[ORAL ARGUMENT NOT YET SCHEDULED]

No. 23-5118

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

JAMES G. CONNELL, III,

Plaintiff–Appellant,

v.

CENTRAL INTELLIGENCE AGENCY,

Defendant–Appellee.

On Appeal from the United States District Court
for the District of Columbia

JOINT APPENDIX

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TABLE OF CONTENTS

APPEAL,CLOSED,JURY,PROSE–NP,TYPE I–FOIA

U.S. District Court
District of Columbia (Washington, DC)
CIVIL DOCKET FOR CASE #: 1:21–cv–00627–CRC

CONNELL v. UNITED STATES CENTRAL INTELLIGENCE AGENCY
Assigned to: Judge Christopher R. Cooper
Case in other court: USCA, 23–05118
Cause: 05:552 Freedom of Information Act

Date Filed: 03/08/2021
Date Terminated: 03/29/2023
Jury Demand: None
Nature of Suit: 895 Freedom of Information Act
Jurisdiction: U.S. Government Defendant

Date Filed	#	Docket Text
03/08/2021	1	COMPLAINT against UNITED STATES CENTRAL INTELLIGENCE AGENCY filed by JAMES G. CONNELL, III. (Attachments: # 1 Civil Cover Sheet)(ztd) (Entered: 03/11/2021)
03/08/2021		SUMMONS Not Issued as to JAMES G. CONNELL, III, U.S. Attorney and Attorney General (ztd) (Entered: 03/11/2021)
03/10/2021		Filing fee received: $ 402.00, receipt number: 4616105214. (ztd) (Entered: 03/11/2021)
03/29/2021		SUMMONS (3) Issued as to UNITED STATES CENTRAL INTELLIGENCE AGENCY, U.S. Attorney and U.S. Attorney General (ztd) (Entered: 03/29/2021)
04/15/2021	2	CERTIFICATE OF SERVICE by JAMES G. CONNELL, III . (Connell, James) (Entered: 04/15/2021)
04/15/2021	3	RETURN OF SERVICE/AFFIDAVIT of Summons and Complaint Executed as to the United States Attorney. Date of Service Upon United States Attorney on 4/15/2021. (Answer due for ALL FEDERAL DEFENDANTS by 5/15/2021.), RETURN OF SERVICE/AFFIDAVIT of Summons and Complaint Executed. UNITED STATES CENTRAL INTELLIGENCE AGENCY served on 4/7/2021, RETURN OF SERVICE/AFFIDAVIT of Summons and Complaint Executed on United States Attorney General. Date of Service Upon United States Attorney General 4/8/2021. (See Docket Entry 2 to view document). (znmw) (Entered: 04/28/2021)
05/05/2021	4	NOTICE of Appearance by April Denise Seabrook on behalf of UNITED STATES CENTRAL INTELLIGENCE AGENCY (Seabrook, April) (Entered: 05/05/2021)
05/17/2021	5	ANSWER to 1 Complaint by UNITED STATES CENTRAL INTELLIGENCE AGENCY.(Seabrook, April) (Entered: 05/17/2021)
05/18/2021		MINUTE ORDER: Before the Court in this FOIA case are a complaint and an answer. It is hereby ordered that the parties shall promptly confer and shall file a joint proposed schedule for briefing or disclosure by 6/1/2021. Signed by Judge Christopher R. Cooper on 5/18/2021. (lccrc2) (Entered: 05/18/2021)
05/18/2021		Set/Reset Deadlines: Joint Proposed Briefing Schedule due by 6/1/2021 (lsj) (Entered: 05/18/2021)
06/01/2021	6	Joint STATUS REPORT *with Proposed Schedule* by UNITED STATES CENTRAL INTELLIGENCE AGENCY. (Seabrook, April) (Entered: 06/01/2021)
06/04/2021		MINUTE ORDER: In light of 6 the parties' latest Joint Status Report, the following schedule shall apply: Defendant shall issue its final response to the FOIA request, including either (i) refusing to confirm or deny the existence of additional responsive records and/or (ii) making additional disclosures by 07/15/2021; Plaintiff shall identify which withholdings, if any, that he requires more information about and/or is challenging by 07/29/2021; Defendant shall produce a Vaughn index to Plaintiff by 09/01/2021; the parties shall file a Joint Status Report proposing a schedule for further proceedings, if necessary, by 9/15/2021. Signed by Judge Christopher R. Cooper on 6/4/2021. (lccrc2) (Entered: 06/04/2021)

07/29/2021	7	STATUS REPORT *Plaintiff's Position on Disclosures* by JAMES G. CONNELL, III. (Connell, James) (Entered: 07/29/2021)
08/08/2021	8	NOTICE of Appearance by Thomas Anthony Quinn on behalf of UNITED STATES CENTRAL INTELLIGENCE AGENCY (Quinn, Thomas) (Entered: 08/08/2021)
09/15/2021	9	Joint STATUS REPORT by UNITED STATES CENTRAL INTELLIGENCE AGENCY. (Quinn, Thomas) (Entered: 09/15/2021)
09/15/2021		MINUTE ORDER: In light of 9 the parties' latest Joint Status Report, the parties are directed to file a further Joint Status Report on or before December 15, 2021. Signed by Judge Christopher R. Cooper on 09/15/2021. (lccrc2) (Entered: 09/15/2021)
12/15/2021	10	Joint STATUS REPORT by UNITED STATES CENTRAL INTELLIGENCE AGENCY. (Quinn, Thomas) (Entered: 12/15/2021)
12/16/2021		MINUTE ORDER: In light of 10 the parties' latest Joint Status Report, the parties are directed to file a further Joint Status Report on or before January 17, 2022. Signed by Judge Christopher R. Cooper on 12/16/2021. (lccrc2) (Entered: 12/16/2021)
01/18/2022	11	Joint STATUS REPORT by UNITED STATES CENTRAL INTELLIGENCE AGENCY. (Quinn, Thomas) (Entered: 01/18/2022)
01/19/2022		MINUTE ORDER: In light of 11 the parties' latest Joint Status Report, the following briefing schedule shall apply: Defendant's motion for summary judgment is due by 3/14/2022; Plaintiff's combined cross–motion for summary judgment and opposition to Defendant's motion is due by 4/14/2022; Defendant's combined reply in support of its motion and opposition to Plaintiff's cross–motion is due by 5/5/2022; Plaintiff's reply is due by 5/19/2022. Signed by Judge Christopher R. Cooper on 1/19/2022. (lccrc2) (Entered: 01/19/2022)
03/11/2022	12	MOTION for Extension of Time to File *DEFENDANT's MOTION FOR SUMMARY JUDGMENT AND AND TO MODIFY REMAINDER OF BRIEFING SCHEDULE* by UNITED STATES CENTRAL INTELLIGENCE AGENCY. (Attachments: # 1 Text of Proposed Order)(Quinn, Thomas) (Entered: 03/11/2022)
03/15/2022		MINUTE ORDER granting 12 Defendant's Motion for Extension of Time and Modification of the Briefing Schedule. The following deadlines shall apply: Defendant's motion for summary judgment is due by 3/28/2022. Plaintiff's combined cross–motion for summary judgment and opposition to Defendant's motion is due by 4/28/2022; Defendant's combined reply in support of its motion and opposition to Plaintiff's cross–motion is due by 5/19/2022; Plaintiff's reply is due by 6/2/2022. Signed by Judge Christopher R. Cooper on 3/15/2022. (lccrc2) (Entered: 03/15/2022)
03/29/2022	13	MOTION for Summary Judgment by UNITED STATES CENTRAL INTELLIGENCE AGENCY. (Attachments: # 1 Memorandum in Support, # 2 Text of Proposed Order)(Quinn, Thomas) (Entered: 03/29/2022)
03/29/2022	14	DECLARATION *IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT AND EXHIBITS AND VAUGHN INDEX* by UNITED STATES CENTRAL INTELLIGENCE AGENCY re 13 MOTION for Summary Judgment filed by UNITED STATES CENTRAL INTELLIGENCE AGENCY. (Attachments: # 1 Exhibit, # 2 Exhibit, # 3 Exhibit, # 4 Exhibit, # 5 Exhibit, # 6 Exhibit, # 7 Exhibit, # 8 Exhibit, # 9 Exhibit)(Quinn, Thomas) (Entered: 03/29/2022)
03/29/2022	15	Order advising plaintiff to respond to 13 Motion for Summary Judgment by April 28, 2022, or Court may deem matter as conceded. Signed by Judge Christopher R. Cooper on 3/29/2022. (lccrc2) (Entered: 03/29/2022)
04/28/2022	16	DECLARATION *of Amy Zittritsch in Support of Opposition* by JAMES G. CONNELL, III re 13 MOTION for Summary Judgment filed by UNITED STATES CENTRAL INTELLIGENCE AGENCY. (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C, # 4 Exhibit D)(Connell, James) (Entered: 04/28/2022)
04/28/2022	17	DECLARATION *of Alka Pradhan in Support of Opposition* by JAMES G. CONNELL, III re 13 MOTION for Summary Judgment filed by UNITED STATES CENTRAL INTELLIGENCE AGENCY. (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C, # 4 Exhibit D)(Connell, James) (Entered: 04/28/2022)

04/28/2022	18	DECLARATION *of Steven Aftergood* by JAMES G. CONNELL, III re 13 MOTION for Summary Judgment filed by UNITED STATES CENTRAL INTELLIGENCE AGENCY. (Connell, James) (Entered: 04/28/2022)
04/28/2022	19	DECLARATION *of Vanessa Brinkman* by JAMES G. CONNELL, III re 13 MOTION for Summary Judgment filed by UNITED STATES CENTRAL INTELLIGENCE AGENCY. (Connell, James) (Entered: 04/28/2022)
04/28/2022	20	DECLARATION *of Neal Higgins* by JAMES G. CONNELL, III re 13 MOTION for Summary Judgment filed by UNITED STATES CENTRAL INTELLIGENCE AGENCY. (Connell, James) (Entered: 04/28/2022)
04/28/2022	21	DECLARATION *of Martha Lutz* by JAMES G. CONNELL, III re 13 MOTION for Summary Judgment filed by UNITED STATES CENTRAL INTELLIGENCE AGENCY. (Connell, James) (Entered: 04/28/2022)
04/28/2022	22	DECLARATION *of James G. Connell, III in Support of Opposition* by JAMES G. CONNELL, III re 13 MOTION for Summary Judgment filed by UNITED STATES CENTRAL INTELLIGENCE AGENCY. (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C, # 4 Exhibit D, # 5 Exhibit E, # 6 Exhibit F, # 7 Exhibit G, # 8 Exhibit H, # 9 Exhibit I)(Connell, James) (Entered: 04/28/2022)
04/28/2022	23	Memorandum in opposition to re 13 MOTION for Summary Judgment filed by JAMES G. CONNELL, III. (Attachments: # 1 Statement of Facts, # 2 Text of Proposed Order)(Connell, James) (Entered: 04/28/2022)
05/13/2022	24	Unopposed MOTION for Leave to File *STATEMENT OF MATERIAL FACTS NUNC PRO TUNC AND TO MODIFY BRIEFING SCHEDULE* by UNITED STATES CENTRAL INTELLIGENCE AGENCY. (Attachments: # 1 Exhibit)(Quinn, Thomas). Added MOTION to Modify on 5/16/2022 (znmw). (Entered: 05/13/2022)
05/17/2022		MINUTE ORDER granting 24 Motion for Leave to File Statement of Material Facts *Nunc Pro Tunc* and Modify the Briefing Schedule. The [24–1] Defendant's Statement of Undisputed Material Facts is hereby made part of the record. The following deadlines shall apply: Plaintiff shall file any supplemental opposition brief by May 27, 2022; Defendant shall file its combined reply and opposition by June 10, 2022; Plaintiff shall file any reply by June 24, 2022. So Ordered by Judge Christopher R. Cooper on 5/17/2022. (lccrc2) (Entered: 05/17/2022)
05/17/2022	25	STATEMENT of Material Facts re 23 Memorandum in Opposition filed by JAMES G. CONNELL, III by UNITED STATES CENTRAL INTELLIGENCE AGENCY. (znmw) (Entered: 05/18/2022)
05/25/2022	26	SUPPLEMENTAL MEMORANDUM to re 25 Memorandum *in Opposition to Statement of Facts* filed by JAMES G. CONNELL, III. (Connell, James) (Entered: 05/25/2022)
06/10/2022	27	REPLY to opposition to motion re 13 MOTION for Summary Judgment filed by UNITED STATES CENTRAL INTELLIGENCE AGENCY. (Quinn, Thomas) (Entered: 06/10/2022)
06/10/2022	28	MOTION to Modify *BRIEFING SCHEDULE BY TRUNCATING LAST DEADLINE* by UNITED STATES CENTRAL INTELLIGENCE AGENCY. (Quinn, Thomas) (Entered: 06/10/2022)
06/13/2022		MINUTE ORDER granting 28 Defendant's Motion to Modify the Briefing Schedule. In light of the Plaintiff's decision not to file a cross–motion for summary judgment, the June 24, 2022, deadline for Plaintiff's reply is hereby stricken. Signed by Judge Christopher R. Cooper on 6/13/2022. (lccrc2) (Entered: 06/13/2022)
03/29/2023	29	ORDER granting 13 Defendant's Motion for Summary Judgment. See full Order and accompanying Memorandum Opinion for details. Signed by Judge Christopher R. Cooper on 03/29/2023. (lccrc3) (Entered: 03/29/2023)
03/29/2023	30	MEMORANDUM OPINION re 29 ORDER granting 13 Defendant's Motion for Summary Judgment. Signed by Judge Christopher R. Cooper on 03/29/2023. (lccrc3) (Entered: 03/29/2023)

05/25/2023	31	NOTICE of Appearance by Brett Max Kaufman on behalf of JAMES G. CONNELL, III (Kaufman, Brett) (Entered: 05/25/2023)
05/25/2023	32	NOTICE OF APPEAL TO DC CIRCUIT COURT as to 30 Memorandum & Opinion, 29 Order on Motion for Summary Judgment by JAMES G. CONNELL, III. Filing fee $ 505, receipt number ADCDC–10096466. Fee Status: Fee Paid. Parties have been notified. (Kaufman, Brett) (Entered: 05/25/2023)
05/26/2023	33	Transmission of the Notice of Appeal, Order Appealed (Memorandum Opinion), and Docket Sheet to US Court of Appeals. The Court of Appeals fee was paid re 32 Notice of Appeal to DC Circuit Court. (zjm) (Entered: 05/26/2023)
05/30/2023		USCA Case Number 23–5118 for 32 Notice of Appeal to DC Circuit Court, filed by JAMES G. CONNELL, III. (znmw) (Entered: 05/30/2023)

RECEIVED
Mail Room
MAR - 8 2021
Angela D. Caesar, Clerk of Court
U.S. District Court, District of Columbia

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JAMES G. CONNELL, III,

7604 Eden Wood Court
Bethesda, MD 20817

Plaintiff,

Case: 1:21-cv-00627
Assigned To : Cooper, Christopher R.
Assign. Date : 3/8/2021
Description: FOIA/Privacy Act (I-DECK)

v.

THE UNITED STATES CENTRAL INTELLIGENCE AGENCY

Washington, D.C. 20505

Defendant.

COMPLAINT FOR INJUNCTIVE RELIEF

1. Plaintiff, James G. Connell, III, brings this action pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. §§ 552, demanding production of documents responsive to plaintiff's 23 May 2017 FOIA request related to operational control by the Central Intelligence Agency over Guantanamo Bay detainees from 1 September 2006 to 31 January 2007, which defendant CIA has improperly withheld from plaintiff.

2. This Court has jurisdiction under 28 U.S.C. § 1331 and 5 U.S.C. § 552(a)(4)(B).

3. Because part or all of the responsive records are located in this District, venue lies in this District under 28 U.S.C. § 1391(e) and 5 U.S.C. §552(a)(4)(B).

4. Plaintiff, James G. Connell III, is a defense attorney and is the requester of the records which CIA is now withholding. Plaintiff has requested this information for use in a pending criminal trial and prompt release of the information is essential to the case. This complaint is based entirely on unclassified information.

5. Defendant, Central Intelligence Agency, is an agency as prescribed in 5 U.S.C. § 551(1) and 5 U.S.C. § 552(f) and has possession of the documents that Mr. Connell seeks.

6. The redacted Executive Summary of the *Senate Select Committee on Intelligence Committee Study of the Central Intelligence Agency's Detention and Interrogation Program* (released December 9, 2014), page 160, noted that, "After the 14 CIA detainees arrived at the

U.S. military base at Guantanamo Bay, they were housed in a separate building from other U.S. military detainees and remained under the operational control of the CIA."

7. On June 13, 2016, CIA released a heavily redacted *Memorandum of Agreement Between the Department of Defense (DOD) and the Central Intelligence Agency (CIA) Concerning the Detention by DoD of Certain Terrorists at a Facility at Guantanamo Bay Naval Station*, dated September 1, 2006.

8. On May 23, 2017, Mr. Connell requested from CIA under FOIA "any and all information that relates to such 'operational control' of the CIA over Guantanamo Bay detainees including but not limited to the document cited in footnote 977" of the redacted Executive Summary. Attachment 1.

9. On 8 February 2018, CIA asked Mr. Connell for more specificity to his request. Attachment 2.

10. On 8 March 2018, Mr. Connell complied with CIA's request for more specificity, including limiting the date range to the period September 1, 2006 to January 31, 2007. Mr. Connell provided examples of areas of operational control to help direct CIA with their search:

> "(1) Whether CIA "operational control" included only Camp 7 or extended to other facilities such as Echo 2;
> (2) What organization had decision-making authority over Camp 7;
> (3) Whether CIA "operational control" ended before or after 31 January 2007;
> (4) Whether the "operational control" involved CIA personnel, whether employees or contractors;
> (5) Any detainee records maintained by the CIA during the period of "operational control" such as Detainee Inmate Management System records or the equivalent;
> (6) How other agencies would obtain access to detainees during the period of "operational control["], such as a Memorandum of Understanding with the Federal Bureau of Investigation or Criminal Investigative Task Force;
> (7) How the facilities transitioned from CIA "operational control" to DOD "operational control."

Attachment 3.

7. Despite the properly placed request, CIA failed to provide a response within the statutorily mandated time frame of 20 working days. On January 16, 2019, Mr. Connell requested an update on the status of the FOIA request. Attachment 4. On September 29, 2020, CIA responded to Mr. Connell's FOIA request by providing one redacted document and wrongfully claiming that CIA can neither confirm nor deny the existence of additional documents pursuant to FOIA exemptions (b)(1) and (b)(3). Attachment 5.

8. On December 16, 2020, Mr. Connell submitted an administrative appeal under FOIA, refuting CIA's *Glomar* response and FOIA exemption claims under (b)(1) and (b)(3). Attachment 6.

9. Mr. Connell has a right of access to the requested information under 5 U.S.C. § 552(a)(3) and there is no legal basis for CIA's failure to turn over all of the requested documentation that properly does not fall under a FOIA exemption.

WHEREFORE, Mr. Connell respectfully requests that this Court:

(1) Order CIA to produce all documents that are responsive to Mr. Connell's FOIA request;

(2) Expedite this proceeding as provided for in 28 U.S.C. § 1657;

(3) Award plaintiff reasonable attorney fees and other litigation costs reasonably incurred in this action, pursuant to 5 U.S.C. § 552(a)(4)(E); and

(4) grant plaintiff such other relief as the Court deems appropriate.

Respectfully submitted,

James G. Connell, III

Dated: March 4, 2021

Attachments

1. May 23, 2017 initial FOIA request
2. February 8, 2018 CIA's request for specificity
3. March 8, 2018 Mr. Connell's response providing additional specificity
4. January 16, 2019 Mr. Connell's letter requesting status update
5. September 29, 2020 CIA partial denial of FOIA request
6. December 16, 2020 Mr. Connell's administrative appeal

Attachment 1

CONNELL LAW, L.L.C.
P.O. BOX 141
CABIN JOHN, MD 20818
(703) 588-0407

Informational and Privacy Coordinator
Central Intelligence Agency
Washington, DC 20505

23 May 2017

Dear FOIA Officer,

This is a request under the Freedom of Information Act.

Description of request: In the Report: "Senate Select Committee on Intelligence: Committee Study of the Central Intelligence Agency's Detention and Interrogation Program" reads on page 160:

"After the 14 CIA detainees arrived at the U.S. military base at Guantanamo Bay, they were housed in a separate building from other U.S. military detainees and remained under the operational control of the CIA." [*Footnote 977* - CIA Background Memo for CIA Director Visit to Guantanamo, December [redacted], 2006, entitled Guantanamo Bay High-Value Detainee Detention Facility].

I request for any and all information that relates to such "operational control" of the CIA over Guantanamo Bay detainees including but not limited to the document cited in the footnote 977.

I am willing to pay up to $100 for the processing of this request. Please inform me if the estimated fees will exceed this limit before processing my request.

I am seeking information for personal use and not for commercial use.

Thank you,

James G. Connell III
Attorney
P.O. Box 141 Cabin John, MD 20818 USA
(703) 588-0407
jconnell@connell-law.com

Attachment: Page 160 of SSCI report

Attachment 2

Central Intelligence Agency

Washington, D.C. 20505

8 February 2018

James G. Connell III, Esq.
Connell Law, L.L.C.
P.O. Box 141
Cabin John, MD 20818

Reference: F-2017-01877

Dear Mr. Connell:

This is further to our 24 October 2017 letter regarding your 23 May 2017 Freedom of Information Act (FOIA) request for **any and all information that relates to such "operational control" of the CIA over Guantanamo Bay detainees including but not limited to the document cited in the footnote 977 [from the Senate Select Committee on Intelligence: Committee Study of the Central Intelligence Agency's Detention and Interrogation Program report].**

Your request as written is quite broad and cannot be searched as it lacks specificity. As set forth in the FOIA, a proper FOIA request must "reasonably describe" the records sought. Pursuant to CIA's FOIA regulations, set forth at 32 CFR Part 1900, "reasonably described" means that the records must be described sufficiently to enable professional employees familiar with the subject matter to locate responsive information with a reasonable amount of effort.

Therefore, we are reaching out for clarification regarding the scope of your request in order to understand what information you are trying to obtain. We need you to provide more details about the specifics of your request in order to assist us in understanding your request to help us in our search efforts. It would be most helpful if you could provide the aspects of operational control that interest you, as well as a specific a period of time you would like us to search. We will hold your request in abeyance for 45 days from the date of this letter pending your response.

Sincerely,

Allison Fong
Information and Privacy Coordinator

Attachment 3

8 March 2018

Allison Fong
Information and Privacy Coordinator
Central Intelligence Agency
Washington, DC 20505

Reference: F-2017-01877

Dear Ms. Fong:

Thank you for your letter dated 8 February 2018.

In your letter, you ask for a specific period of time. The specific period of time in which I am interested is 1 September 2006 to 31 January 2007.

In your letter, you ask for "the aspects of operational control that interest" me. In summary, I am seeking to determine what "operational control" means. By way of example and not limitation, please find following a list of possible topics. Please note that by listing these topics, I am not implying that responsive information actually exists, only that I would be interested in information if it did exist.

(1) Whether CIA "operational control" included only Camp 7 or extended to other facilities such as Echo 2;
(2) What organization had decision-making authority over Camp 7;
(3) Whether CIA "operational control" ended before or after 31 January 2007;
(4) Whether the "operational control" involved CIA personnel, whether employees or contractors;
(5) Any detainee records maintained by the CIA during the period of "operational control," such as Detainee Inmate Management System records or the equivalent;
(6) How other agencies would obtain access to detainees during the period of "operational control, such as a Memorandum of Understanding with the Federal Bureau of Investigation or Criminal Investigative Task Force;
(7) How the facilities transitioned from CIA "operational control" to DOD "operational control."

The document cited at footnote 977 of the SSCI report, which I specifically requested, is "CIA Background Memo for CIA Director visit to Guantanamo, December 2006, entitled Guantanamo Bay High-Value Detainee Detention Facility." I am already aware of Document 6541712, the Memorandum of Understanding between the Department of Defense and the CIA regarding detention at Guantanamo Bay.

Please provide the responsive documents at your earliest convenience.

Best regards,

James G. Connell, III

Attachment 4

16 January 2019

James G. Connell III
P.O. Box 141
Cabin John, MD 20818-0414
(703) 623-8310
jconnell@connell-law.com

Allison Fong
Information and Privacy Coordinator
Central Intelligence Agency
Washington, DC 20505

Reference: F-2017-01877

Dear Ms. Fong or Current FOIA Officer,

I am writing to request an update and that you expedite the processing of the above reference FOIA request. I have not received any update since my last letter dated 8 March 2018 in which I provided additional information that you requested in your letter dated 18 February 2018.

The "compelling need" for this expedited process is that the documents are required as part of evidence needed for a pending criminal trial. I am a defense attorney representing Ammar al Baluchi in an active death penalty case before the United States' military commissions. We have currently scheduled hearings for this trial in January and March of this year. The information from the request is necessary for the fair adjudication of that trial. If this information is not obtained my client may lose the opportunity to fairly present his case in court. Further, given that this is a death penalty trial, the importance of a full presentation of the matters with all of the available evidence cannot be understated. Therefore, please expedite this request so that the documents are received prior to the next hearing.

If you are unable to expedite the request, please advise of the appropriate appellate procedures. If you do not respond to this letter, I will consider my request denied and respond accordingly.

Regards,

James G. Connell III

3 Attachments:
1. Request, dated 23 May 2017
2. Interim Response, dated 18 February 2018
3. Follow-up Response, dated 8 March 2018

CONNELL LAW, L.L.C.
P.O. BOX 141
CABIN JOHN, MD 20818
(703) 588-0407

Informational and Privacy Coordinator
Central Intelligence Agency
Washington, DC 20505

23 May 2017

Dear FOIA Officer,

This is a request under the Freedom of Information Act.

Description of request: In the Report: "Senate Select Committee on Intelligence: Committee Study of the Central Intelligence Agency's Detention and Interrogation Program" reads on page 160:

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I request for any and all information that relates to such "operational control" of the CIA over Guantanamo Bay detainees including but not limited to the document cited in the footnote 977.

I am willing to pay up to $100 for the processing of this request. Please inform me if the estimated fees will exceed this limit before processing my request.

I am seeking information for personal use and not for commercial use.

Thank you,

James G. Connell III
Attorney
P.O. Box 141 Cabin John, MD 20818 USA
(703) 588-0407
jconnell@connell-law.com

Attachment: Page 160 of SSCI report

Central Intelligence Agency

Washington, D.C. 20505

8 February 2018

James G. Connell III, Esq.
Connell Law, L.L.C.
P.O. Box 141
Cabin John, MD 20818

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Dear Mr. Connell:

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Your request as written is quite broad and cannot be searched as it lacks specificity. As set forth in the FOIA, a proper FOIA request must "reasonably describe" the records sought. Pursuant to CIA's FOIA regulations, set forth at 32 CFR Part 1900, "reasonably described" means that the records must be described sufficiently to enable professional employees familiar with the subject matter to locate responsive information with a reasonable amount of effort.

Therefore, we are reaching out for clarification regarding the scope of your request in order to understand what information you are trying to obtain. We need you to provide more details about the specifics of your request in order to assist us in understanding your request to help us in our search efforts. It would be most helpful if you could provide the aspects of operational control that interest you, as well as a specific a period of time you would like us to search. We will hold your request in abeyance for 45 days from the date of this letter pending your response.

Sincerely,

Allison Fong
Information and Privacy Coordinator

8 March 2018

Allison Fong
Information and Privacy Coordinator
Central Intelligence Agency
Washington, DC 20505

Reference: F-2017-01877

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Thank you for your letter dated 8 February 2018.

In your letter, you ask for a specific period of time. The specific period of time in which I am interested is 1 September 2006 to 31 January 2007.

In your letter, you ask for "the aspects of operational control that interest" me. In summary, I am seeking to determine what "operational control" means. By way of example and not limitation, please find following a list of possible topics. Please note that by listing these topics, I am not implying that responsive information actually exists, only that I would be interested in information if it did exist.

(1) Whether CIA "operational control" included only Camp 7 or extended to other facilities such as Echo 2;
(2) What organization had decision-making authority over Camp 7;
(3) Whether CIA "operational control" ended before or after 31 January 2007;
(4) Whether the "operational control" involved CIA personnel, whether employees or contractors;
(5) Any detainee records maintained by the CIA during the period of "operational control," such as Detainee Inmate Management System records or the equivalent;
(6) How other agencies would obtain access to detainees during the period of "operational control, such as a Memorandum of Understanding with the Federal Bureau of Investigation or Criminal Investigative Task Force;
(7) How the facilities transitioned from CIA "operational control" to DOD "operational control."

The document cited at footnote 977 of the SSCI report, which I specifically requested, is "CIA Background Memo for CIA Director visit to Guantanamo, December 2006, entitled Guantanamo Bay High-Value Detainee Detention Facility." I am already aware of Document 6541712, the Memorandum of Understanding between the Department of Defense and the CIA regarding detention at Guantanamo Bay.

Please provide the responsive documents at your earliest convenience.

Best regards,

James G. Connell, III

Attachment 5

Central Intelligence Agency

Washington, D.C. 20505

29 September 2020

James G. Connell III, Esq.
Connell Law, L.L.C.
P.O. Box 141
Cabin John, MD 20818

Reference: F-2017-01877

Dear Mr. Connell:

This letter is a final response to your 23 May 2017 Freedom of Information Act request for **any and all information that relates to such "operational control" of the CIA over Guantanamo Bay detainees including but not limited to the document cited in the footnote 977 [from the Senate Select Committee on Intelligence: Committee Study of the Central Intelligence Agency's Detention and Interrogation Program report].** On 8 March 2018 you have amended your request to cover the date range from 1 September 2006 to 31 January 2007 for documents on the following subjects:

1. **Whether CIA "operational control" included only Camp 7 or extended to other facilities such as Echo 2;**
2. **What organization had decision-making authority over Camp 7;**
3. **Whether CIA "operational control" ended before or after 31 January 2007;**
4. **Whether the "operational control" involved CIA personnel, whether employees or contractors;**
5. **Any detainee records maintained by the CIA during the period of "operational control," such as Detainee Inmate Management System records or the equivalent;**
6. **How other agencies would obtain access to detainees during the period of "operational control, such as a Memorandum of Understanding with the Federal Bureau of Investigation or Criminal Investigative Task Force";**
7. **How the facilities transitioned from CIA "operational control" to DOD "operational control."**

We processed your request in accordance with the FOIA, 5 U.S.C. § 552, as amended, and the CIA Information Act, 50 U.S.C. § 3141, as amended. We completed a thorough search for records responsive to your request and located the enclosed document, consisting of three pages. Please note that this document was previously released in conjunction with this or other release programs.

With respect to any other records, in accordance with Section 3.6(a) of Executive Order 13526, the CIA can neither confirm nor deny the existence or nonexistence of records responsive to your request. The fact of the existence or nonexistence of such records is itself currently and properly classified and is intelligence sources and methods information protected from disclosure by

Section 6 of the CIA Act of 1949, as amended, and Section 102A(i)(l) of the National Security Act of 1947, as amended. Therefore, your request is denied pursuant to FOIA exemptions (b)(1) and (b)(3).

As the CIA Information and Privacy Coordinator, I am the CIA official responsible for this determination. You have the right to appeal this response to the Agency Release Panel, in my care, within 90 days from the date of this letter. Please include the basis of your appeal.

Please be advised that you may seek dispute resolution services from the CIA's FOIA Public Liaison or from the Office of Government Information Services (OGIS) of the National Archives and Records Administration. OGIS offers mediation services to help resolve disputes between FOIA requesters and Federal agencies. Please note, contacting CIA's FOIA Public Liaison or OGIS does not affect your right to pursue an administrative appeal.

To contact **CIA** directly or to appeal the CIA's response to the Agency Release Panel:	To contact the **Office of Government Information Services (OGIS)** for mediation or with questions:
Information and Privacy Coordinator Central Intelligence Agency Washington, DC 20505 (703) 613-3007 (Fax) (703) 613-1287 (CIA FOIA Public Liaison / FOIA Hotline)	Office of Government Information Services National Archives and Records Administration 8601 Adelphi Road – OGIS College Park, MD 20740-6001 (202) 741-5770 (877) 864-6448 (202) 741-5769 (Fax) / ogis@nara.gov

If you have any questions regarding our response, you may contact the CIA's FOIA Hotline at (703) 613-1287.

Sincerely,

Mark Lilly
Information and Privacy Coordinator

Enclosure

C06677259

Approved for Release: 2018/07/09 C06677259

977-186

~~TOP SECRET~~/ (b)(1) (b)(3) CIAAct (b)(3) NatSecAct

Proposed Itinerary for DCIA Visit to Guantanamo Bay
21 December 2006

Time	Event	Remarks
0845	VIP arrival	(b)(1) (b)(3) NatSecAct
0915	Arr Officer's Landing	
0930	Rolling tour of Camp Delta	
	(b)(1) (b)(3) NatSecAct	
1440	Arr NEX	(b)(1) (b)(3) NatSecAct
1505	Arr Officer's Landing	
1525	Arr Leeward Pier	
1530	VIP Departure	

~~TOP SECRET~~ (b)(1) (b)(3) CIAAct (b)(3) NatSecAct

Approved for Release: 2018/07/09 C06677259

C06677259
Approved for Release: 2018/07/09 C06677259

~~TOP SECRET~~//(b)(1) (b)(3) CIAAct (b)(3) NatSecAct//NOFORN//MR

Guantanamo Bay High-Value Detainee Detention Facility

(b)(1)
(b)(3) CIAAct
(b)(3) NatSecAct

Current Detainees:
To date, CIA has sent fourteen high-value detainees to the high-value detention center at GTMO (Please see attachment A for their names and background information). Upon their arrival at site, all detainees are subject to the same general in-processing utilized by DoD for other detainees arriving at GTMO, including being provided a thorough medical exam by the on-site DoD physician, as well as any needed dental and psychiatric care. Per current detainee standards, each of the high value detainees is assigned a private room, basic amenities, and limited reading material. All detainees are offered daily solo recreation in a large outdoor area, as well as joint recreation time with another detainee, during which the two detainees can interact socially.

Criteria for Future Detainees:
In order for a detainee to be considered for transfer from the CIA program to GTMO, first the detainee must no longer be of significant intelligence value. Second, a determination must be made that the detainee would be subject to trial by military commission, as outlined by the Military Commission Act of 2006. Third, a policy decision must be made that the US Government desires to prosecute the individual in a U.S. military commission, vice transferring the detainee to a third country. Last, the Department of Defense must agree to the transfer of the detainee to GTMO.

End Game:
The CIA desires to maintain custody of any given detainee only so long as that detainee continues to provide significant intelligence. Once that has been accomplished (b)(1) (b)(3) CIAAct (b)(3) NatSecAct the (b)(3) CIAAct (b)(3) NatSecAct

(b)(1)
(b)(3) CIAAct
(b)(3) NatSecAct

Approved for Release: 2018/07/09 C06677259

C06677259
(b)(1)
Approved for Release: 2018/07/09 C06677259

~~TOP SECRET~~/ (b)(3) NatSecAct /~~NOFORN~~//~~MR~~

CIA's end game is to ensure that the detainee, if deemed a continuing threat, is either [redacted] or transferred to GTMO to stand trial before a Military Commission. Once at GTMO, CIA's end game is to assist DoD in any way possible in the Military Commission process, while at the same time protecting CIA equities.

(b)(1)
(b)(3) CIAAct
(b)(3) NatSecAct

(b)(1)
(b)(3) CIAAct
(b)(3) NatSecAct
Approved for Release: 2018/07/09 C06677259

Attachment 6

16 December 2020

James G. Connell, III
PO Box #141
Cabin John, MD 20818-0414
Tel: (703) 588-0407
jconnell@connell-law.com

Agency Release Panel
c/o Mark Lilly
Information and Privacy Coordinator
Central Intelligence Agency
Washington, D.C. 20505

Reference: F-2017-01877

To the Agency Release Panel of the Central Intelligence Agency,

This letter constitutes an administrative appeal under the Freedom of Information Act (referred to as "FOIA") regarding F-2017-01877. This appeal is timely submitted within the 90-day period established by your denial letter of 29 September 2020.

At page 160 (189 of the PDF) of the 9 December 2014 SSCI report titled *Committee Study of the Central Intelligence Agency's Detention and Interrogation Program* (referred to as the "SSCI Report") the Agency officially released the following information: "After the 14 CIA detainees arrived at the U.S. military base at Guantanamo Bay, they were housed in a separate building from other U.S. military detainees and remained under the operational control of the CIA.[977]" Footnote 977 referenced a "CIA Background Memo for CIA Director visit to Guantanamo, December [21], 2006, entitled Guantanamo Bay High-Value Detainee Detention Facility." In your 29 September 2020 letter, you released this memo claiming exemption 1 and 3 under the Freedom of Information Act. Under Executive Order 13526, Section 3.6(a) you then neither confirm nor deny the existence or nonexistence of records in bad faith. This document specifically references the "fourteen high-value detainees" in "attachment A" which includes "their names and background information." This information has already been released as unclassified within the SSCI Report and is specifically provided by footnote 982.

At the very least, the SSCI Report and related public sourced documents shows the existence of operational control with documentation between the dates of 1 September 2006 and 31 January 2007. *See* SSCI Report footnote 41 (page 29 of the PDF), 978 (page 189 of the PDF), 981 (page 190 of the PDF). I am also already aware of Document 6541712, the Memorandum of Understanding between the Department of Defense and the CIA regarding detention at Guantanamo Bay. Along with the SSCI Report, there has already be a public acknowledgement of CIAs operational control over Guantanamo Bay, and specifically during the time period requested. *See President Discusses Creation of Military Commissions to Try Suspected Terrorists*, Sep. 6, 2006; *ACLU v. CIA*, 710 F.3d 422 (D.D. Cir. 2013); and *Afshar*, 702 F.2d at 1133 (D.D. Cir. 1983). The Agency should be able to provide additional information that qualifies as "reasonably segregable portion of a record" under 10 U.S.C. § 552(b) as declassified material. *See, e.g., Mead Data Cent., Inc. v. Dep't of the Air Force,* 556 F.2d 242, 260 (D.C. Cir. 1977).

In regards to the seven subjects requested in my 8 March 2018 letter, you have claimed that this material is exempt under FOIA, 5 U.S.C. § 552 and the CIA Information Act, 50 U.S.C. § 3141. The material that I am requesting is the specific subject matter under the SSCI Report, which has been provided by the CIA in such cases this year like *Porup v. CIA,* 2020 U.S. Dist. LEXIS 44963 (D.D. Cir. 2020). The SSCI Report states that the "Committee Study documents the abuses and countless mistakes made between late 2001 and early 2009" and "describes the history of the CIA's Detention and Interrogation Program" to include "a review of each of the 119 known individuals who were held in CIA custody." *SSCI Report* at pages 6-7 of the PDF. Clearly this expansive investigation "require that the CIA search and review its information produced or gathered "concerning... the specific subject matter" of the investigation... under FOIA," which is mandated under the CIA Information Act's subsection (3)(c), 50 U.S.C. § 3141(c)(3). *ACLU v. DOD*, 351 F. Supp. 2d 265, 365 (S.D.N.Y., Feb 2, 2005); *See also Talbot v. CIA*, 315 F. Supp. 3d at 370 (D.D. Cir. 2018); and *Morley v. C.I.A.*, 508 F.3d 1108, 1116, 378 U.S. App. D.C. 411 (D.C. Cir. 2007).

Nor is this material also exempt from production under Section 102(A)(i)(l) of the National Security Act of 1947. The information that I am attempting to obtain is in regards to the Central Intelligence Agency's Detention and Interrogation Program, which has been prohibited by the President. These sources and methods the CIA sought to shield no longer fall within the Agency's mandate. With the elimination of this program, and the passage of time, exemption 1 as it currently stands is not applicable, as the information requested should have portions that are not harmful to national security if released, nor unsegragable from properly classified information. Under Executive Order 13526, Section 1.5(b), there should also exist information as originally classified that is now declassified within the standard 10-year declassification period.

Thank you for your consideration on this appeal. We look forward to hearing from you soon.

Best Regards,

/s/
James G. Connell, III

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FOR THE D.C. CIRCUIT
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MAR - 8 2021
Clerk of Court
District of Columbia

CIVIL COVER SHEET

JS-44 (Rev. 11/2020 DC)

I. (a) PLAINTIFFS
James G. Connell, III

DEFENDANTS
Central Intelligence Agency

MAR 05

(b) COUNTY OF RESIDENCE OF FIRST LISTED PLAINTIFF (EXCEPT IN U.S. PLAINTIFF CASES) Montgomery

COUNTY OF RESIDENCE OF FIRST LISTED DEFENDANT (IN U.S. PLAINTIFF CASES ONLY) D.C.

VOLVED

(c) ATTORNEYS (FIRM NAME, ADDRESS, AND TELEPHONE NUMBER)
James G. Connell, III
7604 Eden Wood Court
Bethesda, MD 20817

Case: 1:21-cv-00627
Assigned To : Cooper, Christopher R.
Assign. Date : 3/8/2021
Description: FOIA/Privacy Act (I-DECK)

II. BASIS OF JURISDICTION
(PLACE AN x IN ONE BOX ONLY)

- ○ 1 U.S. Government Plaintiff
- ○ 3 Federal Question (U.S. Government Not a Party)
- ◉ 2 U.S. Government Defendant
- ○ 4 Diversity (Indicate Citizenship of Parties in item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (PLACE AN x IN ONE BOX FOR PLAINTIFF AND ONE BOX FOR DEFENDANT) FOR DIVERSITY CASES ONLY!

	PTF	DFT		PTF	DFT
Citizen of this State	○ 1	○ 1	Incorporated or Principal Place of Business in This State	○ 4	○ 4
Citizen of Another State	○ 2	○ 2	Incorporated and Principal Place of Business in Another State	○ 5	○ 5
Citizen or Subject of a Foreign Country	○ 3	○ 3	Foreign Nation	○ 6	○ 6

IV. CASE ASSIGNMENT AND NATURE OF SUIT
(Place an X in one category, A-N, that best represents your Cause of Action and one in a corresponding Nature of Suit)

○ **A. *Antitrust***
- ☐ 410 Antitrust

○ **B. *Personal Injury/ Malpractice***
- ☐ 310 Airplane
- ☐ 315 Airplane Product Liability
- ☐ 320 Assault, Libel & Slander
- ☐ 330 Federal Employers Liability
- ☐ 340 Marine
- ☐ 345 Marine Product Liability
- ☐ 350 Motor Vehicle
- ☐ 355 Motor Vehicle Product Liability
- ☐ 360 Other Personal Injury
- ☐ 362 Medical Malpractice
- ☐ 365 Product Liability
- ☐ 367 Health Care/Pharmaceutical Personal Injury Product Liability
- ☐ 368 Asbestos Product Liability

○ **C. *Administrative Agency Review***
- ☐ 151 Medicare Act

Social Security
- ☐ 861 HIA (1395ff)
- ☐ 862 Black Lung (923)
- ☐ 863 DIWC/DIWW (405(g))
- ☐ 864 SSID Title XVI
- ☐ 865 RSI (405(g))

Other Statutes
- ☐ 891 Agricultural Acts
- ☐ 893 Environmental Matters
- ☐ 890 Other Statutory Actions (If Administrative Agency is Involved)

○ **D. *Temporary Restraining Order/Preliminary Injunction***

Any nature of suit from any category may be selected for this category of case assignment.

(If Antitrust, then A governs)

○ **E. *General Civil (Other)*** OR ○ **F. *Pro Se General Civil***

Real Property
- ☐ 210 Land Condemnation
- ☐ 220 Foreclosure
- ☐ 230 Rent, Lease & Ejectment
- ☐ 240 Torts to Land
- ☐ 245 Tort Product Liability
- ☐ 290 All Other Real Property

Personal Property
- ☐ 370 Other Fraud
- ☐ 371 Truth in Lending
- ☐ 380 Other Personal Property Damage
- ☐ 385 Property Damage Product Liability

Bankruptcy
- ☐ 422 Appeal 27 USC 158
- ☐ 423 Withdrawal 28 USC 157

Prisoner Petitions
- ☐ 535 Death Penalty
- ☐ 540 Mandamus & Other
- ☐ 550 Civil Rights
- ☐ 555 Prison Conditions
- ☐ 560 Civil Detainee – Conditions of Confinement

Property Rights
- ☐ 820 Copyrights
- ☐ 830 Patent
- ☐ 835 Patent – Abbreviated New Drug Application
- ☐ 840 Trademark
- ☐ 880 Defend Trade Secrets Act of 2016 (DTSA)

Federal Tax Suits
- ☐ 870 Taxes (US plaintiff or defendant)
- ☐ 871 IRS-Third Party 26 USC 7609

Forfeiture/Penalty
- ☐ 625 Drug Related Seizure of Property 21 USC 881
- ☐ 690 Other

Other Statutes
- ☐ 375 False Claims Act
- ☐ 376 Qui Tam (31 USC 3729(a))
- ☐ 400 State Reapportionment
- ☐ 430 Banks & Banking
- ☐ 450 Commerce/ICC Rates/etc
- ☐ 460 Deportation
- ☐ 462 Naturalization Application
- ☐ 465 Other Immigration Actions
- ☐ 470 Racketeer Influenced & Corrupt Organization
- ☐ 480 Consumer Credit
- ☐ 485 Telephone Consumer Protection Act (TCPA)
- ☐ 490 Cable/Satellite TV
- ☐ 850 Securities/Commodities/ Exchange
- ☐ 896 Arbitration
- ☐ 899 Administrative Procedure Act/Review or Appeal of Agency Decision
- ☐ 950 Constitutionality of State Statutes
- ☐ 890 Other Statutory Actions (if not administrative agency review or Privacy Act)

○ G. *Habeas Corpus/ 2255* ☐ 530 Habeas Corpus – General ☐ 510 Motion/Vacate Sentence ☐ 463 Habeas Corpus – Alien Detainee	○ H. *Employment Discrimination* ☐ 442 Civil Rights – Employment (criteria: race, gender/sex, national origin, discrimination, disability, age, religion, retaliation) *(If pro se, select this deck)*	◉ I. *FOIA/Privacy Act* ☒ 895 Freedom of Information Act ☐ 890 Other Statutory Actions (if Privacy Act) *(If pro se, select this deck)*	○ J. *Student Loan* ☐ 152 Recovery of Defaulted Student Loan (excluding veterans)
○ K. *Labor/ERISA (non-employment)* ☐ 710 Fair Labor Standards Act ☐ 720 Labor/Mgmt. Relations ☐ 740 Labor Railway Act ☐ 751 Family and Medical Leave Act ☐ 790 Other Labor Litigation ☐ 791 Empl. Ret. Inc. Security Act	○ L. *Other Civil Rights (non-employment)* ☐ 441 Voting (if not Voting Rights Act) ☐ 443 Housing/Accommodations ☐ 440 Other Civil Rights ☐ 445 Americans w/Disabilities – Employment ☐ 446 Americans w/Disabilities – Other ☐ 448 Education	○ M. *Contract* ☐ 110 Insurance ☐ 120 Marine ☐ 130 Miller Act ☐ 140 Negotiable Instrument ☐ 150 Recovery of Overpayment & Enforcement of Judgment ☐ 153 Recovery of Overpayment of Veteran's Benefits ☐ 160 Stockholder's Suits ☐ 190 Other Contracts ☐ 195 Contract Product Liability ☐ 196 Franchise	○ N. *Three-Judge Court* ☐ 441 Civil Rights – Voting (if Voting Rights Act)

V. ORIGIN

◉ 1 Original Proceeding ○ 2 Removed from State Court ○ 3 Remanded from Appellate Court ○ 4 Reinstated or Reopened ○ 5 Transferred from another district (specify) ○ 6 Multi-district Litigation ○ 7 Appeal to District Judge from Mag. Judge ○ 8 Multi-district Litigation – Direct File

VI. CAUSE OF ACTION (CITE THE U.S. CIVIL STATUTE UNDER WHICH YOU ARE FILING AND WRITE A BRIEF STATEMENT OF CAUSE.)
5 U.S.C. §§ 552, demanding production of documents responsive to plaintiff's 23 May 2017 FOIA request.

VII. REQUESTED IN COMPLAINT ☐ CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23 **DEMAND $** **JURY DEMAND:** Check YES only if demanded in complaint YES ☐ NO ☐

VIII. RELATED CASE(S) IF ANY (See instruction) YES ☐ NO ☒ If yes, please complete related case form

DATE: 3 March 2021 **SIGNATURE OF ATTORNEY OF RECORD** /s/ John Greenewald, III

INSTRUCTIONS FOR COMPLETING CIVIL COVER SHEET JS-44
Authority for Civil Cover Sheet

The JS-44 civil cover sheet and the information contained herein neither replaces nor supplements the filings and services of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. Consequently, a civil cover sheet is submitted to the Clerk of Court for each civil complaint filed. Listed below are tips for completing the civil cover sheet. These tips coincide with the Roman Numerals on the cover sheet.

I. COUNTY OF RESIDENCE OF FIRST LISTED PLAINTIFF/DEFENDANT (b) County of residence: Use 11001 to indicate plaintiff if resident of Washington, DC, 88888 if plaintiff is resident of United States but not Washington, DC, and 99999 if plaintiff is outside the United States.

III. CITIZENSHIP OF PRINCIPAL PARTIES: This section is completed only if diversity of citizenship was selected as the Basis of Jurisdiction under Section II.

IV. CASE ASSIGNMENT AND NATURE OF SUIT: The assignment of a judge to your case will depend on the category you select that best represents the primary cause of action found in your complaint. You may select only one category. You must also select one corresponding nature of suit found under the category of the case.

VI. CAUSE OF ACTION: Cite the U.S. Civil Statute under which you are filing and write a brief statement of the primary cause.

VIII. RELATED CASE(S), IF ANY: If you indicated that there is a related case, you must complete a related case form, which may be obtained from the Clerk's Office.

Because of the need for accurate and complete information, you should ensure the accuracy of the information provided prior to signing the form.

IN UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JAMES G. CONNELL, III, Plaintiff v. CENTRAL INTELLIGENCE AGENCY. Defendant.	Civil Action No. 21-0627 (CRC)

DECLARATION OF VANNA BLAINE,
INFORMATION REVIEW OFFICER FOR THE
LITIGATION INFORMATION REVIEW OFFICE
CENTRAL INTELLIGENCE AGENCY

I, VANNA BLAINE, hereby declare and state:

I. INTRODUCTION

1. I currently serve as the Information Review Officer ("IRO") for the Litigation Information Review Office ("LIRO") at the Central Intelligence Agency ("CIA" or "Agency"). I have held that position since February 2020.

A. Professional Background

2. Prior to my current positon, I served as the Deputy IRO for LIRO beginning in April 2019, during which time I also served as the Acting IRO in the IRO's absence. Before becoming Deputy IRO, I served as the office's Litigation Production Manager for 24 months. In that capacity, I was the senior

litigation analyst responsible for managing and tracking case assignments, as well as litigation deadlines, and also conducted second-line reviews of Agency information subject to litigation, making classification and release determinations regarding such information when necessary. Before serving as the Production Manager, I was an Associate Information Review Officer for the Director's Area of the CIA for 11 months. In that role, I was responsible for making classification and release determinations for information originating within the Director's Area, which included, among other offices, the Office of the Director of the CIA, the Office of Congressional Affairs, the Office of Public Affairs, and the Office of General Counsel. I have held other administrative and professional positions within the CIA since 2007 and have worked in the information review and release field since 2014.

3. I am a senior CIA official and hold original classification authority at the TOP SECRET level under written delegation of authority pursuant to section 1.3(c) of Executive Order 13526, 75 Fed. Reg. 707 (Jan. 5, 2010). This means that I am authorized to assess the current, proper classification of CIA information, up to and including TOP SECRET information, based on the classification criteria of Executive Order 13526 and applicable regulations.

4. In my current role as IRO, I am responsible for ensuring that any determinations as to the release or withholding of any such documents or information are proper and do not jeopardize the national security. Among other things, I am also responsible for the classification review of CIA documents and information that may be the subject of court proceedings or public requests for information under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552.

5. Through the exercise of my official duties, I have become familiar with this civil action and Plaintiff's FOIA request. I make the following statements based upon my personal knowledge and information made available to me in my official capacity as IRO for LIRO.

B. Purpose of Declaration

6. This declaration is submitted in support of the Government's Motion for Summary Judgment in this case.

7. The purpose of this declaration is to explain and justify, to the greatest extent possible on the public record, the CIA's actions and response to Plaintiff's FOIA request. For the Court's convenience, the remainder of this declaration is divided into three parts: Part II provides the procedural and administrative history of the case; Part III discusses the searches for unclassified records conducted in connection with Plaintiff's request; and Part IV explains the CIA's response.

II. BACKGROUND

8. This matter concerns Plaintiff's 23 May 2017 FOIA request to the CIA "for any and all information that relates to [the] 'operational control' of the CIA over Guantanamo detainees including but not limited to the document cited in footnote 977 [of the Senate Select Committee on Intelligence: Committee Study of the Central Intelligence Agency's Detention and Interrogation Program report]." A true and correct copy of the request is attached herein as **Exhibit A.**

9. By letter dated 24 October 2017, the CIA acknowledged receipt of Plaintiff's FOIA request and assigned it the reference number F-2017-01877. A true and correct copy of this letter is attached herein as **Exhibit B.**

10. In a follow-up letter, dated 8 February 2018, the CIA informed Plaintiff that his "request, as written, is quite broad and cannot be searched as it lacks specificity." The CIA asked Plaintiff to provide more details about his request in order to understand what information he was trying to obtain. A true and correct copy of this letter is attached herein as **Exhibit C.**

11. By letter dated 8 March 2018, Plaintiff clarified that the period of time he was interested in is "1 September 2006 to 31 January 2007." Plaintiff also clarified that he was "seeking to determine what 'operational control' means" and provided the following "list of possible topics":

(1) Whether CIA "operational control" included only Camp 7 or extended to other facilities such as Echo 2;
(2) What organization had decision-making authority over Camp 7;
(3) Whether CIA "operational control" ended before or after 31 January 2007;
(4) Whether the "operational control" involved CIA personnel, whether employees or contractors;
(5) Any detainee records maintained by the CIA during the period of "operational control," such as Detainee Inmate Management Systems records or the equivalent;
(6) How other agencies would obtain access to detainees during the period of "operational control, such as a Memorandum of Understanding with the Federal Bureau of Investigation or Criminal Investigative Task Force;
(7) How the facilities transitioned from CIA "operational control" to DOD "operation control."

Plaintiff noted "that by listing these topics, [he was] not implying that responsive information actually exists, only that [he] would be interested if it did exist." A true and correct copy of this letter is attached herein as **Exhibit D.**

12. By letter dated 4 May 2018, the CIA acknowledged receipt of Plaintiff's 8 March 2018 letter. Specifically, the CIA acknowledged that Plaintiff had amended his initial FOIA request to cover a defined period of time (1 September 2006 to 31 January 2007) and was now seeking to determine what "operational control" means by requesting documents on the seven possible topics that Plaintiff listed on his 8 March 2018 letter (hereinafter referred to as "Amended FOIA Request"). A true and correct copy of this letter is attached herein as **Exhibit E.**

13. By letter dated 29 September 2020, the CIA responded to Plaintiff's Amended FOIA Request stating that it had completed a thorough search for records responsive to the request and had located a document consisting of three pages, which the CIA released in part to Plaintiff. With respect to any other records, the CIA issued a "Glomar"[1] response, indicating that the Agency can neither confirm nor deny the existence or nonexistence of records responsive to Plaintiff's request, as the fact of the existence or nonexistence of records was properly classified and protected from disclosure under FOIA Exemptions (b)(1) and (b)(3). A true and correct copy of this letter is attached herein as **Exhibit F.**

14. By letter dated 17 December 2020, Plaintiff administratively appealed the Agency's response. A true and correct copy of this letter is attached herein as **Exhibit G.**

15. Plaintiff filed the above-captioned lawsuit on 8 March 2021, and the CIA filed its Answer on 17 May 2021.

16. By letter dated 15 July 2021, the CIA provided a final response to Plaintiff's Amended FOIA Request. In its response, the CIA informed Plaintiff that the Agency completed a thorough

[1] The origins of the Glomar response date back to the D.C. Circuit's decision in Phillippi v. CIA, 546 F.2d 1009 (D.C. Cir. 1976), which affirmed the CIA's use of the "neither confirm nor deny" response to a FOIA request for records concerning the CIA's reported contacts with the media regarding Howard Hughes' ship, the Hughes' Glomar Explorer.

search for records that would reveal an unclassified or openly acknowledged association between the Agency and the subject of Plaintiff's Amended FOIA Request, and located two (2) documents, which the Agency released in part with redactions made on the basis of FOIA exemptions (b)(1), (b)(3), (b)(5) and (b)(6), and one (1) document that the Agency withheld in its entirety based on FOIA exemptions (b)(1), (b)(3), and (b)(5). In addition, with respect to any records that may reveal a classified connection between the Agency and the subject of Plaintiff's Amended FOIA Request, the CIA issued a Glomar response, in accordance with section 3.6(a) of Executive Order 13526, as amended, refusing to confirm or deny the existence or nonexistence of such records, as the mere fact of the existence or nonexistence of such records is itself currently and properly classified and relates to CIA intelligence sources and methods information that is protected from disclosure pursuant to FOIA exemptions (b)(1) and (b)(3). A true and correct copy of this letter is attached herein as **Exhibit H.**

17. On 29 July 2021, Plaintiff notified the Court of his position regarding the CIA's final response to his Amended FOIA Request. Plaintiff stated that he accepts the redactions to the documents released in part by the CIA. Plaintiff also stated that he objects to the complete withholding of document C06833121 and challenges the CIA's Glomar response "on the basis

that the question of CIA operational control (or lack thereof) over Camp VII has already been declassified."

18. On 30 September 2021, the CIA provided a *Vaughn* Index to Plaintiff justifying its withholding of document C06833121 based on FOIA exemptions (b)(1), (b)(3), and (b)(5). A true and correct copy of the index is attached herein as **Exhibit I.**[2]

III. CIA's SEARCH FOR UNCLASSIFIED RECORDS

19. The CIA's search was limited to records that would reveal an unclassified or openly acknowledged relationship between the CIA and the subject of Plaintiff's Amended FOIA Request. The CIA employees who performed the searches have access to pertinent records; are knowledgeable about the Agency's records systems and are qualified to search those records; and regularly search those records in the course of their professional duties.

20. The Agency employees conducted a search reasonably calculated to locate all responsive records that might reflect an unclassified or otherwise openly acknowledged relationship between the CIA and the subject in Plaintiff's Amended FOIA Request. Specifically, the Agency employees conducted a search of previously-released CIA records in a case management database

[2] The *Vaughn* Index incorrectly states that the withheld document C06833121 34 pages in length. The document in fact consists of 24 pages.

called CADRE, which is a repository of all Agency records that have been reviewed and/or compiled for potential release, or that have been previously disclosed to the public.

21. The Agency employees conducted the search using the following terms, including different variations and combinations of the terms: "Camp 7", "Echo 2", "operational control", "detainee records", "Memorandum", "GTMO/GITMO/Guantanamo", "DOD", and "Department of Defense." The search was limited to the time period specified by Plaintiff: 1 September 2006 to 31 January 2007. The search yielded three responsive records, two of which were released to Plaintiff in part with redactions and one which was withheld in its entirety.

IV. RESPONSE TO PLAINTIFF's AMENDED FOIA REQUEST

22. The CIA properly asserted a Glomar response with respect to any records that may reveal a classified connection between the CIA and the subject of Plaintiff's Amended FOIA Request, and properly withheld document C06833121 in full.

A. CIA'S GLOMAR RESPONSE

23. The CIA is charged with carrying out critical functions on behalf of the United States, which include, among other activities, collecting and analyzing foreign intelligence and counterintelligence. A defining characteristic of the CIA's intelligence activities is that they are carried out through clandestine means, and therefore they must remain secret in

order to be effective. In the context of FOIA, this means that the CIA must carefully evaluate whether its response to a FOIA request could jeopardize the clandestine nature of its intelligence activities or otherwise reveal undisclosed information about its sources, methods, capabilities, authorities, strengths, weaknesses, personnel, or resources.

24. In a common FOIA scenario, a FOIA requester submits a request to the CIA for information on a particular subject and the CIA conducts a search and advises whether responsive records were located. If records are located, the CIA provides non-exempt records or reasonably segregable non-exempt portions of records and withholds the remaining exempt records or exempt portions of records. In this common scenario, the CIA's response – either to provide or not provide the records sought – serves to confirm the existence or nonexistence of CIA records responsive to the subject of the FOIA request. In such a scenario, confirmation may pose no harm to U.S. national security because the response focuses on releasing or withholding specific substantive information contained within the records. In those circumstances, the fact that the CIA does or does not possess responsive records is not, in and of itself, classified, even though the information contained within the records may be classified.

25. In other situations, however, the mere confirmation or denial of the existence of responsive records would, in and of itself, reveal a classified fact: namely, whether the CIA has an intelligence interest in, or clandestine connection to, a particular individual, group, subject matter, or activity. In those cases, the CIA asserts a Glomar response because the existence or nonexistence of CIA records responsive to the request is a currently and properly classified fact, the disclosure of which reasonably could be expected to cause damage to the national security of the United States.

26. In this case, the CIA issued a Glomar response stating that it could neither confirm nor deny the existence or nonexistence of records that may reveal a classified connection between the Agency and the subject of Plaintiff's Amended FOIA Request because confirming or denying the existence or nonexistence of such records would reveal classified intelligence sources and methods information that is protected from disclosure. The following discussion regarding FOIA Exemptions (b)(1) and (b)(3) apply to the Agency's Glomar determination with respect to the existence or non-existence of those records.

(a) FOIA Exemption (b)(1)

27. Exemption (b)(1) provides that FOIA does not require the production of records that are: "(A) specifically authorized

under criteria established by an Executive Order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive Order." 5. U.S.C. § 552(b)(1). Here, Executive Order 13526 is the operative executive order that governs classification.

28. Section 1.1(a) of Executive Order 13526 provides that information may be originally classified under the terms of this order if the following conditions are met: (1) an original classification authority is classifying the information; (2) the information is owned by, produced by or for, or is under the control of the U.S. Government; (3) the information falls within one or more of the categories of information listed in section 1.4 of Executive Order 13526; and (4) the original classification authority determines that the unauthorized disclosure of the information reasonably could be expected to result in some level of damage to the national security, and the original classification authority is able to identify or describe the damage.

29. Furthermore, section 3.6(a) of Executive Order 13526 specifically states that "[a]n agency may refuse to confirm or deny the existence or nonexistence of requested records whenever the fact of their existence or nonexistence is itself classified under this order or its predecessors." Executive Order 13526

therefore explicitly authorizes precisely the type of response that the CIA has provided to Plaintiff in this case.

30. Consistent with sections 1.1(a) and 3.6(a) of Executive Order 13526, I have determined that the existence or nonexistence of the requested records is a properly classified fact; the records concern "intelligence activities" and "intelligence sources and methods" within the meaning of section 1.4(c) of the Executive Order; the records are owned by and under the control of the U.S. Government; and as explained further below, the disclosure of the existence or nonexistence of requested records reasonably could be expected to result in damage to national security.

31. Additionally, consistent with Section 1.7 of Executive Order 13526, my determination that the existence or nonexistence of the requested records is classified has not been made to conceal violations of law, inefficiency, or administrative error; to prevent embarrassment to a person, organization, or agency; to restrain competition; or to prevent or delay the release of information that does not require protection in the interests of national security.

32. Clandestine intelligence activities are central to the CIA's mission. An acknowledgment of information regarding the Agency's methods or specific intelligence activities can reveal the CIA's specific intelligence capabilities, authorities,

interests, and resources. Terrorist organizations, foreign intelligence services, and other hostile groups use such information to thwart CIA activities and attack the United States and its interests. These groups search continually for information regarding the activities of the CIA and are able to gather information from a myriad of sources, analyze this information, and devise ways to defeat CIA activities from seemingly disparate pieces of information.

33. Here, Plaintiff requested information to determine what "operational control" means and provided a list of topics for the CIA to use in its searches. As discussed above, the CIA conducted a reasonable search to locate records from 1 September 2006 to 31 January 2007 that would reveal an unclassified or otherwise openly acknowledged connection between the CIA and the topics listed in Plaintiff's Amended FOIA Request. The CIA located three responsive records.

34. Other than these three officially acknowledged records, the Agency can neither confirm nor deny the existence or nonexistence of any records requested by Plaintiff that may reveal classified CIA information. A formal acknowledgement confirming or denying the existence or nonexistence of records reflecting a classified or otherwise publicly unacknowledged connection between the CIA and the topics in Plaintiff's Amended FOIA Request would reveal classified intelligence information

and jeopardize the clandestine nature of the Agency's intelligence activities. For example, if the CIA were to confirm the existence of responsive records, such confirmation could reveal sensitive details about CIA's intelligence sources and methods and jeopardize the safety of the CIA employees and the employees of other agencies. Conversely, if the CIA denied having records responsive to this request, that response could provide adversaries with insight into the CIA's priorities, resources, capabilities, and relationships with other agencies. In either case, confirmation or denial of the existence or nonexistence of such records would reveal sensitive information about the CIA's intelligence interests, personnel, capabilities, authorities, and resources that is protected from disclosure by Executive Order 13526 and statute. Such information could be used by terrorist organizations, foreign intelligence services, and other hostile adversaries to undermine CIA intelligence activities and attack the United States and its interests.

35. In order to avoid the potential for such damage to national security, and to be credible and effective, the CIA must use the Glomar response consistently in all cases where the existence or nonexistence of records responsive to a FOIA request is a classified fact, including instances in which the CIA does not possess records responsive to a particular request. If the CIA were to invoke a Glomar response only when it

actually possessed responsive records, the Glomar response would be interpreted as an admission that responsive records exist. This practice would reveal the very information that the CIA must protect in the interest of national security.

36. For these reasons, I have determined that confirming the existence or nonexistence of records responsive to Plaintiff's Amended FOIA Request, other than the three records whose existence is unclassified or otherwise officially acknowledged, could reasonably be expected to cause damage to national security. Further, this information is currently and properly classified and is therefore exempt from disclosure under FOIA Exemption (b)(1).

(b) FOIA Exemption (b)(3)

37. FOIA Exemption (b)(3) protects from disclosure information that is specifically exempted from disclosure by statute. A withholding statute under Exemption (b)(3) must: (A) require that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establish particular criteria for withholding or refer to particular types of matters to be withheld. 5 U.S.C. § 552(b)(3).

38. Section 102A(i)(1) of the National Security Act of 1947, as amended, 50 U.S.C. § 3024(i)(1) (the "National Security Act"), provides that the Director of National Intelligence ("DNI"), "shall protect intelligence sources and methods from

unauthorized disclosure." Accordingly, the National Security Act constitutes a federal statute which, "requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue." 5 U.S.C. §552(b)(3). Under the direction of the DNI pursuant to section 102A, and consistent with section 1.6(d) of Executive Order 12333, the CIA is authorized, and relies on this statute, to protect CIA intelligence sources and methods from unauthorized disclosure.[3]

39. As discussed above in regards to the application of Exemption (b)(1), acknowledging the existence or nonexistence of records reflecting a classified or otherwise unacknowledged connection to the CIA in this matter would reveal information that concerns intelligence sources and methods, which the National Security Act is designed to protect. Accordingly, the fact of the existence or nonexistence of responsive records is exempt from disclosure under Exemption (b)(3) pursuant to the National Security Act. Exemptions (b)(1) and (b)(3) therefore apply independently and co-extensively to protect CIA's intelligence sources and methods from disclosure.

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[3] Section 1.6(d) of Executive Order 12333, as amended, 3 C.F.R. 200 (1981), *reprinted in* 50 U.S.C. § 3001 note at 25 (formerly codified at 50 U.S.C.A. § 401 note at 25 (West Supp. 2009)), and as amended by Executive Order 13470, 73 Fed. Reg. 45,323 (July 30, 2008), requires the Director of the Central Intelligence Agency to "[p]rotect intelligence and intelligence sources, methods, and activities from unauthorized disclosure in accordance with guidance from the [DNI]."

40. In contrast to Executive Order 13526, however, this statute does not require the CIA to identify and describe the damage to the national security that reasonably could be expected to result should the CIA confirm or deny the existence or nonexistence of the records. Nonetheless, I refer the Court to the paragraphs above for a description of the damage to the national security should anything other than a Glomar response be required of the CIA in this case.

B. Withholding of Document C06833121

41. The CIA withheld in full document C06833121, which as described in the *Vaughn* Index, consists of classified draft remarks/discussion points addressing a specific aspect of a sensitive Agency intelligence program/operation. The CIA cited FOIA exemptions (b)(1), (b)(3), and (b)(5) as the basis for withholding this record in full. Each is described below.

(a) FOIA Exemption (b)(1)

42. As a senior CIA official with original classification authority, I have determined that document C06833121 is currently and properly classified and pertains to "intelligence activities (including covert action), [or] intelligence sources or methods" of sections 1.4(c) of the Executive Order; the classified information in the document is owned by and is under the control of the U.S. Government; and its unauthorized disclosure could reasonably be expected to result in damage to

national security. Further, in accordance with section 1.7(a) of the Executive Order, none of the information at issue has been classified in order to conceal violations of law, inefficiency or administrative error; prevent embarrassment to a person, organization or agency; restrain competition; or prevent or delay the release of information that does not require protection in the interest of national security.

43. Here, the classified information withheld pursuant to Exemption (b)(1) consists of information that would tend to reveal specific intelligence sources, methods, and/or activities. Intelligence methods are the techniques and means by which an intelligence agency accomplishes the mission, and the classified internal regulations, approvals, and authorities that govern the conduct of CIA personnel. CIA's collection methods are valuable from an intelligence-gathering perspective only so long as they remain unknown and unsuspected. The more information the CIA discloses about its operational tradecraft, the more difficult it becomes for the CIA to actually collect foreign intelligence around the world.

44. Intelligence interests and activities refer to the CIA's targets and operations, including the clandestine activities undertaken by the CIA to collect intelligence and the means utilized by the CIA to collect intelligence. Although it is widely acknowledged that the CIA is responsible for

conducting intelligence collection and analysis for the United States, the CIA generally does not confirm or deny the existence, or disclose the target, of specific intelligence collection activities or the operations it conducts or supports.

45. In this case, I have determined that the CIA properly withheld document C06833121 in its entirety because it contains classified information related to the methods the Agency uses to collect and analyze intelligence, as well as details relating to a specific aspect of a sensitive Agency intelligence program/operation. Such information must be protected to prevent foreign adversaries, terrorist organizations, and others from learning about the ways in which the CIA operates, which would allow them to take countermeasures to undermine U.S. intelligence capabilities and render collection efforts ineffective. I have determined that disclosure of such sensitive classified CIA information could reasonably be expected to cause damage to U.S. national security.

(b) FOIA Exemption (b)(3)

46. The CIA cited FOIA exemption (b)(3) (National Security Act) as an additional basis for withholding document C06833121. As discussed in Part IV.A(b), Exemption (b)(3) protects information that is specifically exempted from disclosure by

statute. Section 102A(i)(1) of the National Security Act[4] constitutes a withholding statute in accordance with Exemption (b)(3) and applies co-extensively to all of the information protected by Exemption (b)(1) because the information would reveal specific intelligence sources and methods.

47. Although no harm rationale is required under Exemption (b)(3), for the reasons discussed in this section, the release of the information withheld under Exemption (b)(3) pursuant to the National Security Act could result in harm by significantly impairing the CIA's ability to carry out its core missions of gathering and analyzing foreign intelligence.

(c) FOIA Exemption (b)(5)

48. Exemption (b)(5) provides that the FOIA's disclosure requirements do not apply to "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5). As an initial matter, document C06833121 was circulated within the Agency, and therefore satisfies the intra- and inter-agency threshold of the exemption. As described in the CIA's *Vaughn* Index, the information in the document for which CIA asserted Exemption (b)(5) consists of

[4] Background information on the National Security Act is provided in Part IV.A(b).

discussions that are protected by the deliberative process privilege and the attorney-client privilege.

Deliberative Process Privilege

49. The deliberative process privilege protects Agency communications that are pre-decisional and deliberative. The purpose of the privilege is to prevent injury to the quality of agency decision-making.

50. The CIA invoked the deliberative process privilege here to withhold a classified document consisting of intra-Agency analysis, recommendations, assessments, and comments regarding draft language to be used as remarks by a senior Agency official. Specifically, the document reflects the CIA's internal and confidential decision-making process at interim stages of drafting remarks addressing a specific aspect of a sensitive CIA intelligence program/operation. The document has embedded comments, recommendations and edits, as well as discussions about wording, accuracy, and other deliberative ancillary matters. This record does not convey final Agency viewpoints on a particular matter, but rather reflects different considerations, opinions, options, and approaches that preceded the final remarks. Disclosure of this record would reveal, among other things, that some of the information compiled was not utilized or selected for inclusion in the final remarks, which ultimately would open the Agency's deliberative process to

public scrutiny on decisions that were not final. This, in turn, would chill the free flow of discussion in agency decision-making.

51. Furthermore, I have reviewed document C06833121 and have determined that, to the extent it contains any factual material, that information is part of the deliberations, and its disclosure would harm the Agency's deliberative process. The disclosure of facts in this document would reveal the nature of the preliminary recommendations and opinions preceding the final determination. It would further allow for a comparison between the wording in the final version and the draft thereby revealing what information was considered significant or was discarded in the course of the drafting process. Disclosure of this document would inhibit the frank communication and free exchange of ideas that the privilege is designed to protect. If the withheld information were released, CIA employees may hesitate to offer their candid opinions to superiors or coworkers, and such self-censorship would tend to degrade the quality of Agency decisions. Additionally, revealing this information could mislead or confuse the public by disclosing rationales that did not form the basis for the Agency's final decisions.

Attorney-Client Privilege

52. As explained in the *Vaughn* Index, the Agency also asserted the attorney client privilege to protect disclosure of

document C06833121 under Exemption (b)(5). The attorney-client privilege protects confidential communications between an attorney and his or her client relating to a legal matter for which the client has sought professional advice. In this case, the Agency asserted the attorney-client privilege to protect confidential communications between Agency officials and attorneys within the CIA's Office of General Counsel.

53. The confidential communications in document C06833121 consist of factual information supplied by the client in connection with the request for legal advice, as well as discussions between attorneys that reflect those facts, and legal analysis and advice provided to the client. The confidentiality of these communications was maintained. If this confidential information were to be disclosed, it would subject the legal guidance to scrutiny and reveal preliminary legal risk analysis and strategy. This is the very type of information that the attorney-client privilege is designed to protect.

VI. CONCLUSION

54. In this case, the CIA conducted a thorough search for responsive records reflecting an unclassified or otherwise openly acknowledged connection between CIA and the topics listed in Plaintiff's Amended FOIA Request and located three previously acknowledged records. Two records were released to Plaintiff in part and one was properly withheld in its entirety pursuant to

FOIA Exemptions (b)(1), (b)(3), and (b)(5). For records that would reveal a classified or otherwise unacknowledged connection between the CIA and the subject of Plaintiff's Amended FOIA Request, the fact of the existence or nonexistence of such records is itself a properly classified fact, and as explained above, is intertwined with the CIA's intelligence activities, sources, and methods such that this fact is, and must remain, classified and protected by statute. Accordingly, I have determined that the only appropriate response is for the CIA to neither confirm nor deny the existence or nonexistence of the requested records under FOIA exemptions (b)(1) and (b)(3).

* * *

I hereby declare under penalty of perjury that the foregoing is true and correct.

Executed this 11th day of March 2022.

Vanna Blaine
Information Review Officer
Litigation Information Review Office
Central Intelligence Agency

CONNELL LAW, L.L.C.
P.O. BOX 141
CABIN JOHN, MD 20818
(703) 588-0407

JUN 07 2017

Informational and Privacy Coordinator
Central Intelligence Agency
Washington, DC 20505

23 May 2017

F-2017-01877

Dear FOIA Officer,

This is a request under the Freedom of Information Act.

Description of request: In the Report: "Senate Select Committee on Intelligence: Committee Study of the Central Intelligence Agency's Detention and Interrogation Program" reads on page 160:

"After the 14 CIA detainees arrived at the U.S. military base at Guantanamo Bay, they were housed in a separate building from other U.S. military detainees and remained under the operational control of the CIA." [*Footnote 977* - CIA Background Memo for CIA Director Visit to Guantanamo, December [redacted], 2006, entitled Guantanamo Bay High-Value Detainee Detention Facility].

I request for any and all information that relates to such "operational control" of the CIA over Guantanamo Bay detainees including but not limited to the document cited in the footnote 977.

I am willing to pay up to $100 for the processing of this request. Please inform me if the estimated fees will exceed this limit before processing my request.

I am seeking information for personal use and not for commercial use.

