MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY, CUBA

UNITED STATES OF AMERICA **v.** **KHALID SHAIKH MOHAMMAD;** **WALID MUHAMMAD SALIH** **MUBARAK BIN 'ATTASH;** **RAMZI BINALSHIBH;** **ALI ABDUL AZIZ ALI;** **MUSTAFA AHMED ADAM** **AL HAWSAWI**	**AE 619O (GOV)** **Government Response** To Mr. Ali's Motion For An M.C.R.E. 505(h) Hearing 20 March 2019

1. Timeliness

The Prosecution timely files this Response pursuant to Military Commissions Trial Judiciary Rule of Court ("R.C.") 3.7.

2. Relief Sought

The Prosecution respectfully requests that the Military Judge order the Defense to comply with Section 949p-5(a)(1) of the Military Commissions Act of 2009 ("M.C.A.") and Military Commissions Rule of Evidence ("M.C.R.E.") 505(g)(1), which require the Defense to provide the Prosecution with *particularized* notice of the classified information it reasonably expects to disclose in connection with a pretrial proceeding. The Prosecution also respectfully requests that, under Section 949p-5(a)(1) of the M.C.A., the Military Judge specify the time within which the Defense must provide such particularized notice. The Military Judge should require the Defense to provide the notice, absent extraordinary circumstances, at least thirty days before a pretrial session is scheduled to begin.

Citing his previous and newly filed M.C.R.E. 505(g)(1) notices, Mr. Ali moves the Military Judge to conduct an M.C.R.E. 505(h) hearing. The Prosecution agrees the Commission should conduct an M.C.R.E. 505(h) hearing on the M.C.R.E. 505(g) notices for the motions on the March 2019 docket to determine the use, relevance, and admissibility of classified

information. The Commission should do so only for classified information the Accused have notified the Prosecution in writing that they reasonably expect to disclose in connection with the March 2019 pretrial proceedings. The Military Judge should prohibit the disclosure of any classified information for which the Accused have not provided advanced particularized notice for these pretrial proceedings in accordance with 10 U.S.C. § 949p-5(a)(1). The Prosecution also agrees with the Defense that the Military Judge should conduct the hearing and rule on the use, relevance, and admissibility of properly noticed classified information before any further proceedings on the underlying pleadings. The Prosecution requests that, as required by 10 U.S.C. § 949p-6(a)(4), upon completion of the subject hearing, the Military Judge set forth the basis for his ruling in writing whether each item is relevant and admissible for purposes of the pretrial proceeding.

The Prosecution also respectfully requests that the Military Judge conduct the hearing *in camera* under 10 U.S.C. § 949p-6(a)(3). Although the Prosecution disagrees with the Defense that this in-chambers hearing constitutes "closure" (*see* AE 619M (AAA) at 1), the Prosecution joins the Defense in asking the Military Judge to narrowly tailor the hearing as necessary to prevent the disclosure of classified information. To the extent the Military Judge rules that the classified information is relevant and admissible, the Military Judge should not immediately close the courtroom under Rule for Military Commissions ("R.M.C.") 806 for argument on the merits of the substantive motions. Rather, as required by 10 U.S.C. § 949p-6(d), the Military Judge should first give the Prosecution the opportunity to seek alternative procedures for disclosing the classified information. If the Military Judge authorizes the alternative procedures, no closure is necessary; the parties may present their arguments in open session.

3. Burden of Proof

As the moving party, the Accused bear the burden of persuading the Commission, by a preponderance of the evidence, that it should grant their requests for relief. *See* R.M.C. 905(c)(1)–(2). The Prosecution likewise bears the burden of persuasion with respect to its own

requests for relief. The Accused and the Prosecution also bear the burden of proving, by a preponderance of the evidence, any "factual issue the resolution of which is necessary" to resolve their respective requests for relief. R.M.C. 905(c)(1)–(2).

4. Facts

In his motion, Mr. Ali lists notices filed under M.C.R.E. 505(g)(1) that notify the Commission and the Prosecution that the Defense expects to disclose classified information in connection with the March 2019 pretrial proceedings. *See* AE 619M (AAA) at 6 (listing notices). On 18 March 2019, Mr. Ali moved the Commission for an M.C.R.E. 505(h) hearing in connection with the M.C.R.E. 505(g) notices listed in his motion. AE 619M (AAA). The Prosecution joins Mr. Ali's request for a hearing on these notices and asks the Commission to conduct this hearing *in camera* and to conduct an *in camera* hearing on all other M.C.R.E. 505(g) notices for the motions on the March 2019 docket.

