

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

UNITED STATES OF AMERICA

v.

KHALID SHAIKH MOHAMMAD,  
WALID MUHAMMAD SALIH MUBARAK  
BIN 'ATTASH,  
RAMZI BIN AL SHAIBAH,  
AMMAR AL BALUCHI (ALI ABDUL AZIZ  
ALD),  
MUSTAFA AHMED ADAM AL HAWSAWI

AE 425F (Mohammad)

**Mr. Mohammad's Reply**  
To AE 425C (GOV) Government Response To  
Mr. Mohammad's Motion To Recuse Military  
Judge and the Current Prosecution Team and  
for Further Appropriate Relief

DATE FILED:  
31 May 2016

**1. Timeliness**

This Reply is timely filed.

**2. Relief Sought**

As further described in AE 425 (Mohammad), Mr. Mohammad's Motion To Recuse Military Judge and the Current Prosecution Team and for Further Appropriate Relief, Mr. Mohammad respectfully requests, following selection of a neutral and detached Military Judge, recusal of the Honorable Colonel James L. Pohl, U.S. Army, and of the current prosecution team from further participation in these or any related proceedings involving the defendants; and to abate the guilt and penalty phase of these proceedings.

**3. Overview**

AE 425 (Mohammad) presents the question whether Judge Pohl and the prosecution prejudicially misled the defense when (1) Judge Pohl issued a public order assuring defense counsel that a particular type of material exculpatory evidence would be preserved by the government unless the Military Judge issued an order to the contrary; (2) the prosecution secretly drafted and Judge Pohl secretly granted an order contradictory to and abrogative of the do-not-

destroy order and permitted the government to destroy important evidence favorable to the defense that had been protected by the public do-not-destroy order; and (3) Judge Pohl and the prosecution failed to inform the defense of the issuance of the destruction order and ensuing loss of the evidence for nearly two years. As set forth in AE 425 (Mohammad), these and other facts are sufficient to warrant recusal of Judge Pohl on the basis of actual or apparent lack of impartiality; recuse the prosecution for unfair manipulation of the evidence; and abate the proceedings due to the unfair, secret destruction of materially exculpatory evidence.

In AE 425C (GOV) Government Response To Mr. Mohammad's Motion To Recuse Military Judge and the Current Prosecution Team and for Further Appropriate Relief, the prosecution candidly admits that neither it, nor Judge Pohl, intended to inform the defense of the destruction order in time to permit counsel to protect their clients' right to preserve and examine crucial evidence. *Id.* at 7. The prosecution further contends there was no harm and no foul in misleading the defense because it purports that *photographs* of the evidence are an adequate substitute for the destroyed information and will provide all that is needed to mount a defense at trial. *Id.* at 5, 10-11. The government acknowledges, however, that the only bases for arguing the adequacy of the substitutes are the self-interested findings that Judge Pohl made without having examined the original evidence and long after the government had destroyed it. *Id.* at 10-11, 14. The government's arguments do not dispel the evidence of judicial bias and prosecutorial manipulation of the proceedings.

Nevertheless, with predictable reliance on jingoistic histrionics, the government criticizes Mr. Mohammad's counsel for having the temerity to insist that a trial in which their client's life is at stake must be conducted before a tribunal that is unquestionably impartial and uncontaminated by prosecutorial manipulation of the evidence. The government virtually

ignores the law and distorts the facts in an effort to avoid an accounting of its own role in destroying some of the most significant evidence in this case. In so doing, the government relies on a revolving series of implausible and self-contradictory excuses that boil down to saying the failure to give the defense fair notice of the destruction order was merely a “regrettable” oversight; that the defense was not entitled to timely notice because they could not have done anything to prevent the destruction; that the defense *was* given notice because they were informed that a secret order had been filed, even if they were not allowed to see its secret contents; and, anyway, there was no prejudice because the judge who signed the secret, undisclosed destruction order said the destruction order caused no harm.

