

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

**UNITED STATES OF AMERICA**

v.

**KHALID SHAIKH MOHAMMAD,  
WALID MUHAMMAD SALIH  
MUBARAK BIN 'ATTASH,  
RAMZI BIN AL SHIBH,  
ALI ABDUL AZIZ ALI,  
MUSTAFA AHMED ADAM  
AL HAWSAWI**

**AE 286II**

**RULING**

**Consolidated Ruling**

Mr. Ali's Motion to Compel Discovery of  
Senate Select Committee on  
Intelligence Study of RDI Program and  
Related Documents  
and  
Similar Motions to Compel Discovery  
filed by Mr. bin 'Attash, Mr. Hawsawi,  
and Mr. Mohammad

**14 April 2020**

**1. Procedural Background.**

a. The procedural history of this issue includes classified filings, rulings, and argument which, though part of the record of trial, cannot be discussed in detail in an unclassified ruling. Accordingly, these filings, rulings, and argument will be addressed generally and only to the extent necessary to provide context for this ruling.

b. Mr. Ali (a.k.a. al Baluchi), Mr. bin 'Attash, Mr. Hawsawi, and Mr. Mohammad have filed numerous pleadings in the AE 286 Series seeking to compel the Government to produce in discovery unredacted versions of the Senate Select Committee on Intelligence (SSCI) Study of the Central Intelligence Agency (CIA)'s Rendition, Detention, and Interrogation (RDI) Program (commonly referred to as the SSCI Report) and numerous other documents related to the SSCI Report.<sup>1</sup> Because the documents requested by Mr. bin 'Attash, Mr. Hawsawi, and

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<sup>1</sup> See AE 286 (AAA), Defense Motion to Compel Discovery of Senate Select Committee on Intelligence Study of RDI Program and Related Documents, filed 2 April 2014 (and subsequent pleadings); AE 286 (WBA Sup), Supplement to Defense Motion AE 286 (AAA) to Compel Discovery of Senate Select Committee on Intelligence Study of RDI Program and Related Documents, filed 6 January 2015 (and subsequent pleadings); AE 286 (MAH Sup), Defense Supplement to AE 286 to Compel Discovery of Senate Select Committee on Intelligence Study of RDI Program and Related Documents, filed 28 January 2015; AE 286J, Emergency Defense Motion to Order the Government to Produce the Full, Unredacted Senate Report on the RDI Program, or, in the Alternative, to File the Report with the Commission to be Maintained Ex Parte and Under Seal Pending Further Rulings, filed 30 January

Mr. Mohammad generally consist of subsets of the documents requested by Mr. Ali, the Commission will take note of their individualized arguments, but address their motions to compel discovery within the context of Mr. Ali's base motion.

c. The issue of RDI-related discovery has been litigated in various forms before this Commission as early as 2012, with the SSCI Report in particular being the subject of discovery litigation dating back to 2014. During the course of this litigation, the Commission ordered the Government to ensure the Department of Defense (DoD) "preserves a copy of the full SSCI Report pending completion of RDI discovery and the litigation of the 286 series."<sup>2</sup>

d. On 28 December 2015, the Government moved in AE 397 (GOV)<sup>3</sup> to consolidate the litigation of all outstanding requests for RDI-related information and address them in accordance with the "ten-category construct" originally adopted in the case of *United States v. Al Nashiri*. The motion was granted on 5 April 2016 in AE 397F.<sup>4</sup> The Commission articulated ten categories of information related to the RDI program that were discoverable and the provision of which would, coupled with unclassified discovery being provided by the government (to include the unclassified summary of the SSCI Report), satisfy the Government's basic discovery obligations with respect to the RDI program.<sup>5</sup>

e. Thereafter, the Government employed Military Commission Rule of Evidence (M.C.R.E.) 505 to provide the Defense summaries and substitutions of significant amounts of

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2015 (and subsequent pleadings); AE 286AA (KSM), Motion to Compel Discovery of Documents Discussed in the Unclassified Executive Summary of the Report of the Senate Select Committee on Intelligence Committee Study of the Central Intelligence Agency's Detention and Interrogation Program, filed 8 March 2018 (and subsequent pleadings).

