

MILITARY COMMISSIONS TRIAL JUDICIARY  
GUANTANAMO BAY, CUBA

UNITED STATES OF AMERICA

v.

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

**AE613B (AAA)**

**Mr. al Baluchi's Response to**  
Under Seal, *Ex Parte, In Camera*,  
Classified Filing by Special Review Team

16 January 2019

1. **Timeliness:** This response is filed timely.
2. **Relief Sought:**
  - A. Mr. al Baluchi respectfully requests that the military commission deny AE613A (GOV SRT) Under Seal, *Ex Parte, In Camera*, Classified Filing by Special Review Team and deny any relief the government may have requested within.
  - B. Alternatively, Mr. al Baluchi respectfully requests that the military commission order the United States to serve a copy of AE613A on counsel for the defendants, redacted as necessary to protect ongoing investigations but sufficient to notify defense counsel of the subject of the investigation..
3. **Overview:**

The Special Review Team is authorized by AE292QQ Amended Order to “notify the Commission, *ex parte* and in camera, after learning of any future FBI investigation, where the subject of the investigation is a known defense team member in the above-captioned case, and where the reason for the investigation involves and/or is the activity of such a defense team member in his/her capacity as a defense team member.” If AE613A is not such a filing under AE292QQ Amended, it is not permitted under the Rules for Military Commission.

If AE613A is a notice of investigation under AE292QQ Amended, the military commission should order the government to prepare and serve a redacted copy of AE613A sufficient to notify defense counsel of the subject of the investigation while protecting any ongoing investigation. Such a redacted version will allow the defense to meaningfully address the issues presented by the investigation.

4. **Facts:**

a. On 16 December 2014, the military commission issued AE292QQ Amended Order, which included a requirement that the government notify the military commission “of any future FBI investigation, where the subject of the investigation is a known defense team member in the above-captioned case, and where the reason for the investigation involves and/or is the activity of such a defense team member in his/her capacity as a defense team member.”

b. On 23 December 2015, the military commission issued AE292JJJJ Order, which found the FBI investigation which triggered AE292QQ to be complete, and “directed the SRT [to] serve discovery, relating to AE292, on any team it implicates.”

c. On 17 February 2017, following a Special Review Team filing on a different topic, the military commission applied the procedures of AE292QQ Amendment in AE460AA Ruling to referral of any defense team member to the Central Adjudication Facility.

d. On 27 October 2017, the Special Review Team filed AE532 (GOV STC) Notice of Under Seal *Ex Parte* Filing by Special Trial Counsel. The Special Review Team served the underlying document on three defense teams, but not Mr. al Baluchi.

e. On 4 December 2017, the military commission granted Mr. al Baluchi's motion for access to the sealed pleadings in the AE532 series.<sup>1</sup> The documents turned out to involve referral to the Central Adjudication Facility as contemplated in AE460AA.

f. On 30 November 2018 at 1704, the government attempted to file AE613 (GOV) Government Unclassified Notice of *Ex Parte, In Camera*, Under Seal Classified Filing.

g. On 3 December 2018 at 0914, Trial Judiciary rejected the filing for violation of RC 3.10.a(5) regarding classified markings.

h. On 3 December 2018 at 1017, the government re-filed AE613 (GOV). This is the version of AE613 which is contained in the record. AE613 was filed *ex parte*, and Mr. al Baluchi has not seen it.

i. On 9 January 2019, attorneys for Mr. bin 'Atash<sup>2</sup> filed AE615 (WBA) Defense Motion to Conduct Thorough Inquiry into Actual and/or Potential Attorney Conflict of Interest Pursuant to R.M.C. 901 and Halloway v. Arkansas, 435 U.S. 475 (1978) and to Cancel Proceedings Pending Inquiry.

j. On 10 January 2019, the Special Review Team filed AE613A.

5. **Argument:**

Assuming that AE613A is a notice of an investigation pursuant to AE292QQ, the military commission should order the Special Review Team to prepare and serve a redacted version sufficient to advise defense counsel of the nature of the investigation. Such a redacted version

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<sup>1</sup> Unofficial/Unauthenticated Transcript of 4 December 2017 at 17246.

<sup>2</sup> Given these attorneys determination of a conflict of interest, Mr. al Baluchi addresses the actions of Mr. bin 'Atash's attorneys separate from those of Mr. bin 'Atash himself.

would permit the parties to intelligently address the conflict-of-interest issues raised by what appears to be the latest government investigation into defense activities.

