

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

UNITED STATES OF AMERICA v. KHALID SHAIKH MOHAMMAD; WALID MUHAMMAD SALIH MUBARAK BIN ‘ATTASH; RAMZI BINAL SHIBH; ALI ABDUL AZIZ ALI; MUSTAFA AHMED ADAM AL HAWSAWI	AE 4190 ORDER Government Motion to Request Substitutions and Other Relief Regarding Classified Continuing and Trial Discovery 6 February 2019
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1. The Commission issues this order pursuant to the Military Commissions Act of 2009 (M.C.A.), 10 U.S.C. § 949p-4, Rule for Military Commission (R.M.C.) 701(f), and Military Commission Rules of Evidence (M.C.R.E.) 505(f).

2. Procedural History.

a. On 15 October 2018, the Government filed a motion¹ to request substitutions and other relief regarding classified discovery.

b. On 29 October 2018, Mr. Ali (a.k.a. al Baluchi) filed a response² to the Government’s unclassified notice.³ The response requested the Commission deny the Government motion and any relief requested on the grounds the R.M.C. do not authorize the Government’s *ex parte* submissions.

c. On 6 January 2019, the Commission examined the Government’s motion *ex parte* and in camera. The Commission determined from this examination that certain summaries and/or substitutions requested by the Government required revisions.

¹ AE 419L (GOV), Government Motion to Request Substitutions and Other Relief Regarding Classified Continuing and Trial Discovery, filed 15 October 2018.

² AE 419M (AAA), Mr. al Baluchi’s Response to Government Unclassified Notice of Ex Parte, In Camera, Under Seal Classified Filing, filed 29 October 2018.

³ AE 419L (GOV), Government Unclassified Notice Of *Ex Parte*, In Camera, Under Seal Classified Filing, filed 15 October 2018.

d. On 25 January 2019, the Government filed an amendment⁴ to their original motion revising those summaries and/or substitutions in accordance with the Commission's direction.

e. On 31 January 2019, Mr. Ali filed a response⁵ to the Government's unclassified notice⁶ of the amendment they filed to their original motion. The response requested the Commission deny the Government motion and any relief requested on the grounds the R.M.C. do not authorize the Government's *ex parte* submissions.

f. The Commission examined the Government's original motion and amendment *ex parte* and in camera. The motion requested the Commission authorize the Government to produce substitutions to the Defense instead of the underlying classified information that they posited, if disclosed, reasonably could be expected to damage the national security of the United States. The amendment revised one of those substitutions in accordance with the Commission's direction.

g. Specifically, in AE 419L (GOV) the Government provided the Commission with materials containing the Government-proposed substitutions regarding medical records pertaining to Messrs. Hawsawi, bin 'Attash, and Mohammad (Attach. B – E). The Commission specifically examined the underlying classified information and the Government's proposed substitutions of that information in that motion as described below:

(1) Attach. B contains certain medical records regarding Mr. Hawsawi. Within the attachment, the Government provided the Commission with three documents, each separated by a yellow sheet of paper. The first document is the original medical record. The second document provides English translations of a foreign language contained within the original medical record. The third document is the final Government-proposed substitution to be produced to cleared Defense Counsel.

⁴ AE 419L (GOV Amend), Government Motion to Request Substitutions and Other Relief Regarding Classified Continuing and Trial Discovery, filed 25 January 2019.

⁵ AE 419N (AAA), Mr. al Baluchi's Response to Government Unclassified Notice of Ex Parte, In Camera, Under Seal Classified Filing, filed 31 January 2019.

⁶ AE 419L (GOV Amend), Government Unclassified Notice of Ex Parte, *In Camera*, Under Seal Classified Filing, filed 25 January 2019.

(2) Attach. C contains certain other medical records regarding Mr. Hawsawi. The first document is the original medical record. The second document is the final Government-proposed substitution to be produced to cleared Defense Counsel.

(3) Attach. D contains medical records regarding Mr. bin ‘Attash. The first document is the original medical record. The second document is the final Government-proposed substitution to be produced to cleared Defense Counsel.

(4) Attach. E contains medical records regarding Mr. Mohammad. The first document is the original medical record. The second document is the final Government-proposed substitution to be produced to cleared Defense Counsel.

h. In 419L (GOV Amend), the Government amended its original motion by replacing Attach. B with a revised version that clarified the identity of a certain individual.

i. In examining the underlying classified intelligence information and the Government-proposed substitutions, the Commission considered the theories of defense⁷ advanced by counsel for Messrs. Ali,⁸ bin ‘Attash,⁹ and Hawsawi.¹⁰

j. The Commission also considered Mr. Ali’s objections as set forth in his response¹¹ to the Government’s original motion and his response¹² to the Government’s amendment.

⁷ AE 156C Order, Government’s *Ex Parte, In Camera* Motion and Memorandum for Second Protective Order Pursuant to M.C.A., 10 U.S.C. § 949p-4, and M.C.R.E. 505, dated 8 May 2013.

⁸ AE 156F (AAA), Defense *Ex Parte* Response to AE 156C Order, filed 22 May 2013. Although AE 419L does not include documents pertaining to Mr. Ali, the Commission considered Mr. Ali’s theory of defense to the extent it might still have an overall impact on the Commission’s determination of the adequacy of the proposed substitutions.

