

Facts

a. On 13 January 2009, this Honorable Court heard oral argument on a Government appeal pursuant to Rule for Military Commissions (R.M.C.) 908, Manual for Military Commission (MMC) (2007). Shortly after the case was submitted, the Court ordered supplemental briefing on a specified issue not previously before the Court. The Government filed its brief, pursuant to the Court's Order, on 21 January 2009. The Court has not ruled upon either the R.M.C. 908 appeal or the issue specified for supplemental briefing.

b. 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.

c. 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," dated 22 January 2009 (EO) (Attachment A). The EO ordered an inter-agency Review of "the status of each individual currently detained at Guantanamo."

d. Based on the President's order,² on 20 January 2009, 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, and to seek a stay of any case pending before this Honorable Court. (SECDEF Order)(Attachment B).

e. The SECDEF Order was issued in order to provide the Administration sufficient time to conduct a review of detainees currently held at Guantánamo Bay, Cuba.

² The Secretary of Defense received an oral order on 20 January 2009 that was consistent with the Executive Order published on 22 January 2009.

f. On 20 January 2009, the Government filed motions for continuance with two military commissions that had sessions of court scheduled for the next day. The military judges in both commissions granted the requested continuances.

g. On 23 January 2009, the Government filed motions for 120-day continuances in each military commission to which charges had been referred.

Discussion

a. Court of Military Commission Review Rule of Practice (C.M.C.R.P.) 21 authorizes this Court to extend any time limits and to dispose of any other appropriate matter not specifically covered by the rules, in such manner as may appear to be required for a full, fair and expeditious consideration of the case. Rule for Military Commission (R.M.C.) 707(b)(4)(E)(i) authorizes the military judge of a military commission to grant a continuance of the proceedings in a pending case 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 stay is in the interests of justice, as it will permit the President and his Administration to undertake a thorough review of all pending cases, as well as of the military commissions process, generally.

c. The interests of justice served by granting the requested continuance outweigh the interests of both the public and the accused in a prompt appeal. While both the public and the accused have an interest in a prompt appeal of this case, 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 may 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 appeal and a temporary stay of all orders previously issued.

Conclusion

For the foregoing reasons, the Court should stay further proceedings in this appeal until 20 May 2009.

ATTACHMENTS

A. Executive Order "Review and Disposition of Individuals Detained at the Guantanamo Bay Naval Base and Closure of Detention Facilities," dated 22 January 2009

B. SECDEF Order of 20 January 2009.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was e-mailed to David Frakt, Maj, USAF, Detailed Defense Counsel, on this 23d day of January, 2009.

A handwritten signature in black ink, appearing to read "D.M. Stevenson", with a circular flourish around the initials.

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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.

ATTACHMENT A

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.

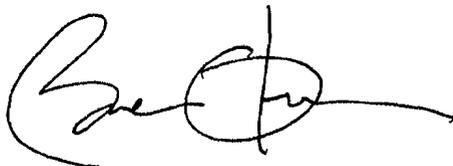
Sec. 7. Military Commissions. The Secretary of Defense shall immediately take steps sufficient to ensure that during the pendency of the Review described in section 4 of this order, no charges are sworn, or referred to a military commission under the Military Commissions Act of 2006 and the Rules for 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.



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.

cc:

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



ATTACHMENT B