

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

UNITED STATES OF AMERICA

v.

ABD AL-RAHIM HUSSEIN MUHAMMED  
ABDU AL-NASHIRI

AE 120S

**DEFENSE MOTION TO COMPEL THE  
PRODUCTION OF AN INDEX  
REGARDING OUTSTANDING AND  
DENIED DISCOVERY PURSUANT TO  
PARAGRAPH SIX OF AE 120C**

2 June 2014

- 1. Timeliness:** This request is filed within the timeframe established by Rule for Military Commission (R.M.C.) 905 and is timely pursuant to Military Commissions Trial Judiciary Rule of Court (R.C.) 3.7.b.(1).
- 2. Relief Requested:** The defense respectfully requests that this Commission compel the government to produce an index with corresponding bates numbers to the items of information the government has already produced as indicated by paragraph 6 of this Commission's order in AE120C.
- 3. Overview:** The defense filed AE120, a classified motion requesting information in the possession of any foreign government and the United States related to the arrest, detention, rendition, and interrogation of Mr. Al-Nashiri. On 14 April 2014, this Commission entered ruling AE120C. In that ruling this Commission "acknowledges the Prosecution's provision of discovery in response to..." a series of the enumerated paragraphs in the defense's initial discovery request and "reminds the Prosecution of its continuing obligation to provide updates and newly discovered information." AE 120C at 4, ¶6. Based on a thorough review of its files, its original request, the government's original response, and its investigation into open sources, the defense fears that the government's provision of discovery respecting the enumerated paragraphs identified by the Commission remains significantly incomplete. As this Commission found, this information is relevant and necessary to the preparation of the accused's defense on the merits

and in mitigation of a death sentence. The defense therefore requests that the government clarify with specificity the discovery that it asserts it has provided in satisfaction of paragraph six of this Commission's order so that it may efficiently identify further discovery that remains outstanding.

**4. Burden of Proof and Persuasion:** As the moving party, the defense bears the burden of persuasion as to any factual issues relevant to the disposition of this motion, which it must demonstrate by a preponderance of the evidence. R.M.C. 905(c). Denial of this motion will violate the defendant's rights guaranteed by the fifth, sixth and eighth amendments to the Constitution of the United States of America, the Military Commissions Act (MCA) of 2009, the Detainee Treatment Act (DTA) of 2005, treaty obligations of the United States and fundamental fairness.

**5. Statement of Facts:**

On 9 August 2012, the defense submitted a request for information containing 75 line items related to the arrest, detention, rendition, and interrogation of Mr. Al-Nashiri (hereafter "Defense Request"). The government responded on 11 September 2012 (hereafter "Government Response"), and the matter became the subject of a motion to compel in AE120 (classified). On 14 April 2014, the Commission issued its ruling in AE120C. Specifically, it states, "[t]he Commission acknowledges the Prosecution's provision of discovery in response to paragraphs 3-5, 14, 20, 27-42, 44-46, 49, 53, 57-62, 64, 68, 69, 70a, 70d, 72, and 73 of the Defense Request for Discovery dated 9 August 2012 (Attachment A of AE120), and reminds the Prosecution of its continuing obligation to provide updates and newly discovered information in accordance with applicable legal standards previously acknowledged." AE120 at 4, ¶6."

**6. Argument:**

The applicable legal standards, which are to be applied to the provision of discovery in this case, are set forth in paragraphs 2 through 4 of this Commission's ruling in AE120C. The prosecution must view its obligation to provide responsive discovery broadly and liberally, especially in light of the capital referral of the charges against Mr. Al-Nashiri and the defense's ethical duty to conduct pre-trial investigation in order to develop the full range of exculpatory, mitigation and extenuation evidence.

In paragraph 6 of AE120C, this Commission found that the information requested in 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 2012 (Attachment A of AE 120) was relevant, necessary and material to the preparation of the defense and/or proper mitigation and extenuation. The Commission further noted that the government had produced – at least some – discovery responsive to those paragraphs.

However, following a thorough search of its files, its original request, and the government's response, the defense is unable to locate the documents that are responsive to its requests. Indeed, in its response to the defense's initial discovery request, the government outright denied any obligation to produce most of the requested materials and conditioned the production of the remainder on labyrinth of caveats, qualifiers, and subjective filtering tantamount to denial of 90% of the information requested. Although best efforts have been employed, the defense has been unable to locate the information the government claims to have provided. To clarify this ambiguity for the defense and for the Commission, the defense requests production of an index with the corresponding bates numbers for the information the government asserts it has already provided, as the government claims it is doing with respect to the ten categories of discovery enumerated in paragraph 5 of this Commission's order. The following

subparagraphs are numbered to correspond to the Defense Request and the corresponding paragraphs in the Government Response:

(3) The prosecution should identify by bates number or produce to the defense “all White House cables and other communications concerning the specific interrogation sessions of Mr. Al-Nashiri” IAW the Commission’s findings that the information is relevant, necessary, and material to the preparation of the defense, irrespective of privileges or protective orders.

