

MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY, CUBA

UNITED STATES OF AMERICA

v.

**KHALID SHAIKH MOHAMMAD;
WALID MUBARAK BIN 'ATTASH;
RAMZI BINALSHIBH;
ALI ABDUL AZIZ ALI; MUSTAFA
AHMED ADAM AL HAWSAWI**

AE 286L (GOV)

Government Response

To Emergency Defense Motion To Order the Government To Produce the Full, Unredacted Senate Report on the RDI Program, or, in the Alternative To File the Report with the Commission To Be Maintained Ex Parte and Under Seal Pending Further Ruling

13 February 2015

1. Timeliness

This Response is timely under Military Commissions Trial Judiciary Rule of Court 3.7.d.(1) because the Prosecution filed it within 14 calendar days after the Motion was filed.

2. Relief Sought

In Appellate Exhibit 286J (KSM), the Defense moves the Commission (1) to grant its original motion to compel the Prosecution to produce the report of the Senate Select Committee on Intelligence (“SSCI”) regarding the CIA’s Rendition, Detention, and Interrogation Program (“SSCI Report”) (“AE 286” or “Motion To Compel”) or, in the alternative, (2) to compel the Prosecution to file the SSCI Report with the Commission *ex parte* and under seal. AE 286J (KSM) at 1. The Commission should defer ruling on the original Motion To Compel and should deny the defense request to compel the Prosecution to file the SSCI Report with the Commission.

3. Burden of Proof

As the moving party, the Defense must demonstrate by a preponderance of the evidence that the requested relief is warranted. R.M.C. 905(c)(1)-(2). It also bears the burden of proving, by a preponderance of the evidence, any “factual issue the resolution of which is necessary” to resolve the request for relief. *Id.*

4. Facts¹**I. Mr. Ali Asks the Prosecution To Produce the SSCI Report and Its Source Material**

On 21 May 2013, Mr. Ali Abdul Aziz Ali asked the Prosecution to produce the report of the Senate Select Committee on Intelligence (“SSCI”) regarding the CIA’s Rendition, Detention, and Interrogation Program (“SSCI Report”) and “all documents and communications” relating to Mr. Ali “that are referred to in or provide source material for the [SSCI Report].” AE 286 (AAA), Attachment B. Then, on 15 July 2013, he asked the Prosecution to produce “all documents mentioning or responding to the [SSCI Report]” and “all documents and communications” relating to Mr. Ali “that are referred to in or provide source material for all documents mentioning or responding to” the SSCI Report. *See* AE 286 (AAA), Attachment C.

II. Mr. al Hawsawi Asks the Prosecution To Produce the SSCI Report and Moves the Commission To Compel the Prosecution To Respond to the Request

On 25 September 2013, Mr. Mustafa Ahmed Adam al Hawsawi asked the Prosecution to produce, among other information, “[a]n unredacted copy of the U.S. Senate Select Committee on Intelligence’s report on interrogations, adopted by that Committee on December 13, 2012.” AE 260, Attachment B at 8. On 23 December 2013, Mr. al Hawsawi moved the Commission to compel the Prosecution “to provide the Defense with a detailed response to the Defense discovery request of 25 September 2013.” *Id.* at 1. The Prosecution timely opposed the motion, noting that counsel for Mr. al Hawsawi failed to comply with the Commission’s order instructing him to sign the Memorandum of Understanding Regarding the Receipt of Classified Information. AE 260A at 1 (citing AE 13DDD).

III. Mr. Ali Moves the Commission To Compel the Prosecution To Produce the SSCI Report and Other Documents

On 2 April 2014, Mr. Ali moved the Commission to compel the Prosecution to produce the SSCI Report, “the CIA internal review of the program known as the ‘Panetta Review,’” “the

¹ With the exception of Part VI. below, the Facts are the same as those presented in the Government’s Response to Mr. al Hawsawi’s Supplement to the Motion To Compel. *See* AE 286K (GOV).

CIA's official response to the Senate committee study," and "underlying documents referring or relating to" Mr. Ali. AE 286 (AAA) at 1. On 16 April 2014, the Prosecution timely responded that it would diligently continue to seek to obtain the SSCI Report—which was understood to be in the possession and control of the Legislative Branch—and, upon review, to determine whether the report or any associated materials are required to be disclosed to the Defense. The Prosecution further noted that it will provide the Defense and this Commission with updates on the status of its efforts to obtain and review the Report. AE 286A (GOV) at 3.

