

UNCLASSIFIED//FOR PUBLIC RELEASE  
MILITARY COMMISSIONS TRIAL JUDICIARY  
GUANTANAMO BAY, CUBA

<b>UNITED STATES OF AMERICA</b>  v.  <b>KHALID SHAIKH MOHAMMAD, WALID MUHAMMAD SALIH MUBARAK BIN ‘ATTASH, RAMZI BIN AL SHIBH, ALI ABDUL AZIZ ALI, MUSTAFA AHMED ADAM AL HAWSAWI</b>	<b>AE 551I</b>  <b>RULING</b>  <b>Mr. al Baluchi’s Motion to Dismiss For the Government’s Denial of a Public Trial</b>  <b>20 December 2018</b>
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**1. Procedural Background.**

a. On 2 February 2018, Mr. Ali (a.k.a. Mr. al Baluchi) filed AE 551 (AAA)<sup>1</sup> requesting the Commission dismiss the charges, citing the Government’s failure to afford him a public trial. The Government responded in opposition on 16 February 2018.<sup>2</sup> Mr. Ali replied on 23 February 2018.<sup>3</sup> Subsequently, Mr. Ali filed three supplements,<sup>4</sup> two of which generated Government responses<sup>5</sup> and Defense replies.<sup>6</sup>

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<sup>1</sup> AE 551 (AAA), Mr. al Baluchi’s Motion to Dismiss For the Government’s Denial of a Public Trial, filed 2 February 2018.

<sup>2</sup> AE 551A (GOV), Government Response To Mr. Ali’s Motion to Dismiss For the Government’s Denial of a Public Trial, filed 16 February 2018.

<sup>3</sup> AE 551B (AAA), Defense Reply to AE 551A (GOV) Government Response to Mr. al Baluchi’s Motion to Dismiss for the Government’s Denial of a Public Trial, filed 23 February 2018.

<sup>4</sup> AE 551 (AAA Sup), Mr. al Baluchi’s Supplement to AE 551, filed 9 April 2018; AE 551 (AAA 2<sup>nd</sup> Sup), Mr. al Baluchi’s Second Supplement to AE 551, filed 22 June 2018; and AE 551 (AAA 3<sup>rd</sup> Sup), Mr. al Baluchi’s Third Supplement to AE 551, filed 17 October 2018.

<sup>5</sup> AE 551E (GOV), Government Response To AE 551 (AAA 2<sup>nd</sup> Sup), Mr. Ali’s Second Supplement to AE 551, Mr. Ali’s Motion To Dismiss For the Government’s Denial of a Public Trial, filed 6 July 2018; and AE 551G (GOV), Government Response To AE 551 (AAA 3<sup>rd</sup> Sup), Mr. Ali’s Third Supplement to AE 551, Mr. Ali’s Motion To Dismiss For the Government’s Denial of a Public Trial, filed 31 October 2018.

<sup>6</sup> AE 551F (AAA), Mr. al Baluchi’s Reply to AE 551E (GOV), Government Response to AE 551 (AAA 2<sup>nd</sup> Sup), Mr. al Baluchi’s Second Supplement to AE 551, Mr. al Baluchi’s Motion to Dismiss for the Government’s Denial of a Public Trial, filed 13 July 2018; and AE 551H (AAA), Mr. al Baluchi’s Reply to AE 551G (GOV), Government Response To AE 551 (AAA 3<sup>rd</sup> Sup), Mr. al Baluchi’s Third Supplement to AE 551, Mr. al Baluchi’s Motion to Dismiss For the Government’s Denial of a Public Trial, filed 6 November 2018.

b. The Commission received evidence and heard argument on this motion on 26 February 2018,<sup>7</sup> 1 March 2018,<sup>8</sup> 23 July 2018,<sup>9</sup> and 14 November 2018<sup>10</sup> at U.S. Naval Station, Guantanamo Bay, Cuba (NSGB).

