

**MILITARY COMMISSIONS TRIAL JUDICIARY  
GUANTANAMO BAY, CUBA****UNITED STATES OF AMERICA**

v.

**KHALID SHAIKH MOHAMMAD;  
WALID MUHAMMAD SALIH  
MUBARAK BIN 'ATTASH; RAMZI  
BINALSHIBH; ALI ABDUL AZIZ ALI;  
MUSTAFA AHMED ADAM AL  
HAWSAWI****AE 018Y (GOV 2nd SUP)****Government's Supplement to  
Emergency Motion**for Interim Order and Clarification that the  
Commission's Order in AE 018U Does Not  
Create a Means for Non-Privileged  
Communications to Circumvent the Joint  
Task Force Mail System

11 March 2016

**1. Timeliness**

On 24 February 2016, the Commission requested that the Government supplement its motion in AE 018Y within a period that would permit a normal briefing cycle in time for oral argument during the sessions scheduled to begin on 4 April 2016. As this supplement is early enough to enable a full briefing cycle prior to 4 April, it is thus timely.

**2. Relief Sought**

The Prosecution respectfully requests that the Commission clarify to the defense teams that its Privileged Written Communications Order in AE 018U does not create a means for non-privileged communications to or from the Accused to circumvent the Joint Task Force mail system. The specific action urged of the Commission is reflected in Attachment B, which requests amendments to AE 018U. While protecting privileged communication is critical to effective representation of the Accused before this Commission, the proposed amended Privileged Written Communications Order would foreclose Defense counsel from inadvertently facilitating non-legal communications by the Accused with members of al Qaeda or affiliated terror organizations that are engaged in hostilities with the United States.

### **3. Overview**

During oral argument in February 2016 on AE 018Y (GOV)—the Government’s two-year old emergency motion for an “Interim Order and Clarification that the Commission’s Order in AE 018U Does Not Create a Means for Non-Privileged Communications to Circumvent the Joint Task Force Mail System”—the Prosecution acknowledged that the draft Interim Order it proposed in February 2014 upon filing the motion no longer reflected precisely the relief the United States now needed and sought. Unofficial/Unauthenticated Transcript (“Tr.”) at 11230-11246 (discussing AE 018Y (GOV), Attachment E—Interim Order). Although that Interim Order was appropriate emergency relief at the time in light of demonstrated instances of Defense team involvement in the dissemination of non-legal messages, subsequent developments have made amendment to AE 018U a more suitable remedy. These subsequent developments have included the interception and re-routing to JTF-GTMO by classification authorities of a “Letter to the President” from the accused Khalid Shaikh Mohammad, the issuance of a sealing order by the Military Judge with regard to this item of non-legal mail, the conferencing of a limited set of other amendments to AE 018U sought by the Defense to which the Prosecution does not object, and the request by the Chief Defense Counsel for each Accused to receive a new state-of-the-art laptop complete with video-editing software and DVD-writing capability.

Amendment of AE 018U is necessary to close a seam that stems from Defense counsels’ demonstrated belief that they are proper couriers of non-legal messages from the Accused to persons and organizations not on the Defense teams. Amendment is also necessary to clarify that classification review does not exhaust the United States government’s legitimate interest in reviewing, and limiting, non-legal communications from captive unprivileged belligerents being detained under the law of war.

### **4. Burden of Proof**

As the moving party, the Government bears the burden of demonstrating by a preponderance of the evidence that the requested relief is warranted. R.M.C. 905(c). Because part of the justification for the Government’s requested amendments is the protection of

classified information that may be known by the Accused, this motion relies in part upon the Commission's authority to issue protective orders. *See* M.C.R.E. 505(e) ("Upon motion of the trial counsel, the military judge shall issue an order to protect against the disclosure of any classified information that has been disclosed by the United States to any accused or counsel, regardless of the means by which the accused or counsel obtained the classified information, in any military commission under chapter 47A of title 10, United States Code, or that has otherwise been provided to, or obtained by, any such accused in any such military commission.").

Also, because "courts must defer to the judgment of detention officials unless the record contains substantial evidence showing their policies are an unnecessary or unjustified response to problems of jail security," *Florence v. Bd. of Chosen Freeholders*, 132 S.Ct. 1510, 1513-1514 (2012); *see Hatim v. Obama*, 760 F.3d 54, 60 (D.C. Cir. 2014) (applying the Supreme Court's test in *Turner* and holding that challenges to prison administration require the prisoner to disprove the validity of the prison regulation), the burden is on the Defense to show that the non-legal mail policy of JTF-GTMO must be surmounted by a Commission order protecting privileged communications. Thus, amendments should be adopted to ensure that the Commission is not vitiating the pre-existing framework of non-legal mail regulation *unless* there is substantial evidence that the amendments are unnecessary. This burden the Defense cannot meet.

## 5. Facts

The essential facts are all undisputed. The Accused are detained under the law of armed conflict in a Department of Defense detention facility. The United States is in a state of hostilities with al Qaeda and associated forces.

The Accused have the right to challenge the lawfulness of their detention under the law of armed conflict. They also have the right, in these proceedings—through an up-front evidentiary pre-trial hearing—to challenge their status as unprivileged enemy belligerents. The Accused are all charged with crimes codified in the Military Commissions Act of 2009.

The Military Judge, presently constituting the Commission convened to try those charges, has issued an order relative to privileged written communications applicable to the cases against the five co-Accused. *See* AE 018U. In the ruling accompanying that Privileged Written Communications Order, the Military Judge notes that it is intended to “strike[] an appropriate balance between JTF-GTMO’s security concerns and the necessary protection of privileged communication critical to the attorney-client relationship.” AE 018T/AE 032PP/AE 049B/AE 144W at ¶ 11.

The Commission’s Privileged Written Communications Order itself draws a line between lawyer-client privileged communications and other case-related material on the one hand and non-legal mail and material on the other. It further defines the former—lawyer-client privileged communications and other case-related material—as information that is “directly related to the Military Commission proceeding involving the Accused,” AE 018U at ¶ 2.1.4., and protects such privileged or directly case-related information from being prohibited coming into or going out of the detention facility or from being freely subject to search or inspection by government personnel.

No further fact-finding concerning the four incidents described in AE 018Y and AE 371 (Mohammad) is necessary, as Defense counsels’ averments in their pleadings fully acknowledge precisely the point of the Government’s requested relief. It is undisputed that an International Committee of the Red Cross (“ICRC”) message, dated 11 October 2013, from Khalid Shaikh Mohammad’s wife to the Accused included the statement, “The letters you sent through attorneys as an experiment have reached us.” AE 018Y (GOV), Attachment C. Defense counsel have not stated in so many words that they formed part of the chain through which non-case-related letters addressed to the Accused’s wife and others were conveyed to the recipients overseas in 2013; nor have they denied it. Rather, they explain a need to “pursue[] an alternative to the normal process of submitting ICRC letters” that are conveyed through JTF-GTMO and that such an alternative was pursued “so the defense could deliver the letters to the family members to whom the respective letters were addressed.” AE 018FF (Mohammad) at 10.

It is undisputed that a non-legal letter from the accused Khalid Shaikh Mohammad reached United Kingdom citizen and resident Rory Green, as reported in the media in January 2014. AE 018Y, Attachment K; AE 018FF (Mohammad), Attachment G. Again, Defense counsel have not stated in so many words that they formed part of the chain through which this non-case-related letter was conveyed to the recipient; nor have they denied it. Rather, they include what is presumably the 29-page typed document in their response to the Prosecution's motion, explaining that their client's "letter to Mr. Green was submitted for review to the Chief Security Officer, Office of Special Security, WHS who in turn submitted it for review to an appropriate Original Classification Authority," a process followed by Defense counsel to declassify communications from their clients so they no longer need to treat those communications as classified. AE 018FF (Mohammad) at 12.

It is undisputed that a few days later in January 2014, a 36-page unprivileged "Statement to the Crusaders of the Military Commissions in Guantanamo" was published by the *Huffington Post*. Copies of the same document had been delivered about four weeks earlier by Defense counsel for the accused Khalid Shaikh Mohammad to, as Defense counsel describe it, "various personnel within the Military Commissions, including prosecutors, personnel representing other defendants, and personnel associated with the Office of Military Commissions." AE 018FF (Mohammad) at 11. The two copies given to the Prosecution on 20 December were not distributed and have been stored as evidence. The Prosecution acknowledges that confusion in government ranks—over what certain provisions of the Privileged Written Communications Order require and over how those provisions are to be squared with JTF-GTMO's non-legal mail policy—appears to have contributed to Defense counsels' circumvention of the latter in the aforementioned instances in 2013 and 2014.

It is undisputed that on 3 September 2015, a so-called "Letter to the President" from the Accused, consisting of 71 pages, was attached to a motion—Appellate Exhibit 371 (Mohammad)—filed by Defense counsel for the Accused in an email addressed to at least 97 recipients, including all members of all Defense teams. Defense counsel freely acknowledge that

months earlier they “attempted to deliver the letter to the Joint Task Force-Guantanamo, for review and transmittal” and “[a]t that time, a . . . representative, accompanied by an Assistant Staff Judge Advocate, . . . refused to accept the letter.” AE 371 (Mohammad) at 3. They also acknowledge that the Defense Information Security Officer for the accused Khalid Shaikh Mohammad’s Defense team submitted the letter to classification authorities for review and that while certain original classification authorities found “they had no equities in the information,” the Department of Defense had determined that the letter was non-legal mail and that it needed to be screened by JTF-GTMO in accordance with JTF-GTMO SOP,” a classification review . . . not replac[ing] this requirement.” AE 371 (Mohammad) at 3-4. This is the document the Military Commission has sealed. *See* AE 371B.

It is undisputed that during oral argument on AE 018Y in February, counsel for the accused Ali Abdul Aziz Ali appeared to maintain that he was authorized by AE 018U and the Commission’s Protective Order #1 to receive messages from his client, transport them out of Guantanamo Bay as lawyer-client privileged communications, decide at some point that it was in the client’s interest to partially or wholly waive privilege as to the communications, and deliver the messages to nongovernmental organizations and other personnel outside of the military commissions process without routing them through the JTF-GTMO non-legal mail process. This is reflected in the slide entitled “Current Privilege Architecture,” which was presented as the fourth in a slide package of twelve by Mr. Connell, and which depicts a green arrow denoting permissible delivery to a category labeled in the slide as “UN/NGO/Non-Profit.” *See* Attachment C.

