

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

AE586B (AAA)

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

10 May 2019

1. **Timeliness:** This response is filed timely.

2. **Relief Sought:**

A. Mr. al Baluchi respectfully requests that the military commission deny

AE586 (GOV Sup) 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 AE586 (GOV Sup) 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 that decision.<sup>1</sup>

3. **Overview:**

The military commission rules do not authorize the government’s *ex parte* submission of AE586 (GOV Sup).

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<sup>1</sup> 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.”).

4. **Argument:**

AE586 (GOV Sup) violates RMC 701(l)(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. AE586 (GOV Sup) lacks prior authorization, and the defense has not been provided with any description of the basis for the *ex parte* nature of the filings, nor opportunity to contest the use of an *ex parte* filing.

The requirement in RMC 701(l)(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.”<sup>2</sup> The D.C. Circuit has similarly stated that “fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights.”<sup>3</sup>

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 the event of misuse or negligence. Many of the security concerns used in federal courts to justify

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

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

hiding classified information from the defense<sup>4</sup> have already been addressed and mitigated by the very structure of the military commissions.

When the government merely provides notice of an *ex parte* filing, it assumes the legitimacy of a one-sided, unopposed filing within the filing itself, thereby eliminating a critical safeguard created by RMC 701(1)(2). Without any hint as to the content of these filings, counsel for Mr. al Baluchi can only speculate as to its purpose.

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 AE586 (GOV Sup), 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.<sup>5</sup> The secret, unilateral pleading in AE586 (GOV Sup) violates the Fifth and Eighth Amendments to the U.S. Constitution, and this commission should reject this further infringement upon the defendants’ Constitutional rights.

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

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<sup>4</sup> Or, in certain instances, even the existence of classified information.

<sup>5</sup> 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. **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 10th day of May, 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*