

MILITARY COMMISSIONS TRIAL JUDICIARY  
GUANTANAMO BAY, CUBA

UNITED STATES OF AMERICA

v.

KHALID SHAIKH MOHAMMAD, WALID  
MOHAMMAD SALIH MUBARAK BIN  
'ATTASH, RAMZI BIN AL SHIBH, ALI  
ABDUL-AZIZ ALI, MUSTAFA AHMED  
ADAM AL HAWSAWI

AE 292VV (Mohammad)

**Defense Motion**

to Compel Discovery Related to Interference  
with Defense Function by the United States

13 August 2014

**1. Timeliness:** This motion is timely filed.

**2. Relief Requested:** The defense respectfully requests the Commission compel the production of all documents responsive to two discovery requests filed by Mr. Mohammad on 23 May 2014, which are captioned Mr. Mohammad's Request for Discovery dated 23 May 2014<sup>1</sup> and Mr. Mohammad's *Second* Request for Discovery dated 23 May 2014.<sup>2</sup> The first request seeks copies of all materials related to the FBI's questioning of a member of Mr. Mohammad's defense team in December 2012 and again on or about 2 January 2013. The second request seeks copies of materials relied on by Special Agent [REDACTED] in forming his opinions and conclusions as reflected in his declaration, Attachment B to AE292R [REDACTED] and additional information on some of the conclusory statements contained in AE292R.

**3. Overview:**

a. The Fifth, Sixth, and Eighth Amendments to the United States Constitution, the Military Commissions Act of 2009 and rules enacted pursuant to it, the ABA Guidelines for the Defense of Death Penalty Cases, and the Rules of Professional Conduct applicable to

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<sup>1</sup> Attachment B.

<sup>2</sup> Attachment C.

counsel, all establish the attorney-client relationship as a protected and restricted space within which Mr. Mohammad and his counsel and other defense team members may privately communicate.

b. The events which underlie the AE 292 series of pleadings describe various intrusions by the United States of America into the protected and restricted space of Mr. Mohammad's defense team. As AE 292P alleged, and as the government confirmed in AE 292R (GOV Sup), in January of 2013 agents of the United States Federal Bureau of Investigation interviewed a [REDACTED] on Mr. Mohammad's defense team about team activities. The FBI agents lied to the [REDACTED] about the purpose for the interview, obtained information about confidential team activities, and directed the [REDACTED] to keep the interview secret from counsel and other team members. To similar effect, in early 2014 FBI, agents also questioned members of the Ramzi bin al Shibh defense team, *see* AE 292R. The questioning sought, among other matters, information about the activities of Mr. Mohammad's defense team. In addition, Mr. Mohammad's and Mr. bin al Shibh's defense teams have shared information on a variety of subjects, and this information, by operation of the joint defense privilege, *see* MCRE 502(a)(3), is also protected from being stolen by the government.

c. In the AE 292 series of pleadings Mr. Mohammad argued that these intrusions indicated that counsel or other defense team members were under investigation by the same United States of America which was prosecuting Mr. Mohammad; that this gave rise to both a potential and an actual conflict of interest; and that the Military Commission was obligated to conduct a thorough inquiry into the circumstances to confirm or dispel the existence of a conflict. Mr. Mohammad emphasized that it was the Military Commission in the first instance which was obligated to use its resources to conduct a thorough factual inquiry, but that counsel and Mr. Mohammad were also obligated to reach their own

determinations whether counsel were conflicted, and if so, whether the conflict could or should be waived.

d. In the process of litigating AE 292, Mr. Mohammad sought discovery from the United States related to the various government intrusions. The United States, asserting that no conflict existed because the investigations had all been closed, refused to provide the discovery. It indicated that the material was discoverable on other theories, but not in order to determine the existence *vel non* of a conflict of interest:

The Special Review Team recognizes that conflict-free counsel may choose to advance other legal claims or arguments related to the FBI [REDACTED] or the FBI [REDACTED] separate and apart from the conflict-of-interest claim raised in AE292. Depending on what other legal claims or arguments conflict-free counsel may choose to raise, the Special Review Team also recognizes that the defense may be entitled to discovery materials related to those other legal claims or arguments. But the Commission must first decide the pending conflict-of-interest claim raised in AE 292. Once the threshold conflict-of-interest claim has been resolved, the Special Review Team is prepared to respond to discovery requests made by conflict-free defense counsel, including providing the defense with appropriate discovery.

AE 292BB, June 13, 2014, at p.2, n.1. On July 24, 2014, in AE 292QQ, the Military Commission decided that counsel for Mr. Mohammad were not laboring under a conflict of interest, and denied him and three of his co-defendants the relief requested in AE 292. The United States has not provided a further response to Mr. Mohammad's previous requests for discovery related to the intrusions described in the AE 292 series of pleadings.

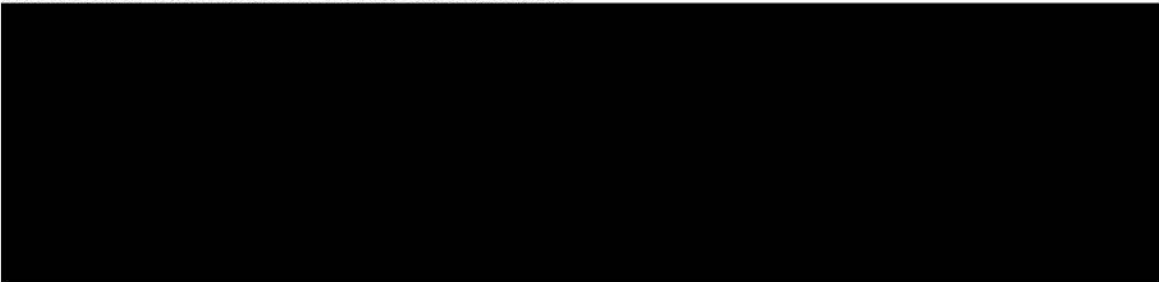
e. If material is discoverable the government must provide it -- and may not withhold it on the ground that defense requests have not yet hit upon the government's understanding of the correct basis of discoverability. The present motion nonetheless seeks discovery related to the government intrusions "separate and apart from the conflict-of-interest claim raised in AE 292."


