MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY, CUBA

UNITED STATES OF AMERICA v. ABD AL RAHIM HUSSAYN MUHAMMAD AL NASHIRI	**AE 120I** **Government Reply** To Defense Response To 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 21 May 2014

1. Timeliness

The government timely files this reply in accordance with Military Commissions Trial Judiciary Rule of Court 3.7.d.(2).

2. Law and Argument

The defense urges the Commission to deny the Motion To Reconsider In Part, arguing that (1) the government failed to comply with the rules for filing a supplement; (2) the government moved for reconsideration as a pretext "to toll the time for" appealing AE 120C; and (3) the government does not offer any new law or facts warranting reconsideration. The Commission should reject these arguments for several reasons. First, the rules for filing a supplement do not apply because the government did not file a supplement. It filed a motion. Second, moving for reconsideration does not toll the appeal period; it renders the underlying order nonfinal until the Commission rules on the motion. Third, the Commission should grant the Motion To Reconsider In Part because of substantial new facts (detailed below and in AE 120D, AE 120F, AE 120G, and AE 120J), including that declassification work pursuant to Military Commissions Rule of Evidence ("M.C.R.E.") 505(a)(3) has already—and even during

the pendency of this motion—resulted in extensive materials being cleared for display only to the accused and because the ambiguity in the legal standard the Commission applied in ordering disclosure calls for clarification.

I. The Government Complied with the Trial Judiciary Rules of Court

Trial Judiciary Rule of Court 3.5.a. defines a "[m]otion" as "an application to the Military Judge for particular relief or for the Military Judge to direct another to perform, or not perform, a specific act." Under the rules, a motion is different from a supplement because, unlike a motion, a supplement does not request any relief but rather merely "add[s] new facts" or "newly decided case law to an existing motion." R.C. 3.5.e. (May 5, 2014). The Motion To Reconsider In Part is a motion because it requests particular relief: that the Commission "reconsider its Order in AE 120C" and, if "the Commission concludes that the classified information (or a portion of it) still must be produced in the manner ordered in AE 120C," 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." AE 120D at 1. This requested relief is previously unasked for and comes at a procedurally unique juncture; thus, styling the filing as a motion is appropriate.

Because the Motion To Reconsider In Part is a motion, the procedures for filing a motion—not a supplement—govern. The government complied with those procedures as set forth in Trial Judiciary Rules of Court 3.7.c. and 3.10., and the Trial Judiciary accordingly accepted the Motion To Reconsider In Part for filing. The Commission should therefore reject the defense argument and reconsider its Order in AE 120C.

II. The Government Moved the Commission To Reconsider Its Order in AE 120C So That It May Apply the Governing Legal Standard for Discovery of Classified Information, Consider Declassification Efforts Underway, and Issue Detailed Findings of Fact and Conclusions of Law

The defense is incorrect as a matter of fact when it claims the government moved for reconsideration in part so that it could "toll the time for filing an interlocutory appeal." AE 120E at 6. The government moved the Commission to reconsider its Order in AE 120C "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." AE 120D at 1. The government also moved for reconsideration so that if the Commission concludes "the classified information (or a portion of it) still must be produced in the manner ordered in AE 120C," the Commission could "clarify the legal standard it is applying to the defense discovery request by issuing detailed findings of fact and conclusions of law." *Id.*

The defense is also incorrect as a matter of law. The government could not have moved for reconsideration as a pretext to toll the time for filing an interlocutory appeal because—as the case cited by the defense evinces—a motion for reconsideration does not toll this deadline. AE 120E at 6 (citing *United States v. Khadr*, 717 F. Supp. 2d 1203 (U.S.C.M.C.R. 2007)). In *United States v. Khadr*, the U.S. Court of Military Commission Review held that "filing a timely motion for reconsideration does not 'toll' the running of the statutory appeal period, but simply renders the underlying order nonfinal until the court rules on the motion." 717 F. Supp. 2d at 1207. As the court explained, "[t]he distinction is an important one, because it impacts the amount of time available to appeal after action on the motion for reconsideration is taken." *Id.*

Bypassing this important distinction, the defense rushes to accuse the U.S.C.M.C.R. of creating a "loophole" in the statutory appeal period and the government of "exploit[ing]" it to delay the proceedings. AE 120E at 6. For all its vitriol, the defense cannot square its accusations with an unbroken line of cases reaching back five decades, each holding that "a timely motion [for reconsideration] renders the underlying order or ruling 'nonfinal for purposes of appeal as long as the petition is pending.'" *Khadr*, 717 F. Supp. 2d at 1206 (quoting *United States v. Ibarra*, 502 U.S. 1, 5 (1991) (citing *United States v. Healy*, 376 U.S. 75, 77-78 (1964), and *United States v. Dieter*, 429 U.S. 6, 8 (1976) (per curiam))). "[T]he underlying order is rendered nonfinal by operation of law"—not a loophole—"while a timely motion for reconsideration is pending." *Id.* at 1207. The Supreme Court of the United States has affirmed that this rule is "well-established" and remains "the consistent practice in civil and criminal cases alike." *Ibarra*, 502 U.S. at 5.