(4) The prosecution should identify by bates number or produce to the defense “unredacted copy of an (undated) Presidential memorandum that the US Government admits authorized setting up detention facilities outside the United States and/or outlined interrogation techniques that may be used against detainees, to include Mr. Al-Nashiri,<sup>1</sup>” IAW the Commission’s findings that the information is relevant, necessary, and material to the preparation of the defense, irrespective of privileges or protective orders. The Government Response claims to have provided information regarding “treatment” but outright denied the specifically requested information. The prosecution should, therefore, produce the requested information with no additional justification from the defense or identify where it has already provided this information.

(5) The prosecution should identify by bates number or produce to the defense “Copies of any written legal analysis or advice from the Office of Legal Counsel of the U.S. DOJ [OLC] concerning the CIA RDI program and/or so called Enhanced Interrogation Techniques [EIT’s]” IAW the Commission’s findings that the information is relevant, necessary, and material to the preparation of the defense, irrespective of privileges or protective orders.

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<sup>1</sup> [http://www.aclu.org/files/pdfs/natsec/20070105\\_Dorn\\_Declaration\\_8.pdf](http://www.aclu.org/files/pdfs/natsec/20070105_Dorn_Declaration_8.pdf)

(14) The prosecution should identify by bates number or produce to the defense all documents “which interrogation techniques, and their parameters for use singly or in combination, were approved for use by interrogators during all interrogations of Mr. Al-Nashiri, including but not limited to those considered ‘standard’, ‘enhanced’ and/or ‘permissible’.” IAW the Commission’s findings that the information is relevant, necessary, and material to the preparation of the defense, irrespective of privileges or protective orders.

(20) The prosecution should identify by bates number or produce to the defense the “OTS Report” (late 2001- early 2002)<sup>2</sup> IAW the Commission’s findings that the information is relevant, necessary, and material to the preparation of the defense, irrespective of privileges or protective orders.

(27) The prosecution should identify by bates number or produce to the defense “[a]ll guidance concerning use of “improvised” interrogation techniques or use of any technique other than specifically identified interrogation techniques provided to any CIA operative or other interrogator who participated in any interrogation of Mr. Al-Nashiri” IAW the Commission’s findings that the information is relevant, necessary, and material to the preparation of the defense, irrespective of privileges or protective orders.

(28) The prosecution should identify by bates number or produce to the defense “[a]ny and all guidance from late December 2002 until September 2006 reducing the period for “standard technique” sleep deprivation from 72 to 48 hours, and the basis for the decision to make this change<sup>3</sup>” IAW the Commission’s findings that the information is relevant, necessary, and material to the preparation of the defense, irrespective of privileges or protective orders.

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<sup>2</sup> CIA OIG Special Review (May 7, 2004), at para. 33-44 (describing OTS role); see also id. at FN 26 (citing to "OTS Report")

<sup>3</sup> See CIA OIG Special Review (May 7, 2004), at FN 34.

(29) The prosecution should identify by bates number or produce to the defense “[a] cable created and sent pre-February 2003 documenting the use of manipulation of the environment”<sup>4</sup> IAW the Commission’s findings that the information is relevant, necessary, and material to the preparation of the defense, irrespective of privileges or protective orders.

(30) The prosecution should identify by bates number or produce “[a]ll logistical records of Mr. Al-Nashiri’s transportation between detention sites, including stopovers,” IAW the Commission’s findings that the information is relevant, necessary, and material to the preparation of the defense, irrespective of privileges or protective orders.

(31) The prosecution should identify by bates number or produce “[a] description of all equipment and/or implements used in detainee’s transportation between sites, his detention and interrogation,” IAW the Commission’s findings that the information is relevant, necessary, and material to the preparation of the defense, irrespective of privileges or protective orders.

(32) The government should identify by bates number or produce “[c]omplete contemporaneous records of each interrogation session, including videotapes, audiotapes, and transcripts of interrogations of Mr. Al-Nashiri or any witness who may be called by the prosecution or whose statement the prosecution may seek to offer” (emphasis added) IAW the Commission’s findings that the information is relevant, necessary, and material to the preparation of the defense, irrespective of privileges or protective orders.

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(34) The prosecution should identify by bates number or produce “[a]ll intelligence reports describing information obtained from interrogations of Mr. Al-Nashiri,” IAW the

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<sup>4</sup> See *CIA OIG Special Review (May 7, 2004)*, at para. 185.

Commission's findings that the information is relevant, necessary, and material to the preparation of the defense, irrespective of privileges or protective orders.

