

MILITARY COMMISSIONS TRIAL JUDICIARY  
GUANTANAMO BAY, CUBA

<p>UNITED STATES OF AMERICA</p> <p>v.</p> <p><b>KHALID SHAIKH MOHAMMAD, WALID MUHAMMAD SALIH MUBARAK BIN 'ATTASH, RAMZI BIN AL SHIBH, ALI ABDUL AZIZ ALI, MUSTAFA AHMED ADAM AL HAWSAWI</b></p>	<p>AE 613G/615Y</p> <p><b>CONSOLIDATED RULING</b></p> <p><b>Mr. Mohammad's Motion to Reconsider</b> AE 613E/615P Ruling;</p> <p><b>Mr. Mohammad's Motion to Compel</b> Discovery from Special Trial Counsel;</p> <p>And</p> <p><b>Renewed Defense Motion to Cancel</b> Proceedings Pending Conclusion of Full FBI Investigation</p> <p><b>20 March 2019</b></p>
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**1. Procedural History.**

a. The Commission adopts and incorporates the procedural history set forth in its prior written ruling,<sup>1</sup> as well as the recitation of facts set forth in paragraph 4 of the Special Review Team (SRT)'s Consolidated Response to the present Defense Motions.<sup>2</sup>

b. On 25 January 2019, after conducting a thorough inquiry into the possible conflict of interest stemming from the investigation of a former defense paralegal, the Commission issued a written ruling in which it specifically found the following (emphasis added for purposes of this analysis):

**“Based on the totality of information, this Commission is thoroughly satisfied 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. In addition, this**

<sup>1</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, dated 25 January 2019 at 1-4.

<sup>2</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, filed 11 March 2019 at 2-6.

Commission is also satisfied that **no member of the five (5) Defense Teams is under any other type of investigation**, to include non-routine security clearance investigations. As such, the Commission 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.**<sup>3</sup>

c. In addition to finding there existed **no conflict of interest**, the Commission also directed the SRT: (1) to provide the Defense Teams with copies of its two *ex parte* filings, redacted as necessary to protect the ongoing investigation into any person or persons not on the Defense Teams; and (2) to obtain a declaration from the other military organization involved in the investigation regarding their involvement in the investigation and thereafter to provide a redacted version of said declaration to the Defense Teams. Lastly, the Commission directed that the transcript of the SRT's *ex parte* presentation to the Military Judge, and all exhibits received as part of the presentation, be sealed and made a part of the appellate record.

d. On 28 January 2019, during the next hearing at Naval Station Guantanamo Bay, Cuba, the Commission also afforded Defense Counsel the opportunity to be heard on the conflict of interest issue.<sup>4</sup> Four of the five Defense Teams articulated their concerns and voiced frustration at not being able to examine all of the information available to the SRT and the Commission.<sup>5</sup> After evaluating the presentations of the parties, the Commission reaffirmed its earlier written ruling regarding the non-existence of a conflict of interest for any members of any of the five Defense Teams.<sup>6</sup> The Commission further held, "if counsel choose not to participate, notwithstanding clear findings by the commission issued after a careful factual inquiry, then this

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<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, dated 25 January 2019 at 6.

<sup>4</sup> Unofficial/Unauthenticated Transcript of the *U.S. v. Khalid Shaikh Mohammad*, et al., Motions Hearing dated 28 January 2019 from 9:11 A.M. to 4:35 P.M., at 22105.

<sup>5</sup> Transcript at 22105-22158 and 22161-22186.