<sup>2</sup> AE 286T, Emergency Defense Motion to Order the Government to Produce the Full, Unredacted Senate Report on the RDI Program, or, in the Alternative, to File the Report with the Commission to be Maintained *Ex Parte* and Under Seal Pending Further Rulings, dated 10 January 2017; *affirmed on reconsideration* by AE 286Z Ruling, AE 286U (AAA) Defense Motion to Reconsider AE 286T Order Regarding Emergency Defense Motion to Order the Government to Produce the Full, Unredacted Senate Report on the RDI Program with the Commission to be Maintained *Ex Parte* and Under Seal Pending Further Rulings, dated 30 June 2017.

<sup>3</sup> AE 397 (GOV) Government Proposed Consolidation of Motions to Compel Information Relating to the CIA's Former Rendition, Detention, and Interrogation Program, dated 28 December 2015.

<sup>4</sup> AE 397F Trial Conduct Order, Government Proposed Consolidation of Motions to Compel Information Relating to the CIA's Former Rendition, Detention, and Interrogation Program, dated 5 April 2016.

<sup>5</sup> *Id.* at 3.

information referenced in the SSCI Report (to include summaries regarding individuals with “direct and substantial” contact with the Accused during their detention within the RDI program).<sup>6</sup> These summaries generally do not contain identifying information for individuals, identifying information about the particular locations at which the Accused were detained and interrogated, or specific dates on which the incidents described in the summaries occurred. Instead, the Government substitutions made use of pseudonyms and/or unique functional identifiers (UFIs) for individuals, code names and/or numeric identifiers for locations, and

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<sup>6</sup> See, e.g., AE 308V Order, Government Motion to Request Substitutions and Other Relief From Ordered Discovery of Classified Information Responsive To Paragraphs 13.a. and 13.b. of the Al Nashiri Ten-Category Construct, dated 4 August 2016; AE 308ZZ (Corrected Copy) Ruling, Government Motion To Request Substitutions and Other Relief From Classified Information Responsive to Paragraph 2h of the Commissions Ten Category Construct, dated 29 December 2016; AE 308AAA (Corrected Copy) Ruling, Government Motion To Request Substitutions and Other Relief From Classified Information Responsive to Paragraph 2.h. of the Commissions Ten Category Construct, dated 3 January 2017; AE 308BBB (Corrected Copy) Ruling, Government Motion To Request Substitutions and Other Relief From Classified Information Responsive to Paragraph 2h of the Commissions Ten Category Construct, dated 3 January 2017; AE 308GGG Ruling, Government Motion and Memorandum For A Protective Order Pursuant To the Military Commissions Act of 2009, 10 U.S.C § 949-4, § 949-6 and M.C.R.E. 505, dated 12 January 2017; AE 308HHH (Corrected Copy) Ruling, Government Motion To Request Substitutions and Other Relief From Classified Information Responsive to Paragraph 2h of the Commissions Ten Category Construct, dated 12 January 2017; AE 308III Order, Government Motion To Request Substitutions and Other Relief From Ordered Discovery of Classified Information Responsive to Paragraphs 13.e. of the Al Nashiri Ten-Category Construct, dated 12 January 2017; AE 308JJJ Order, Government Motion To Request Substitutions and Other Relief From Ordered Discovery of Classified Information Responsive to Paragraphs 13.i. and 13.j. of the Al Nashiri Ten-Category Construct, dated 17 January 2017; AE 308KKK Order, Government Motion To Request Substitutions and Other Relief From Classified Information Responsive to Paragraph 2h of the Commission’s Ten-Category Construct, dated 17 January 2017; AE 308NNN Order, Government Motion To Request Substitutions and Other Relief From Classified Information Responsive to Paragraph 2.h. of the Commission’s Ten-Category Construct, dated 18 January 2017; AE 308VVV CORRECTED Order, Government Motion To Request Substitutions and Other Relief From Classified Information Responsive to Paragraph 2.h of the Commission’s Ten-Category Construct, dated 6 March 2017; AE 308AAAA Order, Government Motion To Request Substitutions and Other Relief From Classified Information Responsive to Paragraph 2.h of the Commission’s Ten-Category Construct, dated 19 April 2017; AE 308BBBB Ruling, Government Motion To Request Substitutions and Other Relief From Classified Information Responsive to Paragraph 2.h. of the Commissions Ten Category Construct, dated 19 April 2017; AE 308CCCC Order, Government Motion To Request Substitutions and Other Relief From Classified Information Responsive to Paragraph 2.h. of the Commissions Ten Category Construct, date 19 April 2017; AE 308HHHH Order, Government Amendment to Government Motion To Request Substitutions and Other Relief Regarding Classified Information Responsive to Paragraphs 2.d., 2.f., and 2.g. of the Commission’s Ten-Category Construct, dated 19 May 2017; AE 308III Order, Government Motion To Request Substitutions and Other Relief From Classified Information Responsive to Paragraph 2.h. of the Commission’s Ten-Category Construct, dated 19 May 2017; AE 308LLLL Order, Government Motion To Request Substitutions and Other Relief From Classified Information Responsive to Paragraph 2.c. of the Commission’s Ten-Category Construct, dated 7 June 2017; AE 308MMMM Order, Government Motion To Request Substitutions and Other Relief Regarding Classified Information Responsive to Paragraphs 2.b, c, e, h, and j of the Commission’s Ten-Category Construct, dated 13 June 2017; AE 308OOOO/AE 497B Order, Government Motion To Request Substitutions and Other Relief From Ordered Discovery of Classified Information So As To Comply With Paragraphs 2.b., 2.c., 2.e., 2.h., and 2.j. of AE 397 and Defense Motion to Compel Production of Durham Investigation Documents, dated 17 July 2017; AE 308RRRR Order, Government Motion To Request Substitutions and Other Relief From Ordered Discovery of Classified Information So As To Comply With Paragraphs 2.c. and 2.h. of AE 397, dated 31 August 2017.

