

UNCLASSIFIED//FOR PUBLIC RELEASE  
**MILITARY COMMISSIONS TRIAL JUDICIARY  
GUANTANAMO BAY, CUBA**

UNITED STATES OF AMERICA  v.  ABD AL HADI AL-IRAQI	<b>AE 023I</b>  <b>Government Reply</b> To the Accused's Response to the Government's Motion for Protective Order Pursuant to the Military Commissions Act of 2009, 10 U.S.C. § 949p-4, And Military Commission Rule of Evidence 505  9 February 2016
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**1. Timeliness**

This reply is timely filed pursuant to Military Commissions Trial Judiciary Rule of Court 3.7.e.(2).

**2. Overview**

The Defense request<sup>1</sup>—that AE 023E Government *Ex Parte* and *In Camera* Under Seal Motion for Protective Order Pursuant to the Military Commissions Act of 2009 (“M.C.A.”), 10 U.S.C. § 949p-4, and Military Commission Rule of Evidence (“M.C.R.E.”) 505 (“Motion for Protective Order”) be denied—is inconsistent with the plain terms of the M.C.A. and M.C.R.E. 505, Congressional intent, and established case law. *See* 10 U.S.C. §§ 949p-1 through 949p-7.<sup>2</sup> Both the M.C.A. and M.C.R.E. 505 specifically allow the Government to submit its proposed classified summaries to the Commission *ex parte* when the Government seeks to protect classified information. 10 U.S.C. § 949p-4(b)(2); M.C.R.E. 505(f)(2)(B). Furthermore, there is no legal basis to support the Defense assertions that the Government’s *ex parte* Motion for

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<sup>1</sup> In its Response, under “Relief Sought,” the Defense lists an alternative request in the event its primary request is denied by the Commission. In the event the alternative request is also denied, the Defense also lists a second alternative request. AE 023H at 1.

<sup>2</sup> “The judicial construction of the Classified Information Procedures Act (18 U.S.C. App.) shall be authoritative in the interpretation of this rule, except to the extent that such construction is inconsistent with the specific requirements of this rule.” M.C.R.E. 505(a)(4).

Protective Order be served on the Defense, or that the Defense be advised of the topic of the said motion. Therefore, AE 023H should be denied in its entirety.<sup>3</sup>

### 3. Facts

Pursuant to M.C.R.E. 505, the Government filed its *ex parte* Motion for Protective Order, together with its proposed classified summaries for approval by the Commission. The Government attached a declaration to the motion, in accordance with M.C.R.E. 505(f)(1)(A), “signed by a knowledgeable United States official possessing authority to classify information,” invoking the classified information privilege and setting forth the damage to the national security reasonably expected to be caused by the discovery of or access to such information.<sup>4</sup> The Government filed this submission *ex parte* because it includes classified information that the Government believes is not subject to discovery under the applicable legal standard. *See* R.M.C. 701(e) and M.C.R.E. 505(f)(2)(B).

In its Response, the Defense requests that the Commission deny the Government’s *ex parte* Motion for Protective Order and the proposed Protective Order. AE 023H at 1. In the alternative, the Defense requests that the Commission order the Government “to serve a copy of AE 023E on counsel for the Accused.” AE 023H at 1. As a second alternative, the Defense requests that the 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.” AE 023H at 1.

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<sup>3</sup> It should be noted that the Defense does have a right to file an *ex parte* motion under M.C.R.E. 505(d)(2) in order to provide the Commission its theory of the case and possible defenses so the Commission can evaluate the proposed summaries to ensure all discoverable material is provided to the Defense.

<sup>4</sup> The Defense’s statement, that it “has not been provided sufficient notice as to whether the Government has made a valid invocation of the classified information privilege pursuant to M.C.R.E. 505(c),” is curious in light of the fact that Rule 505(c) does not require such notice to the Defense. Instead, the rule indicates that the privilege may be claimed by the head of the executive or military department or government agency concerned if that individual finds that the information is properly classified and that disclosure would be detrimental to the national security.

