

**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 312

SEVERANCE ORDER

24 July 2014

1. This Order applies only in the case of *United States v Ramzi bin al Shibh*.
2. In May 2012, the Commission issued an order to show cause why this case should not be severed in accordance with Rule for Military Commissions (R.M.C.) 906(b) (8).¹ The order was predicated upon difficulties encompassed in getting the schedules of the various defense teams in synch and stated:

“The right to a speedy trial is an individual right to each accused. To protect the right for each of accused, it would appear that severance at this time might be the appropriate remedy.”

With the exception of Mr. Aziz Ali, the other Accused did not request severance at that time but reserved the right to do so later;² Mr. Aziz Ali initially requested severance³ but later withdrew his request.⁴

¹ Order to Show Cause, 17 May 2012 (AE 039)

² Mr. Bin ‘Attash’s Response to Order to Show Cause, filed 17 May 2012 (AE 039B (WBA)); Mr. Bin al Shibh’s Response to Military Judge’s Order to Show Cause, filed 31 May 2012 (AE 039B (RBS)); Mr. Hawsawi’s Response to Military Judge’s Order to Show Cause, filed 8 June 2012 (AE 039B (MAH)); Mr. Mohammad’s Response to Military Judge’s Order to Show Cause, filed 12 June 2012 (AE 039B (KSM))

³ Mr. al Baluchi’s Response to AE039 Order to Show Cause, filed 31 May 2012 (AE 039B (AAA))

⁴ Mr. al Baluchi’s Supplement to Response to AE039 Order to Show Cause, filed 20 June 2012 (AE 039B (Sup)(AAA)); the Prosecution filed a reply, AE 039C, targeted only to Mr. Aziz Ali’s response and with his supplemental filing the issue is moot.

3. Before the Commission could proceed with any litigation as to severance in *United States v Ramzi bin al Shibh* the issues of conflict free representation by counsel and a determination as to the mental capacity of Mr. bin al Shibh to participate in his defense would have to be resolved. The attenuate delays in addressing these issues would unduly delay not only this case but the companion cases as well. The Commission has sufficient information at this point to make a decision as to severance without further input from the Prosecution, Special Counsel or Defense Counsel.

4. Since the Prosecution will not have an opportunity to directly respond to this Order the Commission will consider their positions as to the Show Cause Order (AE 039) and their response filed as to Mr. Hawsawi' s motion to sever⁵.

a. In its response to the Show Cause Order the Prosecution requested the Commission forgo severance as neither “potential scheduling conflicts among defense counsel, nor the prospect that penalty phase evidence might be mitigating for one accused and aggravating for another, is the sort of ‘good cause’ for which severance should be liberally granted as contemplated by ... R.M.C. 906(b) (8).”⁶ The response continues “[g]iven that the R.M.C. 707(b)(4)(e)(ii)⁷ mechanism is readily available to address scheduling complications and preserve the speedy trial interests at stake, the prosecution respectfully urges that resort to severance for this purpose would be excessive and inappropriate in this case, where the justifications for maintaining a joint trial are so strong.” In a reply,⁸ filed in response to Mr. Aziz Ali’s initial request for severance (later

⁵ Mr. al Hawsawi’s Motion to Sever, filed 21 May 2014 (AE 299)

⁶ Government Response to Military Judge’s Show Cause Order, filed 24 May 2013 (AE 039A), para. 6

⁷ Rule for Military Commission (R.M.C.) 707(4) (i) permits continuances for a “reasonable cause...as may appear to be just” and continues in (ii) excluding such delays from any specified time periods.

⁸ Government Reply to Defense Response to Military Judge’s Order to Show Cause, filed 19 June 2012 (AE 039C)

withdrawn), the Prosecution believes that severance is neither required or appropriate and will “work closely with the Commission to ensure the appropriate redactions are made to protect the accused’s rights under the Military Commissions Act of 2009, and the prosecution will not object to proper limiting instructions for this evidence,”

b. In response⁹ to the motion filed by Mr. Hawsawi requesting severance¹⁰ The Prosecution, citing R.M.C 906(b)(8), requests the Commission deny Mr. Hawsawi’s motion since “good cause” to sever has not been shown as to evidentiary or procedural conflicts. Further the Accused “fails to establish that there is a serious risk that a joint trial would compromise a specific trial right ... judicial economy and unique public interests militate in favor of a joint trial.”¹¹

