

**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 615W(WBA)

Defense Reply to 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 ‘Atash’s Renewed Defense Motion to Cancel Proceedings Pending Conclusion of Full FBI Investigation

Date Filed: 13 March 2019

1. **Timeliness:** This reply is timely filed, pursuant to the Order of the Military Judge dated 5 March 2019. (AE 615U(ORD) at 2).
2. **Reply:** Counsel for Mr. bin ‘Atash cannot fulfill their ethical and constitutional responsibilities to ascertain whether they are operating under a conflict of interest; they are deprived of any facts from which to make that determination. The issue remains: what next? On 28 January 2019, the Military Judge acknowledged that Defense Counsel have a separate and independent obligation to conduct that assessment. (Tr. at 22157 (“I do understand and appreciate that counsel have that independent ethical duty.”)). The Military Judge also recognized the then-existing limitations on Defense Counsels’ ability to conduct that assessment. (Tr. at 22153 (“[O]ut of no fault of your own, [you] do not still have access to documents and presentations that were ex parte[.]”)) and sought to remedy the dearth of information. Unfortunately, the remedy issued by the Military Judge—specifically, ordering the Special Review team (“SRT”) to produce to Defense Counsel two pleadings—AE 613(GOV) and AE 613A(GOV SRT)—and instructing the SRT to “provide as much as they can without disclosing potentially ongoing investigations to the defense”

(Tr. at 22141)—has proven a failure. Certainly, the Military Judge’s expressed “hope that the documents that . . . are directed to be released will alleviate some of [Defense Counsels’] concerns” (Tr. at 22169) remains unfulfilled.

Contrary to the Military Judge’s Order, the SRT did not provide documents disclosing “as much as they can” sufficient to “alleviate some of [Defense Counsels’] concerns.” Instead, the SRT provided versions of AE 613(GOV) and AE 613A(GOV SRT) that were almost wholly redacted. In one instance, 31 consecutive pages are entirely blacked out. (AE 613(GOV), Attach. B at 1-31). What remained visible to Defense Counsel was already spoken aloud in court—before every party—or written in other unclassified filings well before the two heavily-redacted and now-classified pleadings were produced to Defense Counsel by the SRT. No new facts were disclosed from which any lawyer attempting to perform a conflict analysis might do so. In short, there was nothing new.

Unable to discharge their ethical and constitutional duties, Defense Counsel renewed their Motion to Cancel Proceedings Pending Conclusion of Full FBI Investigation on 1 March 2019. (AE 615T(WBA)). The Military Judge ordered expedited briefing on 5 March (AE 615U(ORD)); on 11 March the SRT filed its Consolidated Response. (AE 615V(GOV SRT)). Instead of addressing the distinct issues confronting Mr. bin ‘Atash’s Counsel, the SRT spoke broadly arguing that Mr. Mohammad’s Counsel and all 9/11 Defense Counsel are in the same position. Specific to Mr. bin ‘Atash, the SRT spent little effort defending its 14 February filing containing the heavily redacted copies of AE 613(GOV) and AE 613A(GOV SRT). Instead, the SRT made a sweeping claim that all Counsel, independent of AE 613(GOV) and AE 613A(GOV SRT), already have “access to ample information to satisfy any separate and independent ethical

responsibility to determine whether they are operating under a conflict of interest.” (AE 615V(GOV SRT) at 10).

