

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 BIN AL SHIBH,  
ALI ABDUL AZIZ ALI,  
MUSTAFA AHMED ADAM  
AL HAWSAWI

AE 371N

RULING

**Defense Motion**  
Mr. Mohammad's Motion  
to Send Letter to the President

**6 January 2017**

**1. Background.**

a. Mr. Mohammad moved<sup>1</sup> the Commission to authorize his Counsel to place an unclassified letter, written by Mr. Mohammad and addressed to President Obama, in the United States Postal Service, postage prepaid, for delivery to the White House. The motion alleges Mr. Mohammad attempted to mail the letter through the Camp Seven (7) non-legal mail process but Joint Task Force-Guantanamo (JTF-GTMO) refused to accept it because the length of the letter exceeded the limit of monthly outgoing correspondence.<sup>2</sup> Counsel for Mr. Mohammad then unsuccessfully attempted to submit the letter for review and transmittal through the JTF-GTMO Staff Judge Advocate office. As the basis for his right to send the letter, Mr. Mohammad argued he has a First Amendment right to “redress his grievances and express his opinions to government officials . . .” and there are no circumstances justifying departure from standard corrections practice in Bureau of Prisons Regulation 28 C.F.R. § 540.2(c), which authorizes prisoners to send “special mail” to the President, among others.

b. The Government immediately filed a motion for a preliminary injunction to enjoin further dissemination of the letter as it constituted inflammatory propaganda in contravention of

<sup>1</sup> AE 371 (Mohammad), Mr. Mohammad's Motion to Send Letter to the President, filed 3 Sep 2015.

<sup>2</sup> *Id.* at 3-4.

JTF-GTMO's non-legal mail policy.<sup>3</sup> The Commission issued an Order sealing the letter until such time as the requisite briefing cycle had been completed, and there had been adequate time for the Commission to consider the positions of the parties.<sup>4</sup>

c. Counsel for Mr. Mohammad then filed a motion<sup>5</sup> requesting the Commission direct the Trial Judiciary staff to require the Government to abide by the Rules of Court, strike the Government's motion to seal the letter, and rescind the sealing order. Subsequent to the Commission's grant of the Government's motion to seal, Mr. Ali (a.k.a. Mr. al Baluchi) responded<sup>6</sup> opposing seal of the letter arguing the Defense was not required by the Commission's Privileged Written Communications Order<sup>7</sup> (AE 018U) to process non-legal, unclassified, client created correspondence to third parties.

d. The Government filed a consolidated response<sup>8</sup> to both motions filed by Counsel for Mr. Mohammad, arguing the letter to the President was "Non-Legal Mail," as defined by AE 018U, and that the Commission should defer to JTF-GTMO's policy with respect to regulating non-legal mail (specifically, the mail control policies intended to prevent detainees suspected of terrorist acts from directing or facilitating further acts of terrorism and to mitigate

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<sup>3</sup> AE 371A (GOV), Government Motion For a Preliminary Injunction Enjoining Further Dissemination of Attachment B to Appellate Exhibit 371, filed 3 September 2015.

<sup>4</sup> AE 371B, ORDER: Mr. Mohammad's Motion to Send Letter to the President, dated 4 September 2015.

<sup>5</sup> AE 371C (Mohammad), Mr. Mohammad's Motion for Order Directing Military Commission Trial Judiciary to Enforce Filing Rules Equally to the Prosecution; to Strike AE 371A (GOV), Government Motion For a Preliminary Injunction Enjoining Further Dissemination of Attachment B to Appellate Exhibit 371, for Failing to Comply with the Rules; and to Rescind AE 371B, Sealing Order Pending Prosecution's Compliance with the Commission's Rules, filed 9 September 2015.

<sup>6</sup> AE 371I (AAA), Mr. al Baluchi's Response to Government Motion for a Preliminary Injunction Enjoining Further Dissemination of Attachment B to Appellate Exhibit 371, filed 17 September 2015.

<sup>7</sup> AE 018U, Order: Privileged Written Communications, dated 6 November 2013.

