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May 13, 2010

BY ELECTRONIC MAIL

Mr. Bryan Whitman
Deputy Assistant Secretary of Defense for Media Operations
The Pentagon, Room 2E974
Washington, D.C. 20301

Re: Expulsion of Reporters from Military Commissions

Dear Mr. Whitman:

We represent *The Miami Herald*, Canwest News Service, and the *Toronto Star*, whose reporters last week were banished by OASD (PA) from attending any future sessions of Military Commissions held at the Naval Station at Guantanamo Bay, Cuba, for purported violations of the Media Policy and Ground Rules for the Naval Station Guantanamo Bay (the "Media Policy"). On behalf of these news organizations, I am writing to you to appeal and/or request reconsideration of the extraordinary decision to bar reporters Carol Rosenberg, Steven Edwards, and Michelle Shephard ("the reporters") from the Military Commissions.

The permanent expulsion of these reporters—without any advance notice or opportunity to be heard—stems from an apparent misunderstanding of their actions, and rests upon an expansive reading of the Media Policy that is inconsistent with its plain terms, its past interpretation, and its application to other journalists who covered the same hearings last week in the same manner. Ms. Rosenberg, Mr. Edwards, and Ms. Shephard did not willfully violate any rule, and their expulsion is an entirely inappropriate—and unlawful—remedy in any event.

These three journalists are among the most informed reporters in the world on the legal proceedings at Guantanamo. The extreme sanction arbitrarily directed at them would impose an unreasonable hardship upon the news organizations for which they work and would undermine the important public interest in transparency of the proceedings before the Military Commissions. Particularly weighing the unintended nature of any violation of the Media Policy, and the significant interference the exclusion order will inflict on reporting about the soon-to-begin Omar Khadr trial, we respectfully request immediate reconsideration. No proper purpose is served by the unprecedented step of banishing these reporters permanently from Guantanamo, and their exclusion should promptly be rescinded.

Background

The Media Policy issued by OASD (PA) lays down certain ground rules that all journalists must accept as a precondition to obtaining access to the Naval Base at Guantanamo Bay. Paragraph 2 of the Media Policy set out rules specifically relating to access to the Military Commissions being conducted on the Base. Paragraph 2.a generally prohibits reporters from publishing “information identified by commission’s personnel as being Protected Information or otherwise protected from disclosure by these ground rules,” and paragraph 2.g directs 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).”

Based on our preliminary investigation of the underlying facts, the relevant events at Guantanamo that led OASD (PA) to conclude that these provisions of the Media Policy had been violated unfolded as follows.

A pre-trial exclusionary hearing in the prosecution of Khadr, a Canadian citizen, began at Guantanamo on May 4, 2010. On May 5, 2010, stories about the hearing were published by each of the reporters. *The Miami Herald* published a news report by Carol Rosenberg detailing events of the prior day that described testimony from a former Army interrogator, Army Spc. Damien Corsetti, who questioned the gravely wounded Khadr at a lockup in Afghanistan, and from Col. Donna Hershey, the head nurse at Bagram when Khadr was a patient there. Rosenberg also reported that another Khadr interrogator, who had been court-martialed for detainee abuse, was scheduled to testify later in the week. Ms. Rosenberg noted in her report that this interrogator had previously been “identified in Canadian media as former Army Sgt. Joshua Claus.” See Carol Rosenberg, “Ex-Army Interrogator Testifies For Omar Khadr,” *Miami Herald*, May 5, 2010.

Steven Edwards’ report on the May 4 hearing for the Canwest News Service also mentioned that Khadr’s main interrogator was expected to testify later in the week. In reporting this fact, Edwards identified the interrogator as “Sgt. Joshua Claus, who was later court-martialled for abusing prisoners, and was involved in an interrogation of a detainee who died.” See Steven Edwards, “Interrogator says Khadr exposed to ‘fear’ techniques,” *Canwest News Service*, May 4, 2010. The *Toronto Star*’s Michelle Shephard likewise reported that Sgt. Claus’s testimony was anticipated later in the week. See Michelle Shephard, “Omar Khadr questioned by sergeant later court-martialled, court told,” *Toronto Star*, May 5, 2010.

