

MILITARY COMMISSIONS TRIAL JUDICIARY
NAVAL STATION GUANTANAMO BAY

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 615T(WBA)

Renewed Defense Motion to Cancel
Proceedings Pending Conclusion of Full FBI
Investigation.

Date Filed: 1 March 2019

1. **Timeliness:** This motion is timely filed.
2. **Relief Sought:** Mr. bin 'Atash requests that the Military Judge cancel all proceedings until such time as Defense Counsel have adequate information and facts to perform their ethical and constitutional obligation to personally assess the presence of a conflict of interest. Presently, no information has been provided that dispels the substantiated fears of Defense Counsel.
3. **Overview:** Despite evidence to the contrary, the Military Judge professes to “understand and appreciate” (Tr. at 22157) that Defense Counsel have a separate and independent ethical responsibility to determine if they are operating under a conflict of interest. However, that assessment cannot be made without information and facts concerning the full FBI investigation involving Mr. bin 'Atash's paralegal. At this point, Defense Counsel do not possess that information: it has been kept from Defense Counsel. The Military Judge espoused an “understanding that [Defense Counsel] may have initially been operating from a severe disadvantage and have every right to feel suspicion that you were under investigation” and that “out of no fault of your own, [you] do not still have access to documents and presentations that were ex parte[.]” (Tr. at 22153). However, the Military Judge repeatedly promised a remedy.

The Military Judge ordered the SRT to produce to Defense Counsel AE 613(GOV) and AE 613A(GOV SRT) and “provide as much as they can without disclosing potentially ongoing investigations to the defense.” (Tr. at 22141). It was the “hope [of the Military Judge] that the documents that . . . are directed to be released will alleviate some of [Defense Counsels’] concerns.” (Tr. at 22169). That hope has been dashed. The SRT did provide copies of AE 613(GOV) and AE613A(GOV SRT). The copies are almost wholly redacted. The few sentences and fragments of sentences that are not blackened out offer nothing that would serve to “alleviate some of [Defense Counsels’] concerns.” Instead, Defense Counsel are left with what they had on December 20—information that the FBI conducted an extensive and intrusive interrogation into the very inner workings of this Defense Team and sought to obtain confidential and privileged information. Today, Defense Counsel labor under a conflict of interest. Until Counsel possess information and facts sufficient to dispel that conclusion, these proceedings must be cancelled.

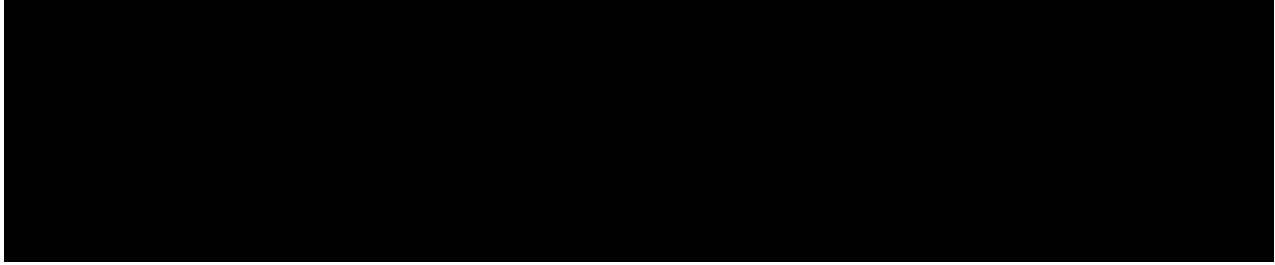
4. Burden of Proof:

The defense bears the burden of persuasion; the standard of proof is a preponderance of the evidence. R.M.C. 905(c)(1).

5. Facts:

a. On 3 December 2018, the Prosecution filed AE 613(GOV), “a classified, *ex parte*, *in camera*, under seal notice with the [Military] Commission.” (AE 613E/615P(RUL) at 1). That submission was made pursuant to 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.” (AE 613E/615P(RUL) at 4).



c. On 20 December 2018, SSG Skeete was directed, under false pretenses, to report to Building 2811 on Battalion Avenue at Fort Hood. (AE 615(WBA), Attach. B at 1-2). Once there, he was interrogated for two-and-one-half hours by Special Agents of the Federal Bureau of Investigation (“FBI”). The vast majority of the FBI questioning—85 to 90%—concerned Mr. bin ‘Atash and the members of his Defense Team. (AE 615(WBA), Attach. B at 7).

d. No member of the Government has ever denied nor refuted that the FBI questioning of SSG Skeete concerned Mr. bin ‘Atash, the civilian attorneys on Mr. bin ‘Atash’s Defense Team, the duties, responsibilities and work of the Defense Team, the communications between Defense Team members and Mr. bin ‘Atash, the personalities and temperaments of both Mr. bin ‘Atash and Defense Team members, and the similarities and differences between Mr. bin ‘Atash and his co-accused.

e. On 9 January 2019, Defense Counsel for Mr. bin ‘Atash filed Defense Motion to Conduct Thorough Inquiry into Actual and/or Potential Conflict Pursuant to R.M.C. 901 and Holloway v. Arkansas, 435 U.S. 475 (1978) and to Cancel Proceedings Pending Inquiry. (AE 615(WBA)). The next day, 10 January, the Special Review Team (“SRT”) filed AE 613A(GOV SRT), a classified pleading filed *ex parte*, *in camera*, and under seal with the Military Judge.

f. Defense Counsel were not formally notified that the SRT filing—AE 613A(GOV SRT)—was in any way related to Mr. bin ‘Atash’s filing in AE 615(WBA), but the timing suggested it was. On 16 January, Counsel for Mr. al Baluchi requested that the Military Judge order the SRT to serve a copy of AE 613A(GOV SRT) on the Defense after necessary redactions were made. (AE 613B(AAA)). One week later—23 January—Counsel for Mr. Mohammad sought similar production of AE 613(GOV). (AE 613C(KSM)). Mr. bin ‘Atash is joined to both pleadings by operation of Rule of Court 3.5.i.

g. Adhering to a previously-established briefing schedule, the SRT filed another pleading on 17 January, avowing that there was no actual or potential conflict of interest because “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.” (AE 615D(GOV SRT), Attach. B at 15-16). On 23 January, without the benefit of any access to the Government’s pleadings in AE 613(GOV) and AE 613A(GOV SRT), Defense Counsel complied with the Military Judge’s Order to reply to the SRT’s assertions that there was no conflict of interest. (AE 615G(RBS); AE 615I(KSM); AE 615J(WBA)).

