MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY

UNITED STATES OF AMERICA v. ABD AL-RAHIM HUSSEIN MUHAMMED ABDU AL-NASHIRI	**AE 206** **DEFENSE MOTION TO COMPEL THE PRODUCTION OF THE SENATE SELECT COMMITTEE ON INTELLIGENCE REPORT ON THE RENDITION, DETENTION INTERROGATION PROGRAM** 28 January 2014

1. Timeliness: This request is filed within the timeframe established by Rule for Military Commission (R.M.C.) 905 and is timely pursuant to Military Commissions Trial Judiciary Rule of Court (R.C.) 3.7.b.(1).

2. Relief Requested: The defense moves this commission to compel the government to produce a copy of the Senate Select Committee on Intelligence's report on the Rendition, Detention, and Interrogation Program.

3. Overview: The Senate Select Committee on Intelligence's *Study of the CIA's Detention and Interrogation Program* ("SSCI Report") is material and relevant to preparation of the accused's defense and therefore its production should be compelled. By all public reports, the SSCI Report is the most comprehensive report to day of the Central Intelligence Agency's Rendition, Detention, and Interrogation Program ("RDI"). The accused was a central figure in the implementation of the RDI program and the RDI program will be central to the accused's defense on the merits, in impeaching the credibility of the evidence against him, and in mitigation of the death sentence the government is seeking to impose.

4. Burden of Proof and Persuasion: As the moving party, the defense bears the burden of persuasion as to any factual issues relevant to the disposition of this motion, which it must demonstrate by a preponderance of the evidence. R.M.C. 905(c). The Defense is "is entitled to

the production of evidence which is relevant, necessary and noncumulative." R.M.C. 703(f)(1). The Defense's ability to obtain orders for witnesses and other 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." 10 U.S.C. § 949j(a) (2009). Denial of this motion will violate the defendant's rights guaranteed by the fifth, sixth and eighth amendments to the Constitution of the United States of America, the Military Commissions Act (MCA) of 2009, the Detainee Treatment Act (DTA) of 2005, treaty obligations of the United States and fundamental fairness.

5. Statement of Facts:

a. In 2002, the accused was taken into the custody of the Central Intelligence Agency as part of its Rendition, Detention, and Interrogation Program ("RDI Program"). While so detained, the accused was subjected to extreme forms of torture and abuse at the hands of U.S. personnel for the ostensible purpose of extracting information from him in the course of so-called "enhanced interrogations."

b. The Senate Select Committee on Intelligence was created by the Senate in 1976 to oversee and make continuing studies of the intelligence activities and programs of the United States Government, to report on the U.S. government's intelligence activities and programs, and to provide vigilant legislative oversight over the intelligence activities of the United States to assure that such activities are in conformity with the Constitution and laws of the United States. The fifteen senators to comprise the SSCI have special access to intelligence sources and methods, programs, and budgets. One of the SSCI's primary functions is to conduct reviews of intelligence programs.

c. In 2012, at a cost of $40 million to taxpayers, the Senate Select Committee on Intelligence prepared a 6,300-page report detailing the scope, conduct, and efficacy of the RDI

program called the *Study of the CIA's Detention and Interrogation Program* ("SSCI Report"). Led by SSCI Chair Senator Dianne Feinstein, the committee reviewed more than six million pages of CIA documents and other records over the course of three years. The SSCI Report purportedly contains over 35,000 footnotes.

d. According to public statements from Sen. Dianne Feinstein, the SSCI Report provides "a detailed, factual description of how interrogation techniques were used, the conditions under which detainees were held and the intelligence that was — or wasn't — gained from the program." She further stated that the SSCI Report "uncovers startling details about the CIA detention and interrogation program and raises critical questions about intelligence operations and oversight ... [T]he creation of long-term, clandestine 'black sites' and the use of so-called 'enhanced-interrogation techniques' were terrible mistakes." Senator John McCain, also a member of the SSCI and a torture victim, stated that the SSCI report confirms that the "cruel, inhuman, and degrading treatment of prisoners" is "a stain on our country's conscience." In addition to detailing the CIA's illegal practices, the SSCI purportedly demonstrates that the CIA deliberately misled the White House, the Department of Justice, and Congress about the effectiveness of waterboarding, wall-slamming, shackling in painful positions, and other methods of torture and abuse.

e. On information and belief, based on public disclosures from government officials, the SSCI Report was provided to government agencies and copies remain within the custody and control of the U.S. government.

