

**MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY, CUBA**

<p>UNITED STATES OF AMERICA</p> <p>v.</p> <p>ABD AL RAHIM HUSSAYN MUHAMMAD AL NASHIRI</p>	<p>AE 206A</p> <p>Government Response To Defense Motion To Compel The Production Of The Senate Select Committee On Intelligence Report On The Rendition, Detention Interrogation Program</p> <p>10 February 2014</p>
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1. Timeliness

This response is filed timely pursuant to Military Commissions Trial Judiciary Rule of Court 3.7.c(1).

2. Relief Sought

The prosecution respectfully requests that the Commission defer ruling on the defense motion to compel discovery of a Senate Select Committee on Intelligence Report (“SSCI Report”).

3. Overview

The government acknowledges its duty and responsibility to provide the defense with all information that is relevant and material to the preparation of the defense. The government, at the defense request, is attempting to obtain whatever materials associated with the report—which the government understands to be a document in the possession and control of the Legislative Branch—that are subject to review for a discoverability determination. The government will update the defense and this Commission on these efforts. Until the government can make a proper discoverability determination, the Commission should defer ruling on the defense motion.

4. Burden of Proof

As the moving party, the defense must demonstrate by a preponderance of the evidence that the requested relief is warranted. R.M.C. 905(c)(1)-(2).

5. Facts

Abd Al Rahim Hussayn Muhammad Al Nashiri (“the accused”) is charged with multiple offenses under the Military Commissions Act of 2009 (“M.C.A.”) relating to terrorist attacks against the United States and its allies. These include the attempted attack on USS THE SULLIVANS (DDG 68) on 3 January 2000, and the attacks on USS COLE (DDG 67) on 12 October 2000 and on the French supertanker MV *Limburg* on 6 October 2002, which together resulted in the deaths of 18 people, serious injury to dozens of others, and significant property damage.

The government received the defense request for discovery of the SSCI Report on 20 September 2013. AE 206, Attachment A. The government did not deny the defense request. Rather, the government responded on 15 October 2013 and stated, “[T]he government can neither grant nor deny the request at this time. The report has yet to be finalized and has not been made available to the prosecution.” AE 206, Attachment B. The government continues to exercise due diligence and is seeking to obtain whatever materials associated with the report—which by information and understanding is in the possession and control of the Legislative Branch—are subject to review, at which time the government will make a discoverability determination with respect to any such materials.

6. Law and Argument¹

As briefed in prior motions before this Commission (AE 044, AE 053, AE 054, AE 057, AE 082, AE 088, AE 089, AE 113, AE 115, AE 116, AE 120, AE 121, AE 141, AE 143, and AE 144), the government produces discovery that is relevant, material to the preparation of the defense, and necessary, as required by the statute and the rules. To that end, the government must produce information that is “material to the preparation of the defense” where the information is “within the possession, custody, or control of the Government.” R.M.C. 701(c).

Here, the government has not denied the defense request for discovery. As the government responded to the defense discovery request, “[T]he government can neither grant nor deny the request at this time.” AE 206, Attachment B. That position has not changed—the government cannot take a position on the discoverability of a document it does not yet have. The government will continue to diligently seek to obtain all materials associated with this report—which is understood to be in the possession and control of the Legislative Branch—that are subject to review and to make a discoverability determination with respect to any such materials. The government will provide the defense and the Commission with updates on the status of its efforts to obtain and review the report. At this stage, however, there is no justiciable issue and

¹ The defense continues to assert—as it now does in nearly all of its motions—that denying motion will violate various rights of the accused, including rights that have not been extended to any detainee by any United States court. *See* AE 206 at 2. The defense persists, however, in omitting any explanation of how those rights are implicated in this case. Absent any explanation as to how those rights are implicated in this request and under these facts, the Commission should reject this boilerplate language. *See Harding v. Illinois*, 196 U.S. 78, 87 (1904) (dismissing writ of error because no federal question was properly raised in the state court where the Illinois Supreme Court concluded that “no authorities were cited nor argument advanced in support of the assertion that [a] statute was unconstitutional” and thus the “point, if it could otherwise be considered, was deemed to be waived”); *United States v. Heijnen*, 215 F. App’x 725, 726 (10th Cir. 2007) (“We nevertheless reject these arguments because they are unsupported by legal argument or authority or by any citations to the extensive record of the proceedings [A]ppellant’s issues are not supported by any developed legal argument or authority, and we need not consider them.”).

the Commission should defer ruling on the defense motion until the government has had the opportunity to obtain the document and conduct its review.

7. Conclusion

The government acknowledges its duty and responsibility to continually review and provide the defense with information that is relevant and material to the preparation of the defense. The government's approach to the discoverability of the SSCI Report is no different, and the government continues to pursue access to any materials associated with this document—a Legislative rather than Executive Branch document—in order to make a discovery determination. As the government has not denied the defense request for discovery, the Commission should defer ruling at this time.

8. Oral Argument

The defense requested oral argument on this motion. The Commission should defer the defense motion without oral argument. Military Commissions Trial Judiciary Rule of Court 3.9(a).

9. Witnesses and Evidence

The government does not anticipate relying on any witnesses or evidence in support of this response.

10. Additional Information

The government has no additional information.

11. Attachments

A. Certificate of Service, dated 10 February 2014.

Respectfully submitted,

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ATTACHMENT A

CERTIFICATE OF SERVICE

I certify that on the 10th day of February 2014, I filed **AE 206A, Government Response To Defense Motion To Compel The Production Of The Senate Select Committee On Intelligence Report On The Rendition, Detention Interrogation Program**, with the Office of Military Commissions Trial Judiciary and served a copy on counsel of record.

//s//

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