h. On 22 January 2019, the Military Judge directed that the SRT “provide an *ex parte* presentation on the facts and circumstances surrounding the FBI investigation and what additional steps, if any, are contemplated.” (AE 615H(ORD)). Defense objections were made to this *ex parte* presentation. (AE 615K(KSM); AE 615L(MAH); AE 615M(RBS)). Defense objections were ignored by the Military Judge ahead of the *ex parte* presentation and were ultimately rendered moot.

i. The *ex parte* SRT presentation occurred on 24 January 2019. One day later, the Military Judge ruled 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” and, therefore, “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.” (AE 613E/615P(RUL) at 6). Notwithstanding his ruling absent any input from the Defense, the Military Judge, in response to previous requests by Defense Counsel for more information (AE 613B(AAA) and AE 613C(KSM)) also ordered that the “SRT will be directed to provide the Defense Teams a copy of both [AE 613(GOV) and AE 613A(GOV SRT)], redacted as necessary to protect the on-going investigation” and that the “SRT will provide [those] redacted versions of AE 613(GOV) and AE 613A(GOV SRT) to the Defense Teams **NLT 8 February 2019.**” (AE 613E/615P(RUL) at 7) (emphasis in original). After issuing its Ruling, the Military Judge indicated that it would still “allow [Defense] Counsel to be heard at the opening of the next session.” (AE 613E/615P(RUL) at 7, n30).

j. The occasion for Counsel “to be heard” occurred on 28 January—three days after the Military Judge issued his ruling. During this “argument,” Counsel for the Defendants asserted, repeatedly, that the determination whether an attorney is conflicted is a decision that constitutionally and ethically rests with that attorney, and that determination could not be made without further information regarding the scope and nature of the full and ongoing FBI investigation. Counsel for Mr. bin ‘Atash specifically noted an understanding “that the inquiry has to be done by a judge. But I also understand that I have a separate ethical duty to determine whether or not I am burdened by a conflict.” (Tr. at 22156-57). Counsel directed the Military Judge with specificity:

[T]he thing I operate under is a quotation from Holloway [v. Arkansas], and it’s found at page 20 of our initial [filing.] And it says, in addressing conflicts, trial courts are clearly instructed to defer to the judgment of defense counsel whether a conflict exists because counsel himself is usually, quote, in the best position professionally and ethically to determine when a conflict of interest exists or will

probably develop in the course of a trial, unquote. And that's found at 435 U.S. 475, page 485, in the Holloway [v. Arkansas] case.

(Tr. at 22157). Learned Counsel for al Hawsawi agreed, arguing “we highlighted that we have an independent, ethical legal duty to make an informed decision about whether we may be under a conflict.” (Tr. at 22140).

k. The Military Judge gave a passing nod to the ethical obligations of Defense Counsel, stating, “I do understand and appreciate that counsel have that independent ethical duty.” (Tr. at 22157). Notwithstanding the dubious quality of this “understand[ing] and appreciate[ion]” by Judge Parrella, Defense Counsel repeatedly asserted that this ethical determination—to be conducted by Defense Counsel—was compromised because Defense Counsel were not permitted to see any of the information presented to the Military Judge by the Government in AE 613(GOV) and AE 613A(GOV SRT). Counsel for Mr. bin ‘Atash reminded the Military Judge that an attorney “shouldn’t have to stand here and rely upon the prosecution and their recitation of the facts when, in fact, everything that I’ve seen says something very, very different.” (Tr. at 22158).

l. The disparity of information was acknowledged by the Military Judge. The Military Judge claimed an “understanding that [Defense Counsel] may have initially been operating from a severe disadvantage and have every right to feel suspicion that you were under investigation” and that “out of no fault of your own, [you] do not still have access to documents and presentations that were ex parte[.]” (Tr. at 22153). To cure this issue, the Military Judge repeatedly asserted that Defense Counsels’ concerns would, in short order, be alleviated by the ultimate production of AE 613(GOV) and AE 613A(GOV SRT) to Defense Counsel. The exchange between the Military Judge and Counsel for Mr. Mohammad serves as an example:

MJ [Col PARRELLA]: Because, again, as -- no fault of your own, I understand the disadvantage you're at because you're not invited to those ex parte presentations, or

don't have access to the ex parte information, but you are operating from an information deficit that the commission has access to. And because of that I believe in part that's why the rule suggests that it's my duty to make that inquiry, which I've done, and pretty clearly stated no conflict.

LDC [MR. NEVIN]: Yeah, and I appreciate your doing that. That's fine. But you also recognize that I have to do this too.

MJ [Col PARRELLA]: And I hope -- I do understand that you have to do that, and I certainly hope that the documents that ----

LDC [MR. NEVIN]: Me too.

MJ [Col PARRELLA]: ---- are directed to be released will alleviate some of your concerns.

LDC [MR. NEVIN]: Me too.

MJ [Col PARRELLA]: I certainly do, because I'm very much aware and sensitive to the context of this case and its very unique nature and its long history and the investigations that have taken place in the past.

(Tr. at 22168-69).

m. Counsel for Mr. al Hawsawi also stressed to the Military Judge the necessity for Defense Counsel to conduct their own assessment of the possibility of an actual or potential conflict of interest. Again, the Military Judge relied upon the eventual release of information through AE 613(GOV) and AE 613A(GOV SRT) to assuage Defense concerns and as evidence that the Military Judge "has taken steps to give the defense as much as possible." (Tr. at 22142).

LC [Mr. RUIZ]: And as we highlighted in 615L, which was Mr. al Hawsawi's objection to the ex parte hearing, the session that you had, we highlighted that we have an independent, ethical legal duty to make an informed decision about whether we may be under a conflict.

...

But as I indicated in 615L, the manner in which the session was handled also limited our access to information, and also -- and that -- in doing that, has limited our ability to independently assess whether we do have a conflict. And the manner in which it has been handled is the defense is an afterthought. We're going to tell you, I took

care of it. You said the court has an interest in determining whether there is a conflict ----

MJ [Col PARRELLA]: Well, Mr. Ruiz, what does the rule say about who has a primary duty to assess whether there is a conflict?

LDC [MR. RUIZ]: The court has the duty to address the conflict.

MJ [Col PARRELLA]: And do you think that, in part, that could be because some of the material may involve ongoing investigations that have to be handled in an ex parte fashion?