<sup>6</sup> Transcript at 22187-22192.

would constitute waiver of their right to participate.”<sup>7</sup> Nevertheless, Counsel for Mr. Mohammad and Mr. bin ‘Attash indicated that they intended to refuse to actively participate in the proceedings until they could independently verify that no conflict existed.<sup>8</sup>

e. On 15 February 2019, Mr. Mohammad filed a motion with the United States Court of Military Commission Review (U.S.C.M.C.R.) to suspend the briefing schedule for an interlocutory appeal in this Commission case “until such time as his counsel are provided information sufficient to resolve” the perceived potential conflict of interest that is the subject of the AE 613 and AE 615 series.<sup>9</sup>

f. On 26 February 2019, Counsel for Mr. Mohammad filed a motion requesting the Commission reconsider its ruling in AE 613E/615P on the basis that the “Military Judge misunderstood the scope of the conflict burdening Mr. Mohammad’s counsel.”<sup>10</sup> Counsel for Mr. Mohammad also filed a motion requesting the Commission compel discovery from the Special Trial Counsel related to the investigation described in AE 615, Attachment B, the declaration of SSG Brent Skeete, a former paralegal assigned to the bin ‘Attash Defense Team.<sup>11</sup> Counsel for Mr. Mohammad requested oral argument on both motions.

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<sup>7</sup> Transcript at 22192.

<sup>8</sup> Notably, counsel for Mr. bin ‘Attash chose to participate in a Rule for Military Commissions (R.M.C.) 505(h) hearing on 29 January 2019, before indicating an intent to not participate in proceedings subsequent thereto. The issue was rendered temporarily moot by the cancellation of the week’s proceedings due to a medical emergency involving the Military Judge. In a later filing in regard to the hearings scheduled for March 2019, Counsel for Mr. Mohammad informed the Commission that “Mr. Mohammad’s defense counsel have been advised that the multiple, unresolved potential conflicts require them constitutionally, ethically, and professionally to refrain from litigating matters in this case other than those necessary to secure a thorough and reliable resolution of their potential conflicts of interest –*i.e.*, the AE 613 and AE 615 series of pleadings and the request for recusal due to conflict of interest of the Military Judge – until such time as defense counsel are able to secure such a resolution.” AE 619I (KSM), Mr. Mohammad’s Notice of Partial Declination of Joinder to Proposed Order of March, filed 13 March 2019 at 2. The Commission notes that Counsel for Mr. Mohammad did not disclose from whom they have received said “advice,” nor what facts the advisor was provided and/or which served as the basis for said advice.

<sup>9</sup> *U.S. v. Khalid Shaikh Mohammad, et al.*, Mr. Mohammad’s Motion to Suspend Briefing Pending Resolution of Potential Conflict of Interest of Counsel, filed with the U.S.C.M.C.R. on 15 February 2019.

<sup>10</sup> AE 615R (KSM), Mr. Mohammad’s Motion to Reconsider AE 613E/615P Ruling, filed 26 February 2019.

<sup>11</sup> AE 615S (KSM), Mr. Mohammad’s Motion to Compel Discovery from Special Trial Counsel, filed 26 February 2019

g. On 1 March 2019, Counsel for Mr. bin 'Attash filed a "renewed" motion<sup>12</sup> requesting the Commission "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." Counsel for Mr. bin 'Attash also requested oral argument.<sup>13</sup>

h. On 5 March 2019, the Commission ordered an expedited briefing cycle for the two motions raised by Mr. Mohammad and the one motion raised by Mr. bin 'Attash.<sup>14</sup>

i. On 6 March 2019, the U.S.C.M.C.R. denied Mr. Mohammad's request to suspend the briefing schedule, finding that there was "no good reason to delay further Appellee Mohammad's obligation to file a brief in opposition to the government's appeal on the merits."<sup>15</sup>

j. On 11 March 2019, the SRT filed a consolidated response in accordance with the expedited briefing order.<sup>16</sup>

k. On 13 March 2019, Counsel for Mr. bin 'Attash filed AE 615W (WBA) in reply.<sup>17</sup>

l. On 13 March 2019, Mr. Mohammad filed a motion with the U.S.C.M.C.R requesting

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<sup>12</sup> AE 615T (WBA), Renewed Defense Motion to Cancel Proceedings Pending Conclusion of Full FBI Investigation, filed 1 March 2019.

