

UNCLASSIFIED//FOR PUBLIC RELEASE

**MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY, CUBA**

UNITED STATES OF AMERICA

v.

**KHALID SHAIKH MOHAMMAD;
WALID MUHAMMAD SALIH
MUBARAK BIN 'ATTASH;
RAMZI BINALSHIBH; ALI ABDUL AZIZ
ALI; MUSTAFA AHMED ADAM AL
HAWSAWI**

AE 371A (GOV)¹

Government Motion

For a Preliminary Injunction Enjoining
Further Dissemination of Attachment B to
Appellate Exhibit 371

3 September 2015

1. Timeliness

This Motion is timely filed pursuant to Military Commissions Trial Judiciary Rule of Court 3.7.c(1).

2. Relief Sought

The Prosecution seeks a preliminary injunction and order that none of the addressees on the filing to AE 371 further disseminate the filing or its attachments, order the email that filed the motions be deleted, and order the Defense to file their motion anew, with Attachment B filed *in camera*, under seal, and in hard copy to prevent easy electronic dissemination.

3. Burden of Proof

As the moving party, the Prosecution must demonstrate by a preponderance of the evidence that the requested relief is warranted. R.M.C. 905(c)(1)-(2).

4. Facts

On 6 November 2013, the Military Judge issued AE 018U, an order governing privileged

¹ Due to the emergency nature of this filing, the time it was filed by the Defense, and the irreparable harm that can be caused by further dissemination of this inflammatory propaganda, the Prosecution did not wait the 24 hours on conference, or for a filing designation, but did follow previous convention in determining what the correct filing designation would likely be.

written communications. This Order also contains procedures for how defense counsel should handle military commissions non-legal mail or material they receive from the Accused in this case consistent with Joint Task Force Guantanamo Bay, Cuba Standard Operating Procedures. *See* AE 18U, para. f. (3). Specifically, non-legal mail or material from the Accused which requires expedited processing for reasons related to the military commission proceedings can be requested through the privilege team, but the privilege team must send it through the normal JTF-GTMO mail screening process prior to release. *See* AE 18U, para 4(d). At no point does AE 018U even contemplate governing non-legal mail wholly unrelated to the military commission.

On 14 August 2014, counsel for Mr. Mohammad gave a media interview discussing his client's letter to the President being denied for release and describing it as "Mr. Mohammed is advising the President that there is a long history of Muslim oppression at the hands of the West in general, the United States in particular," Mr. Nevin said. "Hundreds of thousands of people were killed in Iraq as a result of the Iraq sanctions." As was reported, even though the material in Mohammed's letter was not classified information, counsel claimed he was unsure whether or not he was legally allowed to describe the specific contents of the letter. *See* Attachment B.

At 1539 hours on 3 September 2015, counsel for Mr. Mohammad filed AE 371. AE 371 is an 80 page electronic filing with a 70 page electronic attachment of non-legal mail from Khalid Shaikh Mohammad that was electronically disseminated to at least 97 recipients on the email.

The defense counsel consider this letter to President Obama to be non-legal mail.

JTF-GTMO did not approve its release.

5. Law and Argument

I. Standard for a Preliminary Injunction

A court may grant a motion for a preliminary injunction if the movant demonstrates (1) "a substantial likelihood of success on the merits," (2) "that it would suffer irreparable injury if

the injunction is not granted,” (3) “that an injunction would not substantially injure other interested parties,” and (4) “that the public interest would be furthered by the injunction.” *CityFed Fin. Corp. v. Office of Thrift Supervision*, 58 F.3d 738, 746 (D.C. Cir. 1995). Courts “must balance the strength of a [movant’s] arguments in each of the four elements when deciding whether to grant a preliminary injunction.” *Mills v. D.C.*, 571 F.3d 1304, 1308 (D.C. Cir. 2009). “If the arguments for one factor are particularly strong, an injunction may issue even if the arguments in other areas are rather weak.” *CityFed Fin. Corp.*, 58 F.3d at 747. So “[a]n injunction may be justified, for example, where there is a particularly strong likelihood of success on the merits even if there is a relatively slight showing of irreparable injury.” *Id.* (citing *Population Inst. v. McPherson*, 797 F.2d 1062, 1078 (D.C. Cir. 1986)).

