MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY, CUBA

UNITED STATES OF AMERICA v. ABD AL RAHIM HUSSAYN MUHAMMAD AL NASHIRI	**AE 120D** **Government Motion** To Reconsider AE 120C In Part So The Commission May Take Into Account Declassification Efforts Underway At Prior Prosecution Request, Clarify The Discovery Standard The Commission Is Applying, And Safeguard National Security While Ensuring A Fair Trial 23 April 2014

1. Timeliness

The government timely files this Motion To Reconsider under Military Commissions Trial Judiciary Rule of Court 3.7.b(1) and Rule for Military Commissions ("R.M.C.") 905(b) and 905(f).

2. Relief Sought

The government respectfully moves the Commission to reconsider its Order in AE 120C ("Order") so it may apply the governing legal standard for discovery of classified information and also consider declassification efforts that are underway within the Executive Branch in response to previous prosecution requests made to appropriate classification authorities. If, upon reconsideration and with the benefit of the new matters provided herein, the Commission concludes that the classified information (or a portion of it) still must be produced in the manner ordered in AE 120C, the government respectfully (1) requests that the Commission clarify the legal standard it is applying to the defense discovery request by issuing detailed findings of fact and conclusions of law and (2) reasserts the classified-information privilege for each of the ten categories of information identified in the Order. Such reconsideration, clarification, and detailed description of the applicable standard will enable the government to fulfill its discovery

obligations as promptly as possible; will facilitate the process by which information may be further presented to the Commission with a request for substitution of summaries under Section 949p-4 of the Military Commissions Act of 2009 ("M.C.A."); will assist the government in reconciling certain previous approvals of summaries by the Commission under Section 949p-4 with conflicting guidance in AE 120C; and will preserve and prepare an adequate record for the government to avail itself of important remedies for the protection of national security information, including interlocutory appeal as necessary to obtain further guidance for the Commission.

3. Overview

The Commission should grant the Motion To Reconsider so it may apply the governing legal standard for discovery of classified information and consider declassification efforts underway. Such declassification efforts, and other new facts, provide strong grounds for reconsidering AE 120C, comprehensively and at the level of detail necessary for the parties to understand the legal standard being applied and for the government to effectively reassert the classified-information privilege. The Administration intends to apply guidelines developed for declassification review of the executive summary, findings, and conclusions of the report of the Senate Select Committee on Intelligence ("SSCI") regarding the CIA's Rendition, Detention, and Interrogation Program ("SSCI Report") to declassification of materials relevant to military commissions proceedings. The declassification process is underway not only because of the request from the SSCI but because of prior requests by the Chief Prosecutor. The President intends the declassification process to be expeditious. The process will include consideration of information relating to interrogation techniques as applied to particular detainees. All declassification decisions will of course be subject to the need to protect national security interests, but the President has expressed a clear intent to declassify as much of the executive summary, findings, and conclusions of the SSCI Report as possible. *See* Letter from Kathryn H. Ruemmler, Counsel to the President, to Sen. Dianne Feinstein, Chairwoman, S. Select Comm. on

Intelligence & Sen. Carl Levin, Chairman, S. Comm. on Armed Services (Feb. 10, 2014) (noting that "Director Brennan is taking [steps] to declassify certain information relating to the former [Rendition, Detention, and Interrogation] program in support of the current military commission proceedings") (Attachment B); Letter from Kathryn H. Ruemmler, Counsel to the President, to Sen. Dianne Feinstein, Chairwoman, S. Select Comm. on Intelligence (Apr. 18, 2014) (confirming that "the President and this Administration are committed to working with you to ensure that the 500-plus page executive summary, findings, and conclusions of the report on the former RDI program undergo a declassification review as expeditiously as possible, consistent with our national security interests") (Attachment C). Although the declassification process remains underway, the Commission should reconsider its Order in anticipation that additional material information will be made available to the defense, further enabling it to develop the full range of exculpatory, mitigation, and extenuation evidence. *See* AE 120C at 2; R.M.C. 1001(c).

In addition to incorporating the pending declassification action into its reconsideration, the Commission should more clearly and explicitly apply the law of classified information discovery binding in this jurisdiction to the ten categories outlined in the Order. In that Order, the Commission did not specify the legal standard it applied in determining that the classified information listed in the Order was discoverable. AE 120C at 2. The M.C.A. and binding precedent, *United States v. Yunis*, 867 F.2d 617 (D.C. Cir. 1989), dictate that whatever the standard otherwise means, it must mean at a minimum that once the privilege is properly asserted, classified information is discoverable only if it is actually relevant *and* helpful to the defense. It is unclear how the Commission could have applied this standard to the ten broad and largely undifferentiated categories stated in the Order. *See* AE 120C at ¶ 5 (listing the ten categories without analysis at subparagraphs a. through j.). Thus, given the responsive material already provided or soon-to-be provided, and given the greatly increased ability of defense counsel to discuss newly declassified matters with the accused that is likely to occur in the near

term, an entirely new reckoning against the Commission's ten categories listed in the Order is called for in the coming weeks.

