

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

UNITED STATES OF AMERICA

v.

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

**AE 425L (Mohammad, AAA)**

**Motion to Compel Discovery or in the  
Alternative to Abate and Dismiss**

(Government Invocation of Classified  
Information Privilege to Refuse Production of  
Discovery Regarding Circumstances of  
Destruction of Black Site)

28 September 2016

- 1. Timeliness:** This motion is timely filed.
- 2. Relief Requested:** The Military Commission should compel the government to provide discovery requested by Mr. Mohammad and Mr. al Baluchi, or in the alternative abate the proceedings and dismiss the charges against Mr. Mohammad and Mr. al Baluchi.
- 3. Overview.** On August 19, 2016, Mr. Mohammad's and Mr. al Baluchi's counsel served a Request for Discovery on the government seeking "all documents and information regarding the authorization for and execution of the destruction of the black site at issue in AE052 and AE425" (hereafter the Request).<sup>1</sup> In refusing to produce any materials in response to the Request the government apparently invoked the classified information privilege. Inasmuch as the materials requested are "material to preparation of the defense,"<sup>2</sup> "helpful to the defense,"<sup>3</sup> and "essential to a fair determination of a cause,"<sup>4</sup> the Military Commission must order their production. In the alternative, and inasmuch as the government has invoked the classified information privilege to

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<sup>1</sup> Attachment B.

<sup>2</sup> R.M.C. 701(c)(1).

<sup>3</sup> *United States v. Yunis*, 867 F.2d 617, 623 (D.C. Cir. 1989) (herein *Yunis*).

<sup>4</sup> *Roviaro v. United States*, 353 U.S. 53, 60-61 (1957) (herein *Roviaro*); *Yunis*, 867 F.2d at 622, n. 9.

refuse to produce these plainly discoverable materials, the Military Commission must abate the proceedings and dismiss the case.

**4. Burden of Proof and Persuasion:** The defense bears the burden on this motion.<sup>5</sup>

**5. Facts:**

a. The Request recited the facts in subparagraphs b-i, below.

b. On 10 August 2012, the government filed a pleading describing the existence of an ex parte motion seeking permission of the military commission to destroy a black site. In response, the defense propounded a number of discovery requests, motions to compel most of which are still pending in the military commission.

c. On 19 August 2013, the military commission ruled that information relating to the black site at issue in AE052 is discoverable. On 19 December 2013, the military commission issued AE080G<sup>6</sup>, granting a defense motion to preserve evidence of any overseas detention facilities subject to subsequent modification.

d. On or about 4 June 2014, the military commission issued AE052EE, an order authorizing destruction of the black site and requiring service of a redacted copy of the order on the defense. The government has claimed it believed that the military commission would provide a copy of the order to the defense.

e. In 2014, the government destroyed the black site, at least in part.

f. On 7 December 2015, the government acknowledged that it had not provided a redacted copy of AE 052EE on the defense prior to destroying the black site.

g. On or about 12 February 2016, the military commission provided a redacted copy of AE 052EE to the defense.

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<sup>5</sup> R.M.C. 905(c)(2).

<sup>6</sup> AE 080G, Order AE080G, ORDER, Joint Defense Motion To Preserve Evidence of Any Existing Detention Facility, 19 December 2013 (herein AE080G).

h. On 10 May 2016, Mr. Mohammad filed AE 425(Mohammad) Motion to Recuse Military Judge and the Current Prosecution Team and for Further Appropriate Relief.

i. On 31 May 2016, Mr. al Baluchi filed AE 425E(AAA) Motion to Decline Joinder in Part to AE425.

j. Counsel for Mr. Mohammad and for Mr. al Baluchi submitted the Request on 19 August 2016. The Request (Attachment B to the present motion), sought generally “all documents and information regarding the authorization for and execution of the destruction of the black site at issue in AE052 and AE425.” The Request also included but was not limited to the following additional specific topics:

