

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 613E/615P

**RULING**

**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**

**25 January 2019**

**1. Procedural History.**

a. On 3 December 2018, the Prosecution, in AE 613 (GOV) filed a classified *ex parte, in camera*, under seal notice<sup>1</sup> with the Commission.

b. On 9 January 2019, Counsel for Mr. bin ‘Attash filed AE 615 (WBA), requesting that this Commission conduct a thorough inquiry into any potential conflicts of interest that might exist for Counsel concerning their representation of Mr. bin ‘Attash as a result of facts contained in an accompanying declaration<sup>2</sup> by a paralegal from the bin ‘Attash Defense Team and to cancel all proceedings until a conclusion is made that no such conflict exists.<sup>3</sup> Specifically, Counsel for Mr. bin ‘Attash assert they have a potential conflict of interest because they are currently under investigation by the Federal Bureau of Investigation (FBI).

c. On 10 January 2019, the Government, via the Special Review Team (SRT), filed AE 613A (GOV SRT) a classified *ex parte, in camera*, under seal notice<sup>4</sup> with the Commission

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<sup>1</sup> AE 613 (GOV), Government Unclassified Notice of *Ex Parte, In Camera*, Under Seal Classified Filing, filed 3 December 2018.

<sup>2</sup> *Id.* at Attach. B.

<sup>3</sup> *Id.* at p.1.

<sup>4</sup> AE 613A (GOV SRT), Ex Parte Classified Government Submission by Special Review Team in Compliance with AE 292QQ (Amended Order), filed 10 January 2019.

and all of the Defense Teams. The Prosecution received notification of the filing by the SRT, but not the substance included in the filing.

d. On 11 January 2019, Counsel for Mr. Mohammad moved<sup>5</sup> the Commission to suspend briefing deadlines pending resolution of AE 615 (WBA). On this same date, this Commission issued an order establishing an expedited briefing schedule for the SRT's response to AE 615 (WBA), but found no immediate need to suspend the pending filing deadlines in this case or to entertain oral argument on AE 615A (KSM).<sup>6</sup>

e. On 16 January 2019, Counsel for Mr. Ali, (a.k.a. Mr. al Baluchi) responded to AE 613A (GOV SRT),<sup>7</sup> requesting the Commission deny any relief the SRT may have requested in AE 613A (GOV SRT). In the alternative, Counsel for Mr. Ali requested the Commission order the SRT to serve a copy of AE 613A (GOV SRT), redacted as necessary to protect ongoing investigations, on the Defense because in light of the timing of the filings the factual predicate for the AE 613 and AE 615 series appear to be closely intertwined.<sup>8</sup> On 23 January 2019, Counsel for Mr. Mohammad filed a notice<sup>9</sup> joining Mr. Ali in AE 613B (AAA), but adding two additional requests: (1) to compel the Prosecution to serve a redacted version of AE 613 (GOV) on the Defense; and (2) to order the Prosecution/SRT to disclose any and all privileges, statutes, or regulations relied upon for filing AE 613 (GOV) and AE 613A (GOV SRT) *ex parte* and under seal.<sup>10</sup>

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<sup>5</sup> AE 615A (KSM), Mr. Mohammad's Motion to Suspend Briefing Deadlines Pending Resolution of AE 615, filed 11 January 2019.

<sup>6</sup> AE 615B Order, Expedited Briefing Schedule and Deferral of Ruling on Motion to Suspend Briefing Deadlines, dated 11 January 2019.

<sup>7</sup> 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.

<sup>8</sup> *Id.* at p. 4.

<sup>9</sup> AE 613C (KSM), Mr. Mohammad's Notice in Response to AE 613 and 613A Government Unclassified Notices of Ex Parte, In Camera, Under Seal Classified Filings, filed 23 January 2019.

<sup>10</sup> *Id.* at p.1.

f. On 17 January 2019, the SRT filed 615D (GOV SRT)<sup>11</sup> pursuant to the Commission's expedited briefing schedule. The SRT's response asserted that the Commission need not conduct an inquiry as no actual or potential conflict of interest exists for any member of the five (5) Defense Teams, and the Government followed all procedures outlined by the Commission's order in AE 292QQ.<sup>12</sup> In support of their position, the SRT attached a declaration by FBI Supervisory Special Agent John Stofer<sup>13</sup> avowing "there is no indication that any current counsel of record or current known defense team member is the subject of any open national security or criminal FBI investigation."<sup>14</sup> On 23 January 2019, replies were filed by Counsel for Messrs. Bin al Shibh,<sup>15</sup> Mohammad,<sup>16</sup> and bin 'Attash.<sup>17</sup>

g. On 22 January 2019, the Commission ordered<sup>18</sup> the SRT to provide an *ex parte* presentation on the facts and circumstances surrounding the FBI investigation and what

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<sup>11</sup> AE 615D (GOV SRT), Reply by Special Review Team to AE 615 (WBA), 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, filed 17 January 2019.