Thank you,

James G. Connell III
Attorney
P.O. Box 141 Cabin John, MD 20818 USA
(703) 588-0407
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Attachment: Page 160 of SSCI report

significant inaccurate statements, especially regarding the significance of information acquired from CIA detainees and the effectiveness of the CIA's interrogation techniques.[974]

(U) In the speech, the president announced the transfer of 14 detainees to Department of Defense custody at Guantanamo Bay and the submission to Congress of proposed legislation on military commissions.[975] As all other detainees in the CIA's custody had been transferred to other nations, the CIA had no detainees in its custody at the time of the speech.[976]

2. *The International Committee of the Red Cross (ICRC) Gains Access to CIA Detainees After Their Transfer to U.S. Military Custody in September 2006*

(~~TS//[redacted]//NF~~) After the 14 CIA detainees arrived at the U.S. military base at Guantanamo Bay, they were housed in a separate building from other U.S. military detainees and remained under the operational control of the CIA.[977] In October 2006, the 14 detainees were allowed meetings with the ICRC and described in detail similar stories regarding their detention, treatment, and interrogation while in CIA custody. The ICRC provided information on these claims to the CIA.[978] Acting CIA General Counsel John Rizzo emailed the CIA director and other CIA senior leaders, following a November 8, 2006, meeting with the ICRC, stating:

> "[a]s described to us, albeit in summary form, what the detainees allege actually does not sound that far removed from the reality… the ICRC, for its part, seems to find their stories largely credible, having put much stock in the fact that the story each detainee has told about his transfer, treatment and conditions of confinement was basically consistent, even though they had been incommunicado with each other throughout their detention by us."[979]

(~~TS//[redacted]//NF~~) In February 2007 the ICRC transmitted to the CIA its final report on the "Treatment of Fourteen 'High Value Detainees' in CIA Custody." The ICRC report concluded that "the ICRC clearly considers that the allegations of the fourteen include descriptions of treatment and interrogation techniques - singly or in combination - that amounted to torture and/or cruel, inhuman or degrading treatment."[980] Notwithstanding Rizzo's comments, the CIA disagreed with a number of the ICRC's findings, provided rebuttals to the ICRC in

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[974] *See* Volume I and Volume II for additional information.
[975] September 6, 2006, The White House, President Discusses Creation of Military Commissions to Try Suspected Terrorists.
[976] *See* Volume III for additional information.
[977] CIA Background Memo for CIA Director visit to Guantanamo, December [redacted], 2006, entitled Guantanamo Bay High-Value Detainee Detention Facility.
[978] Email from: [redacted], [redacted] CTC/LGL; to: John Rizzo, [redacted], [REDACTED], [redacted], [redacted], [REDACTED], [REDACTED], [REDACTED], [redacted], [REDACTED], [REDACTED]; cc: [redacted]; subject: 8 November 2006 Meeting with ICRC reps; date: November 9, 2006, at 12:25 PM.
[979] Email from: John A. Rizzo; to: Michael V. Hayden, Stephen R. Kappes, Michael J. Morell; cc: [redacted], [redacted], [REDACTED]; subject: Fw: 8 November 2006 Meeting with ICRC Reps; date: November 9, 2006, at 12:25 PM.
[980] February 14, 2007, Letter to John Rizzo, Acting General Counsel, from [redacted], International Committee of the Red Cross, [redacted]

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USCA Case #23-5118 Document #2021622 Filed: 10/12/2023 Page 65 of 552

Connell Lavv
PO BOX [redacted]
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Information & privacy Coordinator
Central Intelligence Agency
Washington, D.C. 20505

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Central Intelligence Agency

Washington, D.C. 20505

24 October 2017

James G. Connell III, Esq.
Connell Law, L.L.C.
P.O. Box 141
Cabin John, MD 20818

Reference: F-2017-01877

Dear Mr. Connell:

On 7 June 2017, the office of the Information and Privacy Coordinator received your 23 May 2017 Freedom of Information Act request **for any and all information that relates to such "operational control" of the CIA over Guantanamo Bay detainees including but not limited to the document cited in the footnote 977 [from the Senate Select Committee on Intelligence: Committee Study of the Central Intelligence Agency's Detention and Interrogation Program report].**

Our officers will review your request and will advise you should they encounter any problems or if they cannot begin the search without additional information. We have assigned your request the reference number above. Please use this number when corresponding so that we can identify it easily. In accordance with our regulations, as a matter of administrative discretion, there is no charge for processing your request. Unless you object, we will limit our search to CIA-originated records up to and including the date the Agency begins the search.

Sincerely,

Allison Fong
Information and Privacy Coordinator

Central Intelligence Agency

Washington, D.C. 20505

8 February 2018

James G. Connell III, Esq.
Connell Law, L.L.C.
P.O. Box 141
Cabin John, MD 20818

Reference: F-2017-01877

Dear Mr. Connell:

This is further to our 24 October 2017 letter regarding your 23 May 2017 Freedom of Information Act (FOIA) request for **any and all information that relates to such "operational control" of the CIA over Guantanamo Bay detainees including but not limited to the document cited in the footnote 977 [from the Senate Select Committee on Intelligence: Committee Study of the Central Intelligence Agency's Detention and Interrogation Program report].**

Your request as written is quite broad and cannot be searched as it lacks specificity. As set forth in the FOIA, a proper FOIA request must "reasonably describe" the records sought. Pursuant to CIA's FOIA regulations, set forth at 32 CFR Part 1900, "reasonably described" means that the records must be described sufficiently to enable professional employees familiar with the subject matter to locate responsive information with a reasonable amount of effort.

Therefore, we are reaching out for clarification regarding the scope of your request in order to understand what information you are trying to obtain. We need you to provide more details about the specifics of your request in order to assist us in understanding your request to help us in our search efforts. It would be most helpful if you could provide the aspects of operational control that interest you, as well as a specific a period of time you would like us to search. We will hold your request in abeyance for 45 days from the date of this letter pending your response.

Sincerely,

Allison Fong
Information and Privacy Coordinator

8 March 2018

MAR 19 2018

Allison Fong
Information and Privacy Coordinator
Central Intelligence Agency
Washington, DC 20505

Reference: F-2017-01877

Dear Ms. Fong:

Thank you for your letter dated 8 February 2018.

In your letter, you ask for a specific period of time. The specific period of time in which I am interested is 1 September 2006 to 31 January 2007.

In your letter, you ask for "the aspects of operational control that interest" me. In summary, I am seeking to determine what "operational control" means. By way of example and not limitation, please find following a list of possible topics. Please note that by listing these topics, I am not implying that responsive information actually exists, only that I would be interested in information if it did exist.

(1) Whether CIA "operational control" included only Camp 7 or extended to other facilities such as Echo 2;
(2) What organization had decision-making authority over Camp 7;
(3) Whether CIA "operational control" ended before or after 31 January 2007;
(4) Whether the "operational control" involved CIA personnel, whether employees or contractors;
(5) Any detainee records maintained by the CIA during the period of "operational control," such as Detainee Inmate Management System records or the equivalent;
(6) How other agencies would obtain access to detainees during the period of "operational control, such as a Memorandum of Understanding with the Federal Bureau of Investigation or Criminal Investigative Task Force;
(7) How the facilities transitioned from CIA "operational control" to DOD "operational control."

The document cited at footnote 977 of the SSCI report, which I specifically requested, is "CIA Background Memo for CIA Director visit to Guantanamo, December 2006, entitled Guantanamo Bay High-Value Detainee Detention Facility." I am already aware of Document 6541712, the Memorandum of Understanding between the Department of Defense and the CIA regarding detention at Guantanamo Bay.

Please provide the responsive documents at your earliest convenience.

Best regards,

James G. Connell, III

James G Connell
Connell Law
PO Box 141
Cabin John, MD
20818

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Allison Fong
Information & Privacy Coordinator
Central Intelligence Agency
Washington, DC 20505

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Central Intelligence Agency

Washington, D.C. 20505

4 May 2018

James G. Connell III, Esq.
Connell Law, L.L.C.
P.O. Box 141
Cabin John, MD 20818

Reference: F-2017-01877

Dear Mr. Connell:

This acknowledges receipt of your 8 March 2018 letter, received in the office of the Information and Privacy Coordinator on 19 March 2018, in response to our 8 February 2018 letter concerning your 23 May 2017 Freedom of Information Act request for **any and all information that relates to such "operational control" of the CIA over Guantanamo Bay detainees including but not limited to the document cited in the footnote 977 [from the Senate Select Committee on Intelligence: Committee Study of the Central Intelligence Agency's Detention and Interrogation Program report].** We advised you in our 8 February 2018 letter that your request as written is broad and cannot be searched as it lacks specificity. You are now seeking to determine what "operational control" means. By way of example and not limitation, you refer to a list of the following topics. You ask us to note that by listing these topics, you are not implying that responsive information actually exists, only that you would be interested in information if it did exist. You have amended your request to cover the date range from 1 September 2006 to 31 January 2007 for documents on the following subjects:

1. **Whether CIA "operational control" included only Camp 7 or extended to other facilities such as Echo 2;**

2. **What organization had decision-making authority over Camp 7;**

3. **Whether CIA "operational control" ended before or after 31 January 2007;**

4. **Whether the "operational control" involved CIA personnel, whether employees or contractors;**

5. **Any detainee records maintained by the CIA during the period of "operational control," such as Detainee Inmate Management System records or the equivalent;**

6. **How other agencies would obtain access to detainees during the period of "operational control, such as a Memorandum of Understanding with the Federal Bureau of Investigation or Criminal Investigative Task Force";**

7. **How the facilities transitioned from CIA "operational control" to DOD "operational control."**

You advise that the document cited at footnote 977 of the SSCI report, which you specifically requested, is "CIA Background Memo for CIA Director visit to Guantanamo, December 2006, entitled Guantanamo Bay High-Value Detainee Detention Facility." [You] are already aware of Document 6541712, the Memorandum of Understanding between the Department of Defense and the CIA regarding detention at Guantanamo Bay.

Our officers will continue to review your request and will advise you should they encounter any problems or if they cannot begin the search without additional information. In accordance with our regulations, as a matter of administrative discretion, the Agency has waived the fees for this request. Unless you object, we will limit our search to CIA-originated records up to and including the date the Agency begins the search.

Sincerely,

Allison Fong
Information and Privacy Coordinator

Central Intelligence Agency

Washington, D.C. 20505

29 September 2020

James G. Connell III, Esq.
Connell Law, L.L.C.
P.O. Box 141
Cabin John, MD 20818

Reference: F-2017-01877

Dear Mr. Connell:

This letter is a final response to your 23 May 2017 Freedom of Information Act request for **any and all information that relates to such "operational control" of the CIA over Guantanamo Bay detainees including but not limited to the document cited in the footnote 977 [from the Senate Select Committee on Intelligence: Committee Study of the Central Intelligence Agency's Detention and Interrogation Program report].** On 8 March 2018 you have amended your request to cover the date range from 1 September 2006 to 31 January 2007 for documents on the following subjects:

1. **Whether CIA "operational control" included only Camp 7 or extended to other facilities such as Echo 2;**
2. **What organization had decision-making authority over Camp 7;**
3. **Whether CIA "operational control" ended before or after 31 January 2007;**
4. **Whether the "operational control" involved CIA personnel, whether employees or contractors;**
5. **Any detainee records maintained by the CIA during the period of "operational control," such as Detainee Inmate Management System records or the equivalent;**
6. **How other agencies would obtain access to detainees during the period of "operational control, such as a Memorandum of Understanding with the Federal Bureau of Investigation or Criminal Investigative Task Force";**
7. **How the facilities transitioned from CIA "operational control" to DOD "operational control."**

We processed your request in accordance with the FOIA, 5 U.S.C. § 552, as amended, and the CIA Information Act, 50 U.S.C. § 3141, as amended. We completed a thorough search for records responsive to your request and located the enclosed document, consisting of three pages. Please note that this document was previously released in conjunction with this or other release programs.

With respect to any other records, in accordance with Section 3.6(a) of Executive Order 13526, the CIA can neither confirm nor deny the existence or nonexistence of records responsive to your request. The fact of the existence or nonexistence of such records is itself currently and properly classified and is intelligence sources and methods information protected from disclosure by

Section 6 of the CIA Act of 1949, as amended, and Section 102A(i)(l) of the National Security Act of 1947, as amended. Therefore, your request is denied pursuant to FOIA exemptions (b)(1) and (b)(3).

As the CIA Information and Privacy Coordinator, I am the CIA official responsible for this determination. You have the right to appeal this response to the Agency Release Panel, in my care, within 90 days from the date of this letter. Please include the basis of your appeal.

Please be advised that you may seek dispute resolution services from the CIA's FOIA Public Liaison or from the Office of Government Information Services (OGIS) of the National Archives and Records Administration. OGIS offers mediation services to help resolve disputes between FOIA requesters and Federal agencies. Please note, contacting CIA's FOIA Public Liaison or OGIS does not affect your right to pursue an administrative appeal.

To contact **CIA** directly or to appeal the CIA's response to the Agency Release Panel:	To contact the **Office of Government Information Services (OGIS)** for mediation or with questions:
Information and Privacy Coordinator Central Intelligence Agency Washington, DC 20505 (703) 613-3007 (Fax) (703) 613-1287 (CIA FOIA Public Liaison / FOIA Hotline)	Office of Government Information Services National Archives and Records Administration 8601 Adelphi Road – OGIS College Park, MD 20740-6001 (202) 741-5770 (877) 864-6448 (202) 741-5769 (Fax) / ogis@nara.gov

If you have any questions regarding our response, you may contact the CIA's FOIA Hotline at (703) 613-1287.

Sincerely,

Mark Lilly
Information and Privacy Coordinator

Enclosure

17 December 2020

James G. Connell, III
PO Box #141
Cabin John, MD 20818-0414
Tel: (703) 588-0407
jconnell@connell-law.com

DEC 29 2020

Agency Release Panel
c/o Mark Lilly
Information and Privacy Coordinator
Central Intelligence Agency
Washington, D.C. 20505

Reference: F-2017-01877

To the Agency Release Panel of the Central Intelligence Agency,

This letter constitutes an administrative appeal under the Freedom of Information Act (referred to as "FOIA") regarding F-2017-01877. This appeal is timely submitted within the 90-day period established by your denial letter of 29 September 2020.

At page 160 (189 of the PDF) of the 9 December 2014 SSCI report titled *Committee Study of the Central Intelligence Agency's Detention and Interrogation Program* (referred to as the "SSCI Report") the Agency officially released the following information: "After the 14 CIA detainees arrived at the U.S. military base at Guantanamo Bay, they were housed in a separate building from other U.S. military detainees and remained under the operational control of the CIA.[977]" Footnote 977 referenced a "CIA Background Memo for CIA Director visit to Guantanamo, December [21], 2006, entitled Guantanamo Bay High-Value Detainee Detention Facility." In your 29 September 2020 letter, you released this memo claiming exemption 1 and 3 under the Freedom of Information Act. Under Executive Order 13526, Section 3.6(a) you then neither confirm nor deny the existence or nonexistence of records in bad faith. This document specifically references the "fourteen high-value detainees" in "attachment A" which includes "their names and background information." This information has already been released as unclassified within the SSCI Report and is specifically provided by footnote 982.

At the very least, the SSCI Report and related public sourced documents shows the existence of operational control with documentation between the dates of 1 September 2006 and 31 January 2007. *See* SSCI Report footnote 41 (page 29 of the PDF), 978 (page 189 of the PDF), 981 (page 190 of the PDF). I am also already aware of Document 6541712, the Memorandum of Understanding between the Department of Defense and the CIA regarding detention at Guantanamo Bay. Along with the SSCI Report, there has already be a public acknowledgement of CIAs operational control over Guantanamo Bay, and specifically during the time period requested. *See President Discusses Creation of Military Commissions to Try Suspected Terrorists*, Sep. 6, 2006; *ACLU v. CIA*, 710 F.3d 422 (D.D. Cir. 2013); and *Afshar*, 702 F.2d at 1133 (D.D. Cir. 1983). The Agency should be able to provide additional information that qualifies as "reasonably segregable portion of a record" under 10 U.S.C. § 552(b) as declassified material. *See, e.g., Mead Data Cent., Inc. v. Dep't of the Air Force*, 556 F.2d 242, 260 (D.C. Cir. 1977).

In regards to the seven subjects requested in my 8 March 2018 letter, you have claimed that this material is exempt under FOIA, 5 U.S.C. § 552 and the CIA Information Act, 50 U.S.C. § 3141. The material that I am requesting is the specific subject matter under the SSCI Report, which has been provided by the CIA in such cases this year like *Porup v. CIA,* 2020 U.S. Dist. LEXIS 44963 (D.D. Cir. 2020). The SSCI Report states that the "Committee Study documents the abuses and countless mistakes made between late 2001 and early 2009" and "describes the history of the CIA's Detention and Interrogation Program" to include "a review of each of the 119 known individuals who were held in CIA custody." *SSCI Report* at pages 6-7 of the PDF. Clearly this expansive investigation "require that the CIA search and review its information produced or gathered "concerning... the specific subject matter" of the investigation... under FOIA," which is mandated under the CIA Information Act's subsection (3)(c), 50 U.S.C. § 3141(c)(3). *ACLU v. DOD*, 351 F. Supp. 2d 265, 365 (S.D.N.Y., Feb 2, 2005); *See also Talbot v. CIA*, 315 F. Supp. 3d at 370 (D.D. Cir. 2018); and *Morley v. C.I.A.*, 508 F.3d 1108, 1116, 378 U.S. App. D.C. 411 (D.C. Cir. 2007).

Nor is this material also exempt from production under Section 102(A)(i)(I) of the National Security Act of 1947. The information that I am attempting to obtain is in regards to the Central Intelligence Agency's Detention and Interrogation Program, which has been prohibited by the President. These sources and methods the CIA sought to shield no longer fall within the Agency's mandate. With the elimination of this program, and the passage of time, exemption 1 as it currently stands is not applicable, as the information requested should have portions that are not harmful to national security if released, nor unsegragable from properly classified information. Under Executive Order 13526, Section 1.5(b), there should also exist information as originally classified that is now declassified within the standard 10-year declassification period.

Thank you for your consideration on this appeal. We look forward to hearing from you soon.

Best Regards,

/s/
James G. Connell, III

Hand Opened and Inspected
DEC 22 2020

To: Agency Release Panel
c/o Mark Gilly
Information and Privacy Coordinator
Central Intelligence Agency
Washington, DC 20505

20505-

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From: James G. Connell, III
P.O. Box 141
Lobin MD 20848

Central Intelligence Agency

Washington, D.C. 20505

15 July 2021

James G. Connell III, Esq.
Connell Law, L.L.C.
P.O. Box 141
Cabin John, MD 20818

Re: F-2017-01877; 21-cv-00627

Dear Mr. Connell:

This letter is a final response to your Freedom of Information Act (FOIA) request that was received on 23 May 2017 and revised on 8 March 2018 for records pertaining to:

1) Whether CIA "operational control" included only Camp 7 or extended to other facilities such as Echo 2;
2) What organization had decision-making authority over Camp 7;
3) Whether CIA "operational control" ended before or after 31 January 2007;
4) Whether the "operational control" involved CIA personnel, whether employees or contractors
5) Any detainee records maintained by the CIA during the period of "operational control," such as Detainee Inmate Management System records or the equivalent;
6) How other agencies would obtain access to detainees during the period of "operational control", such as a Memorandum of Understanding with the Federal Bureau of Investigation or Criminal Investigative Task Force;
7) How the facilities transitioned from CIA "operational control" to DOD "operational control."

We processed the request in accordance with the FOIA, 5 U.S.C. § 552, as amended, and the CIA Information Act, 50 U.S.C. § 3141, as amended.

We completed a thorough search for records that would reveal an unclassified or openly acknowledged association between the Agency and the subject of your request, and located two (2) documents, which we can release in segregable form with redactions made on the basis of FOIA exemptions (b)(1), (b)(3), (b)(5) and (b)(6). In addition, it has been determined that one (1) document must be denied in its entirety on the basis of FOIA exemptions (b)(1), (b)(3), and (b)(5). Exemption (b)(3) pertains to information exempt from disclosure by statute. The relevant statutes are Section 6 of the Central Intelligence Agency Act of 1949, 50 U.S.C. § 3507, as amended, and Section 102A(i)(l) of the National Security Act of 1947, 50 U.S.C § 3024(i)(1), as amended.

In accordance with section 3.6(a) of Executive Order 13526, as amended, the CIA can neither confirm nor deny the existence or nonexistence of records that may reveal a classified connection between the Agency and the subject of your request. The fact of the existence or nonexistence of such records is itself currently and properly classified and relates to CIA intelligence sources and methods information that is protected from disclosure pursuant to FOIA exemptions (b)(1) and (b)(3). Exemption (b)(3) pertains to information exempt from disclosure by statute. In this case the relevant statutes are Section 6 of the CIA Act of 1949, 50 U.S.C. § 3507, as amended, and Section 102A(i)(l) of the National Security Act of 1947, 50 U.S.C § 3024(i)(1), as amended.

This concludes our response to the above referenced request.

Sincerely,

Mark Lilly
Information and Privacy Coordinator

F-2017-01877; 21-cv-00627

15 July 2021

RIPPUB:
C06902570
C06541712

DIF:
C06833121

***Connell v. CIA*, 21-0627 (D.D.C.) [FOIA Request No. F-2017-01877]**

Central Intelligence Agency *Vaughn* Index

C06833121 – DIF

- Date: unknown
- No. Pages: 34
- Exemptions Cited: (b)(1); (b)(3) (National Security Act); (b)(5)
- Description: This document consists of classified draft remarks/discussion points addressing a specific aspect of a sensitive Agency intelligence program/operation.
- Exemptions (b)(1) and (b)(3) (National Security Act) are asserted to protect certain material that is currently and properly classified under 1.4(c) of E.O. 13526 and reflects "intelligence activities (including covert action), [or] intelligence sources or methods."

  Exemption (b)(5) is asserted to protect intra-Agency pre-decisional analysis, recommendations, and deliberations among Agency personnel concerning revisions to a draft document. This document contains recommendations, assessments, and comments regarding draft language to be used in remarks. Disclosure of this document would reveal internal agency deliberations related to the preparation and revision of the draft document. The draft document also includes attorney-client privileged information protected under Exemption (b)(5)—specifically confidential legal advice from Agency attorneys regarding certain content.

Declaration of Amy Zittritsch

1. My name is Amy Zittritsch. I am over 18 years old and competent to make a declaration.

Duties as Defense Information Security Officer

2. I am employed by the United States government, Department of Defense, Military Commissions Defense Organization, as a Defense Information Security Officer (DISO). In 2014, Colonel Karen Mayberry, United States Air Force, assigned me as part of the defense team for Ammar al Baluchi in *United States v. Ammar al Baluchi*, commonly known as "the 9/11 Case." Prior to this assignment, I was employed by the United States government on other security-classification-related matters for eight years. In this declaration, I write only in my capacity as DISO and do not speak for any other element of the United States government.

3. Attorneys and others detailed to the 9/11 Case routinely work with classified information relating to the CIA former Rendition, Detention, and Interrogation Program and Camp 7. Beginning in 2012, the United States Military Commission at Naval Station Guantanamo Bay has regulated access to classified information by means of a protective order. The current applicable version of the protective order is AE013BBBB *Third Amended* Protective Order #1 to Protect Against Disclosure of National Security Information (hereinafter PO#1) (Attachment A).

4. As defined in PO#1, "The term 'Defense Information Security Officer' (DISO) refers to a security officer, serving as information security advisor to the Defense, who oversees information security provisions pertaining to the filing of motions, response, replies, and other documents with the Commission." PO#1 requires DISOs to fulfill the following duties: "(1) Assist the Defense with applying classification guides, including reviewing pleadings and other papers prepared by the defense to ensure they are unclassified or properly marked as classified. (2) Assist the Defense in performing their duty to apply derivative classification markings pursuant to E.O. 13526 § 2.1 (b). (3) Ensure compliance with the provisions of any Protective Order."

5. As part of these duties, I maintain a reference collection of all classification guidance given to Mr. al Baluchi's defense team since the inception of the case in 2011. I also review public sources of information, including disclosures under Freedom of Information Act, Mandatory Declassification Review,

military commission public release, and other release procedures, relating to Guantanamo Bay and the former CIA Rendition, Detention, and Interrogation Program. As part of my duties, I routinely discuss the provenance and classification of specific items of information with attorneys and Court Information Security Officers (CISOs) as part of the process of determining proper derivative classification markings. I am not an Original Classification Authority.

6. As part of my duties, I monitor the security clearance of members of the team to which I am detailed. I am advised by competent authorities that James G. Connell, III, Alka Pradhan, and I all hold TOP SECRET//SECURE COMPARTMENTED INFORMATION clearances with additional tickets. To the best of my understanding and belief, no statement in this declaration reveals classified information.

Release of the redacted Executive Summary

7. On 9 December 2014, the United States released a declassified, redacted Executive Summary of the Senate Select Committee on Intelligence Committee Study of the Central Intelligence Agency's Rendition and Detention Program (hereinafter "redacted Executive Summary"). Among other information, the redacted Executive Summary contained the following declassified information regarding CIA detention operations at Naval Station Guantanamo Bay (Attachment B).

Page 12:

(~~TS//~~[redacted]~~//NF~~) In early November 2001, CIA Headquarters further determined that any future CIA detention facility would have to meet U.S. prison standards and that CIA detention and interrogation operations should be tailored to "meet the requirements of U.S. law and the federal rules of criminal procedure," adding that "[s]pecific methods of interrogation w[ould] be permissible so long as they generally comport with commonly accepted practices deemed lawful by U.S. courts."[14] The CIA's search for detention site locations was then put on hold and an internal memorandum from senior CIA officials explained that detention at a U.S. military base outside of the United States was the "best option."[15] The memorandum thus urged the DCI to "[p]ress DOD and the US military, at highest levels, to have the US Military agree to host a long-term facility, and have them identify an agreeable location," specifically requesting that the DCI "[s]eek to have the US Naval Base at Guantanamo Bay designated as a long-term detention facility."[16]

[14] November 7, 2001, Draft of Legal Appendix, "Handling Interrogation." *See also* Volume I.
[15] Memorandum for DCI from J. Cofer Black, Director of Counterterrorism, via Deputy Director of Central Intelligence, General Counsel, Executive Director, Deputy Director for Operations and Associate Director of Central Intelligence/Military Support, entitled, "Approval to Establish a Detention Facility for Terrorists."
[16] Memorandum for DCI from J. Cofer Black, Director of Counterterrorism, via Deputy Director of Central Intelligence, General Counsel, Executive Director, Deputy Director for Operations and Associate Director of Central Intelligence/Military Support, entitled, "Approval to Establish a Detention Facility for Terrorists."
[17] Memorandum for DCI from J. Cofer Black, Director of Counterterrorism, via Deputy Director of Central Intelligence, General Counsel, Executive Director, Deputy Director for Operations and Associate Director of Central Intelligence/Military Support, entitled, "Approval to Establish a Detention Facility for Terrorists."
[18] Memorandum for DCI from J. Cofer Black, Director of Counterterrorism, via Deputy Director of Central Intelligence, General Counsel, Executive Director, Deputy Director for Operations and Associate Director of Central Intelligence/Military Support, entitled, "Approval to Establish a Detention Facility for Terrorists."

Page 80:

On September 5, 2006, bin al-Shibh was transferred to U.S. military custody at Guantanamo Bay, Cuba.[427] After his arrival, bin al-Shibh was placed on anti-psychotic medications.[428]

[427] HEADQUARTERS [redacted] (031945Z SEP 06)
[428] [redacted] SITE DAILY REPORT - 24 MAY 07; [redacted] 8904 (182103Z APR 08)

Pages 140-41:

9. *U.S. Supreme Court Action in the Case of Rasul v. Bush Forces Transfer of CIA Detainees from Guantanamo Bay to Country* [redacted]

(~~TS//~~[redacted]~~//NF~~) Beginning in September 2003, the CIA held a number of detainees at CIA facilities on the grounds of, but separate from, the U.S. military detention facilities at Guantanamo Bay, Cuba.[848] In early January 2004, the CIA and the Department of Justice began discussing the possibility that a pending U.S. Supreme Court case, *Rasul v. Bush,* might grant *habeas corpus* rights to the five CIA detainees then being held at a CIA detention facility at

Guantanamo Bay.[849] Shortly after these discussions, CIA officers approached the [redacted] in Country [redacted] to determine if it would again be willing to host these CIA detainees, who would remain in CIA custody within an already existing Country [redacted] facility.[850] By January [redacted], 2004, the [redacted] in Country [redacted] had agreed to this arrangement for a limited period of time.[851]

(~~TS//~~[redacted]~~//NF~~) Meanwhile, CIA General Counsel Scott Muller asked the Department of Justice, the National Security Council, and the White House Counsel for advice on whether the five CIA detainees being held at Guantanamo Bay should remain at Guantanamo Bay or be moved pending the Supreme Court's decision.[852] After consultation with the U.S. solicitor general in February 2004, the Department of Justice recommended that the CIA move four detainees out of a CIA detention facility at Guantanamo Bay pending the Supreme Court's resolution of the case.[853] The Department of Justice concluded that a fifth detainee, Ibn Shaykh al-Libi, did not need to be transferred because he had originally been detained under military authority and had been declared to the ICRC.[854] Nonetheless, by April [redacted], 2004, all five CIA detainees were transferred from Guantanamo Bay to other CIA detention facilities.[855]

[848] April [redacted], 2003, Memorandum for Director, DCI Counterterrorist Center, from [redacted], Chief Renditions and Detainees Group, via [redacted], Counterterrorist Center, Chief of Operations, [redacted], Chief, [redacted], Subject: Request to Relocate High-Value Detainees to an Interim Detention Facility at Guantanamo. *See also* DIRECTOR [redacted]. CIA detainees were held at two facilities at Guantanamo Bay, DETENTION SITE MAROON and DETENTION SITE INDIGO. (*See* Quarterly Review of Confinement Conditions for CIA Detainees, Coverage Period: [redacted]) A third CIA detention facility, DETENTION SITE RED [redacted]. *See* 3897 [redacted]; 3445 [redacted]; 9754 [redacted]; 8405 [redacted]; 8408 [redacted]; and September 1, 2006, Memorandum of Agreement Between the Department of Defense (DOD) and the Central Intelligence Agency (CIA) Concerning the Detention by DOD of Certain Terrorists at a Facility at Guantanamo Bay Naval Station.

[849] Email from: Scott W. Muller; to: [redacted], [REDACTED]; cc: [REDACTED]; subject: Detainees in Gitmo; date: January [redacted], 2004.

[850] *See* HEADQUARTERS [redacted], [REDACTED] 1845 [redacted]. The CIA's long-term facility in Country [redacted], which the CIA Station in Country [redacted] had warned was a drain on the Station's resources, had not yet been completed. *See* [REDACTED] 1785 [redacted].

[851] [REDACTED] 1679 [redacted]

[852] Email from: Scott Muller; to: James Pavitt, [redacted]; cc: George Tenet, John McLaughlin, [REDACTED], [REDACTED], [redacted], [REDACTED], [redacted]; subject: CIA Detainees at GITMO; date: February [redacted], 2004.

[853] Email from: Scott Muller; to: James Pavitt, [redacted]; cc: George Tenet, John McLaughlin, [REDACTED], [REDACTED], [redacted], [REDACTED], [redacted]; subject: CIA Detainees at GITMO; date: February [redacted], 2004.

[854] Email from: Scott Muller; to: James Pavitt, [redacted]; cc: George Tenet, John McLaughlin, [REDACTED], [REDACTED], [redacted], [REDACTED], [redacted]; subject: CIA Detainees at GITMO; date: February [redacted], 2004. [redacted]. *See* 10255 [redacted]; ALEC [redacted]; 13698 [redacted]; ALEC [redacted].

[855] [redacted] 1672 [redacted]; [redacted] 1674 [redacted]; [REDACTED] 1898 [redacted]

Page 160:

(~~TS//~~[redacted]~~//NF~~) After the 14 CIA detainees arrived at the U.S. military base at Guantanamo Bay, they were housed in a separate building from other U.S. military detainees and remained under the operational control of the CIA.[977]

[977] CIA Background Memo for CIA Director visit to Guantanamo, December [redacted], 2006, entitled Guantanamo Bay High-Value Detainee Detention Facility.

Page 440:

On more than one occasion the CIA directed CIA personnel at Guantanamo Bay, Cuba, not to brief a visiting Committee member about the CIA detention facility there, including during a July 2005 visit by Chairman Roberts.[2467]

[2467] Because the Committee was not informed of the CIA detention site at Guantanamo Bay, Cuba, no member of the Committee was aware that the U.S. Supreme Court decision to grant certiorari in the case of *Rasul v. Bush*, which related to the *habeas corpus* rights of detainees at Guantanamo Bay, resulted in the transfer of CIA detainees from the CIA detention facility at Guantanamo Bay to other CIA detention facilities. *See* HEADQUARTERS [redacted], subject "RESTRICTED ACCESS TO [DETENTION SITE COBALT] AND [DETENTION SITE ORANGE]"; email from: [redacted]; to [redacted]; cc: Jose Rodriguez, [REDACTED], [redacted], [REDACTED], [redacted], [REDACTED], [REDACTED]; subject: guidance to [redacted]gitmo; date: May 14, 2004; forwarding final cable: HEADQUARTERS [redacted] (141502Z MAY 04), subject "Possible Brief to US Senator"; email from: Stanley Moskowitz; to: [REDACTED]; cc: [REDACTED]; subject: Re: guidance to [redacted]gitmo; date: May 14, 2004; CIA responses to Questions for the Record, March 13, 2008 (DTS #2008-1310); "CODEL Roberts to Miami/Guantanamo, 7-8 July 2005," dated 5 July, [redacted] 902860.

Impact of the redacted Executive Summary release

8. Throughout the 9/11 Case, the Office of the Chief Prosecutor (OCP) has represented the interests on the CIA and all other government departments and agencies. Despite regular disputes over CIA equities in the military commission, CIA has never sent an attorney separate from OCP to represent their interests. In particular, OCP has regularly represented the interests of CIA in legal proceedings regarding the production of CIA documents in discovery.

9. On 12 December 2014, the military commission in the 9/11 Case ordered OCP to update Protective Order #1 in light of changed classification policy reflected in the redacted Executive Summary.

10. On 30 January 2015, the 9/11 case prosecution filed a motion to amend the protective order in light of new classification policy (Attachment C). Among other changes, the amendment (reflected in the current Protective Order #1, Attachment A) provided that the following information was no longer classified:

- ~~(U//FOUO)~~ Information regarding the conditions of confinement as applied to the 119 individuals mentioned in Appendix 2 of the SSCI Executive Summary acknowledged to have been in CIA custody.

11. The five defendants in the 9/11 Case are included in the 119 individuals mentioned in Appendix 2 of the SSCI Executive Summary acknowledged to have been in CIA custody.

Classification guidance on Camp 7

12. Based on my experience and training on security classification matters, I am aware of a difference between a classification guide and classification guidance. As defined in Executive Order 13,526 § 6.1(h), "'Classification guide' means a documentary form of classification guidance issued by an original classification authority that identifies the elements of information regarding a specific subject that must be classified and establishes the level and duration of classification for each such element." As defined in § 6.1(g), "'Classification guidance' means any instruction or source that prescribes the classification of specific information."

13. In the 9/11 Case, the United States government has not provided, and I have never reviewed, a classification guide regarding CIA operational control over Camp 7.

14. The United States has, however, provided written classification guidance over various matters in the case, including CIA operational control over Camp 7. An unclassified paragraph of the current written classification guidance provides that while the statement regarding operational control on page 160 of the redacted Executive Summary is unclassified, specifics of the operational control are classified. Neither this paragraph nor any classification guidance to which I have access states that the existence of specifics regarding CIA operational control of Camp 7 (as opposed to the specifics themselves) is classified. Indeed, the classification guidance regarding the classification of specifics is itself unclassified.

Documents for public release

15. In the course of my duties, I have come to understand the role of Original Classification Authority security classification review in the process for public release of military commission documents.

16. With respect to filings and orders other than transcripts, counsel and the military judge have a duty to prepare the document on a computer network of the appropriate classification. CISOs, DISOs, and other security professionals are available to advise counsel or the military judge as to the appropriate system, and such advice to defense counsel is a regular part of my duties.

17. After the preparation of an order or filing of a pleading, the CISO examines the document and, if necessary, forwards it for classification review. Under Regulation for Trial by Military Commission § 17-1(c)(3)(A), "The DoD Security Classification/Declassification Review team or appropriate non-DoD federal

department and agency original classification authority shall review and make appropriate redactions as necessary to render the material suitable for public posting." I have consulted with CISOs on many occasions in the course of this process. The classification review process for pleadings and orders can take weeks, months, or even years.

18. Unofficial transcripts—which are separate from the official court record—are prepared by stenographers and forwarded to appropriate Original Classification Authorities (OCAs) for review. The classification review process for unofficial transcripts is faster than for pleadings and orders, although on occasion can take a week or more. The Office of Military Commissions has released slides explaining this process (Attachment D).

19. The public release of filings, orders, and unofficial transcripts only comes after classification review by appropriate OCAs. For this reason, DISOs, counsel, media, and others routinely rely on public release of filings, orders, and unofficial transcripts as official acknowledgement that the unredacted information contained therein is unclassified.

20. Under U.S.C. § 1746, I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on April 27, 2022.

Attachment A

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 013BBBB** ***Third Amended*** **PROTECTIVE ORDER #1** **To Protect Against Disclosure of National Security Information** 6 July 2015

Upon consideration of the submissions regarding the Government's motion for a protective order to protect classified information in this case the Commission finds: this case involves classified national security information, including TOP SECRET / SENSITIVE COMPARTMENTED INFORMATION (SCI), the disclosure of which would be detrimental to national security; the storage, handling, and control of which requires special security precautions; and the access to which requires a security clearance and a need-to-know. Accordingly, pursuant to authority granted under 10 U.S.C. § 949 p-1 to p-7, Rules for Military Commissions (R.M.C.) 701 and 806, Military Commissions Rule of Evidence (M.C.R.E.) 505, Department of Defense Regulation for Trial by Military Commissions (2011) §17-3, and the general judicial authority of the Commission, in order to protect the national security, and for good cause shown, the following Protective Order is entered.

1. SCOPE

a. This Protective Order establishes procedures applicable to all persons who have access to or come into possession of classified documents or information in connection with this case,

regardless of the means by which the persons obtained the classified information. These procedures apply to all aspects of pre-trial, trial, and post-trial stages in this case, including any appeals, subject to modification by further order of the Commission or orders issued by a court of competent jurisdiction.

b. This Protective Order applies to all information, documents, testimony, and material associated with this case that contain classified information, including but not limited to any classified pleadings, written discovery, expert reports, transcripts, notes, summaries, or any other material that contains, describes, or reflects classified information.

c. Counsel are responsible for advising their clients, translators, witnesses, experts, consultants, support staff, and all others involved with the defense or prosecution of this case, respectively, of the contents of this Protective Order.

2. DEFINITIONS

a. As used in this Protective Order, the term "Court Information Security Officer (CISO)" and "Assistant Court Information Security Officer (**AC**ISO)" refer to security officers, appointed by the Military Judge, to serve as the information security advisor to the judge, to oversee information security provisions pertaining to the filing of motions, responses, replies, and other documents with the Commission, and to manage information security during sessions of the Commission. The CISO and ACISO will be administered an oath IAW Rule 10, Military Commissions Rules of Court (5 May 2014).

b. The term "Chief Security Officer, Office of Special Security" refers to the official within the Washington Headquarters Service responsible for all security requirements and missions of the Office of Military Commissions and to any assistants.

c. The term "Defense" includes any counsel for an accused in this case and any employees, contractors, investigators, paralegals, experts, translators, support staff, Defense Information Security Officer, or other persons working on the behalf of an Accused or his counsel in this case.

d. The term "Defense Information Security Officer" (DISO) refers to a security officer, serving as information security advisor to the Defense, who oversees information security provisions pertaining to the filing of motions, response, replies, and other documents with the Commission.

e. The term "Government" includes any counsel for the United States in this case and any employees, contractors, investigators, paralegals, experts, translators, support staff or other persons working on the behalf of the United States or its counsel in this case.

f. The words "documents" and "information" include, but are not limited to, all written or printed matter of any kind, formal or informal, including originals, conforming and non-conforming copies, whether different from the original by reason of notation made on such copies or otherwise, and further include, but are not limited to:

(1) papers, correspondence, memoranda, notes, letters, cables, reports, summaries, photographs, maps, charts, graphs, inter-office and intra-office communications, notations of any sort concerning conversations, meetings, or other communications, bulletins, teletypes, telegrams, facsimiles, invoices, worksheets, and drafts, alterations, modifications, changes, and amendments of any kind to the foregoing;

(2) graphic or oral records or representations of any kind, including, but not limited to: photographs, maps, charts, graphs, microfiche, microfilm, videotapes, and sound or motion picture recordings of any kind;

(3) electronic, mechanical, or electric records of any kind, including, but not limited to: tapes, cassettes, disks, recordings, electronic mail, instant messages, films, typewriter ribbons, word processing or other computer tapes, disks or portable storage devices, and all manner of electronic data processing storage; and

(4) information acquired orally.

g. The terms "classified national security information and/or documents," "classified information," and "classified documents" include:

(1) any classified document or information that was classified by any Executive Branch agency in the interests of national security or pursuant to Executive Order, including Executive Order 13526, as amended, or its predecessor Orders, as "CONFIDENTIAL," "SECRET," "TOP SECRET," or any information controlled as "SENSITIVE COMPARTMENTED INFORMATION (SCI);"

(2) any document or information, regardless of its physical form or characteristics, now or formerly in the possession of a private party that was derived from United States Government information that was classified, regardless of whether such document or information has subsequently been classified by the Government pursuant to Executive Order, including Executive Order 13526, as amended, or its predecessor Orders, as "CONFIDENTIAL," "SECRET," "TOP SECRET," or additionally controlled as "SENSITIVE COMPARTMENTED INFORMATION (SCI)";

(3) verbal or non-documentary classified information known to the Defense;

(4) any document or information as to which the Defense has been notified orally or in writing that such document or information contains classified information, including, but not limited to the following:

(a) Information that would reveal or tend to reveal details surrounding the capture of an accused other than the location and date;

(b) Information that would reveal or tend to reveal the foreign countries in which: Khalid Shaikh Mohammad and Mustafa Ahmed Adam al Hawsawi were detained from the time of their capture on or about 1 March 2003 through 6 September 2006; Walid Muhammad Salih Bin 'Attash and Ali Abdul Aziz Ali were detained from the time of their capture on or about 29 April 2003 through 6 September 2006; and Ramzi Bin al Shibh was detained from the time of his capture on or around 11 September 2002 through 6 September 2006; *and*

(c) The names, identities, and physical descriptions of any persons involved with the capture, transfer, detention, or interrogation of an accused or specific dates regarding the same, from on or around the aforementioned capture dates through 6 September 2006.

The Original Classification Authority (OCA) has provided additional classification guidance (Attachment B (classified), AE 013RRR, Classification Guidance for Information About the Central Intelligence Agency's Former Rendition, Detention and Interrogation Program) which is hereby incorporated in this Order.

(5) any document or information obtained from or related to a foreign government or dealing with matters of U.S. foreign policy, intelligence, or military operations, which is known to be closely held and potentially damaging to the national security of the United States or its allies.

(6) The terms "classified national security information and/or documents," "classified information," and "classified documents" do not include documents or information officially declassified by the United States by the appropriate (OCA).

h. "National Security" means the national defense and foreign relations of the United States.

i. "Access to classified information" means having authorized access to review, read, learn, or otherwise come to know classified information.

j. "Secure area" means a physical facility accredited or approved for the storage, handling, and control of classified information.

k. "Unauthorized disclosure of classified information" means any knowing, willful, or negligent action that could reasonably be expected to result in a communication or physical transfer of classified information to an unauthorized recipient. Confirming or denying information, including its very existence where the very existence of the information is classified, constitutes disclosing that information.

3. COURT INFORMATION SECURITY OFFICER

a. A Court Information Security Officer (CISO) and Assistant Court Information Security Officer(s) (ACISO) for this case have been designated by the Military Judge.

b. The CISO and any ACISO are officers of the court. *Ex parte* communication by a party in a case, to include the Office of Military Commissions, DoD General Counsel, or any intelligence or law enforcement agency, with the CISO/ASICO is prohibited except as authorized by the M.C.A. or the Manual for Military Commissions (M.M.C.). This is to preclude any actual or perceived attempt to improperly influence the Commission in violation of 10

U.S.C. §949b. This does not include administrative matters necessary for the management of the security responsibilities of the Office of Trial Judiciary.

c. The CISO/ACISO shall ensure that all classified or protected information is appropriately safeguarded at all times during Commission proceedings and that only personnel with the appropriate clearances and authorizations are present when classified or protected evidence is presented before Military Commissions.

d. The CISO shall consult with the OCA of classified documents or information, as necessary, to address classification decisions or other related issues.

4. **DEFENSE INFORMATION SECURITY OFFICER**

a**.** Upon request of Defense Counsel for an accused, the Convening Authority shall provide a Defense Information Security Officer (DISO) for the defendant.

b. The DISO is, for limited purposes associated with this case, a member of the Defense Team, and therefore shall not disclose to any person any information provided by the Defense, other than information provided in a filing with the Military Commission. In accordance with M.C.R.E. 502, the *DISO* shall not reveal to any person the content of any conversations he hears by or among the defense, nor reveal the nature of documents being reviewed by them or the work generated by them, except as necessary to report violations of classified handling or dissemination regulations or any Protective Order issued in this case, to the Chief Security Officer, Office of Special Security. Additionally, the presence of the DISO, who has been appointed as a member of the Defense Team, shall not be construed to waive, limit, or otherwise render inapplicable the attorney-client privilege or work product protections.

c. The DISO shall perform the following duties:

(1) Assist the Defense with applying classification guides, including reviewing pleadings and other papers prepared by the defense to ensure they are unclassified or properly marked as classified.

(2) Assist the Defense in performing their duty to apply derivative classification markings pursuant to E.O. 13526 §2.1(b).

(3) Ensure compliance with the provisions of any Protective Order.

d. To the fullest extent possible, the classification review procedure must preserve the lawyer-client and other related legally-recognized privileges.

(1) The Defense may submit documents to the Chief Security Officer, Office of Special Security with a request for classification review. If the Defense claims privilege for a document submitted for classification review, the defense shall banner-mark the document "PRIVILEGED."

(2) The Chief Security Officer, Office of Special Security, shall consult with the appropriate OCA to obtain classification review of documents submitted for that purpose. The Chief Security Officer, Office of Special Security, shall not disclose to any other entity any information provided by a DISO, including any component of the Office of Military Commissions, except that the entity may inform the military judge of any information that presents a current threat to loss of life or presents an immediate safety issue in the detention facility. This does not include administrative matters necessary for the management of the security responsibilities of the Office of Military Commissions.

(3) Submission of documents for classification review shall not be construed to waive, limit, or otherwise render inapplicable the attorney-client privilege or work product protections.

5. **ACCESS TO CLASSIFIED INFORMATION**

a. Without authorization from the Government, no member of the Defense, including defense witnesses, shall have access to classified discovery in connection with this case unless that person has:

(1) received the necessary security clearance from the appropriate DoD authorities and signed an appropriate non-disclosure agreement, as verified by the Chief Security Officer, Office of Special Security,

(2) signed the Memorandum of Understanding Regarding Receipt of Classified Information (MOU), attached to this Protective Order, and

(3) a need-to-know for the classified information at issue, as determined by the Government for that information.

b. In order to be provided access to classified discovery in connection with this case, each member of the Defense shall execute the attached MOU, file the executed originals of the MOU with the Chief Security Officer, Office of Special Security, and submit copies to the **CISO**. The execution and submission of the MOU is a condition precedent to the Defense having access to classified discovery for the purposes of these proceedings. The Chief Security Officer, Office of Special Security and CISO shall not provide copies of the MOUs to the Prosecution except upon further order of the Military Commission. The Chief Security Officer can provide the Prosecution the names of the Defense team members, identified on the record, who have executed the MOU. The MOUs for Defense Team members who have been provided *ex parte* may be provided, under seal, to the Chief Security Officer, Office of Special Security, and the CISO under seal and will not be further released without authority of the Commission.

c. The substitution, departure, or removal of any member of the Defense, including defense witnesses, from this case for any reason shall not release that person from the provisions of this Protective Order or the MOU executed in connection with this Protective Order.

d. Once the Chief Security Officer, Office of Special Security, verifies that counsel for the Accused have executed and submitted the MOU, and are otherwise authorized to receive classified discovery in connection with this case, the Government may provide classified discovery to the Defense.

e. All classified documents or information provided or obtained in connection with this case remain classified at the level designated by the OCA, unless the documents bear a clear indication that they have been declassified. The person receiving the classified documents or information, together with all other members of the Defense or the Government, respectively, shall be responsible for protecting the classified information from disclosure and shall ensure that access to and storage of the classified information is in accordance with applicable laws and regulations and the terms of this Protective Order.

f. No member of the Defense, including any defense witness, is authorized to disclose any classified information obtained during this case, outside the immediate parameters of these military commission proceedings. If any member of the Defense or any defense witness receives any summons, subpoena, or court order, or the equivalent thereof, from any United States or foreign court or on behalf of any criminal or civil investigative entity within the United States or from any foreign entity, the Defense, including defense witnesses, shall immediately notify the military judge, the Chief Security Officer, Office of Special Security, and the Government so that appropriate consideration can be given to the matter by the Commission and the OCA of the materials concerned. Absent authority from the Commission or the Government, the Defense and

defense witnesses are not authorized to disseminate or disclose classified materials in response to such requests. The Defense, and defense witnesses and experts, are not authorized to use or refer to any classified information obtained as a result of their participation in commission proceedings in any other forum, or in a military commission proceeding involving another detainee.

6. USE, STORAGE, AND HANDLING PROCEDURES

a. The Office of the Chief Defense Counsel, Office of Military Commissions, has approved secure areas in which the Defense may use, store, handle, and otherwise work with classified information. The Chief Security Officer, Office of Special Security, shall ensure that such secure areas are maintained and operated in a manner consistent with this Protective Order and as otherwise reasonably necessary to protect against the disclosure of classified information.

b. All classified information provided to the Defense, and otherwise possessed or maintained by the Defense, shall be stored, maintained, and used only in secure areas. Classified information may only be removed from secure areas in accordance with this Protective Order and applicable laws and regulations governing the handling and use of classified information.

c. Nothing in this Protective Order shall be construed to interfere with the right of the Defense to interview witnesses, regardless of their location. If the Defense receives a document containing information described in §2(g) or memorializes information described in §2(g), while in a non-secure environment, the Defense shall:

(1) maintain positive custody and control of the material at all times;

(2) unless under duress, relinquish control of the material only to other personnel with the appropriate security clearance and a need-to-know;

(3) transport the material in a manner not visible to casual observation;

(4) not add information (including markings) corroborating the material as classified until returning to a secure area;

(5) not electronically transmit the information via unclassified networks;

(6) transport the material to a secure area as soon as circumstances permit; and,

(7) after returning to a secure area, mark and handle the material as classified.

d. Consistent with other provisions of this Protective Order, the Defense shall have access to the classified information made available to them and shall be allowed to take notes and prepare documents with respect to such classified information in secure areas.

e. The Defense shall not copy or reproduce any classified information in any form, except in secure areas and in accordance with this Protective Order and applicable laws and regulations governing the reproduction of classified information.

f. Defense counsel can conduct open source searches from a computer not identifiable with the U.S. government. The raw search material can be stored in an unclassified format or on an unclassified system. However, if an individual has access to classified information, any information described in §§2(g)(2) and 2(g)(4) will be marked or treated as classified in a Military Commissions pleading if the information is specifically referenced to information available in the public domain.

g. All documents prepared by the Defense that are known or believed to contain classified information, including, without limitation, notes taken or memoranda prepared by counsel and pleadings or other documents intended for filing with the Commission, shall be transcribed, recorded, typed, duplicated, copied, or otherwise prepared only by persons possessing an appropriate approval for access to such classified information. Such activities shall

take place in secure areas, on approved word processing equipment, and in accordance with procedures approved by the Chief Security Officer, Office of Special Security.

h. The Defense may submit work product for classification review using the procedures outlined in §4(d). Except as provided in §6, all such documents and any associated materials containing classified information or information treated as classified under §§6f and g such as notes, memoranda, drafts, copies, typewriter ribbons, magnetic recordings, and exhibits shall be maintained in secure areas unless and until the OCA or Chief Security Officer, Office of Special Security advises that those documents or associated materials are unclassified in their entirety. None of these materials shall be disclosed to the Government unless authorized by the Commission, by counsel for an Accused, or as otherwise provided in this Protective Order.

i. The Defense may discuss classified information only within secure areas and shall not discuss, disclose, or disseminate classified information over any non-secure communication system, such as standard commercial telephones, office intercommunication systems, or non-secure electronic mail.

j. The Defense shall not disclose any classified documents or information to any person, including counsel in related cases of Guantanamo Bay detainees in Military Commissions or other courts (including, but not limited to, habeas proceedings), except those persons authorized by this Protective Order, the Commission, and counsel for the Government with the appropriate clearances and the need-to-know that information. The Commission recognizes the presentation of a joint defense may necessitate disclosure on a need-to-know basis to counsel for co-accused.

k. To the extent the Defense is not certain of the classification of information it wishes to disclose, the Defense shall follow procedures established by the Office of Military Commissions for a determination as to its classification. In any instance where there is any doubt as to whether

information is classified, the Defense must consider the information classified unless and until it receives notice from the Chief Security Officer, Office of Special Security, this information is not classified.

l. Until further order of this Commission, the Defense shall not disclose to an Accused any classified information not previously provided by an Accused to the Defense, except where such information has been approved for release to an Accused and marked accordingly.

m. Except as otherwise stated in this paragraph, and to ensure the national security of the United States, at no time, including any period subsequent to the conclusion of these proceedings, shall the Defense make any public or private statements disclosing any classified information accessed pursuant to this Protective Order, or otherwise obtained in connection with this case, including the fact that any such information or documents are classified. In the event classified information enters the public domain without first being properly declassified by the United States Government, counsel are reminded they may not make public or private statements about the information if the information is classified. (*See* paragraph 2g of this Protective Order for specific examples of information which remains classified even if it is in the public domain). In an abundance of caution and to help ensure clarity on this matter, the Commission emphasizes that counsel shall not be the source of any classified information entering the public domain, nor should counsel comment on information which has entered the public domain but which remains classified.

7. PROCEDURES FOR FILING DOCUMENTS

a. See Rule 3, Motion Practice, Military Commissions Trial Judiciary Rules of Court (5 May 2014).

b. For all filings, other than those filed pursuant to M.C.R E. 505, in which counsel know, reasonably should know, or are uncertain as to whether the filing contains classified information

or other information covered by Chapter 19-3(b), DoD Regulation for Trial By Military Commission, counsel shall submit the filing by secure means under seal with the Chief Clerk of the Trial Judiciary.

c. Documents containing classified information or information the Defense Counsel believes to be classified shall be filed pursuant to the procedures specified for classified information.

d. Classified filings must be marked with the appropriate classification markings on each page, including classification markings for each paragraph and subparagraph. If a party is uncertain as to the appropriate classification markings for a document, the party shall seek guidance from the Chief Security Officer, Office of Special Security, who will consult with the OCA of the information or other appropriate agency, as necessary, regarding the appropriate classification.

e. All original filings will be maintained by the Director, Office of Court Administration, as part of the Record of Trial. The Office of Court Administration shall ensure any classified information contained in such filings is maintained under seal and stored in an appropriate secure area consistent with the highest level of classified information contained in the filing.

f. Under no circumstances may classified information be filed in an otherwise unclassified filing except as a separate classified attachment. In the event a party believes an unsealed filing contains classified information, the party shall immediately notify the Chief Security Officer, Office of Special Security, and *CISO/ACISO*, who shall take appropriate action to retrieve the documents or information at issue. The filing will then be treated as containing classified information unless and until determined otherwise. Nothing herein limits the

Government's authority to take other remedial action as necessary to ensure the protection of the classified information.

g. Nothing herein requires the Government to disclose classified information. Additionally, nothing herein prevents the Government or Defense from submitting classified information to the Commission *in camera* or *ex parte* in these proceedings or accessing such submissions or information filed by the other party. Except as otherwise authorized by the Military Judge, the filing party shall provide the other party with notice on the date of the filing.

8. PROCEDURES FOR MILITARY COMMISSION PROCEEDINGS

a. Except as provided herein, and in accordance with M.C.R.E. 505, no party shall disclose or cause to be disclosed any information known or believed to be classified in connection with any hearing or proceeding in this case.

(1) Notice Requirements: The parties must comply with all notice requirements under M.C.R.E. 505 prior to disclosing or introducing any classified information in this case including classified information introduced through the testimony of an accused.

(2) Closed Proceedings

(a) While proceedings shall generally be publicly held, the Commission may exclude the public from any proceeding, *sua sponte* or upon motion by either party, in order to protect information, the disclosure of which could reasonably be expected to damage national security. If the Commission closes the courtroom during any proceeding in order to protect classified information from disclosure, no person may remain who is not authorized to access classified information in accordance with this Protective Order, which the ***CISO*** shall verify prior to the proceeding.

(b) No participant in any proceeding, including the Government, Defense, witnesses, or courtroom personnel, may disclose classified information, or any information that tends to reveal classified information, to any person not authorized to access such classified information in connection with this case.

b. Delayed Broadcast of Open Proceedings

(1) Due to the nature and classification level of the classified information in this case, the Commission finds that to protect against the unauthorized disclosure of classified information during proceedings open to the public, it will be necessary to employ a forty-second delay in the broadcast of the proceedings from the courtroom to the public gallery. This is the least disruptive method of both insuring the continued protection of classified information while providing the maximum in public transparency.

(2) Should classified information be disclosed during any open proceeding, this delay will allow the Military Judge to take action to suspend the broadcast - including any broadcast of the proceedings to all locations other than just the public gallery of the courtroom (e.g., any closed-circuit broadcast of the proceedings to a remote location) - so that the classified information will not be disclosed to members of the public.

(3) The broadcast may be suspended by the Military Judge whenever it is reasonably believed that any person in the courtroom has made or is about to make a statement or offer testimony disclosing classified information.

(4) The Commission shall be notified immediately when the broadcast is suspended. In that event, and otherwise if necessary, the Commission may stop the proceedings to evaluate whether the information disclosed, or about to be disclosed, is classified information

as defined in this Protective Order. The Commission may also conduct an *in camera* hearing to address any such disclosure of classified information.

c. Other Protections

(1) During the examination of any witness, the Government may object to any question or line of inquiry that may require the witness to disclose classified information not found previously to be admissible by the Commission. Following such an objection, the Commission will determine whether the witness's response is admissible and, if so, may take steps as necessary to protect against the public disclosure of any classified information contained therein.

(2) Classified information offered or admitted into evidence will remain classified at the level designated by the OCA and will be handled accordingly. All classified evidence offered or accepted during trial will be kept under seal, even if such evidence was inadvertently disclosed during a proceeding. Exhibits containing classified information may also be sealed after trial as necessary to prevent disclosure of such classified information.

d. Record of Trial

(1) It is the responsibility of the Government, IAW 10 U.S.C §948l(c) to control and prepare the Record of Trial. What is included in the Record of Trial is set out by R.M.C. 1103. The Director, Office of Court Administration, shall ensure that the Record of Trial is reviewed and redacted as necessary to protect any classified information from public disclosure.

(2) The Director, Office of Court Administration, shall ensure portions of the Record of Trial containing classified information remain under seal and are properly segregated from the unclassified portion of the transcripts, properly marked with the appropriate security markings, stored in a secure area, and handled in accordance with this Protective Order.

9. UNAUTHORIZED DISCLOSURE

a. Any unauthorized disclosure of classified information may constitute a violation of United States criminal laws. Additionally, any violation of the terms of this Protective Order shall immediately be brought to the attention of the Commission and may result in disciplinary action or other sanctions, including a charge of contempt of the Commission and possible referral for criminal prosecution. Any breach of this Protective Order may also result in the termination of access to classified information. Persons subject to this Protective Order are advised that unauthorized disclosure, retention, or negligent handling of classified documents or information could cause damage to the national security of the United States or may be used to the advantage of an adversary of the United States or against the interests of the United States. The purpose of this Protective Order is to ensure those authorized to receive classified information in connection with this case will never divulge that information to anyone not authorized to receive it, without prior written authorization from the OCA and in conformity with this Order.

b. Any party upon becoming aware of any unauthorized access to or loss, theft, or other disclosure of classified information, shall promptly notify the Chief Security Officer, Office of Special Security, and shall take all reasonably necessary steps to retrieve such classified information and protect it from further unauthorized disclosure or dissemination.

10. SURVIVAL OF ORDER

a. The terms of this Protective Order and any signed MOU shall survive and remain in effect after the termination of this case unless otherwise determined by a court of competent jurisdiction.

b. This Protective Order is entered without prejudice to the right of the parties to seek such additional protections or exceptions to those stated herein as they deem necessary.

So ORDERED this 6th day of July 2015.

//s//
JAMES L. POHL
COL, JA, USA
Military Judge

ATTACHMENT

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	***AMENDED* MEMORANDUM OF UNDERSTANDING** Regarding the Receipt of Classified Information

I, _____ [**print or type full name**], have been provided a copy of, and have read, the *Third Amended* Protective Order #1 relating to the protection of classified information in the above-captioned case. I understand that in connection with this case I will receive classified documents and information that is protected pursuant to both the terms of this Protective Order and the applicable laws and regulations governing the use, storage, and handling of classified information. I also understand that the classified documents and information are the property of the United States and refer or relate to the national security of the United States.

I agree that I will not use or disclose any classified documents or information, except in strict compliance with the provisions of this Protective Order and the applicable laws and regulations governing the use, storage, and handling of classified information. I have further familiarized myself with the statutes, regulations, and orders relating to the unauthorized disclosure of classified information, espionage, and other related criminal offenses, including but

not limited to 50 U.S.C. § 421; 18 U.S.C. § 641; 18 U.S.C. § 793; 50 U.S.C. § 783; and Executive Order 13526.

I agree to take all reasonable precautions to prevent any unauthorized use or disclosure of any classified documents or information in my possession or control. I understand that failure to comply with this Protective Order and the applicable laws and regulations governing the use, storage, and handling of classified information could result in sanctions or other consequences, including criminal consequences. I understand that the terms of this this Protective Order and the applicable laws and regulations governing the use, storage, and handling of classified information shall survive and remain in effect after the termination of this case. Any termination of my involvement in this case prior to its conclusion will not relieve me from the terms of this Protective Order and the applicable laws and regulations governing the use, storage, and handling of classified information.

I make the above statements under penalty of perjury.

_____ _____

Signature Date

Attachment B

In 2008, the CIA's Rendition, Detention, and Interrogation Group, the lead unit for detention and interrogation operations at the CIA, had a total of [redacted] positions, which were filled with [redacted] CIA staff officers and [redacted] contractors, meaning that contractors made up 85% of the workforce for detention and interrogation operations.

#14: CIA detainees were subjected to coercive interrogation techniques that had not been approved by the Department of Justice or had not been authorized by CIA Headquarters.

Prior to mid-2004, the CIA routinely subjected detainees to nudity and dietary manipulation. The CIA also used abdominal slaps and cold water dousing on several detainees during that period. None of these techniques had been approved by the Department of Justice.

At least 17 detainees were subjected to CIA enhanced interrogation techniques without authorization from CIA Headquarters. Additionally, multiple detainees were subjected to techniques that were applied in ways that diverged from the specific authorization, or were subjected to enhanced interrogation techniques by interrogators who had not been authorized to use them. Although these incidents were recorded in CIA cables and, in at least some cases were identified at the time by supervisors at CIA Headquarters as being inappropriate, corrective action was rarely taken against the interrogators involved.

#15: The CIA did not conduct a comprehensive or accurate accounting of the number of individuals it detained, and held individuals who did not meet the legal standard for detention. The CIA's claims about the number of detainees held and subjected to its enhanced interrogation techniques were inaccurate.

The CIA never conducted a comprehensive audit or developed a complete and accurate list of the individuals it had detained or subjected to its enhanced interrogation techniques. CIA statements to the Committee and later to the public that the CIA detained fewer than 100 individuals, and that less than a third of those 100 detainees were subjected to the CIA's enhanced interrogation techniques, were inaccurate. The Committee's review of CIA records determined that the CIA detained at least 119 individuals, of whom at least 39 were subjected to the CIA's enhanced interrogation techniques.

Of the 119 known detainees, at least 26 were wrongfully held and did not meet the detention standard in the September 2001 Memorandum of Notification (MON). These included an "intellectually challenged" man whose CIA detention was used solely as leverage to get a family member to provide information, two individuals who were intelligence sources for foreign liaison services and were former CIA sources, and two individuals whom the CIA assessed to be connected to al-Qa'ida based solely on information fabricated by a CIA detainee subjected to the CIA's enhanced interrogation techniques. Detainees often remained in custody for months after the CIA determined that they did not meet the MON standard. CIA records provide insufficient information to justify the detention of many other detainees.

(~~TS//~~ [redacted] ~~//NF~~) Ramzi bin al-Shibh was subjected to interrogation techniques and conditions of confinement that were not approved by CIA Headquarters. CIA interrogators used the CIA's enhanced interrogation techniques for behavior adjustment purposes, in response to perceived disrespect, and on several occasions, before bin al-Shibh had an opportunity to respond to an interrogator's questions or before a question was asked. The CIA's enhanced interrogation techniques were applied when bin al-Shibh failed to address an interrogator as "sir," when interrogators noted bin al-Shibh had a "blank stare" on his face, and when bin al-Shibh complained of stomach pain.[422] Further, despite CIA policy at the time to keep detainees under constant light for security purposes, bin al-Shibh was kept in total darkness to heighten his sense of fear.[423]

(~~TS//~~ [redacted] ~~//NF~~) CIA psychological assessments of bin al-Shibh were slow to recognize the onset of psychological problems brought about, according to later CIA assessments, by bin al-Shibh's long-term social isolation and his anxiety that the CIA would return to using its enhanced interrogation techniques against him. The symptoms included visions, paranoia, insomnia, and attempts at self-harm.[424] In April 2005, a CIA psychologist stated that bin al-Shibh "has remained in social isolation" for as long as two and half years and the isolation was having a "clear and escalating effect on his psychological functioning." The officer continued, "in [bin al-Shibh's] case, it is important to keep in mind that he was previously a relatively high-functioning individual, making his deterioration over the past several months more alarming."[425] The psychologist wrote, "significant alterations to RBS'[s] detention environment must occur soon to prevent further and more serious psychological disturbance."[426] On September 5, 2006, bin al-Shibh was transferred to U.S. military custody at Guantanamo Bay, Cuba.[427] After his arrival, bin al-Shibh was placed on anti-psychotic medications.[428]

(~~TS//~~ [redacted] ~~//NF~~) The CIA disseminated 109 intelligence reports from the CIA interrogations of Ramzi bin al-Shibh.[429] A CIA assessment, which included intelligence from his

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[422] [redacted] 10582 (242026Z FEB 03); [redacted] 10627 (281949Z FEB 03)

[423] [redacted] 10521 (191750Z FEB 03). The cable referred to keeping bin al-Shibh in darkness as a "standard interrogation technique." The same cable states that during the night of February 18, 2003, the light went out in bin al-Shibh's cell and that "[w]hen security personnel arrived to replace the bulb, bin al-Shibh was cowering in the corner, shivering. Security personnel noted that he appeared relieved as soon as the light was replaced."

[424] [redacted] 1759 (021319Z OCT 04); HEADQUARTERS [redacted] (040023Z NOV 05); [redacted] 1890 (171225Z NOV 04); [redacted] 1878 (140915Z NOV 04); [redacted] 1930 (061620Z DEC 04); [redacted] 2207 (111319Z APR 05); [redacted] 2210 (141507Z APR 05); [redacted] 2535 (051805Z JUL 05); [redacted] 2589 (120857Z JUL 05); [redacted] 2830 (291304Z AUG 05); [redacted] 1890 (171225Z NOV 04); [redacted] 1893 (200831Z NOV 04); CIA document entitled, "Detainee Talking Points for ICRC Rebuttal, [redacted]"; [redacted] 2210 (141507Z APR 05); [redacted] 2535 (051805Z JUL 05); [redacted] 2210 (141507Z APR 05); [redacted] 2535 (051805Z JUL 05); [redacted] 2830 (291304Z AUG 05); [redacted] 1930 (061620Z DEC 04); [redacted] 2210 (141507Z APR 05)

[425] [redacted] 2210 (141507Z APR 05)

[426] [redacted] 2210 (141507Z APR 05)

[427] HEADQUARTERS [redacted] (031945Z SEP 06)

[428] [redacted] SITE DAILY REPORT - 24 MAY 07: [redacted] 8904 (182103Z APR 08)

[429] *See* Volume II for additional information.

CIA Headquarters directed the CIA Station in Country [redacted] to "think big" about how CIA Headquarters could support Country [redacted]'s [redacted].[843] After the Station initially submitted relatively modest proposals, CIA Headquarters reiterated the directive, adding that the Station should provide a "wish list."[844] In [redacted] 2003, the Station proposed a more expansive $[redacted] million in [redacted] subsidies.[845] [redacted] subsidy payments, intended in part as compensation for support of the CIA detention program, rose as high as $[redacted] million.[846] By [redacted] 2003, after an extension of five months beyond the originally agreed upon timeframe for concluding CIA detention activities in Country [redacted], both bin al-Shibh and al-Nashiri had been transferred out of Country [redacted] to the CIA detention facility at Guantanamo Bay, Cuba.[847]

9. *U.S. Supreme Court Action in the Case of Rasul v. Bush Forces Transfer of CIA Detainees from Guantanamo Bay to Country* [redacted]

(~~TS//~~[redacted]~~//NF~~) Beginning in September 2003, the CIA held a number of detainees at CIA facilities on the grounds of, but separate from, the U.S. military detention facilities at Guantanamo Bay, Cuba.[848] In early January 2004, the CIA and the Department of Justice began discussing the possibility that a pending U.S. Supreme Court case, *Rasul v. Bush,* might grant *habeas corpus* rights to the five CIA detainees then being held at a CIA detention facility at

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[redacted] although CIA Headquarters asked the CIA Station to "advise if additional funds may be needed to keep [the facility] viable over the coming year and beyond." CIA Headquarters added, "we cannot have enough blacksite hosts, and we are loathe to let one we have slip away." Country [redacted] never hosted CIA detainees. *See* HEADQUAR [redacted]; [REDACTED] 5298 [redacted]; HEADQUAR [redacted]

[843] ALEC [redacted] 03). In an interview on the CIA program, [redacted] noted that the program had "more money than we could possibly spend we thought, and it turned out to be accurate." In the same interview, he stated that "in one case, we gave [redacted] $[redacted],000,000 [redacted]. Myself and José [Rodriguez] [redacted]. We never counted it. I'm not about to count that kind of money for a receipt." The boxes contained one hundred dollar bills. [redacted] did not identify the recipient of the $[redacted] million. *See* transcript of Oral History Interview, Interviewee: [redacted] (RJ) - October 13, 2006, Interviewer: [REDACTED] and [REDACTED].

[844] ALEC [redacted] 03)

[845] ALEC [redacted]

[846] *See* DTS #2010-2448.

[847] [REDACTED] 2498 [redacted]

[848] April [redacted], 2003, Memorandum for Director, DCI Counterterrorist Center, from [redacted], Chief Renditions and Detainees Group, via [redacted], Counterterrorist Center, Chief of Operations, [redacted], Chief, [redacted], Subject: Request to Relocate High-Value Detainees to an Interim Detention Facility at Guantanamo. *See also* DIRECTOR [redacted]. CIA detainees were held at two facilities at Guantanamo Bay, DETENTION SITE MAROON and DETENTION SITE INDIGO. (*See* Quarterly Review of Confinement Conditions for CIA Detainees, Coverage Period: [redacted].) A third CIA detention facility, DETENTION SITE RED [redacted]. *See* 3897 ; 3445 ; 9754 ; 8405 ; 8408 ; and September 1, 2006, Memorandum of Agreement Between the Department of Defense (DOD) and the Central Intelligence Agency (CIA) Concerning the Detention by DOD of Certain Terrorists at a Facility at Guantanamo Bay Naval Station.

Guantanamo Bay.[849] Shortly after these discussions, CIA officers approached the in Country to determine if it would again be willing to host these CIA detainees, who would remain in CIA custody within an already existing Country facility.[850] By January , 2004, the in Country had agreed to this arrangement for a limited period of time.[851]

(~~TS//~~ ~~//NF~~) Meanwhile, CIA General Counsel Scott Muller asked the Department of Justice, the National Security Council, and the White House Counsel for advice on whether the five CIA detainees being held at Guantanamo Bay should remain at Guantanamo Bay or be moved pending the Supreme Court's decision.[852] After consultation with the U.S. solicitor general in February 2004, the Department of Justice recommended that the CIA move four detainees out of a CIA detention facility at Guantanamo Bay pending the Supreme Court's resolution of the case.[853] The Department of Justice concluded that a fifth detainee, Ibn Shaykh al-Libi, did not need to be transferred because he had originally been detained under military authority and had been declared to the ICRC.[854] Nonetheless, by April , 2004, all five CIA detainees were transferred from Guantanamo Bay to other CIA detention facilities.[855]

(~~TS//~~ ~~//NF~~) Shortly after placing CIA detainees within an already existing Country facility for a second time, tensions arose between the CIA and Country .[856] In 2004, CIA detainees in a Country facility claimed to hear cries of pain from other detainees presumed to be in the facility.[857] When the CIA chief of Station approached the

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[849] Email from: Scott W. Muller; to: , [REDACTED]; cc: [REDACTED]; subject: Detainees in Gitmo; date: January , 2004.

[850] *See* HEADQUARTERS ; [REDACTED] 1845 . The CIA's long-term facility in Country , which the CIA Station in Country had warned was a drain on the Station's resources, had not yet been completed. *See* [REDACTED] 1785 .

[851] [REDACTED] 1679

[852] Email from: Scott Muller; to: James Pavitt, ; cc: George Tenet, John McLaughlin, [REDACTED], [REDACTED], , [REDACTED], ; subject: CIA Detainees at GITMO; date: February , 2004.

[853] Email from: Scott Muller; to: James Pavitt, ; cc: George Tenet, John McLaughlin, [REDACTED], [REDACTED], , [REDACTED], ; subject: CIA Detainees at GITMO; date: February , 2004.

[854] Email from: Scott Muller; to: James Pavitt, ; cc: George Tenet, John McLaughlin, [REDACTED], [REDACTED], , [REDACTED], ; subject: CIA Detainees at GITMO; date: February , 2004. . *See* 10255 ; ALEC ; 13698 ; ALEC .

[855] 1672 ; 1674 ; [REDACTED] 1898

[856] *See,* for example, [REDACTED] 1679 . For additional details of the CIA's interactions with Country , *see* Volume I.

[857] Among the detainees making this claim was Ibn Shaykh al-Libi, who had previously been rendered from CIA custody to . A Libyan national, Ibn Shaykh al-Libi reported while in custody that Iraq was supporting al-Qa'ida and providing assistance with chemical and biological weapons. Some of this information was cited by Secretary Powell in his speech to the United Nations, and was used as a justification for the 2003 invasion of Iraq. Ibn Shaykh al-Libi recanted the claim after he was rendered to CIA custody on February , 2003, claiming that he had been tortured by the , and only told them what he assessed they wanted to hear. For more details, *see* Volume III. While in Country , al-Libi told CIA debriefers that the "sobbing and yelling" he

significant inaccurate statements, especially regarding the significance of information acquired from CIA detainees and the effectiveness of the CIA's interrogation techniques.[974]

(U) In the speech, the president announced the transfer of 14 detainees to Department of Defense custody at Guantanamo Bay and the submission to Congress of proposed legislation on military commissions.[975] As all other detainees in the CIA's custody had been transferred to other nations, the CIA had no detainees in its custody at the time of the speech.[976]

2. *The International Committee of the Red Cross (ICRC) Gains Access to CIA Detainees After Their Transfer to U.S. Military Custody in September 2006*

(~~TS//~~ [redacted] ~~//NF~~) After the 14 CIA detainees arrived at the U.S. military base at Guantanamo Bay, they were housed in a separate building from other U.S. military detainees and remained under the operational control of the CIA.[977] In October 2006, the 14 detainees were allowed meetings with the ICRC and described in detail similar stories regarding their detention, treatment, and interrogation while in CIA custody. The ICRC provided information on these claims to the CIA.[978] Acting CIA General Counsel John Rizzo emailed the CIA director and other CIA senior leaders, following a November 8, 2006, meeting with the ICRC, stating:

> "[a]s described to us, albeit in summary form, what the detainees allege actually does not sound that far removed from the reality… the ICRC, for its part, seems to find their stories largely credible, having put much stock in the fact that the story each detainee has told about his transfer, treatment and conditions of confinement was basically consistent, even though they had been incommunicado with each other throughout their detention by us."[979]

(~~TS//~~ [redacted] ~~//NF~~) In February 2007 the ICRC transmitted to the CIA its final report on the "Treatment of Fourteen 'High Value Detainees' in CIA Custody." The ICRC report concluded that "the ICRC clearly considers that the allegations of the fourteen include descriptions of treatment and interrogation techniques - singly or in combination - that amounted to torture and/or cruel, inhuman or degrading treatment."[980] Notwithstanding Rizzo's comments, the CIA disagreed with a number of the ICRC's findings, provided rebuttals to the ICRC in

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[974] *See* Volume I and Volume II for additional information.
[975] September 6, 2006, The White House, President Discusses Creation of Military Commissions to Try Suspected Terrorists.
[976] *See* Volume III for additional information.
[977] CIA Background Memo for CIA Director visit to Guantanamo, December [redacted], 2006, entitled Guantanamo Bay High-Value Detainee Detention Facility.
[978] Email from: [redacted], [redacted]CTC/LGL; to: John Rizzo, [redacted], [REDACTED], [redacted], [redacted], [REDACTED], [REDACTED], [REDACTED], [redacted], [REDACTED], [REDACTED]; cc: [redacted]; subject: 8 November 2006 Meeting with ICRC reps; date: November 9, 2006, at 12:25 PM.
[979] Email from: John A. Rizzo; to: Michael V. Hayden, Stephen R. Kappes, Michael J. Morell; cc: [redacted], [redacted], [REDACTED]; subject: Fw: 8 November 2006 Meeting with ICRC Reps; date: November 9, 2006, at 12:25 PM.
[980] February 14, 2007, Letter to John Rizzo, Acting General Counsel, from [redacted], International Committee of the Red Cross, [redacted]

memorandum was later disputed by Chairman Roberts.[2463] The Committee has no independent record of this briefing.