The SRT identifies a piece of “ample information” as “the unredacted FBI Declaration” (AE 615D(GOV SRT), Attach. B), wherein a supervising FBI Agent, with no personal knowledge of the investigation, conducted a computer search and concludes “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 2-3). That “FBI Declaration” was filed and served on Defense Counsel on 17 January 2019. The SRT’s second example of “ample information” is described by the SRT as a “lightly-redacted WHS Declaration” (AE 615N(GOV SRT), Attach. B), containing the conclusion of an individual from the Washington Headquarters Service (“WHS”). That individual claims to have received reports from the Department of Defense’s Consolidated Adjudications Facility (“DOD CAF”) and asserts, without providing the underlying factual basis, “that the only pending security clearance actions for known defense team members of Mr. bin ‘Atash’s defense team are a routine Periodic Reinvestigation for [REDACTED] and a routine background investigation to upgrade the DoD security clearance for [REDACTED].” (AE 615N(GOV SRT), Attach. B. at 2). That “lightly-redacted WHS Declaration” was filed on 25 January 2019. (AE 615N(GOV SRT), Attach. B). The last piece of “ample information” available to Defense Counsel is a Declaration by the Deputy Director of the Army Counterintelligence Coordinating Authority—the so-called “ACICA Declaration.” (AE 615V(GOV SRT) at 5, 10). The SRT was forced to admit that the “ACICA Declaration” is “heavily redacted to protect the ongoing investigation” but explained that the document “nonetheless confirms that the only other Government agency involved in the investigation is the Army 902d Military Intelligence Group.” (AE 615V(GOV SRT) at 10). The

much as [the SRT] can” provide without compromising the ongoing investigation. (Tr. at 22142). Instead, on 14 February, the SRT provided heavily-redacted versions of AE613(GOV) and AE613A(GOV SRT) that offered no new information, requiring Defense Counsel for Mr. bin ‘Atash to file a Renewed Motion to Cancel Proceedings. (AE 615T(WBA)). Now, instead of reconsidering its approach and position—and providing the necessary information—the SRT cynically points Defense Counsel to documents that Defense Counsel already possessed and considered before the Judge’s 28 January order to provide additional facts. Defense Counsels’ concerns are not alleviated.

Second, the SRT pleading makes plain that the FBI and Army Counterintelligence Investigation involving a paralegal on Mr. bin ‘Atash’s Defense Team is far from over. Indeed, it now appears that the investigation is expanding. That information is chilling. Instead of alleviating Defense Counsels’ concerns, the filing by the SRT has only exacerbated them.

Finally, the credibility and behavior of the SRT has repeatedly been called into question in these proceedings. (AE 615J(WBA) at 8-10). And not only by Defense Counsel. (AE 292QQ(AMEND ORD) at 27 (Commission viewing the legal representations of the SRT “with a more jaundiced eye”)). Throughout its Response, the SRT continues to advance arguments and make claims that are suspect and borderline misleading. At some point, this Military Judge should give no credence to any argument by the SRT about Defense Counsels’ ethical responsibilities.

- a. **The SRT has utterly failed to provide “as much as they can” to permit Defense Counsel to fulfill their ethical and constitutional obligations.**

It would seem, to any objective person, that there must have been a fundamental misunderstanding on the part of the SRT: either the SRT did not understand what occurred at the

28 January hearing and the Military Judge’s intent “to give the defense as much as possible” or the SRT did not hear or appreciate the Military Judge’s directive “that the SRT [] provide as much as they can without disclosing potentially ongoing investigations to the defense.” (Tr. at 22142). Otherwise, unless motivated by deep cynicism, the SRT would never provide to Defense Counsel the almost wholly redacted versions of AE 613 and 613A that it did. (AE 615Q(GOV SRT)).

Notwithstanding the SRT’s motivations, the clear intent of the Military Judge—in directing the release of these pleadings to Defense Counsel—was to provide *additional* or *new* information to Defense Counsel to permit Counsel to perform their ethically-mandated duty to provide conflict-free representation to the client. See ABA Model Rule 1.7(a)(2); ABA Standards for Criminal Justice: Prosecution and Defense Function, (4th ed., 2015), Defense Function, Standard 4-1.7(b). Additional or new information was not provided. Now, in its Consolidated Response, the SRT continues to withhold any additional or new information; instead it points Defense Counsel to material that Counsel already possessed *before* the 28 January hearing. (AE 613V(GOV SRT) at 10).

