UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

PLAINTIFFS' EMERGENCY MOTION FOR AN ORDER PROTECTING THIS COURT'S JURISDICTION

The ACLU brought this lawsuit to vindicate the right of the American public under the Freedom of Information Act ("FOIA") to the report of a comprehensive investigation into Defendant CIA's now-discontinued program of detention, torture, and other abuse of detainees.[1] That 6,963-page report was produced by the Senate Select Committee on Intelligence ("SSCI"), and describes widespread and horrific human rights abuses by the CIA. It also details the CIA's evasions and misrepresentations about its activities to Congress, the White House, the courts, the media, and the American public. The SSCI transmitted the final version of the report (the "Final Full Report") to all Defendant agencies in December 2014; both then and before, the SSCI made clear its intent to relinquish control of the Final Full Report to Defendants. There should be no question, therefore, that the Final Full Report is an agency document to which the ACLU is entitled under FOIA. Nevertheless, Defendants continue to contest that conclusion. This legal dispute is for the Court to decide.

[1] The ACLU's suit also seeks documents referred to as the Panetta Report, which is not the subject of this motion.

Now, however, Senator Richard Burr, the new Chairman of the SSCI, is apparently seeking to pretermit the Court's decision—perhaps with Defendants' cooperation. Senator Burr has made an extraordinary post-hoc request, asking President Obama to return all copies of the Final Full Report immediately, even though this action is pending. Defendants' transfer of the Final Full Report to Senator Burr would threaten the Court's ability to order effective relief to the ACLU, and perhaps even the Court's jurisdiction.

Before filing this emergency motion, counsel for the ACLU asked counsel for Defendants for Defendants' position. ACLU counsel noted that there would be no need for this motion if Defendants agree on the record not to transfer the Final Full Report to Senator Burr pending the Court's adjudication of the parties' agency record dispute—and asked Defendants for that agreement. In response, Defendants' counsel requested this exact language be included here: "We will respond to the motion in due course. Pending our response, we will not alter the status quo regarding copies of the report provided to the Executive Branch in conjunction with Senator Feinstein's letter dated December 10, 2014." Defendants' response is inadequate.

Under these unique circumstances—and the record of the CIA's attempts to evade its legal obligations, including in this matter—the ACLU is gravely concerned that if the Court does not act to protect its jurisdiction, Defendants may seek to make the Court powerless to enforce its decision, should the Court reject Defendants' arguments and accept those of the ACLU.

The ACLU therefore files this emergency motion and asks the Court to issue an order pursuant to FOIA, the All Writs Act, and Fed. R. Civ. P. 65 barring Defendants from transferring the Final Full Report to Senator Burr while this action is pending. In the alternative, the ACLU seeks limited expedited discovery from the CIA of communications between the agency and Senator Burr.

FACTUAL AND PROCEDURAL BACKGROUND

A. Initiation of SSCI investigation into CIA abuses

The SSCI first began to investigate CIA abuses because the CIA destroyed evidence of its coercive interrogations. On December 6, 2007, the SSCI learned from a *New York Times* article that in November 2005, the CIA had destroyed videotapes of certain abusive interrogations, despite the objections of then-President Bush's White House Counsel and the then-Director of National Intelligence. *See* Press Release, Sen. Feinstein, Statement on Intel Committee's CIA Detention, Interrogation Report (Mar. 11, 2014), http://1.usa.gov/1GdfNhk.[2] According to Senator Dianne Feinstein, an initial SSCI investigation arising out of the CIA's destruction of interrogation tapes was "chilling" because it found that "interrogations and the conditions of confinement at the CIA detention sites were far different and far more harsh than the way the CIA had described them to us." *Id*. Subsequently, on March 5, 2009, the SSCI voted 14-to-1 to initiate a comprehensive review of the CIA's detention and interrogation program. *See id*.

Although the SSCI had wanted to conduct its investigation in part by reviewing relevant CIA documents within the SSCI's own offices, the SSCI and the CIA agreed that SSCI staff would review the agency's documents at a facility in Northern Virginia, subject to "several conditions and protections to ensure the integrity" of the SSCI's investigation.[3] *See id*. The

[2] The CIA destroyed those tapes even though they were covered by a federal district court judge's order to the agency to "produce or identify all responsive documents" to a FOIA request seeking records related to the treatment of detainees apprehended after September 11, 2001 and held in U.S. custody abroad. *See ACLU v. Dep't of Defense*, 339 F. Supp. 2d 501, 505 (S.D.N.Y. 2004).