LDC [MR. RUIZ]: In some instances, yes. However, another avenue that the commission could have taken was to be as inclusive as possible with the defense.

MJ [Col PARRELLA]: Okay, so do you think ----

LDC [MR. RUIZ]: Which, in essence, you could have issued a ruling to say we're going to seal this ----

MJ [Col PARRELLA]: You are ----

LDC [MR. RUIZ]: ---- we're not going to talk about it.

MJ [Col PARRELLA]: Hold on. You are aware, and I think we've gone over this, that the commission has -- has taken steps to give the defense as much as possible, hence the -- the part of my order that directs that the SRT to provide as much as they can without disclosing potentially ongoing investigations to the defense.

LDC [MR. RUIZ]: Well, I mean, that remains to be seen and so ----

MJ [Col PARRELLA]: Well, the order doesn't remain to be seen. Maybe the contents of what's in there remains to be seen, but the order is quite definitive. What I'm getting at, Mr. Ruiz, I think it's somewhat disingenuous to say that the commission isn't making efforts to try to resolve this conflict. As I've pointed out with Mr. Nevin, I mean, I have just as much interest to ensure that you're all conflict free as you all do. And I think that the commission, I certainly will state, takes that responsibility seriously to ensure that it's a thorough inquiry.

(Tr. at 22141-43).

- n. Counsel for Mr. al Hawsawi and the Military Judge returned to the conflict between the

complete lack of information available to Defense Counsel and their simultaneous obligation to access their ethical responsibilities. Defense Counsel noted that the approach of the Military Judge “seems to be that you don’t think that we have an independent duty ourselves to access whether we have that conflict with as much information as necessary on a timely manner. And so as I’m standing here having this argument with you, I’m at a disadvantage because you’ve chosen to provide them two weeks to provide us a redacted version of whatever information it is you have.” (Tr. at 22145). Concerned that the Military Judge would misconstrue the argument as a claim that the Military Judge “did not know or were unaware that [Defense Counsel] have an independent duty to make a conflict assessment,” Defense Counsel indicated, “that’s not what I meant to say.” (Tr. at 22176). Instead, “what I meant to say was that my impression on Mr. al Hawsawi’s team, and certainly listening to some of the discussions we’ve had here this morning, is that you don’t care about it that much, and you don’t value it certainly as much as we do.” (Tr. at 22176). The Military Judge responded, “If that were the case, though, Mr. Ruiz, why would I order the SRT to release anything to you at all? Why wouldn’t I just make my determination and say I’ve made my determination and we’re moving on?” (Tr. at 22176). Moreover, the Military Judge claimed that it was “giving as much as I can as quickly as I can.” (Tr. at 22177).

o. During the course of the post-ruling exchange between the Military Judge and Defense Counsel, the Military Judge inquired of the SRT of the “status of the redactions to AE 613 and 613A; and notwithstanding the date specified in the commission’s order, could they be provided earlier?” (Tr. at 22160). The SRT indicated that it had “completed the redactions for AE 613A and I’m awaiting FBI review to make sure their equities are protected. It will not take me long to redact AE 613 and I believe we will be able to comply with the court’s order well before the 8 February date specified in [the Military Judge’s] order.” (Tr. at 22160).

p. Reiterating his already-issued three-day old decision, the Military Judge emphatically declared that there can be no conflict of interest if knowledge of the law enforcement investigation only arose “after the paralegal in question had left the defense team.” (Tr. at 22191). Nevertheless, the Military Judge “directed the government to release redacted copies of the initial notices in AE 613 and 613A” and modified the “earlier written ruling to reflect that the SRT shall provide those to the defense as soon as they become available.” (Tr. at 22190).

q. The SRT did not “comply with the court’s order well before the 8 February date specified in [the Military Judge’s] order,” and the redacted copies of the initial notices in AE 613 and 613A were not provided to Defense Counsel on or before 8 February 2019. (Tr. at 22160). Almost wholly redacted copies were provided on 14 February. (AE 615Q (GOV SRT)). They alleviated none of Defense Counsel’s concerns.

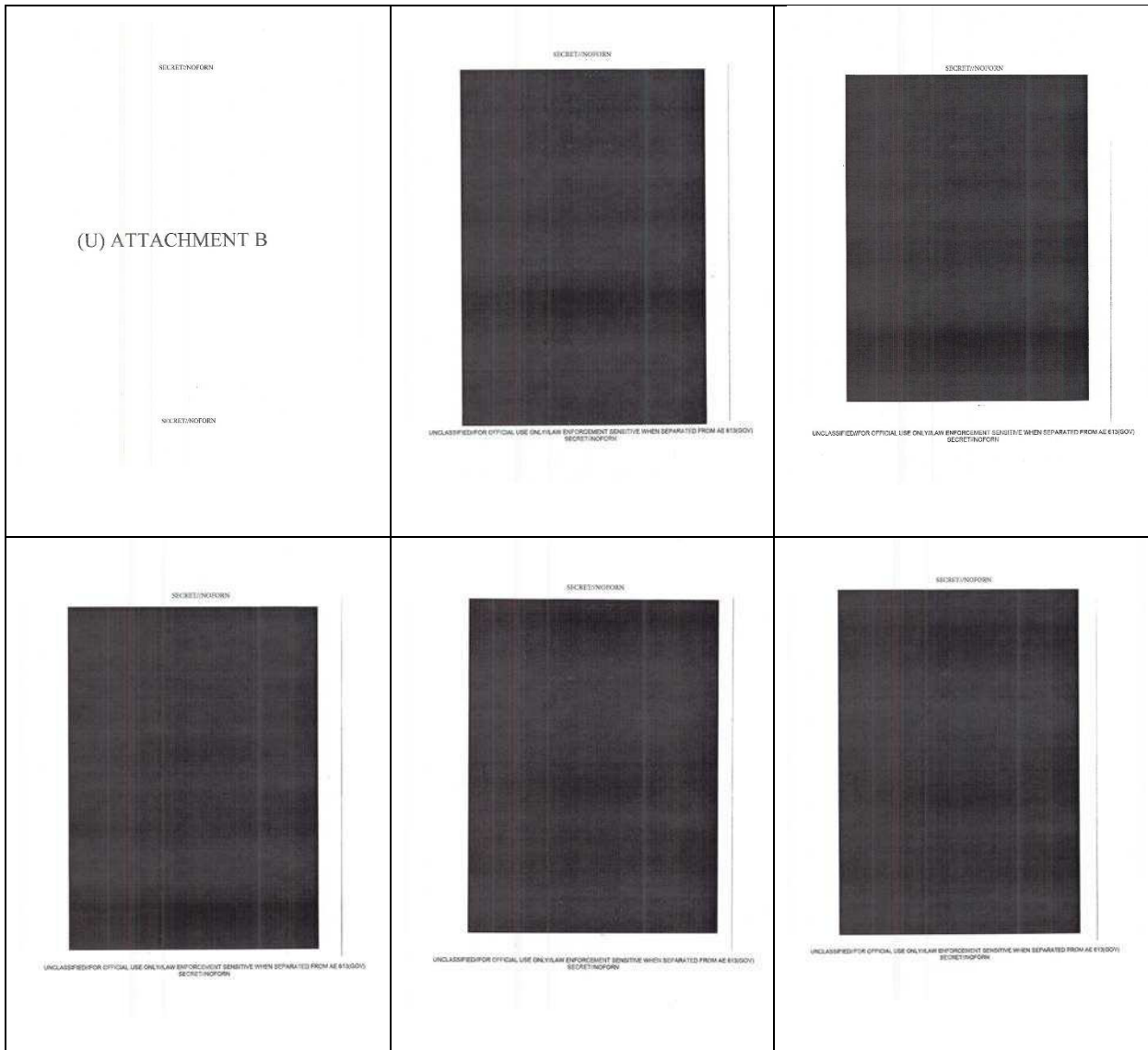
r. The copy of AE 613(GOV) provided to Defense Counsel by the SRT is almost completely redacted. Portions not redacted remain inexplicably classified with only a few sentences or sentence fragments both unclassified and not redacted. The pleading commences with an unclassified paragraph:

