MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY, CUBA

UNITED STATES OF AMERICA v. KHALID SHAIKH MOHAMMAD; WALID MUHAMMAD SALIH MUBARAK BIN 'ATTASH; RAMZI BINALSHIBH; ALI ABDUL AZIZ ALI; MUSTAFA AHMED AL HAWSAWI	AE 286O (GOV Sup) **Government Supplement** To AE 286O, the Government's Response to Mr. Ali's Third Supplement to Defense Motion to Compel Discovery of Senate Select Committee on Intelligence Study of RDI Program and Related Documents 24 May 2016

1. Timeliness

The Prosecution timely files this Supplement in accordance with the Military Commission's ruling in AE 286-16 (RUL)(GOV).

2. Relief Sought

The Prosecution respectfully requests the Commission deny AE 286 (AAA), the Defense Motion to Compel Discovery of the Senate Select Committee on Intelligence Study of the RDI Program and Related Documents.

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).

4. Affirmative Statement under Military Commissions Trial Judiciary Rule of Court 3.5.e.

On 18 March 2016, Defense counsel for Mr. Ali filed the instant supplement requesting the Commission compel "the government to produce unredacted versions of the Senate Select Committee on Intelligence Study of the CIA's Rendition, Detention, and Interrogation Program (including its Forward, Findings and Conclusions, and Executive Summary), the CIA internal review of the program known as the "Panetta Review," the CIA's official response to the Senate

committee study, and underlying documents referring or relating to [Mr. Ali]." AE 286 (AAA 3rd Sup) at 1. On 13 April 2016, the Prosecution responded that the Commission should deny the Defense motion and supplement due, in part, to the fact that the SSCI Report remains a congressional record. In doing so, the Prosecution cited to the D.C. District Court's decision in *ACLU v. CIA*, 105 F. Supp.3d 35 (D.D.C. 2015), which held that the full SSCI Report is a congressional record and subject to congressional control. It also noted that *ACLU v. CIA* was subject to an ongoing appeal.

On 13 May 2016, the United States Court of Appeals for the District of Columbia Circuit issued its decision in *ACLU v. CIA*, 2016 U.S. App. LEXIS 8776 (D.C. Cir. May 13, 2016). Pursuant to Military Commissions Trial Judiciary Rule of Court 3.5.e, a party is permitted to supplement a prior pleading if the supplement adds "newly decided case law." In this case, the D.C. Circuit's opinion is pertinent to the disposition of AE 286 as it speaks directly to the issue of whether Congress relinquished control of the Full SSCI Report when it transmitted the Report to the President and Executive Branch agencies in December 2014.

On 24 May 2016, the Commission granted the Prosecution leave to supplement its Response (AE 286O (GOV)) to the Defense Supplement (AE 286 (AAA 3rd Sup)) with *ACLU v. CIA*. *See* AE 286-16 (Rul)(GOV).

5. <u>Law and Argument</u>

Within its Response to Mr. Ali's Supplement, the Prosecution asserted that, contrary to any Defense claim, "the Senate Select Committee on Intelligence Committee ("SSCI") Study of the Central Intelligence Agency's Detention and Interrogation Program ("SSCI Report" or "Report") is a congressional record, and the SSCI has *not* waived any privilege by providing the Department of Defense and other Executive Branch agencies with a copy of the full Report." AE 286O (GOV) at 8. In support of this argument, the Prosecution referred to the D.C. District Court's opinion in *ACLU v. CIA*, 105 F. Supp.3d 35, 46-49 (D.D.C. 2015), which established that the full SSCI Report is a congressional record subject to congressional control. Without

citing directly to the D.C. District Court's opinion, Defense counsel for Mr. Ali replied to the Prosecution's Response and disputed this notion. In doing so, the Defense cited to and attached an *amicus curiae* brief submitted by Senator John D. Rockefeller on appeal of the D.C. District Court's decision and argued that Congress relinquished control of the full SSCI Report when it transmitted the Report to the President and Executive Branch agencies in December 2014. *See* AE 286P (AAA). However, since the Defense filing, the D.C. Circuit Court of Appeals has issued its opinion on the issue and has held, contrary to the position advanced by the Defense, "the Full Report always has been a congressional document subject to the control of the Senate Committee." *ACLU v. CIA*, 2016 U.S. App. LEXIS 8776, *4.