The Commission should also reconsider its Order because the legal standard the government asks the Commission to apply to the discovery request at issue is the legal standard the Commission has previously applied to all other discovery requests for classified information in this case. In previously applying this governing standard, the Commission concluded that certain categories of classified information were not actually relevant or material to the preparation of the defense and thus were not discoverable. 10 U.S.C. § 949p-4. For other categories of classified information that the Commission concluded *were* relevant or material to the preparation of the defense, the Commission concluded that the government properly invoked the classified-information privilege and approved government-proposed summaries as adequate substitutes for the underlying classified information. A detailed reconsideration will enable the Commission to clarify what currently appear to be conflicting orders, will enable the government to more promptly fulfill its discovery obligations, and will ensure an adequate record is prepared by which the government could, if necessary, seek further guidance for the Commission via interlocutory appeal. More generally, a thorough reconsideration would meet the requirement—imposed by Congress in the classified information provisions of the M.C.A.—that trial judges fashion remedies to preclude situations in which the people, through their government, are compelled to choose between protecting classified information necessary for national security and holding an accused accountable under law for serious violations of the law of war and other offenses triable by military commission.[1]

[1] Because the government addressed the relevant background facts, discovery standards, and law relating to the application of the M.C.A. and the Military Commission Rules of Evidence in a prior submission (AE 022), the government hereby incorporates by reference that motion and its accompanying attachments.

4. Burden of Proof

As the moving party, the government bears the burden to demonstrate by a preponderance of the evidence that the requested relief is warranted. R.M.C. 905(c)(1)-(2); 10 U.S.C. § 949p-1 *et seq.*; M.C.R.E. 505.

5. Facts

Abd Al Rahim Hussayn Muhammad Al Nashiri ("the accused") is charged with multiple offenses under the M.C.A., 10 U.S.C. §§ 948a *et seq.*, relating to his participation in the attacks on USS COLE (DDG 67) on 12 October 2000 and MV *Limburg* on 6 October 2002, and the attempted attack on USS THE SULLIVANS (DDG 68) on 3 January 2000. These attacks resulted in the deaths of 18 people, injury to dozens of others, and significant property damage.

I. The Government Has Produced Substantial Amounts of Classified Information that Is Actually Relevant and Material to the Accused's Defense

To date, the government has produced more than 245,000 pages of discovery to the defense.[2] This includes all information and evidence the government intends to rely on in its case-in-chief, as well as any information that is potentially exculpatory, impeaching, mitigating, or otherwise relevant and material to the preparation of the defense. The government will not rely on classified information during its case-in-chief. It nonetheless has produced substantial amounts of classified information to the defense, including, among other things, all relevant statements made or adopted by the accused while in CIA custody, information relating to the accused's conditions of confinement while in CIA custody, and co-conspirator statements

[2] The defense also has access to, and has made use of, numerous documents relating to the former RDI Program provided by the government in discovery or available in the public domain from prior declassification decisions. *See, e.g.*, Defense Request at 3 n.5 (citing DCI Interrogation Guidelines (Jan. 28, 2003)); *id.* at 3 n.6 (citing CIA OIG Special Review (May 7, 2004)); *id.* at 4 n.13 (citing OPR Report (July 29, 2009)); *id.* at 5 n.14 (citing DCI Confinement Guidelines (Jan. 28, 2003)); *id.* at 5 n.16 (citing OLC Interrogation Techniques (May 10, 2005)); *id.* at 5 n.16 (citing CIA Background Paper on Combined Techniques (2004)).

relating to the referred charges. The government produced the classified information because it is actually relevant and helpful to the preparation of his defense.

The government produced this discoverable classified information to the defense through summaries that the Commission approved in accordance with the classified-information procedures set forth in 10 U.S.C. § 949p-4 and M.C.R.E. 505. The Commission applied the statutory process for approving adequate substitutes for classified information on ten separate occasions.

II. The Government Asserted the Classified-Information Privilege

The government filed its first motion invoking the classified-information privilege on 14 November 2011. AE 022. The government's motion set forth the appropriate standard governing discovery of classified information and sought the Commission's authorization to produce classified summaries in lieu of the original underlying materials under Section 949p-4 of the M.C.A. *See* AE 022.

