

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 615V (GOV SRT)

**Consolidated Response by
Special Review Team to**

**Mr. Mohammad's Motion to Reconsider
AE 613E/615P Ruling**

And

**Mr. Mohammad's Motion to Compel
Discovery from Special Trial Counsel**

And

**Mr. bin 'Attash's Renewed Defense
Motion to Cancel
Proceedings Pending Conclusion of Full
FBI Investigation**

8 March 2019

1. Timeliness

This consolidated response by the Special Review Team ("SRT") to AE 615R (KSM), Mr. Mohammad's Motion to Reconsider AE 613E/615P Ruling; AE 615S (KSM), Mr. Mohammad's Motion to Compel Discovery from Special Trial Counsel; and AE 615T (WBA), Mr. bin 'Attash's Renewed Defense Motion to Cancel Proceedings Pending Conclusion of Full FBI Investigation, is timely filed pursuant to the Commission's order of 5 March 2019. AE 615U.

2. Relief Sought

The SRT respectfully requests that the Commission deny Mr. Mohammad's motion to reconsider the AE 613E/615P Ruling, which asserts that the Commission's Ruling in AE613E/615P misunderstood the scope of the conflict burdening Mr. Mohammad's Defense

Team. The SRT likewise respectfully requests that the Commission deny Mr. bin 'Attash's renewed motion to cancel the proceedings, which asserts that Defense Counsel has been unable to satisfy their separate and independent ethical responsibility to determine whether they are operating under a conflict of interest. Both Counsel claim, incorrectly, that the SRT's filings are insufficient to alleviate Defense Team concerns that they are the target of a Government investigation. Because the Commission has found, appropriately, that Defense Counsel was already in possession of sufficient information to make an independent ethical determination about the existence of a conflict at the time of the 28 January 2019 hearing, and because Mr. Mohammad's Defense Team is not even remotely connected to the pending investigation, the SRT also respectfully asks the Commission to deny Mr. Mohammad's motion to compel discovery.

3. Burden of Proof

The Defense, as the moving party, must demonstrate by a preponderance of the evidence that the relief sought in AE 615R (KSM), AE 615S (KSM), and AE 615T (WBA) is warranted. R.M.C. 905(c)(1)-(2).

4. Facts

On 9 January 2019, Mr. bin 'Attash filed a motion to conduct an inquiry into an actual or potential attorney conflict of interest and to cancel proceedings until an inquiry had been completed. Based solely on the 20 December 2018 interview, Defense Counsel concluded that

Mr. bin 'Attash's team "is now laboring under a cloud of suspicion." AE 615 (WBA) at 2 (internal quotations omitted).

On 11 January 2019, Mr. Mohammad moved the Commission to suspend briefing deadlines pending a resolution of AE 615 (WBA).

On 17 January 2019, the SRT responded, asserting that there was no evidence that any current member of any Defense Team was under investigation. Therefore, there was no conflict of interest. Moreover, because the procedures outlined in AE 292QQ (as amended) were followed, the SRT asked the Commission to deny Mr. bin 'Attash's motion. AE 615D (GOV SRT). In support of this motion, the SRT provided a sworn declaration from FBI Supervisory Special Agent John Stofer (the "FBI Declaration"), avowing that a diligent search of the FBI's Central Records Systems had been completed and that "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, Attachment B, FBI Declaration at 2-3.

On 23 January 2019, Counsel for Mr. bin 'Attash and Mr. Mohammad filed replies to AE 615D (GOV SRT).

On 24 January 2019, by order of the Commission, the SRT provided an *ex parte* presentation to the Commission regarding the facts and circumstances surrounding the FBI investigation. This presentation included a thorough question and answer session to clarify and expand upon the points made in the initial Government notices and declarations, and the SRT provided a full description of the additional investigative steps contemplated by the FBI. During this presentation, the Commission asked the SRT to obtain a declaration from the 902d Military Intelligence Group, which is the only other government organization involved in the ongoing investigation. In addition, the SRT provided the Commission with a declaration from the Director

of Security, Washington Headquarters Services, Department of Defense (the “WHS Declaration”), establishing that no current Defense Team member is under any type of security clearance investigation save a routine re-investigation for renewal of clearances. A redacted version of this document was filed by the SRT on 25 January 2019. AE 615N (GOV SRT).