And it is undisputed that the Chief Defense Counsel seeks to replace the current laptops—purchased for the Accused in 2008 to provide each, then-*pro se*, defendant, “reasonable access to materials necessary for the preparation of the defense,” *see* Commission Ruling D-035 (6 October 2008)—with new, state-of-the-art laptops. While the Government opposes such an unprecedented provision of capabilities, the requested features prominently include hardware and software intended for video and photo-editing by the Accused detainees. *See*

*generally* Attachment D. For instance, the Chief Defense Counsel relays complaints that the existing laptops “lack modern performance for effective video and photo editing,” notes that “[m]odern video editing software recommends 8GB of RAM, [whereas] the clients laptop has 2GB of RAM,” and instructs that “[m]odern video editing software recommends a dual-core or quad-core processors, [whereas] the clients laptop has a single core.” *Id.* On these grounds, the Chief Defense Counsel requests laptops with specifications that include “15[-inch] or greater screens,” “500+ GB Hard Drive,” “[s]ufficient amount of CPU and Memory to run Photoshop and video editing software (at least 8GB RAM or better),” “Blu-Ray Player/DVD writer/CD-RW,” “Intel I7 Processor,” “some version of Adobe Photoshop and some movie making capability,” and “2 external 4GB hard drives . . . with USB ports enabled to plug them into.” *Id.*

It is also subject to judicial notice as “not subject to reasonable dispute,” in that it is “capable of accurate and ready determination by resort to source whose accuracy cannot reasonable be questioned,” M.C.R.E. 201, that solidarity with the blind and imprisoned Shaikh Omar Abdul Rahman was a central theme of al Qaeda indoctrination in the years prior to September 11, 2001. Similarly, it is a fact worthy of judicial notice in these proceedings that the 2008 military commission trial of al Qaeda officer Ali al Bahlul yielded testimony and documents of record establishing Mr. al Bahlul’s sophisticated and self-trained use of nonlinear video-editing software to produce the so-called “Destruction of the American Destroyer USS Cole,” a major recruitment video by al Qaeda in the months leading up to the attacks on the World Trade Center and the Pentagon. *See* AE 182L (GOV), Attachment F (certifying 11 documents from the *United States v. Ali Hamza Ahmad Suliman al Bahlul* record of trial pertaining to Mr. Rahman and to the mastery and use of Adobe Premiere by Mr. al Bahlul).

And of particular import to the instant case, and as alleged in the Charge Sheet, evidence at trial will establish that several of the Accused in this case also worked for or ran al Qaeda’s Media Committee and were responsible for the production of feature-length films that were widely disseminated throughout the Muslim world to recruit additional fighters to al Qaeda’s war against the United States. *See* Charge I, Overt Acts 81, 85, 163, 165.

## 6. Law and Argument

In its ruling accompanying the Privileged Written Communications Order (AE 018U), the Military Commission identified the correct standard: whether there is a “valid, rational connection” between the order and the “legitimate government interest” of protecting both national security and the safety of guards and other personnel who are assigned to work in the detention facility. AE 018T/AE 032PP/AE 049B/AE 144W at 4 (citing *Turner v. Safley*, 482 U.S. 78 (1987)). The Commission applied this standard to its own order, AE 018U. But this standard also applies to the non-legal mail policy of JTF-GTMO.

There clearly is such a valid, rational connection between the non-legal mail policy of the Joint Task Force and a legitimate government interest. There is a legitimate government interest in restricting the dissemination or delivery of messages not directly related to a legal case by someone who is properly detained as an enemy belligerent. That al Qaeda cloaks its membership by renouncing distinctions in the law of armed conflict between combatants and noncombatants and by wearing civilian clothing only heightens that legitimate interest. The Joint Task Force policy reasonably protects this legitimate interest, limiting non-legal mail to two letters and four postcards to a detainee’s family per month, on forms provide by the ICRC. *See* AE 018Y (GOV), Attachment B at 41-3 – 41-5. It is a valid and rational thing to screen the mail of enemy captives, and this Commission should defer to JTF-GTMO using the standard announced again and again by courts in domestic corrections situations, which are less compelling than the situation in this case with these particular five Accused.

Courts have long recognized that “once the Government has exercised its conceded authority to detain a person pending trial, it obviously is entitled to employ devices that are calculated to effectuate this detention.” *Bell v. Wolfish*, 441 U.S. 520, 537 (1979). Since the government has “legitimate interests that stem from its need to manage the facility in which the individual is detained,” such as “maintaining security and order at the institution, . . . restraints that are reasonably related to the institution’s interest in maintaining [jail] security do not, without more, constitute unconstitutional punishment.” *Id.* at 540.



However, the Supreme Court has recognized that “[r]unning a prison is an inordinately difficult undertaking that requires expertise, planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government.” *Turner*, 482 U.S. at 83. As such, “[t]he inquiry of federal courts into prison management must be limited to the issue of whether a particular system violates any prohibition of the Constitution or, in the case of a federal prison, a statute. The wide range of ‘judgment calls’ that meet constitutional and statutory requirements are confided to officials outside of the Judicial Branch of Government.” *Bell*, 441 U.S. at 562.

Not only does Supreme Court precedent in this area demand judicial deference, it discourages a standard of heightened judicial scrutiny for detention operations, for fear that, “every administrative judgment would be subject to the possibility that some court somewhere would conclude that it had a less restrictive way of solving the problem at hand.” *Thornburgh v. Abbott*, 490 U.S. 401, 411 (1989). Furthermore, the Supreme Court has stated that “courts must defer to the judgment of correctional officials unless the record contains substantial evidence showing their policies are an unnecessary or unjustified response to problems of jail security.” *Florence*, 132 S.Ct. at 1513-1514; *see Hatim*, 760 F.3d at 60 (applying the Supreme Court’s test in *Turner* and holding that challenges to prison administration require the prisoner to disprove the validity of the prison regulation).

Moreover the burden is on the Accused, who are challenging the pre-existing JTF-GTMO policy to show that the policy is unreasonable. *Overton v. Bazzetta*, 539 U.S. 126, 132 (2003) (“The burden, moreover, is not on the State to prove the validity of prison regulations, but on the prisoner to disprove it.”); *O’Lone v. Estate of Shabazz*, 482 U.S. 342, 350 (1987) (observing that the court of appeals failed to give appropriate deference to prison authorities when it “plac[ed] the burden on prison officials to disprove the availability of alternatives”).

In light of these authorities, and of the facts recounted in Part 5 of this brief *supra*, the amendments to the Privileged Written Communications Order reflected in Attachment B should be promptly issued by the Commission. This is because the present version of the Order has

been shown to be inadequate, including through the interception and re-routing to JTF-GTMO by classification authorities of a “Letter to the President” from the accused Khalid Shaikh Mohammad, through Defense counsels’ claims that they are proper couriers of non-legal messages from the Accused to persons and organizations not on the Defense teams, and through the Chief Defense Counsel’s request that each Accused receive a new state-of-the-art laptop, complete with video-editing software and a DVD-writer, capable of exponentially increasing the risk that a sophisticated message to co-belligerents could be rapidly disseminated via electronic means. Amendment of AE 018U is necessary to close this seam. Amendment is also necessary to clarify that classification review does not exhaust the United States government’s legitimate interest in reviewing, and limiting, non-legal communications from captive unprivileged belligerents being detained under the law of war.

Attachment B reflects amendments intended to reinforce the handling of non-legal mail by the JTF-GTMO system. In the event that communications from a detainee bypass JTF-GTMO content review under a Defense counsel’s claim of privilege, are removed from Guantanamo Bay under such claim, and then are intended/selected by Defense counsel or the Accused for transmission to any person, entity, or party other than defense personnel as that term is defined in AE 018U—thus partially or wholly waiving privilege—Defense counsel are required to ensure that these materials are routed back through the JTF-GTMO non-legal mail system. *See* Attachment B, definition 2.h., as well as conforming amendments at paragraphs 3.f.(3) and 12. Also in the proposed order at Attachment B are a limited set of other amendments to AE 018U sought by the Defense to which the Prosecution does not object (indicated both with “track changes” and with yellow highlighting).

## **7. Conclusion**

The Commission should deny Defense requests for witnesses and should promptly grant the Motion by signing the Order at Attachment B. The amendments in the order are necessary to

prevent it from vitiating the background framework of regulation by which the JTF-GTMO appropriately limits the non-legal communications of enemy belligerents.

**8. Oral Argument**

The Prosecution objects to oral argument under Rule of Court 3.9 because the Commission need not resolve any issues of fact to resolve the Motion. If the Commission nonetheless grants oral argument to the Defense, the Prosecution reserves the opportunity to be heard.

**9. Witnesses and Evidence**

The Prosecution relies on the facts averred *supra* in Part 5 of this brief and requests the Commission take judicial notice of the items in AE 182L (GOV), Attachment F.

**10. Additional Information**

The Prosecution offers no additional information at this time.

**11. Attachments**

- A. Certificate of Service, dated 11 March 2016.
- B. Amendments to AE 018U, Privileged Written Communications Order (Redline).
- C. Slide from Presentation During Defense Oral Argument on AE 018Y.
- D. February 24, 2016 Email from Chief Defense Counsel Re Laptop Request.
- E. Proposed Draft Order

Respectfully submitted,

                    //s//

Clay Trivett  
Managing Trial Counsel

Mark Martins  
Chief Prosecutor  
Military Commissions

# ATTACHMENT A

**CERTIFICATE OF SERVICE**

I certify that on the 11<sup>th</sup> day of March 2016, I filed **AE 18Y (GOV 2nd SUP) Government's Second Supplement** to Emergency Motion for Interim Order and Clarification that the Commission's Order in AE 018U Does Not Create a Means for Non-Privileged Communications to Circumvent the Joint Task Force Mail System with the Office of Military Commissions Trial Judiciary and I served a copy on counsel of record.

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*//s//*  
Clay Trivett  
Managing Trial Counsel  
Office of the Chief Prosecutor  
Office of Military Commissions

# ATTACHMENT B

## MILITARY COMMISSIONS TRIAL JUDICIARY

<b>UNITED STATES OF AMERICA</b>  <b>v.</b>  <b>KHALID SHAIKH MOHAMMAD,  WALID MUHAMMAD SALIH  MUBARAK BIN ATTASH,  RAMZI BINALSHIBH,  ALI ABDUL AZIZ ALI,  MUSTAFA AHMED ADAM AL  HAWSAWI</b>	<b>AE018U <u>AMENDED</u>  ORDER</b>  <b>Privileged Written Communications</b>  __ March 2016
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1. The Accused in *United States v. Khalid Shaikh Mohammad, Walid Muhammad Salih Mubarak Bin 'Attash, Ramzi Binalshibh, Ali Abdul Aziz Ali, and Mustafa Ahmed Adam al Hawsawi* were arraigned on 5 May 2012. As such, this Order only applies to these cases.

## 2. Definitions

a. **Accused:** Khalid Shaikh Mohammad, Walid Muhammad Salih Bin Attash, Ramzi Binalshibh, Ali Abdul Aziz Ali, and Mustafa Ahmed Adam al Hawsawi.

b. **Defense Counsel:** Only those attorneys designated by the Accused, on the record, as counsel.

c. **Defense Personnel:** Includes co-counsel, interpreters, translators, paralegals, investigators, experts, consultants, and all other personnel or support staff authorized and engaged in, or employed to assist in the defense of the Accused, pursuant to the authority found in the Manual for Military Commissions and the Regulation for Trial by Military Commission.

d. **United States Government (USG) personnel:** Refers to any person employed by or affiliated with the United States other than counsel of record for the Accused or their representatives. The term includes, but is not limited to, persons acting at the direction of or with the knowledge of any agency of the United States and Joint Task Force Guantanamo.

e. Military Commission Privilege Review Team (Privilege Team):

(1) A team consisting of one or more Department of Defense (DoD) attorneys and one or more intelligence or law enforcement personnel who have not taken part in, and, in the future, shall not take part in, a military commission, a Combatant Status Review Tribunal, Administrative Review Board, Periodic Review Board, or habeas corpus proceedings involving the Accused (other than acting as a Privilege Team member for the habeas corpus or other proceedings).

