

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 425G (GOV)

**Government Response**

To Mr. Hawsawi's Supplement to Defense  
Motion to Recuse Military Judge and  
Current Prosecution Team and for Further  
Appropriate Relief

3 June 2016

**1. Timeliness**

This Response is timely filed pursuant to Military Commissions Trial Judiciary Rule of Court (R.C.) 3.7.

**2. Relief Sought**

The Prosecution respectfully requests that this Commission deny all relief requested within AE 425B (MAH), Mr. Hawsawi's Supplement to Defense Motion to Recuse the Military Judge and Current Prosecution Team and for Further Appropriate Relief.

**3. Burden of Proof**

As the moving party, the Defense must demonstrate by a preponderance of the evidence that the requested relief is warranted. R.M.C. 905(c)(1).

**4. Facts**

The Prosecution incorporates by reference the facts as stated in AE 425C (GOV), the Government Response to Mr. Mohammad's Motion to Recuse the Military Judge and the Current Prosecution Team and for Further Appropriate Relief. *See* AE 425C (GOV).

On 20 May 2016, Defense counsel for Mr. Hawsawi filed AE 425B (MAH), Mr. Hawsawi's Supplement to Defense Motion to Recuse the Military Judge and Current

Prosecution Team, and for Further Appropriate Relief, seeking different relief from that requested within AE 425 (Mohammad). *See* AE 425B (MAH).

## **5. Law and Argument**

Despite the fact that the Defense was not given a copy of the Order at issue until January 2016, and contrary to their claims, no due process violation has occurred. The Accused has not suffered prejudice from the delay in receiving the Military Judge's order. The Military Judge determined that the Prosecution had "adequately substituted" the information in question under R.M.C. 505(f)(2)(a). Such orders are not subject to a motion for reconsideration if such order was entered pursuant to an *ex parte* showing, as was the case here. *See* M.C.R.E. 505(f)(3). Contrary to Defense averments as to what it would have done if notified of the Order earlier, it would have defeated the entire purpose behind the protections set forth in M.C.R.E. 505 and the classified information privilege were the Defense to be permitted to see the actual original classified information. Nor could the Defense take an interlocutory appeal to the United States Court of Military Commission Review (U.S.C.M.R.) seeking reversal of the Military Judge's finding that the substitute was adequate, as the Defense has no right of interlocutory appeal. *See* 10 U.S.C. §950d. If the Defense had sought a different ruling in a *habeas* context, or petitioned a federal court for a writ of prohibition, it would have encountered similar treatment, as the classified information procedures in the Military Commissions Act are closely modeled after the federal courts Classified Information Procedures Act (CIPA) and federal case law. 10 U.S.C. § 949p-4(a). The adequate substitute is all the Defense would have ever been entitled to under the law; so the fact that they were not notified of the specifics of the order until 18 months later, while regrettable, and completely unintentional, caused no actual prejudice to the Accused.

The Prosecution is confident that the Order of the Military Commission on the issue is lawful and will be upheld by a court on appeal. The Defense has made its objections and established its record in the previous litigation; thus, should the Accused be convicted, the issue of whether any of the Accused's rights had been violated by the preservation and/or substitution

of the information at issue can then be appealed. But to suggest that Mr. Hawsawi's case is somehow materially prejudiced by the adequate substitute of the information that has been provided is simply inaccurate and meritless.

Both the Prosecution, in requesting, and the Military Judge, in ordering the preservation and/or substitution of information, acted lawfully and consistently with like orders of federal courts. The preservation and/or substitute of information grants the Defense "substantially the same ability to make a defense as would discovery of, or access to, the specific classified information." 10 U.S.C. § 949p-4(b)(3); M.C.R.E. 505(f)(2)(C). As such, the Defense has suffered no prejudice and the Prosecution respectfully requests the Commission deny the instant Supplement (AE 425B (MAH)) as well as the underlying motion (AE 425 (Mohammad)).

**6. Oral Argument**

The Prosecution is willing to waive oral argument but requests an opportunity to be heard should the Defense be granted oral argument.

**7. Witnesses and Evidence**

The Prosecution will not rely on witnesses or additional evidence to support this Emergency Motion for Reconsideration.

**8. Additional Information**

The Prosecution has no additional information.



# ATTACHMENT A