Further contrary to the defense accusations, reconsideration promotes judicial economy by avoiding piecemeal and potentially time-consuming litigation. As the Supreme Court has explained, "[o]f course speedy disposition of criminal cases is desirable, but to deprive the Government of the opportunity to petition a lower court for the correction of errors might, in some circumstances, actually prolong the process of litigation . . . ." *Healy*, 376 U.S. at 80. Indeed, "[t]reating orders as nonfinal for purposes of review during the pendency of a motion for reconsideration promotes judicial economy because 'there is always a possibility that the order complained of will be modified in a way which renders [appellate] review unnecessary.'" *Khadr*, 717 F. Supp. 2d at 1206 (quoting *Stone v. INS*, 514 U.S. 386, 392 (1995)) (alteration in original). By granting motions to reconsider, "courts are given the opportunity to correct their own alleged errors, and allowing them to do so prevents unnecessary burdens being placed on the courts of appeals." *Ibarra*, 502 U.S. at 5.

In *United States v. Moussaoui*, Zacarias Moussaoui "moved for access to Witness A, asserting that the witness would be an important part of his defense." 382 F.3d 453, 458 (4th Cir. 2004). Over the government's objection, the district court granted the motion. *Id.* While acknowledging that Witness A was "a national security asset," the court concluded "that the Government's national security interest in [Witness A] must yield to Moussaoui's right to a fair trial" and ordered "that Witness A's testimony be preserved by means of a Rule 15 deposition." *Id.* While the government's appeal from the order was pending, the U.S. Court of Appeals for the Fourth Circuit stayed the appeal and remanded the case with instructions for the district court to give the government "an opportunity to propose substitutions for the classified information authorized to be disclosed" and to give Moussaoui's counsel "an opportunity to respond to any proposed substitutions." *United States v. Moussaoui*, No. 03-4162, 2003 WL 1889018, at *1 (4th Cir. Apr. 14, 2003) (citing Section 6 of the Classified Information Procedures Act, 18 U.S.C. App. 6 ("CIPA")). The Fourth Circuit reasoned that the issue was not ripe for its review because the proceedings below were not yet "complete." *Moussaoui*, 382 F.3d at 458-59.

Like the proceedings in *Moussaoui*, the proceedings in this case regarding AE 120C are not yet complete. By moving to reconsider in part, the government seeks to avoid piecemeal and time-consuming litigation by requesting, among other relief, the same opportunity the Fourth Circuit afforded the government in *Moussaoui*: an opportunity to assert the classified-information privilege for certain items of classified information within the ten categories of information identified in the Order and then to present additional information to the Commission with a request for substitutions under Section 949p-4 of the Military Commissions Act of 2009, 10 U.S.C. § 948a *et seq.* ("M.C.A."). *See also United States v. Yunis*, 867 F.2d 617, 620 n.7 (D.C. Cir. 1989) (indicating the district court reconsidered its own order directing the government to provide the defense classified information where the order permitted the government to propose redactions but "did not provide assurances that the Court would not release the unredacted transcripts to the defense, without first informing the government, if the Court disapproved of the redacted version").

The government further seeks to preserve judicial economy and minimize delay by asking the Commission to reconsider its Order in the first instance and clarify its rationale, thus preparing an adequate record with which the government may avail itself of important remedies to protect national security information. If necessary, such remedies may include interlocutory appeal to obtain guidance for the Commission. A clear rationale, articulating the legal standard applied and the manner in which it was applied, and an adequate record will help enable reviewing courts to determine whether the Commission erred without remand to "complete" the proceedings below. *See United States v. Smith*, 780 F.2d 1102, 1103-04 (4th Cir. 1985) (vacating district court's order allowing the defendant to introduce into evidence classified information and remanding the case with instructions to apply the correct legal standard by considering the government's asserted privilege before deciding whether the classified information was admissible). Rule for Military Commissions ("R.M.C.") 908(b)(5) requires the record of the proceedings to be "verbatim and complete to the extent necessary to resolve the issues appealed." By ensuring a complete record as required by this rule, reconsideration will

actually serve, not hinder, the interests of judicial economy and the progression of this case toward trial. The Commission should accordingly reject the defense arguments and grant the government's Motion To Reconsider In Part.

III. The Commission Should Grant the Motion To Reconsider In Part Because the Ambiguity in the Legal Standard the Commission Applied Calls for Clarification and Because the Government Shows New Facts Meriting Reconsideration

A court should grant a motion for reconsideration if "there has been an intervening change in controlling law, there is new evidence, or there is a need to correct clear error or prevent manifest injustice." *United States v. Libby*, 429 F. Supp. 2d 46, 46-47 (D.D.C. 2006) (internal quotation marks omitted); *accord National Ctr. for Mfg. Scis. v. Dep't of Defense*, 199 F.3d 507, 511 (D.C. Cir. 2000); *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."). The Commission should grant the Motion To Reconsider In Part because of substantial new facts (detailed below and in AE 120D, AE 120F, AE 120G, and AE 120J) and because the ambiguity in the legal standard the Commission applied in ordering disclosure calls for clarification.

A. The Commission Should Grant the Motion To Reconsider In Part To Clarify the Legal Standard It Applied in Concluding that the Government Must Provide the Defense the Information in the Order

The defense argues that the Commission need not reconsider its Order because the legal standard the Commission applied is certain. AE 120E at 8-9. The defense—to support its argument—waves a large hand across a finely detailed map, giving glancing treatment to "the litany" of various authorities encompassing the legal standard for discovery determinations: a Rule for Military Commissions, a provision from the M.C.A., and two cases. AE 120E (citing R.M.C. 701(c)(1), 10 U.S.C. § 949p-4(a)(2); *United States v. Vanderwier*, 25 M.J. 263 (C.M.A. 1987), *United States v. Roberts*, 59 M.J. 323 (C.A.A.F. 2004)). And the Commission—to support its Order directing the government to provide ten categories of information to the

defense, some of which it previously authorized the government not to disclose to the defense in ten successive protective orders—perhaps assumes all involved know the relevant law and procedure while actually citing none with requisite specificity. AE 120C at ¶¶ 4-5. The legal standard the Commission applied is not certain.