[3] In 2010, the SSCI learned that on two separate occasions, in violation of the agreement between it and the CIA, agency personnel removed nearly 1,000 pages of documents that had originally been provided to the Committee. In a separate incident, the CIA revoked the SSCI's access to the Panetta Report documents. (Plaintiffs will address issues related to the CIA's withholding of the Panetta Report in their brief due on March 11, 2015.)

The dispute over the CIA's removal of those documents and a "search" by CIA personnel of SSCI computers raised "grave concerns" about the CIA's violation of "the separation of powers principles embodied in the United States Constitution" and its undermining of "the constitutional framework

SSCI's investigation involved the review of approximately six million pages of CIA documents, and lasted more than three years. *See* Executive Summary, *Committee Study of the CIA's Detention and Interrogation Program*, Dec. 3, 2014, http://1.usa.gov/1wy9dw9 (together with the SSCI's Findings and Conclusions, the "Executive Summary").

The SSCI approved an initial version of its full investigative report, *Committee Study of the CIA's Detention and Interrogation Program* ("Initial SSCI Report") on December 13, 2012. Upon the Committee's adoption of the Initial SSCI Report, then-Chairman Feinstein said that the study "uncovers startling details about the CIA detention and interrogation program and raises critical questions about intelligence operations and oversight." Press Release, Sen. Feinstein, Feinstein Statement on CIA Detention, Interrogation Report (Dec. 13, 2012), http://1.usa.gov/SXEWHH.

After adopting the Initial SSCI Report, the Committee sent it to executive branch agencies for review and comment. In a transmittal letter accompanying the report, the SSCI explained that it was soliciting from executive branch agencies "suggested edits or comments." Letter, Sen. Dianne Feinstein to The Hon. Barack Obama, Dec. 14, 2012 (attached hereto as Ex.

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essential to effective congressional oversight of intelligence activities." Press Release, Sen. Feinstein, Statement on Intel Committee's CIA Detention, Interrogation Report (Mar. 11, 2014), http://1.usa.gov/1GdfNhk; *see also* Press Release, Sen. Leahy, Statement of Sen. Patrick Leahy (D-Vt.), Chairman, Senate Judiciary Committee, On CIA Interference with Senate Select Committee on Intelligence Investigation (Mar. 11, 2014), http://1.usa.gov/15BSaDn; Carolyn Lochhead, *Feinstein Winning Fight with CIA, Obama Over Torture Report*, S.F. Gate, Aug. 9, 2014, http://bit.ly/1opwhPn ("John McCain of Arizona and Lindsey Graham of South Carolina[] sprang to Feinstein's defense in an Aug. 1 press conference. McCain accused the CIA of 'violating the fundamental barriers of constitutional authority' and acting like a 'rogue agency.'").

The CIA's Inspector General conducted an investigation into the agency's actions, and concluded that the CIA improperly monitored SSCI staff. Jonathan S. Landay & Ali Watkins, *CIA Admits It Broke into Senate Computers; Senators Call for Spy Chief's Ouster*, McClatchy D.C., July 31, 2014, http://bit.ly/WPqgAf. The Inspector General also determined that the CIA had made allegations about SSCI staff's misconduct to the Justice Department based on "inaccurate information." *Id.*

1). The Committee required the CIA provide a list of personnel who would access the report for this limited purpose. *See* Higgins Decl. ¶¶ 15–16, ECF No. 39-1.

Once the SSCI received feedback from the CIA, as well as the views of minority members of the Committee, in April 2014, it revised the Initial SSCI Report, and created an updated version ("First Updated Full Report"). *See* 160 Cong. Rec. S6405 (2014), http://1.usa.gov/1z3Aawf. On April 3, 2014, by a bipartisan vote of 11-to-3, the SSCI voted to send the Executive Summary of the First Updated Full Report to President Obama for declassification and public release. A member of the SSCI described the report as "profoundly disturb[ing]" in its exposure of "brutality that stands in stark contrast to our values as [a] nation." Press Release, Sen. Wyden, Wyden Statement on the Senate Intelligence Committee's Vote to Declassify its Interrogation Report (Apr. 3, 2014), http://1.usa.gov/1lEpBeH; *see also* Press Release, Sen. Feinstein, Intelligence Committee Votes to Declassify Portions of CIA Study (Apr. 3, 2014), http://1.usa.gov/1sdy75I.