Viewed most favorably to the Military Judge and the government, the prosecution’s arguments demonstrate that, at best, Judge Pohl and the prosecution were shockingly indifferent to their duty to protect Mr. Mohammad’s right to the preservation of crucial evidence. The fact that the resulting secret and intentional destruction of the evidence served the prosecution’s overarching priority of covering up the wide-ranging governmental conspiracy in criminal wrongdoing which pertains directly to Mr. Mohammad and other Muslims, would further lead an objective observer to conclude that a fair and thoroughgoing airing of the issues in this case is impossible before Judge Pohl or with this prosecution team.

#### **4. Burden of Proof**

As the moving party, Mr. Mohammad bears the burden of demonstrating by a preponderance of the evidence that the requested relief is warranted. R.M.C. 905(c)(1).

#### **5. Facts**

a. The facts set forth in AE 425 at 5-8, as further amplified by the References listed in Classified Attachments B and C thereto, are incorporated here by reference as if fully set forth.

b. The government admits that the defense was correct in understanding ““the letter and spirit of the Military Judge’s”” order not to destroy evidence ““to require the [g]overnment to maintain the status quo and not destroy the evidence until such time as the Commission issued a new and different order.”” AE 425C (GOV) at 6, 13.

c. The government admits that nearly two years later it drafted and Judge Pohl provided the prosecution with a secret order, filed under seal, which allowed the government to destroy the evidence. *Id.* at 7, 9, 13.

d. The government admits that Judge Pohl did not send defense counsel a copy of the destruction order and, instead, provided the defense only a “placeholder for an *Ex Parte, In Camera* Classified Order,” which “gave no details” of the contents of the referenced order. *Id.* at page 14.

e. The government inaccurately characterizes the placeholder as having “indicated that the Prosecution’s *ex parte, in camera* filing had been ruled on.” *Id.* In fact, the “placeholder,” which is attached hereto as Attachment B, refers only to an underlying “Order,” and simply contains no information about the Order’s content, or whether it might pertain to a substantive, procedural or purely administrative matter.

f. The government admits that the Military Judge did not inform the defense that he had issued the destruction order until nearly two years after he secretly contradicted and abrogated the do-not-destroy order and authorized the government to destroy the evidence. AE 425C (GOV) at 14.

g. The government admits that as drafted by the prosecution and signed by Judge Pohl, the destruction order “makes crystal clear” the fact that neither the Military Judge nor the

prosecution intended the defense to have timely notice of any “new and different order” permitting destruction of the evidence. *Id.* at 7, 9.

h. Any reasonable reading of the context and the content of the do-not-destroy order was that the defense would be put on notice, and afforded an opportunity to object or to seek appellate or mandamus relief, before the irreversible act of destruction occurred.

i. At the time that Judge Pohl and the prosecution generated the secret destruction order, the government had conceded and the Commission had ruled in the context of another defense motion that the defense would have been entitled to file a motion to compel evidence to challenge the adequacy of the government’s substitutions and summaries of classified information. *See* AE 164C (Order); Unauthenticated Transcript of 23 Oct 2013 at 6805-6806 (government argument citing *United States v. Campa*, 529 F.3d 980 (11<sup>th</sup> Cir. 2008) (“any information that the government withholds . . . must be replaced with redacted documents or substitutes. A defendant can examine these redacted documents and substitutes and, if he believes that they are inadequate, move for an order compelling discovery”).

j. The government admits that neither Judge Pohl nor the government informed the defense of the secret issuance of the superseding destruction order for nearly four years after Judge Pohl issued the initial preservation order, nearly two years after he issued the secret destruction order, and over a year after the evidence had been destroyed. AE 425C (GOV) at 14.

k. The government admits that the defense’s attempts to prevent destruction of the evidence generated significant litigation, which included, by the government’s own count, approximately 75 separate filings, orders and rulings over the past three-and-a-half years. AE 425C (GOV) at 13.