1. all actions taken by the government in response to the issuance of AE052EE;
  2. all communications between any persons or entities within or outside of the government regarding the authority purportedly contained within AE052EE;
  3. all communications between any persons or entities within or outside of the government regarding the requirements of AE052EE, including the requirement that a redacted copy of AE052EE be provided to the defense;
  4. any effort of the government at any time to provide AE052EE to the defense;
  5. any effort of the government at any time to determine whether AE052EE had been provided to the defense, including, but not limited to contacting Trial Judiciary for guidance;
  6. the government’s decision to allow destruction or failure to prevent destruction of the black site prior to verifying that AE052EE had been provided to the defense;
  7. the physical condition of the evidence at issue in AE 52EE at any point in time;
- and/or

8. the destruction of the black site at issue in AE 52EE, including any progress or completion reports.

k. The government responded to the Request on 15 September, 2016, refusing to provide any of the requested material. The government wrote,

In accordance with M.C.R.E. 505, the Prosecution, in AE 051/AE 052, properly claimed a privilege over certain classified materials. In AE 051B/AE 052EE, this Commission properly ordered the protection of said classified information. As set forth in its filing, AE 051C(GOV)/AE 052FF (GOV), the Prosecution has complied with the order of this Commission. Therefore, the Prosecution respectfully declines to produce any further information regarding the matters set forth in AE 051/AE 052.

See Attachment C.

## 6. Law and Argument:

1. In passing the Military Commissions Act of 2009, Congress required that “[the opportunity to obtain witnesses and evidence shall be comparable to the opportunity available to a criminal defendant in a court of the United States under article III of the Constitution.” 10 U.S.C. § 949j. R.M.C. 701(j) thus requires that “[e]ach party shall have adequate opportunity to prepare its case and no party may unreasonably impede the access of another party to a witness or evidence.”

R.M.C. 701(c)(1) states that the Government *shall* permit defense counsel to examine any books, papers, documents, photographs, tangible objects, buildings, or places so long as they are under the control of the government and material to the preparation of the defense or intended for use by the trial counsel as evidence in the prosecution case-in-chief at trial. Demonstrating materiality “is not a heavy burden,”<sup>7</sup> and the standard of materiality is broadly construed.<sup>8</sup>

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<sup>7</sup> *United States v. Lloyd*, 992 F.2d 348, 351 (D.C. Cir. 1998).

<sup>8</sup> *United States v. NYNEX Corp.*, 781 F. Supp. 19, 25 n.8 (D.D.C. 1991).

Information material to the preparation of the defense is not limited to exculpatory evidence,<sup>9</sup> as the “language and spirit of the Rule are designed to provide to a criminal defendant, in the interests of fairness, the widest possible opportunity to inspect and receive such materials in the possession of the government as may aid him in presenting his side of the case.”<sup>10</sup> The scope of materiality is also not limited by admissible evidence alone, as documents and information that are not admissible may nonetheless lead to other admissible information and evidence.<sup>11</sup>

Additionally, the scope of materiality is not limited to information that is favorable to the defense, and even includes information that is unfavorable, as “a defendant in possession of such evidence may alter the quantum of proof in his favor in several ways: by preparing a strategy to confront the damaging evidence at trial; by conducting an investigation to attempt to discredit that evidence; or by not presenting a defense which is undercut by such evidence.”<sup>12</sup>

The rules relating to classified information do not alter this fundamental discoverability analysis, for they “create[] no new rights of or limits on discovery of a specific area of classified information. Rather [they] contemplate[] an application of the general law of discovery in criminal cases to the classified information area with limitations imposed based on the sensitive nature of the classified information.”<sup>13</sup>

Relying on *Roviaro*, however, *Yunis* did provide that in order to be discoverable classified information must be “relevant and helpful to the defense of an accused, or ... essential

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<sup>9</sup> *United States v. Marshall*, 132 F.3d 63, 67 (D.C. Cir. 1998).

<sup>10</sup> *United States v. Libby*, 429 F. Supp. 2d 1, 7 (D.D.C. 2006).

