

**MILITARY COMMISSIONS TRIAL JUDICIARY  
GUANTANAMO BAY, CUBA**

<b>UNITED STATES OF AMERICA</b>  <b>v.</b>  <b>KHALID SHAIKH MOHAMMAD, WALID MUHAMMAD SALIH MUBARAK BIN ‘ATTASH, RAMZI BIN AL SHIBH, ALI ABDUL AZIZ ALI, MUSTAFA AHMED ADAM AL HAWSAWI</b>	<b>AE 901D</b>  <b>RULING</b>  <b>Defense Motion</b> to Cancel Pretrial Hearings Scheduled for 16 January – 3 February 2023  <b>21 December 2022</b>
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1. On 13 October 2022, this Military Commission granted a Defense motion to cancel hearings scheduled to take place at Naval Station Guantanamo Bay, Cuba (NSGB) from 7 – 18 November 2022.<sup>1</sup> In issuing the cancellation order, Commission noted that it would be impracticable to convene in open session while a decision on certain “policy principles” relating to ongoing plea negotiations remains pending with U.S. policymakers and while the new Learned Counsel for Mr. bin ‘Attash, Mr. Matthew Engle, was building a relationship with his client and becoming familiar with the case.<sup>2</sup>

2. Due to the significance of the decision as to the “policy principles,” the Commission also directed the Prosecution to provide the Commission with periodic updates as to the status of that decision, with the first update due on 16 December 2022 and further updates due every two weeks thereafter.<sup>3</sup>

3. On 5 December 2022, Counsel for Mr. bin ‘Attash moved<sup>4</sup> the Commission to cancel the Commission hearings scheduled at NSGB for 16 January – 3 February 2023. The Defense motion was based on the fact that the “policy principles” decision had yet to be made, and that Mr. Engle had

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<sup>1</sup> AE 899 Docket Order, November 2022 Hearings, dated 13 October 2022.

<sup>2</sup> *See id.* at 3.

<sup>3</sup> *See id.* at 4.

<sup>4</sup> AE 901 (WBA), Corrected Copy, Defense Motion to Cancel Pretrial Hearings Scheduled for 16 January – 3 February 2023, filed 5 December 2022.

scheduling conflicts related to clients whose cases Mr. Engle had taken prior to his being selected as Mr. bin ‘Attash’s Learned Counsel.<sup>5</sup> Although the Defense motion did not specifically request the Commission also cancel a hearing currently scheduled to take place from 6 – 24 March 2023, the pleading detailed a potential scheduling conflict with that hearing as well.<sup>6</sup>

4. On 6 December 2022, the Commission issued an Expedited Briefing Order.<sup>7</sup>

5. On 16 December 2022, the Prosecution filed a Consolidated Response and Notice<sup>8</sup> in which the Prosecution;

(1) Provided the Commission with its first periodic update as to the status of the decision on the “policy principles;”<sup>9</sup>

(2) Informed the Commission the Prosecution would not oppose the cancellation of the 16 January – 3 February 2023 hearings;<sup>10</sup>

(3) Reserved its position as to the potential cancellation of the March hearings;<sup>11</sup> and,

(4) Requested the Commission enter specific findings that that all “delay that has accrued as a result of the cancellation of the five hearings since March 2022 was in the interests of justice and thus excludable from the mandates of Rule for Military Commission (R.M.C.) 707.”<sup>12</sup>

6. The Prosecution also informed the Commission that it had conferenced with the remaining parties about the potential cancellation of the January/February hearings and received the following responses:

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<sup>5</sup> See *id.* at 1-3.

<sup>6</sup> See *id.* at 3.

<sup>7</sup> See AE 901A Expedited Briefing Order, Defense Motion to Cancel Pretrial Hearings Scheduled for 16 January – 3 February 2023, dated 6 December 2022.

<sup>8</sup> See AE 899A (GOV) / AE 901B (GOV), Government Consolidated Response To Defense Motion to Cancel Pretrial Hearings Scheduled for 16 January–3 February 2023 And Notice Of First Status Update Regarding Defense Joint Policy Principles, filed 16 December 2022.

<sup>9</sup> See *id.* at 4.