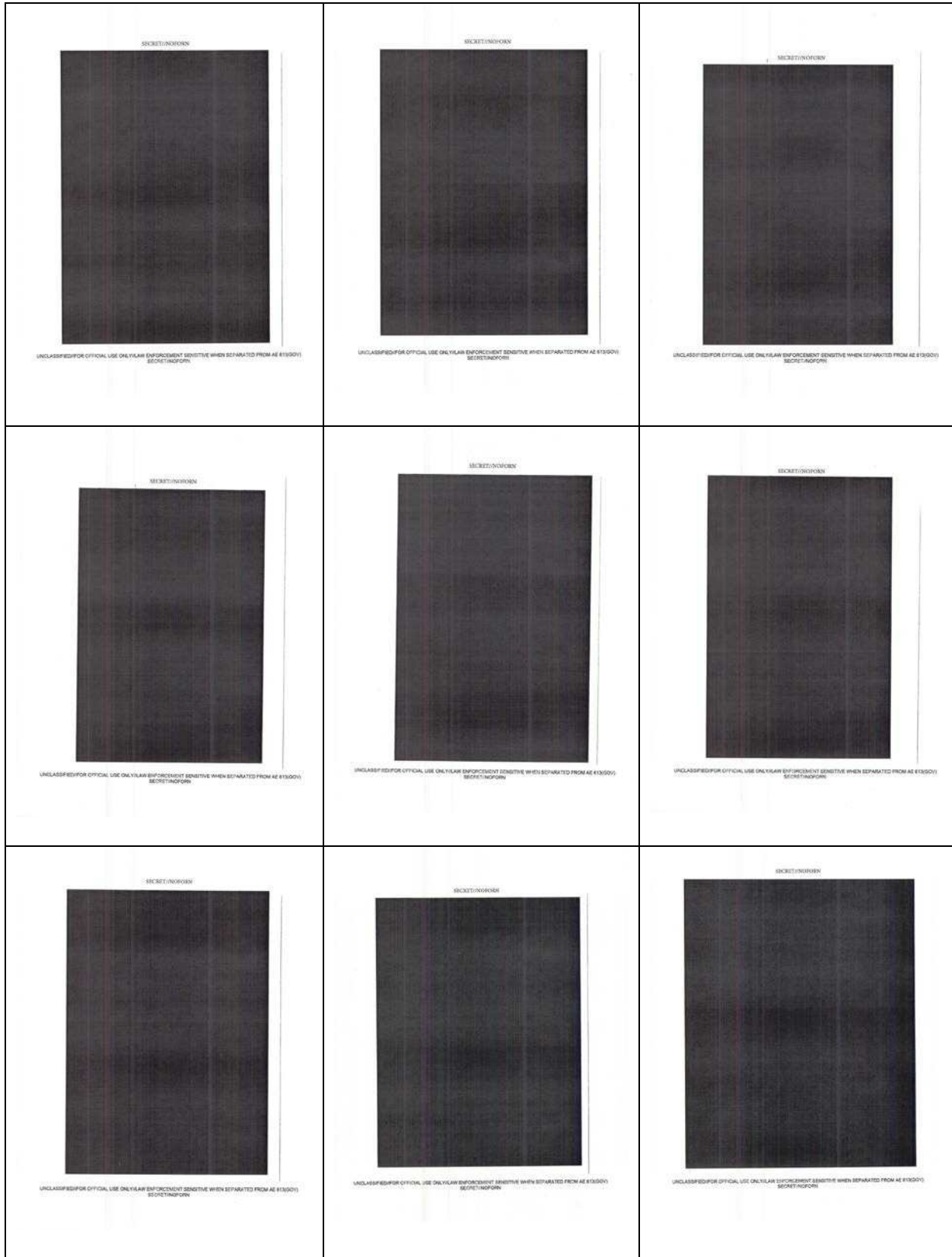
~~(U)~~In Amended Order AE 292QQ, filed 16 December 2014, the Commission directed the Special Review Team (SRT), *or any other appropriate government attorney*, to “notify the Commission, *ex parte* and *in camera*, after learning of any future FBI investigation, where the subject of the investigation is a known defense team member in the above-captioned case, and where the reason for the investigation involves . . . the activity of such a defense team member in his/her capacity as a defense team member.” Amended Order AE 292QQ at 35 (emphasis added).

