

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

AE286(AAA 3<sup>rd</sup> Sup)

**Mr. al Baluchi's Third Supplement to  
Defense Motion to Compel Discovery Of Senate  
Select Committee on Intelligence Study of RDI  
Program and Related Documents**

18 March 2016

1. **Timeliness:** This supplement is timely filed, per AE286-12(Rul)(AAA).
2. **Affirmative Statement:** This supplement addresses an issue raised by the military commission, not previously briefed.

3. **Relief Requested:**

As explained in AE286(AAA 2<sup>nd</sup> Sup) Defense Supplement to Motion to Compel Discovery of Senate Select Committee on Intelligence Study of RDI Program and Related Documents, the military commission should order the government to produce unredacted versions of the Senate Select Committee on Intelligence Study of the CIA's Rendition, Detention, and Interrogation Program (including its Forward, Findings and Conclusions, and Executive Summary), the CIA internal review of the program known as the "Panetta Review," the CIA's official response to the Senate committee study, and underlying documents referring or relating to Mr. al Baluchi. For clarity, documents "referring or relating to Mr. al Baluchi" include but are not limited to the following topics:

- a. The investigation of Ammar al Baluchi, also known as Ali Abdul-Aziz Ali, or any alleged co-conspirator or alternate suspect, at any time;
- b. The capture, rendition, detention, and interrogation of Mr. al Baluchi;
- c. The role of Mr. al Baluchi in United States efforts to investigate, kill, or capture any other person, including but not limited to Abu Ahmed al-Kuwaiti and Osama bin Laden;
- d. The capture, rendition, detention, and interrogation of any person who provided

information regarding Mr. al Baluchi;

e. The capture, rendition, detention, and interrogation of any person who may testify at the trial or sentencing of Mr. al Baluchi;

f. The capture, rendition, detention, and interrogation of any person who provided information used in identifying, preparing, or carrying out any search which allegedly produced evidence against Mr. al Baluchi; or

g. The destruction or suppression of documents or information relating to the CIA Rendition, Detention, and Interrogation Program.

**4. Facts:**

a. On 14 December 2012, the Senate Select Committee on Intelligence (SSCI) sent a copy of its full Study on the CIA's Detention and Interrogation Program, "based on more than six million pages of Intelligence Community records," to "appropriate Executive Branch agencies."<sup>1</sup>

b. On 3 April 2014, the SSCI voted to send the Findings and Conclusions and the Executive Summary of its Study on the CIA's Detention and Interrogation Program to the President for declassification and subsequent public release.<sup>2</sup>

c. On 7 April 2014, the Chairman of the SSCI wrote to the President as follows:<sup>3</sup>

**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**

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<sup>1</sup> Attachment B (14 DEC 2012 Letter from Sen. Feinstein to the President).

<sup>2</sup> AE254OO (Mohammad) Response to AE254KK(GOV), Government Motion for An Expedited Litigation Schedule to Resolve AE254Y, Attachment E, Foreword at 1.

<sup>3</sup> Attachment C (7 APR 2014 Letter from Sen. Feinstein to the President).

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.

d. On 9 December 2014, the SSCI released its Findings and Conclusions and a redacted version of the Executive Summary of its Study on the CIA's Detention and Interrogation Program. In a Foreword to the Findings and Conclusions and redacted Executive Summary, the Chairman of the SSCI explained:

**The full Committee Study, which totals more than 6,700 pages, remains classified but is now an official Senate report. The full report has been provided to the White House, the CIA, the Department of Justice, the Department of Defense, the Department of State, and the Office of the Director of National Intelligence in the hopes that it will prevent future coercive interrogation practices and inform the management of other covert action programs.**

e. On 10 December 2014, the Chairman of the SSCI sent a copy of the full report, exceeding 6,700 pages and 37,000 footnotes, to the President, with a copy to the following Executive Branch officials:<sup>4</sup>

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  
The Honorable James B. Comey, Director, Federal Bureau of Investigation  
The Honorable David Buckley, CIA Inspector General

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<sup>4</sup> Attachment D (10 DEC 2014 Letter from Sen. Feinstein to the President).

f. On 14 January 2015, the new Chairman of the SSCI wrote to the same Executive Branch officials, asking them to return the report to the SSCI.<sup>5</sup>

g. On 16 January 2015, the new Vice Chairman of the SSCI wrote to the same Executive Branch officials:<sup>6</sup>

The full, 6,963-page classified report transmitted on December 10, 2014, is an official Senate report (S. Rep. 113-288). The report has the same legal status of any other official Senate report from this Committee or any other Senate committee. At the December 2012 vote to approve the report and the April 2014 vote to send parts of the report for declassification, among other times, it 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. I therefore disagree with Chairman Burr's analysis that the report should be considered "Committee Sensitive" as that term is defined in the SSCI's Rules of Procedure.<sup>1</sup>

h. On 30 January 2015, Mr. Mohammad moved the military commission to act to prevent the Executive Branch from returning the full report to the Legislative Branch.<sup>7</sup>

i. On 12 February 2015, the government stated that it "has already begun reviewing the 'Panetta Report,'"<sup>8</sup> and that, "Although the Prosecution does not yet have access to the full SSCI Report, it continues actively seeking to obtain it through appropriate Executive and Legislative Branch channels . . . ."<sup>9</sup>

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<sup>5</sup> Attachment E (14 JAN 2015 Letter from Sen. Burr to the President).

<sup>6</sup> Attachment F (16 JAN 2015 Letter from Sen. Feinstein to the President).

