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 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**

1. **Timeliness**: This objection is timely filed.

2. **Relief Sought:** Mr. al Hawsawi objects to the Military Commission's Interim Order in AE 615H, in which the judge ordered an *ex parte* hearing with the Government Special Review Team, and moves for that the hearing be conducted in the presence of Defense Counsel.

3. **Overview**:

In AE 615H, the military judge ordered the Government Special Review Team, on an *ex parte* basis, 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" against the Defense. The judge's order came on the heels of the Government Special Review Team affirming to the parties and the Commission that the FBI and other agencies had interrogated a former defense team member from co-accused Mr. bin 'Attash's defense team about his work on that defense team.[1]

[1] *See United States v. Mohammad et al.*, 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 (19 Jan. 2019).

The judge's order for an *ex parte* hearing with the Government Special Review Team has no legal foundation. In fact, the United States Constitution, federal precedents, and military and civilian codes of judicial conduct strongly disfavor *ex parte* proceedings; rather, the priority is on protecting Due Process and the Sixth Amendment right to counsel. While the need for additional information regarding the Government's investigation of the Defense teams is necessary and appropriate, there is no authority for the type of *ex parte* process the military judge seeks here – much less the increased potential for abuse and rights violations such an *ex parte* process can engender.

Rules of Professional Conduct require counsel to assess potential conflicts of interest, to discuss any such potential or actual conflict with a client, and to determine whether representation can reasonably continue. The Military Judge's proposed *ex parte* hearing with Government violates the Rules of Professional Conduct by usurping Defense Counsel's responsibility to obtain key facts necessary to assess any conflict and to apprise Mr. al Hawsawi. The ordered *ex parte* hearing will prevent defense counsel from complying with Rules of Professional Conduct that are designed to help assure conflict free counsel. As such, the order infringes Mr. al Hawsawi's right to counsel under the Sixth Amendment and Due Process Clause.

To preclude running afoul of the Rules, the Sixth Amendment and Due Process, the Military Judge must conduct a robust factfinding hearing with the Government's Special Review Team in the presence Defense Counsel, so that the latter may also be fully informed of the facts, may assess the potential conflict issues, and thereby properly apprise Mr. al Hawsawi.

4. **Facts**:

a. In AE 615 (WBA),[2] co-accused Mr. bin 'Attash revealed that the FBI and other government agencies interrogated, over the course of two days, a paralegal formerly on his defense team.

b. On January 17, 2019, the Government Special Review Team appointed some years ago to inquire into investigations of defense teams, filed AE 615D (GOV SRT), asserting that no FBI investigation was currently occurring with respect to current defense team members.

c. Less than a week later, the Military Judge issued an Interim Order, AE 615H, ordering an *ex parte* hearing with the Government Special Review Team, 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" against the Defense.[3]

d. The Government Special Review Team is composed of five career prosecutors who work for various components of the Department of Justice.

5. **Argument:**

A. The Military Judge Does Not Have Authority to Conduct an *Ex Parte* Hearing with the Government's Special Review Team.

The Constitution strongly disfavors *ex parte* communications between the judiciary and the Government, and many federal precedents uniformly affirm that principle. Thus, the Sixth Circuit holds that "in all but the most exceptional circumstances, ex parte communications with the court are an extraordinarily bad idea. This court has not concealed its strong disapproval of ex parte approaches in criminal cases, reasoning that giving the government private access to the

[2] *United States v. Mohammad et al.*, AE 615 (WBA), Defense Motion to Conduct Inquiry into Actual or Potential Conflict of Interest (filed 9 Jan. 2019).

[3] AE 615H, Interim Order (22 Jan. 2019).

ear of the court is not only 'a gross breach of the appearance of justice,' but also a 'dangerous procedure' . . ."[4] In this regard, the U.S. District Court for the District of Columbia found:

> This court generally disfavors *ex parte* proceedings involving the government, and has previously expressed reservations about conducting such proceedings in this case. *Ex parte* communications between a district court and the prosecution in a criminal case are greatly discouraged, and should only be permitted in the rarest of circumstances. *See United States v. Napue*, 834 F.2d 1311, 1316 (7th Cir.1987). By way of example, in *United States v. Presser*, 828 F.2d 330 (6th Cir.1987), the Sixth Circuit maintained that "[e]x parte proceedings, particularly in criminal cases, are contrary to the most basic concepts of American justice and should not be permitted except possibly in the most extraordinary cases involving national security." *Id.*, at 335.[5]

Congress itself recognized these constitutional limits and protections in the Military Commissions Act, where it severely circumscribes the availability of an *ex parte* process under M.C.R.E. 505 and 506 – rules which none of the parties are invoking here.[6] While the Military Commissions Act permits limited *ex parte* presentations in Rule of Evidence 505, it does so only "*to the extent necessary to protect classified information*, in accordance with the practice of the Federal courts under the Classified Information Procedures Act (18 U.S.C. App.)."[7] By its express terms, Rule 505 applies to the creation of "substitutions and other relief"—and the judge's ability to authorize the Government to delete or withhold information, or substitute summaries or admissions for the evidence.[8] No one is invoking that rule here, however; only the

[4] *United States v. Carmichael*, 232 F.3d 510, 517-18 (6th Cir. 2000).

