

	)	IN THE COURT OF MILITARY
	)	COMMISSION REVIEW
	)	
UNITED STATES OF AMERICA	)	APPELLEE RESPONSE TO GOVERNMENT
	)	MOTION FOR CONTINUANCE
	)	
	)	CASE No. 08-004
v.	)	
	)	Interlocutory Appeal from the
	)	19 November 2008 Ruling of the Military
MOHAMMED JAWAD	)	Judge on the Defense
	)	Motion to Suppress Out-of-Court Statements
	)	By the Accused Made
	)	While in U.S. Custody, D-021
	)	
	)	Presiding Military Judge
	)	Colonel Stephen R. Henley
	)	
	)	

**TO THE HONORABLE CHIEF JUDGE AND JUDGES OF THE COURT OF  
MILITARYCOMMISSION REVIEW**

COMES NOW Appellee, in response to the government motion for continuance.

Appellee respectfully opposes the government motion's for continuance. This response is filed timely pursuant to Court of Military Commission Review Rule of Practice (C.MC.R.R.P.) Rule 20(c) in that it is filed within five days after receipt of the government motion.

**BURDEN OF PROOF**

To the extent that a continuance is a legally available remedy, a proposition the defense disputes, the burden of persuasion clearly rests with the government to demonstrate that a continuance of the length requested is in the interests of justice.

## ARGUMENT

Based on the unambiguous withdrawal of the original charge in this case by the Convening Authority, this Court lacks jurisdiction to rule on this appeal, and the appeal should be dismissed on that basis. If the Court believes that the withdrawal did not have the legal effect of a withdrawal and did not affect the Court's jurisdiction, the Court should promptly rule on the merits of the appeal. The government's motion for a continuance is unsupported by any proof that such a remedy is available or any compelling justification to grant it. It is well within the government's power to comply with the Executive Order and halt the proceedings by withdrawing the appeal or dismissing the charges. Under the unique facts and circumstances of this case, it would be contrary to the interests of justice and to the substantial prejudice of Mr. Jawad to grant a continuance.

### Facts

- a. Mohammed Jawad was taken into U.S. custody on 17 December 2002 and has been held continuously since that date. During this period, as specifically found by the military commission,<sup>1</sup> he has been subjected to a variety of cruel, abusive and inhumane conditions and treatment, which have caused Mr. Jawad great suffering. Mr. Jawad continues to be held in severe conditions of confinement which are causing ongoing harm to Mr. Jawad's mental health. (See Attachment 1 – Porterfield Declaration)
- b. In the over six years that he has been held by the U.S., Mr. Jawad has never had any meaningful opportunity to challenge the basis for his detention.
- c. After the Supreme Court held in *Rasul v. Bush*, 542 U.S. 466 (2004), that Guantánamo prisoners were entitled to judicial review of the basis for their detention, the U.S. military

---

<sup>1</sup> See, e.g. Ruling D-008.

established Combatant Status Review Tribunals (“CSRT”) at Guantánamo to determine whether prisoners were subject to detention as “enemy combatants.” A CSRT is a non-adversarial hearing conducted pursuant to rules and procedures that are unfair in design and biased in practice, and violate the Constitution, laws and treaties of the United States. *See Boumediene v. Bush*, 128 S. Ct. 2229, 2275 (June 12, 2008) (finding that CSRTs were not an adequate substitute for *habeas* because their procedural flaws created a considerable risk of error).

d. Among other flaws, in a CSRT, the detainee is denied: access to counsel; the right to see evidence against him; the right to confront, or even know the identity of, his accusers; the right to call witnesses; the right to present evidence; and, the right to know how the military and/or other agencies collected evidence against him. In addition, the CSRT rules and procedures mandate that the evidence against a detainee (which he may not have seen) be presumed genuine and accurate, permit evidence obtained by coercion, and presume the reliability of hearsay evidence.

e. Mr. Jawad was determined to be an “enemy combatant” for purposes of detention by a CSRT on November 4, 2004. This decision was reaffirmed in two annual Administrative Review Boards (“ARB”) conducted by the Office of Administrative Review for Detained Enemy Combatants held on December 8, 2005, and November 8, 2006, respectively.

f. Mr. Jawad’s CSRT was conducted after he met with his personal representative twice for a total of two hours. No documents were submitted on his behalf and no witnesses were called. Mr. Jawad’s personal representative declined the opportunity to offer comments or objections to the report that unanimously concluded Mr. Jawad was an “enemy combatant.” Mr. Jawad did not participate in his two ARBs, nor was he represented therein.

