

**MILITARY COMMISSIONS TRIAL JUDICIARY  
GUANTANAMO BAY, CUBA**

<p><b>UNITED STATES OF AMERICA</b></p> <p><b>v.</b></p> <p><b>ENCEP NURJAMAN; MOHAMMED NAZIR BIN LEP; MOHAMMED FARIK BIN AMIN</b></p>	<p><b>AE 0002.007 (TJ)</b></p> <p><b>RULING</b></p> <p>Defense Motions To Continue or Stay Arraignment Proceedings</p> <p><b>2 February 2021</b></p>
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**1. Procedural History.**

a. The Commission in AE 0002.001 (TJ)<sup>1</sup> set the arraignment in this case for 22 February 2021. The Commission additionally required Defense to file any requests to continue the arraignment not later than 30 January 2021 and the Prosecution to file any response to a Defense continuance request not later than 1 February 2021.

b. Counsel for Mr. Nurjaman in AE 0002.002 (NUR) moved the Commission:

to stay indefinitely the arraignment and the proposed hearings pursuant to R.M.C. 707: (1) until vaccinations and safety measures can be guaranteed for all parties involved, (2) until the Convening Authority provides the proper manning and resources such as attorneys, staff, and linguists routinely denied to the Defense, (3) until Defense has had an opportunity to have a meaningful discussion with the client, Mr. Nurjaman, which thus far has been impossible due to the Covid-19 global pandemic, and (4) until Prosecution fulfills all discovery obligations that were previously denied to Defense. Alternatively, the Defense requests that the Commission stay these proceedings for a minimum of thirty (30) days to assess the Covid-19 situation, Defense resources and other such issues.<sup>2</sup>

c. Counsel for Mr. bin Amin in AE 0002.003 (AMI) moved the Commission for:

a continuance under R.M.C. 707(c) due to the pandemic, ineffective assistance of counsel due to office sharing imposed on codefendants, and a lack of adequate resources to proceed. These proceedings should not resume until the parties are properly vaccinated, office sharing issues have been addressed, and the defendant has been provided the resources necessary for effective assistance of counsel. At a

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<sup>1</sup> AE 0002.001 (TJ), Arraignment Order, dated 26 January 2021.

<sup>2</sup> AE 0002.002 (NUR), Defense Motion for Stay of Proceedings, filed 30 January 2021 at 1-2.

minimum, these proceedings should be continued for 30 days to reevaluate the situation.<sup>3</sup>

d. Counsel for Mr. bin Lep in AE 0002.005 (LEP) declined to join counsel for Mr. Nurjaman and Mr. bin Amin in requesting a continuance or a stay of the arraignment. Additionally, Mr. bin Lep opposed the relief requested by co-accused in their motions relying on “the plain language of R.M.C. 701(a)(1) and 701(b)(3).”<sup>4</sup>

e. The Prosecution filed a consolidated response<sup>5</sup> to the three defense filings requesting the Commission find reasonable cause to grant a 40-day continuance under R.M.C. 707(b)(4)(E)(i) “in light of evolving efforts by the federal government to fight the ongoing pandemic and to continuously update health protection policy to meet changing conditions”<sup>6</sup> and to find that all delay beginning on 31 January 2021 be excludable under R.M.C. 707(b)(4)(E)(ii).

## 2. Facts.

a. The global COVID-19 pandemic is either at its height or has yet to reach its apex. Cases of people contracting the virus and dying from it are still increasing. Despite the development of vaccines, new strains of the virus have been discovered recently; there is little scientific data to determine whether the existing vaccines protect against the new strains. President Biden’s administration predicts vaccines will be widely available by the spring of 2021 and the United States will reach herd immunity by the summer of 2021.<sup>7</sup> However, the herd immunity timeline may be extended by the spread of the new virus mutations.<sup>8</sup>

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<sup>3</sup> AE 0002.003 (AMI), Mr. bin Amin’s Motion for Continuance, filed 30 January 2021 at 1.

<sup>4</sup> AE 0002.005 (LEP), Defense Motion to Decline Joinder, filed 31 January 2021 at 1-2. The reference to discovery rules was likely a scrivener’s error and does not make sense in this context. Mr. bin Lep likely meant to cite R.M.C. 707(a)(1) and (b)(3).

<sup>5</sup> AE 0002.006 (GOV), Government Consolidated Response to Defense Motion for Stay of Proceedings (AE 0002.002 (NUR)), Defense Motion for Continuance (AE 0002.003 (AMI)), and Defense Motion to Decline Joinder (AE 0002.005 (LEP)), filed 1 February 2021.

<sup>6</sup> *Id.* at 1.

<sup>7</sup> *See* AE 0002.002 (NUR) at 6 n. 4.

<sup>8</sup> *See id.* at 4 n. 2.

b. Most of the travelers who would attend the docketed arraignment in this case are not vaccinated against the virus, and none of the accused have been vaccinated. The U.S. Government recently suspended plans to vaccinate detainees at Naval Station Guantanamo Bay, Cuba (NSGB).

c. The Centers for Disease Control and Prevention and the Department of Defense have warned people not to travel, because travel is likely to increase transmission of the virus.

d. The Government provided a travel plan<sup>9</sup> designed to mitigate the risk of contraction and transmission of the virus, but no plan can eliminate the risk and this plan is incomplete. The plan involves putting large numbers of travelers into a series of small spaces (air terminals, airplane, offices, etc.) for long periods, which increases the risk, because the virus is passed from individual to individual by respiratory droplets. The plan does not include control measures to maintain physical distancing at all points of travel and to exclude interlopers who are not part of the travel group.

e. There is a potential for a single traveler who contracts the virus during travel to prevent the docketed arraignment from occurring, e.g., the Military Judge. While a single point of failure always exists for travel to NSGB, the risk of a single point of failure occurring is greatly increased during the global COVID-19 pandemic. Given the longer than normal time commitment for travel to NSGB resulting from pandemic risk mitigation measures, such an occurrence would result in a significant waste of personnel, time, and resources.

f. Travelers who are not active duty military personnel and who are medically evacuated from NSGB because of serious reactions to contracting the virus will be personally liable for the cost of the evacuation, and medical insurance plans likely will not cover such expenses.

