

MILITARY COMMISSIONS TRIAL JUDICIARY  
GUANTANAMO BAY, CUBA

UNITED STATES OF AMERICA

v.

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

**AE 286W (GOV)**

**Government Combined Response**  
To AE 286U (AAA), Defense Motion to Reconsider AE 286T Order Regarding Emergency Defense Motion to Order the Prosecution 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, and AE 286V (KSM), Mr. Mohammad's Motion to Reconsider AE 286T

19 June 2017

**1. Timeliness**

The Prosecution timely files this Response pursuant to Military Commissions Trial Judiciary Rule of Court ("R.C.") 3.7.

**2. Relief Sought**

The Prosecution respectfully requests that this Commission deny the requested relief contained within AE 286U (AAA), Defense Motion to Reconsider AE 286T Order Regarding Emergency Defense Motion to Order the Prosecution 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, and AE 286V (KSM), Mr. Mohammad's Motion to Reconsider AE 286T, without oral argument.

**3. 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).

#### 4. Facts

On 10 January 2017, this Commission issued AE 286T, Order, Emergency Defense Motion to Order the Prosecution 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. In doing so, the Commission ordered that “[t]he Prosecution shall ensure the DoD preserves a copy of the full SSCI Report pending completion of RDI discovery and litigation of issues raised in the 286 series.” AE 286T at 2. It further specified the “Preservation Order will remain in effect until otherwise ordered by this Commission or other Court of competent jurisdiction.” *Id.* at 2.

On 8 June 2017, Defense counsel for Mr. Ali filed AE 286U (AAA), Defense Motion to Reconsider AE 286T Order Regarding Emergency Defense Motion to Order the Prosecution to Produce the Full, Unredacted Senate Report on the RDI Program with the Commission to be Maintained *Ex Parte* and Under Seal Pending Further Ruling. Within their motion, the Defense requested “that the Commission reconsider its ruling in AE 286T deferring [Defense] motion to compel discovery . . . of the Senate Select Committee on Intelligence Study of the CIA’s Detention and Interrogation Program (“SSCI Report”), in light of recent reporting that Executive agencies are dispossessing themselves of their copies of the SSCI Report.” AE 286U (AAA) at 1. The Defense made this request despite the fact that the Prosecution stated the following in response to their conferencing request:

The Prosecution has verified that one copy of the SSCI report, that had previously been delivered to the Department of Defense, and which is the subject of the preservation order of the Military Judge in this case, is still being retained by the Department of Defense pursuant to the Military Judge’s Order and will not be returned to the Senate until further order of the Military Commission.

*Id.* at 8.

On 8 June 2017, Defense counsel for Mr. Mohammad filed AE 286V (KSM), Mr. Mohammad’s Motion to Reconsider AE 286T. In doing so, the Defense requested “that the Military Commission reconsider AE 286T and grant, in full, AE 286 (AAA) by ordering

production of the 2014 Senate Select Committee on Intelligence (SSCI) Report . . . or, alternatively, ordering the Prosecution to file a copy with the Commission, *ex parte* and under seal, so it can be made a part of the appellate record . . . .” AE 286V (KSM) at 1-2. Defense counsel for Mr. Mohammad filed their motion despite the fact that the Prosecution stated the following in response to their conferencing request:

The Prosecution has verified that one copy of the SSCI report, that had previously been delivered to the Department of Defense, and which is the subject of the preservation order of the Military Judge in this case, is still being retained by the Department of Defense pursuant to the Military Judge’s Order and will not be returned to the Senate until further order of the Military Commission.

*Id.* at 9.

## **5. Law and Argument**

Rule for Military Commissions 905(f) permits the Military Judge to reconsider any ruling, other than one amounting to a finding of not guilty, prior to the authentication of the record of trial. However, granting of a request for reconsideration is in the Military Judge’s discretion. *See, e.g.*, AE 108AA at 2 (“Generally, reconsideration should be limited to a change in the facts or law or instances where the ruling is inconsistent with case law not previously briefed.”). Courts grant motions for reconsideration if “there has been an intervening change in controlling law, there is new evidence, or there is a need to correct clear error or prevent manifest injustice.” *United States v. Libby*, 429 F. Supp.2d 46, 46-47 (D.D.C. 2006) (internal quotation marks omitted); *see* AE 155F at 1 (“Generally, reconsideration should be limited to a change in the facts or law, or instances where the ruling is inconsistent with case law not previously briefed.”).