g. The evidence upon which the CSRT and the ARBs relied in Mr. Jawad’s case, and

therefore the basis for Mr. Jawad's initial and on-going detention, has been conclusively undermined by new exculpatory or extenuating evidence. All three proceedings relied heavily on evidence obtained by torture and other demonstrably false evidence.

h. In reaching their decisions justifying Respondents' continued detention of Mr. Jawad, the CSRT and the ARBs each relied, in significant part, on a document purported to be a written confession by Mr. Jawad, and allegedly signed by him and marked with his thumbprint. For example, in the Unclassified Summary of Evidence for Administrative Review Board dated November 7, 2005, the government indicated that it was relying on "Detainee Action and Statements" and that "The detainee made a written confession to this attack, signed it and marked it with his fingerprint." Upon information and belief, similar statements were made in documents prepared for the CSRT and the other ARB. This purported confession was the document Mr. Jawad was forced to thumbprint, without reading, after being subjected to torture in Afghan custody.

i. The government has subsequently determined and admitted that the written "confession" previously offered to the CSRT and the ARBs to establish Mr. Jawad's status as an "enemy combatant" was written by someone else in a language Mr. Jawad does not read, write or speak. The government has admitted that it has no other written confessions made by Mr. Jawad.

j. The CSRT and the ARBs are believed to have also considered alleged oral confessions by Mr. Jawad to Afghan officials and to U.S. interrogators within 24 hours of his arrest on December 17, 2002. The statements to the Afghan authorities have subsequently been determined to be the product of torture by Judge Henley, a ruling which was not appealed by the government. The statements to the U.S. authorities made that night, the only confessions made in over 6 years of captivity in over 50 interrogation sessions, were also suppressed by Judge

Henley as the product of torture and are the subject of this appeal.

k. After Mr. Jawad's CSRT and his first ARB were held, the U.S. State Department formally acknowledged to the United Nations Committee Against Torture that evidence obtained from torture may not be used in CSRT and ARB proceedings.<sup>2</sup>

l. The principal basis for the classification of Mr. Jawad as an "enemy combatant" and the decision to detain him – his alleged confessions – were illegally considered by the CSRT and ARBs, in contravention of Article 15 of the Convention Against Torture.

m. Charges were sworn against Mr. Jawad on October 9, 2007. Under the government's procedures, the Annual Review process is suspended for any detainee who is charged before the commissions. As a result, Mr. Jawad was denied his 2007 and 2008 annual ARBs.

n. Mr. Jawad's efforts to obtain his Constitutional right to habeas corpus review in federal court have also been thwarted by the government. Mr. Jawad originally filed a petition for habeas corpus in 2006 as part of *Al Halmandy et al v. Bush*, currently before Judge Hogan of the U.S. District Court for the District of Columbia. An Amended petition was filed on January 13, 2009. (Attachment 2) For two years, the government fought to dismiss the habeas petition, asserting that the detainees had no right to seek habeas corpus review. This position was ultimately rejected by the Supreme Court in *Boumediene v. Bush*, which reaffirmed the right of detainees to seek habeas review. Since that time, the government has continued to seek delay after delay. On January 2, 2009, Judge Hogan entered a Minute Order requiring the government to file a factual return by 27 February 2009 setting forth the government's asserted basis for the detention of Mr. Jawad. See Minute Order in 08-mc-442 (Jan. 2, 2009). On January 16, 2009,

---

<sup>2</sup> John Bellinger, Legal Advisor to the State Department, United States Response to the Questions Asked by the Committee Against Torture, Question No. 42 (May 5, 2006), available at <http://www.state.gov/g/drl/rls/68561.htm>.

the government filed a motion to dismiss to hold the habeas corpus petition in abeyance “pending completion of military justice proceedings.” (Attachment 3)

o. Under the Rules for Military Commission 707(a)(2) the accused has a right to a speedy trial. Specifically, the members must be assembled within 120 days of the service of charges, not including certain excludable periods of delay. The charges were originally referred to trial on 30 January 2008, and were served on Mr. Jawad at that time. Needless to say, the commission was not assembled within 120 days. In fact, 360 days have now passed, three times the 120 day limit, since the original date of service. In the defense’s view, these delays are largely attributable to a combination of misconduct and incompetence on the part of the government. On August 27, 2008, Mr. Jawad filed a motion to dismiss the charges in this case for violation of his right to speedy trial based, among other reasons, on the government’s failure to provide discovery in a timely manner. The motion was denied. (See D-017 Motion to Dismiss – Speedy Trial and Ruling, available at <http://www.defenselink.mil/news/Jawad%20-%20D%20-%20017%20Motion%20to%20Dismiss%20Speedy%20Trial.pdf>.)