<sup>13</sup> *Id.* at para. 7.

<sup>14</sup> AE 615U, Expedited Briefing Order, Mr. Mohammad's Motion to Reconsider AE 613E/615P Ruling and Mr. Mohammad's Motion to Compel Discovery from Special Trial Counsel and Renewed Defense Motion to Cancel Proceedings Pending Conclusion of Full FBI Investigation, dated 5 March 2019.

<sup>15</sup> *U.S. v. Khalid Shaikh Mohammad, et al.*, Order Resolving Motion to Suspend Briefing; Motion to Exceed Page Limits, Joinder; and Revised Briefing Schedule, U.S.C.M.C.R. Case No 17-003, 6 March 2019 at 4.

<sup>16</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, filed 11 March 2019.

<sup>17</sup> 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, filed 13 March 2019.

reconsideration of that court's denial of his 15 February 2019 motion to suspend the briefing schedule.<sup>18</sup>

2. **Findings of Fact.** The Commission adopts and incorporates its Finding of Facts as set forth in its prior written<sup>19</sup> and oral<sup>20</sup> rulings.

3. **Law.**

a. **Reconsideration.**

Rule for Military Commissions (R.M.C.) 905(f) permits the Commission to reconsider any ruling (except the equivalent of a finding of not guilty) prior to authentication of the record of trial. Either party may move for reconsideration, but granting such a request is in the Military Judge's discretion. Generally, reconsideration should be based on a change in the facts or law, or instances where the ruling is inconsistent with case law not previously briefed.

Reconsideration may also be appropriate to correct a clear error or prevent manifest injustice. *See United States v. Libby*, 429 F. Supp. 2d 46 (D.D.C. 2006); *United States v. McCallum*, 885 F. Supp. 2d 105 (D.D.C. 2012). Motions for reconsideration, however, are not appropriate to raise arguments that could have been, but were not raised previously, or arguments the Commission has previously rejected. *See United States v. Booker*, 613 F. Supp. 2d 32 (D.D.C. 2009); *United States v. Bloch*, 794 F. Supp. 2d 15, 19 (D.D.C. 2011).

b. **Conflict of Interest.**

Accused are entitled to the undivided loyalty of their Counsel, and by extension, of the

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<sup>18</sup> *U.S. v. Khalid Shaikh Mohammad, et al.*, Mr. Mohammad's Motion to Reconsider Order Resolving Motion to Suspend Briefing Pending Resolution of Potential Conflict of Interest of Counsel, filed with the U.S.C.M.C.R. on 13 March 2019.

<sup>19</sup> AE 613E/615P at 4-6.

<sup>20</sup> Transcript at 22187-22192.

paralegals and other support members of the Defense Team who fall under the umbrella of privilege,<sup>21</sup> as a critical component of their right to assistance of counsel.<sup>22</sup> Defense counsel who are facing a conflict of interest may deprive an accused of representation by competent counsel unless there is an affirmative waiver, by an accused on the record, after an appropriate appraisal of his right to conflict free counsel<sup>23</sup> or a judicial inquiry finds there is no actual conflict.<sup>24</sup>

Trial courts have a duty to inquire into possible conflicts of interest “not only when defendants object to a possible conflict, but also when trial judges are or should be independently aware of a possible conflict.” *Mountjoy v. Warden*, 245 F.3d 31, 38 (1st Cir. 2001) (citing *Wood v. Georgia*, 450 U.S. 261, 101 S.Ct. 1097, 67 L.Ed.2d 220 (1981)).<sup>25</sup> As discussed by the Second Circuit Court of Appeals in 1998:

When the trial court knows or reasonably should know of the possibility of a conflict of interest, it has a threshold obligation to determine whether the attorney has an actual conflict, a potential conflict, or no conflict.