<sup>8</sup> AE 371H (GOV), Government Response to AE 371H (GOV), Government Response to AE 371 (Mohammad), Mr. Mohammad's Motion to send Letter to the President and to AE 371C (Mohammad), Mr. Mohammad's Motion for Order Directing the Military Commission Trial Judiciary to Enforce Filing Rules Equally to the Prosecution; to Strike AE 371A (GOV); and to Rescind AE 371B, Sealing Order, Pending Prosecution's Compliance with the Commission's Rules, filed 17 September 2015.

risk to the safety and security of detention personnel and detainees).<sup>9</sup> The Government further argued, even if Mr. Mohammad could submit clemency or mitigation matters to the President of the United States to commute, remit, or suspend his sentence, any such submission is premature in that Mr. Mohammad has not been convicted or sentenced. Finally, the Government argued its conduct was proper in that the circumstances necessitated its filing an emergency motion to seal the letter to prevent further dissemination. In footnote 5 of AE 371H, the Government asserted:

The Prosecution notes that while Mr. Mohammad's letter is dated 8 January 2015, it appears to have undergone several iterations culminating in in [sic] the most recent version, dated 3 September 2015. *See* AE 371 (Mohammad), Attachment B at 1. As Defense counsel for Mr. Mohammad state that they last obtained a classification review on 28 January 2015 and then attempted to "submit the letter for screening by J2 (intelligence) division of [JTF-GTMO]" on 17 February 2015, it is highly improbable that any agency, to include those cited within the Defense Motion (AE 371 (Mohammad)), has had an opportunity to review for classification purposes, or otherwise, the current version of the letter or self-authored novel as submitted to this Commission. *See id.* at 2-4.

The Government requested the Commission extend the sealing order to remain in place during the pendency of the proceedings and, if necessary, amend the sealing order to effectuate delivery of the letter to the President.<sup>10</sup>

e. Mr. Ali replied<sup>11</sup> that the letter is "Other Case Related Material" rather than "Non-Legal Mail" under AE 018U because Mr. Mohammad sent it to his Counsel and it relates to the military commission; and that AE 018U does not restrict what Counsel do with unclassified communication from the Accused. Mr. Mohammad also replied<sup>12</sup> reiterating the arguments made

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<sup>9</sup> AE 371H at 5.

<sup>10</sup> *Id.* at 17.

<sup>11</sup> AE 371J (AAA), Mr. al Baluchi's Reply to AE 371H (GOV) Government's Response to AE 371C (Mohammad) Mr. Mohammad's Motion for Order Directing Military Commission Trial Judiciary to Enforce Filing Rules Equally to the Prosecution; to Strike AE 371A (GOV), Government Motion For a Preliminary Injunction Enjoining Further Dissemination of Attachment B to Appellate Exhibit 371, for Failing to Comply with the Rules; and to Rescind AE 371B, Sealing Order Pending Prosecution's Compliance with the Commission's Rules, filed 24 September 2015.

<sup>12</sup> AE 371K (Mohammad), Mr. Mohammad's Reply to AE 371H (GOV) Government's Response to AE 371C (Mohammad) Mr. Mohammad's Motion for Order Directing Military Commission Trial Judiciary to Enforce Filing

in AE 371C, requesting the Commission strike the Government's filing in AE 371H as non-compliant with Commission rules,<sup>13</sup> and arguing the Government's attempt to characterize Mr. Mohammad's letter as propaganda was actually an attempt to circumvent legitimate criticism of U.S. policy.

