

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

UNITED STATES OF AMERICA

v.

**ABD AL RAHIM HUSSAYN
MUHAMMAD AL NASHIRI**

AE 206U

RULING

**DEFENSE MOTION TO COMPEL
THE PRODUCTION OF THE SENATE
SELECT COMMITTEE ON
INTELLIGENCE REPORT ON THE
RENDITION, DETENTION
INTERROGATION PROGRAM**

28 APRIL 2015

1. The Accused is charged with multiple offenses in violation of the Military Commissions Act (M.C.A.) of 2009, 10 U.S.C. §§ 948 *et seq.*, Pub. L. 111-84, 123 Stat. 2574 (Oct. 28, 2009). He was arraigned on 9 November 2011.
2. On 28 January 2014, the Defense filed AE 206 requesting the Commission compel the production of the Senate Select Committee on Intelligence's Report on the Central Intelligence Agency's (CIA) Rendition, Detention, and Interrogation ("RDI") Program, (hereinafter SSCI Report). The Defense argued the SSCI Report is "directly relevant to the weight and credibility of other information tainted by CIA sources and methods," as the report may "demonstrate a pattern and practice of deception by the CIA on the very issue of the RDI program." (AE 206 at 7). The Defense also argued the SSCI Report has mitigating relevance as it may show the Accused was subjected to unlawful pre-trial punishment and "[t]he members very well may consider the mitigating value of the accused's torture differently if they are presented with credible evidence that the government's embrace of barbarism was all for nothing." *Id.* at 8. The Government response, AE 206A, indicated it was attempting to "obtain whatever materials associated with the report . . . that are subject to review for a discoverability determination" and that "[t]he 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.” (AE 206A at 1). The Defense reply, AE 206B, asserted “the government’s refusal to produce the SSCI Report is unreasonable and it must be compelled to do so.” (AE 206B at 6). The Defense argued “the SSCI Report was provided to the CIA” and due to the CIA’s involvement with the “conduct of this prosecution, it is part of the ‘government’ for the purposes of the government’s discovery obligations.” *Id.* at 4-5.

The Commission heard argument on AE 206 in a closed session pursuant to R.M.C. 806 on 29 May 2014.¹ In response to the Commission’s request for information during argument on 29 May 2014, the Defense submitted AE 206F,² outlining the Defense’s theory for the Commission’s authority to compel production of a classified document “owned” by the legislative branch of the federal government. Citing 10 U.S.C. § 949j(a), the Defense asserted the M.C.A. of 2009 grants “this Commission . . . the authority to order the production of evidence from any source, insofar as the accused’s ‘opportunity to obtain witnesses and evidence [in this Commission] shall be comparable to the opportunity available to a criminal defendant in a court of the United States under article III of the Constitution.’” The Defense further asserted “the Senate is equally liable to judicial process for the production of evidence in a criminal trial,” citing *United States v. Rayburn House Office Building*, 497 F.3d 654, 660 (D.C. Cir. 2007). (AE 206F at 4). Since the Defense submitted AE 206 (28 January 2014), the Government filed seven notices: AEs 206H,³ I,⁴ J,⁵ K,⁶ L,⁷ and M,⁸ Q,⁹ detailing the status of its efforts to obtain a copy

¹ See Unofficial/Unauthenticated Transcript of the al Nashiri (2) Closed Hearing Dated 29 May 2014 from 09:04 A.M. to 12:12 P.M. (Part 1 of 3) at pp. 4501 – 28.

² AE 206F, Defense Response on the Specified Issue: What is the Source of the Commission’s Authority to Order the Production of Documents, filed 6 June 2014.