Further contrary to the defense's assertions, the question presented is not only whether the Commission abused its discretion in applying a legal standard. AE 120E at 9. It is true that appellate courts generally review a trial court's evidentiary rulings for abuse of discretion. AE 120E at 9. But they review whether the court applied an incorrect legal standard *de novo*. *United States v. Amawi*, 695 F.3d 457, 470 (6th Cir. 2012) ("[T]o the extent that the district court applied an incorrect legal standard . . . then *de novo* would be the appropriate standard of review to ascertain an error in law."). The government is entitled to ask the Commission to clarify both the legal standard it applied and how it applied that legal standard so that the government and the reviewing court may assess whether a need exists to correct error or to prevent manifest injustice. *See Libby*, 429 F. Supp. 2d at 46-47; *see also* AE 120D at 8 ("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."). Such clarification honors Rule for Military Commissions 908(b)(5) requiring a record that "shall be verbatim and complete to the extent necessary to resolve the issues appealed."

The legal standard the Commission applied is not the only ambiguity that remains. It remains unclear, for example, whether the Commission concluded that the government failed to properly assert the classified-information privilege. Rule for Military Commissions 701(f)(1) provides, "To withhold disclosure of information otherwise subject to discovery under [R.M.C. 701], the military judge *must find* that the privilege is properly claimed under Mil. Comm. R. Evid. 505 and 506 as applicable." R.M.C. 701(f)(1) (emphasis added). In *Yunis*, the U.S. Court of Appeals for the District of Columbia Circuit held that if the defendant shows the information he requests is relevant to his case, the court must determine whether the government has asserted at least a "colorable" claim to privilege. *Yunis*, 867 F.2d at 623; *see* 10 U.S.C. § 949p-4(b);

R.M.C. 701(f). The government's interest in "protecting both the secrecy of information important to our national security and the appearance of confidentiality . . . *must* inform analyses by district courts in passing on the discoverability of classified information." *Yunis*, 867 F.2d at 623 (emphasis added).

But the Order does not articulate this requisite determination. If the Commission did not make it, the government asks the Commission to reconsider its Order to do so and to consider the privilege as part of its analysis in assessing the discoverability of the classified information at issue. *See id.* And if the Commission determines the government did or did not assert a colorable claim of privilege, the government asks the Commission to reconsider its Order to make that determination clear. Given that the Order is not only an order directing disclosure but is also an order "withhold[ing] disclosure" (AE 120C at ¶¶ 6, 7), the rules require the Commission to articulate whether and in what respect it found a proper assertion of privilege as to the specific items of information requested by the defense. R.M.C. 701(f). A clear determination will facilitate the process by which the government may present further information to the Commission with a request "to delete or withhold specified items of classified information," "substitute a summary for classified information," or "substitute a statement admitting relevant facts that the classified information or material would tend to prove" in accordance with Section 949p-4(b)(1) of the M.C.A. and Rule for Military Commissions 701(f). The government also asks the Commission to reconsider its Order to assist in reconciling (a) its previous protective orders approving summaries that protect classified information from disclosure with (b) the Order in AE 120C directing the government to disclose some of the same information.

Courts have granted motions to reconsider in similar situations. In *United States v. Ressam*, for example, the government asked the district court to reconsider its July 24, 2002 order directing the government to disclose to the public certain protective orders that included classified information. Am. Mot. To Reconsider or Amend the Court's July 24, 2002 Order at 2, *United States v. Ressam*, No. CR99-666C (W.D. Wash. Aug. 2, 2002) (Dkt. No. 339). The

government argued that the order conflicted with prior orders protecting the classified information from disclosure. *Id.* The district court granted the motion. It reconsidered its July 24, 2002 order and issued another order protecting the classified information. Minute Order at 1, *United States v. Ressam*, No. CR99-666C (W.D. Wash. Aug. 15, 2002) (Dkt. No. 340); *United States v. Ressam*, 221 F. Supp. 2d 1252, 1263-64 (W.D. Wash. 2002); *cf.* AE 120E at 10 (claiming that the Motion To Reconsider In Part is "virtually unheard of"). The court did so, even though the government did not raise new law or fact but rather alerted the court to the inconsistency.

In *Yunis*, the government moved the district court to clarify and reconsider its order directing the government to provide the defense certain classified information: copies of all tapes or documentation of conversations between Yunis and a government informant. 867 F.2d at 619-20; *United States v. Yunis*, 924 F.2d 1086, 1095 (D.C. Cir. 1991). The order permitted the government to propose redactions but "did not provide assurances that the Court would not release the unredacted transcripts to the defense, without first informing the government, if the Court disapproved of the redacted version." *Yunis*, 867 F.2d at 620 n.7. The district court reconsidered its order. The next day, the court held an *ex parte in camera* hearing, permitting the government to "outline[] in detail the specific damage to both national defense and foreign affairs if the government was ordered to release this information." *Id.* at 620. The court held further *ex parte in camera* proceedings and then ordered the government, "'after appropriate redactions of all sensitive and classified national security matters and information, to deliver to defense counsel, *inter alia*,' [a]n English translation of all taped conversations between [Yunis] and [the informant] . . . ." *Id.*; *see generally United States v. Rezaq*, 899 F. Supp. 697, 702 (D.D.C. 1995) (granting government's motion to reconsider a discovery order and vacating the discovery order where the government argued that the court "failed to consider the merits of" a government argument). These lawful and controlling precedents vitiate the defense claim that the requested relief is "virtually unheard of." *See* AE 120E at 10.