A. Mr. Ali Supplements His Motion To Compel, and the Prosecution Updates the Commission on Its Efforts To Obtain the SSCI Report

On 12 June 2014, Mr. Ali supplemented his Motion To Compel with alleged "discrepancies in the Government's representation of its duty to produce the requested documents to [Mr. Ali] versus its motion for reconsideration of AE120C in *United States v. Abd al Rahim Hussayn Muhammed al Nashiri*." AE 286 (AAA Sup). The Prosecution timely responded, demonstrating that no such discrepancies exist. It explained it "is actively seeking to obtain the entire SSCI Report through appropriate Executive Branch channels" and to review its contents to determine whether the Report, or any associated materials, should be provided to the Defense under R.M.C. 701. AE 286B (GOV). On 27 June 2014, the Prosecution asked the Commission, given these efforts, to defer ruling on Mr. Ali's Motion To Compel. *Id.* at 2.

On 29 August 2014, the Prosecution updated the Commission and the Defense on its efforts to obtain the entire SSCI Report. In particular, it noted that the Executive Branch was still working expeditiously to complete its internal declassification review process and submit a redacted version of the executive summary, findings, and conclusions of the SSCI Report. The Prosecution further noted that it continued to work expeditiously to identify and produce all discovery related to the former RDI Program that is noncumulative, relevant, and helpful to the Defense, while also requesting those substitutions and other relief necessary to protect classified information. AE 286C (GOV) at 1-2. The Prosecution filed similar updates on 30 September

2014, 29 October 2014, and 5 December 2014. AE 286D (GOV); AE 286E (GOV); AE 286F (GOV).

B. The Prosecution Notifies the Commission and the Defense that the SSCI Released an Unclassified Version of the Executive Summary to Its Study

On 15 December 2014, the Prosecution informed the Commission and the Defense that on 9 December 2014, the SSCI released an unclassified version of the Executive Summary to the Study, entitled “Committee Study of the Central Intelligence Agency’s Detention and Interrogation Program” (“Executive Summary”). AE 286G (GOV). The Prosecution added that unredacted portions of the Executive Summary released on 9 December has been declassified and that the redacted portions of the Executive Summary and the entire underlying Report remain classified. The Prosecution also added that it continued to seek access to the entire SSCI Report to review it for any potentially discoverable information not otherwise identified by the Prosecution and that the Prosecution will notify the Commission when it has been granted access to the entire Report. *Id.* at 2-3.

IV. Mr. Bin ‘Attash Requests the Entire SSCI Report and “Related Documents” and Moves the Commission To Compel the Prosecution To Produce Them

On 15 December 2014, Mr. Walid Mubarak Bin ‘Attash asked the Prosecution to produce “the six million pages of materials . . . used by the [SSCI] to create its still-classified 6,700-page Report on the CIA’s Detention and Interrogation Program.” AE 286 (WBA Amend Sup), Attachment B. On the same day, he asked the Prosecution to produce the entire SSCI Report “in full without abridgement, abbreviation, expurgation, and/or redaction of any kind.” *Id.*, Attachment C. In a separate request, he also asked the Prosecution to produce the “‘Panetta Review.’” *Id.*, Attachment D.

The Prosecution declined to produce the entire SSCI Report or the “Panetta Review” because they are “the subject of ongoing litigation in AE 286.” *Id.*, Attachments E, F. The Prosecution also opposed the request for the “six million pages” because the request is “overbroad in its scope and seeks information that clearly falls outside the Prosecution’s

discovery obligations under R.M.C. 701 and/or M.C.R.E. 505(f)(1)(B).” *Id.*, Attachment G. The Prosecution added that it was aware of its discovery obligations and was committed to disclosing information regarding Mr. Bin ‘Attash’s specific conditions of confinement while detained by the U.S. Government. *Id.*

On 13 January 2015, Mr. Bin ‘Attash supplemented the Motion To Compel, asking the Commission to compel the Prosecution to produce “the full SSCI Study, the 6 million pages relied upon by the SSCI for the Study, and the ‘Panetta Review.’” *Id.* at 2. On 27 January 2015, the Prosecution timely responded, maintaining that the Commission should defer ruling on the Motion To Compel the SSCI Report and its underlying documents, the “Panetta Review,” and the CIA’s official response to the SSCI Study. AE 286H at 1.