(2) All members of the Privilege Team will be bound by a non-disclosure agreement to preserve the lawyer-client and other related legally-recognized privileges to the fullest extent possible in a manner consistent with this Order.

(3) If required, the Military Commission Privilege Team may include interpreters and translators, provided that such personnel meet these same criteria.

f. Lawyer-Client Privileged Communications:

(1) Communications that are privileged within the meaning of M.C.R.E. 502, which may include original handwritten or typewritten correspondence between the Accused and his Defense Counsel bearing the signature of the Defense Counsel (or a representative of the Defense Counsel encompassed by M.C.R.E. 502).

(2) Attorney Work Product is encompassed within Lawyer-Client Privileged Communications.

g. Other Case-Related Material:

(1) Communications between a Defense Counsel and the Accused that relate to the Accused's military commission but are not privileged within the meaning of M.C.R.E. 502. This includes discovery and related material that is releasable to the Accused, and records of commission proceedings, including court filings when releasable to the Accused.



(2) Documents initially identified as Other Case-Related Material that are subsequently incorporated by Defense Counsel or the Accused into work product or lawyer- client communications or that are aggregated to support a particular communication or reflect the lawyer's mental impressions or strategy may become Lawyer-Client Privileged Communications under M.C.R.E. 502. If such material is already in the possession of the Accused, JTF-GTMO personnel are not responsible for retrieving documents previously submitted as "Other Case- Related Material" or re-marking them in conformity with paragraph 5.b. below

h. Military Commissions Non-Legal Mail and Material: All correspondence documents, media in any form, or similar material that do not fall within paragraphs 1.f or 1.g. above. In the event that communications from a detainee bypass JTF-GTMO content review under a defense counsel's claim of privilege, are removed from Guantanamo Bay under such claim, and then are intended/selected by defense counsel or the accused for transmission to any person, entity, or party other than defense personnel as that term is defined above—thus partially or wholly waiving privilege—defense counsel are required to ensure that these materials are routed back through the JTF-GTMO non-legal mail system. See paragraphs 3.f(3) and 12 below.

i. Contraband:

(1) Any physical item or prohibited information the Commander, JTF-GTMO, or his designee, has deemed to be impermissible or inappropriate for an Accused Detainee to transmit, possess, be informed of (orally or in writing) or view, subject to the exception in paragraph 1.i.(4), below, or any physical item ~~which~~ whose receipt/transmission by the Accused is prohibited ~~from transmission to the Accused~~ without prior authorization by Commander, JTF-GTMO, or his designee. This includes material that, if transmitted outside or introduced into the detention facility, reasonably could be

expected to result in immediate and substantial harm to the national security, imminent acts of violence, future events that threaten national security, or present a threat to the operation of the detention facilities or to U.S. Government personnel. This material may exist in any form, including correspondence, documents, electronic media, or similar material.

(2) Contraband includes Physical Contraband, as that term is defined in paragraph 1.j., below.

(3) Examples of prohibited information include:

(a) 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;

(b) Current political or military events in any country, historical perspectives or discussions on jihadist activities, including information generated or distributed by or on behalf of foreign terrorist organizations, individuals or groups engaged in terrorist activities.

(c) Information about security procedures or changes to security procedures at JTF-GTMO or the U.S. Naval Station at Guantanamo Bay or information about the physical layout of the detention facilities;

(d) Information about the operation of or changes to the detention facility;

(e) Information about present and former detention personnel or other U.S. Government personnel (including their names, locations or assignment history); and,

(f) Information regarding the status of other Detainees (including former Detainees) at Guantanamo and information regarding any detention of Detainees;

and classified, Controlled Unclassified Information or Sensitive but Unclassified Information that has not been approved by the Government for release to the Accused.

(g) Communications to members of al Qaeda, associated forces, or other persons or entities engaged in hostilities against the United States or a coalition partner.

(4) Notwithstanding sub-paragraphs 1(i)(1)-(3), above, no information shall be considered Contraband if defense counsel reasonably believes it is directly related to the Military Commission proceeding involving the Accused. Even if considered not to be contraband by defense counsel, non-legal mail is to be routed through the JTF-GTMO process for non-legal mail. See paragraphs 3.f(3) and 12 below.

j. Physical Contraband: Consists of paper fasteners (including staples, paper clips, and binder clips), money, stamps, cigarettes, weapons, chemicals, drugs, writing instruments, items of value and material that may be used in an escape attempt, or that present a threat to the operation of the detention facilities or to U.S. Government personnel. "Physical Contraband" does not include written communications.

### **3. Defense Counsel Handling and Marking of Communications with the Accused**

a. Because of the potential for harm posed by the transmission or introduction of contraband out of/into the detention facility, Defense Counsel shall not include contraband in Non-Legal Mail and Material or in Lawyer-Client Privileged Communications or Other Case-Related Material, subject to paragraph 1.i.(4), above.

(1) If Defense Counsel believes contraband must be received from or presented to the Accused, ~~that may~~ or does constitute prohibited information, where such material is directly related to the Military Commission involving that Accused, and if necessary to the preparation of the defense, Defense Counsel may submit such matters *ex parte* to the Military Judge together with an explanation of why the material must be

received from or provided to the Accused.

(2) If the Military Judge approves the Defense Counsel's request, the Military Judge shall notify the JTF-GTMO Commander of the Commission's ruling so that special handling procedures can be instituted as appropriate. The Defense must then also provide notice to the JTF-GTMO Commander, or his designee, of what material it seeks to provide to the Accused, though it need not disclose its explanation to the JTF-GTMO Commander of why that material must be provided to the Accused.

b. When sending material to the Accused or bringing such material to a meeting with the Accused, Defense Counsel shall separate Lawyer-Client Privileged Communications, Other Case Related Material, and Non-Legal Mail and Material.

c. Defense Counsel shall ensure all communications with the Accused are marked with appropriate classification markings, including banner and portion markings. Unclassified communications shall be banner marked but do not require portion marking.

d. Lawyer-Client Privileged Communications

(1) Each page of incoming material shall include Defense Counsel's initials or signature on the top right corner, as well as the name and Internment Serial Number of the accused. The top and bottom of each page shall also be marked as "LAWYER-CLIENT PRIVILEGED COMMUNICATION UNDER M.C.R.E. 502."

(2) Defense Counsel shall include an identically marked cover sheet indicating the number of attached pages and a signed attestation by the Defense Counsel the attached communication is privileged from disclosure under M.C.R.E. 502 and, to the best of his knowledge and belief, the attached communication does not contain Contraband, Classified, Controlled Unclassified Information, or Sensitive but Unclassified Information the intended recipient of the communication is not authorized to receive under M.C.R.E. 505, the Military Commissions Act, and the laws, orders, directives and

regulations governing classified, Controlled Unclassified Information, or Sensitive but Unclassified Information, including any protective orders in the case.

e. Other Case-Related Material

(1) Each page of incoming material shall include Defense Counsel's initials or signature on the top right corner, as well as the name and Internment Serial Number of the Accused. The top and bottom of each page shall also be marked as "OTHER CASE-RELATED MATERIAL." To the extent the incoming material is a commercially-bound book, only the first page need be marked, consistent with the above.

(2) Discovery Material. In addition to the markings described in paragraph 3.d, above, before being provided to the Accused by a Defense Counsel, material provided by the Prosecution in discovery must be marked by the Prosecution in a manner that makes clear the material has been approved for release to the Accused. The specific language for these markings shall be determined by the Prosecution and placed on each page of the document as part of the discovery process. The Prosecution shall provide a list of the approved markings to Defense Counsel, the Military Judge, the Privilege Team, and JTF-GTMO personnel. If requested to do so by the Defense Counsel or ordered to do so by the Military Judge, the Prosecution will provide a duplicate copy of paper discovery materials releasable to the Accused directly to the Privilege Team for delivery to the Accused.

~~(3) Records Relating to Military Commission Proceedings. In addition to the markings described in paragraph 3.d., above, before being provided to the Accused by a Defense Counsel, filings and other materials from Military Commission proceedings must be marked by the Prosecution as appropriate for public release or release to the Accused. The specific language for these markings shall be determined by the Prosecution and placed on each page of the document when these documents are processed. The~~

~~Prosecution shall provide a list of the approved markings to Defense Counsel, the Military Judge, the Privilege Team, and JTF GTMO personnel.~~

(34) Other Material. If the Other Case-Related Material was not discovery provided by the Prosecution or a record from a Military Commission proceeding, Defense Counsel shall include an identically marked cover sheet indicating the number of attached pages and an attestation signed by Defense Counsel stating the attached communication is related to the case and, to the best of his knowledge and belief, the material does not contain Contraband, -Classified, Controlled Unclassified Information, or Sensitive but Unclassified Information, the intended recipient of the communication is not authorized to receive under M.C.R.E. 505, the Military Commissions Act, and the laws, orders, directives and regulations governing Classified, Controlled Unclassified Information, or Sensitive but Unclassified Information, including any protective orders in the case.

f. Military Commissions Non-Legal Mail and Material

(1) Each page of incoming material shall include Defense Counsel's initials or signature on the top right corner, as well as the name and Internment Serial Number of the Accused. The top and bottom of each page shall also be marked as "MILITARY COMMISSION NON-LEGAL MAIL AND MATERIAL."

(2) Defense counsel shall send Non-Legal Mail and Material to the Accused through the United States Postal Service. It shall be reviewed by government personnel at JTF- GTMO under the Standard Operating Procedures for Detainee Non-Legal Mail. However, in extraordinary circumstances, if a Defense Counsel requires delivery of such material to the Accused in an expedited manner, Defense Counsel can submit a request for expedited processing to JTF-GTMO via the Privilege Team. In the request, Defense Counsel shall state the requested delivery date for the material and an explanation for why expedited processing is required. The Privilege Team shall deliver Defense Counsel's request and the

Non-Legal Mail and Material to personnel at JTF-GTMO. If the request is granted, this material shall, to the maximum extent possible, be given expedited priority by JTF-GTMO.

(3) During some meetings with the Accused, a Defense Counsel may receive Non-Legal Mail or Material from the Accused which requires expedited processing for reasons related to the military commission proceedings. For example, the Accused may provide the Defense Counsel with a letter of introduction for the Defense Counsel to use when meeting with a witness. In such instances, the Defense Counsel can submit a request for expedited processing to JTFGTMO via the Privilege Team. In the request, Defense Counsel shall state the date by which processing is required and an explanation for why expedited processing is required. The Privilege Team shall deliver the Defense Counsel's request and the Non-Legal Mail and Material to personnel at JTF-GTMO. If the request is granted, this material shall, to the maximum extent possible, be given expedited priority by JTF-GTMO. This subparagraph, definition 2.h above, and paragraph 12 below are intended to reinforce, not vitiate, JTF-GTMO's processing for non-legal communications that are incoming to or outgoing from a detainee or are otherwise stored or handled.

