

United State of America	)	P-012
	)	
v.	)	Ruling on Government Motion
	)	for a Continuance
Ahmed Mohammed Ahmed Haza	)	
Al Darbi	)	13 February 2009
	)	
	)	

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1. I have reviewed and considered:

a. The government motion, with attachments, for a continuance until 20 May 2009, dated 23 January 2009.

b. The defense response, dated 30 January 2009.

c. The government reply, dated 6 February 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. Referred charges were served on the accused on 3 March 2008. The accused was arraigned on 13 March 2008. Since then, there have been a number of pretrial hearings. A final pretrial motion session is currently scheduled for 2 March 2009 with trial on the merits to begin shortly thereafter unless the results of the motion hearing moot further proceedings.

b. The accused has been represented by counsel at each hearing. The accused has excused one military counsel. The accused is currently represented by one military and one civilian lawyer. The accused has stated on the record that he wishes to be represented by both of them.

c. As indicated in paragraph 1b, above, the accused’s current counsel have provided a response to the government motion for continuance.

d. UP R.C.M 707(a)(1), the accused was arraigned within thirty (30) days of service of the referred charges.

4. Discussion.

a. 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.

b. The government requests the continuance pursuant to the direction of the Secretary of Defense implementing the President's Executive Order to seek time to review current procedures in addressing detainees currently held at Guantanamo Bay, Cuba. The review will also address the proper prosecutorial forum, if any, for detainees, including this accused.

c. The defense requests that the Commission dismiss the charges rather than granting the continuance. The Commission does not believe dismissal is appropriate under these circumstances. If the case is withdrawn by the Convening Authority during the continuance, then the accused receives his requested relief. Conversely, if the case is not withdrawn by the Convening Authority during the continuance, then the accused would be afforded a quicker resolution of his case than he would if it had to start with a new referral.

5. I find:

- a. The requested delay in the next hearing is until 20 May 2009.
- b. On its face, the request to delay the next hearing is reasonable.
- c. The public interest in a speedy trial will be not harmed by the delay of the next hearing.
- d. Granting the continuance will serve the interests of justice.
- e. The government is responsible for the delay from 2 March 2009 until 20 May 2009.

6. The government request for a continuance in the next hearing until 20 May 2009 is GRANTED. The next hearing will be held at 0900 hours on 21 May 2009. Both parties should be prepared to litigate all outstanding issues at that time.

7. The Commission authorizes the public release of this order and supporting pleadings.

So ordered this 13<sup>th</sup> day of February, 2009.

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

UNITED STATES OF AMERICA

GOVERNMENT MOTION

v.

For Appropriate Relief

23 January 2009

AHMED MOHAMMED AHMED HAZA  
AL DARBI

1. **Timeliness:** This motion is timely filed.
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 the Military Commission grant a continuance of the proceedings in the above-captioned case until 20 May 2009.<sup>1</sup>
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* RMC 905(c).
5. **Facts:**
  - a. On 20 January 2009, Barack H. 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.
  - b. On 22 January 2009, President Obama issued an Executive Order, "Review and Disposition of Individuals Detained at the Guantanamo Bay Naval Base and Closure of Detention Facilities," (EO) (Attachment A). The EO 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."

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<sup>1</sup> The Government will be requesting a continuance until on or about 20 May 2009 in all pending military commissions cases.

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 Guantánamo Bay, Cuba (Attachment B).

**6. Argument:**

a. Rule for Military Commission (RMC) 707(b)(4)(E)(i) authorizes the military judge of a military commission to grant a continuance of the proceedings if the interests of justice are served by such action and 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, as it will permit the President and his Administration to undertake a thorough review of all pending cases and the military commissions process generally.

c. The interests of justice served by granting the 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, as the Administration's review of the commissions process and its pending cases might 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 a temporary stay of all orders previously issued. During this continuance the requirements of previously ruled upon motions should be stayed, compliance dates readjusted appropriately, and all other proceedings halted to comport with the President's intent and this commission's ruling.

**7. Conclusion:** For the foregoing reasons, the military commission should grant a continuance of further proceedings in the above-captioned case until 20 May 2009, and adopt the attached Findings of Fact, Conclusions of Law and Order.

