

UNCLASSIFIED//FOR PUBLIC RELEASE  
MILITARY COMMISSIONS TRIAL JUDICIARY  
GUANTANAMO BAY, CUBA

<p>UNITED STATES OF AMERICA</p> <p>v.</p> <p>KHALID SHAIKH MOHAMMAD, WALID MUHAMMAD SALIH MUBARAK BIN ‘ATTASH, RAMZI BIN AL SHIBH, ALI ABDUL AZIZ ALI, MUSTAFA AHMED ADAM AL HAWSAWI</p>	<p>AE 254QQQQ</p> <p>RULING</p> <p>GOVERNMENT MOTION TO RESCIND <i>INTERIM</i> ORDER LIMITING USE OF JTF-GTMO FEMALE GUARDS</p> <p>8 July 2016</p>
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**1. Procedural Background:**

a. On 7 January 2015, the Commission issued an *Interim* Order (AE 254JJ)<sup>1</sup> “limiting the use of female guards to physically touch the Accused during movements to and from attorney-client meetings and Commission hearings, absent exigent circumstances, until such time as the Commission makes a final ruling on AE 254Y.”<sup>2</sup>

b. On 29 October 2015, Counsel for Mr. Mohammad filed a motion that detailed public comments made by senior military and political leaders alleged to constitute Unlawful Influence (UI) on the Military Judge and requested abatement, dismissal, disqualification of senior military leaders who made the comments from further participation in this Commission, and “whatsoever additional relief the Commission may determine appropriate.”<sup>3</sup> During Commission hearings on 29 October 2015,<sup>4</sup> the Commission denied Mr. Mohammad’s request to abate.<sup>5</sup>

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<sup>1</sup> AE 254JJ, *Interim* Order Emergency Defense Motion to Bar Regulations Substantially Burdening Free Exercise of Religion and Access to Counsel, dated 7 January 2015.

<sup>2</sup> AE 254Y (WBA), Emergency Defense Motion to Bar Regulations Substantially Burdening Free Exercise of Religion and Access to Counsel, filed 17 October 2014.

<sup>3</sup> AE 254WW (KSM Sup), Mr. Mohammad’s Emergency Motion for Appropriate Relief to Remedy Unlawful Influence Over the Military Commission by Senior Government Officials Including the Secretary of Defense Regarding the Issues Pending in AE 254Y, filed 29 October 2015.

<sup>4</sup> See Unofficial/Unauthenticated Transcript of the Khalid Shaikh Mohammad et al. (2) Motions Hearing Dated 29 October 2015 from 10:00 A.M. to 10:58 A.M. at pp. 8953-8960.

<sup>5</sup> *Id.* at 8959.

c. On 28 April 2016, after considering all filings in the AE 254 series to include attachments, evidence and witness testimony presented by the parties in both open and closed classified hearings, and argument of Counsel, the Commission issued AE 254JJJJ<sup>6</sup> ruling upon AE 254Y (use of female guards as escorts) and AE 254WW (alleged UI from public comments by senior military and civilian officials).<sup>7</sup>

(1) In pertinent part with respect to the use of female guards to escort the Accused, the Commission found such use was reasonably related to legitimate governmental interests and did not amount to punishment of the Accused. The Commission ruled the *Interim* Order (AE 254 JJ) limiting the use of female guards during escort movements to and from attorney-client missions and Commissions hearings would be rescinded.

(2) With respect to UI from public comments, the Commission found public comments by Secretary of Defense, Ashton B. Carter; Chairman of the Joint Chiefs of Staff, General Joseph F. Dunford, Jr., and the Commander, U.S. Southern Command, General John F. Kelly created apparent UI requiring remedy by the Commission. The Commission ruled rescission of the *Interim* Order (AE 254JJ) would be delayed until six-months after the date of issuance of AE 254JJJJ (28 April 2016). The ruling further provided, “Should the senior military officials who made the comments causing the apparent UI take appropriate action to absolve any taint from their comments upon the public’s view of the independence of the Commission, the Commission remains open to a motion to rescind the *Interim* Order at an earlier date.”

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<sup>6</sup> AE 254JJJJ, Ruling: Emergency Defense Motion to Bar Regulations Substantially Burdening Free Exercise of Religion and Access to Counsel, 28 April 2016.

<sup>7</sup> AE 254JJJJ also addressed an additional issue regarding Equal Opportunity complaints filed by guards that is not relevant to this Ruling.

d. On 27 May 2016, Secretary Carter and General Dunford issued a joint statement regarding gender-neutral staffing of guard forces at JTF-GTMO:

Military commissions are part of our system of military justice. The Department of Defense, and we personally, are committed to fairness and transparency in military commission proceedings, and to the independence of the judges who oversee them. Our comments and those made by other senior officials regarding gender-neutral staffing of guard forces at JTF-GTMO have given rise to a concern that the comments may have appeared to be intended to influence the proceedings. We continue to believe that our military has legitimate and strong interests in gender-neutral staffing, integration of women into all positions, and the prevention of gender discrimination. We also believe that protection of the freedom of religion, and the access to representation, are fundamental to who we are. To be clear, we had no intention to influence the military judges presiding over the military commissions. Along with other senior officials in the Department, we respect the role of military judges presiding over the military judges in evaluating these issues as they might affect an individual case and we fully expect them to make their independent determinations on these and other matters.

e. Based on the joint statement, on 30 May 2016, the Government moved<sup>8</sup> the Commission to immediately rescind the *Interim* Order (AE 254JJ). The Government did not request oral argument.

f. Messrs. bin ‘Attash, Ali (a.k.a. al Baluchi), and Mohammad filed responses on behalf of the Defense opposing the motion.<sup>9</sup> Mr. bin ‘Attash argued the motion for immediate rescission should be denied because the joint statement by Secretary Carter and General Dunford does not mention General Kelly nor is there indication they spoke on his behalf and the joint statement does not explain why the public comments were inappropriate or describe steps taken to cure the taint of apparent UI. Mr. Ali argued, notwithstanding the joint statement, General Kelly did not issue a statement; the apparent UI from the public comments “lives on” in

<sup>8</sup> AE 254KKKKK (GOV), Government Motion to Rescind *Interim* Order Limiting Use of JTF-GTMO Female Guards, filed 30 May 2016.

