MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY, CUBA

UNITED STATES OF AMERICA v. KHALID SHAIKH MOHAMMAD, WALID MUHAMMAD SALIH MUBARAK BIN 'ATTASH, ALI ABDUL-AZIZ ALI, MUSTAFA AHMED ADAM AL HAWSAWI	**AE 952C (KSM)** **Mr. Mohammad's Response To** AE 952 ORDER Specified Issues to be Briefed Invocation of Classified Information Privilege 22 July 2024

1. Timeliness

This motion is timely filed.[1]

2. Mr. Mohammad's Response

The Commission's Order in AE 952, observing that "the Prosecution's proposed limitations on the Defense uses of information subject to the 'national security privilege' has increased," ordered the government to explain its position on "invok[ing]" and four specific questions related thereto. The following is Mr. Mohammad's response to those same questions including, as necessary, rebuttal of the government's positions insofar as much of its proposed scheme categorically prevents a fair trial for Mr. Mohammad.

I. 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?

Military Commission Rule of Evidence (M.C.R.E.) 505 governs the protection of classified information, and is comprehensive and exhaustive. Moreover, it is explicit that the privilege is specific to classified information: "General rule of privilege. *Classified information*

[1] On 18 July 2024, the Military Commission granted an oral motion on the record for an extension of time from 19 to 22 July 2024 for the submission of this brief.

shall be protected and is privileged from disclosure if disclosure would be detrimental to the national security."[2] The potential danger to national security is a component part of the definition of the classified information privilege. The government's suggestion[3] that something called the "national security privilege" exists and is coextensive with the privilege in M.C.R.E. 505 is simply inaccurate. Unlike the classified information privilege that is identified, defined, and operationalized in M.C.R.E. 505, the so-called "national security privilege" appears nowhere in the governing rules or statute. Rather, the government's insertion of this phrase-of-choice is an attempt to free itself from the specific requirements of M.C.R.E. 505, simultaneously expanding the information it would withhold from the Commission and the defense, and diluting its responsibilities when it would seek to do so (*see infra*, Sections III and IV).

II. 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.

There is no legal authority for the assertion of the "national security privilege" as it is not a recognized legal privilege, and all invocations of privilege relating to classified information should conform to the definition and process in M.C.R.E. 505 and 10 U.S.C. § 949p-1(a).

III. 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?

There is no authority for the Prosecution to completely preclude the defense from asking specific questions or making specific oral arguments pursuant to a pretended "national security

[2] M.C.R.E. 505(a)(1) (emphasis added).

[3] AE 952A (GOV) Government Brief in Response to AE 952, Order, Specified Issues to be Brief Invocation of Classified Information Privilege, filed 10 July 2024, at 5-6 and Attachment B.

privilege" or otherwise. Not only are such attempts *ultra vires* of the statute and rules, evading the entire legal mechanism for handling classified information in that is required by M.C.R.E. 505 and 10 U.S.C. §§ 949p-1-7, but they unconstitutionally infringe on Mr. Mohammad's right to a fair trial by preventing the calling and confrontation of witnesses,[4] the creation of a full record,[5] the right to appeal,[6] and access to counsel[7] – to say nothing of ensuring that the trial will satisfy the heightened reliability required for a capital case.[8]

For good reason, the government cannot be compelled to "release [] classified information to any person not authorized to receive such information."[9] But, having elected to prosecute a defendant in a case with classified information, the government incurs specific additional obligations. When the Military Judge determines that information is relevant, he is required to ensure that the defendant retains "substantially the same ability to make a defense" as he would if he had access to the particular classified information.[10] This includes the imposition of sanctions if the government's invocation of the classified information privilege infringes on the defendant's trial rights. It is a simple exchange: "[T]he Government can invoke its evidentiary privileges only at the price of letting the defendant go free. Since the Government which prosecutes an accused also has the duty to see that justice is done, it is unconscionable to allow it to undertake prosecution and then invoke its governmental privileges to deprive the

---

[4] U.S. CONST. amend. VI; 10 U.S.C. §§ 949c(b)(6), 949j.

[5] 10 U.S.C. § 948o; *Chessman v. Teets*, 354 U.S. 156 (1957) (defendant's procedural due process rights were violated where a contested record of trial was finalized *ex parte*).

[6] 10 U.S.C. § 950c.

[7] U.S. CONST. amend. VI; 10 U.S.C. § 949c(b).

[8] U.S. CONST. amend. VIII; *Zant v. Stephens*, 462 U.S. 862 (1983); *Woodson v. North Carolina*, 428 U.S. 280 (1976).

[9] 10 U.S.C. § 949p-1(a) and M.C.R.E. 505(a)(1).