**4. Burden of Proof and Persuasion:** As the moving party, the defense bears the burden on this motion.<sup>3</sup>

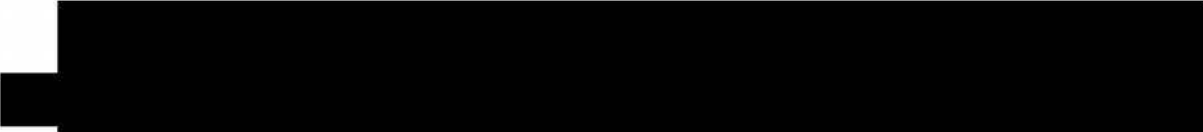
**5. Facts:**

a. On 14 April 2014, counsel for all defendants filed AE292 to, in part, put the commission on notice that a possible conflict of interest exists and to assist in the commission's constitutionally-required inquiry into whether counsel suffer from an actual conflict, a potential conflict, or no conflict at all.<sup>4</sup>

b. On 15 April 2014, the commission issued its interim order, AE292C, directing all current or past defense team members who were contacted by the FBI to disclose the existence of that contact to their lead counsel.



d. On 21 May 2014, the Special Trial Counsel filed AE292R. AE292R states, among other things, that the FBI was informed that a "member of [Mr.] Bin al Shibh's defense team may have been involved in  that the alleged activity "may have constituted a federal crime and compromised national security," and that the FBI "gathered additional information" as a result.<sup>6</sup>

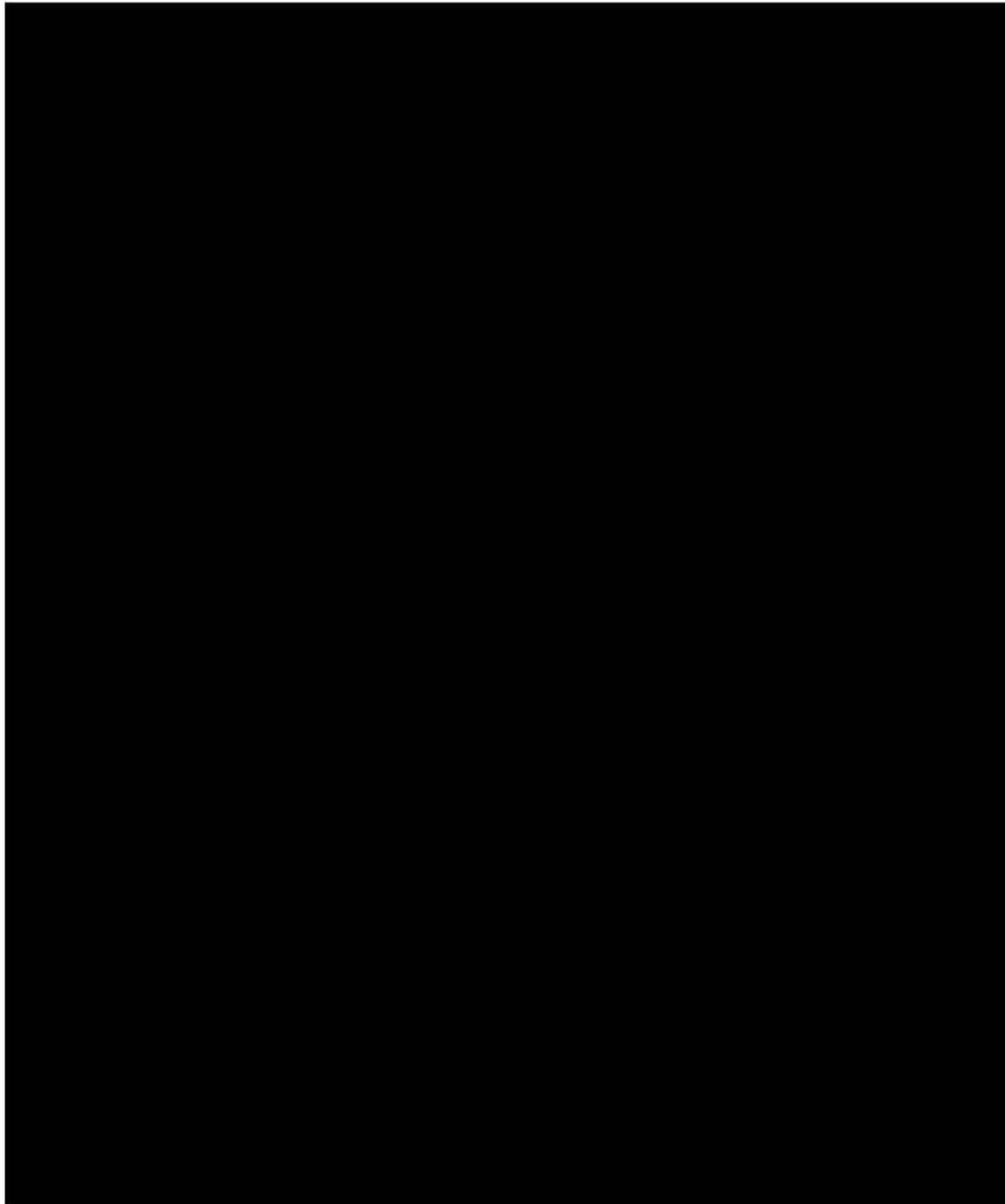


<sup>3</sup> Rule for Military Commission (RMC) 905(c)(2).

<sup>4</sup> *U.S. v. Levy*, 25 F.3d 146, 153 (2d Cir. 1994).

<sup>5</sup> See AE292P filed ex parte and under seal.

<sup>6</sup> AE292R at 3-4.



