MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY, CUBA

UNITED STATES OF AMERICA v. **KHALID SHAIKH MOHAMMAD, WALID MUHAMMAD SALIH MUBARAK BIN 'ATTASH, RAMZI BINALSHIBH, ALI ABDUL AZIZ ALI, MUSTAFA AHMED ADAM AL HAWSAWI**	**AE 380QQ** **RULING** **MOTION TO ABATE COMMISSION PROCEEDING UNTIL RESOLUTION OF THE AE 380 SERIES** **5 MAY 2016**

1. This order applies only to the case of *United States v. Walid Muhammad Salih Mubarak bin 'Attash*.

2. **Background.**

a. From arraignment, on 5 May 2012, to date, Mr. bin 'Attash has been represented by Ms. Cheryl Bormann, as Learned Counsel. Captain, and later Major, Michael Schwartz initially served as Detailed Military Counsel; on or about January 2016, he was released from active duty and has continued to serve as an Assistant Defense Counsel for Mr. bin 'Attash in his civilian capacity. Major Matthew Seeger was detailed to represent Mr. bin 'Attash as an Assistant Defense Counsel in August 2015[1] and, since Mr. Schwartz's departure from active duty, as Detailed Military Counsel.

b. During the October 2015 hearings, Mr. bin 'Attash requested information about *pro se* representation, however, he later stated he wished only to sever his relationship with his Learned Counsel, Ms. Bormann.[2] Over Government objection, the Commission ordered a closed, *ex parte,*

[1] AE 006B, detailing as Defense Counsel in the Military Commission Case of United States Walid Muhammad Salih Mubarek bin 'Attash, filed 9 October 2015.
[2] Unofficial/Unauthenticated Transcript of the Khalid Shaikh Mohammad et al Motions Hearing Dated 28 October 2015 from 9:32 AM to 10:03 AM, at 8858.

hearing with Mr. bin 'Attash and his Defense Team to allow Mr. bin 'Attash to inform the Commission of the reasons he believed established good cause to sever his attorney/client relationship with Ms. Bormann.[3]

c. The Commission determined Mr. bin 'Attash did not establish good cause to sever his attorney/client relationship with Ms. Bormann, and subsequently issued a detailed order setting forth the findings of fact and conclusions of law that led the Commission to decide that Mr. bin 'Attash had not established good cause to sever his attorney/client relationship with Ms. Bormann.[4]

d. The Commission reconvened 7 December 2015, for further proceedings. Mr. bin 'Attash continued to voice objection about his counsel.[5] On 12 February 2016, prior to the start of the Commission hearings scheduled to take place 16 to 26 February 2016, Ms. Bormann advised the Commission that Mr. bin 'Attash still wished to sever his attorney/client relationship with her and that he now also wished to sever his relationship with Mr. Schwartz. Ms. Bormann further advised the Commission that Mr. bin 'Attash drafted a letter with attachments for *ex parte* consideration by the Commission on the issue of attorney/client severance. The letter with six attachments was accepted by the Commission as an appellate exhibit.[6]

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[3] Unofficial/Unauthenticated Transcript of the Khalid Shaikh Mohammad et al Motions Hearing Dated 28 October 2015 from 11:43 AM to 11:53 AM, at 8918-8919. *See also* AE 380Z, ORDER Closure of *Ex Parte* Proceeding Held 28 October 2015, Dated 30 October 2015.

[4] AE 380BB, ORDER RIGHT TO COUNSEL, dated 4 December 2015 (*ex parte* and under seal).

[5] Unofficial/Unauthenticated Transcript of the Khalid Shaikh Mohammad et al Motions Hearing Dated 8 December 2015 from 9:07 AM to 10:36 AM, at 9334-9337; Unofficial/Unauthenticated Transcript of the Khalid Sheik Mohamad et al Motions Hearing Dated 9 December 2015 from 9:08 AM to 10:35 AM, at 9571; Unofficial/Unauthenticated Transcript of the Khalid Shaikh Mohammad et al Motions Hearing Dated 10 December 2015 from 9:05 AM to 10:13 AM, at 9708-9709.