Lacking any factual basis, the SRT claims that Defense Counsel “has access to ample information to satisfy any separate and independent ethical responsibility to determine whether they are operating under a conflict of interest.” (AE 613V(GOV SRT) at 10). The SRT claims that three documents constitute this “ample information.” The first is the FBI Declaration. (AE 615D(GOV SRT), Attach. B). But the FBI Declaration was possessed by Defense Counsel before the 28 January hearing. The FBI Declaration was produced on 17 January. It contained no new facts or information; everything in it was known and evaluated by Defense Counsel before 28 January. There is nothing new in the FBI Declaration that now serves to “alleviate some of [Defense Counsels’] concerns.” (Tr. at 22169).

The second document claimed as “ample information” available to Defense Counsel is the so-called “lightly-redacted WHS Declaration.” (AE 615N(GOV SRT), Attach. B). Like the FBI Declaration conclusions, Defense Counsel already possessed that “lightly-redacted WHS Declaration” before the 28 January hearing. It was filed on 25 January 2019. The SRT *now* pointing to that document as “ample information” disregards the clear intent of the Military Judge to provide Defense Counsel additional information to “alleviate some of [Defense Counsels’] concerns.” (Tr. at 22169).

Finally, the last piece of the “ample information” pointed to by the Government is the heavily-redacted “ACICA Declaration.” (AE 615Q(GOV SRT), Attach. B). That Declaration makes clear that the FBI is not the only agency conducting the investigation. Army Counterintelligence, namely, the Army 902nd Military Intelligence Group, is working with the FBI. (AE 615V(GOV SRT) at 10). That piece of information exacerbates the concerns of Defense Counsel.

Counsel for Mr. al Hawsawi prudently foresaw that it “remains to be seen” whether the SRT would “give the defense as much as possible.” (Tr. at 22142). That comment by Counsel for Mr. al Hawsawi drew immediate rebuke from the Military Judge: “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 . . . I think it’s somewhat disingenuous to say that the commission isn’t making efforts to try to resolve this conflict.” (Tr. at 22143). The “contents of what’s in there” no longer remains to be seen. There is nothing “in there,” and the concerns of Defense Counsel have not been alleviated. Unless and until the Military Judge gives meaning to its order, Counsel remain unable to fulfill their ethical responsibilities.

b. The SRT's filing only magnifies the cloud of suspicion and the threat of eventual prosecution that Defense Counsel currently labor under.

Rather than alleviating the concerns of Defense Counsel, the most recent filing by the SRT—AE 613V(GOV SRT)—exacerbates the cloud of suspicion under which Counsel labor. Right now, the primary source of Defense Counsel information related to the conflict comes from the declaration of their own paralegal. The Military Judge, in the 28 January 2019 hearing, noted that Defense Counsel for Mr. Mohammad's argument "assumes . . . that everything in that declaration is correct, would it not?" (Tr. at 22113). Counsel responded by asking, "Did somebody tell you something different? And if they did, then I stand ready to be filled in." (Tr. at 22114). The Military Judge refused to answer. But the Consolidated Response filed by the SRT provides some confirmation of the paralegal's rendition of the facts. The defense paralegal professed that there were multiple government agencies involved in his interrogation. (AE 615(WBA), Attach. B at 9 ("One man was self-described 'from another government agency' and one other man said he was from Army intelligence.")). That information has been confirmed by the SRT's pleading. (AE 613V(GOV SRT) at 10 (confirming presence and participation of Army 902d Military Intelligence Group)). Importantly, when presented with the opportunity to disavow facts contained in the paralegal's declaration, the SRT has issued neither general nor specific denials. Pointedly, there is nothing in the SRT filing refuting the assertion that 85 to 90% of the FBI questioning of the Defense paralegal involved Mr. bin 'Atash and the members of his Defense Team. (AE 615(WBA), Attach. B at 7-8). The unrefuted fact that at least 85% of the FBI's focus was on Mr. bin 'Atash and his counsel comprises a dark cloud of suspicion.

