UNITED STATES OF AMERICA v. KHALID SHAIKH MOHAMMAD, WALID MUHAMMAD SALIH MUBARAK BIN 'ATTASH, RAMZI BINALSHIBH, ALI ABDUL AZIZ ALI, MUSTAFA AHMED ADAM AL HAWSAWI	**AE 112 (WBA, RBS, AAA, MAH)** **Motion to Compel Discovery** Related to White House and DOJ Consideration of the CIA Rendition, Detention and Interrogation Program 27 December 2012

1. **Timeliness**: This motion is timely filed within the Trial Judiciary Rules of Court, Rule 3.7(b).

2. **Relief Sought**: The defense requests that the Military Judge compel production of discovery which the defense sought from the Government in a request dated 6 September 2012 (Attachments B (unclassified request) and C (classified addendum)).

3. **Overview**: The Defense has requested all documents and information relating to White House or DOJ authority for the CIA rendition, detention and interrogation ("RDI") program.[1] The prosecution specifically refused to produce information regarding White House consideration of authority for RDI (Request 1) and exercise of any purported power of the White House regarding authority for the RDI program (Request 2).[2] The prosecution did not specifically address Requests 3 or 4, but rather stated generally that it will produce discovery in compliance with RMC 701 and 703.[3] The sole proffered basis for the denial (other than the requirement that a protective order be in place, now mooted by AE-013P) is that the requests are "overbroad" and "not relevant or necessary and material to the preparation of the defense."[4]

This objection is not valid. The defense is entitled to the requested material under the

[1] Att. B and C. Attachment C is classified and filed under seal.
[2] Att. D.
[3] Att. D.
[4] Att. D, ¶¶ 5, 6(1).

Military Commissions Act of 2009 ("MCA"), the Rules for Military Commissions ("RMC"), and the Fifth and Eighth Amendments to the Constitution. Specifically, the defense is entitled to the requested materials if they are "material"[5] and/or favorable to the accused.[6] None of these authorities require a showing of "relevance" or "necessity" for disclosure, nor is "overbreadth" a basis for denial of disclosure. To the extent that the government intends to apply RMC 703 standards, as stated in its response, it will unduly limit the discovery provided to the defense. Information that is "material to preparation of the defense,"[7] in the sense of being helpful to the defendant, must be disclosed; there is no other requirement. The material sought by the defense is material to the preparation of both findings and sentencing phase defenses, and is "favorable to the accused."[8] The commission should therefore compel its disclosure.

4. Burden and Standard of Proof: The burden of persuasion on this motion to compel discovery rests with the defense. RMC 905(c)(2).

5. Facts:

a. On 6 September 2012, the defense requested all documents and information relating to White House or DOJ authority for the CIA RDI program.[9]

b. The prosecution denied the defense request in a response dated 11 October 2012.[10] The prosecution response states that it intends to produce some, but not all, responsive documents at an unspecified time.

6. Law and Argument

Under the Rules for Military Commissions, an accused is entitled to discover all

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[5] RMC 701(c)(1) and (2).
[6] *Brady v. Maryland*, 373 U.S. 83 (1963).
[7] RMC 701(c)(1).
[8] *United States v. Safavian*, 233 F.R.D. 12, 15 (D.D.C. 2005).
[9] Att. B (unclassified request); Att. C (classified addendum).
[10] Att. D.

documents and other tangible items that are "material to preparation of the defense,"[11] or that "reasonably tend[] to . . . [n]egate the guilt of the accused of an offense charged; . . . [r]educe the degree of guilt of the accused with respect to an offense charged; or . . . reduce the punishment"[12] imposed after conviction. Under the Due Process Clause of the Fifth Amendment, an accused is entitled to all "evidence favorable to an accused . . . where the evidence is material either to guilt or to punishment."[13] Under the Eighth Amendment, a defendant is entitled to discover information relating to "any aspect of the defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death."[14] All of the information sought by the defense falls under one or more of these categories.

A. The requested RDI information is material to issues arising in any case in which there are allegations of torture.[15]

In any case in which torture is alleged, evidence related to these allegations will be central to the defense. By its nature, torture affects the admissibility of evidence, the credibility of witnesses, the appropriateness of punishment, and the legitimacy of the prosecution itself. As explained in subsection 6.E. below, the RDI policies, memoranda and other information are all either directly admissible for one or more of these purposes, are likely to lead to admissible information for one or more of these purposes, or both. They are therefore indisputably material to the preparation of, and favorable to, the defense of this case.

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[11] RMC 701(c)(1) and (2).
[12] RMC 701(e)(1).
[13] *Brady*, 373 U.S. at 87.
[14] *Lockett v. Ohio*, 438 U.S. 586, 604 (1978).
[15] For these purposes "torture" includes interrogation techniques employed by the CIA in connection with the RDI program and any other techniques designed to elicit statements that are "involuntary" within the meaning of the Due Process Clause of the Fifth Amendment.

(1) Evidence of torture directly affects the admissibility and credibility of inculpatory statements by the defendants.

Under the MCA, the Rules for Military Commission and the Constitution, a statement by a defendant obtained by torture is inadmissible in a military commission proceeding. The MCA provides that "[n]o statement obtained by the use of torture or by cruel, inhuman, or degrading treatment . . . , whether or not under color of law, shall be admissible in a military commission under this chapter."[16] This principle is implemented in the Manual for Military Commissions by Military Commission Rule of Evidence ("MCRE") 304(a)(1), which repeats the statutory language.

In addition, the admission of statements obtained by torture offends the most basic principles of constitutional due process. "The use of torture to extract a statement clearly contravenes 'principles of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'"[17] A defendant's inculpatory admissions are key prosecution evidence in any case in which they are admitted. The defendant's ability to suppress the admissions from trial by demonstrating that they are the product of torture is thus equally key, and any and all evidence tending to demonstrate that such torture occurred is material to preparation of the defense.

Evidence of torture is critical even when a defendant fails to suppress his or her admissions, however. As the Supreme Court has explained, "[c]onfessions, even those that have

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[16] 10 U.S.C. § 948r(a). Because "color of law" is irrelevant to the method by which the statement is obtained, statements extracted by foreign officials and non-governmental actors are excluded to the same extent as those extracted by individuals acting on behalf of the United States.

[17] *United States v. Karake*, 443 F. Supp. 2d 8, 52 (D.D.C. 2006) (quoting *Brown v. Mississippi*, 297 U.S. 278, 284 (1936)); *see also Brown*, 297 U.S. at 285-6 ("Because a state may dispense with a jury trial, it does not follow that it may substitute trial by ordeal. The rack and torture chamber may not be substituted for the witness stand.").

been found to be voluntary, are not conclusive of guilt. And, as with any other part of the prosecutor's case, a confession may be shown to be 'insufficiently corroborated or otherwise ... unworthy of belief.'"[18] Thus, regardless of whether a defendant succeeds in having a statement suppressed, he or she has a constitutional right to challenge its veracity and credibility at the time that it is admitted in evidence by showing that it was extracted under duress.[19] Evidence of torture goes directly to that showing.

The defendants, moreover, have independent Due Process Clause,[20] statutory, [21] and rule-based[22] rights to impeachment evidence that is favorable to the defense, a category that will virtually always include evidence of torture. Evidence that a defendant was tortured will thus also be critical in cases in which she has failed to convince the court or military commission to suppress her admission.

Finally, evidence is discoverable if there is "a strong indication that it will play an important role in uncovering . . . corroborating testimony, or assisting . . . rebuttal."[23] Corroboration of a defendant's claims that he was tortured can be critical to her credibility.[24] For the same reason, independent evidence of torture can rebut the government's claims to the contrary. Evidence serving these purposes is "favorable to the accused" and therefore must be

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[18] *Kentucky v. Crane*, 476 U.S. 683, 689 (1986).
[19] *Id.* at 691.
[20] *Giglio,* 405 U.S. at 154.
[21] 10 U.S.C. § 949j(b).
[22] RMC 701(e).
[23] *Lloyd*, 992 F.2d at 351.
[24] *Compare Karake*, 443 F. Supp. 2d at 62-72 (corroborating evidence of torture victims' claims) *with* 443 F. Supp. 2d at 77-79 (lack of corroborating evidence of torturer's claims); 443 F. Supp. 2d at 86 n.110 (distinguishing *United States v. Abu Ali*, 395 F. Supp. 2d 338 (E.D.Va.2005), on grounds that the defendant's claims of torture in that case were not corroborated).

disclosed to the defense under the Due Process Clause as well.[25]

(2) Witness testimony that results from torture can be suppressed.