<sup>7</sup> AE286J(Mohammad) Emergency Defense Motion to Produce Full, Unredacted Senate Report, or, in the Alternative to File the Report with the Commission to Be Maintained Ex Parte and Under Seal Pending Further Ruling.

<sup>8</sup> AE286K Government Response to Defense Supplement to AE286 at 6.

<sup>9</sup> *Id.*

j. On 13 February 2015, the government “assure[d] the Commission that it will preserve the status quo regarding the full SSCI Report absent either leave of the Commission or resolution of this litigation in the Prosecution’s favor.”<sup>10</sup>

k. On 24 February 2015, the government reported,<sup>11</sup>

On 18 February 2015, the Senate Select Committee on Intelligence authorized the Office of the Chief Prosecutor of Military Commissions to review the full SSCI Report. The Prosecution has begun its efforts to review the full SSCI Report for potentially discoverable information.

l. During the afternoon session of open hearings on 18 February 2016, the following exchange occurred between Mr. Connell, counsel for Mr. al Baluchi, and Judge Pohl regarding AE286(AAA):<sup>12</sup>

MJ [COL POHL]: Do you have any authority where an Article III court ordered the Legislative branch to produce legislative work product in a noncriminal situation? When I say "noncriminal," not that it's not a criminal trial, but that it doesn't involve criminal conduct by the Legislative branch itself? Do you understand, I am not talking about times where they took a bribe or things like that because I think there is a difference there, but I am saying -- do you understand what my question is?

LDC [MR. CONNELL]: Yes, and why don't I take that as a homework assignment.

MJ [COL POHL]: Okay. Good. Okay. Do your homework.

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<sup>10</sup> AE286L Government Response to Emergency Defense Motion to Produce Full, Unredacted Senate Report, or, in the Alternative to File the Report with the Commission to Be Maintained Ex Parte and Under Seal Pending Further Ruling at 6. The Department of Justice made a similar representation in the District of D.C. *See* Attachment G.

<sup>11</sup> AE286M Government Sixth Notice to Defense Motion to Compel Discovery of Senate Select Committee on Intelligence Study of RDI Program and Related Documents at 2.

<sup>12</sup> Unofficial/Unauthenticated Transcript of 18 February 2016 at 10597.

m. During the afternoon session of open hearings on 22 February 2016, the following discussion occurred, again between Mr. Connell and Judge Pohl:<sup>13</sup>

LDC [MR. CONNELL]: [T]he military commission gave me a homework assignment relating to AE 286 about the relationship between the legislature and the executive and the judiciary. I did the research on that. It turns out to be a wonderfully rich area and I request the opportunity to brief it.

MJ [COL POHL]: I look forward to reading your pleading.

LDC [MR. CONNELL]: Thank you, sir.

n. On 16 March 2016, the military commission granted leave to file this supplement.<sup>14</sup>

**5. Argument:**

The government has a responsibility to produce discovery required by the Rules of Military Commissions and the Due Process Clause, regardless of its origin. At the same time, Congress has a privilege against producing its documents in response to a judicial demand. As with the national security privilege, if the government asserts its privilege and refuses to produce responsive discovery, it must accept the corresponding sanction. Fortunately, this situation is unlikely to come about because the SSCI has already provided the report to the Executive Branch and consented to its use.

R.M.C. 701(c) requires the government to produce documents in its “possession, custody, or control” which are “material to the preparation of the defense.” In the *Brady* context, “the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on

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<sup>13</sup> Unofficial/Unauthenticated Transcript 22 February 2016 at 10720.

<sup>14</sup> AE286-12(Rul)(AAA) Ruling.

the government's behalf in the case.”<sup>15</sup> Without a requirement of “possession, custody, or control,” the duty to provide favorable evidence to the defense extends to all “evidence that is known or reasonably should be known to any government officials who participated in the investigation and prosecution of the case against the accused.”<sup>16</sup> Thus, under *Brady* and Rule 701(e), the circle of knowledge is expanded by one degree of connection: the Office of the Chief Prosecutor is not only responsible for evidence in the possession of other government officials, but for their knowledge as well.<sup>17</sup> Obviously, both the Office of the Chief Prosecutor and the investigating agencies know of the full SSCI report, and thus—barring a claim of privilege—are responsible for producing the favorable evidence it contains to the defense.

“Congress has undoubted authority to keep its records secret, authority rooted in the Constitution, longstanding practice, and current congressional rules.”<sup>18</sup> Congressional privilege arises principally from the Publication Clause, which provides that, “Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy . . . .”<sup>19</sup> Although legislative privilege may not be absolute,

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<sup>15</sup> *Kyles v. Whitley*, 514 U.S. 419, 437 (1995); see also, e.g., *In re Sealed Case*, 185 F.3d 887, 891-92 & n.2 (D.C. Cir. 1999); *United States v. Safavian*, 233 F.R.D. 205, 207 n.1 (D.D.C. 2006).

<sup>16</sup> R.M.C. 701(e)(4).

<sup>17</sup> See also *Kyles*, 514 U.S. at 508 n.11 (noting the concession of the government that it is responsible for the knowledge of all of its agents).

<sup>18</sup> *Goland v. CIA*, 607 F.2d 339, 346 (D.C. Cir. 1978).

<sup>19</sup> U.S. Const. art. I, § 5, cl. 3. Other possible sources of privilege include the Immunity From Arrest Clause, U.S. Const. art. I, § 6, cl. 2, and the Speech or Debate Clause, U.S. Const. art. I, § 6, cl. 3. See *United States v. Liddy*, 542 F.2d 76, 83 (D.C. Cir. 1976). The exact source, scope, and strength of legislative privilege is open to debate. See, e.g., *In re Grand Jury Investigation into Possible Violations of Title 18*, 587 F.2d 589, 593 (3<sup>rd</sup> Cir. 1978) (Whether Congress can “place beyond the subpoena power of the judicial branch matters not actually within the Speech or Debate Clause privilege is an open question of considerable delicacy.”). See generally David H. Kaye, *Congressional Papers and Judicial Subpoenas and the Constitution*, 24 UCLA L. Rev. 522 (1977) (arguing that Congress has stretched its claims of privilege beyond their constitutional foundations).

