MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY, CUBA

UNITED STATES OF AMERICA v. ABD AL HADI AL-IRAQI	**AE 035D/040D/042D** **Government Motion** For Determination Of Use, Relevance, And Admissibility Pursuant to M.C.R.E. 505(h) 21 July 2015

1. Timeliness

This Request is timely filed pursuant to Military Commissions Trial Judiciary Rule of Court 3.7.c.(1) and Military Commission Rules of Evidence ("M.C.R.E.") 505(h)(1)(A).

2. Relief Requested

The Government respectfully requests that the Commission conduct an *in camera* hearing pursuant to M.C.R.E 505(h) prior to any testimony being presented during the July 2015 hearings. The Government further requests that the Commission determine the use, relevance, and admissibility of the classified information that the Government intends to disclose or which will likely be disclosed during the July hearings. *See* M.C.R.E. 505(h)(1)(A). The Government also requests that the Commission set forth, in writing, the basis for its determination concerning whether the Government-noticed classified information is relevant and admissible. *See* M.C.R.E. 505(h)(1)(D). Finally, the Government requests that the Military Judge order the Accused not be present during said hearings where classified information derived from a source other than the Accused is to be disclosed.

3. Burden of Proof

With respect to the Government's request that the Commission conduct a hearing pursuant to M.C.R.E. 505(h), there is no articulated burden of proof. Rather, the Military Judge *shall* conduct such a hearing and issue a ruling concerning the use, relevance, and admissibility of classified information prior to conducting any proceedings where classified information may

be disclosed. *See* M.C.R.E. 505(h)(1)(B). This hearing may be held *in camera*, if a "knowledgeable United States official possessing authority to classify information submits to the military judge a declaration that a public proceeding may result in the disclosure of classified information." M.C.R.E. 505(h)(1)(C). As to the M.C.R.E. 505(h) hearing itself, the Government will demonstrate that the classified information it seeks to disclose is relevant and admissible evidence.

4. Facts

On 10 July 2015, the Government, pursuant to M.C.R.E. 505(h)(2), gave notice to the Defense of the possibility that classified information may be disclosed by witnesses called by the Government during the July 2015 hearings. AE 035C, 040C, 042C. As stated in the Notice, the Government anticipates that the classified information elicited from the various witnesses during the hearings may include classified foundational evidence on the issue of personal jurisdiction, including chain of custody and other foundational matters surrounding a number of the Accused's admissions.[1]

5. Law and Argument

I. M.C.R.E. 505(h) Provides That Either Party May Request That a Military Judge Conduct a Hearing to Make Determinations Concerning the Use, Relevance, or Admissibility of Classified Information

Military Commission Rule of Evidence 505 addresses classified information; M.C.R.E. 505(h)(1)(A) states, "[w]ithin the time specified by the military judge for the filing of a motion under this section, either party may request the military judge to conduct a hearing to make all determinations concerning the use, relevance, or admissibility of classified information that would otherwise be made during the trial or pretrial proceeding." As noted above, the Government indicated in its Notice (AE 035C, 040C, 042C) that it anticipates disclosing

[1] To provide further clarity to the Commission with respect to the production of the Accused's statements at issue, the Government has created a timeline which is attached herein. *See* Attachment C.

classified evidence at the July 2015 hearing regarding the issue of personal jurisdiction over the Accused, the Defense motion to suppress the Accused statements, and several Government motions *in limine* to admit evidence for trial on the merits. *Id.* at 1.

This Commission previously dealt with a similar issue. Specifically, in AE 021N, the Government moved, pursuant to M.C.R.E. 505(h), for a hearing to determine the use, relevance and admissibility of classified evidence sought to be disclosed by the parties. The Commission granted the Government's request and conducted the M.C.R.E. 505(h) hearing on 26 January 2015, with all counsel present. The Accused was not present. *See* AE 021Z.

Also, in *United States v. Abd Al Rahim Hussanyn Muhammad Al Nashiri*, the military commission has dealt with a similar matter. In that case, the Government filed a number of motions requesting a hearing pursuant to M.C.R.E. 505(h). Specifically, the Government requested a hearing under M.C.R.E. 505(h) in response to two defense notices filed pursuant to M.C.R.E. 505(g), setting forth the defense's intent to disclose classified information at hearings scheduled for 23-26 October 2012. *See* AE 128, *Al Nashiri* (Mil. Comm'n Oct. 1, 2012). The Commission granted the Government's motion, and an *in camera* hearing was held on 20 February 2014. *See* Order, AE 128C, *Al Nashiri* (Mil. Comm'n Feb. 21, 2014).[2]

