

**MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY**

UNITED STATES OF AMERICA

v.

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

AE152LL(RBS)

Emergency Motion for Show Cause Why
The Government, JTF Camp Commander
And JTF Guard Force Members Should Not
Be Held in Contempt

Date Filed: 11 December 2015

- 1. Timeliness:** The present motion is timely.
- 2. Relief Requested:** Mr. Bin al Shibh requests that the Military Commission order the Government, the Camp VII Camp Commander, the Joint Detention Group (JDG) Commander, and the Joint Task Force (JTF) guard force to comply with its orders in AE152HH, or show cause why the Government should not be held in contempt for interfering with Mr. Bin al Shibh's rights to the assistance of counsel and to present a defense.
- 3. Overview:** The Military Commission ordered the government not to disrupt Mr. Bin al Shibh's cell on 21 June 2013. After this ruling, Mr. Bin al Shibh notified the Military Commission that the JTF guard force continued to harass Mr. Bin al Shibh with noises and vibrations, which are an extension of the traumatization of the torture he has experienced at the hands of the United States Government, especially during the nights leading up to a scheduled hearing. On 2 November 2015, the Military Commission gave the Government a written order, AE152HH "... not to subject Mr. Bin al Shibh to disruptive and harassing noises and vibrations. ...". On 12 November 2015, and 21 November 2015, Mr. Bin al Shibh had conversations with the

day shift Watch Commander (WC) about the Commission's order and about the continuation of the noises and vibrations that Mr. Bin al Shibh was experiencing. The day shift WC stated he did not have to read or follow the Commission's order and if Mr. Bin al Shibh made any accusations, there would be reprisal. Then again, leading up to the hearings, on 4 December 2015, through the early morning of 5 December 2015, Mr. Bin al Shibh was subjected to disruptive and harassing noises and vibrations by the guard force in violation of this Military Commission's order. By way of example, as a result of this violation, Mr. Bin al Shibh was unable to meet with his attorneys on 5 December 2015, because he was unable to sleep during the night before. The guard force's willful violation of AE152HH has prevented and continues to interrupt Mr. Bin al Shibh from assisting his attorneys in his defense and from meaningful participation in the hearings. Mr. Bin al Shibh requests that the Military Commission, through its inherent contempt punishment authority and pursuant to 10 U.S.C. §950t(31) for "disturb[ing] its proceedings by ... disorder," by thwarting the Military Commission's orders, which were intended to effectuate the defendants' rights to the assistance of counsel and to prepare and present a defense, order the Government, Camp VII Camp Commander, JDG Commander, and JTF Commander and guard force to comply with its order immediately or to show cause why they should not be held in contempt and/or removed from contact with Mr. Bin al Shibh.

4. **Burden of Proof:** Questions of fact in this interlocutory motion are determined by a preponderance of the evidence, and the burden of persuasion is on the accused, who is making the motion. R.M.C. 801(e)(2); 905(c)(1).

5. Facts:

a. Mr. Bin al Shibh has been detained in Camp VII for over 9 years. Before he was transferred to Camp VII, Mr. Bin al Shibh was subjected to heinous acts of torture and violence

by the United States Government. Some of this torture was done by physical, psychological, and emotional abuse. This included loud noises and vibrations. In the Senate Select Committee on Intelligence (SSCI) Report, the CIA's "enhanced interrogation torture techniques" included sensory dislocation by "exposing [Mr. Bin al Shibh] to loud noise in a white room with white lights." *SSCI Report*, page 77. In addition to the sensory dislocation, the interrogation phase included "sensory deprivation, a liquid diet, and sleep deprivation." *SSCI Report*, page 77. The sleep deprivation would last up to 72 hours. *SSCI Report*, page 77. This long term abuse has lasting and residual effects. He is retraumatized when it reoccurs.

b. On 21 June 2013 the Military Commission orally ordered the government not to disrupt Mr. Bin al Shibh's cell, after Mr. Bin al Shibh complained of vibrations and noises caused by the JTF guard force.

