

<p>UNITED STATES OF AMERICA</p> <p>v.</p> <p>KHALID SHEIKH MOHAMMED, WALID MUHAMMAD SALIH MUBARAK BIN 'ATTASH, RAMZI BIN AL SHIBH, ALI ABDUL-AZIZ ALI, MUSTAFA AHMED ADAM AL HAWSAWI</p>	<p>D-102</p> <p>Defense Motion for Special Relief: Military Commission Must Decline Receipt of Unsolicited Communication Submitted to the Military Judge on 13 March 2009 by Mr bin al Shibh</p> <p>Order</p>
--	---

1. On 13 March 2009, the Clerk of Court notified the military judge that Mr bin al Shibh had presented a sealed document to the Commission addressed as follows:

To: COL Henley
Commissions Legal Mail
Privileged/Confidential

Detailed defense counsel for Mr. bin al Shibh was unaware of the document and, on 16 March 2009, submitted a special request for relief asking the military judge to decline receipt of the filing, asserting: (1) it is improper to engage in actions which contravene the "President's direct order to halt all Military Commissions;" and (2) it constitutes an improper *ex parte* communication with a represented party in violation of Rule 2.9, ABA Model Code of Judicial Conduct. The prosecution opposes the requested relief.

Violation of Executive Order

2. At the President's direction,¹ the Secretary of Defense ordered the Chief Prosecutor-Office of Military Commissions, in part, to seek from the military judge a four month continuance

¹ "The Secretary of Defense shall immediately take steps sufficient to ensure that during the pendency of the Review described in section 4 of this order, no charges are sworn, or referred to a military commission under the Military

in all commission cases already referred to trial in order to allow the Administration time to evaluate which forum, if any, best suits any future prosecution.² Upon prosecution motion,³ the Military Commission subsequently granted a 120-day continuance for all sessions in this case until 20 May 2009. The prosecution did not seek, nor did the Commission order, a “halt” to any and all actions related to this case, but merely on the record hearings with counsel, the accused and the military judge.⁴ Since recessing on 21 January 2009, the military judge has not called the Military Commission into session.

Ex Parte Communication

3. Unlike a filing submitted by an unrepresented or “*pro se*”⁵ accused, if a military judge receives an unsolicited and unauthorized document from an accused represented by counsel, the military judge should endeavor not to learn the substance of the information and, instead, promptly notify defense counsel regarding the communication.⁶ Such is the case here. Mr bin al Shihb’s detailed defense counsel was immediately notified of her client’s unsolicited communication to the Commission and informed that the Commission will not read the filing.

Commissions Act of 2006 and the Rules for Military Commissions, and that all proceedings of such military commissions to which charges have been referred but in which no judgment has been rendered, and all proceedings pending in the United States Court of Military Commission Review, are halted.” *Presidential Executive Order – Review and Disposition of Individuals Detained at the Guantanamo Bay Naval Base and Closure of Detention Facilities*.

² While directing the Secretary of Defense to take certain actions in relation to Guantanamo Bay litigation, the President has, understandably, neither ordered nor compelled any military judge to suspend or delay a particular military commission. See 120 Stat. 2609, 10 U.S.C. § 949b.(a)(2)(A) (2006).

³ The Rules for Military Commission authorize the military judge of a military commission to grant a continuance of the proceedings in a pending case if the interests of justice are served by such action and outweigh the best interests of both the public and the accused in a prompt trial of the accused. See R.M.C. 707(b)(4)(E)(i).

⁴ See P-009 – Commission Ruling Regarding Government Motion for 120-Day Continuance.

⁵ *Pro se* legal representation refers to the circumstance of a person representing himself or herself without a lawyer in a court proceeding. *Pro se* is a Latin phrase meaning “for oneself”.

⁶ See Rule 2.9, *Army Code of Judicial Conduct for Trial and Appellate Judges* (16 May 2008).

4. The filing submitted by Mr. bin al Shibh alone on or about 13 March 2009 will be returned to him forthwith with the instruction that all future communications to the Military Commission by a represented accused must be submitted through detailed defense counsel.

5. The defense special request for relief submitted by counsel for Mr. bin al Shibh is hereby GRANTED.

6. The Commission directs that a copy of this order be served upon the prosecution and all defense counsel of record, and that it be provided to the Clerk of Court for public release. The Commission further directs the Clerk of Court to have this order translated into Arabic and served upon each of the accused.

So Ordered this 18th Day of March 2009:

/s/
Stephen R. Henley
Colonel, U.S. Army
Military Judge

Sent: Friday, March 13, 2009 5:36 PM

Subject: US v. Mohammed et al. (RBAS) - SPECIAL REQUEST FOR RELIEF

Mr. Polley:

Please find below a Special Request for Relief submitted on behalf of detailed counsel for Mr. bin al Shibh.

1. Introduction:

Detailed defense counsel for Mr. bin al Shibh have become aware that the Military Judge is accepting communications purporting to be from our client. Detailed counsel object to this practice, and respectfully request that any such communications be submitted directly to counsel, rather than the Military Judge; we further request that no such communications be furnished to the prosecution (whether civilian or military counsel) or distributed publicly. Mr. bin al Shibh is represented, and as such, any communications with him, regardless of how those communications are styled, are improper.