l. The government admits that within two months of the commencement of an 18-month hiatus in “normal” military commission hearings, due to government infiltration of defense teams, the prosecution sought and obtained the secret destruction order from Judge Pohl. *Id.* at 10, 13.

m. The prosecution admits that it did not seek “clarity on providing the” destruction order to the defense for over a year-and-a-half after it obtained the order, and for more than a year after the government actually proceeded to destroy the evidence. *Id.* at 10.

n. The government implicitly concedes that at the time Judge Pohl belatedly informed the defense of the destruction order, he simultaneously issued an order making findings that the government’s proposed substitutions, proffered in lieu of the previously destroyed evidence, satisfied its discovery obligations. *Id.*

o. The government does not dispute Mr. Mohammad’s factual allegation that at the time Judge Pohl made the above-described findings regarding adequacy of the substitutes, he had not and could not have examined the original evidence because it already had been destroyed. AE 425 (Mohammad) at 7.

p. The government does not dispute Mr. Mohammad’s factual allegation that at the time Judge Pohl made these findings he was in fact aware that his involvement in the events leading to the destruction of the evidence created a personal interest in the outcome of his assessment of the adequacy of proffered substitutes to the extent the finding afforded the government a basis to argue that its intentional, secret destruction of the evidence had not prejudiced the defense. *Id.*

q. The prosecution has repeatedly exploited Judge Pohl’s findings to argue that its intentional, surreptitious destruction of material evidence did not prejudice the defense. AE 425C (GOV) at 11; and AE 52KK (GOV).

**6. Law and Argument****Introduction**

Contrary to the government's gratuitous attack on Mr. Mohammad's counsel, the motion seeking recusal of Judge Pohl and the prosecution team does not question Judge Pohl's lengthy record of honorable military service. But, neither does that record immunize Judge Pohl from a meritorious motion based on the case-specific circumstances here. Nor may that record be used vicariously as cover for the prosecution's shoddy behavior in orchestrating the destruction of material evidence in a death penalty case, and now offering risibly implausible excuses for doing so. Both the civilian and military case law cited in Mr. Mohammad's motion, and largely ignored by the prosecution, makes it clear that, where warranted, recusal serves to protect both the rights of a defendant as well as the integrity of a judicial system. All judges, military and civilian, who are the subject of recusal motions are presumably honorable men and women, possessed of commendable records of public service. The relevant question raised by a recusal motion is whether their presence in a particular case will ensure both the fact and appearance of impartiality.

Acting Chief Judge Daniel E. O'Toole's voluntary recusal from *United States v. Al Bahlul*, AE 425 (Mohammad) at 10, 17-18, did not signify his admission that he was dishonorable or intending to eviscerate his own professional reputation. Judge O'Toole explained that under the circumstances, his continued involvement in the matter risked producing something "less than full public confidence in the integrity of the military commissions process." *United States v. Al Bahlul*, 807 F.Supp. 2d 1115, 1123 (USCMCR 2011). Judge O'Toole's example teaches us that honorable service includes subordinating personal interest in favor of the

duty to correct mistakes that might otherwise undermine the national interests one is sworn to serve.

The prosecution's breathless, outraged recitation of the bases for the defense's Motion (AE 425C (GOV) at 3-4), cannot disguise the fact that, as was true at the time of filing AE 425 (Mohammad) and is true now, each of the allegations is clearly demonstrated by the evidence. The prosecution cannot – and in fact does not -- deny that this is so. Clearly there were “secret<sup>1</sup> communications” between the judge and prosecution, indeed they are documented in a secret sealed order signed by the Military Judge. Clearly there was “bad faith destruction of exculpatory evidence” – the evidence was destroyed without notice to counsel at a time when they reasonably believed, in reliance on a public judicial order, that they would be notified before the destruction occurred. Clearly there was “surreptitious<sup>2</sup> authorization of destruction.” The destruction occurred without notice to interested parties. Clearly there was “participation [by Judge Pohl] in the Prosecution's orchestration of events.” Clearly there was a “lack of detached and impartial[] and neutral, even-handed administration of the laws governing this case.” Clearly Judge Pohl “acted in tandem with the prosecution [to] mislead[] the Defense.” Clearly it was “grossly improper judicial conduct” to reassure Mr. Mohammad's counsel that the critical evidence would not be destroyed [while] issu[ing] a secret order at the clandestine behest of the government.” Clearly the judge “permitted the prosecution to destroy evidence ... without informing Mr. Mohammad's counsel.” All of which constituted a “judicial head fake.” This