early/mid/late year dates. The Government also committed to facilitating interviews with individuals identified by pseudonyms/UFI in the summaries<sup>7</sup>, produced an RDI-Index which contained some of the specific dates, and is in the process of producing lengthy proposed stipulations of fact containing “rich and vivid” details relating to the RDI-program to each Defense Team for their use in analyzing and organizing the summaries and substitutions they received.

f. On 3 October 2016, the Government indicated it had substantially complied with AE 397F, having either provided RDI data in its original form or through the summary and substitution process.<sup>8</sup> In its compliance notice, the Government also indicated it had reviewed the full and unredacted SSCI Report (to include the Executive Summary), the source documents upon which the SSCI Report is based, numerous investigations into the RDI program, and the CIA databases containing the source documents upon which the Panetta Review was based.<sup>9</sup>

g. Since filing AE 397G (GOV), the Government has continued to provide additional RDI-related discovery either directly to the Defense or through the summary and substitutions process. It has done so either in response to specific Discovery requests and/or as a result of its ongoing “quality control checks” to make sure it had not missed anything discoverable.<sup>10</sup> The Defense has steadfastly maintained that the amount and format of much of the information provided by Government are inadequate.

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<sup>7</sup> The issue of access to RDI-related witnesses has led to additional litigation, most notably in the AE 524 series.

<sup>8</sup> AE 397G (GOV), Government Notice of Compliance with Order Compelling Discovery Relating to the CIA’s Former Rendition, Detention, and Interrogation Program and with Affirmative Discovery Obligations, filed 3 October 2016.

<sup>9</sup> *Id.*

<sup>10</sup> Transcript at p. 23703.

## 2. Oral Argument.

a. The Commission heard oral argument on the AE 286 Series on 18 February 2016,<sup>11</sup> 7 December 2016,<sup>12</sup> 16 May 2017,<sup>13</sup> and 16 November 2018.<sup>14</sup> On 10 April 2019, the Commission offered the parties the opportunity provide the Commission with a status update as to the RDI-related discovery and to again argue AE 286.<sup>15</sup> Specifically, the Commission directed the Parties to focus their argument on the following issues:

(1) Whether the Prosecution has completed its review of the approximately 6 million documents allegedly underlying the Senate Select Committee on Intelligence Committee Study of RDI Program and Related Documents (SSCI Report);

(2) Whether the Prosecution has turned over all discovery it intends to provide related to its review of the documents underlying the SSCI Report;

(3) Whether the Prosecution views any portion of the SSCI Report, the “Panetta Review”, or the Central Intelligence Agency rebuttal to be discoverable (as opposed to the documents underlying these reports);

(4) Whether the Defense requests made pursuant to AE 286 are still ripe in light of additional discovery provided by the Prosecution; and

(5) Whether the original rationale articulated in support of the Defense requests has changed in light of the additional discovery provided.<sup>16</sup>

Thereafter, the Commission heard further oral argument in the 286 Series on 29 April 2019.<sup>17</sup>

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<sup>11</sup> Unofficial/Unauthenticated Transcript of the US v. Khalid Shaikh Mohammad, et al., Motions Hearing Dated 18 February 2016 from 4:05 P.M. to 4:48 P.M. at pp. 10594-10597.

