

**MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY**

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

AE359A(WBA)

Defense Response to AE359(GOV),
Government Motion for the Commission to
Inquire into the Circumstances of
Representation and Impose Procedural
Requirements on Joint Defense Agreements to
Further safeguard the Accused's Right to
Conflict-Free Counsel

Date Filed: 26 May 2015

1. Timeliness: This Response is timely filed.

2. Relief Sought:

The Commission should reject the relief requested in AE359(GOV). The Government's implied accusations are completely without merit. Not a scintilla of evidence exists to support the extraordinary demands of the Prosecution. Counsel for Mr. bin 'Atash unequivocally state that any joint defense agreements undertaken by Mr. bin 'Atash and his counsel in this case do not involve any contractual or fiduciary duty of loyalty to another accused, that counsel's sole duty of loyalty and sole attorney-client relationship rests with Mr. bin 'Atash, and that any joint defense agreements entered into in this case on behalf of Mr. bin 'Atash do not create, either expressly or impliedly, any new attorney-client relationships. The Commission should require nothing further on this issue.

3. Overview:

The Prosecution opposes severance in the instant case, repeatedly emphasizing commonality, shared culpability, and alleged cooperation and conspiracy amongst the co-accused. In opposing severance, the Prosecution cites repeatedly to *Zafiro v. United States*, 506 U.S. 534, 539 (1993), and its holding that courts should grant severance “only if there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants...” Yet now, while continuing to vociferously oppose severance, the Prosecution concedes that the regime it has repeatedly championed *will* compromise a significant and specific trial right – the Sixth Amendment right to conflict-free defense counsel. The concession is shocking in its apparent reversal on two issues: the Prosecution now apparently concedes that the 6th Amendment to the United States Constitution applies to Mr. bin ‘Atash, and that application of the 6th Amendment in a joint trial could abrogate the 6th Amendment rights of Mr. bin ‘Atash. These Prosecution concerns are valid. Concerns about a joint defense agreement are not.

Joint defense agreements, and the joint defense privilege, are a legally-recognized and important tool available to the defense – particularly in a conspiracy case where, as the Prosecution is quick to note, at least twenty one alleged overt acts involve “at least two of the accused [] participating in the respective acts together.” AE039A at 21. Joint defense agreements do not entail the risks that the Prosecution claims exist. Contrary to the Prosecution’s assertion, joint defense agreements do not create new attorney-client relationships or even a duty of loyalty amongst the participants. Myriad authority, including an on-point ethics opinion from the District of Columbia Bar, indicates that co-defendant participants in a joint defense agreement are not “clients” within the meaning of ethics rules – avoiding the risks and pitfalls associated with multiple representation. Binding authority contrasts with the sole, non-binding district court opinion relied upon by the Prosecution. The single non-binding case

relied upon by the Prosecution is distinct and unique because the co-defendant participants in that case had entered into an agreement that would have artificially imposed a binding duty of loyalty on all participants – something not present in this case.

The law is clear: joint defense agreements do not impose a duty of loyalty. The law is also clear that joint defense agreements provide for a legally-recognized privilege. Authority is mixed on whether they impose an ethical duty of confidentiality. However, even if and when such agreements do impose a duty of confidentiality, any duty of confidentiality is not the potentially-disqualifying barrier to representation suggested by the Prosecution. Because there is no duty of confidentiality in communications that are no longer privileged or confidential, in a hypothetical scenario in which a participant in a joint defense agreement departs the group and agrees to cooperate with the Government or otherwise testifies as to the subject matter of the agreement, he waives any privilege or expectation of confidentiality as to the subject matter of his testimony. Moreover, even if the joint defense agreement member did not waive the privilege by his testimony, no defense lawyer could ethically utilize the privileged communications. The “mere inability to utilize the privileged communications” from the joint defense agreement would not in itself be a “manifestation of a conflict of interest” because “no lawyer in the world could utilize those communications,” and thus a new and hypothetically-unconflicted attorney would place Mr. bin ‘Atash in no better of a position. *United States v. Almeida*, 341 F.3d 1318, 1323 (11th Cir. 2003).