#### **4. General Obligations of Military Commission Privilege Review Team (Privilege Team)**

a. To the fullest extent possible and consistent with the terms of this Order, the Privilege Team must preserve the lawyer-client and other related legally-recognized privileges. Members of the Privilege Team shall not disclose to any person any information provided by the Accused or Defense Counsel, except as provided in this Order.

b. All members of the Privilege Team will execute a non-disclosure agreement to preserve the lawyer-client and other related legally-recognized privileges to the fullest extent

possible in a manner consistent with this Order. Non-disclosure agreements will be provided to the designated Court Security Officer.

c. The Privilege Team may not consult with security and intelligence experts regarding potential Contraband or other unauthorized information the Privilege Team becomes aware of when executing its responsibilities under this Order without first notifying the Defense. Defense will be given an opportunity to address the issue with the Privilege Team. If the issue is not resolved, either the Defense or the Privilege Team may raise the issue to the Military Judge. Only after resolution by Defense and the Privilege Team or by the Military Judge, may the Privilege Team consult with security and intelligence experts regarding potential contraband. In extraordinary circumstances, the Privilege Team may contact the Military Judge *ex parte*, without notice to either side, to address concerns. Contact with the Military Judge will be made through the Trial Judiciary staff.

d. The Privilege Team shall maintain a log, which contains general information about its processing of material under this Order (such as the number of pages, date of review, etc., but *not* including details about the content of the documents), as well as information about Contraband or other unauthorized material that was placed into the mail or meeting process by Defense Counsel or defense personnel. This log and information shall be kept in a secure location, and shall not be disclosed to any person except as provided in this Order or as necessary to address these issues with competent authorities, to include the Chief Defense Counsel. Whenever possible, the Privilege Team shall advise the involved Defense Counsel in advance before disclosing this information.

e. After receiving permission from the Military Judge, the Privilege Team shall report to the JTF GTMO Commander any information that reasonably could be expected to result in immediate and substantial harm to national security, imminent acts of



violence, or future events that threaten national security or present a threat to the operation of the detention facilities or to U.S. Government personnel. In his discretion, the Commander, JTF-GTMO, may disseminate the relevant portions of the information to law enforcement, military, and intelligence officials, as appropriate.

f. This Order does not authorize the Privilege Team to conduct a classification review of any document encompassed within the provisions of this Order.

#### **5. Material from Defense Counsel to the Accused ("Incoming Material")**

a. After completing the requirements under paragraph 3, above, Defense Counsel may either deliver Incoming Materials (including Lawyer-Client Privileged Communications, Other Case-Related Material, and requests for expedited Non-Legal Mail and Material) addressed to his client, to the Privilege Team at JTF-GTMO, or mail them to an address for the Privilege Team in the Washington, D.C. area that shall be provided by the government.

b. Defense counsel shall seal the Lawyer-Client Privileged Communications, Other Case Related Material, and Non-Legal Mail and Material in separate envelopes. Defense Counsel shall clearly mark the outside of an envelope containing the material with an appropriate annotation depending on the category of material:

<b>LAWYER-CLIENT PRIVILEGED COMMUNICATION UNDER M.C.R.E. 502 - FOR DELIVERY TO DETAINEE</b>
---

<b>MILITARY COMMISSION OTHER CASE RELATED MATERIAL - FOR DELIVERY TO DETAINEE.</b>
--

<b>MILITARY COMMISSION NON-LEGAL MAIL OR MATERIAL - FOR DELIVERY TO DETAINEE</b>
--

c. Each envelope shall also include the Accused's name and Internment Serial Number and the Defense Counsel's name and return address and the classification level of

any information contained within it. Envelopes received by the Privilege Team that are not properly marked shall be returned to Defense Counsel unopened.

d. Incoming material shall not include Physical Contraband (including paper fasteners, staples, paperclips, and binder clips) or other Contraband.

e. Prior to placing the material into the envelope, Defense Counsel shall ensure each page of Incoming Material is marked in accordance with paragraphs 3.d.(1) or 3.e.(1), above.

f. The Privilege Team shall open the envelopes to inspect the contents for Physical Contraband and to verify that each page of the material includes the markings required by paragraph 3.d.(1) or 3.e.(1), above. Defense Counsel or his representative may be present during this inspection. This inspection shall not include a review of the substantive content of the incoming material privileged under M.C.R.E. 502.

(1) Physical Contraband shall be removed from the envelopes and shall not be processed for delivery to the Accused.

(2) If, in inspecting under paragraph 5.f, above, the Privilege Team observes in plain view material that is not correctly marked as required by paragraph 3, above, that material shall not be processed for delivery to the Accused. This incorrectly marked material can include:

(a) General interest magazines, print media, or third party communications that are marked as Lawyer-Client Privileged Communications,

(b) Classified information, Controlled Unclassified Information, or Sensitive but Unclassified Information whose markings indicate it is not approved for release to the Accused.

g. The Privilege Team shall consult with Defense Counsel regarding the material described in paragraph 5.f, above, in an effort to address the apparent problem(s).

(1) If the discussions resolve the apparent problem, the material shall be processed for delivery to the Accused.

(2) If the discussions do not resolve the problem and if the material does not implicate the concerns articulated above, the material shall be returned to Defense Counsel by the Privilege Team, with a written explanation regarding why it was not processed for delivery to the Accused.

(3) If the discussions do not resolve the apparent problem and if the material does implicate the concerns articulated above, the material shall not be returned to Defense Counsel by the Privilege Team, and the Privilege Team shall provide a written explanation regarding why it was not processed for delivery to the Accused.

h. Following the inspection, the Privilege Team shall annotate each page of the material with the Internment Serial Number of the Accused, a code indicating which Privilege Team member conducted the inspection, and a standardized marking that indicates the Privilege Team has processed the material in accordance with this Order.

i. The processing by the Privilege Team shall generally be completed within five (5) working days of the Privilege Team's receipt of this material.

j. The Privilege Team shall seal the processed material in separate envelopes, in the presence of Defense Counsel or its representative if requested, marked as:

<p><b>LAWYER-CLIENT PRIVILEGED COMMUNICATION UNDER M.C.R.E. 502</b> <b>-- APPROVED FOR DELIVERY TO DETAINEE</b></p>
---

<p><b>OTHER CASE RELATED MATERIAL</b> <b>-- APPROVED FOR DELIVERY TO DETAINEE</b></p>
---

<p><b>REQUEST FOR EXPEDITED NON-LEGAL MAIL OR MATERIAL FOR</b> <b>DELIVERY TO JTF-GTMO STAFF JUDGE ADVOCATE</b></p>
---

k. The sealed envelopes for Lawyer-Client Privileged Communications and Other

Case Related Material shall clearly indicate the identity of the Accused to who the envelopes are to be delivered and, based on the markings found on the documents, the classification level of the documents contained within it.

l. The sealed envelopes containing Lawyer-Client Privileged Communications, Other Case-Related Material, and Requests for Expedited Non-Legal Mail may be returned to the Defense Counsel or defense personnel for transmission to JTF-GTMO in a manner consistent with the classification level of the information. If requested by Defense Counsel, the Privilege Team shall place this material on the next mail courier run to JTF-GTMO.

m. If Defense Counsel desires confirmation that the documents were delivered to the Accused, Defense Counsel shall provide a self-addressed envelope for that purpose. The Accused shall be responsible for mailing any confirmation of delivery to Defense Counsel. This method shall be the sole and exclusive means by which confirmation of delivery is provided to Defense Counsel.

**6. Material Sent from the Accused to Defense Counsel ("Outgoing Material")**

a. Detainees shall be provided by JTF-GTMO with paper and a writing utensil to prepare written communications to Defense Counsel. Access to such items may be limited or restricted because of the Accused's disciplinary and/or medical status, although the Accused's disciplinary status shall not be a basis for denying all access to such items.

b. In the presence of JTF-GTMO staff, the Accused shall seal the written communication in an envelope that shall be annotated as "LAWYER-CLIENT MATERIAL--FOR DELIVERY TO DEFENSE COUNSEL." Each envelope shall be dated and labeled with the name and Internment Serial Number of the Accused and the name of Defense Counsel. It shall be marked and secured as TS/SCI pending review by Defense Counsel or other authority for a classification determination. The sealed envelope

shall be placed in a courier bag which shall then be locked and provided to the Privilege Team.

c. The Privilege Team shall store all Outgoing Material in a safe location in the secure area at JTF-GTMO in a manner designed to protect any classified material and lawyer-client and related privileges until properly transferred to an authorized courier for delivery to the Defense Counsel.

#### **7. Material Brought by Defense Counsel into a Meeting with the Accused**

a. Defense Counsel and defense personnel may only bring into a meeting with the Accused material which meets the requirements for Incoming Mail in paragraph 5, above, and that has been previously inspected and processed by the Privilege Team. This material shall be submitted to the Privilege Team with sufficient time for such inspection to be conducted and for the material to be sent to JTF-GTMO on the next courier run (if required), but generally not less than five (5) working days in advance of the visit. Material not provided to the Privilege Team sufficiently in advance of a scheduled meeting may not be inspected and transported to JTF-GTMO in time for Defense Counsel to bring it into the meeting.

b. Defense Counsel and defense personnel may bring writing utensils and blank paper into a meeting with the Accused. JTF-GTMO personnel may perform a Physical Contraband inspection of the bags and briefcases of Defense Counsel and defense personnel. Written materials are subject to inspection by the Privilege Team to ensure they have been marked and processed.

c. Defense Counsel may request permission to bring into a meeting tape or other forms of electronic communications. This material may be either Case Related or Other Material and shall be submitted to the Privilege Team or Staff Judge Advocate, as appropriate, at least fourteen days (14) prior to the scheduled visit so they can be

processed. The M.C.P.T. is responsible for inspecting tapes and other forms of electronic media for physical contraband, and to verify that the tapes and other forms of electronic media are appropriately marked, pursuant to the Order. The Commander, Joint Detention Group, shall not unreasonably withhold approval of such requests, if this review determines that sharing the communication with the Accused would not reasonably be expected to result in immediate and substantial harm to the national security, imminent acts of violence, or future events that threaten national security or present a threat to the operation of the detention facilities or to U.S. Government personnel.

## **8. Material Brought Out of a Meeting Between the Accused and Defense Counsel**

### a. Material Retained by the Accused

(1) At the completion of each meeting, the Accused shall be allowed to retain any written notes made during the meetings and any written material that was processed pursuant to paragraph 5, above, and brought into the meeting.

(2) For the written notes made during the meeting, Defense Counsel shall mark them pursuant to the procedures in paragraph 3, above. All material shall then be inspected by the Privilege Team pursuant to the procedures in paragraph 5, above.

(3) Under no circumstances should the Accused or Defense Counsel commingle Lawyer-Client Privileged Communications, Other Case-Related Material, and/or Legal or Non- Legal Material.

