

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

UNITED STATES OF AMERICA

v.

ABD AL-RAHIM HUSSEIN MUHAMMED  
ABDU AL-NASHIRI

AE 206P

**DEFENSE REPLY TO GOVERNMENT  
RESPONSE TO DEFENSE MOTION FOR  
LEAVE TO FILE A SUPPLEMENT TO  
AE 206:**

**EMERGENCY MOTION TO ORDER THE  
UNITED STATES GOVERNMENT TO  
PRODUCE ONE UNREDACTED COPY  
OF THE SSCI REPORT ON THE CIA RDI  
PROGRAM TO THE COMMISSION SO  
THAT THE REPORT CAN BE PROVIDED  
TO THE DEFENSE AND PROSECUTION  
FOR LITIGATION OR KEPT UNDER  
SEAL FOR APPELLATE PURPOSES**

9 February 2015

**1. Timeliness:** This reply 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.e.(1).

**2. Overview:** The Senate Select Committee on Intelligence's *Study of the CIA's Detention and Interrogation Program* ("Torture Report") is material and relevant to preparation of the accused's defense and therefore its production must be compelled. Recently the Executive Summary of the Torture Report was released. This summary, which was significantly redacted describes in a general way the brutal physical, psychological, and sexual torture inflicted upon Mr. Al-Nashiri. The Executive Summary demonstrates that the entire, unredacted torture report contains significant exculpatory material relevant to the defense both for the merits phase and for any penalty phase of the trial.

By all public reports, the SSCI Report is the most comprehensive report of the Central Intelligence Agency's Rendition, Detention, and Interrogation Program ("RDI Program"). The

accused was a central figure in the implementation of the RDI Program and the RDI Program will be central to the accused's defense on the merits, in impeaching the credibility of the evidence against him, and in mitigation of the death sentence the government is seeking to impose.

The Commission, under COL Pohl, heard arguments about production of the Torture Report. That matter remains under advisement. However, since the argument two things have occurred which require additional argument and a prompt ruling on the merits of the motion. First, is the release of the redacted Executive Summary of the SSCI Torture Report. Second, according to published reports, the new leadership of the SSCI is attempting to "claw back" from the Executive Branch all copies of the Torture Report in an apparent effort to avoid judicially-ordered production. While the defense believes that this Commission has the authority to order the SSCI to produce the Torture Report, there is some question about that and it is unclear that the SSCI would honor an order from this Commission.

Rather than wait until the claw back has succeeded, the Commission should promptly order production of the report from the Executive Branch, which would clearly be obligated to comply. With the Torture Report in its possession, the Commission can either grant the accused's request, allow the prosecution to review the report and litigate its discovery in the future, or deny the defendant's request for production. In the latter case, even if the Commission were to commit constitutional error and deny the production of the Torture Report, it would be able to retain the Torture Report under seal to be part of the record for appellate review.

### **3. Argument**

#### **A. Definitions.**

Because the prosecution apparently does not understand terms used in in the defense's original motion, the defense advises that following terms have the following specific meanings:

1. “Government” means the entire United States Government, including the Executive Branch and Congress;
2. “Executive Branch” means the Executive Branch of the Government, including all agencies therein such as the Department of Defense, the Department of Justice, the Department of State, and the Central Intelligence Agency; and
3. “Prosecution” means the Office of the Chief Prosecutor for Military Commissions and the team of prosecutors assigned to prosecute the defendant.

**B. The Prosecution’s Response Seeks to Divert the Commission’s Attention From New Developments Which Clearly Constitute New Facts.**

The defense filed its original request for production of the entire unredacted SSCI Torture Report in December 2013. It was argued before COL Pohl in the spring of 2014 and has been under advisement since then. In the many months since it was argued there have been significant developments that clearly constitute new facts, requiring additional argument by the parties and prompt action by the Commission to protect its jurisdiction. These new facts are the release of the Executive Summary of the Torture Report, which discusses in general the brutal torture inflicted upon Mr. Al-Nashiri, which is provided in particular in the 6,000 pages of the actual report. The Executive Summary makes it clear that the entire Torture Report contains much more specific and compelling detail about the torture inflicted upon Mr. Al-Nashiri and other facets of the RDI Program, which clearly are Brady material, refute the credibility of the evidence the prosecution has already noticed its intent to use at trial, and which any ordinary American service-member would view as mitigating.

Also new to the Commission’s consideration, is an ongoing attempt by the recently installed chairman of the SSCI to “claw back” copies of the report that are in the possession of the Executive Branch, including from the White House and the CIA. *The CIA Torture Report*

*Architect Denounces Republican Attempt to Claw Back Copies*, The Guardian (21 Jan. 2015) available at <http://www.theguardian.com/us-news/2015/jan/21/cia-torture-report-architect-denounces-republican-claw-back-copies>.