In fact, the M.C.A., the R.M.C., and the M.C.R.E. authorize the procedural process the government invokes here. Section 949p-4 of the M.C.A. provides that the

> military judge *shall permit the trial counsel to make a request* for an authorization [to delete or withhold specified items of classified information, substitute a summary for classified information, or substitute a statement admitting relevant facts that the classified information or material would tend to prove] in the form of an ex parte presentation to the extent necessary to protect classified information, in accordance with the practice of the Federal courts under [CIPA].

10 U.S.C. § 949p-4 (emphasis added); *accord* R.M.C. 701(f); M.C.R.E. 505(f)(2). In moving the Commission to reconsider its Order, the government "reasserts the classified-information privilege for each of the ten categories of information identified in the Order" and, to the extent the Commission directs the government to provide this information to the defense, requests authorization for substitutions and other relief under Section 949p-4. AE 120D at 1-2. Upon this request, the "military judge shall grant the request . . . if the military judge finds that the summary, statement, or other relief would provide the accused with substantially the same ability to make a defense as would discovery of or access to the specific classified information." 10 U.S.C. § 949p-4(b)(3); *accord* M.C.R.E. 505(f)(2)(C).

The M.C.A. contemplates that the Commission will distill its critical findings of fact and conclusions of law into writing. Section 949p-6(a)(4) of the M.C.A. provides that "[a]s to each item of classified information, the military judge *shall set forth in writing* the basis for the determination." 10 U.S.C. § 949p-6(a)(4) (emphasis added); *see generally* 10 U.S.C. § 949p-6(f)(1) ("Whenever the military judge denies a motion by the trial counsel that the judge issue an order under subsection (a), (c), or (d) . . . , the military judge shall order that the accused not disclose or cause the disclosure of such information."). Although this section regards use, relevance, and admissibility determinations of classified information that would otherwise be made during trial or pretrial proceedings, it should also inform the trial court's analysis in passing on discovery and identifying appropriate relief here, where the defense has indicated it seeks the information and associated access to potential witnesses with a view toward use and

admissibility at trial and where the Commission has indicated it agrees with certain defense theories of relevance. For discovery and evidentiary purposes alike, the government may seek a ruling that some or all of the information is not material, move that it substitute a non-sensitive summary of the classified information for the material, admit a controverted fact the defense seeks to prove by the classified information, or propose some other alternative procedure to place the accused in substantially the same position. 10 U.S.C. §§ 949p-4(b), 949p-6(d). Specificity detailed in a written ruling will facilitate not only the government's assertion of privilege, but also the Commission's "interactive process" with the parties to fashion appropriate remedies that minimize the threat to national security and vindicate the accused's right to a fair trial. *See Moussaoui*, 382 F.3d at 480 (finding, in the context of a capital case, that the trial court abused its discretion when it determined that any proposed remedy of substitution for witness testimony would have been inherently inadequate). Such a ruling is within the Commission's province and supervisory authority "to regulate discovery." *See Marozsan v. United States*, 90 F.3d 1284, 1290 (7th Cir. 1996) ("It is the province of the district court, however, to regulate discovery.").

Because the Motion To Reconsider In Part is grounded in the M.C.A., the R.M.C., and the M.C.R.E. (among other legal authorities), it will not suffice for the defense to minimize the government's obligations with allegations of "impropriety" and "arrogance." *See* AE 120E at 10. The government has sound authority—and, importantly, a solemn duty—to seek reconsideration to fulfill the obligations imposed upon it by Congress. This interactive process is part of what Congress envisioned when it enacted CIPA to combat the "practice whereby a criminal defendant threatens to reveal classified information during the course of his trial in the hope of forcing the government to drop the criminal charge against him." *Smith*, 780 F.2d at 1105. The process is necessary to resolve the "'disclose or dismiss' dilemma" the government may face when confronted with even "proper defense attempts to obtain or disclose classified information." S. COMM. ON THE JUDICIARY, CLASSIFIED INFORMATION PROCEDURES ACT, S. REP. NO. 96-823, at 3 (1980).

The defense's fallback position, then, is that reviewing courts presume judges "know the law and follow it." AE 120E at 10. That is true, but it does not advance the defense argument. The presumption cannot preempt the government's authority rooted in the M.C.A., the R.M.C., and the M.C.R.E., and it cannot preclude a motion to reconsider. And whatever the presumption means, it cannot mean that a court may decline to articulate the legal standard it is applying, particularly where the court compels the government to disclose classified or otherwise privileged information. Otherwise, the defense argument would defeat the *de novo* standard of review because, if the defense were correct, appellate courts would have no need for it. *Amawi*, 695 F.3d at 470. But they do have such a need because they are charged with determining whether trial courts committed errors in law. *Id.* As explained above, to apply this standard of review, appellate courts must know the legal standard the trial court applied. In none of the cases the defense cites did the trial court reject a motion to reconsider by citing the presumption the defense relies upon here. *See* AE 120E at 10-11. Under these circumstances, asking the Commission to clarify the legal standard is a reasonable request, and the Commission should grant it by granting the Motion To Reconsider In Part.