On 25 January 2019, the Commission issued AE613E/615P, granting Mr. bin ‘Attash’s request for a thorough inquiry into the potential conflict of interest. The Commission found, *inter alia*, that:

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.

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.

AE 613E/615P at 5-6. The Order further directed the SRT to provide AE 613 (GOV) and AE 613A (GOV SRT), redacted as necessary to protect the on-going investigation, to Defense Counsel no later than 8 February 2019.

On 28 January 2019, the Commission conducted a lengthy hearing, spanning a total of six hours, during which the Commission heard argument from the Defense Teams, including Counsel for Mr. bin ‘Attash and Mr. Mohammad. At the conclusion of this hearing, the Commission stated that “while it fully appreciates that the Defense Teams, through no fault of their own, do not have access to the same facts as either the Special Review Team or the Commission, [their] feelings, fears, assumptions, or suspicions do not constitute a legal standard relevant to conflicts of interest.” Tr. at 21546. The Commission reaffirmed its prior ruling that no member of the five Defense Teams is currently operating under a conflict of interest that would prohibit them from ethically representing their clients. Tr. at 21548. The Commission additionally found that the Defense Teams were already in possession of sufficient information, in the form of the FBI Declaration and the WHS Declaration, to support the Commission’s Ruling. Tr. at 21547.



On 8 February 2019, the SRT served upon Defense Counsel redacted versions of AE 613 (GOV), AE 613A (GOV SRT), and the ACICA Declaration. On 14 February 2019, the SRT successfully filed these documents with the Commission. AE 615Q (GOV SRT).

On 26 February 2019, Counsel for Mr. Mohammad filed a motion requesting that the Commission reconsider its ruling in AE 613E/615P (AE 615R (KSM)), and a second motion to

compel discovery from the Special Trial Counsel (AE 615S (KSM)). On 1 March 2019, Counsel for Mr. bin ‘Attash filed a motion to cancel proceedings pending the conclusion of the full FBI investigation. AE 615W (WBA).

5. **Overview**

In AE 615R, Counsel for Mr. Mohammad asserts that the Commission misunderstands the scope of the conflict burdening Counsel because it did not acknowledge the extensive record evidence of the what the Defense characterizes as the Government’s “persistent efforts to pressure defense team members into becoming moles.” AE615R at 3. In AE 615T, Counsel for Mr. bin’ Attash asserts that Defense Counsel have been unable to satisfy their separate and independent ethical responsibility to determine whether they are operating under a conflict of interest. Both Counsel assert that the redactions to the materials provided by the SRT on 14 February 2019 have rendered those materials insufficient to alleviate Defense Counsel’s concerns. In AE 615S, Mr. Mohammad asks the Commission to compel the SRT to provide additional discovery from the ongoing investigation.

Justice does not require the Commission to reconsider its ruling in AE 613E/615P or its oral reaffirmation of that ruling after conducting a thorough hearing into the potential conflict of interest on 28 January 2019. The Defense Teams are in possession of sufficient information to support the Commission’s ruling and to satisfy their own ethical obligations in determining whether a conflict exists. The Commission should therefore deny all three pending motions.