#### 4. Law and Argument<sup>5</sup>

The Defense fails to offer a single, valid, legal basis to support its requested relief, which is not surprising, since no such valid, legal basis exists.<sup>6</sup> Instead, the Defense seeks to substitute

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<sup>5</sup> The Defense asserts that the Commission should reject the Government's *ex parte* pleading and deny AE 023E, because it violates the Accused's rights; specifically AE 023E "violates the Military Commissions Act of 2009, MCRE 505, the Detainee Treatment Act of 2005, and the Fifth, Sixth, and Eighth Amendments to the United States Constitution." AE 023H at 3. The Defense, however, omits any explanation of how the Accused's rights under the Detainee Treatment Act of 2005, the Fifth, Sixth, and Eighth Amendments are implicated. Absent any explanation as to how these rights are implicated in the Defense request and under these facts, the Commission should reject this boilerplate language. See *United States v. Heijnen*, 215 F. App'x 725, 726 (10th Cir. 2007) ("We nevertheless reject these arguments because they are unsupported by legal argument or authority or by any citations to the extensive record of the proceedings . . . . [A]ppellant's issues are not supported by any developed legal argument or authority, and we need not consider them.").

Even assuming the Defense adequately raised this issue, which it did not, and assuming arguendo these rights apply to commission proceedings against alien unprivileged enemy belligerents detained at Guantanamo Bay, Cuba, the constitutionality of Classified Information Procedures Act ("CIPA") (18 U.S.C. app. 3) has been "tested repeatedly and uniformly upheld." *United States v. Hashmi*, 621 F. Supp. 2d 76, 80 (S.D.N.Y. 2008) (citing *United States v. Wilson*, 750 F.2d 7, 9 (2d Cir. 1984)). See also *United States v. Yunis*, 924 F.2d 1086, 1094-95 (D.C. Cir. 1991) (affirming denial of motion to dismiss on claim that CIPA discovery provisions infringed defendant's Fifth and Sixth Amendment); *United States v. Ahmed*, No. 10 CR 131, 2011 U.S. Dist. LEXIS 120191 at \*19 (S.D.N.Y. Sep. 23, 2011) (denying motion to reconsider claim that defendant's Fifth and Sixth Amendment rights were violated when the court entered a protective order after allowing the government to file an *ex parte* motion under Section 4 of CIPA); *United States v. Ivy*, No. Crim. A. 91-00602-04, 1993 U.S. Dist. LEXIS 13572, at \*3-7 (E.D. Pa. Aug. 12, 1993) (upholding constitutionality of the CIPA discovery provisions and Section 5). The Defense's invocation of the Eighth Amendment is wholly misplaced as that amendment concerns the government's power to punish, which bears no relation to the Defense arguments within its motion. Additionally, Eighth Amendment excessive punishment review is only applied after a formal adjudication of guilt. *Ingraham v. Wright*, 430 U.S. 651, 671-672, n.40 (1977) ("Eighth Amendment scrutiny is appropriate only after the State has complied with the constitutional guarantees traditionally associated with criminal prosecutions . . . . [The] State does not acquire the power to punish with which the Eighth Amendment is concerned until after it has secured a formal adjudication of guilt in accordance with due process of law.").

<sup>6</sup> The Defense makes a number of assertions in its Response which clearly illustrate its misunderstanding of M.C.R.E. 505 and its application in military commission practice. For instance, the Defense alleges that the Government's motion does not provide them adequate notice and that this inadequate notice precludes the Accused from asserting any rights including, but not limited to, "whether the information subject to the proposed protective order is properly classified . . ." AE 023H at 2. However, the Defense has no role with respect to classification

its judgment for that of Congress regarding the procedures necessary to protect classified information. Additionally, the Defense seeks to substitute its judgement for that of the Commission in determining whether the Government's proposed summaries of classified information are adequate. Not only is the Defense position inconsistent with the plain language of the statute, but it contravenes Congressional intent and established case law.