### b. Material Retained by Defense Counsel

(1) Following a Defense Counsel's meeting with the Accused, the notes or documents used or produced during the visits shall be sealed by the Defense Counsel in the presence of JTF-GTMO personnel. The envelope shall be marked with the Internment Serial Number of the Accused and name of the Defense Counsel and labeled as "Military Commissions Meeting Documents-For Delivery to Counsel" and the classification level of

any information contained within it.

(2) Any material Defense Counsel requires for further meetings can be placed in a separate envelope and made available to Defense Counsel at the next meeting.

(3) Upon completion of all meetings, the envelope(s) shall be sealed into a larger envelope by JTF-GTMO personnel. The larger envelope shall be marked as "Military Commission Meeting Documents--For Delivery to Counsel" and annotated with Defense Counsel's name and the Accused's Internment Serial Number and the classification level of any information contained within it.

(4) If Defense Counsel will not be couriering this material, the larger envelope shall be placed in a courier bag, which shall then be locked and provided to the Privilege Team at JTF-GTMO. The Privilege Team shall store this material in a safe location in the secure area at JTF-GTMO in a manner designed to protect any classified material and lawyer-client and related privileges until properly transferred to a government-designated courier for delivery to Defense Counsel.

## **9. Material Brought Into and Out of Military Commission Hearings**

### **a. Material Brought Into Commission Hearings**

(1) The Accused may bring into a Military Commission hearing any documents and material properly possessed in accordance with this Order that are necessary and relevant to the Accused's Military Commission proceeding. This material shall not be subject to inspection by the Privilege Team before being brought into a hearing, but is subject to inspection by JTF-- GTMO staff for Physical Contraband.

(2) Defense Counsel may bring into a Military Commission hearing any documents and material necessary and relevant to represent the Accused. This material shall not be subject to inspection by the Privilege Team before being brought into a hearing, but is subject to inspection by JTF-GTMO staff for Physical Contraband.

Defense Counsel are required to protect Classified material, Controlled Unclassified Information, and Sensitive but Unclassified Information from unauthorized disclosure, including during commission hearings.

b. Material Brought Out of Commission Hearings

(1) The Accused may not return to the detention facility with material brought out of a Military Commission hearing unless the material is inspected by the Privilege Team in accordance with the same criteria and procedures outlined in paragraph 5, above.

(2) Defense Counsel may retain material brought out of a Military Commission hearing without an inspection by the Privilege Team. As in all situations, if Defense Counsel knows, reasonably should know, or is uncertain whether material brought out of a Military Commission hearing with the Accused contains classified information, Defense Counsel must take appropriate measures to protect such material.

(3) Defense Counsel qualified as couriers at the appropriate level shall seal, handle, transport, and secure such material in accordance with DoD regulations. Defense Counsel who are not qualified as couriers at the appropriate level shall give the classified or believed to be classified notes, documents, or material used or produced during the hearing to a qualified courier to be stored, handled, and transported as classified material at the appropriate level of classification

**10. Storage of and Access to Legal Material.** The Accused's storage of and access to Lawyer-Client Privileged Communications and Other Case-Related Material shall be in accordance with the JTF-GTMO Standard Operating Procedures.

**11. Inspection of Legal Bins**

a. Each Accused possess one or more containers known as "legal bins," in which they store materials protected by the attorney-client privilege, as defined in Military



Commission Rule of Evidence (M.C.R.E.) 502(a)(1). These materials are identified by various markings, including stamps of various forms placed from time to time by USG personnel and banners or markings placed by counsel for the Accused or their representatives. The content of materials bearing any of these various markings, notwithstanding inconsistencies in their form, may not be read or otherwise observed for content by USG personnel other than to identify that the materials are, in fact, marked.

b. USG personnel may inspect legal bins of an Accused only in the presence of a trained Non-Commissioned Officer or higher as designated by the Joint Detention Group Commander and only for contraband. Contraband is defined in paragraph 2.i., above.

c. Materials other than physical contraband observed in the legal bins of the Accused, if any, which do not bear the markings referred to in paragraph 3 shall be segregated in a sealed container, labeled with the date, time and identification of the USG personnel by whom it was observed, and retained by the Non-Commissioned Officer supervising the inspection. In such an event, an attorney representative of the SJA will be immediately notified. Seizure of such material may occur only upon the prior authorization of an attorney representative of the SJA, made upon personal inspection. If the materials are determined to be properly marked, they will be returned to the Accused. If the materials are not properly marked, they will be retained by the attorney representative of the SJA and counsel for the Accused shall be immediately notified. If the materials originated with Defense Counsel, they shall be promptly returned to counsel. The materials shall not be duplicated, photographed, or otherwise copied by any process prior to being shown to Defense Counsel.

d. Material, marked as indicated in paragraph 11.a, above, that is found in locations other than the legal bin of an Accused, shall be segregated in a sealed container, labeled with the date and time and identification of the USG personnel by whom it was

observed, and retained by the Non-Commissioned Officer supervising the inspection.

(1) In such an event, an attorney representative of the SJA will be immediately notified. Seizure of such material may occur only upon the prior authorization of an attorney representative of the SJA, made upon personal inspection. If the materials are determined to be properly marked, they will be returned to the Accused.

(2) If the materials are not properly marked, they will be retained by the attorney representative of the SJA, and Defense counsel for the Accused shall be immediately notified. If the materials originated with counsel, they shall be promptly returned to Defense Counsel. The materials shall not be duplicated, photographed, or otherwise copied by any process prior to being shown to counsel.

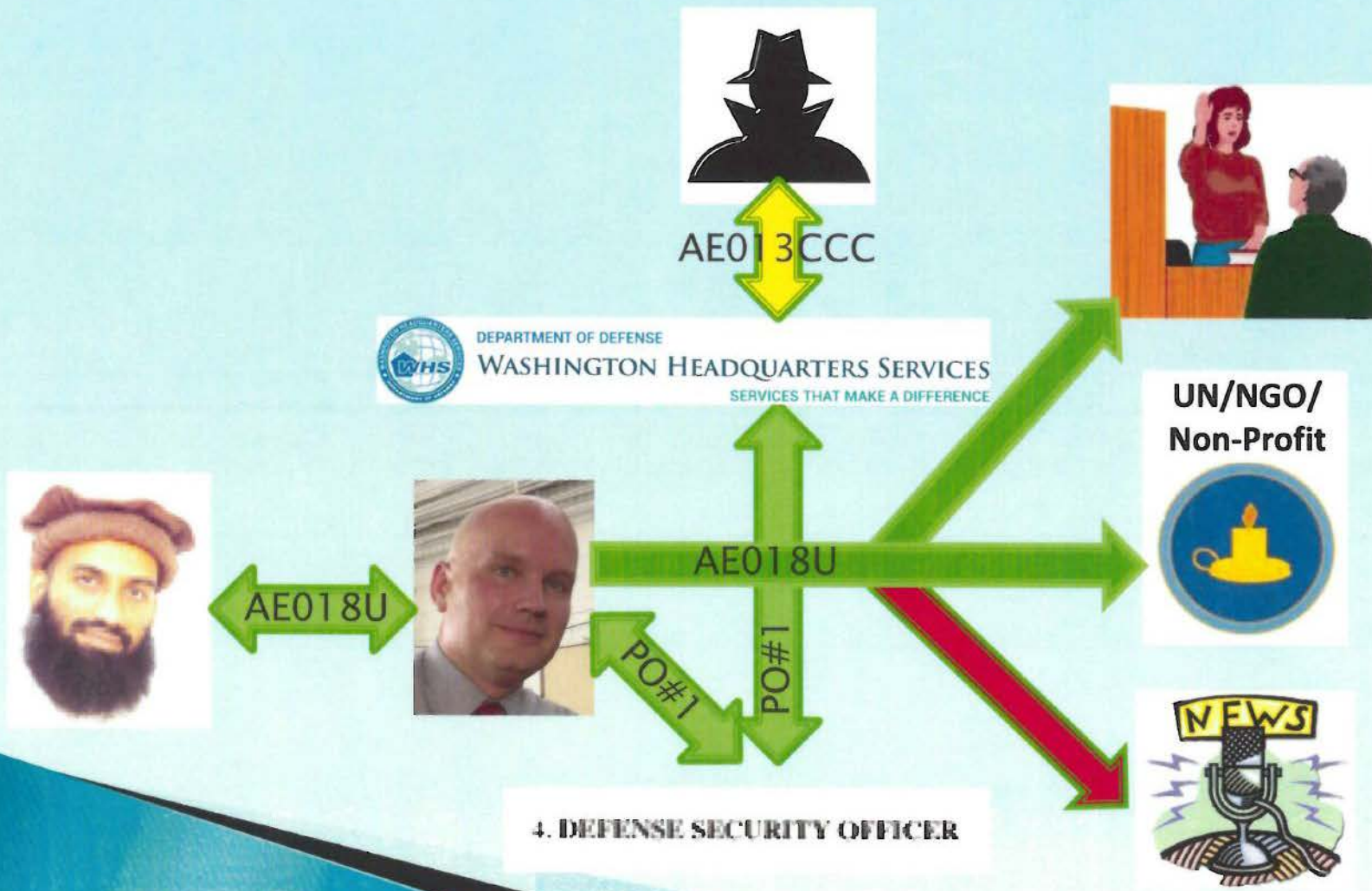
12. Sending, Receipt, Storage of, and Access to Non-Legal Material. The Accused's sending of receipt, storage of, and access to Non-Legal Mail and Material shall be in accordance with the JTF-GTMO Standard Operating Procedure.

So ORDERED this \_\_\_<sup>th</sup> day of March 2016

JAMES L. POHL  
COL, JA, USA  
Military Judge

# ATTACHMENT C

# Current Privilege Architecture



# ATTACHMENT D

**From:** Baker, John G BGen OSD OMC Defense [REDACTED]  
**Sent:** Wednesday, February 24, 2016 7:59 AM  
**To:** CLAYTOGT; [REDACTED]; [REDACTED]; Clay Trivett [REDACTED]  
**Cc:** Filbert, Brent G CAPT USN OSD OMC (US); Martins, Mark S BG USARMY OSD OMC OCP (US); [REDACTED]  
**Subject:** RE: Old Computer Swap  
**Attachments:** AE 182K - ORDER.PDF  
**Signed By:** [REDACTED]

[REDACTED] Clay [REDACTED]

In light of Monday's court session, where the government agreed with the basic concept of providing the detainees with new laptops and the attached order by the military judge, I'm writing to again offer, as an intermediary for the defense teams, to work with the JTF and the CA to obtain workable laptops for the detainees that will be paid for by the CA. CAPT Filbert will be the MCDO's primary POC on this issue.