f. The Commission heard oral argument on 2 June 2016.<sup>14</sup> Counsel for Mr. Mohammad argued Mr. Mohammad had a Fifth Amendment right to communicate with officials who might have influence over his conditions of confinement or his prosecution. Additionally, Counsel for Mr. Mohammad stated they had tried using the non-legal mail process and other means to deliver the letter to the President without success, necessitating the filing of AE 371 with the Commission. Counsel for Mr. Mohammad clarified that the only requested dissemination of the letter was to the President.<sup>15</sup> Counsel for the Government responded the letter was merely a list of grievances amounting to propaganda and included no request for relief. Further, the Government averred that Mr. Mohammad had no right to address the President. The Government made no representation to the Commission that the letter might be classified. Counsel for Mr. Mohammad replied that nothing precluded something "insulting" from being a request for redress.<sup>16</sup>

g. On 21 December 2016, Counsel for Mr. Mohammad advised the Commission and the Government of their desire that AE 371 be resolved prior to the change of administrations on 20 January 2017, so that, if the motion was granted, Counsel for Mr. Mohammad would have

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Rules Equally to the Prosecution; to Strike AE 371A (GOV), Government Motion For a Preliminary Injunction Enjoining Further Dissemination of Attachment B to Appellate Exhibit 371, for Failing to Comply with the Rules; and to Rescind AE 371B, Sealing Order Pending Prosecution's Compliance with the Commission's Rules, filed 25 September 2015.

<sup>13</sup> Mr. Mohammad filed a subsequent motion to strike AE 371H. *See* AE 371L, Mr. Mohammad's Motion to Strike AE 371H (GOV), filed 29 September 2015.

<sup>14</sup> Unofficial/Unauthenticated Transcript of the Khalid Shaikh Mohammad et al Motions Hearing Dated 2 June 2016 from 11:37 A.M. to 2:00 P.M., at pp. 12263-12278.

<sup>15</sup> *Id.* at 12273.

<sup>16</sup> *Id.* at 12277.

time to send Mr. Mohammad's letter to President Obama before the anticipated change in administrations.

## 2. Law.

a. The Commission has limited jurisdiction, and will not interject itself into detention facility management in the absence of a legal requirement falling within the scope of the Commission's purpose and authority.<sup>17</sup>

b. Section 948b(b) of the Military Commissions Act of 2009 (M.C.A.)<sup>18</sup> authorizes the President to establish military commissions to "try alien unprivileged enemy belligerents for violations of the law of war and other offenses triable by military commissions."

c. Section 950i(b) of the M.C.A.<sup>19</sup> provides that if a sentence of a military Commission extends to death, the President must approve the sentence and may commute, remit, or suspend the sentence in whole or in part.

## 3. Analysis.

a. The Commission established rules regarding dissemination of written communications from the Accused in AE 018U. Both the Government and the Defense have requested the Commission relook that order and make amendments to it. *See* AE 018W<sup>20</sup> and AE 018Y<sup>21</sup> *et seq.*

b. The sole relief requested by Mr. Mohammad regarding dissemination of the letter is for the Commission to authorize his Counsel to "place a letter, written by Mr. Mohammad and

<sup>17</sup> *See* AE 018T/AE 032PP/AE 049B/AE 144W, Ruling: Privileged Written Communications, dated 6 November 2013, paragraph 6.

<sup>18</sup> 10 U.S.C. § 948b(b).

<sup>19</sup> 10 U.S.C. § 950i(b).

<sup>20</sup> AE 018W (KSM, WBA, RBS, MAH), Joint Defense Motion to Amend AE 018U Privileged Written Communications Order, filed 6 December 2013.

<sup>21</sup> AE 018Y (GOV), Government Emergency Motion to for Interim Order and Clarification that the Commission's Order in AE 018U Does Not Create a Means for Non-Privileged Communications to Circumvent the Joint Task Force Mail System, filed 3 March 2014.

addressed to President Obama, in the U.S. Postal Service, postage prepaid, for delivery to the White House.”<sup>22</sup>

c. The Commission takes judicial notice of the pending change in Presidential administrations on 20 January 2017 that will result in Mr. Barack Obama ending his tenure as President of the United States.<sup>23</sup>

d. The Commission recognizes Mr. Mohammad has not been convicted or sentenced by the Commission, thereby triggering Presidential powers under 10 U.S.C. § 950i(b). However, the President’s authority under 10 U.S.C. § 948b(b) to establish military commissions necessarily includes authority to terminate them.<sup>24</sup>

e. The Commission agrees with Counsel for Mr. Mohammad that the fact that a filing by an Accused might be perceived as “insulting” by the President does not negate its character as a petition for redress. The Commission further recognizes that if Mr. Mohammad cannot disseminate his letter before 20 January 2017, he will not have an opportunity to obtain redress or relief from President Obama.