c. During the week leading up to the Military Commission Hearings scheduled from 19 through 30 October 2015, the JTF guard force began intensifying the noises and vibrations in Mr. Bin al Shibh's cell. Mr. Bin al Shibh was scheduled to meet with his attorneys prior to the October 2015 hearings to prepare for the hearings and assist his attorneys with his defense.

d. Mr. Bin al Shibh was unable to attend the attorney meeting on 17 October 2015, because the noise and vibrations prevented him from sleeping and gave him intense headaches. Throughout the hearing weeks, Mr. Bin al Shibh was scheduled for attorney visits on 21 October 2015 and 27 October 2015, days in which the Commission was not in session, but again he was unable to attend due to being deprived of sleep as a result of the noises and vibrations.

e. As a result of the continued complaints by Mr. Bin al Shibh, the Military Commissions issued Order, AE152HH, on 2 November 2015, for ". . . the Government, including the JTF guard force not to subject Mr. Bin al Shibh to disruptive and harassing noises

and vibrations in the camp where he is detained, the meeting room where he meets with his defense team, and where he is before the Commissions begin.”

f. The Order also directed the Government to distribute the Order “. . . to all Government entities involved in the detention of Mr. Bin al Shibh, including the JTF, the Joint Detention Group, the JTF-GTMO Staff Judge Advocate Office, and the Camp Commander.”

g. This Commission directed the Order be posted outside Mr. Bin al Shibh’s cell.

h. Mr. Bin al Shibh reported to his counsel that on or about 12 November 2015, Mr. Bin al Shibh asked the day shift WC to read the judge’s order and to stop harassing him with noises and vibrations, to which the day shift WC responded that there was no need to read and follow the judge’s order. Further, on or about 21 November 2015, Mr. Bin al Shibh reported to the day shift WC that the noises and vibrations were very bad and that the WC needed to stop the noises in accordance with the judge’s order. The WC told Mr. Bin al Shibh that the WC was following the SOP and the Camp Commander’s orders, and that the WC was not required to follow the judge’s order. The day shift WC told Mr. Bin al Shibh that if Mr. Bin al Shibh files a complaint against him that the WC will make the noises and vibrations worse. The Camp Commander told Mr. Bin al Shibh that the judge’s order will not change anything in Camp VII and that the camp SOP is above and beyond the judge’s order. Mr. Bin al Shibh was told that the ability to stop the noises and vibrations is out of the guards’ control, and that making the noises and vibrations is ordered from a higher level above them.

i. The tier supervisor told Mr. Bin al Shibh that Mr. Bin al Shibh can’t prove the existence of the noises and vibrations, and that the guard force is protected from adverse action. Mr. Bin al Shibh then attempted to speak to the night shift WCs throughout these occasions of noise and vibrations and in each case, Mr. Bin al Shibh was told that there was nothing he could

do to stop the noises and vibrations and that the guard force follows the SOPs, not the Commission's order.

j. Hearings for Mr. Bin al Shibh's case were scheduled for 7 through 11 December 2015. He was scheduled to meet with his attorneys on 5 and 6 December 2015, to discuss and prepare for the week of Commission hearings.

k. From the evening of 4 December 2015 through the early morning of 5 December 2015, the JTF guard force continued and intensified the noise and vibrations in Mr. Bin al Shibh's cell. As a result, he was unable to sleep. Because of his exhaustion, he cancelled the 5 December 2015 attorney meeting because he was too tired to attend.

6. Law and Argument:

a. The accused has a right to a fair trial to include the opportunity for meaningful consultation with counsel. *Riggins v. Nevada*, 504 U.S. 127, 137 (1992).

b. "The power to punish for contempts is inherent in all courts; its existence is essential to the preservation of order in judicial proceedings, and to the enforcement of the judgments, orders, and writs of the courts, and consequently to the due administration of justice." *Ex parte Robinson*, 86 U.S. 505, 510 (U.S. 1874). This power is an inherent attribute to any judicial office. See *Michaelson v. United States ex rel. Chicago, St. P., & O. Ry. Co.*, 266 U.S. 42, 65-66, (1924); see *International Union, UMWA v. Bagwell*, 512 U.S. 821, 831 (1994) (courts have embraced inherent contempt authority as power "necessary to the exercise of all others"). The underlying concern that gave rise to the contempt powers was to ensure there was obedience to the orders of the Judiciary. *Chambers v. NASCO, Inc.*, 501 U.S. 32, 44 (U.S. 1991); *Young v. United States ex rel. Vuitton et Fils S. A.*, 481 U.S. 787, 798, (1987). While the exercise of this power may be

limited by statute, we should not “assume that Congress has intended to depart from established principles such as the scope of a court's inherent power.” *Chambers*, 501 U.S. 32, 47-49, quoting *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 313 (1982).