(~~TS//[redacted]//NF~~) Throughout 2003, the CIA refused to answer questions from Committee members and staff about the CIA interrogations of KSM and other CIA detainees.[2464] The CIA produced talking points for a September 4, 2003, briefing on the CIA interrogation program exclusively for Committee leadership; however, there are no contemporaneous records of the briefing taking place. The CIA talking points include information about the use of the CIA's enhanced interrogation techniques, their effectiveness, and various abuses that occurred in the program.[2465] Many of the CIA representations in the talking points were inaccurate.[2466] The CIA continued to withhold from the Committee, including its leadership, any information on the location of the CIA's detention facilities. On more than one occasion the CIA directed CIA personnel at Guantanamo Bay, Cuba, not to brief a visiting Committee member about the CIA detention facility there, including during a July 2005 visit by Chairman Roberts.[2467]

(~~TS//[redacted]//NF~~) In 2004, the Committee conducted two hearings on the CIA's role in interrogating U.S. military detainees at Abu Ghraib prison in Iraq. CIA witnesses stressed that the CIA was more limited in its interrogation authorities than the Department of Defense, but declined to respond to Committee questions about the interrogation of KSM or press reports on CIA detention facilities.[2468] During the first briefing, on May 12, 2004, Committee members requested Department of Justice memoranda addressing the legality of CIA interrogations.

[2463] Moskowitz Memorandum for the Record, February 4, 2003, "Subject: Sensitive Notification." For information on Senator Roberts's objections, *see* "Destroying C.I.A. Tapes Wasn't Opposed, Memos Say," by Scott Shane, *The New York Times*, dated February 22, 2010.

[2464] Transcript of CIA briefing for the Senate Select Committee on Intelligence, March 5, 2003 (DTS #2003-1156); Transcript of "Intelligence Update," April 30, 2003 (DTS #2003-2174); Transcript of Senate Select Committee on Intelligence briefing, September 3, 2003 (DTS #2004-0288); email from: [redacted]; to: [REDACTED]; subject: Re: EYES ONLY Re: Question Regarding Interrogations from SSCI Member Briefing on KSM Capture; date: March 17, 2003.

[2465] CIA Interrogation Program: DDO Talking Points, 04 September 2003.

[2466] For example, the talking points included inaccurate data on the waterboarding of Abu Zubaydah and KSM; stated that two unauthorized techniques were used with a detainee, whereas 'Abd al-Rahim al-Nashiri was subjected to numerous unauthorized techniques; and inaccurately stated that the offending officers were removed from the site. The talking points also stated that the use of the CIA's enhanced interrogation techniques "has produced significant results," and that the "[i]nformation acquired has saved countless lives…." *See* CIA Interrogation Program: DDO Talking Points, 04 September 2003.

[2467] Because the Committee was not informed of the CIA detention site at Guantanamo Bay, Cuba, no member of the Committee was aware that the U.S. Supreme Court decision to grant certiorari in the case of *Rasul v. Bush*, which related to the *habeas corpus* rights of detainees at Guantanamo Bay, resulted in the transfer of CIA detainees from the CIA detention facility at Guantanamo Bay to other CIA detention facilities. *See* HEADQUARTERS [redacted], subject "RESTRICTED ACCESS TO [DETENTION SITE COBALT] AND [DETENTION SITE ORANGE]"; email from: [redacted]; to [redacted]; cc: Jose Rodriguez, [REDACTED], [redacted], [REDACTED], [redacted], [REDACTED], [REDACTED]; subject: guidance to [redacted]gitmo; date: May 14, 2004; forwarding final cable: HEADQUARTERS [redacted] (141502Z MAY 04), subject "Possible Brief to US Senator"; email from: Stanley Moskowitz; to: [REDACTED]; cc: [REDACTED]; subject: Re: guidance to [redacted]gitmo; date: May 14, 2004; CIA responses to Questions for the Record, March 13, 2008 (DTS #2008-1310); "CODEL Roberts to Miami/Guantanamo, 7-8 July 2005," dated 5 July, [redacted] 902860.

[2468] Transcript of hearing, May 12, 2004 (DTS #2004-2332); Transcript of hearing, September 13, 2004 (DTS #2005-0750).

Attachment C

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 013RRR (GOV)** **Government Motion** to Amend AE013DDD Second Amended Protective Order #1 To Protect Against Disclosure of National Security Information 30 January 2015

1. (U) Timeliness

(U) On 12 December 2014, the Commission directed the Government to review the Second Amended Protective Order #1 and proffer proposed changes, if necessary, as a result of changes to classification of certain information related to the Central Intelligence Agency ("CIA") former Rendition, Detention, and Interrogation ("RDI") Program no later than 1 February 2015.

2. (U) Relief Sought

(U) The Prosecution respectfully requests the Military Judge amend AE 013DDD as explained in the motion below. A proposed protective order is included in this filing as Attachment C.

3. (U) Burden of Proof

(U) As the moving party, the Government must demonstrate by a preponderance of the evidence that the requested relief is warranted. *See* R.M.C. 905; *see also*, M.C.R.E. 505.

4. (U) Facts

(U) On 31 May 2011 and 25 January 2012, pursuant to the Military Commissions Act of 2009 ("M.C.A."), charges in connection with the 11 September 2001 attacks were sworn against Khalid Shaikh Mohammad, Walid Muhammad Salih Bin 'Attash, Ramzi Binalshibh, Ali Abdul Aziz Ali, and Mustafa Ahmed Adam al Hawsawi. These charges were referred jointly to this capital Military Commission on 4 April 2012. The Accused are each charged with Conspiracy, Attacking Civilians, Attacking Civilian Objects, Intentionally Causing Serious Bodily Injury, Murder in Violation of the Law of War, Destruction of Property in Violation of the Law of War.

(U) On 26 April 2012, the Government filed a Motion to Protect Against Disclosure of National Security Information and requested the Military Judge issue a protective order pursuant to Military Commission Rule of Evidence ("M.C.R.E.") 505(e). *See* AE 013 (App. 1-46). The motion and its accompanying declarations set forth the classified information at issue in this case, the grave harm to national security that unauthorized disclosure of such information would cause, and the narrowly tailored remedies sought to protect this national-security information. *See* AE 013. Attachments A and B were filed *ex parte* and UNDER SEAL with the Commission. Attachment B provided guidance regarding the former RDI Program, operated by the CIA and requested certain protective measures to guard against disclosing classified information.

(U) On 6 December 2012, the Commission issue Protective Order #1 (AE 013P), in order to Protect Against Disclosure of National Security Information. On 9 February 2013, after considering certain defense motions to amend the Protective Order, the

Military Judge issued a Supplemental Ruling on the Government's Motion To Protect Against Disclosure of National Security Information (AE 013Z) and entered Amended Protective Order #1 (AE 013AA).

(U) On 17 December 2013, this Commission issued a Second Amended Protective Order (AE 013DDD). AE 013DDD, consistent with the Government's *ex parte* declarations based on then-current classification guidance, defines "Classified National Security Information and/or Documents," "Classified Information," and "Classified Documents" to include five specific categories of information:

> (a) Information that would reveal or tend to reveal details surrounding the capture of an accused other than the location and date;
>
> (b) Information that would reveal or tend to reveal the foreign countries in which: Khalid Shaikh Mohammad and Mustafa Ahmed Adam al Hawsawi were detained from the time of their capture on or about 1 March 2003 through 6 September 2006; Walid Muhammad Salih Bin 'Attash and Ali Abdul Aziz Ali were detained from the time of their capture on or about 29 April 2003 through 6 September 2006; and Ramzi Bin al Shibh was detained from the time of his capture on or around 11 September 2002 through 6 September 2006;
>
> (c) The names, identities, and physical descriptions of any persons involved with the capture, transfer, detention, or interrogation of an accused or specific dates regarding the same, from on or around the aforementioned capture dates through 6 September 2006;
>
> (d) The enhanced interrogation techniques that were applied to an Accused from on or around the aforementioned capture dates through 6 September 2006, including descriptions of the techniques as applied, the duration, frequency, sequencing, and limitations of those techniques; and
>
> (e) Descriptions of the conditions of confinement of any of the Accused from on or around the aforementioned capture dates through 6 September 2006.

See AE 013DDD, Para. 2(g)(4)(a-e).

(U) On 9 December 2014, the Senate Select Committee on Intelligence released and Executive Summary of a study entitled "Committee Study of the Central Intelligence

Agency's Detention and Interrogation Program" ("Executive Summary"). Upon release, the unredacted portions of the Executive Summary were declassified; the redacted portions of the Executive Summary, however, as well as the entire underlying study remain classified.

(U) On 12 December 2014, and in response to the release of the declassified Executive Summary, the Commission issued a Trial Conduct Order. AE 331. Within AE 331, the Commission ordered the Government to complete the following tasks:

> (1) Not later than 1 February 2015, the Government will review the *Second Amended* Protective Order #1 [(AE 013DDD)] and proffer proposed changes, if necessary, to reflect the new policies[;]
>
> (2) Conduct the following reviews, in the order indicated, as to changes wrought by the new policies on classification of national security information:
>
> (a) All motions for which the Commission has not taken final action and which are, at this time, either classified or for which there is a classified attachment shall be reviewed an appropriate motion filed indicated the change, if any, in classification;
>
> (b) All filings pertaining to Protective Orders requested under the provisions of 10 U.S.C. § 949-p-4, and Military Commission Rule of Evidence ("M.C.R.E.") 505 shall be reviewed an appropriate changes made as to the either summarized, redacted, or classified information; and,
>
> (c) All motions containing classified information for which the Commission has taken final action shall be reviewed and an appropriate motion filed indicating the change, if any, in classification.

See AE 331 at ¶ 4-5. The Commission then ordered the Government to provide the estimated completion date for each of the reviews in paragraphs 5(a) through 5(c), not later than 1 February 2015. *See id.* at § 6.

(U) On 30 January 2015, the CIA provided additional classification guidance with respect to the former RDI Program. See Attachment B (filed separately due to its

classification). According to Attachment B, the following information is no longer classified:

- (U//FOUO) The fact that the former RDI Program was a covert action program authorized by the President. The fact that the former RDI Program was authorized by the 17 September 2001 Memorandum of Notification (MON).
- (U//FOUO) General allegations of torture by HVDs unless such allegations reveal the identities (*e.g.*, names, physical descriptions, or other identifying information) of CIA personnel or contractors; the locations of detention sites (including the name of any country in which the detention site was allegedly located); or any foreign intelligence service involvement in the HVDs' capture, rendition, detention, or interrogation.
- (U//FOUO) The names and descriptions of the thirteen Enhanced Interrogation Techniques (EITs) that were approved for use, and the specified parameters within which the EITs could be applied.
- (U//FOUO) EITs as applied to the 119 individuals mentioned in Appendix 2 of the SSCI Executive Summary acknowledged to have been in CIA custody.
- (U//FOUO) Information regarding the conditions of confinement as applied to the 119 individuals mentioned in Appendix 2 of the SSCI Executive Summary acknowledged to have been in CIA custody.

- (U//FOUO) Information regarding the treatment of the 119 individuals mentioned in Appendix 2 of the SSCI Executive Summary acknowledged to have been in CIA custody, including the application of standard interrogation techniques.
- (U//FOUO) Information regarding the conditions of confinement or treatment during the transfer ("rendition") of the 119 individuals mentioned in Appendix 2 of the SSCI Executive Summary acknowledged to have been in CIA custody.

5. (U) Law and Argument

The recent changes to classification of certain information related to the former RDI Program described above necessitate changes to AE 013DDD in order to include accurate definitions of classified information related to the pending prosecution. Based on the new classification guidance, information that is currently defined by the protective order as classified in paragraphs 2g(4)(d) and 2g(4)(e) of AE 013DDD is no longer classified. The Prosecution, therefore, respectfully requests that the Military Judge issue the amended protective order removing paragraphs 2g(4)(d) and 2g(4)(e) from AE 013DDD.

6. (U) Oral Argument The Prosecution does not request oral argument.

7. (U) Witnesses and Evidence None.

8. (U) Conference

(U) On 28 January 2015, the Government conferenced with the Defense on the subject motion. Counsel for Mr. Bin 'Attash replied that they "have no access to the classification guides or OCAs for the program(s) in question. Therefore, we do not

possess the knowledge necessary to determine whether your request to amend AE013DDD encompasses all of the required changes to the Order." Counsel for Mr. Ali and Mr. al Hawsawi stated they took the same position as counsel for Mr. Bin 'Attash. As of the time of this filing, counsel for Mr. Mohammad or counsel for Mr. Binalshibh had not responded to the conference request.

9. (U) Attachments

A. Certificate of Service, dated 30 January 2015

B. Classification Guidance for Information about the Central Intelligence Agency's Former Rendition, Detention, and Interrogation Program

C. Proposed Protective Order

Respectfully submitted,

//s//
Jeff Groharing
Deputy Trial Counsel

Mark Martins
Chief Prosecutor
Office of the Chief Prosecutor
Office of Military Commissions

ATTACHMENT A

CERTIFICATE OF SERVICE

I certify that on the 30th day of January 2015, I filed AE 013RRR (GOV) the **Government Motion** to Amend AE013DDD Second Amended Protective Order #1 To Protect Against Disclosure of National Security Information with the Office of Military Commissions Trial Judiciary and I served a copy on counsel of record.

//s//
Jeff Groharing
Deputy Trial Counsel
Office of the Chief Prosecutor
Office of Military Commissions

ATTACHMENT B

(Filed Separately via SIPRNET)

ATTACHMENT C

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 013___** ***Third Amended*** **PROTECTIVE ORDER #1** **To Protect Against Disclosure of National Security Information** ___ February 2015

Upon consideration of the submissions regarding the Government's motion for a protective order to protect classified information in this case, the Commission finds this case involves classified national security information, including TOP SECRET / SENSITIVE COMPARTMENTED INFORMATION (SCI), the disclosure of which would be detrimental to national security, the storage, handling, and control of which requires special security precautions, and the access to which requires a security clearance and a need-to-know. Accordingly, pursuant to authority granted under 10 U.S.C. § 949 p-1 to p-7, Rules for Military Commissions (R.M.C.) 701 and 806, Military Commissions Rule of Evidence (M.C.R.E.) 505, Department of Defense Regulation for Trial by Military Commissions (2011) ¶ 17-3, and the general judicial authority of the Commission, in order to protect the national security, and for good cause shown, the following Protective Order is entered.

1. SCOPE

a. This Protective Order establishes procedures applicable to all persons who have access to or come into possession of classified documents or information in connection with this case,

regardless of the means by which the persons obtained the classified information. These procedures apply to all aspects of pre-trial, trial, and post-trial stages in this case, including any appeals, subject to modification by further order of the Commission or orders issued by a court of competent jurisdiction.

b. This Protective Order applies to all information, documents, testimony, and material associated with this case that contain classified information, including but not limited to any classified pleadings, written discovery, expert reports, transcripts, notes, summaries, or any other material that contains, describes, or reflects classified information.

c. Counsel are responsible for advising their clients, translators, witnesses, experts, consultants, support staff, and all others involved with the defense or prosecution of this case, respectively, of the contents of this Protective Order.

2. DEFINITIONS

a. As used in this Protective Order, the term "Court Security Officer (CSO)" and "Assistant Court Security Officer (ACSO)" refer to security officers, appointed by the Military Judge, to serve as the security advisor to the judge, to oversee security provisions pertaining to the filing of motions, responses, replies, and other documents with the Commission, and to manage security during sessions of the Commission. The CSO and ACSO will be administered an oath IAW Rule 10, Military Commissions Rules of Court.

b. The term "Chief Security Officer, Office of Special Security" refers to the official within the Washington Headquarters Service responsible for all security requirements and missions of the Office of Military Commissions and to any assistants.

c. The term “Defense” includes any counsel for an accused in this case and any employees, contractors, investigators, paralegals, experts, translators, support staff, Defense

Security Officer, or other persons working on the behalf of an Accused or his counsel in this case.

d. The term "Defense Security Officer" (DSO) refers to a security officer, serving as security advisor to the Defense, who oversees security provisions pertaining to the filing of motions, response, replies, and other documents with the Commission.

e. The term "Government" includes any counsel for the United States in this case and any employees, contractors, investigators, paralegals, experts, translators, support staff or other persons working on the behalf of the United States or its counsel in this case.

f. The words "documents" and "information" include, but are not limited to, all written or printed matter of any kind, formal or informal, including originals, conforming and non-conforming copies, whether different from the original by reason of notation made on such copies or otherwise, and further include, but are not limited to:

(1) papers, correspondence, memoranda, notes, letters, cables, reports, summaries, photographs, maps, charts, graphs, inter-office and intra-office communications, notations of any sort concerning conversations, meetings, or other communications, bulletins, teletypes, telegrams, facsimiles, invoices, worksheets, and drafts, alterations, modifications, changes, and amendments of any kind to the foregoing;

(2) graphic or oral records or representations of any kind, including, but not limited to: photographs, maps, charts, graphs, microfiche, microfilm, videotapes, and sound or motion picture recordings of any kind;

(3) electronic, mechanical, or electric records of any kind, including, but not limited to: tapes, cassettes, disks, recordings, electronic mail, instant messages, films, typewriter

ribbons, word processing or other computer tapes, disks or portable storage devices, and all manner of electronic data processing storage; and

(4) information acquired orally.

g. The terms "classified national security information and/or documents," "classified information," and "classified documents" include:

(1) any classified document or information that was classified by any Executive Branch agency in the interests of national security or pursuant to Executive Order, including Executive Order 13526, as amended, or its predecessor Orders, as "CONFIDENTIAL," "SECRET," "TOP SECRET," or additionally controlled as "SENSITIVE COMPARTMENTED INFORMATION (SCI);"

(2) any document or information, regardless of its physical form or characteristics, now or formerly in the possession of a private party that was derived from United States Government information that was classified, regardless of whether such document or information has subsequently been classified by the Government pursuant to Executive Order, including Executive Order 13526, as amended, or its predecessor Orders, as "CONFIDENTIAL," "SECRET," "TOP SECRET," or additionally controlled as "SENSITIVE COMPARTMENTED INFORMATION (SCI)";

(3) verbal or non-documentary classified information known to an accused or the Defense;

(4) any document or information as to which the Defense has been notified orally or in writing that such document or information contains classified information, including, but not limited to the following:

(a) Information that would reveal or tend to reveal details surrounding the capture of an accused other than the location and date;

(b) Information that would reveal or tend to reveal the foreign countries in which: Khalid Shaikh Mohammad and Mustafa Ahmed Adam al Hawsawi were detained from the time of their capture on or about 1 March 2003 through 6 September 2006; Walid Muhammad Salih Bin "Attash and Ali Abdul Aziz Ali were detained from the time of their capture on or about 29 April 2003 through 6 September 2006; and Ramzi Bin al Shibh was detained from the time of his capture on or around 11 September 2002 through 6 September 2006.

(c) The names, identities, and physical descriptions of any persons involved with the capture, transfer, detention, or interrogation of an accused or specific dates regarding the same, from on or around the aforementioned capture dates through 6 September 2006.

(5) any document or information obtained from or related to a foreign government or dealing with matters of U.S. foreign policy, intelligence, or military operations, which is known to be closely held and potentially damaging to the national security of the United States or its allies.

(6) The terms "classified national security information and/or documents," "classified information," and "classified documents" do not include documents or information officially declassified by the United States by the appropriate OCA.

h. "National Security" means the national defense and foreign relations of the United States.

i. "Access to classified information" means having authorized access to review, read, learn, or otherwise come to know classified information.

j. "Secure area" means a physical facility accredited or approved for the storage,

handling, and control of classified information.

k. "Unauthorized disclosure of classified information" means any knowing, willful, or negligent action that could reasonably be expected to result in a communication or physical transfer of classified information to an unauthorized recipient. Confirming or denying information, including its very existence, constitutes disclosing that information.

3. COURT SECURITY OFFICER

a. A Court Security Officer (CSO) and Assistant Court Security Officer(s) (ACSO) for this case have been designated by the Military Judge.

b. The CSO and any ACSO are officers of the court. *Ex parte* communication by a party in a case, to include the Office of Military Commissions, DoD General Counsel, or any intelligence or law enforcement agency, with the CSO/ASCO is prohibited except as authorized by the M.C.A. or the Manual for Military Commissions (M.M.C.). This is to preclude any actual or perceived attempt to improperly influence the Commission in violation of 10 U.S.C. § 949b. This does not include administrative matters necessary for the management of the security responsibilities of the Office of Trial Judiciary.

c. The CSO/ACSO shall ensure that all classified or protected evidence and information is appropriately safeguarded at all times during Commission proceedings and that only personnel with the appropriate clearances and authorizations are present when classified or protected evidence is presented before Military Commissions.

d. The CSO shall consult with the Original Classification Authority (OCA) of classified documents or information, as necessary, to address classification decisions or other related issues.

4. **DEFENSE SECURITY OFFICER**

a. Upon request of Defense Counsel for an accused, the Convening Authority shall provide a Defense Security Officer for the defendant.

b. The Defense Security Officer is, for limited purposes associated with this case, a member of the Defense Team, and therefore shall not disclose to any person any information provided by the Defense, other than information provided in a filing with the Military Commission. In accordance with M.C.R.E. 502, the Defense Security Officer shall not reveal to any person the content of any conversations he hears by or among the defense, nor reveal the nature of documents being reviewed by them or the work generated by them, except as necessary to report violations of classified handling or dissemination regulations or any Protective Order issued in this case, to the Chief Security Officer, Office of Special Security. Additionally, the presence of the Defense Security Officer, who has been appointed as a member of the Defense Team, shall not be construed to waive, limit, or otherwise render inapplicable the attorney-client privilege or work product protections.

c. The Defense Security Officer shall perform the following duties:

(1) Assist the Defense with applying classification guides, including reviewing pleadings and other papers prepared by the defense to ensure they are unclassified or properly marked as classified.

(2) Assist the Defense in performing their duty to apply derivative classification markings pursuant to E.O. 13526 § 2.1(b).

(3) Ensure compliance with the provisions of any Protective Order.

d. To the fullest extent possible, the classification review procedure must preserve the lawyer-client and other related legally-recognized privileges.

(1) The Defense may submit documents to the Chief Security Officer, Office of Special Security with a request for classification review. If the Defense claims privilege for a document submitted for classification review, the defense shall banner-mark the document "PRIVILEGED."

(2) The Chief Security Officer, Office of Special Security, shall consult with the appropriate OCA to obtain classification review of documents submitted for that purpose. The Chief Security Officer, Office of Special Security, shall not disclose to any other entity any information provided by a Defense Security Officer, including any component of the Office of Military Commissions, except that the entity may inform the military judge of any information that presents a current threat to loss of life or presents an immediate safety issue in the detention facility. This does not include administrative matters necessary for the management of the security responsibilities of the Office of Military Commissions.

(3) Submission of documents for classification review shall not be construed to waive, limit, or otherwise render inapplicable the attorney-client privilege or work product protections.

5. **ACCESS TO CLASSIFIED INFORMATION**

a. Without authorization from the Government, no member of the Defense, including defense witnesses, shall have access to classified information in connection with this case unless that person has:

(1) received the necessary security clearance from the appropriate DoD authorities and signed an appropriate non-disclosure agreement, as verified by the Chief Security Officer, Office of Special Security,

(2) signed the Memorandum of Understanding Regarding Receipt of Classified Information (MOU), attached to this Protective Order, and

(3) a need-to-know for the classified information at issue, as determined by the Original Classification Authority (OCA) for that information.

b. In order to be provided access to classified information in connection with this case, each member of the Defense shall execute the attached MOU, file the executed originals of the MOU with the Chief Security Officer, Office of Special Security, and submit copies to the CSO.

The execution and submission of the MOU is a condition precedent to the Defense having access to classified information for the purposes of these proceedings. The Chief Security Officer, Office of Special Security and CSO shall not provide copies of the MOUs to the Prosecution except upon further order of the Military Commission. The Chief Security Officer can provide the Prosecution the names of the Defense team members, identified on the record, who have executed the MOU. The MOUs for Defense Team members who have been provided *ex parte* may be provided, under seal, to the Chief Security Officer, Office of Special Security, and the CSO under seal and will not be further released without authority of the Commission.

c. The substitution, departure, or removal of any member of the Defense, including defense witnesses, from this case for any reason shall not release that person from the provisions of this Protective Order or the MOU executed in connection with this Protective Order.

d. Once the Chief Security Officer, Office of Special Security verifies that counsel for the Accused have executed and submitted the MOU, and are otherwise authorized to receive classified information in connection with this case, the Government may provide classified discovery to the Defense.

e. All classified documents or information provided or obtained in connection with this case remain classified at the level designated by the OCA, unless the documents bear a clear indication that they have been declassified. The person receiving the classified documents or information, together with all other members of the Defense or the Government, respectively, shall be responsible for protecting the classified information from disclosure and shall ensure that access to and storage of the classified information is in accordance with applicable laws and regulations and the terms of this Protective Order.

f. No member of the Defense, including any defense witness, is authorized to disclose any classified information obtained during this case, outside the immediate parameters of these military commission proceedings. If any member of the Defense or any defense witness receives

any summons, subpoena, or court order, or the equivalent thereof, from any United States or foreign court or on behalf of any criminal or civil investigative entity within the United States or from any foreign entity, the Defense, including defense witnesses, shall immediately notify the military judge, the Chief Security Officer, Office of Special Security, and the Government so that appropriate consideration can be given to the matter by the Commission and the OCA of the materials concerned. Absent authority from the Commission or the Government, the Defense and defense witnesses are not authorized to disseminate or disclose classified materials in response to such requests. The Defense, an Accused, and defense witnesses and experts are not authorized to use or refer to any classified information obtained as a result of their participation in commission proceedings in any other forum, or in a military commission proceeding involving another detainee.

6. USE, STORAGE, AND HANDLING PROCEDURES

a. The Office of the Chief Defense Counsel, Office of Military Commissions, has approved secure areas in which the Defense may use, store, handle, and otherwise work with classified information. The Chief Security Officer, Office of Special Security, shall ensure that such secure areas are maintained and operated in a manner consistent with this Protective Order and as otherwise reasonably necessary to protect against the disclosure of classified information.

b. All classified information provided to the Defense, and otherwise possessed or maintained by the Defense, shall be stored, maintained, and used only in secure areas. Classified information may only be removed from secure areas in accordance with this Protective Order and applicable laws and regulations governing the handling and use of classified information.

c. Nothing in this Protective Order shall be construed to interfere with the right of the Defense to interview witnesses, regardless of their location. If the Defense receives a document containing information described in ¶ 2(g) or memorializes information described in ¶ 2(g), while in a non-secure environment, the Defense shall:

(1) Maintain positive custody and control of the material at all times;

(2) Unless under duress, relinquish control of the material only to other personnel with the appropriate security clearance and a need-to-know;

(3) Transport the material in a manner not visible to casual observation;

(4) Not add information (including markings) corroborating the material as classified until returning to a secure area;

(5) Not electronically transmit the information via unclassified networks;

(6) Transport the material to a secure area as soon as circumstances permit; and,

(7) After returning to a secure area, mark and handle the material as classified.

d. Consistent with other provisions of this Protective Order, the Defense shall have access to the classified information made available to them and shall be allowed to take notes and prepare documents with respect to such classified information in secure areas.

e. The Defense shall not copy or reproduce any classified information in any form, except in secure areas and in accordance with this Protective Order and applicable laws and regulations governing the reproduction of classified information.

f. Defense counsel can conduct open source searches from a computer not identifiable with the U.S. government. The raw search material can be stored in an unclassified format or on an unclassified system. However, if an individual has access to classified information, any as information described in ¶¶ 2(g)(2) and 2(g)(4) will be marked or treated as classified in a Military Commissions pleading if the information is specifically referenced to information available in the public domain.

g. **A**ll documents prepared by the Defense that are known or believed to contain classified information, including, without limitation, notes taken or memoranda prepared by counsel and pleadings or other documents intended for filing with the Commission, shall be transcribed, recorded, typed, duplicated, copied, or otherwise prepared only by persons

possessing an appropriate approval for access to such classified information. Such activities shall take place in secure areas, on approved word processing equipment, and in accordance with procedures approved by the Chief Security Officer, Office of Special Security

h. The Defense may submit work product for classification review using the procedures outlined in ¶ 4(d). Except as provided in ¶ 6, all such documents and any associated materials containing classified information or information treated as classified under ¶ 6f and g such as notes, memoranda, drafts, copies, typewriter ribbons, magnetic recordings, and exhibits shall be maintained in secure areas unless and until the OCA or Chief Security Officer, Office of Special Security advises that those documents or associated materials are unclassified in their entirety. None of these materials shall be disclosed to the Government unless authorized by the Commission, by counsel for an Accused, or as otherwise provided in this Protective Order.

i. The Defense may discuss classified information only within secure areas and shall not discuss, disclose, or disseminate classified information over any non-secure communication system, such as standard commercial telephones, office intercommunication systems, or non-secure electronic mail.

j. The Defense shall not disclose any classified documents or information to any person, including counsel in related cases of Guantanamo Bay detainees in Military Commissions or other courts (including, but not limited to, habeas proceedings), except those persons authorized by this Protective Order, the Commission, and counsel for the Government with the appropriate clearances and the need-to-know that information. The Commission recognizes the presentation of a joint defense may necessitate disclosure on a need-to-know basis to counsel for co-accused.

k. To the extent the Defense is not certain of the classification of information it wishes to disclose, the Defense shall follow procedures established by the Office of Military Commissions for a determination as to its classification. In any instance in where there is any doubt as to

whether information is classified, the Defense must consider the information classified unless and until it receives notice from the Chief Security Officer, Office of Special Security, this information is not classified.

l. Until further order of this Commission, the Defense shall not disclose to an Accused any classified information not previously provided by an Accused to the Defense, except where such information has been approved for release to an Accused and marked accordingly.

m. Except as otherwise stated in this paragraph, and to ensure the national security of the United States, at no time, including any period subsequent to the conclusion of these proceedings, shall the Defense make any public or private statements disclosing any classified information accessed pursuant to this Protective Order, or otherwise obtained in connection with this case, including the fact that any such information or documents are classified. In the event classified information enters the public domain without first being properly declassified by the United States Government, counsel are reminded they may not make public or private statements about the information if the information is classified. (*See* paragraph 2g of this Protective Order for specific examples of information which remains classified even if it is in the public domain). In an abundance of caution and to help ensure clarity on this matter, the Commission emphasizes that counsel shall not be the source of any classified information entering the public domain, nor should counsel comment on information which has entered the public domain but which remains classified.

7. PROCEDURES FOR FILING DOCUMENTS

a. See Rule 3, Motion Practice, Military Commissions Trial Judiciary Rules of Court.

b. For all filings, other than those filed pursuant to M.C.R E. 505, in which counsel know, reasonably should know, or are uncertain as to whether the filing contains classified information

or other information covered by Chapter 19-3(b), DoD Regulation for Trial By Military Commission, counsel shall submit the filing by secure means under seal with the Chief Clerk of the Trial Judiciary.

c. Documents containing classified information or information the Defense Counsel believes to be classified shall be filed pursuant to the procedures specified for classified information.

d. Classified filings must be marked with the appropriate classification markings on each page, including classification markings for each paragraph. If a party is uncertain as to the appropriate classification markings for a document, the party shall seek guidance from the Chief Security Officer, Office of Special Security, who will consult with the OCA of the information or other appropriate agency, as necessary, regarding the appropriate classification.

e. All original filings will be maintained by the Director, Office of Court Administration, as part of the Record of Trial. The Office of Court Administration shall ensure any classified information contained in such filings is maintained under seal and stored in an appropriate secure area consistent with the highest level of classified information contained in the filing.

f. Under no circumstances may classified information be filed in an otherwise unclassified filing except as a separate classified attachment. In the event a party believes an unsealed filing contains classified information, the party shall immediately notify the Chief Security Officer, Office of Special Security, and CSO/ACSO, who shall take appropriate action to retrieve the documents or information at issue. The filing will then be treated as containing classified information unless and until determined otherwise. Nothing herein limits the Government's authority to take other remedial action as necessary to ensure the protection of the classified information.

g. Nothing herein requires the Government to disclose classified information. Additionally, nothing herein prevents the Government or Defense from submitting classified information to the Commission *in camera* or *ex parte* in these proceedings or accessing such submissions or information filed by the other party. Except as otherwise authorized by the Military Judge, the filing party shall provide the other party with notice on the date of the filing.

8. PROCEDURES FOR MILITARY COMMISSION PROCEEDINGS

a. Except as provided herein, and in accordance with M.C.R.E. 505, no party shall disclose or cause to be disclosed any information known or believed to be classified in connection with any hearing or proceeding in this case.

(1) Notice Requirements

(a) The parties must comply with all notice requirements under M.C.R.E. 505 prior to disclosing or introducing any classified information in this case.

(b) Because statements of an Accused may contain information classified as TOP SECRET/SCI, the Defense must provide notice in accordance with this Protective Order and M.C.R.E. 505(g) if an Accused intends to make statements or offer testimony at any proceeding.

(2) Closed Proceedings

(a) While proceedings shall generally be publicly held, the Commission may exclude the public from any proceeding, *sua sponte* or upon motion by either party, in order to protect information, the disclosure of which could reasonably be expected to damage national security. If the Commission closes the courtroom during any proceeding in order to protect classified information from disclosure, no person may remain who is not authorized to access

classified information in accordance with this Protective Order, which the CSO shall verify prior to the proceeding.

(b) No participant in any proceeding, including the Government, Defense, Accused, witnesses, and courtroom personnel, may disclose classified information, or any information that tends to reveal classified information, to any person not authorized to access such classified information in connection with this case.

(3) Delayed Broadcast of Open Proceedings

(a) Due to the nature and classification level of the classified information in this case, the Commission finds that to protect against the unauthorized disclosure of classified information during proceedings open to the public, it will be necessary to employ a forty-second delay in the broadcast of the proceedings from the courtroom to the public gallery. This is the least disruptive method of both insuring the continued protection of classified information while providing the maximum in public transparency.

(b) Should classified information be disclosed during any open proceeding, this delay will allow the Military Judge or CSO to take action to suspend the broadcast—including any broadcast of the proceedings to locations other than the public gallery of the courtroom (e.g., any closed-circuit broadcast of the proceedings to a remote location)—so that the classified information will not be disclosed to members of the public.

(c) The broadcast may be suspended by the Military Judge or CSO whenever it is reasonably believed that any person in the courtroom has made or is about to make a statement or offer testimony disclosing classified information.

(d) The Commission shall be notified immediately if the broadcast is suspended. In that event, and otherwise if necessary, the Commission may stop the proceedings

to evaluate whether the information disclosed, or about to be disclosed, is classified information as defined in this Protective Order. The Commission may also conduct an *in camera* hearing to address any such disclosure of classified information.

(4) Other Protections

(a) During the examination of any witness, the Government may object to any question or line of inquiry that may require the witness to disclose classified information not found previously to be admissible by the Commission. Following such an objection, the Commission will determine whether the witness's response is admissible and, if so, may take steps as necessary to protect against the public disclosure of any classified information contained therein.

(b) Classified information offered or admitted into evidence will remain classified at the level designated by the OCA and will be handled accordingly. All classified evidence offered or accepted during trial will be kept under seal, even if such evidence was inadvertently disclosed during a proceeding. Exhibits containing classified information may also be sealed after trial as necessary to prevent disclosure of such classified information.

(5) Record of Trial

(a) It is the responsibility of the Government, IAW 10 U.S.C § 948l(c) to control and prepare the Record of Trial. What is included in the Record of Trial is set out by R.M.C. 1103. The Director, Office of Court Administration, shall ensure that the Record of Trial is reviewed and redacted as necessary to protect any classified information from public disclosure.

(b) The Director, Office of Court Administration, shall ensure portions of the Record of Trial containing classified information remain under seal and are properly

segregated from the unclassified portion of the transcripts, properly marked with the appropriate security markings, stored in a secure area, and handled in accordance with this Protective Order.

9. UNAUTHORIZED DISCLOSURE

a. Any unauthorized disclosure of classified information may constitute a violation of United States criminal laws. Additionally, any violation of the terms of this Protective Order shall immediately be brought to the attention of the Commission and may result in disciplinary action or other sanctions, including a charge of contempt of the Commission and possible referral for criminal prosecution. Any breach of this Protective Order may also result in the termination of access to classified information. Persons subject to this Protective Order are advised that unauthorized disclosure, retention, or negligent handling of classified documents or information could cause damage to the national security of the United States or may be used to the advantage of an adversary of the United States or against the interests of the United States. The purpose of this Protective Order is to ensure those authorized to receive classified information in connection with this case will never divulge that information to anyone not authorized to receive it, without prior written authorization from the OCA and in conformity with this Order.

b. The any party shall promptly notify the Chief Security Officer, Office of Special Security, upon becoming aware of any unauthorized access to or loss, theft, or other disclosure of classified information, and shall take all reasonably necessary steps to retrieve such classified information and protect it from further unauthorized disclosure or dissemination.

10. SURVIVAL OF ORDER

a. The terms of this Protective Order and any signed MOU shall survive and remain in effect after the termination of this case unless otherwise determined by a court of competent jurisdiction.

b. This Protective Order is entered without prejudice to the right of the parties to seek such additional protections or exceptions to those stated herein as they deem necessary.

So ORDERED this __day of February 2015.

//s//
JAMES L. POHL
COL, JA, USA
Military Judge

Attachment D

OMC's Public Transcript Process

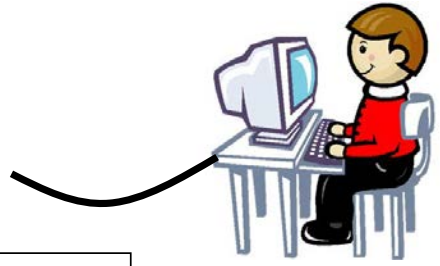
- The Regulation for Trial by Military Commissions, 19-4e states: "[e]xcept under exceptional circumstances, including equipment failure, the Convening Authority shall ensure the custodian of the OMC website posts a draft, unofficial, unauthenticated transcript of the public portions of the military commission proceedings to the OMC website as soon as practicable after the conclusion of a hearing each day the military commission is in session (whether the hearing is recessed, adjourned, or closed). This draft, unofficial, unauthenticated transcript shall be prepared by a court reporter seated in a room that receives an audio feed of the proceedings that is identical to the audio feed broadcast in the public gallery. This procedure will avoid inclusion in the draft, unofficial, unauthenticated transcript of any inadvertent utterances of classified or protected information inside the courtroom."

- The public transcript is prepared and released to facilitate the public's access to military commissions proceedings. The draft transcript, however, is an unofficial, unauthenticated transcript that may be further reviewed and revised to prevent the inadvertent disclosure of protected or classified information prior to public release. Review of the draft transcript is a coordinated, interagency process, which may involve research into motions or filings discussed during the proceedings, and which may further delay the release of the public transcript on the military commissions' public website. Unless a review is required, the public transcript is generally released and posted on the website within 24 to 72 hours after the hearing concludes for the day.

- The public transcript is a separate process from the "official" record or transcript. The "official" transcript is authenticated by the military judge and is used by appellate authorities to determine issues raised on appeal in the case. Authentication indicates or essentially certifies that the transcript accurately reflects what occurred during the proceedings. The public transcript is not authenticated. The Office of Court Administration (OCA) is responsible for preparing both the public and official transcripts.

UNCLASSIFIED//FOR PUBLIC RELEASE

OMC's Public Transcript Process



Step 1. The Writer. The writer "writes" the proceedings using a stenography machine. He/she takes down what he/she hears from a 40-second delayed audio/video feed. The steno team is in a room located outside of the courtroom.

Step 2. Fast-Editor. A laptop is attached to the writer's steno machine; the fast-editor is editing as writer is writing or creating the draft transcript.

Step 3. Scopists. Two scopists review/edit ten minute increments of the transcripts at a time. They look for missing or confusing language in transcript, places where the parties talked over each other, etc. During the proceedings, the scopists also research words, names, and case cites to ensure proper spellings are used in the transcript.

Step 4. The Proofreader. The proofreader merges the scopists' edited portions of the transcript into one document and prints a hard copy for proofing. He/she reviews the transcript for proper content, context, and punctuation. He/she makes corrections and finalizes the transcript.

Step 5. OCA Personnel Reviews. The final draft of the unofficial, unauthenticated transcript is reviewed by OCA personnel. The OCA reviewer corrects the format and unique terms and reviews for issues with substantive information. Once the review is complete and issues resolved, OCA forwards the transcript to the webmaster for public release on the Military Commissions' website.

Declaration of Alka Pradhan

1. My name is Alka Pradhan. I am over 18 years old and competent to make a declaration.

Duties as counsel

2. I am employed by the United States government, Department of Defense, Military Commissions Defense Organization as a civilian attorney. In 2015, I was detailed by Brigadier General John G. Baker, United States Marine Corps, as an attorney for Ammar al Baluchi in *United States v. Khalid Shaikh Mohammad et al.*, commonly known as "the 9/11 Case." In this declaration, I write only in my capacity as counsel for Mr. Baluchi, and do not speak for any other element of the United States government.

3. Prior to my employment at the Military Commissions Defense Organization, I was employed by the UK human rights organization Reprieve as U.S.-based counsel, representing Guantanamo Bay detainees and civilian victims of U.S. drone strikes in Pakistan and Yemen. I also worked as senior counsel for The Constitution Project's Task Force on Detainee Treatment, investigating and writing a comprehensive report on U.S. detention operations since 2001. Among the topics that I investigated, including interviews of U.S. and foreign government officials, was the former CIA Rendition, Detention, and Interrogation Program (RDI Program).

4. Since 2015, my duties as assigned by Learned Counsel James Connell primarily although not exclusively involve analysis and litigation of the role of the CIA in the torture and other cruel, inhuman, and degrading treatment of Mr. al Baluchi. This area of focus includes the RDI Program and conditions of confinement at Camp VII.[1] In the course of my duties, I have examined many hundreds of classified and unclassified documents relating to the RDI Program and Camp VII.

5. Under Regulation for Military Commission § 9-1(b)(2)(F), my duties as counsel include safeguarding national security information. To the best of my understanding and belief, no statement in this declaration reveals classified information.

[1] In the United States Military Commissions, Roman and Arabic numerals are used interchangeably to describe Camps V and VII.

Existence of CIA Camp VII records declassified in SSCI Executive Summary

6. The redacted Executive Summary of the Senate Select Committee on Intelligence report on the CIA RDI Program includes the following declassified text at page 80 (Attachment A):

> On September 5, 2006, bin al-Shibh was transferred to U.S. military custody at Guantanamo Bay, Cuba.[427] After his arrival, bin al-Shibh was placed on anti-psychotic medications.[428]
>
> [428] [redacted] SITE DAILY REPORT - 24 MAY 07: [redacted] 8904 (182103Z APR 08)

7. From unclassified sources, I am aware that "site" is CIA jargon for a specific location at which it conducts operations. From review of many declassified documents, I am also aware that CIA dates documents in the distinctive format DDHHHHZ MMM YY. This date format breaks down into
a two-digit date
four digits of military time
a capital Z for Zulu or Greenwich Mean Time
a space
a three-letter month abbreviation in all caps
a space
a two-digit year.
This distinctive CIA format can be seen throughout the redacted Executive Summary, including in footnote 423 on page 80.

8. Based on my experience in reviewing CIA documents released under the Freedom of Information Act, the context of the redacted Executive Summary, and other unclassified sources, I can say to a reasonable degree of professional certainty that the footnote

> [428] [redacted] SITE DAILY REPORT - 24 MAY 07: [redacted] 8904 (182103Z APR 08)

refers to two CIA documents: a "Site Daily Report" dated 24 May 2007 and a cable numbered 8904 dated 18 April 2008.

Litigation over CIA records of Camp 7

9. In January 2020, attorneys for Ramzi bin al Shibh, a co-defendant in the 9/11 Case, filed a motion to compel production of CIA records of Camp VII (Attachment B). This unclassified motion sought the production of CIA records relating to Camp VII, based on the existence of such records revealed in the SSCI Executive Summary.

10. Following review by the Department of Defense Security Classification/ Declassification Review Team, among others, the U.S. government released

Mr. bin al Shibh's motion AE 711 to the public with only one minor redaction of an email address. The publicly-released version of AE 711 includes assertions from Mr. bin al Shibh's defense counsel regarding the existence of CIA records regarding operational control of Camp VII.

11. On November 2, 2021, I and other attorneys conducted argument in open session on Mr. bin al Shibh's motion to compel CIA records from Camp VII (Attachment C). The open session was monitored for disclosure of classified information by a military judge, multiple prosecutors, a Court Information Security Officer, and on information and belief, an Original Classification Authority for the CIA. The prosecution had access to a text device allowing communication from classified information equity holders in case of unauthorized disclosure of information. The open session was transmitted to an audience of media and other observers on a 40-second delay to allow the military judge or CISO to prevent the disclosure of classified information.

12. In the course of oral argument on November 2, 2021, I and other defense attorneys repeatedly argued the existence and significance of CIA records regarding its role at Camp VII in the late 2006 and early 2007 timeframe. In this oral argument, a prosecutor from the Office of the Chief Prosecutor represented the interests of CIA. One of many examples is the argument of Cheryl Bormann, counsel for Walid bin 'Atash, at page 34246-47:

> LDC [MS. BORMANN]: So I heard Mr. Feeler say that it is relevant and noncumulative, and I'm going to quote him, what the CIA has to say about Mr. Binalshibh. And I think he's right. That's a very narrow question. However, the larger question on this particular issue is why the CIA has anything to say about Mr. Binalshibh or any of these men in early 2007

and late 2006. According to the government's witness, they had nothing to do with these guys, and it's clear they did.

So when you're examining the questions surrounding this particular motion, I suggest that you pay particular attention to the fact that, one, the records exist and, two, the fact that they exist ought to tell you something about their attenuation argument.

13. Later on November 2, 2021, the prosecution three times acknowledged the existence of CIA records regarding their role at Camp VII, specifically including the Site Daily Reports. In the transcript, "MJ" stands for Military Judge, and "TC" stands for Trial Counsel, the military term for prosecutor. At page 34252 of the Unofficial Transcript, the prosecutor admits the existence of the Site Daily Reports from Camp VII:

So when you're saying that the defense already has some of these medical records ----

TC [MR. SWANN]: They have all the medical records.

MJ [Col McCALL]: Understood. But, again, those are the medical records that were produced and compiled by the DoD, correct? And it sounds like the -- the defense's argument is that there may be additional reports relating to the same topic produced by the CIA.

TC [MR. SWANN]: There are no additional reports. Let me address that one that he ----

MJ [Col McCALL]: But -- so -- and this is where I'm trying to cut through some of the -- the churn between the parties. If a document doesn't exist, that makes my job very easy. The document doesn't exist, the argument is over.

If the question then is, well, the document exists but we're not going to produce it because it doesn't fall under -- you know, it's not relevant or material, okay. Then I -- then I'm getting involved.

So I guess that's my first question is: When they reference what was -- this report that was referenced in the footnote 428, and then let's move into the second category of the site daily reports, those do exist, correct?

TC [MR. SWANN]: Yes, sir.

At page 34255, the military judge and prosecutor discuss the significance of documents showing mixed DoD-CIA control of Camp VII:

MJ [Col McCALL]: Well, I -- but -- so it still is an issue in dispute, though, correct? I mean, so it's not a -- it would be very simple, and again, it would make things easier for me if it was black and white, DoD was in complete control, CIA was not involved, or if it was the opposite, if CIA was involved such as in the RDI program, DoD was not involved.

But here where it's -- it sounds like, the testimony from the camp commander and some of the other documentation, shows there was an MOU, there was some overlap, there was some mixing; and so once that becomes in dispute, the amount of CIA involvement and its effect then on the potential attenuation argument, isn't this then a matter of weight, that it should go to the defense so that they can then look at the CIA documents to determine, hey, this helps our argument that CIA was exerting control, was having some type of supervisory action ----

TC [MR. SWANN]: Well, but ----

MJ [Col McCALL]: ---- versus -- I mean, it seems like if the documents that the document may possess, it sounds like, are simply regurgitating what were already in DoD medical records, it seems that the government would want to give those to the defense and foreclose that argument.

TC [MR. SWANN]: That -- that may well be true. But in this case -- in this case, that's not what those documents do.

And at pages 34259-60, the prosecutor again admits the existence of the Site Daily Reports:

MJ [Col McCALL]: But again, the -- the defense position appears to be that they're wanting -- it's not the underlying information, it's the fact that it's then being put into CIA reports, being communicated via CIA channels; any other communications among the CIA and FBI, again, to show that -- that working together between the DoD and the CIA, and then that might have been -- they could lend to defense arguments for having an effect on the LHM. That makes sense to me.

So I guess going back, my question is: It sounds like those do exist, these daily site reports?

TC [MR. SWANN]: Yes, sir.

MJ [Col McCALL]: Okay. And they have not been produced? Because it sounds like the -- the government position is that they are cumulative.

TC [MR. SWANN]: Yeah. One more.

MJ [Col McCALL]: Sure.

TC [MR. SWANN]: Mr. Trivett suggests that I just simply ask you to go back and take a look at the statement of relevant facts. We have -- we have admitted a number of things, but it ----

> MJ [Col McCALL]: I'll do that.
>
> TC [MR. SWANN]: These particular items -- that one particular item they have by virtue of the report itself. The rest of these items have -- they don't contribute to anything that you need to determine about the voluntariness of these statements. People write reports day in and day out and they send reports everywhere, and this is just an example of a report going out.

14. On 11 January 2022, the military judge granted Mr. bin al Shibh's motion and ordered the prosecution to produce "any CIA records related to Camp 7 that reference Mr. bin al Shibh's detention, treatment, and conditions, or his 2007 [FBI-DoD] interrogation." (Attachment D.)

Classification guidance on 2022 Camp VII inspection

15. In April 2021, I and other defense attorneys learned from Mr. al Baluchi and the media that Joint Task Force-Guantanamo had relocated prisoners at Camp VII to another prison. I participated in an inspection of parts of Camp VII in March 2022. During the Camp VII inspection, an attorney from the Office of the Staff Judge Advocate for Joint Task Force-Guantanamo escorted me and the other members of the inspection team. Among other roles, the attorney advised on what elements the inspection team was allowed to photograph. At no time did the attorney advise me that, or prohibit photography on the basis that, the existence or non-existence of information regarding CIA operational control of Camp VII was classified.

16. Under U.S.C. § 1746, I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on April 26, 2022.

Alka Pradhan

Attachment A

(~~TS//~~ [redacted] ~~//NF~~) Ramzi bin al-Shibh was subjected to interrogation techniques and conditions of confinement that were not approved by CIA Headquarters. CIA interrogators used the CIA's enhanced interrogation techniques for behavior adjustment purposes, in response to perceived disrespect, and on several occasions, before bin al-Shibh had an opportunity to respond to an interrogator's questions or before a question was asked. The CIA's enhanced interrogation techniques were applied when bin al-Shibh failed to address an interrogator as "sir," when interrogators noted bin al-Shibh had a "blank stare" on his face, and when bin al-Shibh complained of stomach pain.[422] Further, despite CIA policy at the time to keep detainees under constant light for security purposes, bin al-Shibh was kept in total darkness to heighten his sense of fear.[423]

(~~TS//~~ [redacted] ~~//NF~~) CIA psychological assessments of bin al-Shibh were slow to recognize the onset of psychological problems brought about, according to later CIA assessments, by bin al-Shibh's long-term social isolation and his anxiety that the CIA would return to using its enhanced interrogation techniques against him. The symptoms included visions, paranoia, insomnia, and attempts at self-harm.[424] In April 2005, a CIA psychologist stated that bin al-Shibh "has remained in social isolation" for as long as two and half years and the isolation was having a "clear and escalating effect on his psychological functioning." The officer continued, "in [bin al-Shibh's] case, it is important to keep in mind that he was previously a relatively high-functioning individual, making his deterioration over the past several months more alarming."[425] The psychologist wrote, "significant alterations to RBS'[s] detention environment must occur soon to prevent further and more serious psychological disturbance."[426] On September 5, 2006, bin al-Shibh was transferred to U.S. military custody at Guantanamo Bay, Cuba.[427] After his arrival, bin al-Shibh was placed on anti-psychotic medications.[428]

(~~TS//~~ [redacted] ~~//NF~~) The CIA disseminated 109 intelligence reports from the CIA interrogations of Ramzi bin al-Shibh.[429] A CIA assessment, which included intelligence from his

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[422] [redacted] 10582 (242026Z FEB 03); [redacted] 10627 (281949Z FEB 03)

[423] [redacted] 10521 (191750Z FEB 03). The cable referred to keeping bin al-Shibh in darkness as a "standard interrogation technique." The same cable states that during the night of February 18, 2003, the light went out in bin al-Shibh's cell and that "[w]hen security personnel arrived to replace the bulb, bin al-Shibh was cowering in the corner, shivering. Security personnel noted that he appeared relieved as soon as the light was replaced."

[424] [redacted] 1759 (021319Z OCT 04); HEADQUARTERS [redacted] (040023Z NOV 05); [redacted] 1890 (171225Z NOV 04); [redacted] 1878 (140915Z NOV 04); [redacted] 1930 (061620Z DEC 04); [redacted] 2207 (111319Z APR 05); [redacted] 2210 (141507Z APR 05); [redacted] 2535 (051805Z JUL 05); [redacted] 2589 (120857Z JUL 05); [redacted] 2830 (291304Z AUG 05); [redacted] 1890 (171225Z NOV 04); [redacted] 1893 (200831Z NOV 04); CIA document entitled, "Detainee Talking Points for ICRC Rebuttal, [redacted]"; [redacted] 2210 (141507Z APR 05); [redacted] 2535 (051805Z JUL 05); [redacted] 2210 (141507Z APR 05); [redacted] 2535 (051805Z JUL 05); [redacted] 2830 (291304Z AUG 05); [redacted] 1930 (061620Z DEC 04); [redacted] 2210 (141507Z APR 05)

[425] [redacted] 2210 (141507Z APR 05)

[426] [redacted] 2210 (141507Z APR 05)

[427] HEADQUARTERS [redacted] (031945Z SEP 06)

[428] [redacted] SITE DAILY REPORT - 24 MAY 07: [redacted] 8904 (182103Z APR 08)

[429] *See* Volume II for additional information.

Attachment B

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 711 (RBS)

Mr. Bin al Shibh's Motion to Compel
Production of CIA Records Related to Camp 7

31 January 2020

1. Timeliness: This motion is timely filed.

2. Relief Sought: Mr. Bin al Shibh respectfully requests the Military Commission compel the production of requested Central Intelligence Agency (CIA) records related to Camp 7, where he has been detained since 2006.

3. Overview: The Defense is entitled to discovery of any CIA records related to Camp 7 that reference Mr. Bin al Shibh's detention, treatment, and conditions, or the Letterhead Memorandum (LHM) interrogations from 2007. Based on redacted citations in the Senate Select Committee on Intelligence Report on the Detention and Interrogation Program (the Report), Mr. Bin al Shibh believes these records to exist. The records are relevant and necessary to support Mr. Bin al Shibh's motion to suppress his statements as involuntary, to support future motions to suppress statements, to rebut the Government's arguments about the attenuation of his interrogations at Guantanamo, and as potential mitigating evidence.

3. Burden of Proof: The Defense bears the burden of persuasion on the motion to compel to show by a preponderance of the evidence that the requested discovery is relevant and helpful to the preparation of Mr. Bin al Shibh's defense.[1]

4. Facts: The U.S. Government held Mr. Bin al Shibh in secret, incommunicado detention for nearly four years, from 2002 to 2006, where he was tortured and repeatedly interrogated. Following his transfer to Guantanamo Bay in September 2006, agents of the Federal Bureau of Investigation (FBI) and Department of Defense Criminal Investigative Task Force (DoD CITF) interrogated him on 11-12 January 2007, resulting in statements that the Government now intends to use at trial. Mr. Bin al Shibh has previously provided a more thorough account of relevant facts surrounding his extended detention and torture in the RDI Program, as well as his treatment at Camp 7 and the details of his LHM interrogations, which he relies on for this Motion.[2]

According to the Report, the CIA "maintained operational control" of Camp 7 after Mr. Bin al Shibh was transferred there.[3] Mr. Bin al Shibh has been held at Camp 7 since 2006. He has continued to protest and litigate his conditions of confinement in the Camp for the last 14 years.[4]

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[1] R.M.C. 905(c)(1)-(2).
[2] *See* AE 629 (RBS) at 8-26.
[3] S. Rep. 113-288, (hereafter "SSCI Rep.") at 160 (2014).
[4] *See, e.g.,* AE 152 (RBS) Emergency Defense Motion To Order the Cessation of External Use of Sounds and Vibrations to Interfere with Mr. Bin al Shibh's Confinement and with the Attorney-Client Relationship and to Allow Expert Inspection of his Cell, Substructure/Foundation, Surrounding Areas of the Cell, and the Cell Control Room, and subsequent filings in the series.

In its response to Mr. Bin al Shibh's motion to suppress his statements on voluntariness grounds, the Government argued that the LHM interrogations were voluntary, and specifically contended that the circumstances surrounding the interrogations are the "factual and legal crux of the voluntariness inquiry."[5] The Government relied on the assertion that in September 2006 Mr. Bin al Shibh "was transferred from the custody of the CIA to the custody of the Department of Defense (DoD) and was detained on Naval Station Guantanamo Bay, Cuba at Joint Task Force-Guantanamo's (JTF-GTMO) Camp 7."[6] The Government repeatedly argued in its motion that Mr. Bin al Shibh's circumstances had changed after his arrival at Camp 7 because he was under DoD custody. The Government has contended that Mr. Bin al Shibh was not under the operational control of the CIA after he arrived at Camp 7.[7]

The Report appears to allude to CIA records related to Mr. Bin al Shibh that were produced following his transfer to Camp 7. It notes that after Mr. Bin al Shibh was transported to Guantanamo Bay in 2006 he was placed on psychotropic medication in 2007. Footnote 428 supports this fact, and contains a partially redacted citation "[428] [REDACTED] SITE DAILY REPORT - 24 MAY 07: [REDACTED] 8904 (182103Z APR 08)"[8] The term "SITE DAILY REPORT" does not appear in any other place in the Report that Counsel are aware of. The second half of the citation follows a format that appears to be used for CIA cables throughout the Report,

[5] AE 629A (GOV) at 18.
[6] *Id*. at 3.
[7] *See* AE 692A (GOV) Government Motion to Reconsider AE 692, Order, Or, in the Alternative, Grant an *Ex Parte* Hearing.
[8] SSCI Rep. at 80, n.428.

mostly from the period between 2002 and 2006. Counsel believe that the citation in Footnote 428 references CIA documents. Counsel do not have these documents.

The Government has disputed Mr. Bin al Shibh's account of his treatment at Camp 7, disputed the contention in the Report that the CIA was in operational control of Camp 7, and argued extensively that Mr. Bin al Shibh's conditions at Camp 7 had changed sufficiently to attenuate his coercive detention and treatment by the CIA.[9]

On 30 December 2019, Defense Counsel for Mr. Bin al Shibh sent a discovery request to Trial Counsel, requesting:

1. The document(s) referenced in Footnote 428.

2. Any additional CIA cables related to Mr. Bin al Shibh, conditions at Camp 7, or the LHM interrogations, that were sent after his arrival at Guantanamo Bay in September 2006.

3. Any "SITE DAILY REPORT" related to Camp 7 or Guantanamo Bay that was produced or transmitted after Mr. Bin al Shibh's arrival at Guantanamo Bay in September 2006. It appears that the CIA created a daily report related to Camp 7.

4. Any other communications, between the CIA and any other entity or organization, related to Mr. Bin al Shibh, conditions at Camp 7, or the LHM interrogations, that were sent after his arrival at Guantanamo Bay in September 2006.[10]

The Prosecution has not yet responded to this request.[11]

5. Law and Argument: The Defense is entitled to the requested evidence, as it is "material to preparation of the defense."[12] R.M.C. 701(j) establishes that "[e]ach party shall have an adequate

[9] AE 629A (GOV) at 4-6, 36-37.
[10] Attach. B.
[11] Pursuant to AE 245 (TCO) (7 November 2013) the Commission has established a presumptive 28-day time limit for responses to discovery requests.
[12] R.M.C. 701(c)(1); *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

opportunity to prepare its case and no party may unreasonably impede the access of another party to a witness or evidence." In passing the Military Commissions Act (M.C.A.) of 2009, Congress itself statutorily mandated this process.[13] R.M.C. 701(c)(1) states that the Government shall permit the defense counsel to examine any books, paper, documents, photographs, tangible objects, buildings, or places so long as they are: (1) under the control of the Government, and (2) material to the preparation of the defense or intended for use by the trial counsel as evidence in the Prosecution's case-in-chief at trial.

Demonstrating materiality "is not a heavy burden" and the standard of materiality is broadly construed.[14] Evidence qualifies as material when there is any reasonable likelihood it could affect the judgment of the jury.[15] Information is material for discovery purposes "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."[16] "[A]n accused's right to discovery is not limited to evidence that would be known to be admissible at trial. It includes materials that would assist the defense in formulating a defense strategy."[17] "Material evidence" is also not limited to exculpatory evidence.[18] It includes information that is unfavorable, as:

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[13] *See* 10 U.S.C. § 949j ("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").
[14] *United States v. Lloyd*, 992 F.2d 348, 351 (D.C. Cir. 1998); *United States v. Marshall*, 132 F.3d 63, 67 (D.C. Cir. 1998); *United States v. Libby*, 429 F. Supp. 2d 1, 7 (D.D.C. 2006).
[15] *See Wearry v. Cain*, 136 S.Ct. 1002, 1006 (2016).
[16] *Lloyd*, 992 F.2d at 351.
[17] *United States v. Webb*, 66 M.J. 89, 92 (C.A.A.F. 2008).
[18] *See Marshall*, 132 F.3d 63 at 67; *see also Libby*, 429 F. Supp. 2d at 7.

> [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.[19]

This is because "it is just as important to the preparation of a defense to know its potential pitfalls as it is to know its strengths."[20]

More broadly, Mr. Bin al Shibh has a constitutional right to present a complete defense.[21] Inseparable from this right is the right to obtain evidence.[22] Additionally, because this is a capital case, "the Eighth Amendment requires a greater degree of accuracy and fact finding than would be true in a non-capital case."[23] The penalty of death is qualitatively different than a sentence of imprisonment, and there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case, and this need affects every procedure at trial.[24]

Here, the requested evidence must be turned over to the Defense. The Government has not denied its existence, and it is material to Mr. Bin al Shibh's motion to suppress as well as any motion related to outrageous government misconduct and as mitigating evidence at any pre-sentencing hearing. If there are CIA site reports associated with Camp 7, they could provide

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[19] *Marshall*, 132 F.3d at 68.
[20] *Id.* at 67.
[21] *See, e.g.*, *United States v. Webb,* 66 M.J. 89, 92 (C.A.A.F. 2008) ("[t]he due process clause of the Fifth Amendment guarantees that criminal defendants be afforded a meaningful opportunity to present a complete defense"), citing *California v. Trombetta,* 467 U.S. 479, 485 (1984).
[22] *See Washington v. Texas*, 388 U.S. 14, 19 (1967) (guaranteeing production of documents and witnesses under the Fifth Amendment); *Taylor v. United States*, 329 F.2d 384, 386 (5th Cir. 1964) (guaranteeing production of documents and witnesses under the Sixth Amendment).
[23] *Gilmore v. Taylor*, 508 U.S. 333, 342 (1993).
[24] *See Simmons v. South Carolina*, 512 U.S. 154, 172 (1994) (Souter, J., concurring); *Beck v. Alabama*, 447 U.S. 625, 638 (1980); *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976).

evidence about any continued involvement of the CIA in the detention and treatment of Mr. Bin al Shibh or in the planning and execution of the LHM interrogations, show any ongoing collaboration between the CIA and the DoD or FBI, and provide details about his detention that are not available in any other source or that contradict the information from other sources.

Indeed, the Government has asked the Commission to focus on the circumstances surrounding the LHM interrogations in its arguments against suppression. It has put facts related to the requested evidence into dispute by contending that the interrogations were separate from the RDI Program and that Camp 7 was not under the operational control of the CIA. Given the Commission's duty to consider the totality of circumstances surrounding the LHM interrogations—including both the conditions of the interrogations themselves and their connections to earlier RDI treatment and interrogations—the Defense must have access to all evidence that could demonstrate why the statements must be suppressed or refute the Government's theories of voluntariness. Mr. Bin al Shibh must also have a full accounting of his detention to use as mitigating evidence in any pre-sentencing hearing. The Government itself has conceded the relevance of information related to any involvement of the CIA at Camp 7 and in the lead up to the LHM interrogations by putting the former Camp 7 commander on the stand and having him testify about these matters. The Government must now provide the requested discovery.

6. Oral Argument: Mr. Bin al Shibh requests oral argument on this motion.

7. Witnesses: None

8. Conference with Opposing Counsel: Counsel conferenced the motion with the Government at 7:51AM on 30 January, 2020 and did not receive a response.

9. Attachments:

a. Certificate of Service

b. Defense Discovery Request DR-SSCI Footnote 428-RBS-2019-12-30

c. Proposed Order

Respectfully submitted,

//s//
JAMES P. HARRINGTON
Learned Counsel

//s//
WYATT A. FEELER
Defense Counsel

//s//
VIRGINIA M. BARE
Maj, USAF
Defense Counsel

//s//
JOHN M. B. BALOUZIYEH
CPT, USA
Defense Counsel

//s//
DONNA R. CLINE
Defense Counsel

//s//
VIVIAN HERNANDEZ
Defense Counsel

Counsel for Mr. Bin al Shibh

ATTACHMENT A

UNCLASSIFIED//FOR PUBLIC RELEASE

CERTIFICATE OF SERVICE

I certify that on 31 January 2020, I electronically filed the foregoing motion and served it on all counsel of record by e-mail.

//s//
JAMES P. HARRINGTON
Learned Counsel

UNCLASSIFIED//FOR PUBLIC RELEASE

ATTACHMENT B

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

30 December 2019

MEMORANDUM FOR TRIAL COUNSEL

FROM: Wyatt Feeler, Defense Counsel for Mr. Ramzi Bin al Shibh

SUBJECT: DEFENSE DISCOVERY REQUEST RELATED TO CIA CAMP 7 RECORDS

Mr. Bin al Shibh, by and through undersigned counsel pursuant to R.M.C 701, 10 U.S.C. § 949p-4, 10 U.S.C. § 949j, 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, requests the Government provide the following discovery. Failure to provide the requested information will deny Mr. Bin al Shibh his rights to the due process of law, the effective assistance of counsel, and his right to humane treatment under international law as well as the right to be free from cruel and unusual punishment.

DEFINITIONS

For purposes of these requests for production, the following definitions apply:

1. The terms "document" or "record" should be construed as broadly as possible, and include any tangible recording, however made, of information or data; any written, printed, recorded, taped, electronically or digitally encoded, graphic, or other information. These terms include (without limitation) notes, correspondence, papers, communications of any nature, telegrams, telexes, memoranda, facsimiles, material stored electronically, electronic mail messages, electronic mail or text messages sent or received from a handheld device, notebooks of any character, summaries or records of personal conversations, diaries and calendars, routing slips or memoranda, reports, publications, books, minutes or recordings of meetings, transcripts of oral testimony, contracts and agreements, court papers, reports or summaries of negotiations, reports or summaries of investigations, photographs, films, videotapes, sketches, court papers, brochures, advertisements, promotional literature, pamphlets, press releases, instructions, tape recordings, records, computer databases, and revisions and drafts of any documents.

2. "You" and "your" refer to the Government, its agents, its representatives, its attorneys, and/or any other person acting on its behalf.

3. "Known to you" and "knowledge of" mean all matters known to the Government, its attorneys, its agents, its representatives, its employees, or to anyone whom the Government may control.

4. "Communications" means the imparting or exchanging of information regardless of the method used to impart or exchange the information.

Defense Discovery Request: DR-SSCI Footnote 428

BACKGROUND

On 11-12 January 2007, Mr. Bin al Shibh was interrogated at Guantanamo Bay, Cuba. The Government now seeks to introduce the Letterhead Memorandum (LHM) statements from these interrogations. On 10 June 2019, Mr. Bin al Shibh filed a motion to suppress the statements as involuntary, and the issue is currently pending before the Military Commission. Mr. Bin al Shibh relies on both his treatment in the Rendition, Detention, and Interrogation (RDI) Program and his treatment at Camp 7 up to and including the LHM interrogations, as well as the continued involvement of the CIA at Camp 7. Mr. Bin al Shibh anticipates moving to suppress the statements on additional legal grounds. Mr. Bin al Shibh's treatment is also relevant to any future pre-sentencing hearing.

The Government has disputed Mr. Bin al Shibh's account of his treatment at Camp 7, disputed the contention in the Senate Select Committee on Intelligence Report on the RDI Program (the "Report") that the CIA was in operational control of Camp 7, and argued extensively that Mr. Bin al Shibh's conditions at Camp 7 had changed sufficiently to attenuate his coercive detention and treatment by the CIA.

The Report details aspects of Mr. Bin al Shibh's lengthy, incommunicado detention and torture by the CIA. It notes that after Mr. Bin al Shibh was transported to Guantanamo Bay in 2006 he was placed on psychotropic medication in 2007. Footnote 428 supports this fact, and contains a partially redacted citation:

> [428] [REDACTED] SITE DAILY REPORT - 24 MAY 07: [REDACTED] 8904 (182103Z APR 08)

The term "SITE DAILY REPORT" does not appear in any other place in the Report that Counsel are aware of. The second half of the citation follows a format that appears to be used for CIA cables throughout the Report, mostly from the period between 2002 and 2006. Counsel believe that the citation in Footnote 428 references CIA documents.

DISCOVERY REQUESTS

Mr. Bin al Shibh requests that the Government provide:

1. The document(s) referenced in Footnote 428.

2. Any additional CIA cables related to Mr. Bin al Shibh, conditions at Camp 7, or the LHM interrogations, that were sent after his arrival at Guantanamo Bay in September 2006.

3. Any "SITE DAILY REPORT" related to Camp 7 or Guantanamo Bay that was produced or transmitted after Mr. Bin al Shibh's arrival at Guantanamo Bay in September 2006. It appears that the CIA created a daily report related to Camp 7.

4. Any other communications, between the CIA and any other entity or organization, related to Mr. Bin al Shibh, conditions at Camp 7, or the LHM interrogations, that were sent after his arrival at Guantanamo Bay in September 2006.

The Government must produce information that is both "material to the preparation of the defense"

of Mr. Bin al Shibh and "within the possession, custody, or control of the Government." R.M.C. 701(c). Any documents and communications listed above are within the possession, custody, or control of the Government. These documents and communications relate directly Mr. Bin al Shibh's detention at Guantanamo Bay, the circumstances leading up to his 2007 LHM statements, and the conduct of the Government in detaining him.

Mr. Bin al Shibh requests a response by **Thursday, 30 January 2019**. The point of contact for this request is Mr. Wyatt Feeler at wyatt.a.feeler.civ[redacted]

Respectfully Submitted,

//s//
WYATT A. FEELER
Defense Counsel

Defense Discovery Request: DR-SSCI Footnote 428

ATTACHMENT C

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 AL HAWSAWI**	**AE 711___** **ORDER** **Mr. Bin al Shibh's Motion to Compel Production of CIA Records Related to Camp 7** **__ February 2020**

1. This Order is issued pursuant to the authority under the Military Commissions Act of 2009 (10 U.S.C. §§ 948, et. seq.) and the Manual for Military Commissions, to include, but not limited to: Rule for Military Commissions (R.M.C.) 905(b); and Regulation for Trial by Military Commissions § 17-3.

2. Accordingly, IT IS HEREBY ORDERED that, no later than __ February 2020, the Government shall produce all requested discovery in AE 711 (RBS), to include:

1. The document(s) referenced in Footnote 428.

2. Any additional CIA cables related to Mr. Bin al Shibh, conditions at Camp 7, or the LHM interrogations, that were sent after his arrival at Guantanamo Bay in September 2006.

3. Any "SITE DAILY REPORT" related to Camp 7 or Guantanamo Bay that was produced or transmitted after Mr. Bin al Shibh's arrival at Guantanamo Bay in September 2006. It appears that the CIA created a daily report related to Camp 7.

4. Any other communications, between the CIA and any other entity or organization, related to Mr. Bin al Shibh, conditions at Camp 7, or the LHM interrogations, that were sent after his arrival at Guantanamo Bay in September 2006.

DRAFT ORDER / DEFENSE / 31 Jan 20

UNCLASSIFIED//FOR PUBLIC RELEASE

So **ORDERED** this ___ of February 2020.

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

DRAFT ORDER / DEFENSE / 31 Jan 20

Attachment C

[The R.M.C. 803 session was called to order at 1357, 02 November 2021.]

MJ [Col McCALL]: The commission is called to order. Parties are again present with the exception of Mr. Ali. I can't quite see, is Mr. Hawsawi in the back? It looks like -- yeah, I can see him. Okay.

Mr. Sowards.

LDC [MR. SOWARDS]: Thank you, Your Honor. Not to return to the argument on the motion we had, but I did want you to know that I had answered your question without consulting with my -- my colleagues, and there is one witness that during this session Ms. Radostitz would be prepared to examine, if it's convenient for the government, and that is the -- I guess they refer to him as the former camp commander. And his was one of the testimonies that was interrupted, not by COVID-related problems, but something else.

So if they can get that back on track. And she was indicating that that might actually assist with the information she needs for Special Agent Pellegrino's examination.

MJ [Col McCALL]: Okay.

LDC [MR. SOWARDS]: So just keep that in ----

MJ [Col McCALL]: Thank you, Mr. Sowards.

And, government, I'm not going to ask you your position on that right now. We'll see where we get and -- but I expect you to start to consider it and then I'll ask you at some point if it looks like it's an option.

MTC [MR. TRIVETT]: Yes, sir.

MJ [Col McCALL]: Mr. Connell.

LDC [MR. CONNELL]: Sir, when I left our ELC office about five minutes ago, the feed was down to that and that's fine. I mean, I understand that. But has there been a comms check with the stenos and the interpreters to see if their feeds are up?

MJ [Col McCALL]: I didn't hear that it was an issue. We can check on it.

LDC [MR. CONNELL]: I know that we're on the same feed that they are, sir, so that's what my concern was.

MJ [Col McCALL]: All right. We're checking on it.

[Pause.]

MJ [Col McCALL]: It sounds like at least the stenos are good. We're waiting to hear from the linguists.

Okay. It sounds like we're good with the linguists as well.

All right. We'll go ahead and move into AE 711. This is Mr. Binalshibh's motion to compel production of CIA records

related to Camp VII.

DC [MR. FEELER]: Good afternoon, Your Honor.

MJ [Col McCALL]: Good afternoon.

DC [MR. FEELER]: Wyatt Feeler again on behalf of Mr. Binalshibh.

So AE 711, as we discussed a little bit this morning, is a motion to compel and it's related to a host of issues in this case, not least of which currently is the voluntariness issue, but also related potentially to other suppression issues, to mitigation, to outrageous government conduct, and, depending on the discovery we could receive, to other issues we haven't even thought of yet.

The issue goes to the heart of the defense. And what we're asking for here, to be very clear, are CIA records from Guantanamo Bay or, more specifically, Camp VII related to Mr. Binalshibh from the time after he was brought for the second time to Guantanamo Bay in September 2006.

And the -- the relevant records we would be seeking are those that are directly related to Mr. Binalshibh, for example, that mention him or talk about him; those that talk about conditions of confinement at Camp VII, which even if they don't mention him by name, are pretty directly relevant to Mr. Binalshibh; and any that discuss the planning,

preparation, and conduct of the LHM interrogation, which is, of course, at issue in the suppression litigation.

So the genesis of this motion has to do with the SSCI Report and footnote 428, which you'll be familiar with if you've read the motion. So the unclassified redacted executive summary of the SSCI Report talks about Mr. Binalshibh's transfer from the black sites to Guantanamo Bay. It gives the date he was transferred and then it says, after his arrival, Mr. Binalshibh was placed on antipsychotic medications, and there's a footnote there for reference.

And footnote 428, it says redacted, site daily report, 24 May '07, and there's a colon and it says redacted and then there's the rest of a citation there that appears the same. And if -- you know, if you look at other footnotes in the report, it appears the same as CIA cables. It has a time and a date, some numbers that don't mean much to me, but must have meant something to someone.

So request 1 in our discovery request and the motion to compel is as narrow as I could conceive of a request. It is for this record in footnote 428. We obviously have reason to believe it exists. It references Mr. Binalshibh. It comes from early 2007, and it references him being placed on antipsychotic medications, and it comes from a time when we

know, as I discussed this morning in reference to a couple of motions, that he had been involuntarily, forcibly medicated for a period of several months at Camp VII.

