

UNCLASSIFIED//FOR PUBLIC RELEASE
**MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY, CUBA**

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 613C (KSM)

Mr. Mohammad's Notice in
Response to AE 613 and AE 613A Government
Unclassified Notices Of Ex Parte, In Camera,
Under Seal Classified Filings

January 23, 2019

1. Timeliness

This Notice is timely filed.

2. Relief Sought

Mr. Mohammad joins Mr. al Baluchi's requested relief in AE 613B (AAA)¹ and adds two additional requests for relief:

- A. That the military commission order the United States to serve a copy of AE 613² on counsel for the defendants.
- B. That the military commission order the government to disclose any and all privileges, if any, relied upon for filing AE 613 and AE 613A³ *ex parte* and under seal, as well as citations to whatever statute, regulation or rule authorizes such *ex parte*, under seal filing.

¹ AE 613B (AAA) Mr. al Baluchi's Response to Under Seal, Ex Parte, In Camera, Classified Filing by Special Review Team, (16 January 2019). Mr. al Baluchi requested the following relief:

A. [T]hat the military commission deny AE 613A (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 AE 613A on counsel for the defendants, redacted as necessary to protect ongoing investigations but sufficient to notify defense counsel of the subject of the investigation.

² AE 613 (GOV) Government Unclassified Notice Of *Ex Parte*, In Camera, Under Seal Classified Filing (3 December 2018).

³ AE 613A (GOV SRT) Notice of Under Seal, Ex Parte, In Camera Classified Filing by Special Review Team 10 December 2019[SIC]; the date on the certificate of service is 10 January 2019.

3. Overview

On Friday, November 30, 2018, after 4:00pm eastern, the government attempted to file AE 613 (GOV). However, Trial Judiciary rejected the filing for violation of RC 3.10.a(5) regarding classified markings. On December 3, 2018, the government re-filed AE 613 (GOV). The unclassified notice gave no indication of what the *Ex Parte*, In Camera, Under Seal Classified Filing Notice detailed, nor what statute, rule or regulation authorized it. Mr. Mohammad does not know what the pleading contains or refers to. However, there are two clues, one about what it is not and one about what it is.

In the many unclassified notices of *ex parte*, in camera, under seal classified filings that the government has made over the past eight years, the boilerplate language that the government generally includes in their notice states that the filing is “pursuant to 10 U.S.C. § 949p-4 and M.C.R.E. 505(f).”⁴ These Notices are in compliance with the rules regarding substitutions of evidence. AE 613 and AE 613A do not include any language designating any statutory, regulations or rules that authorize the filing. The absence of the “pursuant to 10 U.S.C. § 949p-4 and M.C.R.E. 505(f)” language is noteworthy.

Moreover, while AE 613 was filed by Trial Counsel,⁵ AE 613A was filed by the Special Review Team (“SRT”).⁶ Further, AE 613A was filed after Mr. bin ‘Attash requested assignment

⁴ See e.g. AE 542M (GOV) Government Unclassified Notice Of Ex Parte, In Camera, Under Seal Classified Filing, 15 August 2018; AE 542F (GOV), Government Unclassified Notice Of Ex Parte, In Camera, Under Seal Classified Filing, 29 May 2018; AE 586 (GOV), Government Unclassified Notice Of Ex Parte, In Camera, Under Seal Classified Filing, 1 August 2018.

⁵ If AE 613 is indeed pursuant to AE 292QQ, AMENDED ORDER the fact that it was filed by the regular prosecution team, more information is required to determine compliance with Judge Pohl’s order which requires: “The FBI will ensure, and establish appropriate additional procedures if necessary, that no one other than members of the SRT, or their supervisors, have access in the future to the FBI investigative files identified above *without demonstrating appropriate need.*” (emphasis added).

⁶ In some pleadings, the Special Trial Counsel (STC) is referred to as the Special Review Team (SRT). Both names depict the same thing – a group of attorneys designated to be walled off from the regular trial counsel team to address issues where a conflict of interest might arise. See AE 003L (GOV) SPECIAL TRIAL COUNSEL DETAILING MEMORANDUM (28 October 2016). See also AE 292QQ .

of Special Trial Counsel after learning of the FBI interrogation of a paralegal assigned to their team, and one day after he filed AE 615.

The timing of the filing of AE 613A, the fact that it was filed by STC instead of the regular prosecution team, and was filed with no statute, regulation or rule indicating the authorization for an *ex parte*, in camera, under seal filing may be an indication that it is related in some way to the matter detailed by Mr. bin 'Attash in his pleading in AE 615, and under the procedure set out in AE 292QQ.⁷ In that case, counsel for Mr. Mohammad are entitled to know exactly what information is contained in the pleading so that they can make an independent evaluation of their ethical obligations, and assure that Mr. Mohammad's rights to due process, to a fair and public trial, to the assistance of counsel, and to be free from cruel and unusual punishment, as guaranteed by the Fifth, Sixth and Eighth Amendments to the United States Constitution and similar provisions of the Military Commissions Act of 2009, are protected. Mr. Mohammad therefore requests that the pleadings be unsealed and any and all information contained therein be provided to his appropriately cleared defense counsel.