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If, as a result of its inquiry, the court concludes that there is no conflict, and therefore no need to disqualify the attorney or to hold a *Curcio*<sup>26</sup> hearing, a defendant’s claim that such a conclusion was in error will not establish a violation of the Sixth Amendment right to effective assistance of counsel unless the defendant can demonstrate that the attorney had either “(1) a potential conflict of interest that resulted in prejudice to the defendant, or (2) an actual conflict of interest that adversely affected the attorney’s performance.”

<sup>21</sup> Para. 2c, *Second Amended Protective Order #1, To Protect Against Disclosure of National Security Information*, dated 16 December 2013 (AE 013BBB).

<sup>22</sup> Discussion to R.M.C. 901(d)(3): “Counsel may be disqualified because...of actions which are inconsistent with the role of counsel.” See also Para. (B), Discussion to R.M.C. 502(d)(7): “Defense counsel must: ...disclose to the accused any interest defense counsel may have in connection with the case, any disqualification, and any other matter which might influence the accused in the selection of counsel; represent the accused with undivided fidelity and may not disclose the accused’s secrets or confidences except as the accused may authorize...”

<sup>23</sup> Discussion to R.M.C. 502(d)(7) para. (B).

<sup>24</sup> *United States v. Jones*, 662 F.3d 1018 (8th Cir. 2011); *Ausler v. United States*, 545 F.3d 1101 (8th Cir. 2008); *United States v. Blount*, 291 F.3d 201 (2d Cir. 2002); *United States v. Lee*, 589 F.2d 980 (9th Cir.1979).

<sup>25</sup> See also Discussion to R.M.C. 901(d)(3) (“If it appears that any counsel may be disqualified, the military judge should conduct an inquiry or hearing.”).

<sup>26</sup> Within the Second Circuit, a *Curcio* hearing refers to a proceeding to determine whether a defendant will knowingly and intelligently waive his right to conflict-free representation. See *United States v. Curcio*, 680 F.2d 881 (2d Cir. 1982).

*United States v. Kliti*, 156 F.3d 150, 153 (2d Cir. 1998) (citing *United States v. Jiang*, 140 F.3d 124 (2d Cir. 1998); *United States v. Leslie*, 103 F.3d 1093 (2d Cir. 1997); *United States v. Stantini*, 85 F.3d 9 (2d Cir. 1996); and *United States v. Levy*, 25 F.3d 146 (2d Cir. 1994) (internal citations omitted).

Although the existence of a criminal investigation into a member of a defense team may give rise to a possible conflict of interest, the mere fear of such an investigation does not. *Harrison v. Motley* 478 F.3d 750 (6th Cir. 2007), citing *Moss v. United States*, 323 F.3d 445, 473 (6th Cir. 2003).<sup>27</sup> As previously noted by this Commission, “a fear of what *might occur* does not create an actual conflict.”<sup>28</sup>

In *United States v. Watkins*,<sup>29</sup> the Navy-Marine Corps Court of Criminal Appeals recently addressed a scenario in which a civilian attorney sought to withdraw from representing the accused after the civilian attorney and Regional Trial Counsel (RTC) had an angry off-the-record exchange that left the civilian attorney believing he was suspected of wrongdoing. During the exchange, the civilian attorney claimed the RTC made a very loud assertion that “[t]his isn’t over,” which the civilian attorney took to mean that the government intended to pursue a bar complaint, an ethical complaint, or some other action related to obstruction of justice. In response, the military judge conducted an inquiry on the record, which included taking the testimony of the RTC and the lead Naval Criminal Investigative Service (NCIS) agent. Despite the civilian attorney’s representation that he felt conflicted, the military judge denied his motion

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<sup>27</sup> See also *United States v. Garcia-Pastrana*, 584 F.3d 351 (1st Cir. 2009), *cert. denied*, 559 U.S. 986 (2010) and *cert. denied*, 560 U.S. 916 (2010); *United States v. Murray*, 2009 WL 1382292 (N.D.N.Y. 2009), *aff’d*, 414 Fed. Appx. 318 (2d Cir. 2011).

