

MILITARY COMMISSIONS TRIAL JUDICIARY  
GUANTANAMO BAY

UNITED STATES OF AMERICA

v.

KHALID SHAIKH MOHAMMAD,  
WALID MUHAMMAD SALIH MUBARAK  
BIN 'ATASH,  
RAMZI BIN AL SHIBH,  
ALI ABDUL AZIZ ALI,  
MUSTAFA AHMED ADAM  
AL HAWSAWI

AE286J

**Emergency Defense Motion to Order the Government to Produce the Full, Unredacted Senate Report on the RDI Program, or, in the Alternative, to File the Report with the Commission to be Maintained *EX PARTE* and Under Seal Pending Further Rulings**

Date Filed: 30 January 2015

- 1. Timeliness:** This Emergency Motion is filed within the timeframe established by Rule for Military Commission (R.M.C.) 905.
- 2. Relief Requested:** The defense requests that the Commission promptly grant AE 286, Defense Motion to Compel Discovery Of Senate Select Committee on Intelligence Study of RDI Program and Related Documents, and order production of the complete, unredacted Senate Select Committee on Intelligence's *Study of the CIA's Detention and Interrogation Program* (hereafter SSCI Report or Report) to the defense, or, in the alternative, order the government to file the Report with the Commission *ex parte* and under seal so that it can be made part of the appellate record and be produced at a later date.<sup>1</sup>
- 3. Overview:** The SSCI Report is the most comprehensive account to date of the Central Intelligence Agency's (CIA) Rendition, Detention, and Interrogation Program (RDI). Based on

<sup>1</sup> The redacted, publicly released Executive Summary of the SSCI Report (hereafter Executive Summary) can be accessed at <http://www.intelligence.senate.gov/study2014/sscistudy1.pdf> (last accessed 29 January 2015) and is attached as Exhibit E to AE 254OO(Mohammad) Mr. Mohammad's Response to AE 254KK (GOV), Government Motion For An Expedited Litigation Schedule To Resolve AE 254Y, filed 22 January 2015.

recent disclosures, it is clear that it provides extensive details of the torture that the Defendants suffered at the hands of the government. There is thus no question that the Report is exculpatory and material to the preparation of the Defendants' merits and sentencing defenses, and therefore subject to disclosure by the government under *Brady v. Maryland*, 373 U.S. 83 (1967), and Rules for Military Commissions (R.M.C.) 701(c)(1) and 701(e). The defense has moved to compel production of the full Report,<sup>2</sup> and now renews that motion and requests that the Commission immediately order the Government to produce it. Because the Report is currently subject to litigation, the government is obligated to produce it or preserve it for disclosure at a later date, and/or maintain it as an appellate record regardless whether it is produced to the defense.

Action by the Commission has become urgent because the Chair of the SSCI has asked all Executive Branch agencies to return their copies of the Report to Congress. If the government complies with this request, the Report may be beyond the Commission's power to compel compliance with its discovery orders and its ability to maintain an accurate appellate record. Accordingly, the Commission should order the government to produce the Report to the defense immediately. Alternatively, it should order the government to file the Report with the Commission, to be held *ex parte* and under seal as part of the appellate record and subject to disclosure to the defense at a later time.

**4. Burden:** As the moving party, the defense bears the burden of persuasion as to any factual issues relevant to the disposition of this motion, which it must demonstrate by a preponderance of the evidence. R.M.C. 905(c). The Defense is entitled to documents within the control of the United States "which are material to the preparation of the defense," (R.M.C. 701(c)), and/or potentially exculpatory. R.M.C. 701(c) and (e); *Brady v. Maryland*, 373 U.S. 83 (1967); *see also*

<sup>2</sup> AE 260(MAH) Motion to Compel Discovery and AE286 Defense Motion to Compel Discovery Of Senate Select Committee on Intelligence Study of RDI Program and Related Documents.

R.M.C. 703(f)(1) (defendant “is entitled to the production of evidence which is relevant, necessary and noncumulative.”)

**5. Facts:**

a. The Defendants were taken into custody at various times as part of the CIA’s RDI Program. While detained, the Defendants were subjected to various extreme forms of torture and abuse at the hands of United States government personnel.

b. The Senate Select Committee on Intelligence (SSCI) was created by the Senate in 1976 to oversee and report on the government’s intelligence activities and programs, and to provide legislative oversight over its intelligence agencies. The SSCI has special access to intelligence sources and methods, programs, and budgets.

c. In 2012, the SSCI finalized a 6,700-page report detailing the scope, conduct, and efficacy of the RDI program. The committee reviewed over six million pages of CIA documents and other records over the course of three years. The SSCI Report reportedly contains over 35,000 footnotes.<sup>3</sup>

d. On 9 December 2014, the SSCI issued an Executive Summary of the Report to the public.<sup>4</sup> The Executive Summary is heavily redacted.

e. According to then-SSCI Chair Senator Dianne Feinstein:

The Committee's full Study is more than ten times the length of the Executive Summary and includes comprehensive and excruciating detail. The Study describes the history of the CIA's Detention and Interrogation Program from its inception to its termination, including a review of each of the 119 known

<sup>3</sup> See Executive Summary, Foreword by Senate Select Committee on Intelligence (SSCI) Chairman Dianne Feinstein, of the Senate Select Committee on Intelligence’s study of the Central Intelligence Agency’s Detention and Interrogation Program (Feinstein Remarks), pp. 1 and 5 of 6.

