

The logo for the New York City Bar, featuring the text "NEW YORK CITY BAR" in a bold, serif font, centered between two horizontal blue bars.

NEW YORK  
CITY BAR

SAMUEL W. SEYMOUR  
PRESIDENT  
Phone: (212) 382-6700  
Fax: (212) 768-8116  
sseymour@nycbar.org

February 16, 2012

Jeh C. Johnson, Esq.  
General Counsel  
United States Department of Defense  
1600 Defense Pentagon, Suite 3E788  
Washington D.C. 20301-1600

Dear Mr. Johnson:

On behalf of the Association of the Bar of the City of New York (the “Association”), we write to express our concern with the Order Governing Written Communications Management for Detainees Involved in Military Commissions, dated December 27, 2011 (hereinafter “the Order”). The Association is alarmed at the dramatic impingement on the attorney-client privilege resulting from the procedures set forth in the Order.

As you are aware, the Association has previously expressed concern about similar proposed procedures that threatened to erode the attorney-client privilege for detainees subject to the Military Commissions system. *See* Letter dated April 18, 2011 from Samuel W. Seymour to Jeh C. Johnson. The sanctity of the attorney-client privilege is fundamental to our system of justice. The attorney-client privilege – and the frank disclosure it allows between clients and their counsel – is vital in criminal cases such as those governed by the Order, some of which may result in capital prosecutions. If the Order is implemented, the attorney-client privilege will be gravely undermined and the legitimacy of Military Commissions will be threatened.<sup>1</sup>

Although the Order asserts that the procedures contained therein are comparable to Special Administrative Measures under 28 C.F.R. § 501.3 (2011) (“SAMs”) and other Bureau of Prisons (“BOP”) regulations, an analysis of the two frameworks demonstrates that this claim is not accurate. The procedures established by the Order exceed SAMs

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<sup>1</sup> The Association believes that our system of civilian courts and courts martial is adequate to try anyone accused of terrorist activities. However, if we must have military commissions, the Association has urged that the rules and procedures governing military commissions be consistent with those of federal courts or courts martial.

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and other current regulations governing Federal Bureau of Prisons facilities, and lack many important safeguards contained in the SAMs regulations. The Association takes no position on SAMs restrictions, and indeed is troubled by those SAMs provisions allowing for attorney-client monitoring, the legality of which has not been determined. Nevertheless, we believe that a comparison of the restrictions outlined in the Order and those contained in SAMs and other BOP regulations is instructive, especially because the Order claims that the two regimes are similar. As set forth below, the Order goes well beyond SAMs and represents a new and, we believe, indefensible incursion into the attorney-client relationship. We urge the appropriate authority to vacate the Order and instead impose a legal framework that maintains security without sacrificing the attorney-client relationship, which is essential to the fair administration of justice and the legitimacy of the Military Commissions system.

As you know, the Association is a professional association of over 23,000 attorneys. Founded in 1870, it has long been committed to studying, addressing, and promoting the rule of law and, when appropriate, law reform. Over the past decade, the Association has been educating the bar and public about legal issues relating to the struggle against terrorism, the pursuit of suspected terrorists, and the treatment of detainees. The principal lesson we have derived from our work is that full and faithful respect for the rule of law strengthens our country. Our system of justice – based on time-tested constitutional and international norms – is a source of strength, not vulnerability.

**Restrictions on the Attorney-Client Privilege Should Be Contemplated, If Ever,  
Only When a Particularized Threat Is Demonstrated and Where the Restrictions  
Are Subject to Judicial Oversight**

The Association is particularly concerned with the universal application of the procedures established in the Order to *all* Guantanamo detainees to be tried before a military commission and *all* defense counsel involved in these cases, with no variation or exception. The rules have a blanket, “one size fits all” approach. There is no provision in the Order requiring that a determination be made respecting the threat posed by a particular detainee or attorney. For example, Section 6.f. of the Order provides uniformly for inspection of all mail from defense counsel to their clients. Order ¶ 6.f. Similarly, Section 7.b. establishes a requirement that all mail from detainees to their counsel be sealed in the presence of JTF-GTMO staff. Order ¶¶ 6.f, 7.b. Inspection by JTF-GTMO staff is also required for any material defense counsel intend to bring to their clients during attorney-client meetings. Order ¶ 8.a.

