

United State of America

v.

Abd al-Rahim Hussein Mohammed Abdu
AL-NASHIRI

D-002

Ruling on Defense Motion to
Discontinue

5 February 2009

1. I have reviewed and considered:

- a. The defense motion, with attachments, dated 9 January 2009.
- b. The government response, with attachment, dated 29 January 2009.
- c. The defense reply, with attachment, dated 3 February 2009.

2. The defense requests the Commission to order the Government to cease the practice of [REDACTED] ed whenever the accused is transported from his cell. The defense alleges that this practice causes psychological harm to the accused since i [REDACTED] by the accused while in custody. The defense further alleges the result of this practice “unduly burdens the attorney-client relationship.” In support of its motion, the defense submitted affidavits from a medical doctor and a psychologist opining about potential harm to the accused caused by this practice. Neither individual has personally examined the accused.

3. The defense requests a hearing on this issue before the arraignment without the presence of the accused since transporting him to the arraignment would necessarily exacerbate the very harm they are seeking to avoid.

4. The government opposes the motion contending the Commission has no authority to rule on the conditions of the accused’s custody. In the alternative, the government alleges the policy is a necessary for the safety of the guards and others and is within the operational discretion of the commander.

5. As the government states in its brief, the decision [REDACTED] detainees should not be disturbed “absent a compelling interest.”

6. Until the accused is arraigned, the Commission does not have his counsel elections on the record. The personal appearance of the accused is required at the arraignment. Accordingly, the Commission rejects the defense proposal to conduct a pre-arraignment hearing on this issue without the presence of the accused.

7. The Commission recognizes the concerns of the government and does not intend to usurp the operational decision-making rightly invested in the command in charge of detainee operations.

8. Contrary to the implication of the government motion, the Commission does have authority to address detainee security issues *if* they impact on the accused's ability to prepare his defense.

9. The alleged harm to the accused is, at this point, speculative. The Commission holds that an evidentiary hearing will be necessary to resolve this issue. The defense will have the opportunity to present evidence at an evidentiary hearing which can be conducted immediately after the arraignment.

10. As discussed in paragraph 2, above, the Commission recognizes that transport to the arraignment may cause some harm to the accused. If, after arrival at the courthouse on 9 February 2009, the defense believes that the transportation of the accused has impaired his ability to participate in the proceedings, the Commission will consider delaying the start of the proceedings on that day.

So ordered this 5th day of February 2009

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