Obviously, our -- our request is not limited to this document, but it is a little curious to me that the government's primary and first contention in their response to our motion seems to be that it is overbroad. It makes me wonder if that's almost a go-to response to motions to compel because I'm not sure, as I said, how this request -- request could be any narrower. So that is request 1.

There are three more requests, getting broader from there. The second request is for any site daily reports. Whatever this is from 24 May '07, calls itself a site daily report. So we ask for any other site daily reports that meet those criteria that I listed above: Relevant to Mr. Binalshibh, conditions of confinement, LHM interrogation.

The second -- since the second half of the footnote appears to be a CIA cable that I assume contained this report or sent it to someone else, then our third request was for CIA cables. Because after Mr. Binalshibh was transferred to Guantanamo Bay, apparently he's showing up in site daily reports and in CIA cables.

And the fourth request is for any communications, in

case we didn't cover anything, between the CIA and other agencies that contain the same information.

As far as I'm aware, we don't have the document in 428. The government obviously could have very easily said in their response, you have this document, here's the Bates number, and I would have gone and read it.

We have a good-faith basis to believe that there are more similar documents. And I'll get to the -- in a minute to the discovery the government has provided and why that's not enough.

But this document is called a site daily report. I assume the CIA doesn't -- or whoever created it, doesn't create something and call it a daily report if they're only producing it monthly or annually. So a good-faith basis to believe that there are other similar documents out there that could be relevant.

What we're not asking to do, and this goes to the narrowness, is to go through drawers of files and look for anything that could exist. And that's what the government in footnote 3 on page 5 of their response accuses us of doing. The defense advocates for the idea of open file discovery whereby it has the ability to open every single drawer of the government's filing cabinet -- this is why I usually don't

read -- and allow it alone to determine what classified information is noncumulative, helpful, and relevant.

Your Honor, if that's what I wanted to do, I would have asked for all CIA records; and then I would have gone through them and looked for things that I found to be relevant, helpful, and noncumulative. Instead, following the usual discovery practice, we're asking the government to look through documents and find the ones that are relevant, helpful, and noncumulative. And here we have at least one document that we don't have that we think meets those criteria.

Right before the government says that, they have this italicized portion of this footnote, and I won't spend too long on this. But they say it appears the defense grounds its motion on the basis that, given the commission's duty to consider the totality of circumstances surrounding the LHM, that the defense must have access to all evidence that could demonstrate why the statements must be suppressed or refute the government's theory of voluntariness.

And if their contention is that we believe we have a right to all documents that could demonstrate why the statements must be suppressed or refute the government's theory of voluntariness, then I completely agree with that.

We are in the middle of litigating a voluntariness issue. We have the right to those very types of documents.

I talked a little bit this morning about the theory of suppression. Obviously, if you have any questions about how these documents -- I hope it's pretty clear -- about how these documents, CIA documents from the time Mr. Binalshibh is supposedly in DoD custody, are relevant, or about why any government documents talking about his forcible medication in United States Government custody, and especially his forcible medication within weeks of supposedly consenting to an interrogation by the FBI are relevant to our issue, I'm happy to explain that more, but I think the relevance speaks for itself.

So I'll move on to address why what the government has provided is not enough. The government says that they've provided medical records, which is true; that they've provided DIMS, which is true. Well, let me -- let me stop there because that's kind of one category. That would be an answer to this request if all we were looking for was the fact that Mr. Binalshibh was medicated with antipsychotic medications. That's not all we're looking for.

So the fact that we have a DoD record or a JTF record that chronicles his medication or the reason why he was

medicated or a doctor's note, something like that, that does not make a CIA record about his involuntary medication from a period months after he came out of DoD custody -- or CIA custody after his time in the black sites cumulative. It was created for a different purpose by a different organization with different concerns, I assume. I haven't seen the record. So it's not about the fact of involuntary medication. That's merely the reason that we know that relevant records exist.

It's also why the government's contention that we can question the Camp VII commander is not enough. The Camp VII commander, of course, didn't work for the CIA. The Camp VII commander said on his testimony that he never saw one of the detainees during the time he was supervising the camp in distress. And this is the Camp VII commander who was in charge of that facility during the time that Mr. Binalshibh was forcibly removed from his cell, forcibly shaved, and ultimately involuntarily and forcibly medicated.

Now, the CIA records, the CP7 records. So the government points out that we've been provided a statement admitting relevant facts regarding Camp VII, and that's true. We have -- the Camp VII commander talked about in his open testimony that there was a memorandum of understanding governing, between DoD and the CIA, governing who did what in

the camp. So there's a relationship here. So we have discovery related to that.

The problem is that MOA and the other discovery we've been provided, the statement of fact -- relevant facts, are general documents. They're not about Mr. Binalshibh. They're relevant, but they're not specific to Mr. Binalshibh. And the interesting thing as we try to get discovery in this case -- or what I find interesting is, when we request general records, right, the response is often, well, you need to be requesting a record that's specific to your client. That's not about your client. And I understand that. Here we have a case where we're requesting specific records, specific to our client, and at least part of the response is, well, you have general records. It can't be both.

A little bit about additional materiality of the issue and then I don't have a lot more to say, frankly, Your Honor. This morning I talked a little bit about attenuation, that the government's theory is attenuation. I think you understand that, why the -- why the role of the CIA is important here. You can find that in our briefs, so I'm not going to spend a lot of time harping on it. The -- the government's things have changed argument, which could very well be undercut by what the CIA is now saying about Mr. Binalshibh. And we

know -- I will say in addition to this -- this document, we know that two months after Mr. Binalshibh was transferred to Camp VII in November of 2006, the CIA prepared a -- what they called a psychological background.

Now, the CIA had done psychological reports on Mr. Binalshibh during his time in the black sites. Some of those reports were written by the psychologists who approved of his EITs, so they are worth what they are worth as far as I am concerned, but they had done these reports.

They did another one after he was transferred to Camp VII, and we do have that. I have no idea why it was prepared or who it was given to, what the purpose of it was, why the CIA's writing a psychological background two months after Mr. Binalshibh supposedly left their custody. But we do have that. So we know that -- I mean, I guess it's a possibility they created that only for their own records. I doubt it.

The final issue that is important here, as if we needed more materiality, is that related to attenuation, the issue of who was running Camp VII and what the roles were is at issue. And as you might be aware, there's a pending motion series in AE 692 that arose out of the camp commander's testimony.

The SSCI Report, among other things, says that when Mr. Binalshibh and the others were transferred to Camp VII, they remained under the operational control of the CIA. And that is -- and the government can correct me if I'm wrong on this. As far as I'm aware, that is the only contention in the SSCI Report that the government does not agree with, and they had the camp commander testify to as much. So that is a contentious issue. There's a reason that the government does not want to admit that, I think, because it cuts so far against their attenuation argument.

And that's part of why the camp commander didn't finish his testimony, because of that 692 issue that arose in his testimony. And I won't go through the issues with that. Just letting you know that that's another issue that's before the commission that CIA records from this time could be very relevant to.

With that, subject to your questions, Your Honor, that's -- that's all I have.

MJ [Col McCALL]: No. I may have more questions for you after I hear from the government, but, no, I appreciate that. Thank you.

DC [MR. FEELER]: Thank you.

MJ [Col McCALL]: Any other defense counsel wish to be

heard? Mr. Connell?

LDC [MR. CONNELL]: Ms. Pradhan from the RHR will be arguing on our behalf.

MJ [Col McCALL]: Okay.

ADC [MS. PRADHAN]: Good afternoon, Your Honor. Can you hear me?

MJ [Col McCALL]: I can.

ADC [MS. PRADHAN]: Great. It always takes me just a second to get oriented over here.

So as Mr. Feeler's argument did just now, my argument on this goes beyond the issue of Mr. Binalshibh's position on Special Agent Butsch. Mr. Connell has elucidated our position on that and, of course, I understand our colleague's position on team Binalshibh.

The issue of CIA control of Camp VII is one that I'm sure you understand, sir, as critical to a resolution of a number of major motions, including every defendant's motion to suppress, but also pending motions to dismiss for outrageous government conduct and whether the military commission will impose any sanctions on the government for their treatment of Camp VII, which is detailed in AE 819 and 821.

Mr. Binalshibh, I think, very effectively pointed to the examples from the SSCI Report that point to existing

documents of relevance to the issues ----

MJ [Col McCALL]: Ms. Pradhan, if you could stop for just a second.

ADC [MS. PRADHAN]: Yes, sir.

MJ [Col McCALL]: If we can switch the main camera. I have all of the camera views up here on the bench, so I have the direct shot to you. The one that's up on the big screen is -- just barely gets you on the camera.

ADC [MS. PRADHAN]: I'm okay with that, sir, but whatever you want.

MJ [Col McCALL]: Hold on.

ADC [MS. PRADHAN]: Sure.

MJ [Col McCALL]: We'll press. We'll just keep it this way for now. Go ahead.

ADC [MS. PRADHAN]: Yes, sir. Thank you.

Mr. Feeler mentioned AE 692, and I won't go into too much detail on that, obviously. Well, actually, briefly, on the documents that Mr. Feeler mentioned from the SSCI Report, he did mention the site daily reports. And I just want to flag the military commission that we do have -- we did file a 505 notice for the series. That's at 711C. And we do have I think a decent amount of classified argument on this motion and would -- for which we can go into a little bit more detail

on those documents.

Regarding 692, I just wanted to flag that I mentioned this issue briefly during the last -- last month's -- September's oral argument, in the context of areas where the government states publicly, I may do so today, that the CIA did not control Camp VII, the men were in DoD custody, and that's why the information is not discoverable or perhaps doesn't exist.

And then we're limited in the ability to challenge that because of the classified nature of most of the bits of information that we have. And again, this is where -- this is why we filed the 505 notice. But I do want to talk about a little bit in open session what we -- what we do know, what is available to the public.

Most government responses on discovery fall into one of two categories: There's nothing there or it's not relevant. And this motion is a really good example of the second, because claiming that there's nothing there is just too much of a stretch on this one. There are a few unclassified highlights of what we know to exist. Mr. Feeler talked through some of them.

But the Camp VII commander's testimony in November 2019 that is referenced in great detail in 819 and

821 is also there on this subject. And I want to note that the -- the publicly released transcripts from the 806 session, the classified session of his testimony, are very, very heavily redacted. I'm not going to go into anything classified, but he did answer questions about, at for example, page 28937 of his 4 November 2019 testimony, this is of the publicly released transcript, he did answer questions about a, quote, interagency meeting in relation to August 2006 when he was familiarizing himself with Camp VII. He did mention, quote, interagency decisions being made in a, quote, summary of conclusions for an interagency process. That's at page 28946 of the publicly released transcript.

CIA documents discussing or outlining their involvement in these decisions should exist. And for suppression purposes, just to be crystal clear in layman's terms, how much -- if and how much the CIA was able to administer Camp VII to be just another black site is extremely relevant to all five defendants' state of minds while they were there.

It's also relevant to any motions regarding outrageous government conduct. If the CIA did do this and was successful, was there pushback? Were there internal squabbles about whether conditions of confinement as imposed, perhaps by

the CIA, were legal under the Geneva Conventions since they were now publicly reported to be in DoD custody? Did the CIA win those fights?

This is actually a topic on which if the government believes its own argument that there was clear separation between the CIA and DoD, they should want us to have. We know from the unredacted parts of the Camp VII commander's testimony that he was asked about periodic interagency meetings regarding Camp VII at 10-day and 30-day intervals in addition to the site daily report that Mr. Feeler mentioned.

And we know that he was asked, in the course of discussing SOPs and the management of Camp VII, about a document that listed for consideration the, quote, modalities for referral of allegations of detainee mistreatment that occurred prior to arrival. And that's at page 29010 of the publicly released transcript of November 4th, 2019. His answer is redacted from the publicly released transcript.

The CIA documents stating or discussing or outlining their involvement in those meetings and this document should exist, particularly as regards modalities of reporting torture at CIA black sites. Again, just to be crystal clear, how detainees could report torture occurring before they got to Camp VII, what that process was, and how or whether the CIA

controlled that process and in what way is extremely relevant to detainees' state of mind and conditions of confinement, particularly in a period where they were unrepresented by counsel by design.

We know that the Camp VII commander was asked about the division of duties and responsibilities at Camp VII. That's at page 29018 of the publicly released transcript, and that he talked about, quote, support personnel there as well. And I can discuss the significance, the extreme significance of those statements more in -- in closed session.

But it's an unclassified fact that the CIA was involved in the preparation for the LHM interrogations months after their transfers to Camp VII. And we know, actually, that even though the men were purportedly in DoD custody, the FBI agents who interrogated them were required to write up their notes on CIA computers.

Given what we know about the level of CIA control over the LHM process, it just wouldn't be credible for the government to state that there are no CIA documents about the exertion of control over Camp VII administration that the Camp VII commander himself discussed.

So they -- they don't exactly. They go to the second category. They recycle their old argument that the defense

must prove that the information requested is, quote, more than theoretically relevant. I mean, as Mr. Feeler pointed out, I think we're way past that. But there are three things I just want to highlight really fast about this.

The first is that, again, they don't deny that the documents exist in that response. What they do is pivot -- this is the second point -- pivot to the relevance argument that has been one major cause of these nine years of pretrial hearings, the delay that they talk about so often.

The military commission doesn't review the classified information that the government holds back on relevance grounds. So we have to do this decoding exercise in so many of these cases where we analyze redactions and put together handfuls of unredacted words in a transcript or from a footnote of the SSCI redacted executive summary to show that, look, something is there and it is relevant. And that, of course, goes to the third point, which is why we should have it and why it is, in fact, noncumulative and relevant.

The taint of the LHM statements in addition to destruction of evidence motions is the most important issue we've ever litigated in nine years. And when Mr. Binalshibh talks about the totality of circumstances, the military commission is well aware that that's a legal term of art and

the government knows, just as well as we do, that to apply it to the suppression issue, we argue -- this is not ----

MJ [Col McCALL]: Ms. Pradhan, if you can slow down a little bit, I'm getting the sign from the linguists.

ADC [MS. PRADHAN]: Of course, sir. Sorry about that.

MJ [Col McCALL]: That's fine.

ADC [MS. PRADHAN]: The government knows then -- and, you know, we've made no secret of this certainly in our suppression group brief at AE 628 that our theory is that the torture and interrogation program was a whole-government program involving multiple agencies and the White House. And we argue that it continues to be a whole-government program, which is why other government agencies exert such control over the discovery process and even courtroom proceedings, which we've seen numerous times in the past nine years and, again, which I can -- I'm happy to talk about more in closed session.

The government says in their response, Mr. Feeler -- Mr. Feeler alluded to this, that we've received voluminous discovery regarding the defendants' detention at Camp VII. And so, you know, let's look at the examples they provide. The first is LHM documents. We got the LHM documents early on in 2013. Because the government's story early on, still is, is what's in the public consciousness now, that the men were

moved to Guantanamo, away from CIA torture, and interrogated by the FBI while drinking McDonald's coffee. So the LHM statements helped promote that narrative.

The medical and the DIMS records, which we do have, are obviously DoD-generated documents pertaining to their daily and periodic assessments here at Guantanamo and, to our knowledge, involving DoD medical personnel. But it wasn't until December 2014, two and a half years into these proceedings, that the SSCI released the redacted executive summary of their report with that line saying that -- that, you know, that one line, in a couple -- in these footnotes saying that per CIA documents, the CIA maintained what they called operational control over Camp VII.

Now, if anybody was on notice, at least by that point, that further discovery should be produced to the defense about that relevant and material fact, it was the government. That's their obligation. And it didn't happen then. That was seven years ago.

And, you know, I want to refer really fast and contextualize Mr. Trivett's statements about -- this morning about delay, because they're really directly relevant to this motion and sort of what we knew when FBI -- you know, about FBI involvement with the CIA and CIA involvement at

Guantanamo, which is the heart of these suppression motions.

Mr. Trivett said the defense has known about these issues for nine years. And that's just false. With this continuous casting of aspersions on the defense, we're really getting into candor issues. I won't belabor the timeline beginning in December 2017 with an accidental disclosure by Special Agent Perkins that, on the stand, that she'd had access to black site reports while prepping for the LHM interrogations, which in one -- one swoop broke the government's neatly laid wall between the FBI and the CIA.

But even then, it wasn't until May 2018 for the first time that the prosecution represented to Judge Pohl that the prosecution team had had no idea up until that point, six years into pretrial hearings, of the FBI's involvement at the black sites. We briefed all that. That's in, for example, 524RR, it's in the 534, 562 motions to reconsider. It's in 628.

And that's when we started getting this discovery about the collaborations between the FBI and CIA at the black sites, and then slowly information about Camp VII. So, for example, two more discovery markers pertinent to this issue, we got or started getting DoD records, the 10- and 30-day assessments regarding early administration of Camp VII on

September 26th, 2019, after we'd begun witness testimony on suppression.

And Mr. Feeler discussed really fast, he mentioned a document that the prosecution said they'd produced to us. They -- they filed a classified document on this topic in 2018. And in their response to 711, 711A, that -- their response was unclassified. And they summarized the title of that document as, quote, statement admitting relevant facts regarding Camp VII.

That classified document is in the record at AE 575 Attachment C, which is included in our 505 notice, and the government, I believe, refers -- has referenced it as also being at AE 641 (Gov) Attachment D.

Now, the government's treatment of this document in this -- their unclassified response is, frankly, another example of kind of misleading between unclassified and classified pleadings. The title of that document is different from how the prosecution summarized it in that unclassified filing.

I have the document here. I can represent that the title, as well as the section headers, are not portion marked by the government as required on classified work product, so I don't know if the title of that document is classified or not.

But out of an abundance of caution, I won't read the title in open session except to say that the reason the government summarized the title in an unclassified pleading is because the title itself confirms that discovery in this motion exists and is relevant and material.

And so we -- we have to be very clear about what we're asking for here. It's not a data dump of everything about Camp VII in this motion. It's the CIA's own documentation of its involvement during, frankly, a critical time, but also down the road of what their involvement was or even continues to be at Camp VII. That's the missing piece of what we don't have. And, of course, there's a lot more detail in -- in closed session that we can go into.

But subject to your questions, sir.

MJ [Col McCALL]: No questions. Thank you, Ms. Pradhan.

All right. Any other defense team?

Ms. Bormann?

LDC [MS. BORMANN]: So I heard Mr. Feeler say that it is relevant and noncumulative, and I'm going to quote him, what the CIA has to say about Mr. Binalshibh. And I think he's right. That's a very narrow question. However, the larger question on this particular issue is why the CIA has anything to say about Mr. Binalshibh or any of these men in early 2007

and late 2006. According to the government's witness, they had nothing to do with these guys, and it's clear they did.

So when you're examining the questions surrounding this particular motion, I suggest that you pay particular attention to the fact that, one, the records exist and, two, the fact that they exist ought to tell you something about their attenuation argument.

In order to rebut their attenuation argument, we are entitled to material that tends to do that. So that's what we're asking for.

MJ [Col McCALL]: Thank you, Ms. Bormann.

Any other defense teams? It looks like a negative.

All right. Government.

TC [MR. SWANN]: Good afternoon, sir.

MJ [Col McCALL]: Good afternoon, Mr. Swann.

TC [MR. SWANN]: Sir, a couple of things I want to correct just so that you can make -- that you don't be misled like I was initially when I read these pleadings.

Take a look at the reply brief that the Binalshibh team filed in this case. That reply brief kind of leads you to believe that we're talking about an entirely different motion. Apparently it was a pretty bad cut and paste of some sort, but it's making reference to -- yeah, the reply brief

dated 11 February 2020 talks about -- this is their reply to the government's response to Mr. Binalshibh's motion to compel production related to his 2004 relocation from Guantanamo Bay, Cuba.

So I don't know that we ever really -- I'm sure there are bits and pieces in here that address this -- that are response. But don't -- that caused me to see what happened in -- in AE 704, to see if the judge maybe had made a ruling in that case. And the judge did exactly that. He explained the law regarding discovery by saying, information is discoverable if it is material to the preparation of the defense or exculpatory. The defense is also entitled to information if there's a strong indication it will play an important role in uncovering admissible evidence, assist in impeachment, corroborate testimony, or aid in some sort of witness preparation, and finally, information is discoverable if it's material to the defense, but ----

Then the judge goes on to explain that a mere conclusory allegation that the requested information is material to the preparation of the defense doesn't satisfy the defense's burden to show the reasonableness and the materiality of that request.

Similarly, which is all you have here, is a vague

asserted need for potentially exculpatory information or evidence that might be contained in materials sought that doesn't pass muster.

Regarding classified information specifically, the Court of Appeals of the District Court -- of Columbia has held that classified information is not discoverable as a mere showing of a theoretical relevance in the face of the government's classified information privilege but further requires seeking classified information is entitled to information that is at least helpful to the defense.

Furthermore, the defense must be able to sufficiently establish that the materials sought, in fact, exist. And finally, a defense discovery that is overbroad or otherwise objectionable may be simply denied. The commission is under no obligation to amend or modify a request to render it unobjectionable.

And the final paragraph, which is all important to us. In the criminal case, the prosecution in a military commission is responsible for determining what information it must disclose in discovery. Our decision is final. Defense counsel have no constitutional right to conduct their own research in the state's files to argue relevance. It's incumbent upon the prosecution to exercise this duty

faithfully because consequences are dire if it fails to fill -- fulfill it's obligation. We understand that. We're not doing this thing again.

So that said, let me go to what the defense has requested in 711. And at some point in time I'll do 721. And while I've heard Mr. Feeler mention 812, I've got that one too, so ----

MJ [Col McCALL]: Okay. Well, let's stick to 711 for now and then we'll move into 721 after.

TC [MR. SWANN]: 711.

MJ [Col McCALL]: Please.

TC [MR. SWANN]: In short, they're moving to compel information they believe exists. He's talking about a -- a report. And if you look at the report, the report -- I mean, the report is what it is. They have it. They have it in the Senate subcommittee report and it's in there, and it's talking about something that occurred in May of 2007. This is five months after the interviews that Special Agent Butsch did with the accused in this case. And they're talking about a forcible medication of the accused. They have that information. Again, that's May of 2007.

MJ [Col McCALL]: But, Mr. Swann, let me just -- I'm trying to make sure I'm understanding. So you're saying they

have it because they have access to where it's written out in the report, where it's mentioned in the report?

TC [MR. SWANN]: Yeah, that's exactly. It's a one-liner that says -- it talks about being forcibly medicated in May of 2007, more than four months after they met with Butsch. But here's what they also have ----

MJ [Col McCALL]: But that's a -- but before we move on, again, I'm trying to make sure that I'm understanding. So that's a reference to this daily site report, correct? But it's not the actual daily site report.

TC [MR. SWANN]: No, but the medical records say the same thing. They have medical records, okay? I've -- I pulled out just one medical record in looking at this. That medical record is dated -- let me get it. It's with 22.

MJ [Col McCALL]: Sure.

TC [MR. SWANN]: They have a medical record that's found at MEA-10013-00010955. This is a 2 February 2007 report, a psychiatrist's progress note where they are considering the forcible medication of this accused. That goes on from that period in time all the way to -- until they actually do it, sometime in -- in May or June, okay?

So they have that information already. It's throughout those reports. That's just the -- that's just the

first report in this period of time. So it's no -- it's no secret that the camp was considering the forcible medication of the accused using some medication. And they had to do it. He was -- he was creating -- let's just say he was creating a ruckus in the camp itself, tearing off cameras off the walls and doing other things.

But they have all of the information that they can use to be able to formulate it. I've heard a lot about this. Ms. Pradhan was just talking about the statement of relevant facts. That didn't come out of the blue. That was a judge sitting and looking through thousands of pages with our statement of relevant facts that he approved under the 505 process, and that's what they've got. They have 10- and 30-day reporting both by -- to the SOUTHCOM commander from the admiral here that -- that information, and we extended that all the way out for about 18 months and gave it to them.

They've heard the testimony, and while they might not agree with the testimony about who was in charge at Camp VII, it is the testimony. And you'll get a chance to see him again and he can explain to you what we're talking about.

MJ [Col McCALL]: Well, let me -- let me stop you there and dig in. And again, just to make sure that I'm not misunderstanding things. It gets a little convoluted here.

So when you're saying that the defense already has some of these medical records ----

TC [MR. SWANN]: They have all the medical records.

MJ [Col McCALL]: Understood. But, again, those are the medical records that were produced and compiled by the DoD, correct? And it sounds like the -- the defense's argument is that there may be additional reports relating to the same topic produced by the CIA.

TC [MR. SWANN]: There are no additional reports. Let me address that one that he ----

MJ [Col McCALL]: But -- so -- and this is where I'm trying to cut through some of the -- the churn between the parties. If a document doesn't exist, that makes my job very easy. The document doesn't exist, the argument is over.

If the question then is, well, the document exists but we're not going to produce it because it doesn't fall under -- you know, it's not relevant or material, okay. Then I -- then I'm getting involved.

So I guess that's my first question is: When they reference what was -- this report that was referenced in the footnote 428, and then let's move into the second category of the site daily reports, those do exist, correct?

TC [MR. SWANN]: Yes, sir.

MJ [Col McCALL]: And the defense does not have them, correct?

TC [MR. SWANN]: Yes, sir.

MJ [Col McCALL]: And it sounds like your argument is that they are cumulative to DoD medical reports that have already been provided. Am I tracking?

TC [MR. SWANN]: Yeah, there were no -- there were no -- there were no agency doctors seeing any of these accused beyond September of '06. One report that he mentioned, I do recall having looked at all of the CIA reporting and medical reports and I -- I can't call him on it right now, but I would suggest that he might want to look at the date of that particular report because some reports towards the end, meaning in -- in August before they arrived here at Guantanamo, were prepared. And then those reports were in a -- well, we didn't get it into the file soon enough and so it was in the system. We discovered those, okay? So that's what he is talking about.

No -- no doctors from another agency ever saw any of these individuals after the day they arrived on Guantanamo Bay, Cuba. Now -- and I'll say this with a great deal of confidence. Every agency report regarding their -- their medical treatment have been turned over.

Now, I know for a fact that you have seen a few recently and that we sent those through the -- through a 505 process. And I know that in looking at it, I believe there were ten documents that relate to this particular accused. Those will be provided. But none of those reports even come close -- come close to this timeline that we're talking about. They are all very early that simply got captured up and then we had to turn them over because they're medical reports. We turned them over. We went through the process, and they're being -- they're in the motion now of being provided to the defense. So I can say that with some confidence.

Now, I fail to understand how a single site report dated sometime in May of 2007 has any relevance to this particular motion at all.

MJ [Col McCALL]: So -- and I may be misstating the defense's position. So I guess let me ask this. So is the government's position that the issue of CIA oversight or control of Camp VII is not an issue? Is that it doesn't go towards the attenuation argument that the -- the government has for the admissibility of the LHM?

TC [MR. SWANN]: Just a second, sir.

MJ [Col McCALL]: Sure.

TC [MR. SWANN]: Sir, our position -- our position is --

is simply explained in the statement of relevant facts. They have all the information that the judge approved in that case for turnover to the defense. So they have everything.

I mean, the testimony of the camp commander, a man on the ground during that period of time, we're not going to dispute that there was a memorandum of understanding, but that's all contained there. So he can tell you exactly what the day-to-day operation of what was going on in that camp when his testimony is continued in this case.

MJ [Col McCALL]: Well, I -- but -- so it still is an issue in dispute, though, correct? I mean, so it's not a -- it would be very simple, and again, it would make things easier for me if it was black and white, DoD was in complete control, CIA was not involved, or if it was the opposite, if CIA was involved such as in the RDI program, DoD was not involved.

But here where it's -- it sounds like, the testimony from the camp commander and some of the other documentation, shows there was an MOU, there was some overlap, there was some mixing; and so once that becomes in dispute, the amount of CIA involvement and its effect then on the potential attenuation argument, isn't this then a matter of weight, that it should go to the defense so that they can then look at the CIA

documents to determine, hey, this helps our argument that CIA was exerting control, was having some type of supervisory action ----

TC [MR. SWANN]: Well, but ----

MJ [Col McCALL]: ---- versus -- I mean, it seems like if the documents that the document may possess, it sounds like, are simply regurgitating what were already in DoD medical records, it seems that the government would want to give those to the defense and foreclose that argument.

TC [MR. SWANN]: That -- that may well be true. But in this case -- in this case, that's not what those documents do.

MJ [Col McCALL]: Okay.

TC [MR. SWANN]: Okay. They don't -- I mean, you would think that giving them the 10- and 30-day reports, which we did, which is the -- the -- which is the -- here's our -- our understanding of what's going on, the important events that are occurring, okay? We did all of that because the camp commander was going to talk about those things.

But that's not what these items do. And if it were relevant, even marginally relevant or even out there, I wouldn't stand in front of you and say we're going to take the risk and not turn them over because there's nothing in them, okay?

The DIMS records. The DIMS records -- and I don't know if you've seen one of these.

MJ [Col McCALL]: I have.

TC [MR. SWANN]: Okay. So you understand that a DIMS record actually shows a guy was handed a bottle of water; a guy was given the following food, calories and all that sort of stuff; and he received mail or whatever the case may be. They are extremely detailed. He was taken out of his cell and he was taken to the medical room for an evaluation. There's a report that's prepared or generated there if it was necessary.

The items that we have turned over are -- are everything that went on in that camp from on or about the 6th of September to the day they hit the camp and up to the present time. I think they -- we have them all the way through now. The last medical records were turned over 31 August for that entire month. So I've got the September and October ones that I'm looking at right now and they'll be turned over probably in the next couple of weeks.

But all of this information has been turned over. There's just nothing more that we can give. Those -- those particular items that you're talking -- that one item, they have that. It makes a mention of something that occurred in May of '07. Hardly relevant to anything. But it's otherwise

contained in the DIMS.

It's otherwise contained in a -- a -- I've got a better one. It's otherwise contained in an e-mail. A week before that report is made, and this is found at MEA-10013-00004805. This is a report of the -- a medical committee consisting of several individuals, seven or eight individuals to include the judge advocate that was here at that time. And the bioethics committee met on 25 April 2007 to hear a presentation in accordance with the detainee. It's unclassified. And we turned that over, my recollection is 2014.

So they have this information. That little snippet that says they're thinking about giving him involuntary medication, the defense knows that. A week before, the doctors met to discuss all of this and ultimately came to a conclusion and a decision. So this information has been turned over. And that's not a report. That's an e-mail that we went to look for. So that information is there, too.

MJ [Col McCALL]: Yeah, I understand that. And again, I'm trying to make sure I'm understanding the government's position. But it sounds like the government's position is that the underlying information, whether it was the medication or whatever was going on with the accused, the underlying

information, whether via the DIMS or some other medical record, has been provided.

TC [MR. SWANN]: It's long ago been provided.

MJ [Col McCALL]: But again, the -- the defense position appears to be that they're wanting -- it's not the underlying information, it's the fact that it's then being put into CIA reports, being communicated via CIA channels; any other communications among the CIA and FBI, again, to show that -- that working together between the DoD and the CIA, and then that might have been -- they could lend to defense arguments for having an effect on the LHM. That makes sense to me.

So I guess going back, my question is: It sounds like those do exist, these daily site reports?

TC [MR. SWANN]: Yes, sir.

MJ [Col McCALL]: Okay. And they have not been produced? Because it sounds like the -- the government position is that they are cumulative.

TC [MR. SWANN]: Yeah. One more.

MJ [Col McCALL]: Sure.

TC [MR. SWANN]: Mr. Trivett suggests that I just simply ask you to go back and take a look at the statement of relevant facts. We have -- we have admitted a number of things, but it ----

MJ [Col McCALL]: I'll do that.

TC [MR. SWANN]: These particular items -- that one particular item they have by virtue of the report itself. The rest of these items have -- they don't contribute to anything that you need to determine about the voluntariness of these statements. People write reports day in and day out and they send reports everywhere, and this is just an example of a report going out.

MJ [Col McCALL]: Okay. All right.

All right. Defense, we'll start off -- back off with Mr. Feeler. All right. So, Mr. Feeler ----

DC [MR. FEELER]: Yes.

MJ [Col McCALL]: ---- before you get into whatever issues you want to address, let me ask you a question then. So we left off with Mr. Swann saying go back and look at the statement of relevant facts. What is it you're hoping to accomplish by getting these daily site reports and some of the other underlying documents that's still in dispute from those -- apart from the statement of relevant facts? I think I know, but I want to hear from you.

DC [MR. FEELER]: Sure. Judge, the first thing it goes to is specificity. And that's what I tried to be clear on in my opening argument, that the statement of relevant facts doesn't

go into -- I can't promise it never mentions Mr. Binalshibh, but it's not about Mr. Binalshibh. So any information the CIA was putting in reports about Mr. Binalshibh would be the kind of information that we're looking for, or about the LHMs specifically.

So the reason I closed with my argument about the issue of who was running the camp is that that is another reason why this information is relevant, and it's a very important one. But the point we started with was we know there's a record related -- directly related to Mr. Binalshibh, a CIA record related to his forcible antipsychotic medication, and we don't have it. And to say it's cumulative because we have non-CIA records about it, at the point of discovery, that can't be where we're at, when the CIA had held him in the black sites for four years.

So we're looking for information about him, about the LHM, about conditions of confinement. I think a lot of this information is also relevant to who was running the camp, which is an important issue that's -- that's in dispute right now. So I hope that answers your question of what we are looking for.

Frankly, I'm looking for any information that I can get about my client from the time period that the government

is in possession of. And it's not -- you know, Mr. Swann mentioned several times the date of the report. This discovery request and motion is not just about this report. The reason I focused on the report so much is because that's how we learned that there's something out there and that it is -- that there is information in there directly relevant to Mr. Binalshibh.

But it's not -- you know, the fact that this report was a few months later doesn't mean that there's not earlier information. And the report itself, you know, we're talking in the context of suppression here because that's what's currently before the commission. But the idea that CIA records, from the organization that held Mr. Binalshibh in the black sites and put him through what he went through there, that CIA records related to his later forced medication in United States Government custody could not be mitigation, for example, takes a very strained view of what's relevant in this case.

There's a reason they've given us our client's medical records, because they understand that those are relevant. And this is -- it's not about the information. It's about the CIA record. It's not the same thing.

One other just very brief point, Your Honor, is that

November psychological assessment. Well, before I do that, I just wanted to present one hypothetical that hopefully would show where I'm going with this.

MJ [Col McCALL]: Okay.

DC [MR. FEELER]: The CIA writes something in a cable about Mr. Binalshibh's forcible medication and it's not he was forcibly medicated today. You could imagine a case where they said, Wow, that guy who we did all that stuff to in the black sites and being forcibly medicated. We really messed him up, didn't we?

And before you think I've gone way off the rails with a hypothetical here, if you look at the SSCI Report, the CIA was saying very similar things to that at the end of the black site period. So -- so it's not some, you know, outlandish hypothetical. The reason I say that is to -- to press the point, it's not just the information. It's the context and it's who was writing the information. And who was writing the information was the CIA. So it's not just about continued involvement.

Your Honor, that's really all I had at this point on reply, so I ----

MJ [Col McCALL]: All right. Thank you, Mr. Feeler.

Any other defense wish to be heard?

Mr. Nevin?

CDC [MR. NEVIN]: Yes, please, Your Honor. And -- and thank you. David Nevin for Mr. Mohammad.

And I passed the first time around because I thought Mr. ----

MJ [Col McCALL]: You're fine.

CDC [MR. NEVIN]: Yeah. I thought Mr. Feeler had spoken to this. I think he did.

I just wanted to say that from Mr. Mohammad's standpoint, and this is really the point you made a moment ago, so I'll simply repeat this. It's not a matter of the -- it's not a matter only of the content of any site daily report, whether it relates to Mr. Mohammad or -- or Mr. Binalshibh or someone else. It's also who's writing it because -- and this is a problem that -- that comes up from time to time in -- from where we sit trying to discern what the government is doing.

It frequently seems that where they go is, when they're not disclosing material, is to cumulativeness. In other words -- and I catch this from Mr. Swann's comments to you. They know perfectly well that there's this issue of forced medication. There are no surprises here. They know about the forced medication. So what's the -- what's the --

you know, they aren't surprised by any of this.

But -- but just as you said, the point of this is not -- is not only the forced medication in the case of Mr. Binalshibh. The point is also that the CIA is writing a report about it. It could be that the CIA is writing a report about anything. Forced medication happens to be a particularly sensitive issue, but it could be about a hangnail.

The idea of the government's view of this is that the CIA on day whatever it is, says we're through. We're through with these detainees. They're -- they're in the custody of the DoD now. We're wiping our hands of this. We have no input, no nothing. We're out of here. And something similar to that was said to Mr. Mohammad prior to his interrogation here at Guantanamo Bay.

Well, now when it turns out that daily reports are being filed by the CIA, suddenly you get a very different picture. Whether it's a daily report about forced medication or whether it's a daily report about a hangnail, the CIA is right in there on a daily basis, participating, involved, and particularly where you have this issue of attenuation, which is really where the government goes with -- in response to our suppression arguments. They go right to attenuation. The

stuff is -- the stuff is square on point.

And so I -- I hesitated to get up because Your Honor had articulated that, but I just wanted there to be no question where Mr. Mohammad stands on this. So thank you for hearing me.

MJ [Col McCALL]: Thank you, Mr. Nevin.

Ms. Bormann.

LDC [MS. BORMANN]: I won't argue what Mr. Nevin just did because I think I hit it the last time around in a very short and brief way. But I will -- the government, through Mr. Trivett, through Mr. Swann, asked you to revisit the statement of relevant facts, which is actually not what it's called, but I will refer to it in that way in an unclassified setting.

What I'd like you to do is to look to see whether or not the judge that issued that statement of relevant facts actually saw the daily site reports issued by the CIA. Because if he didn't and the government withheld that information, that substitution is not adequate.

Thank you.

MJ [Col McCALL]: Thank you, Ms. Bormann. Anyone else?

Ms. Pradhan?

ADC [MS. PRADHAN]: Yes, sir, briefly, if I may.

MJ [Col McCALL]: Please.

ADC [MS. PRADHAN]: We heard a lot from Mr. Swann focusing on medical records. And I just want to point Your Honor to the things we didn't hear very much about, which is documents that exist, CIA documents about their involvement in the LHM prep, CIA documents about potential involvement in the conditions of confinement at Camp VII, and there is actually -- and I -- you know, those -- the conditions of confinement issue, again, pertain not just to suppression, but they're a Geneva Convention issue. They're an outrageous government conduct issue, right? Like, that has far-reaching consequences, those documents.

There's another category, actually, of -- of information that is classified that I can talk about in closed session if given the opportunity, sir. But on that, I heard Mr. Swann invite you to read the statement of -- I think we're calling it the statement of relevant facts. I absolutely join Mr. Swann inviting you to read that statement, sir, because I understand that the prosecution produced this statement unilaterally, I believe, in part to avoid producing the CIA documents.

Obviously, that's not how discovery works anywhere, much less in a capital case. But the statement is -- without

going into the substance, it is full of generalizations and summaries written in large part in passive voice ----

MJ [Col McCALL]: Ms. Pradhan, the linguist's warning light is flashing again, if you could slow down.

ADC [MS. PRADHAN]: Certainly, sir. I'm always a little bit -- when I argue from here, I'm always a little glad that they're down here -- there and I'm up here so I don't have to face them later. I'm very sorry.

But the statement is -- as I was saying, is written largely in passive voice to obscure the actors. And if it were a 505 summary of the CIA documents, which it is not, it would be grossly inadequate.

The statement raises -- it is rich in what it says because it raises many more questions than answers, and it actually is a very good example of what I mentioned earlier in terms of the other government agencies' control over the discovery process here.

The last thing I just wanted to mention really fast is this morning, sir, there was some discussion over whether or not we could call witnesses and, you know, then confront them later if discovery were to emerge. This is actually a very good example of that. We -- we called the Camp VII commander. He spoke about CIA involvement at Camp VII, right? Certainly

a lot in classified session and a decent amount, as I pointed out, in open session, which raised issues.

We're now asking for discovery on what he raised. The government is refusing it. We've asked for a number of CIA witnesses in relation to the motion to suppress. The government has refused all of them other than Drs. Mitchell and Jessen. So, you know, we can't -- there's really no way, it seems, that we can ask for information in a way that is -- that will pass muster with whoever is controlling the discovery process in this case.

Subject to your questions, sir.

MJ [Col McCALL]: No questions. Thank you.

ADC [MS. PRADHAN]: Thank you.

MJ [Col McCALL]: Mr. Swann.

TC [MR. SWANN]: Just one point, Your Honor. I ask that you look at AE 516.

MJ [Col McCALL]: Could you repeat that?

TC [MR. SWANN]: AE 516. The government's position and the judge's agreement in that order is that we have satisfied our obligations with respect to Camp VII and involvement.

All right, sir. Thank you.

MJ [Col McCALL]: I'll take a look at that. Thank you.

All right. We've been going a little over an hour. I

Attachment D

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 711G** **RULING AND ORDER** Mr. Bin al Shibh's Motion to Compel Production of CIA Records Related to Camp 7 **11 January 2022**

1. **Procedural History**.

a. On 31 January 2020, Mr. bin al Shibh moved the Commission to compel production of "any [Central Intelligence Agency (CIA)] records related to Camp 7 that reference Mr. Bin al Shibh's detention, treatment, and conditions, or the Letterhead Memorandum (LHM) interrogations from 2007."[1] On 4 February 2020, the Prosecution responded,[2] requesting the Commission deny Mr. bin al Shibh's motion. On 11 February 2020, Mr. bin al Shibh replied to the Prosecution's response.[3]

b. The parties presented unclassified oral argument on 2 November 2021[4] and classified oral argument on 12 November 2021.[5]

2. **Law**.

a. **Burden of Proof**. As the moving party, the Defense bears the burden of proving any facts prerequisite to the relief sought by a preponderance of the evidence.[6]

[1] AE 711 (RBS), Mr. Bin al Shibh's Motion to Compel Production of CIA Records Related to Camp 7, filed 31 January 2020, at 1.
[2] AE 711A (GOV), Government Response To Mr. Binalshibh's Motion to Compel Production of CIA Records Related to Camp 7, filed 4 February 2020.
[3] AE 711B (RBS), Defense Reply to AE 711A (GOV) Government Response to Mr. Binalshibh's Motion to Compel Production Related to His 2004 Relocation From Guantanamo Bay, filed 11 February 2020.
[4] *See* Unofficial/Unauthenticated Transcript, *United States v. Khalid Shaikh Mohammad et al.*, 2 November 2021, at pp. 34138 – 34169.
[5] *See* Transcript, 12 November 2021, at pp. 34003 - 34057 (TOP SECRET//ORCON/NOFORN).
[6] Rule for Military Commissions (R.M.C.) 905(c)(1)-(2).

b. **Discovery**.

i. Information is discoverable if it is material to the preparation of the defense or exculpatory.[7] 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.[8] Finally, information is discoverable if it is material to sentencing.[9]

ii. As in any criminal case, the Prosecution in a military commission is responsible to determine what information it must disclose in discovery.[10] "[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."[11] It is incumbent upon the Prosecution to execute this duty faithfully, because the consequences are dire if it fails to fulfill its obligation.[12]

3. **Analysis and Findings**.

a. In the subject motion, Mr. bin al Shibh seeks CIA records pertaining to Camp 7 and to his LHM interrogation to support his pending motion[13] to suppress his statements to the FBI. He argues that he believes such records exist, based on redactions in the Senate Select Committee on Intelligence Report on the Detention and Interrogation Program.

b. In its response to Mr. bin al Shibh's motion, the Prosecution countered that the Department of Defense (DOD), not the CIA, was in charge of Camp 7 at the time of Mr. bin al Shibh's transfer there, and the Prosecution "has provided a myriad of discovery on this subject to date."[14]

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[7] R.M.C. 701(c)(1-3) and (e); *Brady v. Maryland*, 373 U.S. 83, 87-88 (1963).
[8] *United States v. Lloyd,* 992 F.2d 348, 351 (D.C. Cir. 1993).
[9] R.M.C. 701(e)(3).
[10] 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).
[11] *Ritchie*, 480 U.S. at 59.
[12] *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).
[13] AE 629 (RBS), Defense Notice of Classified Filing Pursuant to M.C.R.E. 505(g)(1)(A), filed 10 June 2019. While the unclassified placeholder for this motion refers to a 505(g) notice, the underlying classified filing is Mr. bin al Shibh's Motion to Suppress 2007 FBI Statements as Involuntary.
[14] AE 711A (GOV) at 5.

c. In his reply, Mr. bin al Shibh argues that it is still a matter of dispute whether DOD or the CIA controlled Camp 7, and that discovery related to the DOD does not make discovery related to the CIA cumulative or irrelevant.[15]

d. The Commission finds that the requested records pertaining to the conditions of Mr. bin al Shibh's confinement and his LHM interrogation are non-cumulative, relevant, and helpful to the preparation of the Defense.

4. **Ruling**. The Defense motion is **GRANTED**.

5. **Order**. Not later than **4 February 2022**, the Prosecution shall:

a. Disclose to the Defense any CIA records related to Camp 7 that reference Mr. Bin al Shibh's detention, treatment, and conditions, or his 2007 LHM interrogations.

b. Notify the Commission that it has complied with this ruling. In the notice, the Prosecution will advise the Commission whether (or not) such records exist that have not previously been provided to the Defense.

So **ORDERED** this 11th day of January, 2022.

//s//
MATTHEW N. MCCALL, Colonel, USAF
Military Judge
Military Commissions Trial Judiciary

[15] *See* AE 711B (RBS) at 2.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JASON LEOPOLD,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civ. Act. No. 1:13-cv-1324 (JEB)
	)	
UNITED STATES DEPARTMENT OF JUSTICE,	)	
	)	
Defendant.	)	
	)	

DECLARATION OF STEVEN AFTERGOOD

1. My name is Steven Aftergood. I am a senior research analyst at the Federation of American Scientists, a non-profit research and advocacy organization. I direct the Federation's Project on Government Secrecy, which seeks to illuminate and reduce the scope of national security secrecy. I am responsible for preparation of the Federation newsletter *Secrecy News*, which monitors and reports on developments in government secrecy policy. I have authored numerous publications on national security classification policy, including "Reducing Government Secrecy: Finding What Works," *Yale Law & Policy Review*, v. 27, no. 2 (2009) and "An Inquiry Into the Dynamics of Government Secrecy," *Harvard Civil Rights-Civil Liberties Law Review*, vol. 48, no. 2 (Summer 2013).

2. The purpose of this declaration is to identify several features of the national security classification system that are pertinent to this proceeding.

3. The national security classification system is established by executive order, not by statute. Its scope and its provisions are therefore subject to unilateral interpretation and reinterpretation by the executive branch. The executive order that currently governs classification policy is Executive Order 13526 of December 29, 2009.

4. Classified national security information can only be generated upon the authority of the President, as delegated to agency heads and their subordinates. Congress is not authorized within this framework to create newly classified information.

5. Likewise, congressional documents that contain classified information (e.g., hearing records, staff reports, budget documents) cannot be declassified by Congress. Rather, they must undergo declassification by the responsible executive branch authority.

6. The Senate Intelligence Committee does assert a hypothetical right to publicly disclose classified information on its own volition, pursuant to procedures in Section 8 of Senate Resolution 400 of the 94th Congress (1976). But the validity of those procedures is not acknowledged by the executive branch. And in any case, the Committee has never once acted to disclose information or records under this Section. Accordingly, the classification and declassification of information remains a subject of exclusive executive branch control.

7. "Special access programs" are classified programs that are deemed to be particularly sensitive or vulnerable to disclosure, and are therefore subjected to security controls above and beyond those of "ordinary" (or so-called "collateral") classified information. Special access programs may pertain to intelligence programs, acquisition

activities, or military operations. The creation of special access programs is authorized by the President in Executive Order 13526, section 4.3.

8. "Sensitive compartmented information" or SCI refers to classified information that is derived from intelligence sources and methods. SCI is in effect a subset of the broader category of special access programs.

9. Eligibility for access to SCI is determined by standards and procedures established by the Director of National Intelligence in Intelligence Community Directive 704 of October 1, 2008.

10. Access to SCI does not apply categorically to all SCI. Instead, it is determined on a program by program (or compartment by compartment) basis.

11. Congressional access to SCI is normally limited to members and staff of the relevant authorization and appropriations committees. The executive branch is required by law (the National Security Act of 1947, as amended) to notify certain members of Congress regarding covert action, significant intelligence activities, significant intelligence failures, and violations of law. As a matter of course, classified intelligence information is also presented to Congress as part of the budget request and justification process.

12. However, the extent of such disclosures to Congress is considered to be a matter of executive discretion, and it varies over time and circumstance.

13. As with other classified information, Congress is not authorized to generate Sensitive Compartmented Information on its own. Nor may Congress remove SCI controls that have been imposed by the executive branch.

I affirm under penalty of perjury that the foregoing is true and accurate to the best of my knowledge and belief.

STEVEN AFTERGOOD

February 18, 2014

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JASON LEOPOLD, Plaintiff, v. UNITED STATES DEPARTMENT OF JUSTICE Defendant.	Case No. 1:13-cv-01324-JEB

DECLARATION OF VANESSA R. BRINKMANN

I, Vanessa R. Brinkmann, declare the following to be true and correct:

1) I am the Senior Counsel of the Office of Information Policy (OIP), United States Department of Justice (Department). In this capacity, I am responsible for supervising the handling of the Freedom of Information Act (FOIA) requests processed by the Initial Request (IR) Staff of OIP. The IR Staff of OIP is responsible for processing FOIA requests seeking records from within OIP and from six senior leadership offices at the Department, specifically the Offices of the Attorney General, Deputy Attorney General, Associate Attorney General, Legal Policy, Legislative Affairs, and Public Affairs. The IR Staff determines whether records responsive to access requests exist and, if so, whether they can be released in accordance with the FOIA. In processing such requests, the IR Staff consults with personnel in the senior leadership offices and, when

appropriate, with other components within the Department, as well as with other Executive Branch agencies.

2) I make the statements herein on the basis of personal knowledge, as well as on information acquired by me in the course of performing my official duties.

PLAINTIFF'S FOIA REQUEST

3) By letter dated August 16, 2013, plaintiff sent a FOIA request to the Department's Office of Public Affairs, which subsequently forwarded the request to OIP, where it was received on September 23, 2013. This request sought the Department's copy of the 300-page executive summary of a 6,000-page report produced by the Senate Select Committee on Intelligence (SSCI) as a result of its study of the Central Intelligence Agency's former detention and interrogation program [hereafter "SSCI Report" or "Report"]. This request also sought expedited processing pursuant to 28 C.F.R. § 16.5(d)(1)(iv), which pertains to matters of "widespread and exceptional media interest in which there exist possible questions about the government's integrity which affect public confidence." (A copy of plaintiff's August 16, 2013 letter is attached hereto as Exhibit A.)

OIP'S DETERMINATION THAT THE RECORD SOUGHT BY PLAINTIFF IS NOT AN AGENCY RECORD SUBJECT TO THE FOIA

4) The disclosure provisions of the FOIA apply only to "agency records." At the time OIP received plaintiff's FOIA request, I had, in connection with the handling of a previous FOIA request for the SSCI Report, made a determination that any copy of the SSCI Report in the Department's possession is not an "agency record" that is subject to

the FOIA. Rather, based on information I obtained during the course of my official duties, as detailed below, I concluded that the SSCI Report is a Congressional record that remains under the control of Congress. As such, the SSCI Report is not subject to the disclosure provisions of the FOIA.

5) Specifically, in February 2013, seven months prior to the receipt of plaintiff's request, OIP received a FOIA request seeking a copy of the entire SSCI Report, including the executive summary sought by plaintiff. Upon receipt of that request, OIP made inquiries within the Department, including the Office of Legislative Affairs (OLA), and to other relevant federal agencies, regarding the circumstances under which copies of the SSCI Report had been provided to the Executive Branch. Through these inquiries, OIP learned that the SSCI Report, including the executive summary now sought by plaintiff, is in fact a highly classified document that was drafted and subsequently provided by SSCI to the Department and other relevant Executive Branch agencies to allow those Executive Branch entities to provide edits or comments on the Report for SSCI's consideration prior to SSCI finalizing the Report. As a result, while the Department has received copies of the SSCI Report, the Department does not control the disposition of the Report. I have not identified any actions the Department has undertaken which would suggest otherwise. The decisionmaking authority on the amendment, finalization, and dissemination of the Report rests with SSCI.

6) As the attached letter from SSCI Chairman Dianne Feinstein makes clear, SSCI provided the Report to the President and certain Executive Branch agencies for the specific and limited purpose of soliciting suggested Executive Branch edits and

comments for SSCI consideration. (Chairman Feinstein's December 14, 2012 letter is attached hereto as Exhibit B.) SSCI Staff Director David Grannis, in an e-mail to OLA the day before Chairman Feinstein's letter was sent, details explicit instruction of the Chairman, as specified in a motion adopted by the Committee, that SSCI would only provide copies of its Report to specific individuals identified to the Chairman herself – noting, by way of reference, that another agency has a mere two names on its list of cleared individuals. (Staff Director Grannis' e-mail to OLA, dated December 13, 2012, is attached hereto as Exhibit C.) These documents establish that before SSCI would share copies of its own Report with the Executive Branch, the Committee established the narrowly defined purpose and extremely limited access under which it was willing to provide this SSCI document to federal agencies.

7) The SSCI Report was provided to the Department of Justice under strict controls, for the explicit purpose of conducting the information review described by Chairman Feinstein. Subject to Executive Branch classification review to protect against the public disclosure of classified information, SSCI has reserved complete control over the decision to make any public release of the document once Executive Branch comments are provided to SSCI for review. The controls that were placed on the Report by SSCI through the e-mail from Staff Director Grannis and subsequent communications between SSCI and OLA staff following up on that e-mail and the letter from Chairman Feinstein, are clear, extensive, and indicate in no uncertain terms the Committee's intent to retain full control over the distribution, dissemination, and ultimate disposition of the Report from the very outset.

8) Information within the SSCI Report is classified as Top Secret/Sensitive Compartmented Information (SCI). SCI is classified information concerning, or derived from, intelligence sources, methods, or analytical processes requiring handling within formal access control systems. SCI is sometimes referred to as "codeword" information, and its sensitivity requires that it be protected in a much more controlled environment than other classified information.[1] SSCI separately marked each paragraph of the Report itself with the appropriate classification markings, and most paragraphs are marked at the highest classification level contained in the document. In addition, before providing any copies of the SSCI Report to the Department, SSCI required OLA to submit the names of individuals who would review the Report for authorization by SSCI's Chairman. Indeed, the first list of Department names was deemed by SSCI to be too broad; a more limited list was subsequently agreed to by the Committee, and a few additional names were later added to the list, and approved by the SSCI Chairman. In all, SSCI approved eleven individuals from the entire Department to have access to the report for the purpose of conducting the requested review. Moreover, and further demonstrating the narrow breadth of the Department's access, SSCI provided only a limited number of copies of the SSCI Report to the Department, with the understanding that they would not be reproduced. These copies remain stored within Department Sensitive Compartmented Information Facilities (SCIFs)[2], and can only be accessed and reviewed by those

[1] *See, e.g.*, http://www.dhs.gov/xlibrary/assets/foia/mgmt_directive_11043_sensitive_compartmented_information_program_management.pdf

[2] SCIFs are accredited facilities which must meet uniform security requirements established by the Office of the Director of National Intelligence, and are the only facilities in which SCI information may be stored, used, discussed, and/or processed. *See, e.g.*, http://www.dni.gov/files/documents/ICD/ICD_705_SCIFs.pdf

individuals previously approved by SSCI and who possess the requisite security clearances. These factors have significantly limited the distribution of the SSCI Report within the Department to a select number of individuals, and have restricted those individuals' access to the controlled restraints articulated by SSCI.

9) Based on the totality of these factors, I concluded that the SSCI Report is a Congressional record, rather than an Executive Branch agency record, as SSCI maintains control over the Report. More specifically, I considered four factors, specifically (a) whether the document creator (i.e., SSCI) intended to relinquish control over the record; (b) whether the Department of Justice was authorized to use and dispose of the record as it sees fit; (c) the extent to which agency personnel have read or relied upon the document; and (d) whether the document is integrated into the Department's records systems and files. I concluded that the circumstances and explicit instructions under which SSCI, the Congressional committee that prepared the Report, provided the document to the Executive Branch demonstrated a clear intent to retain control over access to and dissemination of the SSCI Report, to preclude the Department's ability to use the document "as it sees fit." The Department of Justice, in turn, has placed close hold restrictions on Department employees' use of and access to the document in consideration of this congressional intent (as well as its high level of classification), and the document therefore has been reviewed by only a limited number of employees, and has not been relied upon during the course of Department business, or integrated into Department records systems. I have been unable to identify any factors which suggest that the Department has effected agency control over the SSCI Report. My assessment of

the relevant factors therefore left no doubt as to Congress' intent to retain control over the document, or of the Department's handling of the document consistent with that intent. OIP responded accordingly to the aforementioned February 2013 FOIA request, advising that the SSCI Report is not an agency record subject to the FOIA.

OIP'S FINAL RESPONSE TO PLAINTIFF'S FOIA REQUEST

10) Upon receipt of plaintiff's FOIA request, I re-visited and confirmed the above-described factors that led to my prior determination that the SSCI Report is not an agency record subject to the FOIA, and determined that the SSCI Report, and in particular, the Executive Summary of the SSCI Report, is still clearly a Congressional record that is not subject to the FOIA. As explained above, I considered in detail the intentions and explicit instructions of the Congressional committee which created the record; the actions of the Department in accordance with those intentions and instructions, including the very limited access to the document by a handful of Department employees; and the facts that the document has not been used or relied upon by Department personnel in conducting agency business, and the Department does not have decisonmaking authority regarding the final amendments to or dissemination of the document. Therefore, at the time of plaintiff's FOIA request, and today, I determined that the Executive Summary of the SSCI Report is not an agency record and is not subject to plaintiff's or any other FOIA request.

11) By letter dated November 6, 2013, OIP responded to plaintiff's request, advising that the document plaintiff sought is a Congressional record, not an agency record, and therefore not subject to the FOIA. OIP's response also granted plaintiff's

request for expedited processing. (A copy of OIP's November 6, 2013 letter to plaintiff is attached hereto as Exhibit D.)

I declare under penalty of perjury that the foregoing is true and correct.

Vanessa R. Brinkmann

Executed this 24th day of January, 2014.

Exhibit B

JOHN McCAIN, ARIZONA, EX OFFICIO

DAVID GRANNIS, STAFF DIRECTOR
MARTHA SCOTT POINDEXTER, MINORITY STAFF DIRECTOR
KATHLEEN P. McGHEE, CHIEF CLERK

United States Senate

SELECT COMMITTEE ON INTELLIGENCE
WASHINGTON, DC 20510-6475

2012 DEC 18 AM 10:03

December 14, 2012

The President
The White House
1600 Pennsylvania Avenue NW
Washington, DC 20500

Dear Mr. President:

I am pleased to inform you that the Senate Select Committee on Intelligence has completed its study of the CIA's former detention and interrogation program, and has produced a 6,000 page report, complete with an executive summary, findings, and conclusions. Yesterday, the Committee approved the report by a vote of 9-6. I will be providing a copy of the report for your review as it involves the implementation of a program conducted under the authority of the President.

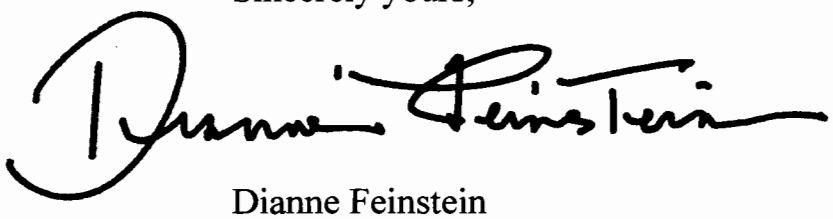
This review is by far the most comprehensive intelligence oversight activity ever conducted by this Committee. We have built a factual record, based on more than six million pages of Intelligence Community records. Facts detailed in the report are footnoted extensively to CIA and other Intelligence Community documents. Editorial comments are kept to a minimum, clearly marked, and included to provide context. We have taken great care to report the facts as we have found them.

I am also sending copies of the report to appropriate Executive Branch agencies. I ask that the White House coordinate any response from these agencies, and present any suggested edits or comments to the Committee by February 15, 2012. After consideration of these views, I intend to present this report with any accepted changes again to the Committee to consider how to handle any public release of the report, in full or otherwise.

The report contradicts information previously disclosed about the CIA detention and interrogation program, and it raises a number of issues relating to how the CIA interacts with the White House, other parts of the Executive Branch,

myself, and staff, available to discuss the report at your convenience.

Sincerely yours,



Dianne Feinstein
Chairman

cc: Mr. Michael Morell, Acting Director, Central Intelligence Agency
The Honorable James Clapper, Director of National Intelligence
The Honorable Eric Holder, Attorney General
The Honorable Leon Panetta, Secretary of Defense
The Honorable Hillary Clinton, Secretary of State

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ACLU and ACLU Foundation,	)	
Plaintiffs,	)	
v.	)	Civil Action No. 13-1870 (JEB)
CENTRAL INTELLIGENCE AGENCY, et al.,	)	
Defendants.	)	

DECLARATION OF NEAL HIGGINS
DIRECTOR, OFFICE OF CONGRESSIONAL AFFAIRS
CENTRAL INTELLIGENCE AGENCY

I, NEAL HIGGINS, hereby declare and state:

1. I am the Director of the Office of Congressional Affairs at the Central Intelligence Agency ("CIA" or "Agency"). I joined the CIA in June 2013 after working for the Senate Select Committee on Intelligence ("SSCI" or "Committee"), where I served as a senior advisor to Senators Bill Nelson and Martin Heinrich, regional monitor for the Persian Gulf, and budget monitor for the Federal Bureau of Investigation. Prior to joining the SSCI staff, I served as Senator Nelson's legislative director. Earlier in my career I worked as a member of the trial team prosecuting Slobodan Milosevic and as an associate attorney at the law firm of Sullivan & Cromwell LLP.

2. As Director of the Office of Congressional Affairs, I am the principal advisor to the Director of the CIA on all matters concerning relations with the Congress. My responsibilities include ensuring that the Congress is kept fully and currently informed of the Agency's intelligence activities via timely briefings and notifications, responding in a timely and complete fashion to congressional taskings and inquiries, tracking and advising on legislation that could affect the Agency, and educating CIA personnel about their responsibility to keep the Congress fully and currently informed. One of the congressional oversight committees with which I regularly interact in this capacity is the SSCI, which authored the document described below.

3. Through the exercise of my official duties, I am familiar with this civil action and the underlying Freedom of Information Act ("FOIA") request. The purpose of this declaration is to explain my understanding of the creation and history of the document at issue in this litigation: the current version of the full 6,963-page report authored by the SSCI concerning the CIA's former detention and interrogation program (the "Full Report"). To provide context, this declaration also discusses the Executive Summary as well as the Findings and Conclusions of the SSCI's study (the "Executive Summary").

4. As I explain in more detail below, the SSCI "approved" drafts of the Executive Summary and Full Report (collectively, the "Study") in December 2012 and transmitted copies of both documents to the Executive Branch for comment. After the CIA submitted its comments, the SSCI made changes and decided in April 2014 to send an updated version of the Executive Summary -- but not the Full Report -- to the President for declassification. The SSCI made additional changes to the Executive Summary and Full Report during the declassification process and publicly released a redacted, declassified version of the Executive Summary in December 2014.

5. The statements in this declaration are based on my personal knowledge and information made available to me in my official capacity. Specifically, these assertions are drawn from my own interactions with the SSCI, consultations with other CIA officials, a review of the relevant documentary record, and other information made available to me in my official capacity.

I. Plaintiffs' FOIA Request

6. By letter dated February 13, 2013, plaintiffs requested "disclosure of the recently adopted report of the Senate Select Committee on Intelligence relating to the CIA's post-9/11 program of rendition, detention, and interrogation." A true and correct copy of this letter is attached hereto as Exhibit A.

7. The Agency responded by letter dated February 22, 2013, and advised plaintiffs that the requested report was a "Congressionally generated and controlled document that is not subject to the FOIA's access provisions" and, accordingly, the CIA informed plaintiffs that it could not accept the request. A true and correct copy of this letter is attached hereto as Exhibit B. This lawsuit followed.

8. The SSCI continued to make changes to the Full Report during the pendency of this lawsuit. The Agency now has at least three different versions of the Full Report in its possession: a December 2012 version, a Summer 2014 version, and the final December 2014 version.

9. Plaintiffs submitted a new FOIA request on May 6, 2014 seeking "the updated version of the Senate Select Committee on Intelligence's Report." A true and correct copy of this letter is attached hereto as Exhibit C. The Agency has not issued a substantive response to that request. The plaintiffs amended their complaint on June 5, 2014, to seek the release of the "Updated SSCI Report." The Agency has interpreted this to refer to the most current and final version of the Full Report -- the December 2014 version. I understand that the plaintiffs are no longer seeking the Executive Summary.

II. Initial Drafting of SSCI Work Product

10. In its congressional oversight role, the SSCI advised the CIA in March 2009 that it planned to conduct a review of the CIA's former detention and interrogation program. At the outset, the SSCI requested access to broad categories of CIA documents related to how the program was created, operated, and maintained, which would form the basis of SSCI's review. Due to the volume and the highly sensitive and compartmented nature of the classified information at issue, the CIA determined that in order to properly safeguard classified equities, the SSCI's review of Agency records would need to take place at CIA facilities.

11. Following discussions with the Committee, the CIA and SSCI reached an inter-branch accommodation that respected both the President's constitutional authorities over classified information and the Congress's constitutional authority to conduct oversight of the Executive Branch. Under this accommodation, the CIA established a secure electronic reading room at an Agency facility where designated SSCI personnel could review these highly classified materials. In addition, the CIA created a segregated network share drive at this facility that allowed members of the Committee and staffers to prepare and store their work product, including draft versions of the Full Report, in a secure environment.

12. One key principle necessary to this inter-branch accommodation, and a condition upon which SSCI insisted, was that the materials created by SSCI personnel on this segregated shared drive would not become "agency records" even if those documents were stored on a CIA computer system or at a CIA facility. Specifically, in a June 2, 2009, letter from the SSCI Chairman and Vice Chairman to the Director of the CIA, the Committee expressly stated that the SSCI's work product, including "draft and final recommendations, reports or other materials generated by Committee staff or Members," are "the property of the Committee" and "remain congressional records in their entirety." The SSCI further explained that the "disposition and control over these records, even after the completion of the Committee's review, lies exclusively with the Committee." As such, the Committee stated that "these records are not CIA records under the Freedom of Information Act or any other law" and that the CIA "may not integrate these records into its records filing systems, and may not disseminate or copy them, or use them for any purpose without prior written authorization from the Committee." Finally, the SSCI requested that in response to a FOIA request seeking these records, the CIA should "respond to the request or demand based upon the understanding that these are congressional, not CIA, records." The full passage reads as follows:

> Any documents generated on the [segregated shared drive], as well as any other notes, documents, draft and final recommendations, reports or other materials generated by Committee staff or Members, are the property of the Committee and will be kept at the Reading Room [at an Agency facility] solely for secure safekeeping and ease of reference. These documents remain congressional records in their entirety and disposition and control over these records, even after the Committee's review, lies exclusively with the Committee. As such, these records are not CIA records under the Freedom of Information Act or any other law. The CIA may not integrate these records into its records filing systems, and may not disseminate or copy them, or use them for any purpose without authorization of the Committee. The CIA will return the records to the Committee immediately upon request in a manner consistent with [security procedures outlined elsewhere]. If the CIA receives any request or demand for access to these records from outside the CIA under the Freedom of Information Act or any other authority, the CIA will immediately notify the Committee and will respond to the request or demand based upon the understanding that these are congressional, not CIA, records.

A true and correct copy of this letter is attached hereto as Exhibit D.

13. Based on this inter-branch accommodation, SSCI personnel used the segregated shared drive to draft the document that is the subject of this litigation. As sections of their work product reached a certain stage, the SSCI worked with the CIA information technology and security personnel to transfer these drafts from the segregated shared drive to the SSCI's secure facilities at the U.S. Capitol complex so that the SSCI could complete the drafting process in its own workspace.

14. CIA understands that the SSCI made changes to its work product following the transfers. Thus, it is the Agency's understanding that the draft versions of the Full Report and Executive Summary that SSCI approved in December 2012 do not reside in the CIA facility described in the preceding paragraph. Nonetheless, the restrictions governing the SSCI's initial work product have informed how the CIA has treated versions of the SSCI's work product in the Agency's possession.

III. SSCI's Treatment of the Full Report

A. December 2012: Approval and Transmission of the Initial Draft

15. On December 13, 2012, the SSCI decided in closed session to "approve" a draft of the Study -- both the Executive Summary and the Full Report -- and transmit it to the Executive Branch for review. The SSCI Staff Director notified the CIA and other federal agencies of the decision by e-mail that evening. He indicated that his staff would transmit a "limited number of hard copies" of the Study to the White House, the Office of the Director of National Intelligence, the CIA, and the Department of Justice for review. He also noted that his staff would provide copies of the Study only to specific individuals identified in advance to the Chairman. The Staff Director's e-mail indicates that these limitations on dissemination and access were imposed pursuant to "the motion adopted by the

Committee." A true and correct copy of this e-mail (with appropriate redactions) is attached hereto as Exhibit E.

16. Soon thereafter, the CIA provided the Committee with a list of Agency officers who would review the Executive Summary and Full Report on behalf of the CIA. The Committee approved access for these individuals for the limited purpose of providing comments in response to the Study. The CIA subsequently conducted a thorough review of the Study and drafted a lengthy response, a process that necessitated increasing the number of officers who had access to the Full Report or portions of the Full Report. However, access to that version of the document remained confined to authorized CIA personnel with the requisite security clearances and a need-to-know, and for the limited purpose of assisting the Agency in its interactions with the SSCI with respect to the Study and the Agency's response.[1]

B. April 2014: SSCI's Decision to Send the Executive Summary to the President for Declassification

17. The SSCI revised the Executive Summary and Full Report after considering the CIA's comments. The SSCI then met in closed session on April 3, 2014, to determine the proper disposition of those documents. The Committee ultimately

[1] In addition, a small number of Agency personnel have reviewed portions of the Full Report for the limited purpose of assessing the proper classification of its contents or responding to FOIA requests.

decided to approve the updated versions and to send the Executive Summary to the President for declassification and eventual public release. My understanding is that the Committee did not approve declassification or release of the Full Report.

18. Because the April 3, 2014, decision was made in closed session, the exact text of the motion approved by the Committee is not publicly available. But it is clear from the public statements of SSCI members that the Committee did not decide to declassify or release the Full Report. For example, the SSCI Chairman noted in a press release announcing the April 3 decision that the Full Report would be "held for declassification at a later time." A true and correct copy of the press release is attached hereto as Exhibit F. The Chairman later explained in her foreword to the Executive Summary that she "chose not to seek declassification of the full Committee Study at this time" because "declassification of the more than six thousand page report would have significantly delayed the release of the Executive Summary."[2]

C. December 2014: SSCI's Release of the Executive Summary

19. The SSCI and the Executive Branch had many discussions after April 2014 regarding the Executive Summary, and the SSCI continued to edit the document in light of those discussions.

[2] A copy of the Chairman's foreword is available on the SSCI website: www.intelligence.senate.gov/study2014.html.

It is my understanding that the SSCI also made conforming changes to the Full Report as it updated the Executive Summary.

20. When the SSCI and the Executive Branch concluded their discussions, the Director of National Intelligence declassified a partially redacted version of the Executive Summary. The SSCI then publicly released the Executive Summary, along with minority views and the additional views of various Committee members, on December 9, 2014. To the best of my knowledge, that was the last official action of the full Committee in connection with its study of the CIA's detention and interrogation program.

IV. The CIA's Treatment of the Full Report

21. In addition to the December 2012 draft, the SSCI Chairman transmitted at least two updated versions of the Full Report to the President and other agencies. The CIA received an updated version in the summer of 2014 and another updated version in December 2014. The December 2014 version is considered the final version of the Full Report.

22. All three versions of the Full Report are marked TOP SECRET, with additional access restrictions noted based on the sensitive compartmented information contained in them. The Full Report discusses intelligence operations, foreign relations, and other classified matters at length and in great detail.

23. The Agency has used the Full Report only for limited reference purposes. When the SSCI provided the CIA with a copy

of the Full Report in December 2012, it did so for the sole purpose of allowing the Agency to review the document and provide comments. Indeed, the Committee placed express restrictions on dissemination of the Full Report. The CIA accordingly gave only a limited number of officers access to the December 2012 version of the Full Report for the limited purpose permitted by the SSCI: as a reference used when preparing the CIA's response.

24. Access to the subsequent versions transmitted in the summer of 2014 and December 2014 has been even more tightly controlled by CIA, and their use by CIA has been limited to reference purposes.

* * *

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 21st day of January 2015.

Neal Higgins
Director, Office of Congressional Affairs
Central Intelligence Agency

Exhibit D

APPROVED FOR RELEASE DATE: 14-Jan-2015

SECRET

United States Senate

SELECT COMMITTEE ON INTELLIGENCE
WASHINGTON, DC 20510-6475

June 2, 2009

The Honorable Leon Panetta
Director
Central Intelligence Agency
Washington, D.C. 20505

Dear Director Panetta:

In a letter dated March 26, 2009, the Senate Select Committee on Intelligence (the Committee) informed the Central Intelligence Agency (CIA) of its intention to conduct a thorough review of the CIA's detention and interrogation program. The letter included terms of reference approved by the Committee, as well as a document request.

To conduct our work in a comprehensive and timely matter, the Committee requires access to unredacted materials that will include the names of non-supervisory CIA officers, liaison partners, black-site locations, or contain cryptonyms or pseudonyms. We appreciate the CIA's concern over the sensitivity of this information. Our staff has had numerous discussions with Agency officials to identify appropriate procedures by which we can obtain the information needed for the study in a way that meets your security requirements. We agree that the Committee, including its staff, will conduct the study of CIA's detention and interrogation program under the following procedures and understandings:

1. Pursuant to discussions between the Committee and CIA about anticipated staffing requirements, the CIA will provide all Members of the Committee and up to 15 Committee staff (in addition to our staff directors, deputy staff directors, and counsel) with access to unredacted responsive information. In addition, additional cleared staff may be given access to small portions of the unredacted information for the purpose of reviewing specific documents or conducting reviews of individual detainees. These Committee staff have or will have signed standard Sensitive Compartmented Information non-disclosure agreements for classified information in the [redacted] compartment.

SECRET

APPROVED FOR RELEASE DATE: 14-Jan-2015

SECRET

2. CIA will make unredacted responsive operational files, as that term is defined in Section 701(b) of the National Security Act of 1947 (50 U.S.C. 431(b)), available at a secure Agency electronic Reading Room facility (Reading Room) which will permit Committee staff electronic search, sort, filing, and print capability.

3. If responsive documents other than those contained in operational files identify the names of non-supervisory CIA officers, liaison partners, or black-site locations, or contain cryptonyms or pseudonyms, CIA will provide unredacted copies of those documents at the Reading Room.

4. Responsive documents other than those contained in operational files that do not identify the names of non-supervisory CIA officers, liaison partners, or black-site locations, or contain cryptonyms or pseudonyms will be made available to the Committee in the Committee's Sensitive Compartmented Information Facility (SCIF), unless other arrangements are made.

5. CIA will provide a stand-alone computer system in the Reading Room with a network drive for Committee staff and Members. This network drive will be segregated from CIA networks to allow access only to Committee staff and Members. The only CIA employees or contractors with access to this computer system will be CIA information technology personnel who will not be permitted to copy or otherwise share information from the system with other personnel, except as otherwise authorized by the Committee.

6. Any documents generated on the network drive referenced in paragraph 5, as well as any other notes, documents, draft and final recommendations, reports or other materials generated by Committee staff or Members, are the property of the Committee and will be kept at the Reading Room solely for secure safekeeping and ease of reference. These documents remain congressional records in their entirety and disposition and control over these records, even after the completion of the Committee's review, lies exclusively with the Committee. As such, these records are not CIA records under the Freedom of Information Act or any other law. The CIA may not

APPROVED FOR RELEASE DATE: 14-Jan-2015

integrate these records into its records filing systems, and may not disseminate or copy them, or use them for any purpose without the prior written authorization of the Committee. The CIA will return the records to the Committee immediately upon request in a manner consistent with paragraph 9. If the CIA receives any request or demand for access to these records from outside the CIA under the Freedom of Information Act or any other authority, the CIA will immediately notify the Committee and will respond to the request or demand based upon the understanding that these are congressional, not CIA, records.

7. CIA will provide the Committee with lockable cabinets and safes, as required, in the Reading Room.

8. If Committee staff identifies CIA-generated documents or materials made available in the Reading Room that staff would like to have available in the Committee SCIF, the Committee will request redacted versions of those documents or materials in writing. Committee staff will not remove such CIA-generated documents or materials from the electronic Reading Room facility without the agreement of CIA.

9. To the extent Committee staff seeks to remove from the Reading Room any notes, documents, draft and final recommendations, reports or other materials generated by Committee Members or staff, Committee staff will ensure that those notes, documents, draft and final recommendations, reports or other materials do not identify the names of non-supervisory CIA officers, liaison partners, or black-site locations, or contain cryptonyms or pseudonyms. If those documents contain such information, Committee staff will request that CIA conduct a classification review to redact the above-referenced categories of information from the materials or replace such information with alternative code names as determined jointly by the Committee and the CIA.