<sup>12</sup> AE 292QQ Order, Emergency Joint Defense Motion to Abate Proceedings and Inquire into Existence of Conflict of Interest Burdening Counsel's Representation of the Accused, dated 24 July 2014.

<sup>13</sup> *Id.* at Attach. B.

<sup>14</sup> *Id.* at 15-16.

<sup>15</sup> AE 615G (RBS), Mr. bin al Shibh's Reply to AE 615D (GOV SRT) Reply by Special Review Team to AE 615 (WBA), 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, filed 23 January 2019.

<sup>16</sup> AE 615I (KSM), Mr. Mohammad's Reply to AE 615D (GOV SRT) Reply by Special Review Team to AE 615 (WBA), 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, filed 23 January 2019.

<sup>17</sup> AE 615J (WBA), Defense Reply to AE 615D (GOV SRT) Reply by Special Review Team to AE 615 (WBA), 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, filed 23 January 2019.

<sup>18</sup> 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, dated 22 January 2019.

additional steps, if any, are contemplated.<sup>19</sup> Counsel for Messrs. Mohammad,<sup>20</sup> Hawsawi<sup>21</sup> and bin al Shibh<sup>22</sup> filed notices of objection to the *ex parte* presentation. Mr. bin al Shibh requested a complete record of the *ex parte* proceeding be preserved in the record and served on the Defense Teams if the proceeding was held.<sup>23</sup> On 24 January 2019, members of the SRT provided an *ex parte* presentation to the Commission.

h. On 25 January 2019, the SRT filed a notice with the Commission that it had provided the Defense Teams a redacted version of a Declaration from the Director of Security, Washington Headquarters Services, Department of Defense dated 24 January 2019.<sup>24</sup>

## 2. Findings of Fact.

a. The Prosecution's notice of 3 December 2018<sup>25</sup> complied with this Commission's order in AE 292QQ *Amended* Order, which directed 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."<sup>26</sup>

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<sup>19</sup> *Id.* at p. 2.

<sup>20</sup> AE 615K (KSM), Mr. Mohammad's Notice of Objection to *ex parte* hearing required by AE 615H Interim Order, filed 23 January 2019.

<sup>21</sup> AE 615L (MAH), Mr. al Hawsawi's Objection to Military Judge's Order (AE 615H) for Ex Parte Hearing with Government Special Review Team, and Motion for Hearing with the Defense, filed 24 January 2019.

<sup>22</sup> AE 615M (RBS), Mr. Bin al Shibh's Motion for Appropriate Relief, filed 24 January 2019.

<sup>23</sup> Similar relief was requested in filings by other Defense Teams.

<sup>24</sup> AE 615N (GOV SRT), Notice By Special Review Team of Declaration by Director of Security, Washington Headquarters Services, Shared With the Commission on 24 January 2019, filed 25 January 2019.

<sup>25</sup> AE 613 (GOV).

<sup>26</sup> AE 292QQ *Amended* Order, Emergency Defense Motion to Abate Proceedings and Inquire into Existence of Conflict of Interest Burdening Counsel's Representation of the Accused, dated 16 December 2014 at 35.

b. The SRT's notice of 10 January 2019<sup>27</sup> also complied with the Commission's order in AE 292QQ, and elaborated upon the nature and scope of the investigation noticed in AE 613 (GOV).

c. The Government's notices in AE 613 and AE 613A also provided the assurances required by AE 292QQ *Amended* Order about proactive measures taken to ensure that information collected as part of any investigation remains appropriately segregated and not shared with the Prosecution in this case.

d. The Government notices in AE 613 and AE 613A directly relate to the subject matter of the AE 615 series.

e. No current member of any Defense Team assigned to this case is under investigation by the FBI or any other government agency. Additionally, no member of any Defense Team is under any type of security clearance investigation save a routine re-investigation for renewal of clearances.

f. While the FBI is still conducting an ongoing investigation involving a former member of Mr. bin 'Attash's Defense Team, the SRT has established procedures to ensure that material garnered during the course of the investigation is segregated from both the Prosecution and any FBI personnel associated with this case. The SRT was directly involved within one week of the FBI opening the investigation and took steps to ensure those involved in the investigation, and their supervisors, were completely "walled off" from other FBI personnel, the Prosecution, and from anyone associated with this case other than the SRT.

g. Another military organization is involved in the ongoing investigation, but that investigation does not include any current member of any Defense Team.