**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 notified the Defense of its intent to file this motion, and was informed the Defense will defer its decision on objecting to same until it has reviewed the motion.

**11. Attachments:**

- A. Executive Order
- B. Secretary of Defense Order
- C. Proposed Findings of Fact and Conclusions of Law.

12. **Submitted by:**

/s/

Frank G. Rangoussis

Trial Counsel, DOJ

Scott A. Bryant

Trial Counsel, CPT, JA, USA

Susan Collins, Trial Counsel, AUSA

Office of Military Commissions



# **ATTACHMENT A**

EXECUTIVE ORDER

REVIEW AND DISPOSITION OF INDIVIDUALS DETAINED AT THE  
GUANTÁNAMO BAY NAVAL BASE AND CLOSURE OF DETENTION FACILITIES

By the authority vested in me as President by the Constitution and the laws of the United States of America, in order to effect the appropriate disposition of individuals currently detained by the Department of Defense at the Guantánamo Bay Naval Base (Guantánamo) and promptly to close detention facilities at Guantánamo, consistent with the national security and foreign policy interests of the United States and the interests of justice, I hereby order as follows:

Section 1. Definitions. As used in this order:

- (a) "Common Article 3" means Article 3 of each of the Geneva Conventions.
- (b) "Geneva Conventions" means:
  - (i) the Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, August 12, 1949 (6 UST 3114);
  - (ii) the Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, August 12, 1949 (6 UST 3217);
  - (iii) the Convention Relative to the Treatment of Prisoners of War, August 12, 1949 (6 UST 3316); and
  - (iv) the Convention Relative to the Protection of Civilian Persons in Time of War, August 12, 1949 (6 UST 3516).
- (c) "Individuals currently detained at Guantánamo" and "individuals covered by this order" mean individuals currently detained by the Department of Defense in facilities at the Guantánamo Bay Naval Base whom the Department of Defense has ever determined to be, or treated as, enemy combatants.

Sec. 2. Findings.

(a) Over the past 7 years, approximately 800 individuals whom the Department of Defense has ever determined to be, or treated as, enemy combatants have been detained at Guantánamo. The Federal Government has moved more than 500 such detainees from Guantánamo, either by returning them to their home country or by releasing or transferring them to a third country. The Department of Defense has determined that a number of the individuals currently detained at Guantánamo are eligible for such transfer or release.

(b) Some individuals currently detained at Guantánamo have been there for more than 6 years, and most have been detained for at least 4 years. In view of the significant concerns raised by these detentions, both within the United States and internationally, prompt and appropriate disposition of the individuals currently detained at Guantánamo and closure of the facilities in which they are detained would further the national security and foreign policy interests of the United States and the interests of justice. Merely closing the facilities without promptly determining the appropriate disposition of the individuals detained would not adequately serve those interests. To the extent practicable, the prompt and appropriate disposition of the individuals detained at Guantánamo should precede the closure of the detention facilities at Guantánamo.

(c) The individuals currently detained at Guantánamo have the constitutional privilege of the writ of habeas corpus. Most of those individuals have filed petitions for a writ of habeas corpus in Federal court challenging the lawfulness of their detention.

(d) It is in the interests of the United States that the executive branch undertake a prompt and thorough review of the factual and legal bases for the continued detention of all individuals currently held at Guantánamo, and of whether their continued detention is in the national security and foreign policy interests of the United States and in the interests of justice. The unusual circumstances associated with detentions at Guantánamo require a comprehensive interagency review.

(e) New diplomatic efforts may result in an appropriate disposition of a substantial number of individuals currently detained at Guantánamo.

(f) Some individuals currently detained at Guantánamo may have committed offenses for which they should be prosecuted. It is in the interests of the United States to review whether and how any such individuals can and should be prosecuted.

(g) It is in the interests of the United States that the executive branch conduct a prompt and thorough review of the circumstances of the individuals currently detained at Guantánamo who have been charged with offenses before military commissions pursuant to the Military Commissions Act of 2006, Public Law 109-366, as well as of the military commission process more generally.

Sec. 3. Closure of Detention Facilities at Guantánamo.