All three reporters included the identification of Sgt. Claus in their reporting due to its central importance to the position Khadr was attempting to advance at the exclusionary hearing. These journalists had no intent to violate the Media Policy and did not believe they were doing so. None of the reporters understood the Media Policy to apply to information they learned outside of Guantanamo or to limit their ability to include in their reports publicly available information that was already widely known—such as Sgt. Claus’s identity.

Sgt. Claus has been publicly identified as Khadr's main interrogator for more than two years. In fact, Claus *sought out* Ms. Shephard in March 2008 and *offered* to give an on-the-record interview. See Michelle Shephard, "Interrogator: I didn't hurt Khadr," *Toronto Star*, Mar. 26, 2008. After that interview, Ms. Shephard wrote at least eight articles in which she identified Sgt. Claus by name, all published before the events of last week. Mr. Edwards had also identified Sgt. Claus in his prior reporting. Edwards has closely followed the Khadr case for his Canadian readers, and published at least nine separate stories between March and June of 2008 naming Sgt. Claus and describing his role as Khadr's main interrogator. Sgt. Claus's involvement in Khadr's interrogation has been reported in scores of other newspaper articles over the past two years, and he is even identified as Khadr's main interrogator in Khadr's biography on Wikipedia—a fact that can readily be learned through a simple Google search. See http://en.wikipedia.org/wiki/Omar_Khadr.

After news reports naming Sgt. Claus appeared on May 5, that afternoon the Chief Prosecutor, Navy Captain John F. Murphy, asked the presiding judge at Guantanamo to issue a public "admonition" relating to the protective orders in the Khadr case. In response, the judge in open court reminded everyone present that there were protective orders in place, and that they should be followed. The judge made no finding—then or since—that any provision of the protective order had in fact been violated, nor was he asked to do so.

Ms. Rosenberg, Mr. Edwards, and Ms. Shephard understood from this exchange that the prosecutor was concerned about the protected status of Sgt. Claus's testimony that was to be taken the next day. Thus, along with the many other journalists covering the hearing at Guantanamo, the reporters collectively sent a note to the judge, through Ms. Shephard, during a break in the proceedings later on May 5. That note asked to be heard on the issue of whether Sgt. Claus's identity warranted protection when he testified before the Commission the next day. The reporters sought this clarification because they recognized they were precluded from reporting protected information *obtained at Guantanamo*, but Sgt. Claus's identity was public information learned elsewhere. The judge, however, did not respond to the reporters' request.

When Sgt. Claus did testify on May 6, the reporters *did not use his name* in their reporting. None of the dispatches by Ms. Rosenberg, Mr. Edwards, and Ms. Shephard describing his testimony identified Sgt. Claus by name. These reporters referred to him only as "Interrogator No. 1," the term used in the courtroom during his testimony. Some reporters did not include the name in their reporting out of an abundance of caution, waiting to see the judge's response to the note seeking clarification on that day's testimony. Others did not use his name as a journalistic matter, because they could not confirm that the person in the witness chair was in fact Sgt. Claus—until Col. Lapan confirmed it in his May 6 banning order.

Later that same day, the reporters were summarily barred from Guantanamo by OASD (PA) and prohibited from reporting on any future Military Commissions because they had reported Sgt. Claus's name earlier in the week. This extreme action was taken without any advance notice or warning, and without any inquiry of the reporters about what they had done, when or why. It was premised on the mistaken assumption that the reporters had willfully violated the Media Policy they had actually sought all along to follow.

No Knowing and Willful Violation

The decision to banish these reporters was improvidently taken because none of them knowing or willfully violated the Media Policy. In fact, they did not violate the policy at all.

