IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ZAYN AL ABIDIN MUHAMMAD HUSAYN (ISN # 10016),	)	
***Petitioner*.**	)	
v.	)	**No. 08-CV-1360 (EGS)**
ASHTON B. CARTER,	)	
Respondent.	)	

PETITIONER'S EMERGENCY REQUEST FOR A TIMELY DECISION ON HIS MOTION TO COMPEL THE RESPONDENT TO PRODUCE FOR THE COURT A COMPLETE AND UNREDACTED COPY OF THE SSCI REPORT ON THE CIA DETENTION AND INTERROGATON PROGRAM

PRELIMINARY STATEMENT

A. Procedural History

Petitioner filed his Motion[1] on November 18, 2016. On November 29, 2016, Respondent filed a motion for an extension of time to file its opposition until January 13, 2017, a full forty-one days after its due date. ECF No. 449. Since this request exceeded his counsel's consent by ten days, Petitioner filed his Partial Opposition on December 13, 2016, reiterating his consent to a month's extension and requesting that the Court require that Respondent file its opposition no later

[1] Motion to Compel the Respondent to Produce for the Court a Complete and Unredacted Copy of the SSCI Report on the CIA Detention and Interrogation Program. ECF No. 441.

than January 3. ECF No. 453. Evidently taking the Court's silence as permission, Respondent did not file its opposition until late on January 13. ECF No. 462.[2]

Before Respondent belatedly filed its Opposition, in *Nashiri v. Obama* Judge Lamberth ordered, *inter alia*, that an electronic or paper copy of the full Senate Select Committee on Intelligence *Committee Study of the CIA's Detention and Interrogation Program* ("SSCI Report") be deposited with the Court Security Officer for secure storage under the terms of the applicable Amended Protective Order ("Custody Order").[3] However, on January 13, 2017, the government filed motions seeking reconsideration of the Custody Order, ECF No. 270, and in the alternative for a stay to allow the government to consider whether to seek appellate review. ECF No. 271.

B. Grounds for Emergency Request for a Timely Decision

Petitioner's original Motion and his Partial Opposition cite these facts on the substantial risk that the SSCI Report will disappear or be destroyed. Petitioner bases its emergency request upon them:

- In the Freedom of Information suit filed by the ACLU, despite repeated orders by Southern District of New York Judge Alvin Hellerstein, the CIA destroyed videotapes of Petitioner's (and Mr. Nashiri's) interrogations and torture. Then Chief of the CIA's Counterterrorism Center Jose Rodriguez confessed his motive for flouting the Court's orders by ordering the destruction: the "heat from destroying [the tapes] is nothing compared to

[2] In doing this, the government deviated markedly from the responsible way it had acted previously. In *Nashiri v. Barack Obama*, 1:08-cv-1207, when the Court had not yet ruled on its motion for an extension, the government respectfully submitted an interim response. Respondent's Interim Response to Petitioner's Motion for a Preservation Order," ECF No. 262 (Dec. 5, 2016).

[3] December 28, 2016 Order, ECF 268, *Nashiri v. Barack Obama*, 1:08-cv-1207.

what it would be if the tapes ever got into the public domain...: it would be devastating to us...."[4]

- In May 2016, reports emerged that the Acting Inspector General of the CIA "accidentally destroyed" the OIG's only copy of the SSCI Report, yet DCI Brennan refused to replace it. This Court's Preservation Order was in place at the time at the time.[5] Despite that long-standing and unrefuted understanding, both by SSCI Vice Chair Feinstein[6] and news media,[7] now the government claims, without explanation other than to suggest that only an "additional copy" had been destroyed,[8] that the CIA OIG suddenly has in its possession a copy of the full SSCI Report.[9] This episode simply creates more uncertainty about the handling of the Report, for one aspect of the original reports to the SSCI and the Justice Department remains undenied—

[4] Motion at 3. The government's Opposition attempts to turn this flagrant spoliation of evidence against Petitioner, but this attempt is misguided. Possibly conscious of the prior destruction of the torture videos when he entered his Preservation Order, Judge Roberts in his 2009 Order directed that various important documents be turned over to Petitioner, not simply preserved. *See* the discussion, *infra* at 7-8.

[5] Motion at 4, 6. *See also* Judge Robert's Sept. 30, 2009 Preservation Order.