The detention facilities at Guantánamo for individuals covered by this order shall be closed as soon as practicable, and no later than 1 year from the date of this order. If any individuals covered by this order remain in detention at Guantánamo at the time of closure of those detention facilities, they shall be returned to their home country, released, transferred to a third country, or transferred to another

United States detention facility in a manner consistent with law and the national security and foreign policy interests of the United States.

Sec. 4. Immediate Review of All Guantánamo Detentions.

(a) Scope and Timing of Review. A review of the status of each individual currently detained at Guantánamo (Review) shall commence immediately.

(b) Review Participants. The Review shall be conducted with the full cooperation and participation of the following officials:

- (1) the Attorney General, who shall coordinate the Review;
- (2) the Secretary of Defense;
- (3) the Secretary of State;
- (4) the Secretary of Homeland Security;
- (5) the Director of National Intelligence;
- (6) the Chairman of the Joint Chiefs of Staff; and
- (7) other officers or full-time or permanent part-time employees of the United States, including employees with intelligence, counterterrorism, military, and legal expertise, as determined by the Attorney General, with the concurrence of the head of the department or agency concerned.

(c) Operation of Review. The duties of the Review participants shall include the following:

- (1) Consolidation of Detainee Information. The Attorney General shall, to the extent reasonably practicable, and in coordination with the other Review participants, assemble all information in the possession of the Federal Government that pertains to any individual currently detained at Guantánamo

and that is relevant to determining the proper disposition of any such individual. All executive branch departments and agencies shall promptly comply with any request of the Attorney General to provide information in their possession or control pertaining to any such individual. The Attorney General may seek further information relevant to the Review from any source.

(2) Determination of Transfer. The Review shall determine, on a rolling basis and as promptly as possible with respect to the individuals currently detained at Guantánamo, whether it is possible to transfer or release the individuals consistent with the national security and foreign policy interests of the United States and, if so, whether and how the Secretary of Defense may effect their transfer or release. The Secretary of Defense, the Secretary of State, and, as appropriate, other Review participants shall work to effect promptly the release or transfer of all individuals for whom release or transfer is possible.

(3) Determination of Prosecution. In accordance with United States law, the cases of individuals detained at Guantánamo not approved for release or transfer shall be evaluated to determine whether the Federal Government should seek to prosecute the detained individuals for any offenses they may have committed, including whether it is feasible to prosecute such individuals before a court established pursuant to Article III of the United States Constitution, and the Review participants shall in turn take the necessary and appropriate steps based on such determinations.

(4) Determination of Other Disposition. With respect to any individuals currently detained at Guantánamo whose disposition is not achieved under paragraphs (2) or (3) of this subsection, the Review shall select lawful means, consistent with the national security and foreign policy interests of the United States and the interests of justice, for the disposition of such individuals. The appropriate authorities shall promptly implement such dispositions.

(5) Consideration of Issues Relating to Transfer to the United States. The Review shall identify and consider legal, logistical, and security issues relating to the potential transfer of individuals currently detained at Guantánamo to facilities within the United States, and the Review participants shall work with the Congress on any legislation that may be appropriate.

Sec. 5. Diplomatic Efforts. The Secretary of State shall expeditiously pursue and direct such negotiations and diplomatic efforts with foreign governments as are necessary and appropriate to implement this order.

Sec. 6. Humane Standards of Confinement. No individual currently detained at Guantánamo shall be held in the custody or under the effective control of any officer, employee, or other agent of the United States Government, or at a facility owned, operated, or controlled by a department or agency of the United States, except in conformity with all applicable laws governing the conditions of such confinement, including Common Article 3 of the Geneva Conventions. The Secretary of Defense shall immediately undertake a review of the conditions of detention at Guantánamo to ensure full compliance with this

directive. Such review shall be completed within 30 days and any necessary corrections shall be implemented immediately thereafter.

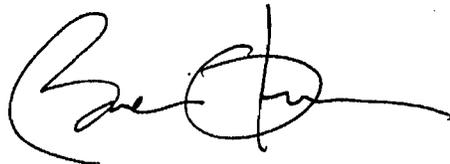
Sec. 7. Military Commissions. The Secretary of Defense shall immediately take steps sufficient to ensure that during the pendency of the Review described in section 4 of this order, no charges are sworn, or referred to a military commission under the Military Commissions Act of 2006 and the Rules for Military Commissions, and that all proceedings of such military commissions to which charges have been referred but in which no judgment has been rendered, and all proceedings pending in the United States Court of Military Commission Review, are halted.