<sup>4</sup> See Executive Summary, Cover Page.

individuals who were held in CIA custody.<sup>5</sup>

f. On 10 December 2014, the full, unredacted SSCI Report was provided to the President, the Director of National Intelligence, the Director of the Central Intelligence Agency, the Attorney General, the Secretary of Defense, the Secretary of State, the Director of the Federal Bureau of Investigation, and the CIA Inspector General, and copies remain in the custody and control of the United States government.<sup>6</sup>

g. On 14 January 2015, the Honorable Richard Burr, current Chairman of the SSCI, wrote to the President requesting that the SSCI Report not be entered in any Executive Branch records system and that all extant copies be returned to the Committee.<sup>7</sup> It has been reported that this attempted “claw back” is at least in part an effort to avoid judicially ordered production of the Report.

## **6. Argument:**

The defense has moved for production of the SSCI Report,<sup>8</sup> and reiterates that request here. The materiality and exculpatory nature of the Report is beyond question; it is indisputably in control of government agencies, including the Department of Defense, the Department of Justice, and the CIA; and it is therefore subject to *Brady v. Maryland* and the Rules for Military Commissions. Accordingly, the commission should grant AE286, Defense Motion to Compel Discovery Of Senate Select Committee on Intelligence Study of RDI Program and Related Documents, and order the government to produce the Report without delay.

In the alternative, if the Commission does not immediately require it to produce the Report to the Defendants, it should order the government to file a complete and unredacted copy *ex parte*

<sup>5</sup> Executive Summary, Feinstein Remarks, p. 3 of 6.

<sup>6</sup> See Letter from Hon. Richard Burr to the President dated 14 January 2015 (Attachment B).

<sup>7</sup> See Attachment B.

<sup>8</sup> See AE286 Defense Motion to Compel Discovery Of Senate Select Committee on Intelligence Study of RDI Program and Related Documents; AE 260(MAH) Motion to Compel Discovery.

and under seal to ensure that it can be made a part of the appellate record and can be disclosed to the defense at a future date.

Changed circumstances mandate that the Commission act on this request on an emergency basis. Chair of the SSCI, Senator Richard Burr, has requested that the Executive branch return all copies of the Report to the Committee and expunge electronic versions from its system of records.<sup>9</sup> This claw-back appears to be an effort to preempt Freedom of Information Act actions seeking to obtain it, and/or to remove it from this and other Commissions' jurisdiction so that the Commission will be powerless to order its production.<sup>10</sup> If the Commission does not act and the SSCI obtains all copies of the Report, the defense fears that the Senate, and possibly the prosecution, will take the position that the Commission has no authority to order its production.<sup>11</sup>

The defense believes that at least in the circumstances presented here -- in which the government possesses the SSCI Report, refuses to disclose it to the defense, and then returns it to Congress -- the Commission would retain the power to order production even if it were to end up in sole possession of the Congress.

<sup>9</sup> Attachment B.

<sup>10</sup> Attachment C.

<sup>11</sup> Because the Due Process Clause "makes the good or bad faith of the State irrelevant when the State fails to disclose to the defendant material exculpatory evidence," *Arizona v. Youngblood*, 488 U.S. 51, 57 (1989), it goes without saying that a deliberate attempt by the government to put the most critical exculpatory and mitigating evidence beyond the reach of the Defense would be a gross violation of the Defendants' Due Process rights. *See also United States v. Valenzuela-Bernal*, 458 U.S. 858, 872 (1982) (even where exculpatory value of witnesses' testimony is unknown, government may deport them only "upon the Executive's good-faith determination that they possess no evidence favorable to the defendant in a criminal prosecution"). Apart from the constitutional violation, an attempt by a prosecutor or other government attorney to make evidence favorable to the defense unavailable would be a clear violation of her professional-ethical obligations. *See* American Bar Association Rule of Professional Conduct (ABA RPC) 3.8(d) (a prosecutor must "make timely disclosure to the defense of all [exculpatory] evidence or information known to the prosecutor"); ABA RPC 3.4(a) ("Fairness to Opposing Party and Counsel"); ("A lawyer should not . . . unlawfully obstruct another party's access to evidence or unlawfully . . . conceal a document or other material having potential evidentiary value."); Air Force Rules of Professional Conduct, Rule 3.4(a) (same); Army Manual 27-26 Rules of Professional Conduct for Lawyers, Rule 3.4(a) (same); Navy JAG Instruction 5803.1C, Rule 3.4(a) (same).

