

**MILITARY COMMISSIONS TRIAL JUDICIARY  
GUANTANAMO BAY, CUBA**

<b>UNITED STATES OF AMERICA</b>  <b>v.</b>  <b>KHALID SHAIKH MOHAMMAD, WALID MUHAMMAD SALIH MUBARAK BIN ‘ATTASH, ALI ABDUL AZIZ ALI, MUSTAFA AHMED ADAM AL HAWSAWI</b>	<b>AE 952</b>  <b>ORDER</b>  <b>Specified Issues to be Briefed Invocation of Classified Information Privilege</b>  <b>25 June 2024</b>
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1. At various times over the years, the Prosecution has stated it is “invoking national security privilege”<sup>1</sup> with regard to information it seeks to preclude from disclosure and/or discussion in this Commission. In doing so, the Prosecution has at times applied the procedures governing the classified information privilege under Military Commission Rule of Evidence (M.C.R.E.) 505.<sup>2</sup>

2. While similarly referring to this “national security privilege” interchangeably with M.C.R.E. 505,<sup>3</sup> Counsel for the Accused have nonetheless argued the Prosecution is using this privilege to impermissibly limit Defense Counsel’s pretrial investigative activities<sup>4</sup> and/or exclude content from any discussion, in both open and closed sessions, to include the mere asking of certain questions.<sup>5</sup>

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<sup>1</sup> See e.g., Unofficial/Unauthenticated Transcript, *United States v. Khalid Shaikh Mohammad, et al.*, 19 October 2017, at 16978. See also Transcript, 21 January 2020, at pp. 30182 and 30267; Transcript, 26 September 2023, at 37044.

<sup>2</sup> See e.g., Transcript, 26 September 2023, at 37043-37045 and 37052.

<sup>3</sup> See e.g., Transcript, 21 January 2020, at 30149 (Defense Counsel explaining “Our objection arises under M.C.R.E. Rule 505(a) and 18 U.S.C. 949p-1(a), which provides the rule of privilege. It’s my understanding that this is the text on which the government is relying for its invocations of national security privilege.”). See also Transcript, 26 September 2023, at 37036-37037.

<sup>4</sup> See e.g., Transcript, 10 January 2018, at 18557 (Defense Counsel arguing they’ve been told that investigating in a foreign country “would be disclosing classified information”).

<sup>5</sup> See Transcript, 28 September 2023, at 37236 (Defense Counsel arguing “the government has asserted the *national security privilege* around that information and we can’t even ask about it in closed session” (emphasis added)).

3. As the scope of the Prosecution’s proposed limitations on the Defense uses of information subject to the “national security privilege” has increased, the Commission finds it appropriate for the Prosecution to more substantively brief the theory and scope of the “national security privilege” it has sought to invoke over the course of this Commission.

4. Accordingly, the Commission will order the Prosecution to brief the issue, provide relevant authorities, and respond to specific questions about the scope of the “national security privilege” it has repeatedly sought to invoke. The Defense will then be afforded a reasonable opportunity to respond.

**5. Order.**

a. **Not later than 2 July 2024**, the Prosecution shall file a brief, stating its position with regard to the “national security privilege” it has sought to invoke and specifically answering the following questions:

(1) What, if any, difference is there between the classified information privilege, pursuant to M.C.R.E. 505, and the “national security privilege” referenced by the Prosecution?

(2) What is the legal authority for the Prosecution’s assertion of the “national security privilege” in this military commission convened under the Military Commissions Act? Provide citations governing the scope, procedures, authorities, exceptions, and remedies.

(3) What authority allows the Prosecution to invoke the “national security privilege” to completely preclude the Defense from asking specific questions or making specific oral arguments?

(4) What authority allows the Prosecution to invoke the “national security privilege” to completely preclude the Defense from using classified information it has received in discovery in a closed session?

b. **Not later than 9 days** following the Prosecution's filing pursuant to paragraph 5.a above, Counsel for the Accused may file responsive briefs.

c. A reply brief is not authorized.

So **ORDERED** this 25th day of June, 2024.

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MATTHEW N. MCCALL, Colonel, USAF  
Military Judge  
Military Commissions Trial Judiciary