The Prosecution is on a fishing expedition. No evidence exists that would provide this Commission the basis for requiring the reduction to writing of joint defense agreements. The facts don’t support the Government’s fishing expedition and neither does the law. In contrast to the single case cited by the Prosecution, the overwhelming weight of authority (including

controlling authority from the D.C. District Court) holds specifically that joint defense agreements need not be in writing. Taking together the complete lack of evidence to support the Prosecution's request, the weight of authority opposed to requiring written joint defense agreements, the fact that joint defense agreements themselves may constitute protected work product, and the fact that the Commission's "supervisory authority" to enact the requested relief is itself unsettled, the Commission should not take the unusual step of requiring that agreements be reduced to writing.

Conflicts of interest are personal to defense counsel, and defense counsel are usually in the best position to identify these conflicts and bring them to the Commission's attention. *Holloway v. Arkansas*, 435 U.S. 475, 486 (1987). In this case, defense counsel have a history of actively identifying and bringing to the Commission's attention potential conflicts. AE292, Emergency Joint Defense Motion to Abate Proceedings and Inquire into Existence of Conflict of Interest Burdening Counsel's Representation of Accused is just such an example. Here, however, defense counsel do not envision the disqualification or withdrawal scenarios presented by the Prosecution. Such scenarios are unsupported by any evidence, too remote and do not warrant the Commission's *sua sponte* action. The Commission should deny the relief requested by the Prosecution.

4. Burdens of Proof:

The Government bears the burden of persuasion; the standard of proof is a preponderance of the evidence. R.M.C. 905(c)(1).

5. Facts:

A. On 17 May 2012, the Commission entered AE039, directing the Prosecution to show cause as to why the cases of Mr. bin 'Atash and his co-accused should not be severed. On 24

May 2012, the Prosecution responded to the Commission's Order to Show Cause. *See* AE039A. In its Response, the Prosecution highlighted the commonality of the accusations against the co-accused, noting that the Government had "charged each of the five accused with the exact same offenses" and that each of the co-accused was "subject in each charge to the exact same punishment." *Id.* at 21. The Prosecution further noted that "twenty one of the overt acts list at least two of the accused as participating in the respective acts together." *Id.* In its Reply, filed on 19 June 2012, the Prosecution cited *Zafiro v. United States*, 506 U.S. 534, 539 (1993) for the proposition that severance of properly joined defendants should only be granted "if there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants..." AE039C at 6.

B. In December 2013, after filing a motion to inquire into the mental capacity of Mr. Bin al Shibh, Trial Counsel again reiterated the Prosecution's opposition to severance. *See, e.g.*, Tr. at 7747 ("[t]he Government is not moving to sever [Mr. Bin al Shibh] at this time.").

C. On 21 May 2014, Mr. Hawsawi filed AE299(MAH), a motion to sever his trial from the remaining four co-accused.

D. On 4 June 2014, the Prosecution filed AE299A(GOV), its Response to Mr. Hawsawi's motion to sever. In its Response, the Prosecution again cited *Zafiro* for the proposition that severance is only appropriate "if there is a serious risk that a joint trial would compromise a specific trial right..." AE299A(GOV) at 2; *see also Id.* at 5. The Prosecution additionally emphasized the "joint, inter-connected nature of each Accused with respect to the charges." *Id.* at 8.

E. In opposing Mr. Hawsawi's motion for severance, the Chief Prosecutor noted on the record that "[w]e have a series of acts or transactions in the allegations that are the same, so

joinder is proper here. These accused have all been charged with the identical offenses and the identical overt acts in the common plan and conspiracy. All of the charges are identical...” Tr. at 8217-18. The Chief Prosecutor specifically cited *Zafiro* as supporting joinder in the instant case.

F. On 24 July 2014, the Commission entered AE312, Severance Order. The Commission noted that delays involved in *United States v. Bin al Shibh* had “become procedural difficulties threatening the rights of the other Accused to some modicum of timely justice.” AE312 at 6. The Commission directed the severance of Mr. Bin al Shibh.