V. Mr. al Hawsawi Supplements the Motion To Compel

On 28 January 2015, Mr. al Hawsawi supplemented the Motion To Compel by asking the Commission to “compel production of full, unredacted versions of” the SSCI Report, the “Panetta Review,” and “the underlying documents that refer and relate to High Value Detainees, to include Mr. al Hawsawi and his alleged co-conspirators.” AE 286J (MAH) at 1. The Prosecution timely responded, maintaining that the Commission should defer ruling on the Motion To Compel because the Prosecution does not have access to the requested material and/or has not fully reviewed the requested material to make discoverability determinations. AE 286K (GOV) at 1.

VI. The Defense Asks the Commission To Grant the Motion To Compel or Compel the Prosecution To File the SSCI Report with the Commission *Ex Parte* and Under Seal

On 30 January 2015, the Defense renewed the Motion To Compel. AE 286J (KSM) at 1-2. In particular, the Defense moved the Commission to (1) “promptly grant” the Motion To Compel or, in the alternative, (2) order the government “to file the Report with the Commission *ex parte* and under seal so that it can be made part of the appellate record and be produced at a later date.” *Id.* The Defense requests this relief because of its concern that the Executive Branch

will return copies of the SSCI Report to the SSCI Chairman and that the “Senate, and possibly the prosecution, will take the position that the Commission has no authority to order its production.” *Id.* at 5. While not conceding the allegations asserted in Appellate Exhibit 286J (KSM), the Prosecution timely opposes both defense requests for relief.

5. Law and Argument

For the reasons explained in its Response to Mr. al Hawsawi’s Supplement to the Motion To Compel, the Prosecution maintains that the Commission should defer ruling on the Motion To Compel. AE 286K (GOV); *see* AE 286A (GOV); AE 286B (GOV); AE 286C (GOV); AE 286D (GOV); AE 286E (GOV); AE 286F (GOV); AE 286G (GOV); AE 286H (GOV). The Commission should also deny the new defense request to compel the Prosecution to file the SSCI Report with the Commission for the same reason: although the Prosecution does not yet have access to the full SSCI RDI Study, it continues actively seeking to obtain it through appropriate Executive and Legislative Branch channels and will continue to report frequently to the Commission on its progress toward commencing review of the full Study. AE 286K (GOV) at 5-7. The United States Department of Defense nonetheless can assure the Commission that it will preserve the status quo regarding the full SSCI Report absent either leave of the Commission or resolution of this litigation in the Prosecution’s favor. The Commission thus need not compel the Prosecution to file the SSCI Report with the Commission.

6. Conclusion

The Commission should defer ruling on the Motion To Compel and deny the defense request to compel the Prosecution to file the SSCI Report with the Commission.

7. Oral Argument

The Prosecution does not request oral argument, but, if the Commission grants the defense request for oral argument, the Prosecution requests the opportunity to be heard in response.

8. Witnesses and Evidence

The Prosecution does not rely on any witnesses or evidence to support this Response.

9. Additional Information

The Prosecution does not offer any additional information to support this Response.

10. Attachments

A. Certificate of Service, dated 13 February 2015.

Respectfully submitted,

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Clay Trivett
Managing Deputy Trial Counsel

Mark Martins
Chief Prosecutor
Military Commissions

ATTACHMENT A

CERTIFICATE OF SERVICE

I certify that on the 13th day of February 2015, I filed AE 286L (GOV) the **Government Response** To Emergency Defense Motion To Order the Government To Produce the Full, Unredacted Senate Report on the RDI Program, or, in the Alternative To File the Report with the Commission To Be Maintained Ex Parte and Under Seal Pending Further Ruling on Trial Judiciary with the Office of Military Commissions Trial Judiciary and I served a copy on counsel of record.

/s/

Clay Trivett
Managing Deputy Trial Counsel
Office of the Chief Prosecutor
Office of Military Commissions