Before the Commission made any decisions on the discoverability of classified information or the adequacy of the government's proposed summaries and substitutions for that information, the Commission allowed the defense to provide its theory of the case through an *ex parte* presentation. Unofficial/Unauthenticated Transcript ("Tr.") at 517. The Commission ruled on the government's motion on 24 August 2012. AE 022E.

III. The Defense Affirmatively Requested Information Pertaining to the CIA's Former Rendition, Detention, and Interrogation ("RDI") Program and the Government Responded

Meanwhile, on 9 August 2012, the defense had delivered a discovery request ("Defense Request") to the prosecution listing seventy-five (75) items pertaining to the CIA's former RDI Program. Citing at various points to declassified versions of documents provided by the government regarding the RDI program, and to publicly available documents, the Defense Request sought a broad range of information related to the program's origins, development,

policy guidance, facilities, implementation, claimed effectiveness, oversight, incidents reported and investigated, and eventual discontinuation.

Although it inquired about aspects of the former RDI Program as they applied to the accused, notably absent in the Defense Request was any explanation of why the requested information was "material to the preparation of the defense" as that term is defined in R.M.C. 701(c)—the standard governing discovery obligations of the government in response to affirmative requests by defense counsel.[3]

On 11 September 2012, the government responded, paragraph by paragraph, to the Defense Request. In this response, the government noted materials already provided, acknowledged its continuing discovery obligations, and declined to produce information in response to all paragraphs that were overbroad and/or lacked an articulation of the requested item's relevance, necessity, and materiality to the preparation of the defense.

On 24 September 2012, the Defense filed a Motion To Compel (AE 120), which included additional requests for documents not requested on 9 August, to which the government filed a Response on 10 October 2012 (AE 120A). The parties orally argued the motion on 22 February 2014, at which time the Commission issued an order from the bench for the government to provide an updated response, which the government filed on 18 March 2014 (AE 120B).

IV. The Commission Then Issued Its Order in AE 120C Directing the Government To Disclose Information to the Defense

On 14 April 2014, the Commission issued an order directing the disclosure of ten categories of information—some of it "un-redacted"—without referencing the M.C.A., the Classified Information Procedures Act ("CIPA"), *Yunis*, or the Commission's previous ten protective orders approving substitutions that did not disclose these limited categories of classified information. AE 120C. Rather, the Commission simply expressed its view that the

[3] *See, e.g.*, R.M.C. 701(c), Discussion ("For the definition of 'material to the preparation of the defense' in subsections [R.M.C. 701(c)] (1), (2), and (3), *see United States v. Yunis*, 867 F.2d 617 (D.C. Cir. 1989).").

government has an "obligation to provide discovery broadly and liberally, especially in light of the capital referral of the charges against the Accused and the Defense's ethical duty to conduct pre-trial investigation in order to develop the full range of exculpatory, mitigation and, extenuation evidence." AE 120C at 2.

The government now timely files this Motion, respectfully requesting that the Commission reconsider the Order.

6. Law and Argument

A court should grant a motion for reconsideration if "the moving party shows new facts or clear errors of law which compel the court to change its prior position." *Nat'l Ctr. for Mfg. Sciences v. Dep't of Defense,* 199 F.3d 507, 511 (D.C. Cir. 2000) (affirming the district court's decision to grant a motion for reconsideration because the district court correctly found clear errors of law); *see* Order at 1, AE 155F, *United States v. Mohammad* (Mil. Comm'n Apr. 17, 2013) ("Generally, reconsideration should be limited to a change in the facts or law, or instances where the ruling is inconsistent with case law not previously briefed."). Here, while the legal standard employed in the Order is not clearly enough outlined to enable a determination of whether there has been error, the ambiguity calls for clarification. Moreover, the government as moving party is showing substantial new facts meriting reconsideration of the Commission's Order.

Thus, the Commission should grant the Motion To Reconsider so that it may more clearly apply the governing legal standard for discovery of classified information in light of declassification efforts currently underway. If the Commission concludes that the classified information (or a portion of it) is discoverable, the government respectfully requests that the Commission clarify the legal standard it has applied to the Defense Request by issuing detailed findings of fact and conclusions of law. Also, the government respectfully reasserts the classified-information privilege for each category of classified information the Commission

orders it to produce, and, to fulfill its discovery obligations, the government will submit proposed summaries of that information to the Commission under Section 949p-4 of the M.C.A.