2. **Findings of Fact.** The Commission makes the following findings of fact:

a. As the Defense motion concedes, the public has access to view the proceedings of this Commission by traveling to NSGB or by remotely viewing the proceedings from Fort Meade, Maryland. While the Defense claims “[t]he general public continues to face the logistical difficulty (or impossibility) of traveling either to a single remote viewing site or to Naval Station, Guantanamo Bay, Cuba, to watch the proceedings,”<sup>11</sup> no evidence was submitted to support the alleged “impossibility.”

b. Pursuant to previous orders of the Commission, public access to the proceedings are available live at the NSGB courtroom and by closed-circuit television on NSGB and at locales in the Continental United States.<sup>12</sup> The Government response directed the Commission’s attention to the Twitter feed of Miami Herald reporter, Carol Rosenberg, as evidence that at least one member of the media has been present for the vast majority of the sessions of the Commission and has reported events in near real time,<sup>13</sup> a contention that is not disputed by the Defense, is consistent with the Commission’s personal observations, and is supported by the evidence.

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<sup>7</sup> Unofficial/Unauthenticated Transcript of the *U.S. v. Khalid Shaikh Mohammad et al.*, Motions Hearing Dated 26 February 2018 from 1:23 P.M. to 2:57 P.M. at pp. 18928-18959.

<sup>8</sup> Transcript Dated 1 March 2018 from 9:05 A.M. to 9:54 A.M. at pp. 18968-18969.

<sup>9</sup> Transcript Dated 23 July 2018 from 9:07 A.M. to 10:43 A.M. at pp. 19944-20305.

<sup>10</sup> Transcript Dated 14 November 2018 from 9:04 A.M. to 10:23 A.M. at pp. 21388-21437.

<sup>11</sup> AE 551 (AAA) at 1.

<sup>12</sup> See AE 007H, Order, Government Motion To Amend AE 007B Order On The Government Motion For Public Access To Open Proceedings Of This Military Commission Via Close-Circuit Television Transmission to Remote Locations, dated 2 February 2016.

<sup>13</sup> AE 551A (GOV) at 5 and fn. 4.

c. The Regulation for Trial by Military Commission (2011) (R.T.M.C.) created a regulatory scheme whereby certain documents, those not requiring security classification review, were to be published to the Office of Military Commissions (OMC) Website within one day of their filing.<sup>14</sup> However, a different provision requires a determination that a document contains no classified information be made, “in consultation with DoD Security Classification/Declassification Review Team and any appropriate non-DoD federal department and agency.”<sup>15</sup> Consistent with the interpretation of the relevant provisions by the previously assigned Military Judge,<sup>16</sup> and the office of the Convening Authority,<sup>17</sup> the consultation provision has been applied in a manner which has resulted in all pleadings, classified or not, undergoing the more laborious classification review process intended for classified (or arguably classified) filings. Even so, the Regulation requires that the security review “shall generally take no longer than 15 business days” and that any deviation from the 15-day deadline generate a notice to the Chief Clerk declaring that “additional time is required by exceptional circumstances.”<sup>18</sup>

d. While the majority of unclassified filings and unofficial transcripts of open sessions have been posted to the OMC Website, compliance with the timelines established by the R.T.M.C. (at least as to filings) has, since at least 2017, been the exception rather than the rule. Likewise, a significant number of filings remain unpublished. As to classified filings, compliance with the requirement to publish redacted versions has been virtually non-existent

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<sup>14</sup> See R.T.M.C. 19-4.c.1.

<sup>15</sup> R.T.M.C. 17-1.c.3.

<sup>16</sup> “The way I read those two things together is that every filing must go to the DoD security classification/declassification review team, which is a de facto OCA [Original Classification Authority] review. That’s how I read the regulation. Accordingly, there is no one-day track A in the regulations.” Transcript dated 1 March 2018 from 9:05 A.M. to 9:54 A.M. at p. 18968.

<sup>17</sup> AE 551D (AAA), Defense In-Court Submission.