Notably, federal courts are required to grant the government's request to hold a hearing with respect to classified material pursuant to Section 6 of the Classified Information Procedures Act ("CIPA") (18 U.S.C. App. 3, § 6). *See United States v. Smith*, 780 F.2d 1102, 1105 (4th Cir. 1985) ("Once the Defendant gives notice of his intention to introduce classified information, the United States may request a hearing at which the court shall determine the 'use, relevance, or admissibility of classified information that would otherwise be made during the trial or pretrial proceeding.'") (citation omitted); *see also United States v. Giffen*, 473 F.3d 30 (2nd Cir. 2006);

[2] In the *Al Nashiri* commission, the Government requested another M.C.R.E. 505(h) hearing on 22 April 2014. *See* AE 206D, *Al Nashiri* (Mil. Comm'n April 22, 2014). The Commission granted this request and issued its order in May 2014. *See* Order, AE 206E, *Al Nashiri* (Mil. Comm'n May 30, 2014).

United States v. Fernandez, 913 F.2d 148 (4th Cir. 1990). Section 6 of CIPA allows the government to "request the court to conduct a hearing to make all determinations concerning the use, relevance, or admissibility of classified information that would otherwise be made during the trial or pretrial proceeding." [3]

In accordance with M.C.R.E. 505(h), the Government has properly requested that this Commission conduct a hearing to make all determinations concerning the use, relevance, or admissibility of classified information that may be disclosed during the July 2015 evidentiary hearings. Additionally, pursuant to M.C.R.E. 505(h)(1)(C), this hearing should be held *in camera* because "a knowledgeable United States official possessing authority to classify information" has submitted a declaration stating that disclosure of classified information may occur at this particular proceeding. *See* Attachment B, Classified Declaration dated 14 July 2015, at ¶ 1.

II. Both the Military Commission Act of 2009 and the Rules for Military Commission Prohibit Classified Information From Being Disclosed to Any Person not Authorized to Receive Such Information

The Military Commission Act of 2009 ("M.C.A.") requires that classified information be protected from disclosure during all stages of proceedings by military commission. 10 U.S.C. § 949p-1(a); M.C.R.E. 505(a). The statute also makes clear that no unauthorized persons may access classified information. 10 U.S.C. § 949p-1(a); M.C.R.E. 505(a). "Under no circumstances may a military judge order the release of classified information to any person not authorized to receive such information." 10 U.S.C. § 949p-1(a); M.C.R.E. 505(a)(1) (stating "[t]his rule applies to all stages of the proceedings"). The Accused is not authorized to receive classified information and, as such, he may not be present during pretrial hearings where the Government intends to disclose classified information.

[3] Section 6 of CIPA is very similar to M.C.R.E. 505(h), although Section 6 appears to limit requesting a hearing to the Government. Under M.C.R.E. 505(h)(1)(A), *either party* may request the hearing.

To be clear, the Accused has the right to present evidence in the Accused's defense and to examine and respond to all evidence admitted against him on the issue of guilt or innocence and for sentencing. 10 U.S.C. § 949a(b)(2)(A). The hearing that the Government has requested deals solely with foundational testimony to establish the admissibility of the transcripts of the Accused's statements.

Likewise, the Rules for Military Commissions ("R.M.C.") state the Accused may not be present during *in camera* presentations where classified information will be disclosed. R.M.C. 804(a) (the Accused has a right to be present "[e]xcept for certain *in camera* and *ex parte* presentations as may be permitted under R.M.C. 701-703 and Mil. Comm. R. Evid. 505"). The rules are consistent with the clear language and intent of the statute as it pertains to classified information. The Accused has a right to be present—a right the Accused may waive—but that right does not extend to all proceedings without limitation. Indeed, the Accused may be excluded from pretrial hearings if he were to endanger the safety of individuals or disrupt the proceedings (R.M.C. 804(b)), and the Accused may be excluded from pretrial hearings where classified information will be disclosed (R.M.C. 804(a); M.C.R.E. 505(a)(1)).[4]

6. <u>Conclusion</u>

The Government respectfully moves for an *in camera* hearing pursuant to M.C.R.E. 505(h) so that the Commission can make a determination concerning the use, relevance, and admissibility of the classified information noticed by the Government. M.C.R.E. 505(h). The Commission should conduct this hearing before commencing with any testimony at the evidentiary hearing on 22 July 2015. Additionally, this *in camera* hearing is also required to allow the Government to request appropriate alternative procedures for disclosing information pursuant to M.C.R.E. 505(h)(4) (if the Military Judge finds the information relevant and admissible), and to determine whether a portion of the evidentiary hearing needs to be closed