To an interested observer like Mr. al Baluchi, the AE613 series and AE615 series appear closely intertwined. After an initial *ex parte* filing by the regular prosecution team on 30 November/3 December 2018, attorneys for Mr. bin ‘Atash discovered facts which led them to believe, “as officers of the court, that they are conflicted.”<sup>3</sup> Mr. bin’ Atash filed AE615, seeking assistance from the military commission on 9 January 2019; the Special Review Team filed AE613A one day later.

The natural—albeit not inevitable—conclusion is that the regular prosecution team notified the military commission of an investigation at the end of November/beginning of December 2018. The military commission’s reasoning in AE292QQ Amended allows the government to investigate the defense at its discretion as long as the defense does not learn of the investigations.<sup>4</sup> Once the government learned through AE615 that the bin ‘Atash team knew of the investigation, the Special Review Team took over the issue from the regular prosecution and filed AE613A.

If, as appears likely, AE613A relates to the FBI investigation described in AE615, it is authorized by AE292QQ Amended. If not, the military commission should deny the pleading as an unauthorized *ex parte* filing.<sup>5</sup>

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<sup>3</sup> AE615 at 21.

<sup>4</sup> *See, e.g.*, AE292QQ at 31.

<sup>5</sup> *See* RMC 701(1)(2). In AE292-1 (MFL)(GOV) Notice of Classified *Ex Parte* Filing by Special Trial Counsel, the Special Review Team sought “leave to file an *ex parte* classified submission by Special Trial Counsel,” which the military commission granted in AE292-2 Ruling. Mr. al Baluchi’s arguments against *ex parte* filings by the Special Review Team are found in AE292J(AAA) Motion to Reconsider AE292-2 Granting Leave for *Ex Parte* Submission and AE292EE(AAA) Response to Notice of Classified *Ex Parte* Filing by Special Trial Counsel, incorporated herein by reference.

In the course of no less than five prior government investigations of the defense, one thing has become clear: hiding the nature and scope of the investigation from the defense is a recipe for confusion and delay. The conflicts of interest generated by the investigations of Mr. Harrington, Mr. Mohammad's linguist, and Mr. bin al Shihb's linguist—mostly hidden from the defense—drove the attorneys for all teams to second-guess themselves, alter their strategies, and file prophylactic pleadings. They also took well over a year to resolve, and generated a severance of Mr. bin al Shihb not finally rescinded until November 2015.<sup>6</sup> The conflicts of interest generated by government investigation into alleged SIPR browsing<sup>7</sup> and mishandling a classified document,<sup>8</sup> on the other hand, were addressed expeditiously because the military commission had the benefit of the positions of all the parties.

More importantly, despite the military commission's finding in AE292QQ Amended that some conflicts of interest were *de minimis*, they do not feel *de minimis* to the people potentially under investigation. Investigations and the serious threat of investigations reduce defense tolerance for risk, lower morale, and affect defense strategy. Mr. bin Atash, not to mention Mr. al Baluchi, needs to know which, if any, members of his team suffer from a conflict of interest so that he may act accordingly. Attorneys and staff for Mr. bin 'Atash need to know whether they are under investigation, or not, so that they may advise the military commission as to their conflict of interest or lack thereof. And other defense teams need to know if they are under investigation so that they may properly formulate a position on AE615. The military commission can clarify

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<sup>6</sup> AE312D Order; *see also* AE312 Severance Order; AE312C Order.

<sup>7</sup> AE460 (GOV STC) Government Notice by Special Trial Counsel of Letter to Defense Requesting Defense Remediation of Material Obtained Outside of the Discovery Process.

<sup>8</sup> AE532.

the positions of the parties with respect to the investigation described in AE615 by ordering a redacted copy of AE613A served on the defense teams.

6. **Request for Oral Argument:** Oral argument is requested.

7. **Attachments:**

A. Certificate of Service.

Very respectfully,

//s//

JAMES G. CONNELL, III  
Learned Counsel

//s//

STERLING R. THOMAS  
Lt Col, USAF  
Detailed Defense Counsel

//s//

ALKA PRADHAN  
Defense Counsel

//s//

BENJAMIN R. FARLEY  
Defense Counsel

//s//

MARK E. ANDREU  
Capt, USAF  
Defense Counsel

Counsel for Mr. al Baluchi

# Attachment A

**CERTIFICATE OF SERVICE**

I certify that on the 16th day of January 2019, I electronically filed the foregoing document with the Clerk of the Court and served the foregoing on all counsel of record by email.

//s//  
JAMES G. CONNELL, III  
*Learned Counsel*