<sup>12</sup> Unofficial/Unauthenticated Transcript of the US v. Khalid Shaikh Mohammad, et al., Motions Hearing Dated 7 December 2016 from 10:51 A.M. to 12:02 P.M. at pp. 14447-14475.

<sup>13</sup> Unofficial/Unauthenticated Transcript of the US v. Khalid Shaikh Mohammad, et al., Motions Hearing Dated 16 May 2017 from 1:35 P.M. to 3:07 P.M. at pp. 15902-15932.

<sup>14</sup> Unofficial/Unauthenticated Transcript of the US v. Khalid Shaikh Mohammad, et al., Motions Hearing Dated 16 November 2018 from 1:14 P.M. to 4:07 P.M. at pp. 22022-22047.

<sup>15</sup> AE 624A Docket Order, dated 10 April 2019.

<sup>16</sup> *Id* at 1.

<sup>17</sup> Unofficial/Unauthenticated Transcript of the US v. Khalid Shaikh Mohammad, et al., Motions Hearing Dated 29 April 2019 from 8:59 A.M. to 9:49 A.M. at pp. 22679-22790.

b. As clarified during the oral argument, the Defense still seeks the following four specific categories of information in an unredacted form:

- (1) The full SSCI Report;
- (2) The documents upon which the SSCI Report is based;
- (3) The CIA Rebuttal to the SSCI Report; and
- (4) The compilation of CIA documents referred to as the “Panetta Review.”<sup>18</sup>

c. During argument, and in their pleadings, the Defense teams offered various rationales and examples of ways in which they believed the requested discovery would be helpful to the Defense.<sup>19</sup> Additionally, the Defense continued to request that the Commission not only maintain the existing preservation order as to the SSCI Report, but also require the Government to provide the Commission a copy for safe-keeping and inclusion in the appellate record.<sup>20</sup>

d. The Government affirmed to the Commission and the parties that it had been provided access to requested reports and all of the underlying materials, to include the repositories of the RDI-related information upon which the SSCI Report, the CIA Response, and the Panetta Report were based and had “produced the discoverable materials” contained therein.<sup>21</sup> In particular, the Government emphasized it had been given complete access to the full SSCI Report, and had verified all 6 million plus documents cited therein were reviewed for discoverability.<sup>22</sup> The Government discussed its search methodology and described each of the five repositories of information it reviewed as part of the RDI discovery process.<sup>23</sup> The Government stated that each of the Defense Teams had been given more than 23,000 pages of RDI-related discovery as a

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<sup>18</sup> Transcript at pp. 22679-22680.

<sup>19</sup> Transcript at pp. 22711-22758

<sup>20</sup> Transcript at p. 22743.

<sup>21</sup> Transcript at pp. 22678-22697.

<sup>22</sup> Transcript at pp. 22683-22684; *see also* AE 286BB (GOV), Government Response to Motion to Compel Discovery of Documents Discussed in the Unclassified Executive Summary of the Report of the Senate Select Committee on Intelligence Committee Study of the Central Intelligence Agency’s Detention and Interrogation Program, filed 22 March 2018 at 23-24.

<sup>23</sup> Transcript at pp. 22684-22688.

result of the Government's comprehensive review.<sup>24</sup> The Government also explained under what circumstances it anticipated it might provide additional RDI-related discovery to the Defense<sup>25</sup> and argued the Commission's preservation order as to the SSCI Report was no longer needed.<sup>26</sup>

3. **Burden of Proof.** As moving party, the Defense bears the burden of proving any facts prerequisite to the relief sought by a preponderance of the evidence.<sup>27</sup>

#### 4. **Law.**

a. Information is discoverable if it is material to the preparation of the defense or exculpatory.<sup>28</sup> The Defense is also entitled to information if there is a strong indication it will play an important role in uncovering admissible evidence; assist in impeachment; corroborate testimony; or aid in witness preparation.<sup>29</sup> Finally, information is discoverable if it is material to sentencing.<sup>30</sup>

b. It is the responsibility of detailed Counsel to provide specificity when briefing issues, as the Commission will not do so for them. *See Abdullah v. Obama*, 753 F.3d 193, 200 (D.C. Cir. 2014) (quoting *N.Y. Rehab. Care Mgmt., LLC v. NLRB*, 506 F.3d 1070, 1076 (D.C. Cir. 2007) "It is not enough merely to mention a possible argument in the most skeletal way, leaving the court to do counsel's work." *Id.*

c. A "mere conclusory allegation that the requested information is material to the preparation of the defense," however, does not satisfy the Defense's burden to "show[] . . . the

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<sup>24</sup> Transcript at p. 22690.