Evidence that a prosecution witness or declarant was tortured can be equally significant to the preparation of the defense. Such evidence may result in suppression of that testimony in its entirety. "When the degree of coercion inherent in the production of a statement from a person other than the accused offered by either party is disputed, such statement may only be admitted if the military judge finds that . . . the statement was not obtained through the use of torture or cruel, inhuman, or degrading treatment."[26]

Even if the statements are not suppressed, the defendants are entitled to impeach them by showing that they were given under duress, including torture. The defendants are therefore entitled to the evidence that can make that impeachment effective.[27]

(3) Torture directly affects the admissibility of evidence derived from it.

Apart from statements directly obtained by torture, evidence derived from those statements (their "fruits"), must also be excluded from trial outside a few narrow circumstances.[28] Where the government seeks to introduce such evidence, proof that the underlying statements were the product of torture (or were otherwise involuntary) is the *sine qua non* of the defense. Whether the "poison fruit" is subsequent statements of the defendant;[29]

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[25] *Brady*, 373 U.S. at 87.
[26] MCRE 304(a)(3)(C).
[27] *Lloyd*, 992 F.2d at 351 (information discoverable "as long as there is a strong indication that it will play an important role in . . . assisting impeachment") (internal quotations omitted); *see also Giglio*, 405 U.S. at 154; 10 U.S.C. § 949j(b)(2); RMC 701(e).
[28] *Wong Sun v. United States*, 371 U.S. 471, 485-86 (1963). MCRE 304(a)(5) also purports to exclude evidence derived from torture; however, its standard of admissibility in these circumstances is patently unconstitutional. The specifics of those flaws will be argued if and when the government seeks to rely on this provision.
[29] *Oregon v. Elstad*, 470 U.S. 298, 312-13 (1985) (voluntary statements that are fruit of coerced statements are excludible from trial).

witness testimony derived from the defendant's statements;[30] or physical evidence discovered directly or indirectly as a result of the defendant's statement,[31] access to evidence of the underlying torture is required for the defendant to make her defense.

(4) Evidence of torture and conditions of confinement may result in a pretrial reduction of the maximum sentence from death to less than death.

Proof of pretrial treatment that amounts to torture may also result in a reduction of sentence in the event of conviction, including a reduction of a sentence of death to less than death.

In the military justice system, defendants who are illegally detained pretrial must receive appropriate "meaningful relief" when a violation of UCMJ Article 13, which prohibits pretrial punishment or conditions of confinement "more rigorous" than required, has been proved.[32] This "pretrial confinement credit" was originally a judicially-created remedy to give force to Article 13's command,[33] and was used to reduce an accused's sentence by crediting days of

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[30] *United States v. Ghailani*, 743 F. Supp. 2d 261, 287-88 (S.D.N.Y. 2010) (excluding prosecution witness testimony as the fruit of torture).

[31] *United States v. Patane*, 542 U.S. 630, 640 (2004) ("We have repeatedly explained 'that those subjected to coercive police interrogations have an *automatic* protection from the use of their involuntary statements (or evidence derived from their statements) in any subsequent criminal trial.") (emphasis in original; cite omitted).

[32] *United States v. Zarbatany*, 70 M.J. 169, 177 (C.A.A.F. 2011). Article 13 provides:

> No person, while being held for trial, may be subjected to punishment or penalty other than arrest or confinement upon the charges pending against him, nor shall the arrest or confinement imposed upon him be any more rigorous than the circumstances required to insure his presence, but he may be subjected to minor punishment during that period for infractions of discipline.

10 U.S.C. § 813.

[33] *See United States v. Larner*, 1 M.J. 371, 373-375 (C.M.A. 1976); *United States v. Suzuki*, 14 M.J. 491, 493 (C.M.A. 1983). The pretrial confinement credit has since been incorporated in the Manual for Courts-Martial. *See* Rule for Courts-Martial 305(k).

illegal confinement against the sentence term.[34] However, a military judge's discretion to fashion an appropriate remedy for a violation of Article 13 extends beyond pretrial confinement credit,[35] and includes remedies as drastic as dismissal of the charges.[36] Most relevant to this capital case, Article 13 remedies may be applied against sentences that are "qualitatively different" than terms of confinement[37]—language that recalls Justice Stewart's statement that "the penalty of death is qualitatively different from a sentence of imprisonment, however long."[38]

The MCA does not include the precise language of Article 13.[39] *Larner* and its progeny do not stand solely on Article 13 grounds, however, but also on the constitutional proscription of pretrial punishment.[40] Like Article 13, the Due Process Clause bars punishment before trial,[41]

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[34] *See Larner*, 1 M.J. at 373-375; *Zarbatany*, 70 M.J. at 174 ("the primary mechanism for addressing violations of Article 13, UCMJ, has been confinement credit.").

[35] *Zarbatany*, 70 M.J. at 175; *Suzuki*, 14 M.J. at 493.

[36] *United States v. Fulton*, 55 M.J. 88, 89 (C.A.A.F. 2001).

[37] *Zarbatany*, 70 M.J. at 175 (quoting Manual for Courts-Martial, Drafter's Analysis app., at A21-21); *id.* (discussing applicability of doctrine to punitive discharges).

[38] *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (Stewart, J., for the Court).

[39] It does, however, bar "cruel and unusual punishments." 10 U.S.C. § 949s. Construing this provision *in pari material* with the Eighth Amendment, it is worth noting that the Supreme Court has stated that conditions that would constitute violations of the Eighth Amendment proscription would also constitute "punishment" if applied to pretrial detainees. *City of Revere v. Mass. Gen. Hosp.*, 463 U.S. 239, 244 (1983) (suggesting, in the context of pretrial detention, that "the due process rights of a person in [the Government's care] are at least as great as the Eighth Amendment protections available to a convicted prisoner"); *see also Lock v. Jenkins*, 641 F.2d 488, 492 n.9 (7th Cir. 1981) ("Although the Eighth Amendment is not applicable to pretrial detainees, Eighth Amendment cases involving conditions of convicted prisoners are useful by analogy because any prohibited 'cruel and unusual punishment' under the Eighth Amendment obviously constitutes punishment which may not be applied to pretrial detainees."). Section 949s thus provides an additional basis for a remedy for pretrial treatment that would violate the Eighth Amendment as applied to convicted defendants.

[40] *United States v. King*, 61 M.J. 225, 227 (CAAF 2005) ("Our determination of whether [the accused] endured unlawful pretrial punishment involves both constitutional and statutory considerations;" citing *Bell v. Wolfish*, 441 U.S. 520, 535–36 (1979)).

[41] *Bell v. Wolfish*, 441 U.S. 520, 535–36 (1979).

but unlike Article 13, it applies directly to these proceedings.[42] There is no question that pretrial torture constitutes "pretrial punishment" within the meaning of the Due Process Clause and the military cases applying it to illegal pretrial confinement. In *King*, the Court of Appeals for the Armed Forces held that placing the accused in a six-by-six windowless cell for two weeks constituted pretrial punishment.[43] *A fortiori*, confinement involving physical abuse and other extreme forms of treatment over far more extended periods must also constitute punishment.

Moreover, absent mitigation of their sentence, military commission accused have no remedies at all for the violation of their constitutional right against pretrial punishment.[44] There is thus every reason for military commissions to follow military justice practice in this regard. Notably, the Manual for Military Commissions limits the military judge's authority to grant pretrial confinement credit in military commission cases, but only to the extent that the credit is based on "[t]he physical custody of alien enemy belligerents captured during hostilities."[45] Thus, by its terms, the rule places no limit on credit for illegal treatment that goes beyond physical custody (such as torture), nor does it place any limitation on the other remedies for pretrial punishment that the Court of Appeals for the Armed Forces has held are within the military judge's discretion.[46] Moreover, given its context, RMC 1001(g) must be read against the well-established military law permitting sentence reductions for pretrial punishments other than mere

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[42] *See* AE057.
[43] *King*, 61 M.J. at 228-29.
[44] *See* 28 U.S.C. § 2241(e)(2) (purporting to bar "any . . . action against the United States or its agents relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien who is or was detained by the United States and has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination").
[45] *See* RMC 1001(g) ("The physical custody of alien enemy belligerents captured during hostilities does not constitute pretrial confinement for purposes of sentencing and the military judge shall not grant credit for pretrial detention.").
[46] *Zarbatany*, 70 M.J. at 175.

incarceration.[47] Accordingly, it is clear by negative implication that the Manual contemplates sentence reductions where the accused can demonstrate that she was subjected to pretrial punishment that went beyond simple physical custody.