Nevertheless, there is some precedent from the D.C. Circuit suggesting that *Brady* does not reach closely-held Congressional information.<sup>12</sup> The uncertainty introduced by this precedent poses the possibility that even if the Commission rules that the Defendants are entitled to the report, it may be powerless to enforce its production order, at least if the Commission also holds that Congress is beyond its jurisdiction. In the alternative, if the Commission were to rule that the Defendants are not entitled to the report, review of that decision and its impact on appeal will be impossible unless the report is made part of the appellate record. Accordingly, the proper course of action, if the Commission does not compel production of the full, unredacted Report to the Defendants at this time, is to order the government to file it with the Commission *ex parte* where it will remain under seal as part of the appellate record in this case pending its future disclosure to the defense.

**7. Oral Argument:** The defense requests oral argument.

**8. Witnesses:** The Honorable Richard Burr.

**9. Conference with Opposing Counsel:** The position of the Government was stated as such, “While the Prosecution is committed to providing any discoverable information within the SSCI report that has not otherwise previously been identified for disclosure; it opposes the Defense-requested relief.”

**10. Attachments:**

- A. Certificate of Service
- B. Letter from Hon. Richard Burr to the President dated 14 January 2015
- C. Greg Miller, “Chairman of the intelligence panel calls for return of full SSCI Report,”

*Washington Post*, 20 January 2015

<sup>12</sup> See e.g. *United States v. Ehrlichman*, 389 F.Supp. 95, 97 (D.C. Cir. 1974); *United States v. Trie*, 21 F.Supp.2d 7, 25 n.17 (D.D.C. 1998) (“The Congress is not an ‘agency,’ and the DOJ has no obligation under *Brady* to disclose information in the possession of Congress that is not also in the possession of the DOJ or the FEC.”).

//s//

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## **ATTACHMENT A**

**CERTIFICATE OF SERVICE**

I certify that on the 30th day of January 2015, I electronically filed AE286J Emergency Defense Motion to Order the Government to Produce the Full, Unredacted Senate Report on the RDI Program, or, in the Alternative, to File the Report with the Commission to be Maintained EX PARTE and Under Seal Pending Further Rulings, with the Clerk of Court and served the foregoing on all counsel of record by electronic mail.

//s//

DAVID Z. NEVIN  
Learned Counsel

## **ATTACHMENT D**

## 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 E**

## National Security

# Chairman of the intelligence panel calls for return of full torture report

By **Greg Miller** January 20

The new Republican chairman of the Senate Intelligence Committee has demanded that the Obama administration return copies of the Senate panel's recently completed report on the CIA's brutal interrogations of terrorism suspects, a move apparently aimed at keeping the full version of the report from being released to the public, U.S. officials said.

Sen. Richard Burr (N.C.), who became chairman of the committee this month, sent a letter to President Obama last week asking "that all copies of the full and final report in the possession of the executive branch be returned immediately," according to officials familiar with the text.

The letter marks the latest twist in the committee's six year investigation of the CIA's use of torture after the Sept. 11, 2001, attacks, a probe that was carried out exclusively by Democrats on the panel after GOP members withdrew from the project.

A declassified overview of the committee's findings was [released last month](#), revealing new allegations of abuse in the CIA program and accusing the agency of systematically exaggerating the effectiveness of methods others denounced as torture.

Burr's letter, however, is focused on the still classified version the report, a document that spans more than 6,900 pages and contains details about CIA operatives and its secret prison program that were stripped from the publicly released file.

Burr's request puts the White House in an awkward political position. Obama has called the agency's interrogation methods torture and ordered the program dismantled shortly after taking office. But since taking office, he has also faced pressure to defend an agency he has relied on heavily in counterterrorism efforts, and the White House sparred repeatedly with the committee over how much of the report should be released.

The full length version was delivered by Sen. Dianne Feinstein (D Calif.), the former chairman of the committee, to the White House, CIA, FBI and other agencies last month.

The transfer not only increased the number of copies in circulation in Washington but also raised the prospect that at least portions of the report might someday be released to the public through Freedom of Information Act requests or other means. Although executive branch agencies are obligated to respond to such requests, Congress is less susceptible to such disclosure requirements.

In his letter to Obama, Burr said that he considered the report "to be highly classified and a committee sensitive

document.” and insisted that it “should not be entered into any executive branch system of records.”

His spokeswoman did not respond immediately to a request for comment.

Burr has been sharply critical of the committee’s report, despite voting in favor of its release. He signed on to two dissenting views submitted by Republican members of the panel, including one that described the investigation as full of “problematic claims and conclusions” that “create the false impression that the CIA was actively misleading policy makers.”

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Greg Miller covers the intelligence beat for The Washington Post.

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