5. Rule for Military Commissions (R.M.C) 602(e) (3) establishes the parameters for a joint trial when “the accused are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting and offense or offenses.” The discussion to the Rule cautions “that joint or common trials may be complicated by procedural or evidentiary rules.” The Supreme Court has consistently recognized joint trials promote judicial efficiency and help ensure those who participate in a crime together but likewise recognizes joinder may work to the detriment of an accused.¹² In *Zafiro* the Court set out their belief when the Accused have been properly joined under a court should grant severance only” if there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants” and goes on later to state “[t]he risk of prejudice will vary with the facts in each case, and district courts may find prejudice in

⁹ Government Response To Mr. Hawsawi’s Motion to Sever, filed 4 June 2014 (AE 299A)

¹⁰ Mr. al Hawsawi’s Motion to Sever, filed 21 May 2014 (AE 299)

¹¹ AE 292A at 19

¹² *Zafiro v. United States* 506 U.S. 534 (1993)

situations not discussed here. When the risk of prejudice is high, a district court is more likely to determine that separate trials are necessary...”¹³

6. Since November 2013, the Commission has suffered a series of delays in *United States v. Ramzi bin al Shibh* that have had a serious impact on the proceedings in the other four cases and calling to mind the concerns of the Commission two years ago.

6. Beginning in January 2013, Mr. bin al Shibh’s counsel raised an issue of abusive treatment by the detention facility in which he is housed, alleging it was designed and constructed in such a manner as to consistently and intentionally subject him to “cruel and abusive treatment through sounds introduced into his cell by JTF personnel.”¹⁴ During the course of the year the complaint was reiterated in a number of motions¹⁵ before the Commission and culminating in the Prosecution filing a motion for an inquiry into Mr. bin al Shibh’s mental capacity to stand trial.¹⁶ The Commission ordered¹⁷ an examination pursuant to R.M.C. 706, and the Prosecution provided notice¹⁸ of the results in January 2014. Subsequent to this, the Prosecution requested an R.M.C. 909 hearing for a judicial

¹³ *Id.* at 937

¹⁴ Mr. Bin al Shibh’s Supplement to Defense Reply to Government Response to Joint Defense Motion to Compel Examination of Conditions of Confinement, filed 18 January 2013 (AE 108B (RBS)); Emergency Defense Motion To Order the Cessation of External Use of Sounds and Vibrations to Interfere with Mr. Bin al Shibh’s Confinement and with the Attorney-Client Relationship and to Allow Expert Inspection of his Cell, Substructure/Foundation, Surrounding Areas of the Cell, and the Cell Control Room, filed 3 April 2013 (AE 152 (RBS))

¹⁵ Defense Reply to Government response to Emergency Defense Motion To Order the Cessation of External Use of Sounds and Vibrations to Interfere with Mr. Bin al Shibh’s Confinement and with the Attorney-Client Relationship and to Allow Expert Inspection of his Cell, Substructure/Foundation, Surrounding Areas of the Cell, and the Cell Control Room, filed 24 April 2013 (AE 152B (RBS)); Defense Emergency Motion Requesting the Commission Provide Appropriate Relief for JTF-GTMO’s Violation Of the Commission’s Order in Response To AE 152, filed 18 December 2013 (AE 152F (RBS))

¹⁶ Government Motion For Inquiry Into Ramzi Binalshibh’s Mental Capacity To Stand Trial Pursuant to R.M.C. 706, filed 19 December 2013 (AE 152G)

¹⁷ Order Government Motion For Inquiry Into Ramzi Binalshibh’s Mental Capacity To Stand Trial Pursuant to R.M.C. 706, 19 December 2013 (AE 152H)

¹⁸ Government Notice Of R.M.C. 706 Sanity Board Evaluation, filed 31 January 2013 (AE 152I)

finding as to Mr. bin al Shibh's ability to stand trial.¹⁹ The motion for the hearing was granted²⁰ and placed on the docket²¹ for a session to be conducted in mid-April 2014 at the request of the Prosecution. This order²² also cancelled a session scheduled in February since Mr. bin al Shibh's capacity to participate was still in question.