G. On 30 July 2014, the Prosecution filed an emergency motion to reconsider the Commission’s severance order. In opposing severance, the Prosecution once again noted the alleged commonality of the charges against the co-accused. *See* AE312A(GOV) at 10. Additionally, the Prosecution repeatedly cited *Zafiro*’s admonition that severance is only appropriate where there is a serious risk of compromise to a specific trial right. *Id.* at 14.

H. On 11 February 2015, the Commission questioned Trial Counsel on the record concerning the severance of Mr. Bin al Shibh (currently held in abeyance), asking if the Prosecution “adamantly opposes” severance. Tr. at 8324. Trial Counsel responded “that’s correct.” *Id.* In opposing severance, Trial Counsel noted the myriad “issues that [the co-accused] are joining together...” *Id.* at 8332.

I. On 12 May 2015, the Prosecution filed AE359(GOV), Government Motion for the Commission to Inquire into the Circumstances of Representation and Impose Procedural Requirements on Joint Defense Agreements to Further Safeguard the Accused’s Right to Conflict-Free Counsel.

J. On 15 May 2015, Mr. al Baluchi filed AE359A(AAA), his Response to AE359(GOV). Mr. bin ‘Atash has joined AE359A(AAA) by operation of the Commission’s rules, and Mr. bin ‘Atash incorporates Mr. al Baluchi’s argument therein by reference.

6. Law and Argument:

Mr. bin ‘Atash must view it as an incremental but positive step that the Prosecution is seemingly willing to concede that Mr. bin ‘Atash is protected by *constitutional* rights. In their motion, the Prosecution relies on a single case for the proposition that courts may order joint defense agreements be reduced to writing – the foundation for the single case cited by the Government is protection of defendants’ Sixth Amendment rights. If Mr. bin ‘Atash is not subject to Sixth Amendment protections, the Government’s single cited case is completely irrelevant. In requesting to pierce the parameters of any joint defense agreement, the Prosecution is seeking a remedy which, when it has been ordered, is based on the Constitution of the United States. The additional request of ordering of joint defense agreements to be written is unheard of at courts-martial, before military commissions, or in apparently any other federal jurisdiction but the one cited by the Government. *See United States v. Stepney*, 246 F. Supp. 2d 1069, 1077 (N.D. Cal. 2003) (noting the “constitutional duty” to explore conflicts of interest in order to “ensure that defendant’s Sixth Amendment rights have been adequately protected or knowingly waived.”) (citing *Cuyler v. Sullivan*, 446 U.S. 335, 344-47 (1980)).

The Prosecution’s claims that it is protecting the Sixth Amendment rights of Mr. bin ‘Atash in AE359(GOV) are particularly disingenuous because the Prosecution created – and has been a constant cheerleader for – the regime of which it now complains. The Prosecution understood that a joint trial in this case would be exceptionally difficult, time-consuming, and fraught with peril – even the Rules for Military Commissions caution that “joint and common

trials may be complicated by procedural and evidentiary rules.” R.M.C. 901(e)(3), Discussion. Yet, the Prosecution has consistently, at every juncture, resisted efforts by various parties (including the Commission) to sever these cases – repeatedly emphasizing the commonality of the accusations, evidence, and potential witnesses, as well as the commonality of the potential sentence (death). *See, e.g.* AE039A; AE039C; AE299A(GOV); AE312A(GOV). Ironically, the Prosecution has even opposed severance aimed at remediating the conflict of interest concerns raised in the AE292 series. In opposing severance, the Prosecution frequently cites to *Zafiro v. United States*, 506 U.S. 534, 539 (1993), and its holding that courts should grant severance “only if there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants...” *See, e.g.* Tr. at 8217-18. Now, while continuing to oppose severance, the Prosecution unequivocally argues that a joint trial (and resulting joint defense agreements) *will compromise a specific trial right* – the Sixth Amendment right to conflict-free defense counsel – deemed amongst the most important rights by the Supreme Court. This Prosecution’s inconsistent positions cannot be reconciled, and the Prosecution simply cannot have it both ways on this issue.

