MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY, CUBA

UNITED STATES OF AMERICA v. ABD AL RAHIM HUSSAYN MUHAMMED AL NASHIRI	**AE206O** **Government Response** To Defense Motion For Leave To File A Supplemental Filing To AE 206: Emergency Motion To Order The United States Government To Produce One 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 3 February 2015

1. Timeliness

The government timely files this response pursuant to Military Commissions Trial Judiciary Rule of Court 3.7.d.(1).

2. Relief Sought

The government respectfully requests that the Commission deny the defense motion to file a supplemental filing to AE 206.

3. Overview

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"). A request to supplement a motion is appropriate when there "are new facts, not known at the time of filing, or newly decided case law" that should be considered by the Commission to resolve the underlying issue, in this case, the production of the full and un-redacted Committee Study on the RDI

Program. Military Commissions Trial Judiciary Rules of Court 3.5.e. [hereinafter "R.C."]. The defense presents no additional facts or a change in the law that warrants supplementing the previously filed motions concerning this same issue of access to the Committee Study.

The defense motion suggests that two additional factors now warrant the Commission to order the production of the Committee Study: (1) the recent public release of the declassified Executive Summary of the Committee Study, and (2) the new Chairman of the Senate Select Committee on Intelligence's request that the Executive Branch immediately return all copies of the full and final un-redacted report to the Committee. Neither of these factors, however, are relevant to this Commission. As such, the defense motion fails to meet the clear standard for filing a supplement in R.C. 3.5.e., and should, therefore, be denied.

4. <u>Burden of Proof</u>

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). It also bears the burden of proving by a preponderance of the evidence "any factual issue the resolution of which is necessary to decide" the motion. *Id.*

5. <u>Facts</u>

The government charged Abd Al Rahim Hussayn Muhammad Al Nashiri ("the accused") with multiple offenses under the Military Commissions Act of 2009, 10 U.S.C. § 948a *et seq.*, relating to terrorist attacks against the United States and its allies. The accused is charged with 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 the French supertanker MV *Limburg* on 6 others, and significant property damage. [1]

[1] The Commission dismissed the separate charges relating to the accused's alleged participation in the attack on MV *Limburg* (Charge IV, Specification 2, & Charges VII-IX). AE 168G; AE 241C. The

On 28 January 2014, the defense filed AE 206, its motion to compel the production of the Committee Study. On 10 February 2014, the government filed its response and, consistent with its earlier representations, explained that it was attempting to obtain the Committee Study. AE 206A. In its filing, the government explained that the Committee Study was not in the government's possession, custody, or control. AE 206A at 2. On 28-29 May 2014, the Commission heard oral argument from both parties on this issue. The government explained that it was seeking a copy of the Committee Study and, if the government received a copy, it would review it for discoverable information:

> [W]e are actively seeking it. There is an extensive body of law that talks about "within the arm of the prosecution." And the prosecution has reached out to everything within the arm of the prosecution, and has reviewed all that information and provided that to the defense. Now, this is a report that clearly the government is aware of, we have requested [it] . . . There has been no final determination made yet as to what is discoverable and what's not because it hasn't been reviewed.

Unofficial/Unauthenticated Transcript ("Tr.") at 4373 (28 May 2014). The government reiterated its intention to make all reasonable efforts to review the Committee Study and produce the discoverable portions. Tr. at 4374. Since oral arguments on AE 206, the government has provided six updates on its efforts to obtain the Committee Study. AE 206H, AE 206I, AE 206J, AE 206K, AE 206L, AE 206M. In all of the updates, the government consistently stated that the

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government moved for reconsideration of the Commission's Order dismissing those charges. AE 168H; AE 241D. The Commission granted reconsideration and, on reconsideration, denied the government's requested relief, while modifying the initial Order to state dismissal of the charges was without prejudice. AE 168K; AE 241G. The Order does not affect the Conspiracy charge (Charge V), which includes overt acts comprising the attack on MV *Limburg*. On 29 September 2014, the government filed an interlocutory appeal with the United States Court of Military Commission Review ("U.S.C.M.C.R."), causing AE 168K/241G to be stayed automatically pending disposition by the U.S.C.M.C.R. On 12 November 2014, the United States Court of Appeals for the District of Columbia Circuit granted the defense request to stay the proceedings before the U.S.C.M.C.R., which then placed those proceedings in abeyance pending the resolution of the mandamus petition before the District of Columbia Circuit.

Committee Study is a Congressional record not within the custody of the Executive Branch. *See, e.g.* AE 206M at 1.

On 9 December 2014, the Senate Select Committee on Intelligence publicly released an unclassified Executive Summary Report titled "Committee Study of the Central Intelligence Agency's Detention and Interrogation Program." The un-redacted portions of the Executive Summary have been declassified by the Executive Branch; however, the redacted portions of the Executive Summary and the entire underlying report remain classified.

6. <u>Law and Argument</u>

The Rules for Court 3.5.e. states in relevant part that, "[a] supplemental filing may only add new facts, not known at the time of filing . . . [and] state a concise summary of the new facts [] and state why the new facts [] should be considered by the Commission." The defense fails to submit any new fact that materially affects the issue before this Commission. The defense alleges two new facts: (1) the Executive Summary of the Committee Study has recently been declassified and subsequently released to the public; and (2) that Senator Richard Burr, who has assumed the responsibilities as the Chairman of the Senate Select Committee on Intelligence, requested the Executive Branch immediately return all copies of the full report to the Committee. AE 206N at 2. The defense contends that this new information provides the impetus for the Commission to compel the production of information "regardless of where it's housed." AE 206F at 5. Mere changes in the Senate committee membership or public release of the declassified Summary, however, are not "new facts" contemplated by the Rules of Court. These facts do not have any material effect on whether the government has the Committee Study within its, possession, custody or control, which is the legal issue before this Commission. R.M.C. 701(c). Furthermore, the fact that the Committee has demanded the return of all copies of the

Committee Study is further evidence that the Committee Study is not within the government's possession, custody, or control, and supports the government's position that the Committee Study is not within the arm of the prosecution.

Finally, if the Committee produces the Committee Study–either in response to the government's request or in response to Commission subpoena—the Study must first be provided to the government in order for the government to properly discharge its discovery obligations. The Committee Study contains classified information belonging to multiple government agencies within the Executive Branch, and those agencies must have the opportunity to invoke the classified-information privilege, if necessary.

7. Conclusion

The issue before this Commission is the production of the Committee Study. The new facts alleged by the defense have no material relevance upon that issue and therefore are not appropriate for a supplement under the Rules of Court. 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. The proper avenue for relief—as it has been throughout this litigation—is to allow the government to continue its efforts to secure access to the Committee Study.

7. Oral Argument

The defense does not request oral argument. The government agrees that oral argument is not necessary under Military Commissions Trial Judiciary Rule of Court 3.9(a) because the Commission can decide this matter without it. If the Commission nevertheless provides the

defense with an opportunity to present oral argument, the government requests an opportunity to do the same.

8. Witnesses and Evidence

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

9. Additional Information

The government has no additional information.

10. Attachments

A. Certificate of Service, dated 3 February 2015.

Respectfully submitted,

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ATTACHMENT A

CERTIFICATE OF SERVICE

I certify that on the 3rd day of February 2015, I filed AE206O, **Government Response** To Defense Motion For Leave To File A Supplemental Filing To AE 206: Emergency Motion To Order The United States Government To Produce One 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, with the Office of Military Commissions Trial Judiciary and served a copy on counsel of record.

//s//

Justin T. Sher
Trial Counsel
Office of the Chief Prosecutor
Military Commissions