Finally, the Court of Appeals for the Armed Forces holding that pretrial punishment remedies may be applied against sentences that are "qualitatively different" than terms of confinement[48] is particularly apposite in a capital case, where, as the Supreme Court has held, the potential sentence "is qualitatively different from a sentence of imprisonment, however long."[49] If any pretrial treatment could justify a reduction in sentence from death to a sentence less than death, it is surely government-sponsored torture. It is therefore critical that the accused have the opportunity to discover all information material to establishing torture for this reason as well.

(5) Evidence of torture will be overwhelmingly important if a sentencing phase becomes necessary.

Regardless of whether pretrial torture reduces the ultimate sentence as a matter of law, it is clear beyond doubt that torture evidence will be admissible as mitigation to put before the sentencing fact-finder.[50] Indeed, the defendants have a constitutional right to present it.

In a capital case, "'the sentencer . . . [may] not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.'"[51] Post-arrest,

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[47] *See id.*

[48] *Zarbatany*, 70 M.J. at 175 (quoting Manual for Courts-Martial, Drafter's Analysis app., at A21-21); *id.* (discussing applicability of doctrine to punitive discharges).

[49] *Woodson*, 428 U.S. at 305 (Stewart, J., for the Court).

[50] The Rules for Military Commission recognize this as well with regard to pretrial "physical custody," which otherwise may not be treated as a sentencing credit. *See* RMC 1001(c)(1), Discussion ("While no credit is given for pretrial detention, the defense may raise the nature and length of pretrial detention as a matter in mitigation.").

[51] *Eddings v. Oklahoma*, 455 U.S. 104, 110 (1982) (quoting *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (emphasis original)).

pretrial "good behavior" while incarcerated must be allowed as mitigating evidence of the defendant's character.[52] Conversely, defendants have the right to inform the sentencing panel of their vicious abuse while detained before trial as well.[53]

Evidence that the defendants were tortured may be the most powerful mitigation that they can put before the sentencing panel in the event of conviction. It is thus no exaggeration to say that evidence of torture will be more material to their sentencing defenses than any other. Defense counsel have a constitutional obligation to discover it,[54] and the government has the constitutional obligation to produce it under both *Brady* and Rule 701(e).

(6) Evidence of Torture May Result in the Dismissal of All Charges Because of Outrageous Government Conduct

Finally, evidence of torture could lead to the dismissal of all charges. Courts have recognized that, in extreme circumstances, it may be appropriate to dismiss all charges solely on the basis of outrageous government conduct.[55] The cases suggest that nothing short of proof that the government engaged in "torture, brutality, and similar outrageous conduct" would be enough to warrant such dismissal.[56] That is what the defendants expect to be able to prove here. Moreover, the focus of the test is on the government conduct, not the effect on the defendant or the outcome of the case. Many of the documents that the defense seeks concern government policies authorizing "torture" and "brutality," and thus are particularly material to this issue.

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[52] *Skipper v. South Carolina*, 476 U.S. 1, 4-5 (1986) (post-incarceration, pretrial good behavior must be considered as mitigating evidence).

[53] *See, e.g., Neal v. Puckett*, 286 F.3d 230, 244 (5th Cir. 2002) (defense attorney's failure to present, *inter alia*, mitigating evidence of "abuse and mistreatment in prison" made attorney's representation constitutionally deficient).

[54] *Wiggins v. Smith*, 539 U.S. 510, 525 (2003).

[55] *United States v. Rezaq*, 134 F.3d 1121, 1130 (D.C. Cir.); *see also United States v. Toscanino*, 500 F.2d 267, 276 (2d Cir.1974).

[56] *Rezaq*, 134 F.3d at 1130 (suggesting that an indictment can be dismissed where the government engaged in "'torture, brutality, and similar outrageous conduct'") (quoting *United States v. Yunis*, 924 F.2d 1086, 1093 (D.C. Cir. 1991)).

B. Information in possession of the government is discoverable if it is material to the preparation of the defense regardless of "overbreadth," "relevance" or "necessity."

The government objects to the requests on the grounds that they are "overbroad" and the information requested is "not relevant or necessary and material to the preparation of the defense."[57] These objections are not valid.

First, "overbreadth" is "not a proper objection."[58] It is nowhere mentioned in the statute or the Rules. Civil discovery rules explicitly provide for objections based on overbreadth or undue burden;[59] Rule 701 does not. Rather, the government is obligated to turn over all information that is material to the preparation of the defense. "Overbreadth" and "undue burden" objections in civil proceedings require balancing of the evidentiary benefits of disclosure against the harms of production.[60] However, "[d]etermining materiality of information discoverable under Rule 16 or required to be produced under *Brady* must not be made according to a cost benefit analysis."[61] If information in the possession of the government is material, then it must be disclosed. If, in the government's judgment, it is not material, then the government can object on that ground. It cannot complain that although "material to the preparation of the defense," the trouble of producing the information outweighs the defendant's right to make a defense.[62]

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[57] Att. D, ¶ 6(1).

[58] *United States v. McVeigh*, 954 F.Supp. 1441, 1450 (D. Colo. 1997).

[59] *See* Federal Rule of Civil Procedure ("F. R. Civ. P.") 26(c)(1) (permitting objections based on "annoyance, embarrassment, oppression, or undue burden or expense"); *id.*, Practice Commentary (permitting objections to "overbroad or unduly burdensome discovery request[s]").

[60] *Id.*, Practice Commentary (protective order issued after "balancing the need for disclosure against the potential harms").

[61] *McVeigh*, 954 F.Supp. at 1450.

[62] As the court explained in *McVeigh*:

> It is notable that in the 1966 version of this rule, the defendant was required to show that his request was reasonable. The Advisory Committee note explained

Nor are "relevance" and "necessity" grounds for objection. "Necessity" is mentioned nowhere in Rule 701, nor is it an element of the government's *Brady* obligation.[63] "Relevance" is mentioned only in the subsection of Rule 701(c) that applies to statements of the accused,[64] which is not pertinent to the instant requests. Rule 701(e) requires disclosure of exculpatory evidence that "reasonably tends" to negate guilt, reduce culpability or mitigate punishment;[65] there is no requirement that the evidence be "necessary" to assisting the defense. Nor are "relevance" and "necessity" elements of the tests under the Due Process Clause or Eighth Amendment.

The government appears to have conflated the provisions of Rule 703(f)(1), which do mention relevance and necessity,[66] with its discovery obligations under Rule 701. In fact, the government cites RMC 703 in its discovery response.[67] Rule 703, however, is concerned with the production of evidence *at trial or pretrial hearing*; it does not purport to govern or affect the

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> that the requirement of reasonableness permits the court to define and limit the scope of the government's obligation to search its files. The reasonableness limitation was removed in the 1974 Amendment with the following comment from the Advisory Committee: The old rule requires a "showing of materiality to the preparation of his defense and that the request is reasonable." The new rule requires disclosure if any one of three situations exists: (a) the defendant shows that disclosure of the document or tangible object is material to the defense, (b) the government intends to use the document or tangible object in its presentation of its case in chief, or (c) the document or tangible object was obtained from or belongs to the defendant.

McVeigh, 954 F.Supp. at 1446.

[63] *Brady*, 373 U.S. at 87 (accused entitled to all "evidence favorable to an accused . . . where the evidence is material either to guilt or to punishment").

[64] RMC 701(c)(3) (requiring disclosure of the "contents of all relevant statements" made by the defendant that are material to the preparation of the defense).

[65] RMC 701(e)(1) ("the trial counsel shall . . . disclose to the defense the existence of evidence known to the trial counsel which reasonably tends to" negate or reduce culpability or mitigate sentence).

[66] RMC 703(f)(1) ("Subject to § 949j(c) and R.M.C. 701, each party is entitled to the production of evidence which is relevant, necessary and noncumulative."). There is no "§ 949j(c)" in the Military Commissions Act of 2009.

[67] Att. D ¶ 6(3).

defendant's entitlement to discovery. Indeed, the rule explicitly exempts the discovery provisions from its reach: Under Rule 703(f)(1), the "relevance" and "necessity" standards apply only "[s]ubject to . . . R.M.C. 701."[68] Thus, under any reading, Rule 701's broader "materiality" entitlement controls here.

