

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

UNITED STATES OF AMERICA v. KHALID SHAIKH MOHAMMAD, WALID MUHAMMAD SALIH MUBARAK BIN ATTASH, RAMZI BIN AL SHIBH, ALI ABDUL AZIZ ALI, MUSTAFA AHMED ADAM AL HAWSAWI	AE 292QQ <i>AMENDED¹</i> ORDER Emergency Joint Defense Motion to Abate Proceedings and Inquire into Existence of Conflict of Interest Burdening Counsel's Representation of Accused 16 December 2014
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1. Procedural background:

a. The Accused filed a joint motion requesting the Commission conduct an inquiry into potential conflicts of interest stemming from an investigation by the Federal Bureau of Investigation (FBI) [REDACTED] and abating all other proceedings until it had sufficient facts to “permit the Commission to assess the conflict, permit defense counsel to determine whether they are required to withdraw, or permit the accused to make voluntary, knowing, and intelligent waivers of any ongoing conflicts.”² The genesis for the motion was the questioning, by the FBI, of the Defense Security Officer (DSO) for Mr. bin al Shibh’s Defense Team [REDACTED] and purportedly enlisting him into a “relationship” with the FBI.⁴ The Defense specifically cited a motion⁵ filed

¹ Motion of Special Review Team for Clarification of AE 292QQ (Order), filed 11 August 2014 (AW 292TT (GOV)) and ORDER, Emergency Joint Defense Motion to Abate Proceedings and Inquire into Existence of Conflict of Interest Burdening Counsel’s Representation of Accused, 15 December 2104 (AE 292WWW).

² Emergency Joint Defense Motion to Abate Proceedings and Inquire into Existence of Conflict of Interest Burdening Counsel’s Representation of Accused, filed 13 April 2014 (AE 292).

³ Id., at 5.

⁴ Id.

by the Government in March 2014, alleging Mr. Mohammad's counsel had violated the Commission's Privileged Written Communications Order ⁶ by releasing three third-party communications without authority, as the [REDACTED]

b. The preliminary response⁷ by the Prosecution requested the Commission deny the Defense motion and continue with issues previously docketed for the hearing then in session.⁸ The Defense reply reiterated the need for an inquiry into the FBI investigative effort and a determination as to possible conflicts that may have arisen as a result between Defense Counsel and their respective clients.⁹

c. The Commission issued an Order directing any current or previous member of a Defense Team who had been contacted or interviewed "...by agents of any federal governmental agency, including the FBI, concerning any defense-related matter must disclose said contact and/or communication to his or her respective Lead Defense Counsel immediately, irrespective of any non-disclosure agreements which may have been signed."¹⁰

d. Next, a Defense motion was filed to produce specified witnesses, later supplemented,¹¹ and a Defense response to an order from the bench to identify the name of the DSO questioned

⁵ Government Emergency Motion for Interim Order and Clarification that the Commission's Order in AE018U Does Not Create a Means for Non-Privileged Communications to Circumvent the Joint Task Force Mail System, filed 28 February 2014 (AE 018Y)

⁶ Order, Privileged Written Communications, 6 November 2013 (AE 018U)

⁷ Government Preliminary Response To Emergency Joint Defense Motion, filed 14 April 2014 (AE 292A)

⁸ See Docket Order, 10 March 2014 (AE 281)

⁹ Joint Defense Reply to Government Preliminary Response to Emergency Joint Defense Motion, filed 15 April 2014 (AE 292B)

¹⁰ Interim Order, emergency Defense Motion to Abate Proceedings and Inquire into Existence of Conflict of Interest Burdening Counsel's representation of Accused, 15 April 2014 (AE 292C)

¹¹ Joint Defense Motion For Orders of Production, filed 16 April 2014 (AE 292D) and Supplement to Joint Defense Motion For Orders of Production, filed 6 June 2014 (AE 292D ((Mohammad, bin 'Attash, bin al Shibh, al Baluchi Sup.)). The Commission notes Mr. Hawsawi was a party to the original production motion but not to the supplement.

by the FBI.¹² Originally identified *ex parte* and under seal, the DSO was later identified on the record as Dante James.¹³

e. On 16 April 2014, the Chief Prosecutor detailed a “Special Trial Counsel,”¹⁴ to represent the interest of the United States in regard to this motion. Special Trial Counsel promptly filed for leave to provide a “full factual submission” by 21 April 2014, and asked the Commission take no further action until the United States submitted its response.¹⁵ The Defense filed a joint response asking the Commission deny the motion of the Special Trial Counsel as an “unprecedented attempt to suspend a constitutionally-required conflict of interest inquiry.”¹⁶

f. The Commission found, in consonance with the facts averred in the original Defense motion (AE292), the need to appoint independent counsel for Messrs. Mohammad and bin al Shibh and issued an order to the Chief Defense Counsel setting out a schedule for appointing such counsel.¹⁷ An *Amicus* Brief and Motion was subsequently filed by the Chief Defense Counsel requesting an extension of time to provide independent counsel predicated on the need to solicit support from the military services to meet the Commission’s order.¹⁸ The Commission granted an extension of time until the Defense was provided copies of the FBI Investigation.¹⁹

¹² Defense Response to Commission’s Order to Provide the Name of Mr. Bin al Shibh’s Defense Security Officer filed 15 April 2014 (AE 292E (RBS))

¹³ Unofficial/Unauthenticated Transcript of the Khalid Shaikh Mohammad et al. (2) Motions Hearing Dated 6/16/2014 from 9:05 AM to 11:05 AM p. 7882

¹⁴ Special Trial Counsel Detailing Memorandum for Litigation of AE 292, filed 16 April 2014 (AE 003C)

¹⁵ Government Motion Requesting Leave to File Submission by Newly Detailed Special Trial Counsel, filed 16 April 2014 (AE 292F)

¹⁶ Joint Defense Response to Government Motion Requesting Leave to File Submission by Newly Detailed Special Trial Counsel, filed 17 April 2014 (AE 292G)

¹⁷ Order, Appointment of Independent Counsel, Emergency Joint Defense Motion to Abate Proceedings and Inquire into Existence of Conflict of Interest Burdening Counsel’s Representation of Accused, 17 April 2014 (AE 292H)

¹⁸ *Amicus* Brief and Motion of the Chief Defense Counsel for Extension of Time to Appoint Independent Counsel pursuant to AE 292H, filed 28 April 2014, (AE 292-3)

¹⁹ *Amicus* Brief and Motion of the Chief Defense Counsel for Extension of Time to Appoint Independent Counsel pursuant to AE 292H, 30 April 2014 (AE 292-4)

g. Special Trial Counsel then filed both a “public” submission²⁰ and Notice of Classified, *Ex Parte* Filing by Special Trial Counsel²¹ and leave to file was granted by the Commission.²² The “public” submission specifically denied [REDACTED] the allegation contained in the Government motion for the Commission to inquire into a possible violation of the Commission’s Privileged Written Communications Order. The Special Trial Counsel requested an additional 30 days in which to provide a more thorough response to the Commission, specifying the establishment of a “Special Review Team”²³ to insulate the Prosecution from being compromised in regard to litigation involving this motion and setting out facts regarding the Defense allegations. Mr. Aziz Ali (aka Mr. al Baluchi) requested the Commission reconsider the decision to grant leave to file *ex parte*.²⁴ The Special Trial Counsel response requested the Commission deny the motion to reconsider as Mr. Aziz Ali failed to carry the burden demonstrating the classified, *ex parte*, motion was not properly restricted in accordance with Military Commission Rule of Evidence (M.C.R.E.) 505 (f)(1)(A).²⁵

h. Mr. Aziz Ali then filed a motion to gain independent counsel asserting his belief “[t]here is reason to believe that the [REDACTED] defense teams concerns alleged communications with third parties, possibly affecting Mr. al Baluchi’s defense team...Mr. al Baluchi’s defense team has good reason to believe that it is being investigated, and the government has created yet another reason for Mr. al Baluchi himself to distrust his

²⁰ Public Government Submission by Special Trial Counsel In Response to Emergency Joint Defense Motion, filed 21 April 2014 (292I)

²¹ Notice Of Classified Ex parte Filing by Special Trial Counsel, 21 April 2014 (AE 292K) and Notice of Classified Ex parte Filing By Special Trial Counsel, 22 April, 2014 (AE 292-1)

²² Ruling, AE 292-1, Special Trial Counsel Motion for Leave to File Ex parte, 23 April 2014 (AE 292-2)

²³ Trial Counsel Detailing Memorandum, 12 May 2014 (AE 003E)