In the instant case, Defense counsel for both Mr. Ali and Mr. Mohammad have filed separate, but nearly identical motions requesting reconsideration of the Commission’s order in AE 286T. However, in doing so, the Defense fails to put forth any new facts or change in law that would warrant reconsideration of the Commission’s order under the circumstances. As indicated to defense counsel upon conferencing their respective motions, the Prosecution has

verified that one copy of the Senate Select Committee on Intelligence's Study of the CIA's Detention and Interrogation Program is still being retained by the Department of Defense pursuant to the Military Judge's Order and will not be returned to the Senate until further order of the Military Commission. Furthermore, the Prosecution attaches to this pleading a letter from the Office of General Counsel for the Office of the Director of National Intelligence to the Chairman of the Senate Select Committee on Intelligence indicating that it *cannot* return the copy delivered to the Department of Defense because it "is the subject of a preservation order of the military judge in the military commission prosecution of individuals related to the September 11, 2001 attacks." Attachment B (citing *United States v. Khalid Shaikh Mohammad (KSM II)*, AE 286T (Jan. 10, 2017)). As such, given the fact that there has been no change in facts or change in law, there is no justification for reconsideration of this Commission's order in AE 286T and this Commission should thus deny the Defense motions without oral argument.

#### **6. Oral Argument**

The Prosecution does not request oral argument. Further, the Prosecution strongly posits that this Commission should dispense with oral argument as the facts and legal contentions are adequately presented in the material now before the Commission and argument would not add to the decisional process. However, if the Military Commission decides to grant oral argument to the Defense, the Prosecution requests an opportunity to be heard.

#### **7. Witnesses and Evidence**

The Prosecution will not rely on any witnesses or additional evidence in support of this Response.

#### **8. Additional Information**

The Prosecution has no additional information.

9. **Attachments**

- A. Certificate of Service, dated 19 June 2017
- B. Letter from General Counsel (Acting) Bradley A. Booker, Office of the Director of National Intelligence, to The Honorable Richard Burr, dated 1 June 2017

Respectfully submitted,

        //s//        

Clay Trivett  
Managing Trial Counsel

Christopher M. Dykstra  
Major, USAF  
Assistant Trial Counsel

Mark Martins  
Chief Prosecutor  
Military Commissions

# ATTACHMENT A

**CERTIFICATE OF SERVICE**

I certify that on the 19th day of June 2017, I filed AE 286W (GOV), Government Combined Response To AE 286U (AAA), Defense Motion to Reconsider AE 286T Order Regarding Emergency Defense Motion to Order the Prosecution 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, and AE 286V (KSM), Mr. Mohammad's Motion to Reconsider AE 286T, with the Office of Military Commissions Trial Judiciary and I served a copy on counsel of record.

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*//s//*

Christopher M. Dykstra  
Major, USAF  
Assistant Trial Counsel

# ATTACHMENT B



OFFICE OF THE DIRECTOR OF NATIONAL INTELLIGENCE  
OFFICE OF GENERAL COUNSEL  
WASHINGTON, DC 20511

June 1, 2017

The Honorable Richard Burr  
United States Senate  
Washington, DC 20510

Dear Chairman Burr:

I write in response to your January 14, 2015 request for the return of copies of the Senate Select Committee on Intelligence Study of the CIA's former detention and interrogation program ("Final SSCI Report"). In light of the Supreme Court's denial of *certiorari* in *Am. Civil Liberties Union v. Cent. Intelligence Agency*, 823 F.3d 655 (D.C. Cir. 2016), *cert. denied* (Apr. 24, 2017) ("*ACLU*"), and in accordance with your instruction, most of the disks that you requested will be promptly returned to you.

There are, however, some limitations on our ability to return certain copies. One copy, delivered to the Department of Defense, is the subject of a preservation order of the military judge in the military commission prosecution of individuals related to the September 11, 2001 attacks. *See United States v. Khalid Shaikh Mohammad (KSM II)*, AE 286T (Jan. 10, 2017) (available at [www.mc.mil](http://www.mc.mil)). Another, delivered to the Department of Justice, is the subject of two district court orders in the *habeas corpus* cases of *Abd Al-Rahim Hussain Mohammed Al-Nashiri v. Trump*, No. 08-CV-1207 (D.D.C.) (ECF Nos. 268, 274), and *Zayn Al Abidin Muhammad Husayn v. Mattis*, No. 08-CV-1360 (D.D.C.) (Minute Order, Jan. 23, 2017). As we previously advised you, pursuant to those court orders that disk has been lodged with Court Information Security Officers for the District Court for the District of Columbia. Further, the Department of State is in the process of briefing leadership on this matter.

Finally, several agencies have received Freedom of Information Act (FOIA) requests for the final report. Those requests have been denied, or will be denied, on the ground that the document is a congressional record, not an agency record subject to FOIA. Nevertheless, in the unlikely event that litigation ensues from those requests and the Supreme Court were to overrule the decision of the D.C. Circuit in *ACLU* cited above, the Executive Branch would use one of the copies presently subject to a preservation order to the extent necessary to comply with the Court's ruling.

To that end, please find enclosed the disk containing the final report that was delivered to the Office of the Director of National Intelligence and the two disks delivered to the Central Intelligence Agency. Except as noted above, the remaining disks will be promptly returned by the relevant Department or agency.

We hope that this information is helpful. Please do not hesitate to contact this office if we may provide assistance regarding any other matter.

Sincerely,



Bradley A. Brooker  
General Counsel (Acting)

cc: Vice-Chairman Mark Warner