c. In addition to the inherent power to punish for contempt, 10 U.S.C. §950t(31) provides that a “military commission under this chapter may punish for contempt any person who ...disturbs its proceedings by ... disorder.”

d. R.M.C. 201(c) states that the “military commission may punish for contempt any person who uses any menacing word, sign, or gesture in its presence, or who disturbs its proceedings by any riot or disorder. The punishment may not exceed confinement for 30 days or a fine of \$1000, or both.”

e. R.M.C. 801(b) gives the Military Judge the authority to “. . . exercise contempt power.”

f. The term “disorder” in this context has a broad meaning. See *United States v. Burnett*, 27 M.J. 99 (C.M.A. 1988). While disorder does not include every disrespectful action to the court and must be more than a mere irregularity or improper act, it certainly includes a positive intrusion upon the proceedings of the court. See *United States v. Burnett*, 27 M.J. 99, 17. While Congress has attempted to limit the Military Commission’s contempt power to disruptive behavior, an abuse of the accused rights amounts to an affront to the judiciary and ensuring the rights of the accused are protected and that there is a fair administration of justice is an inherent power of the court. See *Burnett*, 27 M.J. 99, 17; *United States v. Clark*, 4 F. Supp. 2d 940, 944 (C.D. Cal. 1998); *Robinson*, 86 U.S. 505, 510.

g. The procedures and standards for contempt proceedings are identified in R.M.C. 809. Under R.M.C. 809(b)(2), “when the conduct apparently constituting contempt is not directly witnessed by the commission, the alleged offender shall be brought before the commission and informed orally or in writing of the alleged contempt. The alleged offender shall be given a reasonable opportunity to present evidence, including calling witnesses. The alleged offender shall have the right to be represented by counsel and shall be so advised. The contempt must be proved beyond a reasonable doubt before it may be punished.”

h. On 2 November 2015, this Commission entered an Order in AE152HH, for “. . . the Government not to subject Mr. Bin al Shibh to disruptive and harassing noises and vibrations, including the JTF guard force, in the Camp where he is detained, the meeting room where he meets with his defense team, and the hut where he is before the Commission proceedings begin.”

i. As set forth above, not only has the JTF guard force violated the order by continually subjecting Mr. Bin al Shibh to disrupting and harassing noises and vibrations, but various members of the guard force and their superior Watch Commanders and Assistant Watch Commanders have openly defied the Commission’s order and authority by the comments they have made to him.

j. In addition to these comments, Mr. Bin al Shibh has been threatened with retaliation if he reports these events to the Commissions.

k. The continued violations of AE152HH is most egregious and a total lack of respect for the Military Commission’s authority. The continued willful violation of this order has significantly impacted Mr. Bin al Shibh rights to counsel by preventing him

from participating in his defense and from meaningful participation of these hearings. Mr. Bin al Shibh was subjected to torture in the form of deliberate environmental manipulation and sleep deprivation. As a result, the noises and vibrations being directed at Mr. Bin al Shibh have an overwhelming adverse effect to the point where he can no longer participate in meaningful conversations. The noises and vibrations prevent him from sleeping leaving him in a deprived state similar to the 72 or more hours of sleep deprivation that occurred during his torture. *SSCI Report*, page 77. This impact on Mr. Bin al Shibh prevents him from his right to counsel as he cannot have meaningful discussions about his case and therefore is a direct intrusion into these proceedings preventing him from the fair administration of justice and these actions constitute a “disorder” by the Camp VII Commander, JDG Commander, JTF Camp Commander and the guard force.