[6] On May 13, 2016, Sen. Feinstein wrote to DCI Brennan: "As you may be aware, the office of the CIA Inspector General has misplaced and/or accidentally destroyed its electronic copy and disk of the" full SSCI Report. "I write to request that, as Director of the CIA, you provide a new copy of the Study to the office of the CIA IG immediately....Your prompt response will allay my concern that this was more than an "accident." https://assets.documentcloud.org/documents/2834606/Feinstein-to-Brennan.pdf No response was forthcoming.

[7] Michael Isikoff broke the story on May 16, 2016 in his news piece "Senate report is one step closer to disappearing." In it, Isikoff recounted that "[t]he CIA inspector general's office—the spy agency's internal watchdog—has acknowledged that it mistakenly destroyed its only copy of a mammoth Senate torture report at the same time lawyers for the Justice Department were assuring a federal judge that copies of the document were being preserved... The deletion of the document has been portrayed by agency officials to Senate investigator as an "inadvertent" foul-up by the inspector general... 'I can assure you that the CIA has retained a copy,' wrote Dean Boyd, the agency's chief of public affairs, in an email...." https://www.yahoo.com/news/senate-report-on-cia-torture-1429636113023030.html

[8] The Brennan declaration blandly observes that: "Both the CIA and the CIA's Office of the Inspector General currently have in their possession a copy of the final version of the Full Report." Decl of John O. Brennan, Par. 13.

[9] Oppos. at 14; Decl of John O. Brennan, Par. 13. Respondent's Opposition creates more murkiness, when it states: "[T]he CIA itself did not lose or destroy the copy it has in its possession." And both the CIA and the CIA OIG "currently" have copies in their possession. Oppos. at 14.

an edition of the SSCI Report was "accidentally destroyed" by the CIA OIG.

- Then there's the politically fraught tug-of-war between new SSCI Chair Richard Burr (R-NC), in which the latter has sought to retrieve the seven copies of the SSCI Report originally distributed to Executive Branch agencies, and former SSCI Chair Dianne Feinstein, whose rebuttal made clear to President Obama why the SSCI had intended that the full report (which provides "far more detail than what [the SSCI was] able to provide in the now declassified and released Executive Summary") would be transmitted to such agencies;[10]
- "Concern for the preservation of the [SSCI Torture Report] has also been expressed by a number of human rights NGOs and media organizations, as well as in ongoing military commission proceedings."[11]

Most importantly, during the colloquy for a motion requesting that the military commission compel discovery of the SSCI Torture Report, David Nevin, Lead Counsel for Khalid Sheikh Mohammad, expressed to Military Judge Pohl his extreme concern over the very existence of the report in the gentlest manner possible: "I just wanted to ask...that you rule sufficiently in advance of January the 21st, [so] that your ruling is not overtaken by events."[12] No one felt the need to ask

[10] Motion at 5; *see also* Sen. Feinstein's Jan. 16, 2015 letter to Pres. Obama, https://www.documentcloud.org/documents/1507407-feinstein-jan-16-letter-to-obama-in-response-to.html Feinstein wrote: "The realization of that goal [ensuring that nothing like the CIA's detention and interrogation program can ever happen again] depends in part on future Executive Branch decision makers having and utilizing a comprehensive record of the [CIA's] program...."

[11] Partial Opposition at 3.

[12] Unofficial/Unauthenticated Transcript (Dec. 7, 2016), at 14464; *United States of America v. Khalid Shaikh Mohammad*, Motion AE 286 AAA. That Judge Pohl found Nevin's motion not ripe has no effect on Petitioner's motion. Quite apart from the special and limited jurisdiction of the military commission, which renders it totally unlike this Court, Judge Pohl's order made clear the government in that case is currently providing so-called "RDI" discovery(i.e., documents relating to defendants' Rendition, Detention and Interrogation) pursuant to a different motion series, and the process has not been completed. Judge Pohl directed that the Department of Defense

what Nevin meant, and Judge Pohl issued his order on January 10, 2017.[13] As Nevin no doubt knew, president-elect Trump has expressed disdain for those, like the Feinstein-led SSCI, who have rejected the government's use of torture against alleged terrorists.[14]

Should Petitioner be deprived of this invaluable resource, the Court would be unable to provide "a meaningful review of both the cause for detention and the Executive's power to detain," as required by *Boumediene*. The Report also contains information bearing on Petitioner's mental health, which would inform an assessment of his ability to participate in his defense.[15] For these reasons, we respectfully request that the Court decide this motion before Friday, January 20, 2017.

