

UNCLASSIFIED//FOR PUBLIC RELEASE  
MILITARY COMMISSIONS TRIAL JUDICIARY  
GUANTANAMO BAY, CUBA

UNITED STATES OF AMERICA

v.

**KHALID SHAIKH MOHAMMAD,  
WALID MUHAMMAD SALIH  
MUBARAK BIN 'ATTASH,  
RAMZI BIN AL SHIBH,  
ALI ABDUL AZIZ ALI,  
MUSTAFA AHMED ADAM  
AL HAWSAWI**

AE 286T

**ORDER**

**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  
Rulings

**10 January 2017**

1. On 2 April 2014, Counsel for Mr. Ali filed a motion<sup>1</sup> to compel discovery of the full, unredacted Senate Select Committee on Intelligence (SSCI) Study of the CIA Rendition, Detention, and Interrogation Program (SSCI Report) and related documents. The Government responded,<sup>2</sup> requesting the Commission defer ruling on AE 286J because the Government was seeking to obtain access to the full SSCI Report from both the legislative and the executive branches.<sup>3</sup>

Among the issues raised in AE 386 is whether the Commission has authority to compel discovery of a Congressional record.

2. On 30 January 2015, Counsel for the Accused filed a motion<sup>4</sup> (AE 286J) requesting the Commission compel discovery of the SSCI Report to the Defense, or, in the alternative, order the Government to file the SSCI Report with the Commission *ex parte* and under seal so it can be made part of the appellate record and be produced at a later date.

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<sup>1</sup> AE 286 (AAA), Defense Motion to Compel Discovery of Senate Select Committee on Intelligence Study of RDI Program and Related Documents, filed 2 April 2014.

<sup>2</sup> AE 286K (GOV), Government Response To Defense Supplement to AE 286, Motion To Compel Discovery of Senate Select Committee on Intelligence Study of RDI Program and Related Documents, filed 12 February 2015.

<sup>3</sup> There were additional filings by the parties in the AE 286 series that are not germane to this Order.

<sup>4</sup> AE 286J, 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 Rulings, filed 30 January 2015.

3. On 13 February 2015, the Government responded.<sup>5</sup> Within the response, they asserted, “The United States Department of Defense . . . 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.”<sup>6</sup> On 24 February 2015, the Government notified<sup>7</sup> the Commission that, as of 18 February 2015, the SSCI authorized them to review the full SSCI Report.

4. The Commission heard oral argument regarding AE 286J on 7 December 2016.<sup>8</sup> The Government advised the Commission it was reviewing the full SSCI Report for discoverable information and was providing discoverable information to the Defense regarding the CIA Rendition, Detention, and Interrogation (RDI) Program via AE 308<sup>9</sup> *et seq.*<sup>10</sup> The Government was not prepared at that time to confirm whether the Department of Defense (DoD) currently had a copy of the SSCI Report.<sup>11</sup> Following oral argument, the Commission ordered the Government to notify the Commission whether the DoD currently possessed a copy of the SSCI Report.<sup>12</sup> On

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<sup>5</sup> 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 Rulings, filed 13 February 2015.

<sup>6</sup> *Id.* at 6.

<sup>7</sup> AE 286M (GOV), Government Sixth Notice To Defense Motion To Compel Discovery of Senate Select Committee on Intelligence Study of RDI Program and Related Documents, filed 24 February 2015.

<sup>8</sup> Unofficial/Unauthenticated Transcript of the Khalid Shaikh Mohammad et al Motions Hearing Dated 7 December 2016 from 10:51 a.m. to 12:02 p.m. at pp. 14447-14475.

<sup>9</sup> See AE 308 (AAA), Defense Motion to Compel Discovery Regarding CIA Rendition, Detention, and Interrogation Program, filed 30 June 2014, *et seq.* See also AE 397F, Trial Conduct Order, Government Proposed Consolidation of Motions to Compel Information Relating to the CIA’s Former Rendition, detention, and Interrogation Program, dated 5 April 2016.

<sup>10</sup> Transcript at 14466.

<sup>11</sup> Transcript at 14469 and 14471.

<sup>12</sup> AE 286Q, Order: 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 Rulings, dated 7 December 2016.

15 December 2016,<sup>13</sup> the Government advised the Commission that the DoD had two copies of the SSCI Report and the DoD treats the SSCI Report as a Congressional Record.

## 5. Findings.

a. The DoD maintains two copies of the full SSCI Report. The DoD treats its copies of the SSCI report as Congressional records.

b. The Government, via AE 308 *et seq* has established that information referenced in the SSCI Report is potentially discoverable.

c. The Government is currently in the process of providing RDI discovery in the AE 308 series. The Government has invoked Military Commission Rule of Evidence (M.C.R.E.) 505(f) to seek substitutions and other relief for providing classified information. The M.C.R.E. 505(f) process is ongoing and the Government has not completed provision of RDI discovery in the AE 308 series. Thus, the underlying motion by the Defense for the Commission to compel discovery of the full un-redacted SSCI report is not ripe.

d. The issues of the Commission's authority to compel discovery of Congressional records and whether Congressional records in the possession the DoD are "within the possession, custody, or control of the Government" under Rule for Military Commissions 701(c)(1)) are also not ripe for decision. The Commission notes an Article III Court within the D.C. Circuit has recently issued a preservation order for the Government to preserve the full SSCI Report in *habeas* litigation concerning a Guantanamo Bay detainee not party to this case.<sup>14</sup>

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<sup>13</sup> AE 286R (GOV), Government Notice Concerning Defense Motion to Compel Discovery Of Senate Select Committee on Intelligence Study of RDI Program, filed 15 December 2016.

<sup>14</sup> See *Abd Al Rahim Hussein Al Nashiri v. Barack Obama, et al.*, No. 08-cv-1207 (RCL), Misc. No. 08-mc-442 (TFI-I), dated 28 December 2016.

e. The Commission agrees with the Government's assertion in AE 286L that it is necessary to preserve the *status quo* regarding DoD possession of the SSCI report pending completion of RDI discovery and resolution of the issues raised in the AE 286 series.

**6. Ruling.**

a. The Commission motion to compel discovery of the SSCI Report is **DEFERRED**.

b. The Defense motion to order the Government to file the SSCI Report with the Commission *ex parte* and under seal so it can be made part of the appellate record and be produced at a later date is **GRANTED IN PART** as provided in paragraph 7 of this Order.

**7. Order.**

a. The Government shall ensure the DoD preserves a copy of the full SSCI Report pending completion of RDI discovery and litigation of issues raised in the 286 series.

b. This Preservation Order will remain in effect until otherwise ordered by this Commission or other Court of competent jurisdiction.

So **ORDERED** this 10th day of January, 2017.

//s//  
JAMES L. POHL  
COL, JA, USA  
Military Judge