---

<sup>1</sup> Secret: kept hidden from others : known to only a few people. <http://www.merriam-webster.com/dictionary/secret>.

<sup>2</sup> Surreptitious: 1: done, made, or acquired by stealth: clandestine; 2: acting or doing something clandestinely: stealthy <a surreptitious glance>. <http://www.merriam-webster.com/dictionary/surreptitious>.

clearly created “the specter of collusion and fraud on the defense,” all of which justifies referring to this as “near-Star Chamber proceedings.”

The prosecution offers no facts or law to dispute the appropriateness of recusal.

**I. Another Military Judge Should Hear and Decide this Motion.**

As a preliminary matter, AE 425C (GOV) nowhere disputes the facts, law or the defense’s analysis leading to the conclusion that a military judge other than Judge Pohl should be selected to hear and decide this motion. *See* AE 425 (Mohammad) at 25-26. A principal basis for AE 425C (GOV) is the government’s argument that the secret destruction of evidence did not prejudice Mr. Mohammad because Judge Pohl (who authorized the secret destruction without informing the defense) has found that the government’s surviving substitute meets the defenses’ right to discovery. AE 425C (GOV) at 5, 10-11. Resolution of the issues here therefore will require a military judge to determine whether material, exculpatory evidence was unfairly destroyed and, if so, the appropriate remedy. As the court explained in *United States v. Simmermacher*, 74 M.J. 196, 199-200 (USCAAF 2015), “in determining whether an adequate substitute for lost or destroyed evidence is available, a military judge has broad discretion. It is when no adequate substitute is available . . . that military judges do not have discretion to vary from the prescribed remedy,” i.e., abatement. The circumstances here also require examination of Judge Pohl’s role in the destruction of the evidence.

An objective, hypothetical onlooker reasonably would question whether a self-interested motive to absolve himself of any wrongdoing caused a military judge in Judge Pohl’s position to make a retrospective determination that adequate substitutes are available for the evidence he permitted to be destroyed. Hearing and deciding this motion would thus place Judge Pohl in the

intolerable position of “be[ing] a judge in his own case.” *In re Murchison*, 349 U.S. 133, 136 (1955).

Accordingly, another military judge should be selected at random to hear this motion.

## **II. The Government’s Distortion of the Facts**

The government purports to expose Mr. Mohammad’s failure to mention “relevant and material facts,” and suggests that the “facts as they actually occurred” dispel the appearance of judicial bias and show the prosecution to have engaged in no wrongdoing. AE 425C (GOV) at 5-8, 12-14. The only “new” facts presented by the prosecution, however, are either illusory or insignificant.

First, the defense has not failed “to mention that the information at issue was both preserved and/or adequately substituted.” 425C (GOV) at 5. In this context, the phrase “preserved and/or substituted” is government speak for “destroyed.” Thus, as the government elsewhere uses the phrase, an order permitting “the information at issue . . . to be preserved and/or substituted,” means an order rescinding the preservation order and allowing the government to destroy the evidence. *Id.* at 7, 11. Far from failing to mention this fact, the principal predicate for Mr. Mohammad’s motion is that the government secretly obtained what it euphemistically calls a “preservation and/or substitution” order and proceeded to destroy material evidence. *Id.* at 11.