<sup>25</sup> Transcript at pp. 22688-90 and 22768.

<sup>26</sup> Transcript at pp. 22777-22778.

<sup>27</sup> Rule for Military Commissions (R.M.C.) 905(c)(1)-(2).

<sup>28</sup> R.M.C. 701(c)(1-3), (e); *Brady v. Maryland*, 373 U.S. 83, 88 (1963). Furthermore, "[u]nder *Brady*, . . . prosecutors have an affirmative duty to search possible sources of exculpatory information, including a duty to learn of favorable evidence known to others acting on the prosecution's behalf, . . . and to cause files to be searched that are not only maintained by the prosecutor's or investigative agency's office, but also by other branches of government 'closely aligned with the prosecution.'" *United States v. Safavian*, 233 F.R.D. 12, 17 (D.D.C. 2005). Note, however, that absent "a specific request . . . that . . . explicitly identifies the desired material and is objectively limited in scope," there is no obligation for "prosecutors to search . . . unrelated files to exclude the possibility, however remote, that they contain exculpatory information." *United States v. Joseph*, 996 F.2d 36, 41 (3d Cir. 1993).

<sup>29</sup> *United States v. Lloyd*, 992 F.2d 348, 351 (D.C. Cir. 1993).

<sup>30</sup> R.M.C. 701(e)(3).

reasonableness and materiality of the request.”<sup>31</sup> Similarly, a “vague asserted need for potentially exculpatory evidence that might be contained” in the materials sought “does not pass muster.”<sup>32</sup> Regarding classified information specifically, the Court of Appeals for the District of Columbia Circuit has held that classified information “is not discoverable on a mere showing of theoretical relevance in the face of the government’s classified information privilege, but . . . further requires that a defendant seeking classified information . . . is entitled only to information that is at least helpful to the defense of the accused.”<sup>33</sup> Furthermore, the Defense must be able to sufficiently establish that the material sought in fact exists.<sup>34</sup> Finally, a Defense discovery request that is overbroad or otherwise objectionable may simply be denied; the Commission is under no obligation to amend or modify the request to render it unobjectionable.<sup>35</sup>

d. As in any criminal case, the Prosecution in a military commission is responsible to determine what information it must disclose in discovery.<sup>36</sup> “[T]he prosecutor’s decision on disclosure is final. Defense counsel has no constitutional right to conduct his own search of the State’s files to argue relevance.”<sup>37</sup> It is incumbent upon the Prosecution to execute this duty faithfully, because the consequences are dire if it fails to fulfill its obligation.<sup>38</sup> A court may, where it finds doing so appropriate, rely on Government assurances in this regard.<sup>39</sup>

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<sup>31</sup> *United States v. Conder*, 423 F.2d 904, 910 (6th Cir. 1970) *cert. denied*, 400 U.S. 958 (1970).

<sup>32</sup> *United States v. Apodaca*, 287 F. Supp. 3d 21, 40 (D.D.C. 2017).

<sup>33</sup> *United States v. Yunis*, 867 F.2d 617, 623 (D.C. Cir. 1989) (citing *Roviaro v. United States*, 353 U.S. 53 (1957)).

<sup>34</sup> *United States v. Norwood*, 79 M.J. 644, 666 (N-M.Ct. Crim. App. 2019), review granted on other grounds, No. 20-0006/NA, 2020 WL 710633 (C.A.A.F. Jan. 21, 2020) (citing *United States v. Rodriguez*, 60 M.J. 239, 246 (C.A.A.F. 2004)).

<sup>35</sup> *See, e.g., Benham v. Rice*, 238 F.R.D. 15, 19 (D.D.C. 2006), on reconsideration in part, No. CIV.A. 03-01127, 2007 WL 8042488 (D.D.C. Sept. 14, 2007) (“[I]t is not the court’s function to modify plaintiff’s demands so that, as revised, they are reasonable and legitimate.” *Id.*) (interrogatories in civil case).

