



Written by [Joe Wolverton, II, J.D.](#) on December 31, 2011

New Gitmo Rules May Violate 6th Amendment and Atty.-Client Privilege

According to details of the rules published by the Associated Press, all the covered correspondence sent back and forth between any of the five detainees categorized as 9/11 co-conspirators and their legal counsel would be thoroughly reviewed by law enforcement and Department of Defense personnel.



The new policy has not yet been promulgated as Woods has yet to sign it. However, he has sent a draft copy of the proposal to the appropriate lawyers and has attached thereto an order for them to sign if they agree with the changes to the currently applicable standard operating procedures.

In response to the request from Admiral Woods, the attorneys for the five prisoners have written a memo opposing the new rule based on their averment that such a scheme would violate the privilege afforded communication between attorneys and clients. Furthermore, were the rule to be enforced, their clients would be deprived of the right to counsel afforded to individuals by the U.S. Constitution.

Specifically, as set forth in the Supreme Court's decision in the case of [Brewer v. Williams](#) 430 U.S. 387 (1977), the applicable rights granted by the 6th and 14th Amendments "mean at least that a person is entitled to the help of a lawyer at or after the time that judicial proceedings have been initiated against him, whether by formal charge, preliminary hearing, indictment, information, or arraignment." After the initiation of legal proceedings, a defendant has a right to confer with counsel whenever he is questioned by an agent of the government.

The Sixth Amendment to the U.S. Constitution reads:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Given the gravity of the situation and the substantial effect on one of the Bill of Rights' most fundamental guarantees, the lawyers for the five detainees have requested an extension in the time originally afforded them to review the letter and the order sent them by Admiral Woods.

Time is a valuable commodity at this point in the proceedings, however, as [Attorney General Eric Holder announced in April](#) that the five would be arraigned before military tribunals sometime in 2012. All five face the death penalty if convicted of the charges against them.

The decision to try these defendants before a military commission rather than in a U.S. federal court



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was a disavowal of Holder's earlier statement recommending civilian trials for the suspects.

Included among the five detainees whose correspondence would be subject to inspection under the new rule is Khalid Sheik Mohammed.

Khalid Sheik Mohammed, a Kuwaiti national, is accused by the U.S. government of being a member of al-Qaeda, including running the group's propaganda machine since 1999.

According to the [report issued by the 9/11 Commission](#), Khalid Sheik Mohammed was the "principal architect of the 9/11 attacks." His alleged terrorist activities also include playing a major role in the bombing of the World Trade Center in 1993, the bombings of nightclubs in Bali, and personally beheading American journalist Daniel Pearl in 2002.

He was captured on March 1, 2003 in Pakistan and has been detained at the Guantanamo Bay facility in Cuba since September of 2006.

Mohammed, 46, was charged in 2008 by an American military commission with war crimes and murder and faces the death penalty if convicted.

The other four detainees have also been in custody at the Guantanamo facility since 2006 after having been detained (and allegedly tortured) by the Central Intelligence Agency at secret "black site" prisons located throughout the world.

Attorneys representing these high-profile detainees have repeatedly complained about policies in place at the prison. In November of 2011, for example, lawyers sent an open letter to the Deputy Secretary of Defense for Detainee Affairs decrying the regular revocation of the attorney-client privilege. The letter accused the Joint Task Force Guantanamo of opening, reading, confiscating, and analyzing letters sent between the detainees and their legal counsel. The lawyers insist that such actions are illegal.

Per the Associated Press account: "What they keep wanting to do is to have their intelligence employees promise not to tell anybody about our communications and say that's good enough," said Bryan Broyles, deputy chief defense counsel for the military commissions. "And as a matter of law it's not," he continued.

"They certainly didn't take anything we said into account," Broyles added, referring to the memo mentioned above.

In contrast to that position, the Associated Press quoted Navy Commander Tamsen Reese, spokeswoman for the Guantanamo Bay prison, as saying that Admiral Woods's order was issued in order to "strike a balance."

"He's got responsibilities. He's got to keep security and good order and force protection. And he's got to allow proper procedures for legal meetings between defense counsel and detainees and here's the way we're going to do it," the quote continues.

"The orders doesn't [sic] impede defense counsel from personally visiting or communicating with their clients, which was never the intent but some of the language may have led them to believe that that was going to be the case," added Commander Reese.

Another as yet unanswered question is whether these new rules eventually will be applied to all those imprisoned at Guantanamo Bay.

The AP quoted Broyles opining on just that issue:



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Broyles said that the defense believes that, for now, these new rules would only apply to the five prisoners who have been accused of helping to plan and carry out the Sept. 11 attacks. That's because a military judge has already rejected the creation of a similar review process in the only other active case at Guantanamo, the trial of Abd al-Rahim al-Nashiri, who is charged with orchestrating the attack on the USS Cole in 2000.

"They will have to go back to the judge to have this process in place" in the Nashiri case, Broyles said. "I think that will be an interesting conversation."

In early November, Abd al-Rahim al-Nashiri was arraigned before a military tribunal sitting at the Guantanamo Bay Naval Station in Cuba.

The U.S. government has charged al-Nashiri with war crimes related to his alleged role in the suicide bombing of the USS Cole in 2000, an attack that killed 17 sailors. The defendant is additionally charged with the bombing of a French merchant vessel in 2002, and a planned attack on the American naval warship the USS The Sullivans, also in 2000.

Despite President Obama's campaign promise to shutter the controversial prison established by his predecessor, as of the date of the writing of this report there are reportedly 171 individuals still imprisoned at the Guantanamo Bay Detention Facility.

Photo of Guantanamo: AP Images



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