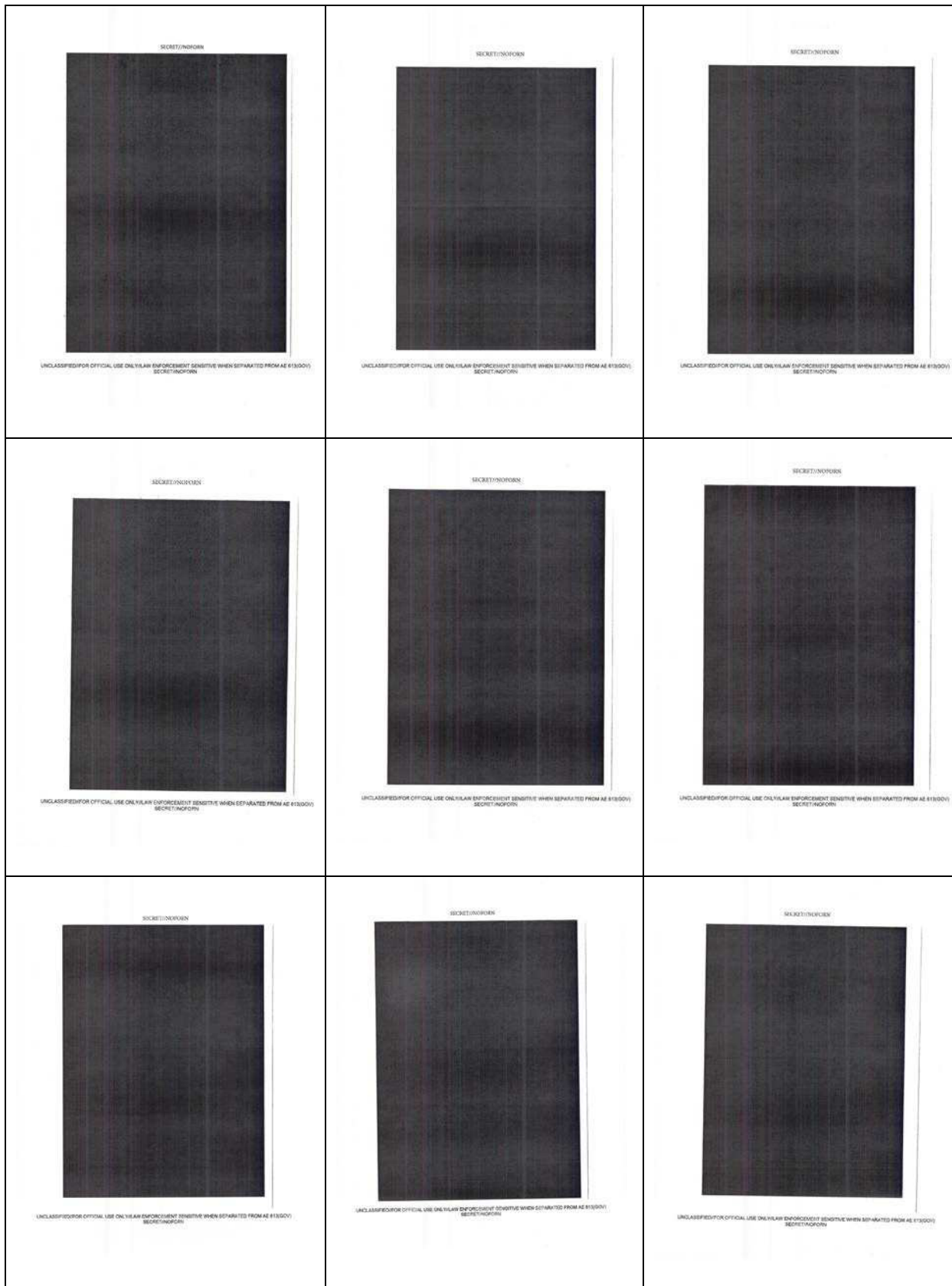
(AE 613(GOV) at 1). The next paragraph contains a sentence fragment that is wholly and improperly classified and then is followed by wholesale redactions to the bottom of the page, the entirety of the next page, the page after that, and over one-half of the following page. (AE

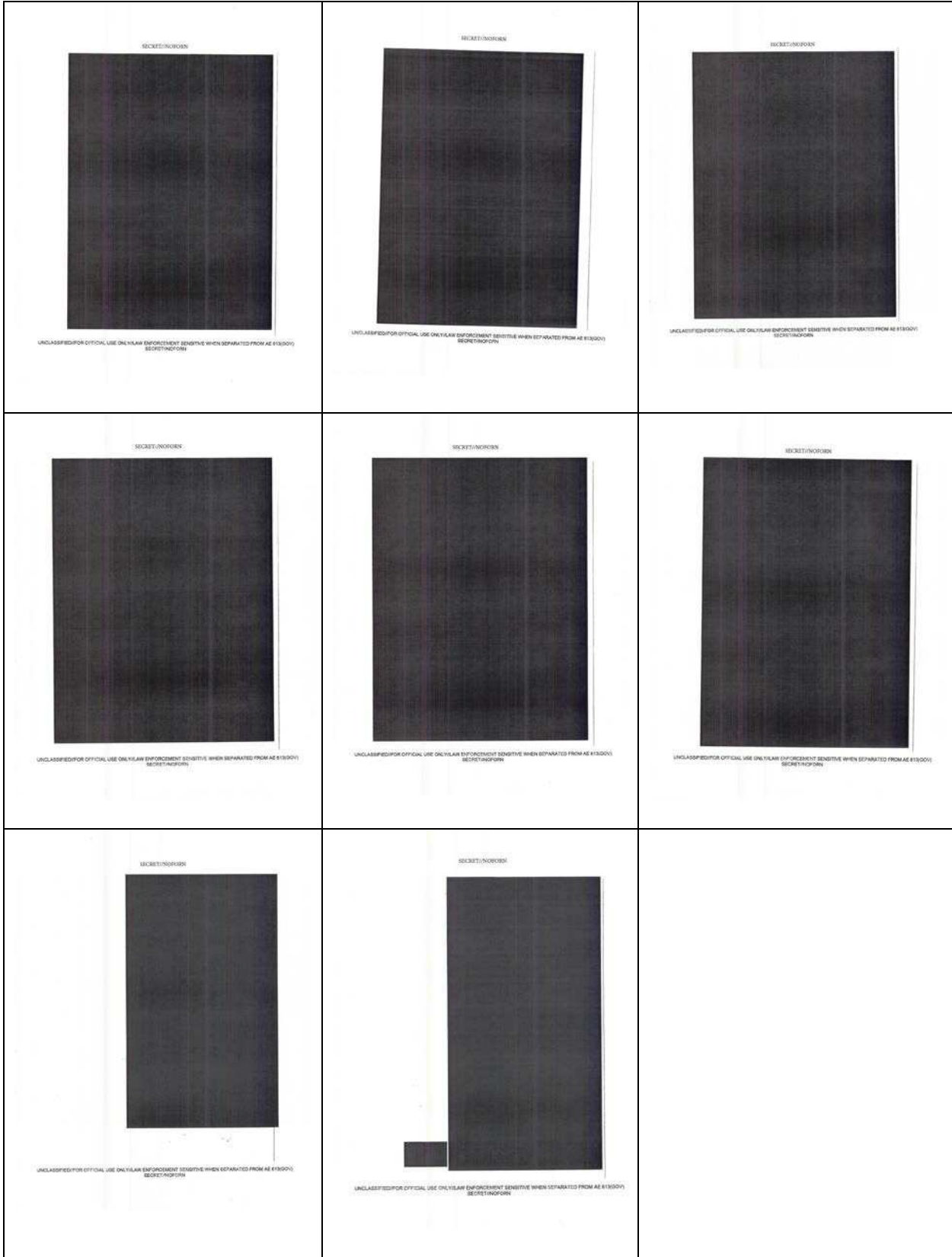
613(GOV) at 1-4). Three paragraphs then follow: the first professing the Prosecution's knowledge of the investigation, the second admitting that the SRT has knowledge of the investigation, and the third offering the assistance and availability of the SRT to provide further information. Inexplicably, these paragraphs are each marked "S//NF" yet contain no more information than what is contained in the unclassified 25 January Ruling of the Military Judge.