These procedures stand in stark contrast with those followed in the BOP, including SAMs regulations. While a SAMs provision exists that could permit monitoring of attorney-client conversations in the case of terrorism suspects, this provision is limited and circumscribed; to our knowledge it has never been invoked; its legality has not been tested; and the Association would be troubled by any monitoring of attorney-client communications without a valid legal basis (e.g., the standards for monitoring and oversight applicable in the crime/fraud context).

More broadly, in contrast to the Order, SAMs may be implemented only on a case-by-case basis, if there is a particularized showing of a specific threat from the individual prisoner. 28 C.F.R. § 501.3. Only the Attorney General is empowered to impose SAMs, by written direction to the BOP. *Id.* The decision may not be delegated to a deputy, *id.*, and in order for the Attorney General to authorize SAMs, he or she must make particularized findings that an individual detainee poses a specific threat. *Id.*; *see also National Security; Prevention of Acts of Violence and Terrorism*, 72 Fed. Reg. 16271-01 at 16274 (April 4, 2007) (“The Attorney General will carefully and systematically review each case and the potential threats before imposing special administrative measures or monitoring attorney-client communications.”); Evaluation and Inspections Div., Office of Inspector Gen., Dep’t of Justice, *Rep. No. I-2006-09, The Federal Bureau of Prisons’ Monitoring of Mail for High-Risk Inmates*, at 14 (2006), available at <http://www.justice.gov/oig/reports/BOP/e0609/final.pdf> (“SAMs may be recommended on a case-by-case basis.”). Further, SAMs must be tailored to the threat posed by each individual defendant. *See Prevention of Acts of Violence and Terrorism*, 72 Fed. Reg. at 16274 (“We do not detail SAM conditions in this rule because each case varies with the particular security needs of the inmate in question.”). The language of the SAMs regulations includes a list of measures that SAMs “ordinarily may include,” but not a uniform, generally applicable list of SAMs restrictions. *See* 28 C.F.R. § 501.3 (emphasis added).

The need for individualized justification for SAMs is especially apparent when the government proposes to intrude on the attorney-client relationship or the defense of the charged case. *See* 28 C.F.R. § 501.3(d), 28 C.F.R. § 501.3(d)(1). Thus, the monitoring of attorney-client mail or other communications is not one of the “ordinarily” included limitations that may be imposed by SAMs. *See* 28 C.F.R. § 501.3. Instead, it constitutes a separate and additional limitation on inmates who might act to facilitate terrorism. 28 C.F.R. § 501.3(d)(1). Both 28 C.F.R. § 501.3(d) and 28 C.F.R. § 501.3(d)(1) specifically describe the decision to engage in attorney-client monitoring as additional to the basic, case-by-case SAMs determination – one made rarely, if at all, and one which would raise significant legal issues if it were extended without a valid legal basis such as the standards for monitoring and oversight applicable in the crime/fraud context.

In cases where SAMs have been challenged, courts have required that the conditions must respond to a specific, current threat posed by the particular inmate affected, and have ordered the removal of SAMs where the government was unable to provide sufficient particularized basis for their imposition. Thus, in *United States v. Suleiman*, the court ordered the release of a defendant into the general population despite evidence linking the defendant to bomb manuals, militant training areas, and one of the men accused of the 1993 World Trade Center bombing, because prosecutors were unable to provide sufficient evidence that the defendant posed a threat from prison warranting the restrictions. 96 Cr. 933 (WK), 1997 U.S. Dist. LEXIS 5793, at \*6 (S.D.N.Y. April 14, 1997); *see also Mohammed v. Holder*, Civ. Action No. 07-cv-02697-MSK-BNB, 2011 U.S. Dist. LEXIS 111571, at \*27-28 (D. Colo. Sept. 29, 2011) (requiring that SAMs be particularly crafted to the threat posed by the individual inmate, who had been convicted for his role in the 1998 Embassy Bombings).

