

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

AE611M (AAA)

Mr. al Baluchi's Motion
for 505(h) Hearing

22 January 2019

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

2. **Relief Sought:**

- a. Mr. al Baluchi respectfully requests that the military commission hold a hearing pursuant to MCRE 505(h)(1)(A) on each motion for which notice has been given prior to argument on the motion.
- b. Mr. al Baluchi respectfully requests that the military commission narrowly tailor any in camera hearing under MCRE 505(h) to closure necessary to protect information for which the government has validly claimed classified information privilege.
- c. Mr. al Baluchi respectfully requests that the military commission order the prosecution to provide the defendants with notice of the classified information that is at issue pursuant to MCRE 505(h)(2)(A).

3. **Overview:** Mr. al Baluchi requests a 505(h) hearing in connection with all 505(g) notices, which is mandatory under MCRE 505(h)(1)(B), but the prosecution must first identify the specific classified information at issue. Mr. al Baluchi further requests a 505(h) hearing in connection with AE575F (GOV) Government Notice Pursuant to M.C.R.E. 505(h)(2)(A). Under the First and

Sixth Amendments, Military Commissions Act, and MCRE 806(b)(2), this military commission must narrowly tailor any *in camera* proceedings to only the closure necessary to protect material protected by the classified information privilege. The Fifth and Sixth Amendments, and the Military Commissions Act, also require the presence of Mr. al Baluchi, if he elects to attend.

4. Facts:

- a. On 28 December 2018, the military commission issued AE611(Sup) *Supplemental* Docket Order.
- b. On 4 January 2019, Mr. al Baluchi filed AE611I (AAA) Mr. al Baluchi's Response to AE611 (Sup) Docket Order (Proposed Order of March). This document listed prior 505(h) hearings and orders, as well as the 505(g) notices filed at the time. The Proposed Order of March suggested adding certain motions and issues to the docket.
- c. On 7 January 2019, the government filed AE611K (GOV) Government Response to Mr. al Baluchi's Proposed Order of March. The government objected to adding some but not all of the motions and issues suggested by Mr. al Baluchi.

5. Burden of Proof: Upon request of either party pursuant to M.C.R.E. 505(h)(1)(B), the military judge shall conduct a hearing to make all determinations concerning the use, relevancy, or admissibility of classified information prior to conducting any further proceedings.

6. Argument:

A. The military commission must conduct the 505(h) hearing prior to hearing arguments on the related motions.

Of the motions listed in AE611I, Mr. al Baluchi seeks a 505(h) hearing on the following:

Underlying motion	505(g)/(h) notice	Prior 505(h) orders
AE118	AE118K (AAA)	AE118I
AE133RR	AE133CCC	AE133VV
AE561 (AAA)	AE561G (AAA)	AE561D; AE561F
AE574G (AAA)	AE574H (AAA)	
AE575 (GOV)	AE575C (AAA); AE575E (WBA); AE575F (GOV)	
AE599 (WBA)	AE599D (WBA)	
AE600 (AAA)	AE600A (AAA)	
AE601A (AAA)	AE601A (AAA)	

The government does not object to adding AE133RR to the docket, but claims that no additional oral argument is necessary on AE118.¹

As Mr. al Baluchi has previously argued, addressing the substantive motion prior to the 505(h) hearing prejudices his ability to make arguments in support of his motions. MCRE 505(h)(1)(B) provides that the military commission “shall conduct such a hearing and shall rule prior to conducting any further proceedings” precisely to avoid such prejudice. By reversing the order of the 505(h) hearing and the argument session, the military commission prevents the defendant from advancing all of the arguments available to him.

B. The prosecution must identify the classified information at issue in the MCRE 505(h) hearing.

Pursuant to MCRE 505(g), Mr. al Baluchi through counsel has notified the government and military commission of documents and information marked as or suspected to be classified

¹ AE611K (GOV) at 3. In fact, the government’s filing in AE606 (GOV) Government Notice of Updated Classified Information Handling Guidance shifts the classification landscape, and underscores the lack of a needed Security Classification Guide at issue in AE118. AE118K gives notice of the classified information contained in AE606.

that he intends to disclose in connection with motions at the upcoming proceeding. MCRE 505(h)(1)(B) makes a hearing on classified information mandatory.

The hearing triggers additional responsibilities of the prosecution to notify the defense of the classified information at issue.² MCRE 505(h)(2)(A) provides as follows,

(A) *Notice To Accused.* Before any hearing is conducted pursuant to a request by the trial counsel under Mil. Comm. R. Evid. 505(h)(1), trial counsel shall provide the accused with notice of the classified information that is at issue. Such notice shall identify the specific classified information at issue whenever that information previously has been made available to the accused by the United States. When the United States has not previously made the information available to the accused in connection with the case the information may be described by generic category, in such forms as the military judge may approve, rather than by identification of the specific information of concern to the United States.

This notice is mandatory. Furthermore, the prosecution duty arises by virtue of the request for a MCRE 505(h) hearing, rather than by an action of the military commission or the defense.³ The prosecution notice is part of the reciprocity scheme established by the Secretary of Defense. Under the MCRE 505 framework, the prosecution notice is especially important because the military commission and defense must know at the 505(h)(1) hearing for what information the prosecution is invoking classified information privilege.⁴ As with the analogous CIPA § 6(b)(1), “If the government wishes to avail itself of [the procedures] to eliminate or ameliorate classified

² For this hearing, the government has filed a MCRE 505(h)(2)(A) notice (AE575F) analogous to a MCRE 505(g) notice with respect to AE575. Although this is a permissible use of MCRE 505(h)(2)(A), it does not relieve the government of specifying classified information at issue in defense MCRE 505(g) notices.