(35) The prosecution should identify by bates number or produce “[a]ll interrogators’ and observers’ notes of interrogations of the accused or any individual interrogated by the CIA or DOD who may be called by the prosecution or whose statement the prosecution may seek to offer,” IAW the Commission's findings that the information is relevant, necessary, and material to the preparation of the defense, irrespective of privileges or protective orders.

(36) The government should identify by bates number or produce “[a]ll records of medical and psychological exams administered to Mr. Al-Nashiri prior to removal of Mr. Al-Nashiri to sites of interrogation,” IAW the Commission's findings that the information is relevant, necessary, and material to the preparation of the defense, irrespective of privileges or protective orders.

(37) The government should identify by bates number or produce “[a]ll records of medical intake examinations and medical examinations of Mr. Al-Nashiri whether or not they included a pre-EIT evaluation,” IAW the Commission's findings that the information is relevant, necessary, and material to the preparation of the defense, irrespective of privileges or protective orders.

(38) The prosecution should identify by bates number or produce “[r]ecords of medical and psychological treatment provided to Mr. Al-Nashiri or to any witness interrogated by the CIA and/or DOD who may be called by the prosecution or whose statement the prosecution may seek to offer,” IAW the Commission's findings that the information is relevant, necessary, and material to the preparation of the defense, irrespective of privileges or protective orders.

(39) The prosecution should identify by bates number or produce “[a]ll information about Mr. Al-Nashiri’s medical status, background, etc., and treatment in detention and interrogation given to and/or used by medical personnel treating or evaluating him,” IAW the Commission’s findings that the information is relevant, necessary, and material to the preparation of the defense, irrespective of privileges or protective orders

(40) \*\*\*CLASSIFIED\*\*\*

(41) The prosecution should identify by bates number or produce to the defense “[a]ll ‘evaluations’ of ‘learned helplessness’ including but not limited to those pertaining to Mr. Al-Nashiri” IAW the Commission’s findings that the information is relevant, necessary, and material to the preparation of the defense, irrespective of privileges or protective orders.

(42) The prosecution should identify by bates number or produce “‘[e]nvironmental and other considerations, as well as particularized considerations affecting any given Detention Facility’” affecting compliance with DCI 2003 Confinement Guidelines vis a vis Mr. Al-Nashiri,” IAW the Commission’s findings that the information is relevant, necessary, and material to the preparation of the defense, irrespective of privileges or protective orders.

(44) The prosecution should identify by bates number or produce to the defense “[a]ll records of the administration of sedatives to Mr. Al-Nashiri during transport, interrogation, or any other time.” IAW the Commission’s findings that the information is relevant, necessary, and material to the preparation of the defense, irrespective of privileges or protective orders.

(45) The prosecution should identify by bates number or produce to the defense “[a]ny records indicating Mr. Al-Nashiri’s subjective belief that he was in physical danger, of death or otherwise; Any records indicating Mr. Al-Nashiri’s subjective belief that another person was in physical danger, of death or otherwise, including but not limited to a family member or other

detainee,” IAW the Commission’s findings that the information is relevant, necessary, and material to the preparation of the defense, irrespective of privileges or protective orders.

(46) The prosecution should identify by bates number or produce to the defense “[a]ny indication Mr. Al-Nashiri was subject to “hard takedown,” or that “hard takedown” was used at his detention site contemporaneous with his detention<sup>5</sup>,” IAW the Commission’s findings that the information is relevant, necessary, and material to the preparation of the defense, irrespective of privileges or protective orders.

(49) The prosecution should identify by bates number or produce to the defense “requests to CIA headquarters and approval/disapproval to use specific interrogation techniques on particular detainees,” IAW the Commission’s findings that the information is relevant, necessary, and material to the preparation of the defense, irrespective of privileges or protective orders.

(53) The prosecution should identify by bates number or produce to the defense “all records of conversations between Mr. Al-Nashiri and any other detainee, whether made at CIA secret sites or Guantanamo Bay after 2006,” IAW the Commission’s findings that the information is relevant, necessary, and material to the preparation of the defense, irrespective of privileges or protective orders.

(54) The prosecution should identify by bates number or produce to the defense “[a]ll claims of ‘effectiveness’ of [EITs] specific to Mr. Al-Nashiri by any CIA operative or any member of the RDI program,” IAW the Commission’s findings that the information is relevant,

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<sup>5</sup> See *CIA OIG Special Review (May 7, 2004)*, at para. 190-192 (portions redacted). This section seems to indicate the CIA OIG was told that “hard takedown” was considered a standard movement procedure at one or more facilities, that a CTC detainee suffered injuries when dragged across the floor during a “hard takedown”, and that CIA interrogators did not fully understand how CIA guidance restricted or controlled their use of “hard takedown”.*Id.*

necessary, and material to the preparation of the defense, irrespective of privileges or protective orders.