²⁴ Mr. al Baluchi’s Motion to Reconsider AE 292-2 Granting Leave for Ex parte Submission, filed 29 April 2014 (AE 292J)

²⁵ Government Response to Defense Motion to Reconsider AE 292-2 Granting Leave for *Ex Parte* Submission, filed 13 May 2014 (AE 292O)

government-assigned counsel.”²⁶ The response by Special Counsel asserted the Commission had already determined there was insufficient evidence to “warrant appointment of independent counsel” as articulated in the Commission order directing appointment for independent counsel for Messrs. Mohammad and bin al Shibh; there was no evidence to support the conclusion the investigation identified in the original motion pertained to counsel for Mr. Aziz Ali; and, appointment would be premature given there is “no evidentiary support to conclude a conflict exists for this particular defendant.”²⁷ Mr. Aziz Ali reply reinforced his belief “the government’s official statement that the FBI is not investigating [REDACTED] [REDACTED] [has] given rise to a reasonable belief that Mr. al Baluchi’s team is the subject—even if not the primary focus—of [REDACTED]

”²⁸

i. This was followed by a motion²⁹ from Mr. Hawsawi seeking an order from the Commission “directing the FBI to immediately remove its confidential informant from the Office of the Chief Defense Counsel; to provide the defense with the identity of the FBI’s confidential informant, so steps could be taken to prevent further breaches of the attorney-client privilege and assess what privileged information has already been compromised; and, to order the production of all interview notes ... or other investigative records, produced from the 21

²⁶ Mr. al Baluchi’s Motion for Independent Counsel to Advise Him Regarding Potential Conflict, filed 28 April 2014 (AE 292L (AAA))

²⁷ Government Response to Mr. al Baluchi’s Motion for Independent Counsel to Advise Him Regarding Potential Conflict, filed 12 May 2014 (AE 292N)

²⁸ Mr. al Baluchi’s Reply to Government Response to Mr. al Baluchi’s Motion for Independent Counsel to Advise Him Regarding Potential Conflict, filed 19 May 2014 (AE 292Q (AAA))

²⁹ Mr. Hawsawi’s Ex parte and Under Seal Response to AE 292C Interim Order related to the Emergency Defense Joint Motion to Abate Proceedings and Inquire into Existence of Conflict of Interest Burdening Counsel’s Representation of Accused, filed 29 April 2014 (AE 292M (MAH))

November 2013 meeting between [REDACTED],³⁰ including records of any subsequent interviews, interrogations, or contacts with [REDACTED], "Person A," and any other members of the Office of the Chief Defense Counsel who have been in contact with the FBI."

j. On 14 May 2014, Mr. Mohammad filed an³¹ *ex parte* and under seal declaration by the Linguist stating their perspective of the facts surrounding [REDACTED]³²

k. In accordance with their earlier submission, the Special Review Team filed their depiction of the facts surrounding the FBI investigation alleged in AE 292 and requested the Commission deny the Defense motion to abate and conduct further inquiry into the circumstances of the FBI questioning a member of Mr. bin al Shibh's Defense team.³³ The Joint Defense Reply, filed by Messer's Mohammad, bin 'Attash, bin al Shibh, and Aziz Ali, but not joined by Mr. Hawsawi, challenged the Special Review Team submission as incomplete and provided a number of unanswered issues they considered relevant to the original motion to abate and resolution of potential conflicts-of-interest.³⁴ Mr. Mohammad then filed a motion³⁵ to compel discovery of details pertaining to the FBI investigation relied upon, and cited, in the Special Review Team submission. The Special Review Team response requested the Commission deny the discovery as being irrelevant to the determination of conflict since there is

³⁰ This motion was originally filed *ex parte* and under seal; subsequent filings and open sessions of the Commission have rendered protections afforded this motion moot. *See* Defense Motion for a Protective Order, filed 4 June 2014 (AE 292W (MAH))

³¹ Notice of Declaration, filed 14 May 2014 (AE 292P)

³² At the request of the Defense, and without objection by the Special Prosecutor, the identity of this individual will not be disclosed and will be referred to as the "Linguist;" *see* Unofficial/Unauthenticated Transcript of the Khalid Shaikh Mohammad et al. (2) Motions Hearing Dated 6/16/2014 from 9:05 AM to 11:05 AM pp. 7881-82.

³³ Government Submission by Special Review Team in Response to Emergency Joint Defense Team Motion, filed 21 May 2014 (AE 292R)

³⁴ Joint Defense Reply to Government Submission by Special Review Team in Response to Emergency Joint Defense Team Motion, filed 30 May 2014 (AE 292T (Mohammad, bin 'Attash, bin al Shibh, al Baluchi))

³⁵ Defense Motion to Compel Discovery Regarding Details of FBI Investigations into Defense Teams, filed 3 June 2014 (AE 292U (KSM))

no ongoing FBI investigation and therefore there is no conflict to be resolved.³⁶ The Defense reply³⁷ castigated the intrusion of the Special Review Team as a “stratagem to derail a thorough investigation of the government’s clandestine invasion and monitoring of confidential defense team functions; promote secret, backdoor, ‘*ex parte*’ resolution of the issues; and result in a whitewashing of the government’s unconscionable overreaching” and disputed the narrow definition of conflict employed by the Special Review Team in their determination no conflict of interest exists. The reply requested the Commission grant their motion for discovery.

1. A session of the Commission was previously scheduled for 16-20 June 2014, but, given the issues advanced by the Defense motions and the response of the Special Review Team, the Commission issued an *Amended Docketing Order*³⁸ on 4 June 2014 both limiting the session to argument on this motion and setting out its concern:

“After review of the submissions by the Special Review Team, the Joint Defense Reply (AE 292T) and the Motion to Compel Discovery (AR 292U), the Commission is concerned the submissions of the Special Counsel have not adequately addressed a number of issues raised by the Defense as to the individuals contacted by the Federal Bureau of Investigation or the scope of any investigation concerning these cases. In addition the Commission is unsure whether other investigations, unknown to the Defense, have been conducted.”³⁹

In response the Special Review Team provided a supplemental submission⁴⁰ setting out a more expansive explanation of the facts involved in [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

³⁶ Response by Special Review Team to AE 292U (Mohammad) Defense Motion to compel Discovery Regarding Details of FBI Investigations into Defense Teams, filed 13 Jun 2014 (AE 292BB)

³⁷ Defense reply to 292BB (GOV) response to Response by Special Review Team to Defense Motion, filed 16 June 2014 (AE 292FF (KSM))

³⁸ Amended Docketing Order, 4 June 2014 (AE 302C)

³⁹ *Id.*, para 4

⁴⁰ Supplemental Government Submission by Special Review Team in Response to Emergency Joint Defense Motion, filed 11 June 2014 (AE 292R (Sup))

_____ ⁴² In reply⁴³ to the supplemental filing by the Special Review Team, Mr. Mohammad requested the Commission proceed with the inquiry as set out in the Docketing Order and offered the “report” of Lawrence J. Fox⁴⁴ as to the ethics constraints implicit in the motion before the Commission.⁴⁵

⁴¹ Id., Declaration of SSA [REDACTED]
⁴² Id., Attachment D, Attachment I
⁴³ Defense Reply to Supplemental Government Submission in Response to Emergency Joint Defense Motion, filed 13 June 2014 (AE 292AA (KSM))
⁴⁴ Professor Fox is, among many other distinctions, a visiting lecturer in Law at Yale Law School and the Supervising Lawyer of the Ethics Bureau at Yale, *see* Attachment B, AE 292AA
⁴⁵ Id., Attachment D
⁴⁶ Defense Motion for a Protective Order, filed 4 June 2014 (AE 292W (MAH))
⁴⁷ Emergency Joint Defense Motion to Compel the Deposition of Thomas Gilhool Pursuant to R.M.C. 702, filed 9 June 2014 (AE 292Y)

██████████ and such is irrelevant to determination of the conflict of interest claim.⁴⁸ On 17 June 2014, the Commission entered an Interim Order deferring any decision in regard to the deposition.⁴⁹

n. On 11 June, 2014 the Special Trial Counsel submitted a classified, *ex parte*, filing⁵⁰ for consideration by the Commission.