f. The Commission finds the letter in Attachment B to AE 371 to constitute “Other Case-Related Material” under paragraph g of AE 018U. Thus, the Commission will grant Mr. Mohammad’s motion and authorize delivery of the letter written by Mr. Mohammad and addressed to President Obama, to the White House. Expeditious processing will prejudice neither party.

g. Based upon the Government’s representation in footnote 5 of AE 371H, the Commission is concerned the letter at Attachment B to AE 371 may not have undergone a proper

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<sup>22</sup> AE 371 at 1; Transcript at 12273.

<sup>23</sup> See Military Commission Rule of Evidence 201 (Judicial Notice of Adjudicative Facts) and <https://www.usa.gov/inauguration-2017>.

<sup>24</sup> See Executive Order 13492, dated 22 January 2009; AE 226 (Mohammed et al. (1)), dated 16 November 2009.

classification review. As such, the Commission will order the Government to deliver the letter to the White House and will maintain the interim seal order in AE 371B for 30 days from the date of this Order, for the Government to conduct a classification review of the letter if necessary.

The Commission finds no other legal basis for continued sealing of the letter's contents.<sup>25</sup>

h. As numerous proposed amendments to AE 018U are pending before the Commission, this analysis and ruling are unique to the letter by Mr. Mohammad in Attachment B to AE 371. Neither this analysis nor this ruling set any precedent. The Commission remains sensitive to the interests of the JTF-GTMO detention facility and will continue to generally defer decisions relating to detention operations to the JTF-GTMO Commander unless detention operations adversely impact the Commission's ability to proceed or the Accused's rights with respect to Commission proceedings.

#### 4. Ruling.

- a. Mr. Hawsawi's motion to decline joinder to AE 371 is **GRANTED**.
- b. Mr. Mohammad's motion for relief in AE 371C is **DENIED**.
- c. Mr. Mohammad's motion to strike AE 371H is **DENIED**.
- d. Mr. Mohammad's motion to authorize his Counsel to place the letter written by Mr. Mohammad and addressed to President Obama, in the U.S. postal service, postage prepaid, for delivery to the White House is **GRANTED** with the modification set forth in paragraph 5.a of this Ruling.

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<sup>25</sup> There appears to be an inconsistency in the Government's position with respect to the propriety of sealing writings of the Accused. The Government proposes to seal Mr. Mohammad's letter at AE 371 (Mohammad), Attachment B throughout the pendency of this trial as inflammatory propaganda; yet, the Government also attached a submission by the Accused entitled "The Islamic Response to the Government's Nine Accusations" as a public filing in AE 254EE (GOV), Attachment H and argued Attachment H should continue to be publicly available. *See* AE 254EE (GOV), Government Response to Emergency Defense Motion to Bar Regulations Substantially Burdening Free Exercise of Religion and Access to Counsel, filed 5 December 2014; AE 254HH (GOV), Government Response To 254FF, Defense Motion To Strike Attachments to AE 254EE (GOV); the Government Response to AE 254Y (WBA), AE 254Y (KSM Sup), AE 254Y (MAH Sup); and AE 254Y (RBS Sup), filed 22 December 2014.

e. The Government motion to continue the seal of attachment B to AE 371 is **GRANTED IN PART** as provided in paragraph 5.b of this Ruling.

**5. Order.**

a. The Government will cause Mr. Mohammad's letter to be delivered to the White House **NLT 13 January 2017**.

b. Attachment B to AE 371 will remain under seal for **30 days** from the date of this Ruling for the Government to conduct a classification review of the letter if necessary.

So **ORDERED** this 6th day of January, 2017.

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