6. Law and Argument**A. There Is No Conflict of Interest Because There Is No Investigation into Any Current Defense Team Member.**

As the Commission has articulated, repeatedly, Mr. Mohammad's Defense Team is not even remotely connected to the subject matter of the investigation. AE 613E/615P at 7, Tr. 21527 ("So I guess what I'm failing to see, Mr. Nevin, is . . . how, using the English language, I can be any more clear about that factual assertion . . . [A]side from Ms. Bormann's team, none of the other teams are even remotely connected to this investigation.") Mr. Mohammad now alleges that the Commission has failed to consider the prior history of alleged Government intrusions, as set forth at the 28 January 2019 hearing. As the Commission correctly found, these suspicions or fears are insufficient under the law to establish that Mr. Mohammed's Defense Team is laboring under a conflict of interest. Where there is no investigation of Counsel at all, as is the case here, courts have held that there is no possibility of a conflict. This makes sense: where there is no threat of prosecution, Counsel has neither an incentive to pull punches nor a reason to fear exposing his or her culpability. For example, in *Harrison v. Motley*, 478 F.3d 750 (6th Cir. 2007), a capital case, the court of appeals stated: "Although a conflict of interest may arise where Defense Counsel is subject to a criminal investigation, see *Taylor v. United States*, 985 F.2d 844, 846 (6th Cir. 1993), we have noted previously that '[t]here lacks any controlling authority to support the proposition that an attorney's fear of investigation may give rise to a conflict of interest.'" *Id.* at 757 (quoting *Moss*, 323 F.3d at 473) (emphasis in *Harrison*); see also AE 292QQ (as amended) at 26 (recognizing and adopting this rule).

The Commission has appropriately conducted portions of its thorough inquiry into this investigation *ex parte* and *in camera* in order to protect the integrity of an ongoing national security investigation. But the FBI Declaration makes clear that a diligent search of the FBI's Central

Records Systems was completed and that “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, Attachment B, FBI Declaration, at 2-3. The WHS Declaration establishes that no current Defense Team member is under any type of security clearance investigation save a routine re-investigation for renewal of clearances. AE 615N (GOV SRT). And the ACICA Declaration confirms that the only other Government agency involved in this investigation is the Army 902d Military Intelligence Group.¹ AE 615Q, Attachment B. Because there is no investigation into any current Defense Team member, there is no conflict.

Moreover, as the Commission correctly identified, the investigation involving a former member of the bin ‘Attash Defense Team only became known after that individual had left the team. The individual left the Defense Team on 7 December 2018; the individual was questioned by the FBI 13 days later, on 20 December 2018. As the Commission recognized in its rulings, a potential conflict only arises when the Defense Teams become aware of a pending investigation. Tr. at 21549. Here that did not happen until after the individual interviewed by the FBI had left the Defense Team. *Id.* See also AE 292QQ (as amended) (finding no conflict as to Mr. Mohammad where no Defense Team members knew of the existence of an FBI investigation into a team linguist). Justice does not require the Commission to reconsider its ruling that no conflict exists as to any of the five Defense Teams.

¹ Counsel for Mr. Mohammad asserts that there “remains a possibility that one of the many other agencies involved in this case is conducting its own investigation into the Defense teams.” AE 615R (KSM) at 17. This “possibility” is pure speculation, and the authorities cited herein make clear that fear of an investigation is not sufficient to establish a conflict.


B. Counsel for Mr. bin ‘Attash Has Sufficient Evidence to Support the Commission’s Ruling.

Counsel for Mr. bin ‘Attash assert, incorrectly, that they have been unable to satisfy their separate and independent ethical responsibility to determine whether they are operating under a conflict of interest. AE 615T (WBA). Mr. bin ‘Attash relies on *Holloway v. Arkansas*, 435 U.S. 475 (1978), to argue that the Commission must defer to Defense Counsel’s own averments that they are conflicted. See AE 615T (WBA) at 5-6, 18. However, *Holloway* involved a different kind of conflict from the one at issue here, and the rationale offered in that case for adopting Defense Counsel’s own assessment of whether they are burdened by conflict does not apply. In *Holloway*, the potential conflict arose from a single Counsel’s representation of multiple codefendants with potentially divergent interests—not a potential conflict from a criminal investigation of Defense Counsel as is alleged here. The Supreme Court in *Holloway* considered whether a defendant was deprived of his right to Counsel when the trial court denied Defense Counsel’s motion to appoint separate Counsel for codefendants and declined to inquire further into the risk of conflict arising from the joint representation. Defense Counsel in that case, who had been appointed to represent multiple codefendants in a state criminal trial, alerted the court that he faced a potential conflict of interest in light of confidential information he received from separate clients. *Id.* at 476. It was against this backdrop—in which confidential client communications formed the basis for the conflict-of-interest claim—that the Court noted that “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.’” *Id.* at 485 (*quoting State v. Davis*, 513 P.2d 1025, 1027 (1973)). Even in that context, the Court indicated that Defense Counsel’s own assessments of conflict are merely one of several persuasive