[5] *United States v. Rezaq*, 899 F. Supp. 697, 707 (D.D.C. 1995).

[6] *See* M.C.R.E. 505; M.C.R.E. 506.

[7] *See* 10 U.S.C. §949p-4(b)(2) (M.C.R.E. 505(f)(2)(A))(emphasis added).

[8] *See id.*

judge, without authority, is asking for a private audience from the prosecutors on the Special Review Team.

The very purpose of the *ex parte* hearing the Military Judge has ordered is to obtain a *presentation of facts* regarding investigation of *the Defense*. It is difficult to conceive of circumstances more directly relevant to the Defense, and more directly demanding the presence and knowledge of Defense counsel.

B. Relevant Codes of Judicial Conduct Also Disfavor a Judge Engaging in *Ex Parte* Communications with the Government.

Judicial codes of conduct, including the American Bar Association Code of Judicial Conduct and the Navy regulation explicitly applicable to Judge Parrella, prohibit e*x parte* communications beyond established legal exceptions.[9] "An ex parte communication between a trial court and government counsel '[i]n addition to raising questions of due process . . . involve[s] a breach of legal and judicial ethics. Regardless of the propriety of the court's motives in such a case . . . the practice should be discouraged since it undermines confidence in the impartiality of the court.'"[10] The courts have further ruled that "it is not controlling that the [*ex parte*] trial brief was intended to help the district judge carry out his trial responsibilities and to give advance warning of possible issues as to admissibility of evidence. The benign purpose does

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[9] *See* U.S. Department of the Navy, *Uniform Rules of Practice for U.S. Navy-Marine Corps Trial Judiciary*, Rule 8.2 (2018) ("*Ex parte* communications with a military judge concerning a case that is pending before that military judge are prohibited, except for routine administrative matters or *as provided by law*") (emphasis added); United States Courts, *Code of Conduct for United States Judges* Canon 3(A)(4) (2014)[9] ("Except as set out below, a judge should not initiate, permit, or consider *ex parte* communications . . . A judge may (a) initiate, permit, or consider ex parte communications *as authorized by law* . . .) (emphasis added).

[10] *United States v. Early*, 746 F.2d 412, 416 (8th Cir. 1984), *quoting* 8B J. Moore, Moore's Federal Practice ¶ 43.03[2], at 43-23 (1983).

not insure against other tendencies for which ex parte communications are disfavored."[11] The judge's "benign purpose" here does not make his conduct constitutional. The Military Judge's order for an *ex parte* hearing with the Government Special Review Team runs afoul of both the warnings of U.S. Courts and of the explicit requirements of the Code of Judicial Conduct directly applicable to him.

The Commission can and should obtain more facts regarding the Government Special Review Team's filing, AE 615D (GOV SRT), so that the record is clearer as to the nature and scope of the Defense conflict. However, the Commission has no authority for, and may not unilaterally request, an *ex parte* briefing or presentation. To comply with the Constitution and the Military Commissions Act, the Commission must strictly limit its use of *ex parte* proceedings, and in the present instance it must involve the Defense in its efforts to gather more facts regarding Government investigations of the Defense -- issues of direct impact to Mr. al Hawsawi's right to counsel under the Sixth Amendment, and his Fifth Amendment right to Due Process.

C. By Barring Defense Counsel, the Judge's Order for an *Ex Parte* Hearing Precludes Defense Counsel from Meeting their Duties under the Rules of Professional Conduct.

