

<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-104</p> <p>Defense Motion for Reconsideration of Military Commission Order D-102, Authorizing Public Release Of Military Commission Order D-102</p> <p>Order</p>
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1. On 13 March 2009, the Clerk of Court notified the Office of Military Commissions-Trial Judiciary staff 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 or its contents and, on 16 March 2009, submitted a special request for relief asking the military judge to decline receipt of the filing. On 18 March 2009, over prosecution objection, the Commission granted the defense counsel's requested relief, declining to accept the filing and ordering the document returned to Mr bin al Shibh with an instruction that all future communications to the Military Commission by a represented accused must be submitted through detailed defense counsel.¹ The Commission further directed the written order be provided to the Clerk of Court for public release. On 19 March 2009, Mr bin al Shibh's detailed defense counsel submitted a motion seeking, in substance, reconsideration of that part of the Commission's order directing public

¹See *D-102, Ruling on 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, dated 18 March 2009.*

release, submitting that the order references protected communications from a represented accused.

2. The public has a qualified right to attend public trials. See *In Re Times Publ. Co*, 1997 U.S. Dist. Lexis 11139 (M.D. FL). This right of access to judicial proceedings applies to written documents submitted in connection with those proceedings that themselves implicate the right to access, to include motions, filings, pleadings, orders and like Military Commission documents. See, e.g., *United States v. Valenti*, 987 F.2d 708 (11th Cir. 1993). Once a matter has been provided to the Commission, be it from an unrepresented accused proceeding *pro se*² or an accused represented by counsel, the public should generally be able to determine for itself the correctness of a judicial decision in determining a party's substantive rights, absent some evidence release could reasonably affect the outcome of the trial or the document is otherwise privileged. In this case, that Mr bin al Shihb endeavored to communicate directly to the military judge without the knowledge of counsel is not a "protected communication from a represented accused" and defense counsel has provided no persuasive authority warranting withholding of the Commission's D-102 order, dated 18 March 2009, from the general public.

3. The defense motion for reconsideration is hereby DENIED.

4. 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 underlying defense motion will also be provided to the Clerk of Court for public release, after

² *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".

appropriate redactions for privacy and security considerations. The Commission's D-102 order, dated 18 March 2009, will be released to the public without redaction. The Commission further directs the Clerk of Court to have this order translated into Arabic and served upon each of the above named accused.

So Ordered this 20th Day of March 2009:

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

UNITED STATES OF AMERICA

v.

KHALID SHEIKH MOHAMMAD, WALID
MUHAMMAD SALIH MUBARAK BIN
'ATTASH, RAMZI BIN AL SHIBH, ALI
ABDUL-AZIZ ALI, AND MUSTAFA
AHMED ADAM AL HAWSAWI

D-_____

Defense Motion

Objecting to Release of Order D-102

19 March 2009

1. Timeliness:

This motion is timely filed within the rules prescribed for this military commission.

2. Facts:

a. At 1640 on 18 March 2009, the clerk of court contacted detailed counsel for Mr. bin al Shibh, via email, seeking "as soon as possible" any defense redactions to the Order issued regarding D-102, Defense Request for Special Relief.

b. At 1655 on that same date, detailed counsel for Mr. bin al Shibh notified the clerk of court of their objection to the release of said order, based on the fact that the order references protected communications from the accused.

c. At 1657, the clerk of court responded that any objection had to be submitted in the form of a motion. The instant motion followed.

d. Notwithstanding the prosecution's having informed the parties and the commission that it had no redactions for the release of Order D-102, the commission refused to accept the instant motion because it did not specify the government's position. The motion is thus filed again, with the government's position spelled out for the commission. In this regard,

Counsel would remind the Commission of the Supreme Court's decision in *Escobedo v. Illinois*, in which the Court declined to "exalt form over substance" when observing an accused's Sixth Amendment right to counsel. *See Escobedo v. Illinois*, 378 U.S. 478, 486, 84 S.Ct. 1758 (1964).

3. Relief Requested:

Detailed counsel respectfully object to the release of Order D-102, for it involves information about the accused, there has been no request for public release of this information, and D-102 references protected communications from a represented accused.¹ The capital context of this case, the recent public release of a prejudicial communication purported to be from Mr. bin al Shibh without prior notification to detailed counsel, and governing rules and regulations each militate strongly against release of this order to the public.

4. Law:

Detailed counsel for Mr. bin al Shibh object to the release of Order D-102, as that order refers to information about the accused, specifically protected communication from an accused. While Rule 3.9c of the Military Commissions Trial Judiciary Rules of Court (MCTJ) authorizes a military judge to forward pleadings to the Assistant Secretary of Defense or his designee for public release, that rule does not *mandate* that the judge do so. Importantly, moreover, the rule specifies that the decision whether to release any document must strike "a fair balance among the protection of individuals accused of offenses, improper or unwarranted publicity pertaining to their cases, and public understanding of the military commission process." MCTJ Rule 3.9a.

Rule 3.9 of the Rules of Court references the regulation which governs how to apply the Rule, that is, Regulation 19 of the Regulations for Trial by Military Commission (RTMC).