p. An “alien unlawful enemy combatant hearing” to determine whether the government could establish personal jurisdiction over the accused was originally scheduled for 25-27 September 2008 with trial scheduled for 8-19 December 2008. The AUEC hearing was later rescheduled for 8-12 December 2008 with the trial rescheduled to 5 January 2009 due to the government’s inability to provide discovery in a timely manner and based on the government’s fruitless but time-consuming motion for reconsideration of Ruling D-007. After this interlocutory appeal was filed, in accordance with R.M.C. 908(b)(8), the military commission proceedings were stayed indefinitely, pending the outcome of the appeal.

q. On 17 December 2008, after this appeal was filed, the Convening Authority withdrew the charges against Mr. Jawad. On 8 January 2009, the Convening Authority re-referred two charges and six specifications against Mr. Jawad to a new military commission with a new convening order and directed that the new charges be served on the accused. The newly referred charges included a charge and three specifications that had been dismissed by the military judge in the original military commission against Mr. Jawad.

r. On 20 January 2009, President Barack Obama took office. Later that evening, he apparently directed Secretary of Defense Robert Gates to take steps to “halt” the military commissions. Secretary Gates issued an order dated 20 January 2009 directing the Chief Prosecutor to “petition the Court of Military Commission Review to hold in abeyance any pending appeals for 120 days.”

s. On 21 January 2009, in direct contravention of the Secretary’s order, the government filed a brief with this Court urging the Court to issue a ruling on the merits of the appeal: “This Court should decide the appeal based on the issues already briefed and argued”; “this Court should render a decision.”

t. On 23 January 2009, the Government filed a motion seeking a “continuance” “a halt” and a “stay” of proceedings until May 20, 2009. The government claims that this is what President Obama has ordered and that it would be “in the interests of justice” for this Court to grant such a continuance.

### Discussion

#### **A. THERE IS NO LEGAL AUTHORITY TO “HALT” A PROPERLY FILED INTERLOCUTORY APPEAL WHICH HAS ALREADY BEEN FULLY BRIEFED AND ARGUED**

Pursuant to Rule 22(c) of the Rules of Practice for the United States Court of Military Commission Review, promulgated by Chief Judge Williams and approved by the Secretary of Defense, interlocutory appeals “will ordinarily be decided within 30 calendar days after oral argument or filing of briefs, whichever is later, unless the Chief Judge grants an extension of time.” This rule would appear to give the Chief Judge the authority to grant a panel of the CMCR extra time to issue a decision in an extraordinarily complex case or if the panel members were overburdened with other commitments. Since the Chief Judge is a member of this panel, he obviously has the discretion to grant himself an extension. This power, however, does not permit the Chief Judge to simply withhold a ruling that the Court has already made (or is prepared to make within the normal time period) at the request of the government for reasons unrelated to the ability of the Court to render an opinion in a timely manner.

The government has cited Rule 21(a) as authority to grant a continuance, but it is clear in context, and by its internal reference to Rule 14(c) that this rule relates to the Court’s power to grant relief in the form of “extensions of time” or “enlargements” to the parties from deadlines to file briefs established elsewhere in the court rules. The rule does not provide general authority to delay issuing a ruling on an appeal in which no further briefs are due. Certainly, nothing in the rule would authorize a 120 day delay. Indeed, the rule states that it is designed to facilitate “expeditious consideration of the case” and authorizes a maximum 30 day extension upon a “particularized showing of necessity.” There has been no such particularized showing of necessity. Rather, the government’s motion relies entirely on an asserted general need for the Executive Branch to review the disposition of cases. No showing has been made that the government is unable to conduct the review of Mr. Jawad’s status prior to May 20, 2008.



It is clear that if the President and the Secretary of Defense do not wish this Court to issue a ruling on this appeal, they have the power to ensure such a result. The President and Secretary of Defense can achieve this result in three distinct ways: by withdrawing the appeal, by acknowledging that this court lacks jurisdiction due to the withdrawal of the charges by the Convening Authority, or by dismissing the charge against Mr. Jawad. The letter prepared by Secretary of Defense Gates simply directed the Chief Prosecutor to file a petition requesting this Court to hold any pending appeals in abeyance. The government has now done so. The letter does not direct the CMCR to grant that petition, nor could it. The Executive Order directs the Secretary of Defense to take steps sufficient to ensure that all proceedings pending in the United States Court of Military Commission Review are halted. The filing of the petition in this case is in an insufficient step, as a matter of law, to achieve this result.

