

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

UNITED STATES OF AMERICA v. RAMZI BIN AL SHIBH	AE 312C ORDER Government Emergency Motion To Reconsider AE 312 Severance Order 13 August 2014
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1. On 24 July 2014, The Commission issued an Order¹ severing the case of *United States v. Ramzi Bin al Shibh* from the cases of *United States v. Khalid Shaikh Mohammad, Walid Muhammad Salih Mubarak Bin 'Attash, Ali Abdul Aziz Ali, and Mustafa Ahmed Adam al Hawsawi*. All five Accused had been jointly referred to trial by the Convening Authority; however, the Commission, concerned about inordinate delays attributable to issues impacting only the case against Mr. bin al Shibh, directed the severance to provide the other Accused “some modicum of timely justice.”² The Prosecution filed a motion³ for reconsideration, requesting the Commission “...to hold the Severance Order in abeyance, proceed on the presumption that Mr. Binalshibh is competent to stand trial, and schedule further inquiry on the issues raised in AE 292⁴ in August and October 2014...”⁵ The

¹ Severance Order, 24 July 2014 (AE 312).

² *Id.*, para. 8.

³ Government Emergency Motion to To Reconsider AE 312 Severance Order, filed 30 July 2014 (AE 312A).

⁴ Emergency Joint Defense Motion to Abate Proceedings and Inquire into Existence of Conflict of Interest Burdening Counsel’s Representation of Accused, filed 13 April 2014 (AE 292).

⁵ Para. 2, AE 312A.

response⁶ by Mr. bin al Shibh requests the Commission deny the Prosecution's request to reconsider the severance order and asserts Mr. bin al Shibh's "support" for severance.⁷

2. Arguments on the issues of reconsideration and severance were heard on 11 and 13 August 2014.⁸ During the hearing on 11 August, the Prosecution recognized issues pertaining to Mr. bin al Shibh's complaints about disturbances in his cell,⁹ competency to participate in his own defense,¹⁰ and a potential conflict regarding his Defense Team still required resolution,¹¹ but the time necessary to resolve them did not require the "[e]xtraordinary and [d]rastic [r]emedy of [s]everance."¹² The gist of the Defense argument on 13 August 2014 reiterated their belief the combination of issues pertaining uniquely to Mr. bin al Shibh would cause unpredictable and lengthy delays in this trial. Further, Defense argued the Prosecution had not articulated a proper legal basis for the Commission to reconsider the Order.

3. Rule for Military Commission 905(f) permits the Military Judge to reconsider any ruling, other than a finding of not guilty, prior to authentication of the record of trial. Either party has the right move for reconsideration, but granting of the request is in the Military Judge's discretion. Generally, reconsideration should be limited to a change in the

⁶ Defense Response TO Government Emergency Motion to Reconsider AE 312 Severance Order, filed 13 August 2014 (AE 312B (RBS)).

⁷ Id., para 4.P.

⁸ Unofficial/Unauthenticated Transcript of the Ramzi Bin al Shibh Motions Hearing Dated 8/11/2014 from 9:13 AM to 10:27 AM.

⁹ 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)

¹⁰ Government Motion For R.M.C. 909 Hearing in April 2014 and Direct Inquiry by the Military Judge to Mr. bin al Shibh Regarding His Capacity to Stand Trial By Military Commission, filed 4 February 2013 (AE 152J).

¹¹ 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).

¹² Para 5.I, AE 312A.

facts or law or instances where the ruling is inconsistent with case law not previously briefed. In this regard, the *sua sponte* Order of the Commission for severance juxtaposed the Prosecution's position on the issue from similar motions¹³ but did not provide them an opportunity to respond to this specific set of circumstances. For purposes of this motion, the Commission will specifically review and consider the Government Emergency Motion to To Reconsider AE 312 Severance Order (AE 312A) and the response of Mr. bin al Shibh (AE 312B). The motion to reconsider is **GRANTED**.

4. The underlying basis for the issuance of the Order to sever was the Commission's concern with the time necessary to resolve the issues pertaining to Mr. bin al Shibh and the uncertainty as to their outcome as to the Accused's competency and Counsel's ability to continue to represent him conflict free. During argument, the Prosecution, recognizing lengthy delays were possible, asserted the time necessary to resolve these issues¹⁴ would be encompassed by the time required to resolve issues pertaining to, and to provide, classified discovery to all the Accused.¹⁵ The Commission notes there are a number of unresolved motions to compel discovery pending argument¹⁶ that also impact on the overarching delay but resolution of any of these discovery motions must be held in

¹³ Government Response to Military Judge's Show Cause Order, filed 24 May 2013 (AE 039A); Government Response To Mr. Hawsawi's Motion to Sever, filed 4 June 2014 (AE 299A).

¹⁴ "We believe it would be reasonable to take the next couple of sessions -- if that's required, I know that there is a motion to reconsider from the Special Review Team, and they are going to hopefully have the opportunity to argue that tomorrow, but even if required, the next several sessions would be time well spent by the military commission to adjudicate those issues so that we can move forward in a joint trial." Unofficial/Unauthenticated Transcript of the Ramzi Bin al Shibh Motions Hearing Dated 8/11/2014 from 9:13 AM to 10:27 AM at 8060.

¹⁵ *Id.*, p. 8058.

¹⁶ E.g. Motion to Compel Discovery Related to White House and DOJ Consideration of the CIA Rendition, Detention and Interrogation Program, filed 27 December 2012 (AE 112); Motion to Compel Discovery of Information Related to Buildings in Which the Accused or a Potential Witness Has Been Confined, filed 4 January 2013 (AE 114) and Joint Notice of Defense Motion to Compel Production of Communications Between Government and Filmmakers of Zero Dark Thirty, filed 1 July 2013 (AE 195).

abeyance either until the issues pertaining to Mr. bin al Shibh are resolved, and he, and his counsel, can fully participate in the proceedings, or are resolved in disparate proceedings under the severance order.

5. It is hereby Ordered the Severance Order be held in abeyance pending resolution of the underlying issues (AE 152, AE 152J, and AE 292) precipitating the delay. The Motion of the Prosecution is **GRANTED**.

So ORDERED this 13th day of August, 2014.

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