The Rules of Professional Conduct place on defense counsel the responsibility to protect the client's interests and assess the presence of conflicts in an existing attorney-client

[11] *Early*, 746 F.2d at 416.

relationship.[12] The American Bar Association's Model Rules of Professional Conduct, which form the foundation for military[13] and state[14] rules of professional conduct, provide that:

> Resolution of a conflict of interest problem under this Rule requires the lawyer to: 1) clearly identify the client or clients; 2) determine whether a conflict of interest exists; 3) decide whether the representation may be undertaken despite the existence of a conflict, i.e., whether the conflict is consentable; and 4) if so, consult with the clients […] and obtain their informed consent, confirmed in writing.[15]

These rules therefore require defense counsel to identify the presence of conflicts of interest by assessing relevant facts. They require defense counsel to discuss the nature of the conflict with the client and to help the client evaluate the risks or advantages of continued representation.[16] And, the rules require defense counsel to determine whether competent and diligent representation can reasonably continue under the circumstances.[17] The Defense therefore has a right and duty to be participate in any presentation of facts involving an actual or potential investigation of counsel; participation at such a presentation would allow defense counsel to

[12] *See* ABA Model Rule of Professional Conduct 1.7, Conflict of Interest: Current Clients; *see also,* Dept. of the Navy, Judge Advocate General Instruction (NAVJAGINST) 5803.1E (20 Jan 2015), Rule 1.7.

[13] *See generally,* NAVJAGINST 5801.1E.

[14] *See, e.g.*, Florida Bar Rules of Professional Conduct, Rule 4-1.7.

[15] ABA Model Rule of Professional Conduct 1.7, Conflict of Interest: Current Clients (Commentary); NAVJAGINST 5801.1E, Rule 1.7(c) (adopting precisely the same language as ABA Model Rule 1.7).

[16] *See* ABA Model Rule of Professional Conduct 1.7(b) (requiring the informed consent from the client in order to continue representation in the presence of a conflict).

[17] *See id.* ("a lawyer may represent a client if: (1) the *lawyer reasonably believes* that the lawyer will be able to provide competent and diligent representation to each affected client.")

gather and assess facts, and inform Mr. al Hawsawi -- as the Rules of Professional Conduct require counsel to do.

By excluding defense counsel from the ordered "robust presentation on the facts and circumstances surrounding the FBI investigation and what additional investigative steps, if any, are contemplated,"[18] the Military Judge is precluding the defense from gaining the facts necessary to carry out their professional ethical responsibilities. The judge's order is also precluding counsel from properly representing Mr. al Hawsawi because it prevents counsel from observing the duties counsel owe Mr. al Hawsawi to inquire into potential conflicts, and to inform him of any such conflicts so that he may make intelligent decisions about how he wishes to be represented in light of any conflicts. The rules of professional conduct squarely place these responsibilities on counsel.

"[T]he 'assistance of counsel' guaranteed by the Sixth Amendment contemplates that such assistance be untrammeled and unimpaired by a court order requiring that one lawyer should simultaneously represent conflicting interests."[19] The Military Judge's order for an *ex parte* hearing with the Government on a question of conflict of counsel infringes Mr. al Hawsawi's Sixth Amendment right because it bars defense counsel from assuring the right to counsel "unimpaired by conflicting interests."[20]

[18] *See* AE 615H, Interim Order.

[19] *Glasser v. United States*, 315 U.S. 60, 70 (1942) (To preclude obtuse readings of this precedent, it is important to note that the Supreme Court did not limit the holding in *Glasser* to conflicts arising from an attorney representing more than one client in the same case; the Court's precedent guards against "conflicted counsel," period.)

[20] *Id.; see also, United States v. Holloway*, 435 U.S. 475, 481 (1978).

D. The Military Judge's Goal of Conducting an *Ex Parte* Hearing with Career Prosecutors Presents a Severe Risk of One-Sided Advocacy.

It is especially important to highlight that the Government Special Review Team is composed of five career prosecutors with the U.S. Department of Justice. That these prosecutors may be "walled off" from the specific prosecutors in Mr. al Hawsawi's capital case does not bear on the impropriety of the Military Judge's order to hold an *ex parte* hearing with them, nor does it take away from the constitutional and statutory violations that the judge's order implicates.

The mere fact that these five attorneys represent the Government underscores, in this criminal case, that they are advocates, now being permitted to appear – alone – before the judge and to advocate for the Government's interests. Even the most well-meaning and impartial prosecutor is "an advocate, accustomed to stating only one side of a case."[21] The courts recognize this fact, and the risks to the Constitution, in thinking otherwise in the context of holding *ex parte* hearings: "[N]ot only is it a gross breach of the appearance of justice when the defendant's principal adversary is given private access to the ear of the court, it is a dangerous procedure. However impartial a prosecutor may mean to be, he is an advocate, accustomed to stating only one side of the case."[22] Presentation from a prosecutor is presentation from an advocate who "could not be expected to be impartial."[23] Conducting the *ex parte* hearing contemplated here therefore, with Government attorneys, and particularly on an issue squarely impacting the work of the Defense teams, presents an unacceptable risk and opportunity for one-sided advocacy. While there may be no nefarious motives, there need not be any to render the

[21] *Haller v. Robbins*, 409 F.2d 857, 859 (1st Cir. 1969).

[22] *Id*.

