

**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 616I RULING Pursuant to Military Commission Rule of Evidence 505(h) and Rule for Military Commissions 806(b)(2) 29 January 2019
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1. The Commission conducted an in camera Military Commission Rule of Evidence (M.C.R.E.) 505(h) hearing on 29 January 2019, with Defense Counsel for all Accused present.¹ The purpose of the M.C.R.E. 505(h) hearing was for the Commission to determine whether classified information the Defense and the Government intended to disclose is relevant for use by the Commission to reach a fair determination of the issues raised in various AE series to include the AE 616 series.² In AE 616E (GOV)³ and AE 616H (GOV),⁴ the Government notified the Commission pursuant to M.C.R.E. 505(h)(2)(A) of the classified evidence that is at issue for the M.C.R.E. 505(h) hearing pertaining to the AE 616 series.⁵ The parties presented classified oral argument before the Commission regarding the use, relevance, and admissibility of the classified information identified by the Government pertaining to the AE 616 series.

¹ AE 611R Ruling, Pursuant to Military Commission Rule of Evidence 505(h), dated 29 January 2019.

² See AE 350SSS/AE 616 Order, Expedited Briefing Schedule, dated 10 January 2019, *et. seq.*

³ AE 616E (GOV), Government Notice Pursuant to M.C.R.E. 505(h)(2)(A), filed 25 January 2019.

⁴ AE 616H (GOV), Government Notice Pursuant to M.C.R.E. 505(h)(2)(A), filed 28 January 2019.

⁵ In AE 350RRRR Order, Defense Motions in the AE 350 Series, dated 13 December 2018, the Commission decided the issues raised in numerous motions filed in the AE 350 series and granted a Defense motion to produce “the Interpreter” to testify in closed session via video teleconference during the January 2019 hearings. The AE 616 series involves Defense objections to the closed session. The Government notices in AE 616E and AE 616H include classified information from the AE 350 and AE 616 series.

2. The Commission ruled the classified information noticed in AE 616E (GOV) and AE 616H (GOV) is relevant for a fair determination of the issues before the Commission in relation to AE 616. Specifically, the Commission ruled the classified evidence is relevant for: (1) oral argument regarding whether the testimony of a witness called the Interpreter should be taken in open or closed session or a combination of both; (2) use by the parties when taking testimony from the witness called the Interpreter; and (3) use in any future proceeding involving the underlying issues in AE 350 (GOV).⁶

3. This ruling addresses only whether closure of a portion of these proceedings is necessary for oral argument addressing whether the testimony of the Interpreter should be taken in open or closed session or a combination of both.

4. When the Commission finds the classified information relevant, the Government is given the opportunity to request the Commission (1) order a substitution in lieu of disclosing classified information; (2) approve a summary of the specific classified information; or (3) permit any other “procedure or redaction limiting disclosure of specific classified information.”⁷

5. The Military Judge may close all or a portion of Commission proceedings upon appropriate findings in accordance with 10 U.S.C. § 949d(c) and Rule for Military Commissions (R.M.C.) 806(b)(2).

6. Findings.

a. The classified information noticed in AE 616E (GOV) and AE 616H (GOV) is relevant for a fair determination of whether the testimony of the Interpreter should be taken in open or closed session or a combination of both.

⁶ See AE 350 (GOV), Government Unclassified Notice of Classified Filing, filed 10 February 2015, *et. seq.*

⁷ 10 U.S.C § 949p-6(d)(1).

b. The Government has not requested the Commission order a substitution in lieu of disclosing classified information, approve a summary of the specific classified information, or permit any other “procedure or redaction limiting disclosure of specific classified information.”

c. Upon hearing oral argument and reviewing the classified information sought to be disclosed, the Commission finds an overriding government interest in preventing public disclosure of the information identified by the Defense that could reasonably be expected to cause serious damage to national security.

d. Closure of a portion of these proceedings is necessary to protect information the disclosure of which could reasonably be expected to cause serious damage to national security, including intelligence or law enforcement sources, methods, or activities.

e. The closure of proceedings in accordance with R.M.C. 806(b)(2), ordered herein, is narrowly tailored to protect information that, if publically disclosed, could reasonably be expected to cause serious damage to national security, in that:

(1) Only the portion of the proceedings directly pertaining to the classified information identified by the Defense will be closed to the public; and

(2) A redacted, unofficial/unauthenticated, transcript of the closed session, excising only classified national security information, will be released to the public in accordance with the Regulation for Trial by Military Commission and the Trial Judiciary Rules of Court.

f. Closure of a portion of the proceedings will protect the classified information at issue by preventing its disclosure to individuals having neither the security clearance nor the “need to know” that are prerequisite to its receipt.

g. The Commission has determined there are no less restrictive means or reasonable alternatives, other than closure of a limited portion of the proceedings, which will adequately satisfy the Government's overriding interest in protecting this national security information.

6. Ruling.

a. The Commission will hear classified argument in closed session on **29 January 2019** for the information noticed in AE 616E (GOV) and AE 616H (GOV) regarding whether the testimony of the Interpreter should be taken in open or closed session or a combination of both. The closed session will be limited to argument pertaining to the classified information noticed in AE 616E (GOV) and AE 616H (GOV).

b. The Commission **DEFERS** decision on whether closure of proceedings, in whole or in part, is necessary when taking testimony from the witness called the Interpreter and for any future proceeding involving the underlying issues in AE 350 (GOV).

7. Order. Within **30 days** after the closed session referenced above, a redacted unclassified, unofficial/unauthenticated, transcript of that session will be expeditiously prepared and provided to the public in a manner similar to unauthenticated transcripts of open sessions.

So **ORDERED** this 29th day of January, 2019.

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