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APPROVED FOR RELEASE DATE: 14-Jan-2015

Any document or other material removed from the reading room pursuant to paragraphs 8, 9, or 10 will be stored in the Committee SCIF or transferred and stored on Committee TS//SCI systems, under Committee security procedures.

10. Any notes, documents, draft and final recommendations, reports or other materials prepared by Committee Members or Staff based on information accessed in the Reading Room will be prepared and stored on TS//SCI systems. Such materials will carry the highest classification of any of the underlying source materials. If the Committee seeks to produce a document that carries a different classification than the underlying source material, the Committee will submit that document to CIA, or if appropriate to the DNI, for classification review and, if necessary, redaction.

11. The Reading Room will be available from 0700 to 1900 hours, official government business days, Monday through Friday. If Committee staff requires additional time or weekend work is required, Committee staff will make arrangements with CIA personnel with as much advance notice as possible. .

12. The Committee will memorialize any requests for documents or information in writing and CIA will respond to those requests in writing.

13. All Committee staff granted access to the Reading Room shall receive and acknowledge receipt of a CIA security briefing prior to reviewing CIA documents at the Reading Room.

APPROVED FOR RELEASE DATE: 14-Jan-2015

SECRET

We anticipate that agreement to these conditions will address your concerns about Committee access to unredacted materials responsive to the Committee's document request. We look forward to immediate staff access to those materials.

In addition, we expect that the discussions and agreements over access to the study information are a matter restricted to the Congress and the Executive branch. As such, neither this letter nor derivative documents may be provided or presented to CIA's liaison partners.

Sincerely,

Dianne Feinstein
Chairman

Christopher S. Bond
Vice Chairman

SECRET

Exhibit E

UNCLASSIFIED

Director of Office of Congressional Affairs

From: Grannis, D (Intelligence) Subject: SSCI report, reading
Date: 12/13/2012 05:18 PM
To: Mark David Agrast
Cc:

Please respond to "Grannis, D (Intelligence)"

[***** Document has been archived. Click "Retrieve" button to retrieve document contents and attachments. *****]

CLASSIFICATION: UNCLASSIFIED

The SSCI approved today its report on CIA Detention and Interrogation.
Per the motion adopted by the Committee, we will be transmitting to the White House, the ODNI, the CIA, and the Department of Justice a limited number of hard copies of the report for review.
We will send an official transmittal letter tomorrow.
However, by explicit instruction of the Chairman, and as specified in the motion, we will only provide copies of the report to specific individuals who are identified in advance to the Chairman (through me).

Regards,

David

David Grannis

Staff Director

Senate Select Committee on Intelligence

UNCLASSIFIED

Exhibit F

United States Senator Dianne Feinstein

Apr 03 2014

Intelligence Committee Votes to Declassify Portions of CIA Study

Washington—Senate Intelligence Committee Chairman Dianne Feinstein (D-Calif.) released the following statement after the committee voted to declassify the executive summary and conclusions of its landmark report on the CIA's Detention and Interrogation Program:

"The Senate Intelligence Committee this afternoon voted to declassify the 480-page executive summary as well as 20 findings and conclusions of the majority's five-year study of the CIA Detention and Interrogation Program, which involved more than 100 detainees.

"The purpose of this review was to uncover the facts behind this secret program, and the results were shocking. The report exposes brutality that stands in stark contrast to our values as a nation. It chronicles a stain on our history that must never again be allowed to happen.

"This is not what Americans do.

"The report also points to major problems with CIA's management of this program and its interactions with the White House, other parts of the executive branch and Congress. This is also deeply troubling and shows why oversight of intelligence agencies in a democratic nation is so important.

"The release of this summary and conclusions in the near future shows that this nation admits its errors, as painful as they may be, and seeks to learn from them. It is now abundantly clear that, in an effort to prevent further terrorist attacks after 9/11 and bring those responsible to justice, the CIA made serious mistakes that haunt us to this day. We are acknowledging those mistakes, and we have a continuing responsibility to make sure nothing like this ever occurs again.

"The full 6,200-page full report has been updated and will be held for declassification at a later time.

"I want to recognize the tireless and dedicated work of the staff who produced this report over the past five years, under trying circumstances. They have made an enormous contribution. I also thank

the senators who have supported this review from its beginning and have ensured that we reached this point."

Background

The report describes the CIA's Detention and Interrogation Program between September 2001 and January 2009. It reviewed operations at overseas CIA clandestine detention facilities, the use of CIA's so-called "enhanced interrogation techniques" and the conditions of the more than 100 individuals detained by CIA during that period.

The executive summary, findings, and conclusions—which total more than 500 pages—will be sent to the president for declassification review and subsequent public release. President Obama has indicated his support of declassification of these parts of the report and CIA Director Brennan has said this will happen expeditiously. Until the declassification process is complete and that portion of the report is released, it will remain classified.

The Senate Intelligence Committee initiated the study of CIA's Detention and Interrogation Program in March 2009. Committee staff received more than 6 million pages of materials, the overwhelming majority of which came from the CIA, but also included documents from the Departments of State, Justice and Defense. Committee staff reviewed CIA operational cables, memoranda, internal communications, photographs, financial documents, intelligence analysis, transcripts and summaries of interviews conducted by the CIA inspector general while the program was ongoing and other records for the study.

In December 2012, the committee approved the report with a bipartisan vote of 9-6 and sent it to the executive branch for comment. For the past several months, the committee staff has reviewed all comments by the CIA as well as minority views by committee Republicans and made changes to the report as necessary to ensure factual accuracy and clarity.

###

Permalink: http://www.feinstein.senate.gov/public/index.cfm/2014/4/senate-intelligence-committee-votes-to-declassify-portions-of-cia-detention-interrogation-study

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JASON LEOPOLD,	)	
Plaintiff,	)	
v.	)	Case No. 13-cv-1324 (JEB)
CENTRAL INTELLIGENCE AGENCY,	)	
Defendant.	)	

DECLARATION OF MARTHA M. LUTZ
CHIEF OF THE LITIGATION SUPPORT UNIT
CENTRAL INTELLIGENCE AGENCY

I, MARTHA M. LUTZ, hereby declare and state:

1. I am the Chief of the Litigation Support Unit of the Central Intelligence Agency ("CIA" or "Agency"). I have held this position since October 2012. Prior to assuming this position, I served as the Information Review Officer ("IRO") for the Director's Area of the CIA for over thirteen years. In that capacity, I was responsible for making classification and release determinations for information originating within the Director's Area, which includes, among other offices, the Office of the Director of the CIA, the Office of Congressional Affairs, and the Office of General Counsel. Since 1989, I have held other administrative and professional positions within the CIA.

2. As the Chief of the Litigation Support Unit, I am responsible for the classification review of CIA documents and

information that may be the subject of court proceedings or public requests for information under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552. I am a senior CIA official and hold original classification authority at the TOP SECRET level under written delegation of authority pursuant to section 1.3(c) of Executive Order No. 13526. Because I hold original classification authority, I am authorized to assess the current, proper classification of CIA information, up to and including TOP SECRET information, based on the classification criteria of Executive Order 13526 and applicable regulations.

3. Through the exercise of my official duties, I am familiar with this civil action and the underlying FOIA request. I make the following statements based upon my personal knowledge and information made available to me in my official capacity.

I. PLAINTIFF'S FOIA REQUEST

4. This declaration addresses plaintiff's FOIA request, dated 28 April 2014, which sought "the CIA's copy of the 480-page executive summary of the Senate Select Committee on Intelligence's (SSCI) report on the agency's detention and interrogation program." A copy of plaintiff's request is attached as Exhibit A. Additionally, I note that this case initially concerned a separate request made by plaintiff to the Department of Justice for its copy of the Executive Summary. *See* ECF No. 17. However, when plaintiff amended his complaint

to include the request to CIA, he substituted the Agency as a defendant in this matter.

II. RECORD AT ISSUE

5. In March 2009, the SSCI commenced a study of the CIA's former detention and interrogation program. On 13 December 2012, the SSCI approved the *Committee Study of the CIA's Detention and Interrogation Program* ("Committee Study"), which included a separate Executive Summary and 20 Findings and Conclusions. The Committee Study was subsequently circulated to Executive Branch agencies for their review and comment. After receiving the CIA's response and the SSCI Minority Staff's views, the SSCI revised certain findings and conclusions and updated the Committee Study. On 3 April 2014, the SSCI voted to send the Executive Summary and Findings and Conclusions ("Executive Summary") of the updated Committee Study to the President for declassification. A copy of Chairman Dianne Feinstein's letter is attached as Exhibit B. The SSCI requested that the Executive Summary be declassified "quickly and with minimal redactions." *Id.*

6. The Director of National Intelligence ("DNI") and the CIA, in consultation with other Executive Branch agencies, conducted a declassification review of the April 2014 Executive Summary. On August 1, 2014, at the direction of the President, the DNI declassified a redacted version of that document and the

President delivered it to SSCI that day. Shortly thereafter, the Executive Branch engaged in extensive discussions with the SSCI about additional material within the Executive Summary which the SCCI sought to be declassified and released. At the conclusion of those discussions, the SSCI delivered to the Executive Branch a new version of the Executive Summary for classification review. A declassified version of the Executive Summary was transmitted to the SSCI for its unrestricted disposition on 8 December 2014. The SSCI publicly released a final version of the Executive Summary the following day.

7. I note that the version of the Executive Summary released by the SSCI and addressed in this declaration was not in existence at the time of plaintiff's request. However, in the interest of efficiency, the CIA offers the following rationale for the redacted material in the final version of the Executive Summary that was publicly released by the SSCI.

8. The Executive Summary released by the SSCI is a 499-page document, which contains minimal redactions. The redacted material is limited to discrete pieces of classified and statutorily-protected material and/or personally-identifying information that implicate an individual's privacy interest, resulting in a document that is approximately seven percent redacted. The vast majority of the redactions in the Executive Summary concern CIA equities. There are also limited redactions

requested by Department of State, the National Security Agency, the Department of Defense, and the Federal Bureau of Investigation. The CIA has consulted with these agencies in connection with the instant filing, which addresses all redactions in the document. As explained below, limited classified, statutorily-protected, and personally-identifiable information was redacted from the Executive Summary -- information which clearly falls within the ambit of Exemptions (b)(1), (b)(3) and (b)(6).

III. FOIA EXEMPTIONS PROTECTING CLASSIFIED INFORMATION

A. Exemption (b)(1)

9. Exemption (b)(1) provides that the FOIA does not require the production of records that are: "(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order." 5 U.S.C. § 552(b)(1). As explained below, the Exemption (b)(1) withholdings in the documents at issue satisfy the procedural and the substantive requirements of Executive Order 13526.

10. Section 1.1(a) of Executive Order 13526 provides that information may be originally classified under the terms of this order if the following conditions are met: (1) an original classification authority is classifying the information; (2) the

information is owned by, produced by or for, or is under the control of the U.S. Government; (3) the information falls within one or more of the categories of information listed in section 1.4 of Executive Order 13526; and (4) the original classification authority determines that the unauthorized disclosure of the information reasonably could be expected to result in some level of damage to the national security, and the original classification authority is able to identify or describe the damage. The Executive Order also mandates that records be properly marked and requires that records not be classified for an improper purpose.

i. Procedural Requirements

11. Original classification authority. Pursuant to a written delegation of authority in accordance with Executive Order 13526, I hold original classification authority at the TOP SECRET level. Therefore, I am authorized to conduct classification reviews and to make original classification decisions. I have determined that certain information in the record at issue is currently and properly classified.

12. U.S. Government information. The information at issue is owned by the U.S. Government, was produced by or for the U.S. Government, and is under the control of the U.S. Government.

13. Classification categories in Section 1.4 of the Executive Order. Exemption (b)(1) is asserted in this case to protect information that concerns "intelligence activities (including covert action), intelligence sources or methods, or cryptology," pursuant to section 1.4(c) of Executive Order 13526. Additionally, Exemption (b)(1) also applies to information that pertains to "foreign relations or foreign activities of the United States, including confidential sources" under section 1.4(d).

14. Damage to the national security. I have determined that certain information contained in the record at issue is classified TOP SECRET, because it constitutes information the unauthorized disclosure of which could reasonably be expected to result in damage to the national security.

15. Proper purpose. With respect to the information for which Exemption (b)(1) is asserted in this case, I have determined that this information has not been classified in order to conceal violations of law, inefficiency, or administrative error; prevent embarrassment to a person, organization or agency; restrain competition; or prevent or delay the release of information that does not require protection in the interests of national security.

16. Marking. The document is properly marked in accordance with section 1.6 of the Executive Order.

ii. Substantive Requirements

17. As explained below, in the course of this litigation, I have reviewed the responsive record and determined that it contains certain information that is currently and properly classified at the TOP SECRET level. Specifically, I have determined that this information has been properly withheld because its disclosure could lead to the identification of intelligence sources, methods and activities and/or cause damage to foreign relations or foreign activities of the United States, including confidential sources, within the meaning of sections 1.4(c) and 1.4(d) of Executive Order 13526. As such, disclosure of this information could reasonably be expected to result in exceptionally grave damage to national security.

B. Exemption (b)(3)

18. Exemption (b)(3) protects information that is specifically exempted from disclosure by statute. A withholding statute under Exemption (b)(3) must (A) require that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establish particular criteria for withholding or refer to particular types of matters to be withheld. 5 U.S.C. § 552(b)(3).

19. Here, the CIA has determined that Section 102A(i)(1) of the National Security Act of 1947, as amended, 50 U.S.C. § 3024 (the "National Security Act"), which provides that the

Director of National Intelligence "shall protect intelligence sources and methods from unauthorized disclosure," also applies to the information for which Exemption (b)(1) was asserted. I note that the National Security Act has been widely recognized by courts to constitute a withholding statute in accordance with Exemption (b)(3). In this case, the National Security Act covers all of the information protected by Exemption (b)(1).

20. The CIA also invoked Section 6 of the Central Intelligence Agency Act of 1949, as amended, 50 U.S.C. § 3507 (the "CIA Act"), in conjunction with Exemption (b)(3). Section 6 of the CIA Act protects from disclosure information that would reveal the CIA's organization, functions, including the function of protecting intelligence sources and methods, names, official titles, salaries, or numbers of personnel employed by the CIA. The CIA Act has been widely recognized by courts to be a federal statute that "establishes particular criteria for withholding or refers to particular types of matters to be withheld." 5 U.S.C. § 552(b)(3). Here, the CIA Act applies to identifying information of Agency personnel, including covert personnel, as well as foreign liaison and human sources of intelligence. Neither of these statutes requires that the CIA demonstrate harm in order to withhold any applicable material, but the harm that would be occasioned by disclosure of this information is described in full below.

IV. DAMAGE TO NATIONAL SECURITY

21. The information redacted from the Executive Summary consists of specific intelligence sources, methods and activities of the CIA and other federal agencies. Disclosure of this information could reasonably be expected to harm national security because it would reveal certain capabilities, activities, and intelligence priorities of U.S. Government, which, in turn, could inhibit the intelligence-gathering. Accordingly, this information has been redacted from the Executive Summary and is exempt from disclosure pursuant to Exemption (b)(1). Additionally, Exemption (b)(3) in connection with the National Security Act also applies to all the information described below given that it falls squarely within the intelligence sources and methods protected by the statute. To the greatest extent possible, I have attempted to explain on the public record the nature of the information that was redacted from the Executive Summary. Should the court require additional details about the redacted information, the Agency is prepared to submit an *in camera, ex parte* declaration for that purpose.

22. Intelligence Sources. Certain redacted information in the Executive Summary would reveal specific intelligence activities, sources and methods utilized by the CIA or by other government agencies. One of the major functions of the

Intelligence Community is to collect foreign intelligence from around the world for the President and other United States Government officials to use in making policy decisions. To accomplish this function, the CIA and other agencies must rely on information from knowledgeable sources, which can be obtained only under an arrangement of absolute secrecy. Intelligence sources will rarely furnish information unless they receive assurances that the fact of their cooperation and the information that they provide will be kept secret. In other words, intelligence sources must be certain that the U.S. Government will do everything in its power to ward against the public disclosure of the intelligence shared and how that information was acquired.

23. *Human Sources*. Some of the information redacted in the report consists of intelligence gathered by human sources on behalf of the CIA. The CIA relies on individuals around the world to collect foreign intelligence, and it does so with the promise that the CIA will keep their identities secret and prevent public disclosure. This is because the CIA's revelation of this secret relationship could harm the individual who frequently cooperates without the knowledge of his or her government. For example, in the case of a foreign national abroad who cooperates with the CIA, the consequences of the disclosure of this relationship are often swift and far-ranging,

from economic reprisals to harassment, imprisonment, and even death. In addition, such disclosure could jeopardize the lives of individuals with whom the foreign national has had contact, including his or her family and associates.

24. Moreover, the release of information in the Executive Summary that would or could identify an intelligence source would damage the CIA's credibility with all other current intelligence sources and undermine the CIA's ability to recruit future sources. As stated previously, most individuals will not cooperate with the CIA unless they have confidence that their identities will remain forever secret. Additionally, the CIA itself has a primary interest in keeping these identities secret, not only to protect the sources of specific intelligence, but also to demonstrate to other individuals and future sources that they can trust the CIA to preserve the secrecy of the relationship.

25. If a potential source has any doubts about the ability of the CIA to preserve secrecy -- that is, if he or she were to learn that the CIA had disclosed the identity of another source - they would be less likely to cooperate with the CIA. In other words, sources, be they present or future, usually will not work for the CIA if they are convinced or believe that the CIA may not protect their identities. The loss of such intelligence sources along with the corresponding loss of the critical

intelligence that they provide, would seriously and adversely affect the national security of the United States. For these reasons, the human sources information in the Executive Summary must be protected.

26. *Foreign Liaison and Government Information.* Foreign liaison information is information that the U.S. Government obtains clandestinely from foreign intelligence services and government officials. Utilizing these intelligence liaison relationships, the CIA collects intelligence and provides national security and foreign policy officials with material that is critical to informed decision making -- information and assistance critical to U.S. counterterrorism operations that the CIA cannot obtain through alternate sources and methods. Foreign liaison services and individual foreign government officials provide this sensitive information in strict confidence based on express assurances from the U.S. Government that the content of the information, as well as the mere fact of the relationship, will remain secret.

27. Here, discrete pieces of foreign government and liaison information were redacted from the Executive Summary. These details would indicate the identity of intelligence sources and the specific information shared. Disclosing the fact of the relationship, the nature of the assistance, or the information provided -- which is reflected in these redactions -

- would suggest to other foreign liaison services and foreign government officials that the U.S. Government is unable or unwilling to observe an express agreement of absolute secrecy. This perception could cause foreign liaison services to curtail cooperation on counterterrorism operations or other activities affecting U.S. national security. Moreover, such acknowledgments could cause serious damage to relations with the foreign government that provided the information and possibly damage relationships with other governments as well. This could result in a significant loss of intelligence information for the U.S. Government and harm other areas of cooperation and thereby cause damage to national security.

28. Intelligence Methods. The Executive Summary also contains classified material that would reveal specific intelligence methods of the CIA and other federal agencies. Generally, intelligence methods are the means by which the CIA accomplishes its mission. The Director of the CIA has broad authority to protect intelligence methods. Intelligence methods are valuable from an intelligence-gathering perspective only so long as they remain unknown and unsuspected. Once the nature of an intelligence method or the fact of its use in a certain situation is discovered, its usefulness in that situation is neutralized and the ability to apply that method in other situations is significantly degraded.

29. Even seemingly innocuous details such as dates and funding amounts associated with a particular program could reveal broader intelligence priorities and the source and methods of certain intelligence collection when juxtaposed with other publicly-available data. For example, releasing precise dates of different events or communications would show the information available to the CIA or other intelligence agencies at a certain point in time, which could show the breadth, capabilities, and limitations of the U.S. Government's intelligence collection. Disclosing intelligence expenditures would show the level of funding devoted to certain activities, which in turn would reveal the resources available to the Intelligence Community and the intelligence priorities of the U.S. Government. Such disclosures could reasonably be expected to harm national security.

30. *Covert Personnel.* A number of redactions in the Executive Summary protect the identities of covert CIA employees. The CIA considers the identities of its undercover employees and their activities to constitute intelligence sources and methods. In order to carry out its mission of gathering and disseminating intelligence, the CIA places certain employees undercover to protect the fact, nature, and details of the Agency's interest in foreign activities as well as the intelligence sources and methods employed to assist in those

activities. Disclosing the identity of a covert employee could expose the intelligence activities in which the employee has been involved and the sources with whom the employee has had contact. Additionally, disclosing the identity of a covert employee could jeopardize the safety of the employee, his or her family, and sources and other persons with whom he or she has had contact.

31. Although these individuals were referenced in pseudonym in the report, given the sensitivity of the detention and interrogation program, there is a significant concern that the release of any information that would allow for the identification of these individuals could place these persons and those associated with them in danger. In fact, following the public release of the Executive Summary, there has been widespread speculation regarding the individuals mentioned in the Executive Summary and attempts to identify those persons. Disclosure of the pseudonyms when connected with other details contained in the Executive Summary could lead to the positive identification of those individuals. In order for the Agency to effectively carry out its foreign-intelligence gathering mission, it is imperative that the identities of covert personnel be protected.

32. *Field Installations*. A number of the redactions to the Executive Summary protect the locations of covert CIA

installations and former detention centers located abroad. The places where the CIA maintains a presence constitute intelligence methods of the Agency. Official acknowledgment that the CIA has an installation in a particular location abroad could cause the government of the country in which the installation is located to take countermeasures, either on its own initiative or in response to public pressure, to eliminate the CIA's presence within its borders. Additionally, the revelation of the location of a particular CIA facility could result in terrorists and foreign intelligence services targeting that installation and the persons associated with it. Further, in some cases, the disclosure of information concerning a covert CIA installation would indicate the purpose of the facility which, in and of itself, would reveal other intelligence methods. Disclosure of the location of former facilities could harm relationships with foreign liaison services, or more broadly, cause damage to foreign relations between those governments and the United States.

33. *Code Words and Pseudonyms*. Some of the information redacted from the Executive Summary consists of code words and pseudonyms. The use of code words is an intelligence method whereby words and letter codes are substituted for actual names, identities, or programs in order to protect intelligence sources and other intelligence methods. Specifically, the CIA and other

federal agencies use code words in cables and other correspondence to disguise the true name of a person or entity of operational intelligence interest, such as a source, a foreign liaison service, or a covert program. As discussed above, the CIA also uses pseudonyms, which are essentially code names, in many of its internal communications.

34. When obtained and matched to other information, code words and pseudonyms possess a great deal of meaning for someone able to fit them into the proper framework. For example, the reader of a message is better able to assess the value of its contents if the reader can identify a source, an undercover employee, or an intelligence activity by the code word or pseudonym. By using these code words, the CIA and other federal agencies add an extra measure of security, minimizing the damage that would flow from an unauthorized disclosure of intelligence information. The disclosure of code words and pseudonyms -- especially in context or in the aggregate -- can permit foreign intelligence services and other groups to fit disparate pieces of information together and to discern or deduce the identity or nature of the person or project for which the code word or pseudonym stands.

35. *Dissemination-Control Information.* Certain dissemination-control information was also redacted from the Executive Summary. The U.S. Government employs a number of

intelligence methods to disseminate intelligence-related information and protect it from unauthorized disclosure. These methods include procedures for marking documents to indicate the presence of particularly sensitive information contained in the documents. They also include some internal routing and administrative information that is used to track and control information. Disclosure of this type of information can reveal or highlight areas of particular intelligence interest, sensitive collection sources or methods, foreign sensitivities, and procedures for gathering, protecting, and processing intelligence.

36. Intelligence Activities. There is also information in the Executive Summary that relates to classified intelligence activities. Intelligence activities refer to the actual implementation of intelligence methods in the operational context. Intelligence activities are highly sensitive because their disclosure often would reveal details regarding specific intelligence methods which, in turn, could provide adversaries with valuable insight into CIA operations that would impair the effectiveness of CIA's intelligence methods.

37. If a hostile entity learns that its activities have been targeted by, or are of interest to, the CIA, it can take countermeasures to make future intelligence collection activities less effective and more dangerous. Foreign

intelligence services and terrorist organizations also seek to glean from the CIA's interests what information the CIA has received, why the CIA is focused on that type of information, and how the CIA will seek to use that information for further intelligence collection efforts and clandestine intelligence activities. If foreign intelligence services or hostile groups were to discover what the CIA has learned or not learned about certain individuals or groups, that information could be used against the CIA to thwart future intelligence operations, jeopardize human sources, and otherwise derail the CIA's intelligence collection efforts.

38. For all of the reasons discussed above, the CIA cannot disclose the classified information in the Executive Summary relating to intelligence sources, intelligence methods, intelligence activities, and foreign relations or foreign activities. That information remains currently and properly classified pursuant to the criteria of Executive Order 13526, as its disclosure could reasonably be expected to cause exceptionally grave damage to the national security of the United States.

39. Additionally, Exemption (b)(3) in conjunction with the National Security Act and the CIA Act likewise apples to this information. The National Security Act is applicable because the information relates to specific sources and methods of

intelligence collection. In addition, the CIA Act also protects the identity of covert personnel inasmuch as it protects the names, titles, and functions of Agency personnel.

V. EXEMPTION (B)(6)

40. Exemption (b)(6) provides that the FOIA's information-release requirements do not apply to "personnel and medical files and similar files, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6). Courts have broadly construed the term "similar files" to cover any personally identifying information. Here, Exemption (b)(6) applies to personally-identifying information of covert and overt CIA personnel, employees of other federal agencies and other individuals merely mentioned in the Executive Summary.

41. Each of these persons maintains a strong privacy interest in this information because its release could subject them to intimidation, harassment, reputational harm, embarrassment or unwanted contact. The extensive media coverage and the sensitivity and controversy surrounding the former detention and interrogation program further heighten those privacy concerns. Conversely, given that the vast majority of the Executive Summary was released without redaction -- the addition of individuals' identities or other personal information would not further the core purpose of the FOIA --

informing the public as to the operations or activities of the government. Accordingly, because there are significant privacy concerns and no corresponding qualifying public interest in disclosure, I have determined that the release of this information would constitute a clearly unwarranted invasion of these individuals' personal privacy under Exemption (b)(6). Additionally, to the extent that the identifying information is that of Agency personnel, foreign liaison and human sources of intelligence the protections of Exemption (b)(3) in conjunction with the CIA Act jointly apply.

VI. SEGREGABILITY

42. In evaluating responsive documents, the CIA conducted a page-by-page and line-by-line review of the Executive Summary and concluded that all reasonably segregable non-exempt information has been released. Indeed, as demonstrated by the released Executive Summary itself, the redactions taken were limited and discrete. Disclosure of the redacted information would reveal classified details of the activities and specific intelligence sources and methods utilized by the CIA and other government agencies, statutorily protected information and/or personally-identifying details, which for the reasons discussed above cannot be disclosed.

* * *

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 21st day of January 2015.

Martha M. Lutz
Chief, Litigation Support Unit
Central Intelligence Agency

EXHIBIT B

DIANNE FEINSTEIN, CALIFORNIA, CHAIRMAN
SAXBY CHAMBLISS, GEORGIA, VICE CHAIRMAN

JOHN D. ROCKEFELLER IV, WEST VIRGINIA
RON WYDEN, OREGON
BARBARA A. MIKULSKI, MARYLAND
MARK UDALL, COLORADO
MARK WARNER, VIRGINIA
MARTIN HEINRICH, NEW MEXICO
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RICHARD BURR, NORTH CAROLINA
JAMES E. RISCH, IDAHO
DANIEL COATS, INDIANA
MARCO RUBIO, FLORIDA
SUSAN COLLINS, MAINE
TOM COBURN, OKLAHOMA

HARRY REID, NEVADA, EX OFFICIO
MITCH McCONNELL, KENTUCKY, EX OFFICIO
CARL LEVIN, MICHIGAN, EX OFFICIO
JAMES INHOFE, OKLAHOMA, EX OFFICIO

DAVID GRANNIS, STAFF DIRECTOR
MARTHA SCOTT POINDEXTER, MINORITY STAFF DIRECTOR
DESIREE THOMPSON SAYLE, CHIEF CLERK

United States Senate

SELECT COMMITTEE ON INTELLIGENCE
WASHINGTON, DC 20510-6475

April 7, 2014

The Honorable Barack Obama
The White House
1600 Pennsylvania Avenue NW
Washington, DC 20500

Dear Mr. President,

I am pleased to inform you that the Senate Select Committee on Intelligence has voted to send for declassification the Findings and Conclusions and Executive Summary of an updated version of the Committee's Study of the CIA's Detention and Interrogation Program. Both are enclosed. I request that you declassify these documents, and that you do so quickly and with minimal redactions. If Committee members write additional or minority views that they wish to have declassified and released as well, I will transmit those separately.

As this report covers a covert action program under the authority of the President and National Security Council, I respectfully request that the White House take the lead in the declassification process. I very much appreciate your past statements – and those of your Administration – in support of declassification of the Executive Summary and Findings and Conclusions with only redactions as necessary for remaining national security concerns. I also strongly share your Administration's goal to "ensure that such a program will not be contemplated by a future administration," as your White House Counsel wrote in a February 10, 2014, letter.

In addition to the Findings and Conclusions and Executive Summary, I will transmit separately copies of the full, updated classified report to you and to appropriate Executive Branch agencies. This report is divided into three volumes, exceeds 6,600 pages, and includes over 37,000 footnotes, and updates the version of the report I provided in December 2012. This full report should be considered as the final and official report from the Committee. I encourage and approve the

dissemination of the updated report to all relevant Executive Branch agencies, especially those who were provided with access to the previous version. This is the most comprehensive accounting of the CIA's Detention and Interrogation Program, and I believe it should be viewed within the U.S. Government as the authoritative report on the CIA's actions.

As I stated in my letter to you on December 14, 2012, the Committee's report contradicts information previously disclosed about the CIA Detention and Interrogation Program, and it raises a number of issues relating to how the CIA interacts with the White House, other parts of the Executive Branch, and Congress. I ask that your Administration declassify the Findings and Conclusions and Executive Summary of this updated report as soon as possible. I also look forward to working with you and your Administration in discussing recommendations that should be drawn from this report.

Thank you very much for your continued attention to this issue.

Sincerely yours,

Dianne Feinstein
Chairman

Enclosures: as stated

cc: The Honorable James Clapper, Director of National Intelligence
The Honorable John Brennan, Director, Central Intelligence Agency
The Honorable Eric Holder, Attorney General
The Honorable Chuck Hagel, Secretary of Defense
The Honorable John F. Kerry, Secretary of State

Declaration of James G. Connell, III

1. My name is James G. Connell, III. I am over 18 years old and competent to make a declaration. I am the plaintiff in *Connell v. Central Intelligence Agency*, 21-cv-0627 (CRC).

Duties as Learned Counsel

2. I am contracted by the United States government, Department of Defense, Office of Military Commissions, as Learned Counsel pursuant to 10 U.S.C. § 949a(b)(2)(C)(ii) and Regulation for Trial by Military Commission (RTMC) § 9-1(a)(6). In 2011, I was detailed by Colonel Jeffrey P. Calwell, United States Marine Corps, as Learned Counsel for Ammar al Baluchi in *United States v. Ammar al Baluchi*, commonly known as "the 9/11 Case." In this declaration, I write only in my capacity as plaintiff and counsel for Ammar al Baluchi, and do not speak for any other element of the United States government.

3. Under RTMC 9-1(b)(2)(F), my duties as Learned Counsel include safeguarding national security information. To the best of my understanding and belief, no statement in this declaration reveals classified information.

Classification guidance on 2013 Camp VII inspection

4. In 2013, I and other defense attorneys in the 9/11 Case obtained an order from the military commission permitting inspection of Camp VII. At the time, Mr. al Baluchi was imprisoned in Camp VII.

5. The Office of Military Commissions, Office of the Chief Prosecutor (OCP) has repeatedly advised me that its attorneys speak for all departments and agencies of the United States, including CIA. On occasion, I have interacted with counsel for specific agencies, including CIA, but no counsel other than OCP has ever appeared (other than as a witness) on behalf of any United States department or agency in the 9/11 Case. On many occasions, OCP has represented the interests of CIA in the 9/11 Case, including with respect to CIA classification decisions, CIA *Touhy* regulations, CIA employee interviews, and other CIA equities. On many occasions, OCP has invoked national security privilege on behalf of CIA. On information and belief, OCP is an authorized representative of CIA in the 9/11 Case.

6. In preparation for the 2013 Camp VII inspection, I spoke with members of OCP (responsible for prosecutions at Guantanamo), the Office of the Staff Judge Advocate for Joint Task Force-Guantanamo (responsible for legal issues

relating to Camp VII), and the Office of Special Security (responsible for security issues in the military commissions). The discussions centered primarily on logistics and classification issues, including specific aspects of Camp VII that were classified. At no time did any member of these government agencies advise me that the existence or non-existence of information regarding CIA operational control of Camp VII was classified.

7. I participated in an inspection of parts of Camp VII in August 2013. During the Camp VII inspection, an attorney from the Office of the Staff Judge Advocate for Joint Task Force-Guantanamo escorted me and the other members of the inspection team, including a photographer from Joint Task Force-Guantanamo. Among other roles, the attorney decided what elements the inspection team was allowed to photograph. At no time did the attorney advise me that, or prohibit photography on the basis that, the existence or non-existence of information regarding CIA operational control of Camp VII was classified.

8. At the conclusion of the Camp VII inspection, I submitted the inspections team's notes and photographs to an Original Classification Authority, through the Office of Special Security, for classification review. The Original Classification Authority marked the notes and photographs SECRET//NOFORN and returned them to me. At no time did the Original Classification Authority advise me that the existence or non-existence of information regarding CIA operational control of Camp VII was classified.

FOIA requests and responses

9. I have reviewed Part II of Vanna Blaine's March 11, 2022 declaration. It is accurate although incomplete is some respects.

10. CIA's September 29, 2020 communication included a three-page document responsive to my request. A complete copy of CIA's September 29, 2020 letter, including the responsive document C06677259, is Attachment A to this declaration.

11. CIA's July 15, 2021 letter included two responsive documents, C06541712 (Attachment B) and C06902570 (Attachment C). CIA had previously released C06541712 with the same number but with a release date of June 10, 2016 through its electronic reading room (Attachment D). In 2018, I was aware of C06541712 and referenced it in my March 8, 2018 letter to CIA. C06902570, provided on July 15, 2021, is an expanded version of C06677259, provided on September 29, 2020.

ODNI disclosures

12. In the course of my duties, I have engaged in extensive research, investigation, and litigation over the connection between CIA, FBI, and DoD in the effort to obtain statements from my client and others in late 2006 and early 2007. In the course of this research, I discovered two documents in the ACLU Torture Database regarding interagency decisions over Camp VII prisoners in late 2006 (Attachments E and F).[1] The documents are on letterhead from the Office of the Director of National Intelligence (ODNI). Metadata on the Torture Database states that ODNI released the documents. I have attached the documents to pleadings in the 9/11 Case and repeatedly relied on them in oral arguments. Following Original Classification Authority review, the military commission publicly released the documents without additional redactions.[2] Despite this extensive use of the documents, no person has ever suggested to me that the documents are anything other than what they purport to be. To a reasonable professional certainty, I believe the documents to be authentic and declassified by ODNI as redacted.

Testimony of the First Camp VII Commander

13. During 2019, I participated in litigation and negotiations over the production of witnesses regarding Mr. al Baluchi's legal positions. As part of that process, OCP called a witness under the pseudonym First Camp VII Commander.

14. The First Camp VII Commander consented to an interview in advance of his testimony. I participated in an interview with the First Camp VII Commander with a prosecutor from OCP present to represent the interests of all United States agencies, including CIA. We reviewed a number of classified documents during the interview. At no time did either the First Camp VII Commander or the prosecutor advise me that the existence or non-existence of documents regarding CIA operational control of Camp VII was classified.

15. Prior to the testimony of the First Camp VII Commander, OCP provided written classification guidance, which it represented to be the combined

[1] The two documents may be found at https://www.thetorturedatabase.org/document/agenda-re-interagency-decisions-needed-regarding-14-high-value-detainees and https://www.thetorturedatabase.org/document/odni-memo-mfr-29-november-hvd-detainee-meeting.

[2] The military commission's public release of the two documents may be found at https://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20(AE538C(AAA)).PDF.

guidance of all relevant Original Classification Authorities, including CIA. During many days of witness testimony in 2019 and 2020, the military judge, CISOs, DISOs, prosecutors, and defense counsel relied extensively on this document (known at the time as AE 658A), which OCP updated several times. As an example, when I asked the First Camp VII Commander in open court, whether the Camp VII guards wearing military uniforms were in fact military, the authority to answer in open court came from the written classification guidance (*see* Exhibit G at 28658-61). An unclassified paragraph of the written classification guidance provides that while the redacted Executive Summary statement regarding CIA operation control of Camp VII is unclassified, specifics underlying that conclusion are classified. At no point does the written classification guidance, or any other classification guidance I have ever received (other than Ms. Blaine's declaration) state that the existence or non-existence of CIA documents regarding operational control of Camp VII is classified. In the course of litigating the 9/11 Case, I and others have relied extensively on the contours of classification guidance regarding CIA operational control of Camp VII, including the unclassified fact of the existence of documents regarding CIA operational control of Camp VII.

16. On November 1 and 4, 2019, the First Camp VII Commander testified under oath in the 9/11 Case (Attachment G). Stenographers employed by the United States Military Commissions Office of the Convening Authority stenographically recorded the testimony, which occurred both in open court (on a forty-second delay) and later in closed court. On information and belief, Original Classification Authorities, including CIA, reviewed the transcripts of both open and closed court, redacted them, and authorized the release of the redacted transcripts to the public. In the transcripts, "TC [MR. SWANN]" refers to counsel for the prosecution; at the time, Mr. Swann was a member of OCP.

Litigation over Camp VII decision-making authority

17. As part of the extensive litigation over 2006-07 CIA-FBI-DoD cooperation in the effort to obtain statements from the defendants in the 9/11 Case, I filed a motion in March 2020 seeking production of documents regarding interagency policy process regarding Camp VII prisoners.

18. In early November 2021, the military commission held oral arguments on the motion to compel. My opening argument on the motion is attached as Exhibit H.

19. On March 8, 2022, the military commission ordered the government to produce documents relating to the interagency processes addressing the Camp VII detainees, specifically including CIA documents (Exhibit I).

20. Under U.S.C. § 1746, I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on April 28, 2022.

Attachment A

Central Intelligence Agency

Washington, D.C. 20505

29 September 2020

James G. Connell III, Esq.
Connell Law, L.L.C.
P.O. Box 141
Cabin John, MD 20818

Reference: F-2017-01877

Dear Mr. Connell:

This letter is a final response to your 23 May 2017 Freedom of Information Act request for **any and all information that relates to such "operational control" of the CIA over Guantanamo Bay detainees including but not limited to the document cited in the footnote 977 [from the Senate Select Committee on Intelligence: Committee Study of the Central Intelligence Agency's Detention and Interrogation Program report].** On 8 March 2018 you have amended your request to cover the date range from 1 September 2006 to 31 January 2007 for documents on the following subjects:

1. **Whether CIA "operational control" included only Camp 7 or extended to other facilities such as Echo 2;**
2. **What organization had decision-making authority over Camp 7;**
3. **Whether CIA "operational control" ended before or after 31 January 2007;**
4. **Whether the "operational control" involved CIA personnel, whether employees or contractors;**
5. **Any detainee records maintained by the CIA during the period of "operational control," such as Detainee Inmate Management System records or the equivalent;**
6. **How other agencies would obtain access to detainees during the period of "operational control, such as a Memorandum of Understanding with the Federal Bureau of Investigation or Criminal Investigative Task Force";**
7. **How the facilities transitioned from CIA "operational control" to DOD "operational control."**

We processed your request in accordance with the FOIA, 5 U.S.C. § 552, as amended, and the CIA Information Act, 50 U.S.C. § 3141, as amended. We completed a thorough search for records responsive to your request and located the enclosed document, consisting of three pages. Please note that this document was previously released in conjunction with this or other release programs.

With respect to any other records, in accordance with Section 3.6(a) of Executive Order 13526, the CIA can neither confirm nor deny the existence or nonexistence of records responsive to your request. The fact of the existence or nonexistence of such records is itself currently and properly classified and is intelligence sources and methods information protected from disclosure by

Section 6 of the CIA Act of 1949, as amended, and Section 102A(i)(l) of the National Security Act of 1947, as amended. Therefore, your request is denied pursuant to FOIA exemptions (b)(1) and (b)(3).

As the CIA Information and Privacy Coordinator, I am the CIA official responsible for this determination. You have the right to appeal this response to the Agency Release Panel, in my care, within 90 days from the date of this letter. Please include the basis of your appeal.

Please be advised that you may seek dispute resolution services from the CIA's FOIA Public Liaison or from the Office of Government Information Services (OGIS) of the National Archives and Records Administration. OGIS offers mediation services to help resolve disputes between FOIA requesters and Federal agencies. Please note, contacting CIA's FOIA Public Liaison or OGIS does not affect your right to pursue an administrative appeal.

To contact **CIA** directly or to appeal the CIA's response to the Agency Release Panel:	To contact the **Office of Government Information Services (OGIS)** for mediation or with questions:
Information and Privacy Coordinator Central Intelligence Agency Washington, DC 20505 (703) 613-3007 (Fax) (703) 613-1287 (CIA FOIA Public Liaison / FOIA Hotline)	Office of Government Information Services National Archives and Records Administration 8601 Adelphi Road – OGIS College Park, MD 20740-6001 (202) 741-5770 (877) 864-6448 (202) 741-5769 (Fax) / ogis@nara.gov

If you have any questions regarding our response, you may contact the CIA's FOIA Hotline at (703) 613-1287.

Sincerely,

Mark Lilly
Information and Privacy Coordinator

Enclosure

~~TOP SECRET~~/ (b)(1) (b)(3) CIAAct (b)(3) NatSecAct

Proposed Itinerary for DCIA Visit to Guantanamo Bay
21 December 2006

Time	Event	Remarks
0845	VIP arrival	(b)(1) (b)(3) NatSecAct
0915	Arr Officer's Landing	
0930	Rolling tour of Camp Delta	
	(b)(1) (b)(3) NatSecAct	
1440	Arr NEX	(b)(1) (b)(3) NatSecAct
1505	Arr Officer's Landing	
1525	Arr Leeward Pier	
1530	VIP Departure	

~~TOP SECRET~~ (b)(1) (b)(3) CIAAct (b)(3) NatSecAct

Approved for Release: 2018/07/09 C06677259

~~TOP SECRET~~//[redacted]//~~NOFORN~~//MR

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(b)(3) NatSecAct

Guantanamo Bay High-Value Detainee Detention Facility

[redacted]

(b)(1)
(b)(3) CIAAct
(b)(3) NatSecAct

Current Detainees:
To date, CIA has sent fourteen high-value detainees to the high-value detention center at GTMO (Please see attachment A for their names and background information). Upon their arrival at site, all detainees are subject to the same general in-processing utilized by DoD for other detainees arriving at GTMO, including being provided a thorough medical exam by the on-site DoD physician, as well as any needed dental and psychiatric care. Per current detainee standards, each of the high value detainees is assigned a private room, basic amenities, and limited reading material. All detainees are offered daily solo recreation in a large outdoor area, as well as joint recreation time with another detainee, during which the two detainees can interact socially.

Criteria for Future Detainees:
In order for a detainee to be considered for transfer from the CIA program to GTMO, first the detainee must no longer be of significant intelligence value. Second, a determination must be made that the detainee would be subject to trial by military commission, as outlined by the Military Commission Act of 2006. Third, a policy decision must be made that the US Government desires to prosecute the individual in a U.S. military commission, vice transferring the detainee to a third country. Last, the Department of Defense must agree to the transfer of the detainee to GTMO.

End Game:
The CIA desires to maintain custody of any given detainee only so long as that detainee continues to provide significant intelligence. Once that has been accomplished [redacted] the

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Approved for Release: 2018/07/09 C06677259

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(b)(3) NatSecAct

~~TOP SECRET~~/ /~~NOFORN~~//MR

CIA's end game is to ensure that the detainee, if deemed a continuing threat, is either [redacted] or transferred to GTMO to stand trial before a Military Commission. Once at GTMO, CIA's end game is to assist DoD in any way possible in the Military Commission process, while at the same time protecting CIA equities.

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(b)(1)
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(b)(3) NatSecAct

Attachment B

C06541712
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Approved for Release: 2021/07/15 C06541712
USCA Case #23-5118 Document #2021622 Filed: 10/12/2023 Page 312 of 552

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MEMORANDUM OF AGREEMENT BETWEEN THE DEPARTMENT OF DEFENSE (DOD) AND THE CENTRAL INTELLIGENCE AGENCY (CIA) CONCERNING THE DETENTION BY DOD OF CERTAIN TERRORISTS AT A FACILITY AT GUANTANAMO BAY NAVAL STATION

I. PURPOSE AND SCOPE

~~(S/NF)~~ This memorandum of agreement (MOA) sets out the duties and responsibilities of DoD and CIA concerning DoD's detention of certain individuals designated by the President to be transferred to the control of the Secretary of Defense, who were captured in the War on Terrorism and who have conducted and/or have engaged in planning for, terrorist acts against US persons or interests.

(b)(1)
(b)(3) NatSecAct

These individuals are unlawful enemy combatants (ECs) engaged in an armed conflict against the United States and, under the laws of war, may be detained until the cessation of hostilities. They have been determined by the President to be subject to the President's Military Order of November 13, 2001 and, pursuant to that order, placed under the control and custody of the Secretary of Defense, including for trial by military commission for any offenses triable there under.

II. DOD DETENTION

A. ~~(S/NF)~~ **In General.** The ECs transferred to DoD and whose detention by DoD is the subject of this MOA are DoD detainees under the exclusive responsibility and control of the Secretary of Defense. The Secretary, subject to the direction of the President, is solely responsible for the continued detention, release, transfer, or movement of the designated ECs. At the direction of the Secretary, the Commander, US Southern Command, shall ensure that the ECs are detained in accordance with US law, including all law applicable to detainees held by DoD, and with all DoD policies, regulations, directives, and procedures applicable to DoD detainees. The applicability of these DoD legal provisions shall be comprehensive, including with respect to the detainees' registration, movement, release, transfer, continued detention, treatment, interrogation, medical care, and trial before military commissions. DoD shall be responsible for the medical care of the detainees, and shall provide them food,

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C06541712
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clothing, and other items that are provided to detainees at Guantanamo Bay, Naval Station (GTMO).

(b)(1)

DOD 1.4 (c)

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(b)(3) NatSecAct addressed in this MOA. DOD 1.4 (c)
shall establish such operating procedures as necessary for the care and detention of the detainees.

3. Post-conviction confinement, if any, of a detainee whose detention by DoD is covered by this MOA (b)(1) DOD 1.4 (c)

(b)(1)

DOD 1.4 (c)

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Case 1:21-cv-00627-CRC Document 21-2 Filed 04/28/22 Page 4 of 9
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DOD 1.4 (c)

(b)(1)
(b)(3) NatSecAct

H. ~~(S/NF)~~ Duties and Responsibilities.

1. The Secretary of Defense, or his designee, is responsible for the DoD implementation of this MOA. Subject to the direction of the President, the Secretary of Defense has authority and control over the continued detention, release, transfer, or movement of the designated detainees.

DOD 1.4 (c)

2. The Commander, US Southern Command, under the direction of the Secretary of Defense, has overall responsibility for ensuring that the detention of all ECs at GTMO, (b)(1) is in accordance with US law, including all laws applicable to detainees held by DoD, and with all DoD policies, regulations, directives, and procedures pertaining to DoD detainees.

3. The Commander, JTF-GTMO, reporting to Commander, US Southern Command, is responsible for the detention of all ECs at GTMO, including the operation of all detention facilities, in accordance with US law, including all laws applicable to detainees held by DoD, and with all DoD policies, regulations, directives, and procedures pertaining to detainees. As necessary for the proper and effective

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implementation of this MOA, the Commander, (b)(1) (b)(3) NatSecAct DOD 1.4 (c

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USCA Case #23-5113 Document #2021622 Filed: 10/12/2023 Page 316 of 552
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(b)(3) NatSecAct

DOD 1.4 (c)

V. INVESTIGATIONS AND COMMUNICATIONS

A. ~~(S/NF)~~ Investigations.

1. Investigation of, or inquiries into, allegations of detainee mistreatment that pertain to activities occurring after the arrival of a detainee at GTMO shall be the responsibility of DoD. Any such allegation shall be reported to the Commander, JTF-GTMO who shall ensure that it is properly investigated in accordance with US law and DoD policies, regulations and directives.

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B. ~~(S/NF)~~ Congressional Communications and Notifications. DoD and CIA shall coordinate with one another with regard to all communications with Congress on matters and activities covered by this MOA. In general,

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Approved for Release: 2021/07/15 C06541712

C06541712
Case 1:21-cv-00627-CRC Document 21-2 Filed 04/28/22 Page 9 of 9
USCA Case #23-5118 Document #2021622 Filed: 10/12/2023 Page 319 of 552
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C. (~~S/NF~~) **Public Affairs.** DoD and CIA will coordinate with one another on all public affairs matters and, as necessary, other US agencies. DoD shall be responsible for addressing those public affairs matters relating to

(b)(1)

DOD 1.4 (c)

Secretary of Defense

8/31/06
Date

Director, Central Intelligence Agency

1 Sept '06
Date

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Approved for Release: 2021/07/15 C06541712

Attachment C

~~CONFIDENTIAL~~//20311220

(b)(3) CIAAct
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(b)(3) CIAAct
(b)(6)

Directors' Protective Staff
Protective Operations Division
(b)(6)

12/20/2006 12:18 PM

To: (b)(3) CIAAct (b)(6)

cc:

Subject: Pickup for dep from Andrews- 21 Dec DCIA trip

DPS will depart the DCIA garage at 0430 tomorrow morning for Andrews, suggest you arrive to the Directors suite o/a 0415 to go down the elevator to the pick point. Thanks and please confirm you will accompany the detail to Andrews or have any questions regarding the movement.

(b)(6)

Approved for Release: 2021/07/15 C06902570

~~UNCLASSIFIED//AIUO~~

(b)(3) CIAAct
(b)(6)

12/20/2006 06:17 PM

To: (b)(3) CIAAct (b)(6)

cc:

Subject: Re: FINAL FINAL DCIA Visit Schedule

(b)(5)
(b)(3) NatSecAct

Original Text of (b)(3) CIAAct (b)(6)

DO/CTC (b)(3) CIAAct (b)(6)

12/20/2006 12:55 PM

To: (b)(3) CIAAct (b)(6)

cc:

Subject: FINAL FINAL DCIA Visit Schedule

Proposed itinerary for DCIA visit t to Guantanamo Bay.doc

Pls forward to (b)(3) CIAAct - final schedule- thanks

(b)(6)
(b)(3) CIAAct

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Approved for Release: 2021/07/15 C06902570

Proposed Itinerary for DCIA Visit to Guantanamo Bay
21 December 2006

(b)(1) (b)(3) NatSecAct

Time	Event	Remarks
0845	VIP arrival	Move to Leeward pier via vehicles and vessel to Officer's landing
0915	Arr Officer's Landing	(b)(1) (b)(3) NatSecAct
0930	Rolling tour of Camp Delta	
		Walking tour (b)(1) (b)(3) NatSecAct
		Lunch; tour of facility (b)(1) (b)(3) NatSecAct
		Walking tour (b)(1) (b)(3) NatSecAct
		Enroute to NEX
1440	Arr NEX	Enroute to Officer's landing
1505	Arr Officer's Landing	Enroute to Leeward Pier
1525	Arr Leeward Pier	Enroute to tarmac
1530	VIP Departure	

Approved for Release: 2021/07/15 C06902570

(b)(1)
(b)(3) NatSecAct

Guantanamo Bay High-Value Detainee Detention Facility

(b)(1)
(b)(3) NatSecAct

Current Detainees:
To date, CIA has sent fourteen high-value detainees to the high-value detention center at GTMO (Please see attachment A for their names and background information). Upon their arrival at site, all detainees are subject to the same general in-processing utilized by DoD for other detainees arriving at GTMO, including being provided a thorough medical exam by the on-site DoD physician, as well as any needed dental and psychiatric care. Per current detainee standards, each of the high value detainees is assigned a private room, basic amenities, and limited reading material. All detainees are offered daily solo recreation in a large outdoor area, as well as joint recreation time with another detainee, during which the two detainees can interact socially.

Criteria for Future Detainees:
In order for a detainee to be considered for transfer from the CIA program to GTMO, first the detainee must no longer be of significant intelligence value. Second, a determination must be made that the detainee would be subject to trial by military commission, as outlined by the Military Commission Act of 2006. Third, a policy decision must be made that the US Government desires to prosecute the individual in a U.S. military commission, vice transferring the detainee to a third country. Last, the Department of Defense must agree to the transfer of the detainee to GTMO.

End Game:
The CIA desires to maintain custody of any given detainee only so long as that detainee continues to provide significant intelligence. Once that has been accomplished

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(b)(1)
(b)(3) NatSecAct

CIA's end game is to ensure that the detainee, if deemed a continuing threat, is either [redacted] or transferred to GTMO to stand trial before a Military Commission. Once at GTMO, CIA's end game is to assist DoD in any way possible in the Military Commission process, while at the same time protecting CIA equities.

(b)(1)
(b)(3) NatSecAct

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(b)(3) NatSecAct

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~~TOP SECRET~~/ [redacted] ~~NOFORN~~//MR

(b)(1)
(b)(3) NatSecAct

(b)(1)
(b)(3) NatSecAct

Guantanamo Bay High-Value Detainee Detention Facility:

~~(TS~~ [redacted] ~~(NF)~~ [redacted]

(b)(1)
(b)(3) NatSecAct

(b)(1)
(b)(3) NatSecAct

Detainees:

~~(TS~~ [redacted] ~~(NF)~~ To date, CIA has sent fourteen high-value detainees to the high-value detention center at GTMO (Please see attachment A for their names and background information). Upon their arrival at site, all detainees are subject to the same general in-processing utilized by DoD for all detainees arriving at GTMO, including being provided a thorough medical exam by the on-site DoD physician, and any needed dental and psychiatric care. Per current detainee standards, each of the high value detainees is assigned a private cell, basic amenities, and limited reading material. All detainees are offered daily solo recreation in a large outdoor area, as well as joint recreation time with another detainee, during which the two detainees can interact socially but remain physically separated.

(b)(1)
(b)(3) NatSecAct

Criteria for Future Detainees:

~~(TS~~ [redacted] ~~(NF)~~ In order for a detainee to be considered for transfer from the CIA program to GTMO, first the detainee must no longer be of significant intelligence value. Second, a determination must be made that the detainee would be subject to trial by military commission, as outlined by the Military Commission Act of 2006. Third, a policy decision must be made that the US Government desires to prosecute the individual in a U.S. military commission, vice transferring the detainee to a third country. Last, the Department of Defense must agree to the transfer of the detainee to GTMO.

(b)(1)
(b)(3) NatSecAct

End Game:

~~(TS~~ [redacted] ~~(NF)~~ The CIA desires to maintain custody of any given detainee only so long as that detainee continues to provide significant intelligence. Once that has been accomplished [redacted]

(b)(1)
(b)(3) NatSecAct

(b)(3) CIAAct
(b)(3) NatSecAct

[redacted]

(b)(1)
(b)(3) NatSecAct

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(b)(1)
(b)(3) NatSecAct

at a CIA facility), the CIA's end game is to ensure that the detainee, if deemed a continuing threat, is either [redacted] or transferred to GTMO to stand trial before a Military Commission. Once at GTMO, CIA's end game is to assist DoD in any way possible in the Military Commission process, while at the same time protecting CIA equities.

(b)(1)
(b)(3) NatSecAct

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NAME	Zubair
PHONETICS	zoo-BEAR
KEY ALIAS(ES)	Mohd Farik bin Amin (true name), Zaid
AFFILIATION(S)	Jemaah Islamiya and al-Qa'ida
NATIONALITY	Malaysian
DATE DETAINED	8 June 2003

Al-Qa'ida and Jemaah Islamiya (JI) member Mohd Farik Bin Amin—best known as Zubair—served directly under JI operational planner Hambali. As one of Hambali's trusted associates, Zubair assisted in Hambali's operations, which included casing targets for JI planned attacks, until his capture in June 2003. Hambali in November 2001 tapped Zubair to be a suicide operative for an al-Qa'ida attack targeting Los Angeles. Zubair played a role in transferring funds used to finance terrorist attacks in Southeast Asia from al-Qa'ida operations chief Khalid Shaykh Muhammad to Hambali. Zubair received small arms and combat tactics training at al-Qa'ida's al-Faruq Camp in Afghanistan in 2000 and again in 2001. While earning his degree in electronics telecommunications in Malaysia, Zubair met fellow student Bashir Bin Lap (a.k.a. Lillie), who also later became one of Hambali's lieutenants and was captured with Hambali in 2003. (U)

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NAME	Ramzi Bin al-Shibh
PHONETICS	Rahm-zee bihn-uhl-SHEEB
KEY ALIASES	Abu Ubaydah, 'Umar Muhammad 'Abdallah Ba' Amar
AFFILIATION	Al-Qa'ida
NATIONALITY	Yemeni
DATE DETAINED	11 September 2002

Ramzi Bin al-Shibh, a key facilitator for the attacks on 11 September 2001, was a lead operative—until his capture in Pakistan in 2002—in the post-11 September plot conceived of by 11 September mastermind Khalid Shaykh Muhammad (KSM) to hijack aircraft and crash them into Heathrow Airport in the United Kingdom. (U)

Bin al-Shibh was born in 1972 in southern Yemen. He noted that he was religious from the age of 12 and fought briefly in Yemen's civil war in 1994. After two attempts to immigrate to the United States failed, Bin al-Shibh traveled to Germany, where he applied for political asylum under an assumed name and as a Sudanese citizen. Denied his request for asylum in January 1996, he left Germany and returned to Yemen, where he applied for a visa in his true name. In December 1997, he returned to Germany, where he became a student. In Hamburg, he met hijackers Muhammad Atta, Marwan al-Shehhi, and Ziad Jarrah. (U)

Bin al-Shibh, Atta, al-Shehhi, and Jarrah traveled to Afghanistan in 1999. In Afghanistan, the four men met Usama Bin Ladin, pledged their loyalty to him, and readily accepted Bin Ladin's proposal to martyr themselves in an operation against the United States. Bin al-Shibh was slated to be one of the 11 September hijacker pilots. He and Atta traveled to Karachi, where they met with KSM.

- After returning to Germany in early 2000, Bin al-Shibh obtained a new passport but was unable to obtain a US visa, despite four attempts. Bin al-Shibh said that in late 2000 he tried to convince a US citizen in San Diego via e-mail to marry him to gain entry into the United States, but Atta convinced him to abandon the idea. Bin al-Shibh also traveled to the United Kingdom to find a bride but changed his mind. (U)

During the eight months before the attacks, Bin al-Shibh was the primary communications intermediary between the hijackers in the United States and al-Qa'ida's leadership in Afghanistan and Pakistan. He relayed orders from al-Qa'ida senior operatives to Atta via e-mail or phone, and he met with Atta in Germany in January 2001 and in Spain in July 2001 for in-depth briefings from Atta on the progress of the plot. He also made travel plans to the United States for some of the 11 September terrorists and facilitated the transfer of money to the 11 September terrorists, including convicted terrorist Zacharias Moussaoui. After learning from Atta in late August 2001 of the date of the hijacking attacks, Bin al Shibh passed the information to KSM.

- A week before the 11 September attacks, Bin al-Shibh left Germany and arrived in Afghanistan three or four days after the attacks. In late 2001, he fled Afghanistan after the collapse of the Taliban and began working with KSM in Karachi on follow-on plots against the West, particularly the Heathrow plot. He was tasked by KSM to recruit operatives in Saudi Arabia for an attack on Heathrow Airport, and, as of his capture, Bin al-Shibh had identified four operatives for the operation. (U)

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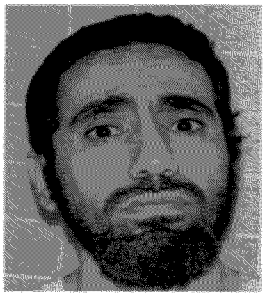

NAME	`Abd al-Rahim al-Nashiri
PHONETICS	AHbd al-Rah-HEEM ah-NASH-er-REE
KEY ALIAS(ES)	Abd al-Rahim Husayn Muhammad `Abdu Nashir (true name), Mullah Bilal, Bilal
AFFILIATION(S)	Al-Qa'ida
NATIONALITY	Saudi National of Yemeni descent
DATE DETAINED	October 2002 ~~(S//NF)~~)

'Abd al-Rahim al-Nashiri was al-Qa'ida's operations chief in the Arabian Peninsula until his capture in the United Arab Emirates (UAE) in late October 2002. Trained in explosives, Nashiri honed his expertise in suicide attacks and maritime operations. He led cells in Saudi Arabia, Yemen, Qatar, and the United Arab Emirates, and he was the mastermind and local manager of the bombing in October 2000 of the USS Cole. The success of the USS Cole operation appeared to have jettisoned Nashiri into a role of greater responsibility. (U)

Born in Mecca on 5 January 1965, Nashiri ended his formal education after intermediate school and eventually followed in the footsteps of his uncles and cousins to become a jihadist. He participated in Ibn al-Khattab's Chechen and Tajik jihads and became a trainer at al-Qa'ida's Khaldan camp in Afghanistan in 1992. After returning from Tajikistan, Nashiri, accompanied by al-Qa'ida operative Khallad bin 'Attash, first met Usama Bin Ladin in 1994. In 1997, Nashiri fought with the Taliban in Kabul and Jalalabad. The following year, Nashiri and his cousin, Jihad Muhammad Abu Ali, were implicated in a Bin Ladin–sponsored operation to smuggle Sagger missiles into Saudi Arabia for use against an unspecified US military target. Nashiri was the leader of the plot and a major player in the Saudi cell at that time. (U)

Nashiri was tasked by Bin Ladin in a private meeting in Afghanistan in 1998 to attack a US or Western oil tanker off the coast of Yemen. This original objective was subsequently modified by Bin Ladin in 1999 to target a US military ship in the Port of Aden. Nashiri's operatives' first attempt was unsuccessful when their boat laden with explosives sank in January 2000—they were probably targeting the USS The Sullivans. Upon Bin Ladin's instructions to try again, Nashiri's suicide operatives successfully attacked the USS Cole in October, although Nashiri was in Afghanistan. (U)

At the time of his arrest in the UAE, Nashiri was arranging funding for a plot to crash a small airplane into the bridge of a Western navy vessel in Port Rashid, UAE, an operation he had hoped to execute in November or December 2002. He also was orchestrating additional attacks, one targeting a US housing compound in Riyadh, Saudi Arabia, which he had earmarked for mid-2003.

- Nashiri abandoned a plot in 2002 to attack warships in the Strait of Hormuz, but his operatives—on orders from Bin Ladin—in October 2002 rammed the French tanker MV Limburg off the coast of Yemen with a small boat.

- Nashiri was involved in plotting a car bomb attack against a Saudi military installation at Tabuk aimed at killing US military personnel, attacks on oil tankers in the Strait of Gibraltar and Western warships passing through the Port of Dubai, and attacks against land-based targets in Saudi Arabia, Morocco, and Qatar. Nashiri was convicted and sentenced to death by a Yemeni court, in absentia, for his part in the USS Cole bombing. (U)

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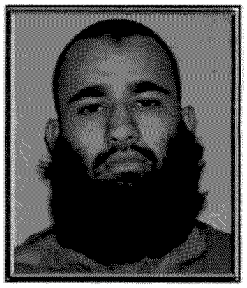

NAME	Majid Khan
PHONETICS	MAH-jid KAHN
KEY ALIAS(ES)	Yusif
AFFILIATION(S)	Al-Qa'ida
NATIONALITY	Pakistani
DATE DETAINED	March 2003

Before his March 2003 capture, Pakistani national Majid Khan was an al-Qa'ida operative with direct connections to the United States. In 1996, Khan moved to the United States with his family and settled in Baltimore, Maryland, but never obtained US citizenship. After graduating from high school in 1999, Khan became involved in a local Islamic organization and, in early 2002, returned to Pakistan. In Pakistan, Khan's uncle and cousin, who were al-Qa'ida operatives, introduced Khan to senior al-Qa'ida operational planner Khalid Shaykh Muhammad (KSM), who selected Khan as an operative for a possible attack inside the United States. KSM selected Khan because of his excellent English and extensive knowledge of the United States.

- During his stay in the United States, Khan worked at his family's gas station and was, therefore, able to assist KSM with his research into the feasibility of a plan to blow up gas stations in the United States. In support of this plot, Khan attended a training course at which he learned how to construct explosive timing devices.

- KSM further tasked Khan to conduct research on poisoning US water reservoirs and considered Khan for an operation to assassinate Pakistani President Musharraf. In addition, Khan passed a test that KSM orchestrated which showed that Khan was committed to being a suicide operative.

- In the fall of 2002 Khan also delivered money to Zubair, an operative who worked directly for Jemaah Islamiya (JI) leader and al-Qa'ida's South Asia representative Hambali. The money was to support terrorist attacks against Western targets. (U)

Khan and detained al-Qa'ida operative and facilitator 'Ammar al-Baluchi discussed with Uzair Paracha's father, Saifullah, a plan to use the New York office of Saifullah's Karachi-based textile import/export business to smuggle explosives into the United States for use with various al-Qa'ida attacks. Khan also had links to al-Qa'ida operatives and facilitators, most notably, Aafia Siddique, a US-educated neuroscientist and al-Qa'ida facilitator, who assisted Majid with documents to hide his travel to Pakistan from US authorities to reenter the United States. (U)

In early 2003, Khan tapped Uzair Paracha, a US permanent resident alien he met in Pakistan through 'Ammar, to impersonate Khan in the United States to make it appear as if Khan had never left the United States and obtain immigration documents that would enable Khan to illegally reenter. Uzair Paracha was convicted and recently sentenced to 30 years imprisonment in the United States for material support to terrorism. (U)

Khan recommended to KSM that Iyman Faris, a naturalized US citizen, be tasked for an al-Qa'ida operation. In 2003, Faris was convicted and sentenced to 20 years imprisonment in the United States on two counts pertaining to material support to terrorism. In 2002, Faris researched, at KSM's request, suspension bridges in New York and looked into obtaining the tools that would be necessary to cut bridge suspension cables. Faris has admitted that he believed Khan tried to recruit him for al-Qa'ida. (U)

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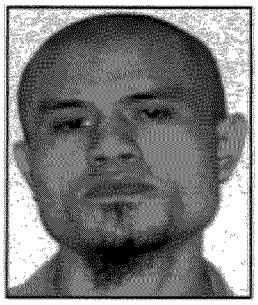

NAME	Lillie
PHONETICS	LIL-lee
KEY ALIAS(ES)	Mohammed Nazir Bin Lep (true name), Bashir Bin Lep
AFFILIATION(S)	Jemaah Islamiya and al-Qa'ida
NATIONALITY	Malaysian
DATE DETAINED	11 August 2003

Malaysian-born Mohammed Nazir Bin Lep (a.k.a. Bashir Bin Lap)—better known as Lillie—was one of Hambali's key lieutenants and had considerable operational experience. Lillie facilitated the transfer of al-Qa'ida funds used for the Jakarta Marriott Hotel bombing in 2003 and knew of the Jemaah Islamiya's (JI) targets and plans to launch attacks elsewhere in Southeast Asia. In mid-2002, he cased targets in Bangkok and Pattaya, Thailand, at Hambali's direction. Lillie was particularly interested in the ideas of martyrdom and was slated to be a suicide operative for an al-Qa'ida "second wave" attack targeting the US West Coast. Lillie also had links to now-deceased JI bombmaker Dr. Azahari bin Husin and in 2002 received bombmaking tutorials from Azahari. Lillie spent time in Kandahar, Afghanistan, in 2000, where he trained at al-Qa'ida's al-Faruq camp in weaponry. Lillie attended Polytechnic University Malaysia in the mid-1990s, where he earned a degree in architecture. (U)

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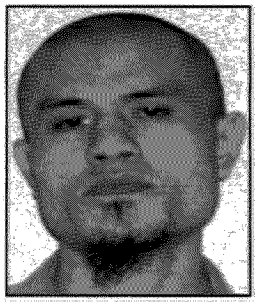

NAME	Lillie
PHONETICS	LIL-lee
KEY ALIAS(ES)	Mohammed Nazir Bin Lep (true name), Bashir Bin Lep
AFFILIATION(S)	Jemaah Islamiya and al-Qa'ida
NATIONALITY	Malaysian
DATE DETAINED	11 August 2003

Malaysian-born Mohammed Nazir Bin Lep (a.k.a. Bashir Bin Lap)—better known as Lillie—was one of Hambali's key lieutenants and had considerable operational experience. Lillie facilitated the transfer of al-Qa'ida funds used for the Jakarta Marriott Hotel bombing in 2003 and knew of the Jemaah Islamiya's (JI) targets and plans to launch attacks elsewhere in Southeast Asia. In mid-2002, he cased targets in Bangkok and Pattaya, Thailand, at Hambali's direction. Lillie was particularly interested in the ideas of martyrdom and was slated to be a suicide operative for an al-Qa'ida "second wave" attack targeting the US West Coast. Lillie also had links to now-deceased JI bombmaker Dr. Azahari bin Husin and in 2002 received bombmaking tutorials from Azahari. Lillie spent time in Kandahar, Afghanistan, in 2000, where he trained at al-Qa'ida's al-Faruq camp in weaponry. Lillie attended Polytechnic University Malaysia in the mid-1990s, where he earned a degree in architecture. (U)

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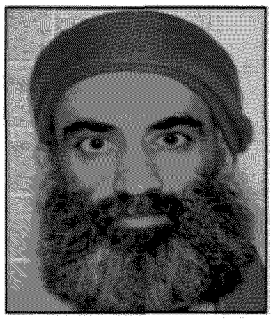

NAME	Khalid Shaykh Muhammad
PHONETICS	HAH-lid SHAKE moo-HAH-mud
KEY ALIAS	Mukhtar
AFFILIATION	Al-Qa'ida
NATIONALITY	Baluchi born and raised in Kuwait
DATE DETAINED	1 March 2003

Khalid Shaykh Muhammad (KSM) is one of history's most infamous terrorists, and his capture in March 2003 robbed al-Qa'ida of one of its most capable senior operatives. He devoted most of his adult life to terrorist plotting, specifically against the United States, and was the driving force behind the attacks on 11 September 2001 as well as several subsequent plots against US and Western targets worldwide. (U)

After graduating from North Carolina A&T State University in 1986 with a degree in mechanical engineering, KSM traveled to Afghanistan to participate in the anti-Soviet jihad there. The successful bombing of the World Trade Center in 1993 by his nephew Ramzi Yousef along with his anger at the US Government's support of Israel were key influences in his decision to engage in terrorism against the United States. KSM joined Yousef in the Philippines in 1994 to plan the "Bojinka" plot—the simultaneous bombings of a dozen US-flagged commercial airliners over the Pacific. After the plot was disrupted and Yousef was caught in early 1995, KSM was indicted for his role in the plot and went into hiding. By 1999, he convinced Usama Bin Ladin to provide him with operatives and funding for a new airliner plot, which culminated in the attacks on 11 September two years later.

- KSM formally joined al-Qa'ida in October 2001, but from 2000 he headed al-Qa'ida's Media Committee and he helped build close operational ties between al-Qa'ida and the Jemaah Islamiya (JI) terrorist group plotting against US and Israeli targets in Southeast Asia. (U)

By late 2001, with the collapse of the Taliban regime and the dispersal of al-Qa'ida's leadership, the prestige associated with engineering the attacks on 11 September propelled KSM into the role of external operations chief for al-Qa'ida. After 11 September, KSM elevated the United Kingdom on his target list because of London's strong support for Washington's global war on terror.

- In addition to his plots against Britain, KSM launched several plots against the US Homeland, including a plot in late 2001 to have JI suicide operatives hijack a plane over the Pacific and crash it into a skyscraper on the US West Coast; a plan in early 2002 to send al-Qa'ida operative and US citizen Jose Padilla to set off bombs in apartment buildings in a US city; and a plot in early 2003 to employ a network of Pakistanis—including Iyman Faris and Majid Khan—to smuggle explosives into New York and to target gas stations, railroad tracks, and a bridge in New York. (U)

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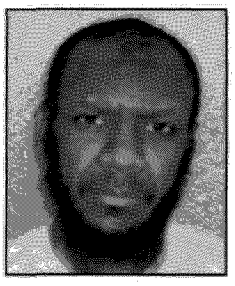

NAME	Mustafa Ahmad al-Hawsawi
PHONETICS	moo-STAH-fah ahl-hah-SOW-ee
KEY ALIAS(ES)	Hashim 'Abd al-Rahman, Zahir, Ayyub, Muhammad Adnan
AFFILIATION(S)	Al-Qa'ida
NATIONALITY	Saudi
DATE DETAINED	1 March 2003

Mustafa Ahmad al-Hawsawi was one of two key financial facilitators entrusted by 11 September mastermind Khalid Shaykh Muhammad (KSM) to manage the funding for the hijackings. As a trusted, respected financial facilitator known to the leadership, al-Hawsawi separately met with Usama Bin Ladin, his deputy Ayman al-Zawahiri, and al-Qa'ida spokesman Sulayman Bu Ghayth soon after the attacks on 11 September and had contact with many of al Qa'ida's most senior managers. (U)

Various reports suggest that al-Hawsawi had direct ties to several of the hijackers and to other operatives, including Ramzi Bin al-Shibh—who delivered some money from al-Hawsawi to the hijackers. In addition, al-Hawsawi and Bin al-Shibh served as a communications link between KSM and the hijackers. He shared a United Arab Emirates (UAE)–based financial account with one hijacker—an account that funded the hijackers' activities in the month before the attacks on 11 September. Four hijackers returned money directly to al-Hawsawi in the week before the attacks, which al-Hawsawi then redeemed in the UAE. Al-Hawsawi also wired thousands of dollars to Bin al-Shibh in the summer of 2001, which funded the activities of Zacarias Moussaoui, who was contacted by Bin al-Shibh during that period, per KSM's instructions. KSM also maintained his own financial links to al-Hawsawi. In 2001, KSM held a supplemental credit card linked to an al-Hawsawi account based in the UAE.

- Al-Hawsawi worked in the al Qa'ida media center in Afghanistan from 2000—while it was under the direction of KSM—until he departed for the UAE in early 2001. (U)

After the attacks on 11 September, al-Hawsawi fled the UAE and traveled to Afghanistan and to Pakistan, where he hid until his capture in 2003. KSM reportedly had been providing a safehouse and other logistic support to guarantee al-Hawsawi's security after he arrived in Pakistan.

- Hawsawi facilitated other operatives' travel, including Muhammad al-Qahtani, who was denied entry into the United States in the summer of 2001.

- Hawsawi's close relationship with KSM and the latter's active participation in providing for his security following 11 September suggests Hawsawi was key to KSM's operational team. (U)

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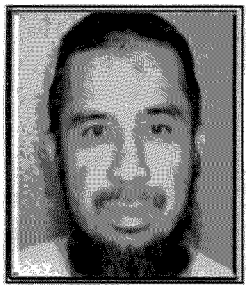

NAME	Hambali
PHONETICS	HAM-bali
KEY ALIAS(ES)	Riduan bin Isomuddin (true name), Encep Nurjaman
AFFILIATION(S)	Jemaah Islamiya and al-Qa'ida
NATIONALITY	Born in Indonesia, ethnically Sundanese
DATE DETAINED	11 August 2003

Indonesian-born Riduan bin Isomuddin—best known among jihadists as Hambali—was an operational mastermind in the Southeast Asia–based Islamic extremist group Jemaah Islamiya (JI) and also served as the main interface between JI and al-Qa'ida from 2000 until his capture in mid-2003. Hambali helped plan the first Bali bombings in 2002 that killed more than 200 persons and facilitated al-Qa'ida financing for the Jakarta Marriott Hotel bombing the following year. In late 2002, he also directed his subordinate Zubair to case the British High Commission in Phnom Penh, Cambodia. Hambali was previously involved in the attempted assassination of the Philippine Ambassador to Indonesia in August 2000 and the bombings on Christmas Eve that year of some 30 churches across the archipelago. Hambali had longstanding ties to now-detained al-Qa'ida external operations chief Khalid Shaykh Muhammad (KSM). Before returning to Southeast Asia in December 2001, Hambali discussed operations with senior al-Qa'ida leaders regarding post–11 September attacks against US interests. (U)

Hambali in 1999 established a cell of young JI up-and-comers in Karachi, Pakistan—dubbed al-Ghuraba—which provided its members with advanced doctrinal and operational training, including at al-Qa'ida training camps in Afghanistan. Hambali tapped his younger brother, Rusman "Gun Gun" Gunawan, as deputy Ghuraba cell leader. (U)

Hambali was born on 4 April 1964 and named Encep Nurjaman in Cianjur, West Java, and is the eldest male of 11 children. His great-grandfather founded a local Islamic school, which Hambali attended during his early adolescence. Press accounts of Hambali's childhood reveal that he romanticized the United States and had ambitions to become an astronaut. Hambali was a devout Muslim youth who, at age 20, left Indonesia for Malaysia, ostensibly to seek work. While there, he met JI cofounders Abdullah Sungkar and Abu Bakar Bashir—fellow Indonesians who had fled the Suharto regime for Malaysia—and through them was exposed to radical Islamic teachings. Hambali tried unsuccessfully to get a scholarship to an Islamic school in Malaysia, before traveling in the mid-1980s to Afghanistan, where he fought alongside many of al-Qa'ida's future leaders. During his three-year stint in Afghanistan, he forged strong ties to Usama Bin Ladin and KSM. After returning to Malaysia in the early 1990s, Hambali and JI spiritual leader Bashir further developed their relationship and became close friends. (U)

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USCA Case #23-5118 Document #2021688 Filed: 10/12/2023 Page 337 of 552
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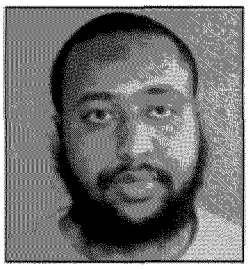

NAME	Gouled Hassan Dourad
PHONETICS	Goo-LED HAH-san Door-AHD
KEY ALIAS(ES)	Guleed Hassan Ahmad, Hanad
AFFILIATION(S)	al-Qa'ida, al-Ittihad al-Islami
NATIONALITY	Somali
DATE DETAINED	4 March 2004

Gouled Hassan Dourad was the head of a Mogadishu-based facilitation network of al-Ittihad al-Islami (AIAI) members that supported al-Qa'ida members in Somalia. As an AIAI soldier with no decisionmaking authorities, Gouled was tapped to be a member of a small, selective group of AIAI members who worked for the East African al-Qa'ida cell led by Abu Talha al-Sudani—Gouled's responsibilities included locating safehouses, assisting in the transfer of funds, and procuring weapons, explosives, and other supplies.