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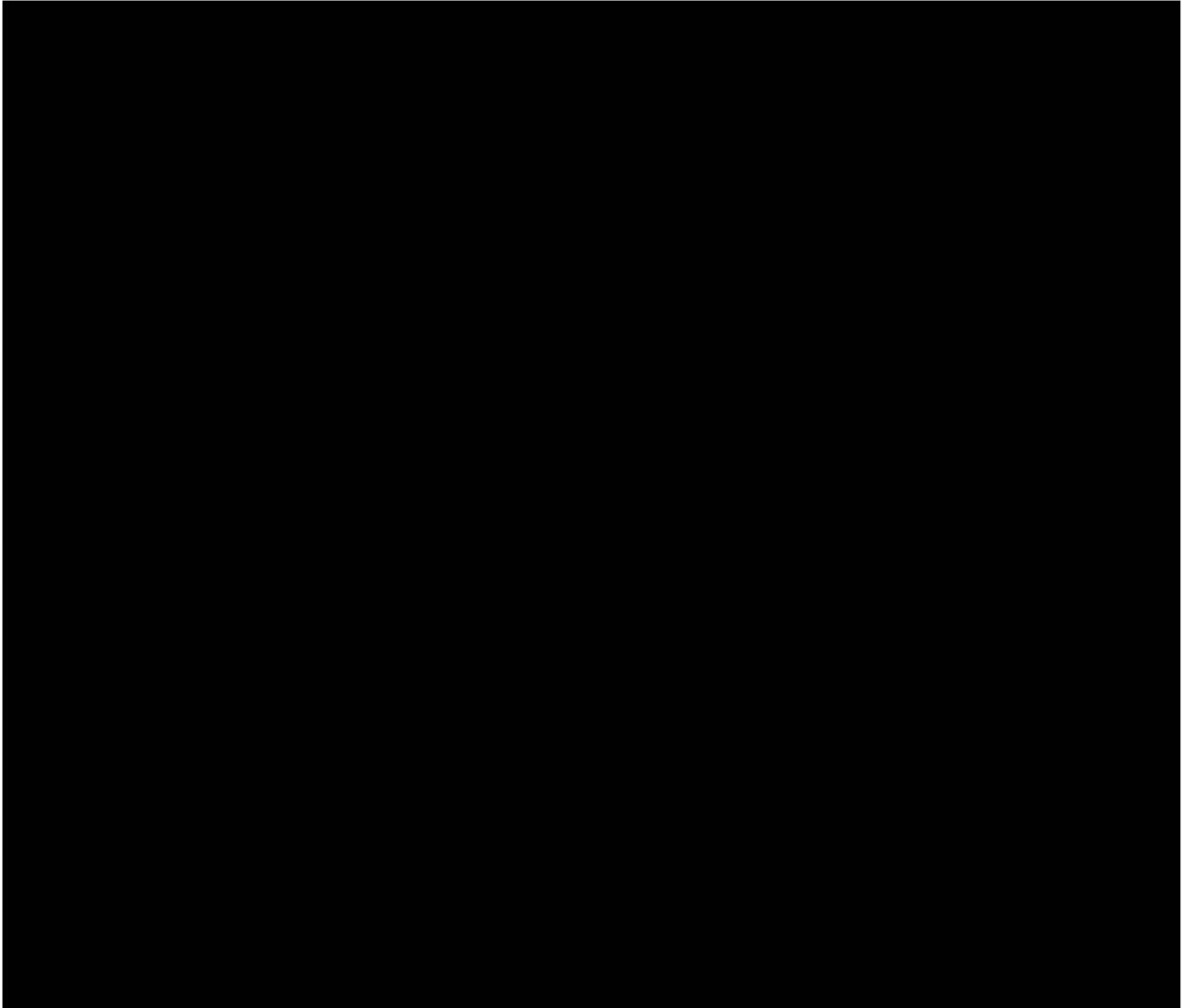
<sup>8</sup> *Id.* at paragraph 9.

<sup>9</sup> *Id.* at paragraph 12.




<sup>10</sup> *Id.* at paragraph 7.

<sup>11</sup> *Id.* at paragraph 10.

<sup>12</sup> *Id.*



f. On 23 May 2014, Mr. Mohammad's first request for discovery asked the Special Trial Counsel to produce documents related to the questioning of one of Mr. Mohammad's

<sup>17</sup> On the same day, Mr. Mohammad's second request for discovery asked the Special Trial Counsel to produce copies of materials referenced in the  declaration and additional information on two matters asserted in AE292R: 

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<sup>13</sup> *Id.* at paragraph 5.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *See* Attachment B.



g. On 30 May 2014, the Special Trial Counsel responded to both of Mr. Mohammad's discovery requests by confirming that a member of Mr. Mohammad's defense team was questioned by the FBI as part of an investigation into a member of Mr. Mohammad's team, but denied production of all requested materials.<sup>19</sup>

h. On 3 June 2014, counsel for Mr. Mohammad filed AE292U Defense Motion to Compel Discovery Regarding Details of FBI Investigations into the Defense Teams.

i. On 13 June 2014, the Special Trial Counsel filed its response to AE292U in AE292BB. In its response, the Special Trial Counsel stated "Depending on what other legal claims or arguments conflict-free counsel may choose to raise, the Special Review Trial (sic) also recognizes that the defense may be entitled to discovery materials related to those other legal claims or arguments...Once the threshold conflict-of-interest claim has been resolved, the Special Review Team is prepared to respond to discovery requests made by conflict-free defense counsel, including providing the defense with appropriate discovery."<sup>20</sup>

j. On 16 June 2014, counsel for Mr. Mohammad filed its reply to AE292BB in AE292FF.

k. On 24 July 2014, this Commission issued AE292QQ. In it, the Military Judge ruled that Mr. Mohammad's counsel did not suffer from a conflict of interest and denied the discovery requested by Mr. Mohammad in AE292U.

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<sup>18</sup> See Attachment C.

<sup>19</sup> Attachment D.

<sup>20</sup> AE292BB at 2, footnote 1.

## 6. Law and Argument:

### A. The Government's Discovery Obligations.

The rules for discovery governing trial by military commission are adapted from the rules for courts-martial and rules governing criminal trials in Article III Courts.<sup>21</sup> The military justice system prides itself on being “a leader with respect to open discovery” and it has “broader discovery than is required in Federal [civilian] practice.”<sup>22</sup> RMC 701(j) establishes: “Each party shall have adequate opportunity to prepare its case and no party may unreasonably impede the access of another party to a witness or evidence.” In passing the Military Commission Act (MCA) of 2009, Congress codified this process.<sup>23</sup>

RMC 701(c)(1) states that the Government must produce documents that are “material to the preparation of the defense.”<sup>24</sup> Information that is material to the preparation of the defense is meant to encompass a larger category of information than exculpatory evidence; “the disclosure required by Rule 16 [Federal Rules of Criminal Procedure] is much broader than that required by the due process standards of Brady.”<sup>25</sup> Material information “need not be an element of a crime or cause of action or defense but it must, at least, be ‘in issue’ in the sense that it is within the range of litigated matters in controversy.”<sup>26</sup>

As we show below, the governmental intrusions into defense spaces at issue in AE 292 implicate matters of constitutional significance. The attorney-client relationship is

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<sup>21</sup> See the Foreword to the Manual for Military Commissions (This manual applies the procedures and rules of evidence applicable in trials by general courts-martial of the United States) and the Discussion to RMC 703(a) (The opportunity to obtain witnesses and evidence shall be comparable to the opportunity available to a criminal defendant in a court of the United States under article III of the Constitution).

<sup>22</sup> *U.S. v. Williams*, 50 M.J. 436, 439 (C.A.A.F. 1999).

<sup>23</sup> 10 U.S.C. 949(j).

<sup>24</sup> RMC 701(c)(1).

<sup>25</sup> *U.S. v. Conder*, 423 F.2d 904, 911 (6th Cir.1970).

<sup>26</sup> *U.S. v. Dunn*, 805 F.2d 1275, 1281 (C.A. 6, 1986).



inviolable and fundamental in American jurisprudence. It is the basis for the oldest of the privileges for confidential communications known in the common law.<sup>27</sup> “An independent judiciary and a sacrosanct confidential relationship between lawyer and client are the bastions of an ordered liberty.”<sup>28</sup> The privilege protects confidential communications between attorneys and clients made for the purpose of securing legal advice.<sup>29</sup> In the words of the United States Supreme Court:

Its purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice. The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer’s being fully informed by the client.<sup>30</sup>

The relationship is also the key to the constitutional guarantees of effective assistance of counsel as well as a defendant’s due process right to a fair trial.<sup>31</sup> The Fifth and Sixth Amendments to the United States Constitution, the Military Commissions rules, the American Bar Association (“ABA”) Guidelines and the ethical rules that govern attorney conduct all recognize the importance of protecting the attorney-client relationship—particularly in capital cases. As described in the AE 292 series of pleadings, the government has intruded into the attorney client relationship and acquired confidential defense-related information. Mr. Mohammad is entitled to learn with specificity exactly what information was acquired so that he may assess the impact on his ability to defend himself and assure that the government does not make improper use of his privileged information.