Similarly, Mr. Mohammad expressly mentioned, and vigorously challenged, the notion that the government “adequately substituted” anything for the material evidence it destroyed. Indeed, as Mr. Mohammad discussed – and the government wholly ignores – the purported adequacy of the government’s substitution is central to determining whether the proceedings should be abated. *See* AE 425 (Mohammad) at 21-25 (discussing, *inter alia*, *Illinois v. Fisher*,

540 U.S. 544, 547-548 (2004); *Arizona v. Youngblood*, 488 U.S. 51, 58 (1988); *California v. Trombetta*, 467 U.S. 479, 489 (1984); *United States v. Simmermacher*, 74 M.J. 196, 201 (USCAAF 2015).

Second, the defense did not fail to mention “that they had received an *adequate* substitute” (AE 425C (GOV) at 5, emphasis added) for the simple reason that no *adequate* substitute has been provided. Again, the *inadequacy* of the government’s proffered second- or third-generation dilution of the original evidence is a basis for Mr. Mohammad’s motion and an issue still to be litigated in a neutral forum.

Third, the government’s accusation that the defense “gloss[ed] over” the fact that the Military Commissions act permits ““secret communications”” between the Military Judge and prosecution is demonstrably false. AE 425C (GOV) at 5-6. The defense explicitly recognized the fact that the defense had to accept the reality that:

The rules and procedures governing defense access to the purportedly classified information in this case already create a two-track system in which Mr. Mohammad is significantly disadvantaged by *the government’s ability to hold secret sessions with the Commission, make secret presentations to which Mr. Mohammad’s counsel have no opportunity to respond, and obtain uncontested orders* preventing the defense from examining or using information that is material to the defense of Mr. Mohammad’s life.

AE 425 (Mohammad) at 9 (emphasis added). Mr. Mohammad, however, further argued – and the government does not dispute – that:

The rules for handling classified evidence, of course, apparently authorize the prosecution virtually unbridled, ex parte access to the Military Commission to secure orders and rulings that may have profound impact on Mr. Mohammad’s ability to prepare his case. Consistent with the principle discussed above, however, statutory authority to engage in such communications does not cure the vice of conducting them “under circumstances which” not only “give the *appearance* of granting undue advantage to one party over the other,” but actually *did* grant such undue advantage. [*United States v.*] *Dean*, 13 M.J.

[676], at 678 [(US. Air Force Court of Military Review 1982)] (emphasis added).

Third, only by ignoring controlling authority can the government suggest that the fact that it “agreed” to provide “hard copy photographs” of the evidence it destroyed somehow places its duplicity in an entirely different light from the “rash account” presented in AE 425 (Mohammad). AE 425C (GOV) at 5. As the court in *Simmermacher* explained, the secondary assessment and documentation of evidence by government agents is no substitute for defense access to the original. In *Simmermacher* the government attempted to provide a report of laboratory analysis of a urine sample that had been destroyed without notice to the defense. The appellate court found that without the actual evidence, the defendant could not retest and determine whether the government's reported result was accurate, or whether there had been any adulterations or misidentifications of the sample. Thus, a laboratory report of the initial analysis procedures was not an adequate substitute for being able to retest.

By comparison, in this case Mr. Mohammad expressly alleged that with respect to the destroyed evidence he “is prepared to show that any proposed reliance on second-hand information and ‘summaries’ is inconsistent with professional standards and protocols for evaluating and developing the full exculpatory significance of such evidence.” AE 425 (Mohammad) at 24 (citing *Kyles v. Whitley*, 514 U.S. 419, 446-447, 449 (1995) (assessing material, exculpatory value of evidence requires consideration of how it could have been used by competent counsel)). The prosecution does not acknowledge Mr. Mohammad’s argument or citations to *Kyles* or *Simmermacher*. Thus, the government cannot attribute any significance to the defense’s purported “failure” to acknowledge the government’s pathetic proffer of photos as a summary of a substitute for the evidence.

