

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

ZAYN AL ABIDIN MUHAMMAD )  
HUSAYN (ISN # 10016), )  
 )  
*Petitioner.* )  
 )  
v. )  
 )  
ASHTON B. CARTER, )  
 )  
*Respondent.* )  
 )

No. 08-CV-1360 (EGS)

**PETITIONER’S 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**

On September 30, 2009, the Court entered an order directing Respondent to “preserve and maintain all evidence, documents and information, without limitation, now or ever in his possession, custody, or control, or that of his agents, servants, employees and confederates, and of any governmental agencies and private contractors ever acting in concert with him concerning the Petitioner, relevant to any claim and/or defense related to the basis for Petitioner’s continued detention.” ECF No. 357.

On December 9, 2014, the Senate Select Committee on Intelligence (“SSCI”) published the redacted Executive Summary of its Report on the CIA’s Detention and Interrogation Program (“SSCI Exec. Summ.” and in footnotes “SSCI ES”). But this summary is not the Senate Torture Report. It is only a small fragment of the report, and a redacted fragment at that.<sup>1</sup> The complete and unredacted report runs to 6,963 pages, and includes several volumes of supporting

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<sup>1</sup> See [http://www.nytimes.com/2014/12/11/us/politics/us-tells-court-that-documents-from-torture-investigation-should-remain-secret.html?\\_r=0](http://www.nytimes.com/2014/12/11/us/politics/us-tells-court-that-documents-from-torture-investigation-should-remain-secret.html?_r=0)

documentation. It is “the most comprehensive review ever conducted of the CIA’s Detention and Interrogation Program... The document production phase lasted more than three years, [and] produced more than six million pages of material... The [SSCI] Study is based primarily on a review of these documents, which include CIA operational cables, reports, memoranda, intelligence products, and numerous interviews conducted of CIA personnel by various entities within the CIA, in particular the CIA’s Office of Inspector General and the CIA’s Oral History Program, as well as internal email and other communications.”<sup>2</sup>

It is clear the preservation order applies to this report. Yet in light of the extraordinary tensions surrounding the creation and dissemination of the document, the prior destruction of material evidence in this case, and the possibility that the Executive Branch may not be sufficiently mindful of its obligations, Petitioner respectfully moves this Court for an Order requiring Respondent to turn over to the Court a complete and unredacted copy of the entire report, with supporting volumes. In support of this request, Petitioner would observe the following:

1. To justify his torture and detention, the CIA variously claimed that Petitioner was “one of the highest ranking members of...Al Qaeda,” that he “had been involved in every major terrorist operation carried out by Al Qaeda,” and that he “wrote Al Qaeda’s manual on resistance techniques...[and] his experience in Al Qaeda makes him well-acquainted with and well-versed in such techniques”<sup>3</sup> Yet the Executive Summary establishes that these and other comparable allegations were knowingly false. As importantly, the Summary cites to literally scores of

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<sup>2</sup> SSCI ES, at 9.

<sup>3</sup> See, e.g., OLC Memo, at 1, 7; SSCI ES, at 410, 430.

internal CIA documents attesting to the true state of affairs. Indeed, the Executive Summary makes clear that these underlying records reveal far more than is contained in the Summary. The relevance and materiality of these underlying records cannot be open to serious question.

2. Unfortunately, there is a substantial risk that these records, in whole or in part, may be destroyed, despite the existence of the Protective Order. To begin with, there have already been material destructions in this case—conduct that is the subject of Petitioner’s Motion for Sanctions for Spoliation of Evidence, ECF 217. In October 2003 and May 2004, the ACLU and others submitted FOIA requests for videotapes taken by the CIA of its interrogation and torture of Petitioner. When those requests were not honored, they filed a FOIA suit. Southern District of New York Judge Alvin Hellerstein repeatedly ordered the CIA to search for and either identify or produce responsive records, which the judge deemed subject to disclosure. But instead of complying with the court’s orders, the CIA destroyed the videotapes.<sup>4</sup> Then Chief of the CIA’s Counterterrorism Center (“CTC”) Jose Rodriguez confessed his motive for flouting the law by ordering the destruction. The “heat from destroying [the tapes] is nothing compared to what it would be if the tapes ever got into the public domain...; it would be devastating to us... All in the room agreed.”<sup>5</sup> As consummate proof of guilty knowledge of wrongdoing, the CIA destroyed the tapes on the morning of November 9, 2005, yet the Agency delayed announcing

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<sup>4</sup> October 5, 2011, Opinion and Order, *ACLU, et al. v. Department of Defense, et al.*, Case 1:04-cv-04151 (Doc. 472), at 13. Moreover, at the time when the CIA destroyed them, military commission defense attorneys were exerting increased pressure to obtain the videotapes. Further, the CIA had kept secret the tapes’ existence from the 9/11 Commission, which had asked the Agency for records of its interrogations. M. Mazzetti and C. Savage, *No Criminal Charges Sought Over C.I.A. Tapes*, <http://www.nytimes.com/2010/11/10/world/10tapes.html>.