On April 7, 2014, Chairman Feinstein transmitted the Executive Summary of the First Updated Full Report to the executive branch. Her accompanying letter to the President stated that she would

> transmit separately copies of the full, updated classified report to you and to appropriate Executive Branch agencies. . . . 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 . . . .

Letter, Sen. Dianne Feinstein to The Hon. Barack Obama, Apr. 7, 2014 (attached hereto as Ex. 2). The Director of National Intelligence, Director of the CIA, Attorney General, Secretary of Defense, and Secretary of State were copied on the transmittal letter. *See id.*

That April 7, 2014 transmittal letter contained no indication of any SSCI committee member's objection to providing the First Updated Full Report to the executive branch, or of any

intent to impose restrictions on the dissemination of the First Updated Full Report either within or outside of the executive branch. *See id.*

B. The ACLU's lawsuit and the CIA's representations to the ACLU and the Court

The ACLU initially filed suit for the full SSCI investigative report and other related documents in November 2013. Once the report was updated and with the government's consent, the ACLU filed a second amended complaint to enforce its FOIA request for the "updated version" of the SSCI's full report from the CIA, DOD, DOJ, and DOS. *See* Second Amended Compl. ¶ 6 (June 5, 2014), ECF No. 22-1.

Starting in June 2014, counsel for the ACLU asked government counsel on a monthly basis to confirm whether the CIA and other Defendant agencies had received the First Updated Full Report. As ACLU counsel informed the Court during an October 2014 status conference, the ACLU was "told that, in fact, no agencies possessed a full report and that was based on agency's [sic] representations to the Department of Justice. That representation was in addition, Your Honor, made to you on September 4th." Hr'g Tr., Status Conf., Oct. 7, 2014 at 5:5-9.

As ACLU counsel explained, after government counsel's representation to the Court on September 4th, "Senate staff directly urged DOJ" to research "[w]hether the agencies did have the full updated report." *Id.* at 5:24–6:1.

During the October 2014 status conference, government counsel informed the Court and the ACLU that the CIA had indeed received the full report, stating: "after the last status conference [on September 4, 2014], we asked that CIA check for the full report again, and they discovered that they did have it. And there was a miscommunication apparently within the agency as to what they were looking for. In fact, we have learned that the report was conveyed

on disk, which may explain some of how 6,000 pages may have—they didn't realize that they had it." *Id.* at 7:12-18.

Counsel for the ACLU asked the Court to order Defendants to file declarations stating precisely what was and was not in their possession, and when. The Court declined to do so, but left the door open to a renewed request.

At the same October status conference, the government agreed that Plaintiffs would not be required to file additional FOIA requests or to further amend the complaint to seek an updated version of the full SSCI investigative report. The Court memorialized this agreement in its Minute Order. *See* Minute Order, *ACLU v.CIA*, No. 13-cv-1870 (Oct. 7, 2014).

C. SSCI's release of the Executive Summary and transmittal of the Final Full Report

The SSCI publicly released the Executive Summary, along with minority views and the additional views of SSCI members, on December 9, 2014. That release generated extensive world-wide public and media attention. *See, e.g.*, Greg Miller, Adam Goldman, & Julie Tate, *Senate Report on CIA Program Details Brutality, Dishonesty*, Wash. Post, Dec. 9, 2014, http://wapo.st/1uhd3ty (describing the SSCI's "exhaustive" description of "levels of brutality, dishonesty and seemingly arbitrary violence that at times brought even agency employees to moments of anguish," and its cataloguing of "dozens of cases" of alleged CIA deceptions); Editorial Board, *The Senate Report on the C.I.A.'s Torture and Lies*, N.Y. Times, Dec. 9, 2014, http://nyti.ms/1uhxqpy ("even after being sanitized by the Central Intelligence Agency itself, [the Executive Summary] is a portrait of depravity that is hard to comprehend and even harder to stomach").