C. "Materiality to preparation of the defense" is a broad standard that includes information that would be inadmissible at trial.[69]

The scope of "materiality" as used in Rule 701 must be construed *in pari materia* with the discovery provisions of the military justice and federal criminal justice systems, Rule for Courts-Martial 701 and Federal Rule of Criminal Procedure ("Fed. R. Crim. P.") 16. The Military Commissions Act provides that although Uniform Code of Military Justice ("UCMJ") rules are not binding, they are "instructive."[70] The Act also provides that, "The opportunity to obtain witnesses and evidence shall be comparable to the opportunity available to a criminal

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[68] *Id.*

[69] The government's objection cites *United States v. Yunis*, 867 F.2d 617 (D.C. Cir. 1989), apparently relying on the statement in the Discussion section under Rule 701(c) that "[f]or the definition of 'material to the preparation of the defense' in subsections (1), (2), and (3), *see United States v. Yunis*, 867 F.2d 617 (D.C. Cir. 1989)." *Yunis* is inapposite to the present motion, however, and not properly raised as part of the government's objection. *Yunis* concerned the discoverability of a defendants' own statements where the government objected to disclosure by invoking the national security privilege. *Yunis*, 867 F.2d at 620. The court analyzed the effect of the national security privilege on the defendant's discovery right and concluded that "classified information is not discoverable on a mere showing of theoretical relevance in the face of the government's classified information privilege, but that the threshold for discovery in this context further requires that a defendant seeking classified information . . . is entitled only to information that is at least 'helpful to the defense of [the] accused.'" *Id.* at 623 (cite omitted).

Thus, by its terms, *Yunis* is relevant only where the government has invoked the national security privilege, a situation covered by Rule 701(f). *See* Rule 701(f)(3) (authorizing issuance of protective order for classified information "upon motion of trial counsel"). The government has not claimed the national security privilege here and *Yunis* and Rule 701(f) are therefore inapposite. The defense will address the merits of any such claim if and when it is invoked.

[70] 10 U.S.C. § 948b(c).

defendant in a court of the United States under Article III of the Constitution."[71] Neither of these provisions was included in the 2006 Military Commissions Act,[72] and there is no doubt that Congress intended them to expand defendants' discovery rights.[73] These principles have special force here, because the language of Rule 701(c)(1) is identical or virtually identical to the parallel provisions of the Rules for Courts-Martial ("RCM") and Fed. R. Crim. P. 16. Like RMC 701(c)(1), RCM 701(a)(2)(A) provides for discovery, *inter alia*, of documentary and tangible information that is "material to the preparation of the defense." Federal Rule of Criminal Procedure 16(a)(1)(E) provides for discovery of documents and tangible items that are "material to preparing the defense."

Most significantly for this motion, in both the federal and military systems, "materiality," for discovery purposes, "normally 'is not a heavy burden.'"[74] Under Rule 16, information is

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[71] 10 U.S.C. § 949j(a)(1).

[72] P.L. 109-366, Oct. 17, 2006, 120 Stat. 2615 ("2006 MCA"). *Compare* 2006 MCA, § 949(c) ("The judicial construction and application of [the UCMJ] are not binding on military commissions established under this chapter.") *with* 2009 MCA (10 U.S.C.) § 948b(c) ("The judicial construction and application of chapter 47 of this title, while instructive, is therefore not of its own force binding on military commissions established under this chapter."); *compare*, 2006 MCA, § 949j(a) (no mention of Article III courts) *with* 2009 MCA (10 U.S.C.) § 949j(a)(1) (adding "The opportunity to obtain witnesses and evidence shall be comparable to the opportunity available to a criminal defendant in a court of the United States under article III of the Constitution.").

[73] *See, e.g.*, comments of Senate Armed Services Committee Chair Carl Levin:

> [The amendments] would eliminate the unique procedures and requirements [under the 2006 MCA] which have hampered the ability of defense teams to obtain both information and have led to much litigation. We would substitute the more established procedures of the Uniform Code of Military Justice (UCMJ).

Opening Statement of Sen. Carl Levin, at 2, *Senate Armed Services Committee Hearing On Legal Issues Regarding Military Commissions And The Trial Of Detainees For Violation Of The Law Of War*, July 7, 2009.

[74] *United States v. Lloyd*, 992 F.2d 348, 351 (D.C. Cir. 1993) (quoting *United States v. George*, 786 F. Supp. 56, 58 (D.D.C.1992)); *see also United States v. Stone*, 40 M.J. 420, 422 n.1 (C.M.A. 1994) (RCM 701 "described a similar right to discovery provided in Fed. R. Crim. P. 16 . . . [The RCM 701] '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

material if it "bears some abstract logical relationship to the issues in the case."[75] All that is required is that there be "some indication that the pretrial disclosure of the disputed evidence would [enable] the defendant significantly to alter the quantum of proof in his favor."[76] In the military justice context, RCM 701 "is specifically intended to provide 'for broader discovery than is required in Federal practice.'"[77]

Accordingly, information need not be admissible in court to be discoverable. The federal discovery rules are intended to provide a defendant with "the widest possible opportunity to inspect and receive such materials in the possession of the Government as may aid him in presenting his side of the case."[78] "[A]n accused's right to discovery is not limited to evidence that would be known to be admissible at trial. It includes materials that would assist the defense in formulating a defense strategy."[79] Information is therefore material for discovery purposes "as long as there is a strong indication that it will play an important role in uncovering admissible evidence, aiding witness preparation, corroborating testimony, or assisting impeachment or rebuttal."[80]

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admissible evidence, aiding witness preparation, corroborating testimony, or assisting impeachment or rebuttal'"; quoting *Lloyd*, 992 F.2d at 351 (internal cites omitted)); *United States v. NYNEX Corp.*, 781 F. Supp. 19, 25 n.8 (D.D.C. 1991).

[75] *Lloyd*, 992 F.2d at 351 (quoting *United States v. Caicedo-Llanos*, 960 F.2d 158, 164 n. 4 (D.C.Cir.1992)).

[76] *Id.*

[77] *United States v. Adens*, 56 M.J. 724, 733 (Army Ct. Crim. App. 2002) (citation omitted).

[78] *United States v. Poindexter*, 727 F. Supp. 1470, 1473 (D.D.C.1989).

[79] *United States v. Webb*, 66 M.J. 89, 92 (C.A.A.F. 2008); *see also United States v. Roberts*, 59 M.J. 323, 325 (C.A.A.F. 2004) (discovery practice is not focused solely upon evidence known to be admissible at trial).

[80] *United States v. Lloyd*, 992 F.2d 348, 351 (D.C. Cir. 1993) (internal quotations omitted)); *see, also United States v. Caro*, 597 F.3d 609, 621 (4th Cir. 2010) (citing *Lloyd*); *see also Stone*, 40 M.J. at 422 n.1 (same); *United States v. Marshall*, 132 F.3d 63, 68 (D.C. Cir. 1998) (same); *United States v. Singhal*, -- F. Supp. 2d --, 2012 WL 2851861 at *16 (D.D.C. 2012).

Nor is material evidence is limited to exculpatory evidence.[81] Indeed, it includes information that is unfavorable, as "a defendant in possession of such evidence may alter the quantum of proof in his favor in several ways: by preparing a strategy to confront the damaging evidence at trial; by conducting an investigation to attempt to discredit that evidence; or by not presenting a defense which is undercut by such evidence."[82]

As explained below, all of the information sought in these discovery requests is either itself admissible or will lead to the discovery of admissible evidence.

D. The government is independently obligated to turn over all information that is "favorable to the defense" for both findings and sentencing.

Apart from its Rule 701(c) obligations, the government is obligated to turn over all information that may be exculpatory to the defendant at both findings and sentencing phases under the Military Commissions Act,[83] Rule 701,[84] and the Constitution.[85]

The standards for disclosure Rule 701(e) are, if anything, lower than the materiality requirement of Rule 701(c). A defendant is entitled to discover all documents and other tangible items that "reasonably tend[] to . . . [n]egate the guilt of the accused of an offense charged; . . . [r]educe the degree of guilt of the accused with respect to an offense charged; or . . . reduce the punishment" imposed after conviction.[86] Under Rule 701(e)(2), she is entitled to information that "reasonably tends to impeach the credibility of a witness whom the government intends to call at trial." And under Rule 701(e)(3), she is entitled to "the existence of evidence that is not subject to paragraph (1) or paragraph (2) but that reasonably may be viewed as mitigation

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[81] *Marshall*, 132 F.3d 63 at 67; *United States v. Libby*, 429 F. Supp. 2d 1, 7 (D.D.C. 2006).
[82] *Marshall*, 132 F.3d at 68.
[83] 10 U.S.C. § 949j(b).
[84] RMC 701(e).
[85] *Brady v. Maryland*, 373 U.S. 83, 87 (1963).
[86] RMC 701(e)(1)(A), (B) and (C).

evidence at sentencing." Thus, with respect to evidence of guilt, relative culpability and impeachment evidence, evidence that simply "reasonably tends" to exculpate the defendant must be disclosed. The standard for disclosure of mitigating evidence under subsection (e)(3) is even lower, because it requires disclosure of evidence that "*may reasonably be viewed*" as mitigating – that is, that must be evaluated from the subjective perspective of a reasonable person. That lower standard is completely appropriate in light of a capital defendant's very strong Eighth Amendment right to all mitigating evidence,[87] and additional right that requires that each juror decide whether particular evidence is mitigating or not from their own individual perspective.[88]