**I. *Ex Parte* Review of the Government's Motion for Protective Order (AE 023E) is Entirely Consistent With the Plain Language of the M.C.A. and M.C.R.E. 505, the Classified Information Procedures Act, and Federal Case Law**

The provisions for protecting classified information in military commissions are similar to procedures employed in courts-martial (*see* Military Rule of Evidence 505) and federal court pursuant to the Classified Information Procedures Act ("CIPA") (*see* 18 U.S.C. app. 3). In fact, the M.C.A. and M.C.R.E. 505 provide that the judicial construction of CIPA shall be authoritative in the interpretation of M.C.R.E. 505 "except to the extent that such construction is inconsistent with the specific requirements of this rule." *See* 10 U.S.C. § 949p-1(d); M.C.R.E. 505(a)(4). CIPA established pretrial, trial, and appellate procedures governing federal criminal cases in which classified information potentially is subject to discovery or disclosure by the

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of the information in the proposed protective order. The determination whether to classify information, and its proper classification, is a matter committed solely to the Executive Branch. *See* M.C.R.E. 505(a); M.C.R.E. 505(f) Discussion. Courts have consistently recognized the principle that neither an accused nor the courts can challenge the classification of information. *United States v. Smith*, 750 F.2d 1215, 1217 (4th Cir. 1984). Another example of the Defense's misunderstanding of M.C.R.E. 505 is its statement that the Government did not comply with Rule 505 because the rule "requires [an] adversarial invocation of [the] classified information privilege prior to an *ex parte* request under M.C.R.E. 505(f)(2)(B)." AE 023H at 2. The rule unambiguously states that the only party that makes the determination that the information in question is properly classified and that disclosure would be detrimental to the national security is the head of the executive or military department or government agency who is claiming the privilege, not the military commission. *See also* M.C.R.E. 505(f) Discussion ("When conducting a review pursuant to Mil. Comm. R. Evid. 505(f), the military judge does not conduct a *de novo* review of the classification."). There is absolutely nothing in the relevant statute or rule requiring an "adversarial invocation" of the classified information privilege prior to the filing of an *ex parte* pleading.

defense at trial. *United States v. Libby*, 453 F. Supp. 2d 35, 37 (D.D.C. 2006).<sup>7</sup> The statute was designed to reconcile, on the one hand, a criminal defendant's right to receive classified information prior to trial and introduce such material with, on the other hand, the government's duty to protect from disclosure sensitive information that could compromise national security. *United States v. Rezaq*, 134 F.3d 1121, 1142 (D.C. Cir. 1998). The sections of CIPA are arranged in sequence, based on the flow of litigation. *United States v. Amawi*, 695 F.3d 457, 468 (6th Cir. 2012).

Both the M.C.A. and CIPA contain analogous provisions authorizing the government to obtain pretrial rulings as to whether classified information in its custody is subject to discovery. If discoverable, the government is permitted to submit to the military commission or court, *ex parte* and *in camera*, proposed summaries or substitutions that would replace the original underlying documents and satisfy the government's discovery obligations with regard to those documents. *See* 10 U.S.C. § 949p-4; 18 U.S.C. app. 3 § 4. The M.C.A. and M.C.R.E. 505 both provide a procedural mechanism for producing substitutions, summaries, or statements admitting relevant facts instead of disclosing specific items of classified information, as long as the accused would have substantially the same ability to make his defense as he would if the government produced the specific items of classified information. 10 U.S.C. § 949p-4(b); M.C.R.E. 505(f).

With respect to CIPA, Section 4 authorizes the government to produce either redacted versions of classified documents (*see United States v. Miller*, 874 F.2d 1255, 1274 (9th Cir. 1989) (affirming determination that only some of the contents are relevant to the defense); *United States v. North*, 713 F. Supp. 1436, 1438 (D.D.C. 1989) (permitting the use of the portion

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<sup>7</sup> The Defense cites *United States v. Libby*, 429 F. Supp. 2d 18 (D.D.C. 2006), for the proposition that "fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights." AE 023H at 3. The Government submits that use of this particular quote is disingenuous since the court ultimately ruled that the defendant and his counsel could not be permitted to play a role equal to the government in the [CIPA] Section 4 proceeding. *See Libby*, 429 F. Supp. at 26. More importantly, the court stated, "[N]evertheless, by enacting Section 4 of CIPA, Congress explicitly provided for *ex parte* proceedings." *Id.*

of the documents that were useful to the defense)), or summaries or stipulations that give the defense the arguably discoverable facts contained in the classified information, without compromising sensitive sources and methods. *See United States v. Dumeisi*, 424 F.3d 566, 578 (7th Cir. 2005) (approving substitution of unclassified summary in the place of classified information); *United States v. Moussaoui*, 365 F.3d 292, 313-314 (4th Cir. 2004) (concluding that appropriate substitutions are available for witness testimony).