The Prosecution’s inconsistency and continuing opposition to severance belies its supposed conflict of interest concerns in AE359(GOV). In order to claim the joint defense privilege, parties must generally demonstrate that “(1) the communications were made in the course of a joint defense effort, (2) the statements were designed to further the effort, and (3) the privilege has not been waived.” *Minebea Co., Ltd v. Papst*, 228 F.R.D. 13, 16 (D.D.C. 2005) (quoting *In re Bevill, Bresler & Schulman Asset Management*, 805 F.2d 120, 126 (3d Cir. 1986)). Because of the “joint defense effort” prerequisite, the Prosecution could allay many of its supposed concerns by severing the cases of the co-accused, thereby reducing the commonality of

interests.¹ Yet, the Prosecution chooses not to sever, demonstrating that the Prosecution's true desire has nothing to do with protecting Mr. bin 'Atash's rights to conflict-free counsel or protecting the appellate record. Instead, the Prosecution is engaged in attempts to chill the defense's common efforts, hamper defense trial preparation, and deprive the defense of a valuable and legally-recognized tool made available in large part due to the Prosecution's insistence on a joint trial.

In addition to its adamant opposition to severance, the Prosecution continues to argue the commonality of the charges and evidence in this case. The Prosecution's averments emphasize the need to develop, in a confidential and unimpeded manner consistent with counsel's ethical and legal obligations, robust joint defense agreements. The rationale for the joint defense privilege is that "persons who share a common interest in litigation should be able to communicate with their respective attorneys and with each other to more effectively prosecute or defend their claims." *In re Grand Jury Subpoenas, 89-3 and 89-4, John Doe 89-129*, 902 F.2d 244, 249 (4th Cir. 1990). The co-accused in this case share more than just a common interest; they share identical charges based upon overt acts at least twenty-one of which, the Prosecution has noted, involve "at least two of the accused as participating in the respective acts together." AE039A at 21.² In a criminal case, the Seventh Circuit has held, the joint defense privilege "can be necessary to a fair opportunity to defend." *United States v. McPartlin*, 595 F.2d 1321, 1336 (7th Cir. 1979). Nowhere could a robust joint defense privilege be more important than in this

¹ Severance may not be a dispositive factor in determining the validity of a joint defense privilege amongst these co-accused. *See, e.g., United States v. Gonzalez*, 669 F.3d 974, 980 (9th Cir. 2012) (noting that criminal defendants seeking severance may continue to claim a joint defense privilege because "parties in separate actions might nonetheless have reasons to work together toward a common objective..."). However, it would certainly be a persuasive factor in determining the existence of a joint privilege.

² The co-accused may ultimately disagree as to relative culpability but, as Mr. al Baluchi notes, the Prosecution "has not acknowledged significant differences in their culpability." AE359A(AAA) at 5.

joint capital case, with the Prosecution's constant focus on commonality and shared responsibility.

Weighed against the vital importance of confidential joint defense agreements entered into as part of counsel's privileged trial strategy (particularly in the instant case, where the Prosecution vociferously opposes severance and constantly emphasizes commonality), the relief requested by the Prosecution is unnecessary, unwarranted, and overly-intrusive. Contrary to the Prosecution's assertions, joint defense agreements in this case are not likely to lead to irreconcilable conflicts of interest, and joint defense agreements are also not required to be memorialized in writing. The Prosecution, rather than imposing on defense counsel the superfluous, unnecessary, and defense-chilling documentation such as the Memorandum of Understanding associated with AE013DDD and the written joint defense agreements requested in AE359(GOV), should instead refocus its efforts on avoiding real conflicts of interest engendered by Government-directed actions, such as FBI investigations into defense teams or CIA assets being assigned to defense teams.

