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July 1, 2010

BY ELECTRONIC MAIL

Jeh Charles Johnson, Esq.
General Counsel of the Department of Defense
1600 Defense Pentagon
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Re: Objections to Media Policy and Ground Rules for the Naval Station Guantanamo Bay

Dear Mr. Johnson:

We represent *The Miami Herald*, The Associated Press, Dow Jones & Company, Inc., *The New York Times*, Reuters and *The Washington Post*, whose reporters regularly travel to Guantanamo Bay to report on the Military Commissions being conducted there. I am writing to raise with you the legal objections of these news organizations to the Department's Media Policy and Ground Rules for the Naval Station Guantanamo Bay (the "Ground Rules") as construed by the Office of the Assistant Secretary of Defense (Public Affairs), and to request that these Ground Rules promptly be revised.

We are also writing on behalf of *The Miami Herald* to request a review and reconsideration of the penalty imposed by OASD (PA) on its reporter, Carol Rosenberg for a purported violation of the Ground Rules. As things now stand, this reporter is expelled from Guantanamo through August 5, 2010, based upon a patently unconstitutional application of the Ground Rules. This penalty is an illegal denial of access to the Commissions, and extending it through August 5 unfairly prohibits Ms. Rosenberg from covering important proceedings that will be conducted at Guantanamo in July. We urge the Department to reconsider and rescind this order.

Background

Proceedings of the Military Commissions, by law, are open to the press. But reporters who wish to attend the proceedings at Guantanamo are required to accept the Ground Rules issued by OASD (PA) in order to gain access to the Commissions. Among many other provisions, the Ground Rules prohibit reporters from publishing "information identified by commission's personnel as being Protected Information or otherwise protected from disclosure

by these ground rules." (Paragraph 2.a.) They also direct that the "identities of all commission personnel, to include the Presiding Officer, commission members, prosecutors, defense counsels, and witnesses, will not be reported or otherwise disclosed in any way without prior release approval of OASD (PA)." (Paragraph 2.g.) In imposing these restrictions, the Ground Rules state that they govern only information "gathered or produced *within* the joint task force Guantanamo (JTF-GTMO) area of operations." Until last month, reporters thus understood that the limitations on the disclosure of "protected" information applied only to information obtained on the Naval Base and in the Military Commission proceedings at Guantanamo Bay.

The plain language of the Ground Rules appears to exclude from their scope information obtained through public channels, independent of the Military Commissions proceedings. DOD's past practices confirmed this reading of the Ground Rules, permitting reporters who visited Guantanamo to report information about detainees they independently learned from sources outside the Base. In 2002, for example, when the first enemy combatants were arriving at the Naval Base, press guidelines forbade reporters visiting the facility from disclosing the names of any detainees they learned while at Guantanamo. But that policy was never applied to restrict those same journalists from reporting the identities of detainees if they learned the information independently, from other sources. *See, e.g.*, Carol Rosenberg, "Camp X-Ray Inmates Called Tough, Patient," *Miami Herald*, Jan. 27, 2002 (noting in a report about a visit to Guantanamo that one detainee, who "sought to be a ringleader," had been identified "in reports abroad" as Australian David Hicks).

Similarly, at a hearing in August 2004 the Department deleted names of the members of the military commission and the prosecutors from transcripts and required artists to obscure their faces in drawings. Reporters covering the hearing who knew the names from previously disclosed documents nonetheless reported those names with no objection from OASD (PA). *See*, *e.g.*, Jess Bravin, "As War Tribunal Opens, Legality Is Challenged," *The Wall Street Journal*, 25 August 2004; Paisley Dodds, "Bin Laden Chauffeur Charged with Conspiracy to Commit War Crimes in First Guantanamo Hearing," Associated Press Newswires, 24 August 2004; Guy Taylor, "Defense on Attack at Gitmo Hearing, *Washington Times*, 25 August 2004; Carol Rosenberg, "Bin Laden's Driver Charged First at Tribunal," *Miami Herald*, 25 August 2004. This approach was also consistent with the practices of military censors in other countries, who do not bar publication of information that already has been widely publicized.

Nonetheless, on May 6, 2010, without any prior notice of its concerns or an opportunity to be heard, OASD (PA) announced that it was banishing four reporters from all future sessions of the Military Commissions at Guantanamo for violating the Ground Rules. The expulsion of these reporters was based upon an expansive and illegal application of the Ground Rules by OASD (PA) to preclude reporters from disclosing information deemed "protected," even if that information had already been widely publicized, was not "gathered or produced" at Guantanamo, and was known by the reporters before they ever traveled to Guantanamo.