<sup>18</sup> R.T.M.C. 19-4.c.2.

notwithstanding a previous order from this Commission directing the Government to comply with its own regulations in this regard.<sup>19</sup> As to transcripts of closed hearings, although no rule requires they be published, compliance with the Commission's orders that they be published in redacted form had also been virtually non-existent until February 2018 when the Commission began issuing rulings requiring redacted transcripts of closed hearings to be made public within 30 days of the hearing.<sup>20</sup>

### 3. Law.

a. A well-established, but qualified, right to open judicial proceedings is enjoyed by the public under both the common law and the First Amendment, and by criminal defendants under the Sixth Amendment. *Waller v. Georgia*, 467 U.S. 39, 44-47 (1984). "The requirement of a public trial is for the benefit of the accused; that the public may see he is fairly dealt with and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of their functions . . . ." *Id.* at 46 (1984), (*citations omitted*). In holding the public trial right pertained at the pre-trial phase, the Supreme Court noted, "In addition to ensuring that judge and prosecutor carry out their duties responsibly, a public trial encourages witnesses to come forward and discourages perjury. . . . These aims and interests are no less pressing in a hearing to suppress wrongfully seized evidence." *Id.* at 46-47 (*internal citations omitted*).

b. The Military Commissions Act of 2009 (M.C.A.) allows a military judge to close proceedings to the public only "upon making a specific finding" that closure is necessary to (1) "protect information the disclosure of which could reasonably be expected to cause damage to

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<sup>19</sup> Transcript Dated 29 January 2013 from 2:06 P.M. to 4:38 P.M. at p. 1642.

<sup>20</sup> Compare AE 530GG, Ruling, Pursuant to Military Commission Rule of Evidence 505(h) and Rule for Military Commissions 806(b)(2), dated 9 January 2018 with AE 144CC, Ruling, Pursuant to Military Commission Rule of Evidence 505(h) and Rule for Military Commissions 806(b)(2), dated 28 February 2018.

the national security . . . .”; or (2) “ensure the physical safety of individuals.” M.C.A. § 949d(c).

*See also* Rule for Military Commissions (R.M.C.) 806.

c. “A court's duty to enforce an agency regulation is most evident when compliance with the regulation is mandated by the Constitution or federal law.” *United States v. Caceres*, 440 U.S. 741, 749 (1979). “Regulations governing the conduct of criminal investigations are generally considered desirable, and may well provide more valuable protection to the public at large than the deterrence flowing from the occasional exclusion of items of evidence in criminal trials. . . . [W]e cannot ignore the possibility that a rigid application of an exclusionary rule to every regulatory violation could have a serious deterrent impact on the formulation of additional standards to govern prosecutorial and police procedures.” *Id.* at 755-56.

d. *United States v. McGraner*, highlighted considerations relevant to determining whether a regulation confers upon an accused an enforceable right. Those considerations include whether the regulation purported to create such a right, whether the regulation was primarily for “administrative” purposes rather than to protect the rights of accused persons, proportionality of the proposed remedy, and any distinguishing factors such as reliance by the accused or an indication that the regulation was intended to “provide specificity to some general standard contained in the Constitution, the Uniform Code or the Manual for Courts-Martial.”<sup>21</sup>

e. “Rules applicable to the construction of statutes are applicable, generally speaking, to the construction of regulations.” *United States v. Scott*, 46 C.M.R. 25, 28 (1972). “[I]t is an elementary rule of construction that effect must be given, if possible, to every word, clause and sentence of a statute.”<sup>22</sup> “A statute is passed as a whole and not in parts or sections and is animated by one general purpose and intent. Consequently, each part or section of a statute

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<sup>21</sup> *United States v. McGraner*, 13 M.J. 408, 417-18 (C.M.A. 1982).

<sup>22</sup> Each Word Given Effect, 2A Sutherland Statutory Construction, § 46:6 (7<sup>th</sup> ed.).

should be construed in connection with every other part or section to produce a harmonious whole.”<sup>23</sup>

#### 4. Analysis/Ruling/Order.

##### a. Motion to Dismiss for Lack of Public Trial.

(1) The Commission is and has been sufficiently public to satisfy the purposes set forth in *Waller*. The Commission has been diligent to minimize closed hearings and to confine those hearings to matters specifically authorized for such a setting in accordance with M.C.A. 949d(c) and R.M.C. 806. The press and the public have had the opportunity to view all open proceedings and to view at no cost and in a relatively contemporaneous timeframe, transcripts of those proceedings. The public has also had access free of charge,<sup>24</sup> albeit belatedly, to the vast majority of unclassified pleadings filed with the Commission and the Commission’s rulings thereon.