(57) The prosecution should identify by bates number or produce “records of intervention by on-scene personnel... to stop the use of any technique, for any reason pertaining to any interrogation of Mr. Al-Nashiri,” IAW the Commission’s findings that the information is relevant, necessary, and material to the preparation of the defense, irrespective of privileges or protective orders.

(58) The prosecution should identify by bates number or produce all documentation reflecting the fact that “any occasion on which on-scene medical personnel or psychological personnel consulted with C/OMS about the appropriateness of use of an EIT pertaining to interrogation,” IAW the Commission’s findings that the information is relevant, necessary, and material to the preparation of the defense, irrespective of privileges or protective orders

(59) The prosecution should identify by bates number or produce “all other records associated with the use of specific interrogation techniques pertaining to any interrogation of Mr. Al-Nashiri or of an interrogation inflicted upon any witness or person whose statement the prosecution may seek to offer,” IAW the Commission’s findings that the information is relevant, necessary, and material to the preparation of the defense, irrespective of privileges or protective orders.

(60) The prosecution should identify by bates number or produce “all records of full-time closed circuit monitoring of Mr. Al-Nashiri in detention cells within CIA custody or since

September 2006<sup>6</sup>,” IAW this Commission’s findings that the information is relevant, necessary, and material to the preparation of the defense, irrespective of privileges or protective orders.

(61) The prosecution should identify by bates number or produce “all photographs of Mr. Al-Nashiri made by the CIA while Mr. Al-Nashiri was in US custody,” IAW the Commission’s findings that the information is relevant, necessary, and material to the preparation of the defense, irrespective of privileges or protective orders.

(62) The prosecution should identify by bates number or produce “all records of any instance in which [EITs] were used in a manner inconsistent with limitations placed by CIA policy, to include but not limited to OMS guidelines, or any limitations described to OLC as it reviewed the techniques for legality,” IAW the Commission’s findings that the information is relevant, necessary, and material to the preparation of the defense, irrespective of privileges or protective orders

(64) The prosecution should identify by bates number or produce “all records reflecting the use of any ‘improvised’ interrogation techniques,” IAW the Commission’s findings that the information is relevant, necessary, and material to the preparation of the defense, irrespective of privileges or protective orders.

(68) The prosecution should identify by bates number or produce “copies of any reports or findings created by the Joint Agency investigation and/or the Department of Justice into the destruction of evidence,” IAW the Commission’s findings that the information is relevant, necessary, and material to the preparation of the defense, irrespective of privileges or protective orders

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<sup>6</sup> *OLC Interrogation Techniques (May 10, 2005)*, at 7, 11. The COE report describes surveillance cameras and microphones in each cell, presumably for monitoring but possibly with recording capability. COE 2007, para 258 et seq.

(69) The prosecution should identify by bates number or produce to the defense “unredacted copy of the CIA OIG Special Review...” IAW the Commission’s findings that the information is relevant, necessary, and material to the preparation of the defense, irrespective of privileges or protective orders.

(70a) The government should identify by bates number or produce (unredacted) “copies of incidents made to CIA OIG in January 2003,” IAW the Commission’s findings that the information is relevant, necessary, and material to the preparation of the defense, irrespective of privileges or protective orders.

(70b) The government should identify by bates number or produce (unredacted) “result and findings of the OIG investigation, including OIG report...” IAW the Commission’s findings that the information is relevant, necessary, and material to the preparation of the defense, irrespective of privileges or protective orders

(73) The government should identify by bates number or produce “the OIG report on detainee abuse,” IAW the Commission’s findings that the information is relevant, necessary, and material to the preparation of the defense, irrespective of privileges or protective orders.

### **Conclusion**

The only thing that is clear from the application of AE 120C to AE 120B is that clarity is warranted. Although the government’s primary argument throughout AE 120B was that the defense request was “overboard,” when the defense articulated particularized areas of information, the government provided very few direct responses. For these reasons, this Commission should order the prosecution to either identify by bates number or produce all information covered by paragraph 6 of this Commission’s ruling in AE120C in light of the legal standard this Commission articulated in paragraphs 2-4 of its order.

7. **Oral Argument:** The defense requests oral argument on this motion.
8. **Witnesses:** None
9. **Conference with Opposing Counsel:** The defense has conferred with the government on this motion. The government opposes this motion.
10. **List of Attachments:** None.

/s/ Brian Mizer  
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/s/ Allison Danels  
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/s/ Richard Kammen  
RICHARD KAMMEN  
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**CERTIFICATE OF SERVICE**

I certify that 2 June 2014, I electronically filed the forgoing document with the Clerk of the Court and served the foregoing on all counsel of record by e-mail.

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