⁹ AE 275 (WBA), Mr. bin ‘Attash’s Notice of Reasons Supporting the Release to Defense Counsel of Classified Information Material to the Preparation of the Defense, filed 7 February 2014; supplanted by AE 275C (WBA), Mr. bin ‘Attash’s Notice of Reasons Supporting the Release to Defense Counsel of Classified Information Material to the Preparation of the Defense, filed 1 June 2015; and AE 275C (WBA SUP), Mr. bin ‘Atash’s Notice of Reasons Supporting the Release of Classified Information Material to the Preparation of the Defense, filed 10 June 2016.

¹⁰ AE 156O (MAH), Mr. Hawsawi’s *Ex Parte* and Under Seal Response to Order AE 156C/AE 073C/AE 156-2, Requesting Theories of Defense, filed 2 May 2014; AE 156O (MAH Sup) Supplement to Mr. al Hawsawi’s *Ex Parte* and Under Seal Response to Order 156C/AE 073C/AE 156-2, Requesting Theories of Defense, filed 2 March 2015.

¹¹ AE 419M (AAA).

¹² AE 419N (AAA).

Specifically, he requested the Commission deny the Government motion; direct service of the Government motion on the Accused; or state the legal basis for the decision of the Commission in granting the motion.

k. Mr. Ali requested oral argument on the issues in AE 419M (AAA) and 419N (AAA). In accordance with R.M.C. 905(h), the decision to grant oral argument on a written motion is within the sole discretion of the Military Judge. In this instance, oral argument is not necessary to the Commission's consideration of the issues before it. The Defense request for oral argument is **DENIED** for both motions.

3. Law.

a. The M.C.A. 2009 authorized the Government to provide *ex parte* submissions to the Commission "to the extent necessary to protect classified information from disclosure, in accordance with the practice of Federal courts under the Classified Information Procedures Act [(CIPA)]."¹³

b. Before the Government may request to "delete, withhold, or otherwise obtain other relief with respect to the discovery of or access to any classified information," the Government must provide the Commission a declaration invoking the United States' classified information privilege and setting forth the damage to national security the discovery of, or access to, such classified information reasonably could be expected to cause. This declaration must be signed by a "knowledgeable United States official possessing authority to classify information."

c. The M.C.A. further empowers the Military Judge to authorize the Government to: (1) "delete or withhold specified items of classified information;" (2) "substitute a summary for classified information;" or (3) "substitute a statement admitting relevant facts that the classified information or material would tend to prove."¹⁴

¹³ 10 U.S.C. § 949p-7(c)(2).

¹⁴ 10 U.S.C. § 949p-4(b)(1)(A-C).

d. These procedures for protecting classified information in military commissions are similar to procedures for courts-martial¹⁵ and Federal courts pursuant to CIPA.¹⁶

e. The M.C.A. requires the Commission to grant a Government request to substitute a summary or a statement admitting relevant facts “if the military judge finds that the summary, statement, or other relief would provide the accused with substantially the same ability to make a defense as would discovery of or access to the specific classified information.”¹⁷

4. Findings.

a. In AE 419L (GOV), the Government incorporated declarations by reference,¹⁸ invoking the classified-information privilege and setting forth the damage to the national security that discovery of, or access to, the underlying classified documents reasonably could be expected to cause.¹⁹

b. The declarations were signed by knowledgeable United States officials with authority to classify information.

c. The Government’s proposed substitutions, as amended, are an adequate alternative to discovery of the underlying classified information.

d. The proposed substitutions, as amended, will provide the Accused with substantially the same ability to make a defense as would discovery of, or access to, the underlying classified information.²⁰

5. Ruling.

a. The relief requested by Mr. Ali in AE 419M (AAA) is **GRANTED IN PART**; the legal basis for the Commission’s determination of the Government’s motion is set out in the preceding paragraphs. The motion is otherwise **DENIED**.

¹⁵ (See M.C.R.E. 505).

¹⁶ (See 18 U.S.C. App. 3).

¹⁷ 10 U.S.C. § 949p-4(b)(3).

¹⁸ Citing AE 463A (GOV), Government Notice of Declarations Filed to Date under Military Commission Rule of Evidence 505, filed 22 December 2016; AE 463A (GOV Sup), Government Notice of Declarations Filed to Date under Military Commission Rule of Evidence 505, filed 17 March 2017.

¹⁹ See 10 U.S.C. § 949p-4(a)(1).

²⁰ See 10 U.S.C. § 949p-4(b)(3).

b. Having considered the Government's motion, proposed substitutions, the theories of defense, and any materials that may be incorporated by reference or otherwise attached, the Commission rules as follows: AE 419L (GOV), as amended by AE 419L (GOV Amend) is **GRANTED**.

6. Order.

a. The Commission authorizes the Government to produce to the Defense its proposed substitutions and summaries in AE 419 (GOV), as amended by AE 419L (GOV Amend), in lieu of the underlying classified information. By producing the substitutions and summaries, the Government will have met its discovery obligations with regard to those documents.

b. This order does not abrogate the Government's continuing obligation to produce discovery required by the R.M.C.

c. The Government's classified, *ex parte*, and in camera motion and its classified attachments shall remain *ex parte* and in camera until further order of this Commission.

d. This Commission seals and preserves the Government's entire *ex parte*, in camera presentation (including the Government's motion, the underlying classified information, the proposed substitutions and summaries, and any other attachments, including any attachments that may be incorporated by reference) in the records of this Commission to be made available to an appellate court in the event of an appeal.

So **ORDERED** this 6th day of February, 2019.

//s//
K. A. Parrella
Colonel, U. S. Marine Corps
Military Judge