Fourth, the government's recitation of the "actual facts" succeeds only in demonstrating the unconscionable treatment Judge Pohl and the prosecution afforded the defense. AE 425C (GOV) at 13. Thus, the government admits that despite the high-profile nature of the litigation – conducted over three years and generating upwards of 75 separate pleadings and orders – the defense did not receive the destruction order and the prosecution did nothing to determine whether the order had been served on the defense before the government proceeded with its destruction of the evidence. *Id.* at 13-14.

In apparent recognition of the bad faith manifested by such facts, the government unreasonably contends that a nondescript "unclassified placeholder" for the secret order somehow "indicated" to the defense "that the Prosecution's *ex parte, in camera*" motion to destroy the evidence "had been ruled on." *Id.* 14. A brief perusal of the actual "placeholder" (*see* Attachment B) shows the government's contention to be nonsense.

Similarly, the government coyly states that "[i]n one of his rulings on the issue," Judge Pohl found that the government's substitute for the destroyed evidence was sufficient to meet its discovery obligations. AE 425C (GOV) at 14. The government carefully avoids mentioning that Judge Pohl did not make this helpful-to-the-government ruling until the destruction order was finally disclosed to the defense, long after the evidence had been destroyed, and the ruling was not based on Judge Pohl's examination of the original evidence. These facts were explicitly discussed in Mr. Mohammad's motion, and thus belie yet another suggestion that the defense failed to discuss the "actual facts." *See* AE 425 (Mohammad) at 7.

Thus, the defense did not fail to mention any material facts, and any such facts clearly support the defense.

**III. The Prosecution Admits It Never Intended to Give the Defense Timely Notice Before Destroying the Evidence.**

The prosecution states plainly that neither it nor Judge Pohl intended that the defense would be given notice before the evidence was destroyed. AE 425C (GOV) at 7. As the defense argued in AE 425 (Mohammad), the defense relied on the do-not-destroy Order for the unremarkable proposition that the evidence would not be destroyed without further notice. *Id.* at 5-6. In turn, the prosecution concedes that this reading of the Order was “correct.” AE 425C (GOV) at 7. The prosecution, however, further claims that defense counsel should have understood that this Order was not intended to require notice to the Defense prior to destruction – that would only be the Defense’s “own litigation wishes,” and was “clearly neither the Military Judge nor the Prosecution’s understanding of the litigation.” AE 425C (GOV) at 7. According to the prosecution, Judge Pohl made this understanding of the order “crystal clear,” but did not do so until he signed the secret destruction order. *Id.* This stunning characterization of events is what AE 425 (Mohammad) referred to as a “judicial head fake.” *Id.* at 12. Any fair reading of the context and the content of the do-not-destroy order was that the defense would be put on notice, and afforded an opportunity to object or to seek appellate or mandamus relief, before the irreversible act of destruction occurred. The prosecution’s bold acknowledgement that this was never Judge Pohl’s nor the prosecution’s intention demonstrates that the resulting deception of Mr. Mohammad was clearly intentional.

The government attempts to mitigate the effect of the acknowledged deception by arguing that the filing of the secret Order permitting the prosecution to destroy the evidence somehow put the defense on notice that the do-not-destroy order was no longer valid. Response at 7. This is because (so the argument goes) the Military Judge directed the filing of an

unclassified “placeholder” on the docket announcing that it had issued a classified ex parte Order. *Id.* Never mind that the placeholder did not provide any information about the content of the secret ex parte Order, that Mr. Connell repeatedly sought, but was refused, additional information about the content of the Order, and that the do-not-destroy Order remained in full force – apparently. The government does not explain how the defense was supposed to have guessed that everything had changed, and begin filing motions and seeking writs in the blind. Nor could it – the defense reasonably relied on the good faith of the Military Judge and the government that it would be notified if its interests were no longer protected by the do-not-destroy Order. Secret ex parte orders do not constitute notice.