Congress clearly can assert a privilege not to turn over documents in response to a subpoena or other demand.

Like the national security privilege of the Executive, however, legislative privilege comes with a cost: if Congress invokes its privilege, it must bear the consequences of the refusal to produce information. In *Christoffel v. United States*,<sup>20</sup> the defendant sought the “minutes book” from a House of Representatives committee. The D.C. Circuit explained,

The right of an accused by appropriate means to obtain evidence material to his defense is essential to the administration of justice. . . . If such evidence is under the control of a department of government charged with the administration of those laws for whose violation the accused has been indicted, and its production is refused, or it is excluded, the courts having responsibility under the Constitution for the trial of criminal cases, have held a conviction will not be permitted without the evidence. *Like principles should apply with regard to evidence in the custody of the House of Representatives. While the privilege of the House must be respected it might give rise to occasions when it would be necessary to forego conviction of crime because evidence is withheld.*<sup>21</sup>

The legislative privilege rule thus mirrors the rule for national security privilege, in which “it is unconscionable to allow [the government] to undertake prosecution and then invoke its

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<sup>20</sup> 200 F.2d 734 (D.C. Cir. 1952).

<sup>21</sup> *Id.* at 739-40 (emphasis added); *see also Calley v. Calloway*, 519 F.2d 184, 220 (5<sup>th</sup> Cir. 1975) (citations omitted) (“Even if the [legislative] privilege were properly invoked and the testimony validly withheld, the withholding of the material might require the Government to let the petitioner go free if he was denied evidence essential to his defense.”).

governmental privileges to deprive the accused of anything which might be material to his defense.”<sup>22</sup>

After a party presents Congress with a demand for potentially privileged information, Congress exercises its discretion whether to comply. Congress and its committees routinely address the question of whether to honor or refuse document demands.<sup>23</sup> As an example in an Article I court, a subcommittee of the House Armed Services Committee refused to produce transcripts of the testimony of witnesses to the My Lai massacre for use in courts-martial. Based on the Congressional refusal, a military judge excluded witnesses against one defendant, SSG David Mitchell, and he was acquitted.<sup>24</sup>

Congressional privilege, however, has no application in the current situation because the full SSCI report is already in the possession of the Executive Branch. Congress not only has declined to assert any privilege, but it has affirmatively waived it by providing the Department of Defense and other Executive Branch agencies with a copy of the full report.<sup>25</sup> The Department of Defense in fact possesses two copies of the full report.<sup>26</sup>

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<sup>22</sup> *United States v. Reynolds*, 345 U.S. 1, 12 (1953).

<sup>23</sup> *See, e.g.*, S. Res. 600—To Authorize Document Production and Testimony by, and Representation of, the Select Committee on Intelligence, Cong. Rec. S6443, 111th Cong., 2<sup>nd</sup> Sess. (July 28, 2010); Communication from Chair of Permanent Select Committee on Intelligence, Cong. Rec. H1341, 113<sup>th</sup> Cong., 1<sup>st</sup> Sess. Cong. (March 12, 2013).

<sup>24</sup> Michael R. Belknap, *The Vietnam War On Trial: The Mai Lai Massacre and the Court-Martial of Lieutenant Calley* 224 (2002). On the other hand, the courts ultimately found no due process violation in the refusal of the military judge to sanction the government in the prosecution of LT William Calley. *See United States v. Calley*, 46 C.M.R. 1131 (A.C.M.R. 1973), *aff'd*, 48 C.M.R. 19 (C.M.A. 1973), *habeas corpus granted sub nom Calley v. Calloway*, 382 F. Supp. 650 (M.D. Ga. 1974), *rev'd*, 519 F.2d 184 (5<sup>th</sup> Cir. 1975).

<sup>25</sup> Attachment D.

<sup>26</sup> Attachment H (Declaration of Mark Herrington). The Executive Branch is exercising not only possession and custody of these documents, but control as well. When the SSCI asked for their copies back, Attachment F, both the Departments of Justice and Defense declined. Attachment G; AE296L at 6.

In the criminal discovery context, possession or custody, not control or origin, determines prosecution discovery duties. Although “control” may determine whether the full report is a Congressional record for Freedom of Information Act purposes,<sup>27</sup> simple “possession” or “custody” is sufficient to trigger RMC 701(c) and *Brady* responsibilities. As the District of D.C. has explained,

Because [Federal Rule of Criminal Procedure] 16 talks of “possession, custody, or control,” however, the Justice Department must turn over any written or recorded statements in its possession or custody *regardless of the origin of the statements*, so long as the government knows or through due diligence could know of their existence. Thus, the prosecution must disclose any statement of [the defendant] in the possession, custody or control of any Executive Branch agency or department, regardless of whether the statement originated from a local law enforcement agency, a non-law enforcement agency of the federal government, *or a coordinate branch of the government such as the United States House of Representatives or the United States Senate.*<sup>28</sup>

In the criminal discovery context, the Executive Branch possession of the full report is sufficient to require the government to produce the favorable evidence therein.