o. A Defense Notice was filed by counsel for Mr. bin al Shibh on 1 July 2014, providing a declaration by Mr. Harrington for consideration by the Commission.⁵¹ The declaration set out activities impacting upon Mr. bin al Shibh's Defense Team since the Commission session in June. Paramount among them was information from several sources concerning a security investigation being conducted against members of the Team⁵² and the suspension of the security clearance for Person B.⁵³ During a meeting with Ms. Flannery, the security officer who had suspended the translator's clearance, she purportedly told counsel there were indicators they might be part of an unspecified problem and warned them not to pursue an inquiry into the suspension because it might uncover even more problems.⁵⁴ Based on this, Counsel believe they cannot advise their client as to potential conflicts of interest without full disclosure of the *ex parte* filings by the Government, a full inquiry by the Commission, including an evidentiary hearing, and the appointment of independent defense counsel to advise Mr. bin al Shibh.⁵⁵ As a

⁴⁸ Response by Special Review Team to AE 292Y, Emergency Joint Defense Motion to Compel the Deposition of Thomas Gilhool Pursuant to R.M.C. 702, filed 13 June 2014 (AE 292DD)

⁴⁹ Interim Order, Emergency Joint Defense Motion to Compel the Deposition of Thomas Gilhool Pursuant to R.M.C. 702, 17 June 2014 (AE 292GG)

⁵⁰ Notice of Classified, Ex Parte Filing by Special Trial Counsel, filed 11 June 2014 (AE 202Z)

⁵¹ Defense Notice of Filing Declaration in Support of AE 292, Emergency Joint Defense Motion to Abate Proceedings and Inquire into Existence of Conflict of Interest Burdening Counsel's Representation of Accused, filed 1 July 2014 (AE 292II (RBS))

⁵² *Id.*, paras 8, 15 and 18, Attachment B

⁵³ *Id.*, paras 15 - 20

⁵⁴ *Id.*, para 18,

⁵⁵ *Id.*, paras 21-22

consequence of this Notice, the Commission directed⁵⁶ the Special Review Team to respond by 9 July 2014, and, in a separate Order, directed the Chief Defense Counsel, with the support of the Director, Office of Military Commissions, to appoint Independent Defense Counsel, along with paralegal and translator support, not later than 16 July 2014.⁵⁷ The response of the Special Review Team asserted the issues raised by the Defense notice have “no bearing” on the issue before the Commission as there is no “claim that he (Mr. Harrington) or any other defense team member is under investigation by the Department of Defense... or any other entity” and provided a sworn declaration by Ms. Flannery as to her perspective of the meetings, first with the Chief Defense Counsel and others, and later with counsel for Mr. bin al Shibh at the conclusion of the first meeting.⁵⁸

2. The complaint was first presented to the Commission during the session on 14 April 2014,⁵⁹ and argument was heard on 15 and 17 April;⁶⁰ further argument on the motion and its ancillary motions occurred on 16 June 2014.⁶¹

3. At the urging⁶² of the Special Prosecutor, the Commission did not consider the Government’s classified, *ex parte*, submissions⁶³ in resolving this motion;⁶⁴ the Commission has considered the *ex parte* motions⁶⁵ by the Defense in its deliberations.⁶⁶

⁵⁶ Amended Order Defense Notice of Filing Declaration in Support of AE 292, Emergency Joint Defense Motion to Abate Proceedings and Inquire into Existence of Conflict of Interest Burdening Counsel’s Representation of Accused, 3 July 2014 (AE 292KK)

⁵⁷ Appointment of Independent Counsel, Emergency Joint Defense Motion to Abate Proceedings and Inquire into Existence of Conflict of Interest Burdening Counsel’s Representation of Accused, 3 July 2014, (AE 292LL)

⁵⁸ Response by Special Review Team to Defense Notice of Filing Declaration In support of AE 292 Emergency Joint Defense Motion to Abate proceedings And Inquire into Existence of Conflict of Interest Burdening Counsel’s Representation of Accused, filed 9 July 2014 (AE 292MM)

⁵⁹ Unofficial/Unauthenticated Transcript of the KSM et al. (2) Motions Hearing Dated 4/14/2014 from 9:15 AM to 9:51 AM

⁶⁰ Unofficial/Unauthenticated Transcript of the KSM et al. (2) Motions Hearing Dated 4/15/2014 from 9:15 AM to 11:13 AM; Unofficial/Unauthenticated Transcript of the KSM et al. (2) Motions Hearing Dated 4/17/2014 from 9:07 AM to 9:50 AM

⁶¹ See Unofficial/Unauthenticated Transcript of the KSM et al. (2) Motions Hearing Dated 6/16/2014 from 9:05 AM to 11:05 AM; Unofficial/Unauthenticated Transcript of the KSM et al. (2) Motions Hearing Dated 6/16/2014 from 11:30 AM to 12:40 PM; Unofficial/Unauthenticated Transcript of the KSM et al. (2) Motions Hearing Dated 6/16/2014 from 2:06 PM to 3:15 PM

4. **Factual Background.** Analysis of the information before the Commission narrows the facts before it into three distinct situations. The first, occurring in January 2013 involved a Linguist assigned to Mr. Mohammad's Defense Team; the second, beginning in the Fall of 2013, involved several members of Mr. bin al Shibh's Defense Team and a member of Mr. Hawsawi's Defense Team; and, the third relates to the suspension of access to Sensitive Compartmented Information (SCI) for one member of Mr. bin al Shibh's Defense Team and a "warning" for counsel not to pursue further inquiry into the suspension.

In assessing the representations of Defense Counsel, the Special Review Team, and the Prosecution, the Commission will assume the stance of the Court in *Holloway v. Arkansas*, 435 U.S. 475, 486 (1978). "[A]ttorneys are officers of the court, and 'when they address the judge solemnly upon a matter before the court, their declarations are virtually made under oath.' "

(internal citations omitted)

a. **FBI [REDACTED] Concerning [REDACTED] on Mr. Mohammad's Defense Team**

⁶² Unofficial/Unauthenticated Transcript of the KSM et al. (2) Motions Hearing Dated 6/16/2014 from 2:06 PM to 3:15 PM at 8021.

⁶³ Notice of Classified, Ex Parte Filing by Special Counsel, 22 April 2014, (AE 292-1); Notice of Classified, Ex Parte Filing by Special Counsel, 21 April 2014 (AE 292K); Notice of Classified, Ex Parte Filing by Special Counsel, 22 April 2014 (AE 292Z).

⁶⁴ See also paragraph 5B, Supplemental Government Submission by Special Review Team In Response to Emergency Joint Defense Motion, filed 11 June 2014 (AE 292R (Sup)).

⁶⁵ Defense Notice of Ex Parte, Under Seal, Filing, filed 15 April 2014, (AE 292E (RBS)); Amicus Brief and Motion of the Chief Defense Counsel for Extension of Time to Appoint Independent Counsel Pursuant to AE292H, filed 28 April 2014 (AE 292-3); Mr. Hawsawi's Ex Parte and Under Seal Response to AE 292C Interim Order related to the Emergency Defense Joint Motion to Abate Proceedings and Inquire into Existence of Conflict of Interest Burdening Counsel's Representation of Accused, filed 29 April 2014 (AE 292M (MAH)); Mr. Mohammad's Notice of Ex Parte and Under Seal Filing, filed 14 May 2014 (AE 292 P (KSM)).

⁶⁶ During a Commission session on 15 April 2014, Mr. Harrington specifically recognized a potential need for the Commission to consider some matters *ex parte*, See Unofficial/Unauthenticated Transcript of the Khalid Shaikh Mohammad et al. (2) Motions Hearing Dated 4/15/2014 from 9:15 AM to 11:13 AM p 7833. In a later session, on 17 April, Mr. Nevin objected to any *ex parte* consideration by the Commission, See Unofficial/Unauthenticated Transcript of the Khalid Shaikh Mohammad et al. (2) Motions Hearing Dated 4/17/2014 from 9:07 AM to 9:50 AM p7843. See also Mr. al Baluchi's Motion to Reconsider AE 292-2 Granting Leave for Ex Parte Submission, filed 29 April 2014 (AE 292J (AAA))

⁶⁹ Declaration of SSA [REDACTED] dated 11 June 2014, Attachment D, Supplemental Government Submission by Special Review Team in Response to Emergency Joint Defense Motion, filed 11 June 2014 (AE 292R (Sup))

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

(3) Mr. Mohammad and his Defense Team were not aware of this [REDACTED] until [REDACTED] revealed it on or about 14 May 2014, following the Order of the Commission.⁷¹

b. FBI [REDACTED] Concerning Members of the Defense Teams for Messrs. bin al Shibh and Hawsawi

(1) In their original joint motion, AE 292, Defense counsel predicated their request for the Commission to conduct an inquiry into potential conflicts of interest based on an [REDACTED]. They based their belief on a Government motion⁷³ alleging counsel for Mr. Mohammad had violated the Commission's Order

⁷⁰ Id., para C

⁷¹ Ex Parte and Under Seal Notice of Declaration, filed 14 May 2014 (AE 292P)

⁷² Para 2, Emergency Joint Defense Motion to Abate Proceedings and Inquire into Existence of Conflict of Interest Burdening Counsel's Representation of Accused, filed 13 April 2014 (AE 292)

⁷³ Government Emergency Motion for Interim Order and Clarification that the Commission's Order in AE018U Does Not Create a Means for Non-Privileged Communications to Circumvent the Joint Task Force Mail System, filed 28 February 2014 (AE 018Y)

in regard to Privileged Written Communications⁷⁴ by releasing several communications which had not gone through screening procedures recognized by the Commission's Order. Later disclosures showed this was not the foundation for [REDACTED] and was not at question at all during the [REDACTED].⁷⁵ The Commission will consider the Government Motion (AE 018Y) in due course, separate and distinct from addressing the issue now under consideration.