7. At the start of the Commission session in April 2014, the Defense filed a joint motion to abate and requested the Commission conduct an inquiry into potential conflicts of interest stemming from an FBI investigation of the Defense Teams.²³ Assuming, for the resolution of the conflict-of-interest issue, Mr. bin al Shibh, was competent to participate, the Commission proceeded to address the issues raised by AE 292 and its progeny during both that session and one conducted in June 2014.²⁴ The Commission issued an Order²⁵ as to the joint motion (AE 292) in which it reaffirmed²⁶ the need for an independent counsel to be appointed for Mr. bin al Shibh and the need for further inquiry into the determination as to whether there was a conflict-of-interest in the continued representation of Mr. bin al Shibh by members of his Defense Team.

¹⁹ Government Motion For R.M.C. 909 Hearing in April 2014 and Direct Inquiry by the Military Judge to Mr. Binalshibh Regarding His Capacity to Stand Trial By Military Commission, filed 4 February 2012 (AE 152J)

²⁰ Order, Government Motion For R.M.C. 909 Hearing in April 2014 and Direct Inquiry by the Military Judge to Mr. Binalshibh Regarding His Capacity to Stand Trial By Military Commission, 6 February 2014 (AE 152K)

²¹ Docketing Order, 10 March 2014 (AE 281)

²² AE 152J

²³ Emergency Joint Defense Motion to Abate Proceedings and Inquire into Existence of Conflict of Interest Burdening Counsel's Representation of Accused, filed 13 April 2013 (AE 292)

²⁴ Docket Order, 28 May 2014 (AE 302)

²⁵ Order, Emergency Joint Defense Motion to Abate Proceedings and Inquire into Existence of Conflict of Interest Burdening Counsel's Representation of Accused, 24 July 2014 (AE 292QQ)

²⁶ Order, Appointment of independent Counsel, Emergency Joint Defense Motion to Abate Proceedings and Inquire into Existence of Conflict of Interest Burdening Counsel's Representation of Accused, 17 April 2014 (AE 292H); Order, Appointment of independent Counsel, Emergency Joint Defense Motion to Abate Proceedings and Inquire into Existence of Conflict of Interest Burdening Counsel's Representation of Accused, 3 July 2014 (AE 292LL)

8. The resolution of the conflict-of-interest issue (AE 292) and the determination of Mr. bin al Shibh's mental capacity to participate (AE 152) are not expected to be completed in the near term. Since the independent counsel needs to be identified,²⁷ obtain necessary clearances, and meet with Mr. bin al Shibh before the presence of a conflict can be addressed, the Commission does not anticipate being able to address AE 292 until later this year. Assuming, *arguendo*, there is no conflict, the determination as to mental capacity may not be addressed until very late this year or early 2015. Much of any delay rests with the ability of DoD to identify the independent counsel, provide the necessary clearances and effectuate meeting between independent counsel and Mr. bin al Shibh.

9. Were the Commission fully confident both issues concerning Mr. bin al Shibh would be resolved in a manner conducive to a timely continuation of the joint trial the problem of severance would not be before it now. In one scenario Defense Counsel representing Mr. bin al Shibh could be found to have a conflict-of-interest and new counsel have to be appointed with further delay to permit them to become familiar with the case; in another, counsel might not have a conflict, as legally defined, but have their security clearances suspended effectively removing them from the case; and under a third scenario Mr. bin al Shibh could be found to not be competent to participate in his defense – any one of these would either require either severance or indefinite delay. The delays to bring these issues to resolution, and the uncertain outcomes, go far beyond the conflicts addressed by the Prosecution in their response to the Show Cause Order and become procedural difficulties threatening the rights of the other Accused to some modicum of timely justice.

²⁷ AE 292LL

10. The delay necessary to determine whether the case *United States v Ramzi bin al Shibh* may proceed is properly considered excludable delay in accordance with R.M.C. 707(b) (4) (E) (i) and R.M.C. 707(c). The Commission finds the interests of justice have been served by granting continuances for the resolution of interlocutory and other pretrial issues, and that the resolution of this case outweighs the interests of the public and the Accused in having a prompt trial.

11. The Commission Orders the severance of *United States v Ramzi bin al Shibh*.

12. The session of the Commission previously scheduled for 11-15 August 2014 will proceed as originally scheduled. Mr. bin al Shibh and his Counsel will not be present.

13. A Docket Order will be issued reflecting these changes.

So ORDERED this 24th day of July, 2014.

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