(2) Since at least 2017, the Government has been habitually and significantly delinquent in meeting the timelines set forth in the R.T.M.C. as to the posting of filings to the OMC website. Whether and to what degree this delinquency warrants intervention by the Commission depends on several factors. Applying the *McGraner* factors, it is clear that the requested remedy of dismissal is neither required nor advisable:

(a) *Stated Purpose*. The R.T.M.C. specifically disclaims any purpose to “create any substantive right enforceable by any party.” R.T.M.C. 1-1.b. While the same paragraph further purports to bind “all persons subject to this Regulation” to adhere to its “guidance,” *id.*, overall supervision and administration of the military commissions is made the

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<sup>23</sup> “Whole statute” interpretation, 2A Sutherland Statutory Construction, § 46:5 (7<sup>th</sup> ed.).

<sup>24</sup> This right to records at no charge exceeds even the public’s right to records through the Federal Judiciary’s PACER system, which charges \$.10 per page. *See* Electronic Public Access Fee Schedule, [https://www.pacer.gov/documents/epa\\_feesched.pdf](https://www.pacer.gov/documents/epa_feesched.pdf).

responsibility of the Secretary of Defense. R.T.M.C. 1-3. It is clear the regulation did not intend to invest day-to-day administration of the R.T.M.C. in an ongoing Commission.

(b) *Apparent Purpose.* Further analyzing the R.T.M.C., it is clear that the regulation was drafted to serve primarily administrative purposes such as assigning responsibilities and defining processes necessary for the efficient functioning of the Commissions. Looking to the provisions relating to public posting of pleadings, the R.T.M.C. provide, “[T]he goal of the DoD is to make military commissions accessible to the public to the maximum extent possible, consistent with the interests of national security, the rights of the accused, and any other interests protected by law.” R.T.M.C. 19-1. From this, it is clear the rights of the accused were a consideration but not the primary purpose motivating the provision. The relevant provisions detail how that balance between public access and the countervailing considerations is struck.

(c) *Requested Remedy.* In light of the regulation’s stated and apparent purposes, it is clear that the Accuseds’ requested remedy of dismissal is disproportionate and would result in a windfall. This is especially the case in light of the previously mentioned measures which are currently being employed to assure an effectively public process. As was the case in *McGraner*, attaching such a drastic remedy would deter the well-intentioned effort to promulgate a regulation aimed at achieving a laudable level of transparency.

(d) *Other Factors.* Finally, there is no indication that any Accused have detrimentally relied on any of the procedures set forth in the regulation or that the provisions were intended to enact any Constitutional or statutory protection. In fact, the only statutory provision cited in the M.C.A., is that pertaining to closed sessions. M.C.A. § 949d(c). The R.T.M.C. provisions are clearly a determination to provide greater transparency than that

required by the M.C.A., an admirable undertaking for which the Government should not be punished.

(e) *Conclusion.* Applying the *McGraner* factors, it is clear that the public access provisions of the R.T.M.C. were not intended to and did not create enforceable rights by any Accused. They represent an administrative scheme for the handling of records and as such should generally be enforced by those assigned that responsibility per the regulation itself.

(3) **Ruling.** The Motion to Dismiss is **DENIED**.

**b. R.T.M.C. Compliance.**

(1) Regardless of whether the Commission is the appropriate entity to enforce compliance with the R.T.M.C., to the extent the Commission interprets the regulation, it must do so accurately and in accordance with sound legal principles. In this context, the Commission is compelled to revisit a particular prior interpretation of the R.T.M.C. and to more rigorously apply the rules of statutory (and by extension regulatory) construction.

(a) The plain language of R.T.M.C. 19-4.c intended to create a bifurcated process whereby certain documents could be published in rapid fashion without need of classification review while others would be subject to more intense scrutiny warranting additional time for analysis and redaction. The only provision introducing any ambiguity into the analysis is the requirement that the Trial Judiciary Court Security Officer (CSO)<sup>25</sup> “in consultation with the DoD Security Classification/Declassification Review Team [SC/DRT] and any appropriate non-DoD federal department and agency, determine whether the filing or document contains classified information . . . .” R.T.M.C. 17-1.c.3. The Commission has previously held, in effect, that this latter provision renders almost meaningless the articulated

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<sup>25</sup> The CSO is also referred to as the Court Information Security Officer (CISO).

