

**MILITARY COMMISSION TRIAL JUDICIARY
GUANTANAMO BAY**

UNITED STATES OF AMERICA

v.

ABD AL HADI AL-IRAQI

AE 023H

Mr. al-Iraqi's Response

To the Government's *Ex Parte* and In Camera
Under Seal Motion for a Protective Order
Pursuant to the Military Commissions Act of
2009, 10 U.S.C. 949p-4, and Military
Commission Rule of Evidence 505

2 February 2016

1. **Timeliness:** This response is filed out of time pursuant to this Commission's grant of the Accused's request for leave to file his response out of time of 2 February 2016. AE 023G.

2. **Relief Sought:**

a. Mr. al-Iraqi respectfully requests that the military commission deny AE 023E and the Government's proposed Protective Order.

b. In the alternative, Mr. al-Iraqi respectfully requests that the military commission order the United States to serve a copy of AE 023E on counsel for the Accused.

c. In the further alternative, Mr. al-Iraqi respectfully requests the Military Commission advise the defense of the topic area of the *ex parte* pleading and permit the defense to submit *ex parte* pleadings providing information to the military commission for use in evaluating AE 023E.¹

3. **Overview:**

¹ Consistent with R.T.M.C. ¶ 17-4(b), if the military judge grants relief after an *ex parte* showing, "the military judge shall state the reasons for that decision without revealing the *ex parte* nature of the underlying showing."

The Government's *ex parte* Motion does not provide any notice as to which classified information has been disclosed by the United States to the Accused or his counsel. This inadequate notice precludes the Accused from asserting any rights that he may have under the statutes, rules, and regulations governing this Military Commission—including, but not limited to whether the information subject to the proposed protective order is properly classified or whether such classification might preclude use of such information by either party before this Military Commission. Accordingly, the Military Commission should reject the *ex parte* pleading. Furthermore, this military commission should deny the motion because the government has not complied with Military Commission Rule of Evidence (MCRE) 505(c), which requires adversarial invocation of classified information privilege prior to an *ex parte* request under MCRE 505(f)(2)(B).

4. **Argument:**

Although the defense cannot know the actual relief requested in AE 023E the inclusion of § 949p-4 in the title of the motion suggests that the government seeks a protective order limiting “the disclosure of any classified information that has been disclosed by the United States to any accused.” To satisfy the requirements of *United States v. Reynolds*,² MCRE 505(c) requires an invocation of the classified information privilege by the head of the agency or department involved, or his or her delegee. Here, the Defense has not been provided sufficient notice as to whom is invoking the classified information privilege, whether that invocation of the classified information privilege is valid pursuant to MCRE 505(c), or if such invocation is supported by facts that would merit the Government's requested relief.

² 345 U.S. 1, 10 (1953).

MCRE 505 allows *ex parte* pleadings in three situations: (1) a request for withholding or substituting discovery³; (2) a statement of damage to national security following an order of discovery⁴; and (3) a proffer of classified witness statements or former statements.⁵ The decision of both Congress and the Secretary of Defense not to authorize *ex parte* motions in MCRE 505(e) is dispositive of the government's attempt to obtain *ex parte* treatment of pleadings to which it is not entitled. Rather, a pleading under MCRE 505(e)(2) is governed by the catchall provision of RCM 701(1)(2), which permits the military commission to enter "such other order as is appropriate." *Ex parte* pleadings under this rule are permitted only "[u]pon motion of a party."⁶ The restriction on *ex parte* pleadings makes sense, as "fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights."⁷ The government has not filed a motion to permit *ex parte* communications.

This *ex parte* pleading, without authorization by rule or order, violates the Accused's right to a fair trial as well as the right to counsel.⁸ The military commission should reject the government's unauthorized *ex parte* pleading and deny AE 023E, because this unauthorized *ex parte* pleading violates the Military Commissions Act of 2009, MCRE 505, the Detainee Treatment Act of 2005, and the Fifth, Sixth, Eighth, and Fourteenth⁹ Amendments to the United

³ MCRE 505(f)(2)(B).

⁴ MCRE 505(h)(4)(D)

⁵ MCRE 505(i)(3)(B), (i)(4)(B).

⁶ RCM 701(1)(2).

⁷ *United States v. Libby*, 429 F. Supp. 2d 18, 24, *modified*, 429 F. Supp. 2d 46 (D.D.C. 2006).

⁸ *United States v. Cronin*, 466 U.S. 648, 659 (1984); *Carroll v. Princess Anne*, 393 U.S. 175, 183 (1968); *United States v. Carmichael*, 232 F.3d 510, 517 (6th Cir. 2000); *United States v. Minsky*, 963 F.2d 870, 874 (6th Cir. 1992); *United States v. Earley*, 746 F.2d 412, 416 (8th Cir. 1984).

⁹ The Defense particularly objects to the lack of notice in AE 023E as the absence of any information regarding the underlying Government assertion of privilege prevents the Accused from access to information upon which he might make a showing that the totality of the circumstances in granting such a protective order denies his Due Process rights. Accordingly the

States Constitution. At the very least, the Military Commission should inform the defense of the topic area of the Government request and permit the Defense to be heard *ex parte* on the proposed limitations on the use of the information.

5. **Request for Oral Argument:** Oral argument is requested.
6. **Request for Witnesses:** None.
7. **Additional Information:** None.
8. **Conference with Opposing Counsel:** The Defense has conferred with the prosecution;

the Government opposes this Response.

9. **Attachments:**

- A. Certificate of Service.

Respectfully Submitted,

//s//
BRENT RUSHFORTH
Pro Bono Counsel

//s//
ROBERT T. KINCAID III, MAJ,
USA
Detailed Defense Counsel

//s//
WENDALL H. HALL, MAJ, USA
Detailed Defense Counsel

//s//
KEITH B. LOFLAND,
LCDR, JAGC, USN
Detailed Defense Counsel

Defense objects to the subject Motion, and any other process that denies the Accused his right to access information in his defense, as unconstitutional deprivations of Due Process.

CERTIFICATE OF SERVICE

I certify that on 2 February 2016, I filed AE 023H with the Office of Military Commissions Trial Judiciary and I served a copy on counsel of record.

//s//
KEITH B. LOFLAND,
LCDR, JAGC, USN
Detailed Defense Counsel