Under the Due Process Clause of the Fifth Amendment, an accused is entitled to all "evidence favorable to an accused . . . where the evidence is material either to guilt or to punishment."[89] The rule includes impeachment evidence within its scope.[90] Where disclosure required by the Due Process Clause is broader than that required by Rule 701, it is the Due Process Clause standard that controls.[91] Moreover, "courts [under of the jurisdiction of the D.C. Circuit] look with disfavor on narrow readings by prosecutors of the government's obligations under *Brady*."[92]

Before and during trial, the government's *Brady* obligation encompasses *all* evidence that is potentially favorable to the accused. To be clear, *Brady* states in addition to the favorability

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[87] *Lockett v. Ohio*, 438 U.S. 586, 604 (1978).
[88] *Mills v. Maryland*, 486 U.S. 367, 384 (1988); *McKoy v. North Carolina*, 494 U.S. 433, 444 (1990).
[89] *Brady*, 373 U.S. at 87.
[90] *Giglio v. United States*, 405 U.S. 150, 154 (1972).
[91] *United States v. Edwards*, 191 F. Supp. 2d 88, 89 (D.D.C. 2002) ("Whatever may be required by [the Federal Rules of Criminal Procedure and Rules of Evidence] is always trumped by *Brady*"; citing *United States v. Paxson*, 861 F.2d 730, 737 (D.C. Cir. 1988)).
[92] *Edwards*, 191 F. Supp. 2d at 90.

standard that the evidence must also be "material to either guilt or punishment."[93] This language is misleading, however, because that materiality requirement applies only when it is discovered after trial and conviction that the government has withheld favorable evidence. In the post-conviction context, it is sometimes clear that the government's failure to abide by its obligation could not have affected the verdict. The post-conviction *Brady* analysis recognizes this reality by imposing the additional "materiality" requirement. The meaning of "materiality" for *Brady* purposes is therefore different than its meaning under Rule 701. Undisclosed information is "material" for *Brady* purposes only "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different."[94] This standard makes clear that *Brady* materiality comes into question only after there is a "result of the proceeding" to analyze.

Accordingly, *Brady* materiality is irrelevant in the current posture of these proceedings. As one court has explained, "[t]he prosecutor cannot be permitted to look at the case pretrial through the end of the telescope an appellate court would use post trial."[95] As a result, the sole

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[93] *Brady*, 373 U.S. at 87.

[94] *United States v. Bagley*, 473 U.S. 667, 682 (1985).

[95] *United States v. Safavian*, 233 F.R.D. 12, 16 (D.D.C. 2005). The court went on to explain that

> The problem with [employing the materiality standard before and during trial is that it permits prosecutors to withhold admittedly favorable evidence whenever the prosecutors, in their wisdom, conclude that it would not make a difference to the outcome of the trial. Most prosecutors are neither neutral (nor should they be) nor prescient, and any such judgment necessarily is speculative on so many matters that simply are unknown and unknowable before trial begins: which government witnesses will be available for trial, how they will testify and be evaluated by the jury, which objections to testimony and evidence the trial judge will sustain and which he will overrule, what the nature of the defense will be, what witnesses and evidence will support that defense, what instructions the Court ultimately will give, what questions the jury may pose during deliberations (and how they may be answered), and whether the jury finds guilt on all counts or only on some (and which ones). *Id.*

criterion for disclosure at the pre-trial and trial phases is whether the evidence is "potentially exculpatory or otherwise favorable . . . without regard to how the withholding of such evidence might be viewed-with the benefit of hindsight-as affecting the outcome of the trial."[96] That is, "[t]he only question before (and even during) trial is whether the evidence at issue may be 'favorable to the accused'; if so, it must be disclosed without regard to whether the failure to disclose it likely would affect the outcome of the upcoming trial."[97]

Finally, with regard to the right to sentencing mitigation under the Eighth Amendment, a defendant is entitled to discover information relating to "any aspect of the defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death."[98] This requirement is exceedingly broad. "[T]he Constitution forbids imposition of the death penalty if the sentencing judge or jury is "'precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.'"[99] Even evidence that is made irrelevant by law may still be considered by a sentencing jury as mitigation.[100] The scope of discovery under the Eighth Amendment must be at least as broad as the scope of admissibility – indeed broader, given that the discovery right encompasses

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[96] *Id.*
[97] *Id.*
[98] *Lockett v. Ohio*, 438 U.S. 586, 604 (1978).
[99] *Smith v. Spisak*, 558 U.S. 139, 130 S.Ct. 676, 681-2 (2010) (quoting *Mills*, 486 U.S., at 374 (*quoting Eddings v. Oklahoma*, 455 U.S. 104, 110 (1982) (quoting *Lockett*, 438 U.S. at 604) (emphasis original).
[100] *McKoy*, 494 U.S. at 441 ("[T]he mere declaration that evidence is 'legally irrelevant' to mitigation cannot bar the consideration of that evidence if the sentencer could reasonably find that it warrants a sentence less than death.").

information that may lead to the discovery of admissible information.[101]

Against the background of these principles, it is clear that the government is obligated to turn over the discovery sought by the instant requests.

E. All of the Requested Information is Discoverable

All of the documents and information requested by the defense are highly material to proof of torture and the role of high government officials in ordering and approving it. Some of the documents set or discuss policies; others concern specific cases. Often they relate to both policies and individuals. All of these documents are either admissible or highly likely to lead to the discovery of admissible evidence that torture was an integral part of the RDI program. All of the requested documents and information therefore relate directly or indirectly to the torture-related issues discussed above and/or tend to exculpate the defendants, reduce their relative culpability, or reduce their punishment.

First, evidence related to policy that makes no mention of specific individuals is discoverable both under *Brady* and Rule 701.[102] It can be the most important evidence corroborating a witness's testimony that a defendant was tortured in the event the prosecution claims that the testimony was fabricated or exaggerated.[103] It can rebut government evidence denying the treatment of a defendant or the application of particular techniques.[104] And it can be potent evidence of government conduct so outrageous that the charges must be dismissed with

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[101] To the extent construed *in pari materia* with the government's Eighth Amendment obligation, the scope of mitigating information discoverable under Rule 701(c)(3) must also be equally broad.

[102] *See United States v. Naegle*, 468 F.Supp.2d 150, 154 (D.D.C. 2007) (policy evidence discoverable). For all of the reasons discussed above, any evidence that discusses or mentions Mr. al Baluchi himself in connection with the RDI program is plainly material.

[103] *Lloyd*, 992 F.2d at 351.

[104] *Id.*

prejudice.[105]

Second, evidence relating to the treatment of specific individuals other than the defendants can help discover or confirm the existence of relevant policies, lead to the discovery of witnesses for the defense, and/or be used to impeach prosecution witnesses who were subjected to the program.[106]

The specific requests ask for documents and information that are discoverable under these principles.

Request 1(a) seeks documents and information pertaining to White House authorizations related to RDI, including specifically CIA communications,[107] that fall into the "policy" category. They are important evidence of the scope of the RDI program (important for corroboration and/or impeachment purposes) and critical evidence establishing "outrageous conduct" at the highest levels. With respect to Request (1), White House communications with the CIA and other agencies about specific individuals[108] are material to both of these issues, as well as providing information about the individuals themselves, some of whom are likely to become witnesses. For similar reasons, evidence related to White House decisions about the scope of the Detainee Treatment Act of 2005 (which banned torture) and evidence pertaining to White House-level orders to employ torture[109] are both powerful evidence of outrageous conduct and likely to lead to other admissible evidence regarding the specifics of the use of torture against particular individuals.

The documents requested in the Classified Addendum also tend to show policies of

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105 *Rezaq*, 134 F.3d at 1130; *see also Toscanino*, 500 F.2d at 276.
106 *Giglio*, 495 U.S. at 154.
107 Request (1)(a).
108 Request (1)(b).
109 Requests (2)(a)-(b).

immediate relevance to the torture issue, as well as being likely to lead to other admissible evidence. The Addendum requests all Presidential Findings and Presidential Memoranda of Notification, if any, regarding authority for CIA RDI, including any documents marked with certain codewords and trigraphs, if they exist. Such evidence would establish the existence of programs under which defendants were detained, rendered, and tortured. The specifics of any such authorizations would be critical to all of the torture-related issues discussed above. They would be policy decisions at the highest level purporting to legitimate the torture of the defendants. As such, at a minimum, they would tend to prove that the torture of the individual defendants occurred, and thus also corroborate testimony by the defendants and others about their treatment. And they would be evidence that the White House instigated and approved the type of "torture, brutality, and similar outrageous conduct" that the D.C. Circuit and other courts have suggested may warrant dismissal of criminal charges.[110]

With respect to Request (3), while some information and documents produced by the Office of Legal Counsel about the RDI program have been made public, they have mostly been in redacted form, and many others are referred to in the released material but have not themselves been released. Request (3) seeks discovery of these documents, identifying them with as much specificity as possible given the available information. Again, these documents pertain both to policies concerning the legality of the program and specific interrogation techniques, and to the treatment of specific detainees.