Sec. 8. General Provisions.

(a) Nothing in this order shall prejudice the authority of the Secretary of Defense to determine the disposition of any detainees not covered by this order.

(b) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.



THE WHITE HOUSE,

January 22, 2009.

**ATTACHMENT B**



SECRETARY OF DEFENSE  
1000 DEFENSE PENTAGON  
WASHINGTON, DC 20301-1000

JAN 20 2009

MEMORANDUM FOR THE CONVENING AUTHORITY FOR MILITARY  
COMMISSIONS  
CHIEF PROSECUTOR, OFFICE OF MILITARY  
COMMISSIONS

SUBJECT: Military Commissions

Pursuant to the Military Commissions Act of 2006 and the authority vested in me as the Secretary of Defense, I hereby direct the Convening Authority for Military Commissions to cease referring cases to military commissions immediately. I direct the Chief Prosecutor of the Office of Military Commissions (OMC) to cease swearing charges, to seek continuances for 120 days in any cases that have already been referred to military commissions, and to petition the Court of Military Commission Review to hold in abeyance any pending appeals for 120 days.

This is to provide the Administration sufficient time to conduct a review of detainees currently held at Guantanamo, 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.

This order does not preclude continued investigation or evaluation of cases by the OMC.

A handwritten signature in black ink, appearing to read "Robert M. Gates", is positioned below the text.

cc:  
General Counsel of the Department of Defense  
Chief Judge, Military Commissions Trial Judiciary  
Chief Defense Counsel, Office of Military Commissions



# **ATTACHMENT C**

**UNITED STATES OF AMERICA**

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

**23 January 2009**

**v.**

**AHMED MOHAMMED AHMED HAZA  
AL DARBI**

1. On 23 January 2009, the Government moved for a continuance until 20 May 2009 of further proceedings in this military commission (P-\_\_\_).
2. On XX January 2009, the Defense responded to the Government's motion (D-\_\_\_).
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 H. Obama took office as President of the United States. As such, President Obama is the Commander-in-Chief of the United States Armed Forces. On 22 January, the President ordered a comprehensive inter-agency Review of all individuals detained at Guantanamo Bay, Cuba to determine, *inter alia*, whether any will be held for trial by military commission or other process, and whether there should be changes to the military commissions process. He ordered the Secretary of Defense to take action to halt all commissions proceedings in the meantime.
  - b. The Honorable Robert Gates continues to serve as the Secretary of Defense. On 20 January 2009, Secretary of Defense Gates directed the Chief Prosecutor of the Office of Military Commissions to seek 120-day continuances in any case that had been referred to military commission in order to provide the Administration sufficient time to conduct a Review of all detainees currently held at Guantánamo Bay, Cuba, and to determine which forum best suits any possible future prosecution of any detainees.
  - c. It is possible that the Review could change the forum in which any cases are tried or change the rules and procedures applicable to military commissions.
  - d. Conducting further proceedings in this case during the Review could 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 might 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 the proceedings in this case until 20 May 2009 is in the interests of justice because it will permit the President to conduct a thorough review of the military commissions

ATTACHMENT C

process and the cases pending before such commissions, including this case, without conducting proceedings that might be affected by the Review.

b. A 120-day continuance during the Review of the military commissions process is in the interests of both the public and the accused, because it will avoid wasted effort in litigating issues that might be rendered moot or might need to be re-litigated by the outcome of that Review, thereby advancing judicial economy, and preventing legal consequences that might affect the options available to the Administration as part of its Review. Changes in the military commissions procedures that could result from a Review of the commissions process might inure to the benefit of the accused

c. 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.

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

e. The Government's continuance request is for an appropriate period of time in light of the Executive Order and the Secretary of Defense's direction.

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 XX day of January 2009, by this military commission

**ORDERED:**

1. That further proceedings in this military commission are continued until 20 May 2009.

2. During the pendency of this continuance the requirements of previously ruled upon motions are stayed, compliance dates will be readjusted appropriately, and all other proceedings in this case will be halted.