My IT folks advise me that simply returning the existing laptops will not comply with the Court Order for the following reasons:

- . Windows XP is no longer supported by Microsoft. Patching is no longer available to secure the OS from known vulnerabilities.
- . The Laptop are old and cannot be updated to any modern operating systems (i.e.. Windows 7, 8, or 10).
- . No installation media is available for reinstallation of failed programs or complete restore after hard drive failure.
- . The laptops (Panasonic CF-19) are from a 2006 time period and will require more technical assistance as parts fail. Replacement parts will be most likely be expensive and used.
- . Small storage capacity - Most client machines have an 80GB Hard Drive. Most client machines are near full capacity at this time.
- . Small video screens - Due to poor eyesight and lighting the clients have issues reading the screen.
- . Laptops are not under warranty.
- . Laptops lack modern performance for effective video and photo editing.
- . Modern video editing software recommends 8GB of RAM, the clients laptop has 2GB of RAM.
- . Modern video editing software recommends a dual-core or quad-core processors, the clients laptop has a single core.

The defense teams and my IT folks have asked that I obtain laptops that include the following specs:

1. 15" or greater screens

2. Extended battery life
3. 500+ GB Hard Drive
4. Sufficient amount of CPU and Memory to run Photoshop and video editing software (At least 8GB RAM or better)
5. Blu-Ray Player/DVD writer/CD-RW
6. Intel I7 Processor
7. Software: in addition to Microsoft Office, some version of Adobe Photoshop and some movie making capability.
8. Peripherals: 2 external 4GB hard drives (one for A/C privilege materials and one for govt provided discovery) with usb ports enabled to plug them into

I am going to task my Ops Officer to start running with these computer purchases (obviously through the CA's office) as I know there is a huge bureaucratic hurdle to climb when purchasing stand-alone computers and the court has set a tight timeline. In the interim, my IT team will attempt to get the old laptops running as a very temporary solution.

S/F,

BGen Baker

-----Original Message-----

From: CLAYTOGT [REDACTED]  
Sent: Thursday, January 07, 2016 4:24 PM  
To: Baker, John G BGen OSD OMC Defense; [REDACTED]  
Cc: Filbert, Brent G CAPT USN OSD OMC (US); Martins, Mark S BG USARMY OSD OMC OCP (US)  
Subject: [Non-DoD Source] RE: Old Computer Swap

BG Baker,

Thank you for keeping the Prosecution advised.

v/r  
Clay

-----Original Message-----

From: Baker, John G BGen OSD OMC Defense [REDACTED]  
Sent: Wednesday, January 06, 2016 10:46 AM  
To: CLAYTOGT [REDACTED]  
Cc: Filbert, Brent G CAPT USN OSD OMC (US) [REDACTED]; Martins, Mark S BG USARMY OSD OMC OCP (US) [REDACTED]  
Subject: RE: Old Computer Swap

Clay,

Re-engaging on this topic.

While I understand that what the laptops that are provided to the

detainees can actually do is the subject of on-going litigation in the AE 182 series, I'm hopeful you will support the basic concept of our purchasing replacement laptops.

We are looking at the laptops having the following specs:

1. 14" or greater screens
2. Extended battery life
3. 500 GB Hard Drive
4. Sufficient amount of CPU and Memory to run Photoshop and video editing software
5. Blu-Ray Player/DVD writer
6. Software: in addition to Microsoft Office, some version of Adobe Photoshop and some movie making capability.

We're not asking that you or your office become actively involved, as Brent will be working this issue directly with the SJA, but want to keep you in the loop as we work it.

Semper Fi,

John G. Baker  
Brigadier General, U.S. Marine Corps  
Chief Defense Counsel  
Military Commissions Defense Organization



-----Original Message-----

From: Filbert, Brent G CAPT USN OSD OMC (US)  
Sent: Thursday, December 10, 2015 9:10 AM  
To: claytogt [REDACTED]  
Cc: Connell, James G III CIV (US); Baker, John G BGen OSD OMC Defense  
Subject: Old Computer Swap

Clay, I wanted to provide some background info on this issue. BGen Baker and I met with the JTF SJA on Tuesday. One of the issues we discussed was replacing the client's laptops with new ones. The SJA did indicate [REDACTED] supportive of replacing the laptops so long as any laptops purchased meet security requirements and specifications. Of course, you should check with the SJA as I don't mean to speak [REDACTED] Pls let me know if you have any



questions.

Respectfully,

CAPT Brent G. Filbert, JAGC, USN

Deputy Chief Defense Counsel

Military Commissions Defense Organization



# ATTACHMENT E

MILITARY COMMISSIONS TRIAL JUDICIARY

<p><b>UNITED STATES OF AMERICA</b></p> <p><b>v.</b></p> <p><b>KHALID SHAIKH MOHAMMAD, WALID MUHAMMAD SALIH MUBARAK BIN ATTASH, RAMZI BINALSHIBH, ALI ABDUL AZIZ ALI, MUSTAFA AHMED ADAM AL HAWSAWI</b></p>	<p><b>AE018U AMENDED ORDER</b></p> <p><b>Privileged Written Communications</b></p> <p>__ March 2016</p>
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1. The Accused in *United States v. Khalid Shaikh Mohammad, Walid Muhammad Salih Mubarak Bin 'Attash, Ramzi Binalshibh, Ali Abdul Aziz Ali, and Mustafa Ahmed Adam al Hawsawi* were arraigned on 5 May 2012. As such, this Order only applies to these cases.

**2. Definitions**

a. **Accused:** Khalid Shaikh Mohammad, Walid Muhammad Salih Bin Attash, Ramzi Binalshibh, Ali Abdul Aziz Ali, and Mustafa Ahmed Adam al Hawsawi.

b. **Defense Counsel:** Only those attorneys designated by the Accused, on the record, as counsel.

c. **Defense Personnel:** Includes co-counsel, interpreters, translators, paralegals, investigators, experts, consultants, and all other personnel or support staff authorized and engaged in, or employed to assist in the defense of the Accused, pursuant to the authority found in the Manual for Military Commissions and the Regulation for Trial by Military Commission.

d. **United States Government (USG) personnel:** Refers to any person employed by or affiliated with the United States other than counsel of record for the Accused or their representatives. The term includes, but is not limited to, persons acting at the direction of or with the knowledge of any agency of the United States and Joint Task Force Guantanamo.

e. Military Commission Privilege Review Team (Privilege Team):

(1) A team consisting of one or more Department of Defense (DoD) attorneys and one or more intelligence or law enforcement personnel who have not taken part in, and, in the future, shall not take part in, a military commission, a Combatant Status Review Tribunal, Administrative Review Board, Periodic Review Board, or habeas corpus proceedings involving the Accused (other than acting as a Privilege Team member for the habeas corpus or other proceedings).

(2) All members of the Privilege Team will be bound by a non-disclosure agreement to preserve the lawyer-client and other related legally-recognized privileges to the fullest extent possible in a manner consistent with this Order.

(3) If required, the Military Commission Privilege Team may include interpreters and translators, provided that such personnel meet these same criteria.

f. Lawyer-Client Privileged Communications:

(1) Communications that are privileged within the meaning of M.C.R.E. 502, which may include original handwritten or typewritten correspondence between the Accused and his Defense Counsel bearing the signature of the Defense Counsel (or a representative of the Defense Counsel encompassed by M.C.R.E. 502).

(2) Attorney Work Product is encompassed within Lawyer-Client Privileged Communications.

g. Other Case-Related Material:

(1) Communications between a Defense Counsel and the Accused that relate to the Accused's military commission but are not privileged within the meaning of M.C.R.E. 502. This includes discovery and related material that is releasable to the Accused, and records of commission proceedings, including court filings when releasable to the Accused.

(2) Documents initially identified as Other Case-Related Material that are subsequently incorporated by Defense Counsel or the Accused into work product or lawyer- client communications or that are aggregated to support a particular communication or reflect the lawyer's mental impressions or strategy may become Lawyer-Client Privileged Communications under M.C.R.E. 502. If such material is already in the possession of the Accused, JTF-GTMO personnel are not responsible for retrieving documents previously submitted as "Other Case- Related Material" or remarking them in conformity with paragraph 5.b. below

h. Military Commissions Non-Legal Mail and Material: All correspondence documents, media in any form, or similar material that do not fall within paragraphs 1.f or 1.g. above. In the event that communications from a detainee bypass JTF-GTMO content review under a defense counsel's claim of privilege, are removed from Guantanamo Bay under such claim, and then are intended/selected by defense counsel or the accused for transmission to any person, entity, or party other than defense personnel as that term is defined above—thus partially or wholly waiving privilege—defense counsel are required to ensure that these materials are routed back through the JTF-GTMO non-legal mail system. See paragraphs 3.f(3) and 12 below.

i. Contraband:

(1) Any physical item or prohibited information the Commander, JTF-GTMO, or his designee, has deemed to be impermissible or inappropriate for an Accused Detainee to transmit, possess, be informed of (orally or in writing) or view, subject to the exception in paragraph 1.i.(4), below, or any physical item whose receipt/transmission by the Accused is prohibited without prior authorization by Commander, JTF-GTMO, or his designee. This includes material that, if transmitted outside or introduced into the detention facility reasonably could be expected to result in immediate and substantial harm

to the national security, imminent acts of violence, future events that threaten national security, or present a threat to the operation of the detention facilities or to U.S. Government personnel. This material may exist in any form, including correspondence, documents, electronic media, or similar material.

(2) Contraband includes Physical Contraband, as that term is defined in paragraph 1.j., below.

(3) Examples of prohibited information include:

(a) 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;

(b) Current political or military events in any country, historical perspectives or discussions on jihadist activities, including information generated or distributed by or on behalf of foreign terrorist organizations, individuals or groups engaged in terrorist activities.

(c) Information about security procedures or changes to security procedures at JTF-GTMO or the U.S. Naval Station at Guantanamo Bay or information about the physical layout of the detention facilities;

(d) Information about the operation of or changes to the detention facility;

(e) Information about present and former detention personnel or other U.S. Government personnel (including their names, locations or assignment history); and,

(f) Information regarding the status of other Detainees (including former Detainees) at Guantanamo and information regarding any detention of Detainees; and classified, Controlled Unclassified Information or Sensitive but Unclassified

Information that has not been approved by the Government for release to the Accused.

(g) Communications to members of al Qaeda, associated forces, or other persons or entities engaged in hostilities against the United States or a coalition partner.

(4) Notwithstanding sub-paragraphs 1(i)(1)-(3), above, no information shall be considered Contraband if defense counsel reasonably believes it is directly related to the Military Commission proceeding involving the Accused. Even if considered not to be contraband by defense counsel, non-legal mail is to be routed through the JTF-GTMO process for non-legal mail. See paragraphs 3.f(3) and 12 below.

j. Physical Contraband: Consists of paper fasteners (including staples, paper clips, and binder clips), money, stamps, cigarettes, weapons, chemicals, drugs, writing instruments, items of value and material that may be used in an escape attempt, or that present a threat to the operation of the detention facilities or to U.S. Government personnel. "Physical Contraband" does not include written communications.

### **3. Defense Counsel Handling and Marking of Communications with the Accused**

a. Because of the potential for harm posed by the transmission or introduction of contraband out of/into the detention facility, Defense Counsel shall not include contraband in Non-Legal Mail and Material or in Lawyer-Client Privileged Communications or Other Case-Related Material, subject to paragraph 1.i.(4), above.