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<sup>9</sup> See AE 0005.001 (GOV), filed 27 January 2021.

g. Mr. Nurjaman’s and Mr. bin Amin’s counsel believe that, despite the Government’s plan to minimize risks associated with the virus, their health will be at significant risk.

h. The global COVID-19 pandemic has adversely impacted the ability of everyone involved in this Commission to react to the normal timeline associated with R.M.C. 707. In the absence of the pandemic and the concomitant mitigation requirement to quarantine for 19 days, all participants would have several weeks to prepare for travel to NSGB and the briefing schedule for continuance motions would not be compressed. Instead, litigants and the Commission have inadequate time to react. In fact, Mr. Nurjaman would have had the ability to get his expert doctor to opine on the Government’s mitigation measures had the Commission not had to compress the briefing schedule. As a result, the Commission gets only one medical input about the mitigation measures—the Government’s. Without a continuance, the Defense will not have a meaningful opportunity to provide that additional medical input, and the Commission must rule based on apparently incomplete information.

i. The Government left unaddressed whether during the COVID-19 pandemic it could or would remedy the Defense assertions of subpar workspaces on NSGB that impact attorney-client privilege and effective representation.

### **3. Law and Analysis.**

a. Rule for Military Commission (R.M.C.) 707 (b)(4)(E) empowers a military judge to “for reasonable cause, grant a continuance . . . for such time . . . as may appear just.” In a court-martial context, a military judge should consider the following factors when determining whether to grant a continuance: “surprise, nature of any evidence involved, timeliness of the request, substitute testimony or evidence, availability of witness or evidence requested, length of continuance, prejudice to opponent, moving party received prior continuances, good faith of

moving party, use of reasonable diligence by moving party, possible impact on verdict, and prior notice.” *United States v. Miller*, 47 M.J. 352, 358 (C.A.A.F. 1997). The Commission finds this analysis persuasive.

b. The motions to continue are the first requests of their kind, were filed in a timely manner and in good faith, and did not surprise the Commission or the Prosecution. On the other hand, because the Convening Authority referred the charges during the global COVID-19 pandemic, the Government’s risk mitigation plan created an artificial timeline that does not permit any of the required participants sufficient time to adequately prepare for travel or the Defense to fully brief the Commission on their opposition to the Government’s mitigation plan.

c. The various defense counsel have limited ability to meet with the Accused and discuss the arraignments because of an extended period of Government-imposed quarantine prior to the arraignments. This could adversely impact the Accused’s understanding of the proceeding and their choices at the proceeding, e.g., whether to make motions or request to defer, whether to enter a plea, what plea to enter, etc.

d. The arraignments do not require evidence or witnesses, so the denial of a continuance would not adversely affect the Accused’s ability to present such to the Commission. However, Mr. Nurjaman desired to present documentary evidence from an expert witness related to the Government’s risk mitigation plan in support of his motion to stay the arraignment hearing. He could not do so without a continuance despite his reasonable diligence in attempting to gather and present the evidence in the time allotted.

e. Mr. Nurjaman and Mr. bin Amin seek an indefinite continuance. That is not appropriate or warranted. The Government and Mr. bin Lep have independent rights to proceed to trial in a timely fashion. However, given the evolving nature of the global COVID-19 pandemic, the

Commission cannot determine with certainty when circumstances will change such that the Commission's analysis will favor holding the arraignment. Between the Biden administration's predictions about vaccine availability, herd immunity, and scientific concern about the impact of virus mutations on that timeline, it appears more likely than not that the health and safety risks associated with travel to NSGB, Cuba will not be measurably reduced until the end of summer 2021. A continuance until then is not unreasonable.

f. Neither the Government nor Mr. bin Lep cited or alleged any specific prejudice they would suffer as a result of a continuance. In fact, the Government conceded that a continuance is necessary. Neither a grant nor a denial of a continuance would impact the verdict.

g. In the context of a joint trial, a continuance for one accused requires a continuance for all accused unless an accused is severed. To grant a continuance of the proceedings for one accused but not for another would effectively sever the proceedings without a fully briefed motion to sever and a ruling granting severance.

h. The Commission notes the concept of a stay, as requested by Mr. Nurjaman, is not found in R.M.C. 707(b)(4)(E), which deals with delaying a hearing in a commissions case. Further, Mr. Nurjaman provides no authority for this Commission to grant a stay, but he does cite R.M.C. 707(c) pertaining to continuances.<sup>10</sup> The Commission views Mr. Nurjaman's request as one for a continuance.

#### **4. Conclusions.**

a. The risk to the health and safety of participants in the arraignments due to the global COVID-19 pandemic is high. The Government's proposed risk mitigation measures lower the risk, but the risk still persists given new uncertainties about the virus, lack of vaccinations, and

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<sup>10</sup> See AE 0002.002, at 4.

gaps in the risk mitigation plan. The various counsels' belief that their health is at significant risk by traveling to NSGB, Cuba, is a reasonable one.

b. A totality of the circumstances indicates a continuance of the arraignments is reasonable.

5. **Ruling.** The motions for a continuance are hereby **GRANTED**. The Commission will issue an amended Arraignment Order in due course.

So **ORDERED** this 2<sup>nd</sup> day of February, 2021.

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CHARLES L. PRITCHARD, JR.  
COL, JA, USA  
Military Judge