5. Law and Argument

I. The M.C.R.E. 505(g) Notices

A. Certain Defense Notices Fail to Comply with the M.C.A.'s Particularity Requirement

The M.C.A. and M.C.R.E. 505(g)(1) provide that,

> [i]f an accused reasonably expects to disclose, or to cause the disclosure of, classified information in any manner in connection with any trial or pretrial proceeding involving the prosecution of such an accused, the accused shall, within the time specified by the military judge or, where no time is specified, within 30 days before trial, notify the trial counsel and the military judge in writing.

The "notice shall include a brief description of the classified information." 10 U.S.C. § 949p-5(a)(1); *accord* M.C.R.E. 505(g)(1). The description "'must be *particularized*, setting forth *specifically* the classified information which the defendant reasonably believes necessary to his defense.'" M.C.R.E. 505(g), Discussion (quoting *United States v. Collins*, 720 F.2d 1195, 1199 (11th Cir. 1983)) (citing *United States v. Smith*, 780 F.2d 1102, 1105 (4th Cir. 1985)). The statutory sanction for failing to comply with the notice requirement is that the Military Judge

"may preclude disclosure of any classified information not made the subject of notification." 10 U.S.C. § 949p-5(b)(1).

Several of the Defense notices fail to satisfy this particularity requirement because they simply cite motions, declarations, memoranda, and transcripts in their entirety, but fail to identify which particular portions of those documents the Defense intends to use. The following notices are therefore deficient: AE 524III (AAA). While maintaining its objections to these notices, the Prosecution is available to meet with Defense counsel before the M.C.R.E. 505(h) hearing to identify what information the Defense seeks to use and to determine whether the Defense can use unclassified or other alternatives that would avoid closure. Because this process takes time (as discussed more below), having particularized notice at least thirty days before the sessions begin is necessary.

Still, failure to satisfy the particularity requirement impairs the military judge's ability to rule on the information's relevance and admissibility at the M.C.R.E. 505(h) hearing. And it prevents the government from assessing the danger of disclosing the information and from "choos[ing] an alternative course that minimizes the threat to national security." *United States v. Badia*, 827 F.2d 1458, 1465 (11th Cir. 1987) (citing *Collins*, 720 F.2d at 1197). "Obviously, without sufficient notice that sets forth with specificity the classified information that the defendant reasonably believes necessary to his defense, the government is unable to weigh the costs of, or consider alternatives to, disclosure." *Id.*

But with sufficient notice, the Prosecution is able to review the classified information with an original classification authority to verify its classification level and, as is its right, seek alternate procedures for its disclosure that provide the Accused with "substantially the same ability to make [their] defense as would disclosure of the specific classified information." 10 U.S.C. § 949p-6(d)(2); M.C.R.E. 505(h)(4). The M.C.A. and M.C.R.E. thus prohibit an accused from disclosing, or causing the disclosure of, classified information until (1) proper notice has been given and (2) "the United States has been afforded a reasonable opportunity to" (a) seek a determination as to use, relevance, and admissibility of that information in an

M.C.R.E. 505(h) hearing and (b) appeal such a determination. 10 U.S.C. § 949p-5(a)(2); *accord* M.C.R.E. 505(g)(1)(B).

In the past, where the Defense has given the Prosecution advance particularized notice, the parties have been able to resolve issues regarding the use of classified information before the pretrial proceedings. (Such was the case with AE 118C and AE 133F, for example.). This can, at times, obviate the need to conduct an M.C.R.E. 505(h) hearing before each oral argument on the merits of an underlying pleading, and it avoids unnecessary closure of the proceedings under R.M.C. 806. For example, having advance notice of the specific information the Defense intends to use, the Prosecution has been able to suggest various unclassified alternatives that would enable the Defense to effectively advocate their position without closing the proceedings or excluding the Accused from the courtroom. But for the Prosecution to do so, the Defense must narrowly tailor their notices and provide the specific portion of the classified information they intend to use.