<sup>5</sup> October 5, 2011 Opinion and Order, *supra* at n. 20, at 15; *see also*, M. Mazzetti and C. Savage, *supra* at n. 20.

the destruction for five years and one day—until November 10, 2010—after the applicable statute of limitations had run.<sup>6</sup>

Nor is destruction of evidence in this case a feature of the distant past. In May 2016, reports emerged that the Acting Inspector General of the CIA “accidentally destroyed” the IG’s only copy of the report.<sup>7</sup> On May 13, 2016, former Chair Feinstein wrote to John Brennan “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.”<sup>8</sup> The same day, Senator Feinstein wrote to Attorney General Lynch, pointing out that “[t]he CIA IG should have a copy of the full Study because the report includes extensive information directly related to the IG’s ongoing oversight of the CIA.” She closed with the same wish for a “prompt response” that would “allay [her] concern that this was more than an ‘accident.’”<sup>9</sup> However, according to published accounts, the CIA has not sent a new copy to the IG.<sup>10</sup>

3. Other dangers threaten the report. In the ACLU’s FOIA case, “the CIA told [the ACLU] through government counsel month-after-month that it did not possess the [Full Report], until finally it turned out that the CIA *did*, in fact, have the report, and the government lawyer

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<sup>6</sup> M. Mazzetti and C. Savage, *supra* at n. 20.

<sup>7</sup> <http://thehill.com/policy/national-security/280002-cia-watchdog-accidentally-destroyed-only-copy-of-torture-report>

<sup>8</sup> <https://assets.documentcloud.org/documents/2834606/Feinstein-to-Brennan.pdf>

<sup>9</sup> <https://www.scribd.com/doc/312766027/160513-Letter-to-AG-Loretta-Lynch-From-Vice-Chairman-Feinstein-Re-CIA-IG>

<sup>10</sup> *The Hill* article, *supra* at n. 7.

had to explain: ‘there was a miscommunication apparently within the Agency as to what we were looking for...they didn’t realize that they had it.’”<sup>11</sup>

Indeed, the full report has been controversial—to put it gently—since the publication of the Executive Summary. In the month following publication, Senator Richard Burr (R-NC), who had just ascended to the chair of the SSCI, wrote President Obama to ask that executive branch agencies transfer their copies of the report back to the Senate. Indeed, Burr demanded that the report “not be entered into any Executive Branch system of records.”<sup>12</sup> This prompted the ACLU to assert that “[t]he timing and content of Sen. Burr’s request strongly suggest some degree of coordination with Executive Branch agencies to avoid producing the report” in the ACLU’s FOIA suit seeking its release.<sup>13</sup> Former SSCI Chair Dianne Feinstein (D-CA) wrote to the president on January 16, 2015, stating: “[I]t was clear that the final, updated classified version of the report was the official version of the Study and that it would be transmitted to appropriate Executive Branch agencies. There was never any objection to providing the full, official report to the Executive Branch, consistent with appropriate limitations due to classification.”<sup>14</sup>

4. In light of this unfortunate history, the Court should take custody of the entire report. At bottom, the Court is called upon to determine the lawfulness of Petitioner’s detention. The full report demonstrates, in excruciating detail, that the CIA manufactured a deliberately false

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<sup>11</sup> <https://www.aclu.org/blog/speakeasy/no-senator-you-cant-have-torture-report-back-updated>; italics original.

<sup>12</sup> *ACLU v. CIA*, Case 1:13-cv-01870, Doc. 39-8 filed on 01/21/15, D.C.D.C.

<sup>13</sup> <https://www.aclu.org/blog/speakeasy/no-senator-you-cant-have-torture-report-back-updated>

<sup>14</sup> *ACLU v. CIA*, *supra* at n. 5, Doc. 39-9, filed on 01/21/15.

narrative about Petitioner and his connection to al Qaeda and terrorism.<sup>15</sup> The relevance of the report, therefore, is not open to serious question. Indeed, there is probably no more important piece of evidence to the Court and Petitioner than this report. Yet the risk that Respondent will destroy or transfer away from its custody the full report is palpable. If it should come to pass, the damage to Petitioner would be irreparable. As much to the point, should Petitioner be deprived by chicanery, misadventure or accident 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 the Supreme Court in *Boumediene v. Bush*, 553 U.S. 723, 783 (2008).

5. Fortunately, a remedy is close at hand. A court may take steps to preserve evidence when there is “a significant risk that relevant evidence will be lost or destroyed.” *Pueblo of Laguna v. United States*, 60 Fed.Cl.133, 138 (2004); *see also Capricorn Power Co., Inc. v. Siemens Westinghouse Power Corp.*, 220 F.R.D. 429 (W.D.Pa. 2004); *Preservation of Documents in the Electronic Age—What Should Courts Do?*, Federal Courts Law Review, 2005 Fed. Cts. L.Rev. 5, 11 (“*Pueblo of Laguna* and *Capricorn Power* are the latest word on the standards for the issuance of preservation orders”). To be sure, *Pueblo of Laguna* addresses a preservation order. But we have already learned—to Petitioner’s detriment—that a preservation order is not sufficient to preserve evidence in this matter. A court order was in place when Jose Rodriguez destroyed the tapes of Petitioner’s interrogation; the Preservation Order entered by the Court was in place when the CIA IG destroyed its only copy of the Senate Torture Report. The CIA has demonstrated that it cannot be trusted with the Report and its underlying documentation.

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<sup>15</sup> “Much of the information the CIA provided to the OLC (about petitioner) was inaccurate in material respects.” SSCI ES, at 409; *see also id.* at 4-5.

The only foolproof solution is for the Court to take custody of the entire report, along with all supporting documentation.

Undersigned counsel has conferred with Respondent, who opposes this motion.

Dated: November 18, 2016

Respectfully submitted,

/s/

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