The episode that gave rise to this broad interpretation of OASD (PA)'s authority to censor public information out of news reports from Guantanamo involved the disclosure of the name of a witness who testified at a pre-trial exclusionary hearing in the prosecution of Omar

Khadr, a Canadian citizen. When it was disclosed at the start of the hearing on May 4, 2010 that Khadr's lead interrogator would be a witness at the hearing, several reporters noted in their coverage of the proceeding that an interrogator who had been court-martialed for detainee abuse was scheduled to testify, and included in their stories the fact that this interrogator had previously been identified in the media as Army Sgt. Joshua Claus. *See, e.g.*, Carol Rosenberg, "Ex-Army Interrogator Testifies For Omar Khadr," *Miami Herald*, May 5, 2010; Steven Edwards, "Interrogator says Khadr exposed to 'fear' techniques," *Canwest News Service*, May 4, 2010; Michelle Shephard, "Omar Khadr questioned by sergeant later court-martialled, court told," *Toronto Star*, May 5, 2010.

The identity of "Interrogator No. 1" in the Khadr case was neither gathered by the reporters nor produced by the military during the proceeding at Guantanamo Bay. Rather, his name was publicly disclosed years earlier by Sgt. Claus himself. Sgt. Claus was widely identified as Khadr's main interrogator in 2008 after he *sought out* a reporter for the *Toronto Star* and *offered* to give an on-the-record interview. *See* Michelle Shephard, "Interrogator: I didn't hurt Khadr," *Toronto Star*, Mar. 26, 2008. Since that interview, Sgt. Claus has repeatedly been identified by name in scores of news reports concerning Khadr, including previous news reports written *from* Guantanamo. *See, e.g.,* M. Melia, "Abuse allegations from US prison in Afghanistan cast shadow over 3 Guantanamo hearings," ASSOCIATED PRESS, Mar. 14, 2008 (identifying Sgt. Claus as one of Khadr's interrogators); O. El Akkad, "Khadr's lawyers granted access to more information," *The Globe and Mail,* Mar. 15, 2008 at A17 (same). Sgt. Claus is even identified as Khadr's main interrogator in Khadr's biography on Wikipedia. *See* http://en.wikipedia.org/wiki/Omar_Khadr.

After the news reports naming Sgt. Claus as a witness in the Khadr hearing were published on May 5, 2010, four reporters at Guantanamo who had included his name in their reports were summarily barred from attending all future Military Commissions by OASD (PA). This unconstitutional action was taken without any advance notice or warning, and without any inquiry of the reporters about what they had done, when or why.

The reporters promptly appealed their expulsion to Bryan Whitman, Deputy Assistant Secretary of State for Public Affairs. After a month-long review of the situation, Mr. Whitman concluded that the expulsion was proper because the name of the witness had been deemed "protected" by the presiding judge, and the Ground Rules make no exception for information "in the public domain." Nonetheless, he agreed that permanent expulsion was inappropriate and agreed to "consider" lifting the lifetime ban if each reporter personally submitted an application for reinstatement indicating they understood "why we took this action" and promising to "abide by all the ground rules" in the future. *See* June 14, 2010 letter to David A. Schulz from Bryan G. Whitman.

Without waiving their right to challenge the legality of the Ground Rules in court, the reporters submitted the requested applications. Mr. Whitman then agreed to "reinstate" them, but not until August 5, 2010— an arbitrary date chosen to ensure the reporters would be unable to cover the continuation of the Khadr hearing beginning on July 12, 2010.

The Ground Rules Require Immediate Revision

As construed by OASD (PA), the Ground Rules are plainly illegal. The Ground Rules violate the First Amendment by imposing a prior restraint against the publication of information deemed "protected" regardless of whether that information is already widely known and publicly available. The Ground Rules equally violate the Military Commissions Act and the public's constitutional right of access to the Military Commissions, by refusing access to the proceedings for no compelling reason. As the Supreme Court has stated, in no uncertain terms, "a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens," *Handi v. Rumsfeld*, 542 U.S. 507 (2004), and the Department cannot through its media Ground Rules deny reporters their constitutional rights. The Ground Rules require immediate revision.