3. That all delay between today and 20 May 2009 shall be excluded when determining whether any time period under R.M.C. 707(a) has run.

Military Judge

**MILITARY COMMISSION**

United States of America

P-012

v.

**Defense Response to Motion for Appropriate  
Relief (120-Day Continuance)**

Ahmed Mohammed Ahmed Haza Al Darbi

30 January 2009

1. **Timeliness:** This Response is timely filed.<sup>1</sup>
2. **Relief Sought:** Ahmed Al Darbi maintains that military commission rules and procedures are irredeemably unfair to the accused. Consequently, Mr. Al Darbi does not dispute the Government's assertion in its motion for a continuance that the Administration's review of the commissions process generally and of this case in particular could result in changes that would inure to his benefit. Mr. Al Darbi respectfully submits that dismissal of all charges by this Commission would be more appropriate in this case than a continuance. Should the Military Commission nonetheless choose to grant the continuance sought by the Government, the period of delay resulting from the continuance should not be excluded when determining whether the time period under R.M.C. 707(a)(2) has run, and the delay occasioned should be ascribed to the Government.
3. **Law and Argument:** On January 22, 2009, the President issued an Executive Order launching an interagency review of the status of each individual detained at Guantánamo Bay, Cuba, and directing the Secretary of Defense to ensure that all military commission proceedings be halted for the duration of the interagency review. The Secretary

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<sup>1</sup> The re-referral of this case by the Convening Authority on 9 January 2009 raised jurisdictional issues that were addressed in the Defense Motion to Halt Proceedings and Dismiss for Lack of Subject Matter Jurisdiction, submitted on 19 January 2009. The Government has yet to respond to that Motion. The Defense in no way waives any of those jurisdictional objections to this proceeding by filing this Response.

of Defense ordered the Chief Prosecutor of the Office of Military Commissions to seek continuances of 120 days in all cases that had been referred to a military commission, in order to provide the Administration sufficient time to conduct a review of detainees currently held at Guantánamo and of the process more generally. The Prosecution has accordingly requested a continuance of 120 days in this case, until 20 May 2009.

The Defense has no desire to hinder the Presidential review of the military commissions process generally or of this case in particular. However, the Defense does request that the Commission take appropriate steps to safeguard Mr. Al Darbi's rights. This Commission has the authority to dismiss the charges against Mr. Al Darbi with or without prejudice and it should dismiss for a host of reasons previously briefed by Mr. Al Darbi, including the extensive, amply documented and corroborated torture he has already endured during his six years of imprisonment. Dismissal of charges is also appropriate here because proceeding with the litigation of substantive legal issues and then onto trial in a flawed system that the Administration wishes to refrain from using pending review would not be proper, yet further prolonging Mr. Al Darbi's indefinite and illegal confinement at Guantánamo Bay for the next 120 days without any avenue of judicial review or relief would be cruel and unlawful. Indeed, a continuance leaving the charges against Mr. Al Darbi in place might preclude judicial review in civilian courts, contravening the Supreme Court's unequivocal direction that detainees be afforded prompt habeas corpus hearings.

In the event that this Commission does grant a continuance, the cost of that delay should not rest on Mr. Al Darbi's shoulders alone. The Government should bear its fair share of that burden. The Commission should not exclude the period of delay resulting

from the continuance when determining whether the time period under R.M.C. 707(a)(2) has run and it should ascribe the delay occasioned to the Government.

**A. Dismissal of charges is more appropriate than a continuance in light of the torture that Mr. Al Darbi has endured in U.S. custody**

Mr. Al Darbi has been tortured at the hands of U.S. personnel. [REDACTED]

[REDACTED], Mr. Al Darbi has been beaten, suspended by his arms and placed in other excruciating positions for extended periods of time, [REDACTED] sexually humiliated, forced to perform hard labor, exposed to loud music and bright lights, kept in isolation for extended periods of time, and deprived of sleep for extended periods of time.<sup>2</sup> To this day, Mr. Al Darbi continues to suffer mental and physical harm as a result of his torture, reporting headaches, mood swings, recurring nightmares involving his interrogators, night terrors, incontinence and, until recently, back pain.<sup>3</sup>

