



## NIMJ BRIEFS ON THE GUANTÁNAMO MILITARY COMMISSIONS

### ***Public Trials***

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#### Rulings:

- *United States v. Mohammed, et al.*, 1 M.C. 304 (2009) (Order: Defense Motion for Special Relief – Objection to Public Release of Statement Filed with Military Commission on 1 March 2009 by Pro Se Accused)
- *United States v. Mohammed, et al.*, 1 M.C. 308 (2009) (Order: Defense Motion for Reconsideration of Military Commission Order D-102, Authorizing Public Release of Military Commission Order D-102)

The public's right of access to judicial proceedings and courts-martial is based on the U.S. Constitution. Interests arise periodically requiring that proceedings be closed to public view. Examples include cases involving the organized criminal syndicates or gangs, minor child sex offense victims, or terrorists. The same balancing test for open proceedings generally applies to both Article III courts and military tribunals. The United States Supreme Court held that “the right to attend criminal trials is implicit in the guarantees of the First Amendment,” and that, “absent an overriding interest articulated in findings, the trial of a criminal case must be open to the public.” *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 580-581 (1980). Justice Brennan's concurring opinion in *Richmond Newspapers, Inc.* stressed that the determination of whether a particular proceeding should be closed depends on the weight of the historical practice and an assessment of the specific structural value of public access in the circumstances of the case. *Id.* at 589, 593. Subsequent rulings have validated these opinions and have both extended the First Amendment right of access doctrine to apply to pretrial proceedings and refined the test itself.

In the military justice context, the United States Court of Appeals for the Armed Forces (“CAAF”) acknowledged in *United States v. Grunden*, 2 M.J. 116 (C.M.A. 1977) that the First Amendment safeguarded the right of the public's attendance in courts-martial and other military proceedings, holding that exclusion of the public from a court-martial required a compelling showing that exclusion was necessary to prevent disclosure of classified information. The strict interpretation of this ruling was underscored in *United States v. Hershey*, 20 M.J. 433 (C.M.A. 1985).

Rule for Military Commissions (“R.M.C.”) 806 echoes these tests. Rule 806 not only defines the public to include media, international organizations, and “certain members of the military and civilian communities,” but also reiterates the presumption that trials shall be publicly held, as constrained only by access to the “location, size of the facility, physical security requirements, and national security concerns.” As in any other military trial, access to trials in military commissions is inseparable from issues of classified evidence and the need to protect such information from inadvertent and potentially harmful public

disclosure. While R.M.C. 806 provides a standard for closure of the court, the rule also allows for the use of other methods that serve as less drastic options to a full closure. This includes the use of a delayed broadcast feed, limiting public access, and the issuance of protective orders.

In two decisions, *United States v. Mohammed, et al.*, 1 M.C. 304 (2009), and *United States v. Mohammed, et al.*, 1 M.C. 308 (2009), Judge Henley unequivocally upheld the public's right of attendance and disclosure of certain documentary evidence. The alleged 9-11 co-conspirators, several represented *pro se*, filed a document with the military commission. Detailed defense counsel for some of the accused sought to block public disclosure of the document, which was titled: *The Islamic Response to the Government's Nine Accusations*. The defense counsels' request was denied. Judge Henley quoted federal common law for the proposition that "[t]he public has a qualified right to attend public trials...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 commissions documents...Once a document is 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 released that could reasonably affect the outcome of the trial, or that the document is otherwise privileged." *Id.* at 305. Judge Henley upheld this decision upon a motion to reconsider. *U.S. v. Mohammed, et. al.*, 1 M.C. 308 (2009).

While Judge Henley's opinion seems to strike a working balance between the need to protect national security and the guarantee of a public trial, observers have pointed out that, oftentimes, the actual practice of the military commissions has been to err on the side of caution by making heavy presumptions in favor of exclusion. In many instances, observers feel that the transparency that should be afforded to the public through the guarantee of access has been overshadowed by the overprotection of information.

These two opinions do not address the serious concerns expressed by numerous civil rights groups about the problem of public access to the military commissions. Media, certain limited members of various non-governmental organizations (including the National Institute of Military Justice), and select family members of victims may observe the proceedings. The 9-11 co-conspirator case takes place in a secured courtroom where the observers are allowed to watch the proceedings behind a glass wall with an audio delay. Should classified information be discussed, the audio feed is stopped and a flashing light turns on. A government security officer, possibly from the CIA, observes the proceedings and will indicate to the military judge when the proceedings must be closed. The military commissions that take place in the non-

secured courtroom also have a government security officer to advise the military judge when proceedings must be closed.

Obviously, the location of the military commissions – at the U.S. Naval Base at Guantanamo Bay, Cuba – and the material at issue in the proceedings, create serious difficulties in providing public access. It is unclear if Congress or the President will amend the system to establish a more open environment in the future.