

**MILITARY COMMISSIONS TRIAL JUDICIARY  
GUANTANAMO BAY, CUBA**

UNITED STATES OF AMERICA

v.

KHALID SHAIKH MOHAMMAD, WALID  
MOHAMMAD SALIH MUBARAK BIN  
‘ATTASH, RAMZI BIN AL SHIBH, ALI  
ABDUL-AZIZ ALI, MUSTAFA AHMED  
ADAM AL HAWSAWI

**AE 615X (KSM)**

**Mr. Mohammad’s 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 ‘Attash’s Renewed  
Defense Motion to Cancel Proceedings Pending  
Conclusion of Full FBI Investigation

13 March 2019

**1. Timeliness.**

This Reply is timely filed pursuant to RC 3.7.e.

**2. Reply.**

The government argues: (1) there is no conflict of interest because there is no investigation into any current defense team member; (2) there is sufficient evidence to support the Military Judge’s ruling in AE 613E/615P; and (3) Counsel is not entitled to discovery.<sup>1</sup> As with the ruling in AE 613E/615P itself, the government ignores the potential conflict arising from counsel’s present inability to be assured of the confidentiality of privileged communications in light of *unrefuted* evidence that the government, once again, is attempting to infiltrate and/or has infiltrated protected defense team functions. Thus, the government

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<sup>1</sup> 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.

implicitly concedes that the Military Judge has acknowledged, but failed to resolve “an issue of grave concern,” which “may implicate . . . the government's access to attorney-client material.”<sup>2</sup>

In turn, the government’s limited analysis of the potential conflict arising from the continuing national security investigation simply rests on the Commission’s finding that “no other Defense Team is even remotely connected to the subject matter of the investigation, and therefore is absolutely without conflict as a result of this issue.”<sup>3</sup> This is, however, precisely one of the unsupported findings that Mr. Mohammad moves the Military Judge to reconsider. The government’s response amounts to the circular argument that because the Military Judge has ruled already, the ruling cannot be reconsidered, which is obviously contradicted by the very presence of a reconsideration remedy in the Rules for Military Commissions.<sup>4</sup>

Reconsideration is particularly appropriate when, as here, a tribunal has “patently” misunderstood the parties, made a decision beyond the adversarial issues presented, [or] made an error in failing to consider controlling decisions or data.” *Lyles v. District of Columbia*, 65 F.Supp.3d 181, 188 (D.D.C. 2014) (citations omitted). *See, also, Palmer v. Champion Mort.*, 465 F.3d 24, 30 (1st Cir. 2006) (motion for reconsideration has colorable basis where the tribunal “has misapprehended some material fact or point of law”). The government Response fails to address the significant grounds raised in AE 615R<sup>5</sup> regarding the Military Judge’s failure to meaningfully investigate or resolve issues arising from the government’s demonstrated efforts to

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<sup>2</sup> Unofficial/Unauthenticated Transcript (“Transcript”) at 22138.

<sup>3</sup> AE 613E/615P RULING, 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, 25 January 2019, at 7.

<sup>4</sup> Rules for Military Commissions, Rule 905(f); *see also, Lyles v. District Court of Columbia*, 65 F.Supp.3d 181, 188 (D.D.C. 2014) (citations omitted); *Palmer v. Champion Mort.*, 465 F.3d 24, 30 (1st Cir. 2006) (motion for reconsideration has colorable basis where the tribunal “has misapprehended some material fact or point of law”).

<sup>5</sup> AE 615R (KSM), Mr. Mohammad’s Motion To Reconsider AE 613E/615P RULING, 26 February 2019.

obtain confidential information about *all* defense teams' functioning. Neither does the Response explain why the SRT's representations regarding the potential targets of the investigation should now be taken at face value given its past misleading statements. On the contrary, reconsideration of the Commission's ruling in AE 613E/615P is both proper and necessary to resolve the question of whether conflicts of interest exist.