Fortunately, this analysis is largely academic. In the current situation, Executive Branch possession and Legislative Branch control, such as it is, are in harmony. “On 18 February 2015, the Senate Select Committee on Intelligence authorized the Office of the Chief Prosecutor to

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<sup>27</sup> *ACLU v. CIA*, 105 F. Supp. 3d 35, 49 (D.D.C. 2015), *argued on appeal* March 17, 2016.

<sup>28</sup> *United States v. Safavian*, 233 F.R.D. 12, 14-15 (D.D.C. 2005) (emphasis added); *see also id.* at 19 (applying possession or custody standard to *Brady*).

review the full SSCI report.”<sup>29</sup> The military commission is not presented with a situation in which Congress has asserted its privilege, but rather one in which Congress has consented to use of documents it voluntarily provided to the Executive Branch.<sup>30</sup>

Finally, it bears noting that even if Congress recovered all its copies and asserted its privilege over the full report, 99.89% of the documents sought in AE286 are pure Executive Branch documents. For example, the government has already begun reviewing the Panetta Review.<sup>31</sup> The 6.3 million documents that the SSCI reviewed to produce the full report are far more important than the report itself. Like the redacted Executive Summary, the most important function of the full report is to demonstrate the existence and importance of the underlying documents.

Congressional privilege presents no obstacle to discovery of the full SSCI report, the Panetta Review, the official CIA response, and underlying documents referring or relating to Mr. al Baluchi. The military commission should grant AE286 and order production.

**6. Conference with Opposing Counsel:** The prosecution does not oppose this motion to file a supplement to AE286.

**7. Attachments:**

- A. Certificate of Service
- B. Letter from Sen. Feinstein to the President, dtd 14 Dec 12
- C. Letter from Sen. Feinstein to the President, dtd 7 Apr 14
- D. Letter from Sen. Feinstein to the President, dtd 10 Dec 14

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<sup>29</sup> AE286M at 2.

<sup>30</sup> *Cf. In re Grand Jury Investigation*, 587 F.2d at 593 (noting that more detailed analysis was not required because the Clerk of the House agreed to comply with a subpoena).

<sup>31</sup> AE286K at 6.

- E. Letter from Sen. Burr to the President, dtd 14 Jan 15
- F. Letter from Sen. Feinstein to the President, dtd 16 Jan 15
- G. Civil Action No. 1:13-cv-01870 (JEB), Government filing
- H. Declaration of Mark Herrington

Very respectfully,

//s//  
JAMES G. CONNELL, III  
Learned Counsel

Counsel for Mr. al Baluchi

//s//  
STERLING R. THOMAS  
Lt Col, USAF  
Defense Counsel

# Attachment A

**CERTIFICATE OF SERVICE**

I certify that on the            day of            , 201    , I electronically filed the foregoing document with the Clerk of the Court and served the foregoing on all counsel of record by email.

*//s//*

JAMES G. CONNELL, III

*Learned Counsel*

# Attachment B

DAVINE FEINSTEIN, CALIFORNIA, CHAIRMAN  
SAXBY CHAMBLISS, GEORGIA, VICE CHAIRMAN

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## United States Senate

SELECT COMMITTEE ON INTELLIGENCE

WASHINGTON, DC 20510-8475

HARRY REID, NEVADA, EX OFFICIO  
MITCH MCCONNELL, KENTUCKY, EX OFFICIO  
CARL LEVIN, MICHIGAN, EX OFFICIO  
JOHN MCCART, ARIZONA, EX OFFICIO

DAVID GRANMS, STAFF DIRECTOR  
MARTHA SCOTT POINDEXTER, MINORITY STAFF DIRECTOR  
KATHLEEN P. McNEE, CHIEF CLERK

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.

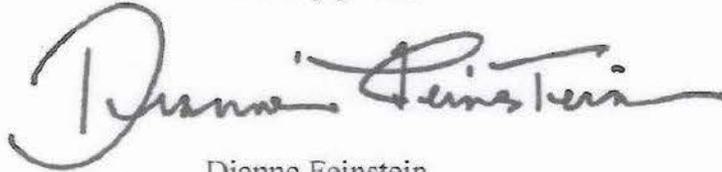
This review is by far the most comprehensive intelligence oversight activity ever conducted by this Committee. We have built a factual record, based on more than six million pages of Intelligence Community records. Facts detailed in the report are footnoted extensively to CIA and other Intelligence Community 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,

and Congress. Recognizing the many important issues before you, I urge you to review or get briefed on the report as soon as possible. I will be pleased to make myself, and staff, available to discuss the report at your convenience.

Sincerely yours,

A handwritten signature in black ink, reading "Dianne Feinstein". The signature is written in a cursive style with a large initial "D".

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

# Attachment C

DIANNE FEINSTEIN, CALIFORNIA, CHAIRMAN  
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 MARTIN HEINRICH, NEW MEXICO  
 TOM COBURN, OKLAHOMA  
 ANGUS KING, MAINE



United States Senate

SELECT COMMITTEE ON INTELLIGENCE  
 WASHINGTON, DC 20540-4400

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 MARTHA SCOTT POWDLKATZ, MINORITY STAFF DIRECTOR  
 DESIREE THOMPSON SAYLE, CHIEF CLERK

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.

