

**Military Commissions:  
Pre-Trial Hearings  
*ISN 10024 Khalid Sheikh Mohammed et. al.*  
November 6-10, 2023, 9-11 Commissions**

On 18SEP2023, the military judge ordered the sealing of Ramzi Bin Al Shibh's mental health documents pursuant to AE 906 M/914 AA and a closed 909 hearing for the assessment of the detainee's capacity/competency to stand trial.<sup>1</sup> On 21SEP2023, the military judge issued AEs 906 O and 914 EE, which are both titled "Ruling and Order: Rule for Military Commissions 909 Competency Determination and Severance." These orders remain under classification review, but considering Ramzi Bin Al Shibh's absence at subsequent pre-trial hearings, it appears he has been severed from the proceedings.

*Events:*

The pre-trial hearings scheduled to start on 6NOV2023 were postponed until 8NOV2023 because an undisclosed member or members of the defense teams on island demonstrated Covid-19 symptoms. Proceedings were briefly interrupted but not recessed in the afternoon on 10NOV2023 when a member of the defense team for Hawsawi, who had been attending from the Remote Hearing Room (RHR), tested positive for Covid-19 and was sent home. Several personnel in both the expeditionary courtroom and the RHR opted to wear face masks throughout the proceedings, but no other visible measures were taken. All witnesses testified without masks.

Prior to calling the first witness, the defense teams for Khalid Sheikh Mohammed (KSM), Ali/Baluchi, and Hawsawi raised concerns about the microphones in the expeditionary courtroom and the RHR, asserting that the government may have, either accidentally or in bad faith, equipped both locations with microphones that could transmit sound even when in the "off" position. The defense team for Hawsawi also objected to a procedure at the RHR that required that defense teams be segregated (whether from other defense teams or from other users is unclear) in elevators and asserted that WHS (Washington Headquarters Services) reactions to his team's objections to the procedure had led to a frivolous investigation that had a chilling effect on counsel assistance. The judge briefly recessed the commission for the government team to retrieve specifications on the microphones and any information on the RHR procedure and WHS investigations. When court resumed, the government asserted that the microphone specifications indicated that they only received and transmitted sound when the "push to talk" buttons were engaged. Additionally, the RHR was equipped with a few models of microphones where the "push to talk" button locked in the "talk" position, so had to be pressed again to

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<sup>1</sup> Located at 58067-KSM II (AE906M).pdf (mc.mil)

disengage it. If the button was not engaged on any given microphone, nobody could listen in or was listening.<sup>2</sup>

Several further arguments occurred before calling witnesses, including whether the government should be permitted to re-prepare witnesses who have been recalled after multi-year gaps in testimony; whether the government should be granted an extension, and if the defense would also be granted one in that event; and if JTF-GTMO was really allowed to change Ali/Baluchi's medications "without asking him."

The first witness to be called was Agent Abigail Perkins of the FBI. The defense teams examined her in open session about the process of investigating Hawsawi, the means of sending collection requirements from the FBI to the CIA while the detainees were at the black sites, the involvement of New York law enforcement departments, legal admonishments that were given in place of Miranda warnings, and agent efforts to convince Director Mueller III to allow the FBI to directly interview detainees.

The second witness to be called was Assistant Director Jacqueline MacGuire of the FBI Training Division, who was the case agent for investigating Flight 77 in the 9-11 PENTTBOMB investigation. The defense teams examined her in open session about the involvement of members of the New York Police Department in the investigation, her investigations of Ali Al Marri (an enemy combatant who had telephone contact with Hawsawi, was indicted twice in Illinois, and was detained in the Charleston Brig), how FD-302 pass lines were populated, her investigations into Farouq Al Najdi and Zaid Al Rashid, her investigations into Al Bayoumi and Osama Bassnan, her interviews of Al Bayoumi and Bassnan and Tamari in Saudi Arabia in conjunction with the 9-11 Commission, her understanding of the term "clean team," and her awareness of agent efforts to lobby Director Mueller III for FBI direct access to detainees. The government cross-examined her about the timelines of the 9-11 hijackers who took up residence in the Los Angeles and San Diego areas, her conclusions about Al Bayoumi's lack of involvement in or prior awareness of 9-11 and the hijackers' purposes, the independent review by the 9-11 Commission that concluded the same, and the two re-investigations in 2007-2016 and 2019 that ultimately reaffirmed the conclusions.

#### Observations:

Both witnesses for this week of hearings were defense witnesses, called in pursuit of the defense discovery motion that demands declassification of and access to all documents of the investigation into Al Bayoumi. Some of the examination questions also appeared to be seeking further evidence for defense motions to suppress the Letter Head Memoranda as illegal or involuntary. Both witnesses gave solid testimony, though each defense team deployed different questioning styles designed to elicit responses of bewilderment, frustration, defensiveness, and self-contradiction.

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<sup>2</sup> The RHR procedure and WHS investigation were not addressed in public session after the recess. It is likely that this was for force protection, or because of attorney-client privilege concerns, as neither the judge nor the Hawsawi defense team reopened the matter.

At the end of Assistant Director MacGuire's testimony, Lt. Col. McCue of the KSM team vaguely asked her if she had been disciplined for an incident in Philadelphia. As MacGuire indicated a lack of knowledge, the government objected on relevance grounds, and the judge sequestered the witness so that McCue could explain. With clear reluctance in the face of repeated questioning by the judge, McCue stated that the incident had involved the discharge of a firearm and that the inciting event had been a dog fight, then added that after investigation, the district attorneys had dismissed all concerns. However, she did not know the outcome of an FBI internal investigation. The judge sustained the objection and appeared antipathetic toward McCue for the rest of the day's session. This line of questioning shows that the KSM team considers its ability to prevail in the motion for the Al Bayoumi documents to be low.

Unless the witnesses gave significantly conflicting testimony in the closed sessions of this hearing, the judge appears likely to opine that discovery of the Al Bayoumi documents would be irrelevant, overly burdensome, and likely to delay the proceedings further to no advantage to the detainees. He appears likely to rule against the discovery motion.

A journalist from the Netherlands attended this hearing observation. Since Al Bayoumi was ultimately arrested in the United Kingdom for visa fraud, and since a subset of the 9-11 hijackers were living in Germany prior to the attack, European citizens will probably find discovery that leads to declassification of the Al Bayoumi documents of interest.