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<sup>27</sup> 8 John Henry Wigmore, *Wigmore on Evidence* §2290 (McNaughton rev. 1961).

<sup>28</sup> Edna Selan Epstein, *The Attorney–Client Privilege and the Work–Product Doctrine* 2 (3rd ed. 1997).

<sup>29</sup> *In Re Lindsey*, 158 F.3d 1263, 1267 (D.C. Cir. 1998).

<sup>30</sup> *Upjohn v. United States*, 449 U.S. 383, 389 (1981).

<sup>31</sup> *United States v. Neill*, 952 F. Supp. 834, 839 (D.D.C. 1997).

## B. The Sixth Amendment Right to Effective Assistance of Counsel

“[L]awyers in criminal courts are necessities, not luxuries.”<sup>32</sup> Among the rights afforded to a criminal defendant in any regularly constituted tribunal in the United States, the Sixth Amendment right to counsel is “by far the most pervasive, for it affects his ability to assert any other rights he may have.”<sup>33</sup> Both civilian and military courts have repeatedly held that the right to counsel is the *right to effective assistance of counsel*.<sup>34</sup> The “essence” of this right is “privacy of communication with counsel.”<sup>35</sup>

To provide effective assistance, a lawyer must be able to communicate freely with his or her client without fear that the advice and legal strategy will be seized and used against the client.<sup>36</sup> The government has an “affirmative obligation not to act in a manner that circumvents the protections afforded the Accused by invoking this right.”<sup>37</sup> The government violates the Sixth Amendment when it intrudes on the attorney-client relationship, preventing defense counsel from “participat[ing] fully and fairly in the adversary factfinding process.”<sup>38</sup>

Various government intrusions on the attorney-client relationship have been found to constitute violations of the right to counsel. *See, e.g., Geders v. United States*, 425 U.S. 80, 91 (1976) (an order that defendant not consult with his attorney during an overnight recess during trial violated the Sixth Amendment); *Perry v. Leeke*, 448 U.S. 272, 284 (1989) (limiting the ability of counsel and attorney to communicate violates the right to counsel if

<sup>32</sup> *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963).

<sup>33</sup> *Penson v. Ohio*, 488 U.S. 75, 84 (1988) (citation omitted).

<sup>34</sup> *See, e.g., Glasser v. United States*, 316 U.S. 60 (1942); *United States v. Lindsay*, 48 MJ 93 (CAAF 1990).

<sup>35</sup> *United States v. Rosner*, 485 F.2d 1213, 1224 (2d. Cir. 1973); *see also Mastrian v. McManus*, 554 F.2d 813 (1977) (“It is clear that an Accused does not enjoy the effective aid of counsel if he is denied the right of private consultation with him.”).

<sup>36</sup> *United States v. Neill*, 952 F. Supp. 834, 839 (D.D.C. 1997); *see also Fischer v. United States*, 425 U.S. 391, 403 (1976) (“The purpose of the [attorney/client] privilege is to encourage clients to make full disclosure to their attorneys,” and thereby “obtain full informed legal advice.”).

<sup>37</sup> *Main v. Moulton*, 474 U.S. 159, 176 (1985).

<sup>38</sup> *Herring v. New York*, 422 U.S. 853, 858 (1975).

those procedures result in more than a de minimis bar to communication); *Weatherford v. Bursey*, 429 U.S. 545, 555 n.4 (1977) (attorney-client communications are particularly inhibited by “the fear that the government is monitoring those communications through electronic eavesdropping”); *Bishop v. Rose*, 701 F.2d 1150, 1156-57 (6th Cir. 1983) (state’s seizure of 14-page handwritten letter to counsel from defendant’s cell and use of it at trial established violation of Sixth Amendment right to counsel); *Shillinger v. Ha-worth*, 70 F.3d 1132, 1140 (10th Cir. 1996) (deputy sheriff’s listening to and reporting on defendant’s meetings with counsel constituted an intentional violation of Sixth Amendment); *Coplon v. United States*, 191 F.2d 749, 756 (1951) (stating, in the context of wiretapping of attorney-client communications, “[i]t is well established that an Accused does not enjoy the right to effective aid of counsel if he is denied the right of private consultation with him”).

The importance of access to and confidential communication with counsel is particularly underscored by the interests at stake in a capital prosecution.<sup>39</sup> The government’s intrusions described in the AE 292 series of pleadings not only obstructs Mr. Mohammad from exercising his right to have confidential communications with counsel but precludes him from enjoying his fundamental right to prepare a defense.

### **C. Fifth Amendment Due Process Rights**

Governmental interference with the attorney-client relationship may also rise to the level of “outrageous government conduct” in violation of a defendant’s Fifth Amendment right to due process. The government violates a defendant’s Fifth Amendment right to due process by interfering with confidential attorney-client communications when (1) the government is objectively aware of an ongoing, personal attorney-client relationship; (2) the

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<sup>39</sup> *Holland v. Florida*, 130 S. Ct. 2549, 2563-64 (2010).

government deliberately intrudes into that relationship; and (3) the defendant suffers actual and substantial prejudice.<sup>40</sup>

In addition, the Supreme Court has also held that a defendant does not waive his Fifth Amendment privilege against self-incrimination by providing information to his attorney.<sup>41</sup> *A fortiori*, when the government acquires confidential and/or privileged defense information, it necessarily violates the defendant's Fifth Amendment privilege against self-incrimination.

#### **D. Military Commissions Rules Regarding the Attorney Client Relationship**

The attorney-client relationship similarly enjoys long-standing recognition in military courts. The Court of Military Appeals has explained the policy justification of the attorney-client privilege: "[t]he rule is designed to encourage full and unrestrained communication between client and attorney. Any forced revelation of conversations resulting from the relationship is certain to discourage free and full disclosure of facts by the person seeking assistance."<sup>42</sup> The court in *Fair* went on to note that the rule, "grounded as it is in policy reasons even more sound in the military than in the civilian community, should be strictly enforced and not relaxed."<sup>43</sup>

The rules governing the military commissions have also codified the protections of the attorney-client privilege. Military Commissions Rules of Evidence 502(a) provides that "[a] client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client . . . ." The Discussion to the Rules of Military

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<sup>40</sup> *United States v. Voigt*, 89 F.3d 1050, 1067 (3d Cir. 1996).