This request for relief is fully consistent with the discovery process—and the military judge's regulating role in that process as the presiding officer for the Commission—contemplated by R.M.C. 801, R.M.C. 701, and other applicable law. Faced with an apparent welter of documents and litigation comprising affirmative discovery, defense discovery requests, government-requested substitutions for classified documents, and extensive briefs and oral argument on the specific Defense Request that spawned the AE 120 series of filings, the military judge understandably elected to begin prescribing a way ahead—avoiding undue interference with the parties' presentations, providing more than reasonable opportunities to present and support their contentions on any relevant matter, and remaining impartial, but also preventing excessive waste of time and promoting the ascertainment of truth. *See* R.M.C. 801(a)(3) & Discussion.

In addition to fulfilling overarching judicial responsibilities in this way, the issuance of AE 120C also furthered specific judicial responsibilities with regard to discovery. The military judge is clearly both empowered and required to specify the time, place, and manner of making discovery and to prescribe such terms and conditions as are just. R.M.C. 701(l)(1). Also, the judge may at any time order that discovery or examination be denied, restricted, or deferred, or make such other order as is appropriate. R.M.C. 701(l)(2). The rules of discovery state that "[u]pon motion by a party, the military judge may permit the party to make such showing, in whole or in part, in writing to be inspected by the military judge," and that "[i]f the military judge grants relief after such an ex parte showing, the entire text of the party's statement shall be sealed and attached to the record of trial as an appellate exhibit." *Id.* It is in the context of this broad regulatory authority and responsibility that the government now seeks the military judge's reconsideration of AE 120C, even as it fully appreciates the factors that compelled him to forge ten new categories upon which to focus the discovery process as to RDI material henceforth.

While a thorough reconsideration is requested in light of the compelling facts and reasons explained in the present brief, there is no desire that this ten-category framework be undone; accordingly, the Motion is styled a request for reconsideration in part.

I. Declassification Efforts Underway To Further Facilitate Fair and Secure Military Commission Trials Will Further Enable the Defense To Meet Its Ethical Duty To Develop the Full Range of Exculpatory, Mitigation, and Extenuation Evidence

The President is committed to making public the findings of the SSCI Report. *See* President of the United States, Remarks to Women Members of Congress and an Exchange with Reporters, 2014 DAILY COMP. PRES. DOC. 160 (Mar. 12, 2014) ("We will declassify those findings so that the American people can understand what happened in the past, and that can help guide us as we move forward."); Letter from Kathryn H. Ruemmler, Counsel to the President, to Sen. Dianne Feinstein, Chairwoman, S. Select Comm. on Intelligence & Sen. Carl Levin, Chairman, S. Comm. on Armed Services (Feb. 10, 2014) (noting that "Director Brennan is taking [steps] to declassify certain information relating to the former [Rendition, Detention, and Interrogation] program in support of the current military commission proceedings") (Attachment B); Letter from Kathryn H. Ruemmler, Counsel to the President, to Sen. Dianne Feinstein, Chairwoman, S. Select Comm. on Intelligence (Apr. 18, 2014) (stating that "[t]he President supports making public the Committee's important review of the historical RDI program") (Attachment C). Among those subjects currently being reviewed is the application of specific interrogation techniques to individual detainees, including the accused. The declassification process is underway not only because of the request from the SSCI but because of prior requests to appropriate classification authorities made by the Chief Prosecutor. The President intends the declassification process to be expeditious. The process will include consideration of information relating to interrogation techniques as applied to particular detainees. All declassification decisions will of course be subject to the need to protect national security interests, but the

President has expressed a clear intent to declassify as much of the executive summary, findings, and conclusions of the SSCI Report as possible.

The Commission should reconsider its Order in light of these new facts. In directing the government to provide the defense with discovery information listed in the Order, the Commission reasoned that it viewed the government's "obligation to provide discovery broadly and liberally, especially in light of the capital referral of the charges against the Accused and the Defense's ethical duty to conduct pre-trial investigation in order to develop the full range of exculpatory, mitigation and, extenuation evidence." AE 120C at 2. In doing so, the Commission cited R.M.C. 1001, which provides that a "[m]atter in mitigation of an offense [may be] introduced to lessen the punishment to be adjudged by the military commission, or to furnish grounds for a recommendation of clemency." R.M.C. 1001 (c)(1)(B). Although the specific application of the President's declassification decision to information at issue in this case remains underway, declassification of enhanced interrogation techniques applied to certain detainees would further enable the defense to develop the full range of exculpatory, mitigation, and extenuation evidence by interviewing the accused and, as appropriate, showing him newly declassified material relating to his interrogation.[4]