A. There is No Evidence that Potential Conflicts Cited by Prosecution will Occur

The Prosecution, citing *United States v. Henke*, 222 F.3d 633 (9th Cir. 2000) (per curiam), incorrectly argues that joint defense agreements create "implied attorney-client relationship[s]" between counsel and co-defendants. AE359(GOV) at 4. Decisions subsequent to *Henke* (as well as the *Henke* decision itself) clarify that this implied relationship is extremely limited and does not bring with it the full range of ethical duties attendant to a normal attorney-client relationship. For example, the *Stepney* court, cited frequently by the Prosecution, note that "the cases on which the *Henke* court relied to reach its conclusion do not suggest a general duty of loyalty or a full attorney-client relationship between an attorney and all co-defendants who are

party to a joint defense agreement.” 246 F. Supp. 2d at 1082-82; *see also Id.* (“[t]here is good reason for the law to refrain from imposing on attorneys a duty of loyalty to their clients’ co-defendants” because “[a] duty of loyalty between parties to a joint defense agreement would create a minefield of potential conflicts...”). The District of Columbia Bar Association is in accord on this point, opining that, in the District of Columbia, “a non-client member of a joint defense group is not a ‘client’ – and in many cases could not be a client under the applicable conflict rules,” and thus “Rule 1.9 [of the D.C. Rules of Professional Conduct] does not preclude adversity to non-client joint defense group members.” D.C. Bar Ethics Opinion 349, *Conflict of Interest of Lawyers Associated with Screened Lawyers Who Participated in a Joint Defense Group* (2009) (hereinafter “D.C. Bar Opinion 349”), available at <http://www.dcbar.org/bar-resources/legal-ethics/opinions/opinion349.cfm>.

Because joint defense agreements (including any agreements entered into in the instant case) do not create a duty of loyalty, the Prosecution’s claim regarding potential withdrawal or disqualification is without basis. In *Stepney*, the Court became deeply involved largely because the co-defendants had entered into a joint defense agreement that *did* artificially “purport[] to create a duty of loyalty on the part of signing attorneys that extends to all signing defendants.” 246 F. Supp. 2d at 1079. The duty of loyalty, described as “the most basic of counsel’s duties,” is at the heart of all conflict of interest concerns. *Strickland v. Washington*, 466 U.S. 668, 692 (1984). Without a duty of loyalty, many of the concerns brought to mind by the Prosecution’s motion, such as cross-examining a cooperating co-defendant or presenting a “defense that in any way conflict[s] with the defense of the other defendants participating in a joint defense agreement,” simply are not present in this case. *Stepney*, 246 F. Supp. 2d at 1082. Without a

duty of loyalty, counsel for Mr. bin ‘Atash, by their participation in joint defense agreements, are not constrained in their ability to present the most favorable possible case for Mr. bin ‘Atash.

Although joint defense agreements clearly do not create an attorney-client relationship with or duty of loyalty to co-defendants, the Prosecution claims that such agreements do “impose an ethical duty of confidentiality on participating attorneys...” AE359(GOV) at 1-2; *see also Stepney*, 246 F. Supp. 2d at 1076. The Prosecution’s view is not widely held. For example, the District of Columbia Bar has taken the position that joint defense agreements do not impose a duty of confidentiality because “[t]he only obligations that Rule 1.6 imposes involve ‘a confidence or secret of the lawyer’s client’” and “[a] joint defense agreement does not make the parties ‘clients’ of the participating lawyers.” D.C. Bar Opinion 349; *see also* ABA Comm. On Ethics & Prof’l Responsibility, Formal Op. 395 (1995) (noting that the Model Rules of Professional Conduct do not impose an ethical duty of confidentiality for attorneys involved in joint defense agreements). Even the *Stepney* Court, in finding a circumscribed duty of confidentiality, observes that this duty is “limited in that the showing required to establish a conflict of interest arising from prior participation in a joint defense agreement is significantly higher than that required to make out a conflict based on former representation of a client.” 246 F. Supp. 2d at 1076.