Even when courts do not remove defendants from SAMs entirely, challenges to SAMs have resulted in their modification, either by court order or by the Department of Justice. *See, e.g., United States v. El-Hage*, 213 F.3d 74, 78 (2d Cir. 2000) (defendant's SAMs modified to allow him a cellmate and extra phone time with his family); *United States v. Kassir*, No. S2 04 Cr. 356 (JFK), 2008 U.S. Dist. Lexis 52713, at \*5 (S.D.N.Y. July 8, 2008) (defendant given a laptop to aid in reviewing discovery, and SAMs restrictions regarding newspapers, radio and television amended); Transcript of Sentencing of Mohammed Warsame, July 9, 2009, at 24:21-22, *United States v. Warsame*, No. 0:04-cr-00029-JRT-FLN (D. Minn. Jan. 20, 2004) ("The Court also modified the conditions [of confinement] as time went on..."). In each of these ways, SAMs maintain their particularized and limited nature, placing restrictions on defendants only to the extent believed necessary based on the threat posed by that particular defendant.

Although the Association recognizes that detaining individuals accused of terrorism crimes raises legitimate and potentially serious security concerns, a prisoner's status as an accused terrorist does not obviate the need for specific findings about the current threat posed by a detainee prior to applying additional restrictive procedures. Indeed, the BOP has implemented SAMs (to our knowledge not involving monitoring of attorney-client communications) for only a minority of individuals convicted of involvement in terrorism. Since 2001, federal prisons have held many perpetrators of terror attacks, such as Najibullah Zazi, Faisal Shahzad, Umar Farouk Abdulmutallab, Bryant Vinas, and others, each with recent, demonstrated connections to terrorists and/or terror organizations. Nevertheless, of the more than 400 persons prosecuted in terrorism cases in federal courts since September 11, 2001, only 44 were being held under SAMs as of March 2011. *See* March 26, 2010, Letter from Ronald Weich, Assistant Attorney General, U.S. Department of Justice, Office of Legislative Affairs, to the Honorable Patrick Leahy and Jeff Sessions; *see also* Exhibit D-1 to Defendant's Motion for Summary Judgment at 2, filed March 25, 2011, *Ayyad v. Gonzalez, sub nom. Ayyad v. Holder*, No. 1:05-cv-02342-WYD (D. Colo. Nov. 18, 2005), ECF No. 259 (hereinafter, "Ayyad Motion"). Eleven others had previously been subjected to SAMs, but the SAMs were lifted. *See* Ayyad Motion at Ex. D-1 at ¶ 24.

Even in cases of convicted terrorists held in Administrative Maximum Security facilities, SAMs are applied on an individual basis, with opportunities for inmates to challenge their designation and to modify the restrictions placed upon them. For example, prior to placement in Administrative Maximum segregation under SAMs, inmates must be informed of the specific reasons for their placement and given an opportunity to respond to those allegations. *See, e.g., Ayyad Motion* at 29-32, Ex. F-1 at ¶¶ 11, 12. Such hearings have resulted in the removal of at least one inmate from Administrative Maximum security, while the SAMs of other inmates have been modified in order to allow them to participate in the least restrictive level of administrative segregation. *See id.* at 41, 49, Ex. F-1 at ¶ 27, Ex. B-1 at ¶ 49. These hearings are repeated yearly, allowing inmates to continually challenge their SAMs so that SAMs remain specifically tailored to a current threat. Indeed, eleven of the inmates who have been held under SAMs in an Administrative Maximum facility have had their SAMs removed, six since 2009. *Id.* at Ex. D-1 at ¶ 24.