5. Facts

Mr. Mohammad adopts the facts as set out in AE 613B and fully incorporates them by this reference, and adds the following:

On January 11, 2019, the military judge issued AE 615B ORDER Expedited Briefing Schedule and Deferral of Ruling on Motion to Suspend Briefing Deadlines.

On January 17, 2019, SRT filed AE 615D (GOV) Reply by Special Review Team to AE 615 (WBA), Defense Motion to Conduct Thorough Inquiry into Actual and/or Potential Attorney

⁷ AE 292QQ *AMENDED* ORDER Emergency Joint Defense Motion to Abate Proceedings and Inquire into Existence of Conflict of Interest Burdening Counsel's Representation of Accused (16 December 2014).

Conflict of Interest Pursuant to R.M.C. 901 and *Holloway v. Arkansas*, 435 U.S. 475 (1978) and to Cancel Proceedings Pending Inquiry.

On January 22, 2019, the military judge issued AE 615H INTERIM ORDER Defense Motion to Conduct Thorough Inquiry into Actual and/or Potential Attorney Conflict of Interest Pursuant to R.M.C. 901 and *Holloway v. Arkansas*, 435 U.S. 475 (1978) and to Cancel Proceedings Pending Inquiry, ordering: “At least one member of the STC will appear and provide the Commission a robust presentation on the facts and circumstances surrounding the FBI investigation and what additional investigative steps, if any, are contemplated. The presentation will be *ex parte* in nature.”⁸

6. Law and Argument

The 2009 Military Commissions Act is very specific in its language regarding the protection of classified information and when *ex parte* proceedings are allowed. The government may seek to protect information “if disclosure would be detrimental to the national security.” RMC 701(f). However, if the government seeks to do so, pursuant to 10 U.S.C. §§949 p1-p7 it must first invoke the national security privilege, and the “the military judge must find that the privilege is properly claimed under Mil. Comm. R. Evid. 505 and 506 as applicable.” RMC 701(f)(1).

Here, there has been no invocation of the national security – or any other – privilege by the government, nor any finding that such an invocation “is properly claimed.” RMC 701(f)(1). Mr. Mohammad has the right to have access to the information, or at a minimum, the information should be provided to his cleared defense counsel. If redactions are required to

⁸ Mr. Mohammad will file AE 615I, his reply to AE 615D, and AE 615K his Notice of Objection to the *ex parte* hearing ordered in AE 615H simultaneous with the current pleading.

protect national security, the proper invocation of privilege and findings pursuant to MCRE 505 must be made.

If the information is indeed related to the activities described in the AE 615 series, counsel for Mr. Mohammad have an ethical obligation to review the materials in order to determine whether the materials give rise to a conflict of interest.⁹ Further, inquiry must be made as to whether proper segregation of the materials was made pursuant to Judge Pohl's order that:

“[t]he SRT, or any other appropriate government attorney, will 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 such notification takes place, the Commission will be told the steps that will be taken to ensure that information collected as part of that investigation remains appropriately segregated and not shared with the Prosecution Team in this case.*

AE 292QQ at 35. Emphasis added.

For the reasons stated above, and those set forth in AE 613B¹⁰ Mr. Mohammad respectfully requests that a copy of AE 613 and AE 613A be served on the parties.

7. Oral Argument:

Oral argument is requested.

8. List of attachments:

A. Certificate of Service

⁹ See AE 615I (KSM) Mr. Mohammad's Reply to AE 615D (GOV SRT).

¹⁰ AE 613B (AAA) Mr. al Baluchi's Response to Under Seal, *Ex Parte*, *In Camera*, Classified Filing by Special Review Team, filed 16 January 2019.

Respectfully submitted,

//s//
DAVID Z. NEVIN
Learned Counsel

//s//
GARY D. SOWARDS
Defense Counsel

//s//
DEREK A. POTEET
LtCol, U.S. Marine Corps
Defense Counsel

//s//
RITA J. RADOSTITZ
Defense Counsel

Counsel for Mr. Mohammad

ATTACHMENT A

CERTIFICATE OF SERVICE

I certify that on the 23rd of January 2019, I electronically filed AE 615C (KSM), Mr. Mohammad's Notice in Response to AE 613 and AE 613A Government Unclassified Notices Of Ex Parte, In Camera, Under Seal Classified Filings, with the Clerk of Court and served the foregoing on all counsel of record by electronic mail.

//s//
DAVID Z. NEVIN
Learned Counsel