II. The Commission Should Apply the Governing Legal Standard for Classified-Information Discovery to the Defense Request for Classified Information

Meanwhile, the government maintains that certain information within the ten categories as stated in the Order is not discoverable because it is neither actually relevant nor helpful to the preparation of the defense under the governing legal standard for discovery of classified

[4] *See, e.g.*, Tr. at 3287 (oral argument of learned defense counsel) (stating that defendants' "memories are not always accurate"); *id.* at 3293 ("And, you know, so the fact that we can't discuss these things with him, I mean, just absolutely ties our hands. You know, we can come back and, you know, I'm sure we'll be filing motions and dealing with all of this material, but at the end of the day the government will probably say something along the lines of, well, you've got to tell us you know, you say that this is wrong, you say this happened, you say this happened. You know, you've got to do more than just say stuff.").

information. The government recognizes that military case law generally affords broad discretion to the convening authority to consider clemency matters. *See generally United States v. Rosenthal*, 62 M.J. 261 (C.A.A.F. 2005). But the defense has failed to show that the information that remains classified is necessary for the defense to develop exculpatory, mitigation, or extenuation evidence or for any other purpose. In its Order, the Commission did not specify the legal standard it applied in determining that the classified information listed in the ten categories was discoverable. AE 120C at 2. The M.C.A. and binding precedent nonetheless dictate that whatever the standard otherwise means, it must mean at a minimum that classified information is discoverable only if it is actually relevant and helpful to the defense. *Yunis*, 867 F.2d at 622 (citing *Rovario v. United States*, 353 U.S. 53, (1957)).

Both the M.C.A. and CIPA are designed to protect classified information from inappropriate disclosure while ensuring the accused receives a fair trial. The M.C.A. provides that "[c]lassified information shall be protected and is privileged from disclosure if disclosure would be detrimental to the national security." 10 U.S.C. § 949p-1(a); M.C.R.E. 505(a)(1). While vested with authority as the presiding officer to ensure a fair trial (*see* 10 U.S.C. § 984j), a military judge may not authorize the disclosure of classified information to any person not authorized to receive such information. 10 U.S.C. § 949p-1(a); M.C.R.E. 505(a)(1). Further, a military judge may not authorize the disclosure of classified information unless the judge determines that such information would be noncumulative and actually relevant and helpful to a legally cognizable defense, rebuttal of the prosecution's case, or sentencing. *See* 10 U.S.C. § 949p-4(a)(2); M.C.R.E. 505(f)(1)(B); *see also Yunis*, 867 F.2d at 623 (concluding that "classified information is not discoverable on a mere showing of theoretical relevance").

Even where the Commission authorizes the disclosure of classified information, the M.C.A. allows the government to produce substitutions, summaries, or statements admitting relevant facts instead of disclosing specific items of classified information, so long as the accused would have substantially the same ability to make his defense as if he were provided the

underlying classified information. 10 U.S.C. § 949p-4; M.C.R.E. 505(f). This discovery mechanism is based upon CIPA, the judicial construction of which is "authoritative in the interpretation" of the classified-information procedures in the M.C.A. 10 U.S.C. § 949p-1(d). These procedures are critical to balancing the competing interests in "protecting the flow of information against the individual's right to prepare his defense." *Roviaro*, 353 U.S. at 62.

Protecting classified information from discovery is premised in large part on the analysis set forth by the Supreme Court concerning the government-informant's privilege. *See id.* There, the Supreme Court held the government retained privilege in not disclosing the identity of its undercover informants. The Court concluded that the privilege only gives way "[w]here the disclosure of an informer's identity, or of the contents of his communication, is relevant and helpful to the defense of an accused, or essential to a fair determination of a cause." *Id.* at 60-61. The Court continued, "The problem is one that calls for balancing the public interest in protecting the flow of information against the individuals' right to prepare his defense." *Id.* at 62.

In *Yunis*, the D.C. Circuit applied the *Roviaro* rationale to CIPA. In ruling on the government's motion for a protective order to withhold discovery of classified information, the D.C. Circuit stated,

> Classified information is not discoverable on a mere showing of theoretical relevance in the face of the government's classified information privilege, but . . . the threshold for discovery in this context further requires that a defendant seeking classified information, like a defendant seeking the informant's identity in *Roviaro*, is entitled only to information that is at least "helpful to the defense of the accused."