¹ Implicit in the instant motion is an expectation that this motion, itself, will not be publicly released without affording defense counsel an opportunity to object, and to submit redactions to the same.

That Regulation dictates that the “release of information pertaining to accused persons should not be initiated by persons in the office of military commissions. Information of this nature should be released only upon specific request,” and only subject to the guidelines delineated out in Rule 19. *See* RTMC 19-3a.

Regulation 19 further lays out information that is *not* to be release:

The following information concerning an accused generally may not be released except as provided in 19-5² below:

1. Subjective opinions, observations or comments concerning the accused’s character, demeanor, expected testimony at any time, or guilt of the offense or offenses involved.
2. The prior criminal record (including other apprehensions, charges, or trials) or the character or reputation of the accused.
3. **The existence or contents of any confession, admission, statement or alibi given by the accused, or the refusal or failure of the accused to make any statement.**
4. The performance of any examination or test, such as polygraph examinations, chemical tests, ballistics test, etc., or the refusal or failure of the accused to submit to an examination or test.
5. The identity, testimony, or credibility of possible witnesses.
6. The possibility of a plea of guilty to any offense charged or to a lesser offense and any negotiation or any offer to negotiate respecting a plea of guilty.

² Regulation 19-5 provides that release may be permissible where the information to be released will assist in apprehension of a fugitive, or to warn the public of a danger from a fugitive

7. References to confidential sources or investigative techniques or procedures.

8. Any other matter when there is a reasonable likelihood that its dissemination will affect the deliberations of an investigative body or the findings or sentence of a military commission or otherwise prejudice the due administration of the military commission process either before, during or after trial.

RTMC 19-4b (emphasis added)

The above provisions must be read with the following overarching policy in mind:

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.

RTMC 19-1.

Finally, the Army Code of Judicial Conduct (ACJC) 2.4 is notable in this context:

An independent judiciary requires that judges decide cases according to the law and facts, without regard to whether particular laws or litigants are popular or unpopular with the public, the media, government officials, or the judge's friends or family. Confidence in the judiciary is eroded if judicial decision making is perceived to be subject to inappropriate outside influences.

ACJC 2.4 (Comment)(emphasis added).

5. Argument

Foremost here precluding the release of Order D-102, the clerk has not informed detailed counsel why information pertaining to Mr. bin al Shibh is to be released. The regulation specifies that the release of information should be not be initiated by persons in the office of military commissions. *See* RTMC 19-3a. And, there has been no request for the order at

issue here.³ The commission's efforts to effectuate a release *sua sponte* are improper under the clear instruction of the regulation.

The rush to release is also suspect. Detailed counsel would note that, pending before this very commission, there is a request for the release of a formal filing, directly related to the litigation of this case. Specifically, there is a discovery motion submitted nearly two months ago by co-accused Khalid Sheikh Mohammed, which Mr. Mohammed has sought to have released. Oddly, the request for release of that motion still has not been ruled upon. Yet, an order released just a day ago, for which there is no request for release pending, and which references protected information about Mr. bin al Shibh, is being precipitously pushed for release. It appears that the trend is to release information that could be prejudicial to an accused, but to withhold from public scrutiny any information the government does not want the public to know about. Such a state of affairs hardly promotes confidence in the process. *See* ACJC 2.4 (comment).

Even if a request for release of Order D-102 existed, the rules provided above dictate that any release must strike "a fair balance among the protection of individuals accused of offenses, improper or unwarranted publicity pertaining to their cases, and public understanding of the military commission process." MCTJ Rule 3.9a. No public understanding of the commission process will be promoted through release of Order D-102; in fact, release of the order will provoke more questions, and those questions will quite patently be directed at Mr. bin al Shibh's case, and thus inure to the detriment of his rights. It is also important to recall the context here, where a statement purported to be from Mr. bin al Shibh, a represented accused, already has been released to the public and received widespread scrutiny. A systemic promotion of scrutiny of Mr. bin al Shibh, scrutiny that is frowned upon under the rules, would be exacerbated with further public references to a supposed additional statement

³ Any sudden request from the public or press for release of the subject order that may appear at this stage would be suspect, and would suggest that the requester was prompted to make the request.

from him. There is therefore no countervailing interest to release D-102.

The information at issue here, moreover, is explicitly precluded from release under Regulation 19-4b. That regulation instructs against publication of Order D-102 because the order discusses *the existence of a statement from an accused*. See RTMC 19-4b(3). Again, the rules and regulations do not mandate that the commission release information. It is within the commission's discretion to do so, and that discretion is directed by the regulations and the Code of Conduct. It is apparent from the language of the regulations that prosecutorial motivations do not govern the release of information; rather, the regulations emphasize avoiding influencing the outcome of litigation, and protecting an accused's rights.

6. Conclusion:

The public nature of this case, and the fact that this is a capital case, call for heightened scrutiny of the release of any information that could impair the accused's rights. As discussed above, release of Order D-102, which reveals the existence of a communication purported to be from Mr. bin al Shibh, is improper.

7. Conference

The prosecution opposes this motion.

Respectfully submitted,

_____*Suzanne M. Lachelier*_____

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