Request (4) seeks disclosure of specific information about CIA communications with the White House and the DOJ concerning RDI. These include information relating to the Survival,

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[110] *Rezaq*, 134 F.3d at 1130; *see also Toscanino*, 500 F.2d at 276.

Evasion, Resistance and Escape program ("SERE"),[111] about particular detainees,[112] and about specific interrogation techniques employed on the detainees and their conditions of confinement, all of which are critical to establishing their states of mind at the time that they gave statements and revealed information to their interrogators.[113]

Finally, it should be emphasized that the prosecution's burden is to produce *all* discoverable evidence in possession of the government, regardless of the agency, that is related to the investigation. "The lawyers appearing on behalf of the United States, speaking for the entire government, must inform themselves about everything that is known in all of the archives and all of the data banks of all of the agencies collecting information which could assist in the construction of alternative scenarios to that which they intend to prove at trial."[114] The scope of that duty includes intelligence agencies that may have collected material or exculpatory information, regardless of whether the agency was "aligned" with the prosecution at the time the information was collected, and regardless of whether the information was ever provided to the prosecution.[115]

7. Request for Oral Argument: The defense requests oral argument. *See* RMC 905. The defense requests the opportunity to argue this motion at the next hearing, 28 January 2013, as the prosecution continues to object to disclosing the requested information.

8. Conference with Opposing Counsel: The defense has conferred with the

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[111] Request (4)(a).
[112] Request (4)(b).
[113] Request (4)(c).
[114] *McVeigh*, 954 F. Supp. at 1150; *see also Kyles v. Whitley*, 514 U.S. 419, 437 (1995).
[115] *United States v. McVeigh*, 923 F. Supp. 1310, 1315 (D. Colo. 1996) (intelligence agency not "aligned" with the prosecution and that "did not provide information to" the prosecution still subject to *Brady* and discovery requirements); *United States v. Diaz-Munoz*, 662 F.2d 1330, 1334-1335 (5th Cir. 1980) (reversing where information from CIA files not turned over to the government).

prosecution regarding this motion. The prosecution position is stated in Attachment D.

9. Attachments:

A. Certificate of Service

B. Memorandum for Trial Counsel, dated 6 September 2012.

C. Classified Addendum to Memorandum for Trial Counsel, dated 6 September 2012.

D. Prosecution Response to 6 September 2012 Memorandum, dated 11 October 2012.

Very respectfully,

//s//
JAMES G. CONNELL, III
Learned Counsel

//s//
STERLING R. THOMAS
Lt Col, USAF
Defense Counsel

Counsel for Mr. al Baluchi

//s//
CHERYL T. BORMANN
Learned Counsel

//s//
WILLIAM T. HENNESSY
Maj, USMC
Defense Counsel

//s//
MICHAEL A. SCHWARTZ
Capt, USAF
Defense Counsel

Counsel for Mr. bin 'Attash

//s//
JAMES P. HARRINGTON
Learned Counsel

//s//
KEVIN BOGUCKI
LCDR, USN
Defense Counsel

Counsel for Mr. bin al Shibh

//s//
WALTER B. RUIZ
CDR, USN
Defense Counsel
Counsel for Mr. al Hawsawi

Attachment A

CERTIFICATE OF SERVICE

I certify that on the 27th day of December, 2012, I electronically filed the foregoing document with the Clerk of the Court and served the foregoing on all counsel of record in person.

//s//
JAMES G. CONNELL, III,
Learned Counsel

Attachment B

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~~(U)~~ 6 September 2012

~~(U)~~ Memorandum for Trial Counsel

~~(U)~~ From: James Connell and Lt. Col Sterling Thomas, Defense Counsel for Mr. al Baluchi
Cheryl Bormann, Maj. William Hennessy, and Capt. Michael Schwartz, Defense Counsel for Mr. bin 'Attash
David Nevin, Maj. Derek Poteet, and CPT Jason Wright, Defense Counsel for Mr. Mohammad
James Harrington and LCDR Kevin Bogucki, Defense Counsel for Mr. bin al Shibh
CDR Walter Ruiz, Defense Counsel for Mr. al Hawsawi

~~(U)~~ Pursuant to Rule for Military Commissions 701, Military Commission Rule of Evidence 304, and the Fifth and Sixth Amendments to the United States Constitution, the defendants through counsel request the government to furnish all documents or information in its possession, or known or discoverable to the government, which directly or indirectly mentions or pertains to the defendants or any government witnesses or which is otherwise relevant to *United States v. Muhammad et al.*

~~(U)~~ In this request, defined phrases shall be given the following meaning:

(1) ~~(U)~~ "White House" includes but is not limited to (a) the President of the United States; (b) the Vice President of the United States; (c) the Office of the President; (d) the Office of the Vice President; (e) the National Security Council; and (f) the National Security Advisor. "White House" includes both current and former occupants of the named positions and organizations.

(2) ~~(U)~~ "CIA" means (a) the Central Intelligence Agency; (b) any subdivision of the Central Intelligence Agency; (c) any private organization founded, controlled, or funded by the Central Intelligence Agency; and (d) any current or former employees, agents, and/or contractors of the Central Intelligence Agency.

(3) ~~(U)~~ "DOJ" means (a) the Department of Justice; (b) the Attorney General of the United States; (c) the Office of the Attorney General; (d) the Office of Legal Counsel; (e) any other subdivision of the Department of Justice; and (f) any employees, agents, or contractors of the Department of Justice. "DOJ" includes both current and former occupants of the named positions and organizations.

(4) ~~(U)~~ "Defendants" means Khalid Shaikh Mohammad, Walid bin 'Attash, Ramzi bin al Shibh, Ammar al Baluchi, also known as Ali Abdul Aziz Ali, and Mustafa al Hawsawi.

(5) ~~(U)~~ "Potential witness" means (a) Majid Khan; (b) any person the prosecution intends to call to testify in any proceeding; (c) any person from whom the prosecution intends to introduce a statement pursuant to MCRE 801(d) and/or MCRE 803 in any proceeding; (d) any

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person whom a party may be reasonably expected to call to testify at any proceeding; (e) any person from whom a party may be reasonably expected to seek to introduce a statement pursuant to MCRE 801(d) and/or MCRE 803 at any proceeding; (f) any alleged co-conspirator of the defendants; (g) any person held in CIA custody at the same facility as the defendants; and (h) any person whom the government knows or reasonably should know possesses information relevant to any issue in any proceeding.

(5) ~~(U)~~ "Document" means any recorded information, regardless of the nature of the medium or the method or circumstances of recording. Where the United States has previously released a redacted version of a document, the word "document" includes a complete, unredacted version of the same document. The word "document" includes drafts of a document, whether prepared by the same or a different person, and any record of the sender, recipient, and date of transmittal of a transmitted document.

(6) ~~(U)~~ "Information" means any knowledge that can be communicated. When used with respect to a document, the word "information" includes any knowledge of the sender, recipient, and date of transmittal of a transmitted document. Where information responsive to a request is not contained in a document, it includes a summary of the information and the name and contact information of a person with knowledge of the information. When information was contained in a document which no longer exists, it includes a summary of the content of that document and the circumstances of its destruction.

(7) ~~(U)~~ "SERE" means the Survival, Evasion, Resistance, and Escape program, as implemented at any time by any branch of the United States armed forces.

(8) ~~(U)~~ A word or phrase expressed in the singular shall include the plural. A word or phrase expressed in the plural shall include the singular.

(9) ~~(U)~~ The conjunctions "and" and "or" shall include both conjunctive and disjunctive meanings.

(10) ~~(U)~~ "Authority for CIA RDI" means legal, policy, or operational authorizations for or limitations upon the CIA's powers to apprehend, render, detain, interrogate, perform or withhold medical acts, or take any other action with respect to terrorism suspects, including but not limited to communications about specific persons, locations, foreign partners, interrogations, "techniques," medical actions, and conditions of confinement. This term is not limited to those in CIA custody, however defined.

~~(U)~~ In particular, Mr. al Baluchi requests all documents and information in the possession of the United States regarding White House or DOJ authority for CIA RDI. Responsive documents and information include, but are not limited to, the following:

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(1) ~~(U)~~ All documents and information regarding White House consideration of authority for CIA RDI, including but not limited to the following:

a. ~~(U)~~ All documents and information regarding CIA briefings to the National Security Council.

b. ~~(U)~~ All documents and information, including but not limited to CIA cables, sent to or from the White House concerning specific interrogations, specific techniques, specific medical actions, or specific detainees.