Yunis, 867 F.2d at 623 (quoting *Roviaro*, 353 U.S. at 60-61). The D.C. Circuit explained that "much of the government's security interest . . . lies not so much in the contents of the conversations, as in the time, place, and nature of the government's ability to intercept the conversations at all." *Id.* The D.C. Circuit also found the details revealed in classified surveillance would "make all too much sense to a foreign counter-intelligence specialist who could learn much about this nation's intelligence-gathering capabilities from what [those

documents] revealed about sources and methods." *Id.* This analysis is particularly relevant here because the government does not seek to withhold from discovery the contents of the accused's statements relevant to any issue cognizable to the Commission or the manner in which the accused was treated; rather, the government only seeks to protect matters at most tangential to any cognizable issue in this case and thus not material to the preparation of the defense.

In holding that the district court abused its discretion by ordering discovery of Fawaz Yunis's statements, the D.C. Circuit reasoned that for the defense to make a showing of materiality may be difficult, but "'it should be remembered that [the accused] was present throughout the commission of his crime. No one knows better than he what the deported witnesses actually said to him, or in his presence, that might bear upon [his defense in the case].'" *Yunis*, 867 F.2d at 624 (quoting *United States v. Valenzuela-Bernal*, 458 U.S. 858, 871 (1982)). Claims of "impossib[ility]" in articulating materiality should be examined with this critical point in mind. *Id.* Like Yunis, no one is in a better position than the accused to know what he has experienced and, armed with that knowledge, to assist in the preparation of his defense. As defense counsel noted during oral argument, "This isn't some secret that happened to somebody else. This is stuff that happened to him." Tr. at 3276. The anticipated declassification will advance this aspect of the process even further.

The Commission should apply the governing legal standard articulated in the M.C.A. and *Yunis* to the defense request for classified information. Because it is unclear whether the Commission applied this standard, the government respectfully requests that the Commission reconsider its Order and faithfully apply it, comprehensively and in detail. If the Commission concludes that the classified information (or a portion of it) is discoverable, the government respectfully requests that the Commission clarify the legal standard it has used by issuing detailed written findings of fact and conclusions of law.

III. If the Commission Concludes that the Classified Information (or a Portion of It) Is Discoverable, the Government Reasserts the Classified-Information Privilege for that Information

If the Commission concludes that the classified information (or a portion of it) is discoverable, the government respectfully reasserts the classified-information privilege for each category of classified information the Commission orders it to produce. To fulfill its discovery obligations, the government will submit proposed summaries of that information to the Commission under Section 949p-4 of the M.C.A.

IV. The Government Reasserts the Classified-Information Privilege To Withhold Information from Discovery Because Disclosure Would Be Inimical to National Security

The government may assert the classified-information privilege by setting forth the damage to national security that discovery of classified information reasonably could be expected to cause. 10 U.S.C. § 949p-4(a)(1). Once the government asserts the privilege, it may "withhold information from discovery when disclosure would be inimical to national security." *United States v. Abu-Jihaad*, 630 F.3d 102, 140-41 (2d Cir. 2010) (internal quotation marks omitted); *see also* 10 U.S.C. § 949p-1(a); M.C.R.E. 505(a). The privilege however must yield if necessary to preserve the defendant's right to "present a meaningful defense"—that is, if the information is "useful to counter the government's case or bolster a defense." *Abu-Jihaad*, 630 F.3d at 41 (internal quotation marks omitted).

Where the government asserts the classified-information privilege, even otherwise discoverable information need not be disclosed where it is "cumulative of information already provided to the [accused] in the course of discovery." *Id.* at 142; *United States v. Smith*, 780 F.2d 1102, 1109-10 (4th Cir. 1985) ("A district court may order disclosure only when the information is at least essential to the defense, necessary to his defense, and neither merely cumulative nor corroborative, nor speculative.") (internal citations quotation marks omitted). Similarly, once the classified-information privilege is asserted, otherwise discoverable information need not be produced if it fails to counter the government's case or bolster a defense.

See United States v. Stewart, 590 F.3d 93, 131 (2d Cir. 2009); *United States v. Aref*, 533 F.3d 72, 79 (2d Cir. 2008); *United States v. Buhtani*, 175 F.3d 572, 577 (7th Cir. 1999) ("The government cannot be held responsible for failing to disclose merely speculative evidence.").

