

**MILITARY COMMISSIONS TRIAL JUDICIARY  
NAVAL STATION GUANTANAMO BAY**

**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 895C (WBA)**

**Defense Motion** to Cancel Hearings  
Scheduled for September – October 2022

**19 August 2022**

1. **Timeliness:** This motion is timely filed.

2. **Relief Sought:**

Defense Counsel for Mr. bin ‘Atash move this Military Judge to cancel the public hearings scheduled for 19 September – 14 October 2022. Defense Counsel for Mr. bin ‘Atash have conferred with the other defense teams, and all join in the motion to cancel the September – October 2022 public hearings, with the exception of Mr. al Hawsawi, who intends to submit a declination of joinder and state a separate position. As further described in Paragraph 9, “the Prosecution does not oppose Mr. Bin ‘Attash’s motion, joined by three other Defense teams, to cancel the September/October hearings.”

While Mr. Matthew Engle has been authorized and funded to serve as Learned Counsel for Mr. bin ‘Atash, he has not yet had an opportunity to meet with and form an attorney-client relationship with Mr. bin ‘Atash. His first meeting is scheduled for 22 August 2022, less than a month before hearings are scheduled to resume. Mr. Engle’s TS/SCI security clearance has also not been finally adjudicated, preventing him from reviewing all of the discovery in this case. Moreover, even after Mr. Engle meets with Mr. bin ‘Atash, he still requires significant time to study the voluminous discovery and prepare to enter this case.

Mr. bin ‘Atash submits that instead of contested hearings in September and October—at which he could not participate—the most productive use of that time would be to permit the defense teams to continue working towards a pretrial resolution of this case onboard Naval Station Guantanamo Bay, Cuba (“NSGB”), as was done during the time scheduled for hearings in May, and in June – July 2022.

### 3. **Overview:**

Mr. bin ‘Atash is charged with multiple violations of the law of war, including capital offenses. To defend against these capital charges, Mr. bin ‘Atash is entitled not only to an attorney prepared and able to provide effective assistance,<sup>1</sup> but also one “learned in applicable law relating to capital cases.”<sup>2</sup> While Mr. Matthew Engle has been appointed and funded to serve as Mr. bin ‘Atash’s Learned Counsel, he has not yet had an opportunity to meet with Mr. bin ‘Atash and form an attorney-client relationship with him, nor is his TS/SCI security clearance adjudicated, meaning that he holds only an interim TS/SCI clearance and cannot yet review all of the discovery in this case. Mr. Engle plans to travel to NSGB imminently to meet with Mr. bin ‘Atash, but still requires significant time to study the discovery and filings in this decade-long capital case. Until Learned Counsel achieves adequate familiarity with the discovery and filings, Mr. bin ‘Atash is unable to participate in motions hearings that involve argument or witness examination or in any other scenario that might prejudice his rights going forward.

Furthermore, pretrial negotiations are ongoing, and critical issues remain pending. During the weeks in May, and in June – July, in which hearings had been scheduled, the defense teams were able to meet with their respective clients on a near-daily basis to discuss the many issues that

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<sup>1</sup> 10 U.S.C. §§ 948k, 949c (2018); Strickland v. Washington, 466 U.S. 668 (1984).

<sup>2</sup> R.T.M.C. 9-1.a.6. See also Powell v. Alabama, 287 U.S. 45, 70-72 (1932).

arise in a pretrial resolution of a case of this magnitude. Being onboard NSGB in September and October without public hearings promises the same productive meetings as were held in May, and in June – July. Mr. bin ‘Atash submits that the most productive use of this time would be to cancel the public hearings and allow the defense teams to travel to NSGB and continue working toward a pretrial resolution of this case.

