey.colwell@osd.mil.

Respectfully submitted,

JP Colwell

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Chief Defense Counsel

Cc:
General Counsel
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