considerations, adding that its holding does not “preclude a trial court from exploring the adequacy of the basis of Defense Counsel’s representations regarding a conflict of interests” *Id.* at 487.

Mr. bin ‘Attash’s team has access to ample information to satisfy any separate and independent ethical responsibility to determine whether they are operating under a conflict of interest. Mr. bin ‘Attash has access to the unredacted FBI Declaration, which makes clear “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). The lightly-redacted WHS Declaration establishes that no current Defense Team member is under any type of security clearance investigation save a routine re-investigation for renewal of clearances. AE 615N (GOV SRT). And the ACICA Declaration, although heavily redacted to protect the ongoing investigation, nonetheless confirms that the only other Government agency involved in this investigation is the Army 902d Military Intelligence Group. AE 615Q (GOV SRT).

In AE 613E/615P, and again on 28 January 2019, the Commission directed the SRT to provide Mr. bin ‘Attash copies of AE 613 (GOV) and AE 613A (GOV SRT), redacted as necessary to protect the ongoing investigation. On 14 February 2019, the SRT provided these redacted documents to Defense Counsel, as well as a redacted version of the ACICA Declaration. Mr. bin ‘Attash alleges that these documents are “almost wholly redacted” and that the “few sentences and fragments of sentences that are not blackened out offer nothing that would serve to alleviate some of Defense Counsels’ concerns.” AE 615T (WBA) at 2 (quotations omitted). Likewise, Mr. Mohammad alleges that the materials provided by the SRT are “evasive and insubstantial” and “are inadequate to dispel the existence of a conflict of interest.” AE 615R (KSM) at 4.

These documents, filed by the SRT *ex parte* and *in camera*, were designed to provide the Commission 

[REDACTED]

[REDACTED]

[REDACTED] The redacted versions of these documents nonetheless provided important information to the Defense Teams, most notably the fact that no current Defense Team member is under investigation of any kind, and that no other Government agency is involved in the ongoing national security investigation besides the FBI and the 902d Military Intelligence Group.² AE 615Q Attachment B. These facts—and these facts alone—are all that is necessary to establish that the Defense Teams are not laboring under a conflict.

C. Counsel for Mr. Mohammad is Not Entitled to Discovery.

Mr. Mohammad has asked the Commission to compel the SRT to provide him with “information” and “documents” that “relate in any way to the investigation” described herein. AE 615S (KSM) at 1. The Commission has found, appropriately, that Mr. Mohammad is not in any way connected to the subject matter of the investigation. AE 613E/615P at 7, Tr. 21545-46. The SRT has abided by the Commission’s order to be “hypervigilant to any indication that the investigation’s focus has changed to encompass a current member of a Defense Team.” No such indication exists. Tr. 21548-49. Mr. Mohammad is not, therefore, entitled to discovery into the pending investigation.

7. **Oral Argument**

The Special Review Team does not request oral argument.

8. **Attachments**

A. Certificate of Service, dated 8 March 2019.

Respectfully submitted,

//s//

Jocelyn Ballantine
Fernando Campoamor-Sánchez
Kevin Driscoll
Vijay Shanker
Heidi Boutros Gesch

Special Review Team

ATTACHMENT A

CERTIFICATE OF SERVICE

I certify that on the 8th day of March 2019, I filed AE 615V (GOV SRT), the Consolidated Response by the SRT, and I served a copy on Defense Counsel of record by electronic mail.

//s//

Jocelyn Ballantine
Special Trial Counsel
Office of Military Commissions