Critically, both the M.C.A. and M.C.R.E. 505 specifically allow the government to submit its proposed classified summaries to the military commission *ex parte* where the government seeks to protect classified information. 10 U.S.C. § 949p-4(b)(2) (“The military judge shall permit the trial counsel to make a request for an authorization under [10 U.S.C. § 949p-4(b)(1), which is implemented in Mil. Comm. R. Evid. 505(f)(2)(A)] in the form of an *ex parte* presentation to the extent necessary to protect classified information, in accordance with the practice of the federal courts under the Classified Information Procedures Act [].”); *see also* M.C.R.E. 505(f)(2)(B).

Under CIPA, federal courts have discretion to accept *ex parte* filings and routinely grant such requests. *See, e.g., United States v. O’Hara*, 301 F.3d 563, 568 (7th Cir. 2002) (holding that the district court properly conducted an *ex parte* and *in camera* proceeding to determine whether classified information was discoverable); *United States v. Klimavicius-Viloria*, 144 F.3d 1249, 1261 (9th Cir. 1998) (approving CIPA Section 4 *ex parte* hearings); *United States v. Sarkissian*, 841 F.2d 959, 966 (9th Cir. 1988) (holding that CIPA Section 4 allows a court to permit the United States to make a request . . . in the form of a written statement to be inspected by the court alone); *see also United States v. Yunis*, 867 F.2d 617, 619-20, 622 (D.C. Cir. 1989) (allowing the government to file numerous *ex parte*, *in camera* pleadings under CIPA Section 4).

In military commissions practice, the government will submit its proposed classified summaries to the military commission *ex parte* via a motion for a protective order, where the

government seeks to protect classified information. M.C.R.E. 505(f)(2)(B).<sup>8</sup> These proposed summaries are reviewed by the military commission and, if necessary, certain modifications may be required before the military commission executes a protective order authorizing the government to delete specific non-discoverable items of classified information, and to provide only discoverable information with summaries. The M.C.A. requires that the military commission grant the government's request to substitute a summary or a statement admitting relevant facts so long as the substitution would place the accused in substantially the same position as if he received the original classified material. 10 U.S.C. § 949p-4(b)(3). Should the military commission determine that the classified information at issue is discoverable in whole or in part, the government still may seek alternate relief under M.C.R.E. 505(f)(2)(A), such as additional substitutions or summaries, or an interlocutory appeal under R.M.C. 908(a)(4)(A) ("The United States may take an interlocutory appeal . . . of any order or ruling of the military judge that . . . with respect to classified information—authorizes the disclosure of such information . . .)." *See, e.g.*, 10 U.S.C. §§ 949p-4(b)(1) and 949p-6(f)(3); M.C.R.E. 505(f)(2)(A).

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<sup>8</sup> The Government is uncertain how the Defense arrived at the conclusion that "a pleading under M.C.R.E. 505(e)(2) is governed by the catchall provision of R.C.M. 701(l)(2), which permits the military commission to enter 'such other order as is appropriate.'" AE 023H at 3. The Government submits that this statement is further evidence that the Defense either does not understand how discovery of classified information is handled under M.C.R.E. 505 or just ignores it. Assuming the Defense's cite to R.C.M. 701(l)(2) (AE 023H at 3) was intended to be a cite to Rule of Military Commissions ("R.M.C.") 701(l)(2), the Defense provides no authority why M.C.R.E. 505, the rule specifically designed to handle classified information, should be discarded in favor of R.M.C. 701(l)(2). M.C.R.E. 505(f), not M.C.R.E. 505(e)(2), is specifically designed to handle the discovery of classified information to an accused. M.C.R.E. 505(f)(2)(B) states that a "military judge shall permit the trial counsel to make a request for an authorization under Mil. Comm. R. Evid. 505(f)(2)(A) in the form of an *ex parte* presentation to the extent necessary to protect classified information . . ." Pursuant to this rule, the Government filed an *ex parte* motion with the Commission seeking authorization to substitute summaries for the original classified documents. *See* AE 023E.

