

UNCLASSIFIED//FOR PUBLIC RELEASE
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

AE616A (AAA)

**Mr. al Baluchi's Objection to Closure of
Interpreter's Testimony**

16 January 2019

1. **Timeliness:** This motion is timely filed, pursuant to AE616/AE350SSS Order.
2. **Relief Sought:** Mr. al Baluchi objects to the closed testimony of the Former CIA Interpreter Utilized by Mr. bin al Shibh's Defense Team ("Interpreter"), and respectfully requests that the Interpreter give testimony in open session.
3. **Burden of Proof:** Given the strong and long-standing presumption in favor of public trials, the burden of justifying a limitation upon public access must rest upon a party seeking such limitation. Should the government now seek closure of the military commission hearing for the Interpreter's testimony, they will bear the burden of persuasion.¹
4. **Facts:**
 - a. On 13 December 2018, after 3.5 years of litigation, the military commission issued AE350RRR Order, requiring the government to produce the witness known as "The Former CIA Interpreter Utilized by Mr. bin al Shibh's Defense Team" for live testimony via videoconference in closed session.
 - b. AE350RRR Order limited the scope of the Interpreter's testimony to

¹ See, e.g., *In re Oliver*, 333 U.S. 257, 268 (1948); *Waller v. Georgia*, 467 U.S. 39, 48 (1984).

(1) The circumstances surrounding the Interpreter's employment and assignment to the MCDO, including any information the Interpreter did provide or could have provided regarding his involvement with the Central Intelligence Agency (CIA) prior to accepting work on behalf of the MCDO and with individual Defense teams (including the scope and provisions of the interpreter's non-disclosure agreement);

(2) The scope and nature of the Interpreter's work on behalf of the MCDO and individual Defense teams (including what potentially privileged information the Interpreter may have had access to); and

(3) Whether or not, and if so, to what extent, the Interpreter shared any potentially privileged information with any other persons or organizations.

The military commission further ordered the defense to refrain from seeking information regarding the Interpreter's actions or observations during his employment with the CIA prior to his seeking employment with the Military Commissions Defense Organization.

c. On 4 January 2019, Mr. al Baluchi filed AE611I, Mr. al Baluchi's Response to AE611 (Sup) Docket Order (Proposed Order of March). AE611I contained a request for oral argument on objections to holding closed hearings on the unclassified testimony ordered in AE350RRR. The government did not oppose this request in AE611K (GOV).

d. On 10 January 2019, the military commission issued AE350SSS containing an expedited briefing schedule for all parties regarding objections to taking the Interpreter's deposition in closed session.

5. **Argument:**

Mr. al Baluchi objects to the portion of AE350RRR ordering a closed hearing on unclassified testimony without any evidence of factors justifying closure.² The Sixth Amendment provides that “[i]n all criminal prosecutions, the accused shall enjoy the right to a . . . public trial.” This requirement is reflected in R.M.C. 806(a): “Military Commissions shall be publicly held,” and RTMC §19-1, mandating the military commission to “provid[e] access to military commission proceedings, transcripts, pleadings, filings, rulings, orders and other materials used at military commission proceedings, to the extent that these materials are not classified, covered by a protective order, or otherwise protected by law, including the rules and regulations governing military commissions.” This right includes pretrial hearings, and not just the trial itself.³

Public access to trials not only benefits the defense, but also the public at large.⁴ AE350, the motion series regarding the Interpreter’s placement on a defense team, was initiated after a

² See 10 U.S.C. § 949d(c)(2); *Press-Enterprise v. Superior Court*, 478 U.S. 1, 15 (1986); RMC 806; RTMC 20-7. The considerations governing open proceeding have been briefed extensively, and are incorporated by reference here. See AE013A Motion of the American Civil Liberties Union for Public Access to Proceedings and Records; AE013A (Sup) Supplemental Motion of the American Civil Liberties Union for Public Access to Proceedings and Records; AE013E Mr. al Baluchi’s Motion to Join and Adapt the American Civil Liberties Union Motion for Public Access to Proceedings and Records; AE081 Request by Press Intervenors for Notice and Opportunity to be Heard on Any Application Seeking to Limit Public Access to Proceedings or Records and for Timely Access to Filings; AE136A (AAA) Mr. al Baluchi’s Response to Government Motion Regarding Accused’s Presence During Closed Proceedings.

³ See *Waller v. Georgia*, 467 U.S. 39, 44 (1984)(finding Sixth Amendment right to public trial includes pretrial suppression hearings). The Court in *Waller* noted that a public trial is believed to affect a fair result by ensuring that all parties perform their functions more responsibly, encouraging witnesses to come forward, and discouraging perjury. *Id.* at 104; cf. *Gannett Co. v. DePasquale*, 443 U.S. 368, 99 S.Ct. 2898, 61 L.Ed.2d 608 (1979).