(2) Despite the Defense's misconception as to the basis, [REDACTED] agents of the FBI did interview Mr. bin al Shihb's Defense Security Officer (DSO), [REDACTED] on 6 April 2014.

[REDACTED]

[REDACTED]

[REDACTED]⁷⁶ At the close of the interview, the agents asked Mr. James to sign a sensitive information nondisclosure agreement and a classified information nondisclosure agreement; the former purported to create "a relationship with the FBI," and the latter, a standard nondisclosure statement, asserted limitations as to whom he can disclose the classified information.

(3) After meeting with the FBI, [REDACTED] notified his supervisors at [REDACTED] to tell them of the FBI interview and the execution of nondisclosure agreements. [REDACTED] officials held a conference call on this with its supervisors, general counsel, and all contractors working for the Defense, Prosecution, and Trial Judiciary.⁷⁷

⁷⁴ Order, Privileged Written Communications, 6 November 2013 (AE 018U)

⁷⁵ Para. 3, Public Government Submission by Special Counsel in Response to Emergency Joint Defense Motion, filed 21 April 2014 (AE 292I)

⁷⁶ Para. 6, Attachment D, AE 292

⁷⁷ Id., para. 4m

(4) On 9 April 2014, [REDACTED] contacted Mr. Harrington, Learned Counsel for Mr. bin al Shibh's Defense Team and informed him of the FBI interview. As a consequence of the FBI interview, [REDACTED] was terminated as a member of Mr. bin al Shibh's Defense Team since his participation in the interview, and signing the nondisclosure statements, created at least the appearance of a professional conflict.⁷⁸ The contact by [REDACTED] was the first inkling Defense Counsel had of any investigation.

(5) On 12 April 2014, after arriving at Guantanamo Bay and after a scheduling conference, counsel for all five Accused discussed the FBI investigation and all agreed the existence of an [REDACTED] presented a potential conflict of interest requiring notice to the Commission and further investigation to protect the counsel rights of the Accused. Accordingly, the Emergency Joint Defense Motion to Abate Proceedings and Inquire into Existence of Conflict of Interest Burdening Counsel's Representation of Accused⁷⁹ was filed the next day.

(6) Before the Commission, Mr. Harrington reiterated his belief that the Government Motion concerning privileged communications (AE 018Y) was the catalyst for the FBI investigation and advanced the necessity for an independent inquiry as well as the appointment of independent defense counsel to advise each of the Accused as to any actual or potential conflict.⁸⁰ Ms Bormann, Learned Counsel for Mr. bin 'Attash, expressed her lack of knowledge as to whether members of Mr. bin 'Attash's Team had also been interviewed and the

⁷⁸ Unofficial/Unauthenticated Transcript of the Khalid Shaikh Mohammad et al. (2) Motions Hearing Dated 4/14/2014 from 9:15 AM to 9:51 AM p. 7758

⁷⁹ AE 292

⁸⁰ Unofficial/Unauthenticated Transcript of the Khalid Shaikh Mohammad et al. (2) Motions Hearing Dated 4/14/2014 from 9:15 AM to 9:51 AM p. 7759

impediments this would cause in the Defense Counsel's relationship with their clients. Mr. Ruiz expressed these same reservations on behalf of Mr. Hawsawi.⁸¹

(7) During this session of the Commission on 14 April 2014, the Prosecution, in response to a question from the Military Judge, stated it was not aware of the FBI interview of Mr. bin al Shihb's DSO.⁸² This was reaffirmed in the Prosecution written response to the motion, filed later the same day, stating:

"Based on the facts presented in AE 292, it appears that only the DSO for Mr. Binalshibh has been contacted by the FBI. The Defense has made no averments that any other defense team members have been approached...

To date, the Prosecution possesses no knowledge of the facts of any investigation, other than what has been presented by the Defense in AE 292. The Prosecution is not in a position to dispute the Defense facts, nor is the Prosecution in a position to learn the details of any such investigation."⁸³

The Defense reply⁸⁴ disputed the Prosecution assertion as to their perceived limitations on the FBI investigation and reiterated the need to abate the proceeding and conduct an inquiry.⁸⁵

(8) At the Commission session the next day Ms. Bormann expressed disquietude regarding the conference call made by SRA and participation by members of the Prosecution Team.⁸⁶ Mr. Connell, learned counsel for Mr. Aziz Ali, expressed his belief that, contrary to the belief of Mr. Mohammad's counsel in regard to AE 018Y, he might have "triggered" the FBI inquiry based upon information submitted for classification review.⁸⁷ During this session the Prosecution reaffirmed its lack of knowledge concerning the FBI investigation and declared they were "in a position where we are precluded from being in a position of knowledge as to the

⁸¹ *Id.*, p 7761; p 7771

⁸² *Id.*, p 7766

⁸³ Para. 5, Government Preliminary Response to Emergency Defense Motion, filed 14 April 2014 (AE 292A)

⁸⁴ Joint Defense Reply to Government Preliminary Response to Emergency Defense Motion, filed 15 April 2014 (AE 292B)

⁸⁵ Based, at least in part, on the misconception AE 018Y was a basis for [REDACTED] *See Id.*, para 5c

⁸⁶ Unofficial/Unauthenticated Transcript of the Khalid Shaikh Mohammad et al. (2) Motions Hearing Dated 4/15/2014 from 9:15 AM to 11:13 AM p 7801

⁸⁷ *Id.*, p 7806

circumstances surrounding the events described in 292.”⁸⁸ Further, in regard to the conference call made by SRA to its employees throughout the Military Commissions, the Prosecution stated:

“The only thing I will say further about matters the defense has raised in regard to this company called SRA, is the earliest anybody heard anything from the prosecution team would have been this past Friday in regard to a phone call that may or may not have been taking place.

As far as we know, no member of the prosecution team, and as far as I know, no member of OCP was on that call. Again, to the best of our knowledge. Certainly no information concerning it was presented to us....

That is correct. So to be clear, we're sort of two steps removed in the sense that we don't know the phone -- if anyone was on the phone call, we certainly don't know what happened on any phone call, and beyond that, you know, as I said, we were not -- we are not in a position of any sort of knowledge, by design, regarding any sort of interviews that took place.

We, in short, sir, cannot dispute many of the claims made by the defense in 292 because we just don't know.”⁸⁹

(9) At the conclusion of the session on 15 April 2014, the Commission issued an Order⁹⁰ directing current or past members of any of the Defense teams who had been interviewed by any federal agency to identify themselves to their Lead Defense Counsel.⁹¹

(10) On 17 April 2014, the Commission conducted another session during which the appointment of a Special Trial Counsel to represent the United States in all matters relating to AE 292 was placed in the record.⁹²

(11) After this session, the Commission entered an Order making findings “based on the current state of the record,” but reserving the right to amend those findings “in light of

⁸⁸ Id., p 7811

⁸⁹ Id., pp.7811-7812

⁹⁰ AE 292C

⁹¹ This resulted in the Linguist contacting the lead counsel for Mr. Mohammad.

