

MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY, CUBA

UNITED STATES OF AMERICA

v.

KHALID SHAIKH MOHAMMAD, WALID
MUHAMMAD SALIH MUBARAK BIN
'ATASH, RAMZI BIN AL SHIBH, ALI
ABDUL-AZIZ ALI, MUSTAFA AHMED
ADAM AL HAWSAWI

AE419N (AAA)

Mr. al Baluchi's Response to
Government Unclassified Notice
Of Ex Parte, In Camera, Under Seal
Classified Filing

31 January 2019

1. **Timeliness:** This response is filed timely.
2. **Relief Sought:**

A. Mr. al Baluchi respectfully requests that the military commission deny AE419L (GOV Amend) Government Unclassified Notice of *Ex Parte, In Camera*, Under Seal Classified Filing and deny any relief the government may have requested within.

B. Alternatively, Mr. al Baluchi respectfully requests that the military commission order the United States to serve a copy of AE419L (GOV Amend) on counsel for the defendants.

C. In the further alternative, should the military judge grant the relief requested after an *ex parte* showing, the defense requests a published ruling detailing the legal basis and relevant findings of fact supporting those decisions.¹

¹ Regulations for Trial by Military Commission ¶ 17-4(b) (“The military judge shall state the reasons for that decision without revealing the *ex parte* nature of the underlying showing.”).

3. **Overview:**

The military commission rules do not authorize the government's *ex parte* submission of AE419L (GOV Amend).

4. **Argument:**

AE419L (GOV Amend) violates RMC 701(1)(2), which requires an adversarial “motion by a party” prior to *ex parte* proceedings. The government is not permitted to submit *ex parte* filings at its sole discretion; no statute or rule authorizes the government to file an *ex parte* pleading with nothing more than bare notice. AE419L (GOV Amend) lacks prior authorization, and the defense has not been provided with any description of the basis for the *ex parte* nature of the filing, nor opportunity to contest the use of an *ex parte* filing.

The requirement in RMC 701(1)(2) of an adversarial motion for leave prior to an *ex parte* filing was clearly put in place to limit the use of such *ex parte* filings – for, as the D.C. District Court noted, “*ex parte* proceedings, particularly in criminal cases, are contrary to the most basic concepts of American justice and should not be permitted except possibly in the most extraordinary cases involving national security.”² The D.C. Circuit has similarly stated that “fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights.”³

Military commissions necessarily oversee cases that involve classified information. As a result, the defense teams receive the same clearances and extensive training as the prosecution and the judiciary; they are provided with infrastructure, procedures, and safeguards for the handling of that information; and they are subject to constant oversight and potentially grievous penalties in

² *United States v. Rezaq*, 156 F.R.D. 514 (D.D.C. 1994), *modified*, 899 F. Supp. 697 (D.D.C. 1995).

³ *United States v. Libby*, 429 F. Supp. 2d 18, 24 (D.D.C. 2006).

the event of misuse or negligence. Many of the security concerns used in federal courts to justify hiding classified information from the defense⁴ have already been addressed and mitigated by the very structure of the military commissions.

Such a tactic represents exactly the type of abuse of the *ex parte* process that the courts forcefully warned against in *Libby* and *Rezaq* – and, unlike in those precedents, these pleadings were filed in a capital proceeding, in which constitutional safeguards are at their zenith. In AE419L, the government has once again provided the military commission with additional information regarding this case from undisclosed sources and has failed to comply with the R.M.C. while doing so.⁵ The secret, unilateral pleading in AE419L (GOV Amend) violates the Fifth and Eighth Amendments to the U.S. Constitution, and this commission should reject this further infringement upon the defendants’ Constitutional rights.

The prejudice to Mr. al Baluchi in this case is more severe because it appears that the military commission has communicated with the government without memorializing that communication for the record. For example, the military commission previously disclosed in a colloquy on the record the iterative process involved in the review, editing, and supplementing of the government’s pleadings during these *ex parte* communications.⁶ Mr. al Baluchi objects to this process, no matter how informal, continuing without a durable appellate record being created and preserved. Despite Mr. al Baluchi’s previous in-court objection, the fact that the government is

⁴ Or, in certain instances, even the existence of classified information.

⁵ As stated in greater detail in a series of similar filings, including AE292J (AAA) Motion to Reconsider AE292-2 Granting Leave for *Ex Parte* Submission and AE292EE (AAA) Response to Notice of Classified *Ex Parte* Filing by Special Trial Counsel, incorporated herein by reference.

⁶ Unofficial/Unauthenticated Transcript at 12966-68 (describing how the reviewed material will contain handwritten notes or other suggested edits regarding the material that is the subject of the *ex parte* communication).

filing supplements with no intervening communication of record from the military commission suggests that this practice is continuing. This extra-record procedure violates MCRE 505(f)(2)(B), which requires the preservation of “the entire presentation,” RMC 1103(a), which requires “a complete record of trial,” and RTMC 22-1, which requires a “complete record of the proceedings.” Such “off-the-record” *ex parte* communications are apparently part of the practice which led directly to the destruction of material, exculpatory evidence without notice to the defense.⁷ Every *ex parte* communication must become a part of the appellate record.

These problems are some of the many reasons why RMC 701(1)(2) requires a motion to file *ex parte* in advance of *ex parte* filings, and why § 949p-4(b)(2) only permits *ex parte* presentations “to the extent necessary to protect classified information.” These procedures allow the military commission, in an adversarial format, to address the need for and scope of *ex parte* proceedings. By arrogating to itself the authority to file *ex parte* without advance permission,⁸ the government has damaged the adversarial process envisioned by Congress and the Secretary of Defense and required by fundamental fairness.

5. **Request for Oral Argument:** Oral argument is requested.

⁷ See AE051E/AE052JJ (AAA) Joint Defense Motion for Stay of AE051B/AE052EE to Prevent Irreparable Harm; AE425 (Mohammad) Motion to Recuse Military Judge and the Current Prosecution Team and for Further Appropriate Relief; AE425E (AAA) Motion to Decline Joinder in Part to AE425 (MOH).

⁸ See AE419K (GOV) Government Updated Notice of Status of CIA Medical Record Discovery (giving notice of intent to file *ex parte*).

6. **Attachments:**

A. Certificate of Service.

Very respectfully,

//s//

JAMES G. CONNELL, III
Learned Counsel

//s//

STERLING R. THOMAS
Lt Col, USAF
Defense Counsel

//s//

ALKA PRADHAN
Defense Counsel

//s//

BENJAMIN R. FARLEY
Defense Counsel

//s//

MARK ANDREU
Capt, USAF
Defense Counsel

Counsel for Mr. al Baluchi

Attachment A

CERTIFICATE OF SERVICE

I certify that on the 31st day of January, 2019, I electronically filed the foregoing document with the Clerk of the Court and served the foregoing on all counsel of record by email.

//s//

JAMES G. CONNELL, III
Learned Counsel