- Information available to the US Government suggests that Gouled carried out only one low-level operational mission for Abu Talha: during September–October 2003, he cased the US military base in Djibouti—Camp Lemonier—as part of Abu Talha's plot to conduct a suicide truck-bombing attack. He also was tasked by Abu Talha to purchase two rocket-propelled grenades, five AK-47 assault rifles and four 9mm pistols, which he delivered to Abu Talha in mid-2003.

- Gouled was aware of several terrorist plots under consideration by his AIAI cell, including shooting down an Ethiopian jetliner landing at an airport in Somalia in 2003 and kidnapping Western workers of nongovernmental organizations in Hargeysa, Somalia, in 2002 as a means to raise money for future AIAI operations. Following Gouled's arrest in Djibouti, AIAI terrorists on 19 March 2004 tried unsuccessfully to kidnap a German aid worker and murdered a Kenyan contract employee in Hargeysa. (U)

Gouled was born in Mogadishu in 1974; when the Somali civil war erupted in 1991, his parents sent him to Germany, where he lived in a refugee camp. He traveled to Sweden and gained asylum there in 1993. In 1994, he attempted travel to the United States but was turned back in Iceland because of his fraudulent passport. Gouled's parents emigrated to the United States and were living in Minnesota around the time of his capture.

- Gouled became religious while in Sweden; he attended a Somali mosque, whose imam arranged for Gouled and his friend, future AIAI bombmaker Qasim Mohamed, to train in Afghanistan before joining the Somali war effort. Gouled trained at Khaldan camp in weapons and explosives from January through October 1996 and at another camp in Khowst in assassination techniques for several months. By late 1996, he returned to Somalia. (U)

Gouled became a member of AIAI in 1997 out of a commitment to support the Somali war against Ethiopia and to win the Ogaden region of Ethiopia—near the border with Kenya—back for Somalia. He fought against the Ethiopians in Ogaden off and on from 1997 to 2002 and trained AIAI fighters. He allegedly became associated with al-Qa'ida because its members were in Somalia and his AIAI cell, under orders from senior AIAI leaders, was obligated to help al-Qa'ida.

- Gouled was introduced to Abu Talha al-Sudani—who he said came to Mogadishu to hide following the Mombasa attacks in November 2002—in early 2003 by his AIAI cell leader. Gouled was recruited to work for Abu Talha, in part, because he had trained in Afghanistan; spoke Arabic, English, some Swedish, and Somali; and had a high-school education. (U)

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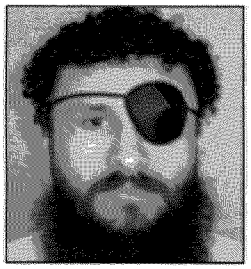

NAME	Zayn al-'Abidin Abu Zubaydah
PHONETIC	AH-Boo Zoo-BAY-duh
KEY ALIASES	Hani, Tariq
AFFILIATIONS	Al-Qa'ida
NATIONALITY	Palestinian, raised in Saudi Arabia
DATE DETAINED	27 March 2002

Zayn al-'Abidin Abu Zubaydah was a leading, independent mujahidin facilitator who operated in the Afghanistan-Pakistan region from the mid-1990s. Although he never pledged bay'ah to Usama Bin Ladin, Abu Zubaydah functioned as a full member of al-Qa'ida and was a trusted associate of the organization's senior leaders. Despite Abu Zubaydah's freelance status, Bin Ladin recruited him to be one of al-Qa'ida's senior travel facilitators following Abu Zubaydah's success in 1996 at securing safe passage of al-Qa'ida members returning from Sudan to Afghanistan. In November 2001, Abu Zubaydah helped smuggle now-deceased al-Qa'ida in Iraq leader Abu Mus'ab al-Zarqawi and some 70 Arab fighters out of Kandahar, Afghanistan, into Iran.

- At the time of his capture, Abu Zubaydah was trying to organize a terrorist attack in Israel—a longtime goal of his that never got beyond the preliminary planning state—and had enlisted the help of fellow Palestinian Zarqawi in finding a smuggling route into Israel for moving persons and materials. Fighting Israel was allegedly Abu Zubaydah's sole aim when he initially joined the jihad, but he later considered conducting operations against the United States apparently because he viewed the US detention of Shaykh 'Umar 'Abd al-Rahman (a.k.a. the Blind Shaykh) as an affront to Islam.

- Although not directly linked to the attacks on 11 September 2001, the $50,000 that Abu Zubaydah received from Saudi donors and passed to al-Qa'ida's senior leadership for his Israel plot may have been used for the attacks. Moreover, three of the hijackers received basic training at al-Qa'ida's Khaldan camp in Afghanistan, which was part of the "Khaldan group" of camps and guesthouses that he oversaw between 1995 and 2000. (U)

Abu Zubaydah's early work as a mujahidin facilitator in the mid-1990s focused on recruiting Arabs in Pakistan and arranging their travel for various training camps in Afghanistan and the frontlines of Bosnia and Chechnya. Between 1994 and early 2000, he often smuggled both persons and chemicals—such as cyanide and nitrates for use by al-Qa'ida in making weapons—from Pakistan into Afghanistan. He learned document forgery and trained in explosives at the Khaldan camp, where he advanced to become instructor and then administrative director. In his role as a senior mujahidin facilitator and Khaldan camp director, he assisted countless Western-based trained jihadists, including Americans—such as Adam Gadahn, to whom Abu Zubaydah served as a mentor.

- Abu Zubaydah established a document forgery network in Pakistan that supported al-Qa'ida and other extremist groups. In the late 1990s, he procured funds from donors in Kuwait, Saudi Arabia, and the United Arab Emirates, which he doled out to various contacts in Pakistan-based extremist networks for their terrorist activities.

- Abu Zubaydah also assisted US Millennium plot operative Ahmad Ressam to enter Afghanistan to attend a training camp in the late 1990s and to travel to Canada via the United States at the end of 1998. He facilitated the travel and training of the Jordanian cell that was involved in Jordan's Millennium plot. (U)

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(b)(3) NatSecAct

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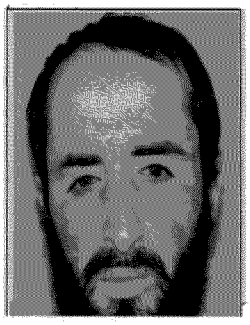
Approved for Release: 2021/07/15 C06902570



NAME	Abu Faraj al-Libi
PHONETICS	AH-boo FAH-raj ahl-LEE-bee
KEY ALIAS(ES)	Mustafa al-'Uzayti (probable true name), Mahfuz, 'Abd al-Hafiz, Abu Hamada, Tawfiq
AFFILIATION(S)	Al-Qa'ida
NATIONALITY	Libyan
DATE DETAINED	May 2005

Veteran paramilitary commander and facilitator in the Pakistan-Afghanistan theater, Abu Faraj took on more direct operational responsibilities following the arrest in March 2003 of former al-Qa'ida external operations chief and 11 September mastermind Khalid Shaykh Muhammad (KSM). He was the organization's general manager subordinate only to Usama Bin Ladin and Ayman al-Zawahiri beginning in mid-2003, while being heavily involved in financing operatives and their families. (U)

Abu Faraj was the sole communications conduit for al-Qa'ida managers to Bin Ladin from August 2003 until his capture in May 2005. He was the recipient of couriered messages and public statements from Bin Ladin on approximately five occasions and passed messages to Bin Ladin from both senior lieutenants and rank-and-file members. Some of his work almost certainly required personal meetings with Bin Ladin or Zawahiri, a privilege reserved since 2002 for select members of the group. (U)

Abu Faraj had frequent contact with former senior operational planner Hamza Rabi'a, and other senior managers involved with al-Qa'ida's external operations and paramilitary efforts, and he most likely has extensive knowledge of their work, including efforts to attack the United States. Abu Faraj searched for operatives on Rabi'a's behalf, including those who could travel to the United States for attacks, and he also asked now-deceased al-Qa'ida in Iraq leader Abu Mus'ab al-Zarqawi to target US interests outside of Iraq.

- Pakistan wanted Abu Faraj for suspected involvement in plots to assassinate Pakistani President Musharraf.
- Abu Faraj served as chief of al-Qa'ida's training camps in Afghanistan in the 1990s. (U)

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United States Navy Biography

Rear Admiral Harry B. Harris, Jr.
Commander, Joint Task Force, Guantanamo

Rear Admiral Harry B. Harris, Jr., was born in Yokosuka, Japan, and reared in Tenn. and Fla. He graduated from the U.S. Naval Academy in 1978. After flight training, he was assigned to VP-44, homeported in Brunswick, Maine. His subsequent operational tours include assignment as a Tactical Action Officer onboard *USS Saratoga* (CV-60), when CV-60 participated in the *Achille Lauro* incident and strikes against Libya; Operations Officer in VP-4 during *Operations Desert Shield/Desert Storm*; and three tours with Patrol and Reconnaissance Wing 1/CTF57/CTF 72, homeported in Kami Seya, Japan. In 2002, he reported to Commander, U.S. Naval Forces Central Command, serving as ACOS for Operations, Plans, and Pol-Mil Affairs (N3/N5) where he was responsible for the planning and execution of the Naval component's portion of *Operation Iraqi Freedom*.

His command assignments include VP-46 at Whidbey Island, Wash., and Patrol and Reconnaissance Wing 1/CTF57/CTF 72 at Kami Seya, Japan. While in command of Wing 1, Task Force 57 was heavily involved in *Operation Enduring Freedom*, flying nearly 1,000 combat sorties over Afghanistan.

Rear Adm. Harris' shore assignments include Aide and Flag Lieutenant to the Commander, U.S. Naval Forces Japan, in Yokosuka, Japan; duty on the staff of

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the Chief of Naval Operations as a strategist in the Strategy and Concepts Branch; and Special Assistant to the Chairman of the Joint Chiefs of Staff.

His education assignments include selection for the Navy's Harvard/Tufts Program, where he graduated with a master's of Public Administration from Harvard's John F. Kennedy School of Government in 1992. Subsequently selected as an Arthur S. Moreau Scholar, he studied international relations and ethics of war at Oxford and Georgetown Universities, earning a master of Arts in National Security Studies from the latter in 1994. While at Georgetown, he was also Fellow in the School of Foreign Service.

In August 2004, in his first Flag assignment, he reported to the staff of the Chief of Naval Operations as Director, Information, Plans and Security Division, responsible for Navy current operations and anti-terrorism/force protection policy.

In March 2006, he assumed command of Joint Task Force Guantanamo in Cuba.

Rear Adm. Harris has logged 4400 flight hours, including over 400 combat hours, in U.S. and foreign maritime patrol and reconnaissance aircraft. His personal decorations include the Defense Superior Service Medal, the Legion of Merit (3 awards), the Bronze Star (2 awards), the Meritorious Service Medal (4 awards), the Air Medal, the Joint Service Commendation Medal, the Navy Commendation Medal (5 awards), the Navy Achievement Medal, and various campaign and unit decorations.

Updated: 3 April 2006

Approved for Release: 2021/07/15 C06902570

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(b)(3) NatSecAct

Strawman Agenda
(b)(1)
(b)(3) NatSecAct
D/CIA
visit to GTMO 21 December 2006

1. Wheels up 0530 local Andrews AFB
2. Wheels down 0845 local GTMO.
(b)(1)
(b)(3) NatSecAct
Met planeside
3. Transported to (b)(1) ssel and moved to windward side of island (arrive - 0910).
(b)(3) NatSecAct
4. Met dockside at windward side with vehicles.

(b)(1)
(b)(3) NatSecAct

14. Return to windward side dock (arrive 1525)
15. Depart windward side and arrive leeward side at 1530.

(b)(3) CIAAct
(b)(3) NatSecAct

(b)(1)
(b)(3) NatSecAct

~~TOP SECRET~~ /20311212

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~~TOP SECRET~~ /20311212 (b)(1) (b)(3) NatSecAct

16. Arrive leeward side, move to aircraft, load and depart no later than 1545.

17. Arrive Andrews AFB at 1800.

(b)(1)
(b)(3) NatSecAct

~~TOP SECRET~~ 20311212

Approved for Release: 2021/07/15 C06902570

Attachment D

Approved for Release: 2016/06/10 C06541712

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MEMORANDUM OF AGREEMENT BETWEEN THE DEPARTMENT OF DEFENSE (DOD) AND THE CENTRAL INTELLIGENCE AGENCY (CIA) CONCERNING THE DETENTION BY DOD OF CERTAIN TERRORISTS AT A FACILITY AT GUANTANAMO BAY NAVAL STATION

I. PURPOSE AND SCOPE

~~(S/NF)~~ This memorandum of agreement (MOA) sets out the duties and responsibilities of DoD and CIA concerning DoD's detention of certain individuals designated by the President to be transferred to the control of the Secretary of Defense, who were captured in the War on Terrorism and who have conducted and/or have engaged in planning for, terrorist acts against US persons or interests. (b)(1) (b)(3) NatSecAct [redacted] These individuals are unlawful enemy combatants (ECs) engaged in an armed conflict against the United States and, under the laws of war, may be detained until the cessation of hostilities. They have been determined by the President to be subject to the President's Military Order of November 13, 2001 and, pursuant to that order, placed under the control and custody of the Secretary of Defense, including for trial by military commission for any offenses triable there under.

II. DOD DETENTION

A. ~~(S/NF)~~ **In General.** The ECs transferred to DoD and whose detention by DoD is the subject of this MOA are DoD detainees under the exclusive responsibility and control of the Secretary of Defense. The Secretary, subject to the direction of the President, is solely responsible for the continued detention, release, transfer, or movement of the designated ECs. At the direction of the Secretary, the Commander, US Southern Command, shall ensure that the ECs are detained in accordance with US law, including all law applicable to detainees held by DoD, and with all DoD policies, regulations, directives, and procedures applicable to DoD detainees. The applicability of these DoD legal provisions shall be comprehensive, including with respect to the detainees' registration, movement, release, transfer, continued detention, treatment, interrogation, medical care, and trial before military commissions. DoD shall be responsible for the medical care of the detainees, and shall provide them food,

Approved for Release: 2016/06/10 C06541712

clothing, and other items that are provided to detainees at Guantanamo Bay, Naval Station (GTMO).

(b)(1)

DOD 1.4 (

(b)(1)
(b)(3) NatSecAct addressed in this MOA. DOD 1.4 (
shall establish such operating procedures as necessary for the care and detention of the detainees.

3. Post-conviction confinement, if any, of a detainee whose detention by DoD is covered by this MOA (b)(1) DOD 1.4 (

(b)(1)

DOD 1.4 (

Approved for Release: 2016/06/10 C06541712

DOD 1.4 (c)

~~SECRET//NOFORN~~

(b)(1)
(b)(3) NatSecAct

H. ~~(S//NF)~~ Duties and Responsibilities.

1. The Secretary of Defense, or his designee, is responsible for the DoD implementation of this MOA. Subject to the direction of the President, the Secretary of Defense has authority and control over the continued detention, release, transfer, or movement of the designated detainees.

DOD 1.4 (c)

2. The Commander, US Southern Command, under the direction of the Secretary of Defense, has overall responsibility for ensuring that the detention of all ECs at GTMO, (b)(1) is in accordance with US law, including all laws applicable to detainees held by DoD, and with all DoD policies, regulations, directives, and procedures pertaining to DoD detainees.

3. The Commander, JTF-GTMO, reporting to Commander, US Southern Command, is responsible for the detention of all ECs at GTMO, including the operation of all detention facilities, in accordance with US law, including all laws applicable to detainees held by DoD, and with all DoD policies, regulations, directives, and procedures pertaining to detainees. As necessary for the proper and effective

Approved for Release: 2016/06/10 C06541712

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implementation of this MOA, the Commander, (b)(1) (b)(3) NatSecAct DOD 1.4 (c)

(b)(1) DOD 1.4 (c)

(b)(1)
(b)(3) CIAAct
(b)(3) NatSecAct DOD 1.4 (c)

DOD 1.4 (c)

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DOD 1.4

(b)(1)
(b)(3) CIAAct
(b)(3) NatSecAct

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Approved for Release: 2016/06/10 C06541712

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DOD 1.4 (c)

(b)(1)
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(b)(3) NatSecAct

DOD 1.4 (

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Approved for Release: 2016/06/10 C06541712

~~SECRET//NOFORN~~

(b)(1)
(b)(3) CIAAct
(b)(3) NatSecAct

DOD 1.4 (c)

V. INVESTIGATIONS AND COMMUNICATIONS

A. ~~(S/NF)~~ Investigations.

1. Investigation of, or inquiries into, allegations of detainee mistreatment that pertain to activities occurring after the arrival of a detainee at GTMO shall be the responsibility of DoD. Any such allegation shall be reported to the Commander, JTF-GTMO who shall ensure that it is properly investigated in accordance with US law and DoD policies, regulations and directives.

(b)(1)
(b)(3) CIAAct
(b)(3) NatSecAct

DOD 1.4 (c)

(b)(1)
(b)(3) CIAAct
(b)(3) NatSecAct

B. ~~(S/NF)~~ Congressional Communications and Notifications. DoD and CIA shall coordinate with one another with regard to all communications with Congress on matters and activities covered by this MOA. In general,

(b)(1)

DOD 1.4(c)

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Approved for Release: 2016/06/10 C06541712

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C. (~~S//NF~~) Public Affairs. DoD and CIA will coordinate with one another on all public affairs matters and, as necessary, other US agencies. DoD shall be responsible for addressing those public affairs matters relating to (b)(1)

DOD 1.4 (c)

Secretary of Defense

8/31/06
Date

Director, Central Intelligence Agency

1 Sept '06
Date

~~SECRET//NOFORN~~

Attachment E

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OFFICE OF THE DIRECTOR OF NATIONAL INTELLIGENCE

LIC

FACSIMILE TRANSMITTAL SHEET

TO:	FROM:
Ashley Deeks	[redacted] (b)(1) (b)(3)
ORGANIZATION: State - Legal	DATE: 11/21/06
FAX NUMBER: (202) 647-6132	TOTAL NUMBER OF PAGES INCLUDING COVER: 3
PHONE NUMBER: (202) 647-9598	SENDER'S SECURE FAX NUMBER: (202) 201-1072
RE: Inter-agency meeting on CSITT	SENDER'S PHONE NUMBER: (202) 201-1052

URGENT FOR REVIEW PLEASE COMMENT PLEASE REPLY PLEASE RECYCLE

Ashley -

Here is the rough agenda for the meeting on Wednesday Nov 29th at 9:30 in room 5625 at Bolling. Please identify who will attend and let us know so we can clear them into the building. We would need name, SSN, DoB + vehicle License Plate. Thanks

[redacted] (b)(1) (b)(3)

~~Secret~~

~~CLASSIFICATION~~

NOV 21 2006 12:40PM

ACLU-RDI 5934 p.1

UNCLASSIFIED//FOR PUBLIC RELEASE

NOV 21. 2006 12:42PM

Interagency Decisions Needed Regarding the 14 High Value Detainees

~~SECRET-PREDECISIONAL~~

1

DIA

ACLU-RDI 5934 p.2

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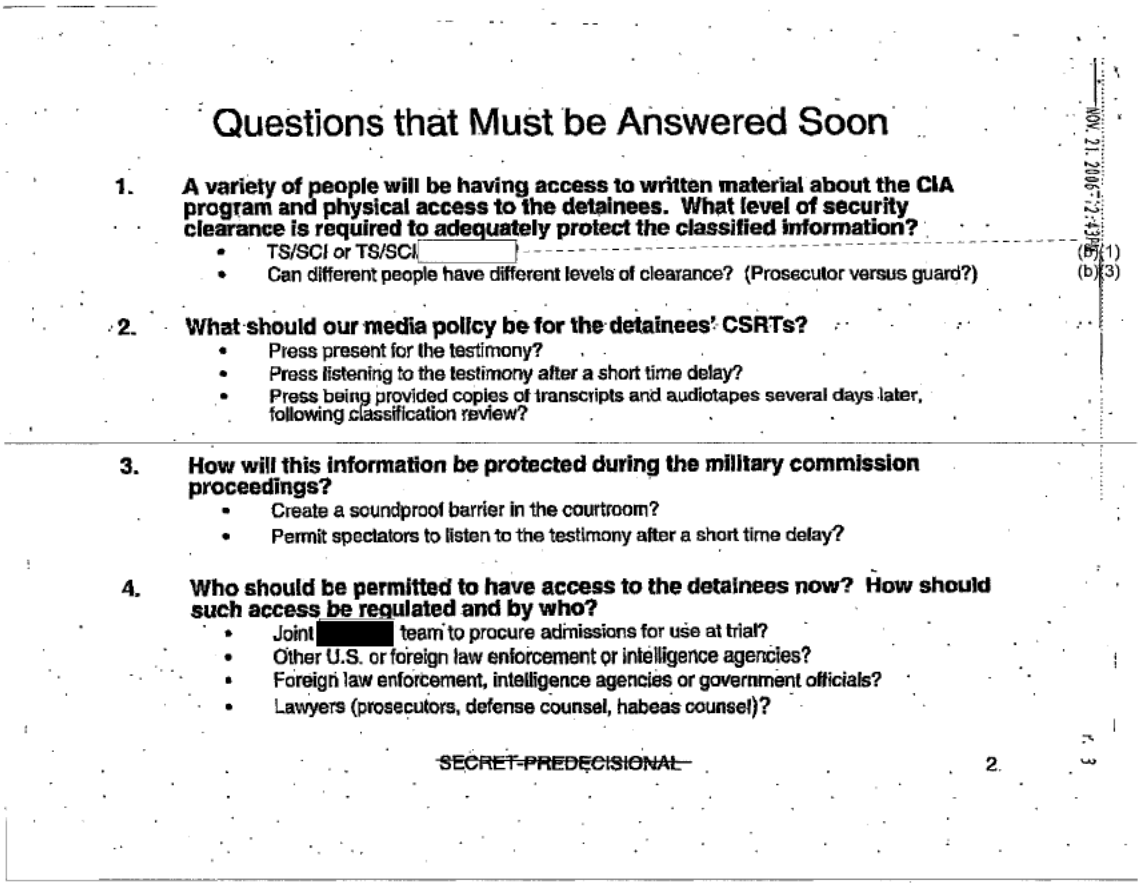

Questions that Must be Answered Soon

1. **A variety of people will be having access to written material about the CIA program and physical access to the detainees. What level of security clearance is required to adequately protect the classified information?**
   - TS/SCI or TS/SCI [redacted]
   - Can different people have different levels of clearance? (Prosecutor versus guard?)

(b)(1)
(b)(3)

2. **What should our media policy be for the detainees' CSRTs?**
   - Press present for the testimony?
   - Press listening to the testimony after a short time delay?
   - Press being provided copies of transcripts and audiotapes several days later, following classification review?

3. **How will this information be protected during the military commission proceedings?**
   - Create a soundproof barrier in the courtroom?
   - Permit spectators to listen to the testimony after a short time delay?

4. **Who should be permitted to have access to the detainees now? How should such access be regulated and by who?**
   - Joint [redacted] team to procure admissions for use at trial?
   - Other U.S. or foreign law enforcement or intelligence agencies?
   - Foreign law enforcement, intelligence agencies or government officials?
   - Lawyers (prosecutors, defense counsel, habeas counsel)?

~~SECRET-PREDECISIONAL~~ 2

NOV. 21. 2006 12:43PM

ACLU-RDI 5934 p.3

Attachment F

UNCLASSIFIED//FOR PUBLIC RELEASE

DEC. 6. 2006 5:45PM SECRET/NF NO. 140 P. 1

OFFICE OF THE DIRECTOR OF NATIONAL INTELLIGENCE

LIA

877.491.
7572

#1391197

FACSIMILE TRANSMITTAL SHEET

TO:	FROM:
Ashley Deeds	[redacted] (b)(1) (b)(3)
ORGANIZATION: State Department	DATE: 12/6/06
FAX NUMBER: (202) 647-6132	TOTAL NUMBER OF PAGES INCLUDING COVER: 3
PHONE NUMBER: (202) 647-9598	SENDER'S SECURE FAX NUMBER: (202) 201-1072
RE: MFR for 29 Nov mtg	SENDER'S PHONE NUMBER: (202) 201-1052

URGENT FOR REVIEW PLEASE COMMENT PLEASE REPLY PLEASE RECYCLE

Ashley –

Here is the MFR. Call if you have any questions.

[redacted] (b)(1) (b)(3)

SECRET/NF

CLASSIFICATION

ACLU-RDI 5933 p.1

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~~SECRET//NOFORN//20300930~~

LIB

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

December 6, 2006

MEMORANDUM FOR: Distribution

FROM: Benjamin A. Powell

SUBJECT: (U) MFR for 29 November HVD Detainee Meeting

~~(S//NF)~~ On 29 November 2006, representatives from the NSC, DOD, State Department, DOJ, CIA and ODNI met to discuss several security issues concerning the 14 High Value Detainees (HVDs) being held at Guantanamo Bay. Consensus was reached on three of the four issues discussed with the fourth item, protection of information during military commission proceedings, being deferred pending additional discussions.

~~(S//NF)~~ Security Clearances. The group discussed clearance issues and based on the meeting and subsequent discussions recommends the following, three security categories for the CSRT process of the 14 HVDs at Guantanamo:

1. Those individuals who will have access to CIA codeword documents will require a TS/SCI codeword clearance (e.g. prosecutors, investigators).
2. Those individuals who may have substantive access to detainees but no access to CIA codeword documents will require a TS/SCI clearance but not codeword clearance (e.g., CSRT panel members, translators, stenographers). If the detainee provides codeword information to these individuals they will need to be retroactively debriefed that they have been exposed to compartmented information.
3. Those individuals who will only have incidental contact with the detainees will require a Secret level clearance. JTF Guantanamo officials, in consultation with other agencies as appropriate, will define the parameters of incidental contact.

~~(S//NF)~~ Codeword billet requirements for CSRT personnel are high priority based on the imminent start of the CSRT process but military commission billet requirements would immediately follow. Specific codeword billet requirements would be immediately forwarded to the NSC for consideration.

~~(S//NF)~~ Media Policy for CSRTs. The group recommends that no media be present for the CSRTs given the substantial likelihood of the disclosure of classified information. Redacted transcripts will be made public within 72 hours after the completion of the CSRTs, if possible, [redacted] All agreed that redacted audiotapes of the CSRTs should also be made public after the CSRTs once full translations were completed and comparisons were made with the written transcripts to ensure accuracy [redacted] (b)(1) (b)(3)

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[redacted] (b)(1) (b)(3)

(S//NF) Access to 14 HVDs. All representatives agreed that a law enforcement team should be allowed to conduct a "historical narrative" interview of each of the HVDs. [redacted] (b)(1) (b)(3) DOD and DOJ lawyers agreed to seek authorization for these interviews in the next week. All agreed that this interview should happen as soon as possible. Requests for access by other groups, such as [redacted] military COCOM investigators, and NGOs, will be determined by the prosecutors on a case-by-case basis [redacted] DoD determine

(S//NF) Military Commission Proceedings. Final decisions on information requirements for a military commission proceeding were deferred to a NSC review effort. Participants, however, were favorably inclined to a Pan Am 103 trial arrangement in which a soundproof glass partition and curtain separate the well of the courtroom from the public gallery. DOD informed the group that discussions were ongoing with the Hill for the funding of these courtrooms but it is unclear if they will approve the current plan.

Benjamin A. Powell
ODNI General Counsel

Distribution:
Mr. Pete Geren, Under Secretary of the Army, Department of Defense
Mr. Peter Flory, Assistant Secretary of Defense for International Security Policy, Department of Defense
Major General Scott S. Custer, Vice Director of the Joint Staff
Mr. John Bellinger, Legal Adviser, Department of State
Mr. Patrick Rowan, Deputy Assistant Attorney General, National Security Division, Department of Justice
Ms. Eliana Davidson, National Security Counsel Deputy Legal Advisor
Mr. John Rizzo, Office of General Counsel, Central Intelligence Agency

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Attachment G

[The R.M.C. 803 session was called to order at 0901, 1 November 2019.]

MJ [Col COHEN]: The commission is called to order. Good morning, everyone.

General Martins, are all the government counsel who were present at the close of the previous open session again present?

CP [BG MARTINS]: Good morning, Your Honor. Yes.

MJ [Col COHEN]: All right. Thank you, sir.

Team KSM, I see Mr. Sowards, Ms. LeBoeuf, Ms. Radostitz, and Mr. Nevin, all here to represent the accused.

For WBA, I see Mr. Montross and Ms. Bormann, both here.

None of the accused are currently present. I'll just go ahead and say that.

For Mr. Harrington, his team, I see Mr. Harrington and Major Bare.

For Mr. Connell's team, I see Mr. Connell. Mr. Farley is not here, but Ms. Pradhan is. I see Captain Andreu here as well.

And then I see Mr. Ruiz. Mr. Gleason, is that you back there? Yes. And, Mr. Ruiz, remind me of the gentleman

MJ [Col COHEN]: I understand. Okay. Excellent.

Trial Counsel, do you wish to be heard on the request to defer the argument until Monday?

MTC [MR. TRIVETT]: No. We're in agreement with that, sir.

MJ [Col COHEN]: Okay. Done. I will issue a written order to follow on AE 665, but the government may act on the oral -- oral granting of the motion at this time. Okay.

Are there any other matters to take up before we call the witness?

Oh, Mr. Connell, are those binders necessary for this witness? Yeah, if you could -- sir, if you want to come forward or have Ms. [redacted] come forward and then just take what you need or leave what you don't. Or just the opposite of what I just said: Leave what you need, take what you don't.

[Pause.]

MJ [Col COHEN]: All right, Counsel. I think we're ready to start. General Martins, is this -- is this a defense witness?

CP [BG MARTINS]: No, Your Honor.

MJ [Col COHEN]: Okay.

CP [BG MARTINS]: Government witness.

MJ [Col COHEN]: Excellent. Then the government may call the witness, then.

CP [BG MARTINS]: Please inform the witness to come to the courtroom. Please proceed to the witness stand, remain standing, and raise your right hand for the oath.

FIRST CAMP VII COMMANDER, civilian, was called as a witness for the prosecution, was sworn, and testified as follows:

DIRECT EXAMINATION

Questions by the Chief Prosecutor [BG MARTINS]:

MJ [Col COHEN]: Good morning, sir.

WIT: Good morning, sir.

Q. You were the first Camp VII commander; is that correct?

A. That's correct, yes, sir.

Q. And are you aware that all are admonished by this commission that you are to testify in this open session only in that capacity?

A. Yes, sir, I understand.

Q. And are you also aware that all are admonished by this commission that you are to be identified only as the first Camp VII commander?

A. Yes, sir, I understand.

CP [BG MARTINS]: Your witness, Mr. Swann.

Questions by the Trial Counsel [MR. SWANN]:

Q. The general indicated that you were the first camp commander of Task Force Platinum; am I correct?

A. That's correct, sir.

Q. All right. And the time is August of 2006 until late March 2008?

A. Yes, sir, that's correct.

Q. Who gave you that job?

A. Admiral Harry Harris, so now the U.S. Ambassador to South Korea.

Q. Admiral Harris got four stars, right?

A. Correct. That's correct.

Q. And then went on to be the ambassador?

A. Yes, sir.

Q. What was your understanding of your role as the OIC of Camp VII?

A. The commander, responsible for the safe, humane care and custody of those detainees in my charge.

Q. All right. Have you seen the classification guidance in this case?

A. I have, yes, sir.

Q. So I'll simply remind you that if I or anyone else ask you a question that you believe calls for a classified

response, please let us know, and we will address that in the appropriate forum.

A. I will.

Q. Furthermore, at least three of the defense teams had the opportunity to interview you; is that correct?

A. That is correct.

Q. Mr. Connell interviewed you back in August, I believe, and although you allowed him an hour, you actually ended up giving him closer to two?

A. Yes, sir. I think you're right.

Q. Then you were asked late last week to be interviewed by the Hawsawi team and then the Mohammad team ----

A. Correct.

Q. ---- correct? And you agreed to those interviews?

A. I did.

Q. Did anyone else ask you to be interviewed in this case?

A. No, sir.

Q. Now, I know Mr. Connell may have asked a follow-up question for a second interview. Did I address that issue with you?

A. You did address that issue.

Q. And we decided that no further interviews were

necessary?

A. That's correct.

Q. While you agreed to the interviews by these three teams, did anyone from the prosecution team try to talk you out of that?

A. Absolutely not, sir.

Q. So let's go right to the arrival of the 14 high-value detainees during the first week of September 2006.

A. Okay.

Q. What were you doing then?

A. At the arrival time, I was on the airfield responsible for receiving them and ensuring their safe movement back to Camp VII; accounting for them at that time, and safely moving them back to Camp VII.

Q. And they came off a C-17, correct?

A. That's correct.

Q. Was your task force, your soldiers, your sailors, were they with you at that time?

A. Absolutely. A good portion of them was -- were.

Q. Now, I'll address the issues about how they got from one place to another in the classified session.

A. Okay.

Q. But let's go ahead straight to Camp VII, that

location.

A. Okay.

Q. How were they in-processed?

A. So when we arrived at Camp VII, the first thing we wanted to do was to allow each of the detainees to move to their -- their cell, allow them to get cleaned up. We had showers there. We had food for them at that time, and we had new clothes for them to put on. So the first thing was the -- to just simply get acclimated to the -- to the facility, get cleaned up, and be prepared for the -- for in-processing.

Q. How long did the in-processing take for all 14 of these individuals?

A. It consumed the entire night. It took a good 12 -- probably 8 to 12 hours.

Q. And were you there throughout that entire period of time?

A. Yes, sir, absolutely.

Q. Did you have occasion to address any of the accused in this case? And you understand those to be Khalid Shaikh Mohammad, Walid Bin'Attash, Ramzi Binalshibh, Ali Abdul Aziz Ali, and Mustafa al Hawsawi. Did you address any of these individuals?

A. I addressed all of them. One of the -- the last

in-processing station was an opportunity for me to meet -- to speak to them individually, at which time I let them know you are -- you have arrived to Naval Station Guantanamo, Guantanamo Bay, Cuba. You are under the custody of the Department of Defense here. And then I continued to read the camp rules at that time, asked if there were any questions.

Q. Did you explain to any of them the application of the Geneva Conventions?

A. We talked about Geneva Convention Common Article 3, that our detention operations are consistent with Geneva Convention Common Article 3, that's correct.

Q. Were you ordered to say that?

A. No. That was a script that I put together. I thought that it was appropriate that they understood that, that they understood where they were. I discussed that with Admiral Harris prior to doing that, but we thought it was all pro -- he thought it was appropriate.

Q. And what were you wearing when you addressed the detainees?

A. Military uniform.

Q. You've already testified that when they arrived at Camp VII, they were immediately placed into their cells?

A. Correct.

Q. Did they have a chance to get cleansed up?

A. Absolutely. That was one of the first things we provided for them. They had showers in their cells and they had fresh clothes there.

Q. That's something that people don't understand, but each of these individuals actually has a shower facility inside their respective cell?

A. Correct. The shower, a toilet, a desk, a chair, a bed with a mattress. And then we -- the basic issue items we said -- we also included. So a couple of different types of footwear, prayer beads, prayer rug, prayer cap, a copy of the Quran, and -- that basically defines -- defines it. We had a mirror, a sink for them to get cleaned up as well as the shower.

Q. Now, you said that you informed them of the rules. If you remember, generally, what were those rules?

[redacted]

The simple rules that, you know, violence, attacks against the guard force were -- would be unacceptable; the --

that -- just abide by the overall -- overall camp rules. We let them know what the schedule would be like, if you will, that meals would be delivered to them, and water exchange with them on request.

As much protocol as it was rules, if you will.

Q. Now, I note that Ramadan was from 23 September 2006 until approximately 23 October 2006, about two weeks after they arrived. Do you remember anything special that was done during the Ramadan season?

A. Well, we did adjust the -- the meal delivery schedule to allow for the fasting period. We did adjust our schedule within the camps. We always -- we observed quiet time. We understood when the prayer times were, and those were quiet times within the camp. And made sure that we followed all those similar cultural practices.

Halal meals were provided. A special meal was provided to break the fast at the conclusion of each. So we haven't -- our guard force was familiar with the -- the procedures for Ramadan, if you will, and adapted our schedule to accommodate.

Q. What about music being piped in during prayer call?

A. We did provide the prayer call, call to prayer, five times a day, I believe.

Q. All right. Let's talk about recreational activities now. Did they have access to recreation during this period of time?

A. They did. [redacted] they were able to get sunlight and access to outdoor, nature a little bit. [redacted] In each recreation area, we had -- I call it state-of-the-art exercise equipment, newer equipment than some of the other camps at that time, so good conditions in there.

We -- we allowed the detainee to bring coffee. We'd take coffee to him out there, and we would bring meals sometimes out there if the -- if the recreation coincided with -- with the meal schedule. [redacted]

[redacted]

So that basically describes the recreation. We had some other exercise equipment, an ab ball, if you will, an abdominal workout ball, we had a pull-up bar, and continued to expand that capability as the months continued.

Q. Did they have access to library books?

A. We did. We had library books. We had -- we would circulate those throughout the week so they could also take those to recreation, if you will. In addition to the Quran, Tafsir. We had other library books for them to choose from and as many as we could in their native language. International Community of the Red Cross helped us with that in gaining -- in gaining some additional books.

Q. All right. So you've mentioned the -- the ICRC. Between the period of time of their arrival early September 2006 until the -- and we'll talk about the law enforcement interviews that were conducted in January of 2007, approximately a four-month period of time -- did the International Committee of the Red Cross visit these

gentlemen?

A. They did. I believe it was October, the first visit, and then another one in December. It was an opportunity for each one of the detainees to meet with a delegation from the ICRC at Camp Echo II where they would -- they would meet. We would take the detainee there, they'd meet with the ICRC delegation and have -- have discussions. And then go back to their cell afterward.

This -- they could actually come back a second day if -- if schedule permitted for the ICRC. But that first took place in October, then once again in December, as I best remember.

Q. And if you know, the meeting place of the ICRC, that's the same meeting place that the interviews were conducted and the same location where the accused see their attorneys day in and day out.

A. That's correct, sir.

Q. Now, what about access to doctors and medicines and things of that nature?

A. So that was, of course, a big part of the in-processing. We had dedicated medical staff as part of my task force that I was commander of at that time, met doctor and -- and corpsmen that provided 24/7 care. We were

available -- they were available throughout the night.

We'd -- so in-processing, a little more deliberate process where we did medical exams for each of the detainees. We later followed up with a little more extensive capability. We gave them dental exams, if you will, and then optometry exams a little bit later. Not all of that was completed on the in-processing day, but those -- those preventive medicine practices -- preventive care practices, I should say, were applied at that time.

Q. Now, if I were to say that the period of time between September and January, they had access to dental, doctors, cardiologists, endodontists, would that be correct?

A. To the best of my knowledge. I honestly don't remember a cardiologist at that time, but -- but I do remember the others.

Q. Do you remember any CT scans being done during that period of time?

A. I do not remember.

Q. So what was your principal place of duty during the months of September to -- to February of 2007?

A. Camp VII. That was my only job. That was my only responsibility. Now, I did have -- I did have another command post that I was able to use. The camp itself didn't have all

the means for which I needed to -- to be the commander and complete administrative responsibilities. So I did have another -- an alternate command post in Camp America that I used for a lot of the administrative logistics functions that couldn't otherwise be accomplished at Camp VII.

Q. How long do you think you spent each day out at Camp VII?

A. Eight to 12 hours, I would guess.

Q. And that -- that wasn't the end of your day, was it?

A. No. We still -- we still had other duties to perform over at Camp America, accountability for my folks and training, if you will, physical fitness training and other types of training, evaluations and things like that.

Q. Seven days a week?

A. Absolutely.

Q. At that time, did you have any computer access at Camp VII?

A. I had had a standalone computer. [redacted] We were able to use that for administrative purposes. But that -- that was the only -- that was the only computer

that I used at Camp VII.

Q. Now, the guards that you had, were they trained on how to interact with the accused?

A. They were. We had a rehearsal period before -- before they arrived. We understood that most of our interactions would be transactional, if you will. So our role of the guard force was not to engage in detailed conversation, discussions. If there were questions for which the guard force couldn't answer, then they were elevated through the chain of command there within -- within Camp VII to -- to satisfy the requirement.

Q. And what about you? Did you have interaction with the accused during -- well, the nearly 19 months that you were in command?

A. I did. So each time SOPs change, for example, the recreation schedule changed or when Ramadan was approaching, I briefed them. I talked to them individually on how that -- how that would unfold. I wanted to make sure I got the message across.

And so we would put together a -- with my command team, we'd put together some of that -- that language. So if there were questions asked, we were all on the same page, so different changes in procedures, if you will, primarily

within -- within the camp. I'd let them know that the ICRC was coming and they'd have an opportunity to meet with them, so those types of things I -- I delivered myself.

Q. Now, all of these transactions, they would be documented in what is known as the Detainee Information Management System ----

A. Correct.

Q. ---- DIMS.

When you say transactional, are you talking about things like swapping out a waterboarder -- water bottle, a -- swapping out a T-shirt, those kind of things?

A. Correct, correct. Exchange of laundry, exchange of meals, books, ICRC -- postcards, letters, things like that that detainees were ----

Q. What about your guards? What did they wear?

A. Uniforms, military uniforms.

Q. How did the guards talk to each other?

A. We addressed each other -- for the protection of operational security, we had pseudonyms that we used within the -- within the facility. We didn't use our -- our own -- our own names within the facility. We all had nametags, if you will, that identified -- that each of us had a pseudonym that we wore all of the time in there, and so that the

detainees could identify us as well. So that pseudonym was consistent throughout Camp VII.

Q. And how did the guards address the detainees?

A. "Detainee." I mean, we didn't typically use the detainee's ----

Q. They had ISN numbers, right?

A. Correct. They had ISN numbers.

Q. All right. We've talked a little bit about some of the amenities. What kind of food did they get during this period of time?

A. So meals were delivered three times a day by my force to -- from the -- from the dining facility to -- to Camp VII. Halal meals -- halal-certified meals were the primary. And there's a menu that cycled through about a two-week -- two-week period.

The detainees had some selection in what was offered, but typically there were four or five different meal selections, and they would pick that and that would be their, for example, dinner meal of choice at that time period.

Q. How would their cells be cleaned?

A. They did -- they did most of the cleaning themselves. So typically Sunday was a day for which we distributed grooming, personal grooming gear. Each one of them had his

own razor and trimmers and scissors and things like that that we would use -- we would pass out on Sundays, and then Sunday we'd also use for the cell cleaning opportunity.

But if the detainee asked for a means to clean his cell any other day of the week, I believe we would do that. Sunday was typically the day for that, and if we had to do some additional cleaning, my guard force would do that.

Q. All right. Let's shift now to the law enforcement interviews that were conducted of these five men from January 2007, extending at least for one of these men, into February of 2008.

A. Okay.

Q. How did the interviews work?

A. Well, first of all, Admiral Harris notified me about these law enforcement teams. I was able to meet them in advance, and we understood how this process would take place. Echo II would be the site for which we would -- we would meet. We worked out those arrangements, if you will, with the law enforcement team.

Then when time began, when the first -- when we started the interviews, I would -- I would go or one of my guard force members would go individually to each cell and notify the detainee, "Tomorrow you have a meeting. You have a

knows everything.

MJ [Col COHEN]: Okay.

Q. Did the camp, while you were there, have standard operating procedures?

A. We did. We were able to leverage the existing standing operating procedures from other camps that were in operation at the same time to build our own. So we were able to adapt those, those SOPs, to conform with our unique facility. For the most part, we were able to follow those, to the extent possible, in -- at Camp VII.

Q. I think -- well, I believe -- would you agree with this statement, that in some instances with respect to SOPs, that you were actually ahead of the other camps on Guantanamo?

A. Well, we certainly tried to keep pace with them. I mean, I consulted with other -- with the -- with the JTF commander. He was interested in the SOP development. I would like to say I at least tried to keep pace with those that were already prepared. Remember, those SOPs had been prepared over a period of years. So I did my best to make sure they were in keeping with the same procedures.

MJ [Col COHEN]: Mr. Swann, may I ask a question? Sir, when you say "other camps," are you talking about other DoD camps?

WIT: Correct, sir. I'm referring to Camps V and VI.

MJ [Col COHEN]: Copy. Thank you.

Q. All right. You had 19 months as the camp commander?

A. Yes, sir.

Q. Did you see anything to suggest that any of these men, during the period of time, say, September to -- the interview periods, were disoriented, anxious, distressed, having any difficulty concentrating?

A. I could say that -- when it comes to distress, I -- that would be something I would have observed. Anxiety, things like that, are tough to -- tough for me to be able to -- to evaluate. But distress is something that I think I would be able to recognize as the camp commander with my engagements with them. I'm comfortable -- I'm comfortable with that assessment.

Q. Did you see anything to indicate that any of these men were incapable of making their own decisions?

A. No, sir. I had conversations with them. They were able to -- they clearly let me know when they didn't want to go to a meeting, when they wanted to go to a meeting.

I remember we had medical care that we took them out of Camp VII for dental cleaning, dental checks, optometry. We had -- they had conversations with me and other members of my

guard force for those things, and I -- I believe they were engaging and understood their -- their decisions.

TC [MR. SWANN]: Everything that I ask further on will be in a closed session. Thank you.

WIT: Yes, sir. Thank you.

Q. Excuse me. One final question. And we've talked about this.

A. Okay.

Q. In the Senate Select Committee on Intelligence, subcommittee study of the CIA's detention and interrogation program at page 160, there's a statement that reads that these men were under the operational control of the Central Intelligence Agency. Do you believe that statement to be true?

A. No, sir. Operational control refers to the authorities a commander has over his or her assigned forces, and I believe I -- as a commander, I had -- I had full responsibility and authorities over those -- those forces. They responded to my orders consistently. I -- I believe that to be the case.

TC [MR. SWANN]: Okay. I will ask you for your reasons in the closed session.

WIT: Okay.

LDC [MR. CONNELL]: Yes, sir.

MJ [Col COHEN]: All right.

CROSS-EXAMINATION

Questions by the Learned Defense Counsel [MR. CONNELL]:

Q. Good morning, sir.

A. Good morning, sir.

Q. Are you good for water?

A. I'm good. Thank you very much.

Q. Thank you. Mr. Swann made the point that you had agreed to meet with me, which I really appreciate.

A. Thank you, sir.

Q. I hope that it helps everything go more smoothly. And along those lines, if I ask you about any kind of document, I'll show you where it is.

A. Okay.

Q. And they will be the same documents that we went over when we met.

A. Okay. Understood.

Q. Specifically about documents, do you see that there's a binder in front of you?

A. I do.

Q. There are a few different tabs in that binder. Would you mind just looking at the -- at the green tabs, and you'll

see one that says CP7 on it?

A. Okay.

Q. Okay. That's the one that we're basically going to be talking about. And some of the writing is very small.

A. I brought my glasses. Thanks.

Q. Very good. I did too, so we're good.

A. Okay.

Q. Okay. The -- you'll see some -- some documents I'm going to be showing you on the document camera because -- but when I ask you about one of those documents, do you see that down there in the corner there is a -- a number that says CP, dash, something, something?

A. I do.

Q. Okay. So that's what lawyers call the Bates number, and we'll be -- I'll be referring to that. So if I need to direct you to CP7, page 7, then that's how you would find it.

A. Understood.

Q. Okay. Great. The -- the other sort of ground rules things that I want to go over with you is, obviously there's a lot of classified information surrounding our topic here. And can we agree that I have formulated the questions sometimes, like the government did, to try to pick out unclassified aspects of otherwise classified topics?

A. I agree. I understand.

Q. And so I'll just ask that you listen very closely to the question. Sometimes I'll ask you a yes-or-no question, like do you know something. And I'm not asking you to tell me the underlying thing. I'm asking do you know it.

A. Thank you.

Q. Does that make sense?

A. Yes, it does.

Q. Okay. The other thing is that the judge has ruled that all of us here in this courtroom are custodians of classified information. So in an open session, if I ask a question that you think calls for a classified answer, the best practice is just to say that it's a 505 issue.

A. Okay.

Q. All right? And that's a way to address the question without confirming or denying whether the information in my question was classified.

A. I understand.

Q. And if there's an objection, either about classified information privilege or some other topic, the attorneys will confer usually, and then the judge will rule. So you just wait for -- can we just agree that you'll wait for the judge to tell you whether to answer or not?

A. I understand. I'll wait.

Q. Okay. Great. Thank you very much.

A. Sure.

[The security classification button was pushed in the courtroom which caused the video feed to terminate at 1026, 1 November 2019.]

[The Military Commission resumed at 1029, 1 November 2019.]

MJ [Col COHEN]: Counsel, we're back on. All right, thank you. We let it run while you guys were conferring. Are we all on the same page?

LDC [MR. CONNELL]: I believe so, sir.

MJ [Col COHEN]: Okay. Excellent.

CROSS-EXAMINATION CONTINUED

Questions by the Learned Defense Counsel [MR. CONNELL]:

Q. At some point Admiral Harris nominated you to be Camp VII commander?

A. That is correct, sir.

Q. Okay. And that was a new camp? Camp VII was not previously in operation?

A. That's correct.

Q. Okay.

LDC [MR. CONNELL]: May I consult?

MJ [Col COHEN]: You may, absolutely.

discussions here in the courtroom, and while people might be seeing you doing it, they don't know what you're actually saying ----

LDC [MR. CONNELL]: Right.

MJ [Col COHEN]: ---- which allows for more free-flowing discussion while we're here.

LDC [MR. CONNELL]: Yes.

MJ [Col COHEN]: All right. Let's re-call the witness.

[The witness resumed the witness stand.]

MJ [Col COHEN]: Sir, you are back on the stand. Please have your seat, and I remind you, you're still under oath. Thank you for your patience.

WIT: Thank you, Judge.

MJ [Col COHEN]: Mr. Connell, you may continue.

LDC [MR. CONNELL]: Thank you. Sorry about all that, sir.

CROSS-EXAMINATION CONTINUED

Questions by the Learned Defense Counsel [MR. CONNELL]:

Q. At some point after your nomination as Camp VII commander, you participated in an interagency meeting where you received more information about your mission; is that right?

A. Correct.

Q. And you learned you'd be in charge of two facilities,

Camp VII and Camp Echo II?

A. So the facility -- the facility really remained -- I was responsible for the -- for the operations. Facilities we can talk about in a 505 session.

Q. I understand the distinction.

You would be responsible for the operation of two -- two -- of Camp VII and Camp Echo II?

A. Correct.

Q. Okay. And at that time, although you didn't know any details, you know that at one time Camp Echo II had been used by the CIA to house detainees?

A. I learned that. I don't remember specifically when, but I learned that at some point, yes.

Q. Okay. And in -- as part of your responsibilities, you inspected the -- the physical facilities before the detainees arrived?

A. Yes, sir. My team -- my team was responsible for that. That's correct.

Q. Okay. Sir, I'm going to show you some photographs on the screen in front of you.

A. Okay.

Q. These photographs have already been -- I've already discussed them with the prosecution, and this will -- because

the documents themselves are classified, they will not be shown outside of this courtroom. The -- so I'll ask you to -- this is one of those occasions you should listen very carefully to the question and only answer the question which I ask.

A. Okay.

LDC [MR. CONNELL]: So, sir, if I could have access to the document camera, I have pre-coordinated with the court reporters, and this will not be displayed to the gallery.

MJ [Col COHEN]: Okay. Trial Counsel?

MTC [MR. TRIVETT]: Sir, we have no objection to it being displayed to the witness. Obviously, it can't be displayed to the gallery. Our concern, too, is to make sure that it's not on counsel screens, which can be seen sometimes from the gallery.

MJ [Col COHEN]: Especially as you get closer towards the back.

MTC [MR. TRIVETT]: Yes, sir.

MJ [Col COHEN]: So what would you like me to do with that?

LDC [MR. CONNELL]: I'm sorry, sir?

MJ [Col COHEN]: What would you like me to do with that? Because that is technically true. The closer you get to those

long.

MJ [Col COHEN]: Okay. So I'll tell you what, then. Let's just try to get through your examination and then we'll take a recess.

Ma'am, we'll come back to you after lunch.

LDC [MR. CONNELL]: Yes, sir.

MJ [Col COHEN]: Unless he's really fast, and then I'll adjust. All right.

We're ready for the witness. Thank you, sir.

[The witness resumed the witness stand.]

MJ [Col COHEN]: Sir, please return to your seat. I think we're going to get a little bit further down the road, so ----

WIT: Okay.

MJ [Col COHEN]: Mr. Connell is going to ask you some questions.

WIT: All right, sir. Thank you.

CROSS-EXAMINATION CONTINUED

Questions by the Learned Defense Counsel [MR. CONNELL]:

Q. Sir, I want to assure you none of this has anything to do with you. I know you're out there sweating, but it is all, it has nothing to do with you. At the end of the day we went for the low-tech solution of I just made copies of the packet and you should have some loose papers in front of you.

A. I see them.

Q. All right. Very good. That's what I'm going be -- I'm just going to go through those with you for a little bit, okay? I've talked to the prosecution about all of this. Everybody is on the -- I think everybody is on the same page.

A. Okay.

Q. The pages change, but there we are. Okay.

So on the -- the first document that's in front of you should say at the bottom of it AE 502W Attachment B, PDF page 220.

A. Acknowledge.

Q. Do you see that? Okay.

And that is a photograph of a tier; is that right?

A. That is correct.

Q. Okay. And if you'll turn to the next page, it should say at the bottom of the AE 502W Attachment B, PDF page 167?

A. That's the one I have.

Q. Okay. And that's a picture of an empty cell?

A. Correct.

Q. It depicts the items that you described on direct examination, the desk, the bed, et cetera?

A. Yes, it does.

Q. Sir, if you'll turn the page to AE 502W Attachment B,

PDF page 46 ----

A. Okay.

Q. ---- that's a diagram. I'll give you a second to look at it. The -- does that appear to be a diagram of one of the cells in Camp VII?

A. Okay. It does, yes.

Q. And so like, I'm sure, every cell in the world, the cells that you described on direct examination, they have a door?

A. Yes, sir.

Q. And the -- on one of the doors, the -- and you can turn to AE 502W Attachment B, PDF page 163. There's a small glass window in the door?

A. Correct.

Q. And there are lockable slots called -- often called bean holes?

A. Yes.

Q. And at the time that you were there, the bean hole slots in Camp VII were kept closed except when they were in use for passing food or other purposes, correct?

A. That's true.

Q. And the door that contains the -- the bean holes [redacted]

[redacted]

A. I believe so. That sounds familiar.

Q. And if you'll look at page 163 that's in front of you, on the right-hand side of that photograph [redacted]

A. Yes.

Q. [redacted]

A. Correct.

[redacted]

A. Yes.

Q. Okay. If you could turn to AE 502W Attachment B, PDF 166. Should be the next page.

A. Okay.

Q. That picture depicts what it looks like when [redacted] Would you agree?

A. I would agree.

Q. And if you turn to the next page, PDF 161 in that same exhibit.

A. Okay.

Q. [redacted]

A. That's correct.

Q. [redacted]

A. That's correct.

Q. Okay. There is an -- you testified on direct examination [redacted]

A. Correct.

Q. And if you could just flip back, sir, to -- two pages, to PDF page 166.

A. Got it.

Q. Is that a photograph [redacted] that you testified about?

A. Yes, it is.

[redacted]

Q. Okay. Now, you testified on direct [redacted]

A. Yes, I did.

Q. Okay. [redacted]

A. I did.

Q. All right. To refer to a space that is partially open to the outside?

A. Correct.

Q. Yeah.

A. That's correct.

[redacted]

A. That's correct.

[redacted]

A. That's correct.

Q. If you wouldn't mind looking at the next page in your packet, which is AE 502W Attachment B, PDF page 168.

A. Yes.

Q. Would you agree that this picture [redacted]

A. I would agree.

Q. Okay. And if you would turn to the next page, 502W Attachment B, PDF page 48. Would you take a look at that for a moment [redacted] This one was occupied, but ----

A. Yes.

Q. And if you would turn to the next page, 502W

Attachment B, PDF page 176.

A. Got it.

Q. And at the -- on the outside [redacted] you mentioned it's possible to see a little bit of nature, see some sunlight. [redacted]

A. I would agree.

Q. Okay. And page 176 is a photograph [redacted]

A. I would agree.

Q. Okay. Now, you testified on direct examination about the outdoor recreation area.

A. Yes.

Q. Could you turn to the next page, 502W Attachment B, PDF page 194.

A. Okay.

Q. The -- at some point -- let me ask this a different way. [redacted]

A. That's what I remember, yes.

Q. Okay. And at some point that was modified, in the evolution that you described, [redacted]

A. That's accurate.

Q. Okay. And if you will look at page 194, I -- [redacted]

[redacted]

Q. Okay.

A. That's correct.

Q. Okay. And on the far right edge of the photograph [redacted]

[redacted]

A. Yes.

Q. And on the far left-hand side of the picture [redacted]

[redacted]

A. Yes.

Q. ---- that you referred to?

A. I see it.

Q. Okay. Okay. You can put those down, sir.

A. Okay.

Q. We're done with those.

I'd like to ask you a little bit about the chain of command. In your role as camp commander of Camp VII, were you under Joint Detention Group?

A. No, I was not. I reported directly to the JTF commander.

Q. Okay. And the JTF commander obviously was under SOUTHCOM?

A. Correct.

Q. All right. But a number of government agencies had interests or equities in the situation at Camp VII, correct? Let me give you an example: The Secretary of Defense.

A. No -- oh, other -- okay. I thought you said other government agencies. Yes, there are a lot of -- there are staff in the -- in the OSD, in the Pentagon, that had interest in that. That is correct.

Q. Right. The -- and so there was an interagency body that took the various organizations that had interests and allowed them to come to consensus on policy issues?

A. Yes. I'm familiar with that.

Q. Okay. And at the level immediately above Admiral Harris, it was called the Special Detainee Follow-Up Group?

A. Yes.

Q. And then there was one -- I don't know if you ever had any interaction, but there was one level above that called the Special Leadership Oversight Committee?

A. I didn't have any interaction with it.

Q. Okay. But you were aware of its existence?

A. I believe. I believe there was another -- a higher level, but I don't remember specifically that was -- that's what it was called.

Q. That's fine, sir. And when decisions had to be made about what the policy was going to be for -- on a particular issue at Camp VII, that was -- the decisions were made -- if they were on big issues, they were made by that Interagency Policy Group; is that right?

A. So there were -- the decision-makers started with myself and Admiral Harris and OSD staff. I mean, sometimes the OSD staff would answer things directly, and then other times they would go to that Special Detainee Follow-Up Group.

So those decisions, you referred to them as big ones. I mean, decisions were made at all those levels at one time or another during my tenure.

Q. Sure. That makes sense. There -- so for issues that were -- so let's sort of start at the lowest level.

For issues at the lowest level, there was a daily

meeting? I know there were two daily meetings. I'm talking about the lower level one first.

A. Yes, that's correct.

Q. Okay. There was a daily meeting, and you were represented at that?

A. Yes, that's correct.

Q. And the medical staff, the psychologist and the M.D., were represented at that?

A. Typically, yes.

Q. Okay. And a representative from another Government agency was also present?

A. Yes.

Q. Okay. And then later there was a -- in the day for one level higher, there were other meetings that -- where you would brief Admiral Harris on the situation?

A. That's correct.

Q. Okay. And the same parties were present for that meeting?

A. Agreed.

Q. And then if an issue had to go -- so if a decision could be made basically at your level, you just made the decision?

A. That's correct. That's correct.

Q. And if a decision needed elevation, it would go first to Admiral Harris?

A. Yes.

Q. And if a decision needed elevation beyond that, it would go to the interagency group?

A. Or to OSD policy.

Q. Or the OSD ----

A. The policy -- there was a -- there's a step in between. OSD policy.

Q. Okay. And was that Mr. England?

A. No. That was OSD detainee policy director.

Q. Okay. Or was that Mr. Coble?

A. He was one of the members of that policy group that I'm referring to, yes.

Q. Okay. The -- I'd like to ask you specifically about one example of decision-making. When you inspected Camp VII, one of the comparisons you made was with Camp Delta; is that fair to say?

A. Camp V or VI, I would say.

Q. V or VI, excuse me. Is that more accurate, to say Camp V or VI?

A. Yes, that's more accurate.

Q. You made a comparison to Camp V or VI?

A. Correct.

[redacted]

A. That is correct.

Q. Okay. And so you directed the people who worked under you [redacted] to make it comply with the situation in Camp V and VI?

A. That's correct.

Q. Okay. And that decision was countermanded by the Interagency Policy Group?

A. I don't know who it was countermanded by, but it was countermanded. That's correct.

Q. Okay. And the decisions of -- or discussions with the Interagency Policy Group, when they took place, were generally by video teleconference?

A. Yes.

Q. And sometimes there was communication by e-mail?

A. Correct, both ways.

Q. And when decisions were made, or sort of bigger decisions -- maybe not every minute decision, but bigger decisions were made by an Interagency Policy Group, like other Interagency Policy Groups, they would issue a thing called a summary of conclusions?

A. I remember seeing those.

Q. Okay. And sometimes they would -- those would contain policy directions to you?

A. Agreed.

Q. Okay. One of the things that you testified to on direct examination was that Camp VII had [redacted] call to prayer?

A. We did. That's correct.

Q. Yeah. And the reason why there was a -- first of all, I mean, most fundamentally the reason why there was a call to prayer was to let the detainees know that it was prayer time?

A. Correct.

Q. And I'm sure you all coordinated those with the -- with the schedule of prayer times?

A. Yes, sir.

Q. Yeah. And the reason why that was a service performed by Camp VII as opposed to, say, another detainee, was that at that time detainees could not communicate with each other to sort of -- to communicate the call to prayer; is that fair?

A. I -- I believe so. I don't know why that decision was made specifically, but that makes sense to me, yes.

Q. Okay. You talked about accommodations for Ramadan.

A. Yes, sir.

Q. And it -- it became clear to you at some point, clearly, that Ramadan was a very significant event in the religious life of a Muslim?

A. Absolutely.

Q. Yeah. And sort of the daily rhythms of the camp would change at that time?

A. Yes, sir.

Q. And one of those daily -- one of the requirements of Ramadan, for an observant Muslim, is that they fast during daylight hours; do you agree?

A. I agree.

Q. So when you talked about providing an opportunity for the men to break their fast after the sun had gone down, that was an accommodation that Camp VII made for the holy season of Ramadan?

A. That's correct.

Q. Is it correct to say that at this time in -- at the -- that you were there, that meal was provided individually in the cells to the men?

A. It was, yes.

Q. Because at that time there was no opportunity for any kind of meal as a group, correct?

A. No. I mean, under a rare occasion that -- [redacted]

[redacted] it was call to prayer -- it was time to break the fast, then -- then when we would -- they would break the fast together. But that -- that didn't happen initially; that happened later -- later in the process.

Q. Understood, sir. And likewise, prayer for the men -- so in the course of understanding these issues, you came to understand that generally, on Fridays, observant Muslims congregate and have a communal prayer?

A. Yes.

Q. Much like for Christians go to church on Sunday?

A. Yes.

Q. And at the time that you were there, there was no mechanism or opportunity for group prayer [redacted]

[redacted]

A. I would agree.

Q. Okay. And was it your opinion that there should be some way to have group prayer?

A. I believe that we -- we strived to match those SOPs with -- with Camps V and VI, which did allow that. But governing policy at the time did not -- did not allow that. We -- we do -- you know, it was the belief that for Admiral Harris, myself, we believed that we were to work our

ways towards those consistent procedures that were successful in Camps V and VI.

Q. That makes sense. And at the time the governing policy on that particular issue came from higher than Admiral Harris?

A. That's correct.

Q. Sir, you talked on direct examination about the ICRC visits.

A. Yes.

Q. The -- when was the -- so during the period of time between September 2006 and January of 2007, there were two ICRC visits. Is that -- am I right?

A. That's correct.

Q. Okay. When was the first of those?

A. October. It was a week-long period in October. I don't precise -- remember precisely the one, but I -- it was October.

Q. Okay. And at some point someone had to decide what order those ICRC visits would take place in; is that right?

A. Correct. We usually worked with ICRC to set that up.

Q. Sure. And -- and the order of interviews or meetings with the ICRC, the order in which detainees would have their meetings, at least for that first meeting, that was the

subject of interagency discussion; would you agree?

A. See, I don't remember specifically that. I -- I mean, I don't remember specifically that -- that being an OSD policy. I -- in my memory, I remember after almost two years there, typically that was an arrangement we worked out with the ICRC.

Is it possible that OSD directed those, the sequence, the timing? It's possible. I don't specifically remember that in October of 2006.

Q. Okay. You testified on direct examination about your duty station. Do you recall? That Camp VII was one duty station; you had an alternate duty station at Camp America?

A. Correct. That's correct.

Q. And Camp VII was also the duty station of some other government agencies?

A. Correct.

Q. You testified on direct examination that the guards were trained and that essentially their interactions with the detainees -- their training was that those should be transactional; is that correct?

A. That's correct.

Q. All right. And by transactional, you mean when there is an authorized transaction, like the exchange of material or

water or meal service, laundry, those sorts of things. That's -- that's the limit of what guards should be engaging with detainees on, correct?

A. That's what I'm referring to. I mean, there would be a little bit more interaction, for example, when a detainee was being moved, obviously, from either inside the facility or to a -- a place outside the facility. There was a little more interaction.

Q. In that situation there would often have to be directions to the detainee?

A. Absolutely, yes.

Q. Past those transactional interactions, was personal conversation between guards and detainees prohibited?

A. So prohibited, no. It was not typical. It would -- a detainee may engage in conversation during water bottles being exchanged or the meals being exchanged. The detainee may ask some questions at that time period and there would be a brief conversation, but for the most part, we -- those were limited -- limited discussions, and we tried to keep them that way.

Q. The guards had a limited set of topics on which they were allowed to make decisions, right? Most decisions had to go somewhere higher?

A. Yes. If there was a -- if there was a question, it would -- they would come to me. They would come through their chain of command and maybe through a watch commander to me for a decision to be made, yes.

Q. Right. So there were the equivalent of NCOs, for example, who they would work their way through?

A. That's correct.

Q. And so the guards weren't coming to you every day with questions?

A. That's correct.

Q. Right.

LDC [MR. CONNELL]: Your Honor, if I may have a moment?

MJ [Col COHEN]: You may.

[Counsel conferred.]

MJ [Col COHEN]: Mr. Connell, were you able to resolve your issue?

LDC [MR. CONNELL]: We at least have a path forward, Your Honor.

MJ [Col COHEN]: Okay. Great.

Q. The -- so the various guards that worked missions relating to Camp VII, [redacted]

[redacted]

[redacted]

Q. Sure.

A. Correct, generally.

Q. So my next question applies [redacted] okay? You testified on direct examination -- but do me a favor. Don't answer this question until the government has an opportunity to speak, which ----

A. Okay.

Q. [redacted] you testified on direct examination that they wore military uniforms. Were they, in fact, military?

TC [MR. SWANN]: Objection, Your Honor.

MJ [Col COHEN]: Basis?

TC [MR. SWANN]: Calls for a classified response.

MJ [Col COHEN]: Okay.

LDC [MR. CONNELL]: I don't actually think so, Your Honor. Perhaps we could go to 658A because ----

MJ [Col COHEN]: Okay. That's fine. Let's do that. All right. Thank you. Counsel, look to paragraph 68.

LDC [MR. CONNELL]: 68. Sir, I'm glad you pointed me to that because I was at 10, so I was in the whole wrong part.

MJ [Col COHEN]: My CISO helped me out.

LDC [MR. CONNELL]: Okay. 68 is quite specific, and my question does not implicate either -- it does not implicate the second sentence of 68.

MJ [Col COHEN]: Okay. Trial Counsel, the question itself would not call for that answer, that specific piece of information, but it would -- but -- so the question is, is -- are we in a nuance where it's something you did not anticipate, or is it just that specific fact that is -- that is privileged?

If you guys need a moment to chat, I'm fine with that. Like I said, you don't have to make a -- as you're discussing here, let me tell you how I interpret this, is I see a very specific piece of information that cannot -- that you have asserted national security privilege over, but just a very specific piece; whereas a generic answer, in the way we've done other types of generic answers, would not necessarily be covered by this as it's currently written.

So I'll let you all chat. Thank you.

[Counsel conferred.]

TC [MR. SWANN]: Your Honor, it's in paragraph 66.

MJ [Col COHEN]: Okay. Thank you. Let's look at that paragraph. Thank you.

Yes. So once again, though, I'm looking at it as if

we do not -- the question, as posed, is were they Department of Defense, not -- I'm not implying whether they were or not. That's not what my question is. That is the question posed. Not if they were not, what were they? So I need an answer to that -- that -- that specific line of questioning. That's where we're at.

TC [MR. SWANN]: The first question can be asked.

MJ [Col COHEN]: Okay. And answered?

TC [MR. SWANN]: And answered.

MJ [Col COHEN]: With the instruction of do not indicate -- because I think ----

TC [MR. SWANN]: That's it.

MJ [Col COHEN]: ---- I know what the answer is going to be, as do counsel.

TC [MR. SWANN]: Right.

MJ [Col COHEN]: Sir, specifically based on the assertion of privilege by the government, you may answer the question as to whether or not they were Department of Defense. You may not answer anything beyond that if they were not.

WIT: Understood, sir.

MJ [Col COHEN]: All right.

Q. So I'll give you -- I'll repeat my question, which I think was very narrow and precisely framed and a yes-or-no

question, which is: [redacted] were the guards military?

A. No.

Q. Sir, you testified on direct examination that ----

MJ [Col COHEN]: And we'll take up the rest in the closed session.

LDC [MR. CONNELL]: Yes, sir.

Q. ---- on direct examination, that the -- about how detainees were addressed, like when the guard had to call their -- had to call their ----

A. Yes.

Q. ---- attention?

A. Yes.

Q. The -- and could you explain that to us? I understood you to say one thing, and then I think you might have been cut off. You said often they were addressed as "Detainee"?

A. "Detainee" or their specific ISN.

Q. I see. So Mr. al Baluchi, for example, who is my client, is 10018. He would be called "18" or "10018"?

A. Correct. Both of those would be applicable.

Q. Or "Detainee"?

A. Yes. All of those would be applicable.

Q. Now, I think this is just a matter of maybe refreshing

[The R.M.C. 803 session was called to order at 1346, 1 November 2019.]

MJ [Col COHEN]: The commission is called to order. The parties are present. Mr. Connell, are you ready to continue?

LDC [MR. CONNELL]: Yes, sir.

MJ [Col COHEN]: All right. Please call the witness.

LDC [MS. BORMANN]: Judge, for the record ----

MJ [Col COHEN]: Yes, ma'am.

LDC [MS. BORMANN]: ---- Captain Peer has rejoined us.

MJ [Col COHEN]: He has. Thank you, ma'am. I apologize.

LDC [MS. BORMANN]: No worries.

MJ [Col COHEN]: Thank you.

[The witness resumed the witness stand.]

MJ [Col COHEN]: Please, sir, have your seat. You are still under oath.

WIT: Thank you, sir.

MJ [Col COHEN]: Thank you.

Your witness, Mr. Connell.

LDC [MR. CONNELL]: Thank you, Your Honor.

MJ [Col COHEN]: You're welcome.

LDC [MR. CONNELL]: Sir, I found my document, and I just went ahead and made a copy for everybody so that we could all look at the same thing. The document that I'm referring to is

AE 628RRRR (AAA), and it is a document released under the Freedom of Information Act in 2016 with unambiguous markings. I would request access to the document camera and publication to the gallery.

MJ [Col COHEN]: This appears to be consistent with 118W. Government, do you agree?

TC [MR. SWANN]: We do, Your Honor.

MJ [Col COHEN]: Okay. You may do so.

LDC [MR. CONNELL]: Thank you.

MJ [Col COHEN]: You may publish to the gallery. Okay. Thank you.

CROSS-EXAMINATION CONTINUED

Questions by the Learned Defense Counsel [MR. CONNELL]:

Q. Sir, you were asked on direct examination about the SSCI use of this phrase, "operational control"?

A. Yes.

Q. Yes. Is it fair to say that the division of responsibilities between DoD and CIA regarding Camp VII is memorialized, perhaps among other places, in a memorandum of agreement?

A. I agree, sir.

Q. Yeah. Thank you. And the title of that memorandum of agreement is "Memorandum of Agreement Between the Department

of Defense and the Central Intelligence Agency Concerning the Detention by DoD of Certain Terrorists At a Facility Guantanamo Bay Naval Station"; is that right?

A. Yes, sir, I acknowledge.

Q. And the -- in the -- just in that first sentence, the memorandum uses the phrase "duties and responsibilities of DoD and CIA concerning DoD's detention"; is that right?

A. Yes, sir. I agree.

Q. And this memorandum of agreement, if you could flip to the back, was signed at the very end of August and very beginning of September 2006?

A. Agreed, sir.

Q. And it was operative during the time that you were commander of ----

A. That is correct.

Q. Yes. And I just wanted to draw your attention to one particular part. Sir, if you could turn your attention to page 7.

A. Okay.

Q. The memorandum of agreement, among other things, states that, "Investigations of or inquiries into allegations of detainee mistreatment that pertain to activities occurring after the arrival of a detainee at GTMO shall be the

responsibility of DoD."

A. I acknowledge.

Q. Was that your understanding at the time?

A. Yes, it is.

Q. And, "Any such allegation shall be reported to the commander JTF-GTMO who shall ensure that it is properly investigated in accordance with law and policy"?

A. Agreed.

Q. Without giving us any details, did that ever happen? Were there ever allegations of detainee mistreatment or -- after arrival at Guantanamo?

A. No, not under my watch.

LDC [MR. CONNELL]: Okay. Thank you, sir.

WIT: Yes, sir. Thank you.

LDC [MR. CONNELL]: Nothing further.

MJ [Col COHEN]: Thank you, Counsel.

Ma'am, your turn.

Can we cut the feed, please.

CROSS-EXAMINATION

Questions by the Assistant Defense Counsel [MS. RADOSTITZ]:

Q. Sir, I'm Rita Radostitz, and I represent Mr. Mohammad.

I want to follow up on that last question first and then I'll get to the questions that I had prepared. Was there

not a report of one of the guards tightening the handcuffs too tight and that person was, in fact, disciplined for that under your watch?

A. So that is partially correct. So there were -- there was an observation from my guard force leadership reported to me directly upon instance that the shackles were tighter than they should be by normal SOP. I -- I believe when reported -- and I did report this is -- to the commander of the JTF, but it was more of an SOP violation rather than an injury or anything with regard to that.

Typically, our SOP said the shackles should be certain tightness, where two fingers could be squeezed between the -- the shackles themself and the skin, and so a certain guard force member was not adhering to that.

So we identified that and we retrained that particular person. And he -- he did not complete the act properly after being retrained, so I asked that he -- he depart, and he did not return after that.

Q. Okay. Thank you. So I want to talk somewhat chronologically, although some of my questions may be a little bit out of chronological order. So I want to talk first, after you became Camp VII commander, you talked about the fact that you were briefed about the new mission that you were

over -- undertaking; is that right?

A. Yes, ma'am.

Q. And you were told at that time that 14 high-value detainees, using the language of the DoD, were going to come into your care?

A. Correct.

Q. And you were provided with a two-page document describing each of those detainees?

A. Yes. We had background information on each one of them, and we had medical information on each one of them; that's correct. Those are two separate documents, if you will.

Q. Okay. And this may be -- this is at first a yes-or-no question. Do you know who gave you -- who prepared those documents?

A. I do not.

Q. You did know that prior to arrival in Guantanamo, that those men were -- had been detained in CIA custody; is that right?