1. Reporters cannot legally be ordered to exclude public information from their Guantanamo reporting.

As construed by OASD (PA) the Ground Rules directly restrain a reporter from publishing information lawfully obtained outside of the Military Commissions and hence constitute a "classic example" of a prior restraint, *Alexander v. United States*, 509 U.S. 544, 550 (1993), and "the essence of censorship," *In re Providence Journal Co*., 820 F.2d 1342, 1345 (1st Cir. 1986), *modified*, 820 F.2d 1354 (1st Cir. 1987). *See Rodgers v. U.S. Steel Corp.*, 536 F.2d 1001, 1007 (3d Cir. 1976) (a protective order that prohibits disclosure of information "obtained otherwise than through the court's processes, is valid only if it can withstand scrutiny under the rigorous standards by which we judge prior restraints of speech"); *Jesse v. Farmers Ins. Exch.*, 147 P.3d 56 (Colo. 2006) (a protective order can apply "only to documents or information obtained solely as a result of discovery in a pending case"); *Gillard v. Boulder Valley Sch. Dist. RE.-2*, 196 F.R.D. 382, 387 (D. Colo. 2000) (same); *Cooper Hosp./Univ. Med. Ctr. v. Sullivan*, 183 F.R.D. 135, 146-147 (D.N.J. 1998) (rejecting requested protective order governing information received outside of discovery under prior restraint doctrine).

Such prior restraints are "the most serious and the least tolerable infringement on First Amendment rights" and they are "presumptively unconstitutional." *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 558 (1976). *See New York Times Co. v. United States*, 403 U.S. 713, 714 (1971) (any prior restraint bears "a heavy presumption against its constitutional validity"). The Supreme Court repeatedly has refused to allow any such prior restraint, even in the name of national security:

> Even where questions of allegedly urgent national security or competing constitutional interests are concerned, we have imposed this "most extraordinary remed[y]" only where the evil that would result from the reportage is both great and certain and cannot be militated by less intrusive measures.

CBS Inc. v. Davis, 510 U.S. 1315, 1317 (1994) (Blackmun, J., in chambers) (quoting *Nebraska Press Ass'n*, 427 U.S. at 559) (alteration in original) (citations omitted); *see also Procter &*

Gamble Co. v. Bankers Trust Co., 78 F.3d 219, 225 (6th Cir. 1996) (prior restraint, "under all but the most exceptional circumstances, violates the Constitution").

No such "great and certain" evil justifies the restriction on dissemination of public information currently imposed by the Ground Rules. The OASD (PA) says this restriction is intended to protect classified information and intelligence collection capabilities, and to preserve the anonymity of participants in the proceedings. Media Policy and Ground Rules, ¶ 1. None of these objectives is advanced one iota by preventing journalists physically present at Guantanamo from reporting information that has been public for years, while other journalists covering the proceedings off base are free to report the very same information. Such a prior restraint does not further any legitimate military purpose. It simply stifles those journalists on the scene who are best-positioned to illuminate the proceedings of the Military Commissions for the general public, and puts them at a competitive disadvantage to those rewriting from afar. This is a patently unconstitutional restraint.

2. Reporters cannot legally be denied access to the Commissions without a compelling reason based on explicit factual findings.

The Ground Rules are legally indefensible for the further reason that they purport to empower OASD (PA) to bar reporters from attending proceedings of the Military Commissions without any of the findings of fact that are required to be made under the Military Commissions Act and the First Amendment *before* access to those proceedings may be restricted.

In adopting the Military Commissions Act in 2006, Congress recognized the critical importance that these proceedings be conducted in the open so the watching world would accept their validity. *See e.g.*, 152 Cong. Rec. H7522, H7534 (Sept. 27, 2006) (statement of Rep. Hunter); 152 Cong. Rec. H7508, H7509 (Sept. 27, 2006) (statement of Rep. Cole); 152 Cong. Rec. H7522, H7552 (Sept. 27, 2006) (statement of Rep. Sensenbrenner); 152 Cong. Rec. H7925, H7937 (Sept. 29, 2006) (statement of Rep. Hunter); 152 Cong. Rec. H7925, H7945 (Sept. 29, 2006) (statement of Rep. Sensenbrenner). Congress thus expressly mandated that the proceedings of the Commissions must be open to the press and international observers, except in certain narrowly limited circumstances. 10 U.S.C. § 949d(c). The Act permits a *military judge* to deny access only after making specific findings that such a step is necessary either to "(A) protect information the disclosure of which could reasonably be expected to cause damage to the national security, including intelligence or law enforcement sources, methods or activities; or (B) ensure the physical safety of individuals." 10 U.S.C. § 949d(c)(2).