*a. The Military Judge's inquiry has yet to dispel the existence of conflicts of interest.*

The government repeatedly stresses that the declarations it provided from the Federal Bureau of Investigation, Washington Headquarters Service, and Army Counterintelligence prove conclusively "that no current Defense Team member is under investigation of any kind, [REDACTED]

[REDACTED]

[REDACTED]

Nothing in the factual record, however, supports this sweeping, conclusive assertion. The record instead lacks any indication that the Military Judge addressed, let alone had a reliable basis to resolve, the constitutionally significant questions arising from the interrogation of Mr. bin 'Attash's former paralegal about other defense teams. Neither has there been a determination – nor the suggestion that it is supported by heretofore undisclosed government representations made *ex parte* to the Military Judge – that the government is not continuing to coerce defense team members into revealing confidential information about defense teams' work.

The sworn declaration from Mr. bin 'Attash's former paralegal states that, during his interrogation, government agents "asked about the other defense teams and the other

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<sup>6</sup> AE 615V [REDACTED]; see also, *id.* [REDACTED]

defendants.”<sup>7</sup> None of the government’s pleadings or arguments even attempts to explain or refute this fact. Indeed, the government has ignored the declaration almost entirely, never providing any explanation to Mr. Mohammad’s counsel why the investigation began or why an investigation that is purportedly *not* focused on current team members would have necessitated questions about the other teams. Counsel acknowledged that explanations were potentially available, and implored the Military Judge and the government to provide them.<sup>8</sup> Against this backdrop the absence of a response speaks volumes. The unrefuted fact that the paralegal was asked about the inner workings of other defense teams necessarily raises the specter of either a broader investigation potentially implicating Mr. Mohammad’s team and/or the continuing efforts of the government to breach the protected areas of his team’s functioning. Indeed, such explanations of government overreaching bear a striking similarity to the motivations for previous investigations known to have targeted Mr. Mohammad’s defense team.

The AE 292 series is instructive here. On 9 October 2014, the STC asserted that “the FBI Preliminary Investigation has been closed and . . . there is no other pending FBI investigation of any member of the RBS defense team.”<sup>9</sup> Only two months later, however, “[i]n December 2014,

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<sup>7</sup> 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, 9 January 2019, Attachment B, at ¶ 32.

<sup>8</sup> Transcript at 22166: “There’s not been an explanation that I’ve heard at this point for why these people are asking the team member questions about the other defense teams. And if that’s not investigation of the other defense teams, what is it? Is it just idle chatter or is it a rogue agent or is it -- what does it mean that there’s an investigation or that there’s no investigation?”

Somebody was obviously investigating the other teams, someone who claimed that they were an FBI agent. Was that a lie, too? An FBI agent is asking this person questions about my team. I mean, not -- I understand this is different -- I’m in a different position from Ms. Bormann, but they’re asking questions about my team. And they’re official law enforcement people. They’re investigators. They’re not investigating me? Okay. So great. They’re not investigating me. So what? The team member is lying?”

<sup>9</sup> AE 292HHH (GOV), Reply by Special Review Team To AE 292WW (RBS), Defense Response to SRT’s Motion for Reconsideration of AE 292QQ (Order), 9 October 2014, at 6.

the Under Secretary of Defense referred the allegations to the U.S. Department of Justice (DOJ) for a potential criminal investigation,”<sup>10</sup> and *another* FBI investigation was opened in January 2015. After an additional eight months of investigation, “the U.S. Attorney’s Office for the Northern District of Illinois declined to prosecute or file any charges.”<sup>11</sup>

This history is important in two respects. First, it reinforces the wisdom of carefully scrutinizing the representations of the STC that there is no current investigation of defense team members. It means at most that, at this moment, the FBI or Army Counterintelligence is not actively investigating a current defense team member. It does not foreclose the existence of a planned or contemplated future investigation – or even *current* investigations by other government entities – targeting team members. Second, it highlights that an assurance that ‘no defense member is under investigation’ is not the same as an assurance that no criminal charges, or administrative investigations, are being contemplated. The government has so far remained silent about whether any additional government action, such as a referral of criminal charges to the DOJ implicating any current – or former --defense team member, is being contemplated.