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As Attorney General Holder has stated, SAMs must be crafted in a manner that is specific to an individual inmate. *See* Press Release, U.S. Department of Justice, Office of Public Affairs, *Fact Sheet: Prosecuting and Detaining Terror Suspects in the U.S. Criminal Justice System* (June 9, 2009) (available at <http://www.justice.gov/opa/pr/2009/June/09-ag-564.html>). SAMs are therefore carefully modified on a case-by-case basis to allow for the imposition of the least restrictive means necessary to protect national security. *See* Ayyad Motion at 28-41. Once again, this practice sharply contrasts with the procedures described in the Order, which provide no opportunity for modification based on independent review of the decision to monitor attorney-client communications.

**The Written Communications Management Order is Overbroad and Dangerously Intrusive with Respect to Attorney-Client Communications**

The Order Reverses Accepted Principles of Attorney-Client Privilege

As written, the Order upends the presumption that communications between attorneys and their clients are privileged. This presumption is long established in federal courts and in BOP regulations. This well-accepted presumption is necessary to the successful functioning of any adversarial criminal proceeding, including those before a Military Commission.

The Order reverses this presumption by providing for wholesale review of written attorney-client communications. The Order establishes that a “privilege team” will review *all* written attorney-client communications, as well as material brought into or out of attorney-client meetings. Order ¶¶ 6-9. Attorneys for detainees awaiting prosecution in Military Commissions at Guantanamo must mark every document to be delivered to a client as either “LAWYER-CLIENT PRIVILEGED COMMUNICATION...,” “MILITARY COMMISSION OTHER CASE RELATED MATERIAL...,” or “MILITARY COMMISSION NON-LEGAL MAIL OR MATERIAL...” Order ¶ 6.b. The Order directs the Privilege Team to review this material in order to assure that it is correctly marked and does not contain information to be withheld from the detainee. Order ¶¶ 6.b., 6.f. Should the Privilege Team disagree with defense counsel’s labeling of the materials, or believe that some material is contraband, defense counsel are expected to justify their labeling or inclusion of that material to the Privilege Team. Order ¶¶ 6.f., 6.g., 9.a.

Placing this burden on defense attorneys and their clients contradicts federal criminal practice, which presumes that attorney-client communications are privileged, and allows incursions into attorney-client privileged communications only when some evidence suggests attorneys may be abusing the privilege to further criminal or otherwise improper behavior.<sup>2</sup> *See United States v. Zolin*, 491 U.S. 554, 563 (1989) (citations omitted) (“the ‘seal of secrecy’ between lawyer and client does not extend to communications ‘made for the purpose of getting advice for the commission of a fraud’

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<sup>2</sup> Departing from the traditional presumption that defense counsel will act honorably and lawfully is unwarranted in the context of military commissions, where defendants are represented by uniformed military counsel or civilian counsel who have passed a security clearance. The loyalty and professionalism of these attorneys can safely be presumed.

or crime”). In federal court, the party wishing to invoke the “crime-fraud exception” in order to remove the privilege from attorney-client communications must demonstrate that there is a “factual basis for a showing of probable cause to believe that a fraud or crime has been committed and that the communications in question were in furtherance of the crime or fraud.” *See, e.g., United States v. Jacobs*, 117 F.3d 82, 87 (2d Cir. 1987). If the proposed factual basis “strike[s] ‘a prudent person’ as constituting a ‘reasonable basis’ to suspect the perpetration of a crime or fraud, and that the communications were in furtherance thereof,” the district court has discretion whether to engage in an *in camera* review of the evidence. *Id.* If and when there has been an *in camera* review, the district court again has discretion to determine whether the crime-fraud exception applies. *Id.*

The procedures in the Order authorizing uniform screening of attorney-client communications are not “comparable” to BOP regulations, as the Order claims. *See* Order at ¶ 1. To the contrary, BOP provisions that address attorney-client communications recognize that attorney-client visits and correspondence are privileged, and may be limited or denied only if the attorney purposefully acts to contravene prison regulations. *See* 28 C.F.R. § 543.14 (listing examples of attorney conduct, such as false statements; a plan, attempt, or act to introduce contraband; a conspiracy or attempt to commit violence; or encouraging the inmate to violate the law or BOP rules, that may warrant limiting or denying inmates’ attorney visits or correspondence). Moreover, in *United States v. Kassir*, the SAMs imposed on Kassir provided that, in contrast to limitations on all other communications, the only limitations placed on his attorney-client communications and material were that it should not be transmitted to third parties and that if translated, a government approved translator should be used. *See Kassir*, 2008 U.S. Dist. LEXIS 52713, at \*23-28.