f. On 28 September 2011, the Convening Authority referred charges against the accused for trial by military commission. Six of those charges carry a maximum punishment of death upon conviction.

g. On several occasions the government has informed defense that intends to use statements given by the accused to federal officials as evidence against him.

h. On 20 September 2013, the defense duly submitted a discovery request to counsel for the government requesting the SSCI Report[1] as relevant and necessary to the preparation of the accused's defense both on the merits and in mitigation of punishment. (Attachment A)

i. On 15 October 2013, the government responded stating it could "neither grant nor deny the request," because the "report has yet to be finalized" (Attachment B).[2]

j. Based on media reports, it appears the report has in fact been finalized, and the only decision remaining is what parts will be released to the public.[3]

6. Argument:

Upon request under R.M.C. 701(c)(1), the defense is entitled to examine and copy documents within the control of the United States "which are material to the preparation of the defense." "When the defense requests documentary evidence, it will generally be provided upon a showing, that the material is relevant … and that the request … is reasonable." *United States v. Vanderwier*, 25 M.J. 263, 269 (C.M.A. 1987). In applying the materiality test, the benefit of any reasonable doubt is resolved in favor of the accused. *Morris*, 52 M.J. at 197 (citing *United States v. Green*, 37 M.J. 88, 90 (1993)).

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[1] Admittedly, the Defense request misstates the name of the committee that conducted the inquiry and generated the report. The request states that Defense seeks production of the Senate Intelligence Committee's not the Senate Service Committee on Intelligence. However, the requested document is describes as being a 6,000 report generated from the Committee's review of six million pages of documents about the CIA's interrogation tactics. Therefore, Defense believes request submitted to government counsel on 20 September 2013 sufficiently identifies which report Defense is in fact seeking the government to produce.

[2] It is the Defense's position that this response is an effective denial of the motion.

[3] Scott Roehm, *The Chorus Grows Louder for Releasing the Senate Intelligence Committee Report*, (Dec. 13, 2013http://www.constitutionproject.org/documents/the-chorus-grows-louder-for-releasing-the-senate-intelligence-committee-report/; *see also* Rosa Banks, *We Can Handle the Truth: The CIA's Truth About Torture Just Doesn't Hold Water*, Foreign Policy, January 6, 2014 available at http://www foreignpolicy.com/articles/2014/01/06/we_can_handle_the_truth_cia_excuses_torture

R.M.C. 701(c)(1) is near identical to R.C.M. 701(a)(2)(A). The Court of Appeals for the Armed Forces have repeatedly held that discovery under the analogous portion of R.C.M. 701 is not limited to admissible evidence. *See United States v. Luke*, 69 M.J. 309, 319-20 (C.A.A.F. 2011); *United States v. Webb*, 66 M.J. 89, 92 (C.A.A.F. 2008); *United States v. Roberts*, 59 M.J. 323, 325 (C.A.A.F. 2004). Rather, the military rules of discovery "focus on equal access to evidence to aid the preparation of the defense and enhance the orderly administration of military justice." *Roberts*, 59 M.J. at 325. The right to discovery includes materials that would assist the defense in formulating a defense strategy. *Luke*, 69 M.J. at 320; *Webb*, 66 M.J. at 92. The right to discovery also includes information that would assist in other pretrial issues, such as challenges for cause. *United States v. Modesto*, 43 M.J. 315, 320 (C.A.A.F. 1995).

The reasons for the military's open discovery practices are plain:

> Providing broad discovery at an early stage reduces pretrial motions practice and surprise and delay at trial. It leads to better-informed judgment about the merits of the case and encourages early decisions concerning withdrawal of charges, motions, pleas, and composition of court-martial. In short, experience has shown that broad discovery contributes substantially to the truth-finding process and to the efficiency with which it functions. It is essential to the administration of justice; because assembling the military judge, counsel, members, accused, and witnesses is frequently costly and time consuming, clarification or resolution of matters before trial is essential.

R.C.M. 701 *analysis*, app. 21, at A21-33 (2008).