To the extent that joint defense agreements do create an ethical duty of confidentiality in participating attorneys, decisions subsequent to *Stepney* reveal that this duty of confidentiality is generally not the disqualifying barrier to representation that it initially may appear to be. For example, the *Stepney* Court notes that “an attorney may be disqualified if her client’s interests require that she cross-examine (or oppose in a subsequent action) another member of a joint defense agreement about whom she has learned confidential information.” *Id.* at 1075; *see also*

AE359(GOV) at 5. However, the *Stepney* opinion fails to address the effect of waiver of the privilege; no duty of confidentiality pertains to communications that are no longer privileged or confidential. If a co-defendant formerly participating in a joint defense agreement chooses to depart the agreement and testify as to the subject matter of the agreement (in the instant case, none of the accused can be compelled to testify involuntarily), he will have waived any privilege or expectation of confidentiality as to the subject matter of his testimony. *See generally In re Sealed Cases*, 676 F.2d 793, 818 (D.C. Cir. 1982) (“[a]ny disclosure inconsistent with maintaining the confidential nature of the attorney-client relationship waives the privilege. When a party reveals part of a privileged communication in order to gain an advantage in litigation, it waives the privilege as to all other communications relating to the same subject matter...”).

Illustrative of this point is *United States v. Almeida*, 341 F.3d 1318 (11th Cir. 2003). In *Almeida*, co-defendants in a joint trial entered into a verbal joint defense agreement, but one of the defendants subsequently agreed to cooperate with the Government and testify for the Prosecution. The trial court erred in prohibiting defense counsel from cross-examining the cooperating defendant on matters learned during, or information derived from, the joint defense agreement. The 11th Circuit reversed, finding that the cooperating defendant “waived the privilege when he agreed to plead guilty and testify against [his co-defendant]...” *Id.* at 1323 (further noting that “[a] duty of loyalty...does not exist in this situation and it is therefore improper to conclude that all of the attorneys in the joint defense strategy session represent all of the participating defendants.”); *see also In re Grand Jury Subpoena*, 274 F.3d 563, 572-73 (1st Cir. 2001) (“[e]ven when [the joint defense privilege] applies...a party always remains free to disclose his own communications...the existence of a joint defense agreement does not increase

the number of parties whose consent is need to waive the attorney-client privilege...”); *Matter of Grand Jury Subpoena Duces Tecum Dated November 16, 1974*, 406 F. Supp. 381, 394 (S.D.N.Y. 1975) (the “shield” afforded by the joint defense privilege “may be lowered...when the parties once joined assume the stance of opposing parties...”). Moreover, the *Almeida* Court found that, even if the cooperating defendant had not waived the privilege by testifying for the Government, the “mere inability to utilize the privileged communications” from the joint defense agreement was not itself a “manifestation of a conflict of interest” because “no lawyer in the world could utilize those communications.” 341 F.3d at 1323.; *see also United States v. Executive Recycling, Inc.*, 908 F. Supp. 2d 1156, 1160 (D. Colo 2012) (“[i]f the Court were to grant the Motion to Withdraw [based on a supposed conflict of interest as a result of a joint defense agreement]...new counsel would likewise be unable to examine [co-defendant] about any confidential information. Indeed, new counsel would not likely have access to such confidential information.”).

B. Written Joint Defense Agreements Not Required

Even if the Prosecution were able to present a colorable argument as to an actual or potential conflict of interest rooted in the existence of a joint defense agreement, Mr. bin ‘Atash still need not reduce his joint defense agreements (if any) to writing. The Prosecution presents a single, non-binding case for the proposition that this Commission should take the highly-unusual step of requiring all joint defense agreements be committed to paper and provided to the Commission. Counsel is unable to locate a single other point of authority that would authorize this remedy. Moreover, as Mr. al Baluchi notes, the single case cited by the Prosecution is distinct both legally and factually from this capital prosecution. *See* AE359A(AAA) at 5.