Finally, Learned Counsel for Mr. al Hawsawi has represented that he will request rulings without argument on AE 490 (MAH), AE 492 (MAH), and AE 496 (MAH), and that he will request oral argument on additional unidentified pending motions during the first week of the scheduled September hearings. Mr. bin ‘Atash is joined to all three of the motions identified by Mr. al Hawsawi and likely joined to some of the additional pending motions for which Mr. al Hawsawi is seeking oral argument in September. Mr. bin ‘Atash does not waive oral argument, is not capable at this time of thoughtfully waiving oral argument, and opposes any rulings without oral argument on motions to which he is joined. Mr. Engle remains unable to engage in oral argument on the motions identified by Mr. al Hawsawi, as well as any other motion to which Mr. bin ‘Atash is joined, due to the fact that he has not had adequate time and opportunity to form an attorney-client relationship and review necessary filings and discovery to allow him to take a position on any substantive motion in this Commission.

#### **4. Burden of Proof:**

The movant bears the burden of persuasion; the standard of proof is a preponderance of the evidence.<sup>3</sup>

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<sup>3</sup> R.M.C. 905(c)(1).

**5. Facts:**

a. The Accused face conviction and execution for their alleged roles in the attacks against the United States on September 11, 2001. Ms. Cheryl Bormann was detailed in July 2011 as Learned Counsel to represent Mr. bin ‘Atash.

b. On 30 December 2021, and just before his retirement from the military, BGen John G. Baker, USMC, Chief Defense Counsel (“CDC”) of the Military Commissions Defense Organization (“MCDO”), appointed an inquiry officer to investigate allegations that Ms. Bormann had engaged in “inappropriate performance and conduct.”

c. On 7 March 2022, after the conclusion of this investigation, then led by BG Jackie L. Thompson, USA, as CDC, this Military Judge held an *ex parte* session with Ms. Bormann and discussed the findings of that investigation. During that session, Ms. Bormann orally moved to withdraw from her representation of Mr. bin ‘Atash.

d. On 23 March 2022 this Military Judge issued AE 006ZZ/AE 886W (RUL) granting Ms. Bormann’s request to withdraw from her representation of Mr. bin ‘Atash. This Military Judge further ordered the CDC to “expeditiously detail a new Learned Counsel to represent Mr. bin ‘Attash.”<sup>4</sup>

e. The Prosecution, on 28 March 2022, moved to reconsider AE 006ZZ/AE 886W (RUL).<sup>5</sup> This Military Judge denied that motion on 31 March 2022.<sup>6</sup>

f. Subsequent to Ms. Bormann’s withdrawal, the CDC undertook an exhaustive search for a new Learned Counsel for Mr. bin ‘Atash. Following interviews with multiple applicants, the CDC

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<sup>4</sup> AE 006ZZ/AE 886W (RUL) at 13.

<sup>5</sup> AE 886X (GOV).

<sup>6</sup> AE 886Y (RUL).

nominated Mr. Matthew Engle to serve as Mr. bin 'Atash's Learned Counsel. On 1 June 2022, the Convening Authority appointed and funded Mr. Engle to serve as Learned Counsel.

g. Since that time, Mr. Engle has worked to obtain the requisite security clearances and complete the other administrative requirements associated with onboarding into the MCDO. He has been granted an interim TS/SCI clearance, and on 26 July 2022 was read-on to the required programs to meet with Mr. bin 'Atash, but still cannot be read on to Special Access Programs. Mr. Engle has not yet had an opportunity to travel to NSGB and meet with Mr. bin 'Atash, but currently plans to do so on 20 August 2022. Mr. Engle is not yet sufficiently familiar with the discovery and filings in this case to appear before this Commission on Mr. bin 'Atash's behalf. Indeed, he is not even authorized to review every filing or piece of discovery with his interim clearance.

h. On 18 August 2022, Learned Counsel for Mr. al Hawsawi informed the parties that Mr. al Hawsawi intends to seek rulings without oral argument on AE 490 (MAH), AE 492 (MAH), and AE 496 (MAH), and that he intends to request oral argument on additional unidentified motions pending before the Commission during the first week of the September 2022 hearings. Mr. bin 'Atash is joined to the three motions identified by Learned Counsel for Mr. al Hawsawi and likely joined to some of the unidentified pending motions for which Mr. al Hawsawi seeks oral argument in September.

i. Additionally, since the beginning of pretrial negotiations during the March 2022 hearings, the Prosecution and Defense have made progress towards a pretrial resolution of this case. Given the current posture of pretrial negotiations, contested hearings would be detrimental to a pretrial resolution of this case. The ongoing communications among counsel for the parties reasonably

indicate that further progress will be made if the parties are afforded the opportunity to resume their negotiations onboard NSGB in September and October in lieu of a public, adversarial hearing.