Moreover, where the government has proposed a substitution, the relevant question is whether the portion of the underlying document that is not included in the substitution is actually relevant and helpful to the preparation of the defense. *See, e.g.*, *In re Terrorist Bombings of U.S. Embassies in E. Afr.*, 552 F.3d 93, 124-25 (2d Cir. 2008). Such a process comports with the underlying principles of Executive Order 13,526, which provides that a person may have access to classified information only if "the person has a need-to-know the information." Exec. Order No. 13,526, § 4.1(a)(3). This standard applies even if the person has an appropriate security clearance. *See id.*

V. The Government Will Submit Further Proposed Summaries of Privileged Classified Information for the Commission's Approval

The government will continue to submit proposed summaries of privileged classified information to the Commission with a request that the Commission authorize the government to substitute the information with the summaries under Section 949p-4 of the M.C.A. A description and analysis of the kinds of summaries and substitutions the government intends to submit—organized around the ten categories contained in the Order and describing with particularity the harm to national security that would result should the summaries and substitutions not be approved—will be provided in separate filings. Classified summaries are an adequate substitution for the underlying classified information where some of the information contained in the underlying documents is discoverable. And it bears emphasizing that the government has already provided the defense with classified information that is actually relevant and material to the preparation of the defense. *See* 10 U.S.C. § 949p-4(a)(2).

When authorizing the government to produce a summary in lieu of the original classified materials, the Commission should evaluate the sufficiency of the substitution. Congress evinced that courts should not evaluate substitution so as to require "precise concrete equivalence."

Rather, courts should consider whether receiving the summary instead of the documents will "materially disadvantage the defendant." *United States v. Moussaoui*, 382 F.3d 453, 477 (4th Cir. 2004); H.R. REP. NO. 96-1436, at 12-13 (Conf. Rep. 1980). That "insignificant tactical advantages" could accrue to the accused by use of the specific classified information should not preclude the court from ordering alternative disclosure. H.R. REP. NO. 96-1436, at 12-13. Likewise, a summary should not be rejected simply because the defense could argue that it lacks the "evidentiary richness" or "narrative integrity" of the classified information in its original form. *See United States v. Rezak*, 134 F.3d 1121, 1142 (D.C. Cir. 1998).

Substitutions only must convey the actually relevant and helpful information; the summaries need not summarize the entire classified document. The *Roviaro/Yunis* principle applies not only to whole documents but also to sub-elements of documents: "If some portion or aspect of a document is classified, a defendant is entitled to receive it only if it may be helpful to his defense." *Rezak*, 134 F.3d at 1142. The Commission should approve a substitution if it "fairly state[s] the relevant elements of the classified documents." *Id.*

If the Commission concludes that some portion of the classified information at issue is subject to disclosure, the government reasserts the classified-information privilege as to each category of classified information and will submit proposed substitutions to the Commission for its approval in accordance with the M.C.A. 10 U.S.C. § 949p-4.

7. Conclusion

The Commission should grant the Motion To Reconsider. Declassification efforts, and other new facts, provide strong grounds for reconsidering AE 120C, comprehensively and at the level of detail necessary for the parties to understand the legal standard being applied and for the government to effectively reassert the classified-information privilege. A detailed reconsideration could enable the Commission to clarify what currently appear to be conflicting orders, would enable the government to more promptly fulfill its discovery obligations, and would ensure an adequate record is prepared by which the government could, if necessary, seek

further guidance for the Commission via interlocutory appeal. More generally, a thorough reconsideration would meet the requirement—imposed by Congress in the classified information provisions of the M.C.A.—that trial judges fashion remedies to preclude situations in which the people, through their government, are compelled to choose between protecting classified information necessary for national security and holding an accused accountable under law for serious violations of the law of war and other offenses triable by military commission.

8. Oral Argument

The government requests oral argument.

9. Witnesses and Evidence

The government does not intend to rely on any witnesses or evidence to support this Motion, except for the attachments to this Motion, including matters incorporated by reference.

10. Certificate of Conference

The government conferred with the defense before filing this Motion. The defense objects to the government's requested relief.

11. Additional Information

The government has no additional information.

12. Attachments

A. Certificate of Service, dated 23 April 2014.

B. Letter from Kathryn H. Ruemmler, Counsel to the President, to Sen. Dianne Feinstein, Chairwoman, S. Select Comm. on Intelligence & Sen. Carl Levin, Chairman, S. Comm. on Armed Services, dated 10 February 2014.

C. Letter from Kathryn H. Ruemmler, Counsel to the President, to Sen. Dianne Feinstein, Chairwoman, S. Select Comm. on Intelligence, dated 18 April 2014.

Respectfully submitted,

_____//s//_____
Mark Martins
Chief Prosecutor
Military Commissions

ATTACHMENT A

CERTIFICATE OF SERVICE

I certify that on the 23rd day of April 2014, I filed **AE 120D, Government Motion** To Reconsider AE 120C In Part So The Commission May Take Into Account Declassification Efforts Underway At Prior Prosecution Request, Clarify The Discovery Standard The Commission Is Applying, And Safeguard National Security While Ensuring A Fair Trial, with the Office of Military Commissions Trial Judiciary and served a copy on counsel of record.

