

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**

Government's Reply to Defense's Answer

28 January 2009

P-002

1. Timeliness: This reply 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. Reply:

Pursuant to directives issued last week by the President and the Secretary of Defense, the Government has filed a motion seeking to continue all proceedings in this case for a period of 120 days. The Defense has responded to the Government's motion. In their response, the Defense does not object to a continuance generally, but they do offer several arguments as to why the current proceedings in this matter should not be completely halted. The instant Reply will address the Defense arguments in turn:

A. The Defense contends the 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 request to stop pending and future motions, court proceedings and discovery motions. The Government suggests a more careful interpretation of the two orders in light of the unique procedures of the Military Commissions Act and the unclear potential future course of this litigation. This Court has the authority under R.M.C 707 to continue any and all matters before it. The Government based its request for continuance on the "interests of justice," which, the Government submits, are served by allowing the President sufficient time to review the Military Commissions process. This argument applies not only to the request to postpone arraignment in the case, but to all proceedings, including engagement with the Court on management of classified discovery. The continuance is in the interests of justice because it will allow sufficient time for a comprehensive review of the current process and prevent decisions and actions that may be inconsistent with future adopted procedures; and prevent potentially futile expenditure of resources. The Government is not arguing for an indeterminate delay; rather, the Government requests a continuance for a specified period to allow time for the comprehensive review ordered by the President.

B. The Defense next contends that, while the Government's motion cites as authority the directives from the President and the Secretary of Defense, neither of these directives authorizes the Court to extend its authority to continue cases as far as the Government wishes. The Government agrees, and it neither seeks an indefinite delay nor cites either the President or the Secretary as conclusive authority; rather, the Government bases its request for continuance on the President's order that the commissions proceedings be suspended and the Secretary's directive to seek the 120-day continuance, both of them having their sole intent to permit the Administration's comprehensive review of the process. The Secretary's directive to the Chief Prosecutor identified a "continuance" as the means by which to execute the President's directive. In light of the specific terms used by the President and Secretary, it is clear both intended that no further proceedings be permitted while the Review continues.

C. The Defense argues that the Secretary of Defense can give effect to the Executive Order by withdrawing the charges from this Commission. While that is true, such a radical move is unnecessary when a continuance would permit all parties to continue to prepare their cases. Moreover, should the Commissions process continue, all parties will be best positioned to continue with minimal delay. The Government's request to halt temporarily all proceedings in the interests of justice is sufficient to implement the President's directive.

D. The Defense argues that, if a continuance is granted on all matters, the Accused is left without a forum to address issues pertaining to this case. The Government respectfully submits, however, that the requested continuance does not leave the Accused without a forum. The Government has requested only a temporary suspension of the proceedings. Once the continuance expires and the case resumes, the Defense will have an opportunity to raise all appropriate issues to the Court. Further, a continuance renders it unnecessary to resolve Defense motion D-002 concerning the transport of the accused to court, as all parties agree that there will be no sessions of court during the continuance.

E. The Defense argues that, if the Government's motion is granted, the Accused will be without discovery for a period of four months and suffer a disadvantage as a result. In the Arraignment Order dated 21 December 2008, the Military Judge stated that, at the arraignment session, he would establish a full schedule of litigation. It was intended that the discovery timetable would be established at that time. However, both the President's Order and Secretary of Defense's memorandum specify that no further proceedings should be held in these cases. If the Government's request for a continuance were granted, the arraignment would be held after the continuance expires. Accordingly, a judicially-directed discovery timetable would not be established until that time. RMC 701(a)(3) states the military judge may specify the "time place and manner of discovery and may prescribe such terms and conditions as are necessary to the interests of justice..." RMC 707(b)(4)(E)(i) authorizes a judge to grant a continuance "or other departure from the requirements of this rule ... in the interests of justice," and "this rule" provides, at RMC 707(a)(3), that the judge "shall set an appropriate schedule for discovery." The Government contends that the interests of justice are served by also postponing the issuance of any discovery orders, as no parties reasonably can forecast what if any changes will come to the Commissions process – or whether the process as currently constructed will continue. It would be inefficient if not presumptuous for the judge to set a discovery schedule under such circumstances. In addition, as compliance with discovery inevitably results in disputes that often

need to be resolved in a proceeding, it would be contrary to judicial efficiency to issue orders that could not be resolved through litigation until the continuance expires. None of this should preclude the Government from complying with disclosure obligations under RMC 701(b)(1). That obligation, however, is not self-executing, as it should be read in accordance with several other provisions, especially RMC 701(a)(3), which not only authorizes the judge to set discovery terms and conditions, but it also makes clear that “protection of national security[] and the safety of witnesses” is a factor; consequently, any potential Government discovery would be provided consistent with those constraints. Because obtaining a protective order requires *ex parte* engagement with a military judge, the Government can not produce classified discovery during the period of the continuance.

F. Should the judge contemplate that discovery will continue, there will be no forum to resolve any disputes or to enforce court orders. While the Government cannot provide classified discovery during the continuance, all parties should recognize that if the Government provides unclassified discovery it could reach the point that it could not be further resolved – because resolution would require a proceeding – until the continuance expires.

G. In light of the fact that the ultimate forum in which this matter may be heard is unknown to all the parties in this case, the wisest course of action - and one that is in the interests of justice – is to postpone all proceedings for 120 days. The Administration’s review could result in a number of changes, including forum, rules of evidence, rules of procedure, and many others. Any rulings by a military commission, or actions by a trial counsel on matters decided during this review period, might adversely affect a future proceeding convened under different rules and procedures.

3. Conclusion: The Government has requested a continuance of all proceedings in this case. The Accused does not object to continuance of the arraignment, and the Government submits the arraignment should therefore be continued as requested. The Accused does object to continuance of all other matters in the case, such as the filing of motions and the conduct of discovery. Given the current – and unique – posture in which this case currently presents, the Government submits that it should be free to provide unclassified discovery to the defense, but no unclassified discovery and no other litigation of motions practice. The Government submits that a 120-day continuance of all proceedings is justified under the circumstances and is consistent with both the President’s Order. For these reasons, the Military Commission should grant a continuance of further proceedings in this case until 20 May 2009, and adopt the attached Findings of Fact, Conclusions of Law and Order (Attachment C).

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