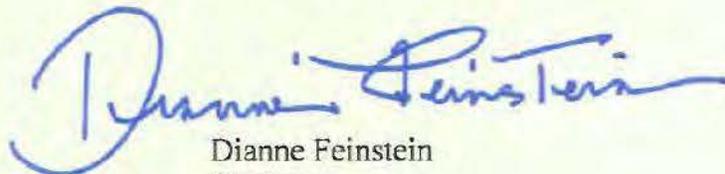
In addition to the Findings and Conclusions and Executive Summary, I will transmit separately copies of the full, updated classified report to you and to appropriate Executive Branch agencies. This report is divided into three volumes, exceeds 6,600 pages, and includes over 37,000 footnotes, and updates 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

# Attachment D

DIANNE FEINSTEIN, CALIFORNIA, CHAIRMAN  
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MARCO RUBIO, FLORIDA  
SUSAN COLLINS, MAINE  
TOM COBURN, OKLAHOMA



United States Senate

HARRY REID, NEVADA, EX OFFICIO  
MITCH MCCONNELL, KENTUCKY, EX OFFICIO  
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JAMES INHOFE, OKLAHOMA, EX OFFICIO  
DAVID GRAMMIS, STAFF DIRECTOR  
MARTHA SCOTT POINDEXTER, MINORITY STAFF DIRECTOR  
DESIREE THOMPSON SAYLE, CHIEF CLERK

SELECT COMMITTEE ON INTELLIGENCE  
WASHINGTON, DC 20510-6475

SSCI# 2014-3514

December 10, 2014

The Honorable Barack Obama  
The White House  
1600 Pennsylvania Avenue NW  
Washington, DC 20500

Dear Mr. President,

Yesterday the Senate Select Committee on Intelligence formally filed the full version of its Study of the Central Intelligence Agency's Detention and Interrogation Program with the Senate and publicly released the declassified Executive Summary and Findings and Conclusions, as well as the declassified additional and minority views.

The full and final report is enclosed with this letter. It is divided into three volumes, exceeds 6,700 pages, and includes over 37,700 footnotes.

As you said publicly on August 1, 2014, the CIA's coercive interrogation techniques were techniques that "any fair-minded person would believe were torture," and "we have to, as a country, take responsibility for that so that, hopefully, we don't do it again in the future."

I strongly share your goal to ensure that such a program will not be contemplated by the United States ever again and look forward to working with you to strengthen our resolve against torture. Therefore, the 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. To help achieve that result, I hope you will encourage use of the full report in the future development of CIA training programs, as well as future guidelines and procedures for all Executive Branch employees, as you see fit.

Thank you very much for your continued attention to this issue.

Sincerely yours,



Dianne Feinstein  
Chairman

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  
The Honorable James B. Comey, Director, Federal Bureau of Investigation  
The Honorable David Buckley, CIA Inspector General

# Attachment E

**United States Senate**

SELECT COMMITTEE ON INTELLIGENCE  
WASHINGTON, DC 20510-6475

January 14, 2015

The Honorable Barack Obama  
The White House  
1600 Pennsylvania Avenue NW  
Washington, DC 20500

Dear Mr. President:

It has recently come to my attention that on December 10, 2014, Senator Feinstein, in her capacity as the Chairman of the U.S. Senate Select Committee on Intelligence, provided a digital copy of the full and final report of the Committee's Study of the Central Intelligence Agency's Detention and Interrogation program (divided into three volumes and exceeding 6,700 pages) to you, the Director of National Intelligence, the Director of the Central Intelligence Agency (CIA), the Attorney General, the Secretary of Defense, the Secretary of State, the Director of the Federal Bureau of Investigation, and the CIA Inspector General. You may recall that Senator Chambliss, the Vice Chairman of the Committee at that time, was not copied on that letter. As the Chairman of the Committee, I consider that report to be a highly classified and committee sensitive document. It should not be entered into any Executive Branch system of records. For that reason, I request that all copies of the full and final report in the possession of the Executive Branch be returned immediately to the Committee. If an Executive Branch agency would like to review the full and final report, please have them contact the Committee and we will attempt to arrive at a satisfactory accommodation for such a request.

Thank you for your continued attention to this issue.

Sincerely,



Richard Burr  
Chairman  
Senate Select Committee on Intelligence

Cc: The Honorable Dianne Feinstein, Vice Chairman, Senate Select Committee on Intelligence  
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  
The Honorable James B. Comey, Director, Federal Bureau of Investigation  
The Honorable David Buckley, CIA Inspector General

# Attachment F

DIANNE FEINSTEIN  
CALIFORNIASELECT COMMITTEE ON  
INTELLIGENCE—VICE CHAIRMAN  
COMMITTEE ON APPROPRIATIONS  
COMMITTEE ON THE JUDICIARY  
COMMITTEE ON RULES AND  
ADMINISTRATION

## United States Senate

WASHINGTON, DC 20510-0504

<http://feinstein.senate.gov>

January 16, 2015

SSCI# 2015-0374The President  
The White House  
1600 Pennsylvania Avenue NW  
Washington, DC 20500

Dear Mr. President,

I write in response to Chairman Richard Burr's letter to you dated January 14, 2015, in which he requested that the Executive Branch return all copies of the Committee's Study of the Central Intelligence Agency's Detention and Interrogation Program. I do not support this request and believe it is important for appropriately cleared individuals in the Executive Branch to have access to the Committee's full, classified report.

The full, 6,963-page classified report transmitted on December 10, 2014, is an official Senate report (S. Rep. 113-288). The report has the same legal status of any other official Senate report from this Committee or any other Senate committee. At the December 2012 vote to approve the report and the April 2014 vote to send parts of the report for declassification, among other times, it 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. I therefore disagree with Chairman Burr's analysis that the report should be considered "Committee Sensitive" as that term is defined in the SSCI's Rules of Procedure.<sup>1</sup>

As you and I have discussed and strongly agree, the purpose of the Committee's report is to ensure that nothing like the CIA's detention and interrogation program from 2002 to 2008 can ever happen again. The realization of that goal depends in part on future Executive Branch decisionmakers having and utilizing a comprehensive record of this program, in far more detail than what we were able to provide in the now declassified and released Executive Summary. In this regard, I appreciate the CIA's proposed

<sup>1</sup> See Rule 9.3, Rules of Procedure, available at <http://www.intelligence.senate.gov/pdfs/11214.pdf>.