Under the MCA, the accused has a right to present evidence in his defense. 10 U.S.C. § 949a(2)(A) (The accused has a right "to present evidence in the accused's defense[.]") R.M.C. 701(e)(1)(C) requires the trial counsel to provide the defense with any evidence which tends to "reduce the punishment." As stated many times before, this is a capital case. *See Loving v. United States*, 62 M.J. 235, 236 (C.A.A.F. 2005) (recognizing that the unique severity of a death sentence infuses the legal process with special protections that ensure a fair and reliable trial); *see also United States v. Walker*, 66 M.J. 721 (N.M.C.C.A. 2008) (recognizing the concept that

"death is different" in reviewing capital cases). And in preparing a capital defense, the defense must focus on two tasks—preparing a vigorous defense against the underlying evidence and preparing an equally vigorous defense against a possible sentencing hearing. *See*, *e.g.*, R.M.C. 1004 ("The accused shall be given broad latitude to present evidence in extenuation and mitigation.") At times, these two tasks may be intertwined insofar as a defense against the charges is also a mitigating reason against the death penalty.

The government is also under an affirmative obligation to disclose potentially exculpatory evidence. R.M.C. 701(e); *Brady v. Maryland*, 373 U.S. 83 (1967). The same disclosure obligation also applies to potentially mitigating evidence. *Id.* The fact that this information is in the hands of an agency of the United States other than the prosecution does not relieve the prosecution from its obligation. *Kyles v. Whitley*, 514 U.S. 419 (1995). To that end, the defense's work must focus on the underlying facts and the government's putative theory, as well as preparing a mitigation case.

The SSCI Report provides a compendium of information, including 35,000 citations derived from six million pages of CIA documents, on the RDI program to which the accused was subjected for nearly four years. The government has thus far produced, at most, 500 documents pertaining to the RDI program despite the accused's central role in it and its relevance to the issues in this case. In other words, the government has been exceptionally reluctant, arguably obstructive, as the defense has sought discovery about a significant period of the accused's custody and a now-abandoned government policy that affects all aspects of the government's evidence. The relevance of the information and judgments contained in the SSCI Report cannot be underestimated. During the four years the accused was in CIA custody, he was subjected to extreme forms of torture and abuse that are the central subject of the SSCI Report. This is relevant to this commission's jurisdiction, the credibility of the evidence that will be introduced on the merits, and

any sentence the commission ultimately may impose on the accused.

Relating to the commission's jurisdiction, the accused's treatment constitutes extraordinarily outrageous government conduct. If Senator McCain is to be believed, the SSCI Report demonstrates that the RDI program, of which the accused was a central victim, is a "stain on our country's conscience." The SSCI is therefore directly relevant to whether the government's conduct in bringing this case "shocks the conscience" to such an extent that it has forfeited any legitimate prosecutorial interest. At a minimum, the commission's members are entitled to hear the evidence, to evaluate the judgments of the most senior members of our government, and to decide for themselves.

Relating to the credibility of the government's evidence on the merits, the government has already notified defense counsel that it intends to use statements taken from the accused during interview with the FBI. The government contends that these "clean team" statements should be admissible, because he gave them to criminal investigators in Guantanamo after he was formally transferred from the "black sites" to Guantanamo. Yet, the credibility of these statements as well as the coercion that motivated them is inextricably tied to the four years during which the CIA disappeared and tortured the accused. Even in the absence of these specific statements, substantial questions remain unanswered respecting whether the government's remaining evidence that may be the poisonous fruit from the tree of torture. Already, one district court has disallowed witness testimony from individuals, whose identities only came to light as a result of the abusive interrogation practices that defined the RDI program. *United States v. Ghailani*, 743 F.Supp.2d 261 (S.D.N.Y. 2010).

The SSCI Report also is reported to demonstrate a pattern and practice of deception by the CIA on the very issue of the RDI program. That pattern and practice of deception is directly relevant to the weight and credibility of other information tainted by CIA sources and methods.

Finally, the relevance of the SSCI Report to mitigation in this capital case is significant. Both the commission and the members are likely to find the accused's treatment in pre-trial custody highly relevant to whether the accused has been subjected to unlawful pre-trial punishment. Moreover, if the reports about the SSCI Report are to be believed, the RDI program generated largely useless information. The members very well may consider the mitigating value of the accused's torture differently if they are presented with credible evidence that the government's embrace of barbarism was all for nothing.

For the forgoing reasons, the commission should order the government to produce the SSCI Report without delay.

7. Oral Argument: The defense requests oral argument on this motion.

8. Witnesses:

a. Sen. Dianne Feinstein

b. Sen. John McCain

c. John Rizzo

d. John Brennan

e. James Clapper

9. Conference with Opposing Counsel: The defense has conferred with the government on this motion. The government does not oppose providing an unredacted version of this report; however, it does object to providing the full unredacted report.