⁹² Unofficial/Unauthenticated Transcript of the Khalid Shaikh Mohammad et al. (2) Motions Hearing Dated 4/17/2014 from 9:07 AM to 9:50 AM p 7839; *see also* AE 003C

additional evidence,”⁹³ and directing the appointment of independent defense counsel to advise Messrs. Mohammad and bin al Shibh on any possible conflicts of interest. The findings of the Commission at that time were:

“a [REDACTED]
[REDACTED]

b. The Defense Security Officer (DSO) assigned to Mr. Bin al Shibh’s Defense Team was interviewed on 6 April 2014, by FBI Agents [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

c. The DSO was required to sign a sensitive information nondisclosure agreement and a classified information nondisclosure agreement;

d. With the signing of the sensitive information nondisclosure agreement, the DSO apparently entered into a ‘special relationship’ with the FBI while remaining a privileged member of the Mr. Bin al Shibh defense team;

e. Because the members of Mr. Mohammad’s Defense Team are the [REDACTED] an apparent conflict of interest may exist;

f. Because the DSO assigned to Mr. Bin al Shibh’s Defense Team may have provided privileged / confidential attorney-client information to the FBI, an apparent conflict of interest may exist; and,

g. An independent defense counsel must be appointed to advise Mr. Mohammed about any potential conflict of interest. Similarly, an independent defense counsel must be appointed to advise Mr. Bin al Shibh about any potential conflict of interest. The Commission understands that such advice must be informed based on the evidence as it develops.”

(12) The Special Trial Counsel provided the Commission a “factual submission” on 21 April 2014, and requested leave to file additional submissions.⁹⁴ In the submission, the Special Trial Counsel explicitly stated:

“Contrary to the apparent belief of defense counsel (*see* AE 292 at 5;

⁹³ Order, Appointment of Independent Counsel, Emergency Defense Joint Motion to Abate Proceedings and Inquire into Existence of Conflict of Interest Burdening Counsel’s Representation of Accused, 17 April 2014 (AE 292H)

⁹⁴ Public Government Submission by Special Trial Counsel in Response to emergency Joint Defense Motion, filed 21 April 2014 (AE 292I)

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] [REDACTED]

[REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED]

[REDACTED]

(S)

[REDACTED]

[REDACTED] In the response to Mr. Aziz Ali, the Special Review Team cited the earlier finding of the Commission that independent counsel was only required for Messrs. Mohammad and bin al Shibh⁹⁷ and continued:

“To date, no additional facts have been presented to demonstrate the existence of an actual or potential conflict with respect to Mr. al Baluchi’s defense team. In fact, no evidence has been provided to warrant the conclusion that [REDACTED] relates to or involves Mr. al Baluchi’s defense team. Accordingly, there is no basis for the Commission to reconsider its prior ruling. Moreover, it would be premature at best to appoint independent counsel for Mr. al Baluchi given that there is no evidentiary support to conclude a conflict exists for this particular defendant.”⁹⁸

(14) Counsel for Mr. Hawsawi filed an *ex parte*, under seal, motion⁹⁹ on 29 April 2014, which included an unsworn statement by a former member of the Defense Team,¹⁰⁰ a Mr.

⁹⁵ Id.p.3

⁹⁶ Mr. al Baluchi's Motion for Independent Counsel to Advise Him Regarding Potential Conflict, filed 28 April 2014 (AE 292L (AAA))

97 AE 292H

⁹⁸ Government Response to Mr. al Baluchi's Motion for Independent Counsels to Advise Him Regarding Potential Conflict, filed 12 May 2014 (AE 292N)

⁹⁹ Mr. Hawsawi's Ex Parte and Under Seal Response to AE 292C Interim Order related to the Emergency

Gilhool. This statement indicated he had been approached as early as December 2012, by an individual ("Person A") on Mr. bin al Shibh's Defense Team who expressed concern about another member of the Team ("Person B")¹⁰¹ in regard to security concerns over Person B's relationship to Mr. bin al Shibh. In response to repeated expressions of concern, [REDACTED]

[REDACTED] stated there was no discussion during this meeting concerning Mr. Hawsawi or his counsel; a fact he related to members of Mr. Hawsawi's Defense Team in conjunction with providing this statement on 28 April 2014. During a session of the Commission, Mr. Ruiz, learned counsel for Mr. Hawsawi, acknowledged this disclosure and expressed his belief that no conflict was apparent through [REDACTED]

[REDACTED]¹⁰²

(15) Mr. Mohammad filed an *ex parte* and under seal Notice of Declaration¹⁰³ from the Linguist establishing the Linguist's perspective of the [REDACTED]

c. Suspension of Access to Sensitive Compartmented Information

(1) The third challenge to the attorney-client relationship occurred after the June 2014 session of the Commission. The Special Review Team, prior to the session, provided the Commission with a supplemental submission¹⁰⁴ to their previously filed response¹⁰⁵ to AE 292.

Defense Joint Motion to Abate Proceedings and Inquire into Existence of Conflict of Interest Burdening Counsel's Representation of Accused, filed 29 April 2014 (AE 292M (MAH))

¹⁰⁰ The identity of this individual was disclosed during an open session of the Commission, as was the content of his statement. The Commission does not consider his identity or statement as protected; *See* Unofficial/Unauthenticated Transcript of the Unofficial/Unauthenticated Transcript of the Khalid Shaikh Mohammad et al. (2) Motions Hearing Dated 6/16/2014 from 9:05 AM to 11:05 AM, pp.7882-7884

¹⁰¹ The designation of these 2 individuals varies from statement-to-statement depending on the source; as a matter of convenience, since the identity of Person A has never been disclosed and the identity of Person B is protected, the Commission will continue to use these designations.

¹⁰² Unofficial/Unauthenticated Transcript of the Khalid Shaikh Mohammad et al. (2) Motions Hearing Dated 6/16/2014 from 11:30 AM to 12:40 PM, pp. 7950-7953

¹⁰³ Notice of Declaration, filed 14 May 2014 (AE 292P)

¹⁰⁴ Supplemental Government Submission by Special Review Team In Response to Emergency Joint Defense Motion, filed 11 June 2014 (AE 292R (GOV Sup))

As part of the supplemental filing, the Special Review Team provided a copy of a Memorandum from the [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]¹⁰⁷

(2) On 1 July 2014, Mr. bin al Shibh provided the Commission with a declaration by his Lead (and Learned) Defense Counsel regarding a series of events that appeared to create the potential for, or at least the appearance of, additional encumbrances on their attorney-client relationship.¹⁰⁸ In his declaration Mr. Harrington related the action of an attorney member of the Defense team, LTC Brou,¹⁰⁹ who had discussions with security officers in regard to security concerns she had previously raised with Mr. Harrington and then, contrary to his directions to

¹⁰⁵ Government Submission by Special Review Team In Response to Emergency Joint Defense Motion, filed 21 May 2014 (AE 292R (GOV))

¹⁰⁶ [REDACTED] Attachment I to Attachment B, Supplemental Government Submission by Special Review Team In Response to Emergency joint Defense Motion, (AE 292R (GOV Sup))

¹⁰⁷ [REDACTED]

¹⁰⁸ AE 292II (RBS)

¹⁰⁹ The Commission notes LTC Brou is not an attorney of record, i.e. having made an appearance in the Commission and identifying herself as representing Mr. bin al Shibh, and is not familiar with who she is, but assumes she is in a support role for the Defense.

have no contact with [REDACTED] had lunch with Mr. James. Based on these incidents, she was removed from the Defense Team on 22 June 2014. The same day, the Chief Defense Counsel (CDC) met with the Ms. Flannery, security officer for the Office of Military Commissions (OMC), and learned the security clearance for the Interpreter¹¹⁰ for Mr. bin al Shibh's Defense Team had been suspended. Later that day the Interpreter and a team attorney met with Ms. Flannery and were told the same thing. Mr. Harrington then traveled to Rosslyn, Virginia, and he, along with other representatives of the Defense, met with the same security officer. He related to Ms. Flannery the importance of the Interpreter to the Defense Team's efforts to work with their client, thus assuming a role beyond his job description. Mr. Harrington described his loss to the Team as making "representation of Mr. Bin al Shibh much more difficult and complicated."¹¹¹ Ms. Flannery told the Defense representatives the suspension of the translator's clearance was based upon the FBI memorandum and an internal investigation she had conducted. Then, after several of the Defense representatives left, Ms. Flannery, according to Mr. Harrington:

"...mentioned there were indications LCDR Bogucki and I may be part of the unspecified problem. She further warned us not to pursue an inquiry because such an inquiry might uncover even more problems within our team."¹¹²

5. Legal Analysis:

a. The issues presented to the Commission for resolution are broader than the Special Review Team's equation that "[b]ecause there is no ... investigation there is no possible conflict of interest."¹¹³ The Accused are entitled to the undivided loyalty of their counsel, and by

¹¹⁰ This individual is referred to as [REDACTED] in AE 292MM; however to limit conflict with as the term as used in the issue regarding [REDACTED] in Mr. Mohammad's Defense Team the Commission will use [REDACTED] when referring to this member of Mr. bin al Shibh's Defense Team.