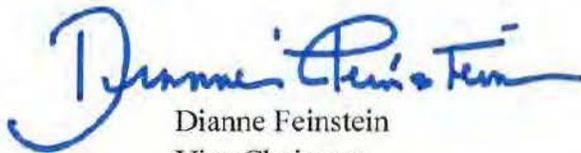
reforms, first described in the CIA's response to the Committee's report in June 2013 and recently repeated by Director John Brennan in his post-release press conference.

Finally, I do want to respond to the inference in Senator Burr's letter that I somehow did not inform former Vice Chairman Saxby Chambliss or other Members of my December 10, 2014, letter. In fact, all Members of the Senate Intelligence Committee – including Senators Chambliss and Burr – received access to my December 10, 2014, transmittal letter (along with access to the full report) on the day it was sent. It is standard Committee practice to make such correspondence available to all Members and appropriately cleared staff through the Committee's internal document system. Any implication that Senator Chambliss or any other Committee Member did not have access to the December 10, 2014, letter is simply false.

Therefore, I reiterate the request from my December 10, 2014, letter and ask that you retain the full 6,963-page classified report within appropriate Executive branch systems of record, with access to appropriately cleared individuals with a need to know, so as to ensure the history of the CIA Detention and Interrogation Program is available and appropriate lessons can be learned from it.

Thank you very much for your continued attention to this issue.

Sincerely yours,



Dianne Feinstein  
Vice Chairman

cc: Members, Senate Select Committee on Intelligence  
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  
The Honorable James B. Comey, Director, Federal Bureau of Investigation  
The Honorable David Buckley, CIA Inspector General

# Attachment G

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

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AMERICAN CIVIL LIBERTIES UNION, and AMERICAN CIVIL LIBERTIES UNION FOUNDATION,	)	
	)	
Plaintiffs,	)	Civil Action No. 1:13-cv-01870 (JEB)
	)	
v.	)	
	)	
CENTRAL INTELLIGENCE AGENCY, et al.	)	
	)	
Defendants.	)	

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**DEFENDANTS' RESPONSE TO PLAINTIFFS' EMERGENCY MOTION  
FOR AN ORDER PROTECTING THIS COURT'S JURISDICTION**

**STATEMENT**

There is no need for extraordinary interim relief. Although the government maintains that the Full Report is a congressional document, it can assure the Court that it will preserve the status quo regarding the Full Report absent either leave of court or resolution of this litigation in the government's favor.

Plaintiffs have pointed to only their own speculation to surmise that any other course of action is likely. Accordingly, plaintiffs cannot make any showing of harm – let alone irreparable harm – required to obtain the relief they seek. *Winter v. Natural Resources Defense Council*, 555 U.S. 7, 22 (2008). Moreover, as defendants have briefed previously, and incorporate here, the Full Report is a congressional document, not an agency record, and the plaintiffs are not likely to succeed on the merits of their claim. ECF No. 39. Whether plaintiffs' motion is decided under the All Writs Act or under the preliminary injunction standard of Fed. R. Civ. P.

65, it should be denied.<sup>1</sup> Nor should plaintiffs be permitted to take discovery in an attempt to uncover nonexistent evidence.

### ARGUMENT

#### **I. PLAINTIFFS ARE NOT ENTITLED TO A PRELIMINARY INJUNCTION.**

A preliminary injunction under Rule 65 is “an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief.” *Winter v. Natural Resources Defense Council*, 555 U.S. 7, 22 (2008). A party seeking a preliminary injunction must show (1) it is likely to succeed on the merits of its claim, (2) it is likely to suffer irreparable harm in the absence of preliminary relief, (3) the balance of equities tips in its favor, and (4) an injunction is in the public interest. *See Winter*, 555 U.S. at 20 (party seeking preliminary injunction must satisfy these four criteria). “A movant must demonstrate ‘at least some injury’ for a preliminary injunction to issue.” *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 297 (D.C. Cir. 2006).

##### **A. Plaintiffs Cannot Show Irreparable Harm.**

“A movant’s failure to show any irreparable harm is . . . grounds for refusing to issue a preliminary injunction, even if the other three factors entering the calculus merit such relief.” *Chaplaincy of Full Gospel Churches*, 454 F.3d at 297. Here, plaintiffs fail to demonstrate any harm – irreparable or otherwise.<sup>2</sup>

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<sup>1</sup> The ACLU does not style its motion as one for preliminary injunctive relief. Nevertheless, because the body of the motion includes a citation to Federal Rule of Civil Procedure 65, and any analysis under the All Writs Act would be the same, the government responds to the motion as if it were one for preliminary injunction.