The Prosecution is likely to succeed on the merits because the Defense admits that the letter is not legal mail, and as such it is in the discretion of JTF-GTMO whether to allow for its release. The Defense attaching this non-legal mail to a pleading creates the serious potential of further electronic dissemination, which would be a circumvention of the Joint Task Force Guantanamo non-legal mail system.

II. A Preliminary Injunction Is Warranted Based on Defense-Admitted Uncontradicted Facts

The Prosecution would likely suffer irreparable injury if the preliminary injunction is not granted because any of the recipients could disseminate the letter to the public, permanently depriving the United States Government of its security protocols that seek to ensure that its enemies not be allowed to disseminate propaganda wholly unrelated to this commission proceeding.

The injunction would not substantially injure Mr. Mohammad because he can still argue the merits of the motion by filing anew and providing the attachments *in camera*, *under seal*, and *in hard copy to prevent easy electronic dissemination*.

The public interest would be furthered by the injunction because the commission system would not be viewed, by the 2,976 family members whose families were killed on September 11,

2001, and the public at large, as a instant platform to disseminate inflammatory propaganda of a non-legal nature.

There are two facts in this issue that are uncontradicted: The Defense counsel consider this letter to President Obama to be non-legal mail, and JTF-GTMO did not approve its release. Based on those facts alone, which are uncontradicted and are explicitly or implicitly admitted to in the defense filing, the Prosecution is likely to win in its response opposing the Defense Motion requesting permission from the Military Judge to allow the Defense counsel to mail the letter to the President.

This Commission has ruled that, except where “it is established the daily operations of the detention facility adversely impact the Commission's ability to proceed or the Accused's rights,” it “will generally defer decisions relating to executing responsibility for the facility to the Commander.” AE 018T at ¶ 6.

While the Defense claims that there are no legitimate national security, institutional security, or guard force interests that are served by preventing the President from receiving and reading Mr. Mohammad's letter (AE 371 (Mohammad) at 4), the Defense isn't the party that gets to make that determination. The fact that the attachments have been determined to not be classified is of no moment to the inquiry. The mechanism in place for the Defense to have a walled-off classification review is simply for classification review. These authorities do not determine if non-legal mail can be disseminated. In fact, according to Defense, the DoD review team informed them that they believed it was non-legal mail and needed to be reviewed by JTF-GTMO. *Id.* at 3-4. (“DOD considered a letter to the President of the United States to be ‘non-legal mail,’ within the meaning of AE018U, which, in conjunction with the “JTF-GTMO Commander's June 17, 2014 Policy for Handling Detainee Legal/Non-Legal [M]ail” required the letter to be screened by “JTF-GTMO in accordance with JTF-GTMO SOP 14.10; a classification review does not replace [sic] this requirement.”). The responsibility for determining whether non-legal mail can be released falls to JTF-GTMO, the authority that detains the Accused, and its immediate superior commands.

In reading the letter from Mr. Mohammad to the President it becomes clear it is pure propaganda, seeking to justify the September 11, 2001 attacks as a means of self-defense based on alleged American actions throughout history. And although the first 18 pages at least purport to be a letter to the President of the United States, there is an additional 50 page self-authored book Mr. Mohammad titled, "Shall I Die When the Crusaders Carry out the Death Sentence? The Truth About Death," that is also attached and that is not addressed to anyone, or even tangentially related to the letter to the President. The attachments to this filing are pure propaganda obviously meant for a larger audience than the President of the United States and the parties to this litigation, and any suggestion to the contrary is an insult to the intelligence of all involved.

This 80 page electronic filing could have been accomplished without attachments, or with the attachments filed under seal for the Military Judge's consideration *in camera*. Instead, it was filed at 1559 with a 70 page electronic attachment of non-legal mail from Khalid Shaikh Mohammad, that was electronically disseminated to at least 97 recipients on the email. If just one of those individuals decides to forward the filing to someone outside the government or not a party to this military commission, Mr. Mohammad's propaganda can be spread across the world, which would harm the United States, as it would be an end-run around JTF-GTMO protocols meant to ensure our nation's enemies are not given a soap-box to spread their radical agenda to world.²

As such a preliminary injunction ordering the Defense to not further disseminate the filing, delete the filing, and have the defense file anew is warranted to ensure that this information is not disseminated to the public.