(2) ~~(U)~~ All documents and information regarding exercise of any purported power of the White House regarding authority for CIA RDI, including but not limited to the following:

a. ~~(U)~~ All documents and information regarding exercise of any purported power to construe the Detainee Treatment Act of 2005.

b. ~~(U)~~ All documents and information regarding exercise of any purported power to order the use of torture.

(3) ~~(U)~~ All documents and information regarding legal analysis or advice by the Office of Legal Counsel regarding authority for CIA RDI, including but not limited to the following:

a. ~~(U)~~ All documents and information relating to the preparation, transmission, or effect of the document entitled, "Legal Principles Applicable to CIA Detention and Interrogation of Captured Al-Qa'ida Personnel," date unknown.

b. ~~(U)~~ Document entitled or referring to "Advice to the National Security Council regarding which terrorist organizations can be targeted [redacted]," date unknown.

c. ~~(U)~~ Document entitled or referring to "Legal standards governing the use of certain intelligence techniques," dated 4 October 2001.

d. ~~(U)~~ Document entitled or referring to "Whether U.S. Armed Forces in Afghanistan Are Legally Obligated to Prevent Certain Conduct by Others," dated 11 December 2001.

e. ~~(U)~~ Document entitled or referring to "War Crimes Act, Hague Convention, Geneva Conventions, federal criminal code, and detainee treatment," dated 20 November 2001.

f. ~~(U)~~ Document entitled or referring to "Possible Criminal Charges Against American Citizen Who Was a Member of the Al Qaeda terrorist Organization or the Taliban Militia," dated 21 December 2001.

g. ~~(U)~~ Document entitled or referring to "Possible habeas jurisdiction over aliens held in Guantanamo Bay, Cuba," dated 28 December 2001.

h. ~~(U)~~ Document entitled or referring to "Authority of OLC, DOJ, AG, and DOS in the interpretation of treaties and international law," dated 11 January 2002.

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i. ~~(U)~~ Document entitled or referring to "Geneva Conventions," dated 11 January 2002.

j. ~~(U)~~ Document entitled or referring to "Geneva Conventions and prisoners of war," dated 24 January 2002.

k. ~~(U)~~ Document entitled or referring to "Application of international law to the United States," dated 24 January 2002.

l. ~~(U)~~ Document entitled or referring to "Possible interpretation of Common Article 3 of the 1949 Geneva Convention Relative to the Treatment of Prisoners of War," dated 1 February 2002.

m. ~~(U)~~ Document entitled or referring to "Availability of habeas corpus relief to detainees," dated 5 March 2002.

n. ~~(U)~~ Document entitled or referring to "DOS memorandum," dated 22 March 2002.

o. ~~(U)~~ Document entitled or referring to "Applicability of the Convention Against Torture," dated 22 July 2002.

p. ~~(U)~~ Information regarding oral advice regarding interrogation of Abu Zubaydah on or about 24 and 26 July, 2002.

q. ~~(U)~~ Document entitled or referring to "Interrogation of al Qaeda members," dated 1 August 2002.

r. ~~(U)~~ Document entitled or referring to "Standards of Conduct for Interrogation Under 18 U.S.C. §§ 2340-2340A," dated 1 August 2002.

s. ~~(U)~~ Document entitled or referring to "American Bar Association's Task Force on Treatment of Enemy Combatants Report," dated 7 February 2003.

t. ~~(U)~~ Document entitled or referring to "Use of information collected in course of classified foreign intelligence activities,: dated 25 February 2003.

u. ~~(U)~~ Document entitled or referring to "Classified foreign intelligence activities," dated 14 March 2003.

v. ~~(U)~~ Document entitled or referring to "Interrogation of prisoners by CIA," dated June 2003.

w. ~~(U)~~ Document entitled or referring to "Geneva Conventions," dated 31 October 2003.

x. ~~(U)~~ Document entitled or referring to "Legal advice provided to DOD re: application of Geneva Conventions," dated 18 November 2003.

y. ~~(U)~~ Document entitled or referring to "Letter clarifying OLC advice on classified foreign intelligence activities," dated 11 March 2004.

z. ~~(U)~~ Document entitled or referring to "Classified foreign intelligence activities," dated 12 March 2004.

aa. ~~(U)~~ Document entitled or referring to "Preliminary OLC views regarding legal issues concerning classified foreign intelligence activities," dated 15 March 2004.

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bb. ~~(U)~~ Document entitled or referring to "Legal recommendations regarding classified foreign intelligence activities," dated 16 March 2004.

cc. ~~(U)~~ Document entitled or referring to "Criminal Liability of CIA Officials Under 18 USC Sec 2339A or 2339B for Providing Material Support to Terrorists," dated 29 May 2004.

dd. ~~(U)~~ Document entitled or referring to "Exercises of CIA Authority and 'Covert Action,'" dated 30 May 2004.

ee. ~~(U)~~ Document entitled or referring to "Interrogation of prisoners by CIA," dated June through October 2004.

ff. ~~(U)~~ Document entitled or referring to "Implications of recent Supreme Court decisions for certain foreign intelligence activities," dated 16 July 2004.

gg. ~~(U)~~ Document entitled or referring to "Proposed memorandum concerning a decision to be made by the Deputy Attorney General regarding an intelligence collection activity," dated 9 August 2004.

hh. ~~(U)~~ Document entitled or referring to "Communications with detainees in combatant status review tribunals who are represented by counsel," dated 6 December 2004.

ii. ~~(U)~~ Document prepared by Mr. England, Mr. Zelikow, Mr. Waxman, and Mr. Bellinger, dated June 2005.

jj. ~~(U)~~ Information regarding oral advice from John Eisenberg to CIA regarding Majid Khan, including draft memo dated 14 September 2005.

kk. ~~(U)~~ Document entitled or referring to "Application of the Detainee Treatment Act to Conditions of Confinement at Central Intelligence Agency Detention Facilities," dated 31 August 2006.

ll. ~~(U)~~ Document entitled or referring to "Application of Common Article 3 to Conditions of Confinement at Central Intelligence Agency Detention Facilities," dated 31 August 2006.

mm. ~~(U)~~ Document entitled or referring to "Application of the War Crimes Act, the Detainee Treatment Act, and Common Article 3 of the Geneva Conventions to Certain Techniques that May Be Used by the CIA in the Interrogation of High Value al Qaeda Detainees," dated 20 July 2007.

nn. ~~(U)~~ All documents and information regarding DOJ consideration of CIA use of specific interrogation techniques, including but not limited to unredacted versions of the following documents:

i. ~~(U)~~ Document addressed from Mr. Goldsmith to Mr. Muller, dated 7 July 2004.

ii. ~~(U)~~ Document addressed from Mr. Ashcroft to Mr. McLaughlin, dated 22 July 2004.

iii. ~~(U)~~ Document addressed from Mr. Levin to Mr. Rizzo, dated 6 August 2004.

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iv. ~~(U)~~ Document addressed from Mr. Levin to Mr. Rizzo, dated 26 August 2004.

v. ~~(U)~~ Document addressed from Mr. Levin to Mr. Rizzo, dated 6 September 2004.

vi. ~~(U)~~ Document addressed from Mr. Levin to Mr. Rizzo, dated 20 September 2004.

(4) ~~(U)~~ All documents and information provided by the CIA to the White House or DOJ for action or analysis regarding authority for CIA RDI, including but not limited to the following:

a. ~~(U)~~ All documents and information provided by the CIA to the White House or DOJ regarding the SERE program, including but not limited to the following:

i. ~~(U)~~ Document addressed from Dr. Jerald Ogrisseg to the Joint Personnel Recovery Agency Chief of Staff, dated 24 July 2002.

ii. ~~(U)~~ Document prepared by Joint Personnel Recovery Agency, dated 24 June 2002.

iii. ~~(U)~~ Document prepared by Joint Personnel Recovery Agency, dated 25 June 2002.

iv. ~~(U)~~ Document entitled or referring to SERE Training Manual, dated 7 May 2002.

v. ~~(U)~~ Pre-Academic Laboratory Operating Instructions, date unknown.

b. ~~(U)~~ All documents and information provided by the CIA to the White House or DOJ regarding individual detainees, including but not limited to biographies, profiles, and psychological assessments.

c. ~~(U)~~ All documents and information provided by the CIA to the White House or DOJ regarding conditions of confinement and interrogation techniques, including but not limited to the following:

i. ~~(U)~~ Document entitled or referring to "Guidelines on Interrogations Conducted Pursuant to the [Redacted], dated 28 January 2003.

ii. ~~(U)~~ Document entitled or referring to "Guidelines on Confinement Conditions for CIA Detainees," dated 28 January 2003.

iii. ~~(U)~~ Document entitled or referring to "OMS Guidelines on Medical and Psychological Support to Detainee Rendition, Interrogation and Detention," dated April 2003.

iv. ~~(U)~~ Document entitled or referring to "Al-Qa'ida's Ties to Other Key Terror Groups: Terrorist Links in a Chain," dated 28 August 2003.

v. ~~(U)~~ Document entitled or referring to "OMS Guidelines on Medical and Psychological Support to Detainee Rendition, Interrogation and Detention," dated 4 September 2003.

