

UNCLASSIFIED//FOR PUBLIC RELEASE

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

UNITED STATES OF AMERICA

v.

**KHALID SHAIKH MOHAMMAD;
WALID MUHAMMAD SALIH
MUBARAK BIN 'ATTASH;
RAMZI BINALSHIBH; ALI ABDUL AZIZ
ALI; MUSTAFA AHMED ADAM AL
HAWSAWI**

AE 008JJJ (GOV)

Government Response
To Commission Order
To Inform the Commission of the
Continued Need for a Closed Session

24 April 2015

1. Timeliness

This Response is timely and complies with the Commission's Order directing the Prosecution to update the Commission by 24 April 2015 on whether there is a continued need for a closed session. *See* AE 008III.

2. Facts

On 7 February 2013, Learned Counsel for Mr. Bin 'Attash filed a four page, 35-paragraph¹ M.C.R.E. 505(g) notice, indicating her intention to disclose certain classified information in support of several of her pre-trial motions, to include AE 008, the Defense Motion to Dismiss for Defective Referral. At or near the time it was filed, this M.C.R.E. 505(g) notice was determined to contain classified information at the TOP SECRET level. *See* AE 008II.

On 16 December 2013, the Commission held an M.C.R.E. 505(h) Hearing.² Learned Counsel for Mr. Bin 'Attash indicated that the three things she needed to be able to argue, for purposes of AE 008, was that her client was deprived of sun, that he was held in isolation, and

¹ Each paragraph was numbered from 1-35 and will be referred throughout this filing by the paragraph number.

² While the undersigned managing deputy trial counsel reviewed the transcript, the transcript is not available at the time and place of the drafting of this notice. Therefore, all references back to the transcript are from notes and memory, and should not be read to be a verbatim accounting of the transcript.

that his custody was at the hands of the U.S. Government via the CIA (or words to the effect).³ See *United States v. Mohammad, et al.*, Unofficial/Unauthenticated Transcript of 16 December 2013 MCRE 505(h) Hearing (Tr.) at 23. Learned Counsel for Mr. Bin ‘Attash later indicated that only paragraphs 1, 2, 3 and 4 of the four page, 35-paragraph M.C.R.E. 505(g) notice were relevant to AE 008. See *id.* at 118. Learned Counsel further indicated that she could argue paragraphs 1 and 2 in an unclassified setting by simply deleting any reference to the country wherein Mr. Bin ‘Attash was alleged to have been held, because it was the treatment she was alleging, and not where it occurred, that was relevant to the issue in AE 008 (or words to that effect). See *id.* at 117-118. The Military Judge, who at the time had determined a classified session was already going to be required for other paragraphs in the notice, pertaining to other pre-trial motions, requested that the the information be argued as is, with nothing deleted, to keep it “cleaner” (or words to that effect). See *id.* at 118.

On 17 December 2013, the Military Judge issued an order based on the 7 February 2013 M.C.R.E. 505(g) notice, finding that the classified information the Defense sought to use was relevant and necessary to a fair determination of the issue before the Commission, and that closure of a portion of these proceedings was necessary to protect information the disclosure of which could reasonably be expected to damage national security. See AE 008FFF.

On 6 April 2015, pursuant to the Military Judge’s Order in AE 331, the Prosecution provided all defense teams and the Commission with updated and re-marked classified filings, reflecting any changes that occurred as a result of the declassification of certain information relating to the release of the SSCI Executive Summary on the CIA’s former Rendition, Detention, and Interrogation program. The Prosecution’s filing was accepted by the Trial Judiciary on 10 April 2015.

As part of its filing in response to AE 331, the Prosecution caused the four page, 35-paragraph M.C.R.E. 505(g) notice to be reviewed and given an updated classification. While

³ All information contained in this notice has been determined to be unclassified.

the overall classification of the document remains TOP SECRET, only paragraph 2, as currently written, remains classified. All other paragraphs in that notice are marked as unclassified.

3. Prosecution's Position on the Continued Need for a Closed Session

Learned Counsel for Mr. Bin 'Attash indicated that the three things she needed to be able to argue, for purposes of AE 008, was that her client was deprived of sun, that he was held in isolation, and that his custody was at the hands of the U.S. Government via the CIA (or words to the effect). She can do all of these things in an unclassified open hearing.

If the entirety of Paragraph 2, as currently written, was necessary for the argument on AE 008, a closed session would still be necessary. However, based on Learned Counsel's prior representations during the M.C.R.E. 505(h) Hearing, that the alleged location where Mr. Bin 'Attash was held was not relevant to the issue in AE 008, and that it was the underlying treatment he was alleging that was relevant, there should be no need for a closed session of the Military Commission. *See* Tr. at 117-118.

Simply omitting any reference to the alleged location or the specific dates referenced in Paragraph 2 would also make that paragraph unclassified. Specifically, a slightly modified statement that specifies that "throughout those three and a half years, Mr. Bin 'Attash was held in places where he never saw sunlight . . . [and] only in one location did the CIA permit Mr. Bin 'Attash to see the sun for 30 minutes a day" would be UNCLASSIFIED, and would allow Learned Counsel to argue the three points that she indicated she needed to be able to argue (that her client was deprived of sun; held in isolation (referenced in paragraph 6, now unclassified); and that his custody was at the hands of the U.S. Government via the CIA).

The Prosecution has waived oral argument on AE 008, and reiterates its position that further oral argument is not necessary for resolution of this motion; in either a closed or open hearing of the Military Commission. There is no right to oral argument on pre-trial motions. Learned Defense counsel already argued every other aspect of her argument in AE 008. The Military Judge is fully aware of the information that Learned Counsel intends to argue, and can

consider that information and prior arguments, as written, as well as in the transcript of the M.C.R.E. 505(h) Hearing, in crafting his ruling on the Defense motion.

4. Conference with Counsel

On 22 April 2015, Detailed Military Counsel for Mr. Bin 'Atash wrote: "The location where Mr. Bin 'Atash was held is not relevant to the issue in AE 008. If there remains no classified underlying fact other than this, it appears a closed session would not be necessary for argument of AE 008."

5. Attachments

A. Certificate of Service, dated 24 April 2015.

Respectfully submitted,

//s//

Clay Trivett
Managing Deputy Trial Counsel

Mark Martins
Chief Prosecutor
Military Commissions

ATTACHMENT A

CERTIFICATE OF SERVICE

I certify that on the 24th day of April 2015, I filed AE 008JJJ (GOV) the **Government Response** To Commission Order To Inform the Commission of the Continued Need for a Closed Session with the Office of Military Commissions Trial Judiciary and I served a copy on counsel of record.

//s//

Clay Trivett
Managing Deputy Trial Counsel
Office of the Chief Prosecutor
Office of Military Commissions