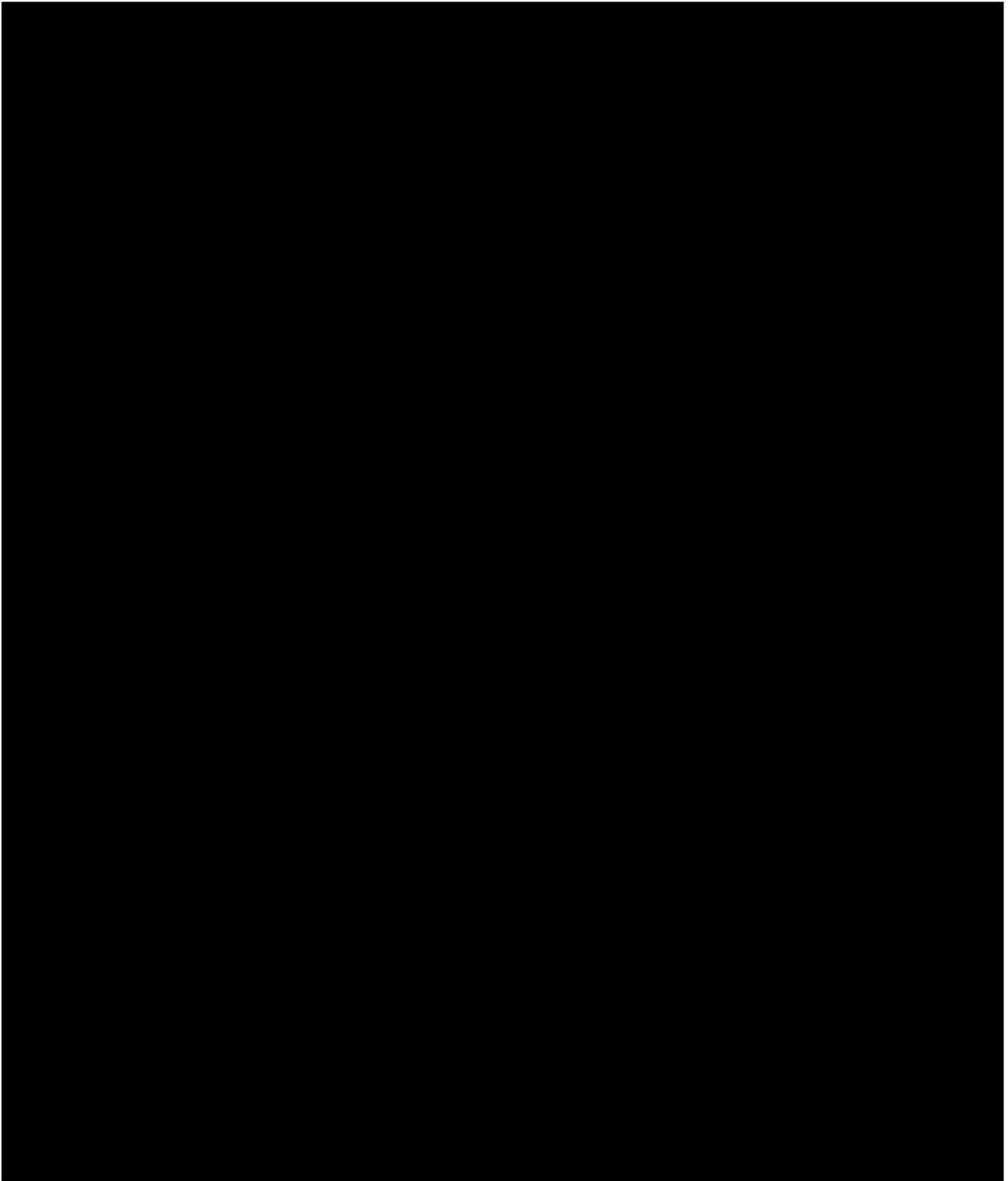
s. There is an attachment to AE 613(GOV). It is Attachment B. It is 31 pages long. It is completely blacked out. It appears as follows:












 Inexplicably, the SRT has deemed that information not suitable for release to Defense

Counsel. Only one complete sentence and two sentence fragments in the remaining pages of the pleading were deemed by the SRT as releasable to cleared Defense Counsel. Those few words are somehow classified so this pleading cannot repeat them. The full sentence is a declaratory statement. The only relevant information it contains is unclassified information the Military Judge spoke aloud in open hearings: “[I]t is very clearly stated in this commission’s ruling that no member of a current defense team is currently under investigation by either the FBI or any other government agency[.]” (Tr. at 22154). It mirrors the same statement that the Military Judge placed in its 25 January Order: “No current member of any Defense Team assigned to this case is under investigation by the FBI[.]” (AE 613E/615P(RUL) at 5). However, in the SRT pleading, the Government has marked a full sentence containing that information as “S//NF.” The first sentence fragment concerns the filing of AE 613A(GOV SRT). In its unclassified 25 January Order, the Military Judge stated: “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 with the Commission” and that the “SRT’s notice of 10 January 2019 also complied with the Commission’s order in AE 292QQ[.]”. (AE 613E/615P(RUL) at 1, 5). The same information is contained in the sentence fragment in AE 613A(GOV SRT) and marked “S//NF.”

u. Since 14 February 2019, Defense Counsel have received no information beyond the few snippets described above [REDACTED] possibly concerning one of Mr. bin ‘Atash’s paralegals.

