

,mmmmmm. UNITED STATES OF AMERICA v. KHALID SHEIKH MOHAMMED, WALID MUHAMMAD SALIH MUBARAK BIN 'ATTASH, RAMZI BIN AL SHIBH, ALI ABDUL-AZIZ ALI, MUSTAFA AHMED ADAM AL HAWSAWI	D-126 Defense Motion for Appropriate Relief: Delay of Any Further Proceedings Order
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1. Ramzi Bin al Shibh was captured by Pakistani forces in Karachi, Pakistan on or about 11 September 2002. Mustafa Ahmed Adam al Hawsawi was captured by Pakistani forces in March 2003. Both were transferred to Guantanamo Bay, Cuba on or about September 2006, where they remain today. Charges were referred to trial by military commission on 9 May 2008 and both men were arraigned on 5 June 2008. Military Commission sessions convened on 9-10 July 2008; 22-24 September 2008; 8 December 2008, and 19 and 21 January 2009. On 21 January 2009, this Military Commission granted the prosecution's request for a 120 day continuance until 20 May 2009 to allow the new Administration sufficient time to review the Military Commission process and decide the proper forum, if any, to prosecute these accused, among others, or make appropriate changes to the current military commission rules and procedures.

2. On 14 May 2009, the prosecution filed a supplemental motion requesting an additional 120 day continuance until 17 September 2009 to complete the review as well

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as maintaining the status quo on all activity related to this case until then, which the Commission interpreted to include all discovery and related motions. On 11 June 2009, over objection, this Military Commission granted the prosecution request, in part. The Military Commission found that the interests of justice served by continuing further substantive proceedings to allow for interagency review of the factual and legal bases for continued detention of these accused and to determine whether each could be transferred, released or prosecuted for criminal conduct before a Military Commission or Article III court, or provided other lawful disposition consistent with the national security and foreign policy interests of the United States, outweighed the accused and general public's right to a prompt trial.

3. While the Military Commission granted a delay in all substantive pretrial and trial proceedings to no earlier than 17 September 2009, the prosecution did not demonstrate why the underlying medical examinations, investigation and case preparation which must be completed prior to conducting the outstanding Rule for Military Commission (RMC) 909 incompetence determination hearings could not proceed during the delay.¹ Therefore, the Commission scheduled a session for 16 July 2009 to address several

¹ The Commission observed that "deferring discovery obligations relating to a competency determination" and "postponing further discovery on this case required to resolve the outstanding competency questions until after 17 September 2009" would "likely result in delaying the competency determinations themselves, constituting an unjustified hardship on Messrs. Al Shibh and Al Hawsawi and affecting all five accused and the general public's right to a prompt trial."

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matters related to the incompetence determination hearings for Messrs. bin al Shibh and al Hawsawi so that the parties could be ready to proceed on 21-25 September 2009 with the incompetence determination hearing. The parties were notified that no other matters would be addressed at this session and that the Military Commission intended to hear only hear from detailed military defense for Mr. bin al Shibh and Mr. al Hawsawi.

4. At 1613 hours on 9 July 2009, detailed military defense counsel for Mr. bin al Shibh filed a written motion for appropriate relief requesting the 16 July 2009 hearing be indefinitely deferred “until such time as the Executive has determined its course of action for the future of military commissions.” The prosecution opposes the defense motion.

5. The defense submits that requiring the parties to address pretrial discovery matters relevant to an outstanding incompetence determination hearing in light of the uncertainty surrounding the continuation of the military commissions generally and pending rules changes specifically, would be “inefficient and potentially unjust.” The Military Commission appreciates the difficulties counsel on both sides face in working within a system in which uncertainty is the norm and where the rules appear random and indiscriminate. That said, the specific reasons posited by defense counsel in support of an open-ended delay pending resolution of all conceivable issues by Congress and the Administration are unpersuasive given that none of proposed rule

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changes attributed to the Executive and Legislative Branches thus far will have a direct impact on the only issue currently before the Commission - the RMC 909 incompetence determination hearings for Mr. bin al Shibh and Mr. Al Hawsawi. The defense assertion that, given the prevailing uncertainty surrounding what rules may subsequently apply to these military commissions, any benefit achieved by proceeding with the 16 July 2009 session is de minimus and does not serve the interests of justice is also misplaced. The impact that a hypothetical rule change may have on future military commissions is merely speculative. At this point, the Military Commission can only proceed with what it knows and if any rule changes do affect the RMC 909 hearings, the Military Commission can reconsider any prior ruling in light of those modifications upon the appropriate motion.²

6. The defense motion to indefinitely continue these proceedings is DENIED.³

7. The Commission directs that a copy of this order be served upon the prosecution and all defense counsel of record, and that it be provided to the Clerk of Court for public release. The Commission further directs the Clerk of Court to have this order translated

² Additionally, it is unnecessary now for this Military Commission to determine the degree to which each accused is entitled to constitutional and due process rights. The current military commission rules as interpreted by the military judge provide adequate protections and will ensure the fundamental fairness of the incompetency determination proceedings.

³ A continuance may only be granted by the military judge. See RMC 906(b)(1).

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into Arabic and served upon each of the above named accused. The underlying defense motion and government response will also be provided to the Clerk of Court for public release, after appropriate redactions for privacy and security considerations.

So Ordered this 13th Day of July 2009:

/s/
Stephen R. Henley
Colonel, U.S. Army
Military Judge