B. The Commission Should Grant the Motion To Reconsider In Part So That It May Take Into Account New Facts

The government has already provided, and will endeavor to continue to provide, indices that better catalogue what the Commission and defense counsel have already received according to the ten-category framework the Commission established with its Order in AE 120C. Requesting that material be indexed is one way by which trial courts gain necessary understanding of the body of information in question. *See, e.g.*, *Yunis*, 867 F.2d at 620 (noting that the district court ordered the government to provide an index and summary of the material subject to the discovery dispute); *United States v. Rezaq*, 134 F.3d 1121, 1142 (D.C. Cir. 1998) ("[T]he district court ordered the United States to prepare an index listing the contents of each document, whether it believed the document to be subject to discovery, and why."). Indeed, without using the term "index," the Commission appears to have instinctively sought indexed

material to aid it in guiding the parties concerning the present matter. *See United States v. Nashiri*, Unofficial/Unauthenticated Transcript ("Tr.") at 2994 to 2997 ("MJ [COL POHL]: Okay, okay. Let me explain it to you. If you say you gave them Bates stamp X, that ain't going to cut it. These are in words, the request. . . I want a response in words. . . I just want—since you started out your discussion of we have given them X, I need to know what X is . . . and to go from there.").

1. The Commission Should Take Into Account New Facts

The Commission should also grant the Motion To Reconsider In Part so that it may "consider declassification efforts that are underway within the Executive Branch in response to previous prosecution requests made to appropriate classification authorities." AE 120D at 1. In its Motion To Reconsider In Part, the government explained, "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." *Id.* at 2. In doing so, the government cited and attached two letters to the Chairwoman of the Senate Select Committee on Intelligence from the Counsel to the President of the United States, including one that expressly references the intent that declassification efforts support military commission proceedings. *Id.* at 2-3, 10.

The defense argues that the Commission should deny the Motion To Reconsider In Part because one of those letters is dated before the parties argued AE 120 and the government filed its supplemental response in AE 120B. AE 120E at 12. The Commission should reject the defense argument because it ignores that the second letter was dated *after* the parties' argument and the government's supplemental response. And in that letter, the White House Counsel wrote to the Chairwoman 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"—a sentence not in the first letter. AE 120D, Attachment C at 1. The Commission should not turn a blind eye to it because, as the defense strains to argue, the second letter follows the first. AE 120E at 13.

The defense urges the Commission to disregard these new facts, on the one hand alleging that the agencies providing the information to Senate investigators were deceptive and, on the other hand, moving to compel the government to produce that same information in discovery. *Compare id.* at 13, *with id.* at 15. If the defense is correct that it cannot "prepare arguments, interview witnesses, or develop a mitigation case" based on that information, then this acknowledgment by the defense provides yet another reason why the Commission should deny the separate defense motion to compel the government to produce it. *Id.* at 15. Regardless, new facts about the Administration's declassification efforts are not rendered irrelevant because the SSCI Report is the subject of a separate discovery request by the defense. AE 120E at 13 (citing AE 206). That the defense requested the SSCI Report makes its declassification all the more relevant to the question whether the Commission should reconsider its Order in AE 120C because, as the government has explained, the declassification "process will include consideration of information relating to interrogation techniques as applied to particular detainees." AE 120D at 2; *see* AE 120C at ¶ 5.

Also, as the government explained in its Motion To Reconsider In Part, "[a]lthough 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." AE 120D at 11. Because no one is in a better position than the accused to know what he has experienced, the Commission should grant the motion in order to reconsider defense claims of impossibility regarding more specific requests and statements of relevance and helpfulness. *See United States v. Valenzuela-Bernal*, 458 U.S. 858, 871 (1982) ("[I]t should be remembered that [the accused] was present throughout the

commission of this 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]."); *see also* Tr. at 3276 (Kammen: "This isn't some secret that happened to somebody else. This is stuff that happened to him.").

It is true that the pre-trial record reflects both a potential defense theory that the accused's ability to recall is deficient because of what was done to him, *see* Tr. at 3831 (Dr. Sandra Crosby testifying that the accused exhibited "decreased concentration"), and other testimony that suggests the accused's recall is intact, *see* Tr. at 4291 (Dr. 97: "I didn't observe or was aware of any outright memory deficits, and he never complained to me of having memory or cognitive problems."). But even the defense admits that enabling the accused to see discovery now in his counsel's possession is something valuable for his defense. Tr. at 3277 (defense counsel arguing that "we need the ability when we – if we ever receive all of the records, to discuss those with Mr. Nashiri"); *id.* at 3279 ("And the only person, you know, from the defense side who can provide us with – who can begin to provide us with the context is Mr. Nashiri."); *id.* at 3274, 3288-89, 3293. This important new fact, particularly when combined with the government's *ex parte* and *in camera* submission in AE 120G—which the Commission should consider before oral argument on this motion under its Section 949p-4(b)(2) authority to do so—supports the government's Motion to Reconsider In Part.