[6] AE 380EE (WBA), Letter from WBA, filed 16 February 2016 (*ex parte*/under seal).

e. During the initial session of the Commission hearings on 16 February 2016, the Commission held a colloquy with Mr. bin 'Attash regarding attorney/client severance.[7] Mr. bin 'Attash advised the Commission that he now also wished to sever his relationship with Mr. Schwartz as well as Ms. Bormann.[8] Mr. bin 'Attash did not request to sever his relationship with Major Seeger but advised the Commission that he met with Major Seeger only once, on 15 February 2016, and viewed Major Seeger as part of the defense team under the control of Ms. Bormann.[9] Mr. bin 'Attash also stated a desire to submit another letter, drafted in Arabic, for the Commission to consider in furtherance of his desire to sever his relationship with Ms. Bormann.[10] The Commission ordered Mr. bin 'Attash's letter be translated into English and provided to the Commission.[11] The translation was completed and the Commission accepted this new letter as an appellate exhibit.[12] The Commission considered both letters filed *ex parte* and placed both letters under seal.[13]

f. The Commission denied Mr. bin 'Attash's request for attorney/client severance for the second time.[14] The Commission advised Mr. bin 'Attash of its ruling on the record and further advised him that a detailed, *ex parte*, under seal written order would be forthcoming explaining the reasons why the Commission arrived at its decision.[15] The Commission also ordered an

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[7] Unofficial/Unauthenticated Transcript of the Khalid Shaikh Mohammad et al Motions Hearing Dated 16 February 2016 from 9:14 AM to 10:32 AM, at 10196-10208.
[8] *Id.* at 10197.
[9] *Id.* at 10200 and 10208.
[10] *Id.* at 10198-10199.
[11] *Id.* at 10229-10230.
[12] AE 380FF (WBA), Letter from WBA, filed 16 February 2016 (*ex parte*/under seal).
[13] AE 380HH, SEALING ORDER – AE 380EE (WBA) Letter from Mr. bin 'Attash, dated 9 February 2016 and AE 380FF (WBA) Letter from Mr. bin 'Attash, Dated 18 February 2016. The Commission also considered a portion of AE 380GG submitted on behalf of Mr. bin 'Attash by Counsel. *See* AE 380GG, Declaration of BG Baker, filed 17 February 2016. Unofficial/Unauthenticated Transcript of the Khalid Shaikh Mohammad et al Motions Hearing Dated Unofficial/Unauthenticated Transcript of the Khalid Shaikh Mohammad et al Motions Hearing Dated 17 February 2016 from 9:35 AM to 11:00 AM, at 10237-10238.
[14] Unofficial/Unauthenticated Transcript of the Khalid Shaikh Mohammad et al Motions Hearing Dated 17 February 2016 from 9:35 AM to 11:00 AM, at 10244.
[15] *Id.*

independent counsel be appointed to assist Mr. bin 'Attash in preparing future fillings on this matter.[16]

g. Following that announcement, Ms. Bormann requested to withdraw from representing Mr. bin 'Attash as Learned Counsel.[17] Ms. Bormann listed a number of events and systemic issues involving alleged government intrusion into the attorney/client relationship she believed necessitated her withdrawal request.[18] She argued these situations affected Mr. bin 'Attash's perception of her and her team and chipped away at his trust in her and the team. When asked by the Commission whether there was anything Ms. Bormann has done to indicate a lack of trust, Counsel responded: "I have tried my very hardest."[19]

3. **Independent Counsel Issue**. The issue before the Commission is whether an independent counsel is necessary.

4. **Subsequent Pleadings**.

a. On 8 March 2016, the Commission issued AE 380KK, Short Form Order Attorney/Client Severance.[20] Within the Order, the Commission ruled that Mr. bin 'Attash had not established a justifiable dissatisfaction to establish good cause to sever either Ms. Bormann's or Mr. Schwartz's representation and that Ms. Bormann had not established good cause to withdraw as Learned Counsel. In doing so, the Commission found that "Ms. Bormann has not stated a legitimate conflict of interest that would prevent appropriate representation." *Id.* at 6.

