

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

UNITED STATES OF AMERICA v. ABD AL HADI AL-IRAQI	AE 023V Government Reply To AE 023U, Mr. al-Iraqi's Response to the Government's <i>Ex Parte</i> and <i>In Camera</i> Under Seal 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 12 April 2016
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1. Timeliness

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

2. Overview

This marks the fourth time the Defense has raised the substantively identical objection, despite the Commission's clear mandate in three prior rulings that the Defense's position is inconsistent with well-settled law. AE 023H, denied by AE 023O; AE 023L, denied by AE 023P; and AE 023M, denied by AE 023T. The Government hereby re-asserts and incorporates by reference Section 2 ("Overview") of AE 023I, AE 023N, and AE 023Q (Government Replies to AE 023H, AE 023L, and AE 023M, respectively) in their entirety, except to the extent that dates and references to previous motions in the AE023 series are updated herein. Further, the Government respectfully requests that the Commission adopt the rulings in AE 023O, AE 023P, and AE 023T, and hold that the Government has properly invoked the procedures of Military Commissions Rule of Evidence (M.C.R.E.) 505(f)(2)(B). Lastly, the Government respectfully requests the Commission caution the Defense on filing the same pleadings which have no bases in fact and law and are factually indistinguishable from motions previously ruled on by the Commission. *See, e.g.*, AE 023U at 3-4; AE 023N at 7-9.

3. Facts

On 23 March 2016, pursuant to M.C.R.E. 505, the Government filed its *ex parte* Motion for Protective Order, together with its proposed relief for approval by the Commission (AE 023R). Pursuant to M.C.R.E. 505(f)(1)(A), the Government attached to this motion a declaration from a knowledgeable United States official possessing authority to classify information invoking the national security privilege and setting forth the damage to national security that would result from the discovery of or access to such information. This submission was filed *ex parte* pursuant to M.C.R.E. 505(f)(2)(B).¹ This submission is identical in form and legal authority as those the Government filed in AE 023E, AE 023J, and AE 023K.

The Defense filed its response to AE 023R on 5 April 2016. AE 023U. In that pleading, the Defense objected to “the deprivation of [the Accused’s] meaningful opportunity to contest the evidence the Government seeks to use against him.” *Id.* at 1. The Defense further requested the Commission deny the Government’s *ex parte* Motion for Protective Order and the proposed Protective Order. *Id.* In the alternative, the Defense requested the Commission order the Government “to serve a copy of AE 023R on counsel for the Accused.” *Id.* at 2. As a second alternative, the Defense requested 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 023R.” *Id.*²

¹ The Military Commissions Act (M.C.A.) (10 U.S.C. § 949p-4(b)(2)), M.C.R.E. 505(f)(2)(B), and the Classified Information Procedures Act (CIPA) § 4 all explicitly authorize *ex parte* presentations, to include motions, in the context of classified discovery motions. Furthermore, federal courts have approved of *ex parte* motions and presentations for classified material under CIPA. *See, e.g., United States v. Klimavicius-Viloria*, 144 F.3d 1249, 1261 (9th Cir. 1998) (explicitly approving of an *ex parte* presentation under CIPA); *United States v. Yunis*, 867 F.2d 617, 620 (D.C. Cir. 1989) (accepting the District Court’s *ex parte* procedures without comment and performing one itself).

² The objection asserted by the Defense in AE 023U is identical to its objection in AE 023L and AE 023M, and the relief requested is identical to that sought in those pleadings and AE 023H. In fact, the last two iterations of this objection are simply copy-and-paste pleadings with the Appellate Exhibit number being changed, or not, as evidenced by the Defense’s errant reference to AE 023J instead of AE 023R on page 3 of AE 023U. The only “substantive” difference between the instant pleading and the previous ones repeatedly denied by the Commission is the addition of a misleading and irrelevant footnote, addressed *supra*.