This statutory right of the press to attend Commission proceedings is recognized and implemented in both the Regulation for Trial by Military Commissions ("Reg. MC") and the Rules for Military Commissions ("RMC"). *See* Reg. MC 19-7(a) ("sessions of military commissions shall be public to the maximum extent practicable."); RMC 806(a) ("military commissions *shall* be publicly held") (emphasis added). The Rules make clear that Commission proceedings are open to "representatives of the press, representatives of national and international organizations, . . . and certain members of both the military and civilian communities." RMC 806(a). Where Congress has mandated proceedings open to the press, and

permitted a limitation of access by a military judge only in those circumstances where "necessary" to protect national security or ensure physical safety, OASD (PA) cannot unilaterally impose restrictions upon access by reporters that are inconsistent with this statutory mandate and frustrate the Congressional objectives embodied in the Military Commissions Act itself.

Indeed, the access right here is not simply a statutory right, but a constitutional one as well. The First Amendment independently "protects the public and the press from abridgement of their rights of access to information about the operation of their government." *Richmond Newspapers Inc., v. Virginia*, 448 U.S. 555, 584 (1980) (Stevens, J., concurring) (recognizing First Amendment right of public access to criminal trials); *see also*, *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 13-14 (1986) ("*Press-Enterprise II*") (same as to preliminary hearings in a criminal prosecution). This constitutional access right applies fully to proceedings conducted within the executive branch, including the Military Commissions. *See, e.g.*, *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 695-96 (6th Cir. 2002) (right of access to INS deportation proceedings); *United States v. Anderson*, 46 M.J. 728, 729 (A. Ct. Crim. App. 1997) (per curiam) ("trials in the United States military justice system are to be open to the public"); *United States v. Travers*, 25 M.J. 61, 62 (C.M.A. 1987) (First Amendment right of public access extends to courts-martial); *ABC, Inc. v Powell*, 47 M.J. 363, 366 (C.A.A.F. 1997) (First Amendment right of public access applies to investigations under Article 32).

Because the Ground Rules purport to permit OASD (PA) to deny access to journalists for no compelling reason, with no effective result, and without any order from a military judge, they are flatly illegal and must necessarily be revised.

3. The Ground Rules are procedurally defective.

The Ground Rules further require modification because they provide no adequate procedures to safeguard the important constitutional and statutory rights at stake. In the recent expulsion order, for example, no factual findings were made before four reporters were banned from the proceedings for life. Nor were the reporters afforded any notice or opportunity to be heard before being stripped of their constitutional rights. *See Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 609 n.25 (1982) (media and public "'must be given an opportunity to be heard'" on questions relating to access) (citation omitted); *accord, e.g., In re Associated Press*, 172 F. App'x. 1, 4 (4th Cir. 2006).

In assessing the significant legal flaws in the Ground Rules, it is no answer that reporters "agree" to abide by them when they travel to Guantanamo. They have no choice but to accept the Ground Rules, and the Supreme Court has long held that "the government may not deny a benefit to a person on a basis that infringes his constitutionally protected . . . freedom of speech even if he has no entitlement to that benefit." *Board of County Commissioners v. Keen*, 518 U.S. 668, 674 (1996) (internal citations and quotation marks omitted); *G&V Lounge v. Michigan Liquor Control Commission*, 23 F.3d 1071, 1077 (6th Cir. 1994) ("a state actor cannot constitutionally condition the receipt of a benefit, such as a liquor license or an entertainment permit, on an agreement to refrain from exercising one's constitutional rights, especially one's

right to free expression"). It does not matter that a reporter is free to reject the terms of the Ground Rules and forgo the benefit of access to the Naval Base. Instead, the focus of the analysis is on the "propriety of the condition imposed on receiving the discretionary benefit, not on whether the party was compelled to accept the condition." *Parks v. Watson*, 716 F.2d 646, 651 (9th Cir. 1983).

The law has long held that "a condition requiring an applicant for a governmental benefit to forgo a constitutional right is unlawful if the condition is not rationally related to the benefit conferred." *Id*. at 652. There must be a sufficiently strong, legitimate government interest before a contractual condition may legally restrict a citizen's First Amendment rights. *Keen*, 518 U.S. at 675. As demonstrated above, no such legitimate interest justifies the overly-broad censorship imposed by the Ground Rules.

4. The Ground Rules urgently need revision.

To address these fundamental legal problems, the Ground Rules must be revised. At a minimum, the rules need to be redrafted to exclude any restrictions on reporting information that is publicly known and obtained outside of the Military Commission process. In litigation in the civilian courts, judges entering protective orders recognize the First Amendment limit to their authority to restrain the disclosure of information by expressly *excluding* from the scope of any restraint information that becomes "generally available to the public other than through a violation of this order."