**6. Argument:**

- a. Mr. bin ‘Atash is entitled to the assistance of Learned Counsel.

As discussed in AE 892A (WBA), Mr. bin ‘Atash is entitled to the assistance of learned counsel at all critical stages of proceedings.<sup>7</sup> Until Learned Counsel has formed an attorney-client relationship with Mr. bin ‘Atash, and is sufficiently familiar with the case, Mr. bin ‘Atash is unable to participate in motions hearings that involve argument, witness examination, or in any other scenario that might prejudice his rights going forward.

As of 23 March 2022, Mr. bin ‘Atash has been effectively without Learned Counsel and thus lacks a complete and effective defense team to represent him at pretrial hearings that include argument on contested issues. He will remain without Learned Counsel until he and Mr. Engle form an attorney-client relationship, and Mr. Engle is sufficiently familiar with the discovery and filings in this case to appear on Mr. bin ‘Atash’s behalf. Mr. Engle can become sufficiently familiar with the discovery only after a thorough review—something he cannot even begin to do with his current interim TS/SCI clearance. In the meantime, there cannot be a pretrial hearing that includes argument on any contested, adversarial issues or witness testimony because such a hearing would be a critical stage in the proceedings against Mr. bin ‘Atash.

- b. A pretrial resolution of this case is best facilitated by cancelling the pending public hearings.

Over the last five months, the parties have made progress toward a potential pretrial agreement in this case and are still engaged with the prosecution regarding critical matters related

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<sup>7</sup> AE 892A (WBA), para. 6(a).

to the plea agreement. This is in no small part attributable to the Commission cancelling the intervening contested hearings. Without contested hearings, the parties have been able to divert their attention from preparing to litigate motions to addressing the multitude of issues associated with a pretrial resolution of a case of this magnitude. Continuing with a public, adversarial hearing in September and October would serve only to distract the parties from these efforts and force the parties to litigate when the need to litigate is at its nadir.

c. Cancelling the hearings benefits all participating and interested parties.

Cancelling the hearings in advance of arriving onboard NSGB allows the parties to bring only those personnel necessary for pretrial negotiations. Leaving the hearings scheduled, only to subsequently cancel them once the parties arrive on-island, entails travel to NSGB by a much larger group than necessary for pretrial negotiations. This would be an inefficient use of Prosecution, Defense, and Trial Judiciary resources and staff.

Additionally, victim family members travel great distances to NSGB or the Remote Viewing Locations to view the public hearings. Having victim family members travel such distances expecting to observe argument on pretrial motions or hear witness testimony, only to learn upon arrival that the hearings have been cancelled to allow the parties to continue negotiations, would be unfair. All interested parties—the Defense, the Prosecution, Trial Judiciary, the public as represented by the media, and victim family members—deserve an early decision on whether this Military Judge will cancel the September – October 2022 hearings.

Because Mr. bin ‘Atash’s appointed Learned Counsel has neither met with him nor is familiar enough with the case to appear on his behalf, Mr. bin ‘Atash lacks constitutionally and statutorily required Learned Counsel and is thus unable to participate in contested hearings. Additionally, because a pretrial resolution of this case is most likely to be accomplished by

allowing the parties to use their time on NSGB to negotiate with each other, the Military Judge should cancel the September – October 2022 hearings. The parties could still travel to NSGB on the already-scheduled OMC flight as planned, but with only those personnel necessary to work towards a pretrial agreement. Allowing the parties to meet on NSGB without the encumbrance of contested hearings promises continued focused and productive negotiations toward resolving this decade-long case.

- d. Mr. bin ‘Atash opposes oral argument and rulings on motions to which he is joined, and remains unable to take a substantive position on these motions, until his Learned Counsel has had adequate time to study the case and form an attorney-client relationship with him.