Another way to obviate an M.C.R.E. 505(h) hearing and maximize openness of the proceedings is for the Defense, in instances when they want to use classified documents, to simply submit the classified information as it would any other appellate exhibit for the Military Judge's consideration—as a classified attachment to a pleading. The Trial Judiciary Rules of Court permit the parties to do so; they even dedicate a separate section of the parties' briefs to "Witnesses and Evidence" relied upon to support their arguments. *See* R.C. Form 301 Format for a Motion. In that section, the Defense could reference (in an unclassified manner, as necessary) the classified information they want the Military Judge to consider and then simply attach it as a classified, *in camera* and *under seal* exhibit to the pleading for his consideration. Doing so would avoid having to close the proceedings for oral argument—a method of argumentation that, in any event, "is within the sole discretion of the Military Judge" to grant and usually unnecessary for argument on what often is an insignificant amount of remaining classified information. R.C. 3.5.m. The Military Judge should avoid closure of the proceedings,

authorizing it only as a last resort and not simply for oral argument that touches upon the classified information at issue.

Regardless, an M.C.R.E. 505(g) notice is the "central document" in the M.C.A.'s classified-information procedures, as it is in the classified-information procedures of their progenitor, the Classified Information Procedures Act ("CIPA"). *See Collins*, 720 F.2d at 1199 (citing CIPA). To maximize its intended purpose, the Military Judge should order the Defense to comply with the M.C.A. and M.C.R.E.'s particularity requirement. It should also specify the time within which the Defense must provide particularized notice to the Prosecution. In previous pretrial sessions, the Defense continued to file M.C.R.E. 505(g) notices up to one business day before those sessions were scheduled to begin, and during the sessions themselves as well. *See, e.g.*, AE 399L (WBA); AE 579C (KSM); AE 538F (WBA). But Section 949p-5(a)(1) requires an accused to provide particularized notice "within the time specified by the military judge or, where no time is specified, within 30 days before trial." *Accord* M.C.R.E. 505(g)(1).

Although the reference point for the 30-day deadline is trial, the deadline recognizes the importance of providing sufficient advance notice to the Prosecution. *Badia*, 827 F.2d at 1465 ("The thirty-day time frame is intended to give the government the opportunity to ascertain the potential harm to national security, and to consider various means of minimizing the cost of disclosure. Any form of notice provided less than thirty days prior to trial clearly does not permit the government to accomplish this objective."). This notice is no less important in pretrial proceedings because, as discussed above, it serves the same objectives. To allow it to accomplish these objectives of giving the Prosecution an opportunity to ascertain the potential harm to national security and propose alternate procedures that could obviate the need for an M.C.R.E. 505(h) hearing, the Military Judge should henceforth require the Defense to provide the notice at least thirty days before a pretrial session is scheduled to begin.

B. M.C.R.E. 505(h)(2)(A) Does Not Oblige the Prosecution to Identify Which Information Noticed by the Defense Is Classified Information

The Commission should reject the Defense request to compel the Prosecution to identify which classified information noticed by the Defense is classified. The Prosecution disagrees that a plain reading of M.C.R.E. 505(h)(2)(A) supports imposing such an obligation on the Prosecution. Even if it did, the Prosecution could not reasonably fulfill that obligation here because the Defense fails to identify with particularity the classified information at issue. The Commission should not permit the Defense to simply give notice that it intends to disclose, or cause the disclosure of, "all information marked as *or determined to be* classified" in one of their filings. *See, e.g.,* AE 350CCC (AAA).

This is especially true in this Military Commission (as opposed to most CIPA cases) because the Defense has the independent ability to verify, in a privileged manner, whether the information is classified by utilizing its government-funded Defense Security Officer, who may submit documents to the Chief Security Officer, Office of Special Security, with a request for classification review of the materials it seeks to disclose. *See* AE 013BBBB at ¶ 4.(d). Because the Defense has the ability to secure classification reviews of their work product, it also should have the obligation to utilize that process before providing M.C.R.E. 505(g) notice, as it could obviate the need for (or at least dramatically limit) an M.C.R.E. 505(h) hearing. The Prosecution should not be required to conduct such a classification review of entire filings following M.C.R.E. 505(g) notices that often come shortly before scheduled hearings, when it is only the Defense who knows exactly what information contained within these filings it truly intends to use and when the Defense has the ability to obtain the proper classification of that information. *See, e.g.*, AE 031XX (MAH) (describing the classified information as "information the Government recently disclosed under an Alternative Compensatory Control Measures (ACCM) program").

