

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 616J</b>  <b>RULING</b>  Pursuant to Rule for Military Commissions 806(b)(2)  <b>1 March 2019</b>
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1. **Procedural History.** In AE 350RRR,<sup>1</sup> this Commission ordered the Government to produce the person referred to in this AE series as “the Interpreter” to testify as a witness via video teleconference in a closed session pursuant to Rule for Military Commissions (R.M.C.) 806(b)(2).<sup>2</sup> The Defense, in AE 616A (AAA), objected to the closed testimony of the Interpreter and requested the Interpreter testify in an open session.<sup>3</sup> In AE 616D (GOV), the Government responded with a classified filing invoking the National Security Privilege pursuant to Military Commission Rule of Evidence (M.C.R.E.) 505(h), asserting that it is necessary to take the Interpreter’s testimony entirely in closed session to protect information the disclosure of which could reasonably be expected to cause damage to the national security, including intelligence or law enforcement sources, methods, or activities and to protect the physical security of the Interpreter and his or her family. Counsel for the Accused and the Government argued the matter in closed session before the Commission on 29 January 2019.

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<sup>1</sup> AE 350RRR Order, Defense Motions in the AE 350 Series, dated 13 December 2018.

<sup>2</sup> The Commission ordered the Government to produce the Interpreter to testify during the January 2019 hearings. The hearings were truncated due to a medical emergency of the military judge and the Interpreter did not testify at that time.

<sup>3</sup> AE 616 (AAA), Mr. al Baluchi’s Objection to Closure of Interpreter’s Testimony, filed 16 January 2019.

**2. Law.**

a. As a general rule, military commission proceedings shall be open to the public as provided in R.M.C. 806(a).

b. Both 10 U.S.C. § 949d(c) and R.M.C. 806(b)(2) authorize a military judge to close all or part of commission proceedings to the public 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 the national security, including intelligence or law enforcement sources, methods, or activities; or (2) ensure the physical safety of individuals.<sup>4</sup> When making these findings, the military judge determines whether the information has been classified by proper authorities in accordance with appropriate regulations. The military judge does not conduct a de novo review of the propriety of agency official determinations that certain sources, methods, or activities are classified.<sup>5</sup>

c. If closure of proceedings is not necessary, the military judge may take lesser measures to protect information and ensure the physical safety of individuals, to include having witnesses testify under pseudonym or light disguise, or the use of delayed broadcast technologies.<sup>6</sup>

**3. Analysis.** The AE 350 series encompassed extensive litigation regarding the national security concerns associated with the identity of the Interpreter and his or her employment prior to seeking employment as an interpreter within the Military Commissions Defense Organization. The Commission finds that the Interpreter's identity, and associated material, was classified by the proper authorities in accordance with the appropriate regulations. Taking into account the strong presumption in favor of open proceedings, and considering all possible lesser measures

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<sup>4</sup> 10 U.S.C. § 949d(c)(2)(A)-(B); R.M.C. 806(b)(2)(A)(B)(i)-(ii).

<sup>5</sup> R.M.C. 806(b)(2) Discussion.

<sup>6</sup> See e.g., M.C.R.E. 611(d)(2) and R.M.C. 806(b)(2) Discussion.

short of closing the proceedings, the Commission reaffirms its finding in AE 350RRR<sup>7</sup> and orders that the testimony of the Interpreter be taken in closed session. Specifically, the Commission finds that closure of the hearing is necessary for the following reasons:

(a) Taking the Interpreter's testimony in an open session could reasonably be expected to cause damage to the national security, including intelligence or law enforcement sources, methods, or activities;

(b) Taking the Interpreter's testimony in a closed session is necessary to protect the physical security of the Interpreter and his or her family;

(c) Lesser measures short of closing the proceedings are insufficient to protect national security or the physical security of the Interpreter and his or her family. Counsel for the Defense have cited past Commission rulings granting bifurcated hearings (both open and closed hearings) in support of their motion. However, the underlying facts in support of these prior rulings are distinguishable from those raised in AE 616A (AAA). Here, the identity of the Interpreter is classified and his or her very appearance before an open session, with or without a pseudonym or disguise, makes the disclosure of a classified fact highly probable.<sup>8</sup> Further, unlike trained law enforcement personnel, the Interpreter likely lacks the technical skill to ensure his or her answers remain unclassified.

(d) During oral argument, the Defense also asked the Commission to consider allowing the Accused to be present even if the Commission decided to close the proceedings to the public. This remedy is implausible given the stated reasons for the closure, and the fact that the Accused do not have the requisite security clearance. Given the pre-trial nature of the Interpreter's

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<sup>7</sup> AE 350RRR Order, Defense Motions in AE 350 Series, dated 13 December 2018.

<sup>8</sup> See generally *United States v. Pugh*, 2016 U.S. Dist. LEXIS 194544 (E.D.N.Y., Feb. 24, 2016) (upholding a limited closure of the courtroom where disclosure of the witness's identity could reasonably be expected to cause serious damage to U.S. national security).

testimony, the Commission finds that the Accused's presence is not necessary,<sup>9</sup> but will entertain steps to mitigate their absence such as taking recesses during the Interpreter's testimony to afford Defense Counsel the opportunity to confer with the Accused.

(e) The Commission can mitigate the denial of public access to the Interpreter's testimony by ordering the Government to expeditiously conduct a classification review of the unofficial/unauthenticated transcript and produce a redacted copy of the transcript to the public.

4. **Ruling.** The Defense motion to take the Interpreter's testimony in an open session is **DENIED.**

5. **Order.**

a. The Government will produce the Interpreter to testify in closed session outside the presence of the Accused and the public during the Commission hearings scheduled for 25-29 March 2019.<sup>10</sup>

b. No later than **ten (10) days** after the Interpreter testifies, the Government will conduct appropriate classification reviews of the transcript, produce a redacted, unclassified, unofficial/unauthenticated transcript, and provide it to the public in a manner similar to unofficial/unauthenticated transcripts of open sessions.

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<sup>9</sup> See, AE 136E Order, Government's Memorandum of Law Regarding Accused Presence During Closed Proceedings, dated 15 July 2013; *United States v. Hausa*, 232 F. Supp. 3d 257, 266-67 (E.D.N.Y. 2017) (citing *In re Terrorist Bombings of U.S. Embassies in E. Africa*, 552 F. 3d 93, 130 (2d Cir. 2008) in finding that the exclusion of the defendant from a hearing where classified information was discussed did not violate his due process right to be present because the matters discussed did not relate to the defendant's guilt or innocence, and the defendant was represented by three highly experienced and competent defense attorneys who had the proper security clearances and would be present at the hearing to participate on his behalf).

<sup>10</sup> If, for any reason, the Interpreter does not testify during the 25-29 March 2019 hearings, this is a continuing order to the Government to produce the Interpreter to testify at the next scheduled Commission hearing session.

So **ORDERED** this 1st day of March, 2019.

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