10. List of Attachments:

A. Defense Discovery Request, dated 20 September 2013

B. Government Response to Defense Request for Discovery, dated 15 October 2013

/s/ Brian Mizer
BRIAN L. MIZER
CDR, JAGC, USN
Assistant Detailed Defense Counsel

/s/Allison Danels
ALLISON C. DANELS, Maj, USAF
Assistant Detailed Defense Counsel

/s/ Daphne Jackson
DAPHNE L. JACKSON, Capt, USAF
Assistant Detailed Defense Counsel

/s/ Richard Kammen
RICHARD KAMMEN
DOD Appointed Learned Counsel

CERTIFICATE OF SERVICE

I certify that on the day of filing I electronically filed the forgoing document with the Clerk of the Court and served the foregoing on all counsel of record by e-mail this 28th day of January 2014.

/s/ Brian Mizer
BRIAN L. MIZER
CDR, JAGC, USN
Assistant Detailed Defense Counsel

ATTACHMENT

A

DEPARTMENT OF DEFENSE
OFFICE OF THE CHIEF DEFENSE COUNSEL
1620 DEFENSE PENTAGON
WASHINGTON, DC 20301-1620

20 September 2013

MEMORANDUM FOR Trial Counsel

FROM: Capt Daphne Jackson, Assistant Detailed Defense Counsel

SUBJECT: DEFENSE REQUEST FOR DISCOVERY (SISC CIA RDI Report)

On 13 December 2012, the Senate Intelligence Committee approved a 6,000 page report on the CIA's detention and interrogation policies. This report focuses on 6 million pages of documents about the CIA's post-interrogation tactics, including waterboarding.[1]

Pursuant to 10 U.S.C. § 949j, Rules for Military Commission 701(c)(1) and 701(e)(1)(C), and the Due Process Clause of the United States Constitution, Mr. Al-Nashiri, through counsel, requests the government furnish all documents or information in its possession, or known or discoverable by the government, which are material to the preparation of Mr. Al-Nashiri's defense. In particular, the defense requests an unredacted copy[2] of the Senate Intelligence Committee's 6,000 page report on the CIA's detention and interrogation policies. The United States Government has admitted to torturing Mr. Al-Nashiri by waterboarding, and by other means, while he was held captive in CIA custody[3]. As this is a capital trial, any evidence describing the conditions of Mr. Al-Nashiri's confinement and Mr. Al-Nashiri's treatment while in CIA custody may be offered in extenuation and mitigation. This information is not only relevant to reduce the punishment under R.M.C. 703(e)(1)(C), but it is also material to the preparation of the defense under R.M.C. 701(c)(1).

The Defense considers this request to be ongoing. Please notify the Defense in writing by 4 October 2013 if you do not intend to comply with any part of this request. Thank you for your prompt attention in this matter. If you have any questions about this request or would like to discuss further, please feel free to contact me.

Very Respectfully Submitted,

//s//
DAPHNE L. JACKSON, Capt, USAF
Assistant Detailed Defense Counsel

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[1] http://www feinstein.senate.gov/public/index.cfm/2012/12/feinstein-statement-on-cia-detention-interrogation-report

[2] The report is currently classified but pending comments and classification review by the Executive. http://www.markudall.senate.gov/?p=press_release&id=3382

[3] See, e.g., CIA Inspector General's Report at ¶90 – 92 (7 May 2004)(declassified version)

ATTACHMENT

B

MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY, CUBA

UNITED STATES OF AMERICA **v.** **ABD AL RAHIM HUSSAYN MUHAMMAD AL NASHIRI**	**Government Response to Defense Request for Discovery** 15 October 2013

The government received, on 20 September 2013, the defense request for an unredacted copy of a Senate Intelligence Committee's report on CIA detention and interrogation policies. The government hereby responds to the defense request.

The government will – as it has in the past and continues to do – 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.

The government acknowledges its duty and responsibility to continually review and provide the defense with information that is relevant 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. R.M.C. 701(c).

With regard to the defense request for an unredacted copy of a Senate Intelligence Committee's report on CIA detention and interrogation policies, the government can neither grant nor deny the request at this time. The report has yet to be finalized and has not been made available to the prosecution.

Respectfully submitted,

//s//

Anthony W. Mattivi
CDR Andrea Lockhart, JAGC, USN
Justin T. Sher
Joanna Baltes
Maj Chris Ruge, USMC
LT Bryan M. Davis, JAGC, USN
Trial Counsel

Mark Martins
Chief Prosecutor

Military Commissions