_____//s//_____
Mark Martins
Chief Prosecutor
Military Commissions

ATTACHMENT B

THE WHITE HOUSE

WASHINGTON

February 10, 2014

The Honorable Dianne Feinstein
Chairwoman
Select Committee on Intelligence
United States Senate
Washington, DC 20510

The Honorable Carl Levin
Chairman
Senate Armed Services Committee
United States Senate
Washington, DC 20510

Dear Senators Feinstein and Levin:

I write in response to your letter to the President, dated January 6, 2014, regarding declassification of information describing the Central Intelligence Agency's (CIA) former rendition, detention and interrogation (RDI) program.

As you know, one of the President's first acts in office was to sign an Executive Order which brought an end to the RDI program. The President believes that the program was inconsistent with our values as a Nation, and he has worked to ensure that this type of program will never be repeated. As just one example, in the President's first 100 days in office, the Administration took the extraordinary step of declassifying and releasing four Office of Legal Counsel memoranda, which provided significant details regarding the program.

The President shares your commitment to facilitating the prosecution of those charged in connection with the 9/11 terrorist attacks, and the Administration will continue to take all appropriate steps to help support these military commission proceedings, including through declassification of information relating to the RDI program. In addition, the President is committed to making public some version of the Intelligence Committee's important review of that historical program, as he believes that public scrutiny and debate will help to inform the public understanding of the program and to ensure that such a program will not be contemplated by a future administration. As I know you appreciate, however, declassification decisions, even with respect to historical legacy programs, are fact-based and must be made with the utmost sensitivity to our national security.

The President and Director Brennan are committed to working with you and others on your respective Committees to ensure that information regarding the RDI program is declassified, consistent with our national security interests. In support of these goals, I

understand that Director Brennan will be in contact with you and Vice Chairman Chambliss soon to discuss steps that Director Brennan is taking to declassify certain information relating to the former program in support of the current military commission proceedings, as well as information relating to the Intelligence Committee's review of the detention and interrogation program.

Sincerely,

Kathryn H. Ruemmler

Kathryn H. Ruemmler
Counsel to the President

cc: The Honorable Saxby Chambliss
Vice-Chairman
Select Committee on Intelligence
United States Senate
Washington, DC 20510

The Honorable Eric H. Holder, Attorney General
The Honorable Chuck Hagel, Secretary of Defense
The Honorable James R. Clapper, Director of National Intelligence
The Honorable John O. Brennan, Director, Central Intelligence Agency

ATTACHMENT C

THE WHITE HOUSE

WASHINGTON

April 18, 2014

The Honorable Dianne Feinstein
Chairwoman
Select Committee on Intelligence
United States Senate
Washington, DC 20510

Dear Senator Feinstein:

I write in response to your letter to the President requesting declassification of the executive summary, findings, and conclusions of the Senate Select Committee on Intelligence's report regarding the Central Intelligence Agency's (CIA) former rendition, detention and interrogation (RDI) program.

As I have shared with you in prior letters, the President and this Administration are committed to working with you to ensure that the 500-plus page executive summary, findings, and conclusions of the report on the former RDI program undergo a declassification review as expeditiously as possible, consistent with our national security interests. The President supports making public the Committee's important review of the historical RDI program, as he believes that public scrutiny and debate will help to inform the public understanding of the program and to ensure that such a program will not be contemplated by a future administration.

The Committee's report reflects extraordinary effort, and we commend the Committee and its staff on the completion of this significant achievement. The Executive Branch has initiated its review of the executive summary, findings, and conclusions. As I know you appreciate, declassification decisions, even with respect to discontinued programs, are fact-based and must be made with the utmost sensitivity to our national security. As such, the CIA, in consultation with other agencies, will conduct the declassification review. In addition, the President has requested that the Director of National Intelligence oversee the declassification process and ensure that any declassification questions that may arise during interagency consultations are appropriately resolved.

Prior to the release of any information related to the former RDI program, the Administration will also need to take a series of security steps to prepare our personnel and facilities overseas. Based on our prior discussions, I know you share our view that the first order priority must be to ensure their safety and security.

Sincerely,

Kathryn H. Ruemmler

Kathryn H. Ruemmler
Counsel to the President

cc: The Honorable Saxby Chambliss, Vice Chairman
The Honorable James Clapper, Director of National Intelligence
The Honorable John Brennan, Director, Central Intelligence Agency
The Honorable Eric Holder, Attorney General
The Honorable Chuck Hagel, Secretary of Defense
The Honorable John Kerry, Secretary of State