Only in the newspeak the prosecution insists upon using in this case would there be any question that these developments are “new” facts, requiring prompt reexamination of the issue of production of the SSCI Torture Report and emergency action to protect the Commission’s ability to compel production.

The prosecution says, for example:

Nothing about the facts alleged by the defense is relevant to the issue of whether the government can be compelled to produce the Committee Study because it is not within the government’s possession, custody, or control. Similarly, the Commission cannot, over assertion of the legislative privilege, compel the Senate Committee to release the report.

Govt. Response at 5. This statement simply seeks to draw a false distinction between the government, which unquestionably has the Torture Report, and the government’s lawyers in this case – to wit, the prosecution – which apparently do not. The fact that these lawyers have apparently avoided obtaining personal possession of the Torture Report provides yet more justification for the Commission to act promptly and grant the emergency request.

Indeed, the prosecution also says:

The government is, through appropriate channels, actively seeking access to the Senate Select Committee on Intelligence Report (“Committee Study” or “Study”) concerning the CIA’s former Rendition, Detention, and Interrogation Program (“RDI Program”).

Gov’t Response at 1. The prosecution’s claim that it is trying to obtain the Torture Report, a quest that has allegedly be ongoing for many months, demonstrates that it is necessary for the Commission grant the defense’s request as that would also assist the prosecution. An order by

this Commission would ensure production to the Commission for prosecutorial review should that be appropriate. Only an order from this Commission will move the Executive Branch to turn over the Torture Report. Further delay only provides additional ammunition for this Commission's many critics of the inability or unwillingness of this Commission to meaningfully pursue important evidence, critical to its mission.

**C. In Its Emergency Motion, The Defense Seeks Only To Preserve The Torture Report In Order To Insure That It Is Not Lost To This Commission.**

Under *Brady v. Maryland*, 373 U.S. 83 (1963) and its progeny, the defense is entitled receive the complete unredacted Torture Report, which is in the government's knowing possession, and the courts reviewing this case on appeal will be forced to vacate this conviction and/or sentence if it is not produced in a timely way. That issue should be reargued in light of the contents of the highly redacted Executive Summary of the Torture Report, which was released December 2014. After re-argument the parties are entitled to a prompt ruling.

The Emergency Motion seeks relief that will protect this Commission's jurisdiction and preserve some modicum of fairness. The Commission has the authority to order the government to produce the complete unredacted Torture Report, which is in the knowing possession of the Executive Branch. The attempt of questionable legality by the chairman of the SSCI to claw back the Torture Report from the Executive Branch is a new fact requiring action by the Commission. While there may be a question of the Commission's authority to order production of the Torture Report from Congress, there is no question of the Commission's authority to order production from the Executive Branch and it is inconceivable that the Executive Branch would defy this Commission. Therefore, it is important for the Commission to act now. The Commission must order the Executive Branch to produce a complete unredacted copy of the Torture Report.

In making this demand, the defense acknowledges that the prosecution opposes production of the Torture Report and asserts its “right” to review the report for discovery purposes. While the defense disagrees with this position, the relief sought by the defense protects everybody, the Commission, the defense and the prosecution. Once the Commission orders production of the Torture Report from the Executive Branch, it can then address the prosecution’s demand to censor the report before turning it over to the defense. If the Commission ultimately orders production, as it must, the Torture Report will remain available to be produced under such circumstances as are warranted. If the Commission improbably finds that production of the Torture Report is unwarranted, it will remain in the possession of the Commission under seal until review by an appellate court. In short, by granting the defense’s emergency request, every party to this litigation retains the right to fully litigate its position and no party is harmed.

**D. The Failure To Order Production of the Torture Report Will Doom Any Claim by the Commission to Legitimacy.**

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

The Torture Report was material to the defense when it was first requested, a claim which the release of the Executive Summary has only bolstered. The Torture Report is in the knowing

possession of the Executive Branch of the government and subject to immediate production.

This Commission must act and act promptly or forfeit any claim to fairness or legitimacy.

4. **Additional Witnesses:** None.

5. **Additional Attachments:** None Additional.

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

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

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

/s/ Thomas Hurley  
THOMAS F. HURLEY, Maj, USA  
*Assistant Detailed Defense Counsel*

/s/ Richard Kammen  
RICHARD KAMMEN  
*DOD Appointed Learned Counsel*

**CERTIFICATE OF SERVICE**

I certify that on the day of filing I electronically filed the forgoing document with the Clerk of the Court and served the same on all counsel of record.

/s/ Richard Kammen  
Richard Kammen #5064-49  
KAMMEN & MOUDY  
135 North Pennsylvania St.  
Suite 1175  
Indianapolis, IN 46204  
(317) 236-0400  
Richard @kammenlaw.com