<sup>11</sup> See *United States v. Lloyd*, 992 F.2d 348, 351 (D.C. Cir. 1993) (finding materiality “as long as there is a strong indication that it will play an important role in uncovering admissible evidence, aiding witness preparation, corroborating testimony, or assisting impeachment or rebuttal.”).

<sup>12</sup> *United States v. Marshall*, 132 F.3d 63, 68 (D.C. Cir. 1998).

<sup>13</sup> *Yunis*, 867 F.2d at 621 (referring to CIPA).

to a fair determination of a cause,” 353 U.S. at 60–61. *Yunis* did not involve evidence “essential to a fair determination of a cause”:

It would seem apparent that evidence “essential to a fair determination of a cause” creates a different situation than either the case where information is not helpful or merely helpful. In the case of such “essential” evidence, due process and the terms of CIPA Section 6(e)(2) might afford the defendant further relief, even possibly dismissal. Happily, this is not the case before us, and we need not decide that question.

at 623, n.9.<sup>14</sup>

2. The evidence at issue in the Request is materially favorable to Mr. Mohammad and Mr. al Baluchi because it documents their torture, a central matter of mitigation in this death penalty case. Disclosure of the evidence to the defense is therefore compelled by the defendants’ rights to due process, a fair trial and an accurate determination of guilt and penalty in a capital case, as guaranteed by the Fifth, Sixth and Eighth Amendments to the United States Constitution. *See, e.g., Kyles v. Whitley*, 514 U.S. 419 (1995); *Beck v. Alabama*, 447 U.S. 625 (1980); *Brady v. Maryland*, 373 U.S. 83 (1963). On 19 August 2013, the military commission ruled that information relating to the black site at issue in AE052 is discoverable. Not only the fact, but also the myriad details, of Mr. Mohammad’s and Mr. al Baluchi’s torture at the hands of the United States provide grounds to impeach, refute and exclude government evidence – including derivative evidence – that the prosecution will attempt to rely on in its case-in-chief and rebuttal at the guilt phase. Thorough examination of the black site by counsel individually and in consultation with qualified experts, would also have been necessary to the development of

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<sup>14</sup> “... we conclude that ‘essential to a fair determination of a cause’ is equivalent to the Manual’s standard of ‘necessary to an element of the offense or a legally cognizable defense.’” *United States v. Lonetree*, 31 M.J. 849, 861 (N-M. C.M.R. 1990), *aff’d and remanded*, 35 M.J. 396 (C.M.A. 1992).

critical affirmative mitigation evidence. As such, the black sites themselves constitute *Brady* material.<sup>15</sup>

Reliance on the second-hand information and “summaries” which the Prosecution intends to substitute for the actual evidence is inconsistent with professional standards and protocols for evaluating and developing the full exculpatory significance of such evidence. *See Kyles*, 514 U.S. at 446-447, 449 (assessing material, exculpatory value of evidence requires consideration of how it could have been used by competent counsel). As a result, Mr. Mohammad and Mr. al Baluchi’s rights to prepare their defense in a capital case, and to a reliable determination of guilt and penalty, have been irreparably harmed.

Destruction of the black site without notice also effectively deprived Mr. Mohammad and Mr. al Baluchi of access to the courts, including by seeking extraordinary remedies preventing destruction of the evidence; to meaningful appellate review of any prospective judgment in their case; and to the effective assistance of counsel.

The evidence at issue here is discoverable under both prongs of *Roviaro* and *Yunis*. It is “helpful” to Mr. Mohammad and Mr. al Baluchi because it would reveal details of the circumstances under which important exculpatory information was destroyed by government agents, while counsel labored under the misimpression that this destruction was prevented – without further notice to them -- by the preservation order in AE 080G.