bifurcation called for by paragraph 19-4.c. Such an interpretation, however, violates the canon of statutory construction that the regulation should be construed in such a manner as to give effect to all of its provisions. Whatever the “consultation” envisioned by the regulation entails, in light of the purpose of the regulation to promote transparency “to the maximum extent possible,” that purpose is undermined by a reading requiring even the most mundane and obviously unclassified filing to undergo a lengthy review process by agencies with no discernable equities in the document. Such an interpretation would (and by all account has) clogged the review process with volumes of obviously unclassified material. The Commission instead interprets the consultation requirement to only pertain to those documents as to which some question of classification remains after review by the CSO and those filed under seal pursuant to R.T.M.C. 17-1.c.1.<sup>26</sup> Accordingly, the Commission directs the Chief Clerk to send all documents not requiring classification security review directly to the OMC Webmaster for posting within one business day per R.T.M.C. 19-4.c.1.

(b) For those filings requiring classification security review, the Commission directs the Chief Clerk to promptly upon acceptance, deliver such filings to the DoD SC/DRT.<sup>27</sup> If the classification review cannot be completed within the R.T.M.C.’s timeline, the appropriate non-DoD federal department or agency original classification authority

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<sup>26</sup> To the extent the parties have not been permitted to make use of the procedure set forth in R.T.M.C. 17-1.c.1, that prohibition is lifted. Counsel utilizing this provision will apprise the Chief Clerk and CSO of the questioned portions of the filing and the basis for their concern. Defense Filings utilizing this procedure shall also be accompanied by a certification that the Defense has followed the process set forth in paragraph 4.d of AE 013BBBB, *Third Amended Protective Order #1 To Protect Against Disclosure of National Security Information*, dated 6 July 2015, and that process has after 15 days from submission for security review, failed to produce adequate guidance as to the appropriate classification and marking of the document in question.

<sup>27</sup> The Commission is aware that past practice entailed the CSO transporting a disk to non-DoD entities for classification security review. In accordance with the R.T.M.C., the Commission intends for the DoD SC/DRT to serve as the conduit for all future classification security reviews. The DoD SC/DRT may, in turn, forward documents requiring classification security review to any non-DoD entity it deems appropriate since the DoD SC/DRT is the entity best positioned to determine which non-DoD federal departments or agencies (if any) have equities in a particular filing.

or the Officer in Charge of the DoD SC/DRT will submit an appropriate notification to the Chief Clerk in accordance with R.T.M.C. 19-4. Consistent with R.T.M.C. 1.1, the failure to post a particular document to the OMC Website within a given timeline, or to adhere with the other timelines set forth within R.T.M.C. 17-1 or 19-4, will not - in itself - constitute a basis for substantive relief.

(c) As requested by the parties, the Commission will also provide guidance as to the priority for those filings requiring classification security review. To the extent possible, the Government shall make all reasonable efforts to prioritize the classification security review and public posting of (1) Docket and Scheduling Orders, (2) other commission rulings and orders, (3) filings associated with an upcoming session of court, and (4) other filings or transcripts as directed by the Commission.

(d) The Commission is aware of other areas of inefficiency and regulatory non-compliance which have evolved over time. At present, the Commission simply registers its concern that, to the extent the regulatory framework is unworkable, it is incumbent upon those charged with its creation and administration to make appropriate course corrections.

(2) **Order.** (1) Commencing **16 January 2019**, the Chief Clerk will send all filings that do not require a classification security review directly to the OMC Webmaster for posting per R.T.M.C. 19-4.c.1; (2) Commencing **16 January 2019**, the Chief Clerk will send filings requiring a classification security review to the DoD SC/DRT to coordinate appropriate classification review;<sup>28</sup> and (3) Commencing immediately, the Government shall make all

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<sup>28</sup> By default, the Chief Clerk will deliver all matters requiring classification security review to the Officer in Charge of the DoD SC/DRT. The Government may, no later than 9 January 2019, propose an alternative point-of-contact within the DoD SC/DRT to serve as the point of contact for receipt of documents from the Chief Clerk.

reasonable efforts to prioritize the classification security review and public posting of filings to adhere to the guidance set forth in paragraph 4.b.(1)(c) above.

So **ORDERED** this 20th day of December, 2018.

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