<sup>9</sup> AE 254LLLLL (WBA), Mr. bin ‘Atash’s Response to AE 254KKKKK(GOV), Motion to Rescind Interim Order Limiting Use of Female Guards, filed 16 June 2016; AE 254MMMMM (AAA), Mr. al Baluchi’s Response to Government Motion to Rescind Interim Order Limiting Use of JTF-GTMO Female Guards, filed 17 June 2016; and AE 254NNNNN (KSM), Defense Response to Government Motion To Rescind Interim Order Limiting Use of JTF-GTMO Female Guards, filed 29 June 2016.

Senator Kelly Ayotte's official government website; Senator Ayotte unlawfully influenced the Commission by issuing additional statements and press releases disparaging the *Interim* Order; and, on 14 June 2016, the Senate passed the Fiscal Year 2017 National Defense Authorization Act (FY 17 NDAA) which included Section 535 which would prohibit enforcement of the Commission's Order in AE 254JJJJ. Mr. Ali requested the Commission abate the proceedings until "the taint of Senator Ayotte's UI is cured, if possible." Mr. Mohammad argued the joint statement did not admit the public comments made by Secretary Carter, General Dunford, and General Kelly were inappropriate; there were obvious efforts to minimize public awareness of the joint statement because it was issued on a Friday evening before the Memorial Day 2016 holiday weekend; and the Commission should not summarily resolve a UI motion by the most senior leadership of the Department of Defense without oral argument while a recusal motion (AE 425)<sup>10</sup> is pending. The Defense requested oral argument.

g. The Government filed one reply to all three Defense filings<sup>11</sup> arguing there was no effort to minimize public disclosure of the joint statement as it was posted on the official Department of Defense and Military Commissions websites and cited multiple media outlets with articles about the joint statement.

## 2. Findings:

a. The joint statement by Secretary Carter and General Dunford was "appropriate action to absolve any taint from their comments upon the public's view of the Independence of the Commission" as specified by the Commission in its Ruling in AE 254JJJJ.

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<sup>10</sup> AE 425 (KSM), Mr. Mohammad's Motion To Recuse Military Judge and the Current Prosecution Team and for Further Appropriate Relief, filed 10 May 2016.

<sup>11</sup> AE 25400000 (GOV), Government Reply To Defense Response To Government Motion to Rescind *Interim* Order Limiting Use of JTF-GTMO Female Guards, filed 6 July 2016.

b. Although General Kelly did not make a similar statement, the Commission takes judicial notice that he is no longer the Commander of U.S. Southern Command.<sup>12</sup> Thus, General Kelly is no longer a senior military official in a position to unlawfully influence the Commission. In addition, the joint statement was made by Secretary Carter and General Dunford, the senior civilian and military leaders in the Department of Defense and acknowledged statements made “by other senior officials regarding gender-neutral staffing of guard forces at JTF-GTMO have given rise to a concern that the comments may have appeared to be intended to influence the [Commission] proceedings.”

c. The Commission recognizes that “any person” may unlawfully influence the action of a military commission. 10 U.S.C. § 949b(a)(2). In AE 254JJJJ, the Commission found no actual or apparent UI raised from comments made by Senator Ayotte or other political leaders. Political speech by politicians would not lead an objective informed observer to have significant doubt as to the fairness of this Commission. Similarly, the Commission does not find actual or apparent UI raised from subsequent actions and statements by Senator Ayotte or legislative language included in section 535 of the Senate version of the FY 17 NDAA.<sup>13</sup>

d. The issues regarding AE 254Y (use of female guards as escorts) and AE 254WW (alleged UI from public comments by senior military and civilian officials) have been fully briefed and argued. In light of the *Interim* Order’s impact upon the legitimate government interests in gender-neutral guard staffing to promote JTF-GTMO detention facility security, full integration of women into the Armed Forces, and prevention of gender discrimination, the

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<sup>12</sup> See <http://www.defense.gov/News-Article-View/Article/643162/admiral-tidd-takes-command-of-southcom>.

<sup>13</sup> As the FY 17 NDAA has not been enacted into law, the Commission declines to address the substance or potential impact of proposed legislation.

Commission does not deem it appropriate to delay rescission of the *Interim* Order while AE 425 is pending.

**3. Ruling:**

- a. Oral Argument. The issues have been fully briefed and argued by the parties. Accordingly, pursuant to Rule for Military Commission (R.M.C.) 905h and Military Commissions Trial Judiciary Rule of Court (RC) 3.9, the Defense request for further oral argument is **DENIED**.
- b. The Government Motion for immediate rescission of the *Interim* Order is **GRANTED**.
- c. Mr. Ali's request to abate the proceedings is **DENIED**.

**4. Order:** The *Interim* Order (AE 254JJ) is rescinded on the date of issuance of this Ruling. So **ORDERED** this 8th day of July, 2016.

//s//  
JAMES L. POHL  
COL, JA, USA  
Military Judge