² At 1832 hours, after reading the 80 page filing, the Prosecution notified all addressees on the filing, excepting the trial judiciary, that it intended to file a motion to enjoin further dissemination of the filing outside of the addressee list, and that it viewed any further dissemination of this filing to non-parties of this commission as a blatant violation of the written privileged communications order and will seek all legal remedies if this motion and its attachments are further disseminated to the public.

6. Conclusion

A preliminary injunction is warranted to ensure inflammatory and threatening non-legal propaganda is not further disseminated in contradiction to the JTF-GTMO policy.

7. Oral Argument

Granting of oral argument would defeat the emergency nature of the filing.

8. Witnesses and Evidence

None.

9. Certificate of Conference

Due to the emergency nature of this filing, the time it was filed by the Defense, and the irreparable harm that can be caused by further dissemination of this inflammatory propaganda, the Prosecution did not wait the 24 hours, or for a filing designation. At 1832 hours, after reading the 80 page filing, the Prosecution did notify all addressees on the filing, excepting the Trial Judiciary, that it intended to file a motion to enjoin further dissemination of the filing outside of the addressee list, and that it viewed any further dissemination of this filing to non-parties of this commission as a blatant violation of the written privileged communications order and will seek all legal remedies if this motion and its attachments are further disseminated to the public. In response to the conference request, counsel for Mr. Ali replied, "Please note the opposition of Mr. al Baluchi to your motion, for the reasons articulated in AE018AA and AE018AAA."

10. Additional Information

None.

11. Attachments

- A. Certificate of Service, dated 3 September 2015.
- B. New Republic Article, dated 14 August 2014.
- C. Miami Herald Article, dated 17 August 2014.

Respectfully submitted,

//s//

Clay Trivett
Managing Deputy Trial Counsel

Mark Martins
Chief Prosecutor
Military Commissions

ATTACHMENT A

CERTIFICATE OF SERVICE

I certify that on the 3rd day of September 2015, I filed AE 371A (GOV), the **Government Motion** For a Preliminary Injunction Enjoining Further Dissemination of Attachment B to Appellate Exhibit 371, with the Office of Military Commissions Trial Judiciary and that I served a copy on counsel of record.

//s//

Clay Trivett
Managing Deputy Trial Counsel
Office of the Chief Prosecutor
Office of Military Commissions

ATTACHMENT B

NEW REPUBLIC



AUGUST 14, 2014

The Man Accused of Planning 9/11 Wrote Obama a Letter About Gaza

But the president probably won't get to read it

By Jessica Schulberg

 @jessicaschulb

Photo: AFP/Mladen Antonov

GUANTÁNAMO BAY, CUBA — Today, [Khalid Sheikh Mohammed's](http://projects.nytimes.com/guantanamo/detainees/10024-khalid-shaikh-mohammed)

[<http://projects.nytimes.com/guantanamo/detainees/10024-khalid-shaikh-mohammed>] attorney, David Nevin, tried to mail a letter that his client—the man accused of planning 9/11—had written to President Obama, offering the commander-in-chief his thoughts on the Israeli invasion of Gaza. Without providing a reason, the government authorities refused to send the letter.

"Mr. Mohammed is advising the President that there is a long history of Muslim oppression at the hands of the West in general, the United States in particular," Nevin said. "Hundreds of thousands of people were killed in Iraq as a result of the Iraq sanctions."

Even though the material in Mohammed's letter was not classified information, Nevin was unsure whether or not he was legally allowed to describe the specific contents of the letter—an example of the ambiguity of the rules governing the military commissions here at the Guantánamo Bay detention center.

The high-value detainees in Camp 7, the most secure prison camp in Guantánamo, receive their news through a pre-screened, day-old DVD recording of Russia Today, which is presumably how Mohammed has been following the current Israel-Gaza conflict.

In what one of the 9/11 defense attorneys, James Connell, described as a “mute, silent expression of solidarity with the people of Gaza,” the five alleged orchestrators of the 9/11 attacks appeared in war court today, noticeably wearing clothing of Palestinian origin. Ramzi bin Al Shibh, one of the accused, covered his head with a black-and-white checkered keffiyeh, a symbol of Palestinian nationalism often worn by Yasser Arafat. Co-accused Mustafa al Hawsawi carried a Koran into the room and wore a scarf around his neck adorned with Jerusalem’s Dome of the Rock, one of the holiest sites in Islam.