The SRT pleading—perhaps unwittingly—therefore provides even greater cause for concern. First, the SRT pleading confirms earlier statements by the paralegal and offers no

refutation of the more chilling and invasive facts contained in the same declaration. Second, the pleading is evidence that the investigation is not only still open, but potentially expanding. The SRT states that during the course of its *ex parte, in camera* presentation before the Military Judge, the SRT provided information about “additional investigative steps contemplated by the FBI.” (AE 615V(GOV SRT) at 3). This investigation is not nearing closure; it now poses additional risk. Finally, the SRT Response provides a little hint at the what the investigation might be related to. In AE 613T(WBA), Defense Counsel noted that the 31 completely-redacted pages provided by the SRT contained nothing; in AE 613V(GOV SRT), the SRT gave a cursory explanation that the

[REDACTED] and that has absolutely no connection to the activities of any Defense Team.” (AE 615V(GOV SRT) at 11 n.2). Defense Counsel do not know all of the intricacies and intimacies of each team member, including the Defense paralegal who is involved in the current FBI/Army 902d Military Intelligence Group investigation. With respect to the Defense paralegal here, Defense Counsel are aware of one incident in July 2018 involving the defense paralegal and military police. If the [REDACTED] involves the July 2018 incident, Mr. bin ‘Atash’s Defense Counsel were not only aware of the incident, but became involved in the incident, including the handling of potential evidence. Moreover, if the [REDACTED] regards the July 2018 incident, and that incident [REDACTED] Defense Counsel are now witnesses. That is a conflict. Obviously, Defense Counsel need additional information.

c. The SRT’s representations continue to be less than forthright.

The pleadings and representations of the SRT before the Military Commission have repeatedly been called into question—both as a matter of legal accuracy and as truthful and honest

disclosures. (AE 292QQ(AMEND ORD) at 27 (Commission “views . . . with a jaundiced eye” the legal representations of the SRT.); AE 302C(AMEND ORD) at 1-2 (“[T]he Commission is concerned the submissions of the Special Counsel have not adequately addressed a number of issues raised by the Defense as to the individuals contacted by the Federal Bureau of Investigation or the scope of any investigation concerning these cases.”); AE 292QQ(AMEND ORD) at 28 (“The parsing the assertions of the Government’s knowledge of *any* investigative or adverse actions being taken does not provide the Commission with the confidence necessary to make a definitive finding as to whether a conflict-of-interest exists.”)). The SRT does not redeem itself in this pleading.

The SRT makes much of the claim that “the investigation involving a former member of the bin ‘Atash Defense Team only became known after that individual had left the team.” (AE 615V(GOV SRT) at 8). Therefore, the SRT posits, there can be no conflict of interest, as the individual was no longer a member of the team. This position is intellectually dishonest. [REDACTED]

[REDACTED] At that time, it is true that Defense Counsel were unaware of the fact of the investigation. But it is also indisputable that [REDACTED] the Defense paralegal was an integral part of the Defense Team and was under the direct supervision of Defense Counsel. Defense Counsel became aware of the investigation on 20 December. If the investigation concerns activity that occurred while the individual was a member of the Defense Team, the investigation creates, at the very least, a potential conflict. The unsupported suggestion that no conflict exists because the Defense paralegal is now halfway around the world has no legal validity. This Military Judge must reject the SRT’s specious legal argument.

3. **Attachments:**

A. Certificate of Service

4. **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, U.S. Army
Detailed Military Counsel

Attachment A

CERTIFICATE OF SERVICE

I certify that on the 13th day of March 2019, I electronically filed, via e-mail, AE 615W(WBA), Defense Reply to 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 'Atash's Renewed Defense Motion to Cancel Proceedings Pending Conclusion of Full FBI Investigation, with the Trial Judiciary and, served a copy on all defense counsel of record and the Special Review Team. Per paragraph 4.e of AE 615B(ORD), the Prosecution has been given notice of the aforementioned filing.

/s/

CHERYL T. BORMANN
Learned Counsel