#### Restrictions or Monitoring of Privileged Communication Must Include Opportunities for Judicial Oversight

The adversarial nature of our criminal justice system, which the Military Commissions Act has adopted, requires not only the presumption of attorney-client privilege, but also protection of that privilege by detached judicial officers. Thus, even under the SAMs provision that authorizes monitoring attorney-client communications where necessary in order to prevent acts of terrorism, those persons designated to monitor attorney-client conversations may not disclose *any* information absent a determination that “acts of violence or terrorism are imminent,” unless and until they have obtained approval from a judge. 28 C.F.R. 501.3(d)(3).

In sharp contrast, the Order leaves the decision to disclose information entirely in the hands of the Privilege Team, which consists in part of legal personnel, and in part of intelligence or law enforcement personnel. *See* Order ¶ 2.d. The members of the Privilege Team do not have an attorney-client relationship with any detainee. Order ¶¶ 2.d., 5. The Order permits consultation by the Privilege Team “with security and intelligence experts at JTF-GTMO,” who are under no obligation to maintain attorney-client privilege. Order ¶ 5.b. The Privilege Team is further ordered to disclose to the JTF-GTMO Commander “any information that reasonably could be expected to result in ... future events that threaten national security, or that presents [*sic*] a threat to the operation of the detention facilities or to U.S. Government personnel.” The JTF-GTMO

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Commander, in turn, is authorized to disseminate that information as he or she deems appropriate. *Id.* ¶ 5.d. The absence of judicial oversight of determinations to disclose arguably privileged material contravenes federal criminal practice.

According to press reports, on February 10, 2012, Army Colonel James Pohl, the Military Judge overseeing the prosecution of Abd el-Rahim al-Nashiri in the Military Commissions system, ruled on a motion challenging restrictions on communications between al-Nashiri and his attorneys. *See* Jane Sutton, *Guantanamo mail screeners ordered to keep mum*, Reuters, Feb. 13, 2012 available at <http://www.reuters.com/article/2012/02/14/us-usa-guantanamo-mail-idUSTRE81D05620120214>. Judge Pohl's ruling has not yet been released publicly. However, the Association understands from press reports that the ruling orders Guantanamo staff responsible for screening al-Nashiri's attorney-client correspondence to obtain Judge Pohl's permission prior to disclosing any information gleaned from their review. *Id.* The ruling therefore appears to underscore the deficiencies in the Order with respect to the absence of judicial oversight over disclosure of detainees' attorney-client correspondence. However, it does not appear that the ruling remedies the broader concerns about the Order in terms of the incursion by Guantanamo staff on detainees' attorney-client communications. Finally, the Association understands that the ruling applies only to al-Nashiri's proceeding, and therefore does not cure the deficiencies in Order as applied to other detainees.

#### The Definition of "Contraband" in the Order Is Unnecessarily Broad

The Order compounds the problems listed above by broadly defining "Contraband" material that defense counsel may not transmit to any detainee. The broad definition impedes defense counsel's ability to gather information for purposes of ascertaining a detainee's defense, and requires the Privilege Team to become inappropriately entangled in the preparation and presentation of the detainee's defense.