In affirming "the eminently well-reasoned judgment of the District Court," *id.* at *12, and ruling that "[t]he Full Report . . . remains a congressional document that is not subject to disclosure under FOIA," *id.* at *29, the D.C. Circuit concluded that "the Senate Committee's intent to retain control of the Full Report [was] clear . . . [and] [t]he Full Report therefore remains a congressional document . . . ." *Id.* at 29. In doing so, the Court held, contrary to Defense argument, *see* AE 286P (AAA) at 1-2, that the SSCI expressly intended from the beginning to retain control over its work product, including the Full Report. *See ACLU v. CIA*, 2016 U.S. App. LEXIS 8776, *20 ("As we have made clear, the critical evidence in this case is the June 2009 Letter from the Senate Committee Chairman and Vice Chairman to the Director of the CIA. The Letter, in straightforward terms, makes it plain that the Senate Committee intended to control any and all of its work product, including the Full Report, emanating from its oversight investigation of the CIA."). Further, the Court determined that "the Committee's limited transmittal of the Full Report—*especially in contrast with its public release of the Executive Summary*—in no way vitiated its existing, clearly expressed intent to control the Full Report." *Id.* at *24-*25. Lastly, the D.C. Circuit held, once again contrary to Defense argument, *see* AE 286P (AAA) at 3, that Congress has taken no action since the release of the Executive Summary to relinquish control of the Full Report. In so doing, the Court stated that,

> When the December 2014 Letter is read in context, however—particularly against the backdrop of the June 2009 letter—it does not vitiate Congress' existing, clearly expressed intent to maintain control of the Full Report. The December 2014 letter undoubtedly gives the Executive Branch some discretion to use the Full Report for internal purposes, much like the transcript at issue in *Goland*. *See Goland*, 607 F.2d at 347 (transcript was a congressional document even though "[t]he CIA retain[ed] a copy . . . for internal reference purposes"). However, the December 2014 letter does not override the Senate Committee's clear intent to maintain control of the Full Report express in the June 2009 letter.

2016 U.S. App. LEXIS 8776, *27-*28.

6. <u>Conclusion</u>

As set forth above, the D.C. Circuits opinion in *ACLU v. CIA* effectively establishes that the full SSCI Report remains a congressional document subject to congressional control. Therefore, the Defense's request for discovery of materials relating to the SSCI Report is improper. Regardless of the D.C. Circuit's controlling decision in this case, however, the Commission should deny the Defense Motion as, even aside from issues of whether the SSCI Report could otherwise be subject to discovery under R.M.C. 701, the Prosecution is never required to provide unredacted classified documents in their current form. In this case, the Prosecution is currently reviewing the SSCI Report, which is entirely comprised of Executive Branch documents, and will disclose all information from those documents that contain "noncumulative, relevant, and helpful to a legally cognizable defense, rebuttal of the prosecution's case, or to sentencing" pursuant to M.C.R.E. 505(f)(1)(B), as guided by the ten-paragraph construct adopted by the Commission in AE 397F, Trial Conduct Order.

7. <u>Oral Argument</u>

The Prosecution does not request oral argument.

8. <u>Witnesses and Evidence</u>

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

9. Conference with Opposing Party

The Prosecution consulted with the Defense on the Motion for Leave and instant Supplement. Counsel for Messrs. Bin 'Attash, Ali, and Hawsawi did not object to the Motion or Supplement. Counsel for Messrs. Mohammad and Binalshibh did not respond within the 24-hour timeframe established by Military Commissions Trial Judiciary Rule of Court 3.5.k.

10. Additional Information

The Prosecution has no additional information.

11. Attachments

A. Certificate of Service, dated 24 May 2016.

Respectfully submitted,

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Clay Trivett
Managing Trial Counsel

Christopher Dykstra
Major, USAF
Assistant Trial Counsel

Mark Martins
Chief Prosecutor
Military Commissions

ATTACHMENT A

CERTIFICATE OF SERVICE

I certify that on the 24th day of May 2016, I filed **AE 286O (GOV Sup) Government Supplement** To AE 286O, the Government's Response to Mr. Ali's Third Supplement to Defense Motion to Compel Discovery of Senate Select Committee on Intelligence Study of RDI Program and Related Documents with the Office of Military Commissions Trial Judiciary and I served a copy on counsel of record.

_____//s//_____
Clay Trivett
Managing Trial Counsel
Office of the Chief Prosecutor
Office of Military Commissions