Moreover, the government hereby avers that the appropriate authority has now determined that extensive discovery already in possession of cleared defense counsel pertaining to interrogation techniques that were applied to the accused and conditions of the accused's detention will be re-marked "DISPLAY ONLY ABD AL RAHIM AL-NASHIRI." And, as mentioned above, the government has already provided, and will endeavor to continue to provide, indices that better catalogue what the Commission and defense counsel have already received according to the ten-category framework the Commission established with its Order in AE 120C. Other new facts—described in AE 120F and AE 120G, as well as in AE 120J—further warrant granting the Motion To Reconsider In Part.

The Commission may consider these new facts, and other new matters detailed in AE 120J, in light of the extensive discovery the government has already provided and has now indexed for the convenience of the Commission and defense counsel. The defense claims "[t]he prosecution had refused to provide responsive discovery to 75 of the line items in the 9 August 2013 request." AE 120E at 4. Not so. As the Commission found in its Order, the government provided "discovery in response to paragraphs 3-5, 14, 20, 27-42, 44-46, 49, 53, 54, 57-62, 64, 68, 69, 70a, 70d, 72, and 73 of the Defense Request for Discovery dated 9 August 2013." AE 120C at 4. That the government declined to produce discovery in response to the remaining paragraphs—and that the Commission declined to compel the government to produce all the information the defense requested—does not eclipse the substantial discovery the government has provided the defense. To date, the government has provided the defense 210,975 pages of unclassified discovery, thousands of pages of classified discovery, and more than a thousand pages of discovery specifically related to the CIA's former Rendition, Detention, and Interrogation Program ("RDI Program") as it pertains to the accused.

Although the Commission has now deemed additional information relevant and material, the government previously provided this RDI Program information without judicial prompting and with significant matters already declassified. This includes information regarding the CIA Inspector General's 2003 findings that "[u]nauthorized, improvised, inhumane, and undocumented detention and interrogation techniques were used" in 2002 and 2003. Office of Inspector General, Central Intelligence Agency, Special Review: Counterterrorism Detention and Interrogation Activities ¶ 258 (September 2001-October 2003) (May 7, 2004) (Report No. 2003-7123-IG) (redacted version released publicly Aug. 24, 2009).

The Inspector General's 2003 investigation uncovered, for instance, that:

- a CIA Headquarters interviewer racked a pistol and revved a drill behind the accused's head, *id*. at ¶ 92;
- a threat was made to the accused's family, *id*. at ¶ 94;
- an interviewer blew cigar smoke in the accused's face, *id*. at ¶ 96;

- the accused was reportedly lifted "off the floor by his arms while his arms were bound behind his back with a belt," *id.* at ¶ 97;
- the use of a stiff brush "was intended to induce pain on [the accused] and standing on [the accused's] shackles, which resulted in cuts and bruises," *id.* at ¶ 98; and
- the waterboard was used "in November 2002," *id.* at ¶ 90.

The Inspector General's findings also included many other details about the genesis, motivations, policies, organization, training, and purported legal authority for the RDI Program. *Id.* at ¶¶ 25-80; *see* Tr. at 3284. These government efforts to provide RDI Program information to the defense—consistent with its duties to seek declassification of relevant evidence and to advance justice—repudiate defense claims of government stonewalling. Although the defense apparently finds the urge to make such accusations irresistible, it is no small irony that the very information the government has willingly provided the defense now serves as the basis for all manner of its discovery requests.

2. The Commission Should Take These New Facts Into Account When Assessing the Discoverability of Classified Information

a. The Analytical Framework

The Commission should take the government's substantial production and these new facts into account when conducting the proper multi-step analysis for determining whether the classified information at issue is discoverable. The court must first determine whether the information is relevant—admittedly, not a high bar, but also not a step that can be ignored because of its importance to defining the inquiries into helpfulness-to-the-defense and possible substitutions that follow. *Yunis*, 867 F.2d at 622-23. The touchstone of the Commission's inquiry must be whether the information has a "tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." *Id.* at 622 (citing FED. R. EVID. 401).

Here, this could include information regarding matters that could serve as a basis for a Commission recommendation of clemency to the convening authority, R.M.C. 1001(c)(1)(B);

the accused's future dangerousness or lack thereof, *Skipper v. South Carolina*, 476 U.S. 1, 5 (1986); "the totality of the circumstances" in assessing whether a statement was voluntarily given, 10 U.S.C. § 948r; allegations of outrageous government conduct, *United States v. Russell*, 411 U.S. 423, 431 (1973); claims that the accused lacked requisite intelligence to plan and supervise the sequence of failed and successful attacks recounted in the charges, MIAMI HERALD, May 9, 2014 (quoting defense counsel as arguing that his client "too stupid to be a mastermind of anything"); and other facts of consequence. And, of course, R.M.C. 1004(b)(3)—granting the accused "broad latitude to present evidence in extenuation and mitigation"—is an important integer in the calculus of relevance in this capital case. Using this lens, the government assesses whether classified information at issue is relevant.

If a court concludes that the accused demonstrated relevance, the court must next determine whether the government's assertion of privilege, if any, is "at least a colorable one." *Yunis*, 867 F.2d at 623. The government's interest in "protecting both the secrecy of information important to our national security and the appearance of confidentiality . . . *must* inform analyses by district courts in passing on the discoverability of classified information." *Id.* (emphasis added). To withhold disclosure of information otherwise discoverable under R.M.C. 701, the court "must find" that the government properly claimed the privilege. R.M.C. 701(f)(1).