As set forth in the Order, "Contraband" encompasses information about "current political or military events in any country; historical perspectives or discussions on jihadist activities ... Information about security procedures ... at JTF-GTMO ... [and] [i]nformation regarding the status of other detainees." Order ¶¶ 2.h.(3)(a)-(f). This definition is expansive and encompasses information that could be necessary to build a defense or defense strategy. For example, information deemed "Contraband" under the Order could help establish non-inculpatory reasons the detainee possessed a weapon or was in a particular location; whether the detainee has any knowledge of jihadist rhetoric; the prevalence of jihadist rhetoric in the detainee's local environment, even among non-terrorists; a detainee's own opinions as to jihadist activities and philosophies; doubts as to the voluntariness of any confessions offered by the detainee; and doubts as to the truthfulness of inculpatory statements made about the detainee by other detainees. Each of these facts may at different times be fundamental to a client's defense.

The Order exempts some categories of information from the definition of "Contraband" if defense counsel reasonably believes the information is case-related. However, the process for determining whether a particular piece of information is subject to the exception would further insert the Privilege Team in the inner workings of the defense team. The Order directs defense counsel to discuss the relationship of otherwise

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“Contraband” information to their client’s case with JTF-GTMO personnel and the Privilege Team, presumably in order to explain the relationship of the material to the case. *Id.* ¶¶ 4.a. (“If Defense Counsel believes information that does or may otherwise constitute Contraband ... is directly related to the military commission proceeding ... Defense Counsel are strongly encouraged to seek guidance from JTF-GTMO personnel via the Staff Judge Advocate”); 6.f.(3); 6.g. (“If ... the Privilege Team observes material that appears to be Contraband ... that material shall not be delivered to the Detainee-Accused. The Privilege Team shall consult with Defense Counsel regarding the material ... in an effort to address the apparent problem(s)). This sort of consultation would require counsel to reveal the defense strategy to personnel who are not part of the defense team and whose obligations lie towards disclosure rather than confidentiality. Such a procedure is at odds not only with established principles of attorney-client privilege, but also with the BOP regulations the Order claims to parallel.

BOP regulations expressly authorize prison officials to ban material that is “determined [to be] detrimental to the security, good order, or discipline of the institution or if it might facilitate criminal activity.” 28 C.F.R. § 540.71(b). Unlike the unfettered authority established by the Order, however, prison officials’ ability to ban material on this basis is strictly limited, first by a list of nonexclusive but suggestive descriptions of the type of material that may be banned. *See* 28 C.F.R. § 540.71(c), (d). This list includes materials written in code, describing, explaining or encouraging violent behavior, escape, the manufacturing of weapons, or the commission of other crimes, or sexually explicit material. *Id.* Moreover, the regulation explicitly states that each individual item must be examined and deemed to be a threat prior to being prohibited—lists of prohibited publications are not acceptable. Should an item be prohibited, the inmate must be granted an opportunity to view the material in order to appeal its designation. *See* 28 C.F.R. § 540.71(c), (d).

Finally, the BOP regulation applies to contact with the community in general, *but not* to attorney-client contact and communication. *See* 28 C.F.R. § 540 (“Contact with Persons in the Community”). To the contrary, and as has been discussed above, federal regulations establish that attorney-client communication is assumed to be privileged, and may only be intruded upon in the case of evidence that an attorney is purposefully contravening prison regulations or threatening prison order.

### **Conclusion**

As outlined in this letter, the Association believes the Written Communications Management Order is problematic because it invades the attorney client privilege, inappropriately inserts outsiders into the defense team, and reverses the presumption that the privilege should be respected, all on a blanket basis and without any particularized showing of need. We believe the Order threatens to undermine the proper functioning of the adversary system and, with it, the legitimacy of the Military Commissions system. Accordingly, we recommend that the Order be revoked and replaced with a policy that, while allowing for reasonable steps to ensure the security of the detention facility at Guantanamo, also respects the sanctity of the attorney-client privilege in military commission proceedings. In addition, the Association urges that no monitoring of

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attorney-client communications be performed until these concerns have been addressed and the procedures have been so modified.

Very truly yours,

A handwritten signature in black ink, appearing to read 'S.W. Seymour', with a long horizontal flourish extending to the right.

Samuel W. Seymour