June 10, 2003

William Haynes
General Counsel
Department of Defense
1600 Defense Pentagon
Washington, DC 20301-1600

Dear Mr. Haynes:

We write regarding the rules that pertain to legal representation for defendants before military commissions.

The U.S. military justice system has long recognized that fair trials cannot occur without the ability of defendants to be represented by counsel of their choice and that such counsel must be able to mount a vigorous defense, including by the production of witnesses and evidence on their clients' behalf. Consistent with this tradition and international human rights and humanitarian law, the right to counsel is one of the due process safeguards incorporated in the military commissions proceedings authorized by President Bush for the trial of suspected terrorists.

Yet the rules for the military commissions, contained in both Military Commission Order No. 1, issued March 21, 2002, and the set of eight Military Commission Instructions, issued on April 30, 2003, include significant and, in our view, wholly unwarranted limitations on the right to counsel. We understand that certain restrictions on counsel may be necessary to protect classified or sensitive national security information. The instructions, however, extend restrictions that are far broader than necessary for that purpose.

We urge you to clarify or amend the instructions to ensure any restrictions on counsel are consistent with the right to counsel and its crucial role in fair trials and are crafted as narrowly as possible to meet legitimate government interests. The specific restrictions that are of concern to us are the following:

1. Right to Counsel of Choice

The military commission instructions provide for the mandatory appointment of a military defense counsel for the defendant, who would have the right to request a different military counsel. The defendant may also retain, at his own expense, private counsel, but military counsel would remain assigned to the defense team. As the instructions state, the "[a]ccused must be represented at all relevant times by Detailed Defense Counsel [military defense counsel]."[1]

The right to counsel of one's choice is an integral component of a fair trial – one recognized in international and U.S. law, including the rules for courts-martial. Nevertheless, the Department of Defense instructions for military commissions violate this fundamental right by requiring the defendant to accept a military lawyer and by denying the defendant the right to either represent himself or to be represented solely by private counsel.[2]

[1]MCO No. 1, (4)(C)(4).

[2]Article 14 of the ICCPR provides that everyone charged with a criminal offense shall have the right "to communicate with counsel of his own choosing." The Human Rights Committee has interpreted this to include a right of persons to defend themselves. See Human Rights Committee, *Hill and Hill v. Spain* (526/1993).

In the United States, low-income defendants who cannot afford to retain their own private counsel as a practical matter must accept lawyers assigned to them by a public defender or legal services organizations. Yet these lawyers are independent of the government. In the case of the military commissions, however, the defendants will be compelled to conduct a defense with counsel provided by, and under the ultimate authority of, the executive branch that is prosecuting and judging them.

We do not question the ability or willingness of military defense lawyers to represent zealously and competently anyone brought to trial before the military commissions. There is no lawful basis, however, for denying a defendant the ability to conduct a defense without the participation of military defense lawyers.[3] The ability to represent oneself or to be represented solely by private counsel takes on added significance in the context of foreign persons who were captured in Afghanistan or other countries and held as military prisoners at Guantánamo. For reasons of culture, personal history, and the conditions of their imprisonment, many of those detainees may never fully trust or cooperate with U.S. military counsel assigned to them. Such trust and cooperation are, of course, vital to an effective defense.

2. Restrictions on Effective Defense

The military commission rules impose severe limitations on the ability of defense counsel – both military and civilian lawyers – to mount an effective defense of their clients. Restrictions on travel, research, and communications "during the pendency of the proceedings" are spelled out in the affidavit civilian lawyers for the commissions are required to sign and with which military defense counsel must comply.[4] Taking the rules at face value, defense representation could be limited to concocting legal arguments from a room in Guantánamo, with no leeway to interview witnesses or gather evidence elsewhere.

Evidence Gathering: Counsel may not "discuss or otherwise communicate or share documents or information about the case with anyone" except members of the "Defense Team."[5] The provision is far broader than necessary to meet legitimate national security concerns, e.g. to ensure that classified documents or information obtained during the trial proceedings are not passed on to terrorist organizations.[6] The excessive breadth of the restriction on attorney communications significantly limits the ability of counsel to mount a meaningful defense. Read literally, the provision would prevent lawyers from trying to locate and talk to prospective witnesses, conversations that would necessarily include discussion of at least some aspects of a case.

In addition, the rules mandate that all work by defense lawyers relating to the commission proceedings, including electronic or other research, be done at the site of the proceedings.[7] Requiring all defense work to be done at Guantánamo or other site of commission proceedings

[3]Persons tried by U.S. courts-martial may conduct their defense *pro se* or proceed solely with civilian counsel if they so choose.
[4]Military defense counsel are directed to conduct their activities consistent with the "prescriptions and proscriptions" specified in the Affidavit and Agreement by Civilian Defense Counsel. MCI No. 4, 3(B)(4).
[5]MCI No. 5, Annex B, II(E)(2).
[6]Defense lawyers are already bound by a separate provision never to make any statements regarding classified information or material. MCI No. 5, Annex B, II(F).
[7]MCI No. 5, Annex B, II(E)(2).

makes constructing an effective defense nearly impossible. On their face, these rules prevent members of the defense team from leaving Guantánamo to locate and interview potentially exculpatory eyewitnesses in Afghanistan or other countries. They would not be able to travel to locate and review useful documents. They would not be able to investigate the scene of the alleged conduct. In addition, the rules would prevent civilian attorneys from using stateside paralegals and other lawyers to work on aspects of the case that do not entail protected or classified information.