¹¹¹ Declaration, para 20, AE 292II (RBS)

¹¹² Id., para 18

¹¹³ AE 292R at 5

extension, of the paralegals and other support members of the Defense Team who fall under the umbrella of privilege,¹¹⁴ as a critical component of their right to assistance of counsel.¹¹⁵ Defense counsel facing a conflict of interest may deprive an accused of representation by competent counsel unless a judicial inquiry finds there is no actual conflict¹¹⁶ or there is an affirmative waiver, by an accused on the record, after an appropriate appraisal of his right to conflict free counsel.¹¹⁷

b. Adding a complexity to the issue before the Commission is the nature of the potential conflict. These five cases involve information classified at the highest levels, developed from both intelligence and law enforcement agencies, and potentially integral to possible Defense trial strategies and tactics. As stated by SSA [REDACTED] in his Declaration:

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED],¹¹⁸

While the nature of the communications are not divulged, in assessing risk the Commission must assume the intertwining of some attorney-client privileged information, both in what was alleged to have been communicated and the trial tactics involved in the “why” or “to whom” the communications were made. This assessment of risk is not to alleviate responsibility for any

¹¹⁴ Para. 2c, *Second Amended Protective Order #1, To Protect Against Disclosure of National Security Information*, 16 December 2013 (AE 013BBB)

¹¹⁵ Discussion to R.M.C 901(d) (3): “Counsel may be disqualified because...of actions which are inconsistent with the role of counsel.” See also Para (B), Discussion to R.M.C. 502(d) (7): “Defense counsel must: ... disclose to the accused any interest defense counsel may have in connection with the case, any disqualification, and any other matter which might influence the accused in the selection of counsel; represent the accused with undivided fidelity and may not disclose the accused’s secrets or confidences except as the accused may authorize...”

¹¹⁶ *United States v. Jones*, 662 F.3d 1018 (8th Cir. 2011); *Ausler v. United States*, 545 F.3d 1101 (8th Cir. 2008); *United States v. Blount*, 291 F.3d 201(2nd Cir. 2002) *United States v. Lee*, 589 F.2d 980 (9th Cir.1979)

¹¹⁷ Para (B), Discussion to R.M.C. 502(d)(7)

¹¹⁸ Declaration of Supervisory Special Agent [REDACTED] in Support of Government Submission by Special Review Team, AE 292R, Attachment B, AE 292R

abuse of national security interests by a party but to enable the Commission to appreciate the seriousness of any conflict in interest that may accrue from any FBI investigations or the residual actions, if any, from other sources.

c. A second complexity comes from the very nature of this trial. The Accused have represented they are presenting a joint defense which, almost by definition, requires sharing of knowledge and tactics. While a FBI [REDACTED] was directed towards a member of the bin al Shibh Defense Team, counsel for the other Accused have alleged a chilling impact on their work facing the uncertainty of the bin al Shibh investigation.¹¹⁹

d. In looking at these issues, the Commission is aware many cases addressing conflicts-of-interest have been based on criminal investigations of counsel. With the ability of the FBI, DoD and others to carry on national security investigations, possibly resulting in a range of punitive actions, from the revocation of a security clearance and loss of a job, to criminal prosecution, the Commission needs to look at the idea of conflict in a broader scope.

e. The Commission believes the Special Review Team accurately stated the proposition if there is no ongoing investigation there is no conflict of interest.¹²⁰ The Commission's adherence to this proposition, however, begins only at the point when the FBI acknowledges closing the [REDACTED] into the conduct of a member of the bin al Shibh Defense Team on 12 May 2014. Further, this is subject to a number of caveats discussed later. Colloquially, the basis for the impact of an actual conflict in a criminal trial has been defense

¹¹⁹ See Unofficial/Unauthenticated Transcript of the Khalid Shaikh Mohammad et al. (2) Motions Hearing Dated 6/16/2014 from 9:05 AM to 11:05 AM, pp. 7909-7916 and 7920-7922 and Unofficial/Unauthenticated Transcript of the Khalid Shaikh Mohammad et al. (2) Motions Hearing Dated 6/16/2014 from 11:30 AM to 12:40 PM pp. 7929-7935. The Commission notes Counsel for Mr. Hawsawi did not articulate a chilling factor. See Unofficial/Unauthenticated Transcript of the Khalid Shaikh Mohammad et al. (2) Motions Hearing Dated 6/16/2014 from 11:30 AM to 12:40 PM p. 7949

¹²⁰ *Harrison v Motley* 478 F.3d 750 (6th Cir. 2007); *Moss v. United States*, 323 F.3d 445, 473 (6th Cir. 2003); *United States v Taylor*, 657 F.2d 92 (6th Cir. 1981), *cert. denied*, 454 U.S. 1086 (1981)

counsel “pulling punches”¹²¹ in furtherance of their own interests¹²² as opposed to unbridled loyalty towards their client.¹²³ This premise, however, is built upon the proposition the defense *knows* of the conflict and reacts to that stimulus. Thus when Defense counsel is unaware of an investigation, it cannot be the catalyst for any subsequent action or inaction and, consequently, cannot be the basis of a conflict-of-interest between defense counsel and their client.¹²⁴ The FBI’s [REDACTED] of [REDACTED] a member of the Defense Team for Mr. Mohammad, was closed in January 2013, but did not become known to either Mr. Mohammad or the members of the his Defense Team until [REDACTED] informed them of it in accordance with the Commission’s Order in May 2014. There is no evidence Defense Counsel for Mr. Mohammad did any less than their professional utmost on behalf of their client during this period.¹²⁵ Because they lacked knowledge about the FBI’s [REDACTED], it could not have had an impact on any decisions made during that period of time. Without impact or influence on the Defense, there cannot be any conflict - actual or potential.

f. Setting aside the actual FBI [REDACTED] involving Mr. bin al Shibh’s Defense Team, three of the other Defense Teams¹²⁶ informed the Commission they felt a “chilling” effect by the knowledge the FBI was conducting an investigation. None of the parties were aware of the FBI investigation until [REDACTED] informed counsel for Mr. bin al Shibh on 9

¹²¹ *Blake v. United States*, 723 F.3d 870 n.10 (7th Cir.2013)

¹²² *United States v. Marin*, 630 F. Supp.64 (ND Ill. 1985)

¹²³ *Strickland v. Washington*, 66 U.S. 668 (1984); *Taylor v United States*, 985 F.2d 844 (6th Cir. 1993); *United States v Balzano*, 916 F.2d 1273 (7th Cir. 1990) citing *United States v. Ellison*, 798 F.2d 1102, 1106 (7th Cir. 1986); *United States v. Noble*, 754 F.2d 1324, 1333 (7th Cir. 1985); *United States ex rel. Williams v. Franzen*, 687 F.2d 944, 948 (7th Cir. 1982)

¹²⁴ *Lafuente v. United States*, 617 F.3d 944 (7th Cir. 2010)

¹²⁵ Counsel for Mr. Mohammad mistakenly believed the FBI [REDACTED] was prompted by actions for which they had been challenged by the Prosecution

¹²⁶ Counsel for Mr. Hawsawi were not so intimidated. See Unofficial/Unauthenticated Transcript of the Unofficial/Unauthenticated Transcript of the Khalid Shaikh Mohammad et al. (2) Motions Hearing Dated 6/16/2014 from 11:30 AM to 12:40 PM pp. 7949-7953

April 2014, and counsel, in turn, informed members of the other Defense Teams. Mr. Mohammad's Defense Team believed they had caused the investigation since their conduct in the release of a statement attributed to Mr. Mohammad had been challenged by the Prosecution; Counsel for Mr. Aziz Ali claimed the same responsibility because of documents they had sent for clearance before releasing; and counsel for Mr. bin 'Attash, while affirming they knew of nothing they had done that would draw the attention of the FBI, were concerned generally about the lack of knowledge as to the parameters of the investigation. Working in this enhanced security environment all, including the Commission, must be acutely aware of the need to be prudent and to observe and follow the parameters for using classified information in a trial environment. The fear of miss-stepping, while possibly understandable in a lay sense, does not create a legal basis for conflict in the choices made by counsel in representing their clients. A fear of what *might occur* does not create an actual conflict since what does occur is within control of counsel. Specifically pertinent here, "[t]here lacks any controlling authority to support the proposition that an attorney's *fear* of investigation may give rise to a conflict of interest."¹²⁷

g. Counsel for Mr. Hawsawi, during a session of the Commission on 16 June 2014, indicated they did not believe they faced a conflict-in-interest in their continued representation of their client. They had originally been a party to AE 292. However, after further development of the facts available to them and questioning [REDACTED] about his involvement with the FBI, counsel were satisfied there was no conflict. In estimates as to the presence of a conflict, courts have given "substantial weight" to the determinations of counsel.¹²⁸ In reviewing the facts, as