<sup>36</sup> R.M.C. 701(b)-(c); *United States v. Briggs*, 48 M.J. 143 (C.A.A.F. 1998); *Pennsylvania v. Ritchie*, 480 U.S. 39, 59 (1987).

<sup>37</sup> *Ritchie*, 480 U.S. at 59.

<sup>38</sup> *See United States v. Stellato*, 74 M.J. 473 (C.A.A.F. 2015) (finding no abuse of discretion in military judge’s dismissal with prejudice of charges due to a Prosecution discovery violation); *United States v. Bowser*, 73 M.J. 889 (A.F.Ct.Crim.App. 2014), *summarily aff’d* 74 M.J. 326 (C.A.A.F. 2015) (same).

<sup>39</sup> *See, e.g., Apodaca*, 287 F.Supp.3d at 41 (“Based on the government’s written and oral assurances, the Court is satisfied that the government has been and will remain vigilant in ensuring that it fulfills its discovery and *Brady/Giglio* obligations.” *Id.* (citing *United States v. Karake*, 281 F. Supp. 2d 302, 306 (D.D.C. 2003)); *see also United States v. Brooks*, 966 F.2d 1500, 1504–05 (D.C. Cir. 1992)(noting that “cases considering demands for disclosure of files to the defense appear to have . . . regard[ed] prosecutorial review of possible *Brady* materials as



e. “Classified information shall be protected and is privileged from disclosure if disclosure would be detrimental to the national security. Under no circumstances may a military judge order the release of classified information to any person not authorized to receive such information.” 10 U.S.C. § 949p-1(a). The military judge, in assessing the accused’s discovery of or access to classified information, may authorize the United States to delete or withhold specified items of classified information, and/or substitute a summary for classified information. *See* 10 U.S.C. § 949p-4(b); *see also* (M.C.R.E.) 505(f)(2)(A).

f. The military judge shall permit the trial counsel to request authorization to delete, withhold, or substitute in the form of an *ex parte* presentation to the extent necessary to protect classified information. *See* 10 U.S.C. § 949p-4(b). “The military judge shall permit the trial counsel to make a request for an authorization under M.C.R.E. 505(f)(2)(A) in the form of an *ex parte* presentation to the extent necessary to protect classified information.” M.C.R.E. 505(f)(2)(B).

g. The military judge shall grant the request of the trial counsel if the military judge finds that the summary, statement, or other relief would provide the accused with substantially the same ability to make a defense as would discovery of or access to the specific classified information. *See* 10 U.S.C. § 949p-4(b); *see also* M.C.R.E. 505(f)(2)(C).

h. “An order of a military judge authorizing a request of the trial counsel to substitute, summarize, withhold, or prevent access to classified information under this section is not subject to a motion for reconsideration by the accused, if such order was entered pursuant to an *ex parte* showing under this section.” M.C.R.E. 505(f)(3).

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normally sufficient,” and that, absent specific evidence of wrongful prosecutorial withholding, such “case[s] call[] for the usual prosecutorial rather than [*in camera*] judicial examination.” *Id.*).

5. **Findings of Fact.** The Commission makes the following findings of fact:

a. **SSCI Report.** As part of its review of the former RDI program, the SSCI negotiated an agreement with the CIA for certain SSCI staff members to have “unprecedented direct access to millions of pages of unredacted CIA documents” related to the RDI program.<sup>40</sup> The staff members, however, did not conduct any interviews or conduct independent research as part of their review. After spending more than two years reviewing RDI-related CIA documents, the SSCI staff members created a detailed classified report, consisting of a “fact-based narrative that summarizes over six-million pages of mostly CIA documents” and which is “more than 6,700 pages long and includes approximately 38,000 footnotes.”<sup>41</sup> This report became commonly known as the SSCI Report.

b. **“Panetta Review”.**

(1) Although the pleadings in this series refer to a document commonly called the “Panetta Review,” it is not a single document or report. It is instead, the remnants of an unfinished CIA project that resides within a CIA repository.