6. Argument:

- a. *Defense Counsel are constitutionally and ethically required to assess the presence of conflicts that could affect the representation of Mr. bin ‘Atash.*

Mr. bin ‘Atash—and each of the accused before this Military Commission—has a statutory and constitutional right to counsel. See 10 U.S.C. §§ 948k, 949c (2018); Strickland v. Washington, 466 U.S. 668 (1984). That right to counsel includes the right to an attorney that is effective and not burdened by conflicts of interest. See, e.g., Wood v. Georgia, 450 U.S. 261, 271 (1981); McMann v. Richardson, 397 U.S. 759 (1970); Reece v. Georgia, 350 U.S. 85 (1955); Glasser v. United States, 315 U.S. 60 (1942). Of course, in a capital case, that right carries even greater weight, where the Eighth Amendment to the United States Constitution demands heightened fairness and reliability. See Beck v. Alabama, 447 U.S. 625, 638 (1980).

Given the critical importance of conflict-free counsel, all defense attorneys are charged with the responsibility of maintaining conflict-free representation. This responsibility is reflected in the ethical codes and rules of responsibility that govern the profession. See, e.g., American Bar Association (“ABA”) Model Rule 1.7(a)(2) (a lawyer may not represent a client “if the representation involves a concurrent conflict of interest,” including where “there is a significant risk that the representation of one or more clients will be materially limited by . . . a personal interest of the lawyer.”) (emphasis added); ABA Standards for Criminal Justice: Prosecution and Defense Function, 4th ed. (2015), Defense Function, Standard 4-1.7(b) (“Defense counsel should not permit their professional judgment or obligations regarding the representation of a client to be adversely affected by . . . their personal political, financial, business, property, or other interests or relationships.”). This obligation commands that counsel to be vigilant about the existence of any potential conflict and the consequences thereof. Indeed, the individual best positioned to

determine if a conflict exists—and often the only individual able to make that determination—is the defense attorney. Holloway v. Arkansas, 435 U.S. 475, 485-86 (1978) (“In so holding, the courts have acknowledged and given effect to several interrelated considerations. An ‘attorney representing two defendants in a criminal matter is in the best position professionally and ethically to determine when a conflict of interest exists or will probably develop in the course of a trial.’ Second, defense attorneys have the obligation, upon discovering a conflict of interests, to advise the court at once of the problem. Finally, attorneys are officers of the court, and ‘when they address the judge solemnly upon a matter before the court, their declarations are virtually made under oath.’ We find these considerations persuasive.” (internal citations omitted)).

These basic principles are not controversial. The Military Judge paid lip service to Defense Counsels’ independent ethical duty to determine the existence of any conflict in this matter. (Tr. at 22157 (“I do understand and appreciate that counsel have that independent ethical duty.”); Tr. at 22169 (“I do understand that you have to do that[.]”). However, this duty can only be discharged when Defense Counsel possess sufficient facts and evidence to make that determination. Each Defense Counsel averred to the Military Judge that they possessed little or no information beyond the fact that there is an ongoing full FBI investigation involving one of Mr. bin ‘Atash’s paralegals during the period of time when he was a deeply embedded team member. (Tr. at 22156 (Learned Counsel for Mr. bin ‘Atash: “... I do know that I have not seen anything factually that leads me to believe that this was anything but focused on what that paralegal did prior to his finally PCS’ing to his new orders.”); Tr. at 22141 (Learned Counsel for Mr. al Hawsawi: “But as I indicated in 615L, the manner in which the session was handled also limited our access to information, and also -- and that -- in doing that, has limited our ability to independently assess whether we do have a conflict.”); Tr. at 22129 (Learned Counsel for Mr. Mohammad: “Really, I can’t be trusted to

know some of the basic details about how this started and what it was about sufficient to make my own decision about whether this is yet another false alarm or whether this is something more serious?”).

The Military Judge claimed to recognize the informational deficits constraining each Defense Counsel. (Tr. at 22153 (claiming an “understanding that [Defense Counsel] may have initially been operating from a severe disadvantage” and that “out of no fault of your own, [you] do not still have access to documents and presentations that were ex parte”); Tr. at 22168 (acknowledging “[b]ecause, again, as -- no fault of your own, I understand the disadvantage you're at because you're not invited to those ex parte presentations, or don't have access to the ex parte information”)). Noevertheless, the Military Judge believed he had a solution: he would order the Government to provide Defense Counsel with copies of the AE 613(GOV) and AE 613A(GOV SRT) filings, and in doing so, “alleviate some of your concerns.” (Tr. at 22169). The Military Judge was firm that this “solution” would provide Defense Counsel information to alleviate ethical concerns. In response to concerns expressed by Defense Counsel for Mr. al Hawsawi about the lack of information available to Defense Counsel, the Military Judge vociferously responded: “Hold on. You are aware, and I think we've gone over this, that *the commission has -- has taken steps to give the defense as much as possible, hence the -- the part of my order that directs that the SRT to provide as much as they can without disclosing potentially ongoing investigations to the defense.*” (Tr. at 22142 (emphasis added)). When Defense Counsel responded, “that remains to be seen,” the Military Judge interrupted and interjected, “Well, the order doesn’t remain to be seen. Maybe the contents of what’s in there remains to be seen, but the order is quite definitive. What I’m getting at, Mr. Ruiz, I think it’s somewhat disingenuous to say that the commission isn’t making efforts to try and resolve this conflict.” (Tr. at 22142-43).

The sincerity of the Military Judge's efforts "to resolve this conflict" will now be tested. The SRT's release of the nearly-wholly redacted filings, AE 613(GOV) and AE 613A(GOV SRT), provided no more information to Defense Counsel than that provided by the Military Judge in open hearings.

