

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

UNITED STATES OF AMERICA

v.

**KHALID SHAIKH MOHAMMAD;
WALID MUHAMMAD SALIH
MUBARAK BIN ‘ATTASH;
RAMZI BIN AL SHIBH;
ALI ABDUL AZIZ ALI;
MUSTAFA AHMED ADAM
AL HAWSAWI**

AE 542DD

ORDER

Government Motion
to Request Substitutions and Other Relief
Regarding Classified Continuing and Trial
Discovery

7 February 2019

1. The Commission issues this order pursuant to the Military Commissions Act (M.C.A.) 2009, 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 August 2018, the Government filed a motion¹ to request substitutions and other relief regarding classified discovery the Government intended to provide to the Defense pursuant to their continuing discovery duty. *See* R.M.C. 701(i).

b. On 17 August 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 24 January 2018, the Commission examined the Government's motion *ex parte* and *in camera*. The motion requested the Commission authorize the Government to produce summaries and/or substitutions to the Defense, instead of the underlying classified information

¹ AE 542M (GOV), Motion to Request Substitutions and Other Relief Regarding Classified Continuing and Trial Discovery, filed 15 August 2018.

² AE 542N (AAA), Mr. al Baluchi's Response to Government Unclassified Notice of *Ex Parte*, *In Camera*, Under Seal Classified Filing, filed 17 August 2018.

³ AE 542M (GOV), Government Unclassified Notice of *Ex Parte*, *In Camera*, Under Seal Classified Filing, filed 15 August 2018.

they posited, if disclosed, reasonably could be expected to damage the national security of the United States.

d. In AE 542M (GOV), the Government provided the Commission with two substantive attachments, Attachs. B and C. Attach B. contains certain original classified information and the Government's proposed summaries and/or substitutions for that classified information. Attach. C contains a signed declaration. The Commission specifically examined the underlying classified information and the Government's proposed summaries and/or substitutions of the information contained in Attach. B as described below:

1) Attach. B begins with an index that lists the discovery materials that follow. There are three versions of the index separated by yellow tabs (one version for the Military Judge, one "red-lined" version, indicating changes made to the final version that will be produced to cleared Defense Counsel, and the final version that will produced to cleared Defense Counsel).

2) Tabs 1 and 2 contain classified material that the Government believes is responsive to the issue of the state of hostilities between the U.S. and al Qaeda before 11 September 2001. In these tabs the Government provided the Commission with three documents separated by a yellow sheet of paper. The first document is the original classified information. The second document is a red-lined version of the original classified information that indicates the specific modifications proposed by the Government for production to cleared Defense Counsel. The third document is the Government-proposed substitution to be produced to cleared Defense Counsel.

e. In examining the underlying classified information and the Government-proposed substitutions, the Commission considered the theories of defense⁴ advanced by counsel for Messrs. Ali,⁵ bin ‘Attash,⁶ and Hawsawi.⁷

f. The Commission also considered Mr. Ali’s objections as set forth in his response⁸ to the Government’s motion. 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.

g. Mr. Ali requested oral argument on the issues in AE 542N (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**.

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

⁴ 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.

⁵ AE 156F (AAA), Defense *Ex Parte* Response to AE 156C Order, filed 22 May 2013.

⁶ 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.

⁷ 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/AE073C/AE 156-2, Requesting Theories of Defense, filed 2 March 2015.

⁸ AE 542N (AAA).

accordance with the practice of Federal courts under the Classified Information Procedures Act [(CIPA)].”⁹

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.”¹⁰

d. These procedures for protecting classified information in military commissions are similar to procedures for courts-martial¹¹ and Federal courts pursuant to CIPA.¹²

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.”¹³

⁹ 10 U.S.C. § 949p-7(c)(2).

¹⁰ 10 U.S.C. § 949p-4(b)(1)(A-C).

¹¹ (*See* M.C.R.E. 505).

¹² (*See* 18 U.S.C. App. 3).

¹³ 10 U.S.C. § 949p-4(b)(3).

4. Findings.

a. In AE 542M (GOV), the Government attached a signed declaration at Attach C, and incorporated previously filed declarations by reference,¹⁴ 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.¹⁵

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

c. The Government's proposed summaries and/or substitutions are an adequate alternative to discovery of the underlying classified information.

d. The proposed substitutions and/or summaries will provide the Accused with substantially the same ability to make a defense as would discovery of, or access to, the underlying classified information.¹⁶

5. Ruling.

a. The relief requested by Mr. Ali in AE 542N (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**.

b. Having considered the Government's motion, proposed summaries and/or substitutions, the theories of defense, and any materials that may be incorporated by reference or otherwise attached, the Commission rules as follows: AE 542M (GOV) is **GRANTED**.

¹⁴ 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; AE 574 (GOV), Government Motion and Memorandum for a Protective Order Requesting a Substitute, Substituted Evidentiary Foundation, and Limitations on Cross-Examination and Other In-Court References, Pursuant to the M.C.A., 10 U.S.C. § 949p-4, § 949p-6, and M.C.R.E. 505, filed 1 June 2018.

¹⁵ See 10 U.S.C. § 949p-4(a)(1).

¹⁶ See 10 U.S.C. § 949p-4(b)(3).

6. Order.

a. The Commission authorizes the Government to produce to the Defense its proposed substitutions and summaries 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 7th day of February, 2019.

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