(2) In light of the aforementioned agreement with the SSCI, Leon Panetta, the Director of the CIA at the time, “expressed a desire to remain informed about what was contained in the millions of pages of documents that would be made available to the Committee.”<sup>42</sup> In particular, the Director and other senior CIA leaders wished to be informed of “noteworthy information” that could help “inform other policy decisions related to the Committee’s study.”<sup>43</sup> The CIA formed a Special Review Team (SRT) comprised of

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<sup>40</sup> *Jason Leopold v. Central Intelligence Agency*, 89 F. Supp. 3d 13, (D.D.C. 2015) submitted via AE 286GG (GOV), In-Court Submission, filed 29 April 2019.

<sup>41</sup> Letter from Senator Dianne Feinstein to the Secretary of Defense, dated 19 December 2016 and found at AE 286S, Notice, Emergency Defense Motion to Order the Government to Produce the Full, Unredacted Senate Report on the RDI Program, or, in the Alternative, to File the Report with the Commission to be Maintained Ex Parte and Under Seal Pending Further Rulings, filed 21 December 2016.

<sup>42</sup> *Leopold v. Central Intelligence Agency*, 89 F. Supp. 3d at 15.

<sup>43</sup> *Id.*

approximately ten people to review the documents “being turned over to the SSCI” and to create “summaries of certain key information.”<sup>44</sup>

(3) The SRT team leaders assigned team members “research topics, some of which related to particular detainees and some of which related to “overarching programmatic subject-matters.”<sup>45</sup> Team members then conducted searches for documents “related to their assigned topic” and review them to determine if any of those documents “might be relevant to informing senior CIA leaders in connection with the SSCI’s study.”<sup>46</sup> Whenever a team member found information that he or she “believed was significant,” the information was described in a Draft Review which eventually would “become a rough guide to noteworthy information on a particular topic” and which “would help guide” the CIA policy decisions.<sup>47</sup>

(4) The project was abandoned, however, after only one year because the CIA determined that its “continued work on the Reviews could potentially complicate a separate criminal investigation by the Department of Justice into the detention and interrogation program.”<sup>48</sup> The Draft Reviews were never finished.<sup>49</sup> When the project was abandoned, the team members had reviewed “less than half of the millions of pages of documents that the CIA ultimately made available to the SSCI.”<sup>50</sup> The Draft Reviews themselves were also left in varying stages of completion, with some consisting of “only rough notes regarding some relevant documents” and some “in a more polished form,” having “undergone preliminary editing and formatting.”<sup>51</sup>

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<sup>44</sup> *Id.* at 15-16.

<sup>45</sup> *Id.* at 16.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

**c. The Executive Summary of the SSCI Report.**

(1) On 9 December 2014, the SSCI publicly released twenty “Findings and Conclusions” accompanied by a 499 page Executive Summary of a “Committee Study of the Central Intelligence Agency’s Detention and Interrogation Program” (“Executive Summary”), along with minority views and the additional views of various Committee members.<sup>52</sup>

(2) Upon release, the portions of the Executive Summary that were not covered in redactions were declassified. The redacted portions of the Executive Summary, however, as well as the SSCI Report itself, remain classified.<sup>53</sup>

**d. CIA Response to the SSCI Report.** On the same date as the release of the Executive Summary of the SSCI Report, the CIA released a redacted version of its 27 June 2013, 129 page response to the SSCI Report which was accompanied by a Memorandum from the Director of the CIA John Brennan and included an unredacted fact sheet that referenced Mr. Ali.<sup>54</sup>

**e. Government Review of RDI-Related Discovery.**

(1) The Government has been provided access to the full and unredacted versions of the SSCI Report (to include the Executive Summary), the CIA Response to the SSCI Report, and the “Panetta Review.”

(2) The Government has been provided full access to the databases containing the source documents upon which the SSCI Report, the CIA Response to the SSCI Report, and the “Panetta Review” were based.

(3) The Government has affirmed to the Commission that it conducted a thorough review of those source documents and has provided to the Defense (either directly or through the

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<sup>52</sup> Unofficial/Unauthenticated Transcript of the US v. Khalid Shaikh Mohammad, et al., Motions Hearing Dated 29 April 2019 from 8:59 A.M. to 9:49 A.M. at p. 22717.

<sup>53</sup> AE 286G (GOV), Government Fifth Notice to Defense Motion to Compel Discovery of Senate Select Committee on Intelligence Study of RDI Program and Related Documents, filed 15 December 2014.