<sup>28</sup> AE 292QQ, Amended Order, Emergency Joint Defense Motion to Abate Proceedings and Inquire into Existence of Conflict of Interest Burdening Counsel’s Representation of Accused, dated 16 December 2014 at 26.

<sup>29</sup> *United States v. Watkins*, No. 201700246, 2019 WL 937192 (N.M.C.C.A. 21 February 2019).

to withdraw, finding no evidence tending to prove either misconduct by the civilian attorney, or an intent by the government to take any action against him. The Navy-Marine Corps Court of Criminal Appeals (N.M.C.C.A.) affirmed the trial court's factual determination of "no conflict of interest" because it was based on the representations of the RTC that he "had no evidence that [the attorney] had committed misconduct and no plans to pursue any legal or professional sanctions against him."<sup>30</sup> Likewise, the Navy Criminal Investigator had indicated that she "had no plans to investigate [the attorney]."<sup>31</sup> In affirming the trial military judge's findings, the N.M.C.C.A. held:

"Having accept[ed] the military judge's finding that Mr. W was not suspected of participating in any misconduct and not the subject of any government investigation, we are left to conclude that Mr. W did not have any conflict of interest that should have precluded his representation of the appellant. . . . [w]hile Mr. W was emphatic about his subjective sense that the representation involved a conflict, he was, after having been given many opportunities, unable to articulate a course of action that was foreclosed to the appellant by virtue of his representation. We find that Mr. W's subjective sense of conflict does not by itself create a conflict of interest that should have precluded his participation in this case."

*Id.* at 8; *citing Tueros v. Greiner*, 343 F.3d 587, 597 (2d Cir. 2003) (determination of whether a conflict of interest exists turns on analysis of "actual duties" rather than an attorney's subjective sense of conflict) (per Sotomayor, J.).

Additionally, Rule 1.16 of the American Bar Association (ABA) Model Rules of Professional Conduct, as well as the military service-specific rules applicable to Judge Advocates, recognize that situations may arise wherein an attorney may believe that he or she is ethically prohibited from representing an accused (due to a conflict of interest or other some ethical consideration), but is nonetheless ordered to continue representation by a tribunal or other

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<sup>30</sup> *Id.* at 8.

<sup>31</sup> *Id.*



competent authority.<sup>32</sup> In such situations, the lawyer is required to continue to represent the accused, even if good cause exists for terminating the representation.<sup>33</sup> *See also Hawkins v. Commission for Lawyer Discipline*, 988 S.W.2d. 927, 934-35 (Tex. Crim. App. 1999), *cert denied*, 529 U.S. 1022 (2000) (affirming disciplinary proceedings against an attorney who refused to continue his representation of a criminal defendant, but noting that the attorney would have been shielded from ethical repercussions had he followed the trial judge's order).<sup>34</sup>

**c. Discovery.**

The Government must disclose to the Defense the existence of evidence known to the Trial Counsel which reasonably tends to (1) negate the guilt of the accused of an offense charged, (2) reduce the degree of guilt of the accused of an offense charged, or (3) reduce the punishment. *United States v. Graner*, 69 M.J. 104, 107 (C.A.A.F. 2010). "Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." *Id.*

Upon request, the Government is required to permit the Defense to examine several classes of materials which are "within the possession, custody, or control of the Government, the existence of which is known or by the exercise of due diligence may become known to trial counsel, and which are material to the preparation of the defense or are intended for use by the trial counsel as evidence in the prosecution case-in-chief at trial." R.M.C. 701(c)(1)-(3).