**IV. Judge Pohl and the Prosecution Unreasonably Failed to Provide Mr. Mohammad Timely Notice of the Intended Destruction of Evidence.**

The government next argues that the failure to inform the defense of the destruction order until long after the evidence was destroyed was attributable to a simple misunderstanding: the judge and the prosecution each thought that the other would give notice to the defense, but neither did. AE 425C (GOV) at 9. The government explains that it drafted the order, which “did not direct the Prosecution to provide a redacted order” to the defense. *Id.* at 10. Instead, “the Prosecution had anticipated that the redacted Order would come from the Trial Judiciary, like other orders, following a classification review. The Prosecution has never provided an order from the Trial Judiciary during these proceedings.” *Id.* The government says that although it is “regrettable,” nonetheless this “miscommunication, resulting in inaction, is what caused a delay of provision of the redacted order to the defense, nothing else.” *Id.* at 9.

The government’s argument not-so-subtly shifts responsibility to the Trial Judiciary and Judge Pohl for failing to provide timely notice of the destruction order. This argument only

makes internal sense if it is understood to allege that Judge Pohl reasonably knew that he was responsible for preparing and serving a redacted order notifying the defense that he had rescinded the preservation order, and he failed to do so long after giving the prosecution authorization to destroy the evidence. If Judge Pohl genuinely believed that the government was to provide the notice, he was repeatedly made aware for over a year, starting in July 2014, that the government had not done so. The prosecution thereby confirms the gravamen of the defense's complaint: "Military Judge Pohl, on the one hand, provided the defense an order that reassured Mr. Mohammad's counsel that critical evidence would not be destroyed, but with the other hand issued a secret order at the clandestine behest of the government permitting the prosecution to destroy that very evidence without informing Mr. Mohammad's counsel." AE 425 (Mohammad) at 12.

Even though the government's explanation establishes Judge Pohl's responsibility in effectively misleading the defense, it does not absolve the prosecution of having manipulated the evidence for its advantage. Notably, the government admits that it "initially drafted and proposed" the Order "in such a way that both the Trial Judiciary and Prosecution could reasonably believe that the other was to provide the redacted order to the Defense." AE 425C (GOV) at 9. Thus, the Order necessarily was susceptible to being interpreted by either the Trial Judiciary or the prosecution as making *it* the one responsible for providing the redacted order. Even if the government genuinely believed that the Military Commission was to provide the notice, it need only have consulted the docket to confirm that it had not. Irrespective of whether the government ever provided an order, it knew that if and when the Trial Judiciary served one, it would appear on the Military Commission website.

In any event, as we note above, Mr. Connell repeatedly asked Trial Judiciary for an explanation of the secret ex parte Order, but was told nothing. Thus, both Judge Pohl and the government knew that the defense had not received it. Unlike the government, no good faith actor would proceed to destroy evidence known to be exculpatory without at least confirming that its adversary had been notified as required by the very Order *it* had drafted.

As described by AE 425C (GOV), the actions of both Judge Pohl and the prosecution, at minimum, failed to discharge their respective duties to protect Mr. Mohammad's rights. *United States v. Banks*, 383 F.Supp. 389, 397 (D. S.D. 1974) (a "court's first duty, then, is to insure that our laws are fairly enforced"). *See also Stellato*, 74 M.J., at 490 ("trial counsel is not simply an advocate but is responsible to see that the accused is accorded procedural justice"; quoting Dep't of the Army, Reg. 27-26, Legal Services, Rules of Professional Conduct for Lawyers, R. 3.8 Comment (May 1, 1992)).

## V. Prejudice

Aside from relying on Judge Pohl's self-interested finding that the government has provided an adequate substitute for the evidence he allowed them secretly to destroy, the prosecution's prejudice analysis rests on two other, erroneous predicates: (1) the defense had no legal remedies to prevent destruction of the evidence; and (2) "they have everything they need right now" to obtain appellate review of the issue should Mr. Mohammad "be convicted." AE 425C (GOV) at 11-12.