[16] AE 380II, ORDER APPOINTMENT OF INDEPENDENT COUNSEL, Dated 21 February 2016.
[17] Unofficial/Unauthenticated Transcript of the Khalid Shaikh Mohammad et al Motions Hearing Dated 17 February 2016 from 9:35 AM to 11:00 AM, at 10248.
[18] *Id.* at 10249-10268.
[19] *Id.* at 10269.
[20] AE 380KK, Short Form Order, Attorney Client Severance, Dated 8 March 2016.

b. On 14 March 2016, Counsel for Mr. bin 'Attash filed AE 380LL (WBA)[21] stating "[t]he Commission must abate all proceedings in this case until the Commission-ordered independent counsel resolves his/her task of conducting an inquiry and determining whether he should or ethically can file motions in an attempt to sever [Mr. bin 'Attash's] relationship with his current defense attorneys." AE 380LL (WBA) at 1. Disregarding the Commission's findings in AE 380KK, Counsel for Mr. bin 'Attash argue that "[u]ntil the inquiry into defense counsels' performance and conduct is resolved, detailed defense counsel burden under the conflict of investigation and [Mr. bin 'Attash] is effectively unrepresented before the Commission." AE 380LL (WBA) at 2.

c. On 21 March 2016, the Chief Defense Counsel (CDC) filed AE 380MM (CDC),[22] an *amicus* brief and status report, in which he asserted the appointment of an independent counsel for the specific purpose of facilitating Mr. bin 'Attash's desire to sever his existing attorney/client relationship would violate the Regulation for Trial by Military Commission (R.T.M.C.) (2011), which requires the CDC to "facilitate the proper representation of all accused referred to trial before a military commission," "take appropriate measures to preclude defense counsel conflicts of interest arising from the representation of accused before military commissions," and "take appropriate measures to ensure that each detailed defense counsel is capable of zealous representation and unencumbered by any conflict of interest." AE 380MM (CDC) at 3 (citing R.T.M.C. 9-1(a)(2), (8), and (9)). The CDC further asserted the appointment of an independent counsel under the circumstances present would also violate the 2009 Military Commission Act's prohibition of unlawful influence, 10 U.S.C. § 949(a)(2)(C), and the CDC's Professional Rules of Conduct, JAGINST 5803.1E, Rule 5.1. *See* AE 380MM (CDC) at 3.

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[21] AE 380LL (WBA), Defense Motion to Abate Commission Proceedings Until Resolution of the AE 380 Series, filed 14 March 2016.

[22] AE 380MM (CDC), Amicus Brief and Report of Chief Defense Counsel Regarding Status of AE 380II, filed 21 March 2016.

d. On 28 March 2016, the Government filed AE 380OO (GOV),[23] arguing first that the appointment of an independent counsel in this instance did not give rise to a conflict-of-interest, and thus, there is no reason to abate the Commission's proceedings. Second, based on the filing by the CDC, an independent counsel may never be appointed, and, assuming *arguendo*, one is appointed, abatement of the proceedings pending that representation would result in significant delay not in the interests of justice. Third, the Government argued Mr. bin 'Attash can waive his right to Learned Counsel and all additional counsel on his Defense Team except Major Seeger, his Detailed Military Defense Counsel. Lastly, the Government posited that because the Commission has not found good cause to sever Mr. bin' Attash's relationship with Ms. Bormann and Mr. Schwartz, he has three choices regarding his defense counsel: (1) represent himself; (2) accept his current Defense Counsel; or (3) waive Defense Counsel except Major Seeger. Independent counsel is neither required nor necessary for Mr. bin 'Attash to make a decision regarding his counsel rights, and he should not be required to file a formal motion to assert such a fundamental right. As such, Counsel for Mr. bin 'Attash established no justifiable reason to abate the proceedings, and the Commission should deny the Defense Motion.

e. On 4 April 2016, Counsel for Mr. bin 'Attash filed a reply, AE 380PP (WBA),[24] arguing the Government ignored the law and facts as they apply to the Commission ordered inquiry into the defense team representing Mr. bin 'Attash. When the Military Judge ordered an "independent defense counsel to advise and assist Mr. bin 'Attash regarding his desire to sever his attorney/client relationship with [Learned Counsel Cheryl Bormann] and [Detailed Defense Counsel Michael Schwartz] to include any potential impacts from such a severance,"[25] the

[23] AE 380OO (GOV), Government Response to Defense Motion to Abate Commission Proceedings Until Resolution of AE 380 Series, filed 28 March 2016.
[24] AE 380PP (WBA), Defense Reply to Government Response to Motion to Abate Commission Proceedings Until Resolution of the AE 380 Series, filed 4 April 2016.
[25] AE 380II at pp. 3-4.