"This materiality standard normally 'is not a heavy burden,' rather, evidence is material as long as there is a strong indication that it will 'play an important role in uncovering admissible

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<sup>32</sup> ABA MODEL RULES OF PROF'L CONDUCT R. 1.16 (c); Model Rules of Prof'l Conduct for Lawyers, Dep't of Army, Reg. 27-26, Rule 1.16(c) (28 Jun 2018); Prof'l Conduct of Attorneys Practicing Under the Cognizance & Supervision of the JAG, JAGINST 5803.1E, Rule 1.16(c) (20 Jan 2015); Air Force Instruction 51-110, Prof'l Responsibility Program (11 Dec 2018); and Coast Guard Legal Prof'l Responsibility Program, Rule 1.16(c)(1 Jun 2005).

<sup>33</sup> *Id.*

<sup>34</sup> The language of the Texas Rules of Professional Conduct at issue in *Hawkins* was identically worded to that of Rule 1.16(c) of the ABA Model Rules. *Hawkins*, 988 S.W.2d. at 937.

evidence, aiding witness preparation, corroborating testimony, or assisting impeachment or rebuttal.” *United States v. Lloyd*, 992 F.2d 348, 351 (D.C. Cir. 1993) (quoting *United States v. Felt*, 491 F. Supp. 179 (D.D.C 1979) (internal citations omitted)).

**d. Burdens of Proof and Persuasion.** The burden of proof on any factual issue the resolution of which is necessary to decide a motion shall be by a preponderance of the evidence. R.M.C. 905(c)(1). The burden of persuasion on any factual issue the resolution of which is necessary to decide a motion shall be on the moving party. R.M.C. 905(c)(2).

**e. Oral Argument.** The opportunity to present oral argument regarding pretrial motions is afforded at the discretion of the Military Judge. R.M.C. 905(h); Military Commission Rules of Court (RC) 3.5.m. and RC 3.9.a.

#### 4. Analysis.

##### a. Motions for Reconsideration.

The Commission considers both Mr. Mohammad and Mr. bin ‘Attash’s motions to be requests for reconsideration of the Commission’s ruling in AE 613E/615P, even though only the former explicitly states as much. As a preliminary matter, the Commission finds that neither motion meets the standard for reconsideration, in that they do not state new facts or law, cite new controlling case law, or articulate how the ruling results in clear error or a manifest injustice. Assuming *arguendo*, however, a basis for reconsideration did exist, for the following reasons the Commission’s original analysis remains the same.<sup>35</sup>

First and foremost, after conducting a careful inquiry, “this Commission is thoroughly satisfied 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.” By necessity, this determination was

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<sup>35</sup> Due to the unique nature of this situation, the Commission will exercise its discretion and readdress its prior ruling. R.M.C. 905(f).

made largely based upon *ex parte* submissions by the SRT since the investigation is both classified<sup>36</sup> and ongoing. Still, the Commission's determination was based upon readily verifiable facts set forth in sworn declarations, SRT pleadings, and a detailed *ex parte* presentation. In contrast, Mr. Mohammad's and Mr. bin 'Attash's motions for reconsideration rely upon "assumptions" that they are "potentially" under investigation. As this Commission previously noted in both AE 292QQ and AE 613E/615P, conflicts of interest cannot be based on "feelings, fears, assumptions, or suspicions." *See, e.g., Moss v. United States*, 323 F.3d 445, 473 (6th Cir. 2003) (noting that there is no "controlling authority to support the proposition that an attorney's fear of investigation may give rise to a conflict of interest.")

Mr. Mohammad's stated need for such an inquiry seems to be premised on two points: (1) prior intrusions by the Government into matters of the Defense Teams; and (2) a single sentence in paragraph 32 of SSG Brent Skeete's declaration where he states, "[t]hey also asked about the other defense teams and other defendants."<sup>37</sup> Based on this, Counsel for Mr. Mohammad conclude they "may reasonably assume that they are, once again, potentially under investigation."<sup>38</sup> This is a flawed assumption. Even if (1) SSG Skeete's statement is accurate, and (2) "other defense teams" includes Mr. Mohammad's team, at best, this would indicate that interviewers possibly inquired into past attorney-client communications.<sup>39</sup> It is not evidence that any member of any current Defense Team is presently under investigation – a fact that has been subsequently and emphatically refuted. Counsel for Mr. Mohammad may not

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<sup>36</sup> While members of the Defense Teams possess the requisite security clearances, they do not necessarily possess the requisite need to know— especially when considering this Commission has already determined that no current member of the Defense Teams is the subject of the investigation.