C. Brief commentary on opposition

Respondent strains credulity by urging that the relief sought by Petitioner would be unduly burdensome. After all, though the full report has many pages, it can be contained electronically on a single computer disk. Further, the government fails to explain how such relief would "disturb relations between the CIA and" the SSCI.[16] As already seen, the SSCI in December 2014 freely distributed the SSCI Report to Executive Branch agencies, including the Defense

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"preserve a copy" of the report "pending completion of the RDI discovery" and litigation pertaining thereto. Hence, the defense motion to order the government to file the report with the military commission was "granted in part." Oppos., Ex. 3. Crucially, no such "RDI documents" currently are being provided in Petitioner's case.

[13] Oppos. , Ex. 3.

[14] Partial Oppos. at 5. Any action taken by the Trump administration to render the SSCI Report unavailable, or perhaps even to order it destroyed, might well be supported by nearly half of Americans who in a recent survey said they believed an enemy fighter could be tortured to extract information. S. Sengupta, "Torture Can Be Useful, Nearly Half of Americans in Poll Say," (Dec. 5, 2016). www.nytimes.com/2016/12/05/world/americas/torture-can-be-useful-nearly-half-of-americans-in-poll-say.html

[15] Petitioner's Motion at 6.

[16] Oppos. at 2.

Department ("DOD"), the Respondent in this case. That aside, Petitioner is not seeking the Report from the CIA, he asks for the Court to take custody of a copy provided by the DOD.

No person who has read the SSCI Executive Summary closely could seriously doubt the discoverability of the SSCI Report. By a recent count, Petitioner's name is mentioned over 1,000 times in the highly redacted Executive Summary alone, and the summary repeatedly refers the reader to the full Report for more information. What's contained in the government's Factual Return does not limit Petitioner's discovery rights. As but one example, that elements in the government brazenly deceived other government entities and personnel in order to obtain permission to torture, and in the process fabricated a lengthy series of facts concerning Petitioner, who he was, and what he had done, surely bears on the credibility of factual claims now put forward by the government. Further, commentary in the SSCI Report on Petitioner's interrogation and torture, insofar as it touches on his mental and physical states, sheds light on his ability to communicate with his counsel and participate meaningfully in this case. As to there being "no risk that the Report" will be lost or destroyed, its well-known storm-tossed history, which we have summarized, and the potential threat to its existence in the near future, contradicts any such notion. Finally, the case cited in support of Respondent's argument that the Preservation Order entered by Judge Roberts does not apply to the SSCI Report is irrelevant; that decision was specific to a FOIA claim, and it has no bearing on this motion.

Lastly, despite the plain meaning its title, Respondent misconceives the scope of Petitioner's motion. Petitioner does not seek the documents underlying

the Senate Report at this time; that's for a later day perhaps. Rather, the subject motion is confined solely to the Report alone.[17]

ARGUMENT

I. The Preservation Order

Respondent's argument[18] regarding the October 1, 2009 preservation order issued by Judge Roberts miscasts what the Court did. Nothing in the order stands in the way of the specific relief now sought by Petitioner. Judge Roberts denied Petitioner's requests for "each relevant agency to submit a list of all relevant evidence that has already been destroyed," and "that the order require a government official from each entity covered by the order to certify the accuracy of any representations made on behalf of that entity."[19] He also denied Petitioner's request that the government be directed "to provide [Petitioner's] counsel with translations of [his] diaries and other writings....[20] That's all. Apart from a broad preservation order, the Court granted Petitioner's request for his diaries, five sketches made by Petitioner depicting the interrogation techniques used upon him, and a series of papers containing names and telephone numbers of Petitioner's business partner and families he stayed with during his travels.[21] When fairly read, the order supports Petitioner's present motion, in that the Court provided to

[17] Respondent states that: "It is not clear whether [Petitioner's] request extend[s] to materials other than the" full Report." Oppos. at 10, pointing to a few scattered references to other documents. Petitioner wishes to be very clear: this Motion seeks only what its title says it desperately needs: an order by this Court to Compel the Respondent to Produce for the Court a Complete and Unredacted Copy of the SSCI Report on the CIA Detention and Interrogation Program, and that the Court take custody of the Report. Beyond that, Petitioner simply reserves the right to seek other documents and things at a future time. Hence, pages 10 et seq. of Respondent's opposition, to the extent they deal with other documents, are irrelevant to this motion.

[18] Oppos. at 3-4.

[19] Sept. 30, 2009 Memorandum Order, ECF No. 429, at 2.

[20] *Id.* at 5-6.

