

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

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ABD AL-RAHIM HUSSEIN MUHAMMED
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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