<sup>41</sup> *Fisher v. United States*, 425 U.S. 391, 403-05 (1976).

<sup>42</sup> *United States v. Fair*, 2 U.S.C.M.A 521, 528 (1953).

<sup>43</sup> *Id.*

Commissions (“R.M.C.”) 502(d)(6), which addresses duties of defense counsel, states that counsel must “guard the interests of the Accused zealously within the bounds of the law . . . and *may not disclose the Accused’s secrets or confidences except as the Accused may authorize.*” (emphasis added).

Moreover, according to senior military officials, the current iteration of the Military Commissions system is supposed to “incorporate all of those fundamental guarantees of a fair and just trial that are demanded by our values.” BG M. Martins, Remarks to the American Bar Association, Dec. 1, 2011. *See also* Remarks of BG M. Martins at Harvard Law School, April 3, 2012 (“Reformed military commissions are not the special, separate, and exclusive terror court that some have sought and others have feared, and that is because these military commissions are fully integrated within our federal framework of criminal justice. . .”).

Congress likewise emphasized the importance of providing the Accused with adequate representation. In authorizing the Military Commissions Act of 2009, Congress stated that adequate representation is a critical component to an effective military commissions system. *See* National Defense Authorization Act for Fiscal Year 2010, Pub. L. No. 111-84, §1807, 123 Stat. 2190 (2010) (“[T]he sense of Congress that . . . the fairness and effectiveness of the military commissions system under Chapter 47A of title 10, United States Code (as amended by section 1802), will depend to a significant degree on the adequacy of defense counsel . . . particularly in the case of capital cases. . .”); *see also*, Sen. Rep. No. 110-335, at 863 (2008) (“[T]he conferees strongly encourage the Secretary of Defense to take appropriate steps to ensure the adequacy of representation for detainees, particularly in capital cases.”).

The intrusions upon the attorney-client relationship described in the AE 292 series of pleadings also implicate the ability of counsel to meet their professional obligations as required by the military commission rules:

In addition to complying with State and service-specific Rules of Professional Conduct, all attorneys practicing before II-10 military commissions shall adhere to any rules of professional responsibility prescribed by the Secretary of Defense and shall, in the course of practice before military commissions, apply state, service-specific and commission-specific rules of practice and professional responsibility consistent with the provisions of this Rule.<sup>44</sup>

In addition, the Secretary of Defense has issued rules explicitly ordering defense counsel to comply with all professional obligations inherent to their licensing, and stating that defense counsel may be disbarred for failure to abide by their licensing state's rules of professional conduct.<sup>45</sup> The intrusions described in the AE 292 series of pleadings, however, restrict defense counsel from fulfilling their ethical obligations and constitute an actual and constructive denial of Mr. Mohammed's right to due process and to the effective assistance of counsel.

#### **E. Ethical Rules/ABA Guidelines**

The American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, 31 Hofstra L. Rev. 913 (2003) ("ABA Guidelines"), emphasize that contact and communication with the client is a duty of utmost importance for defense attorneys in capital cases. Guideline 10.5 addresses counsel's relationship with the client. Subsection C states:

Counsel at all stages of the case should engage in a continuing interactive dialogue with the client concerning all matters that might reasonably be expected to have a material impact on the case, such as: 1) the progress of and prospects for the factual investigation, and what assistance the client might provide to it; 2) current or potential legal issues; 3) the development of a defense theory; 4) presentation of the defense case; 5) potential agreed-upon dispositions of the cases; 6) litigation deadlines and the projected schedule of

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<sup>44</sup> R.M.C. 109(b)(1).

<sup>45</sup> See Reg. for Trial by Mil. Comm., 1-5.

case-related events; and 7) relevant aspects of the client's relationship with correctional, parole, or other governmental agents.

Defense counsel also have an ethical and constitutional duty to affirmatively protect privileged attorney-client communications from government surveillance and interception. The Model Rules of Professional Conduct, which serve as the model for states' ethical rules, specifically prohibit defense counsel from disclosing confidential information to the government. Model Rule of Professional Conduct 1.1 provides, "[a] lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation." Rule 1.6(a) provides that "a lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out representation, and except as stated in paragraph (b)."<sup>46</sup>

This duty is also recognized in 1 RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §§ 60(1)(b), 63 & Comment b (2000). Section 60(1)(b) provides, in relevant part:

(1) Except as provided in §§ 61-67 [when disclosure permitted], during and after representation of a client . . . (b) the lawyer must take steps reasonable in the circumstances to protect confidential client information against impermissible use or disclosure . . . that may adversely affect a material interest of the client or otherwise than as instructed by the client.

Comment b to Section 63 likewise mandates that a lawyer must object to "another's attempt to obtain confidential client information (see § 59) from the lawyer if revealing the information would disadvantage the lawyer's client and the client has not consented (see § 62), unless disclosure would serve the client's interest (see § 61)."<sup>47</sup>

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<sup>46</sup> Model Rules of Professional Conduct Rule 1.6(a).

<sup>47</sup> RESTATEMENT Section 63 comment b.



### F. Information is Required to Provide an Effective Defense

These principles are illustrated by *United States v. DiDomenico*, 78 F.3d 294, 298-99 (7th Cir. 1996). In a pending organized crime prosecution, a room was set aside for the use of the defendants and their counsel at the federal jail in downtown Chicago. In this room, “[s]omeone made a tape recording of a conversation between one of the defendants and his lawyer and sent the tape to the lawyer.”<sup>48</sup> The lawyer turned the tape over to the FBI which conducted an extensive but ultimately inconclusive investigation, a report of which was submitted *ex parte* to the District Court. On appeal, Judge Posner recognized the obvious difficulties presented:

[t]he bugging was discovered before the trial and from then on the defendants and their lawyers must have wondered whether their conversations were being overheard, even though the district judge promptly authorized the defendants to meet with counsel outside of the jail; and conceivably this fear might have prevented effective communication between client and lawyer, emptying the right to the assistance of counsel of much of its meaning. Cf. *United States v. Cronin*, 466 U.S. 648, 659–60 (1984); *United States v. Berkowitz*, 927 F.2d 1376, 1381 (7th Cir.1991). “Free two way communication between client and attorney is essential if the professional assistance guaranteed by the sixth amendment is to be meaningful.” *United States v. Levy*, 577 F.2d 200, 209 (3d Cir.1978); *see also Geders v. United States*, 425 U.S. 80, 91 (1976).<sup>49</sup>

Because the defendants were “understandably reluctant to defer to a report they have not seen compiled by an agency that they suspect or at least affect to suspect of being responsible for the very crime that it was investigating,”<sup>50</sup> they sought an evidentiary

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<sup>48</sup> *DiDomenico*, 78 F.3d at 298.

<sup>49</sup> *Id.* at 300.