The court must then determine whether the information is at least "'helpful'" to the accused's defense. *Yunis*, 867 F.2d at 623 (quoting *Roviaro v. United States*, 353 U.S. 53, 60-61 (1957)); *see* 10 U.S.C. § 949p-4(a)(2) (precluding authorization of discovery "unless the military judge determines that such classified information would be noncumulative, relevant, and helpful to a legally cognizable defense, rebuttal of the prosecution's case, or to sentencing in accordance with standards generally applicable to discovery of or access to classified information in Federal criminal cases"). A court abuses its discretion when it orders the disclosure of classified information where the information at issue was no more than theoretically relevant and was not helpful to the presentation of the defense or essential to the fair resolution of the case. *Id.* at 624-25. Even if it is helpful, if it is also cumulative of other information already provided to the

defense, the government is not obligated to provide that information to the defense. 10 U.S.C. § 949p-4(a)(2); *Smith*, 780 F.2d at 1110 ("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." (citations omitted)).

If the court determines that the information is noncumulative, relevant, and helpful to the accused's defense, the court "shall permit the trial counsel to make a request for an authorization" to "delete or withhold specified items of classified information," "substitute a summary for classified information," or "substitute a statement admitting relevant facts that the classified information or material would tend to prove." 10 U.S.C. § 949p-4(b); *see* 10 U.S.C. § 949p-6(c). The "at least helpful" test accounts for courts' recognition that the accused cannot see the privileged information to assist the court in assessing its discoverability until such a showing of helpfulness is made. *See United States v. Mejia*, 448 F.3d 436, 458 (D.C. Cir. 2006); *Yunis*, 867 F.2d at 624.

The requirement of showing helpfulness "is not an impossible one," particularly given that the accused himself is in the best position to assist his counsel in crafting discovery requests based on his own recollection and his ability to review declassified summaries and other information made available to him. *Yunis*, 867 F.2d at 624 (citing *Valenzuela-Bernal*, 458 U.S. at 871); *United States v. El-Mezain*, 664 F.3d 467, 524-25 (5th Cir. 2011). The requirement "does not impose upon [the accused] any burden of absolute memory, omniscience, or superhuman mental capacity to expect some specificity as to what benefits he expects to gain from the evidence" he seeks. *Yunis*, 867 F.2d at 624. Here, the defense was able to further assist the Commission in assessing discoverability by submitting its theories of defense to the Commission *ex parte*.

Defense counsel's duty "to make reasonable investigations" should not be permitted to overwhelm this analysis. *See* AE 120E at 13-14. The duty to investigate requires reasonable investigation. *Rompilla v. Beard*, 545 U.S. 374, 383 (2005). It does not require "lawyers to scour the globe," *id.*; pursue every defense, *Knowles v. Mirzayance*, 566 U.S. 111, 123 (2009);

"leave no stone unturned and no witness unpursued," *Rompilla v. Horn*, 355 F.3d 233, 252 (3d Cir. 2004) (internal quotation marks omitted), *overturned on other grounds by Beard*, 545 U.S. at 374; or "fully investigate every potential avenue," *id*. And it does not deputize defense counsel, vest them with the authority of a public prosecutor, or relax their requirement to demonstrate relevance and helpfulness to compel the production of classified information.

b. Applying the Analytical Framework

The government welcomes this holistic analysis as the defense articulates how a specific item is helpful—an ability the defense can now enhance by speaking with the accused about information the government has already provided to it in discovery without judicial prompting. Courts must apply this analysis to assess the discoverability of each item of classified information individually. Properly applying the analytical framework in this way requires courts to be diligent in their adherence to the classified-information-procedures process. "Generally speaking, CIPA processes are tedious, time consuming . . . , and require significant dedication of resources by all involved." *United States v. Brown*, No. 5:14-CR-58, 2014 WL 1572553, at *5 (E.D.N.C. Apr. 18, 2014). Courts acknowledge that "[w]hen classified materials are involved, it is difficult for the government to predict when it will be able to complete various discovery disclosures," particularly where "the government seeks to declassify the materials" because the government must "consult with various intelligence agencies for approval." *Id.* The contours of the process accordingly "must be folded carefully to make a fit in each case." *Id.* at *4.

This is particularly true when courts fashion substitutions or other forms of relief that "would provide the accused with substantially the same ability to make a defense as would discovery of or access to the specific classified information" at issue. 10 U.S.C. § 949p-4(b)(3). For its part, the government could, for example, seek a ruling that some or all the information is not material, move that a non-sensitive summary of the classified information be substituted for the material, or admit a controverted fact sought to be proved by the classified information. And where the defense seeks information by interviewing a witness, the better procedure may be to

put defense counsel in contact with the witness and "to allow the defense counsel to hear directly from the witness whether he would be willing to talk to the defense attorney, either alone or in the presence of his attorney." *United States v. Walton*, 602 F.2d 1176, 1180 (4th Cir. 1979). But neither CIPA nor the M.C.A. provides "a detailed roadmap for courts to follow." *Libby*, 429 F. Supp. 2d at 22.

The process thus must be an iterative, "interactive" one among the parties and the Commission, whereby the Commission, exercising its supervisory authority to regulate discovery, works with the government and the accused to "fashion creative solutions in the interests of justice for classified information problems." *Id.*; *see In re Terrorist Bombings of U.S. Emb. in E. Afr.*, 552 F.3d 93, 122 (2d Cir. 2008) (reasoning that CIPA leaves "the precise conditions under which the defense may obtain access to discoverable information to the informed discretion of the district court"). The solution to these problems however is not simply to rule that any substitute would be inadequate, for this course would yield no solution at all. *Moussaoui*, 382 F.3d at 478 ("[W]e reject the ruling of the district court that any substitution for the witnesses' testimony would be inadequate."). And the solution is not that the government must dismiss the case, for CIPA and its military-commissions analog provide procedures for avoiding the disclose-or-dismiss dilemma. Rather, the solution must include a particularized remedy that both minimizes the threat to national security and vindicates the defendant's right to a fair trial.