**II. There is No Basis in Law for the Defense's Requested Relief**

Put simply, the Defense failed to present any support, in law or fact, for the Commission to deny the Government's Motion for Protective Order (AE 023E). The Defense also failed to show why a copy of AE 023E should be served on them or why they should be advised of the topic area of AE 023E. Neither the M.C.A., M.C.R.E. 505, nor CIPA contain any requirement that the Defense review the Government's *ex parte* requests for relief, nor do any of them provide any right to the Accused for such a review. Additionally, neither the M.C.A., M.C.R.E. 505, nor CIPA require that an *ex parte* motion be served on the Defense or that the Defense be advised of the topic area of the *ex parte* motion. The rationale underlying the statutory provisions authorizing *ex parte* submissions is clear. As the Ninth Circuit Court of Appeals observed, where "the government is seeking to withhold classified information from the defendant, an adversary hearing with defense knowledge [of the classified information to be withheld] would defeat the purpose of the discovery rules." *Sarkissian*, 841 F.2d at 965 (quoting H.R. Rep. No. 831, 96th Cong., 2d Sess. 27 n.22). The M.C.A., M.C.R.E. 505, and CIPA are clear—they explicitly provide the Government with the right to submit its classified information to the appropriate court or commission *ex parte*, and they each further provide that the entire Government submission be sealed. *See* 10 U.S.C. § 949p-4(b)(2); 18 U.S.C. app. 3 § 4; M.C.R.E. 505(f)(2)(B).

This procedure (of allowing the government to submit classified information *ex parte*) is neither novel nor unique. Even in cases where classified protections are not implicated, federal courts routinely engage in *ex parte*, *in camera* review of materials to determine whether materials are properly subject to discovery in criminal prosecutions. The Second Circuit, for example, found that the government may submit materials *ex parte* for a discoverability review:

A defendant's Brady request for discovery of exculpatory materials or materials with which to impeach a government witness does not give the defendant the right to compel the disclosure of documents that are not material for those purposes; nor does it give the defendant the right to assess materiality for himself. To the extent that there is a question as to the relevance or materiality of a given group of documents, the documents are normally submitted to the court for *in camera*

review. Such review preserves the need for confidentiality of those documents that the court determines need not be disclosed to the defendant.

*United States v. Wolfson*, 55 F.3d 58, 60 (2d Cir. 1995). Likewise, in discussing the analogous CIPA provision to the M.C.A. and M.C.R.E. 505(f)(2), the Ninth Circuit ruled that CIPA Section 4 allows a court to permit the party seeking to deny or restrict discovery to “show good cause by a written statement that the court will inspect *ex parte*.” *Sarkissian*, 841 F.2d at 965-66.

Disclosing the Government’s classified *ex parte* submission to the Defense would divulge the very information that the Government is seeking to protect, and would therefore undermine the exact purpose of the M.C.A. (10 U.S.C. § 949p-4), M.C.R.E. 505(f)(2)(A), and CIPA Section 4.

In light of the above, all of the Defense requests in its Response (AE 023H) should be denied. The Defense cannot pierce the *ex parte* nature of the Government’s Motion for Protective Order merely because it does not agree with the controlling statutes, procedural rules, and case law that are directly on point. The procedure for allowing the parties to file classified information *ex parte* exists for a reason—to protect classified information from disclosure. The Commission should apply the laws as drafted by Congress and interpreted by federal courts, and deny the Defense requests.

## **5. Conclusion**

The M.C.A. and M.C.R.E. 505, CIPA, and federal case law all allow the Government to submit *ex parte* its Motion for Protective Order, together with its proposed summaries, so that the Commission can determine whether the summaries are an adequate substitute for the original classified materials. The Defense failed to provide any support for the relief it seeks in its Response.

## **6. Oral Argument**

The Government does not believe that oral argument is necessary to resolve this issue. However, if the Commission elects to hear from the Defense, the Government requests an opportunity to be heard.



# ATTACHMENT A

Filed with TJ  
9 February 2016

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**CERTIFICATE OF SERVICE**

I certify that on the 9th day of February, 2016, I filed **AE 023I, Government Reply To the Accused's Response to the Government's Motion for Protective Order Pursuant To The Military Commissions Act Of 2009, 10 U.S.C. § 949p-4, And Military Commission Rule Of Evidence 505**, with the Office of Military Commissions Trial Judiciary and I served a copy on counsel of record.

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//s//  
Felice J. Viti  
Trial Counsel  
Office of the Chief Prosecutor  
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