2. Facts:

Mr. bin al Shibh is pending a competency hearing, and is represented by two detailed military defense counsel.

On 20 January 2009, the President of the United States ordered that all military commissions be halted.

On 21 January 2009, the Military Judge ordered that this case be continued for 120 days, until 20 May 2009. Since that date, the Military Judge has not ruled on any of the numerous pending motions before the Commission.

On 9 March 2009, at approximately 1655, detailed counsel was informed by the Commission that the Military Judge was in receipt of a supposed Pro Se filing and that the judge intended to release it to the public.

At 1749 on that same date, the Clerk of Court contacted defense counsel inquiring whether there were any redactions to this filing, as it was prepared to be released immediately.

Detailed counsel for Mr. bin al Shibh had never seen the filing before the initial email, although the Commission was in possession of it since at least 24 February 2009.

Although Mr. bin al Shibh is not proceeding pro se, the filing purported to be from him in that it contained his typed name, along with the names of the four co-accused.

At 1807 that evening, detailed counsel for Mr. bin al Shibh and Mr. al Hawsawi, submitted an objection to the receipt and publication of said pleading.

That same evening, while the defense's objection was pending with the Commission, the pleading was released by an as yet unknown source.

At approximately 0835 on 10 March 2009, the Clerk of Court informed detailed defense counsel that any objections had to be addressed to the Military Judge, even though the previous evening, the Clerk of Court had indicated she forwarded counsels' objection to

the Military Judge. Detailed defense counsel, at 1115, resubmitted their objections to the Military Judge.

The filing was released publicly before any ruling was made on the defense objections. To-date, no ruling has been made on that objection.

Today, 13 March 2009, detailed counsel for Mr. bin al Shibh was informed by the Clerk of Court that the Commissions intended to receive a document supposedly coming from Mr. bin al Shibh. Detailed defense counsel filed an objection, with the Clerk of Court. The Clerk of Court merely stated that the document in question was addressed to the Military Judge, that it would be retrieved for delivery to the judge, and that any objections to receipt of that document should be submitted to the Military Judge.

The instant objection and special request for relief therefore follow the above-noted instruction from the Clerk of Court.

3. Relief Requested:

Detailed counsel for Mr. bin al Shibh object to the Commission's receipt of any communication alleged to come from Mr. bin al Shibh. We also hereby renew our request -- made on 9 and 10 March 2009 -- for the Commission to decline receipt of D-101 from Mr. bin al Shibh.

Furthermore, we respectfully request that any communications purporting to be from Mr. bin al Shibh be immediately turned over to detailed defense counsel, that the Commission refrain from accepting any such communications or filings, and that it not publish such communications or filings either to the prosecution (civilian or military) or to the general public.

4. Justification for Relief Requested:

Mr. bin al Shibh is represented by LT Federico and me. Engaging in or furthering any communications with a represented party is prohibited. Please see Army Rule of Professional Conduct 4.2 (Communication with Person Represented by Counsel). The ABA Model Code of Judicial Conduct also prohibits judges from initiating, permitting, or considering ex parte communications. See ABA Model Code of Judicial Conduct 2.9 (Ex Parte Communications)

Regulation for Trial by Military Commission contains a rule that echoes military service regulations, regarding the general release of information in a case: " At the heart of all guidelines pertaining to the furnishing of information concerning an accused or the allegations against him or her is the mandate that no statements or other information shall be furnished to the news media for the purpose, or which could reasonably have the effect of influencing the outcome of a trial." Reg. for Trial by Mil. Comm'n 19-1 (Spectators and Release of Information).

There is no justification for engaging in any communications with, or releasing communications from, our client -- particularly in light of the President's direct order to

halt all Military Commissions. The fact that the communication is marked for one person or another is irrelevant. This prohibition on communicating with represented persons is all the more important where, as here, the accused's competency is in question. Even more notably in Mr. bin al Shibh's case, the Commission is aware that RMC 706 Board results, which diagnose a psychosis, raise significant concerns about his competency to stand trial. Proceeding with any such communications, facilitating them, or publishing them infringes on the rules cited above, among others.

Very respectfully,

S.M. Lachelier
CDR, JAGC, USN
Office of the Chief Defense Counsel
Office of Military Commissions

Sent: Tuesday, March 17, 2009 3:00 PM

Subject: US v. Mohammed et al. - D-102-Prosecution's response to the Defense Special Request for Relief (bin al Shibh letter) (U)

Judiciary,

The Prosecution opposes the Defense Special Request for Relief (D-102) filed on behalf of Ramzi bin al Shibh. Although the accused is represented by counsel and is pending a competency hearing, the defense cannot dictate to this Commission how it should act when it receives unsolicited correspondence from the accused. Counsel's implication that the Military Judge is engaging in communications with a represented party by receiving an unsolicited letter labeled for his attention is wrong.

Counsel is free to advise their client of the potential ramifications associated with letters written to the Court and that once the judge receives the letter he must provide a copy of it to the opposing party in order to avoid the accusation that he is engaging in ex parte communications. Whether the judge determines to publicly release the document (beyond providing it to the opposing party) is within his sound discretion. See RC 3.9c.

Respectfully submitted,

Clay Trivett