Also, although the Defense is correct that M.C.R.E. 505(a)(3) requires trial counsel to work to ensure evidence "is declassified to the maximum extent possible" (AE 619M (AAA)

at 5), by the rule's specific terms, this requirement applies only to "evidence that may be used *at trial*"—not for pretrial proceedings. M.C.R.E. 505(a)(3) (emphasis added). For all these reasons, the Commission should deny the Defense request to compel the Prosecution to identify which classified information noticed by the Defense is classified.

II. The M.C.R.E. 505(h) Hearing

A. The Prosecution Does Not Oppose the Military Judge Conducting an M.C.R.E. 505(h) Hearing

While maintaining its objection to the notices, the Prosecution does not oppose the Defense request that the Military Judge, before conducting further proceedings on the underlying pleadings, conduct a hearing under M.C.R.E. 505(h) to determine the use, relevance, and admissibility of classified information because one of the parties has requested the hearing prior to argument in the March 2019 hearings. The M.C.A. and the M.C.R.E. provide that once either party requests a hearing under 10 U.S.C. § 949p-6(a)(1) or M.C.R.E. 505(h)(1)(A) respectively, "the military judge shall conduct such a hearing and shall rule prior to conducting any further proceedings." 10 U.S.C. § 949p-6(a)(2); *accord* M.C.R.E. 505(h)(1)(B). Mr. Ali has requested the hearing, so the M.C.A. and M.C.R.E. require the Military Judge to conduct the hearing and to rule before conducting any further proceedings on the pleading that is the subject of the request. *See* 10 U.S.C. § 949p-6(a)(2); M.C.R.E. 505(h)(1)(B).

The Military Judge should conduct the hearing however only for classified information the Accused have notified the Prosecution in writing that they reasonably expect to disclose in connection with the March 2019 pretrial proceedings. The Military Judge should not hold a hearing—and thus should prohibit the disclosure of any classified information—for which the Accused have not provided advance notice in accordance with 10 U.S.C. § 949p-5(a)(1). The M.C.A. prohibits an accused from disclosing, or causing the disclosure of, classified information in connection with a pretrial proceeding until at least notice has been given in accordance with 10 U.S.C. § 949p-5(a)(1). 10 U.S.C. § 949p-5(b); *accord* M.C.R.E. 505(g)(1)(B). For the reasons discussed above, notice is a critical component of the M.C.A.'s classified-information

procedures. To the extent the Accused ask to disclose classified information for which they have not provided proper notice, the Military Judge should deny those requests.

B. The Prosecution Requests that the Military Judge Hold the Hearing *In Camera*

The Prosecution respectfully requests that the Military Judge hold the M.C.R.E. 505(h) hearing *in camera*. Any hearing held under 10 U.S.C. § 949p-6 (or its corresponding rule, M.C.R.E. 505(h)) "shall be held in camera if a knowledgeable United States official possessing authority to classify information submits to the military judge a declaration that a public proceeding may result in the disclosure of classified information." 10 U.S.C. § 949p-6(a)(3); *accord* M.C.R.E. 505(h)(1)(C). Because a knowledgeable United States official submits such a declaration, the Military Judge should hold the hearing *in camera*. *See* Attachment C, Classified *Ex Parte* Filing of Unredacted Declaration Pursuant to M.C.R.E. 505(h)(1)(A), (C) (20 March 2019). Although the Prosecution disagrees with the Defense that this in-chambers hearing constitutes "closure" (*see* AE 619M (AAA) at 1), the Prosecution joins the Defense in asking the Military Judge to narrowly tailor the hearing to the extent necessary to prevent the disclosure of classified information as the Military Judge "make[s] all determinations concerning the use, relevance, or admissibility of classified information that would otherwise be made during the trial or pretrial proceeding." 10 U.S.C. § 949p-6(a)(1); *accord* M.C.R.E. 505(h)(1)(A). Also, as the Accused will often not be present for the M.C.R.E. 505(h) hearing, these hearings should, in the future, occur in the Washington, D.C. area prior to traveling to Naval Station Guantanamo Bay, Cuba.

