



Written by [Joe Wolverton, II, J.D.](#) on January 17, 2012

Gitmo's Chief Defense Counsel to Lawyers: Defy Letter-Reading Rule

As was reported in [The New American](#) last December,

The commander of the Guantanamo Bay detention facility, Rear Admiral David Woods, has suggested a fundamental rule change regarding the military's right to access and review written communication exchanged between Gitmo prisoners suspected of being co-conspirators in the attacks of September 11, 2001 and the attorneys representing them.



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

In the memo, Colonel Colwell justified his command to refuse to comply with the new rules by citing several applicable provisions of military regulations dealing with members of the Judge Advocate General (JAG) corps.

Air Force Rules of Professional Conduct (AFRPC of 17 Aug 2005) FRPC 5.2(b) states "[a] subordinate lawyer does not violate these rules if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty."

JAGINST 5803.1C, Subj: Professional Conduct of Attorneys Practicing Under the Supervision of the Judge Advocate General of 9 Nov 2004: Rule 5.2(b), which guides Navy and Marine Corps judge advocates, is identical to the Air Force Rule, with the added requirement that the supervisor's resolution must be in writing. Paragraph 12a of the Navy rules authorizes a covered attorney to seek written informal ethics advice from "supervisory attorneys in the field."

Army Regulation 27-26 (Rules of Professional Conduct for Lawyers of 1 May 1992) Rule 5.2(b) is identical to the Air Force and Navy/Marine Corps rule.

Rule 5.2(b) of the Model Rule of Professional Conduct is identical to each of the Service rules.

The Regulation for Trial by Military Commission (2011 Edition) (RTMC) paragraph 9.1(a)(2) states, "The Chief Defense Counsel shall supervise all defense activities and the efforts of detailed defense counsel and other office personnel and resources pursuant to the M.C.A. and the M.M.C., ensure proper supervision and management of all personnel and resources assigned to the Office of the Chief Defense Counsel (OCDC), and facilitate the proper representation of all accused referred to trial before a military commission appointed pursuant to the M.C.A."

RTMC paragraph 9.1(a)(9) states, "The Chief Defense Counsel shall take appropriate measures to



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ensure that each detailed defense counsel is capable of zealous representation and unencumbered by any conflict of interest. In this regard, the Chief Defense Counsel shall monitor the activities of all defense counsel (detailed and civilian) and take appropriate measures to ensure that defense counsel remain unencumbered by conflicts of interest."

More than 100 civilian and military lawyers fall under the command of the OCDC.

According to [a statement printed in the *Washington Post*](#) attributed to Colonel Clowell, "It is impermissible for them to agree to the procedure that the government has set for the delivery and review of legal mail."

Included among the five detainees whose correspondence would be subject to inspection under the new rule is Khalid Sheik Mohammed, a Kuwaiti national, who is accused by the U.S. government of being a member of al-Qaeda, including running the group's propaganda machine since 1999.

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

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

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

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

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

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

The [Sixth Amendment to the U.S. Constitution](#) reads:

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

Given the gravity of the situation and the substantial effect on one of the Bill of Rights' most fundamental guarantees, the lawyers for the five detainees have fought to set aside the order sent them by Admiral Woods wherein the new rules were proposed.



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There is very little time to work out these critical issues of civil liberty, as Attorney General Eric Holder announced in April that the five would be arraigned before military tribunals sometime in 2012. All five of these inmates face the death penalty if convicted of the charges against them.

The decision to try these defendants before a military commission rather than in a U.S. federal court was a disavowal of Holder's earlier statement recommending civilian trials for the suspects.

Colonel Clowell's memo was released by the American Civil Liberties Union, who [issued a statement of their own](#) in praise of Clowell's directive. "Col. Colwell joins an honorable line of Guantanamo military lawyers who have opposed superiors' attempts, in the ostensible name of security, to undermine long-standing rules necessary for a fair trial," declared Zachary Katznelson, senior staff attorney with the ACLU National Security Project.

As [The New American reported last week](#), January 11 marked the 10th anniversary of the opening of the Guantanamo Bay Detention Facility in Cuba.



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