Mr. bin ‘Atash is joined to all three of the motions identified by Mr. al Hawsawi and likely joined to some of the additional unidentified motions for which Mr. al Hawsawi is seeking oral argument in the September – October hearings. Mr. Engle remains unable to engage in oral argument on the motions identified by Mr. al Hawsawi, as well as any other motion to which Mr. bin ‘Atash is joined, due to the fact that he has not had adequate time or opportunity to form an attorney-client relationship and review necessary filings and discovery to allow him to take a position on any substantive motion in this Commission. Mr. bin ‘Atash opposes any rulings without oral argument on motions to which he is joined, and he opposes the Commission proceeding with oral argument on any other motions to which he is joined. Mr. Engle simply has not had adequate time to make a thoughtful decision on whether to waive oral argument on substantive motions, nor can he engage in oral argument without significant preparation and mastery of the discovery and filings in this Commission.

## **7. Oral Argument:**

Defense Counsel for Mr. bin ‘Atash do not request oral argument.



**8. Witnesses:**

None at this time.

**9. Conference with Opposing Counsel:**

The Prosecution does not oppose cancelling the September – October 2022 hearings and states its position as follows:

The Prosecution is prepared to proceed with suppression motion testimony in the September/October hearings, consistent with the witnesses that will be listed in our forthcoming response to AE 895A (Order). However, the Prosecution recognizes Mr. Engle has not yet met with Mr. Bin ‘Attash, and Dr. Montalbano is likely to soon issue his report on Mr. Binalshibh’s current mental status that may require separate and additional litigation, which is why the Prosecution does not oppose Mr. Bin ‘Attash’s motion, joined by three other Defense teams, to cancel the September/October hearings.

As to Mr Ruiz’s separate position, the Prosecution does not oppose his ex parte meeting request with the Military Judge (providing the subject matter is privileged). Consistent with its long-held position regarding the discretionary nature of oral argument, the Prosecution also does not oppose rulings on any and all outstanding motions that do not require testimony without oral argument. The Prosecution does continue to oppose severance at this time, but may reconsider its position following the conclusion of pre-trial agreement negotiations. The Prosecution assesses that a forced severance at this time will have a negative impact on on-going negotiations in several ways, and is still not legally warranted.

While the Policy Principles have been under active consideration by various levels of the government since they were forwarded in March, OCP can now report that those discussions continue, and while OCP assesses that we will not get a formal response prior to the November hearings, we do assess that a response is forthcoming. While the Prosecution had previously indicated its desire to begin litigating the cases in the September hearings had it not heard anything regarding the Policy Principles, the Prosecution was recently assured that the issue is under active consideration at high levels of the government. Based on this recent development, Mr. Engle having not met his client, and potential litigation regarding Mr. Binalshibh’s mental condition, the Prosecution believes it is prudent to not oppose the Defense motion, and, if the motion is granted, will commit to use the dates of the September/October hearings to continue progress on potential pre-trial agreements regarding the Prosecution Principles, so that the parties can either quickly enter pleas should the Defense be amenable to the response on the Policy Principles, or simply resolve to contest the case. The Prosecution anticipates the parties will have final resolution on the potential for pre-trial proceedings prior to the January 2023 hearings, and commits to going forward with contesting the case if pre-trial agreements are not reached by that time.

**10. Attachments:**

A. Certificate of Service

**11. Signatures:**

/s/  
WILLIAM R. MONTROSS JR.  
Detailed Defense Counsel

/s/  
EDWIN A. PERRY  
Detailed Defense Counsel

/s/  
ANISHA P. GUPTA  
Detailed Defense Counsel

# Attachment A

**CERTIFICATE OF SERVICE**

I certify that on 19 August 2022, I electronically filed, via email, the attached AE 895C (WBA), Defense Motion to Cancel Hearings Scheduled for September - October 2022, with the Trial Judiciary and served a copy to all parties.

/s/

EDWIN A. PERRY

Detailed Defense Counsel