(1) If Defense Counsel believes contraband must be received from or presented to the Accused or does constitute prohibited information, where such material is directly related to the Military Commission involving that Accused, and if necessary to the preparation of the defense, Defense Counsel may submit such matters *ex parte* to the Military Judge together with an explanation of why the material must be received from or provided to the Accused.

(2) If the Military Judge approves the Defense Counsel's request, the Military Judge shall notify the JTF-GTMO Commander of the Commission's ruling so that special handling procedures can be instituted as appropriate. The Defense must then also provide notice to the JTF-GTMO Commander, or his designee, of what material it seeks to provide to the Accused, though it need not disclose its explanation to the JTF-GTMO Commander of why that material must be provided to the Accused.

b. When sending material to the Accused or bringing such material to a meeting with the Accused, Defense Counsel shall separate Lawyer-Client Privileged Communications, Other Case Related Material, and Non-Legal Mail and Material.

c. Defense Counsel shall ensure all communications with the Accused are marked with appropriate classification markings, including banner and portion markings. Unclassified communications shall be banner marked but do not require portion marking.

d. Lawyer-Client Privileged Communications

(1) Each page of incoming material shall include Defense Counsel's initials or signature on the top right corner, as well as the name and Internment Serial Number of the accused. The top and bottom of each page shall also be marked as "LAWYER-CLIENT PRIVILEGED COMMUNICATION UNDER M.C.R.E. 502."

(2) Defense Counsel shall include an identically marked cover sheet indicating the number of attached pages and a signed attestation by the Defense Counsel the attached communication is privileged from disclosure under M.C.R.E. 502 and, to the best of his knowledge and belief, the attached communication does not contain Contraband, Classified, Controlled Unclassified Information, or Sensitive but Unclassified Information the intended recipient of the communication is not authorized to receive under M.C.R.E. 505, the Military Commissions Act, and the laws, orders, directives and regulations governing classified, Controlled Unclassified Information, or Sensitive but



Unclassified Information, including any protective orders in the case.

e. Other Case-Related Material

(1) Each page of incoming material shall include Defense Counsel's initials or signature on the top right corner, as well as the name and Internment Serial Number of the Accused. The top and bottom of each page shall also be marked as "OTHER CASE-RELATED MATERIAL." To the extent the incoming material is a commercially-bound book, only the first page need be marked, consistent with the above.

(2) Discovery Material. In addition to the markings described in paragraph 3.d, above, before being provided to the Accused by a Defense Counsel, material provided by the Prosecution in discovery must be marked by the Prosecution in a manner that makes clear the material has been approved for release to the Accused. The specific language for these markings shall be determined by the Prosecution and placed on each page of the document as part of the discovery process. The Prosecution shall provide a list of the approved markings to Defense Counsel, the Military Judge, the Privilege Team, and JTF-GTMO personnel. If requested to do so by the Defense Counsel or ordered to do so by the Military Judge, the Prosecution will provide a duplicate copy of paper discovery materials releasable to the Accused directly to the Privilege Team for delivery to the Accused.

(3) Other Material. If the Other Case-Related Material was not discovery provided by the Prosecution or a record from a Military Commission proceeding, Defense Counsel shall include an identically marked cover sheet indicating the number of attached pages and an attestation signed by Defense Counsel stating the attached communication is related to the case and, to the best of his knowledge and belief, the material does not contain Contraband, Classified, Controlled Unclassified Information, or Sensitive but Unclassified Information, the intended recipient of the communication is not authorized to

receive under M.C.R.E. 505, the Military Commissions Act, and the laws, orders, directives and regulations governing Classified, Controlled Unclassified Information, or Sensitive but Unclassified Information, including any protective orders in the case.

f. Military Commissions Non-Legal Mail and Material

(1) Each page of incoming material shall include Defense Counsel's initials or signature on the top right corner, as well as the name and Internment Serial Number of the Accused. The top and bottom of each page shall also be marked as "MILITARY COMMISSION NON-LEGAL MAIL AND MATERIAL."

(2) Defense counsel shall send Non-Legal Mail and Material to the Accused through the United States Postal Service. It shall be reviewed by government personnel at JTF- GTMO under the Standard Operating Procedures for Detainee Non-Legal Mail. However, in extraordinary circumstances, if a Defense Counsel requires delivery of such material to the Accused in an expedited manner, Defense Counsel can submit a request for expedited processing to JTF-GTMO via the Privilege Team. In the request, Defense Counsel shall state the requested delivery date for the material and an explanation for why expedited processing is required. The Privilege Team shall deliver Defense Counsel's request and the Non-Legal Mail and Material to personnel at JTF-GTMO. If the request is granted, this material shall, to the maximum extent possible, be given expedited priority by JTF-GTMO.

(3) During some meetings with the Accused, a Defense Counsel may receive Non-Legal Mail or Material from the Accused which requires expedited processing for reasons related to the military commission proceedings. For example, the Accused may provide the Defense Counsel with a letter of introduction for the Defense Counsel to use when meeting with a witness. In such instances, the Defense Counsel can submit a request for expedited processing to JTFGTMO via the Privilege Team. In the request, Defense Counsel shall state the date by which processing is required and an explanation for why

expedited processing is required. The Privilege Team shall deliver the Defense Counsel's request and the Non-Legal Mail and Material to personnel at JTF-GTMO. If the request is granted, this material shall, to the maximum extent possible, be given expedited priority by JTF-GTMO. This subparagraph, definition 2.h above, and paragraph 12 below are intended to reinforce, not vitiate, JTF-GTMO's processing for non-legal communications that are incoming to or outgoing from a detainee or are otherwise stored or handled.

**4. General Obligations of Military Commission Privilege Review Team (Privilege Team)**

a. To the fullest extent possible and consistent with the terms of this Order, the Privilege Team must preserve the lawyer-client and other related legally-recognized privileges. Members of the Privilege Team shall not disclose to any person any information provided by the Accused or Defense Counsel, except as provided in this Order.

b. All members of the Privilege Team will execute a non-disclosure agreement to preserve the lawyer-client and other related legally-recognized privileges to the fullest extent possible in a manner consistent with this Order. Non-disclosure agreements will be provided to the designated Court Security Officer.

c. The Privilege Team may not consult with security and intelligence experts regarding potential Contraband or other unauthorized information the Privilege Team becomes aware of when executing its responsibilities under this Order without first notifying the Defense. Defense will be given an opportunity to address the issue with the Privilege Team. If the issue is not resolved, either the Defense or the Privilege Team may raise the issue to the Military Judge. Only after resolution by Defense and the Privilege Team or by the Military Judge, may the Privilege Team consult with security and

intelligence experts regarding potential contraband. In extraordinary circumstances, the Privilege Team may contact the Military Judge *ex parte*, without notice to either side, to address concerns. Contact with the Military Judge will be made through the Trial Judiciary staff.

d. The Privilege Team shall maintain a log, which contains general information about its processing of material under this Order (such as the number of pages, date of review, etc., but *not* including details about the content of the documents), as well as information about Contraband or other unauthorized material that was placed into the mail or meeting process by Defense Counsel or defense personnel. This log and information shall be kept in a secure location, and shall not be disclosed to any person except as provided in this Order or as necessary to address these issues with competent authorities, to include the Chief Defense Counsel. Whenever possible, the Privilege Team shall advise the involved Defense Counsel in advance before disclosing this information.

e. After receiving permission from the Military Judge, the Privilege Team shall report to the JTF GTMO Commander any information that reasonably could be expected to result in immediate and substantial harm to national security, imminent acts of violence, or future events that threaten national security or present a threat to the operation of the detention facilities or to U.S. Government personnel. In his discretion, the Commander, JTF-GTMO, may disseminate the relevant portions of the information to law enforcement, military, and intelligence officials, as appropriate.

f. This Order does not authorize the Privilege Team to conduct a classification review of any document encompassed within the provisions of this Order.

##### **5. Material from Defense Counsel to the Accused ("Incoming Material")**

a. After completing the requirements under paragraph 3, above, Defense Counsel may either deliver Incoming Materials (including Lawyer-Client Privileged

Communications, Other Case-Related Material, and requests for expedited Non-Legal Mail and Material) addressed to his client, to the Privilege Team at JTF-GTMO, or mail them to an address for the Privilege Team in the Washington, D.C. area that shall be provided by the government.

b. Defense counsel shall seal the Lawyer-Client Privileged Communications, Other Case Related Material, and Non-Legal Mail and Material in separate envelopes. Defense Counsel shall clearly mark the outside of an envelope containing the material with an appropriate annotation depending on the category of material:

**LAWYER-CLIENT PRIVILEGED COMMUNICATION UNDER M.C.R.E. 502  
- FOR DELIVERY TO DETAINEE**

**MILITARY COMMISSION OTHER CASE RELATED MATERIAL - FOR  
DELIVERY TO DETAINEE.**

**MILITARY COMMISSION NON-LEGAL MAIL OR MATERIAL  
- FOR DELIVERY TO DETAINEE**

c. Each envelope shall also include the Accused's name and Internment Serial Number and the Defense Counsel's name and return address and the classification level of any information contained within it. Envelopes received by the Privilege Team that are not properly marked shall be returned to Defense Counsel unopened.

d. Incoming material shall not include Physical Contraband (including paper fasteners, staples, paperclips, and binder clips) or other Contraband.

e. Prior to placing the material into the envelope, Defense Counsel shall ensure each page of Incoming Material is marked in accordance with paragraphs 3.d.(l) or 3.e.(l), above.

f. The Privilege Team shall open the envelopes to inspect the contents for Physical Contraband and to verify that each page of the material includes the markings required by

paragraph 3.d.(1) or 3.e.(1), above. Defense Counsel or his representative may be present during this inspection. This inspection shall not include a review of the substantive content of the incoming material privileged under M.C.R.E. 502.

(1) Physical Contraband shall be removed from the envelopes and shall not be processed for delivery to the Accused.

(2) If, in inspecting under paragraph 5.f, above, the Privilege Team observes in plain view material that is not correctly marked as required by paragraph 3, above, that material shall not be processed for delivery to the Accused. This incorrectly marked material can include:

(a) General interest magazines, print media, or third party communications that are marked as Lawyer-Client Privileged Communications,

(b) Classified information, Controlled Unclassified Information, or Sensitive but Unclassified Information whose markings indicate it is not approved for release to the Accused.

g. The Privilege Team shall consult with Defense Counsel regarding the material described in paragraph 5.f, above, in an effort to address the apparent problem(s).

(1) If the discussions resolve the apparent problem, the material shall be processed for delivery to the Accused.

(2) If the discussions do not resolve the problem and if the material does not implicate the concerns articulated above, the material shall be returned to Defense Counsel by the Privilege Team, with a written explanation regarding why it was not processed for delivery to the Accused.