<sup>2</sup> Post *Winter*, there is some question whether the D.C. Circuit still adheres to the sliding scale for a preliminary injunction, whereby “a strong showing on one factor could make up for a weaker showing on another,” *Sherley v. Sebelius*, 644 F.3d 388, 392-93 (D.C. Cir. 2011), or whether the four factors should be treated independently. *Id.*; *see also Nken v. Holder*, 556 U.S. 418, 438

Plaintiffs' sole attempt to establish harm demonstrates the purely speculative nature of their motion. Plaintiffs state only that "the Court's ability to order the relief the ACLU seeks . . . *could be* substantially impaired *if* it is forced to order that relief against Senator Burr instead of the Defendant agencies." Pls.' Br. at 21 (emphasis added). Plaintiffs further conjecture that "substantial constitutional questions *could be implicated* – and extensive delay result – *if* Senator Burr were to argue, for example, that the Speech or Debate Clause places limits on the Court's ability to compel him to disclose an unlawfully withheld agency record." *Id.* (emphasis added). Such speculation, however, comes nowhere near the level of harm necessary for the entry of preliminary injunctive relief. As the Supreme Court has made clear, the mere possibility of irreparable harm cannot support a preliminary injunction; an injunction may issue only if the plaintiffs prove that irreparable harm is *likely*. *Winter*, 555 U.S. at 22. Here, the language that plaintiffs use to make their showing of irreparable harm is couched in possibilities ("could be," "if"). This is insufficient for the issuance of a preliminary injunction.

Even before the filing of this motion, plaintiffs had no evidence that any of the defendant agencies were planning to return the Full Report to SSCI. Moreover, the government can now assure the Court that it will preserve the status quo either until the issue of whether the Full Report is a congressional document or an agency record is resolved, or until it obtains leave of

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(2009) (Kennedy, J., concurring) ("When considering success on the merits and irreparable harm, courts cannot dispense with the required showing of one simply because there is a strong likelihood of the other"). Under either approach, however, the plaintiffs must make *some* showing of irreparable harm. *See, e.g., Sierra Club v. U.S. Army Corps. of Engineers*, 990 F. Supp. 2d 9, 38 (D.D.C. 2013) ("Even under the sliding scale approach that is utilized in this Circuit, Plaintiffs must demonstrate that they will suffer irreparable harm absent an injunction in order to be eligible for injunctive relief.") (citing *Chaplaincy of Full Gospel Churches*, 454 F.3d at 297).

court to alter the status quo. Accordingly, the ACLU is suffering no harm, let alone irreparable harm.<sup>3</sup>

**B. Plaintiffs Are Unlikely to Succeed on the Merits of their Claim.**

On January 21, 2015, the government moved to dismiss plaintiffs' claim for the Full Report in this case, on the grounds that the Full Report is a congressional document, not an agency record. ECF No. 39. These arguments are incorporated herein, and show that the government, and not the plaintiffs, is likely to prevail on the merits of this claim. At bottom, Congress' expression of control comes not from the actions of any member, but rather from the actions of the committee as a whole. The Chairman and Vice Chairman jointly specified in correspondence that both draft and final versions of the Full Report remain congressional documents, *see* June 2, 2009 Letter to CIA Director, attached to Defendants' Motion to Dismiss as Exhibit D to the Declaration of Neal Higgins (ECF No. 39-1) ("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"),<sup>4</sup> and the Committee as a whole made a determination not to publicly release the Full Report. *See*

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<sup>3</sup> In the absence of evidence supporting harm, plaintiffs ask the Court simply to distrust the government. Pls.' Br. at 19-20 (alleging a "history of evasion"). However, plaintiffs' one-sided characterizations are entirely irrelevant to this Motion. Indeed, plaintiffs do not even attempt to tie their allegations to the legal standard for obtaining a preliminary injunction. *See id.* These allegations should be disregarded.

<sup>4</sup> The SSCI's letter further stated that "disposition and control over these records, even after the completion of the Committee's review, lies exclusively with the Committee." Exh. D to Higgins Decl. As such, the Committee explicitly stated that "these records are not CIA records under the Freedom of Information Act or any other law" and that "[t]he 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." *Id.* The SSCI also stated 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 documents are congressional, not CIA, records." *Id.*

Defendants' Motion to Dismiss at 7 (ECF No. 39). The ACLU points to no communication from the full committee that contradicts that clearly articulated intent. Consequently, because the plaintiffs are unlikely to succeed on the merits of their claim, they cannot satisfy the merits prong of the preliminary injunction standard.

**C. The Balance of Equities and the Public Interest Require Denial of Plaintiffs' Motion.**

The balance of equities and the public interest weigh clearly in favor of denying the instant motion. The public interest lies in having the political branches of government resolve for themselves what has plainly become a political dispute. Although the ACLU invites the Court to take sides in this legislative dispute, the Court should resist undoing through litigation what the full SSCI decided through the political process.

**D. The All Writs Act is Inapplicable, and, in any event, the Standard is Identical to that of a Preliminary Injunction.**

Plaintiffs contend that they are alternatively entitled to an order under the All Writs Act, 28 U.S.C. § 1651(a), barring defendants' transfer of the Full Report back to SSCI. The All Writs Act, however, is inapplicable here, where plaintiffs in effect are seeking a preliminary injunction.

Without explaining what requirements *would* apply to an injunction issued under the All Writs Act, plaintiffs cite to the Eleventh Circuit case of *Klay v. United Healthgroup, Inc.*, 376 F.3d 1092, 1100 (11th Cir. 2004), to argue that "the requirements for a traditional injunction do not apply to injunctions under the All Writs Act." Pls.' Br. at 14. Relief under the All Writs Act, however, is generally unavailable where a party has an adequate remedy through some other procedure (here, Rule 65). *See Clinton v. Goldsmith*, 526 U.S. 529, 537 (1999). And even in the *Klay* case, the court noted that, "a district court may not evade the traditional requirements of an injunction by purporting to issue what is, in effect, a preliminary injunction under the All Writs

Act.” *Klay*, 376 F.3d at 1101 n.13. Here, plaintiffs in effect seek a preliminary injunction. Accordingly, the All Writs Act is inapplicable.