A motion to reconsider can be part of this interactive process, as illustrated in *Yunis*. Yunis moved to compel the government to produce, *inter alia*, copies of all tapes or documentation of conversations between himself and a government informant. 867 F.2d at 619. "The government filed an omnibus response to all of Yunis's motions" and "a motion for a pretrial conference under CIPA." *Id.* Over the following ten months, it also filed "the first of several *ex parte in camera* pleadings," arguing that "disclosure of the transcripts would harm national security." *Id.* at 620. Then the district court ordered the government to provide an "index and summary of the contents of all the recordings of the conversations between [the

government informant] and Yunis which had not already been furnished to Yunis." *Id.* The government gave the court the indices, eight transcripts, and declarations of government officials "discussing the national security implications of compliance with Yunis's discovery motion." *Id.*

The court was unsatisfied with the government's filings and went back to the government, ordering it "to provide defendant's counsel with, *inter alia*, all audio and video tapes and/or transcripts of conversations between defendant and [the government informant]." *Id.* Then the "government immediately moved for reconsideration." *Id.* And at an *ex parte in camera* hearing the next day, the government "outlined in detail the specific damage to both national defense and foreign affairs if the government was ordered to release this information." *Id.* After holding further *ex parte in camera* proceedings, the court "ordered the government, after appropriate redactions of all sensitive and classified national security matters and information, to deliver to defense counsel, *inter alia*, an English translation of all taped conversations between" Yunis and the government informant. *Id.* (internal quotation marks omitted). The government went back to the court, notifying it that it would not call the government informant as a witness and, on that basis, sought modification of the order. *Id.* at 621. The court declined to modify the order. On appeal, the D.C. Circuit reversed. *Id.* at 625; *see Ressam*, 221 F. Supp. 2d at 1263-64 (granting the government's motion to reconsider and modifying its order where the original order conflicted with prior orders protecting classified information).

In this interactive process between the parties and the court, a court could authorize the government "to substitute, summarize, withhold, or prevent access to classified information" under Section 949p-4 of the M.C.A. During oral argument on 22 February 2014, the Commission noted that the M.C.A. does not permit the accused to move the Commission to reconsider this authorization. Tr. at 3037. This is correct. 10 U.S.C. § 949p-4(c). But it also suggested the accused could make "an end-run around" the M.C.A. if the Commission concludes, on the basis of a new discovery request, that the government should provide the classified information to the defense. Tr. at 3037. Although the interactive process indeed

contemplates that a more specific showing of relevance and helpfulness could eventually gain the accused access to previously undisclosed information, the characterization of an "end-run around" is incorrect to the extent it vitiates Section 949p-4(c). That provision must have force if the government's opportunity, in turn, to request substitutes in lieu of disclosure is to be meaningful. Whenever the Commission concludes that classified information is discoverable, it must give the government the opportunity to request an authorization to substitute, summarize, withhold, or prevent access to that classified information. 10 U.S.C. § 949p-4(b)(2) ("The military judge shall permit the trial counsel to make a request for an authorization . . . .").

That is the opportunity the government requests here. The government respectfully requests reconsideration so that the Commission may take into account new facts (detailed in this reply and in AE 120D, AE 120F, AE 120G, and AE 120J) and to clarify the ambiguity in the legal standard the Commission applied in ordering disclosure. If, upon reconsideration and with the benefit of these new matters, the Commission concludes that the classified information (or a portion of it) still must be produced, the government (1) requests that the Commission issue detailed findings of fact and conclusions of law, (2) reasserts the classified-information privilege for certain items of classified information within the ten categories of information identified in the Order, (3) requests that the Commission state in writing its determination whether the government asserts a colorable claim of privilege, and (4) requests the opportunity to offer alternatives that would provide the accused with substantially the same ability to make a defense as would discovery of or access to the specific classified information. If the Commission denies the government the opportunity to offer such alternatives, the government requests that the Commission deny it in writing.

3. Conclusion

The Commission should grant the Motion To Reconsider In Part because of substantial new facts (detailed in this reply and in AE 120D, AE 120F, AE 120G, and AE 120J) and because

the ambiguity in the legal standard the Commission applied in ordering disclosure calls for clarification.

4. Witnesses and Evidence

The government intends to rely on the evidence in its AE 120 series of filings.

5. Additional Information

Under M.C.R.E. 505, the government requests that the Commission conduct (1) an *in camera* hearing to "make all determinations concerning the use, relevance, and admissibility of classified information that would otherwise be made during" the pretrial proceeding on the Motion To Reconsider In Part (AE 120D) and (2) an *ex parte in camera* hearing to permit the government to request authorization to substitute, summarize, withhold, or prevent access to classified information regarding the Order (AE 120C).

6. Attachments

A. Certificate of Service, dated 21 May 2014.

Respectfully submitted,

//s//
Mark Martins
Chief Prosecutor
Military Commissions

ATTACHMENT A

CERTIFICATE OF SERVICE

I certify that on the 21st day of May 2014, I filed **AE 120I, Government Reply** to Defense's Response To 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