The Convening Authority has recently stated that coercive techniques resulting in physical harm, such as those described in part here, fall well within the category of torture. *See* Bob Woodward, *Detainee Tortured, Says U.S. Official: Trial Overseer Cites 'Abusive' Methods Against 9/11 Suspect*, Wash. Post, Jan. 14, 2009 at A1 (reporting on an interview with Susan Crawford). It also bears emphasis that the admissibility of coerced testimony—as distinct from tortured testimony—before this Military Commission raises grave constitutional questions. The Convening Authority herself noted that coerced testimony should not be allowed because it is excluded from regular

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<sup>2</sup> *See, e.g.*, Def.'s Mot. Dismiss Due to Torture 1-8 (Nov. 10, 2008); Def.'s Mot. Suppress Due to Torture 2-8 (Nov. 10, 2008); Def.'s Reply Mot. Dismiss Due to Torture 1-10 (Dec. 24, 2008); Def.'s Reply Mot. Suppress Due to Torture 1-12 (Dec. 24, 2008).

<sup>3</sup> *See, e.g.*, Def.'s Mot. Dismiss Due to Torture 1-8 (Nov. 10, 2008), Def.'s Mot. Suppress Due to Torture 2-8 (Nov. 10, 2008); Def.'s Reply Mot. Dismiss Due to Torture 1-10 (Dec. 24, 2008); Def.'s Reply Mot. Suppress Due to Torture 1-12 (Dec. 24, 2008).

courts. *Id.* Military commission rules notwithstanding, the Defense does not concede that evidence characterized in this system as resulting from coercion is properly admissible under any circumstances.

The Government's case rests entirely on 119 statements Mr. Al Darbi allegedly gave while in U.S. custody at Bagram and Guantánamo; all those reported statements—to the extent they were actually given by Mr. Al Darbi—are the direct result of torture and coercion. Since the case against Mr. Al Darbi is built exclusively on torture and coercion, all charges against Mr. Al Darbi should be dismissed. Further, in light of his past experiences, continuing to hold Mr. Al Darbi in indefinite detention would compound the harm he has suffered a result of torture, adding to the feelings of powerlessness and despair engendered by the torture he survived. Dismissing all charges due to torture, as previously argued, best serves the interests of justice in this case for that reason as well as those detailed below.

**B. Dismissal of charges is more appropriate than a continuance because a continuance will likely preclude Mr. Al Darbi's access to any form of review of his detention for the duration of the delay**

A continuance, unlike dismissal of charges, may interfere with Mr. Al Darbi's right to a prompt habeas corpus hearing. The Supreme Court ruled in *Boumediene v. Bush*, 128 S. Ct. 2229 (2008), that detainees at Guantánamo must be afforded prompt review of their habeas petitions in light of their lengthy detention and the inadequacy of prior review procedures. *See Boumediene*, 128 S. Ct. at 2275 (“While some delay in fashioning new procedures is unavoidable, the costs of delay can no longer be borne by those who are held in custody. The detainees in these cases are entitled to a prompt habeas corpus hearing.”). Mr. Al Darbi has yet to receive the review guaranteed by *Boumediene* despite having a habeas petition pending in federal court for over four years.

*See* Pet. for Writ of Habeas Corpus, *Al Darby v. Bush*, 05-cv-2371 (dkt. no. 1) (D.D.C. Dec. 15, 2005). The Supreme Court also held that the separate review process created by the Detainee Treatment Act, Pub. L. No. 109-148, 119 Stat. 2680 (2005) (“DTA”), remained “intact” alongside habeas review. *Boumediene*, 128 S. Ct. at 2275. Mr. Al Darbi sought review under the DTA before the Court of Appeals for the District of Columbia Circuit and that petition has been pending for well over a year. *See* Pet. for Review, *Al Darbi v. Gates*, 07-1413 (D.C. Cir. Oct. 11, 2007).