For example, the protective order entered by the district court in *United States v. National Ass'n of Realtors*, No. 05-C-5140 (N.D. Ill. filed Jan. 11, 2006), an antitrust action, expressly provides that its restrictions on information designated as "confidential" do not apply:

> to information obtained from the public domain or from other sources (other than the Protected Person) who were rightfully in possession of the information, regardless of whether such information is also contained in materials designated as "Confidential" pursuant to this Order.

The protective order in *Orwasher v. A. Orwasher, Inc.*, No. 09 CV 1081 (S.D.N.Y. filed Dec. 21, 2009) similarly exempts from its confidentiality provisions any information "that was lawfully available to the public" or that lawfully come into the possession of a party "independent of any disclosure" in the litigation.

A similar exemption must be added to the Ground Rules to satisfy the constitutional concerns. *The Wall Street Journal* has consistently annotated its agreement to the Ground Rules to specify that the government could not require suppression of information its journalists knew or obtained independent of the Commissions, and OASD (PA) has never objected to his amendment. There should be no possible objection to changing the Ground Rules to exempt such public information.

My clients would also like to discuss a number of other needed changes to the Ground Rules, including:

- a requirement that a factual finding be made that a compelling interest requires confidentiality before information is deemed "protected" under the Ground Rules;
- a mechanism for reporters to be notified, when OASD (PA) believes a violation has occurred, and to be heard before action is taken;
- a requirement for factual findings to be made by a military judge *before* a reporter is denied access to a Military Commission; and
- clarification that the "embargo" provisions of the Ground Rules do not authorize OASD (PA) to delete and permanently destroy photographs and images taken at Guantanamo, but instead require preservation while the press organization has an opportunity to challenge the embargo.

These procedural safeguards are necessary to ensure that reporters are not arbitrarily penalized for their reporting, and to bring the Ground Rules into compliance with the Military Commissions Act and the First Amendment.

The Expulsion of Reporters Through August 5 Should Immediately Be Rescinded

The Miami Herald further submits that the decision by OASD (PA) to bar its reporter Carol Rosenberg from Guantanamo through August 5, 2010 was illegally taken and should be reconsidered and rescinded immediately. The action impermissibly enforces an unconstitutional prior restraint, and even if the Ground Rules were legal and enforceable, the remedy imposed is out of all proportion to the alleged transgression.

As previously explained to OASD (PA), based on the prior application of the rules Ms. Rosenberg did not understand that she was precluded from reporting publicly available information. She did not willfully violate the Ground Rules. Nor could any damage possibly have been done by including in a news report information readily available to anyone on the internet. Yet barring her from the continuation of the Khadr pre-trial proceeding in July denies the public the benefit of the skills and insights of a professional journalist with significant knowledge to bring to the public in her reporting on the Khadr prosecution.

Carol Rosenberg is a nationally recognized international correspondent whose reporting for *The Miami Herald* and the McClatchy newspaper chain has focused on terrorism trials and the operations at Guantanamo Bay. The depth and breadth of her knowledge of events at Guantanamo is unsurpassed among journalists, and she has covered the Khadr case in particular since his transfer to Guantanamo in 2002. Ms. Rosenberg has visited the facility more than any other reporter. She has personally attended virtually all Military Commission hearings, and has

been present for every day of every trial since the inauguration of the Military Commissions in August 2004.

The decree issued by OASD (PA) unfairly penalizes this reporter who has invested a significant portion of her professional life over the past several years to researching and understanding the important issues raised by the Commissions generally, and by the Khadr prosecution specifically. It deprives her news organization of its most significant resource in covering this story. And it deprives the public of the analysis and insights of a journalist who is uniquely situated to contribute to public understanding of the work of the Commissions. The action by OASD (PA) undermines the important public interest in transparency of the proceedings before the Military Commissions.

The order is illegal, inappropriately punitive, and should be lifted immediately so that Ms. Rosenberg may attend the Khadr hearings on July 12, 2010. Each day the unconstitutional order remains in effect imposes irreparable injury upon Ms. Rosenberg's rights.

Conclusion

For each and all of these reasons, we respectfully submit that the Ground Rules must be modified and the order banning four reporters from Guantanamo through August 5, 2010 should immediately be withdrawn. We request the opportunity to meet with the appropriate individuals at the Department to accomplish the necessary changes and to effect the immediate withdrawal of the expulsion order.

Very truly yours,

David A. Schulz

cc: William J. Lynn, III, Deputy Secretary of Defense
Douglas Wilson, Ass't Sec. of Defense for Public Affairs
Bryan Whitman, Deputy Ass't Sec. of Defense for Public Affairs
Vice Adm. Bruce MacDonald, Convening Authority