<sup>37</sup> *See* AE 615 (WBA) at 37.

<sup>38</sup> *See* AE 615S (KSM) at 3.

<sup>39</sup> While this may raise a separate issue involving Government access to attorney-client material, it does not by itself establish that current members of the Defense are under investigation. Additionally, the SRT has represented the steps taken to ensure that any attorney-client material is completely walled-off from either FBI agents or prosecutors associated with this case. *See* AE 613A at 2.

reasonably assume they are, once again, potentially under investigation without ignoring the findings of this Commission's inquiry as well as the various declarations submitted by the SRT. This analysis also applies to the other teams.

Defense Counsel rely upon the Supreme Court's ruling in *Holloway v. Arkansas*<sup>40</sup> for the proposition that this Commission should defer to the Defense Counsels' determination regarding the presence of a conflict as they are best positioned to professionally and ethically confirm or refute its existence. The Court's ruling in *Holloway*, however, is distinguishable from the situation in the instant case. *Holloway* involved an attorney representing two defendants in a criminal matter, not an attorney who "subjectively feared" that he or she was under investigation. Because the attorney in the *Holloway* scenario was in possession of most of the pertinent facts, it rationally follows that the attorney would be uniquely situated to assess the existence of a possible conflict.<sup>41</sup>

Here, the Commission faces an entirely different issue – whether the investigation of a former member of the bin 'Attash defense team results in a potential conflict of interest for any current member of the Defense Teams. Given the nature of the potential conflict, and the sensitivity of the associated material involving an ongoing FBI investigation, this Commission—as a necessity—must take the lead in conducting this conflict inquiry.<sup>42</sup> The Commission is the neutral entity charged under the rules to make this assessment, and unlike *Holloway*, the Defense

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<sup>40</sup> *United States v. Holloway*, 435 U.S. 475 (1978).

<sup>41</sup> For further discussion of *Holloway*, see the SRT's response 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, filed 17 January 2019 at 5-6.

<sup>42</sup> See, e.g., *United States v. Lee*, 70 M.J. 535, 542 (N.M.C.C.A. 2011) (recognizing that "our system empowers [the military judge] to hear and resolve professional conflicts," due to the military judge's "sober and detached perspective.")

are not best positioned (or positioned at all) to do so.<sup>43</sup> Accordingly, Defense Counsel can, and should, rely upon the findings and determination of the Commission.

Contrary to Defense assertions, this Commission never promised that Defense concerns *would be* alleviated by the release of redacted information. Rather, this Commission endeavored to do what it could, within its authority to release as much material as possible without jeopardizing an on-going FBI investigation or national security. Neither was this Commission's finding of no conflict in AE 613E/615P premised on the release of these redacted documents which the Defense now claim are of negligible value. In reaffirming its earlier ruling on the record, the Commission stated, "[t]he commission did not order the production of these documents in furtherance of additional inquiry by the commission, but rather to *assist* in alleviating defense concerns, given the unique nature of this case." (emphasis added).<sup>44</sup>

Although the Defense can and should rely upon the Commission's conflict determination, it need not rely *solely* upon this Commission's ruling. As stated by the Commission on the record, "the defense is privy to evidence sufficient to support the commission's ruling and to satisfy their own ethical obligations of ensuring they are conflict free."<sup>45</sup> This evidence includes the following prior to the 28 January 2019 hearing:

(1) Declaration by FBI Supervisory Special Agent John Stofer;

(2) Declaration by Daniel Purtrill, Director of Security, Washington Headquarters

Service; and

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<sup>43</sup> Like the trial court in *United States v. Watkins*, this Commission made the necessary inquiry into a possible conflict of interest. While in *Watkins* the military judge conducted the inquiry by taking witness testimony from the RTC and NCIS agent in open court, this course of action was not available to the Commission because of the classified and law enforcement sensitive nature of the investigation.