The government’s claim that counsel merely fears or suspects an investigation is incorrect. Counsel’s concerns are not speculative, rather they are founded on the government’s own admission of an ongoing investigation.<sup>12</sup> [REDACTED]

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<sup>10</sup> AE 292JJJJ ORDER Emergency Joint Defense Motion to Abate Proceedings and Inquire into Existence of Conflict of Interest Burdening Counsel’s Representation of Accused, 23 December 2015, at 6.

<sup>11</sup> Transcript at 8681.

<sup>12</sup> See, e.g., AE 615V (GOV SRT), [REDACTED] 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, Attachment B.

[REDACTED] Further, as the military judge found, “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.”<sup>14</sup> This strongly indicates to counsel that the suspected wrongdoing stems directly from the paralegal’s work on behalf of Mr. bin ‘Attash, rather than from some private transgression. As counsel are similarly situated and engage in much of the same work as the paralegal, counsel are rightly concerned that any investigation may implicate the activities of defense teams more broadly.

Irrespective of whether there *is* a conflict, the record currently demonstrates a significant possibility of a conflict. When such a possibility exists, “the court [has] a duty to inquire further.” *Holloway v. Arkansas*, 435 U.S. 475, 485 (1978). This inquiry must “*completely* explore and resolve” the possible conflict. *United States v. Levy*, 25 F.3d 146, 155 (2d. Cir. 1994)(emphasis added). Accordingly, the Military Judge must conduct additional inquiry into two unresolved questions: whether – and if so, why, and to what extent -- the government interrogated Mr. bin ‘Attash’s former paralegal regarding other defense teams; and whether the government is contemplating any future action against any member of the defense teams in light of the ongoing investigation. Only when these questions have been resolved can the Military Judge appropriately determine whether counsel are laboring under conflicts of interest.

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<sup>13</sup> AE 615V (GOV SRT), [REDACTED]  
[REDACTED]

<sup>14</sup> See AE 613E/615P quoting AE 292QQ *Amended* at 35.

*b. Evidence provided by the Special Trial Counsel fails to comply with the Commission's order*

The government again points to the FBI Declaration, the WHS Declaration, and the Army Counterintelligence Coordinating Authority (ACICA) Declaration to argue that the STC furnished to the defense teams evidence sufficient “to satisfy any separate and independent ethical responsibility to determine whether they are operating under a conflict of interest.”<sup>15</sup> Again, the record demonstrates the contrary.

In AE 613E/615P, the Military Judge directed the SRT to “provide redacted versions of AE 613 (GOV) and AE 613A (GOV SRT) to the Defense Teams . . . .”<sup>16</sup> The Military Judge’s express purpose for doing so was to provide information “*to assist in alleviating defense concerns*, given the unique nature of this case.”<sup>17</sup> What the government provided, however, was almost entirely redacted and of little substantive value. The government defends these submissions by arguing “[t]he redacted versions of these documents nonetheless provide important information to the Defense Teams, most notably the fact that no current Defense Team member is under investigation of any kind, [REDACTED]

[REDACTED]

[REDACTED]

Much like the Military Judge’s ruling in AE 613E/615P, the government’s conclusory description of its pleadings is vastly overstated. The declarations provided by the SRT only assert that the FBI, WHS, and Army Counterintelligence are not currently investigating any member of the defense teams. Apart from failing to explain why the agents *were* obviously

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<sup>15</sup> AE 615V (GOV SRT) at 9.

<sup>16</sup> AE 613E/615P at 8.

<sup>17</sup> Transcript at 22190-91 (*emphasis added*).

<sup>18</sup> AE 615V (GOV SRT) [REDACTED]