In addition, the information sought in the Request is “essential to the determination of a cause” – indeed to several of them. To Mr. Mohammad’s claims that the Military Commission and the Prosecution should be recused from further participation in the case, the government has

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<sup>15</sup> *Brady* material “is plainly subsumed within the larger category of information that is ‘at least helpful’ to the defendant ...” under *Yunis*. *United States v. Mejia*, 448 F.3d 436, 456–57 (D.C.Cir.2006); *United States v. Brown*, No. 5:14-CR-58-FL, 2014 WL 1572553, at \*3 (E.D.N.C. Apr. 18, 2014). The Defendant has a Fifth Amendment Due Process right to the production of *Brady* material, *Mejia*, 448 F.3d at 458.

essentially interposed the defense of mistake. It claimed that “[s]imple miscommunication, resulting in inaction, is what caused a delay of provision of the redacted order to the Defense, nothing else.”<sup>16</sup> The Request, seeking “all documents and information regarding the authorization for and execution of the destruction of the black site at issue in AE052 and AE425,” was designed to require the production of supporting evidence for such a claim if it exists. The request specifically sought everything the government did in response to the issuance of AE052EE (subsection a), communications among actors within and without the government regarding the authority and requirements contained within AE052EE (subsections b and c), any efforts the government made to notify the defense of AE 052EE (or determine whether someone else had) before allowing destruction of the black site (subsections d and e); how the government arrived at the decision to destroy the black site without first determining whether notice had been given to the defense (subsection f); and details of the timing and completion of the destruction (subsections g and h).

Of course, the details requested are also “essential” to Mr. Mohammad’s and Mr. al Baluchi’s defense at both the guilt and penalty (if any) phases of trial. They will be entitled to inform the triers of fact of precisely how this critical evidence came to be destroyed, and why their evidence on these subjects is necessarily limited. Similarly, the evidence is now unavailable to any appellate court to which it otherwise would have been provided as part of the record necessary to permit meaningful evaluation of the sufficiency of any Commission-authorized substitutions provided to the defense in lieu of the actual evidence. *See, e.g.*, 10 U.S.C. 949p-4(b)(2); 949p-6(e).

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<sup>16</sup> AE 425C (GOV), Government Response To Mr. Mohammad’s Motion To Recuse Military Judge and the Current Prosecution Team and for Further Appropriate Relief, 24 May 2016 (herein AE 425C), at 9.



3. The information sought in the Request is thus “material to the preparation of the defense,” “helpful to the defendant,” and “essential to the determination of a cause,” and to completion of the litigation in AE 425; and also to AE 114, Motion to Compel Discovery of Information Related to Buildings in Which the Accused or a Potential Witness Has Been Confined, 4 January 2013; AE 114F(Mohammad, bin ‘Attash, bin al Shibh, al Baluchi), Defense Motion to Compel Government to Grant Defense Counsel Access to Buildings and Locations in Which the Defendants May Have Been Confined, 4 April 2013; AE191(AAA), Defense Motion to Compel Production of Information, 19 July 2013; and to forthcoming motions for additional sanctions resulting from the destruction of the evidence. Thus, in addition to the mandate of the Rules for Military Commissions, the Fifth, Sixth and Eight Amendments compel disclosure of the requested information to the defense.

4. The government’s response to the Request indeed does not dispute the discoverability of the material sought in the Request. Again, the response reads as follows:

In accordance with M.C.R.E. 505, the Prosecution, in AE 051/AE 052, properly claimed a privilege over certain classified materials. In AE 051B/AE 052EE, this Commission properly ordered the protection of said classified information. As set forth in its filing, AE 051C(GOV)/AE 052FF (GOV), the Prosecution has complied with the order of this Commission. Therefore, the Prosecution respectfully declines to produce any further information regarding the matters set forth in AE 051/AE 052.

Attachment C. It is not entirely clear what to make of this assertion. On the one hand, a variety of material has been submitted to the Military Judge by the Prosecution in secret.<sup>17</sup> On the other, in claiming that there is no further obligation of production, the response states that “this Commission properly ordered the protection of said classified information,” referring to an order (AE 052EE), which predates the Request by more than two years.