“Israel is committing, in my humble opinion, a number of war crimes: attacking civilians, destroying schools, a UN refugee camp, killing non-combatants. The situation in Gaza is very serious,” said Connell in a press conference.

Officials couldn’t confirm how typical the treatment of Mohammed’s letter is. According to government prosecutor General Mark Martins, the Communications Management Unit carefully regulates outgoing mail from the prisoners in Guantánamo. “The restrictions balance very important concerns of security, fairness, and access to counsel,” said Martins.

Navy Captain Tom Gresback, the detention center spokesman, could only guarantee that the detainees in the lower-security Camp 5 and 6 can send mail. Even he does not have information about the rights of the Camp 7 detainees, but said he would look for more information.

In the federal prison system, convicted criminals at all levels can send outgoing mail—including to the commander in chief. At this point, Mohammed has not been found guilty of a crime.

Nevin noted the irony of preventing Mohammed from writing to President Obama. “The president after all, under the Military Commissions Act, is the person who is required to sign off on the execution on any death warrant that is issued as a result of the culmination of these proceedings,” said Mohammed’s attorney.

This article has been updated. It originally identified Khalid Sheikh Mohammad's attorney as David Nevins. In fact, he is David Nevin.

ATTACHMENT C

Guantánamo AUGUST 17, 2014

Guantánamo policy: Intelligence unit reviews KSM's letter to Obama

HIGHLIGHTS

If approved by a prison intelligence unit, a letter written by alleged 9/11 mastermind Khalid Sheik Mohammed will be sent in the mail to President Barack Obama.

BY CAROL ROSENBERG

Khalid Sheik Mohammed, the man who bragged that he ran the Sept. 11, 2001, terror attacks "from A to Z," has written President Barack Obama about his views on the situation in Gaza and other current events.

If the letter clears a review for "non-legal" communications by prison headquarters, U.S. troops can put a postage stamp on it and drop it in the mail to the commander-in-chief.

Mohammed's defense attorney, David Nevin, disclosed the existence of the letter during a news conference on Thursday. In the letter, Mohammed complains about "Muslim oppression at the hands of the West in general and the United States in particular," according

to Nevin. He shares his views on what happened in Iraq during the period of U.S. sanctions and "events in Palestine and Gaza over the years," Nevin said.

Nevin said he doubts the letter contains classified information — although he noted that the president has the sweeping power to declassify it.

After Mohammed's capture in Pakistan in March 2003, the CIA held the alleged mass murderer in its secret overseas prison network, where the agency broke his will with 183 rounds of waterboarding and other, as-yet undisclosed "enhanced interrogation techniques."

Since his arrival at Guantánamo, he's been held in a prison called Camp 7 that is run by a secret military unit, Task Force Platinum. Everything Mohammed says and does is presumptively classified.

On Saturday, as the prosecution and defense teams for the 9/11 case were leaving Guantánamo for Andrews Air Force Base, where the White House parks Air Force One, Army Lt. Col. Myles B. Caggins III said that the military lets each Camp 7 captive mail at most two letters and four postcards a month as "non-legal mail."

Those correspondences are different than the International Red Cross messages that the global, Geneva-based prisoners-rights group delivers to families around the world (the U.S. military censors those, too). "Legal mail" is

correspondence between the Camp 7 captives and their lawyers through a Privileged Review Team system supervised by the war court judge, Army Col. James L. Pohl in collaboration with the prison.

The third category is "non-legal mail," such as the letter from Mohammed to Obama. And those "are reviewed for security purposes," according to Caggins, by the Detention Center directorate responsible for intelligence operations, called the J-2.

Because prisoners can't have postage stamps, Caggins said, the detention center staff will stick a stamp on it and send it "through the U.S. Postal System."

Classified information can't go through ordinary mail. That means anything Mohammed writes Obama that the prison intelligence unit considers a secret would be redacted before it reaches 1600 Pennsylvania Ave.

Earlier, the chief war crimes prosecutor, Army Brig. Gen. Mark Martins, who has charged Mohammed and four other men with the deaths of 2,976 people on 9/11, said all U.S. national-security lockups have "special administrative measures" that make sure communications with the outside world "are carefully managed."

"Those restrictions balance very important concerns of security, fairness, access to counsel," Martins said.

Carol Rosenberg tweets @carolrosenberg on Twitter.