[21] *Id.* at 11,

Petitioner's counsel (rather than merely taking custody of) important documents in his case.

Moreover, since it did not exist at the time, Judge Roberts was not presented with the SSCI Report, the reality that quite likely it contains oceans of relevant information, and the clear and abiding danger that it might disappear. Nothing he did in 2009 reflects negatively on what this Court should do.

II. This Court previously granted precisely the relief Petitioner now seeks

In *Halperin v. Kissinger,* 606 F.2d 1192 (D.C. Cir. 1979), a former member of the National Security Council sued ten federal officials for improperly subjecting his home and private communications to electronic surveillance. The records of that surveillance were stored in a White House safe. Given the fear that these records might be destroyed for political purposes during the Watergate investigation, this Court ordered the defendants, who still served in the highest offices of the federal government, to "surrender the originals of all materials [subject to the preservation order] for impoundment by this Court...[and further ordered] that such material surrendered in compliance with this Order shall be maintained by the Court under seal, subject to further order of this Court." *Halperin v. Kissinger*, Case No. 73-civ-1187, Order (D.D.C., June 28, 1973).

Given the well-founded bases for fear shown by Petitioner in this motion that the SSCI Report will be lost or destroyed, an order such as that rendered by the *Halperin* trial judge is even more justified in this habeas proceeding. (Halperin simply sought money damages.) "[T]he power of the federal courts to conduct inquiry in habeas corpus is equal to the responsibility which the [the Great Writ] involves." *Harris v. Nelson*, 394 U.S. 286, 292 (1969). And unlike the voluminous paper records subject to the impoundment order in *Halperin*, the SSCI Report is contained on a computer disk. Granting Petitioner's request will impose no logistical burden on Respondent, or on the Court.

III. Respondent's inapposite "congressional record" point

For reasons that are unclear, Respondent burdens this Court with a carefully edited history of the Report, to the effect that the document is a congressional document, and that such status limits this Court's access to it. Surely, former SSCI Chair Dianne Feinstein harbored no such thought. In her December 10, 2014 cover letter for the full Report to President Obama, she stated: "[T]he full report should be made available within the CIA and other components of the Executive Branch for use as broadly as appropriate to help make sure that this experience is never repeated....."[22] Various agencies in the Executive Branch were copied, and also received copies of the full Report.

ACLU v. CIA, 823 F.3d 655 (D.C. Circuit 2016), pet. for cert No. 16-629 (filed Nov. 9, 2016), which Respondent relies upon, has no significance here. The Circuit's only holding was that the SSCI Torture Report is exempt from disclosure under the Freedom of Information Act ("FOIA") because it is not an "agency record," but instead (on the record before it) is a "congressional record" and therefore is statutorily exempt under FOIA from disclosure to a private litigant. But Petitioner is not a private litigant who depends on FOIA, and his habeas case discovery rights are not limited to "agency records" he could obtain under FOIA. Rather, this Court's "power of inquiry on federal habeas corpus is plenary." *Harris*, 394 U.S. at 292. Such an inquiry will only be possible if the SSCI Report continues to exist.

IV. The irrelevance of the Report's preservation under the Presidential Records Act

[22] Letter from Dianne Feinstein, SSCI Chair, to President Barack Obama (Dec. 10, 2014). http://www.feinstein.senate.gov/public/_cache/files/b/e/be9d4494-383c-44c2-97ba-085033357ab6/FD5957E288184512C22015210EC336DA.letter-to-potus-transmitting-the-full-and-final-ssci-study.pdf

Respondent urges that, since the Senate Torture Report is safely immured under the Presidential Records Act ("PRA"), neither Petitioner nor this Court need have concerns for its safety. Yet, as the December 9, 2016 letter[23] from White House Counsel W. Neil Eggleston makes abundantly clear—the Report "should be restricted for the twelve full years allowed under the Act." While PRA does contain an exception to the twelve year restriction on access, so that Presidential records "shall be made available pursuant to subpoena or other judicial process issued by a court of competent jurisdiction for the purposes of any civil...investigation or proceeding," such access is far from unfettered. The relevant exception is prefaced by these daunting limitations, as the exception is "[s]ubject to any rights, defenses, or privileges which the United States or any agency or person may invoke."[24]

Respondent fails to explain why Petitioner must be burdened by the need to embark on a separate and potentially complex litigation to gain access to the Report, when this Court is fully equipped to safeguard the Report with the greatest of ease.