On 17 March 2016, the Commission issued two rulings, AE 023O and AE 023P, addressing respectively AE 023H and AE 023L, Defense responses to the Government's motions for a protective order. In both rulings, the Commission denied the relief requested. AE 023O at 2; AE 023P at 2. On 1 April 2016, four days before the Defense filed the instant motion, the Commission again ruled on these exact issues in AE 023T, addressing AE 023M. As before, the Commission denied the Defense's requested relief. In all three rulings, the Commission, in accordance with Rule for Military Commissions 905(h) and Military Commissions Trial Judiciary Rule of Court 3.5.m (May 2014), deemed oral argument was "not necessary" to resolve the issue. AE 023O at 2; AE 023P at 2; AE 023T at 2.

4. Law and Argument

The Government hereby re-asserts and incorporates by reference Section 4 ("Law and Argument") of AE 023I, AE 023N, and AE 023Q (Government Replies to AE 023H, AE 023L, and AE 023M, respectively) in their entirety.³ As previously stated, the Commission has ruled on this very issue three times, holding that Government motions of this kind are "consistent with M.C.R.E. 505(f)(2), which allows the Government to make a request for summaries and substitutions of classified information '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 [(CIPA)] (18 U.S.C. App.).'" AE 023O at 2; AE 023P at 2; AE 023T at 2. That the Defense does not like the rules established by CIPA is evident, despite the fact that it has been the law of the land since 1980.⁴

The Defense disturbingly ignores not only the plain meaning of M.C.R.E. 505, CIPA, and a profusion of Federal case law that directly contradicts its assertion, but also, perhaps even more

³ In the event the Defense continues to file responses without additional argument to the Government's filing of *ex parte* and *in camera* motions for a protective order pursuant to M.C.R.E. 505, the Government intends to incorporate by reference AE 023I, AE 023N, and AE 023Q.

⁴ CIPA took effect on October 15, 1980. Military Rule of Evidence 505 first appeared in the 1984 Manual for Courts-Martial, published August 1, 1984.

disturbingly, ignores one of the most basic tenets of common law—namely the touchstone legal doctrine known as “law of the case.” Under the law-of-the-case doctrine, when a court has ruled on an issue, that decision should generally be adhered to by that court in subsequent stages in the same case, unless there has been an intervening change in law, new evidence is available, or there is a need to correct a clear error or prevent a manifest injustice. *Liberty Synergistics, Inc. v. Microflo Ltd.*, 50 F. Supp 3d 267, 282 (E.D.N.Y. 2014) (citing *Thompson v. Choinski*, 374 F. App'x 222, 223 (2d Cir. 2010); see also *L.I. Head Start Child Development Services, Inc. v. Economic Opportunity Com'n of Nassau County, Inc.*, 820 F. Supp. 2d 410, 416 (E.D.N.Y. 2011) (“It is a basic rule of law, routinely enforced, that ‘when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case.’”) (citing *Arizona v. California*, 460 U.S. 605, 618 (1983)); *United States v. Walker*, 71 M.J. 523, 532 (N.M.C.C.A. 2012) (“Law of the case doctrine provides that when a court applies law to fact and renders a decision, that decision continues to govern the issue as the case winds its way through subsequent stages of the proceeding.”) (*rvs'd. on other grounds*). “The underlying intent of the [law-of-the-case] doctrine is to prevent the relitigation of settled issues in a case, thus protecting the settled expectations of parties, ensuring uniformity of decisions, and promoting judicial efficiency.” *First Union Nat'l Bank v. Pictet Overseas Trust Corp.*, 477 F.3d 616, 620 (8th Cir. 2007) (internal citations omitted); see also *Agostini et. al. v. Felton, et. al.*, 521 U.S. 203, 236 (1997) (“Under this doctrine, a court should not reopen issues decided in earlier stages of the same litigation” unless it is “convinced that [its prior decision] is clearly erroneous and would work a manifest injustice.”) (internal citations omitted). “Courts must rarely invoke the ‘clear error’ exception, lest the exception swallow the rule.” *Jenkins Brick Co. v. John E. Bremer*, 321 F.3d 1366, 1370 (11th Cir. 2003). The Defense did not, because it cannot, demonstrate any clear error in the Commission’s three prior rulings that would justify its repeated insistence on the Commission revisiting the issue. Such continued insistence produces precisely the type of re-litigation and judicial inefficiency the rule is designed to prevent.

