

# Appendix C



**DEPARTMENT OF DEFENSE  
OFFICE OF THE CHIEF DEFENSE COUNSEL  
OFFICE OF MILITARY COMMISSIONS**

14 January 2009

MEMORANDUM FOR THE CONVENING AUTHORITY

SUBJ: REQUEST TO WITHDRAW CHARGES ICO *UNITED STATES V. AL-NASHIRI*

1. The Defense requests that you withdraw and dismiss the charges against Mr. Al-Nashiri and order the government to provide you with all evidence pertaining to the torture, abuse and interrogation of Mr. Al-Nashiri while in U.S. custody.
2. In an article in the January 14, 2009, Washington Post, you are quoted as stating that you did not refer charges in Mr. Al-Qahtani's case because he was tortured. "We tortured Qahtani." "His treatment met the legal definition of torture. And that's why I did not refer the case [for prosecution]."
3. As noted in our prior request to you, strong evidence exists that Mr. Al-Nashiri was tortured while in CIA custody. Mr. Al-Nashiri stated in his CSRT hearing that any admissions he made were the product of torture. And, most importantly, the government has admitted to waterboarding Mr. Al-Nashiri. By itself, waterboarding amounts to torture.<sup>1</sup> The State Department has criticized other countries for engaging in techniques of torture, such as near drowning.<sup>2</sup> Also, the Ninth Circuit in *Hilao v. Marco*, held that a plaintiff subjected to waterboarding by the Filipino military had a cause of action for torture.<sup>3</sup> And the United States has prosecuted waterboarding as a war crime: in 1947 the United States prosecuted a Japanese military officer for using a form of waterboarding on an American civilian.<sup>4</sup> In light of this prima facie case of torture, your duty as the convening authority and international law requires you to examine all related evidence.<sup>5</sup>
4. The government likely possesses information related to Mr. Al-Nashiri's treatment while in CIA custody. We believe that this information was not made available to you during the referral process. The defense requested this information pre-referral so we could provide it to you for your consideration, but the government denied the request. In light of your recent comments, it seems that such evidence would have been crucial to your referral decision.

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<sup>1</sup> See Physicians for Human Rights, *Broken Laws, Broken Lives: Medical Evidence of Torture by US Personnel and its Impact* (June 2008)

<sup>2</sup> Bureau of Democracy, Human Rights, and Labor, U.S. Dept. of State, Country Reports on Human Rights Practices-2006 (2007), available at <http://www.state.gov/g/drl/rls/hrrpt/>.

<sup>3</sup> *Hilao v. Marco*, 103 F.3d 789, 790 (9th Cir. 1996).

<sup>4</sup> Walter, Pincus, *Waterboarding Historically Controversial: In 1947, the U.S. Called It a War Crime; in 1968, It Reportedly Caused an Investigation*, Wash Post, Oct. 5, 2006 at A17.

<sup>5</sup> See, e.g., *Hiber Conteris v. Uruguay*, Comm'n No. 139/1983, U.N. Doc. CCPR/C/OP/2 at 168 ¶ 7.2 (1990).

5. Additionally, the Defense has evidence that is both highly relevant to this request and will highlight the crucial need to obtain further information from the government. We request an opportunity to communicate this information to you. However, in order to comply with the protective order in this case and the specific nature of the evidence, we would request that we be permitted to submit these matters *ex-parte* and in a secured facility.

//s//

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Detailed Defense Counsel

CC: Chief Defense Counsel  
Trial Counsel