³ AE 206H, Government Notice Defense Motion to Compel the Production of The Senate Select Committee on Intelligence Report on the Rendition, Detention Interrogation Program, dated 20 June 2014. The Government provided notice of the status of its efforts to obtain the SSCI Report. The Government indicated the “SSCI Report remains a congressional record not within the custody or control of the Executive Branch.” (AE 206H at 1).

of the SSCI Report. Ultimately, the Government gained access to the SSCI Report and is currently reviewing it for discoverable materials.¹⁰

3. The Defense “is entitled to the production of evidence which is relevant, necessary and noncumulative.” R.M.C. 703(f)(1). The Government must produce information “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). The Government must produce all exculpatory evidence that reasonably tends to (a) negate the guilt of the accused, (b) reduce the degree of guilt of the accused, or (c) reduce the punishment. R.M.C. 701(e)(1); *see also Brady v. Maryland*, 373 U.S. 83, 88 (1963).

4. It is clear to the Commission the SSCI Report contains discoverable information. What is not clear is the extent to which this is cumulative with discovery previously provided to the Defense. The Government gained full access to the SSCI Report and started its review for discovery on 18 February 2015. (AE 206Q at 3). The Government has in the past and continues to provide

⁴ AE 206I, Government’s Second Notice Defense Motion to Compel the Production of The Senate Select Committee on Intelligence Report on the Rendition, Detention Interrogation Program, dated 29 August 2014. The Government provided notice of the status of its efforts to obtain the SSCI Report. The Government indicated the “SSCI Report remains a congressional record not within the custody or control of the Executive Branch.” (AE 206I at 1).

⁵ AE 206J, Government’s Third Notice Relating to The SSCI Report, dated 29 September 2014. The Government provided notice of the status of its efforts to obtain the SSCI Report. The Government indicated the “SSCI Report remains a congressional record not within the custody or control of the Executive Branch.” (AE 206J at 1).

⁶ AE 206K, Government’s Fourth Notice Relating to The SSCI Report, dated 29 October 2014. The Government provided notice of the status of its efforts to obtain the SSCI Report. The Government indicated the “SSCI Report remains a congressional record not within the custody or control of the Executive Branch.” (AE 206K at 1).

⁷ AE 206L, Government’s Fifth Notice Relating to The SSCI Report, dated 5 December 2014. The Government provided notice of the status of its efforts to obtain the SSCI Report. The Government indicated the “SSCI Report remains a congressional record not within the custody or control of the Executive Branch,” but noted it anticipated the SSCI would publicly release an Executive Summary of the SSCI Report. (AE 206L at 1-2).

⁸ AE 206M, Government’s Sixth Notice Relating to The SSCI Report, dated 18 December 2014. The Government provided notice of the status of its efforts to obtain the SSCI Report. The Government indicated the SSCI released the Executive Summary of the SSCI Report on 9 December 2014. The Government stated it would “continue to seek access to the entire SSCI Report to review it for potentially discoverable information not otherwise identified by the prosecution.” (AE 206M at 4).

⁹ AE 206Q, Government’s Seventh Notice Relating to The Senate Select Committee On Intelligence Study, dated 20 February 2015. The Government reported the SSCI authorized the Government to review the full SSCI Report for “potentially discoverable information.” (AE 206Q at 3).

¹⁰ *Id.*

discoverable information to the Defense.¹¹ Further, the Commission is not persuaded the authorities cited by the Defense provide it with authority to order the Senate Select Committee on Intelligence to produce a copy of the SSCI Report. Given the Government's current work reviewing the SSCI Report, the Commission will not issue an order the enforceability of which is unclear. The record since the Defense's filing of AE 206 has not yielded any facts or information giving the Commission cause to believe the Government has failed or is failing to comply with its discovery obligations or the Commission's Orders.

Accordingly, AE 206 is **DENIED**. The Government is directed to provide notice to the Commission as to all newly located and discoverable material provided to the Defense as result of its review of the SSCI Report. This notice will be filed under the AE 206 series and not pursuant to paragraph 1.a. of AE 045H.

So **ORDERED** this 28th day of April, 2015.

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VANCE H. SPATH, Colonel, USAF
Military Judge
Military Commissions Trial Judiciary

¹¹ See AE 120AA (ORDER, 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, dated 24 June 2014) and pleadings filed thereafter; and the numerous notices of provision of discovery filed pursuant to the Commission's Order in paragraph 1a of AE 045H (ORDER, Government Motion for a Scheduling Order, dated 21 August 2013).