¹²⁷ *Harrison v Motley* 478 F.3d 750 (6th Cir. 2007) citing *Moss v. United States*, 323 F.3d 445, 473 (6th Cir. 2003); see also *United States v. Garcia-Pastrana*, 584 F.3d 351 (1st Cir. 2009), *cert. denied*, 559 U.S. 986 (2010) and *cert. denied*, 560 U.S. 916, (2010); *United States v. Murray*, 2009 WL 1382292 (N.D. N.Y. 2009), *aff'd*, 414 Fed. Appx. 318 (2d Cir. 2011)

¹²⁸ *Ferrell v. Hall*, 640 F.3d 1199 (11th Cir. 2011); *Gillard v. Mitchell*, 445 F.3d 883 (6th Cir. 2006),

they pertain to Mr. Hawsawi's Defense Team, the Commission shares the same conclusion. With the exception of the limited participation by [REDACTED] nothing before the Commission implicates Mr. Hawsawi's Defense Team in any fashion; moreover they, like all the other Defense Counsel, had no idea the FBI had conducted [REDACTED] investigations therefore had no reason to "pull their punches."

h. The Special Review Team asserted "[w]here an attorney is under investigation for a different offense or by a different prosecuting authority, courts have generally found no conflict of interest."¹²⁹ The Commission views this with a more jaundiced eye when examined in terms of national security interests in a capital criminal trial. It is beyond dispute Defense Counsel have an independent duty¹³⁰ to investigate the circumstances of the crimes alleged and gather information for use during the case-in-chief and, if necessary, for mitigation.¹³¹ This investigation includes reviewing classified and unclassified discovery provided by the Prosecution; information, considered classified, from their client,¹³² and, information developed from non-governmental sources that may-or-may not be classified when it comes into the possession of defense counsel.¹³³ Thus, almost anything Defense Counsel do in the course of an independent investigation can place them at risk, either from malice or mistake, of breaching

United States v. Novaton, 271 F.3d 968 (11th Cir. 2001); *Taylor v. United States*, 985 F.2d 844 (6th Cir. 1993); *United States v. Kliti*, 156 F.3d 150 (2nd Cir. 1998); *United States v. Haren*, 952 F.2d 190 (8th Cir. 1991); *United States v. McLain*, 823 F.2d 1457 (8th Cir. 1987)

¹²⁹ *United States v. Novaton*, 271 F.3d 968 (11th Cir. 2001); *Taylor v. United States*, 985 F.2d 844 (6th Cir. 1993); *United States v. McLain*, 823 F.2d 1457 (8th Cir. 1987); *Prada-Cordero v. United States*, 95 F. Supp. 2d 76 (D.P.R. 2000)

¹³⁰ *Wiggins v. Smith*, 539 U.S. 510, 522-25 (2003); *Williams v. Taylor* 529 U.S. 362, 371 (2000); *Strickland v. Washington*, 466 U.S. 668, 691 (1984)

¹³¹ Military Courts Martial and Military Commissions afford an accused a mitigation opportunity not available to someone convicted in a "civilian" trial. At the conclusion of a trial, before any sentence is carried out, the Convening Authority has to approve both the finding of guilt and the sentence. As part of this process the defense is permitted to submit matters in mitigation for consideration, independent of what was considered by the panel (jury) or judge during the trial. See Rules for Courts-Martial 1105 and 1106 and Rules for Military Commissions 1105 and 1106

¹³² Second Amended Protective Order #1, To Protect Against Disclosure of National Security Information, 16 December 2013 (AE 013DDD) para 2g(3)

¹³³ *Id.*, para 2g *et seq.*

security constraints. In the “normal” conflict case, the criminal activities of the attorney and the client are separate acts and, unless the attorney is actually acting in their own best interest at the expense of the client, there is no conflict.¹³⁴ In this case a breach of a national security interest may potentially occur as a result of the of the defense’s effort to fulfill their obligation to investigate. Thus, segregation is not as clear and mandates a more cautious evaluation to resolve whether a conflict exists.

i. The representations of the Special Review Team, with the associated declarations, are determinative in assuaging many of the Commission’s concerns about actual or potential conflict involving the Defense Teams representing four of the Accused. The same cannot be said, in regard to the circumstances surrounding the relationship between Mr. bin al Shibh and his counsel.

(1) The parsing the assertions of the Government’s knowledge of *any* investigative or adverse actions being taken does not provide the Commission with the confidence necessary to make a definitive finding as to whether a conflict-of-interest exists. Limitations imposed by the declarants as to the scope of the FBI investigations affirmatively stated they are not providing the Commission with the entirety of their knowledge:

[REDACTED]

[REDACTED]

[REDACTED]

The Special Review Team continually limited the scope of the statements as being to ongoing “criminal” investigations:

“Accordingly, no defense counsel suffers from any conflict of interest arising from a criminal investigation...”¹³⁷

¹³⁴ *Moss v. United States*, 323 F.3d 445 (6th Cir. 2003)

¹³⁵ SSA [REDACTED] Attachment B, AE 292R

¹³⁶ SSA [REDACTED] Attachment D, AE 292 (Sup).

“the basis for the inquiry “rests on the assumption that there is a criminal investigation...”¹³⁸

“...without making any referrals for further criminal investigation or any criminal prosecution...”¹³⁹

“... declares that there is no criminal investigation...”¹⁴⁰ and

“that they could suffer from a conflict of interest arising from a criminal investigation...”¹⁴¹

The assumption of the nature of any investigation as “criminal” is a limitation in scope applied by the Special Review Team, not the Commission.

(2) The Commission also notes the Response of the Special Review Team¹⁴² is careful in expressing no investigation is being conducted either by the FBI or Ms. Flannery:

“... no defense counsel of record ... is under investigation by the FBI.”¹⁴³

“... no basis to conclude that DoD has opened or will open a criminal investigation...”¹⁴⁴

(3) While taking the word of Counsel as to the literal meaning of their pleadings declarations, the Commission is concerned over the absence of any reference to intelligence related investigations or to investigation by entities other than the FBI which may implicate members of Mr. bin al Shihb’s Defense Team.

(4) Given the limitations in the assurances provided the Commission by the Special Review Team filings and the differing opinions as to what occurred during the meeting

¹³⁷ para 3, AE 292R

¹³⁸ para 6a, AE 292R

¹³⁹ Attachment D, AE 292 (Sup)

¹⁴⁰ para 2, AE 292 (Sup)

¹⁴¹ Para 3 AE292MM

¹⁴² AE 292MM

¹⁴³ *Id.*, para 4b

¹⁴⁴ *Id.*,

between Ms. Flannery and Defense Counsel, further inquiry is the proper¹⁴⁵ recourse to ascertain if any actual or serious potential conflict exists in order to placate the concerns of both the Commission and counsel as to the ability of Defense Counsel to continue their aggressive representation of Mr. bin al Shibh. In this light, appointment of independent counsel to guide and represent Mr. bin al Shibh is necessary.¹⁴⁶

6. Findings:

a. None of the Accused or their counsel knew of either of these investigations until 9 April 2014 when ██████ told Mr. Harrington about the FBI interview. The Defense original motion in this regard was filed five days later.

b. The FBI ██████ concerning ██████ was not revealed to Mr. Mohammad's Defense Team until 14 May 2014, almost 17 months after the investigation had been closed without further action. Mr. Mohammad's Defense Team had no prior knowledge of the investigation.

c. The Prosecution did not know of either of these investigations, and, since the investigation pertaining to Mr. bin al Shibh's Defense Team was identified, they have been effectively "walled off" from any knowledge pertaining to this motion.

d. As to the cases of the *United States v. Walid Muhammad Salih Mubarak Bin 'Attash* and *United States v. Ali Abdul Aziz Ali*, the Commission finds there is no actual or potential conflict between counsel and their clients based upon any information available to the Commission. Nothing indicates any member of either Defense Team was implicated in either FBI investigation. Defense Counsel were not aware of either investigation until 12 May 2014. Any "chilling" that may have occurred is *de minimus* given the length of time since

¹⁴⁵ *United States v. Taylor*, 657 F.2d 92 (6th Cir. 1981), *cert. denied.*, 454 U.S. 1086 (1981)

¹⁴⁶ *United States v. Lii*, 2010 WL 3377646 (8th Cir. 2010); *United States v. Vasquez*, 995 F.2d 40 (5th Cir. 1993)

arraignment¹⁴⁷ and the relatively short period of time that has lapsed since the investigations surfaced. Moreover the “walling off” of the Prosecution acts as a protective buffer for the trial process.

