

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 615K (KSM)

Mr. Mohammad’s Notice of Objection
 to *ex parte* hearing required by AE 615H
 INTERIM ORDER

23 January 2019

1. Timeliness:

This Notice of Objection is timely filed.

2. Relief Requested:

Please take notice of Mr. Mohammad’s objection to the unusual *ex parte* hearing required by AE 615H INTERIM ORDER.¹ Mr. Mohammad respectfully requests the military judge to rescind AE 615H insofar as it authorizes an *ex parte* hearing on matters for which the government has not publicly invoked the state secrets or other privilege. Additionally, Mr. Mohammad requests the military judge order the production of a transcript of the portions of the proceeding not necessary to protect classified information.

3. Argument:

On 22 January 2019, the military judge ordered an *ex parte* hearing with Special Trial Counsel to “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.” AE 615H at 2. Mr. Mohammad objects to this *ex parte* hearing regarding intrusion into the defense on the basis of the Due Process Clause of the Fifth Amendment, as well as the Sixth and Eighth Amendments, and 10

¹ 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, 22 January 2019.

U.S.C. § 949p-4(b)(2), and MCRE 505(f)(2)(B). Several of these bases for objection to unbounded *ex parte* proceedings are described in detail in AE 542R² and are again applicable here.

Further, before holding an *ex parte* proceeding on a government claim of privilege, “the trial judge should insist (1) that the formal claim of privilege be made on the public record and (2) that the government either (a) publicly explain in detail the kinds of injury to national security it seeks to avoid and the reason those harms would result from revelation of the requested information or (b) indicate why such an explanation would itself endanger national security.”³ AE 615H denies Mr. Mohammad his right to “as full as possible a public debate over the basis and scope of a privilege claim.”⁴

An *ex parte* proceeding is particularly inappropriate in the context of the AE 615 series in that the crux of the argument is whether *defense counsel* are laboring under a conflict of interest. If they are precluded from learning the essential facts of the conflict, they cannot make an independent determination – as they are ethically and legally required to do – of whether the government intrusion into the workings of the defense team creates a conflict of interest requiring withdrawal.

Additionally, the military judge should order the production of a transcript with redactions only “to the extent necessary to protect classified information.”⁵ In adversarial closed hearings, the military judge in this case routinely orders that “a redacted unclassified,

² AE 542R (KSM), Motion for Appropriate Relief to Amend Order AE 542Q to Comply with the Military Judge’s Duties to Properly Conduct Proceedings Regarding Classified Discovery and Provide a Fair and Public Trial, 17 October 2018.

³ *Ellsberg v. Mitchell*, 709 F.2d 51, 63-64 (D.C. Cir. 1983).

⁴ *Id.* at 63.

⁵ 10 U.S.C. § 949p-4(b)(2).

unofficial/unauthenticated transcript of that session [be] expeditiously prepared and provided to the public in a manner similar to unauthenticated transcripts of open sessions.”⁶ Although no substitute for an adversarial motion, such a procedure would provide Mr. Mohammad some information about the government’s *ex parte* presentation and arguments, and provide some degree of sunlight for Mr. Mohammad into this suddenly-ordered proceeding in his capital case with special prosecutors from which he and his attorneys have been barred, regarding yet additional intrusions into the defense.

4. Oral Argument:

Mr. Mohammad does not request oral argument on this notice.

5. List of Attachments:

A. Certificate of Service

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

⁶ AE 404G ORDER Pursuant to Military Commission Rule of Evidence 505(h) and Rule for Military Commissions 806(b)(2), 9 December 2016 .

ATTACHMENT A

CERTIFICATE OF SERVICE

I certify that on the 23rd day of January 2019, I electronically filed AE 615K (KSM), Mr. Mohammad's Mr. Mohammad's Notice of Objection to *ex parte* hearing required by AE 615H INTERIM ORDER, with the Chief Clerk of the Military Commissions Trial Judiciary and served the foregoing on all counsel of record by electronic mail.

//s//
DAVID Z. NEVIN
Learned Counsel