[4] *See* Order, AE 0142C, *Al Nashiri* (Mil. Comm'n July 15, 2013) (ruling "the accused does not enjoy a right to be present at closed pretrial hearing during which classified materials will be discussed for which the accused is not the source of the information").

pursuant to R.M.C. 806(b)(2). The *in camera* hearing would help protect national security information and assist the Commission in minimizing the amount of closure that may be necessary, if any. *See* R.M.C. 806. The Accused may not be present where classified information will be disclosed. *See* R.M.C. 804(a). The Government further requests that the Military Judge set forth in writing the basis for any determination. *See* M.C.R.E. 505(h)(1)(D).

7. Oral Argument

The Government does not request oral argument.

8. Witnesses and Evidence

The Government will not rely on any witnesses or evidence other than the attached declaration, dated 14 July 2015, in support of this request.

9. Certificate of Conference

The Government conferred with the Defense before filing this request. In the absence of a response, the Government concludes that the Defense objects to the relief requested.

10. Attachments

A. Certificate of Service, dated 21 July 2015.

B. Classified *Ex Parte*, *In Camera*, Under Seal Declaration, dated 14 July 2015, filed pursuant to M.C.R.E. 505(h). (To the Military Judge only.)

C. Timeline with respect to dates of disclosure of the Accused's statements by the Government.

Respectfully submitted,

//s//
LTC David J. Long, JA, USA
Trial Counsel

CDR Kevin L. Flynn, JAGC, USN
MAJ Joshua S. Bearden, JA, USA
LCDR B. Vaughn Spencer, JAGC, USN
Assistant Trial Counsel
Office of the Chief Prosecutor
Office of Military Commissions

ATTACHMENT A

CERTIFICATE OF SERVICE

I certify that on the 21st day of July, 2015, I filed **AE 035D/040D/042D**, the **Government Motion For Determination Of Use, Relevance, And Admissibility Pursuant to M.C.R.E. 505(h)**, with the Office of Military Commissions Trial Judiciary and I served a copy on counsel of record.

_____//s//_____
LTC David J. Long, JA, USA
Trial Counsel
Office of the Chief Prosecutor
Office of Military Commissions

ATTACHMENT B

MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY, CUBA

UNITED STATES OF AMERICA v. ABD AL HADI AL-IRAQI	**AE 035D/040D/042D** **Attachment B** **Filed *Ex Parte*, *In Camera* Under Seal** 21 July 2015

PLACEHOLDER FOR CLASSIFIED FILING

ATTACHMENT B - CLASSIFIED *EX PARTE*, *IN CAMERA*, UNDER SEAL DECLARATION, DATED 14 JULY 2015, FILED PURSUANT TO M.C.R.E. 505(h).

United States v. al Hadi.

APPELLATE EXHIBIT 035D

ATTACHMENT B
(Pages 11 to 14)

CLASSIFIED
EX PARTE/ IN CAMERA/UNDER SEAL

APPELLATE EXHIBIT 035D is located in original record of trial.

**POC: Chief, Office of Court Administration
Office of Military Commission**

ATTACHMENT C

MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY, CUBA

UNITED STATES OF AMERICA v. ABD AL HADI AL-IRAQI	**AE 035D/040D/042D** **Attachment C** 21 July 2015

Timeline of Discovery

The following dates are a timeline of discovery provided to the Defense regarding statements of the Accused. The dates are as follows:

a. 1 May 15 the Defense received hard drives containing statements of the Accused.[1]

b. 4 May 15 the Defense received summaries of the statements of the Accused.

c. 29 June 15 the Defense received four full verbatim English transcriptions of statements of the Accused.

d. 30 June 15 the Government filed AE 020J with the Commission providing notice of additional evidence to be used in the jurisdictional hearing.

e. 9 July 15 the Defense received four original Accused statements.

f. 19 July 15 the Defense received the precise Accused statements the Government was to use during the July hearing contained within the four statements in question.[2]

[1] While there were some technological difficulties with Defense reviewing a portion of the initial discovery on 1 May 15, the Defense caused additional delay by not promptly notifying the Government of the problem and not complying with Government requests to return the hard drives. Notwithstanding this particular issue with discovery on 1 May 15, the Defense received sufficient notice and subsequent content of Accused's statements to adequately prepare for the July hearings.

[2] This information was provided in excess of any discovery requirement as the specific statements were already included in the 29 June 15 discovery and the general nature of the Accused's statements were disclosed on 4 May 15.