- b. *The SRT's release of AE 613(GOV) and AE 613A(GOV SRT) contains no information that would permit Defense Counsel to ascertain whether it was operating under an actual or potential conflict of interest.*



Specific to AE 613(GOV) and AE 613A(GOV SRT), the Military Judge expressed the "hope that the documents that . . . are directed to be released will alleviate some of your concerns." (Tr. at 22169). To turn hope into reality, the Military Judge prepared an "order that directs that the SRT to provide *as much as they can* without disclosing potentially ongoing investigations to the defense." (Tr. at 22142 (emphasis added)). They provided nothing.

The first filing redacted and turned over by the SRT is AE 613(GOV)—a pleading prepared and signed by Prosecutor Clay Trivett. Including the listing of attachments and the signature block, the filing is five pages long. The material made available to Defense Counsel—"to alleviate our concerns"—is an opening paragraph that simply copies the language in Amended Order AE 292QQ ordering that the Commission be notified when any defense team member is the subject of an FBI investigation. (AE 613(GOV) at 1). The next piece of information provided—"as much as [the SRT] can"—is a phrase that provides nothing more than notice of filing (improperly marked as classified)—followed by blacked out redactions to the bottom of the page. Page two of the pleading is entirely blacked out. (AE 613(GOV) at 2). Page three of the pleading is entirely blacked out. (AE 613(GOV) at 3). Over one-half of page four is blacked out. (AE 613(GOV) at 4). The remaining three paragraphs contained on pages four and five are simply assertions that the Prosecution and the SRT are aware of the investigation and offering the availability of the SRT

to provide additional information. Inexplicably, these three paragraphs are marked “S//NF.” There is nothing in the pleading that would provide a factual basis for any Defense Counsel to conduct the ethically-mandated conflict of interest analysis.

Despite its complete failure to “alleviate concerns,” the AE 613(GOV) pleading is itself an exemplar of transparency when compared to the pages attached to it. AE 613(GOV) promises that there is an attachment—marked as B—to the filing. It is marked “U//FOUO.” There attachment is not labeled and there is no indication what the attachment is—the name is blacked out. The promised attachment is thirty-one pages. Everything single word on those thirty-one pages is redacted.

The next pleading, AE 613A(GOV SRT), similarly provides nothing that will “alleviate some of [our] concerns.” (Tr. at 22169). The SRT filing commences with another rote recitation of its obligations, pursuant to AE 292QQ. (AE 613A(GOV SRT) at 1). That obligation was known to Defense Counsel, and provides no facts or information that would permit Counsel to conduct any assessment of conflict. The next paragraph is entirely blacked out.


(AE 613A(GOV SRT) at 2). This paragraph does provide a scintilla of information to Defense Counsel. 

That is information that suggests the presence of a conflict.

Clearly, at this point, the investigation may intrude upon the entirety of the team. Defense Counsel are not surprised; 85 to 90% of the FBI questions put to the paralegal concerned Mr. bin ‘Atash and the members of his Defense Team. (AE 615(WBA), Attach. B at 7). This information suggests the presence of a conflict.

The rest of the AE 613A(GOV SRT) is filled with black markings. The only visible writings consist of one complete sentence and two sentence fragments. They are marked as classified so cannot be repeated here. In its Order dated 25 January 2019, the Military Judge indicated that, “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 with the Commission[.]” (AE 613E/615P(RUL) at 1). That information is contained in one of the unredacted and classified sentence fragments in AE 613A(GOV SRT). (AE 613A(GOV SRT) at 3). The full sentence visible in AE 613A(GOV SRT)—marked classified—also contains information contained in unclassified writings and oral pronouncements of the Military Judge. The relevant information is found throughout the unclassified record. In an open Commission session, the Military Judge said,

“[I]t is very clearly stated in this commission’s ruling that no member of a current defense team is currently under investigation by either the FBI or any other government agency[.]” (Tr. at 22154). The Military Judge wrote “No current member of any defense team assigned to this case is under investigation by the FBI or any other government agency.” (AE 613E/AE 615P(RUL) at 5).

Most importantly, the SRT’s lack of credibility and veracity as to redactions, forthrightness, candidness, and classification determinations has been demonstrated on past occasions, namely, in the AE 292 series. Judge Pohl found the representations of the SRT suspect. (AE 292QQ(AMEND ORD) at 27 (the Commission “views . . . with a jaundiced eye” the representations of the SRT); 28 (the parsing of SRT assertions “does not provide the Commission with the confidence necessary to make a definitive finding as to whether a conflict-of-interest exists.”8). Defense Counsel agree.

The promise of the Military Judge that the release of the documents would “alleviate some of (Defense Counsels’) concerns” has been dashed. Ordered to produce “as much as they can,” the SRT has produced almost nothing.

- c. *The Military Judge must cancel all hearings until such time as Defense Counsel can conduct their ethically-mandated assessment of the potential conflict.*

Despite the Military Judge’s representation that when the SRT produce versions of AE 613(GOV) and AE 613A(GOV SRT), it would “alleviate some of (Defense Counsels’) concerns,” it has done no such thing. The Military Judge repeatedly professed to appreciate Defense Counsels’ ethical obligation to personally assess the presence of a conflict of interest. Currently, no information has been provided that dispels the substantiated fears of Defense Counsel. Specifically, none of the information provided in SSG Skeete’s declaration has been refuted or

denied. Until such time as Defense Counsel is permitted to fulfill its ethical and constitutional obligations, all proceedings should be cancelled.

7. Oral Argument:

Mr. bin 'Atash requests oral argument.

8. Witnesses:

None at this time.

9. Conference with Opposing Counsel:

The Special Review Team opposes “the filing of a renewed motion to cancel proceedings; we are aware of no new information that makes such a motion viable.”

10. Attachments:

A. Certificate of Service

11. Signatures:

/s/
CHERYL T. BORMANN
Learned Counsel

/s/
EDWIN A. PERRY
Detailed Defense Counsel

/s/
WILLIAM R. MONTROSS, JR.
Detailed Defense Counsel

/s/
MATTHEW H. SEEGER
MAJ, USA
Detailed Military Counsel

Attachment A

CERTIFICATE OF SERVICE

I certify that on 1 March 2019, I electronically filed with the Trial Judiciary, AE 615T(WBA), Renewed Defense Motion to Cancel Proceedings Pending Conclusion of Full FBI Investigation, and served a copy on all counsel of record.

/s/

CHERYL T. BORMANN
Learned Counsel