In contrast to the single case cited by the Prosecution, overwhelming authority, including authority from the D.C. Circuit, indicates specifically that joint defense agreements need not be reduced to writing. *See, e.g., Intex Recreation Corp. v. Team Worldwide Corp.*, 471 F. Supp. 2d 11, 16 (D.D.C. 2007) (“an oral agreement whose existence, terms and scope are proved by the party asserting it, may provide a requisite showing” for the joint defense privilege); *United States v. Gonzalez*, 669 F.3d 974, 979 (9th Cir. 2012) (“it is clear that no written agreement is required... a [joint defense agreement] may be implied from conduct and situation, such as attorneys exchanging confidential communications from clients who are or potentially may be codefendants or have common interests in litigation.”); *Continental Oil Co. v. United States*, 330 F.2d 347, 350 (9th Cir. 1964) (confidentiality may be inferred when communications made between attorneys “engaged in maintaining substantially the same cause on behalf of other parties in the same litigation.”); *In re Regents of University of California*, 101 F.3d 1386, 1389 (Fed. Cir. 1996) (common interest privilege may be inferred); *HSH Nordbank AG New York Branch v. Swerdlow*, 259 F.R.D. 64, 72 n.12 (S.D.N.Y. 2009) (“[c]ourts in this circuit have acknowledged that although the common interest doctrine applies only where a party has demonstrated the existence of an agreement to pursue a common legal strategy, the agreement need not be in writing.”); *Stepney*, 246 F. Supp. 2d at 1080 n.5 (“[n]o written agreement is generally required to invoke the joint defense privilege.”).

C. Commission Lacks Clear Authority or Cause to Intervene

Because the near-unanimous view is that joint defense agreements need not be reduced to writing, and because joint defense agreements in this case have not and are unlikely to yield the serious ethical conflicts suggested by the Prosecution, there is no cause for this Commission to take the risky and unusual step of intervening in what is itself essentially a matter of privileged

defense strategy. *See, e.g. Jeld-Wen, Inc. v. Nebula Glasslam International, Inc.*, 2008 WL 756455 at 11 (S.D. Fla. 2008) (finding that joint defense agreement constituted protected work product including counsel’s “mental impressions, conclusions, opinions, and legal theories for jointly defending the case...”). With the exception of one case—*Stepney*—the Prosecution provides no authority that would even remotely suggest that the Commission could or should intervene under these circumstances.³ To the contrary, the cases cited by the Prosecution are based upon lawyers who have represented multiple co-defendants in the same case – where conflicts are obvious and readily apparent – not joint defense agreements. *See, e.g., United States v. Bucuvalas*, 98 F.3d 652, 655 (1st Cir. 1996) (noting that the Court had “carved out a limited exception” to its non-intervention posture only in circumstances where “one lawyer represents multiple co-defendants.”); *Ford v. United States*, 379 F.2d 123 (D.C. Cir. 1967) (multiple co-defendant representation); *Henderson v. Smith*, 903 F.2d 534 (8th Cir. 1990) (multiple co-defendant representation).

As explained in the AE292 series, this Commission does have the authority and responsibility to *sua sponte* inquire into bona fide potential conflicts of interest. *See, e.g., R.M.C. 901(d)(4)(E)*, Discussion (“[w]henver it appears that any defense counsel may face a conflict of interest, the military judge should inquire into the matter, advise the accused of the right to effective assistance of counsel, and ascertain the accused’s choice of counsel.”); *see also*

³ The Prosecution asks this Commission to exercise its “inherent supervisory authority” in order to enact the relief that it seeks. AE359(GOV) at 2. In *Stepney*, the Court noted that its “inherent supervisory powers permit inquiry into the circumstances of representation and imposition of procedural requirements on joint defense agreements...” 246 F. Supp. 2d at 1076-77. However, “supervisory power” is a term of art, and the supervisory power of military courts and, in particular, this Military Commission is far from settled. *See, e.g., United States v. Leak*, 61 M.J. 234, 250 n.6 (C.A.A.F. 2005) (Gierke, C.J., concurring in part and dissenting in part). This is particularly true because, unlike article III courts which exercise plenary jurisdiction, the jurisdiction of military commissions is “narrowly circumscribed” by statute. *Clinton v. Goldsmith*, 526 U.S. 529, 535 (1999); *Denedo v. United States*, 66 M.J. 114, 139 (C.A.A.F. 2008) (Ryan, J., dissenting) (noting that the Supreme Court in *Clinton v. Goldsmith* “made it clear that this Court occupied only a small plot of the judicial landscape, and that that plot was circumscribed by statute.”); *United States v. Payner*, 447 U.S. 727, 737 (1980) (supervisory power may not be utilized by federal court to “disregard the considered limitation of the law it is charged with enforcing.”).