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<sup>17</sup> Including AE 052OO (GOV), described on the filings inventory as “Gov Ex Parte, In Camera Motion Pursuant to 10 U.S.C. 949p-4(b) and 6(d),” filed 28 July 2016, with the notation in the Comments section, “Oral Presentation Requested.”

If the government has indeed presented all the material responsive to the Request to the Military Commission, and if the Military Commission has indeed determined that none of the material need be provided to the defense, Mr. Mohammad and Mr. al Baluchi respectfully move in the alternative to abate the proceedings and dismiss the Charge Sheet pursuant to 10 U.S.C. 949p-6. The materials requested are plainly discoverable, as shown above, and as the government essentially concedes. Providing the defendants with *none* of these materials necessarily denies them “substantially the same ability to make a defense as would discovery of or access to the specific classified information.”<sup>18</sup> Necessarily such a result also effectively prevents them from “disclosing or causing the disclosure” of the information.<sup>19</sup> In that case, the remedy is simple: “the military judge shall dismiss the case ... ,” 10 U.S.C. 949p-6(f)(2), unless it finds that the interests of justice would not be served by a dismissal, in which case it is to fashion a separate remedy. For the reasons set out above, the only appropriate remedy in the present situation would be dismissal.

**7. Oral Argument:** The defense requests oral argument on this motion.

**8. Witnesses:** Any person who was or would be identified by a complete response to the Request.

**9. Conference with Opposing Counsel:** In response to a conference request the Prosecution stated that “The Prosecution’s position is as stated in our 15 September 2016” response to the Request, “specifically: in accordance with M.C.R.E. 505, the Prosecution, in AE 051/AE 052, properly claimed a privilege over certain classified materials. In AE 051B/AE 052EE, this Commission properly ordered the protection of said classified information. As set forth in its filing, AE 051C(GOV)/AE 052FF (GOV), the Prosecution has complied with the order of this

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<sup>18</sup> 10 U.S.C. 949p-4(b)(3); *see also* 949p-6(d)(2).

<sup>19</sup> 10 U.S.C. 949p-6(f)(2).

Commission. Therefore, the Prosecution respectfully declines to produce any further information regarding the matters set forth in AE 051/AE 052.”

**10. List of Attachments:**

A. Certificate of Service.

B. Mr. Mohammad’s and Mr. al Baluchi’s Request for Discovery, dated 19 August 2016.

C. Government response to Mr. Mohammad’s and Mr. al Baluchi’s Request for Discovery, dated 19 August 2016, dated 15 September 2016.

Respectfully submitted,

*//s//*  
DAVID Z. NEVIN  
Learned Counsel for  
Mr. Mohammad

*//s//*  
GARY D. SOWARDS  
Defense Counsel for  
Mr. Mohammad

*//s//*  
DEREK A. POTEET  
Maj, USMC  
Detailed Defense Counsel for  
Mr. Mohammad

*//s//*  
JAMES G. CONNELL, III  
Learned Defense Counsel for  
Mr. al Baluchi

*//s//*  
STERLING R. THOMAS  
Lt Col, USAF  
Detailed Defense Counsel for  
Mr. al Baluchi

# Attachment A

**CERTIFICATE OF SERVICE**

I certify that on 28 September 2016, I electronically filed the above AE425L (Mohammad, AAA) **Motion to Compel Discovery or in the Alternative to Abate and Dismiss** with the Trial Judiciary and served it on all counsel of record by e-mail.

