

Chief Prosecutor Recommends Withdrawal of One of Eight Charges Against Alleged 9/11 Co-Conspirators: Confirms Trial of Remaining Seven Charges in Capital Case

Army Brig. Gen. Mark Martins, chief prosecutor, Office of Military Commissions, recommended and requested that the convening authority withdraw and dismiss one of the eight charges in the case of *United States v. Khalid Shaikh Mohammad, Walid Muhammad Salih Mubarak Bin 'Attash, Ramzi Binalshibh, Ali Abdul Aziz Ali, and Mustafa Ahmed Adam al Hawsawi*, while leaving the remaining seven charges intact.

The chief prosecutor recommended that the convening authority withdraw and dismiss the conspiracy charge in response to a recent U.S. federal appeals court decision that provided guidance for evaluating the permissibility of charging offenses for conduct occurring prior to 2006. The withdrawal and dismissal of the conspiracy charge removes an issue that would otherwise generate uncertainty and delay resulting from prolonged litigation in the ongoing capital prosecution of the 9/11 attacks.

“There is a clear path forward for legally sustainable charges,” Martins said. “The remaining charges are well-established violations of the law of war and among the gravest forms of crime recognized by all civilized peoples. This action helps ensure the prosecution proceeds undeterred by legal challenge. The United States remains committed to accountability under law for all who terrorize and attack innocent civilians,” Martins added.

The seven remaining charges, currently pending before a military commission empowered to impose the death penalty, allege that the five accused are responsible for the planning and execution of the attacks of Sept. 11, 2001, in New York, Washington, D.C., and Shanksville, Pa., resulting in the killing of 2,976 people. Those charges consist of attacking civilians, attacking civilian objects, murder in violation of the law of war, destruction of property in violation of the law of war, hijacking aircraft, intentionally causing serious bodily injury, and terrorism. The convening authority had referred all of these charges for eventual joint trial last April, and the five accused were arraigned in Guantanamo Bay last May. Pre-trial motions hearings are continuing, and no trial date has yet been set by the military judge.

Last October, the U.S. Court of Appeals for the District of Columbia Circuit overturned the military commission conviction in 2008 of Salim Ahmed Hamdan on charges of providing material support for terrorism. In a unanimous decision, the appellate court ruled that the material support charge—involving actions by Hamdan as Usama bin Laden’s driver and bodyguard prior to November of 2001—was not “an international-law war crime” that Congress had enforced “at the time Hamdan engaged in the relevant conduct.” Hamdan, whose sentence to confinement has been completed, was already free in his home country of Yemen when the decision overturning his conviction was announced.

Based on the reasoning of the court in that case Martins determined that there was uncertainty about whether the courts would reach a similar conclusion as to the permissibility of charging conspiracy as a stand-alone offense involving pre-2006 conduct. He therefore recommended its withdrawal and dismissal “as a separate and standalone offense,” in a memorandum sent to the convening authority. Martins also noted, however, that the common plan and joint enterprise described in the 9/11 charges should be retained as a basis for holding Khalid Shaikh Mohammad and his four co-accused criminally liable for physical acts committed by the now-deceased 9/11 hijackers and other members of al Qaeda.

While the government will continue to challenge the court's decision in a separate case pending at the federal appellate court, the chief prosecutor nevertheless concluded that dismissal of the conspiracy charges would reduce potential risks in the prosecution of the 9/11 attacks and allow that case to move forward without unnecessary delay.

The charges are only allegations that the five accused have committed offenses punishable under the Military Commissions Act of 2009 and the law of war, and each accused is presumed innocent unless proven guilty beyond a reasonable doubt. Pursuant to the reforms in that Act, each accused has been provided defense counsel possessing specialized knowledge and experience in death penalty cases.