(3) If the discussions do not resolve the apparent problem and if the material does implicate the concerns articulated above, the material shall not be returned to Defense Counsel by the Privilege Team, and the Privilege Team shall provide a written

explanation regarding why it was not processed for delivery to the Accused.

h. Following the inspection, the Privilege Team shall annotate each page of the material with the Internment Serial Number of the Accused, a code indicating which Privilege Team member conducted the inspection, and a standardized marking that indicates the Privilege Team has processed the material in accordance with this Order.

i. The processing by the Privilege Team shall generally be completed within five (5) working days of the Privilege Team's receipt of this material.

j. The Privilege Team shall seal the processed material in separate envelopes, in the presence of Defense Counsel or its representative if requested, marked as:

**LAWYER-CLIENT PRIVILEGED COMMUNICATION UNDER M.C.R.E. 502  
-- APPROVED FOR DELIVERY TO DETAINEE**

**OTHER CASE RELATED MATERIAL  
-- APPROVED FOR DELIVERY TO DETAINEE**

**REQUEST FOR EXPEDITED NON-LEGAL MAIL OR MATERIAL FOR  
DELIVERY TO JTF-GTMO STAFF JUDGE ADVOCATE**

k. The sealed envelopes for Lawyer-Client Privileged Communications and Other Case Related Material shall clearly indicate the identity of the Accused to who the envelopes are to be delivered and, based on the markings found on the documents, the classification level of the documents contained within it.

l. The sealed envelopes containing Lawyer-Client Privileged Communications, Other Case-Related Material, and Requests for Expedited Non-Legal Mail may be returned to the Defense Counsel or defense personnel for transmission to JTF-GTMO in a manner consistent with the classification level of the information. If requested by Defense Counsel, the Privilege Team shall place this material on the next mail courier run to JTF-GTMO.

m. If Defense Counsel desires confirmation that the documents were delivered to the Accused, Defense Counsel shall provide a self-addressed envelope for that purpose. The Accused shall be responsible for mailing any confirmation of delivery to Defense Counsel. This method shall be the sole and exclusive means by which confirmation of delivery is provided to Defense Counsel.

#### **6. Material Sent from the Accused to Defense Counsel ("Outgoing Material")**

a. Detainees shall be provided by JTF-GTMO with paper and a writing utensil to prepare written communications to Defense Counsel. Access to such items may be limited or restricted because of the Accused's disciplinary and/or medical status, although the Accused's disciplinary status shall not be a basis for denying all access to such items.

b. In the presence of JTF-GTMO staff, the Accused shall seal the written communication in an envelope that shall be annotated as "LAWYER-CLIENT MATERIAL--FOR DELIVERY TO DEFENSE COUNSEL." Each envelope shall be dated and labeled with the name and Internment Serial Number of the Accused and the name of Defense Counsel. It shall be marked and secured as TS/SCI pending review by Defense Counsel or other authority for a classification determination. The sealed envelope shall be placed in a courier bag which shall then be locked and provided to the Privilege Team.

c. The Privilege Team shall store all Outgoing Material in a safe location in the secure area at JTF-GTMO in a manner designed to protect any classified material and lawyer-client and related privileges until properly transferred to an authorized courier for delivery to the Defense Counsel.

#### **7. Material Brought by Defense Counsel into a Meeting with the Accused**

a. Defense Counsel and defense personnel may only bring into a meeting with the Accused material which meets the requirements for Incoming Mail in paragraph 5, above,



and that has been previously inspected and processed by the Privilege Team. This material shall be submitted to the Privilege Team with sufficient time for such inspection to be conducted and for the material to be sent to JTF-GTMO on the next courier run (if required), but generally not less than five (5) working days in advance of the visit. Material not provided to the Privilege Team sufficiently in advance of a scheduled meeting may not be inspected and transported to JTF-GTMO in time for Defense Counsel to bring it into the meeting.

b. Defense Counsel and defense personnel may bring writing utensils and blank paper into a meeting with the Accused. JTF-GTMO personnel may perform a Physical Contraband inspection of the bags and briefcases of Defense Counsel and defense personnel. Written materials are subject to inspection by the Privilege Team to ensure they have been marked and processed.

c. Defense Counsel may request permission to bring into a meeting tape or other forms of electronic communications. This material may be either Case Related or Other Material and shall be submitted to the Privilege Team or Staff Judge Advocate, as appropriate, at least fourteen days (14) prior to the scheduled visit so they can be processed. The M.C.P.T. is responsible for inspecting tapes and other forms of electronic media for physical contraband, and to verify that the tapes and other forms of electronic media are appropriately marked, pursuant to the Order. The Commander, Joint Detention Group, shall not unreasonably withhold approval of such requests, if this review determines that sharing the communication with the Accused would not reasonably be expected to result in immediate and substantial harm to the national security, imminent acts of violence, or future events that threaten national security or present a threat to the operation of the detention facilities or to U.S. Government personnel.

#### **8. Material Brought Out of a Meeting Between the Accused and Defense Counsel**

a. Material Retained by the Accused

(1) At the completion of each meeting, the Accused shall be allowed to retain any written notes made during the meetings and any written material that was processed pursuant to paragraph 5, above, and brought into the meeting.

(2) For the written notes made during the meeting, Defense Counsel shall mark them pursuant to the procedures in paragraph 3, above. All material shall then be inspected by the Privilege Team pursuant to the procedures in paragraph 5, above.

(3) Under no circumstances should the Accused or Defense Counsel commingle Lawyer-Client Privileged Communications, Other Case-Related Material, and/or Legal or Non- Legal Material.

b. Material Retained by Defense Counsel

(1) Following a Defense Counsel's meeting with the Accused, the notes or documents used or produced during the visits shall be sealed by the Defense Counsel in the presence of JTF-GTMO personnel. The envelope shall be marked with the Internment Serial Number of the Accused and name of the Defense Counsel and labeled as "Military Commissions Meeting Documents-For Delivery to Counsel" and the classification level of any information contained within it.

(2) Any material Defense Counsel requires for further meetings can be placed in a separate envelope and made available to Defense Counsel at the next meeting.

(3) Upon completion of all meetings, the envelope(s) shall be sealed into a larger envelope by JTF-GTMO personnel. The larger envelope shall be marked as "Military Commission Meeting Documents--For Delivery to Counsel" and annotated with Defense Counsel's name and the Accused's Internment Serial Number and the classification level of any information contained within it.

(4) If Defense Counsel will not be couriering this material, the larger

envelope shall be placed in a courier bag, which shall then be locked and provided to the Privilege Team at JTF-GTMO. The Privilege Team shall store this material in a safe location in the secure area at JTF-GTMO in a manner designed to protect any classified material and lawyer-client and related privileges until properly transferred to a government-designated courier for delivery to Defense Counsel.

## **9. Material Brought Into and Out of Military Commission Hearings**

### **a. Material Brought Into Commission Hearings**

(1) The Accused may bring into a Military Commission hearing any documents and material properly possessed in accordance with this Order that are necessary and relevant to the Accused's Military Commission proceeding. This material shall not be subject to inspection by the Privilege Team before being brought into a hearing, but is subject to inspection by JTF-- GTMO staff for Physical Contraband.

(2) Defense Counsel may bring into a Military Commission hearing any documents and material necessary and relevant to represent the Accused. This material shall not be subject to inspection by the Privilege Team before being brought into a hearing, but is subject to inspection by JTF-GTMO staff for Physical Contraband. Defense Counsel are required to protect Classified material, Controlled Unclassified Information, and Sensitive but Unclassified Information from unauthorized disclosure, including during commission hearings.

### **b. Material Brought Out of Commission Hearings**

(1) The Accused may not return to the detention facility with material brought out of a Military Commission hearing unless the material is inspected by the Privilege Team in accordance with the same criteria and procedures outlined in paragraph 5, above.

(2) Defense Counsel may retain material brought out of a Military

Commission hearing without an inspection by the Privilege Team. As in all situations, if Defense Counsel knows, reasonably should know, or is uncertain whether material brought out of a Military Commission hearing with the Accused contains classified information, Defense Counsel must take appropriate measures to protect such material.

(3) Defense Counsel qualified as couriers at the appropriate level shall seal, handle, transport, and secure such material in accordance with DoD regulations. Defense Counsel who are not qualified as couriers at the appropriate level shall give the classified or believed to be classified notes, documents, or material used or produced during the hearing to a qualified courier to be stored, handled, and transported as classified material at the appropriate level of classification

**10. Storage of and Access to Legal Material.** The Accused's storage of and access to Lawyer-Client Privileged Communications and Other Case-Related Material shall be in accordance with the JTF-GTMO Standard Operating Procedures.

**11. Inspection of Legal Bins**

a. Each Accused possess one or more containers known as "legal bins," in which they store materials protected by the attorney-client privilege, as defined in Military Commission Rule of Evidence (M.C.R.E.) 502(a)(1). These materials are identified by various markings, including stamps of various forms placed from time to time by USG personnel and banners or markings placed by counsel for the Accused or their representatives. The content of materials bearing any of these various markings, notwithstanding inconsistencies in their form, may not be read or otherwise observed for content by USG personnel other than to identify that the materials are, in fact, marked.

b. USG personnel may inspect legal bins of an Accused only in the presence of a trained Non-Commissioned Officer or higher as designated by the Joint Detention Group Commander and only for contraband. Contraband is defined in paragraph 2.i., above.

c. Materials other than physical contraband observed in the legal bins of the Accused, if any, which do not bear the markings referred to in paragraph 3 shall be segregated in a sealed container, labeled with the date, time and identification of the USG personnel by whom it was observed, and retained by the Non-Commissioned Officer supervising the inspection. In such an event, an attorney representative of the SJA will be immediately notified. Seizure of such material may occur only upon the prior authorization of an attorney representative of the SJA, made upon personal inspection. If the materials are determined to be properly marked, they will be returned to the Accused. If the materials are not properly marked, they will be retained by the attorney representative of the SJA and counsel for the Accused shall be immediately notified. If the materials originated with Defense Counsel, they shall be promptly returned to counsel. The materials shall not be duplicated, photographed, or otherwise copied by any process prior to being shown to Defense Counsel.

d. Material, marked as indicated in paragraph 11.a, above, that is found in locations other than the legal bin of an Accused, shall be segregated in a sealed container, labeled with the date and time and identification of the USG personnel by whom it was observed, and retained by the Non-Commissioned Officer supervising the inspection.

(1) In such an event, an attorney representative of the SJA will be immediately notified. Seizure of such material may occur only upon the prior authorization of an attorney representative of the SJA, made upon personal inspection. If the materials are determined to be properly marked, they will be returned to the Accused.

(2) If the materials are not properly marked, they will be retained by the attorney representative of the SJA, and Defense counsel for the Accused shall be immediately notified. If the materials originated with counsel, they shall be promptly returned to Defense Counsel. The materials shall not be duplicated, photographed, or

otherwise copied by any process prior to being shown to counsel.

**12. Sending, Receipt, Storage of, and Access to Non-Legal Material.** The Accused's sending of, receipt, storage of, and access to Non-Legal Mail and Material shall be in accordance with the JTF-GTMO Standard Operating Procedure.

So ORDERED this \_\_\_<sup>th</sup> day of March 2016

JAMES L. POHL  
COL, JA, USA  
Military Judge

DRAFT ORDER / GOVERNMENT / 11/03/2016