<sup>54</sup> AE 286 (AAA 2<sup>nd</sup> Sup), Defense Supplement to Motion to Compel Discovery of Senate Select Committee on Intelligence Study of RDI Program and Related Documents, filed 3 February 2015 at 2 and at Appendix D.

summary and substitutions process) all of the discoverable information it found within those source documents.

## **6. Discussion/Analysis.**

a. Although the Defense Teams have articulated numerous ways in which access to the full and unredacted versions of the SSCI Report, the CIA Response to SSCI Report, and the “Panetta Review” would make it easier for them to organize and analyze the 23,000 plus pages of RDI-related discovery now in their possession, the Defense has failed to carry its burden of showing that the contents of the SSCI Report, the CIA Response, and the “Panetta Review” are discoverable and/or must be produced by the Government.

b. All three of the requested documents (the SSCI Report, the CIA Response, and “Panetta Review”) are based, not upon interviews or independent investigations, but upon examination of the very same documents the Government reviewed in carrying out its responsibilities as required by the law and in accordance with this Commission’s order in AE 397F. Accordingly, the narrative portions of the SSCI Report, CIA Response, and “Panetta Review” (even if based on facts contained in the source documents) are not original sources of facts or evidence. To the extent the narratives are merely descriptions or summaries of the underlying source material, the relevant portions of which already have been provided to the Defense in discovery, they are cumulative with what has already been provided, and need not be provided again. To the extent the narratives may contain opinions or conclusions based on the source materials, they have no relevance sufficient to trigger discovery obligations.

c. The Defense has also asserted that it would be beneficial for the Defense to have access to the unredacted versions of the six million source documents reviewed by the Government, instead of the Commission-approved summaries and substitutions of those source documents that have already been provided to them. To the extent that the Government reviewed and found any of the source documents to be discoverable, it has either already provided them to

the Defense directly or provided summaries and substitutions thereof following Commission review and approval.

d. In essence, the Defense is requesting an opportunity to circumvent the discovery process and question the sufficiency of the Government's review of the RDI-related materials. The Commission, however, does not have reason to doubt the Defense has been or will be provided with the relevant and material portions of the underlying source materials in accordance with the Government's ongoing discovery obligations. The Government is aware of its obligations as to the discovery process and of the potential consequences of a failure to meet those obligations. This does not, however provide the Defense with the authority to go rummaging through the Government's files.

e. In regard to the motion to compel the underlying source documents (which the Defense estimates comprises 99.89% of the documents requested in the AE 286 Series),<sup>55</sup> the Defense motions to compel discovery constitute an impermissible request for the Commission to reconsider its numerous prior rulings regarding summary and substitution motions.<sup>56</sup>

f. In sum, the Defense has not offered an adequate theory of why the opinions and conclusions contained within the SSCI Report, the CIA Response and the "Panetta Review" are relevant and material to the preparation of the defense, or why the Defense should be provided access to the unredacted original source documents for SSCI Report, the CIA Response, and the "Panetta Review."

7. **Ruling.** The Defense Motions within the 286 Series to Compel Discovery of the SSCI Report, the documents upon which the SSCI Report is based, the CIA Rebuttal to the SSCI Report; and the compilation of CIA documents referred to as the "Panetta Review" are **DENIED**.<sup>57</sup>

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<sup>55</sup> AE 286 (AAA 3<sup>rd</sup> Sup), Mr. Al Baluchi's Third Supplement to Defense Supplement to Motion to Compel Discovery of Senate Select Committee on Intelligence Study of RDI Program and Related Documents, filed 18 March 2016 at 11.

<sup>56</sup> See n. 7, *supra*.

<sup>57</sup> The Commission notes that the Government has affirmatively recognized its ongoing duty to provide RDI-related discovery as information may become relevant or as additional documents are located. Additionally, the

8. **Order.** The Commission’s preservation order in AE 286T, as affirmed in AE 286Z, remains in effect, but is modified as follows: The Government shall ensure that DoD preserves a copy of the full SSCI Report, pending completion of appellate review of this case or until this Commission or another Court of competent jurisdiction orders otherwise.

So **ORDERED** this 14th day of April, 2020.

*//s//*  
W. SHANE COHEN, Colonel, USAF  
Military Judge  
Military Commissions Trial Judiciary

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Government has informed the Commission it is engaging in “quality control checks” to ensure the Government has not inadvertently failed to disclose noncumulative, relevant and material information. Transcript at p. 23703.