The Media Policy, on its face, states unambiguously that it governs military information “gathered or produced *within* the joint task force Guantanamo (JTF-GTMO) area of operations.” These reporters thus quite reasonably understood that the limitation on the disclosure of protected information in the Media Policy applied only to information obtained on the Naval Base and in the Military Commission proceedings at Guantanamo Bay. The identity of “Interrogator No. 1” in the Khadr case was neither gathered by the reporters nor produced by the military during any proceeding at Guantanamo Bay. Rather, the name was publicly disclosed as a result of other reporting, conducted outside of Guantanamo, and by Sgt. Claus himself. When they arrived to cover the hearing last week, the reporters knew of Sgt. Claus’s identity and his role in Khadr’s interrogation—Ms. Shephard knew it from Sgt. Claus directly—and they never understood that they could not use such prior public information in their reporting.

Not only does the plain language of the Media Policy exclude from its scope such information obtained through public channels, DOD’s past practices permitted reporters visiting 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). This approach previously followed at Guantanamo was consistent with the practices of military censors in other countries, who typically do not bar publication of information by one reporter after it has already been made public by another news organization.

Given this context, and the literal language of the Media Policy, the reporters at Guantanamo had no reason to suspect the policy would be construed to prohibit them from including *public* information in their news reports, and such a broad reading of the Media Policy would serve no purpose. The policy states that its “ground rules” are imposed to protect classified information and intelligence collection capabilities, and to preserve the anonymity of participants in the proceedings. 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. This is particularly true in reporting the name of a witness who voluntarily gave up his anonymity long ago and sought out the attention of the press. Such a construction of the policy does not further any legitimate military purpose. It simply stifles those journalists on the scene who are best-positioned to illuminate the proceedings for the general public, and puts them at a competitive disadvantage to those rewriting from afar. The Media Policy, on its face, imposes no such counter-productive restrictions.

Legal Limits to DOD's Ability to Restrict Press Coverage

Such a pointless application of the Media Policy would also be contrary to law. 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)¹.

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. The Media Policy must necessarily be construed in a manner that does not defeat the press access required by Congress.

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). The Court found this qualified First Amendment right to be implicit in the guarantees of free speech and press, just as the right of association, right of privacy, right to travel and the right to be presumed innocent are implicit in other provisions of the Bill of Rights. *See Richmond Newspapers*, 448 U.S. at 579. *Richmond Newspapers*

¹ 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).

“unequivocally holds that an arbitrary interference with access to important information is an abridgement of the freedoms of speech and of the press protected by the First Amendment.” *Id.* at 583 (Stevens, J. concurring).

While the constitutional access right has most frequently been asserted to compel access to judicial proceedings, the right equally applies to proceedings conducted within the executive and legislative branches. *See, e.g., Detroit Free Press v. Ashcroft*, 303 F.3d 681, 695-96 (6th Cir. 2002) (right of access to INS deportation proceedings); *Whiteland Woods, L.P. v. W. Whiteland*, 193 F.3d 177, 181 (3d Cir. 1999) (municipal planning meeting); *Society of Prof'l Journalists v. Sec'y of Labor*, 616 F. Supp. 569, 574-79 (D. Utah 1985), *vacated as moot*, 832 F.2d 1180 (10th Cir. 1987) (administrative hearing). And this right repeatedly has been held to apply to proceedings conducted by adjudicative military tribunals, such as the military commissions at Guantanamo. *See, e.g., United States v. Anderson*, 46 M.J. 728, 729 (A. Ct. Crim. App. 1997) (per curiam) (absent adequate justification clearly set forth on the record, “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); *United States v. Hershey*, 20 M.J. 433, 436 & 438 n.6 (C.M.A. 1985) (finding First Amendment right of public access to a court-martial proceeding); *United States v. Scott*, 48 M.J. 663, 665 (A. Ct. Crim. App. 1998) (same); *United States v. Story*, 35 M.J. 677, 677 (A. Ct. Crim. App. 1992) (per curiam) (same), *aff'd* 37 M.J. 270 (C.M.A. 1993); *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).