First, the prosecution's current dispute regarding the legal remedies that would have enabled Mr. Mohammad to challenge the destruction of the information reneges on the position it took to persuade the Commission to reject a constitutional challenge to MCRE 505(f)(3). In that context, the government argued that 505(f)(3) did not deny due process because a defendant

retained the right to dispute the sufficiency of substitutions by moving to compel the original information. *See* AE 164C (Order); Unauthenticated Transcript of 23 Oct 2013 at 6805-6806. The government's efforts now to disavow its earlier characterization of such available remedies present a classic case of intentional self-contradiction and "playing 'fast and loose with the courts,'" that should not be tolerated. *Russell v. Rolfs*, 893 F.2d 1033, 1037 (9<sup>th</sup> Cir. 1990).

Second, although Mr. Mohammad *could have* challenged the destruction order via a motion to compel and a petition for writ of mandamus to the Court of Appeal, (*see In re al-Nashiri*, 791 F.3d 71 (D.C. Cir. 2015); as well as challenging the substitution on appeal if the evidence had not been destroyed, he does not now "have everything" he would need to do so. AE 425C (GOV) at 12. More specifically, the original information has been destroyed and is not available for comparison with the government's proposed substitution.

Mr. Mohammad therefore has suffered the significant, irreparable loss of judicial remedies and access to the courts. *See* AE 425 (Mohammad) at 14-16.

As maintained in the Motion, the degree to which Mr. Mohammad also has been prejudiced by the loss of material evidence is a question that must await consideration by a neutral Military Judge. *See, Id.* at 24-26.

## **7. Conclusion**

For the foregoing reasons, this motion should be heard by another Military Judge, and we respectfully move for recusal of Military Judge Pohl and of the current prosecution team and for abatement of the proceedings.

## **8. Oral Argument**

Mr. Mohammad requests oral argument.

**9. Conference**

The prosecution does not consent to the requested relief.

**10. Witnesses**

Upon selection and assignment of a disinterested Military Judge, Mr. Mohammad will:

(1) request expert witnesses to explain why access to substitutions for the destroyed evidence will not afford him a fair opportunity to develop and present a defense; and

(2) request to voir dire Military Judge Pohl.

**11. Attachments**

- A. Certificate of Service (1 page)
- B. AE 51B/52EE Order Placeholder

Respectfully submitted,

//s//  
DAVID Z. NEVIN  
Learned Counsel

//s//  
GARY D. SOWARDS  
Defense Counsel

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

*Counsel for Mr. Mohammad*

**ATTACHMENT A**

**CERTIFICATE OF SERVICE**

I certify that on the 31st day of May 2016, I electronically filed AE 425F (Mohammad) Mr. Mohammad's Reply to Government Response AE425C (GOV) with the Clerk of Court and served the foregoing on all counsel of record by electronic mail.

*//s//*

DAVID Z. NEVIN  
Learned Counsel

**ATTACHMENT B**

UNCLASSIFIED//FOR PUBLIC RELEASE  
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

AE 051B/052EE

**NOTICE OF *Ex Parte/ Under Seal*  
CLASSIFIED ORDER**

4 June 2014

This placeholder serves as notice for AE051B/052EE *Ex Parte/ Under Seal* Classified Order.

**United States v. KSM et al.**

**APPELLATE EXHIBIT 052EE**

**ORDER  
(Pages 2-8)**

**CLASSIFIED/EX PARTE  
/UNDER SEAL**

**APPELLATE EXHIBIT 052EE is located in  
original record of trial Classified Annex.**

**POC: Chief, Office of Court Administration  
Office of Military Commissions**

**United States v. KSM et al.**

**APPELLATE EXHIBIT 052EE**