investigating the other defense teams and when if ever this investigation was closed, the declarations do not foreclose the possibility that another government agency is involved. Indeed, Mr. bin ‘Attash’s former paralegal stated that during his polygraph examination he was introduced to members of Army Counterintelligence and a man from “another government agency.”<sup>19</sup> As described in the government’s response, the ACICA declaration simply claims that “the only other Government agency involved in this investigation is the Army 902d Military Intelligence Group.”<sup>20</sup> The inconsistency with the declaration of the bin ‘Attash paralegal is unexplained. Was there truly a member of another government agency present? If not, did the FBI and Army Counterintelligence lie to the paralegal to make him believe there was? Unlike the Military Judge,<sup>21</sup> counsel cannot conclude a good faith effort to determine whether they labor under a conflict of interest without resolving these and other inconsistencies.<sup>22</sup> Indeed, the potential existence of an unidentified government agency whose participation in the current investigation is being concealed, or at least unexplained, significantly amplifies counsel’s concerns, rather than alleviating them in accordance with the Military Judge’s stated intent. Similarly, if the paralegal’s interrogators lied about their official capacity to insinuate one of them was from the CIA – similar to their use of false pretenses to lure the paralegal to the interrogation in the first place – this further supports the likelihood the agents were attempting to frighten the team member into disclosing confidential information and possibly agreeing to become a government agent. Accordingly, the evidence provided by the SRT to date has failed

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<sup>19</sup> AE 615 (WBA), Attachment B, at ¶ 36.

<sup>20</sup> AE 615V (GOV SRT), at 8.

<sup>21</sup> See Transcript, at 22113, ls. 20-2 (taking counsel to task for assuming that the former defense team member’s declaration is accurate).

<sup>22</sup> See, e.g., Transcript at 22164-5 (counsel arguing that the government might claim that the statement of affiliation with “another government agency” was never made, or that it was made, but was false, for example, to trick the former team member into cooperating). Without an explanation, however, Sixth Amendment-compliant counsel must take the assertion at face value.



to comply with the order in AE 613E/615P and is not sufficient to resolve legitimate concerns whether conflicts of interest exist.

*c. The Military Judge should grant Mr. Mohammad's motion to compel.*

In a single paragraph, the government asserts simply that Mr. Mohammad is not entitled to discovery because the Military Judge “has found, appropriately, that Mr. Mohammad is not in any way connected to the subject matter of the investigation.” As noted above, however, counsel are very much affected by the current investigation. The discovery of the requested information is particularly important given the lengthy history of government intrusions into the defense function and, as noted above, the government’s repeated inability to provide forthright information to the Military Judge or the defense about its activities. Accordingly, discovery of the requested information is necessary under R.M.C. 701(c)(1), R.M.C. 701(e), and the Fifth, Sixth, and Eighth Amendments to the United States Constitution. Judge Pohl ordered similar discovery during the AE 292 litigation,<sup>23</sup> and Judge Parrella also acknowledged that discovery of this type “may be an issue of grave concern and may implicate some other aspect of, you know, attorney-client -- the government's access to attorney-client material, things of that nature ... .”<sup>24</sup> The SRT’s breezy response fails to explain why this discovery should not be ordered.

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<sup>23</sup> AE 292VV (KSM), Defense Motion to Compel Discovery Related to Interference with Defense Function by the United States, 13 August 2014 at 3 (noting that SRT did not oppose provision of discovery to defense counsel once conflict issue was resolved); AE 292AAA (GOV), Special Review Team's Response to Defense Motion to Compel Discovery Related to Interference with Defense Function by the United States (AE 292VV (Mohammad) and AE 292VV (AAA)), 12 September 2014 at 2 (confirming willingness to provide discovery); AE 292JJJJ, ORDER Emergency Joint Defense Motion to Abate Proceedings and Inquire into Existence of Conflict of Interest Burdening Counsel’s Representation of Accused, 23 December 2015 at 13 (granting the motions to compel discovery).

<sup>24</sup> Transcript at 22138.

3. **List of attachments.**

A. Certificate of Service.

Respectfully submitted,

//s//

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//s//

GARY D. SOWARDS  
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//s//

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//s//

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# ATTACHMENT A

Filed with TJ  
13 March 2019

Appellate Exhibit 615X (KSM)  
Page 11 of 12

**CERTIFICATE OF SERVICE**

I certify that on the 13<sup>th</sup> day of March 2019, I caused to be electronically filed AE 615X (KSM) Mr. Mohammad's Reply to AE 615V (GOV SRT) Consolidated Response with the Chief Clerk of the Military Commissions Trial Judiciary and delivered the foregoing on all parties by electronic mail, serving only Special Trial Counsel on behalf of the prosecution.

//s//  
DAVID Z. NEVIN  
Learned Counsel