[23] *Early*, 746 F.2d at 416.

judge's contemplated use of the *ex parte* process improper: the risk alone that the advocate will perform its regular function in its regular manner and, in doing so, paint with their own brush, offends due process.[24]

E. The Judge's Order for an *Ex Parte* Hearing with the Government Special Review Team Undermines the Public Trust.

The use of *ex parte* sessions inherently undermines the public trust in the judicial system. The Supreme Court holds that, even in a civil case (where the prospect of death at the Government's hands is not at issue, as it is here) "[t]he value of a judicial proceeding . . . is substantially diluted where the process is *ex parte*, because the Court does not have available the fundamental instrument for judicial judgment: an adversary proceeding in which both parties may participate."[25] In the interest of promoting the public trust therefore, the courts warn against the use of *ex parte* proceedings. In *Minsky*, the Sixth Circuit rejected a trial judge's use of an *ex parte* bench conference, holding that it would not "condone conduct that 'undermines confidence in the impartiality of the court.'"[26]

The Military Judge here is improperly availing of an *ex parte* process so that he can have a private audience with career prosecutors and obtain a "robust presentation of facts" about law enforcement investigation into the Defense teams. In the criminal context where this case sits,

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[24] *See Haller*, 409 F.2d at 859; *Early*, 746 F.2d at 416.

[25] *Carroll v. President and Commissioners of Princess Anne*, 393 U.S. 175, 183 (1968). As the Defense has previously argued, the Government should never be allowed to make *ex parte* arguments without properly and publicly invoking the national security privilege. *See, e.g.*, AE 308K(AAA), Defense Response to Government Unclassified Notice of Ex Parte, In Camera, Under Seal Classified Filing, filed 28 March 2016, at 3 & n.1; *a fortiori*, the Commission should not be able to implicitly invoke this privilege on the Government's behalf.

[26] *United States v. Minsky*, 963 F.2d 870, 874 (6th Cir. 1992), *quoting Early*, 746 F.2d at 416.

such an *ex parte* proceeding will fall entirely outside the limits set by law. It will violate Mr. al Hawsawi's right to Due Process under the Fifth Amendment; his rights to representation and to confront witnesses (including documentary declarants) under the Sixth Amendment; and will vitiate the enhanced Constitutional protections required in capital cases under the Eighth Amendment. Such use of the *ex parte* process severely undermines public perception and trust in an already highly challenged and questioned Military Commission system.

F. Conclusion

The judge's order lacks any legal foundation. An *ex parte* hearing with the Government Special Review Team will undermine the public trust by allowing an advocacy hearing in the absence of defense counsel who have ethical responsibilities to assure Mr. al Hawsawi's right to conflict free counsel. The ordered *ex parte* hearing will further diminish public confidence in the justice meted out in this case, in particular. On constitutional, statutory and ethical grounds therefore, Mr. al Hawsawi objects to the Military Judge's unilateral order seeking a private session with the Government's Special Review Team;[27] furthermore, he moves for any hearing with the Special Review Team to take place in the presence of the Defense.

6. **Request for Oral Argument**: The Defense does not request oral argument.

7. **Conference:** The Government Special Review Team supports its having an *ex parte* hearing with the judge.

[27] *See id.* at 859 (noting due process violation in *ex parte* communications by prosecutor); *Minsky*, 963 F.2d at 874 (finding Sixth Amendment violation as well as Fifth Amendment fair trial violation from *ex parte* sidebar between judge and Government); *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (heightened standards required in capital cases); ABA Model Rule 1.7.

8. **Attachment**:

A. Certificate of Service.

//s//
WALTER B. RUIZ
Learned Defense Counsel for
Mr. al Hawsawi

//s//
JENNIFER N. WILLIAMS
LTC, JA, USAR
Detailed Defense Counsel for
Mr. al Hawsawi

//s//
SEAN M. GLEASON
Detailed Defense Counsel for
Mr. al Hawsawi

//s//
SUZANNE M. LACHELIER
Detailed Defense Counsel for
Mr. al Hawsawi

//s//
JOSEPH D. WILKINSON II
MAJ, JA, USAR
Detailed Defense Counsel for
Mr. al Hawsawi

//s//
DAVID D. FURRY
LCDR, JAGC, USN
Detailed Defense Counsel for
Mr. al Hawsawi

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CERTIFICATE OF SERVICE

I certify that on the 24th of January 2019, I caused to be electronically filed **AE 615L (MAH) - Mr. al Hawsawi's Objection to AE 615H, Military Judge's Order for Ex Parte Hearing with Government Special Review Team**, with the Clerk of Court and served the foregoing on all counsel of record by electronic mail.

//s//
WALTER B. RUIZ
Learned Counsel for Mr. Hawsawi