

United State of America)	
)	P-002
v.)	
)	Ruling on Government Motion to
Abd al-Rahim Hussein Mohammed Abdu)	Continue Arraignment
AL-NASHIRI)	
)	29 January 2009
)	

1. I have reviewed and considered:

- a. The government motion, with attachments, for a 120 day continuance in the arraignment, dated 23 January 2009.
- b. The defense response thereto, undated (filed with the Commission on 23 January 2009).
- c. The government reply, dated 28 January 2009.

2. Law. Once the Convening Authority has referred a case to trial by Military Commission, Congress and the Secretary of Defense have invested in the Military Judge the sole authority to grant continuances. (Military Commission Act, 10 U.S.C. §949e; Rule for Military Commission (R.M.C.) 706(b)(4)(E)(i)). In Section 8b of the executive order (Attachment A to the Government motion), the President directed the order “shall be implemented consistent with applicable law.”

3. Chronology.

a. As reflected on the charge sheet (MC Form 458), the last of the alleged offenses in this case occurred NLT 2002. Charges were sworn on 12 December 2008. The Convening Authority referred the case to trial by Military Commission on 19 December 2008. The Convening Authority referred the case capital. The accused was served with the charges on 24 December 2008.

b. UP R.C.M 707(a)(1), the accused must be arraigned within thirty (30) days of service of the referred charges. Accordingly, the Commission set the arraignment for 14 January 2009. Pursuant to a defense delay request to coordinate defense counsel schedules, the Commission granted a continuance in the arraignment until 9 February 2009. In granting the delay, the Commission found the delay to be reasonable and in the interests of justice.

4. Discussion.

a. At the arraignment, the accused is formally advised of the charges and called upon to enter plea (R.M.C. 904). No additional charges may referred to the trial after

arraignment (R.M.C. 601(e)(2)). At the arraignment, the accused is informed of his right to counsel. He selects his counsel who then enter a formal appearance on behalf of the accused. From this point forward, defense counsel cannot be released absent consent of the accused and/or approval of the Military Judge (R.M.C. 506(b)).

b. IAW R.C.M. 707(b)(4)(E)(ii)(A), a continuance should be granted only if Military Judge specifically finds that the interests of justice are served by granting a continuance and those interests outweigh the best interests of the public and the accused in a prompt trial.

c. In its motion, the government avers that delaying the arraignment would serve the interests of justice since the Administration's review *could* result in changes that would:

(1) Render moot any proceedings conducted during the review;

(2) Necessitate relitigation of issues; or,

(3) Produce legal consequences affecting options available to the Administration after completion of the review.

d. The Commission finds all these reasons to be an unpersuasive basis to delay the arraignment. No substantive legal issues will be litigated at the arraignment so nothing will be mooted or necessary for relitigation. The Commission is unaware of how conducting an arraignment would preclude any option by the Administration.

e. Congress passed the Military Commission Act which remains in effect. The Commission is bound by the law as it currently exists not as it may change in the future.

f. With regards to the authority of the Military Judge, as the District Court stated in a different Commission case (*Hamdan v. Gates*), "Article III judges do not have a monopoly on justice, or on constitutional learning. A real judge is presiding over the pretrial proceedings in Hamdan's case and will preside over the trial. He will have difficult decisions to make, as judges do in nearly all trials." So it is in this case.

5. I find:

a. The requested delay in the arraignment is for a total of 102 days.

b. There have been no previous requests for delay from the government in this proceeding.

c. On its face, the request to delay the arraignment is not reasonable.

d. The public interest in a speedy trial will be harmed by the delay in the arraignment.

- e. Granting the continuance do not serve the interests of justice.
6. The government request for a continuance in the arraignment until after 22 May 2009 is DENIED.
7. At the arraignment, the Commission will address the remaining portion of the government motion requesting a continuance of all other sessions of the Commission.

So ordered this 29th of January 2009.