#### **IT IS NOT IN THE INTERESTS OF JUSTICE TO DELAY RULING ON THIS APPEAL**

The government claims that it is in the interests of justice to withhold the court's ruling until May 20, 2008, citing R.M.C. 707(b)(4)(E)(i). This rule authorizes the trial judge in a military commission to grant a continuance. It does not provide that authority to the CMCR. The few cursory reasons cited by the government to justify their request do not support the extraordinary relief the government is seeking. The government states that a stay will "permit the President and his administration to undertake a thorough review of all pending cases, as well as of the military commission process, generally." While the defense welcomes such a review, it is not clear why such a review would be facilitated by this stay, or hindered by the court's failure to grant the requested stay. Furthermore, the need to review other completely unrelated pending

cases is an improper consideration in evaluating the request for such an extended delay in this case.

The government suggests that the review might “render moot any proceedings conducted during the review.” Presumably, the government is referring to the possibility that the charges against Mr. Jawad may be dismissed. The government does not explain why the potential that the government may choose to discontinue prosecuting Mr. Jawad at some point in the future is a basis for this Court to withhold ruling now. In the view of the defense, the ruling from this Court is likely to benefit Mr. Jawad. Indeed, a favorable ruling will likely result in the immediate dismissal the charges. The government also claims that failure to issue the stay may “necessitate re-litigation of issues.” The government does not explain, and it is not readily apparent, why this is so. What issue might have to be re-litigated and in what forum? The government also argues that the issuance of a ruling might “produce legal consequences affecting the options available to the Administration following its review.” This only seems to be true if the government loses the appeal. If the government were to prevail on this appeal, how would it limit their future options? Of course, an adverse ruling from this commission may affect the options available to the government, but that was true well before the Executive Order was issued. The possibility that the government might have to dismiss the charges for lack of evidence is not a legitimate basis to withhold ruling. Finally, the government suggests that a delay might result in changes to military commissions procedures which “might inure to the benefit of the accused.” This is entirely speculative and no examples are provided. Furthermore, with all due respect to the government’s sudden concern for Mr. Jawad’s interests, it is up to the defense to determine what may or may not be in Mr. Jawad’s best interests. In our view, it is in his best interest for this court to rule promptly on the appeal.

The government offers no support for their assertion that the interests in delay outweigh Mr. Jawad's interest in a prompt trial or other resolution of the charges against him. Mr. Jawad was held without charges and without a meaningful basis to challenge his unlawful detention for over five years. Because charges were filed in October 2007, he has missed his last two annual administrative review boards. When he filed a habeas corpus petition over two years ago, when he was not facing any charges, the government denied that he had a right to file such a petition and refused to respond on the merits. After the Supreme Court ruled that he did have a right to habeas corpus, the government has avoided responding to the petition because Mr. Jawad is facing trial by military commission.

Mr. Jawad is caught in a legal Catch-22. There are three possible forums for Mr. Jawad to challenge the government's evidence against him – Federal District Court, the Administrative Review Board, and the Military Commissions – but the government is seeking to simultaneously deny him access to all three. Meanwhile, according to the undisputed testimony of the court-appointed child psychologist, Dr. Kate Porterfield, Mr. Jawad's mental and physical condition continues to deteriorate due to the unnecessarily harsh conditions in which he is being held. It is highly ironic that the government defines the right to a speedy trial as the right to have a trial within 120 days of service of charges, yet claims that another 120 day delay for a juvenile detainee already held for over six years is in the interests of justice. The government seems to have lost sight of a fundamental truth -- justice delayed is justice denied.

### Conclusion

For the foregoing reasons, the Government's Motion for Continuance should be denied.

Respectfully Submitted,

//signed//

By: DAVID J. R. FRAKT, Major, USAFR  
Defense Counsel

//signed//

And: KATHARINE DOXAKIS, LCDR, JAGC, USN  
Assistant Defense Counsel

//signed//

And: ERIC MONTALVO, MAJ, USMC  
Assistant Defense Counsel  
Office of the Chief Defense Counsel  
Office of Military Commissions  
1099 14<sup>th</sup> Street NW, Ste 2000E  
Washington, DC 20005  
(202) 761-0133, ext. 106

### **CERTIFICATE OF SERVICE**

I certify that a copy of the foregoing was e-mailed to this Court and Lt Col Douglas M. Stevenson, Trial Counsel, on 26 January 2009.

//signed//

---

DAVID J. R. FRAKT  
Major, USAFR  
Defense Counsel  
Dated: 26 January 2009