A. That is correct.

Q. Okay. And did you know where they came from?

A. No, ma'am.

Q. And in the information that was provided, you said

that there was some background information and medical information. Did it include the fact that Mr. Mohammad had been sleep deprived for more than seven days; that he had been waterboarded more than 183 times; that his head had been repeatedly slammed against the wall? Were all of those kinds of facts included in that information?

A. Ma'am, I don't recall those specifically. I do recall a description of their current state, any problems that they may be experiencing upon arrival, their overall condition that -- expected when we would first meet with them. One detainee was an amputee, for example. One -- one had lost eyesight in one eye.

So we -- we did have a good summary of the overall condition of them from -- from that broader perspective, if you will. That's what I'm referring to.

Q. Okay. And did that include body weights, for example, that Mr. Bin'Attash was significantly underweight?

A. I don't remember body weights, to be -- I haven't seen those documents in quite some time. I don't remember body weights to be part of that.

Q. Okay. In that information, were you made aware that the detainees had been held in communicado for three and a half years and maybe, for some of them, more than that?

A. That -- that statement was not made to me, no.
Q. Did you know that?
A. No, I did not know that.
Q. Okay. Did you know that they had not been previously held in compliance with the Geneva Conventions?
A. I did not know that.
Q. Do you recall President Bush saying that he didn't believe that the Geneva Conventions applied to these prisoners?
A. I remember this: I remember Department of Defense Directive 2310.01E which guides our activities for detention operations which says, in fact, we -- we do adhere to the principles of Geneva Convention Common Article 3. Those are one of the guiding references, governing authorities for which I was responsible for enforcing, so I know that much.
Q. Okay. And did you have training on what was required under the Common Article 3 of the Geneva Conventions?
A. Yes. I -- we -- I had training, correct.
Q. Okay. So you testified both on direct and on Mr. Connell's cross that you -- that the guards -- the guard force that you were supervising had received training. Is training considered part of operational control or does that fall under a different category?

A. Well, it's an example of the -- the operational control, I believe. So in assuming operational control of those personnel, I was responsible for their training. We did, in fact, conduct training prior to the -- prior to the arrival of the -- of the detainees.

So I was responsible for that. That's -- that's one of the things that would fall underneath the category of operational control, yes.

Q. And was that solely your -- I mean, did -- was -- were any other government agencies involved in what should be included in that training?

A. No, not in this training I'm specifically referring to. The preparation for the mission, detention, safe, humane care and custody, that was solely Department of Defense. That was my responsibility to ensure that those standards were met and enforced.

Q. Okay. So on direct examination, you talked about going on -- during the first week of September, going to the other side of the island and meeting the C-17 flight that came in?

A. Yes, ma'am.

Q. I'm going to talk a lot more about this in closed session ----

A. Okay.

Q. ---- but I just have a couple questions. Did you talk with any of the folks who -- the personnel who were on that flight while you were there?

A. I stood at the ramp of the aircraft. The answer is yes, brief -- brief -- briefly. Just I stood at the ramp of the aircraft when we took custody of each one of those detainees individually and so -- I mean, engines are running, I believe, so there wasn't a conversation going on. It was quick exchanges, transactional, if you will.

Q. Okay. And what were they wearing?

A. The detainees, ma'am?

Q. No, the personnel you spoke with.

A. I do not remember.

Q. Were they wearing military uniforms?

A. I'm not a hundred percent sure that all of them were wearing military uniforms, to be quite honest.

Q. Okay. And when the detainees came off the flight, did they have anything other than the clothes on their back?

TC [MR. SWANN]: Your Honor, he can answer that in a closed session.

MJ [Col COHEN]: Okay.

ADC [MS. RADOSTITZ]: Okay.

A. So that process would work that -- it was -- it would be the doctor that would first talk to him about that, the harmful effects of going without nourishment and -- and the concerns that -- that the doctor would have when -- and, you know, we would watch for body mass index and -- and see that -- if there were any potential harmful effects coming forward.

But it would typically be the doctor that talked to them, not me, if they were missing meals like that. And -- and potentially, the psychiatrist as well; not just the internal medicine physician, but the psychiatrist.

Q. Okay. So you talked earlier with Mr. Connell about that there were two types of meetings every day. There was the, for lack of a better word, the lower-level meeting and then the higher-level meeting?

A. Yes, ma'am.

Q. And were there written agendas for those meetings?

A. No, ma'am. Typically -- typically, I would -- I would jot some notes down. I knew -- I would structure the meeting. I was responsible for both of them, if you will, and so I would structure them with some notes of my own on what needed -- what I was going to report, what changes came about.

I knew what the -- I knew what the commander was

interested in, so -- and I knew what -- what he would want to hear about, and that's just about everything that was going on there.

Q. Okay. And what happened to your notes?

A. They would -- they'd be left at Camp VII. There's not -- I wouldn't have taken them with me afterward.

Q. Okay. And if somebody, for whatever reason, who was a -- normally attended those meetings couldn't attend, how would that person be notified of what was reported during a daily briefing?

A. Okay. So, for example, if the -- if the internal medicine doctor wasn't there, I would have the senior -- senior nurse or a senior corpsman who would sit in on the discussion, and then he -- he or she would be responsible for relaying that back to the doctor.

Q. Okay. And what about if you couldn't attend, how would you be informed of what -- not so much what information was being pushed out, but what information was coming back?

A. I had a deputy who would sit in for me, and he would bring that information back to me, or one of my other members of my command element.

Q. Okay. So you testified about -- in those photographs about the fact that there were two doors to each cell and that

it -- you made the recommendation that the outer door be removed like it was in Camps V and VI; is that -- am I right in remembering that?

A. That's correct.

Q. And would you consider that an operational decision, that you were in operational control; and doors, is that an operational concern?

A. I believe it was, yes.

Q. Now, you also talked about that one of -- I forgot to ask this. One of the people who attended the daily briefings was the SJA?

A. Correct.

Q. And at that time, or during your period of time there, was there an SJA that was specifically assigned to Camp VII, or was this the SJA over all of Guantanamo?

A. This was the SJA over all of Guantanamo.

Q. And there wasn't -- now we have one that's specific to Camp VII that ----

A. Right. No, he had both -- he wore both hats during that time period.

Q. Now, Mr. Swann talked to you a little bit about a November 2007 return of an FBI agent to talk to Mr. Mohammad.

A. Yes, ma'am.

DIRECT EXAMINATION CONTINUED

Questions by the Trial Counsel [MR. SWANN]:

Q. And before we broke I was asking you certain questions about the operation of the camp. Let me read a statement and you tell me whether it's a true statement or not.

A. Okay.

[redacted]

LDC [MR. CONNELL]: Your Honor?

MJ [Col COHEN]: Counsel.

LDC [MR. CONNELL]: I object. This is just a strange way to lead.

MJ [Col COHEN]: Yeah, Counsel, is -- where are we going with the line of questioning? I guess ----

TC [MR. SWANN]: That's the last question in this line of

questioning.

MJ [Col COHEN]: All right. I'm going to allow this one so we can move on. You may answer.

[redacted]

So I -- I do believe there's two separate missions that went on there. I can't account for why that statement was made. Again, OPCON is traditionally a military term used by military -- in the military jargon to define a relationship between forces and the -- and the -- and the commander of -- of those forces and how they interact and their responsibilities. There's OPCON, there's ADCON, TACON. I'm not going to go down those roads.

But OPCON, to me, as I've described, was OPCON over forces, over forces that are accomplishing a mission, specific

mission. The detention mission was responsible for -- was the responsibility of Task Force Platinum. The commander of Task Force Platinum had OPCON over all those forces that conducted the detention mission.

[redacted]

[The R.M.C. 806 session was called to order at 1253, 4 November 2019.]

MJ [Col COHEN]: The commission is called to order. Parties are present.

Intelligence Community Standard 705-02 ----

LDC [MR. SOWARDS]: Sorry, Your Honor. May I have that again? I beg your pardon.

MJ [Col COHEN]: Yes. Intelligence Community Standard 705-02 signed by the Director of the National Counterintelligence and Security Center dated 12/22/16, paragraph 4.a. says, "In circumstances where a SCIF is under a co-use agreement and/or personnel are not briefed into all the respective programs, procedures shall be instituted by the host and tenant CSAs to prevent unauthorized access to that specific compartment, subcompartment or program information."

And then I don't have -- I haven't had a chance to look this up yet, but it says, "Physical, visual, and acoustic access to the comparted information by unauthorized personnel shall be controlled by the security measures identified in IC Tech Specs, Chapter 2 Section C."

And then I was -- I was looking to make sure. In addition, with respect to visitors, the National Counterintelligence and Security Center put out technical

MJ [Col COHEN]: You're back on the stand. We're going to conclude your testimony this afternoon, or at least the classified session this afternoon. Please have a seat. I remind you that you're still under oath.

WIT: Understood, sir.

MJ [Col COHEN]: Thank you.

CROSS-EXAMINATION CONTINUED

Questions by the Learned Defense Counsel [MR. CONNELL]:

Q. Sir, the military commission just thanked you for your patience, but I just want to say that I'm pretty confident I'm speaking for everybody when I say how sorry I am that you have been kept waiting for seven hours today. I know that your time is important and valuable, and I just want to let you know that the -- the question came up of what we were going to do now and we uniformly said, "Let's get this over with. Let's do this."

A. Thank you, sir. Appreciate that.

Q. Sure.

LDC [MS. BORMANN]: I'm sorry to interrupt, but Mr. [redacted] has rejoined us.

MJ [Col COHEN]: All right. Thank you, ma'am.

[redacted]

say one week after I had been briefed in this we began -- myself and my operations officer began looking at how we would adapt those -- those SOPs to conform to the new facility.

[redacted]

WIT: Thank you, sir.

MJ [Col COHEN]: I handed the witness a bottle of water.

LDC [MR. CONNELL]: Sure.

[redacted]

A. So I remember the site manager at the time, and this is -- the first site manager wasn't there very long. I believe he was an interim until the longer-term one arrived.

[redacted]

[redacted]

Q. And was it your understanding that Admiral Harris was -- or -- or Commander McCarthy was passing down instructions from higher? It wasn't their independent judgment; is that right?

A. Yeah. To the best of my knowledge, it wasn't independent decisions that were made at the JTF. Those came from the Pentagon. Correct.

[redacted] It wasn't that first day when we met at Camp VII and talked about the broader, overarching responsibilities. So it was a little closer to that.

So our dialogue picked up the pace with OSD detainee

policy. As we got closer -- "we" meaning myself, Admiral Harris, Captain McCarthy, and the Deputy Commander, Brigadier General Leacock, that we -- we were the ones that were read into this and understood what was happening. [redacted]

[redacted]

If Admiral Harris or Commander McCarthy at the time knew about those recommendations coming, we learned them from OSD Detainee Policy. If those decisions were made in Washington, D.C., it was not obvious to me, at least, to -- so that was not the role of the site manager that I interacted with at the -- at Camp VII.

[redacted]

Q. It means at a much higher interagency level?

A. I believe so. Because at my level, I didn't advise him on how to protect national security information. I don't mean to sound facetious, but -- and he didn't tell me how to do the detention operations. [redacted]

Attachment H

The commission is in recess.

[The R.M.C. 803 session recessed at 1432, 03 November 2021.]

[The R.M.C. 803 session was called to order at 1456, 03 November 2021.]

MJ [Col McCALL]: The commission is called to order. Parties are again present as before. Mr. Mohammad is present. The other accused are absent.

All right. We'll go ahead and move into AE 779. This is Mr. al Baluchi's motion to compel discovery regarding interagency processes to obtain statements from the defendants.

LDC [MR. CONNELL]: Thank you, sir. I have one housekeeping matter before that if ----

MJ [Col McCALL]: Yes.

LDC [MR. CONNELL]: You know, there are a lot of -- a lot of pipes that run around here, and one of those pipes is super important because it's the reason that this is a public trial, and that's the pipe of audio and video from here in the courtroom on the delay ordered by the military commission to the gallery.

Over the break I was advised that at the last -- when we started the last time, the audio was off for several minutes, and that they could only begin to hear once

Mr. Gleason was arguing. And that they figured out what was going on, but it was -- it was a problem. And that problem is compounded by there's a rule, and the military commission might know about it or not, that no one in the gallery is allowed to communicate with anyone in the courtroom. And there -- I understand the original intent of that room -- rule, but it was probably not to let the judge that -- know that the audio was not coming through.

So I don't have a proposed solution yet. I will be thinking about it. But I did want to let you know about the problem. You know, yesterday I brought up the comms check issue and everything checked out. I probably should have done that today because there was an issue, but I just wanted to let you know and something to be cognizant of for the future.

MJ [Col McCALL]: No, I appreciate you bringing that to my attention. And I'll also give it some thought on how we can make sure that if that feed gets lost or, you know, again, we see this, right, with the IT that we can be let known here in the courtroom so we can pause.

LDC [MR. CONNELL]: Sure.

MJ [Col McCALL]: Because it is important. It's an unusual case. It's a small gallery, but it's still important.

LDC [MR. CONNELL]: Yes, sir.

MJ [Col McCALL]: All right. If you could hold on one second, Mr. Connell.

LDC [MR. CONNELL]: Of course.

MJ [Col McCALL]: All right. Proceed.

LDC [MR. CONNELL]: Thank you, sir.

For the military commission is AE 779 regarding motion to compel information about interagency processes that were used to obtain statements from these five defendants.

You know, there's been some observations this morning and it -- and especially when we cluster motions like this, themes develop. But this goes in a different direction, right? This is not a question of friction between the parties where we couldn't work out something. This is just a disagreement among the parties on the scope of relevance, and particularly on the scope of the military commission's order in 538AA.

And so I -- I suggest that it's entirely appropriate for -- for sort of bring to the military commission to resolve this question because sometimes people disagree. And in our view, this issue begins and should probably end with the text of AE 538AA, 561T.

538AA arose out of a long series of arguments about the FBI/CIA/DoD, and I'm not going to rehearse the -- what

happened. And as counsel for the government correctly noted in the last argument, sort of it -- it sort of kicked off with 538C, but then everyone agreed ----

MJ [Col McCALL]: And Mr. Connell, again, and perhaps counsel that have been on this case longer than I have realize that I'm probably interrupting more often as far as the interpreters letting us know that -- for us to slow down. So the interpreters often use lip reading to assist in ----

LDC [MR. CONNELL]: Ah.

MJ [Col McCALL]: ---- interpreting. And because we're wearing the masks, they've let me know that it makes it difficult. So without going unnaturally slow, if we could just all be cognizant and try to go a little bit slower.

LDC [MR. CONNELL]: Thank you, sir. I usually get into trouble when I read, but when I argue, I don't usually get into quite as much trouble. But I -- I have nothing but immense love and respect for the interpreters and I want to do everything that I can to help them out. So I had not thought about the lip reading aspect.

So in this long series of arguments in 538 -- that arose out of 538C, one thing that became clear is that there's simply a difference among -- I don't want to speak for anyone else -- I get in trouble when I speak for anyone else on the

left side of the room -- but between Mr. al Baluchi and the government on the question of the appropriate scope of discovery outside of Echo II.

You know, the government articulated this morning that it believes that the question of voluntariness sort of begins when you enter Echo II and leaves -- and ends when you leave Echo II. We see it as a much broader inquiry, and have articulated that throughout the military commissions proceeding since the filing of the motion to suppress. And, with due respect to my colleagues on the other side of the room, we have won the issue.

538AA represents a policy determination by the military commission that everything related -- that within the -- within the scope which is established there, which has to do with, you know, reasonably known to the prosecution, the ordinary standards. That text is, the government shall produce all documents that are known or reasonably should be known to any government officials who participated in the investigation and prosecution of the case against these five accused that reasonably tend to show cooperation between the CIA, FBI, and Department of Defense in the effort to abstain -- obtain statements from these five accused.

And so it's probably clear to you, but just in case,

you know, it -- that was -- we framed that up. We asked for that ruling because we were not getting anywhere with the -- the prosecution and we were not getting anywhere in the question -- you know, we tried some -- some more granular approaches, right? We had -- we met and conferred. We established our, here's our six highest priorities. You know, if you give us those, maybe we'll back off on some -- we tried negotiating it.

And the government negotiated in good faith. I'm not -- I'm not saying that they didn't. But we tried negotiating it. And of those six priorities, only one of them was ever turned over to us. And so that wasn't really working, so the meet and confer approach wasn't working. And so we asked the military commission, listen, can you settle the principle? And then maybe we can -- maybe we can use that to work from there.

And the government -- the military commission did settle the principle. Not just here in 538A, but again and again and again in the testimony of the witnesses. Because on, I believe, 60 occasions the government made relevance objections and on almost all of those occasions, and this is all laid out in the 824 series in granular detail, but on almost all of those occasions the military commission ruled

the defense has a right to prove integration or cooperation between DoD and CIA and FBI. And so questions or documents that are related to that are relevant in that evidentiary context and here in the discovery context, which is very closely aligned.

And -- but it was not -- it was not a complete victory for us. I mean, there's the paragraph c. in the ruling, 5.c., which denies something that we were asking for. And we're going to talk about that more when we get to 780 because 780 is about what -- what basket does certain information fit into. Does it fit into the b., must produce basket, or does it produce -- fall into the c., don't have to produce basket?

After having that issue resolved, unfortunately 538AA resulted in exactly -- in the production of exactly zero additional discovery. What we hoped would happen was that the government would take this new expanded standard, which was much, much broader than, you know, what they continued to articulate even today, much, much broader than what they thought the standard was, in good faith I'm sure, and that they would go back and say, okay, look, we need to -- we need to take another approach to this, go through this information again, produce what falls -- you know, the delta between their previous view of relevance and 538AA.

And they can speak to their processes. I -- I don't impugn their processes in any way. But whatever their process was, it was not effective at producing additional discovery because no additional discovery was produced after 538AA. The only continuing discovery issue is the one that you addressed in 538RR about the redactions in the intel requirements.

So, you know, I mentioned earlier that I think that there are always a couple of questions that the -- that any judge wants to know on a motion to compel, which is, number one, what did you get already? Number two, how do you know that something else exists? And number three, if you get that something else, what are you going to do with it?

And so there are four categories. I'm really going to collapse them to three for this argument, but there are four categories that we laid out in the motion of interagency process documents that we know exist either through Freedom of Information Act or some other way.

So I'd like to begin with category one, which is interagency coordination on the denial of the rights to prompt presentation, right to counsel, and the right to remain silent. Just a little while ago in AE 737, we talked about general FBI policy, mostly laid out in a couple of key documents. We talked about the redacted policy in FBI-22700,

and I suggest what I think is occurring is that the redacted policy in FBI-22700 represents their unilateral approach, right? FBI is fundamentally responsible for law enforcement within the United States with -- and whether we include Guantanamo in the United States or not, there is fundamental FBI mission at Guantanamo that they'd been carrying out for four or five years by this point, and -- you know, so that their general counsel's office probably thought we need -- we need some policy, and so that's why we're laying out FBI-22700.

But given the persistent interests and involvement of the CIA and other agencies, you know, it became clear that the FBI could not decide on its own what the policy was going to be. For one thing, they weren't FBI prisoners. You know, if they were at MCC New York, they could go down there and pull them out whenever they wanted and talk to them; but they're not. They're in a DoD facility at Camp VII under the operational control of the CIA, and so there's multiple agency partners that they have to collaborate with.

And the government's brief argues that -- like, one of its main arguments is of course the interagency process comes into play, which makes complete sense to me. Of course the interagency process comes into play. And the whole of

government approach for extraction of -- of statements from these defendants is, in our view, a reason why more discovery should be produced, because there are more hands in the pot, than a reason that it should not be produced. Like, why would we choose FBI as the unit of we're only going to produce information from the FBI and their efforts to abstain -- obtain statements and -- and not produce them from DoD or CIA who also had a hand in it?

You know, it seems somewhat arbitrary if we're going to choose one -- in that situation, you can't even say, well, only the FBI was in Echo II because DoD was also in Echo II, right? Mr. al Baluchi was interrogated by three people, two FBI and one from CITF, the -- from out of Army CID originally.

And so, you know, it's been an interagency process to obtain statements from the beginning and that's why I think Judge Cohen put that "to obtain statements from these five defendants" language in 538AA, which is that the effort to obtain statements is the linchpin, not the individual agency that is -- that is -- has come into play.

So what we do know is that there is an interagency meeting and -- excuse me just one second. We do know from Freedom of Information Act documents that there's an interagency meeting on 29 November of 2006. And there are two

documents that have been released relating to that. One of them is found in the record at AE 538C Attachment E. It is a document which has FOIA markings under it and, thus, comes under AE 118W (Amend). And if I could have access to the document camera and permission to publish to the gallery.

MJ [Col McCALL]: You may.

LDC [MR. CONNELL]: Perfect. So the first thing that we know that we as -- as Mr. al Baluchi's team can prove exists, this document is given for context. Like, I'm satisfied with the FOIA production of this document. I don't need anything out of this Attachment E. But it provides an agenda for an interagency meeting. And by the way, we interviewed the -- the person whose name is on this document and she didn't remember anything about it, so -- so we -- we have done the other ways that you could get information out of this.

And -- but what the agenda said was that there were interagency decisions needed regarding the 14 high-value detainees, which includes Mr. al Baluchi, of course, and under the heading Questions That Must Be Answered Soon, the -- interagency body was going to consider -- and I'd like to draw your attention to paragraph 4, is who should get permitted to have access to the detainees now, how should such access be regulated, and by whom?

There's a question of a joint FBI/CITF team, which has obviously been in November under consideration, whether other intelligence or law enforcement agencies would have access, including foreign ones, and then whether there would be counsel access, including defense counsel or habeas counsel.

So when I talked earlier about the -- the question of due process as a factor that -- that the panel brings into -- you know, is really interested in, there was a very intentional decision -- interagency decision-making process about the question of whether we were going to give access to counsel to prisoners who we intended to prosecute in a -- in a court of law. And that -- the second thing that we don't know, we don't know if anyone sent in any policy paper. The government knows -- knows, I'm sure, that they looked into this question from ODNI.

But at E -- Attachment F, we have the second document which was released under Freedom of Information Act, which is a memorandum for -- a partially redacted memorandum for record -- sorry. My glasses are fogging up with the mask.

MJ [Col McCALL]: That's fine.

LDC [MR. CONNELL]: And on the second page of the memorandum for record, we have some important redactions, especially regarding to access to the 14 HVDs. Now, the first

sentence on that paragraph says that all representatives agreed that a law enforcement team should be allowed to conduct a, quote, historical narrative interview of each of the HVDs.

Now, I'll tell you that we found this very interesting, and one of the things that I -- I think is important to demonstrate to the military commission is our due diligence in seeking other sources of information, which is why I told you that we interviewed the person whose name on this document, but we also filed a Freedom of Information Act request for historical narrative interview because that's an unusual way to describe an investigation. And -- and so with both DoD -- with DoD, CIA, and FBI, all of which returned that there were zero documents other than this one, which were -- referred to historical narrative interviews.

So we've never come to understand what a historical narrative interview is, how that's different from the understanding that Special Agent Fitzgerald testified to, which was that the job -- their job was to put together prosecutions if they could, like any law enforcement effort.

Then there's a redaction and then the -- then there's an element -- the next sentence says: DoD and DoJ lawyers agreed to seek authorization for these interviews in the next

week. That really goes to the question of -- of the interaction of DoD and DoJ, which the parent of -- of FBI, and -- and CIA. Because I'm -- I'm not sure from whom they are seeking those permissions. We know there's CIA operational control. It would make sense there would have to at least be CIA consent to an interview and -- and I -- then we have a question of what about counsel? Requests for access by other groups such as -- blank -- military COCOM investigators and NGOs will be determined by the prosecutors on a case-by-case basis -- redaction. So I think that probably these redactions somewhere -- because we know from the agenda they were considering the question of habeas and defense counsel, I suspect that somewhere under these redactions is a question of what are we going to do about access to counsel by defense and habeas because otherwise, it would not -- they would not have covered -- they cover everything else that they described in the agenda.

Now, the last thing that I want to say is where this document points us for additional information. And in the -- the last sentence about military commissions proceedings, there is a reference in the first sentence to an NSC, or National Security Council, review effort. This is -- this is a deputies committee, right? When you look at the people who

are on the distribution list, these are deputies. But something as important as this, it makes sense that it was probably decided by the National Security Council and we -- you know, so that's the other place that -- just these documents, we know that an NSC review effort exists because it's -- it's documented here in this. And that's not something that we have received either a 505 substitution for or any kind of -- of document.

Now, what will we do with it when we get it? This is what I began to describe to the military commission earlier, that there's an arc or that there's a series of decisions that are made that ultimately mean that the FBI agents on the ground are not able to follow the ordinary policy that they themselves have followed hundreds of times of advising of the right to counsel, and advising of the right to remain silent, including what happens if you don't exercise your right to remain silent.

And I mentioned earlier the -- the clemency letter in the Khan case and they actually specifically mention the question of access to counsel. In the first justification for recommending clemency, the panel noted that: Mr. Khan has been held without the basic due process under the U.S. Constitution. Specifically, he was held without charge

or legal representation for nine years until 2012.

And the -- you know, one of the things that I think that that suggests -- should suggest to the military commission is that everyone knows how important access to counsel is. You know, Article 31 is baked into the military -- the military gave Miranda warnings before Miranda. Article 31 was put into the -- into the UCMJ in its creation in 1950. I mean, it -- it is a fundamental part of military and panel thinking that, yeah, sure, if you're going to get incriminating statements from someone, you observe their rights and it's -- it's not just a, you know, sort of idea that is interesting only to defense lawyers. It's ones that -- that is integral to a presentation to a -- the panel about what actually happened here.

So the -- the other point that I want to make about this high-level interagency process is that it had an actual impact on what the individual agents did, not just the policy that came out on January 10th. But Special Agent Perkins testified -- and this is at 20 September 2019 at 26647 to 48. She testified that she spent a, quote, couple of months reviewing CIA material as part of the High-Value Detainee Prosecution Task Force while, quote, interagency high-level government, end quote, discussions were ongoing about access

to the prisoners.

So it's at -- there's actually been, you know, a -- a kind of a small reference, but there's already been a reference to this in the testimony of one of the FBI agents who interrogated Mr. al Baluchi about -- that -- that she knew about this high-level interagency process that was going on and was waiting for access to Mr. al Baluchi and Mr. al Hawsawi and others. And during that time, spent that couple of months reviewing the CIA TD-314s and CIRs and other documents that had been circulated by the CIA and placed in something we're about to talk about called buckets.

All right. And that actually brings us -- oh, excuse me. The -- the last observation that I want to make about category one is that the government has -- those two documents that I just showed you are the -- are the sum total of what we know about this. The -- and they both come from Freedom of Information Act requests. The government has produced zero evidence on the interagency policy process. They did produce the 10 January 2007 memo, which is the end result, an FBI general counsel document. But the involvement of DoD and CIA, this purported DoD policy not to give Miranda warnings, which we saw referred to in 22700, and CIA involvement of whatever type, the government has produced zero evidence about that.

Because that's been their consistent position is that it's not discoverable, it's not relevant, and so they shouldn't have to produce it.

So that brings us to the second category, which is interagency coordination on creation of the defendants' -- the defendant buckets of CIA information for use by the High-Value Detainee Prosecution Task Force. And there's been no discovery on this topic either, but there has been substantial testimony about it. So I'd like to review what the sworn testimony has been about that. And I'll give you citations, too. You can look back at the exact quotes.

Special Agent Fitzgerald, who was one of the three agents who interrogated Mr. al Baluchi here at Guantanamo, testified about the creation of a High-Value Detainee Task Force -- High-Value Detainee Prosecution Task Force in September 2006, with the goal of preparing prosecutions of the high-value detainees. His testimony about that topic is from 18 September 2019 at 22887 to 912.

And he explained -- he testified at -- in that same area that the High-Value Detainee Prosecution Task Force is a joint effort of the FBI, the CIA, the Criminal Investigative Task Force, which is put together by the DoD, the Office of the Chief Prosecutor, and to a lesser extent NSA. So there

were four -- sort of four full partners and one junior partner.

The government has invoked national security privilege over many -- inquiry into some aspects of the HVD PTF, like its location, where it worked, how it worked, and specifically the identity of the CIA officers who were assigned to it; but it has allowed other questions which gives us some -- it cuts out a lot of information that we don't have access to, but it gives us some.

And according to Special Agent Fitzgerald, the FBI element of the HVD PTF was supervised by Supervisory Special Agent Joan-Marie Turchiano and Special Agent Grant Mendenhall. And then there were about 15 special agents who were involved, including himself, Special Agent Perkins, Special Agent Pellegrino, Special Agent Gaudin, Special Agent Butsch, Maguire, and Drucker, and two intel analysts, Brian Antol, and Kimberly Waltz.

Special Agent Fitzgerald testified that the HVD PTF used a closed computer system with a folder for each prisoner that included FBI records, CIA cables, and other CIA records, including TD-314s. And that specific element is found in the transcript at 18 September 2019 at 25909 to 10.

And he didn't give much detail but Special

Agent Perkins did. She testified right after Special Agent Fitzgerald and she called those buckets. Buckets is her word. And she testifies about the buckets. And on 20 September 2019, between -- and 26640 to 26658, she testified that the buckets contained, quote, CIA reporting that had been disseminated out about a detainee or from a detainee, end quote. And that's at 26642.

The reason why I want to say that's particularly important is that it includes both from the individual detainee, Ammar al Baluchi, a senior al Qaeda detainee said blah, blah, blah, blah, blah, but also about him. And when we get to 780 and 781, one of the things that we're going to be talking about is the significance of reporting about a detainee from other detainees and how the government used that to obtain statements from these defendants.

So that was also a distinction that was powerful to Special Agent Perkins, because she testified not just that there was individual reporting from each detainee but also the reporting about those detainees from the CIA.

The -- she also talked about stacks. She said, in addition there -- that there was a closed computer system that had the buckets. It was basically a folder. It wasn't -- it wasn't easily searchable. It -- it wasn't a database that you

type in a name to. It was document 1, document 2, document 3 and you could work your way down, which is why it took her and Special Agent Fitzgerald a couple of months to work on it.

But she also talked about stacks, which she said there was an eight- to ten-inch stack of printouts of CIA reports on each detainee that she was provided -- each of the four that she was working on that she was provided. And she differentiated those from the buckets. She said, that's not the same information that was in the buckets. It came from a different CIA source. She thought perhaps it was printouts from computers that had been seized, and so she said it was a different set of information. It was not just the buckets printed, it was a -- a different stream.

And the government has produced exactly zero documents about the existence of the High-Value Detainee Prosecution Task Force and the buckets and the stacks of documents that Special Agent Fitzgerald, Perkins, and others reviewed.

So these -- that brings us to the question -- or that's how we know that this information exists. And that brings us to a question of what are we going to do with it, which is, these buckets are critical to one issue, which by itself -- even separate from all these other things we've talked about, but by itself could lead the military commission

to grant Mr. al Baluchi's motion to suppress. And that is, the dispute over Special Agent Fitzgerald's pre-interrogation access to CIA material about Mr. al Baluchi. That's -- and so I'm going to review sort of what that dispute is, what the sworn testimony has been about it.

On 7 December of 2017, Special Agent Fitzgerald testified that he did not get access to the closed CIA system that we just talked about, which contained the buckets, until 2007. And obviously, the interrogations took place at the beginning of 2007, so that was pretty significant. And that led to the only information that the government has ever revealed about the buckets.

On direct examination, the government asked Special Agent Fitzgerald about is -- was that true? Was it true that you didn't get access to those buckets until -- to that closed system -- they didn't even mention the word "buckets" -- but to the closed system until 2007? And that took place on 16 September 2019 at 25462.

And Special Agent Fitzgerald testified that he had asked -- he had inquired and that he learned that he got access to the closed system on 17 October 2006, which fits in perfectly with Special Agent Perkins' testimony that they spent a couple of months reviewing this material.

And so then the government asked Fitzgerald a question on direct examination. I want to quote it because it's important. He said: Do you recall obtaining access to statements made by Mr. Ali while he was in CIA custody? And that critical question is at 16 September 2019, 25547.

And the answer was, and I'm going to read it verbatim: I don't recall, like, getting a specific access regarding Mr. Ali of a CIA database circa 2003. That's "sic." I mean, he says "2003." Again my expectation and best recollection is I would have had some of those, at least some of those statements available to me, and likely read some of the statements at the time, but I don't -- I don't know that -- if I'm answering the question correctly, that I had formal access to a CIA system of records at that time.

The reason why I want to quote that is you can take that sentence -- I mean, you decide what that means. Is that a denial? Is that an evasion? I'm not certain. But what we did follow up on that, that -- the testimony of Special Agent Perkins who testified that she and Special Agent Fitzgerald and other HVD PTF members worked in an offsite location in Virginia, reviewing the buckets in late 2006, and that Special Agent Fitzgerald in -- specifically reviewed the bucket for Mr. al Baluchi, the CIA -- the bundle of CIA

documents. And her testimony to that came at 20 September 2019 at 26650.

The reason why I say that's so important is if the government produces this information and we're able to get Special Agent Fitzgerald back on the stand and have something to impeach his claim with -- you know, it's difficult to impeach one witness with the testimony of another witness. You can't typically do that. But if we have something, some explanation of how these buckets worked, what his access was, these documents that clearly exist or even what was in the buckets other than general description of TD-314s and other CIA -- CIA reporting from the black sites, then we can impeach him, right?

And if he ultimately admits, not just I had some access and I read some documents, but if he admits, yes, I spent the two months prior to interrogating Mr. al Baluchi reviewing CIA documents, then it's essentially game over on these -- on these statements, right? The claim -- the government has retreated over time on the claims that it makes from beginning with the clean team statements that Judge Parrella, like, framed the 524 inquiry as to whether the clean team statements are -- are admissible or not, using the name "clean team," but the government has retreated over time.

And in this document, you know, interestingly, in 2019, the -- the government starts with its, okay, yes, it wasn't a clean team. It was a whole-of-government effort. We all -- everybody mobilized to try to extract statements from these defendants, which is -- you know, it's a -- it's a pivot, which the people are allowed to pivot their -- their approaches, but what they're really down to is Special Agent Fitz -- yes, Special Agent Perkins knew everything that she spent months and months reviewing, all this CIA documents about Mr. al Baluchi but she wasn't the one asking most of the questions. She only asked some of the questions. Special Agent Fitzgerald asked most of the questions and -- and he doesn't recall having looked at all the CIA material.

If -- if it turns out that what I -- what I have been saying is true, then there's very little room for the government left on this motion to suppress because -- because if Special Agent Fitzgerald acknowledges, yeah, that's what I did, I spent a couple of months from 17 October 2006 until the middle of January reviewing CIA documents about Ammar al Baluchi, then it's pretty much -- I don't see where there is left for the government to go. I mean, this -- this is really critical material.

But to be honest, it's already been ordered, right?

The CIA buckets, the CIA stacks, the coordination of DoD, FBI, CIA, has already been ordered in 538AA. And, you know, when I -- when we -- when we got the order in 538AA, I thought this whole buckets and stacks problem was going to be solved and that the government was going to produce something like a substitution, a list that didn't give us the underlying documents, an access log from Special Agent Fitzgerald, something. But nothing. It's been crickets since then.

And the -- even though the military commission has already ordered the production of this material, the government hasn't produced it.

MJ [Col McCALL]: Well, and -- Mr. Connell, let me stop you there, because that was one of my questions coming into this and -- normally, as you've seen my approach on these, a lot of times I want to let y'all kind of lay this out for me before I start to ask questions. But, I mean, my read of your motion is, I mean, the -- your view is the material that you're requesting has already been ordered.

LDC [MR. CONNELL]: Yes, sir.

MJ [Col McCALL]: It's 538AA, that it falls within that.

LDC [MR. CONNELL]: Yes, sir.

MJ [Col McCALL]: All right. And so the question of whether or not it would -- what you've been going through now,

which is helpful for me to, like, maybe lay out what the reasoning was under 538AA, but that's already been decided.

LDC [MR. CONNELL]: Yes, sir.

MJ [Col McCALL]: Okay. And the only question is -- and I appreciate that you're -- part of your argument has been showing again what -- why you believe that there is more out there.

LDC [MR. CONNELL]: Yes, sir.

MJ [Col McCALL]: All right. I just wanted to make sure I was understanding that. Go ahead.

LDC [MR. CONNELL]: Yes, sir. And I'll just go ahead and answer the unarticulated question that follows up after that which is the military commission ordered, what do you want me to do about it, Counsel?

And, you know, in hostilities where we have a very similar structure, we've taken -- we filed a motion that -- that we think there should be an exclusion of the -- of the government's hostilities arguments because -- evidence because they have not produced the -- what the military commission has ordered in that situation.

I leave it to the military commission whether we're to sanction -- in sanction territory yet. To me, what our actual request for relief is, is that I think that there should be a

highly specific order for production of these four categories of information that we asked for in the -- in the -- the motion. And the reason for that is because 5 -- the reason why in my personal opinion, or team opinion, that we're not at sanctions territory yet, because 538AA was a global approach, right? We asked the military commission to set broad outlines. The military commission did set broad outlines.

And I think the government has -- you know, could say that if they were sanctioned at this point, we should have had an opportunity to -- one more opportunity to comply, and I think they should have one more opportunity to comply. And that's actually what I'm asking for, is a specific order, you know, saying, look, 538AA says what it says and this information that's sought in this motion falls under 538AA. You know, produce it or we'll see what happens, right? I mean, that's really what it is.

And I think a highly targeted order would make it easier ultimately for us. If the government -- they may invoke national security privilege, right? That's one of their options. That has consequences, but that's one of their options. You know, the -- there's always the disclosure -- disclose or dismiss question for the government. And 949p-6 includes sanctions other than disclose or dismiss, right?

There are other sanctions which are included there in the statute which might come into play. They came into play in the -- in the 524 series. That's what military -- the military commission issued as a sanction there.

And so I think a highly specific order would be appropriate because it would let -- it would frame up for the government their decision that they have to make of are we going to produce relevant discovery or are we going to pursue some other remedy that they have available to them?

So the last observation that I just want to make on category two is that the -- the military commission has really ruled on the relevance of these specific things multiple times. You know, take the buckets, for example. When I started asking about the buckets, the military -- I mean, the government objected and said it's outside the scope of the -- of the hearing. It's not relevant.

And on all, except one point, the military commission overruled them repeatedly saying this goes to integration of FBI and CIA in a way that's relevant to -- I'm not saying that defense theory going to carry the day, but it's at least relevant to the defense theory, it's a viable theory, and I'm going to let them explore it.

The one place that the military commission sustained a

relevance objection on this question was on the operating system of the closed system.

The -- I asked a question which included is it like an ordinary Windows-type system? And the military commission sustained an objection saying that's too much into the technical details. I moved on. I got the information that I actually wanted, which was that it was folders as opposed to a searchable database, and everything was fine. But that's the only place where the military commission said, no, this information is not relevant.

So really -- not only has the military commission already adjudicated the scope of discovery in this area, it's really already adjudicated whether this information about the buckets, for example, and the interagency process falls within the scope of relevant information because it came up a whole bunch of times already.

And so I think that the kind of order that I'm asking you for, the kind of specific order, is -- almost adds nothing to the jurisprudence that the military commission has already laid out on this topic, but it does add the question of framing it up cleanly for the government so they can decide how they want to respond.

So the third -- I'm going to collapse my third and

fourth categories, which are -- which are closely related. And we now come to -- this is the first time this has come up, but I have to explain a process that a military commission has for public display of information. We've talked about 118W (Amend), but there's another process the military commission has in place, which is that if we want to use, for example, a slide that we've created or -- or -- or a transcript or a document off of mc.mil, any document that we want to use that doesn't fall within 118W, more than at least seven days in advance of travel to Guantanamo, we have to take it to the CISO.

And in this situation, I prepared a slide seven days in advance of travel. I took it the to CISO. The CISO immediately submitted it to the SC/DRT for review. And now, nine days after it was submitted for -- for SC/DRT review by the CISO, they have not come back with an answer as to whether it is -- it can be displayed or not. I -- I made it in good faith thinking that it was unclassified. I don't -- no one has suggested to me that it's -- that it is anything other than unclassified. But the rule is that I can't display to the gallery or, you know, the public, such as they are, unless we have an approval back in this process.

So what I'm going to do is I'm -- with -- with that

understanding and over my objection, the -- I'm going to ask the military commission for the feed from Table 4 to display my slide, and that I will ask that it be displayed to the parties and the court only and not to the gallery.

MJ [Col McCALL]: And I'll look into the background on why that took so long, but, yeah, for -- at this time, you can publish to the commission and the counsel.

LDC [MR. CONNELL]: Thank you. And for the record, Your Honor, I'm showing AE 779E. And this is the -- the third and fourth category which I'm combining. The third category of -- of interagency process that is relevant to the attempt to extract -- obtain statements from these five defendants that falls within the scope of AE 534AA.

And that's to explain the structure of governance, if you will, of Camp VII. And I'll start at the bottom. We know that there was a Camp VII commander who was on the DoD side and that worked at Camp VII and had control -- had command over the people who worked there. We know in unclassified testimony that the guards at Camp VII wore military uniforms but were not members of the military. And -- and we know that the SSCI concluded that there was CIA operational control over Camp VII.

Now, yesterday we spent a fair amount talking about

daily site reports and we know that there was someone who prepared -- you know, from the CIA who prepared a daily site report. The government has neither produced -- has -- has invoked national security privilege over the identities of those persons. And so the bottom part of this slide describes that governance structure. There are some -- there's person or persons on the CIA side and we know there's Camp VII commander on the DoD side.

Now, how did -- those people -- the Camp VII commander testified was that he was under the command of the -- of the JTF commander and that there was an interagency process that essentially he daily interacted with. And that interagency process is known as the Special Detainee Follow-Up Group. And information -- so that was -- there were contributions to the Special Detainee Follow-Up Group from the DoD and from the CIA, possibly from others as well, we have very little information. We know some of the people who were on the Special Detainee Follow-Up Group, in part because they listed it on their LinkedIn, but the -- but we don't know all -- the complete composition of it. There's been zero discovery on this topic. This is all independent investigation that we've done. And we know how information flowed.

Mr. Swann yesterday talked about the 10- and 30-day

reports that the -- that the prosecution produced to us, and that's a good source of information. It's one of the ways that we know that the interagency process in the camp we're talking about, the -- you know, how they prepared for the law enforcement interviews, how they decided conditions of confinement. But the 10- and 30-day reports only flow in one direction. They flow from the camp to the Special Detainee Follow-Up Group.

Then there is a second set of information, and I don't know whether documents exist in the second set or not. We know that there were very frequent, probably daily, secure video teleconferences between the -- those who were involved in the day-to-day administration of the camp and the Special Detainee Follow-Up Group.

The -- I don't know whether -- like, those could have just evaporated into the ether. I'm not saying that they recorded them or anything; I don't have any reason to believe that that's true. But we know that there was correspondence. I don't know if there were notes. I don't know if there were minutes that were taken, if there were MFRs that were prepared. Those things might exist. It would make sense, like the way the government works that those things would exist, but I cannot independently prove that they exist. I

have -- no one has ever showed me one or talked to me about one because none of the people who were on the Special Detainee Follow-Up Group have ever responded positively to a request for an interview.

But we do know and we are certain of a third category of existing information, which are what are called summaries of conclusions. And when the Special Detainee Follow-Up Group, that interagency process made a decision as to conditions of confinement, for example, whether they were going to be more like the black sites or more like Camp V; what -- what access, who was going to get and how was that going to be decided; decisions about how is the ICRC going to work; all -- the defense counsel, you know, all these kinds of sort of day-to-day decisions which get made by the Special Detainee Follow-Up Group, they would issue a document called a summary of conclusions and they would send that document back down to Camp VII, you know, here's the policy you have to follow.

We've never seen those summaries of conclusions. In my view, they clearly fall within 538AA and should have been produced, but we do know of their existence, there's been testimony to their existence. And it's -- it has -- it's -- it's the way policy was promulgated from the Special Detainee

Follow-Up Group down to Camp VII.

And then there's a third level, which is that there was a Senior Leadership Oversight Committee. And the Senior Leadership Oversight Committee decided questions that the Special Detainee Follow-Up Group could not reach consensus on. So, you know, the Special Detainee Follow-Up Group made most policy decisions, but if there was a disagreement, say, between the DoD side and the CIA side, then it would be bumped up to the Senior Leadership Oversight Committee of more senior government officials who would make those policy decisions. I don't know what the documents that the Senior Leadership Oversight Committee issued are called, but it's clear that there was some -- that there were at least occasional decisions that were made by a senior body that would tell -- resolve differences among the Special Detainee Follow-Up Group who would then convey them down to Camp VII. And that's what controlled the day-to-day life of Mr. al Baluchi and the other defendants as to whether, you know, they would have -- how their rec would work, whether they would be allowed rec, whether they would be allowed to communicate with other detainees, whether they'd be in complete solitary confinement, how long that would last. You know, those sorts of important things which ultimately weigh on this period of what the

government calls attenuation between -- between September of 2006 and January of 2007 are really important.

They also ultimately affect the -- they're one of the few ways that the conditions of confinement are documented, right? There are few sources of -- you know, the DIMS records, for example, you've seen them. They don't -- they don't talk about the conditions of confinement. They talk about when food was delivered and things like that, but they don't -- they don't talk about what it was like to be in solitary confinement or who made that decision or what solitary confinement actually meant. Did it mean 24-hours-a-day isolation? 22 hours a day? 23? Those -- those sort of policy decisions are made in this interagency process and really provide important information about not -- about the conditions of confinement as well as the conditions under which the law enforcement interviews, that is, the -- the so-called clean team interviews, would take place.

So that's kind of the third category of interagency process information that we think is important to the effort to obtain statements from these five defendants. And that's my presentation unless you have any other questions.

MJ [Col McCALL]: No questions.

LDC [MR. CONNELL]: Thank you, sir.

Attachment I

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 779G** **RULING AND ORDER** Mr. al Baluchi's Motion to Compel Discovery Regarding Interagency Processes to Obtain Statements from the Defendants **8 March 2022**

1. **Procedural History**.

a. On 12 March 2020, Mr. Ali (a.k.a. al Baluchi) moved the Commission to compel production of "unredacted versions of all documents related to the interagency policy processes undertaken as part of the effort to obtain statements from the defendants."[1] Mr. Ali lists four specific examples:

> (1) The interagency coordination that resulted in FBI/CITF access to the defendants at Guantanamo, including the 10 January 2007 FBI guidance on "historical narrative" interviews;
>
> (2) The interagency coordination by the High Value Detainee Prosecution Task Force, to the extent that it involved the effort to obtain statements from the defendants, including FBI/CITF access to the "buckets" of CIA and other documents contained on CIA systems;
>
> (3) The interagency coordination by the Special Detainee Follow-Up Group, to the extent that it involved conditions of confinement, access to detainees, or other aspects of the effort to obtain statements from the defendants; and
>
> (4) The interagency coordination by the Special Leadership Oversight Committee, to the extent that it involved conditions of confinement, access to detainees, or other aspects of the effort to obtain statements from the defendants[.][2]

[1] AE 779 (AAA), Mr. al Baluchi's Motion to Compel Discovery Regarding Interagency Processes to Obtain Statements from the Defendants, filed 12 March 2020, at 1.
[2] *Id.*

Mr. Ali argues that these documents should have been produced pursuant to the Commission's order in AE 538AA / AE 561T.[3]

b. On 1 April 2020, the Prosecution responded,[4] opposing the motion. On 8 April 2020, Mr. Ali replied to the Prosecution's response.[5]

c. The parties presented unclassified oral argument on 3 and 4 November 2021[6] and classified oral argument on 12 November 2021.[7]

2. **Law**.

a. **Burden of Proof**. As the moving party, the Defense bears the burden of proving any facts prerequisite to the relief sought by a preponderance of the evidence.[8]

b. **Discovery**.

i. Information is discoverable if it is material to the preparation of the defense or exculpatory.[9] 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.[10] Finally, information is discoverable if it is material to sentencing.[11]

[3] *Id*.; *see* AE 538AA / AE 561T Order, Defense Motion to Compel FBI Manual for Terrorism Interrogation and Defense Motion to Compel Information Regarding Non-CIA Requests for Black Site Interrogation, dated 25 October 2019.
[4] AE 779A (GOV), Government Response To Mr. Ali's Motion to Compel Discovery Regarding Interagency Processes to Obtain Statements from the Defendants, filed 1 April 2020.
[5] AE 779B (AAA), Mr. al Baluchi's Reply to Government's Response to Mr. al Baluchi's Motion to Compel Discovery Regarding Interagency Processes to Obtain Statements from the Defendants, filed 8 April 2020.
[6] *See* Unofficial/Unauthenticated Transcript, *United States v. Khalid Shaikh Mohammad et al.*, 3 November 2021, at pp. 34429 – 34487; 4 November 2021, at pp. 34503 – 34565.
[7] *See* Transcript, 12 November 2021, at pp. 35686 – 35705 (TOP SECRET//ORCON/NOFORN).
[8] Rule for Military Commissions (R.M.C.) 905(c)(1)-(2).
[9] R.M.C. 701(c)(1-3) and (e); *Brady v. Maryland*, 373 U.S. 83, 87-88 (1963).
[10] *United States v. Lloyd,* 992 F.2d 348, 351 (D.C. Cir. 1993).
[11] R.M.C. 701(e)(3).

ii. As in any criminal case, the Prosecution in a military commission is responsible to determine what information it must disclose in discovery.[12] "[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."[13] It is incumbent upon the Prosecution to execute this duty faithfully, because the consequences are dire if it fails to fulfill its obligation.[14]

3. **Analysis and Findings**.

a. In 2019, the Commission issued AE 538AA / AE 561T, a ruling defining the scope of the Prosecution's discovery obligations regarding cooperation between the Central Intelligence Agency (CIA), the Federal Bureau of Investigation (FBI), and the Department of Defense (DOD) in the effort to obtain "letterhead memorandum (LHM) statements" from the Accused. The Commission ordered as follows:

> The government shall produce all documents that are known or reasonably should be known to any government officials who participated in the investigation and prosecution of the case against these five Accused that reasonably tend to show cooperation between the CIA, FBI, and Department of Defense in the effort to obtain statements from these five Accused. This includes evidence which tends to show that statements obtained from these five Accused while in CIA custody were used to obtain evidence that could be used against these five Accused during the current trial. The military commission finds that such evidence is discoverable under R.M.C. 701.[15]

b. In this motion, Mr. Ali proffers that representatives of multiple agencies, including the CIA, FBI, and DOD, coordinated for approximately six weeks prior to the FBI Office of General Counsel's issuance of guidelines regarding detainee interviews.[16] He also identifies three specific

[12] 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).
[13] *Ritchie*, 480 U.S. at 59.
[14] *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).
[15] AE 538AA / AE 561T at 8.
[16] *See* AE 779 (AAA) at 9 (*citing* AE 538C, Mr. al Baluchi's Reply to Government's Response to Motion to Compel FBI Manual for Terrorism Interrogation, at Attachments E, F).

interagency coordination groups – the High-Value Detainee Prosecution Task Force, the Special Detainee Follow-Up Group, and the Senior Leadership Oversight Committee (collectively referred to as "the Groups" in this Ruling) – which coordinated efforts leading up to Mr. Ali's January 2007 interview.[17] All of these processes and groups appear to involve cooperation between the CIA, FBI, and DOD.

c. On 16 January 2018, in its response to one of Mr. Ali's discovery requests, the Prosecution responded, "Interagency documents relating to the policy process that occurred prior to the FBI/CITF interviews of your client are not discoverable pursuant to R.M.C 701."[18] The Commission notes that this response predates the order in AE 538AA / AE 561T by 22 months. . Notwithstanding the Commission's ruling in AE 538AA / AE 561T, the Prosecution maintains that the information Mr. Ali moves to compel is outside the scope of the Commission's order and is not discoverable.[19] The Commission disagrees.

d. The Commission finds that evidence pertaining to interagency cooperation in efforts to obtain statements from these five Accused is material to the preparation of the Defense, and is therefore discoverable under R.M.C. 701.

4. **Ruling**. The Defense motion is **GRANTED**.

5. **Order**. Not later than **8 April 2022**, the Prosecution shall:

a. Disclose to the Defense records related to interagency cooperation in the effort to obtain statements from the five Accused in January 2007, including but not limited to:

[17] *See id.* at 7.
[18] AE 779 (AAA) at 22.
[19] "While Mr. Ali provides a non-exhaustive list of 'interagency structures' operating in 2006–2007, he is not entitled to all unredacted documents associated with those entities simply because he can name them." AE 779A (GOV) at 8.

(1) The interagency coordination that resulted in FBI/CITF access to the defendants at Guantanamo, including the 10 January 2007 FBI guidance on "historical narrative" interviews;

(2) The interagency coordination by the High Value Detainee Prosecution Task Force, to the extent that it involved the effort to obtain statements from the defendants, including FBI/CITF access to the "buckets" of CIA and other documents contained on CIA systems;

(3) The interagency coordination by the Special Detainee Follow-Up Group, to the extent that it involved conditions of confinement, access to detainees, or other aspects of the effort to obtain statements from the defendants; and

(4) The interagency coordination by the Special Leadership Oversight Committee, to the extent that it involved conditions of confinement, access to detainees, or other aspects of the effort to obtain statements from the defendants.

b. Notify the Commission that it has complied with this Ruling. In the notice, the Prosecution will advise the Commission whether (or not) such records exist that have not previously been provided to the Defense.

c. If the Prosecution seeks relief through exercise of privilege or through summaries and/or substitutions, it must follow the procedures in M.C.R.E. 505 or M.C.R.E. 506, as appropriate. Motions for such relief shall be filed not later than **8 April 2022**.

So **ORDERED** this 8th day of March, 2022.

//s//
MATTHEW N. MCCALL, Colonel, USAF
Military Judge
Military Commissions Trial Judiciary

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JAMES G. CONNELL, III, Plaintiff, v. **UNITED STATES CENTRAL INTELLIGENCE AGENCY**, Defendant.	Case No. 21-cv-627 (CRC)

ORDER

For the reasons stated in the accompanying Memorandum Opinion, it is hereby

ORDERED that [13] Defendant's Motion for Summary Judgment is **GRANTED**.

This is a final appealable Order.

SO ORDERED.

CHRISTOPHER R. COOPER
United States District Judge

Date: March 29, 2023

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JAMES G. CONNELL, III, Plaintiff, v. **UNITED STATES CENTRAL INTELLIGENCE AGENCY**, Defendant.	Case No. 21-cv-627 (CRC)

MEMORANDUM OPINION

In 2006, the Central Intelligence Agency transferred a number of "high-value" detainees to a detention facility at the U.S. military base in Guantanamo Bay, Cuba known as Camp 7. The intelligence community later declassified snippets of information that touch on the CIA's relationship to that facility. In 2014, for instance, the Director of National Intelligence blessed the public release of a redacted executive summary to a study by the Senate Select Committee on Intelligence ("SSCI") on the CIA's detention and interrogation program in the aftermath of the September 11, 2001 terrorist attacks. The executive summary states that in September 2006, after "14 CIA detainees arrived at the U.S. military base at Guantanamo Bay, they were housed in a separate building from other U.S. military detainees and remained under the operational control of the CIA." Decl. of Amy Zittritsch ("Zittritsch Decl.") Ex. B at 160. Seizing on this statement, defense lawyer James Connell, who represents Guantanamo detainee Ammar al Baluchi before a U.S. military commission, filed a FOIA request with the CIA seeking "any and all information" relating to the CIA's "operational control . . . over Guantanamo Bay detainees." Decl. of Vanna Blaine, Information Review Officer ("Blaine Decl.") Ex. 1 at 1. After receiving clarification of the request, the agency responded by providing Connell three documents and

withholding one other. As to other records, the agency issued a "*Glomar*"[1] response, neither confirming nor denying that any responsive information exists. The agency based its *Glomar* response on FOIA Exemptions 1 and 3, which protect from release, respectively, classified records and records prohibited from disclosure by statute.

Connell challenges the CIA's *Glomar* response. Specifically, he contends the agency waived its ability to assert the response because it has purportedly declassified and publicly acknowledged the existence of information reflecting its "operational control" over Camp 7, including in the two documents the CIA released to him. Rejecting Connell's waiver argument, the Court will grant summary judgment for the CIA.

I. Background

Mr. Connell lodged the request at issue with the CIA in May 2017. Blaine Decl. Ex. 1 at 1. The request begins:

> **Description of Request:** In the Report: "Senate Select Committee on Intelligence: Committee Study of the Central Intelligence Agency's Detention and Interrogation Program" reads [sic] on page 160:
>
> "After the 14 CIA detainees arrived at the U.S. military base at Guantanamo Bay, they were housed in a separate building from other U.S. military detainees and remained under the operational control of the CIA." [Footnote 977 – CIA Background Memo for CIA Director Visit to Guantanamo, December [redacted], 2006, entitled Guantanamo Bay High-Value Detainee Detention Facility]. (brackets in original) (emphasis omitted).

It continues:

> I request for [sic] any and all information that relates to such "operational control" of the CIA over Guantanamo Bay detainees including but not limited to the document cited in the footnote 977.

Id.

[1] The *Glomar* response got its name from the Glomar Explorer vessel—the focus of Phillippi v. CIA, where a FOIA requester challenged the CIA's refusal to acknowledge the existence of records about the ship. 546 F.2d 1009 (D.C. Cir. 1976).

After acknowledging receipt, the CIA's FOIA office wrote to Connell seeking clarification regarding the scope of the request. Blaine Decl. Exs. 2, 3. It asked Connell to "provide the aspects of operational control that interest you, as well as a specific [] period of time you would like us to search." Id. Ex. 3 at 1. Connell responded that "[t]he specific period of time in which I am interested is 1 September 2006 to 31 January 2007." Id. Ex. 4 at 1. He further explained that "I am seeking to determine what 'operational control' means," and offered the following unexhaustive list of "possible topics:"

(1) Whether CIA "operational control" included only Camp 7 or extended to other facilities such as Echo 2;

(2) What organization had decision-making authority over Camp 7;

(3) Whether CIA "operational control" ended before or after 31 January 2007;

(4) Whether the "operational control" involved CIA personnel, whether employees or contractors;

(5) Any detainee records maintained by the CIA during the period of "operational control," such as Detainee Inmate Management System records or the equivalent;

(6) How other agencies would obtain access to detainees during the period of "operational control,["] such as a Memorandum of Understanding with the Federal Bureau of Investigation or Criminal Investigative Task Force; [and]

(7) How the facilities transitioned from CIA "operational control" to DOD "operational control."

Id.

The CIA replied in September 2020. Blaine Decl. Ex. 6. Treating Connell's clarifications as an amended request covering the period September 1, 2006 to January 31, 2007 and encompassing the seven listed topics, the agency indicated that a "thorough search" had revealed one three-page document, which it released. Id. at 1; Decl. of James G. Connell III ("Connell Decl.") Ex. A. As to other records, the agency issued a *Glomar* response, stating that it could "neither confirm nor deny the existence of records responsive to your request." Blaine

Decl. Ex. 6 at 1–2. The agency explained that "[t]he fact of the existence or nonexistence of such records is itself currently and properly classified and is intelligence sources and methods information protected from disclosure by Section 6 of the CIA Act of 1949, as amended, and Section 102A(i)(l) of the National Security Act of 1947, as amended. Therefore, your request is denied pursuant to FOIA exemptions (b)(1) and (b)(3)." Id.

Connell filed an administrative appeal in December 2020 and followed with this lawsuit in March 2021. Blaine Decl. Ex. 7; see also Compl. The CIA responded to the appeal in July 2021, indicating that it had found three additional responsive documents, two of which it released in redacted form and the third of which it withheld in its entirety. Blaine Decl. Ex. 8 at 1. The two additional documents released by the agency were: (1) a Department of Defense ("DoD")-CIA Memorandum of Agreement ("MOA") concerning DoD's detention of certain suspected terrorists at Guantanamo; and (2) a proposed itinerary and memo for the then-CIA Director's visit to Guantanamo in December 2006. Connell Decl. ¶ 11; id. Exs. B, C. The agency withheld Document C06833121, which it describes as "consist[ing] of classified draft remarks/discussion points addressing a specific aspect of a sensitive Agency intelligence program/operation." Blaine Decl. ¶ 41. The agency also repeated its *Glomar* response. Id. Ex. 8 at 2.

The CIA moved for summary judgment; Connell did not cross move. See Mot. Summ. J. ("Mot."). Connell has since indicated that he does not challenge the withholding or redaction of the documents the CIA deemed responsive. Opp'n Mot. Summ. J. ("Opp'n") at 6 n.4; Pl.'s Status Report (July 29, 2021). The lone remaining dispute, then, is Connell's objection to the agency's *Glomar* response.

II. Legal Standards

"FOIA cases typically and appropriately are decided on motions for summary judgment." Eddington v. U.S. Dep't of Just., 581 F. Supp. 3d 218, 225 (D.D.C. 2022). Under FOIA, federal agencies are generally required to "disclose their records upon request," subject to several exemptions. Knight First Amend. Inst. at Columbia Univ. v. CIA, 11 F.4th 810, 813 (D.C. Cir. 2021) (citing 5 U.S.C. § 552(a)(3)(A)). Agencies "may refuse to confirm or deny the existence of records where to answer the FOIA inquiry would cause harm cognizable under an FOIA exception." Wolf v. CIA, 473 F.3d 370, 374 (D.C. Cir. 2007) (cleaned up). This practice, known as a *Glomar* response, is proper if "the fact of the existence or nonexistence of agency records" itself falls within a FOIA exemption. Id. (cleaned up). In considering a *Glomar* response, courts apply the "general exemption review standards established in non-*Glomar* cases." Knight First Amend. Inst., 11 F.4th at 813 (cleaned up). The burden falls on the agency to justify the "applicability of FOIA exemptions." Mobley v. CIA, 806 F.3d 568, 580 (D.C. Cir. 2015).

An otherwise valid *Glomar* response can be waived if the agency has "officially and publicly acknowledged the records' existence." Leopold v. CIA, 987 F.3d 163, 167 (D.C. Cir. 2021) (citing Am. C.L. Union v. CIA, 710 F.3d 422, 426–27 (D.C. Cir. 2013)). An official acknowledgement must satisfy a three-part test—the information requested (1) "must be as specific as the information previously released;" (2) "must match the information previously disclosed;" and (3) "must already have been made public through an official and documented disclosure." Wolf, 473 F.3d at 378 (quoting Fitzgibbon v. CIA, 911 F.2d 755, 765 (D.C. Cir. 1990)). Plaintiffs relying on this strict test "bear the initial burden of pointing to specific information in the public domain that appears to duplicate that being withheld." Schaerr v. U.S.

Dep't of Just., 435 F. Supp. 3d 99, 116 (D.D.C. 2020) (quoting Afshar v. Dep't of State, 702 F.2d 1125, 1130 (D.C. Cir. 1983)). When applied to *Glomar* responses, the first two prongs of the inquiry merge—"if the prior disclosure establishes the existence (or not) of records responsive to the FOIA request, the prior disclosure necessarily matches both the information at issue—the existence of records—and the specific request for that information." Wolf, 473 F.3d at 379 (cleaned up). The prior disclosure must thus "confirm the existence or nonexistence of records responsive to the FOIA request." Knight First Amend. Inst., 11 F.4th at 813 (citing Am. C.L. Union, 710 F.3d at 427). Courts should "accord substantial deference to an agency's *Glomar* response and avoid searching judicial review when the information requested implicates national security, a uniquely executive purview." Eddington, 581 F. Supp. 3d at 225 (cleaned up).

III. Analysis

The CIA supports its *Glomar* response with a declaration from Information Review Officer Vanna Blaine. See Blaine Decl. ¶ 1. Like the agency's initial response to Connell's FOIA request, Ms. Blaine grounds the *Glomar* response in FOIA Exemptions 1 and 3. Id. ¶¶ 16, 22, 26.

Beginning with Exemption 1, Blaine correctly notes that it protects from disclosure any information that has been properly classified pursuant to Executive Order ("E.O.") 13526, which established the current system for classifying national security information. Blaine Decl. ¶ 27. Blaine further explains that she holds "original classification authority" under E.O. 13526, meaning she has authority to assess the proper classification of CIA information up to the TOP SECRET level. Id. ¶ 3. Exercising that authority, Blaine declares that she "ha[s] determined that the existence or nonexistence of the requested records is a properly classified fact; the records

concern 'intelligence activities' and 'intelligence sources and methods' within the meaning of . . . the Executive Order; the records are owned by and under the control of the U.S. Government; and . . . the disclosure of the existence or nonexistence of [the] requested records reasonably could be expected to result in damage to national security." Id. ¶ 30. Blaine continues, stating that formally acknowledging the existence or nonexistence of records "reflecting a classified or otherwise publicly unacknowledged connection between the CIA and the topics in Plaintiff's Amended FOIA request would reveal classified intelligence information and jeopardize the clandestine nature of the Agency's intelligence activities." Id. ¶ 34. Either a confirmation or a denial, Blaine posits, "could be used by terrorist organizations, foreign intelligence services, and other hostile adversaries to undermine CIA intelligence activities and attack the United States and its interests." Id.

Blaine alternatively based the *Glomar* response on FOIA Exemption 3, which shields information that is specifically exempted from disclosure by statute. Blaine Decl. ¶ 37. One such statute is the National Security Act, which directs the Director of National Intelligence to "protect intelligence sources and methods from unauthorized disclosure." Id. ¶ 38; 50 U.S.C. § 3024(i)(1). The CIA relies on the National Security Act to protect its own sources and methods. Blaine Decl. ¶ 38. Consistent with her discussion of Exemption 1, Blaine asserts that "acknowledging the existence or nonexistence of records reflecting a classified or otherwise unacknowledged connection to the CIA in this matter would reveal information that concerns intelligence sources and methods, which the National Security Act is designed to protect." Id. ¶ 39. While the National Security Act does not require the CIA to identify the damage to national security that might result should it confirm or deny the existence of a responsive record, Blaine points to the same potential harms noted with respect to Exemption 1. Id. ¶ 40.

Courts "must accord substantial weight to an agency's affidavit concerning the details of the classified status of the disputed record." Am. C.L. Union, 710 F.3d at 427 (cleaned up). An agency's rationale for invoking an exemption—even for *Glomar* responses—"is sufficient if it appears 'logical' or 'plausible.'" Id. (quoting Wolf, 473 F.3d at 374–75).

Connell does not dispute Blaine's authority to assess classification of CIA information. Nor does he contest that E.O. 13526 and the National Security Act are recognized grounds upon which to assert FOIA Exemptions 1 and 3, respectively. Rather, he argues that the CIA has waived its ability to invoke Exemptions 1 and 3 to support its *Glomar* response because the agency has declassified "the intelligence connection between [the] CIA and Guantanamo Bay's Camp VII and [officially acknowledged] the existence of responsive documents about that connection."[2] Opp'n at 5–7. Specifically, Connell claims that "the [DNI] declassified CIA 'operational control' over Camp VII in 2014" and, since then, "CIA and other authorities have—until now—consistently treated both the fact of [the] CIA'[s] connection to Camp VII and the existence of documents providing specifics as unclassified, even if the specifics themselves are classified." Id. at 8. As a result, he argues, further "confirming or denying the existence of

[2] While Connell presents declassification as a standalone basis for a *Glomar* response waiver—separate from the public acknowledgement test—he cites no authority supporting that approach and the Court has not independently found any. While an agency can publicly acknowledge the existence of records by declassifying documents discussing that information, waiver still requires satisfying the three criteria of the public acknowledgment test. To the extent that Connell relies on declassification to contend that the CIA's rationale for invoking exemptions 1 and 3 is not "logical" or "plausible," the Court rejects this argument. The Court finds the CIA's description of the "potential harm from further disclosures is both logical and plausible," Competitive Enter. Inst. v. Nat'l Sec. Agency, 78 F. Supp. 3d 45, 60 (D.D.C. 2015), and that the declassified documents referenced do not definitively disclose the CIA's "operational control" over Camp 7. "[T]he fact that information resides in the public domain does not eliminate the possibility that further disclosures can cause harm to intelligence sources, methods and operations." Fitzgibbon, 911 F.2d at 766 (cleaned up).

responsive records will not result in a harm cognizable under Exemption 1 or 3 because the DNI has already declassified the intelligence connection [the] CIA claims to be protecting." Id.

Before tackling Connell's waiver argument and the declassified materials upon which it is based, the Court will first pinpoint the topic of Connell's FOIA request that he claims the agency has publicly acknowledged. As discussed above, Connell initially sought "any and all information" related to the CIA's purported "operational control . . . over Guantanamo Bay detainees." Blaine Decl. Ex. 1 at 1. He later clarified that he was interested in materials reflecting "what 'operational control' means," with reference to seven specific topics as examples. Id. Ex. 4 at 1. He further refined the request to cover the five-month period from September 1, 2006 through January 31, 2007. Id. And he reiterated that he was requesting the document cited at footnote 977 of the redacted SSCI Executive Summary, namely the "CIA Background Memo" for the CIA Director's visit to Guantanamo in December 2006. Id. With those refinements, the topic of Connell's FOIA request can fairly be described as records reflecting not only the fact of the CIA's purported "operational control" over Guantanamo detainees from September 2006 through January 2007, but also "what [that] operational control means"—that is, details about the CIA's purported operational control, including the seven questions Connell posed in response to the agency's call for clarification of his original request. See id. The topic of Connell's request also includes the specific unclassified documents noted in the request: the SSCI Executive Summary and the CIA Background Memo cited at footnote 977. Id.

Turning to Connell's *Glomar*-waiver argument, to support his contention that the CIA's "intelligence connection" to the topics of his FOIA request has been declassified or otherwise

officially acknowledged, Connell points to information contained in several publicly released documents.

He focuses primarily on the passage from the redacted SSCI Executive Summary quoted in his FOIA request, which states: "After the 14 CIA detainees arrived at the U.S. military base at Guantanamo Bay, they were housed in a separate building from other U.S. military detainees and remained under the operational control of the CIA." Opp'n at 12 (citing Zittritsch Decl. Ex. B at 160). The parties spar over whether the DNI's declassification of the quoted sentence in the executive summary is attributable to the CIA for purposes of the public acknowledgement doctrine. Opp'n at 11; Reply at 18–19. But the Court need not decide that question. Instead, assuming *arguendo* that DNI declassification suffices, the Court asks whether the passage matches the topics of Connell's FOIA request. In other words, does it acknowledge that the CIA in fact exercised "operational control" over Camp 7 and "what operational control means" in context? The Court thinks not.

As noted above, the information requested "must be as specific as the information previously released" and "must match the information previously disclosed." Wolf, 473 F.3d at 378 (cleaned up). The quoted sentence from the redacted SSCI Executive Summary does not meet this standard. For starters, it is not an acknowledgement *by the CIA* of its operational control over Camp 7; rather, it reflects the SSCI's characterization of the CIA's relationship to Camp 7, presumably based on its interpretation of the source document cited at footnote 977: the "CIA Background Memo" for the agency director's visit to Guantanamo Bay in September 2006. Accordingly, any CIA acknowledgment flowing from the declassification of the Executive Summary would only extend to the fact that the SSCI read the Background Memo cited at footnote 977 to imply CIA "operational control" over the fourteen detainees. That is not

enough to establish public acknowledgement. Knight First Amend. Inst., 11 F.4th at 816 ("While information from outside an agency may be viewed as 'possibly erroneous,' confirmation by the agency itself 'would remove any lingering doubts.'" (quoting Frugone v. CIA, 169 F.3d 772, 774–75 (D.C. Cir. 1999))).

The declassified sections of the CIA Background Memo do not acknowledge the CIA's operational control over Camp 7, either. See Connell Decl. Ex. C. To the contrary. The redacted memo states that the CIA "sent fourteen high-value detainees to the high-value detention center at GTMO." Id. at 4. It then indicates that "[u]pon their arrival . . . all detainees are subject to the same general in-processing utilized by DoD for other detainees arriving at GTMO." Id. That processing included "a medical exam by the on-site DoD physician, as well as any needed dental and psychiatric care." Id. The memo continues that "[i]n order for a detainee to be considered for transfer from the CIA program to GTMO, . . . the detainee must no longer be of significant intelligence value" and be subject to trial by a military commission. Id. Finally, under a section heading titled "End Game[,]" the memo explains that the "CIA desires to maintain custody of any given detainee only so long as that detainee continues to provide significant intelligence." Id. Thus, if the unclassified portions of the memo suggest anything about "operational control," it is that CIA transferred the fourteen high-value detainees to Guantanamo, and relinquished "custody" over them, because they no longer had "significant intelligence value." Id. And once the detainees were there, they were subject to customary DoD procedures. As a result, neither the quoted language from page 160 of the redacted SSCI Executive Summary nor the CIA memo upon which it was based supports Connell's waiver argument.

Connell also points to the following snippet from page 80 of the redacted SSCI's unclassified Executive Summary: "On September 5, 2006, [detainee] bin al Shibh was transferred to U.S. military custody at Guantanamo Bay, Cuba. After his arrival, bin al Shibh was placed on anti-psychotic medications." Opp'n at 13 (citing Zittritsch Decl. Ex. B at 80). Connell contends that the DNI declassified references to two CIA documents supporting these statements. Opp'n at 13. But the passage says nothing about CIA "operational control." Indeed, the CIA Background Memo indicates that psychiatric screening was a standard part of *DoD* intake procedures for all detainees who arrived at Guantanamo.

Next, Connell points to a redacted version of a 2006 MOA between the DoD and the CIA concerning "DoD's detention of certain individuals" at Guantanamo Bay. Connell Decl. Ex. D at 1. As far as the Court can tell, however, none of the unredacted material discusses the CIA's role or activities under the MOA, let alone acknowledges the agency's operational control of Camp 7.

Connell also relies on two facsimiles from the Office of the Director of National Intelligence to a lawyer at the State Department regarding the agenda for an upcoming "[i]nter-agency meeting." Connell Decl. Exs. E, F. An attached agenda—for a discussion of "Interagency Decisions Needed Regarding the 14 High Value Detainees"—includes questions on "[w]hat level of security clearance is required to adequately protect the classified information" about "the CIA program and physical access to the detainees" and "[w]ho should be permitted to have access to the detainees." Id. Ex. E at 1–3. These questions may well encompass some of the specific topics of Connell's FOIA request. But a document that merely reflects the CIA's participation in an interagency meeting on those subjects falls far short of an acknowledgement

by the agency that it had "operational control" of Camp 7 or that documents concerning such "operational control" exist.

Finally, Connell cites excerpts from transcripts of military commission proceedings where defense lawyers, prosecutors, and the First Camp 7 Commander—all of whom are either employed or retained by DoD—referenced the CIA's purported operational control of Camp 7, including the sentence about "operational control" from page 160 of the SSCI Executive Summary. See Opp'n at 15–18; Reply at 13; see also Connell Decl. Ex. G at 28584–86; Organization Office, Office of Military Commissions, https://www.mc.mil/ABOUTUS/OrganizationOverview.aspx. Although not entirely clear to the Court, these proceedings appear to concern discovery disputes involving efforts by defense counsel to unearth specifics about the CIA's role at Camp 7. See Decl. of Alka Pradhan ¶¶ 9–14. Connell claims that the CIA has declassified the transcripts. Opp'n at 16–18. But like the executive summary, the transcripts only reflect characterizations of the CIA's relationship to Camp 7 by people outside the agency. They say nothing about the CIA's position on the matter.

In sum, none of the unclassified information Connell highlights constitutes public acknowledgement by the CIA of its "operational control" of Camp 7 or the ins and outs of "what [such] operational control means." See Wolf, 473 F.3d at 378 ("An agency's official acknowledgment of information by prior disclosure . . . cannot be based on mere public speculation, no matter how widespread." (cleaned up)). As a result, none of the materials referenced constitute a public acknowledgement by the CIA of the existence of documents concerning the agency's purported operational control of Camp 7.

The agency therefore has not waived its ability to assert a *Glomar* response to Connell's amended FOIA request. And because the Blaine Declaration "logically" and "plausibly" supports the response under FOIA Exemptions 1 and 3, the Court will uphold it.

A final point. Even if the Court were to assume *arguendo* that the CIA acknowledged its operational control of Camp 7 by declassifying one or more of the documents Connell cites, the agency's *Glomar* response would still be valid. In Wolf v. CIA, the CIA asserted a *Glomar* response with respect to a FOIA request for records related to former Colombian politician Jorge Eliecer Gaitan. 473 F.3d at 372. The requester countered with evidence that a former CIA Director had given Congressional testimony decades earlier that included direct quotations from CIA dispatches referencing Gaitan. Id. at 378–79. The D.C. Circuit found that the testimony amounted to public acknowledgment of the existence of records about Gaitan. Id. It thus held that the agency's *Glomar* response "[did] not suffice regarding the dispatch excerpts that reference Gaitan." Id. at 379. The Circuit went on to find, however, that the "official acknowledgment waiver relate[d] only to the existence or nonexistence of the records about Gaitan disclosed by [the former Director's] testimony." Id. As a result, the requestor "[wa]s entitled to disclosure of *that* information, namely the existence of CIA records about Gaitan that ha[d] been previously disclosed (*but not any others*)." Id. (emphasis added). Applying Wolf here, if the release of the redacted SSCI Executive Summary or any of the other documents that Connell highlights triggered a public acknowledgement waiver, then he would be entitled to an acknowledgement of the existence of those specific documents "but not any others." Id. All of those documents have been produced to Connell or are otherwise publicly available.