Cuyler, 446 U.S. at 344-47 . However, this case is far from the multiple representation cases cited by the Prosecution; in the instant case, any claim of conflict based upon joint defense agreements (agreements without any accompanying duty of loyalty) would be tenuous, hypothetical, and unworthy of this Commission's *sua sponte* intervention.

D. Conclusion

As the Prosecution acknowledges, conflicts of interest present personal, ethical issues for defense counsel. The Supreme Court has held that, because of the personal nature of conflicts of interest, attorneys themselves are “in the best position professionally and ethically to determine when a conflict of interest exists or will probably develop in the course of a trial.” *Holloway v. Arkansas*, 435 U.S. 475, 486 (1978).⁴ When such a conflict develops or appears imminent, counsel have an ethical obligation to bring the conflict to the Commission's attention, as counsel did in AE292. *Id.* at 485-86 (“defense attorney have the obligation, upon discovering a conflict of interests, to advise the court at once of the problem.”).

In the instant case, defense counsel, who are in the best position to forecast an actual or potential conflict based upon hypothetical joint defense agreements, do not currently envision the disqualification or withdrawal scenarios raised by the Prosecution. If they did, defense counsel would raise the conflict issue – as they have, over government objection, in the past. In this case, unlike in *Stepney*, any joint defense agreements entered into on behalf of Mr. bin ‘Atash have not created and will not create in the future any duty of loyalty between counsel and any individual other than Mr. bin ‘Atash. Moreover, while joint defense agreements do involve the exchange of

⁴ This contrasts with the factual predicate in AE292, where counsel are not in a position to examine the nature and extent of any conflict without aid of the Commission. *See* AE292 at 11 (noting that while *Holloway* indicates that counsel is in the best position to determine whether a conflict exists, AE292 is different because “while a potential conflict is readily apparent, defense counsel are not able to determine the nature and scope of the conflict because the underlying investigation giving rise to the potential conflict is highly secretive” and because “the government has actively taken steps to prevent counsel from discovering the full nature of the potential conflict.”).

privileged and confidential information, it is extremely unlikely (due to waiver rules) that a scenario would arise in which counsel would be constrained in counsel's ability to examine or cross-examine a witness, make a particular argument, or pursue a particular strategy based upon counsel's participation in a joint defense agreement. Even if it could be said that counsel was constrained, Mr. bin 'Atash would be no better served by another attorney because the outside attorney would not be privy to the hypothetically-advantageous confidential information.

As counsel are not presently subject to the conflict scenarios envisioned by the Prosecution, as no binding authority would require counsel to reduce joint defense agreements to writing, and as the authority of the Commission to direct such relief is suspect at best, the Commission should deny the Prosecution's motion in its entirety.

7. Oral Argument: The defense requests oral argument.

8. Witnesses: Mr. bin 'Atash reserves the right to request production of witnesses on this Response at a later date.

9. Attachments:

A. Certificate of Service

//s//

CHERYL T. BORMANN
Learned Counsel

//s//

TODD M. SWENSEN
Maj, USAF
Defense Counsel

//s//

MICHAEL A. SCHWARTZ
Capt, USAF
Defense Counsel

Attachment A

CERTIFICATE OF SERVICE

I certify that on 26 May 2015, I electronically filed the attached **Defense Response to AE359(GOV), Government Motion for the Commission to Inquire into the Circumstances of Representation and Impose Procedural Requirements on Joint Defense Agreements to Further safeguard the Accused's Right to Conflict-Free Counsel** with the Trial Judiciary and served it on all counsel of record by e-mail.

//s//

CHERYL T. BORMANN
Learned Counsel

Attachment A