e. As to *United States v. Mustafa Ahmed Adam al Hawsawi*, based upon all information available to the Commission, and the assertion of Mr. Ruiz, Learned Counsel for Mr. Hawsawi, after his own review of the circumstances involving his former security officer serving a limited role in the FBI [REDACTED] into the conduct of a member of the bin al Shibh Defense Team, the Commission finds there is no actual or potential conflict between Counsel and Mr. Hawsawi. Again, the “walling off” of the Prosecution acts as a protective buffer for the sanctity of the trial process.

f. As to *United States v. Khalid Shaikh Mohammad*, the Commission finds there was an FBI [REDACTED] concerning one of the members of the Defense Team, [REDACTED] With the exception of [REDACTED] no other member of the Defense Team knew of the investigation. The Commission finds there was no conflict of interest since the Defense lack of knowledge as to the investigation did not give them a vested interest as to the outcome and thereby serve as the basis for changing trial strategy or intensity of effort. As to the [REDACTED] FBI investigation, concerning a member of the bin al Shibh Defense Team, there is no evidence indicating any involvement of Mr. Mohammad’s Defense Team and no actual conflict of interest ensues. Since Defense Counsel were not aware of either investigation until 12 May 2014 any “chilling” that may have occurred is *de minimus* given the length of time since arraignment¹⁴⁸ and the relatively short period of time that has lapsed since the investigations surfaced. The “walling off” of the Prosecution again acts as a protective buffer.

¹⁴⁷ All Accused were arraigned on 5 May 2012. See Arraignment Order, 9 April 2012 (AE 002)

¹⁴⁸ Id.

g. In *United States v. Ramzi bin al Shibh*, the Commission cannot, with any fidelity, assure Mr. bin al Shibh, that a conflict did not, and does not now, exist. Since the Commission cannot, currently, guarantee such to Mr. bin al Shibh, further examination of the conflict issue is necessary before a determination as to whether any actual or potential conflict exists can be made.

h. Understandably, Defense Counsel are properly concerned about the use of classified materials while mounting an aggressive defense of their clients. As stated by the court in *United States v. Hashmi*, 621 F.Supp.2d 76, 87 (S.D.N.Y. 2008):

“The Court appreciates defense counsel's invitation to take judicial notice of the prosecution of Lynne Steward for violating 18 U.S.C. § 1001, after signing the required SAM affirmation. *But counsel would do well to avoid the conduct that formed the basis of that attorney's conviction.*” (emphasis added)

The Commission issued a Protective Order¹⁴⁹ in this case, which in conjunction with the agreements signed by all counsel prior to obtaining their security clearances and gaining access to sensitive compartmented information (SCI), provides counsel guidance on the parameters of using classified material and also serves as a sufficient legal basis for any necessary action to preserve the interests of national security.¹⁵⁰

i. Likewise the Government has to decide which path it chooses to take in the prosecution of these cases. While there are limitations on the permissible use of classified information,¹⁵¹ as in any trial involving such, the Government must be mindful that unwarranted or improper

¹⁴⁹ *Second Amended PROTECTIVE ORDER #1, To Protect Against Disclosure of National Security Information*, 16 December 2013 (AE 013DDD)

¹⁵⁰ See also para E.1, MC Form 9-2, Affidavit and Agreement by Civilian Defense Counsel:

“I will not discuss, transmit, communicate, or otherwise share documents or information that are classified or protected/privileged, with anyone who does not have the necessary security clearance, and will only share with properly cleared persons as is necessary to represent my client before a military commission. ... I understand that nothing in this agreement allows me to disregard any laws, rules, regulations, or instructions governing the handling of classified information and material, or other protected information.”

¹⁵¹ See Military Commission Rule of Evidence 505 as well as the Classified Information Procedures Act, §18 U.S.C. App III

interference with the trial procedures of this or any court cannot be tolerated. If the Government believes the needs of national security trump the need for a just criminal proceeding, the means are available to accomplish this. Rule for Military Commission (R.M.C.) 604 permits the withdrawal of charges “for any reason;” and, when taken in consideration of R.M.C. 407(b), a proper reason is a determination of harm to national security.¹⁵²

j. To ensure the trials of the Accused are not again encumbered by criminal, administrative, or intelligence based investigations or inquiries, the Commission will direct prophylactic measures that, while not requiring the Government to abstain from any investigation, requires notice to the Commission and documentation of the measures to be taken to insulate the Prosecution.

IT IS HEREBY ORDERED:

- a. The Commission’s Interim Order (AE 292H) of the Commission is **RECIENDED**;
- b. The Joint Defense Motion for Orders of Production (AE 292D) and the supplement thereto (AE 292D (Sup)) are **DENIED**;
- c. The classified, *ex parte*, filings of the Special Trial Counsel were not considered for this Order. Accordingly, Mr Aziz Ali’s Motion to Reconsider AE 292-2 Granting Leave for *Ex Parte* Submission (AE 292J) is **MOOT**;
- d. Mr Aziz Ali’s Motion for Independent Counsel (AE 292L) is **DENIED**;
- e. The Joint Defense Motion to Compel Discovery Regarding Detail of FBI Investigations Into Defense Teams (AE 292U) is **DENIED**;

¹⁵² “When in receipt of charges the trial of which the convening authority finds would probably be inimical to the prosecution of a war or harmful to national security, that convening authority, unless otherwise prescribed by regulations of the Secretary of Defense, and after appropriate consultation with the Office of the Director of National Intelligence, shall determine whether trial is warranted and, if so, whether the security considerations involved are paramount to a trial. As the convening authority finds appropriate, he may dismiss the charges, authorize trial of them, or forward them to a superior competent authority.” R.M.C 407(b)

f. The Defense Motion for a Protective Order (AE 292W (MAH)) is **MOOT** (*see* subparagraph h, below);

g. The classified, *ex parte*, filings of the Special Trial Counsel were not considered for this Order. Accordingly Mr. Aziz Ali's Motion for a 505(h) hearing (AE 292X (AAA))¹⁵³ is **DENIED**;

h. The Emergency Defense Joint Defense Motion To Compel The Deposition of Thomas Gilhool (AE 292Y) is **DENIED**;

i. The classified, *ex parte*, filings of the Special Trial Counsel were not considered for this Order; accordingly Mr. Aziz Ali's Motion for a 505(h) Hearing (AE 305 (AAA)) is **DENIED**; and

j. Further inquiry will be scheduled by the Commission to determine the full scope of whether any conflict of interest, actual or potential, exists and impacts *United States v Ramzi bin al Shibh*.

DURING THE PENDENCY OF THIS CASE IT IS FURTHER ORDERED:

a. The FBI will create a log to record the identity of anyone who in the future accesses or is given access to the FBI investigative file (the electronic or physical file maintained by the FBI) for the FBI [REDACTED] or the FBI [REDACTED] [REDACTED] that are identified in this Order of the Commission. The log will be made available to the Commission upon its request.

b. The FBI will ensure, and establish appropriate additional procedures if necessary, that no one other than members of the SRT, or their supervisors, have access in the future to the FBI investigative files identified above without demonstrating appropriate need. To the

¹⁵³ Mr. al Baluchi's Motion for 505(h) Hearing, filed 6 June 2014 (AE 292X (AAA))

extent that the SRT or other FBI or law enforcement personnel need to gain access to these investigative files for appropriate reasons, their identity will be recorded in the log identified above. Similarly, the FBI will also continue to ensure that members of the Prosecution Team involved in the above-captioned case are not given access to these [REDACTED] FBI investigative files.

c. The SRT, or any other appropriate government attorney, will notify the Commission, *ex parte* and in camera, after learning of any future FBI investigation, where the subject of the investigation is a known defense team member in the above-captioned case, and where the reason for the investigation involves and/or is the activity of such a defense team member in his/her capacity as a defense team member. If such notification takes place, the Commission will be told the steps that will be taken to ensure that information collected as part of that investigation remains appropriately segregated and not shared with the Prosecution Team in this case.

d. In addition, the SRT or any other appropriate government attorney will notify the Commission, *ex parte* and in camera, after learning of any referral made by the Department of Defense (DoD) to either the Defense Intelligence Agency (DIA) Central Adjudication Facility (CAF) or DoD CAF for the review of the eligibility of any known member of the defense team for access to classified information. Notification shall not be made of activities of security officers in the course of their duties to determine whether security infractions have occurred unless and until a referral is made to the DIA CAF or DoD CAF.

So ORDERED this 16th day of December, 2014.

//s//
JAMES L. POHL
COL, JA, USA
Military Judge