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<sup>27</sup> AE 613A (GOV SRT).

h. No evidence exists to suggest that the current FBI investigation at issue was initiated in retaliation to any action taken by the Defense Teams in conjunction with this case.

i. The Government's notices in this matter were appropriately filed *ex parte* and in camera to protect law-enforcement equities in an on-going investigation.

### 3. Law and Analysis.

a. The Commission adopts and incorporates its legal analysis encompassed within AE 292QQ<sup>28</sup> and AE 292QQ *Amended* Order.<sup>29</sup>

b. Notwithstanding the SRT's initial assertion in AE 615D (GOV SRT) that no inquiry is required, this Commission, out of an abundance of caution, conducted an in-depth inquiry to ensure that all current members of the five (5) Defense Teams are free from conflict. This inquiry included review of the Government's *ex parte* notices, analysis of the declaration submitted by a member of the FBI, and a thorough question/answer presentation with the SRT to clarify and expound upon facts set forth in the initial Government notices and declaration. Based on the totality of information, this Commission is thoroughly satisfied that no member of the five (5) Defense Teams is currently, or likely to be, under investigation by the FBI or any other government agency. In addition, the Commission is also satisfied that no member of the five (5) Defense Teams is under any other type of investigation, to include non-routine security clearance investigations. As such, the Commission finds that no member of the (5) Defense Teams is currently operating under a conflict of interest that would prohibit them from ethically representing their clients.

c. To the extent the ongoing investigation relates to any Defense Team, it pertains *only* to the bin 'Attash Defense Team. This is not to suggest that any current member of the bin 'Attash

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<sup>28</sup> AE 292QQ Order.

<sup>29</sup> AE 292QQ *Amended* Order.

Defense Team is under investigation, but rather to emphasize that no other Defense Team is even remotely connected to the subject matter of the investigation, and therefore is absolutely without conflict as a result of this issue.

#### 4. **Ruling.**

a. AE 615 (WBA) is **GRANTED IN PART**. Mr. bin 'Attash's request for this Commission to conduct a thorough inquiry is **GRANTED**.<sup>30</sup> Mr. bin 'Attash's request to cancel all proceedings during this inquiry is **MOOT** as no proceedings were scheduled during the pendency of the inquiry.

b. AE 613B (AAA) and 613C (KSM) are **GRANTED IN PART**. The SRT will be directed to provide the Defense Teams a copy of both filings, redacted as necessary to protect the on-going investigation. The other relief requested by Mr. Ali and Mr. Mohammad in AE 613B and AE 613C is **DENIED**.

c. AE 615M (RBS) is **GRANTED IN PART**. The transcript and any exhibits received by the Commission as part of the SRT's *ex parte* presentation pursuant to AE 615H will be sealed and made a part of the appellate record. The only exhibit received by the Commission during the *ex parte* presentation (a declaration) was provided to the Defense Teams by the SRT.<sup>31</sup> The Defense request for this Commission not to conduct an *ex parte* hearing is **MOOT**.

#### 5. **Order.**

a. The SRT will provide redacted versions of AE 613 (GOV) and AE 613A (GOV SRT) to the Defense Teams **NLT 8 February 2019**.

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<sup>30</sup> While the Commission has conducted an inquiry sufficient to conclude that no conflict exists, it will allow Counsel to be heard at the opening of the next session and will supplement this Ruling as appropriate thereafter.

<sup>31</sup> See AE 615N (GOV SRT).

b. The SRT will obtain a declaration from the other military organization involved in the investigation regarding their involvement in this investigation to be filed *ex parte* with the Commission **NLT 8 February 2019**.<sup>32</sup> The SRT will provide this declaration (with redactions as appropriate) to the Defense Teams **NLT 8 February 2019**.

So **ORDERED** this 25th day of January, 2019.

//s//  
K. A. PARRELLA  
Colonel, U.S. Marine Corps  
Military Judge

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<sup>32</sup> Although the SRT represented during the *ex parte* presentation that this military organization was not investigating any current member of the Defense Teams, the Commission is directing the provision of a declaration in order to provide the Defense Teams with additional evidence to alleviate their concerns.