

**UNITED STATES
OF
AMERICA**

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**D-015
Ruling on Defense Motion for Appropriate Relief
(to Preclude Further Ex Parte Proceedings Under
Color of M.C.R.E. 505(e)(3))**

21 February 2008

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OMAR AHMED KHADR
a/k/a "Akhbar Farhad"
a/k/a "Akhbar Farnad"
a/k/a "Ahmed Muhammed Khahi"

1. The commission has considered the defense motion, the government response, and the defense reply.
2. The defense requests that the commission rule that Military Commission Rule of Evidence (M.C.R.E.) 505(e)(3) is inconsistent with the provisions of the Military Commissions Act of 2006 (MCA).
3. The defense request is apparently based on a train of logic that runs as follows:
 - a. MCA § 949d(b) states that, with certain exceptions, all proceedings shall be in the presence of the accused.
 - b. Black's Law Dictionary defines proceedings to include all possible steps in an action from commencement to the execution of judgment. (See Defense Motion, paragraph 6a(3).)
 - c. If the prosecution meets with the military judge, it is a proceeding, according to Black's, and is, therefore, barred by § 949d(b).
4. The commission notes that § 949d is titled "Sessions." The commission further notes that § 949d(a) is titled "Sessions Without Presence of Members," while § 949d(b) is titled "Proceedings in Presence of Accused." The defense motion does not address § 949d(a), which would seem to be more appropriate to discussion of M.C.R.E. 505(e)(3), since the defense does not contend that the defense counsel and the accused were somehow excluded from a Proceeding with Members.
5. § 949d(a) is generally analogous to 10 U.S.C. 839a (UCMJ Article 39a). Article 39a provides that the military judge can hold on the record proceedings without members -

although the accused shall be present (Case law exceptions to that rule are omitted.). However, despite the strictures of Article 39a (and 39b), no appellate court has ever held that a conference under the provisions of Rule for Courts-Martial 802 violates an accused's right to be present at proceedings in his case.

6. The defense definition of proceedings is not consistent with military jurisprudence in general or, more importantly, the MCA specifically (See, for example, § 949d(f)(2)(A) and (B)). The military judge is charged, by statute, with safeguarding national security information and the MCA does not require that the accused or defense counsel be present at all times while the military judge is carrying out that duty. The commission finds that M.C.R.E. 505(e)(3) is a valid exercise of the Secretary's powers to prescribe regulations as authorized by § 949a(a) and § 949d(f)(4).

7. The commission declines to grant the defense the relief requested. However, the commission will continue to use the procedures which it established in the government's initial request for review under the provisions of MCRE 505(e)(3) (See pp. 13-14, Defense Motion.). The commission notes that such procedures are specifically authorized by § 949d(f)(3). If the prosecution desires to have the commission change such procedures, it may so request by motion.

Peter E. Brownback III
COL, JA, USA
Military Judge