

**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 619I (KSM)

**Mr. Mohammad's Notice of Partial
Declination of Joinder to Proposed Order of
March**

13 March 2019

1. Timeliness:

This Notice of Partial Declination of Joinder is timely filed pursuant to RC 3.5i(1).

2. Overview:

Mr. Mohammad hereby gives notice that he declines to join AE 619C (AAA)¹ in part. Until the Military Judge conducts a thorough investigation and reliably concludes that Mr. Mohammad's counsel are not burdened by any conflicts of interest, Mr. Mohammad must object to holding argument on any matters other than those pertaining to the potential conflicts of interest described in the AE 615 series, and/or to the recusal due to conflict of interest of the Military Judge as sought in the AE 595 series.

3. Facts:

a. Mr. Mohammad's defense counsel are presently laboring under the cloud of potential conflicts of interest.²

¹ AE 619C (AAA), Mr. al Baluchi's Response to Docket Order (Proposed Order of March), 8 March 2019.

² See AE 615R (KSM), Mr. Mohammad's Motion to Reconsider AE 613E/615P RULING, 26 February 2019.

b. Mr. Mohammad's counsel are actively seeking and litigating to obtain information sufficient to dispel the existence of any conflict of interest, and/or to understand the parameters of the conflicts.³

c. The government has an extensive, well-documented history of investigating the defense teams in this capital case and intruding into their privileged communications.⁴

d. 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 615 and AE 613 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. Counsel's litigation of other matters prior to the Military Judge's disposition of AE 615R, or counsel's ability to seek any necessary, orderly appellate review of the challenged ruling, would constitute the unwarranted, "irretrievable surrender of constitutional guarantees." *United States v. Dickenson*, 465 F.2d 496, 511 (5th Cir. 1972), *cert. denied*, 414 U.S. 979 (1973).

e. On 8 March 2019, Mr. al Baluchi filed AE 619C (AAA), proposing that several matters be argued at the March 2019 hearings unrelated to the conflict of interest or to the recusal for conflict of interest of the Military Judge.

³ See, e.g., AE 615R (KSM), Mr. Mohammad's Motion to Reconsider AE 613E/615P RULING, 26 February 2019; and AE 615S (KSM), Mr. Mohammad's Motion to Compel Discovery from Special Trial Counsel, 26 February 2019.

⁴ See, e.g., partial list contained at AE 530S (KSM), Response to AE 530F, 20 November 2017, pp. 14-23, and Unofficial/Unauthenticated Transcript at pp. 22106-22130, 28 January 2019.

4. Notice:

Mr. Mohammad declines to join AE 619C (AAA) to the extent that pleading contemplates that the military commission hearings currently scheduled for 25-29 March 2019 (“March hearings”) may properly address matters other than AE 615R and the recusal for conflict of interest of the Military Judge, in the absence of the Military Judge’s disposition of AE 615R, or counsel’s pursuit of any necessary, orderly appellate review of AE 613E/615P RULING. If the Military Judge denies or fails to resolve AE 615R at the March hearings, Mr. Mohammad will not have a reasonable opportunity to secure otherwise available, orderly appellate review of the challenged ruling, and will be confronted with the prospect of proceeding without the assistance of conflict-free counsel, which is the equivalent of no counsel at all. *Mickens v. Taylor*, 535 U.S. 162, 166-167 (2002).

5. Oral Argument:

Mr. Mohammad does not request oral argument on this notice.

6. Request for Witnesses:

None.

7. Conference with Opposing Counsel:

No conference required. RC 3.5.i(3).

8. List of Attachments:

A. Certificate of Service

Respectfully submitted,

//s//

DAVID Z. NEVIN
Learned Counsel

//s//

GARY D. SOWARDS
Defense Counsel

//s//

DEREK A. POTEET
LtCol, U.S. Marine Corps
Defense Counsel

//s//

RITA J. RADOSTITZ
Defense Counsel

Counsel for Mr. Mohammad

ATTACHMENT A

CERTIFICATE OF SERVICE

I certify that on the 13th day of March 2019, I electronically filed AE 619I (KSM), Mr. Mohammad's Notice of Partial Declination of Joinder to Proposed Order of March, with the Chief Clerk of the Military Commissions Trial Judiciary and served the foregoing on all counsel of record by electronic mail.

//s//
DAVID Z. NEVIN
Learned Counsel