<sup>44</sup> Transcript at 22190-91.

<sup>45</sup> Transcript at 22189.

(3) This Commission's direction for a robust presentation of the facts and circumstances surrounding the FBI investigation.

The evidence also includes redacted versions of the following since the 28 January 2019 hearing:

(1) AE 613 (GOV);

(2) AE 613A (SRT); and

(3) Declaration from Army Counterintelligence Coordinating Authority/902d

Military Intelligence Group categorically refuting that any other government agency was present at the 20-21 December 2018 interviews of SSG Skeete.

The Commission recognizes that the heavy redactions made to some of these materials limit their value to the Defense and thereby contribute to the Defense Counsel's "subjective fear" of investigation. Nevertheless, these redactions are not a basis for this Commission to either prematurely order the release of information to the detriment of an on-going investigation or delay these proceedings as the Commission has already made a binding conflict determination with the benefit of full access to this material.

Mr. Mohammad also claims that this Commission's ruling failed to address "unrefuted evidence that reasonably pointed to renewed intrusion by government agents into the confidential, inner workings of the defense."<sup>46</sup> This claim is both inaccurate and fails to distinguish between a conflict of interest and government access to protected attorney-client material.<sup>47</sup> As previously stated in AE 613E/615P:

"[T]he 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

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<sup>46</sup> AE 615R at 2.

<sup>47</sup> See generally *United States v. Kelly*, 790 F. 2d. 130 (D.C. Cir. 1986).

Prosecution, and from anyone associated with this case other than the SRT.”<sup>48</sup>

**b. Motion for Discovery.**

Mr. Mohammad has failed to establish the relevance and materiality of the information requested in AE 615S. As previously noted, this Commission conducted a thorough inquiry and unambiguously assured Counsel for Mr. Mohammad and the other teams that no conflict of interest existed as a result of the investigation. The Commission went even further with respect to Counsel for Mr. Mohammad’s specific concern by assuring him he was in no way connected to the investigation.<sup>49</sup> This undercuts the need for Counsel for Mr. Mohammad to conduct an independent inquiry using discovery involving an unrelated on-going investigation.

Although the Commission recognizes the Defense Counsels’ need to make their own inquiry, such an inquiry can—and in a situation involving an on-going investigation, must—rest largely upon the findings of the Commission. As such, Mr. Mohammad has failed to demonstrate the relevance and materiality of producing this information for the singular purpose of validating the Commission’s inquiry. Accordingly, in light of the Commission’s continued finding that no conflict of interest exists, Mr. Mohammad’s motion to compel further discovery is moot.

The Commission finds that further oral argument is not necessary for the resolution of this issue.

**5. Ruling.**

a. The requests for further oral argument are **DENIED**.

b. As the Commission has exercised its discretion to reconsider its ruling in

AE 613E/615P, the motions to reconsider are **MOOT**.

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<sup>48</sup> See AE 613E/615P at 5.

<sup>49</sup> See AE 613E/615P at 6. (“To the extent the ongoing investigation relates to any Defense Team, it pertains *only* to the bin ‘Attash Defense Team.”)

c. Upon reconsideration, the Commission **AFFIRMS** its ruling as written in AE 613E/615P.

d. Mr. Mohammad's request for an order compelling the Government to produce all information or documents which in any way relate to the investigation described in AE 615, Attachment B, is **DENIED**.

e. Mr. bin 'Attash's motion to cancel all proceedings until such time as Defense Counsel have adequate information and facts to personally assess the presence of a conflict of interest is **DENIED**.

So **ORDERED** this 20th day of March, 2019.

*//s//*  
K. A. PARRELLA  
Colonel, U. S. Marine Corps  
Military Judge