*//s//*  
DAVID Z. NEVIN  
Learned Counsel

# **Attachment B**



DEPARTMENT OF DEFENSE  
MILITARY COMMISSIONS DEFENSE ORGANIZATION  
1620 DEFENSE PENTAGON  
WASHINGTON, DC 20301-1620

19 August 2016

MEMORANDUM FOR Trial Counsel

FROM: David Z. Nevin, Learned Counsel for Mr. Mohammad  
James G. Connell, III, Learned Counsel for Mr. al Baluchi

SUBJECT: DEFENSE REQUEST FOR DISCOVERY  
**Destruction of black site**

Defendants, by and through undersigned counsel pursuant to RMC 701, 10 U.S.C. § 949p-4, Common Article III to Geneva Convention (III) Relative to the Treatment of Prisoners of War, Aug. 12, 1949, the Due Process Clause of the Fifth Amendment, the Confrontation Clause to the Sixth Amendment, and the Compulsory Process Clause of the Sixth Amendment to the United States Constitution, hereby request that the government produce the following discovery:

**Definitions**

In this request, the following definitions shall govern:

“Destruction” means any diminution in evidentiary value or change in condition, whether called alteration, decommissioning, dismantling, substitution, preservation, or some other word.

"Document" means any recorded information, regardless of the nature of the medium or the method or circumstances of recording.

“Government” includes all components of or persons acting on behalf of the United States Government, including but not limited to the Office of the Chief Prosecutor and the Central Intelligence Agency.

“Information” means any knowledge that can be communicated or documentary material, regardless of its physical form or characteristics.

To the extent that responsive documents are subject to the classified information, government information, or other applicable privilege, the word “produce” means to provide a privilege log of any withheld information or documents, along with the facts disclosed in the responsive documents that are not protected by the applicable privilege, and documents attached and/or incorporated into the responsive documents that are not otherwise exempt. Otherwise, the word “produce” means to convey to the defense without redaction (except as authorized by the military commission pursuant to MCRE 505) or alteration of any electronically stored information associated with the document.

DR-265-MOH/AAA

2016-08-19

Appellate Exh bit 425L (KSM AAA)

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Filed with TJ  
28 September 2016

**Background**

On 10 August 2012, the government filed a pleading describing the existence of an *ex parte* motion seeking permission of the military commission to destroy a black site. In response, the defense propounded a number of discovery requests, motions to compel most of which are still pending in the military commission. On 19 August 2013, the military commission ruled that information relating to the black site at issue in AE052 is discoverable. On 19 December 2013, the military commission issued AE080G, granting a defense motion to preserve evidence of any overseas detention facilities subject to subsequent modification.

On or about 4 June 2014, the military commission issued AE052EE, an order authorizing destruction of the black site and requiring service of a redacted copy of the order on the defense. The government has claimed it believed that the military commission would provide a copy of the order to the defense. In 2014, the government destroyed the black site, at least in part. On 7 December 2015, the government acknowledged that it had not provided a redacted copy of AE 052EE on the defense prior to destroying the black site. On or about 12 February 2016, the military commission provided a redacted copy of AE 052EE to the defense.

On 10 May 2016, Mr. Mohammad filed AE425(MOH) Motion to Recuse Military Judge and the Current Prosecution Team and for Further Appropriate Relief. On 31 May 2016, Mr. al Baluchi filed AE425E(AAA) Motion to Decline Joinder in Part to AE425. The underlying issues of access to, substitution for, and destruction of black sites are also before the military commission in AE114 Defense Motion to Compel Discovery of Information related to Buildings in Which the Accused or a Potential Witness Has Been Confined, AE114F Defense Motion to Compel Government to Grant Defense Counsel Access to Buildings and Locations in Which the Defendants May Have Been Confined, and AE191 Defense Motion to Compel Production of Information. The discovery request below relates to all of those pending motions.

**Request**

Please produce all documents and information regarding the authorization for and execution of the destruction of the black site at issue in AE052 and AE425. This request includes but is not limited to the following specific topics:

- a. all actions taken by the government in response to the issuance of AE052EE;
- b. all communications between any persons or entities within or outside of the government regarding the authority purportedly contained within AE052EE;
- c. all communications between any persons or entities within or outside of the government regarding the requirements of AE052EE, including the requirement that a redacted copy of AE052EE be provided to the defense;
- d. any effort of the government at any time to provide AE052EE to the defense;
- e. any effort of the government at any time to determine whether AE052EE had been provided to the defense, including, but not limited to contacting Trial Judiciary for guidance;
- f. the government's decision to allow destruction or failure to prevent destruction of the black site prior to verifying that AE052EE had been provided to the defense;
- g. the physical condition of the evidence at issue in AE 52EE at any point in time; and/or

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2016-08-19



h. the destruction of the black site at issue in AE 52EE, including any progress or completion reports.