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

UNITED STATES OF AMERICA)
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 v.) **Defense Response**
)
 ABD AL-RAHIM HUSSEIN MUHAMMED) to Government Motion For 120
 AL-NASHIRI) Day Continuance.
)
)
)

1. **Timeliness:** This response is filed within the timeframe established in Rules of Court (RC) 3.
2. **Summary:** The defense does not oppose a continuance in this case, but opposes the government's specific request that the continuance "halt all proceedings in this matter, including but not limited to all pending motions, future motions, court proceedings and discovery disclosures[.]" (Gov't Motion at) This Court has the authority under the Military Commissions Act and the Rules for Military Commissions to grant a continuance, but there is no authority for the government's specific relief. Moreover, the interest of justice and judicial economy demand that this Court not grant such a broadly worded and sweeping continuance request.
3. **Facts:** The Defense concurs with the government's recitation of facts.
4. **Argument:** M.C.A §949e and R.M.C. 707 authorize the military judge to grant continuances. But neither of these provisions authorizes more. And no other interpretation can be ascertained from a plain reading of the M.C.A or the R.M.C. In fact, the only provision that grants this Court the authority to stop or

halt the proceedings is R.M.C. 703. Yet this rule only relates to the availability of evidence.

The government cites to both the President's Executive Order and the Secretary of Defense's memorandum as support of its motion. But both the order and the memorandum suffer from the same fate: they do not authorize this Court to extend its authority to continue cases as far as the government wishes.

First, the Executive Order authorizes the Secretary of Defense to take steps to halt the proceedings in cases that have been referred. There is nothing in the four-corners of the order that permits a permutated continuance request to be this catalyst. Notably, the Secretary of Defense can give effect to the Executive Order by withdrawing the charges before this Court.

And second, the Secretary of Defense's memorandum merely authorizes the prosecution to seek a continuance. The government complied with this memorandum in filing their motion, but there is nothing in the memorandum that grants this Court the authority to halt all the proceedings before it.

The interest of justice may call for the continuing of this case. However, the interest of justice also calls for this Court to reject the government's request for a broad and sweeping order. If this Court were to essentially shut its doors then the Defendant is left without a forum to address any

of its issues that pertain to this case. Defense's Motion D002 is an example of such important and pressing issues. Moreover, according to the Secretary of Defense's memorandum, the government, aided by the full force of the agencies of the United States, is free to continue to investigate and evaluate these cases. But the defense is left in silence to contemplate what evidence the government may have against its client, while the government fine tunes its case.

Also, judicial economy demands that this Court reject the government's sweeping language. The government cannot state with certainty that this case will not be back before this commission. If such is the case and the government's motion is granted then the Defense would be without discovery for over four months. Also, even if this case were to proceed in another forum, the Defense included in its motion for continuance (D001) a cleared counsel election form from Mr. Al-Nashiri. This election gives the current counsel the authority to represent Mr. Al-Nashiri in all forums.

5. **Conclusion.** In sum, the Defense does not object to the government's continuance request, but opposes its request that the continuance ""halt all proceedings in this matter, including but not limited to all pending motions, future motions, court proceedings and discovery disclosures[.]""

6. **Oral Argument.** The Defense does not request oral argument in this case.

//s//
LCDR STEPHEN C. REYES
Detailed Defense Counsel
Office of the Chief Defense
Counsel
Office of the Military Commissions

UNITED STATES OF AMERICA)
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 v.) **Defense Response**
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of its issues that pertain to this case. Defense's Motion D002 is an example of such important and pressing issues. Moreover, according to the Secretary of Defense's memorandum, the government, aided by the full force of the agencies of the United States, is free to continue to investigate and evaluate these cases. But the defense is left in silence to contemplate what evidence the government may have against its client, while the government fine tunes its case.

Also, judicial economy demands that this Court reject the government's sweeping language. The government cannot state with certainty that this case will not be back before this commission. If such is the case and the government's motion is granted then the Defense would be without discovery for over four months. Also, even if this case were to proceed in another forum, the Defense included in its motion for continuance (D001) a cleared counsel election form from Mr. Al-Nashiri. This election gives the current counsel the authority to represent Mr. Al-Nashiri in all forums.

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6. **Oral Argument.** The Defense does not request oral argument in this case.

//s//
LCDR STEPHEN C. REYES
Detailed Defense Counsel
Office of the Chief Defense
Counsel
Office of the Military Commissions

UNITED STATES OF AMERICA

v.