The application of the Media Policy to deny access to journalists for including publicly available information in their reporting, would violate their constitutional access right as well as their statutory one. While the constitutional right is not absolute, it can only be overcome upon specific factual findings of a substantial probability of harm to some overriding interest if the access right is not limited. *Richmond Newspapers*, 448 U.S. at 580-81; *Press-Enterprise II*, 478 U.S. at 13-14. No such factual findings were made in this case, nor could they possibly be made under the present circumstances. No were the banned reporters afforded any notice or opportunity to be heard before being stripped of their statutory and 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).

The decision to exclude these reporters from all future military commissions was improper as a matter of law, and for this reason too should promptly be rescinded.

Inappropriate Remedy

Even if some unintended violation of the Media Policy had occurred, the remedy imposed by OASD (PA) is inappropriate, out of all proportion to the alleged transgression. No damage could possibly have been done by including in a news report information readily available to anyone on the internet, yet barring these reporters from all future proceedings denies the public

the benefit of the skills and insights of the very professional journalists with the most knowledge about this story.

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.

Steven Edwards is one of the most experienced and respected journalists employed by the Canwest News Service, which distributes articles to a chain of Canadian newspapers including the *Ottawa Citizen*, *The Gazette* of Montreal, *The Vancouver Sun*, and the *National Post*. Based in New York City, he regularly covers the United Nations and stories of significant international interest. Mr. Edwards has also followed the proceedings involving Omar Khadr for years, and has filed more than 200 stories concerning the detention and prosecution of Mr. Khadr. He has invested significant time and effort to develop a professional expertise and a network of sources that allow him to clarify this important and complex story for the Canadian public. He is widely regarded as one of Canada's leading journalists covering the proceedings at Guantanamo Bay.

Similarly Michelle Shephard is steeped in the Khadr prosecution. She has been a reporter for the *Toronto Star* for thirteen years, and has covered national security for the newspaper since 2001. In the past four years, she has made twenty-one trips to the Guantanamo facility, and Ms. Shephard has written more than 240 articles on the Khadr case for the *Star*, as well as authoring a book on Khadr, entitled *Guantanamo's Child*, published in 2008. She undoubtedly knows more about the history of the Khadr case than the vast majority of participants in the Military Commission, let alone her fellow journalists.

Their experience allows these three veteran journalists to bring a clarity and comprehension to their reporting on Commission proceedings that cannot be replicated simply by substituting in another journalist. The decree issued by OASD (PA) unfairly penalizes reporters who have invested a significant portion of their professional lives over the past several years to researching and understanding the important issues raised by these prosecutions. It deprives their news organizations of their most significant resources in covering this story. And it deprives the public of the analysis and insights of the very journalists who have the most to contribute to public understanding of the work of the Commissions generally and the Khadr case specifically.

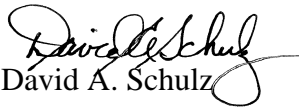
The order is mistaken, the remedy is too severe, and the expulsion should be rescinded.

Mr. Bryan Whitman
May 13, 2010
Page 8

Conclusion

For each and all of these reasons, we respectfully submit that the order banning Carol Rosenberg, Steven Edwards and Michelle Shephard from Guantanamo should promptly be withdrawn. The next hearing in the Khadr prosecution is scheduled for July 12, 2010 and the case is to go to trial beginning August 10. A hearing is also scheduled for the week of June 7 in the prosecution of Ibrahim Ahmed Mahmoud al Qosi, an alleged founder of al Qaeda, that may not be covered at all if the order stands and Ms. Rosenberg remains banned from the proceeding. The order excluding these reporters should be rescinded now to avoid improper and unnecessary interference with the flow of information about these proceedings to the public. Your immediate attention is requested.

Very truly yours,


David A. Schulz

cc: Jeh Johnson, General Counsel, Department of Defense
Douglas Wilson, Ass't Sec. of Defense for Public Affairs
Vice Adm. Bruce MacDonald, Convening Authority