More troubling still, in the eyes of many, Presidential records also shall be made available "to an incumbent President if such records contain information that is needed for the conduct of current business of the incumbent President's office...."[25] That just the kind of peril this emergency request is designed to avoid.

V. The ultimate discoverability of the SSCI Report

Petitioner does not seek a ruling at this time on the discoverability of the Report; he only asks that it be preserved on account of the threats to its existence

[23] Oppos., Ex. 2.

[24] 44 U.S.C. §§ 2205(2) and (2)(A).

[25] 44 U.S.C. §§ 2205(2) and (2)(B).

for the chance that it may be deemed discoverable. Nonetheless, Respondent avers that the Report "is not likely to be properly subject to discovery in this case."[26] Details of his interrogation while he was in the CIA's custody, Respondent claims, are not pertinent to whether Petitioner lawfully may be detained, "because the Factual Return in which the Government laid out the factual basis for Petitioner's detention does not rely on statements Petitioner made while in CIA or other U.S. custody." The only statements relied upon in the Factual Return are statements Petitioner made *before* he was captured, including his diary and a propaganda video Petitioner recorded before his capture. Hence, details of Petitioner's interrogations while in CIA custody "are not likely to be pertinent" to the Court's evaluation of whether Petitioner's present detention is lawful.[27] With all due respect, the government could not be more wrong.

In point of fact, though Petitioner does not at this time seek a ruling declaring this, the contents of the SSCI Torture Report clearly are discoverable. The Report evaluates intelligence about Petitioner's alleged relationship with, or knowledge about Al Qaeda and Osama bin Laden, matters which are discussed in the Factual Return. To the extent the Report goes into detail about these issues, and offers expert opinions respecting the facts then available to the government, these details and opinions must be preserved.[28] For example, on information and belief, Petitioner's counsel believe that they will be able to show that Petitioner denied involvement in acts of terrorism prior to, and during his torture--information which is exculpatory and therefore highly relevant to a habeas petition. *See Bin Attash v. Obama*, 628 F.Supp.2d 24, 32-33 (D.D.C. 2009). One of the

[26] Oppos. at 9.

[27] *Id.*; italics original.

[28] As already noted, the redacted SSCI Executive Summary contains Petitioner's name in excess of 1,000 times, probably more often than any other detainee's. Also, the summary repeatedly refers the reader to the full Report for more information.

principal findings of the SSCI Report was the extraordinary extent to which the CIA actively deceived its overseers across the branches of government about the efficacy of torture and the culpability of the individuals it tortured. The Report therefore is highly likely to cast doubt on the reliability, accuracy, or impartiality of any government interrogators, doctors, fellow detainees whose testimony is procured by the government, or other witnesses. Finally, Judge Roberts in his September 30, 2009 Order specifically rejected Respondent's assertion that discovery must be limited to the four corners of the Factual Return: "Even if the respondent does not rely on statements made by [Petitioner] during the time he was in the control or custody of the United States, evidence of [his] treatment during that period could be relevant to whether he has the ability to assist his counsel in his case, an ability central to a meaningful opportunity to demonstrate that he is being held pursuant to the erroneous application or interpretation of relevant law."[29] Especially in Petitioner's case, the details in the Report relating to his mental and physical health are vital to his counsel, potential expert witnesses, and the Court in assessing his ability to participate meaningfully in his case.

CONCLUSION

There already is a pattern of destruction of evidence in this case. Despite Judge Hellerstein's various orders, the CIA knowingly and willfully destroyed in November 2005 vitally important videotapes of Petitioner's interrogation and torture. At least one copy of the SSCI Torture Report has already been destroyed by the CIA, despite the assurances of Justice Department lawyers in February 2015 that the status quo would be maintained. A few specific steps to place a copy of the SSCI Report under the Court's control are needed because the very existence of the Report has been cast in doubts by political controversy, and Petitioner fears, as do many others, that still greater political controversy can be expected beginning

[29] Sept. 30, 2009 Order at 4. ECF No. 429; internal quotes omitted.

on January 20. For these reasons, Petitioner respectfully requests that the Court decide this motion before such time, and order the immediate placement of a copy of the Report in the Court's custody. Judge Lamberth, as noted, already has agreed on the need for such relief, and we respectfully ask that this Court do so as well.

Alternatively, Petitioner respectfully requests that the Court declare that the full SSCI Report is subject to the existing preservation order.

Dated:

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing was served on opposing counsel, below, by electronic court filing this 17th day of January, 2017.

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