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vi. ~~(U)~~ Document entitled or referring to "OMS Guidelines on Medical and Psychological Support to Detainee Rendition, Interrogation and Detention," dated 17 May 2004.

vii. ~~(U)~~ Document addressed from Mr. Muller to Mr. Goldsmith, dated 14 June 2004.

viii. ~~(U)~~ Document entitled or referring to "Khalid Shaykh Muhammad, Preeminent Source on Al-Qa'ida," dated 13 July 2004.

ix. ~~(U)~~ Document addressed to Mr. Levin from Associate General Counsel, CIA, dated 30 July 2004.

x. ~~(U)~~ Document addressed to Mr. Levin from Mr. Rizzo, dated 2 August 2004.

xi. ~~(U)~~ Document addressed to Mr. Levin from Associate General Counsel, CIA, dated 5 August 2004 or 19 August 2004.

xii. ~~(U)~~ Document addressed to Mr. Levin from Associate General Counsel, CIA, dated 25 August 2004.

xiii. ~~(U)~~ Document addressed to Mr. Levin from Associate General Counsel, CIA, dated 12 October 2004.

xiv. ~~(U)~~ Document addressed to Mr. Levin from Associate General Counsel, CIA, dated 22 October 2004.

xv. ~~(U)~~ Document entitled or referring to "Background Paper on CIA's Combined Use of Interrogation Techniques," dated on or before 30 December 2004.

xvi. ~~(U)~~ Document entitled or referring to "CIA OIG Special Review of [Redacted] Counterterrorism Detention and Interrogation Activities (September 2001 – October 2003)," date unknown.

xvii. ~~(U)~~ Document entitled or referring to "OMS Guidelines on Medical and Psychological Support to Detainee Rendition, Interrogation and Detention," dated December 2004.

xviii. ~~(U)~~ Document addressed to Mr. Levin from Assistant General Counsel, CIA, dated 4 January 2005.

xix. ~~(U)~~ Document addressed to Mr. Bradbury from OCI Counterterrorist Center, dated 2 March 2005.

xx. ~~(U)~~ Document referred to as the "CIA Effectiveness Memo," date unknown, in Office of Professional Responsibility, Department of Justice, *Investigation into the Office of Legal Counsel's Memoranda Concerning Issues Relating to the Central Intelligence Agency's Use of "Enhanced Interrogation Techniques" on Suspected Terrorists*, dated 29 July 2009.

xxi. ~~(U)~~ Document entitled or referring to "Briefing Note on the Value of Detainee Reporting," dated 15 April 2005.

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xxii. ~~(U)~~ Document addressed to Mr. Bradbury from Assistant General Counsel, CIA, dated 22 April 2005.

xxiii. ~~(U)~~ Document entitled or referring to "the use of enhanced interrogation techniques after the Detainee Treatment Act," dated 2005.

~~(U)~~ Thank you for your attention to this matter. Please do not hesitate to contact me with any questions.

Very respectfully,

James G. Connell, III

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Attachment C

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THIS IS A COVER SHEET

FOR CLASSIFIED INFORMATION

ALL INDIVIDUALS HANDLING THIS INFORMATION ARE REQUIRED TO PROTECT IT FROM UNAUTHORIZED DISCLOSURE IN THE INTEREST OF THE NATIONAL SECURITY OF THE UNITED STATES.

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STANDARD FORM 704 (8-85)
Prescribed by GSA/ISOO
32 CFR 2003

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~~Classified Addendum~~

~~(U)~~ In addition to the documents and information requested in the unclassified portion of this memorandum, Mr. al Baluchi requests the following:

[redacted]

Derivative markings applied by: James Connell
Source document: None
Declassification instructions: ~~OADR~~ 28 Aug 2037

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Attachment D

~~UNCLASSIFIED~~

11 October 2012

MEMORANDUM FOR Defense Counsel for Khalid Shaikh Mohammad, Walid Bin 'Attash, Ramzi Binalshibh, Ali Abdul Aziz Ali, and Mustafa al Hawsawi

SUBJECT: ~~(U)~~ Prosecution Response to 6 September 2012 Defense Request for Information Regarding White House or DOJ Authority for CIA RDI Program

1. ~~(U)~~ The Prosecution received the Defense request for discovery, filed jointly, dated 6 September 2012, pertaining to the RDI program. The Prosecution hereby responds to the Defense request.

2. ~~(U)~~ Once this Commission signs a protective order and subject to any applicable privileges, the Prosecution will produce all relevant, material, and responsive information in accordance with the Military Commissions Act of 2009 ("M.C.A."), 10 U.S.C. §§ 948a *et seq.*, Rules for Military Commissions ("R.M.C.") 701 and 703, Military Commissions Rule of Evidence ("M.C.R.E.") 505, and other applicable law, including any materials that may mitigate the punishment or lead to materials that would mitigate punishment, pursuant to R.M.C. 701.

3. ~~(U)~~ Rule for Military Commissions (R.M.C.) 701 governs discovery in the military commission system, and requires the disclosure to the Defense of information material to the preparation of the Defense or intended for use by the trial counsel. The Prosecution's discovery obligations with regard to classified information extend only to that which is relevant and helpful to the preparation of the defense. *See United States v Yunis*, 867 F.2d. 617, 623 (D.C. Cir 1989) (stating "classified information is not discoverable on a mere showing of theoretical relevance"); *see also United States v. Mejia*, 448 F.3d 436 (D.C. Cir. 2006) (applying *Yunis*); R.M.C. 701(c), Discussion (citing *Yunis* to define what information is material to the preparation of the defense).

4. ~~(U)~~ The Prosecution acknowledges its duty and responsibility to continually review and provide the Defense with information that is relevant, necessary, and material to the preparation of the defense, when such information is in the government's possession, custody, or control and it is known, or, by the exercise of due diligence, may become known to trial counsel. *See* R.M.C. 701(c).

5. ~~(U)~~ The Defense in its joint memorandum of 6 September 2012, requests that the Prosecution furnish all documents or information in its possession, or known or discoverable to the government, which directly or indirectly mentions or pertains to the defendants or any government witnesses or which is otherwise relevant to this case. The Defense is not entitled to every piece of paper in the possession of the United States Government that directly or indirectly mentions or pertains to the Accused. To the extent documents or information are relevant and material to the preparation of the defense, the prosecution will turn over those materials. At the appropriate time, the Prosecution will turn over any statements or reports for any witnesses it intends to call that are relevant,

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necessary, and material to the preparation of the defense subject to applicable privileges and protective orders.

6. ~~(U)~~ Within the joint Defense filing, defense for Mr. Ali requested all documents and information in the possession of the United States regarding White House or DOJ authority for the CIA RDI. The prosecution responds as follows:

1) The Prosecution respectfully declines to provide documents and information regarding White House consideration of authority for CIA RDI, to the extent that such information exists. The Defense's request for such information is overbroad and not relevant or necessary and material to the preparation of the defense.

2) The Prosecution respectfully declines to provide documents and information regarding exercise of any purported power of the White House regarding authority for the CIA RDI program, to the extent that such information exists. The Defense's request for such information is overbroad and not relevant, necessary, and material to the preparation of the defense

3) In accordance with R.M.C. 701 and R.M.C. 703(f), the Prosecution, upon issuance of a protective order, will provide all documentation regarding the detention, conditions of confinement, interrogation, and treatment of the accused in the possession of the U.S. Government that is relevant, necessary, and material to the preparation of the defense, subject to any applicable privileges and protective orders. In accordance with R.M.C. 701(c)(3), all statements of the accused relating to the charges, or extenuation and mitigation that are relevant, necessary, and material to the preparation of the Defense will be provided to the Defense, subject to any applicable privileges and protective orders.

Respectfully submitted,

//s//

Joanna Baltes
Deputy Trial Counsel

CPT Michael J. Lebowitz, JA, USA
Assistant Trial Counsel

Mark Martins
Chief Prosecutor

Military Commissions