⁴ See *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 606 (1982). (“Public scrutiny of a criminal trial enhances the quality and safeguards the integrity of the fact finding process, with

significant incident in open session, at which the media and observers were present and following which there has been considerable media interest in the possible government intrusion into the 9/11 capital defense teams and the effects on pre-trial proceedings.⁵

Although the right to a public trial is not absolute, closure of the court must be done “sparingly with the emphasis always toward a public trial.”⁶ Even when the interest sought to be protected is national security, the party moving for closure must *demonstrate* a compelling need to exclude the public. *Id.* at 120. The Supreme Court in *Press-Enterprise* set forth a multi-prong test that must be met prior to closing a hearing.⁷ Under the Sixth Amendment, the closure of a hearing over the objections of the defendants must meet the multi-prong test. Specifically, “[u]nder *Press-Enterprise*, the party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, the closure must be no broader than necessary to protect that interest, the trial court must consider reasonable alternatives to closing the proceeding, and it must make findings adequate to support the closure.”⁸ Any proponent of closing the proceedings must bear a “weighty” burden to establish that closure is permissible.⁹

benefits to both the defendant and to society as a whole”).

⁵ Media coverage includes articles in the Miami Herald, The Independent, Newsweek, Reuters, the New York Times, and Lawfare. Counsel for Mr. al Baluchi have omitted links to articles that may include information the government considers to be classified.

⁶ *United States v. Grunden*, 2 M.J. 116 (CMA 1977).

⁷ *Press-Enterprise*, 464 U.S. at 511.

⁸ *Waller*, 467 U.S. at 48.

⁹ *Press-Enterprise*, 464 U.S. at 509-10.

Yet neither the defense nor the government has sought closure of the Interpreter's testimony on the issues delineated by the military commission in AE350RRR. During written and oral argument, defense counsel repeatedly requested either oral testimony or a deposition of the Interpreter on *both* the details of his CIA employment, and the circumstances leading to his employment with the Military Commissions Defense Organization ("MCDO").¹⁰ Defense counsel did not object to taking the Interpreter's testimony in closed session previously¹¹ because of the potential for classified information to be discussed in connection with the Interpreter's former CIA employment. The military commission has already approved use of a pseudonym for the Interpreter, which is sufficient to protect his identity.

In AE350RRR, however, the military commission strictly limited the scope of the Interpreter's testimony to information arising out of or related to his employment at the MCDO.¹² This testimony will address the questions of how the Interpreter sought employment with the MCDO and whether there were any limitations on his disclosures to the MCDO from previous employment with the CIA – similar to any other legal employment dispute in which a conflict is alleged. If the Interpreter's application to the MCDO was a pure mistake or coincidence, then he would be describing his own interest in a job announcement or being recommended by a friend or colleague. On the other hand, if the Interpreter was directed in any way to apply to the MCDO or withhold relevant disqualifying information leading to a conflict of interest with any of the

¹⁰ AE 350RRR, Order, Defense Motions in the AE 350 Series, dated 13 December 2018 at p. 7.

¹¹ *Id.*, AE616/AE350SSS Order at 1.

¹² Mr. al Baluchi maintains his objection to this limitation.

defendants,¹³ that is relevant information to the defense regarding improper conduct by the parties involved. However, the circumstances of how the Interpreter came to be applying for a MCDO position cannot be classified.¹⁴

Pursuant to AE350RRR, Mr. al Baluchi will not ask the Interpreter any questions regarding the details or substance of his previous employment with the CIA. The closure of the Interpreter's unclassified testimony cannot be justified under *Press-Enterprise* or RMC 806(a), and impinges on Mr. al Baluchi's Sixth Amendment public trial right. The military commission should order the Interpreter to testify in an open session.

6. **Request for Oral Argument:** Mr. al Baluchi respectfully requests oral argument.
7. **Request for Witnesses:** None.
8. **Certificate of Conference:** Not required under RC 3.5(k).

¹³ See AE292JJJJ Order; AE615 Defense Motion to Conduct Thorough Inquiry into Actual and/or Potential Attorney Conflict of Interest Pursuant to R.M.C. 901 and *Holloway v. Arkansas*, 435 U.S. 475 (1978) and to Cancel Proceedings Pending Inquiry.

¹⁴ While the details of the Interpreter's scope of work with individual defense teams may be privileged, that privilege is for individual defendants to waive during the course of questioning. The decision to waive privilege may not be made by the government or by the military commission. Further, privileged communications may be impacted in either open or closed session.

9. **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 E. ANDREU
Capt, USAF
Defense Counsel

Counsel for Mr. al Baluchi

Attachment A

CERTIFICATE OF SERVICE

I certify that on the 16th 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