<sup>50</sup> *Id.*



hearing before the district court. The Seventh Circuit agreed that this request was “reasonable.”<sup>51</sup>

As in *DiDomenico*, and in the other cases cited above, the initial remedy for the present situation is information. Only by reviewing the discovery requested in the May 23, 2014 Requests for Discovery may counsel for Mr. Mohammad begin to fulfill our obligation to protect the confidentiality of defense communications. Indeed, until we can determine with precision what information was obtained by the government and how it has been used, we will be unable to prevent its actual or derivative use against Mr. Mohammad in the future. Most critically, until we are able to determine the nature of the information seized, the exact mechanism of its seizure, and the current disposition of the information, we cannot be confident ourselves, and will be unable to assure Mr. Mohammad or our respective bar associations, that government intrusions are not ongoing, and that future defense communications are indeed confidential.

**7. Oral Argument:** The defense requests oral argument on this motion.

**8. Witnesses:** None.

**9. Conference with Opposing Counsel:** On August 4, 2014, counsel for Mr. Mohammad inquired of the Special Trial Counsel as follows:

Mr. Campoamor,

On behalf of Mr. Mohammad, we intend to file a motion for an order compelling the government to provide the discovery requested in our two Requests for Discovery of May 23, 2014. In earlier pleadings you have indicated that the government would provide this discovery if it were

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<sup>51</sup> *Id.* The conviction was ultimately affirmed because the defendants had indeed been granted an evidentiary hearing in the district court, but had failed to conduct the hearing despite numerous continuances. The opinion implicitly suggests that the failure to go forward may have been because the defendants were themselves complicit in creating the tape recording. The investigation revealed that a “tape recorder may have been smuggled in to one of the defendants by a visitor, or even carried in by one of the defendants’ lawyers. A guard at the MCC might have been in the pay of the defendants (there was evidence at trial that at least one federal officer was in the pay of the Ferriola Street Crew) and made the tape in an effort to embarrass the prosecution.” *Id.*

requested to support relief other than determination of the existence *vel non* of a conflict of interest. The present motion would seek this discovery, among other purposes, to determine precisely what information was sought and obtained as a result of government intrusions into areas protected by the attorney-client privilege, the attorney work product doctrine, and the requirement of our attorney ethical rules that we maintain the confidentiality of case-related information; to determine how this information has been used by the government; and to assure that it is not used to Mr. Mohammad's detriment in the future. The motion may also argue that if material is discoverable the government must provide it -- and may not withhold it on the ground that defense requests have not yet hit upon the government's understanding of the correct basis of discoverability.

May I state your position on this motion?

Thank you, David Nevin

On 5 August 2014 The Special Trial Counsel responded as follows:

Mr. Nevin,

As we have previously indicated, once the conflict of interest claim is resolved, under an appropriate protective order we are amenable to providing you with certain discovery regarding the closed FBI [REDACTED] involving a [REDACTED] member of your team. To be clear, however, we have never agreed to provide you with the documents requested in your 23 May 2014 discovery requests, and we do not intend to do so as we consider many of the requests to be irrelevant, inappropriate, and/or over-broad. Regarding potential discovery involving the FBI [REDACTED] our intention is to first provide any such materials to the RBS team once it is determined that RBS has conflict-free counsel. After the RBS team has an opportunity to determine whether they object to the production of those materials to the other defense teams -- assuming they do not -- we would then be in a position to share those with you. Of course, materials related to your team would be subject to the same procedure.

As a result, before you file a motion, I would invite you to set up a conference call with us to discuss what you believe are the documents that should be produced, as well as the legal basis for your discovery request. If you prefer, we can also discuss these issues in writing. Specifically, we are interested in finding out: (1) whether you have now abandoned your claim that you are operating under a conflict of interest; (2) the effect of the Commission's order (AE 292QQ) on your legal positions and the potential relevance of any documents that you are seeking in light of the Commission's order; and (3) what narrow categories of documents you think you actually need to be able to file whatever other motion you think is appropriate.

If you disagree with our proposal as to how to proceed, please quote in your motion our answer to you in this email in full and please inform the

Commission that we oppose your request for reconsideration of your prior motion to compel, which has been previously denied. See AE 292QQ at 33.

We look forward to hearing from you.

On Friday, 8 May 2014, Counsel for Mr. Mohammad responded as follows:

Mr. Campoamor,

Thanks for your email. We are glad to meet to discuss the situation further, although we may proceed with filing the motion in the meantime. Ahead of our meeting, could you advise me 1. Specifically what discovery regarding the closed FBI [REDACTED] involving a [REDACTED] member of our team you are amenable to providing? 2. Are you able to represent to me that the FBI agents who actually conducted the interrogation of Mr. bin al Shihb's DSO dispute the nature, scope and subject of the interrogation as described by Mr. bin al Shihb's Learned Counsel, James Harrington (see AE 292, Attachment D)? 3. If so, can you specify in what manner the FBI agents disagree with Mr. Harrington's account? And 4., as you know, we have not abandoned our claim that we are operating under a potential conflict of interest. If it is your position that abandoning that claim is a condition of your providing any discovery, could you please explain the reason for that condition?

Thank you. Regards, David Nevin

Counsel will indeed meet with the Special Trial Counsel in an effort to resolve this discovery dispute without the ultimate need for judicial intervention. The Special Trial Counsel's reply, however, suggests that an agreement may not be possible. The Special Trial Counsel seems to suggest that he intends a very limited release of documents. And it appears that it is expected that Mr. Mohammad must "abandon[]" his claim that his counsel are laboring under a potential conflict of interest in order to obtain discovery. In any event, counsel will engage with the Special Trial Counsel, and if an agreement can be reached we will promptly advise the Military Commission and take appropriate action.

**10. List of Attachments:**

- A. Certificate of Service.
- B. Mr. Mohammad's Request for Discovery dated 23 May 2014.
- C. Mr. Mohammad's *Second* Request for Discovery dated 23 May 2014
- D. Special Review Team's Response to Mr. Mohammad's Requests for Discovery,  
dated 30 May 2014.

Respectfully submitted,

//s//  
DAVID Z. NEVIN  
Learned Counsel

//s//  
DEREK A. POTEET  
Maj, USMC  
Defense Counsel

//s//  
GARY D. SOWARDS  
Defense Counsel

//s//  
JASON D. WRIGHT  
MAJ, JA, USA  
Defense Counsel

*Counsel for Mr. Mohammad*

# ATTACHMENT A

**CERTIFICATE OF SERVICE**

I certify that on the 13th day of August 2014, I caused the electronic filing of the foregoing document with the Clerk of the Court and the service on all counsel of record by electronic mail.

