

<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-101</p> <p>Defense Motion for Special Relief: Objection to Public Release of Statement Filed with Military Commission on 1 March 2009 By <i>Pro Se</i> Accused</p> <p>Order</p>
--	--

1. On 5 March 2009, the Military Commission received an unsolicited filing titled “*The Islamic Response to the Government’s Nine Accusations*,” submitted by the above named Accused, three of whom represent themselves *pro se*.¹ On 9 March 2009, the Military Commission directed that copies of the document be provided to the prosecution and defense counsel of record, to include stand-by counsel, and further directed the filing be provided to the Clerk of Court for release to the general public. As the filing sought no specific relief, the Commission did not require a response.

2. On 10 March 2009, detailed military defense counsel for Mr bin al Shibh and Mr al Hawsawi submitted a special request for relief objecting to release of the filing and asks the order be rescinded, submitting they had not seen the document and that “it is highly irregular for the military judge to accept pleadings from represented accused that are not filed with the Commission by the counsel themselves.” Counsel for Mr bin al Shibh and Mr Al Hawsawi further suggest that release of the filing “violates the President’s Executive Order ... halting all military commission cases.” The prosecution opposes the requested relief.

¹ *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”.

Violation of Executive Order

3. At the President's direction,² the Secretary of Defense ordered the Chief Prosecutor-Office of Military Commissions to request the military judge grant a four month continuance in any case already referred to trial in order to allow the Administration time to evaluate which forum, if any, best suits any future prosecution.³ Upon prosecution motion,⁴ 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.⁵ Since recessing on 21 January 2009, the military judge has not called the Military Commission into session.

Public Release of Military Commission Filings

4. 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 document is

² "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 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*.

³ 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).

⁴ 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).

⁵ See P-009 – Commission Ruling Regarding Government Motion for 120-Day Continuance.

submitted to the Commission for consideration by counsel representing an accused or an unrepresented accused proceeding *pro se*, 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.

5. There was, and this Commission continues to find, no basis to sustain defense counsel's objection to public release of a filing submitted by a *pro se* accused.⁶ Pursuant to Rule 3.9.c., Military Commissions Trial Judiciary Rules of Court, dated 2 November 2007, *The Islamic Response to the Government's Nine Accusations* may be released to the general public.⁷

6. The defense special request for relief submitted by counsel for Mr Al Hawsawi and Mr bin al Shibh is hereby DENIED.

So Ordered this 18th Day of March 2009:

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

⁶ That said, the record will reflect that counsel for Mr Al Hawsawi and Mr bin al Shibh did not join in the filing.

⁷ By authorizing release of *The Islamic Response to the Government's Nine Accusations*, the Military Commission has not ruled on admissibility of the filing as substantive evidence at any future proceeding.

Sent: Tuesday, March 17, 2009 2:56 PM

U.S. v Mohammed, et al-D 101-Prosecution's response to the Special Request for Relief regarding release of the "The Islamic Response to the Government's Nine Accusations"

Judiciary,

The Prosecution opposes the Defense Request for Special Relief from counsel for Bin al-Shibh and Mustafa Ahmed Adam Al Hawsawi asking the Military Judge to rescind his decision to release to the public filing D-101 "The Islamic Response to the Government's Nine Accusations." The Military Judge's decision was within his discretion under RC 3.9.c and did not violate the President's Executive Order. If at some future date, the accused claim they did not agree with the sentiments expressed in the filing, they can make their objections known either through counsel or in a separate filing.

Respectfully submitted,

Clay Trivett

Sent: Tuesday, March 10, 2009 11:15 AM

Subject: RE: ORDER: D 101 US V. Mohammed, et al Pro Se Filing "The Islamic Response to the Government's Nine Accusations" (U)

Mr. Polley:

Below is the more detailed special request for relief for forwarding to the Military Judge.

RELIEF REQUESTED:

1. Counsel for Mr. bin al Shibh and Mr. al Hawsawi object to the public release of the statement allegedly written by the five co-accuseds, dated 1 March 2009. Counsel request that the Military Judge withdraw his order for its release, and accept the filing only on behalf of the pro se accused.