Thank you. Please let us know if you need further information.

Respectfully,

//s//

David Z. Nevin

Learned counsel for Mr. Mohammad

//s//

James G. Connell, III

Learned counsel for Mr. al Baluchi

DR-265-MOH/AAA

2016-08-19

# Attachment C



OFFICE OF THE  
CHIEF PROSECUTOR

**DEPARTMENT OF DEFENSE**  
OFFICE OF THE CHIEF PROSECUTOR OF MILITARY COMMISSIONS  
1610 DEFENSE PENTAGON  
WASHINGTON, DC 20301-1610

15 September 2016

MEMORANDUM FOR Defense Counsel for Messrs. Mohammad and Ali

SUBJECT: Prosecution Final Response to 19 August 2016  
Joint Defense Request for Discovery (DR-265-MOH/AAA)

1. The Prosecution received the Defense request for discovery on 19 August 2016. The Prosecution hereby responds to the Defense request, below, in bold.
2. The Defense asserts: On 10 August 2012, the government filed a pleading describing the existence of an ex parte motion seeking permission of the military commission to destroy a black site. In response, the defense propounded a number of discovery requests, motions to compel most of which are still pending in the military commission. On 19 August 2013, the military commission ruled that information relating to the black site at issue in AE052 is discoverable. On 19 December 2013, the military commission issued AE080G, granting a defense motion to preserve evidence of any overseas detention facilities subject to subsequent modification.

On or about 4 June 2014, the military commission issued AE052EE, an order authorizing destruction of the black site and requiring service of a redacted copy of the order on the defense. The government has claimed it believed that the military commission would provide a copy of the order to the defense. In 2014, the government destroyed the black site, at least in part. On 7 December 2015, the government acknowledged that it had not provided a redacted copy of AE052EE on the defense prior to destroying the black site. On or about 12 February 2016, the military commission provided a redacted copy of AE 052EE to the defense.

On 10 May 2016, Mr. Mohammad filed AE425(MOH) Motion to Recuse Military Judge and the Current Prosecution Team and for Further Appropriate Relief. On 31 May 2016, Mr. al Baluchi filed AE425E(AAA) Motion to Decline Joinder in Part to AE425. The underlying issues of access to,

substitution for, and destruction of black sites are also before the military commission in AE114 Defense Motion to Compel Discovery of Information related to Buildings in Which the Accused or a Potential Witness Has Been Confined, AE114F Defense Motion to Compel Government to Grant Defense Counsel Access to Buildings and Locations in Which the Defendants May Have Been Confined, and AE191 Defense Motion to Compel Production of Information. The discovery request below relates to all of those pending motions.

3. The Defense requests:

Please produce all documents and information regarding the authorization for and execution of the destruction of the black site at issue in AE052 and AE425. This request includes but is not limited to the following specific topics:

- a. all actions taken by the government in response to the issuance of AE052EE;
- b. all communications between any persons or entities within or outside of the government regarding the authority purportedly contained within AE052EE;
- c. all communications between any persons or entities within or outside of the government regarding the requirements of AE052EE, including the requirement that a redacted copy of AE052EE be provided to the defense;
- d. any effort of the government at any time to provide AE052EE to the defense;
- e. any effort of the government at any time to determine whether AE052EE had been provided to the defense, including, but not limited to contacting Trial Judiciary for guidance;
- f. the government's decision to allow destruction or failure to prevent destruction of the black site prior to verifying that AE052EE had been provided to the defense;
- g. the physical condition of the evidence at issue in AE 52EE at any point in time; and/or