³ Compare MCRE 505(h)(2)(A) (“Before any hearing is conducted pursuant to a request by the trial counsel . . . , trial counsel shall provide the accused with notice”) with MCRE 505(h)(2)(B) (. . . the military judge, upon request of the accused, may order the trial counsel to provide the accused, prior to trial, such details”).

⁴ *United States v. Zettl*, 835 F.2d 1059, 1065-66 (4th Cir. 1987).

information disclosure, it must provide the defendant with notice of those items of classified information in the defendant's . . . notice which are the subject of the . . . procedure."⁵

The prosecution notice required by MCRE 505(h)(2)(A) is especially important in this case. Among other things, the defense and the military commission need to know exactly what the prosecution thinks is actually classified. The defense has given 505(g) notice for some items which it believes are improperly marked as classified or which the defense derivatively marked as classified only out of an abundance of caution.

The prosecution notice requirement in MCRE 505(h)(2)(A) is even more important than the analogous requirement in CIPA § 6(b)(1). The prosecution in a military commission, unlike its civilian counterparts, has a duty to ensure that information is declassified to the maximum extent possible, consistent with the requirements of national security.⁶ Specifically, the prosecution must provide MCRE 505(h)(2)(A) notice, among other reasons, to inform the military commission and defense which information the government has been able to declassify.

C. The military commission should narrowly tailor any closed hearings to protect Mr. al Baluchi's right to be present and to a public trial.

As extensively briefed in other pleadings,⁷ the First and Sixth Amendment rights to a public trial require proceedings and judicial documents to be open to the public unless closure is narrowly tailored to protect a compelling governmental interest.⁸ "The simple utilization of the

⁵ *United States v. Collins*, 720 F.2d 1195, 1200 (11th Cir. 1983).

⁶ MCRE 505(a)(3).

⁷ *See, e.g.*, AE616A (AAA) Mr. al Baluchi's Objection to Closure of Interpreter's Testimony.

⁸ *See, e.g.*, *United States v. Aref*, 533 F. 3d 72, 81-82 (2d Cir. 2008).

terms ‘security’ or ‘military necessity’ cannot be the talisman in whose presence the protections of the Sixth Amendment and its guarantee to a public trial must vanish.”⁹ The Court of Military Appeals suggested that one way of balancing constitutional rights with the need to protect classified information is to “conduct a preliminary hearing which is closed *to the public* at which time the government must demonstrate that it has met the heavy burden of justifying the imposition of restraints on this constitutional right.”¹⁰

Unless the government submits a proper declaration pursuant to MCRE 505(h)(1)(C) for the relevant motions, the military commissions’ only authority to conduct the MCRE 505(h) hearing *in camera* is the general closure authority under RMC 806(b)(2)(A). RMC 806(b)(2)(B) provides that the military commission may only close a hearing upon making a specific finding that such closure is necessary to protect information the disclosure of which could reasonably be expected to damage national security. It is far from self-evident that many of the documents contained in 505 notices are classified at all, much less pose a risk to national security.¹¹

⁹ *United States v. Grunden*, 2 M.J. 116, 121 (C.M.A. 1977).

¹⁰ *Id.* at 122 (emphasis added).

¹¹ *Cf. United States v. El-Hanafi*, 2012 U.S. Dist. LEXIS 23403 at *14 (S.D.N.Y. Feb. 24, 2012) (initially addressing whether CIPA § 4 materials were actually classified); *United States v. Walizazi*, 2011 U.S. Dist. LEXIS 67859 at *5 n.3 (E.D.N.Y. June 24, 2011) (“Embedded within this [CIPA § 4] determination is the threshold requirement that the subject materials be classified.”); *United States v. Abu-Jihaad*, 2008 U.S. Dist. LEXIS 7653 at *6-*7 (D. Conn. Feb. 4, 2008) (“Because CIPA applies to classified information, any motion under CIPA must first establish that the information in question is classified.”).

The military commission's ruling excluding the defendants from classified hearings makes this narrow tailoring all the more critical. As explained in detail elsewhere,¹² Mr. al Baluchi himself has the right to attend the closed proceeding requested by the government. Title 10 U.S.C. § 949d guarantees a defendant the right to attend all "proceedings" except deliberation and voting unless the defendant forfeits that right through his behavior. Under the military commission's ruling, however, closing the hearing to the public also means closing it to the defendant. Such a closed hearing can only address classified information, not a mix of classified and unclassified information.

7. **Request for Oral Argument:** Oral argument is requested.
8. **Request for Witnesses:** None.
9. **Certificate of Conference:** The government has no objection to a 505(h) hearing.
10. **Additional Information:** None.

¹² AE136 (AAA) Mr. al Baluchi's Response to Government Motion Regarding Accused's Presence During Closed Proceedings. Mr. al Baluchi incorporates this pleading by reference here.

11. Attachments:

A. Certificate of Service

Very respectfully,

//s//

JAMES G. CONNELL, III
Learned Counsel

//s//

STERLING R. THOMAS
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//s//

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Counsel for Mr. al Baluchi

Attachment A

CERTIFICATE OF SERVICE

I certify that on the 22nd 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