ABD AL-RAHIM HUSSEIN MUHAMMED
ABDU AL-NASHIRI

GOVERNMENT MOTION

**MOTION FOR 120 DAY
CONTINUANCE IN THE INTERESTS
OF JUSTICE**

23 January 2009

P-002

- 1. Timeliness:** This motion is filed in accordance with the timelines specified by R.M.C. 905(b)(4) and the Military Commissions Trial Judiciary Rules of Court issued on 2 November 2007.
- 2. Relief Requested:** In the interests of justice, and at the direction of the President of the United States and the Secretary of Defense, the Government respectfully requests that the Military Commission grant a continuance of the proceedings in the above-captioned case until May 22, 2009.¹ The Government requests that this continuance halt all proceedings in this matter, including but not limited to all pending motions, future motions, court proceedings and discovery disclosures. The government also requests postponement of arraignment of the accused, currently scheduled for February 9, 2008, until after May 22, 2009.
- 3. Overview:** In order to provide the President and his Administration time to review the military commissions process generally, and the cases pending before military commissions specifically, the Secretary of Defense has, by order of the President, directed the Chief Prosecutor to seek continuances of 120 days in all pending cases.
- 4. Burden and Persuasion:** As the moving party, the Government bears the burden of persuasion. *See* R.M.C. 905(c)(2).
- 5. Facts:**
 - a. On 20 January 2009, President Barack Obama took office as President of the United States. As such, President Obama is the Commander-in-Chief of the United States Armed Forces. The Honorable Robert Gates continues to serve as the Secretary of Defense.

¹ The Government will be requesting a continuance until 22 May 2009 in all pending military commissions cases.

b. On 22 January 2009, President Obama issued an Executive Order entitled: REVIEW AND DISPOSITION OF INDIVIDUALS DETAINED AT THE GUANTANAMO BAY NAVAL BASE AND CLOSURE OF DETENTION FACILITIES. (Attachment A.) This Executive Order ordered an inter-agency Review of “the status of each individual currently detained at Guantanamo” and directed the Secretary of Defense to “ensure that during the pendency of the Review ... no charges are sworn or referred to a military commission ... and that all proceedings of such military commissions to which charges have been referred but in which no judgment has been rendered ... are halted.”

c. By order of the President, the Secretary of Defense directed the Chief Prosecutor of the Office of Military Commissions to seek continuances of 120 days in any case that had been referred to military commission, in order to provide the Administration sufficient time to conduct a review of detainees currently held at Guantanamo Bay, Cuba. (Attachment B).

6. Argument:

a. Rule for Military Commission 707(b)(4)(E)(i) authorizes the military judge of a military commission to grant a continuance or other departure of the proceedings if the interests of justice served by taking such action outweigh the best interests of both the public and the accused in a prompt trial of the accused.

b. The requested continuance is in the interests of justice, since it will permit the President and his Administration to undertake a thorough review of all pending cases and the military commissions process.

c. The interests of justice served by granting the requested continuance outweigh the interests of both the public and the accused in a prompt trial. Granting a continuance of the proceedings is in the interests of the accused and the public, since the Administration’s review of the commissions process and its pending cases could result in changes that would (1) render moot any proceedings conducted during the review, (2) necessitate re-litigation of issues, or (3) produce legal consequences affecting the options available to the Administration following its review. Further, changes in the military commissions procedures that could result from a review of the commissions process might inure to the benefit of the accused.

d. The Government requests a halt to this military commission and temporary stay of future proceedings until the end of the period in order to comport with the President’s intent and this commission’s ruling. The halt should include but not be limited to future court proceedings, rulings on past motions, submission of future motions and discovery disclosures.

7. Conclusion: For the foregoing reasons, the military commission should grant a continuance of further proceedings and halt all activity in the above-captioned case until 22 May 2009, and adopt the attached Findings of Fact, Conclusions of Law and Order (Attachment C).

8. Oral Argument: The Government does not request oral argument, but is prepared to argue should the commission find it helpful.

9. Witnesses and Evidence: No witnesses or evidence are necessary to decide this motion.

10. Certificate of Conference: The Government has conferred with the defense and the defense expressed a desire for the opportunity to respond to the Government's motion.

