

Wm. T. (Bill) Robinson III
President

AMERICAN BAR ASSOCIATION

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December 21, 2011

Honorable Leon Panetta
Secretary of Defense
1000 Defense Pentagon
Washington, DC 20301-5000

**Re: Preservation of Attorney-Client Privilege
For Guantanamo Bay Detainees and Their Lawyers**

Dear Mr. Secretary:

The American system of justice depends on the essential role of lawyers in counseling their clients. This includes providing zealous and effective counsel, even to those accused of heinous crimes against this nation and its people. In furtherance of this objective, in August 2003, the American Bar Association adopted a policy calling upon Congress and the Executive Branch to ensure that all defendants in any military commission trials receive dedicated and effective assistance of counsel. We endorsed certain basic principles for the conduct of military commission trials, including that the “government should not monitor privileged conversations, or interfere with confidential communications, between any defense counsel and client.”

We are therefore deeply troubled to learn that a new policy at Guantanamo Bay appears to violate both the letter and spirit of the attorney-client privilege. Lawyers for detainees report that their highly privileged attorney-client communications are being intercepted and reviewed by the U.S. government. It has even been suggested that content from these communications may be reaching the prosecution team. In some instances, materials attached to and referenced in legal correspondence (such as expert witness qualifications and newspaper articles) are being withheld from the detainees entirely. A security rationale has been provided in response to the lawyers’ objections; however, there is no information about any security violation or incident that prompted the recent change in policy. It is thus not surprising for Presiding Judge Pohl in the Military Commission trial of Mr. al Nashiri to conclude (transcript page 168) that the government screening procedures employed during baseline review in that proceeding “infringes on the attorney-client privilege.”

Lawyers have an ethical duty to diligently represent their clients, and to take whatever lawful and ethical measures are required to vindicate a client's cause. This is especially important when the client faces a possible death sentence, as do each of these detainees when their cases are referred for trial. The current policy seriously compromises the ability of lawyers to meet their obligations and provide ethically and constitutionally adequate representation to their clients. It also impairs the ability of these dedicated lawyers to gain the trust and confidence of their clients, establish an effective attorney-client relationship, and maintain the professional independence that is so critical to a true adversarial process.

We therefore urge you to take prompt action to immediately rescind this policy and restore the confidentiality of communications between lawyers and Guantanamo detainees. We respectfully request that the Inspectors General for the Department of Defense and the Justice Department investigate this matter and make their findings and conclusions public in a report. Finally, we request that the Office of Professional Responsibility in the Department of Justice determine how this serious breach occurred and take appropriate action to prevent any future violations of the attorney-client privilege. We believe that these actions will maintain public confidence and reaffirm the integrity of our justice system.

Thank you for your consideration of these issues. I look forward to your reply.

Yours truly,

A handwritten signature in black ink, appearing to read "Wm. T. Robinson III", enclosed within a large, loopy circular flourish.

Wm. T. (Bill) Robinson III
President