C. The M.C.A. and M.C.R.E. Establish the Procedures for Conducting a Hearing to Determine the Use, Relevance, and Admissibility of Classified Information

The military judge conducts the M.C.R.E. 505(h) hearing "to make all determinations concerning the use, relevance, or admissibility of classified information that would otherwise be made during the . . . pretrial proceeding." 10 U.S.C. § 949p-6(a)(1); M.C.R.E. 505(h)(1)(A). M.C.R.E. 505, like CIPA, "does not change the generally applicable evidentiary rules of

admissibility, but rather alters the *timing* of rulings as to admissibility to require them to be made before the trial." M.C.R.E. 505(h)(1), Discussion (internal quotation marks and citation omitted). At the M.C.R.E. 505(h) hearing, "the court is to hear the arguments of counsel, and then rule whether the classified information identified by the defense is relevant under the standards of Mil. Comm. R. Evid. 401." *Id.* And if the military judge concludes the classified information is relevant, it must then determine whether it is admissible as evidence. *Id*. For each item of classified information, the military judge must make the determinations—and set forth the basis for them—in writing. 10 U.S.C. § 949p-6(a)(4); M.C.R.E. 505(h)(1)(D). The military judge must make the determinations "prior to conducting any further proceedings." 10 U.S.C. § 949p-6(a)(2); M.C.R.E. 505(h)(1)(B). If the military judge determines that the classified information is not relevant and admissible, that determination concludes the matter; the Defense cannot disclose the information.

But if the military judge determines the classified information is relevant and admissible, the military judge's inquiry does not end there. Upon such a determination—and before closing the proceedings under R.M.C. 806—the military judge must give the government an opportunity to move to substitute the classified information for (1) a statement admitting relevant facts that the classified information would tend to prove, (2) a summary of the classified information, or (3) "any other procedure or redaction limiting the disclosure of specific classified information." 10 U.S.C. § 949p-6(d)(1); M.C.R.E. 505(h)(4)(A); M.C.R.E. 505(h)(4), Discussion ("In many cases, the United States will propose a redacted version of a classified document as a substitution for the original, having deleted only non-relevant classified information."). The military judge must hold a hearing on the motion. 10 U.S.C. § 949p-6(d)(3); M.C.R.E. 505(h)(4)(C).

After the hearing, the military judge "shall grant such a motion of the trial counsel if the military judge finds that the statement, summary, or other procedure or redaction will provide the defendant with substantially the same ability to make his defense as would disclosure of the specific classified information." 10 U.S.C. § 949p-6(d)(2); M.C.R.E. 505(h)(4)(B). If the military judge approves alternate procedures, the Defense can use it to support its argument in

open session. If the military judge does not approve the alternate procedure, the government can appeal the decision or, if it decides not to appeal, move the Military Judge to close the courtroom under R.M.C. 806. 10 U.S.C. § 950d(a)(4); *see* M.C.R.E. 505(g)(1)(B)(ii). In accordance with the M.C.A. and M.C.R.E., the Prosecution thus respectfully requests that, if the Military Judge determines the classified information is relevant and admissible, he give the Prosecution the opportunity to seek substitutions and other relief before closing the proceedings.

6. Conclusion

The Commission should (1) require the Accused to provide the Prosecution with *particularized* notice of classified information it reasonably expects to disclose in connection with a pretrial proceeding (only after the Defense firsts utilizes its classification review procedures pursuant to *Third Amended* Protective Order #1); (2) require the Accused to provide the notice at least thirty days before a pretrial session is scheduled to begin; (3) conduct an M.C.R.E. 505(h) hearing *in camera* and before further proceedings on the underlying motion to determine the use, relevance, and admissibility of classified information—but only for classified information the Accused have sufficiently notified the Prosecution in writing that they reasonably expect to disclose in connection with the March 2019 pretrial proceedings; (4) set forth the basis for its ruling in writing whether each item is relevant and admissible; and (5) to the extent the Commission rules that the classified information is relevant and admissible, it should give the Prosecution the opportunity to seek alternative procedures for disclosing the classified information before closing the proceedings.

7. Oral Argument

The Prosecution does not request oral argument on this pleading.