11. Attachments:

A. Executive Order entitled REVIEW AND DISPOSITION OF INDIVIDUALS DETAINED AT THE GUANTANAMO BAY NAVAL BASE AND CLOSURE OF DETENTION FACILITIES

B. Secretary of Defense Order

C. Proposed Findings of Fact and Conclusions of Law.

12. Submitted by:

//S//

Colonel Robert Cotell
Prosecutor

//S//

Captain Edward Regan
Prosecutor

//S//

Anthony Mattivi
Prosecutor

//S//

Susan Collins
Prosecutor

UNITED STATES OF AMERICA

v.

ABD AL-RAHIM HUSSEIN MUHAMMED
ABDU AL-NASHIRI

ORDER

**Proposed Findings of Fact and
Conclusions of Law**

23 January 2009
P-002

1. On 23 January 2009, the Government moved for a continuance of the proceedings and a halt of all proceedings in this matter, including but not limited to future court proceedings, rulings on past motions, submission of future motions and discovery disclosures. The Government requested such continuance until 23 May 2009.
2. On ___ January 2009, the defense responded to the Government's motion (P-002).
3. After reviewing the briefs of the parties, and the entire record, the Military Commission finds the following facts:
 - a. On 20 January 2009, Barack Obama took the office as President of the United States. As such, President Obama is the Commander-in-Chief of the United States Armed Forces.
 - b. The Honorable Robert Gates continues to serve as the Secretary of Defense.
 - c. On 22 January 2009, by order of President Obama, Secretary of Defense Gates directed the Chief Prosecutor of the Office of Military Commissions to seek continuances of 120 days in any case that had been referred to military commission.
 - d. The Secretary of Defense issued his order to the Chief Prosecutor in order to provide the Administration sufficient time to conduct a review of detainees currently held at Guantánamo Bay, Cuba, to evaluate the cases of detainees not approved for release or transfer to determine whether prosecution may be warranted for any offenses these detainees may have committed, and to determine which forum best suits any future prosecution.
 - e. President Obama intends to conduct a thorough review of the cases referred to military commissions, as well as of the entire military commissions process.
 - f. Implicit in this review is the possibility that the Administration may forego prosecution in certain cases altogether, move prosecution of some or all cases to other courts, or make changes to the rules and procedures applicable to military commissions.
 - g. Conducting further proceedings in the case *sub judice* during the Administration's review would likely result in expending effort and resources to litigate issues that might later be rendered moot, or that might need to be re-litigated due to changes in the rules or procedures, or otherwise produce legal consequences affecting the options available to the Administration in its review.

4. Based upon the foregoing facts, the Military Commission reaches the following conclusions of law:

a. Continuing this proceeding and halting all activity in the case *sub judice* until 22 May 2009 is in the interests of justice, because it will permit the President to conduct a thorough and thoughtful review of the military commissions process, and the cases pending before such commissions, including this case, without the pressures or distractions that might result from contemporaneous proceedings before a military commission.

b. The interests of justice served by a 120-day continuance in this case outweigh the best interests of both the public and the accused in a prompt trial.

c. The requested 120-day continuance and suspension of all activities during the review of the military commissions process is affirmatively in the interests of both the public and the accused, as it will avoid wasted effort in litigating issues that might be rendered moot or need to be re-litigated by the outcome of that review, advance judicial economy, and prevent legal consequences that might affect the options available to the Administration as part of its review.

d. The Government has not requested this continuance for the purpose of obtaining unnecessary delay, or for any other inappropriate reason.

e. The continuance request by the Government is not for an unduly long period of time.

f. This delay should be excluded when determining whether any time period under Rule for Military Commission (R.M.C.) 707(a) has run.

5. Wherefore, it is this ____ day of _____ 2009, by this military commission

ORDERED:

1. That further proceedings in this military commission are continued until 22 May 2009, and during such period, all proceedings including but not limited future court proceedings, rulings on past motions, submission of future motions and discovery disclosures, shall be halted.

2. Arraignment of the accused currently scheduled for 9 February 2008 will not take place and is re-scheduled for _____ 2009.

2. That all delay between today and _____, 2009 shall be excluded when determining whether any time period under R.M.C. 707(a) has run.

James Pohl
Military Judge