//s//

DAVID Z. NEVIN  
Learned Counsel

# ATTACHMENT B



DEPARTMENT OF DEFENSE  
OFFICE OF THE CHIEF DEFENSE COUNSEL  
1620 DEFENSE PENTAGON  
WASHINGTON, DC 20301-1620

23 May 2014

MEMORANDUM FOR Special Trial Counsel ICO *United States v. Mohammad, et al.*

FROM: Defense Counsel for Khalid Shaikh Mohammad

SUBJECT: Mr. Mohammad's Request for Discovery dated 23 May 2014

1. Defense counsel for Khalid Shaikh Mohammad submit this request for discovery pursuant to RMC 701 and 703, 10 U.S.C. § 949(j), the Due Process Clause and the Sixth and Eighth Amendments to the United States Constitution, accepted principles of death penalty jurisprudence, and international law.

2. Khalid Shaikh Mohammad, by counsel, requests that the Special Trial Counsel produce and make available for copying to him, and his counsel, the items and information listed below, whether currently in the possession, custody, control or knowledge of the Special Trial Counsel, the Department of Defense, or any law enforcement or intelligence agent or agency of the United States, or which by the exercise of due diligence may become known to the Special Trial Counsel. The Special Trial Counsel are reminded of their obligation and duty to search for relevant materials and information in the possession of other government agents and agencies and to ensure that such evidence is preserved and not otherwise destroyed.<sup>1</sup>

**Discovery Request**

4. Please provide any and all materials in any form which document, memorialize or otherwise relate in any way to the telephone contact or the interview, including but not limited to the following paragraphs:

a. Any FD-302, memorandum of interview, or similar materials which document, memorialize, or otherwise relate in any way to the telephone contact and/or the interview;

b. Any memoranda, emails, or other materials which authorized, or purported to authorize, the telephone contact and/or the interview.

<sup>1</sup> See *Kyles v. Whitley*, 514 U.S. 419 (1995).



SUBJECT: Mr. Mohammad's Request for Discovery dated 23 May 2014

c. Any planning materials, such as rough notes, emails, or internal memoranda, which reflect or describe the reason(s) for conducting the telephone contact or the interview, topics or areas of inquiry to be discussed during the telephone contact or the interview, and/or specific questions anticipated to be addressed to [REDACTED] during the telephone contact and/or the interview.

d. Any materials, such as internal memoranda, emails, time records, log notes or the like, which document, memorialize, or otherwise relate in any way to any meetings of persons for the purposes of planning or preparing for, debriefing, or otherwise discussing the telephone contact or the interview after they occurred, or otherwise discussing the telephone contact and/or the interview.

e. Audio or video recordings in any form of the telephone contact and/or the interview.

f. Contemporaneous notes in any form, including transcriptions or summaries thereof, made by any person during and related to the telephone contact and/or the interview.

### Conclusion

5. The foregoing documents are requested in accordance with the military judge's verbal order of 15 April 2014, and are required for counsel to make a full and knowledgeable decision regarding a possible conflict of interest with Mr. Mohammad. The Commission's inquiry requires both defense counsel and Mr. Mohammad to be informed personally of all significant information regarding the existence of a conflict, which defense counsel must be able "to assess, and . . . convey by way of explanation to" Mr. Mohammad.<sup>2</sup> The disclosure of the documents requested is paramount to ensure a "full and fair trial" as mandated by the Military Commissions Act of 2009 and to afford Mr. Mohammad all the judicial guarantees which are recognized as indispensable by civilized people, as mandated in the Manual for Military Commissions as well as well-established principles under the U.S. Constitution, death penalty jurisprudence and international law.

6. In AE292R, the Special Trial Counsel states that "[t]he Special Review Team now submits that there is no possible conflict of interest burdening defense counsel" because the FBI investigation "was focused on one [REDACTED] member of the Ramzi Bin al Shibh team."<sup>3</sup> [REDACTED]

[REDACTED]<sup>4</sup> Curiously absent from both AE292R and SA [REDACTED] declaration is any mention of contact and questioning by the FBI of a [REDACTED] member of Mr. Mohammad's defense team. As AE292R did not address the FBI's questioning of [REDACTED], counsel for Mr. Mohammad are entitled to the materials requested above. Apart from the problem of a conflict of interest, the FBI's intrusion into Mr. Mohammad's defense team, and its insistence that [REDACTED] not reveal the

<sup>2</sup> U.S. v. Wheat, 486 U.S. 153, 163, (1988).

<sup>3</sup> AE292R at 2.

<sup>4</sup> AE292R, Attachment B, at 3.

SUBJECT: Mr. Mohammad's Request for Discovery dated 23 May 2014

intrusion, as the FBI and the government surely anticipated and intended, has had a sharply negative effect on team functioning. These actions constitute "outrageous government conduct," *e.g.*, *Greene v. United States*, 454 F.2d 783 (9th Cir.1971), and require the application of an appropriate remedy.

7. Lastly, do not under any circumstances disclose the privileged and personal information contained herein. This document contains information regarding the composition and workings of Mr. Mohammad's defense team, and contains personally identifiable information of one of the team members.

Respectfully submitted,

//s//  
DAVID Z. NEVIN  
Learned Counsel

//s//  
GARY D. SOWARDS  
Defense Counsel

//s//  
DEREK A. POTEET  
Maj, USMC  
Defense Counsel

//s//  
JASON D. WRIGHT  
MAJ, JA, USA  
Defense Counsel

*Counsel for Mr. Mohammad*

# ATTACHMENT C



DEPARTMENT OF DEFENSE  
OFFICE OF THE CHIEF DEFENSE COUNSEL  
1620 DEFENSE PENTAGON  
WASHINGTON, DC 20301-1620

23 May 2014

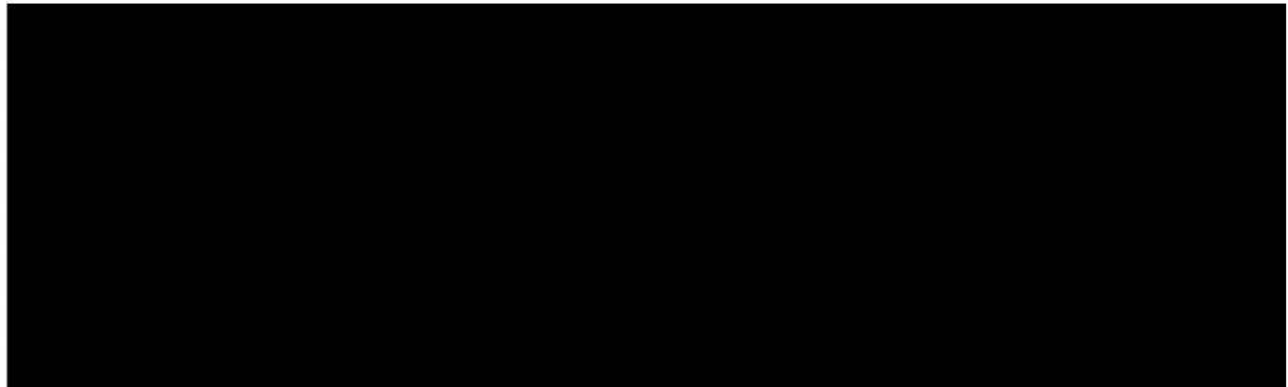
MEMORANDUM FOR Special Trial Counsel ICO *United States v. Mohammad, et al.*