Military Judge ordered an inquiry into whether good cause exists to sever the relationship between Mr. bin 'Attash and his current Defense Counsel. As such, abatement of the proceedings is appropriate to resolve matters of representation.

5. **Oral Argument.** In accordance with Rule for Military Commission (R.M.C.) 905(h) and Military Commissions Trial Judiciary Rules of Court (RC) 3.5.m and 3.9 (5 May 2014), the decision to grant oral argument on a written motion is within the sole discretion of the Military Judge. In this instance, oral argument is not necessary to the Commission's consideration of the issue before it. The request for oral argument is **DENIED**.

6. **Law/Discussion.**

a**.** Where a court is informed of the existence of a potential conflict of interest on the part of defense counsel, the law dictates that the court *must* conduct an adequate inquiry into the matter, and this Commission's own rules and regulations are in accord. *Holloway v. Arkansas,* 435 U.S. 475, 488 (1978).

b. Once a party has advised the court of the "*possibility* of a conflict of interest," the court has a "duty to inquire further." *Wood v. Georgia*, 450 U.S. 261, 272 (1981) (emphasis in original). To satisfy this duty, the Commission "must investigate the facts and details of the attorney's interests to determine whether the attorney in fact suffers from an actual conflict, a potential conflict, or no genuine conflict at all." *United States v. Levy*, 25 F.3d 146, 153 (2d Cir. 1994).

c. The Commission is well aware of its responsibilities once it is informed of a potential conflict of interest. Previously in these proceedings, an issue of a potential conflict of interest arose concerning other defense teams. Although not termed an abatement, the Commission

postponed numerous scheduled sessions of the Commission to ensure an adequate inquiry into the potential conflict of interest was conducted and the issue was resolved.[26]

7. **Findings.**

a. The Commission did not, and does not, find that there was a conflict or potential conflict of interest between Mr. bin 'Attash and Ms. Bormann or Mr. Schwartz.

b. By the Order appointing an independent counsel (AE 380II), the Commission was simply attempting to assist Mr. bin 'Attash in understanding the legal issues as to why the Commission found no good cause to sever his relationship with Ms. Bormann or Mr. Schwartz. The appointment was not ordered to require any investigation or indicate there was still a lingering conflict of interest.

c. In AE 380KK (issued subsequent to the Independent Counsel Order), the Commission again found no good cause to sever Mr. bin 'Attash's relationship with Ms. Bormann or Mr. Schwartz. In addition, the Commission found that "Ms. Bormann had not stated a legitimate conflict of interest that would prevent appropriate representation."

d. The Commission issued the Independent Counsel order *sua sponte* and without giving the parties and the CDC an opportunity to be heard. On reflection, this was premature. Accordingly, the Commission will treat the CDC's submission as a motion for reconsideration of AE 380II. Upon consideration of the recent filings by the parties and the CDC, the motion for reconsideration is **GRANTED.**

e. The Commission recognizes that the Order appointing an independent counsel could create an impression current Defense Counsel for Mr. bin 'Attash may be laboring under a conflict of interest. This was not the intent of the Order and, as stated before, the Commission has specifically found that no conflict or potential conflict of interest exists between

[26] *See* AE 292, Emergency Joint Defense Motion to Abate Proceedings and Inquire into Existence of Conflict of Interest Burdening Counsel's Representation of Accused, filed 14 April 2014; *et seq*.

Mr. bin 'Attash and Ms. Bormann or Mr. Schwartz.

f. As a capital accused, Mr. bin 'Attash has right to a learned counsel, i.e., Ms. Bormann. He also has a right to a detailed military counsel. i.e., MAJ Seeger. Additional counsel, including Mr. Schwartz, are not statutorily required.

g. If Mr. bin 'Attash, or any other accused, has a question about his right to counsel, he may bring it to the attention of the Commission directly to be resolved. However, as with all legal issues, the Commission will not address the same issue repeatedly once it has ruled in the absence of new facts or law.

8. **Ruling.**

a. The Commission's Ruling ordering an appointment of an Independent Counsel is **RESCINDED**.

b. The motion by Counsel for Mr. bin' Attash to abate the proceedings is **DENIED**.

c. This order shall be translated into Arabic by Counsel for Mr. bin 'Attash and provided to Mr. bin 'Attash.

So **ORDERED** this 5th day of May, 2016.

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