In any event, even if the All Writs Act were applicable, the proper standard in this Circuit would be that used to determine whether a preliminary injunction should issue. *See, e.g., Kiyemba v. Obama*, 561 F.3d 509, 513 n.3 (D.C. Cir. 2009) (party seeking to preserve the status quo under the All Writs Act must satisfy the criteria for issuing a preliminary injunction). As set forth above, plaintiffs cannot satisfy the requirements for a preliminary injunction. Their motion, therefore, should be denied.

## **II. DISCOVERY IS UNWARRANTED.**

Plaintiffs alternatively seek discovery in an effort to find evidence they plainly lack. Discovery, however, is generally not appropriate in FOIA actions, *Wheeler v. CIA*, 271 F. Supp. 2d 132, 139 (D.D.C. 2003) (“Discovery is generally unavailable in FOIA actions.”); *Judicial Watch, Inc. v. Exp.-Imp. Bank*, 108 F. Supp. 2d 19, 25 (D.D.C. 2000) (same), and is especially unwarranted here, where plaintiffs are required to produce some evidence that they will be irreparably harmed *before* coming to court for emergency relief. Here, the government has made it clear that it will maintain the status quo. Plaintiffs, by contrast, have offered nothing more than speculation to support their discovery request. Accordingly, their alternative request for discovery should be denied. *See, e.g., United Presbyterian Church in the U.S.A. v. Reagan*, 738 F.2d 1372, 1383 (D.C. Cir. 1984) (denying discovery where the request was “a ‘fishing expedition’ of the most obvious kind.”).

## **CONCLUSION**

For the foregoing reasons, the government respectfully requests that this Court deny plaintiffs’ motion.

Dated: February 6, 2015

Respectfully submitted,

JOYCE R. BRANDA  
Acting Assistant Attorney General

RONALD C. MACHEN, Jr.  
United States Attorney

ELIZABETH J. SHAPIRO  
Deputy Branch Director  
Civil Division

/s/ Vesper Mei  
VESPER MEI (D.C. Bar 455778)  
Senior Counsel  
United States Department of Justice  
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E-mail: vesper.mei@usdoj.gov

*Counsel for the Defendant*

# Attachment H

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

AMERICAN CIVIL LIBERTIES UNION,  
and AMERICAN CIVIL LIBERTIES  
UNION FOUNDATION,

Plaintiffs,

v.

CENTRAL INTELLIGENCE AGENCY, et  
al.

Defendants.

Civil Action No. 1:13-cv-01870 (JEB)

**DECLARATION OF MARK H. HERRINGTON**

Pursuant to 28 U.S.C. § 1746, I, Mark H. Herrington, hereby declare under penalty of perjury that the following is true and correct:

1. I am an Associate Deputy General Counsel in the Office of General Counsel (“OGC”) (Office of Litigation Counsel) of the United States Department of Defense (“DoD”). OGC provides legal advice to the Secretary of Defense and other leaders within the DoD. I am responsible for, among other things, overseeing Freedom of Information Act (“FOIA”) litigation involving DoD. I have held my current position since March 2007. My duties include coordinating searches across DoD to ensure thoroughness, reasonableness, and consistency.
2. The statements in this declaration are based upon my personal knowledge and upon my review of information available to me in my official capacity. Specifically, I am the OGC counsel assigned to this case.

**Purpose of this Declaration**

3. I submit this declaration to provide information regarding DoD's handling of the record that is the subject of this litigation.

**Plaintiff's Request**

4. On May 6, 2014, Plaintiffs requested "the updated version of the Senate Select Committee on Intelligence's report, *Study of the CIA's Detention and Interrogation Program*." ("SSCI Report")

**Status**

5. At the time of Plaintiffs' request, DoD did not have a complete version of the SSCI Report. DoD had previously received a copy of the SSCI Report executive summary during the classification review conducted by the Executive Branch prior to the release of the declassified version of that executive summary. DoD first received a copy of the full version in December 2014 after the SSCI publically released the declassified Executive Summary of the SSCI Report. The SSCI report was transmitted with a letter dated December 10, 2014, from Senator Dianne Feinstein, who was then SSCI Chairman.

6. DoD has treated the SSCI Report as a congressional record and continues to do so. The Report has not been placed within a DoD system of records, it is stored in secure locations, access to it is limited to a small number of persons with proper clearance and a need to know, and access is strictly controlled by the Under Secretary of Defense for Intelligence.

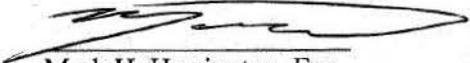
7. Through inter-agency discussions within the Executive Branch, DoD was aware that the SSCI had been adamant that the draft version of the Report could not be integrated with agency record filing systems, and that disposition and control over the records, even after the completion of the Committee's review, lay exclusively with the Committee. With those

admonishments in mind, DoD has treated the classified executive summary and this full version similarly. DoD has two copies of the full SSCI Report and both are kept in sensitive compartmented information facilities ("SCIF"s). One is kept in a safe in the SCIF office of the Under Secretary of Defense for Intelligence. The other copy is on a stand-alone, TOP SECRET laptop in the SCIF office of the Under Secretary's principal legal adviser, the DoD Deputy General Counsel (Intelligence), so that she may address/advise on litigation and other legal related matters, as necessary. Only the Deputy General Counsel has access to that copy. Further, given the highly classified nature of the report, broad dissemination throughout DoD is not possible.

8. DoD's treatment of the full SSCI Report is consistent with all previous indications from Congress about the use of the Report. DOD interpreted the December 10, 2014, letter from Senator Feinstein as consistent with these caveats, and has continued to treat the Report consistent with the understanding that the Report remains a congressional record.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Dated this 21st day of January, 2015, in Arlington, VA.



Mark H. Herrington, Esq.