

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