1. An extreme example of the disruptive and harassing conduct occurred on the evening of 4 December 2015, through the early morning of 5 December 2015. As has been the practice and pattern before previous Commissions hearings, the noise and vibrations intensify during the days leading up to when Mr. Bin al Shibh’s attorneys are scheduled to have their first meeting with him before the next hearing session. This causes, as it did on 5 December 2015, Mr. Bin al Shibh to be unable to sleep. This made it impossible for him to meet with his attorneys in preparation for the hearing session. The willfulness of this violation is demonstrated by the day shift WC who stated essentially, that SOPs are the only regulations he is required to follow and he does not need to follow the Commission’s order. Mr. Bin al Shibh reverts back to the days where he was being held and tortured using similar deliberate environmental manipulation and

sleep deprivation by the United States Government without the ability to stop it. This was the desired effect of Mr. Bin al Shibh's torture confirmed in the CIA's Office of Technical Services cable sent on 1 April 2012 which stated "[t]he deliberate manipulation of the environment is intended to cause psychological disorientation, and reduced psychological wherewithal for the interrogation," as well as "the deliberate establishment of psychological dependence upon the interrogator," and "an increased sense of learned helplessness." SSCI Report, page 26, footnote 94. The current violation of the Commission's order, by subjecting Mr. Bin al Shibh to similar noises, vibrations, and sleep deprivation, is a deliberate manipulation of Mr. Bin al Shibh psychological state that has directly impacted his ability to prepare for these hearings and aid in the preparation of his defense, and adversely effects the Commission.

m. The Commission's order directed the Government to distribute it to the JTF, the Joint Detention Group, the JTF-GTMO Staff Judge Advocate, and the Camp Commander. In addition, it directed that a copy be posted outside Mr. Bin al Shibh's cell. On 10 November 2015, the Government filed a Notice with the Clerk of the Commission affirming that the Order had been posted outside Mr. Bin al Shibh's cell, but did not refer to the distribution of the Order as directed in it.

n. Defense counsel have asked the Government for confirmation of its compliance in distributing the Order. Assuming that the Government has complied with the distribution requirement of the Order, the Camp VII Camp Commander, the JDG Commander, and JTF guard force who violated the substantive terms of the Order and expressed their disdain for it have committed contempt and must be sanctioned.¹ The Military Commission should order the Government to confirm it has complied with

¹ On 10 December 2015, Col David Heath, JDG Commander testified he was made aware of the Order by the SJA.

AE152HH and order a show cause to why the Camp VII Camp Commander, JDG Commander, and the JTF guard force and his subordinates should not be held in contempt.

7. Oral Argument: Mr. Bin al Shibh request oral argument.

8. Witnesses: Ramzi bin al Shibh

Camp VII Camp Commander

The [REDACTED] Watch Commander on Mr. Bin al Shibh's Tier [REDACTED]
[REDACTED]

The [REDACTED] Watch Commander on Mr. Bin al Shibh's Tier [REDACTED]
[REDACTED]

The [REDACTED] Watch Commander on Mr. Bin al Shibh's Tier [REDACTED]
[REDACTED]

The [REDACTED] Watch Commander on Mr. Bin al Shibh's Tier [REDACTED]
[REDACTED]

Unknown JTF Guard Force Members, Watch Commanders, and Assistant Watch Commanders

Abu Zubaydah

9. Conference with Opposing Counsel: The prosecution was conferenced on this motion on 8 December 2015, but has not responded.

10. Attachments:

A. Certificate of Service

Respectfully submitted,

//s//

JAMES P. HARRINGTON
Learned Counsel

//s//

ALAINA WICHNER
MAJ, USA
Defense Counsel

//s//

TRI NHAN
CDR, USN
Defense Counsel

ATTACHMENT A

CERTIFICATE OF SERVICE

I certify that on 11 December 2015, I electronically filed the attached Motion for Show Cause Why the Government, JTF Camp Commander and JTF Guard Force Should Not Be Held in Contempt with the Trial Judiciary and served it on all counsel of record by e-mail.

//s//

JAMES P. HARRINGTON
Learned Counsel

Attachment A