FROM: Defense Counsel for Khalid Shaikh Mohammad

SUBJECT: Mr. Mohammad's *Second* Request for Discovery dated 23 May 2014

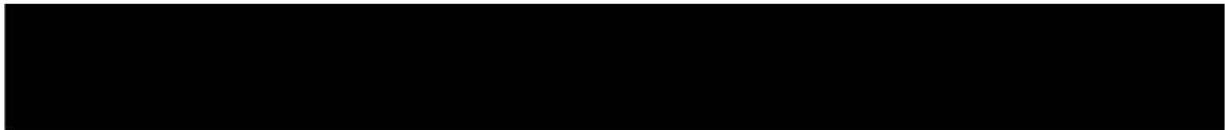
1. Defense counsel for Khalid Shaikh Mohammad submit this request for discovery pursuant to RMC 701 and 703, 10 U.S.C. § 949(j), the Due Process Clause and the Sixth and Eighth Amendments to the United States Constitution, accepted principles of death penalty jurisprudence, and international law.

2. Khalid Shaikh Mohammad, by counsel, requests that the Special Trial Counsel produce and make available for copying to him, and his counsel, the items and information listed below, whether currently in the possession, custody, control or knowledge of the Special Trial Counsel, the Department of Defense, or any law enforcement or intelligence agent or agency of the United States, or which by the exercise of due diligence may become known to the Special Trial Counsel. The Special Trial Counsel are reminded of their obligation and duty to search for relevant materials and information in the possession of other government agents and agencies and to ensure that such evidence is preserved and not otherwise destroyed.<sup>1</sup>



**Discovery Request**

4. Produce any FD-302, Letterhead Memoranda, memoranda of interview, or similar materials which document, memorialize, were generated during, or otherwise relate in any way to the investigation or its activities, including:



<sup>1</sup> See *Kyles v. Whitley*, 514 U.S. 419 (1995).

SUBJECT: Mr. Mohammad's *Second* Request for Discovery dated 23 May 2014



5. Produce any FD-302, Letterhead Memoranda, memoranda of interview, or similar materials which document, memorialize, or otherwise relate in any way to authorization, or purported authorization, to conduct the investigation.

6. Produce any planning materials, such as rough notes, emails, or internal memoranda, which reflect or describe the reason(s) for conducting the investigation, topics or areas of inquiry to be discussed during witness interviews, and/or specific questions anticipated to be addressed to witnesses during interviews.

SUBJECT: Mr. Mohammad's *Second* Request for Discovery dated 23 May 2014

7. Produce any materials, such as internal memoranda, emails, time records, log notes or the like, which document, memorialize, or otherwise relate in any way to any meetings of persons for the purposes of planning or preparing for, debriefing after, or otherwise discussing witness interviews and their results.
8. Produce any audio or video recordings in any form of witness interviews, meetings, telephone conversations, or other events related in any way to the investigation.
9. Produce any contemporaneous notes in any form, including transcriptions or summaries thereof, made by any person during and related to the investigation.

#### Conclusion

10. The foregoing documents are requested in accordance with the military judge's verbal order of 15 April 2014, and are required for counsel to make a full and knowledgeable decision regarding a possible conflict of interest with Mr. Mohammad. The Commission's inquiry requires both defense counsel and Mr. Mohammad to be informed personally of all significant information regarding the existence of a conflict, which defense counsel must be able "to assess, and . . . convey by way of explanation to" Mr. Mohammad.<sup>2</sup> The disclosure of the documents requested is paramount to ensure a "full and fair trial" as mandated by the Military Commissions Act of 2009 and to afford Mr. Mohammad all the judicial guarantees which are recognized as indispensable by civilized people, as mandated in the Manual for Military Commissions as well as well-established principles under the U.S. Constitution, death penalty jurisprudence and international law.

Respectfully submitted,

//s/  
DAVID Z. NEVIN  
Learned Counsel

//s/  
GARY D. SOWARDS  
Defense Counsel

//s/  
DEREK A. POTEET  
Maj, USMC  
Defense Counsel

//s/  
JASON D. WRIGHT  
MAJ, JA, USA  
Defense Counsel

*Counsel for Mr. Mohammad*

---

<sup>2</sup> *U.S. v. Wheat*, 486 U.S. 153, 163 (1988).

# ATTACHMENT D



U.S. Department of Justice

Ronald C. Machen Jr.  
United States Attorney

*District of Columbia*

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Judiciary Center  
555 Fourth St., N.W.  
Washington, D.C. 20530

30 May 2014

**By Electronic Mail**

David Z. Nevin, Esq.  
Gary D. Sowards, Esq.  
Major Derek A. Poteet  
Major Jason D. Wright  
1620 Defense Pentagon  
Washington, DC 20301-1620

**Re: Mr. Mohammad's Requests for Discovery dated 23 May 2014**

Dear Counsel:

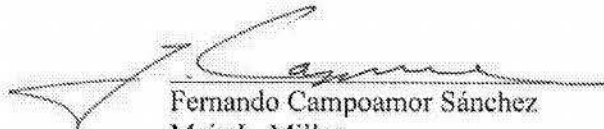
In response to your discovery requests dated 23 May 2014, which we received by email on 27 May 2014, we respectfully refer you to our filing of 21 May 2014 (AE 292R), in which we explained that any discovery related to your conflict of interest claim would be unwarranted as a matter of law because there is no indication that any defense counsel of record for any defense team in this case is under investigation by the FBI. Therefore, there can be no conflict. *See, e.g., Lafuente v. United States*, 617 F.3d 944, 947 (7th Cir. 2010) ("The government could obviate the need for an evidentiary hearing by simply confirming, through an affidavit, that [defense counsel] was never under investigation."); *Moss v. United States*, 323 F.3d 445, 472-74 (6th Cir. 2003) (no conflict of interest where the government made clear that it had not launched an investigation against counsel).

We can, however, inform you that the individual referenced in your letter was interviewed by the FBI in relation to an investigation of a [REDACTED] member of Mr. Mohammad's team. That investigation was unrelated to the FBI [REDACTED]



referenced in our filing of 21 May 2014. The interview took place on or about January 3, 2013, and the investigation was closed on or about January 11, 2013.

Sincerely,

A handwritten signature in black ink, appearing to read 'Fernando Campoamor Sánchez', written over a horizontal line.

Fernando Campoamor Sánchez

Maia L. Miller

Vijay Shanker

Kevin Driscoll

Heidi Boutros Gesch