Accordingly, the CIA's *Glomar* response was valid and the agency is entitled to summary judgment. A separate order will follow.

CHRISTOPHER R. COOPER
United States District Judge

Date: March 29, 2023

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JAMES G. CONNELL, III,
Plaintiff,

v.

CENTRAL INTELLIGENCE AGENCY,
Defendant.

Civil Action No. 1:21-cv-00627-CRC

NOTICE OF APPEAL

PLEASE TAKE NOTICE that Plaintiff, James G. Connell, III, hereby appeals to the United States Court of Appeals for the District of Columbia Circuit from this Court's March 29, 2023 Order and Judgment, ECF No. 29, and Memorandum Opinion, ECF No. 30.

Dated: May 25, 2023

Respectfully Submitted,

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MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY, CUBA

UNITED STATES OF AMERICA v. **ABD AL RAHIM HUSSAYN MUHAMMAD AL NASHIRI**	**AE 467CCC** **RULING** **Defense Motion** to Suppress Custodial Statements Allegedly made by Mr. Al-Nashiri in January, February, and March 2007 **18 August 2023**

1. **Procedural Background**.

a. On 17 February 2022 in AE 467, the Defense moved the Commission to suppress custodial statements made by the Accused to U.S. government officials from January to March 2007 under 10 U.S.C. § 948r. The Government opposed the motion in AE 467C on 22 March 2022. The Defense replied in AE 467F on 12 April 2022.

b. The Commission held evidentiary hearings on AE 467 from July 2022 through June 2023 and heard oral argument following the presentation of evidence on 30 June 2023 at United States Naval Station Guantanamo Bay, Cuba (NSGB).

c. Additional procedural history described in the Commission's rulings at AEs 467J, 467S, and 467SS is hereby incorporated by reference.

2. **Burden of Proof**. "When an appropriate motion or objection has been made by the defense under [Military Commission Rule of Evidence (M.C.R.E.) 304], the prosecution has the burden of establishing the admissibility of the evidence" by a preponderance of the evidence. M.C.R.E. 304(d).

3. **Findings of Fact.**[1]

I. RDI Program

a. In the aftermath of the terrorist attacks on the United States perpetrated on 11 September 2001, the Central Intelligence Agency (CIA) developed the Rendition, Detention, and Interrogation (RDI) program to gather intelligence from suspected terrorists captured during the so-called war on terror. As a part of the RDI program, the CIA developed, with the approval of the Department of Justice (DOJ), a list of "Enhanced Interrogation Techniques" (EITs) to be used during interrogations of terrorism suspects. It was assumed that the use of such techniques would assist in the gathering of useful intelligence from terrorist operatives who were otherwise trained to resist interrogation.

b. The EITs adopted by the CIA were based on techniques employed in a training environment in U.S. military SERE[2] training. SERE training was designed to expose U.S. military personnel to the types of coercive interrogation techniques that have been employed in the past by communist adversaries such as North Korea, the Soviet Union, and China. SERE training mimics the exploitative communist model in order to equip U.S. servicemembers with the ability to resist should they be taken captive. Service members in positions with increased risk of capture are trained at SERE schools. During the training, these service members are "captured" by course cadre performing the roles of enemy captors. Captured students are subjected to examples of harsh treatment and the use of coercive interrogation techniques by the simulated enemy while being subjected to other physical and psychological pressures.

[1] *See* AE 467DDD for additional classified findings of fact.
[2] "SERE" stands for Survival, Evasion, Resistance, and Escape.

c. The goal of the communist techniques was to gain the compliance of subjects, more so than to gather useful intelligence. Instead, harsh techniques were used to extract false confessions and to create propaganda through the infliction of severe mental pain or suffering. For example, waterboarding and sleep deprivation, going back to antiquity, have been used in political or religious persecutions to elicit recantations or confessions. Such techniques do not elicit reliable information.

d. In developing the RDI program, the CIA contracted with two staff psychologists from the U.S. Air Force SERE school, Doctor James Mitchell and Doctor Bruce Jessen. During their employment at the Air Force SERE school, Drs. Mitchell and Jessen were responsible for monitoring the mental health of the cadre administering the course and the servicemembers going through the course. Both Mitchell and Jessen were highly familiar with the SERE techniques as well as the techniques used by foreign adversaries. However, neither Mitchell nor Jessen were trained interrogators.

e. The CIA employed Drs. Mitchell and Jessen to implement a program of interrogation for use on high-value detainees (HVDs) in CIA custody. The objective of the program was to service CIA intelligence requirements. In so doing, the program officers sought to put detainees in a "compliance condition"[3] and to force the detainees to answer questions from debriefers. In the event a detainee in the program was not providing the type, amount, or quality of information the agency desired, EITs would be employed—or escalated—in an attempt to extract that information.

f. In the words of Dr. Mitchell (AE 467AA), the approved EITs included:[4]

[3] Unofficial/Unauthenticated Transcript of the *United States v. Nashiri* Motions Hearing dated 2 May 2022 at 16852.
[4] The use of insects and mock burial were considered for use with Abu Zubaydah, but not the Accused.

~~CONFIDENTIAL//NOFORN~~

Below are the descriptions of potential physical and psychological pressures discussed in the July 8, 2002 meeting. The aim of using these techniques is to dislocate the subject's expectations concerning how he is apt to be treated and instill fear and despair. The intent is to elicit compliance by motivating him to provide the required information, while avoiding permanent physical harm or profound and pervasive personality change.

1. Attention Grasp:
In a controlled and quick motion, grasp the individual with both hands, one on each side of the collar opening. In the same motion, draw the individual toward you.

2.Walling: The individual is stood in front of a specially constructed flexible wall. The individual's heels touch the wall. The individual is pulled forward and then quickly and firmly pushed into the wall. The head and neck are supported with a rolled hood or towel that provides a c-collar effect to help prevent whiplash. Contact with the wall is made with the individual's shoulder blades. To reduce the probability of injury, the individual is allowed to rebound from the wall.

3. Facial Hold: One open palm is placed on either side of the individual's face, fingertips well away from the individual's eyes. The goal is to hold the head immobile.

4. Facial Slap (Insult Slap): The slap is delivered with fingers slightly spread. Contact should be made with the area directly between the tip of the chin and the bottom of the corresponding earlobe. The goal of the facial slap is to induce shock and surprise, not severe pain.

5. Cramped Confinement: Individuals are placed in a confined space the dimension of which restricts movement. The container is usually dark. Individuals may be kept in larger confinement spaces for up to 18 hours, and smaller confinement boxes for one hour.

6. Wall Standing: This technique is used to induce fatigue. The individual stands approximately 4 or 5 feet from a wall, with his feet spread approximately shoulder width. With arms out stretched in front, fingers resting on the wall supporting body weight. Individuals are not allowed to move or reposition their feet or hands.

7. Stress Positions: A variety of stress positions are possible. They focus on producing mild physical discomfort from prolonged muscle use, rather than pain associated with contortions or twisting of the body. The two discussed were (1) the subject sitting on the floor with legs extended straight out in front of him with his arms raised above his head; and (2) having the subject kneel on the floor and lean back at a 45 degree angle.

8. Sleep Deprivation: Preventing sleep is intended to have the effect of reducing the subject's ability to think on his feet secondary to fatigue and to motivate him to cooperate because of the discomfort associated with sleep debt. For most people, the effects of sleep deprivation remit after one or two nights of uninterrupted sleep. In rare circumstances, individuals predisposed to psychological problems may display abreactions, but these too generally remit after the individual sleeps. The record (Guinness Book of World Records) for voluntary sleep deprivation is 205 hours with the subject showing no significant psychological problems and quick recovery after one or two days of sleep.

9. Water Board: With this procedure, individuals are bound securely to an inclined bench. Initially a cloth is placed over the subject's forehead and eyes. As water is applied in a controlled manner, the cloth is slowly lowered until it also covers the mouth and nose. Once the cloth is saturated and completely covering the mouth and nose, subject would be exposed to 20 to 40

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seconds of restricted airflow. Water is applied to keep the cloth saturated. After the 20 to 40 seconds of restricted airflow, the cloth is removed and the subject is allowed to breath unimpeded. After 3 or 4 full breaths, the procedure may be repeated. Water is usually applied from a canteen cup or small watering can with a spout.

10: Use of Diapers: The subject appears to be very fastidious. He spend much time cleaning himself and seems to go out of his way to avoid circumstances likely to bring him in contact with potentially unclean objects or material. He is very sensitive to situations that reflect a loss of status or are potentially humiliating. One way to leverage his concerns, while helping ensure his wound doesn't become infected with human waste when in cramped confinement is to place him in an adult diaper. If soiled, care would have to be taken to keep human waste out of his leg wound.

11. Insects: The subject appears to have a fear of insects. One possibility is to threaten to place stinging insects into the cramped confinement box with him, but instead place harmless insects. The purpose of this would be to play off his fears and increase his sense of dread and motivate him to avoid the box in the future by cooperating with the interrogator's requests.

12. Mock Burial: The individual is placed in a cramped confinement box that resembles a coffin. The box has hidden air holes to prevent suffocation. The individual is moved to a prepared site where he hears digging. The site has a prepared hole, dug in such a way that the box can be lowered into the ground and shovels of dirt thrown in on top of it without blocking the air holes or actually burying the individual. This procedure would be used as part of a threat and rescue scenario where the "burial" is interrupted and the subject is rescued by a concerned party. The rescuers then use the subject's fear of being returned to the people trying to bury him as a means of pressuring the subject for information.

Hope this helps.

Jim Mitchell

Sent on 8 July 2002 at 04:15:15 PM

g. Using a combination of classical and operant conditioning, the interrogators intended to provoke compliance in the form of an involuntary stimulus response in the detainee following their cues. According to Dr. Jessen, the goal of the program was to deprive detainees of creature comforts to cause them to consider their dilemma and wonder if maybe they could find a way out. Essentially, the interrogator's goal was to cause detainees discomfort leading to compliance.

h. After a determination was made that a detainee was providing enough useful information to be considered compliant and cooperative, he would be transitioned into debriefing mode. This occurred either after an interrogation or after the application of EITs, depending on the detainee's responsiveness. Once a detainee was deemed compliant, debriefers would come in to question him and to service intelligence requirements. The debriefers were not authorized to use EITs.

i. The interrogators hoped EITs would only be necessary once; however, in practice, the techniques were used on several detainees, including the Accused, multiple times. Mitchell and Jessen believed, however, that going back to EITs after a detainee demonstrated compliance would lose a significant amount of goodwill in terms of the detainee's future compliance.

j. Mitchell and Jessen's purpose for the EITs was to impart in the detainees a belief that the detainees themselves could end or even prevent their own suffering if they would comply and answer questions from the interrogator or debriefer. For example, Mitchell explained to the Accused that the Accused could stop the waterboarding by cooperating.

k. After the EIT phase, detainees generally had a fear of going back into the EIT phase. Jessen described their program as creating a "contract" between the interrogators and detainees, whereby the interrogators made sure the detainees understood that they would not go back into

EITs if they continued to cooperate and provide intelligence. The interrogators wanted the detainee to realize that he had a "pathway" whereby, if he provided even a little information, he could start to find a way out of captivity. The interrogators tried to ensure the detainees understood the contract was valid and EITs would not happen unless the detainee became non-compliant again. Therefore, the threat of a return to the EIT phase continued to dangle over the heads of detainees such as the Accused like a proverbial sword of Damocles.

l. The first person subjected to EITs was Abu Zubaydah, a detainee who was shot in the back during his capture and nearly died from his wounds. After receiving authorization to proceed with the EITs and allowing for some physical recovery, the CIA implemented its new program, overseen by Mitchell and Jessen, with full approval of CIA Headquarters. The plan implemented on Abu Zubaydah became the template for the plan used on the Accused. Present at the site during the implementation of the EITs on Abu Zubaydah was Federal Bureau of Investigation (FBI) Special Agent (SA) Stephen Gaudin, who participated in the interrogations. Agent Gaudin would later be part of the "clean team" tasked with taking the statement of the Accused which is before the Commission in this motion.

II. The Accused's "Sojourn through Captivity"[5]

a. The Accused was captured in the United Arab Emirates in mid-October 2002.[6]

b. The Accused was suspected by the U.S. government of being an Al Qaeda operations planner who was involved in the 1998 East Africa Embassy bombings and the attack on the USS COLE in 2000.

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[5] Transcript dated 14 April 2023 at 23894.

[6] U.S. Senate Select Committee on Intelligence, *Committee Study of the Central Intelligence Agency's Detention and Interrogation Program*, Executive Summary at 66 (2014) (hereinafter SSCI). As stated during oral argument, the Commission takes judicial notice of the SSCI Executive Summary with the consent of the parties.

c. While still in foreign custody, the Accused provided information on multiple terrorist plots including the USS COLE and *MV Limburg*, as well as plans to attack oil tankers in the Strait of Hormuz and locations in Dubai and Jeddah. This information was disseminated in CIA intelligence reports prior to the Accused's transfer to U.S. custody.[7]

d. The Accused was rendered to U.S. CIA custody at DETENTION SITE COBALT (Location 2) in November 2002. Standard operating procedures at COBALT during this period included total darkness, standing sleep deprivation, loud music, isolation, and dietary manipulation. Dr. Jessen saw paramilitary forces there and described it as "gloomy and dark,"[8] "very unpleasant,"[9] "deplorable,"[10] and "medieval."[11] It was very cold, and detainees were shackled to metal rings mounted in concrete walls. Detainees were held naked in their cells—which Dr. Mitchell described as "like a horse stall"[12]—with only a waste bucket.

e. Detainee Gul Rahman died of exposure at COBALT after being left overnight in cold temperatures wearing only a sweatshirt and after having been doused in cold water.

f. When the Accused arrived at COBALT, he was placed in a cell and shackled for approximately one hour before Dr. Mitchell approached him. Mitchell then asked a guard to bring the Accused into the interrogation room, which was a small room constructed out of plywood. The room contained bright halogen lights that would shine into the Accused's face. Dr. Mitchell then removed the Accused's hood and asked the Accused, "[w]hat would you like me to know about you?" Initially, the Accused was "perfectly willing" to talk about the USS COLE but

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[7] SSCI at 73 n.373, 187.
[8] Transcript dated 13 April 2023 at 23743.
[9] *Id.* at 23702.
[10] *Id.* at 23751.
[11] *Id.* at 23742.
[12] Transcript dated 2 May 2022 at 16824.

refused to answer questions about future operations. Mitchell told the Accused that he wanted to hear about future threats. Mitchell told the Accused that the next time the Accused talked to someone they were going to ask him questions and if he answered those questions nothing bad would happen to him. The Accused was returned to his cell and shackled to the wall.[13]

g. The Accused was labeled as a "typical resister"[14] and Mitchell and Jessen nicknamed him "Little Shit."[15]

h. After only a few days at COBALT, the Accused was rendered to DETENTION SITE GREEN (Location 3), accompanied by Mitchell and Jessen. At GREEN, Abu Zubaydah was already being held and subjected to EITs. Upon his arrival at GREEN, the Accused was also interrogated using EITs, beginning with less-intrusive measures. The Accused was formally subjected to EITs during four periods: December 5–8, 2002; December 27, 2002 – January 1, 2003; and January 9–10 and 15–27, 2003.[16] The Government concedes that all statements of the Accused made during this time are inadmissible under 10 U.S.C. § 948r.

i. Use of EITs at GREEN included cramped confinement in large and small boxes. The Accused was often left naked in the boxes for hours at a time. The larger of the boxes was approximately the size of a coffin and the smaller was slightly larger than a miniature refrigerator. The temperature of the site was cold enough that the Accused could see condensation forming on the walls of the box. Mitchell and Jessen were actually under the impression that the Accused preferred going into the boxes because it provided a break from the lights, cold, and interrogators.

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[13] *Id.* at 16823–31.
[14] Transcript dated 13 April 2023 at 23778.
[15] Transcript dated 14 April 2023 at 23895.
[16] SSCI at 67 n.338.

j. On day one of the "aggressive interrogation phase," the Accused said he was ready to talk. Interrogators told the Accused that "they would do whatever it takes to get the information they wanted from him." *See* AE 402, Attach. C, Cable 2. The interrogators began using EITs on the Accused, including the attention grab and walling. His clothes were ripped off him by the security team. "[The Accused] whimpered that he would do anything the interrogators wanted." *Id*. Eventually interrogators warned the Accused that he would be left alone to consider the information the interrogators were seeking, and he was told that "if he refused to cooperate, he would suffer in ways he never thought possible." *Id*. Later that day, he was forcibly shaved by security staff while the Accused "moaned and wailed." He was then locked inside of the large box at 0445 hours.

k. During the second session of day one, the Accused was pulled out of the large box at 1703 hours. He was backed against the "walling panel" in his cell, a rolled-up towel was placed around his neck, and the hood was slowly removed from his head, revealing his interrogator. His interrogator stood silent for 30 seconds, then "repeated with a hiss" that the interrogators wanted complete, accurate information from him. The Accused almost immediately again confessed to his role in the attack on the USS COLE. AE 402, Attach. C, Cable 3. When he did not provide additional information the interrogators were seeking, he was walled and placed in the small box. His interrogators were left "guardedly optimistic that the aggressive procedures may already be having an impact on [the Accused's] resistance posture." *Id*.

l. So it went for the Accused. Each time the Accused was subjected to EITs, interrogators generally concluded he was "compliant and cooperative." However, CIA

Headquarters disagreed and instructed on-site officers to continue using EITs. When the Accused did not respond to certain questions, the interrogators escalated the measures.

m. Eventually, Mitchell and Jessen turned, with CIA Headquarters' blessing, to the waterboard to try to obtain more information from the Accused. Waterboarding was conducted by strapping the Accused onto a medical gurney which would be angled down at a 40-degree angle at the head, such that the Accused's feet would be higher than his head. The Accused would have a neck brace put around his neck to hold his head in place. The interrogators would then cover the Accused's face with a thin piece of cotton fabric, like a towel, and pour water over the cloth for anywhere from 2–40 seconds at a time, usually starting with shorter "pours" and proceeding to longer "pours." Between pours, Mitchell would lift the cloth and talk to the Accused, then put the cloth back and the pouring would re-commence. After they reached a long pour, which may have gone on for 40 seconds, the gurney would then be lifted upright so the detainee could clear his sinuses and take at least three breaths. The interrogators would then lower the gurney and begin pouring again. This process would continue for up to fifteen minutes. The waterboarding of the Accused was administered by Mitchell with the assistance of Jessen. Mitchell conceded during his testimony that it would not have surprised him if the Accused experienced the sensation of drowning during the waterboard episodes.

n. On one of the occasions where the Accused was subjected to waterboarding, he began to slide out of the straps onto the floor because he was too small in stature for the straps to hold him on the gurney. Mitchell described the Accused during waterboarding sessions as "anxious"[17] and "struggling."[18] Jessen described waterboarding as "visually and psychologically very

[17] Transcript dated 2 May 2022 at 16877.
[18] *Id.* at 16876.

uncomfortable for all of those involved."[19] In fact, Jessen described a waterboarding session of Abu Zubaydah in which some observers in the room cried while watching the procedure.

o. The Accused was at GREEN for approximately three weeks. That site was also dark; there was no natural light. Temperature was manipulated to leave the Accused naked in a cold cell. Loud music was played in the cells. The cells were empty except for a waste bucket. The guards dressed in all black. The Accused was subjected to sleep deprivation. There were bars on the ceiling from which to hang detainees with their arms above their heads as part of standing sleep deprivation. Detainees were also short shackled to the floor.

p. Interrogations at GREEN were videotaped, but these videotapes were taped over and later destroyed by the CIA in 2005[20] out of apparent fear of their discovery during legal proceedings.

q. Like at COBALT, at GREEN the Accused was willing to talk about past events and information, but stated he had nothing to tell interrogators or debriefers about future plots.

r. In December 2002, GREEN was closed, and the Accused and Abu Zubaydah were rendered to DETENTION SITE BLUE (Location 4). BLUE included bright lights, loud music, empty cells with waste buckets, nudity, and constant monitoring.

s. Shortly after the Accused's arrival at BLUE, officers again judged him as compliant, cooperative, engaged, and willing to answer questions. Nevertheless, CIA Headquarters believed the Accused was withholding further actionable intelligence.

[19] Transcript dated 13 April 2023 at 23682.
[20] SSCI, Foreword at 4.

t. After multiple debriefings, officers at BLUE wrote to headquarters that the Accused was providing "logical and rational" answers and that no further enhanced measures were needed. Headquarters disagreed again.

u. CIA officer NX2, who at times was referred to as "the New Sheriff,"[21] took over the interrogation of the Accused, supervising several interrogators who used a series of unauthorized techniques. They placed the Accused in a standing stress position with his hands above his head for approximately two-and-a-half days. They put a pistol to the Accused's head and also threatened the Accused with a power drill. They slapped the Accused multiple times on the back of the head and blew cigar smoke in his face. At least one interrogator told the Accused that the Accused's mother could be brought in and sexually abused while the Accused was forced to watch.[22] The Accused was forcibly washed and scrubbed, including his buttocks and genitals, with a stiff boar brush which was then forced into the Accused's mouth. The Accused reported to Dr. Crosby, a defense expert on torture, that he was sodomized with the brush. Additionally, the Accused was also placed in "improvised" stress positions that caused cuts and bruises.

v. One of these stress positions involved tying the Accused's elbows together behind his back with a belt and hanging him from them. On at least one occasion, the use of this stress position caused Mitchell to intervene because he believed the Accused's shoulders might become dislocated. Mitchell also witnessed NX2 put a broomstick behind the Accused's knees, force him to kneel, and then lean back, causing him extreme pain. He also saw people lean the Accused's head against the wall and then lean their own bodies on him, putting all the weight onto the

[21] Transcript dated 12 April 2023 at 23429.
[22] SSCI at 70.

Accused's neck. According to Mitchell, NX2 was using some of these unapproved measures not for operational reasons but because the Accused refused to call NX2 "sir."[23]

w. During the use of the unapproved stress positions, Mitchell thought the CIA officers were going to hurt the Accused unnecessarily, which surprised him because the Accused was cooperating and providing useful answers. Mitchell testified that the Accused "looked like he was in pain . . . was hollering. He looked uncomfortable . . . he was in distress, that's for sure, and he was in pain."[24] Mitchell claims he unsuccessfully tried to intervene to prevent the use of unauthorized techniques against the Accused.

x. While at BLUE, the Accused was put in a debriefing phase where he was debriefed by a female analyst. Mitchell sat in on the debriefing and encouraged the Accused to cooperate, reminding the Accused that they wanted to avoid any more "hard times"[25] if he failed to cooperate.

y. Formal guidelines were promulgated in January 2003 following the death of Gul Rahman and the use of a gun and a drill to threaten the Accused.[26]

z. Also in January 2003, Jessen arrived at BLUE to conduct a psychological assessment of the Accused for continued use of EITs. Following the assessment, Jessen developed an interrogation plan which authorized the full range of measures. According to the interrogation plan, once the interrogators had eliminated the Accused's "sense of control and predictability"

[23] Transcript dated 2 May 2022 at 16662.
[24] *Id.* at 16663.
[25] Transcript dated 3 May 2022 at 16951.
[26] SSCI at 62.

and established a "desired level of helplessness," they would reduce the use of EITs and return to debriefing mode.[27]

aa. CIA Headquarters approved the plan to reinstitute EITs with the Accused, beginning with shaving him, cutting off his clothes, and placing him in standing sleep deprivation[28] with his arms affixed over his head. Cables describe the Accused during subsequent interrogations as nude, standing, handcuffed, and shackled.[29]

bb. After what the Accused experienced at BLUE at the hands of NX2 and his subordinates, Jessen described the Accused as angry and more unwilling to engage in dialogue. Jessen's presence and work with the Accused ultimately convinced the Accused to go down the road of cooperation again and continue fulfilling the terms of the contract between him and his debriefers.

cc. Locations 3, 4, and 5 had bright lights, empty cells with only waste cans, shackling, stress positions, loud music, and solitary confinement. Location 5 had foreign guards and no physical pressures were used.

dd. Location 6 was a black site located at Echo II on NSGB, where the Accused was held from approximately late 2003 until early 2004. Evidence demonstrates that some detainees had access to fresh air, sunlight, socialization, and outdoor recreation for the first time at Location 6. However, it is unclear whether this was actually the case for the Accused.

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[27] *Id.* at 71.
[28] Sleep deprivation—keeping the person awake—is used "to impact their will to continue to withhold information." Interrogators also used sleep interruption, whereby they allowed the detainee to sleep, but only for very short periods of time.
[29] *Id.* at 72.

ee. Jessen conducted a "maintenance visit" with the Accused at Location 6 after an incident when the Accused made a mess in his cell and refused to clean it up. As a ploy to get the Accused to clean up the mess, Jessen had Abu Zubaydah brought to the Accused's cell and ordered him to clean up the Accused's mess. This was done to manipulate the Accused into cleaning up the mess. Because the Accused apparently felt guilty about Abu Zubaydah being forced to clean up the mess, the Accused cleaned it up himself.

ff. The purpose of maintenance visits was to remind detainees to be compliant and to provide information to debriefers when requested. Maintenance visits served as a reminder to the Accused that a failure to cooperate would breach the contract and result in the possibility of returning to the "hard times," reimplementation of the EITs. Mitchell and Jessen believed their presence alone, given they had participated in the implementation of the EITs themselves, was enough to encourage compliance. They would also monitor debriefings, sometimes coming in and out of the room. Essentially, maintenance visits were intended to extend the impact of the physical duress applied to the Accused.

gg. The Accused and other HVDs were moved out of NSGB in anticipation of the U.S. Supreme Court's potential ruling related to detainees in *Rasul v. Bush*, 542 U.S. 466 (2004).

hh. Over the years, the Accused alleged that the CIA drugged his food and complained of pain and insomnia. He occasionally undertook hunger strikes, in his words, to protest being treated like an animal. At Location 6, the CIA responded to a hunger strike by "force feeding" him rectally.[30] As described in the context of his rectal feeding, "Ensure was infused into al-Nashiri 'in a forward-facing position (Trendlenberg) with head lower than torso.'"[31] Since the

[30] SSCI at 100 n.584.
[31] Unlubricated rectal examinations were part of the rendition intake process.

early twentieth century, medical knowledge has concluded that there is no medical reason to conduct so-called "rectal feeding." Although *fluids* can be absorbed through the rectum in emergencies, food or nutrition cannot.

ii. After leaving NSGB in mid-2004, the Accused was rendered to DETENTION SITE BLACK (Location 7). Conditions at BLACK included solitary confinement, constant light, sleep deprivation, attention grasp, and facial hold. Detainees could earn "amenities" and had access to showers for the first time in the program, being allowed to shower once a week.

jj. An October 2004 psychological assessment of the Accused was used by the CIA to discuss reaching an "endgame" for the program.[32] In June 2005, the Chief of Base at DETENTION SITE BLACK suspended debriefings of the Accused because it was rare for the Accused to recognize any photographs being shown to him and the repeat debriefings often caused outbursts.[33] In July 2005, the CIA was concerned that the Accused was depressed, uncooperative, and on the "verge of a breakdown."[34]

kk. In late 2005 the Accused was then rendered to DETENTION SITE VIOLET (Location 8), which also included solitary confinement and bright lights. There were no EITs, as Mitchell and Jessen concluded physical pressures were no longer necessary because the contract could be maintained with emotional and psychological coercion.

ll. Next, in mid-2006, the Accused was rendered to DETENTION SITE ORANGE (Location 9). ORANGE was an open compound, but detainees were still held in solitary confinement. Detainees had access to a library and food choices. This is where Jessen conducted

[32] SSCI at 114.
[33] *Id.* at 73 n.372.
[34] *Id.* at 114.

his last maintenance visit with the Accused sometime in 2006, the same year the Accused was transferred for the last time to Guantanamo Bay.

mm. Locations 7, 8, and 9 were an improvement compared to 3, 4, and 5. Though the detainees remained in solitary confinement with constant bright lights, they got bunks in Location 7 and a real toilet in Location 9.

nn. Over the course of the Accused's time in the RDI program, the CIA disseminated 145 intelligence reports based on his debriefings. He provided information on past plots, associates, and Al Qaeda's structure and methods.[35]

oo. The Accused was transferred to NSGB on 5 September 2006. During this time, CIA officials diagnosed the Accused with anxiety and major depressive disorder.

pp. During the entirety of his time in the black sites, the Accused had no contact with anyone that was not either an employee or agent of the United States or another detainee. The Accused never knew where he was and was essentially held in solitary confinement for the better part of four years.

qq. Between 2002 and 2006 in the RDI program, the Commission finds that the Accused was subjected by the CIA to physical coercion and abuse amounting to torture as well as living conditions which constituted cruel, inhuman, and degrading treatment.

III. Transfer to NSGB and the Accused's 2007 Statements

a. In October 2006, after being transferred to NSGB, 14 HVDs including the Accused were allowed to meet with the International Committee of the Red Cross (ICRC). They all provided similar detailed accounts of the RDI program.[36] This was the Accused's first contact

[35] *Id.* at 73. *See also* AE 467F at 23 (stating the Accused was interrogated over 200 times).
[36] SSCI at 160.

with a person who was not an agent or employee of the United States since he was turned over to CIA custody in 2002.

b. During the intervening period between September 2006 to March 2007, confinement conditions at NSGB improved slightly. For example, the Accused was permitted joint outdoor recreation time where he could communicate with one other detainee.[37]

c. At least fifteen forced cell extractions (FCEs) of the Accused were conducted between November 2006 to March 2007. *See* AE 467ZZ. Not unlike how the contract operated in the RDI program, the guard force responded with the overwhelming physical force of FCEs to assert control over him when the Accused was non-compliant or misbehaved in some way.

IV. Law Enforcement Interview

a. FBI SA Steve Gaudin, Naval Criminal Investigative Service SA Robert McFadden, and Air Force Office of Special Investigations SA Kristen (Sendlein) Lange interviewed the Accused at Echo II, NSGB, from 31 January to 2 February 2007. During this time, an HVD prosecution task force was operating at NSGB with the goal of obtaining evidence for prosecution. Multiple detainees were being interviewed by various agencies during this time.

b. The interview team had a DOJ attorney assigned to their team. The attorney monitored the interview and consulted with the agents on breaks.

c. The agents reviewed intelligence products prior to the interviews in order to be able to demonstrate to detainees that the agents knew a lot about them. Federal agents from various organizations in the HVD prosecution task force had access to electronic systems containing intelligence products. Although some of those products included prior statements of the Accused

[37] *See* AE 467DDD for additional classified relevant facts.

and other detainees from the RDI program, many of the reports were not attributable to specific sources.

d. The room where the Accused was interviewed was a holding cell adjacent to an interview area with outdoor plastic furniture. The law enforcement agents were escorted to the interview by military members whose uniforms bore no identifying insignia. There is no evidence in the record that the Accused was given a choice about whether or not he would initially meet with the agents.

e. Inside the interview room, the Accused was shackled to the floor, but his hands were free. The Accused, however, appeared clean, healthy, and alert.

f. The agents began the interview by identifying themselves by name and agency. Gaudin was the lead, but because McFadden had so much experience in the USS COLE investigation, he was co-lead on questioning. Gaudin and McFadden both were proficient in Arabic. Gaudin took notes. Sendlein also asked some questions. FBI linguist John Elkaliouby acted as the interpreter for the interview.

g. At the start of the interview, the agents proceeded to go through a six-point admonishment form drafted specifically by the DOJ for the Accused. AE 518. The agents were instructed to verbally go through the form with the Accused but not to place it on the table or show it to the Accused.

h. The agents were instructed not to read *Miranda*[38] rights to the detainees they interviewed at NSGB, which Gaudin described as "not normal."[39] However, the agents were instructed to obtain a statement that could be used in a criminal or law enforcement prosecution

[38] *Miranda v. Arizona*, 384 U.S. 436 (1966).
[39] Transcript dated 12 August 2022 at 19335.

in a military court.[40] The Commission concludes that the agents were instructed not to give traditional *Miranda* warnings in order to increase the likelihood of obtaining incriminating information from detainees who were being considered for possible criminal charges and trial.

i. First, the agents stated they did not work for and were independent from any organization that previously held the Accused.

j. Second, they told the Accused he was in the legal custody of the Department of Defense (DOD) and he would not return to his previous captors. However, unbeknownst to the agents, after the 14 HVDs including the Accused arrived at NSGB in September 2006, they were held separately from other detainees and "remained under the operational control of the CIA."[41]

k. Third, they told the Accused that he was not required to speak with them and that his being in the custody of the DOD was not conditional upon agreeing to speak with them. They explained to him that his speaking with the interviewing agents was voluntary and that the agents were at his pleasure as to if they would speak at all, when they would speak, as well as what they would speak about. They told the Accused they were aware he may have made prior statements but that they were "not interested" in the previous questioning or his previous answers. The agents also told the Accused that any statements he made could be used in court.

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[40] *See* AE 496 at 9, "If the detainee asks whether any prior statements can be used against the detainee at a criminal proceeding, the agent should tell the detainee that decision will be made by the court if he is charged with a crime . . . Allegations of misconduct will not be included in this LHM." *See id.* at 17, referencing "FBI policy that *Miranda* warnings generally need not be given prior to interviews of [Department of Defense] detainees held at [NSGB]."

[41] SSCI at 160.

l. Fourth, the agents advised the Accused that the room where the interview was taking place may have been familiar[42] to him from his time in the custody of a different organization but that, even so, he was in DOD custody now.

m. Fifth, the agents asked the Accused if he was willing to answer questions. The Accused agreed to do so.

n. Lastly, the agents instructed the Accused, regarding any documents or photographs shown to him, that the agents did not care what he may have said in the past and they were only interested in his current answers.

o. The Accused acknowledged each point on the form as it was read, and Gaudin placed a checkmark next to each item on the form.

p. The agents were instructed, in the event that the Accused were to ask for an attorney, to tell him he was not entitled to one.

q. The agents did not tell the Accused that prior statements he made while in CIA custody and while being abused by the CIA interrogators could not be used against him in court.

r. The agents were instructed to include any allegations of mistreatment by detainees in a separate document recorded on a separate computer.[43]

s. During the interview, the Accused did state that he had been tortured and specifically mentioned waterboarding. He stated he had been hung from the ceiling for long periods of time, left naked to soil himself, and was submerged in water to the point he felt like he was drowning.

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[42] The Accused was previously held in Echo II when it was a black site in 2003–2004. The FBI interview in 2007 actually occurred in the same complex—and perhaps even the same cell—where the Accused was subjected to abuses such as "rectal feeding."

[43] *See* AE 467, Attach. B; AE 467M.

t. The agents and the Accused shared tea and pastries during the interviews, and the Accused was permitted to and did take breaks at his discretion. The interviews lasted approximately three to six hours per day, including breaks. The atmosphere during the interviews was cordial and friendly. The Accused generally appeared to be in good spirits during the interview.

u. Throughout the interview process, the agents continued to remind the Accused after breaks that he did not have to speak with them. The Accused was generally informed that he was "in charge" or "the boss"[44] of the interview and that he could choose what they spoke about.

v. None of the interviews of the Accused were recorded via audio or visual means. Additionally, no transcript was made of the interview. The only recording of what happened during the interviews is the Letterhead Memorandum (LHM) prepared by the agents, summarizing what the Accused said during the interviews, as well as individual agents' notes.

w. During the three days of interviews, the Accused directly incriminated himself, providing extensive details regarding his direct role in the conspiracy that culminated in the attack on the USS COLE.

x. At the end of the third day of interviews, the Accused told the agents that he did not want to continue the interviews as he had nothing more to say.

V. Combatant Status Review Tribunal

a. The Accused's Combatant Status Review Tribunal (CSRT) took place on 14 March 2007 on Camp Delta, NSGB. The CSRT was a fact-finding proceeding held so that tribunal members could determine whether a detainee should be classified as an enemy combatant.

[44] Transcript dated 11 August 2022 at 18998, 19074.

b. The Accused was assigned a personal representative to assist him during the proceeding. The personal representative was not an attorney.

c. The hearing took place in a prefabricated trailer with tables and chairs. Present in the room were the presiding officer, two other voting members of the tribunal, a recorder, and a court reporter. The Accused was then brought into the room with his personal representative and a translator.

d. The Accused was advised of the following rights: the right to be present; the right to not be compelled to testify; the right to testify voluntarily either under oath or in an unsworn statement; the right to have a personal representative; the right to present evidence, including witnesses; the right to question witnesses; and the right to examine unclassified evidence. AE 467C, Attach. M.

e. The hearing was recorded, and a verbatim transcript of the proceeding was created. AE 467C, Attach. M, N.

f. The Accused appeared calm and alert at the CSRT. He was shackled, but his hands were free.

g. The presiding officer was a judge in both his civilian and military capacities.

h. During the open portion of the CSRT, the recorder read a summary of allegations of fact related to the Accused's suspected involvement in the attack on the USS COLE.

i. After the allegations were read by the recorder, the Accused was offered an opportunity to make a statement. The Accused opted to have his personal representative read a prepared statement on his behalf. The Accused was offered the opportunity to take an oath to tell

the truth, but he was advised that he was not required to do so. The Accused opted to take the Muslim oath prior to the presentation of his statement.

j. The Accused's personal representative then read the Accused's prepared statement. It began by asserting that the Accused was "tortured into confession and once he made a confession his captors were happy and they stopped torturing him." In the statement, the Accused also asserted that he "made up stories during the torture in order to get it to stop." AE 467C, Attach. M. Thereafter, the statement responded to the individual factual allegations previously read by the recorder. As a part of the statement, the Accused denied any involvement in the USS COLE bombing. While the Accused admitted that he knew people who were involved in the USS COLE bombing, he insisted that he only had a business relationship with them and did not know what they were planning to do.

k. Following his statement, the president of the CSRT asked the Accused about his allegations of torture. The Accused described some of the abuse he endured. After that discussion, the president asked the Accused if he was under any pressure or duress at the CSRT proceeding. The Accused answered "no, not today." *Id.*

l. The president and other panel members proceeded to ask the Accused questions about his statement, including about the allegations that the Accused participated in the attack on the USS COLE. During the questioning the Accused admitted meeting Usama Bin Laden on many occasions, but he generally denied involvement in the conspiracy that led to the attack on the USS COLE.

m. The open portion of the CSRT lasted for about two hours, including breaks.

n. A subsequent, closed, classified portion of the CSRT occurred outside the presence of the Accused and his personal representative in which the Government presented further alleged evidence against the Accused without any opportunity for rebuttal.

VI. Effects of Trauma

a. The Accused was diagnosed with Post-Traumatic Stress Disorder (PTSD) by a Rule for Military Commissions (R.M.C.) 706 sanity board in 2013,[45] as well as by defense expert Dr. Sandra Crosby in 2014.[46]

b. The Commission finds that the Accused's PTSD is likely related, at least in part, to the abuse he experienced in the RDI program.[47] There is no evidence of the Accused having ever received any treatment specifically for PTSD.[48]

c. Significant physical and psychological effects of torture can last for ten years or more.

d. If a captive faces a choice between compliance and "extreme pain or suffering, then that's not a real choice."[49] A subsequent interviewer cannot know whether the results of their interview are the product of their current questioning or prior coercion.[50]

4. **Law & Analysis**.

a. "No statement obtained by the use of torture or by cruel, inhuman, or degrading treatment [] whether or not under color of law, shall be admissible in a military commission . . . ." 10 U.S.C. § 948r(a); *see* M.C.R.E. 304(a)(1). M.C.R.E. 304(a)(2) provides:

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[45] AE 467C, Attach. R.
[46] Dr. Crosby has previously been recognized by the Commission as an expert in the diagnosis and treatment of torture victims, as well as on the appropriate standard of medical care.
[47] *See* AE 467DDD.
[48] *See generally* AE 467WW, para. 49.
[49] Transcript dated 20 April 2023 at 24476 (testimony of Government Expert Dr. Welner).
[50] Transcript dated 16 June 2023 at 25433–34 (testimony of Defense Expert Kleinman).

> A statement of the accused may be admitted in evidence in a military commission only if the military judge finds—(A) that the totality of the circumstances renders the statement reliable and possessing sufficient probative value; and (B) that—(i) the statement was made incident to lawful conduct during military operations at the point of capture or during closely related active combat engagement, and the interests of justice would best be served by admission of the statement into evidence; or (ii) the statement was voluntarily given.

b. M.C.R.E. 304(a)(5)(A) addresses the admissibility of evidence derived from statements obtained by torture or cruel, inhuman, or degrading treatment. It states:

> Evidence derived from a statement that would be excluded under section (a)(1) of this rule may not be received in evidence against an accused who made the statement if the accused makes a timely motion to suppress or an objection, unless the military judge determines by a preponderance of the evidence that—(i) the evidence would have been obtained even if the statement had not been made; or (ii) use of such evidence would otherwise be consistent with the interests of justice.

see also M.C.R.E. 304(a)(5)(B); AE 335N at 8–16.

c. "A coerced confession is offensive to basic standards of justice, not because the victim has a legal grievance against the police, but because declarations procured by torture are not premises from which a civilized forum will infer guilt." *Lyons v. Oklahoma*, 322 U.S. 596, 605 (1944). Some interrogations can be "so inherently coercive that [their] very existence is irreconcilable with the possession of mental freedom by a lone suspect against whom [the government's] full coercive force is brought to bear." *Ashcraft v. Tennessee*, 322 U.S. 143, 154 (1944). "The Court's role when faced with an allegedly coerced confession is to 'enforce[] the strongly felt attitude of our society that important human values are sacrificed where an agency of the government, in the course of securing a conviction, wrings a confession out of an accused against his will.'" *United States v. Karake*, 443 F.Supp.2d 8, 89 (D.D.C. 2006) (citing *Schneckloth v. Bustamonte*, 412 U.S. 218, 225 (1973).

d. The Supreme Court recognized almost 90 years ago that statements obtained from an accused through torture or physical coercion should not be admitted at trial. In *Brown v. Mississippi*, 297 U.S. 278, 280 (1936), the Supreme Court held that it was error for the trial court to receive into evidence statements coerced from the defendants by torture. In that case, the defendants were mercilessly whipped by a mob that included a deputy sheriff until their backs were "cut to pieces with a leather strap with buckles on it." *Id.* at 282. The Court went on to further describe the defendants' ordeal as follows:

> [T]hey were likewise made by the said deputy definitely to understand that the whipping would be continued unless and until they confessed, and not only confessed, but confessed in every matter of detail as demanded by those present . . . When the confessions had been obtained in the exact form and contents as desired by the mob, they left with the parting admonition and warning that, if the defendants changed their story at any time in any respect from that last stated, the perpetrators of the outrage would administer the same or equally effective treatment.
>
> Further details of the brutal treatment to which these helpless prisoners were subjected need not be pursued. It is sufficient to say that in pertinent respects the transcript reads more like pages torn from some medieval account than a record made within the confines of a modern civilization which aspires to an enlightened constitutional government.

Id. The next day, two officials came "to hear the free and voluntary confession of these miserable and abject defendants. The sheriff of the county of the crime admitted that he had heard of the whipping, but averred that he had no personal knowledge of it." *Id.* at 283. "Nevertheless the solemn farce of hearing the free and voluntary confessions was gone through with, and . . . used in court to establish the so-called confessions." *Id.*[51]

[51] *See also Brooks v. Florida*, 389 U.S. 413 (1967), in which the Supreme Court reversed a conviction based upon a confession given by an inmate almost immediately after having been held for two weeks in a small punishment cell with no windows, no bed, little food, and with only a hole in the floor to use as a commode. The Court noted that for "two full weeks he saw not one friendly face from outside the prison, but was completely under the control and domination of his jailers." *Id.* at 414. The Court commented that "the record in this case documents a shocking display of barbarism which should not escape the remedial action of this Court." *Id.* at 415.

e. The Government concedes here that "the military commission should assume that statements petitioner made while he was in U.S. -- while he was in CIA custody should be treated as statements -- quote, statements obtained by the use of torture or by cruel, inhuman, or degrading treatment under 10 U.S.C. Section 948r(a), which provides that such statements are not admissible in a military commission."[52] The Government has not sought to introduce those statements at the Accused's military commission. However, the Government argues that the statements made by the Accused in early 2007 to law enforcement agents and to the CSRT should be admissible at trial because they were not obtained through torture or coercion and because the circumstances surrounding the making of those statements are sufficiently attenuated from the taint of the abuses inflicted upon the Accused between 2002–2006.

f. The significant distinction between *Brown* and this case is the four-year gap between the worst of the abuses suffered by the Accused and the interviews and proceedings that led to the statements being offered by the Government.[53] The Government's position begs the question of whether, if the *Brown* defendants had continued to be held in jail for four years, without access to an attorney or anyone other than members of the sheriff's department, while periodically being paid "maintenance visits" by the mob that tortured them to remind them that they better continue answering questions or risk a return to the "hard times," similar confessions made to a different sheriff's deputy, with minimal rights advisement, would be sufficiently attenuated from the torture. Having found that the Accused made incriminating statements to CIA interrogators while being subjected to torture and cruel, inhuman, or degrading treatment,

[52] Transcript dated 30 June 2023 at 26684.
[53] This is not to say that all of the Accused's abuse ceased in 2003. The Accused continued to be subjected to confinement conditions and treatment that qualify as inhuman and degrading up until 2006, long after the use of EITs was terminated.

this Commission must address how long the taint of that torture and abuse lasts and under which circumstances it may be considered attenuated.

g. In *Lyons*, 322 U.S. 596, the Supreme Court addressed a case where the defendant had given an initial confession under physically coercive circumstances. Then, eleven days later, he gave another confession. In assessing the admissibility of the second confession, the Court observed, "the voluntary or involuntary character of a confession is determined by a conclusion as to whether the accused, at the time he confesses, is in possession of 'mental freedom' to confess or to deny a suspected participation in a crime." *Id*. at 602 (citing *Ashcraft*, 322 U.S. at 154). The Court also explained:

> The Fourteenth Amendment does not protect one who has admitted his guilt because of forbidden inducements against the use at trial of his subsequent confessions under all possible circumstances. The admissibility of the later confession depends upon the same test -- is it voluntary. Of course the fact that the earlier statement was obtained from the prisoner by coercion is to be considered in appraising the character of the later confession. The effect of earlier abuse may be so clear as to forbid any other inference than that it dominated the mind of the accused to such an extent that the later confession is involuntary.

Id. at 603.

h. In *Oregon v. Elstad*, 470 U.S. 298, 307 (1985), the Supreme Court again addressed the question of whether a second confession given by an accused was admissible at trial. However, in that case, the first confession was not the product of physical coercion. In eliciting the first confession, law enforcement officers did not inform the accused of his *Miranda* rights. The Court concluded that a prior unwarned confession that was voluntarily given did not preclude the admissibility of a subsequent voluntary confession given after a proper rights advisement. The Court cited its own ruling in *United States v. Bayer*, 331 U.S. 532, 540–541 (1947), for the proposition that "this Court has never gone so far as to hold that making a

confession under circumstances which preclude its use, perpetually disables the confessor from making a usable one after those conditions have been removed." *Elstad*, 470 U.S. at 311.

i. Distinct from the instant case, *Elstad* did not deal with a situation where the initial confession was the product of coercion. Instead, the Court recognized the crucial difference between an unwarned statement and a coerced statement. The Court noted, "[w]hen a prior statement is actually coerced, the time that passes between confessions, the change in place of interrogations, and the change in identity of the interrogators all bear on whether that coercion has carried over into the second confession." *Id*. at 310. Ultimately the Court held that, "absent deliberately coercive or improper tactics in obtaining the initial statement, the mere fact that a suspect has made an unwarned admission does not warrant a presumption of compulsion." *Id*. at 314. A subsequent administration of *Miranda* warnings to a suspect who has given a voluntary but unwarned statement ordinarily should suffice to remove the conditions that precluded admissibility of the earlier statement. In so holding, however, the Court acknowledged that a second confession could be considered the fruit of a previous confession that was obtained by improper means. *Id*. at 308.

j. The Court of Appeals for the Armed Forces has held that, "[w]here a confession is obtained at a lawful interrogation that comes after an earlier interrogation in which a confession was obtained due to *actual* coercion, duress, or inducement, the subsequent confession is presumptively tainted as a product of the earlier one." *United States v. Cuento*, 60 M.J. 106, 108–09 (C.A.A.F. 2004) (quoting *United States v. Phillips*, 32 M.J. 76, 79 (C.M.A. 1991) (emphasis in original)). If the first statement was unwarned, the absence of a "cleansing

warning"[54] before a subsequent statement is a factor to be considered in determining voluntariness. *Cuento*, 60 M.J. at 109. However, the absence of a cleansing warning has generally not been fatal to a finding that a subsequent confession was given voluntarily. *See, e.g.*, *United States v. Brisbane*, 63 M.J. 106, 114 (C.A.A.F. 2006); *United States v. Lewis*, 78 M.J. 447 (C.A.A.F. 2019).

k. Mirroring the Supreme Court's holding in *Elstad*, M.C.R.E. 304(a)(4) provides:

> [i]n determining whether a statement was voluntarily given, the military judge shall consider the totality of the circumstances, including, as appropriate, the following: (A) the details of the taking of the statement, accounting for the circumstances of the conduct of military and intelligence operations during hostilities; (B) the characteristics of the accused, such as military training, age, and education level; and (C) the lapse of time, change of place, or change in identity of the questioners between the statement sought to be admitted and any prior questioning of the accused.

This multi-factor inquiry addresses whether there has been a sufficient break in the stream of events separating the coercion from the statement. *Clewis v. State of Texas*, 386 U.S. 707, 710 (1967).[55] "[L]ess traditional forms of coercion, including psychological torture, as well as the conditions of confinement have been considered by courts in their assessment of the voluntariness of the statements." *Karake*, 443 F.Supp.2d at 51 (citing *Brooks*, 389 U.S. at 313–15). "The critical question with respect to attenuation is not the length of time between a previously coerced confession and the present confession, it is the length of time between the

[54] A "cleansing warning" serves to advise a suspect that statements they previously made cannot be used against them in court.

[55] The test has already been applied in the context of Guantanamo Bay litigation. *See Al Rabiah v. United States*, 658 F.Supp.2d 11, 36–37 (D.D.C. 2009) (approximately two years was not long enough to dissipate coercion); *see also Anam v. Obama*, 696 F.Supp.2d 1, 7 (D.D.C. 2010) ("The Court is particularly concerned that the interrogators at Guantanamo relied on, or had access to, Petitioner's coerced confessions from Afghanistan.").

removal of the coercive circumstances and the present confession." *Id*. at 89 (citing *Lyons*, 322 U.S. at 597).

l. Consideration of the details of the taking of the January–February 2007 statements includes not only the specific manner in which the agents conducted the interviews in 2007, but also the totality of the circumstances surrounding the Accused's detention beginning in 2002. The Government bears the burden of producing sufficient evidence that the coercive circumstances of the Accused's confinement by the CIA from 2002 to September 2006, including the extreme abuse inflicted upon the Accused in 2002 and 2003, his continuous interrogation, continued isolation, detention, and psychological abuse, were attenuated over the course of the few short months between September 2006 to January 2007 when the law enforcement interviews were conducted. During the litigation of the motion, the Government offered no significant evidence to demonstrate that the coercive circumstances which began in October 2002 changed in any significant way through late 2006, when he was finally ostensibly turned over to the DOD.

m. The Government concedes the Accused was tortured by the CIA. As part of the psychology-based EIT program, the Accused was conditioned through torture and other inhumane and coercive methods by trained psychologists—who also participated in the torture—to become compliant during interrogations and debriefings. This conditioning was continued through repeated maintenance visits to ensure the Accused remained compliant. Therefore, although the EITs may have ceased in 2003, the Accused was subjected to constant reminders by his original tormentors of the unwritten contract, and the fact that a failure to cooperate with debriefers upon demand could lead to a return to the "hard times." Unsurprisingly, the Accused

continued to make statements while in CIA custody from late 2002 until September 2006. These statements, made during the course of scores[56] of interrogations and debriefings over four years, were not merely unwarned, but instead were actually coerced, with the constant looming threat of "hard times" to come if the Accused failed to live up to his end of the "contract." As in *Karake*, "here, the coercion was a product of both discrete beatings, as well as the general conditions of confinement." *See* 443 F.Supp.2d at 89. The Government has failed to establish that there was any meaningful relief from those conditions prior to the FBI interview.

n. Having found that the Accused was subjected to torture and other physical and mental abuse which created the coercive conditions in which he gave numerous incriminating statements to the CIA over four years, any subsequent statements made by the Accused are presumptively tainted by the prior statements obtained by torture. It is for the Government to prove that the statements at issue in the instant motion are sufficiently attenuated from that taint.

o. Following four years of essentially solitary confinement[57] in a series of CIA-controlled black sites—including the very location where the LHM statement was taken—the Accused was "transferred" to DOD custody in September 2006.[58] The LHM was taken four months later. Four months is a considerable amount of time; however, it is a small fraction of time compared to the years the Accused spent held incommunicado in inhumane and degrading living conditions. Surely, the Supreme Court that described the conditions in *Brooks* as

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[56] *See supra* note 20.
[57] *See, e.g.*, *In re Medley*, 134 U.S. 160, 167–69 (1890) ("solitary confinement bears 'a further terror and peculiar mark of infamy'"); *Davis v. Ayala*, 576 U.S. 257, 287 (2015) (Kennedy, J., concurring); *Glossip v. Gross*, 135 S. Ct. 2726, 2765 (2015) (Breyer, J., dissenting); *Gallina v. Wilkinson*, 988 F.3d 137 (2d Cir. 2021); *Porter v. Pennsylvania Dep't of Corr.*, 974 F.3d 431 (3d Cir. 2020); *Porter v. Clarke*, 923 F.3d 348 (4th Cir. 2019), as amended May 6, 2019; *Grissom v. Roberts*, 902 F.3d 1162 (10th Cir. 2018); *Williams v. Sec'y Pennsylvania Dep't of Corr.*, 848 F.3d 549 (3d Cir. 2017); *United States v. King*, 61 M.J. 225 (C.A.A.F. 2005).
[58] *See* Classified Addendum, AE 467DDD.

"barbarism," would likely struggle to find adequate words to describe what the Accused endured in this case.

p. Additionally, the Accused's conditions of confinement improved only incrementally and in small measures from the time he was in CIA custody to the time he was in DOD custody. Aside from two visits with the ICRC once he was returned to NSGB, the Accused was still held in the same location as the former CIA black site where he was previously held and subjected to forced "rectal feeding." Additionally, he was still under the complete domination and control of his captors as demonstrated by forced cell extractions and forced grooming.[59] Under those circumstances, it is difficult to conceive how the Accused would have believed that his circumstances had significantly changed or that "the contract" was not still in full effect.

q. With this backdrop, U.S. law enforcement agents arrived in January 2007 with the purpose of obtaining incriminating statements from the Accused. A prosecution team was in place and likely knew that the Accused's prior statements during the RDI program would never be admissible in any trial. The solution to that problem was to obtain new incriminating statements. To obtain new statements that could be used in court, the prosecution team came up with a rights advisement for the agents to provide to the Accused, which was carefully constructed to strike a balance between avoiding outright coercion but also leaving the Accused in the dark in several important respects. Despite demonstrating, on numerous occasions, the ability to provide a full rights advisement to other detainees in foreign countries, including during interviews of alleged Al Qaeda operatives Owhali, Badawi, and Quso,[60] the U.S.

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[59] *See* AE 467ZZ.

[60] When Jamal Al-Badawi was interviewed by U.S. law enforcement agents, including FBI SA Ali Soufan, he was provided the standard FBI FD-395 Advice of Rights form prior to each interview. AE 327, Attach. A; AE 319MM, Tabs 47–48; Transcript dated 12 June 2023 at 24887 ("similar to our *Miranda* warnings"). When Fahd Al-Quso was

government, including the DOJ and the CIA, chose to create a specific and limited rights advisement for the Accused. AE 518. For example, the Accused was not to be advised that he could consult counsel. That right would have to wait until after he further incriminated himself and the Government got around to charging him with crimes.[61] Additionally, the rights advisement failed in one major respect: it did not notify the Accused that his prior statements, which were obtained through torture, could not be used against him at any future trial.[62]

r. The Government cites to two somewhat comparable cases in *United States v. Elsheikh*, 578 F. Supp. 3d 752 (E.D. Va. 2022) and *United States v. Khweis*, 971 F.3d 453, 459-64 (4th Cir. 2020) as instances where courts did not suppress statements made by terrorism suspects to law enforcement agents after the suspects had previously given unwarned confessions during interrogations. In both cases, the primary issue was whether the men had been subjected to what amounted to two-part interviews which were designed to obtain confessions from the men before they were later read their rights and provided additional confessions, a technique rejected in *Missouri v. Seibert*. The Court in *Elsheikh*, for example, rejected the accused's

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interviewed by NCIS SA Robert McFadden, he was also advised of his rights as set forth in the FD-395. AE 319MM, Tabs 55–56; Transcript dated 11 April 2023 at 23096–97 ("Almost like a full *Miranda* warning"). And when Mohammed Al-Owhali was interviewed by FBI SA Steve Bongardt, he was provided a printed copy of the Advice of Rights document prepared by Assistant United States Attorney Pat Fitzgerald including "full *Miranda* rights." Owhali was read the form at the beginning of each interview session. AE 482, Attach. D; AE 482M, Attach. B; AE 319MM, Tab 74; Transcript dated 11 March 2023 at 22637–38.

[61] This is not to imply that the Accused is entitled to a *Miranda* warning or that he is entitled to suppression of his statements due to the lack of such a warning. Clearly, the Military Commissions Act does not require such a warning and the Commission does not find that *Miranda* applies to unprivileged alien enemy belligerents held at NSGB while awaiting trial for alleged law of war violations. However, the nature of the rights advisement provided to the Accused by the law enforcement agents can be considered among the totality of the circumstances surrounding the January–February 2007 interviews.

[62] *See, e.g.*, *Missouri v. Seibert*, 542 U.S. 600, 612 (2004) ("Could the warnings effectively advise the suspect that he had a real choice about giving an admissible statement at that juncture? Could they reasonably convey that he could choose to stop talking even if he had talked earlier? For unless the warnings could place a suspect who has just been interrogated in a position to make such an informed choice, there is no practical justification for accepting the formal warnings as compliance with *Miranda*, or for treating the second stage of interrogation as distinct from the first, unwarned and inadmissible statement.").

argument, noting that "any reasonable person in Defendant's position would have readily 'appreciate[d] that the interrogations had taken a new turn.'" *Elsheikh*, 578 F. Supp. 3d at 38.

s. *Elsheik* and *Khweis* are easily distinguishable from the instant case. Neither case involved allegations of significant abuse suffered by the accused, much less conditions or treatment that amounted to torture, during their initial interviews. Neither man was held for four years, incommunicado, in what amounted to solitary confinement. In both cases, prior to the second sets of interviews, the accused were given at least modified *Miranda* warnings, wherein they were advised of the rights to remain silent and to consult with an attorney. In *Elsheikh*, the accused was even advised that his prior statements would likely not be usable against him in court. *Id.* at 14–15. In *Khweis*, agents advised him of the right to counsel, told him his family had retained counsel for him in the United States, and told him "he did 'not need to speak with [them] today just because [he] h[ad] spoken with others in the past.'" *Khweis*, 971 F.3d at 458.

t. While a deficient cleansing statement alone does not require suppression, it is appropriate for the Commission to consider under the totality of the circumstances surrounding the January–February 2007 interviews. As discussed above, the rights warning for the Accused was drafted with the input of the same agency that coerced the Accused and conditioned his compliance to obtain the previous statements. This rights warning was crafted to omit notice to the Accused that his prior coerced statements might not be admissible against him. The Military Commissions Act of 2006, which was in effect at the time of the 2007 interviews, did not specifically prohibit the admission of involuntary statements.[63] M.C.R.E. 304 was added after

[63] Pub.L. 109-366, October 17, 2006, 120 Stat 2600, § 948r(c)–(d). These provisions allowed for the admission of coerced statements without regard to voluntariness. *See also id.* at 949a(b)(2)(C) ("A statement of the accused that is otherwise admissible shall not be excluded from trial by military commission on grounds of alleged coercion or compulsory self-incrimination so long as the evidence complies with the provisions of section 948r of this title.").

the promulgation of the Military Commissions Act of 2009.[64] The Commission is left to conclude that the warning given to the Accused was designed to fit the rules in effect in 2007, which were drafted with the specific intent to leave an open question as to the admission of involuntary statements. Under these circumstances, the Commission finds that at the time of the January–February 2007 interviews the Accused was given no reason to believe that his many prior incriminating statements made over the years under torture or cruel, inhuman, or degrading treatment would not eventually be used against him if he ever saw the inside of a courtroom.

u. The Government urges the Commission to conclude that the Accused should have been or was aware that his conditions had changed in some meaningful way. While it is true and the Commission finds that the agents that conducted his January–February 2007 statements treated the Accused with fairness and respect and did not subject him to any form of coercion, this fact alone does not necessarily erase all that had come before. The Accused, having been required to answer the questions of various debriefers over the years under the threat of return to the "hard times," could not be expected to ascertain whether Agents Gaudin, McFadden, and Sendlein were actually from a different agency than the one that had tortured him for years. He was in no position to know whether Drs. Mitchell and/or Jessen were watching the interviews in the next room and prepared to intervene with more abusive treatment should he violate the contract. He had no reason to doubt that he might, without notice, suddenly be shipped back to a dungeon like the ones he had experienced before. He had no real reason to know whether NX2

The Act also made inapplicable the portions of the Uniform Code of Military Justice relating to compulsory self-incrimination. § 948b(d)(B). The words "voluntary" and "voluntariness" do not appear in the bill's text.
[64] 10 U.S.C. § 948r. Added Pub.L. 111-84, Div. A, Title XVIII, § 1802, Oct. 28, 2009, 123 Stat. 2580.

lurked nearby with a pistol, a drill, or a broomstick in hand in the event he chose to remain silent or to offer versions of events that differed from what he told his prior interrogators.

v. In essence, when the agents finally provided the Accused with some form of a rights advisement, he had to ask himself whether he was willing to risk that he could say nothing, without harsh ramifications, or whether he would just continue to abide by the contract, as he was conditioned to do for several years, and repeat the same incriminating statements he had made numerous times. Given all he had experienced before and with the understanding that he had already incriminated himself numerous times in the past, the Commission is unsurprised that the Accused chose not to gamble by immediately putting his faith and trust in yet another group of U.S. officials who showed up at a former black site to "debrief" him.

w. The Government also points to statements made by the Accused after interview sessions on 1 and 2 February 2007 in arguing that the Accused knew that his situation had changed, that he had rights, and that he did not have to speak to the agents.[65] The Government notes that the Accused stated that he was "denying everything." However, a quick review of the LHM belies any suggestion that the Accused denied everything when speaking to the agents. Throughout the LHM, the Accused thoroughly implicates himself in the conspiracy that led to the attack on the USS COLE. The Accused's statement that he was denying everything may have been little more than wishful thinking or braggadocio designed to make him feel better about once again complying with the "contract" and incriminating himself to U.S. personnel.

x. The Government has a stronger argument with respect to the Accused's statements on 2 February 2007. At that time, the Accused indicated his understanding that meeting with the

[65] AE 467C at 6, 19, 22; see AE 467C, Attach. H, I; *see* AE 467DDD.

agents was actually optional. By that time, of course, the Accused had also made clear that he understood that fact by telling the agents that he did not want to talk to them anymore. The agents documented in the LHM that they would have preferred to continue the interviews past the third day. But by the end of the third day, the Accused apparently trusted what the agents told him starting on day one, that he was not required to speak to them. Although the Commission is convinced that by the end of the third day of the interviews, the Accused understood that he was not required to speak to the agents and that he was confident that he would not suffer a return to the "hard times" by refusing to speak, the Commission cannot find that he understood that fact when the interviews began. Further, because the interviews were not recorded and the LHM does not reflect a timeline of when statements certain admissions were made, the Commission cannot assume that the incriminating statements reflected therein were only made after the Accused finally came to the realization that he could trust what Agents Gaudin, McFadden and Sendlein had told him about his right to refuse to talk.

Admissibility of LHM Statements

y. As noted previously, in determining whether an accused's will was overborne in a particular case, courts consider the totality of all the surrounding circumstances, regarding both the characteristics of the accused and the details of the interrogation. *Schneckloth*, 412 U.S. at 226–27 (listing cases). The Commission has considered, among others, the following factors in the analysis of the voluntariness of the Accused's statements to investigators in January–February 2007:

1. Youth. From the time the Accused was taken into custody until the 2007 statements

were made, he was approximately in his late twenties to early thirties. Therefore, this factor does not weigh heavily in the evaluation.

2. Education and intelligence. The Accused has a high school education but finished school sometime into his twenties. There is evidence in the record to suggest that he may be of below-average intelligence. However, there is also evidence suggesting that he is clever and skilled in logistics. Dr. Jessen testified the Accused may be smarter than others give him credit for. This factor does not tip the scale in either direction.

3. Lack of rights advisement. As discussed previously, the U.S. agents who interviewed the Accused in 2007 were specifically directed not to advise the Accused that he could consult an attorney. Although he was told that he did not have to speak to the agents, the Accused had no reason to think that his prior confessions would not seal his fate in any future judicial proceedings as he was not informed that his prior statements could not be used against him. This weighs toward suppression.

4. Length of detention. At the time of the 2007 statements, the Accused had been in U.S. government custody for over four years. For the vast majority of that time, he was held incommunicado in solitary confinement. This weighs heavily toward suppression.

5. Repeated and prolonged nature of the questioning. Prior to the 2007 interviews, the Accused had been interrogated or debriefed somewhere between 145 to 200 times. The record indicates that, especially from 2005 on, these debriefings were repetitive and unfruitful, leading to concerns about the Accused's mental health. These interrogations were repeated over the four years of the Accused's detention. The 2007 interviews themselves took place over several days, multiple hours each day. This weighs heavily toward suppression.

6. Use of physical punishment such as the deprivation of food or sleep. The Commission has previously addressed the horrific abuses inflicted upon the Accused during his years in CIA custody and need not belabor the point here. While the Accused was no longer experiencing most of the abuses he had previously been subjected to by 2007, he was still under the complete domination and control of the U.S. government under circumstances not entirely dissimilar to those he had experienced the previous several years. This weighs heavily toward suppression.

7. Circumstances of the statement. The circumstances of the interviews in 2007, evaluated on their own merit, were not actually coercive in nature. The agents involved in the 2007 interviews acted professionally and in no way coerced the Accused. This weighs against suppression. However, the agents, perhaps unknowingly, could not help but benefit from the terms of the contract established by the CIA and Drs. Mitchell and Jessen years before.

8. Psychological impact on the accused. This factor is perhaps the most important and weighs most heavily towards suppression. The entire goal of the RDI program and the contract created by Drs. Mitchell and Jessen was to provoke an involuntary response to stimuli which would condition compliance from the Accused. The compounding effects of the program—both physical and psychological—could not be removed by the law enforcement agents in 2007 and cannot be ignored by the Commission.

z. The Commission has carefully considered the aforementioned factors among the totality of the circumstances surrounding the 2007 LHM statements, to include the treatment of the Accused from the time his detention began in late 2002 until 2 February 2007. The Commission has also considered the limited advisement of rights given the Accused by the interviewing agents as well as the non-coercive environment of those interviews. The

Government, although conceding the Accused was tortured during the RDI program, argues the 2007 statements were sufficiently attenuated from that mistreatment. The Commission is not convinced.

aa. Any resistance the Accused might have been inclined to put up when asked to incriminate himself was intentionally and literally beaten out of him years before. For years, the Accused was coerced and psychologically conditioned to cooperate with questioners—dozens, if not hundreds of times. To refuse to cooperate was to face the prospect once again of experiencing drowning, the fear of summary execution, days of sleeplessness while shackled naked in a cell, confinement to small boxes, forced rectal feeding, or other physical and mental abuse. Through all that, the Accused implicated himself again and again. The Commission finds that the limited changes in the Accused's circumstances from September 2006 until February 2007 were not meaningful enough to erase the effects of what came before. The change of interlocutors also means little under these circumstances as the Accused was met by numerous different debriefers over the years. From his perspective, Agents Gaudin, McFadden, and Sendlein were merely the newest faces. Further, the Government has done little to establish that the Accused's circumstances materially changed from 2003 until his arrival at NSGB in September 2006.

bb. Most, if not all, Supreme Court and U.S. Court of Appeals for the Armed Forces cases dealing with the issue of subsequent statements made following an initial unwarned or coerced statement deal with a *single* prior inadmissible statement being made before a second warned or uncoerced statement. As discussed above, here, the Accused was in U.S. custody for four years prior to the "second" statement. During those four years, the Accused was coerced and

psychologically conditioned to cooperate with questioners—dozens of times. If there was ever a case where the circumstances of an accused's prior statements impacted his ability to make a later voluntary statement, this is such a case.[66]

cc. Considering the totality of all relevant circumstances, the Commission is most persuaded by the contract established and maintained by Drs. Mitchell and Jessen. The contract required the Accused to speak to the agents in January and February 2007. The Accused had no reason to believe the contract had lapsed. He therefore had only the Hobson's choice of refusing to talk and risking the consequences or continuing to comply and implicating himself for the 201st time. The Commission finds this to be no choice at all and cannot be confident the Accused believed he was free to remain silent on 31 January 2007.

dd. The Commission finds that the Government has not met its burden to establish that the statements made by the Accused between 31 January 2007 and 2 February 2007 were made voluntarily. Even if the 2007 statements were not *obtained by* torture or cruel, inhuman, and degrading treatment, they were *derived from* it. The Commission is not convinced that the 2007 statements would have been obtained if not for the Accused's prior experience with being tortured and abused in the RDI program. On the facts presented, the Commission does not find that the Accused should or could have reasonably believed that his circumstances had substantially changed when he was marched in to be interviewed by the newest round of U.S. personnel in late January 2007. The limited rights advisement given was insufficient to attenuate

[66] *See, e.g.*, *United States v. Bayer*, 331 U.S. 532, 540 (1947) ("Of course, after an accused has once let the cat out of the bag by confessing, no matter what the inducement, he is never thereafter free of the psychological and practical disadvantages of having confessed. He can never get the cat back in the bag. The secret is out for good. In such a sense, a later confession always may be looked upon as fruit of the first."). Though *Elstad* found this theory inapplicable as to that case, it is helpful here in evaluating the totality of the circumstances.

the lingering taint of the torture, the psychological abuse associated with incommunicado and solitary confinement for years, and the constant threat of a return of the "hard times" if the Accused were to fail to live up to the contract.

ee. Returning to the words of the Supreme Court in *Lyons*, "the effect of the earlier abuse may be so clear as to forbid any other inference than that it dominated the mind of the accused to such an extent that the later confession is involuntary." 322 U.S. at 603. The Commission concludes that the Government has not proven by a preponderance of the evidence that the presumed taint from the prior years of physical and psychological torment was dissipated when the Accused was again confronted with interrogators in January–February 2007. Instead, the evidence supports a conclusion that the Accused did what he was trained to do: comply. Compliance is not the same as the "mental freedom" addressed by the Supreme Court in *Ashcraft*. Compliance is not enough to establish the voluntariness of the Accused's statements. The LHM statements must be suppressed pursuant to 10 U.S.C. § 948r and M.C.R.E. 304.

ff. Exclusion of such evidence is not without societal costs. However, permitting the admission of evidence obtained by or derived from torture by the same government that seeks to prosecute and execute the Accused may have even greater societal costs. Permitting admission of this evidence would greatly undermine the actual and apparent fairness of the criminal proceeding against the Accused in this case and infect the trial with unfairness sufficient to make any resulting conviction a denial of whatever process is due. *See Romano v. Oklahoma*, 512 U.S. 1, 12 (1994).

Admissibility of CSRT Statements

gg. The Commission does not reach the same conclusion with respect to the Accused's statements made during the CSRT hearing on 14 March 2007, as the CSRT statements are distinguishable in a number of important respects. Once again, the Commission has considered the totality of the circumstances surrounding the making of the statements during the CSRT hearing on 14 March 2007, to include the Accused's experiences in CIA and DOD custody from 2002 to 2007.

hh. The crucial difference between the LHM and the CSRT statements is what happened over the course of the three days of the LHM interviews. When the Accused was brought in to talk to the agents, the Commission finds that the Accused was likely in compliance mode. He was trained to comply or face harsh consequences, so he initially complied even despite limited warnings that suggested he could refuse to talk. After all, he had little to risk by repeating what he had already said many times; he had much to risk if he refused to talk and faced a return to the "hard times." After day three of the LHM interviews, however, likely based upon the relaxed and cordial interactions between himself and the agents and the repeated reminders that he was "the boss" during the interviews, the Accused reached a point where he was willing to assert his right to terminate the interview. When he terminated the interview after three days, he presumably did so because he no longer feared unknown consequences that might follow. By the time of the CSRT hearing, the Accused knew for sure that he did not suffer any consequences for terminating the interview in early February. In other words, the Accused would have known after the LHM interviews that he had an actual choice whether or not he would speak.

ii. There are other substantial differences between the interview that began on 31 January 2007 and the CSRT. Where the Accused had no advance warning that he would again be debriefed at the end of January 2007, in preparation for the CSRT he was assigned a personal representative to explain the nature of the CSRT and assist during the proceeding. This would have been a clear signal to the Accused that the situation was substantially different from debriefings and interrogations he experienced with the CIA.

jj. Among other substantial differences for the Accused were the location, the forum, the formality, and the personnel involved in the CSRT. Rather than his prior experiences of being interrogated in a cell in front of a walling wall with a towel ominously draped around his neck or while trying to avoid drowning, the CSRT was conducted as an official proceeding in a hearing room presided over by a military judge with two other military officers sitting as panel members. The Accused had a personal representative to speak for him and to assist him during the proceeding. While the personal representative was not an attorney, the availability of a representative marked a sea change in what the Accused had previously experienced and clearly signaled that the Accused had rights. Further, the personal representative was a Lieutenant Commander in the United States Navy, someone who clearly would have had significant military training and experience, as well as advanced education.

kk. When the proceeding began, the president clearly explained the purpose of the hearing and advised the Accused that he could not be compelled to testify at the tribunal, but instead had the choice to either testify or not to testify, including the right to make an unsworn statement if he so chose. He was also advised of his right to present evidence at the hearing and to question witnesses that might testify. When asked, the Accused indicated that he understood

the purposes of the proceeding as well as his rights. When asked if he had any questions concerning the tribunal process, he responded "[n]o."

ll. During the hearing, the allegations were read to the Accused. The allegations referenced statements made by individuals other than the Accused, to include Mohammed Al 'Owhali and Jamal Al-Badawi, which implicated the Accused in the conspiracy to attack the USS COLE. None of the allegations read to the Accused made reference to any statements previously made by the Accused. In other words, there was no mention of the fact that the Accused had previously admitted his involvement in the USS COLE operation.

mm. Finally, when asked if he would like to make an oral statement to the Tribunal, the Accused opted to have a written statement presented by his personal representative. He was then asked if he wished to take an oath but was told that he was not required to do so. He chose to take the oath. He was even offered the option of a Muslim oath, which he accepted.

nn. Perhaps one of the most significant considerations in determining that the Accused believed by the time of the CSRT that he faced no further danger from his former interrogators came during the Accused's sworn statement, when he denied much of what he previously told interrogators and investigators from 2002 through 2007. He denied having anything to do with the bombing of the USS COLE. He also denied being a member of Al Qaeda. He denied allegations made by Al-Badawi, insisting that his interactions with Al-Badawi and others related to the USS COLE bombing were simply a business relationship in the fishing industry. The Accused further insisted that incriminating statements he made to the CIA were the product of torture. He then went on to apparently discuss the torture he endured.[67] The president then

[67] This portion is redacted from the transcript of the proceedings at AE 467C, Attach. H at 16 of 36.

acknowledged the Accused's assertion that he was tortured and asked the Accused if he was "under any pressure or duress today." The Accused responded, "No. Not Today."[68]

oo. The Accused went on to answer questions from the president and the other tribunal members. Although some of his statements tend to incriminate him in certain respects, he continued to insist that he was not knowingly involved in the plan to attack the USS COLE and that he was involved only in a plan to run a fishing business.

pp. Considering the totality of the circumstances, it is clear that the Accused understood by 14 March 2007 that he had rights, to include the right not to incriminate himself further. He apparently no longer feared potential ramifications as reflected in his denial of involvement in the USS COLE operation or with Al Qaeda, along with his insistence that his admissions in the past were obtained due to torture. He was clearly informed of his right not to testify at the tribunal and indicated that he understood that right. He was also asked whether he was under duress and denied that he was. The fact that he complained of prior torture indicates that he would have been willing to reveal if he was under duress at the CSRT hearing. Further, the CSRT allegations and evidence focused not on any statement previously made by the Accused, but only on allegations made by others as well as other forms of evidence.

qq. The Commission finds, based on the totality of the circumstances, that the Accused's statements to the CSRT were made voluntarily and were not obtained through or derived from torture or any other form of coercion or abuse he was subjected to at the hands of his former captors and interrogators.

[68] *See* AE 467C, Attach. H at 16 of 36.

6. **Ruling**. The defense motion to suppress set forth in AE 467 is **GRANTED in part** and **DENIED in part**. That portion of the motion related to the LHM statements made by the Accused to investigators during the January–February 2007 interviews is **GRANTED**. That portion of the motion that seeks to suppress the Accused's statements to the CSRT is **DENIED**.

So **ORDERED** this 18th day of August 2023.

//s//
LANNY J. ACOSTA, JR.
COL, JA, USA
Military Judge