[10] 10 U.S.C. § 949p-6(d)(2) and M.C.R.E. 505(f)(2)(B).

accused of anything which might be material to his defense."[11] Sanctions here are not a punishment; they are a recognition by the court that the government is unable to fulfill its full obligations to the defendant it has chosen to prosecute. This can be, and often is, a matter-of-fact analysis. In *U.S. v. Murphy*, the Air Force Court of Criminal Appeals affirmed the trial court's holding that "as a result of the government's failure to release classified information, the maximum punishment to which the appellee could be sentenced, if convicted, is a sentence of no punishment."[12] So too did the Fourth Circuit confirm in *U.S. v. Moussaoui* that "[i]f no adequate substitution can be found, the government must decide whether it will prohibit the disclosure of the classified information; if it does so, the district court must impose a sanction, which is presumptively dismissal of the indictment."[13]

While both *Murphy* and *Moussaoui* concern the provision of classified discovery to the defense at all, the same analysis applies to the use of such information in questioning a witness or making an argument.[14] Upon a finding by the Military Judge that the information is relevant and material,[15] and following proper notice by the defense under M.C.R.E. 505(g) of its intent to use such information, the statute and rules are clear that, if the government *still* declines to release the information, "the military judge shall dismiss the case" or fashion other appropriate

---

[11] *U.S. v. Moussaoui*, 382 F.3d 453, 475 (2003) (*quoting Jencks v. U.S.*, 353 U.S. 657, 670-671 (1957)).
[12] *U.S. v. Murphy*, 2008 CCA LEXIS 511, *1 (2008).
[13] *Moussaoui*, 382 F.3d. at 476.
[14] 10 U.S.C. § 949p-6.
[15] *Id*.

remedies.[16] In that situation, the government's protection of the classified information is fundamentally incompatible with a fair trial for the defendant.

In *U.S. v. Gaddis*, the Court of Appeals for the Armed Forces (CAAF) held that it would be unconstitutional for an evidentiary "balancing test" to "preclude the admission of evidence 'the exclusion of which would violate the constitutional rights of the excused.'"[17] In other words, it is impermissible to "balance" the defendant out of his constitutional right to a fair trial. The military judge is not called upon under the MCA to "balance" values that have already been carefully balanced by Congress. The MCA states the rights and obligations of the parties relative to the discovery of classified information, and the procedures through which those rights and obligations will be fulfilled. Once the Military Judge has applied the law as he is called upon to do under the MCA, his duties are fulfilled. The government must then choose its course. Yet, in this case, the government wants to have its cake and eat it too. Seeking to avoid any trial court sanction or meaningful appellate review of its objection to particular questions (and in so doing, depriving the defendant of his right to examine witnesses and to counsel), the government developed the ingenious idea to simply prevent the record from being made at all. This is unconstitutional and contrary to the MCA.[18] The result is to hide from the Military Judge and the record the disadvantages that redound to the defendant by preventing issues related to classified information from being presented and raised on appeal. The United States Supreme Court in *Chessman* found a due process violation where the capitally-charged defendant challenged the *ex parte* preparation of a contested record of trial.[19] Here, the danger is worse by

---

[16] 10 U.S.C. § 949p-6(f)(2).
[17] *U.S. v. Gaddis*, 70 M.J. 248, 250 (2011).
[18] 10 U.S.C. § 948o.
[19] *Chessman*, 354 U.S. at 161-162.

orders of magnitude – there will be no record to review. If the current practice is allowed to continue, the appellate court will receive a pre-sanitized version of proceedings that excludes significant questions about the use of relevant discovery in a capital case. And, this Commission would be deprived of the record that would substantiate the order required under 10 U.S.C. 949p-6(f)(2). The government is attempting a circumvention of the statutory structure, preventing both defense counsel and the Military Judge from executing their statutorily required duties, and it should not be countenanced by this Commission.

IV. 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?

There is no authority allowing 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. *See supra*, section III. The government elected to try the four defendants in this case in a joint proceeding, provided security clearances to all eligible team members, and cannot now seek to isolate information between defense teams or from the Military Judge on the basis of an invented privilege. There is no provision in the MCA for withholding information on this basis without sanction, and counsel for Mr. Mohammad reminds the Commission of its statutory obligation to impose such sanction on the government for failure to provide such information even to the Military Judge.[20]

---

[20] 10 U.S.C. § 949p-6(f)(2); *Murphy*, 2008 CCA LEXIS at *23 ("The military judge imposed this sanction [of a maximum sentence of no punishment] pursuant to Mil. R. Evid. 505(i)(4)(E) for the government's failure to provide the classified information for an *in camera* review in order to insure [sic] a fair trial for the appellee").

3. List of Attachments

A. Certificate of Service, dated 22 July 2024.

Respectfully submitted,

//s//
GARY D. SOWARDS
Learned Counsel

//s//
ELSPETH G. THEIS
Maj, U.S. Air Force
Defense Counsel

//s//
GABRIELA M. McQUADE
Defense Counsel

Counsel for Mr. Mohammad

ATTACHMENT A

CERTIFICATE OF SERVICE

I certify that on the 22nd day of July 2024, I electronically filed the foregoing document with the Chief Clerk of the Military Commissions Trial Judiciary and delivered the foregoing to all counsel of record by electronic mail.

//s//
GARY D. SOWARDS
Learned Counsel