Defense Travel Restrictions: Defense attorneys must also obtain permission from military authorities to travel to and from the site of the proceedings and to transmit documents from there unless they receive prior approval from the Presiding Officer.[8] The rules suggest that the Presiding Officer may modify these travel and communication restrictions. Nevertheless, they give scant guidance as to the criteria by which the Presiding Officer should respond to defense attorney requests.[9] Nothing requires a Presiding Officer, for example, to exercise discretion according to the criteria of enabling a meaningful defense. Leaving the ability of the defense team to develop the facts necessary to represent their client to the unfettered discretion of the commission violates the most basic notion of the right to a defense.

3. Attorney-Client Confidentiality

Defense counsel must represent their clients knowing that any communications with them may be monitored by government officials for "security and intelligence purposes."[10] There is no requirement that a military judge authorize the monitoring of any such communications.

The confidentiality of attorney-client conversations encourages clients to confide openly with their attorneys. The ability to communicate candidly and effectively with one's attorney is inherent in the right to counsel, which in turn, helps secure the overarching right of due process and a fair trial. It would be profoundly troubling for the United States to monitor conversations between attorneys and their clients as they develop a defense in any commission proceedings. Indeed, we question whether attorneys could ethically agree to represent any such defendants under these conditions.

4. Security Restrictions on Civilian Defense Lawyers

Civilian counsel may not represent defendants before the military commission unless they have received security clearance of "SECRET" or higher.[11] This rule is not in and of itself unreasonable. We question, however, why the rules require that attorneys who do not already possess a security clearance must pay "any actual costs associated with processing" the security clearance.[12] We note also that the rules do not commit the government to trying to expedite security clearances for civilian attorneys seeking to represent defendants before the commissions. These requirements may limit the ability of civilian attorneys to take cases before the commissions.

[8]MCI No. 5, Annex B, II(E).
[9]Military Commission Order No. 1 charges the Presiding Officer with ensuring the "expeditious conduct of the trial." MCO No. 1, 4(A)(5)(c).
[10]MCI No. 5, Annex B, II(I).
[11]MCI No. 5, 3(A)(2)(d)(ii).
[12]MCI No. 5, 3(A)(2)(d)(ii).

We are more troubled by the fact that private attorneys are not guaranteed access to all materials presented in a case before the commissions even if they possess the requisite high-security clearance. The Military Commission Order No.1 authorizes the Secretary of Defense or his designate, or the Presiding Officer, to close proceedings on broad grounds, such as to protect "intelligence and law enforcement sources, methods, or activities; and other national security interests."[13] Civilian defense counsel, unlike military counsel, may be excluded from closed military commission proceedings.[14] The commission rules also authorize the Presiding Officer to issue protective orders to safeguard "protected information," including orders to delete the information from documents made available to the defendant or the defense team. The commission may not consider protected information unless it is presented to the military defense counsel. But civilian defense counsel may be denied access to such information even when it is admitted into evidence.

5. Gag Order for Defense Counsel

While the commission proceedings are presumptively open to the public and press, the commission rules nonetheless contain various provisions that would prevent defense counsel from speaking publicly about their cases or commission proceedings. Collectively, these rules impose a gag order on defense attorneys, a dictate of silence that contradicts the fair trial purposes of open proceedings.[15]

One commission rule, discussed above, prevents defense counsel from discussing information about the case with anyone except the defense team.[16] In addition to limiting defense counsel investigations, this rule precludes defense counsel from talking to the press or public at large about their case. Another commission rule prohibits defense counsel from making statements about cases or other matters relating to the commissions to the news media, unless they have received approval from the Appointing Authority (Secretary of Defense or designee) or the General Counsel of the Secretary of Defense.[17] This rule imposes unwarranted censorship on counsel communications with the media. Another rule prohibits defense attorneys from ever making any public or private statements regarding any closed sessions of the proceedings.[18]

Human Rights Watch understands that the counsel's right to speak and the public's right to know must be balanced against the legitimate Department of Defense goal of protecting national security information. Indeed, one of the commission rules commits attorneys to never make public or private statements regarding classified or protected information.[19] The other restrictions on defense attorneys, however, silence far more than the disclosure of such information. For example, the rules would prohibit defense attorneys from *ever* commenting on whether closed proceedings were conducted in ways that safeguarded defendants' due process interests or even noting publicly how much of the trial consisted of closed proceedings.

[13]MCO No. 1, 6(B)(3).
[14]MCI No. 4, 3(E)(4).
[15]As the Manual for Courts-Martial states, opening proceedings "to public scrutiny reduces the chance of arbitrary or capricious decisions and enhances public confidence." RCM 806(b) (discussion).
[16]MCI No. 5, Annex B, II (E) (2).
[17]MCI No. 4 (5)(C).
[18]MCI No. 5, Annex B, II(F).
[19]MCI No. 5, Annex B, II (F).

While the rules suggest defense attorneys may seek prior approval for public statements that would otherwise be prohibited, they do not contain any criteria to guide military authorities considering such requests. There is, for example, no requirement that any such request be granted as long as protected national security information is not revealed.

Conclusion

On June 4, 2003, Human Rights Watch spoke with Major John Smith, the Judge Advocate Spokesperson in the Office of Military Commissions at the Department of Defense, concerning the restrictions on defense counsel's ability to travel and communicate with others in the course of developing their clients' defense. Major Smith acknowledged that the literal language of the rules could be read as preventing any research off-site and limiting attorney communications beyond what is necessary to protect national security information. He stated that the issue was currently under review for clarification so that the language would "not be read with unintended results."

We indeed hope that the Department of Defense will clarify or amend the commissions instructions to remove restrictions on counsel that are inconsistent with international fair trial standards, including the right to counsel.

Sincerely,

Jamie Fellner
Director, U.S. Program