JUSTIFICATION:

2. The statement was dated 1 March 2009 and it was typed. There are no original signatures on it, just typed names. The accused have no ability to print typed documents, and thus the printing must have been done with the assistance of a member of the JTF-GTMO staff. There is no evidence that the co-accused had any meeting after 1 March, and outside these government-arranged meetings, they have no contact with each other. Thus, there is no way to determine whether all five co-accused have even read the document, let alone agree with or acquiesce to its content and release.

3. Mr. bin al Shibh and Mr. al Hawsawi are represented by counsel and have hearings pending to determine competency. Counsel were not made aware of, nor given an opportunity to review the statement prior to the Military Judge ordering it be released to the public. It is highly irregular for the Military Judge to even accept pleadings from represented accuseds that are not filed with the Commission by the counsel themselves. There is no justification for an exception to this well-established rule, particularly in a system where attorneys have such limited and difficult access to their clients, and where any statements the accuseds make are presumed to be classified as Top Secret.

4. A public release of this statement is also in violation of the President's Executive Order, dated 22 January 2009, that all military commission cases be "halted." Subsequent to the Military Judge granting the prosecution's motion for a 120-day continuance on 20 January 2009, there has been no forward movement on this case – no discovery provided, pleadings filed, etc. The order by the Military Judge to release the statement violates both the spirit and the letter of the Executive Order as it moves

the case forward in a manner highly prejudicial to the co-accused.

5. "The Military Judge has the sole authority to determine whether or not any given matter shall be released." See RC 3.9.c; see also R.M.C. 801; Reg. ¶¶ 19-5, 19-6. The Commission should seek to strike a balance of protecting the accuseds' right to a fair trial, the improper or unwarranted publicity pertaining to the case, and the public understanding of the Military Commissions. See Reg. ¶ 19-1.

6. A "motion" is an application to the Military Judge for particular relief or for the Military Judge to direct another to perform, or not perform, a specific act. A motion as used herein also specifically includes those motions addressed in R.M.C. 905, 906, and 907. RC 3.2.a. This statement is not a motion at all because it does not seek any legal relief that the Military Judge can provide. Rather, on its face, this document is detrimental to the co-accused and will undoubtedly be used as evidence by the prosecution at trial. If this statement is released, the result is that the Military Judge is releasing evidence to the public before trial.

7. The timing of this release is contrary to the procedures utilized to-date in this case, wherein any pleadings have only been released to the public after the matters at issue have been fully adjudicated and a ruling issued. For example, none of the "law motions" filed in this case, more than twenty motions, have been released to the public because the Military Judge has not issued rulings on any of them.

Very Respectfully,

CDR Lachelier, Detailed Counsel for Mr. Bin al Shibh
MAJ Jackson, Detailed Counsel for Mr. al Hawsawi

V/r,

Gretchen D. Sosbee
LT, JAGC, USN
Office of Military Commissions
Office of Chief Defense Counsel

Sent: Tuesday, March 10, 2009 10:10 AM

Subject: Re: ORDER: D 101 US V. Mohammed, et al Pro Se Filing "The Islamic Response to the Government's Nine Accusations" (U)

Counsel for Mr Bin al Shibh and Mr. Al Hawsawi intend to file a written objection to any submission and/or publication of this pleading on behalf of their respective clients.

Both Mr. Bin al Shibh and Mr. Al Hawsawi are represented and have competency proceedings that are pending to determine their competency to stand trial and represent themselves.

Accordingly, counsel for the aforementioned accused object to the receipt of this pleading, and to the proposal for this unprecedented expedited release. Counsel need time to meet with their clients regarding this pleading, and to formally file an objection to the commission's receipt and publication of it. Counsel request until 9 April to submit objections, which will allow us to meet the present commissions travel notification requirements for travel to Guantanamo.

V/r,

CDR Lachelier

Maj Jackson

S.M. Lachelier

CDR, JAGC, USNR

Defense Counsel

Office of the Chief Defense Counsel

Military Commissions

Sent: Monday, March 09, 2009 4:54 PM

Subject: ORDER: D 101 US V. Mohammed, et al Pro Se Filing "The Islamic Response to the Government's Nine Accusations" (U)

UNCLASSIFIED

Judge Henley has directed that the attached Pro Se Filing and Order be provided to counsel and other interested parties. Please note the requirement for translation and the directive that a copy of the order be provided to the accused.

Judge Henley has also directed the public release of the Order and Filing.

v/r

James D. Polley, IV
Attorney Advisor
Trial Judiciary