8. Witnesses and Evidence

The Prosecution relies on Attachment C, Classified *Ex Parte* Filing of Unredacted Declaration Pursuant to M.C.R.E. 505(h)(1)(A), (C) (20 March 2019). [1]

9. Additional Information

At this time, the Prosecution does not offer additional information to support this response.

10. Attachments

A. Certificate of Service, dated 20 March 2019.

B. Redacted Declaration Pursuant to M.C.R.E. 505(h)(1)(A), (C) (20 March 2019).

C. Classified *Ex Parte* Filing of Unredacted Declaration Pursuant to M.C.R.E. 505(h)(1)(A), (C) (20 March 2019).

Respectfully submitted,

_____//s//_____
Clay Trivett
Managing Trial Counsel

Christopher Dykstra
Major, USAF
Assistant Trial Counsel

Mark Martins
Chief Prosecutor
Military Commissions

[1] Attachment C is submitted *ex parte* and under seal consistent with the justification set forth in Attachment A to AE 133B.

ATTACHMENT A

CERTIFICATE OF SERVICE

I certify that on the 20th day of March 2019, I filed AE 619O (GOV), Government Response To Mr. Ali's Motion For An M.C.R.E. 505(h) Hearing, with the Office of Military Commissions Trial Judiciary and I served a copy on counsel of record.

_____//s//_____
Christopher Dykstra
Major, USAF
Assistant Trial Counsel

ATTACHMENT B

~~UNCLASSIFIED~~
~~CONFIDENTIAL//NOFORN~~

MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY, CUBA

UNITED STATES OF AMERICA **v.** **KHALID SHAIKH MOHAMMAD;** **WALID MUHAMMAD SALIH MUBARAK BIN 'ATTASH;** **RAMZI BINALSHIBH;** **ALI ABDUL AZIZ ALI;** **MUSTAFA AHMED ADAM AL HAWSAWI**	~~**FILED *EX PARTE, IN CAMERA*, AND UNDER SEAL**~~ **AE 619O (GOV)** **Attachment B** **(U) Declaration Pursuant to M.C.R.E. 505(h)(1)(C)** March 20, 2019

(U) ~~(C//NF)~~ I, [REDACTED], hereby declare and state under penalty of perjury:

1. ~~(U)~~ ~~(C//NF)~~ I, [REDACTED], a knowledgeable United States official with original classification authority, submit this certification pursuant to M.C.R.E. 505(h)(1)(A), (C), which authorizes me to request that a hearing be held *in camera* and that the transcript of the *in camera* hearing be sealed.
2. ~~(U)~~ The matters stated herein are based upon my knowledge, upon review and consideration of documents and information available to me in my official capacity as a knowledgeable United States official with original classification authority, and discussions that I have had with other United States officials with knowledge of the materials.
3. ~~(U)~~ Ali Abdul Aziz Ali has requested a hearing in this case under M.C.R.E. 505(h)(1)(A) so that the Military Judge can determine use, relevance, and admissibility of classified information that would otherwise be made during trial or a pretrial hearing.

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~~UNCLASSIFIED~~
~~CONFIDENTIAL//NOFORN~~

4. (U) M.C.R.E. 505(h)(1)(C) provides that this hearing shall be held *in camera* at the request of a knowledgeable United States official with original classification authority who submits a declaration that a public proceeding may result in the disclosure of classified information.

5. (U) As a knowledgeable United States official with original classification authority, I declare that a public hearing on this matter may result in the disclosure of classified information that is the subject of the M.C.R.E. 505(h) motion AE 619O (GOV).

6. (U) Therefore, I respectfully request that this hearing be held *in camera* under M.C.R.E. 505(h)(1)(C) and that the transcript of the *in camera* hearings be sealed.

Executed this 20th day of March 2019.

[REDACTED]
(U) ~~(C//NF)~~ [REDACTED]

~~CONFIDENTIAL//NOFORN~~
~~UNCLASSIFIED~~

ATTACHMENT C

APPELLATE EXHIBIT 619O (Gov)

(Page 19 - 20)

Ex Parte/In Camera/Under Seal
Classified

Defense Motion

APPELLATE EXHIBIT 619O (Gov) is located in the classified portion of the original record of trial.

POC: Chief, Office of Court Administration
Office of Military Commissions