<sup>10</sup> See *id.* at 5.

<sup>11</sup> See *id.*

<sup>12</sup> See *id.*

Mr. Mohammad's Defense Team joins the request to cancel the January/February 2023 Hearings as they are awaiting a response to the policy principles and will need the opportunity to review them with Mr. Mohammad once received.

Mr. Ali's Defense Team does not object to Mr. Bin 'Attash's motion to cancel the January/February 2023 Hearings.

Mr. Binalshibh's Defense Team does not oppose Mr. Bin 'Attash's motion to cancel the January/February 2023 Hearings.

Mr. Hawsawi's Defense Team defers to the Military Judge on whether to cancel the January/February 2023 Hearings.<sup>13</sup>

7. On 16 December 2022, Counsel for Mr. bin 'Attash provided the Commission with further details related to Mr. Engle's potential scheduling conflicts.<sup>14</sup>

8. On 20 December 2022, Mr. Mohammad filed a reply brief notifying the Commission that he does not object to the Prosecution's request that the Commission find that "all delay accrued because of the cancellation of the five hearings since March 2022 was in the interests of justice and thus excludable from the mandates of R.M.C. 707."<sup>15</sup>

### 3. Analysis.

a. As previously recognized by this Commission, certain aspects of the plea negotiations involve "policy principles" which are pending decision by Senior U.S. Government United States policy officials.<sup>16</sup> As of 16 December 2022, the officials had rendered no final decision on the "policy principles."<sup>17</sup>

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<sup>13</sup> *Id.* at 5-6.

<sup>14</sup> See AE 901-1 (MFL)(WBA), Mr. bin 'Atash's Motion for Leave to File Supplement to Defense Motion to Cancel Pretrial Hearings Scheduled for 16 January – 3 February 2023, filed 16 December 2022.

<sup>15</sup> See AE 899B (KSM) / AE 901C (KSM), Mr. Mohammad's Reply to AE 899A (GOV) / AE 901B (GOV), filed 20 December 2022. Mr. Mohammad's reply was the only reply filed.

<sup>16</sup> See AE 899.

<sup>17</sup> See AE 899A (GOV) / AE 901B (GOV) at 5.

b. Because it remains impracticable for this Commission to convene in an open session while a decision on the “policy principles” remains pending, the Commission will cancel the hearings currently scheduled for 16 January – 3 February 2023.

c. Although the parties have made the Commission aware of potential scheduling conflicts affecting the hearings scheduled for March of 2023, the Commission finds it premature to make any changes to the March hearing schedule.

d. The Commission finds that all delay accrued as a result of the cancellation of the five hearings since March 2022 was in the interests of justice and therefore excludable from the mandates of R.M.C. 707.

4. **Ruling.** The Defense Motion to Cancel the Hearings scheduled for 16 January – 3 February 2023 is **GRANTED**.<sup>18</sup>

5. **Order.**

a. Courtroom #2 at NSGB will be made available from 16 January – 3 February 2023 for the use of the parties to engage in negotiations and for Defense Counsel to meet with their clients.<sup>19</sup>

b. Defense Counsel shall coordinate with the Prosecution and the Joint Task Force, Guantanamo Bay to ensure that the Accused are available at Courtroom #2, NSGB to participate in the negotiations and/or attorney/client meetings as needed.

c. The Prosecution will continue to provide the Commission with updates as to the status of the “policy principles” decision every two weeks from 30 December 2022 until such time as the

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<sup>18</sup> It is the Commission’s understanding that, notwithstanding the cancellation of the hearings, air transportation will be provided from the National Capital Region to NSGB as previously scheduled.

<sup>19</sup> The availability of Courtroom #2 need not be exclusively reserved for the use of the parties to this Military Commission during the entirety of 16 January – 3 February 2023. With proper coordination, Courtroom #2 may be used, at times, by other Commissions as needed.

Prosecution has been informed that a decision has been reached. These updates will henceforth be filed in the AE 902 series.

So **ORDERED** this 21<sup>st</sup> day of December, 2022.

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MATTHEW N. MCCALL, Colonel, USAF  
Military Judge  
Military Commissions Trial Judiciary