The Defense attempts to justify its continued practice of ignoring the Commission's orders by blaming its inability to file a more substantive filing on the Government's "ongoing failures to effectively manage security clearance and other administrative procedures under its sole purview" and the Government's "dilatory" conduct in the "handling of its own procedures" with respect to security clearances for Defense team members. AE 023U at 1, fn.1.⁵

The Defense's assertion that if only all team members possessed the necessary clearances a more substantive and persuasive argument could be made in support of the relief requested is a red herring.⁶ No statutory authority and federal case interpreting well-established M.C.R.E. 505 and CIPA procedures discussed in this motion and previous Government motions relating to M.C.R.E. 505 support the Defense requests, regardless of their security clearance. Specifically, contrary to Defense requests for relief (1) and (2), the M.C.R.E explicitly authorizes the Commission to grant protective orders for classified material and to allow the Government to provide summaries and/or substitutions without Defense Counsel participating in the *ex parte* hearing or receiving a copy of any pleadings. M.C.R.E. 505(f)(2). *See* FN6, *supra*. In regard to Defense request (3), the Defense does not have the right to receive notice of the classified information that is at issue at the discovery phase. *See* M.C.R.E. 505(h); FN6, *supra*. However,

⁵ Defense provides no bases upon which to assert that the Government is ineffective or "dilatory" with respect to the security clearance process. Furthermore, the Defense's reference to *Luis v. United States*, No. 14-419, 2016 WL 1228690 (U.S. Supreme Court March 30, 2016) as supporting their position is an irony worthy of O. Henry. In *Luis*, the government, in reliance on 18 U.S.C. § 1345, seized, pretrial, assets belonging to the defendant that were untainted by the crime charged, thereby preventing the defendant from using legally-obtained funds to hire counsel of her choosing. *Luis*, 2016 WL 1228690 at *4. The Court held "that the pretrial restraint of legitimate, untainted assets needed to retain counsel of choice violates the Sixth Amendment." *Id.* at *5. In the instant matter, diametric to *Luis*, the delay is specifically to afford the Accused his choice of counsel, resulting from the Commission granting the Accused's request for new counsel, after repeated explanation to the Accused and acceptance by the Accused that granting his request would result in delay during the pendency of the clearance process required by law.

⁶ In brief review, Defense requests three potential forms of relief: (1) For the Commission to deny AE 023R and the associated protective order; (2) For the Government to serve a copy of AE 023R, including all appendices on Defense; or (3) For the Commission to 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 023R. AE 023U at 1-2.

Defense has always had the ability to request a conference under M.C.R.E. 505(d)(2) to present its theories to the Commission. *See id.*; *see, e.g.*, AE 023T ¶4.

Additionally, the Defense neglects to mention (or recognize) that three members of the Defense team, MAJ Robert Kinkaid III, USA, MAJ Wendall H. Hall, USA, and LCDR Keith B. Lofland, JAGC, USN, have, since at least October of 2015, possessed all requisite clearances to fully and effectively represent their client and have met with their client multiple times in the intervening six months.

For the foregoing reasons, the Commission should deny the Defense's requests.

5. Conclusion

The M.C.A., M.C.R.E. 505, and CIPA all allow the Government to submit *ex parte* its Motion for Protective Order so that the Commission can determine whether the Government's proposed relief is an adequate substitute for the original classified materials. *See* AE 023O at 2; AE 023P at 2; AE 023T at 2. The Defense failed to provide any support for the relief it seeks in its Response.

6. Oral Argument

The Government continues to agree with the Commission that oral argument is unnecessary to resolve this issue in light of the clear state of the law.

7. Witnesses and Evidence

No witnesses or other evidence is anticipated at this time.

ATTACHMENT A

Filed with TJ
12 April 2016

Appellate Exhibit 023V (al Hadi)
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CERTIFICATE OF SERVICE

I certify that on the 12th day of April, 2016, I filed **AE 023V, Government Reply To AE 023U, Mr. al-Iraqi's Response to the Government's *Ex Parte* and *In Camera* Under Seal 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.

//s//
Felice J. Viti
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