Recently, the D.C. Circuit held that, in light of *Boumediene*, review is no longer available under the DTA. *Bismullah v. Gates*, 2009 WL 48149 (D.C. Cir. Jan. 9, 2009). In light of this ruling, the Government has asked the D.C. Circuit to dismiss Mr. Al Darbi’s DTA petition. Resp’t’s Mot. to Dismiss for Lack of Jurisdiction, *Al Darbi v. Gates*, 07-1413 (D.C. Cir. Jan. 12, 2009). Shortly thereafter, the Government asked the district court to “dismiss [Mr. Al Darbi’s] habeas petition without prejudice or hold the petition in abeyance pending the completion of military commission proceedings.” Resp’ts’ Mot. to Dismiss 2, *Al Darby v. Bush*, 05-cv-2371 (dkt. no. 108) (D.D.C. Jan. 16, 2009).

Granting a continuance in this case, with the charges remaining in place, therefore, would create a substantial danger that habeas proceedings would be stayed as well, leaving Mr. Al Darbi with no habeas review for the duration of the delay, contrary to *Boumediene*’s clear direction. Denying the continuance to proceed with the litigation of substantive legal issues and then onto trial, on the other hand, would also be improper as it would subject Mr. Al Darbi to trial under unfair rules in a system that the Government itself now wishes to refrain from using pending comprehensive review.

Dismissal of charges without prejudice by this Commission would be the most equitable outcome. Such a course would clear the way for the judicial review of his detention to which Mr. Al Darbi is “entitled,” *Boumediene*, 128 S. Ct. at 2262, without precluding the Government from attempting to bring charges in the future in this forum or another, if it so chooses.

**C. This Commission should make the Government bear some of the cost of the delay it seeks by not excluding the continuance period when determining whether time has run under the Rules**

In the Proposed Order attached to its Motion, the Government includes a proposed conclusion of law stating that the delay sought “should be excluded when determining whether any time period under Rule for Military Commission (R.M.C.) 707(a) has run.” Should the Commission prefer to grant a continuance rather than dismiss the charges pending against Mr. Al Darbi, the interests of justice would not be served by excluding the period of delay when calculating whether the time period under R.M.C. 707(a)(2) has run and the delay should be wholly ascribed to the Government under R.M.C. 707(b)(4)(E)(ii)(B). In general, a military commission must be assembled within 120 days of service of charges. R.M.C. 707(a)(2). The Military Judge has the power to grant a continuance when doing so would be in the interests of justice. R.M.C. 707(b)(4)(E). According to the Rules for Military Commissions, the delay period should only be excluded if the Military Judge specifically finds that “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.” R.M.C. 707(b)(4)(E)(ii).

Mr. Al Darbi maintains that military commission rules and procedures are irredeemably unfair to the accused. Moreover, Mr. Al Darbi agrees with the Government’s assertion in its motion for a continuance that the Administration’s review

of the commissions process generally and of this case in particular could result in changes that would inure to his benefit. In that respect, both the interests of justice and those of the accused in a fair disposition are served if “proceedings ... are halted” in accordance with the President’s January 22, 2009 Executive Order. Should the Commission choose to act in the interests of justice by granting the continuance, excluding the delay when calculating the time period under the rule would be unjust. If the delay is excluded, Mr. Al Darbi will bear the entire cost of delay. While Mr. Al Darbi would continue to languish in indefinite detention at Guantánamo, his habeas case stalled, the Government would retain at no cost the option to resume proceedings before this Commission after the continuance.

Mr. Al Darbi has been in Government custody for well over six years. If the Government wishes to seek a continuance pending its comprehensive review rather than withdraw the charges, then it, too, should be made to bear a share of the risks entailed by that approach. The period of delay should not be excluded and, if the Government exceeds the 120-day limit, it should be subject to the consequences specified in R.M.C. 707(d), namely dismissal of charges with or without prejudice. Letting the 120-day clock run would more fairly allocate the costs of delay on both the Government and Mr. Al Darbi. It would be unjust to exclude the period of delay when calculating whether the time period under the Rules has run during the continuance.

4. **Oral Argument:** Mr. Al Darbi does not request oral argument on this Motion. Should the Commission schedule argument, the Defense is prepared to appear.

5. **Conference with Opposing Counsel:** Not applicable.

6. **Request for public release:** The Defense requests permission to publicly release the original Motion and the Commission's ruling as soon as possible.

Respectfully Submitted,

//s//

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