President Obama described the Executive Summary as "reinforc[ing] my long-held view that these harsh methods were not only inconsistent with our values as a nation, they did not

serve our broader counterterrorism efforts or our national security interests." Press Release, The White House, Statement of the Senate Select Committee on Intelligence (Dec. 9, 2014), http://1.usa.gov/1Gf7PEp. The public release of the Executive Summary also spurred renewed calls for reform of the CIA and accountability for its actions. *See, e.g.*, Editorial Board, *Prosecute Torturers and Their Bosses*, N.Y. Times, Dec. 21, 2014, http://nyti.ms/1wBBMxw (demanding the investigation and prosecution of the architects of the CIA torture program); Letter, Sen. Dianne Feinstein to The Hon. Barack Obama, Dec. 30, 2014, http://1.usa.gov/1yZy5mE (outlining recommendations for legislative and administrative reform "to make sure that the United States never again engages in actions that you have acknowledged were torture").

At the time, Senator Feinstein also described the Final Full Report, which exceeds 6,900 pages and contains over 37,000 footnotes:

> The full Committee Study also provides substantially more detail than what is included in the Executive Summary on the CIA's justification and defense of its interrogation program on the basis that it was necessary and critical to the disruption of specific terrorist plots and the capture of specific terrorists. While the Executive Summary provides sufficient detail to demonstrate the inaccuracies of each of these claims, the information in the full Committee Study is far more extensive.

Sen. Feinstein, Foreword, Executive Summary at 3. Among the matters more expansively detailed in the Final Full Report are the CIA's efforts to evade oversight for abusive conduct by making misrepresentations to Congress, other executive branch agencies including the Department of Justice, the courts, the media, and the American public. *See, e.g.*, Executive Summary at 172–73 n.1050, 177 n. 1058.

Senator Feinstein emphasized in her foreword to the Executive Summary that the SSCI's full report "is now final and represents the official views of the Committee. This and future Administrations should use this Study to guide future programs, correct past mistakes, increase

oversight of CIA representations to policymakers, and ensure coercive interrogation practices are not used by our government again." Sen. Feinstein, Foreword, Executive Summary at 5.

On the same day, the SSCI formally filed the full version of its 6,963-page study with the Senate. In the SSCI's filing with the Senate, Senator Feinstein's cover letter stated that "[t]he entire classified report will be provided to the Executive Branch for dissemination to all relevant agencies. The full report should be used by the Central Intelligence Agency and other components of the Executive Branch to help make sure that the system of detention and interrogation described in this report is never repeated." Letter, Sen. Dianne Feinstein to Sen. Patrick Leahy, President Pro Tempore, United States Senate, Dec. 9, 2014, http://1.usa.gov/1sfCzic.

On December 10, the SSCI sent the Final Full Report to President Obama. Senator Feinstein's transmittal letter—copying the Director of National Intelligence, the Director of the CIA, the Attorney General, the Secretary of Defense, the Secretary of State, the Director of the FBI, and the CIA Inspector General—states that "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 this 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." Letter, Sen. Dianne Feinstein to The Hon. Barack Obama, Dec. 10, 2014 (attached hereto as Ex. 3).

The December 10 transmittal letter contained no indication that the SSCI sought to impose any restrictions on the dissemination of the Final Full Report either within or outside of the executive branch. The SSCI sent the Final Full Report to each of the Defendants in

December 2014. *See* Frifield Decl. ¶ 8, ECF No. 39-2; Herrington Decl. ¶ 5, ECF No. 39-3; Higgins Decl. ¶ 21, ECF No. 39-1; Kadzik Decl. ¶ 5, ECF No. 39-4.

D. Senator Burr's request for return of the Final Full Report

A week before Defendants' responsive filings in this case, Senator Richard Burr, now Chairman of the SSCI, wrote to the President requesting the transfer back to the SSCI of all copies of the Final Full Report in the possession of the executive branch. *See* Mark Mazzetti, *C.I.A. Report Found Value of Brutal Interrogation Was Inflated*, N.Y. Times, Jan. 20, 2015, http://nyti.ms/1DbxUUv. Senator Burr's letter, dated January 14, 2015, was made public in Defendants' responsive filings. In his letter, Senator Burr indicated that he had only recently become aware that the Final Full Report had been sent to the executive branch on December 10, 2014, and sought the return of copies "immediately." *See* Letter, Sen. Richard Burr to The Hon. Barack Obama, Jan. 14, 2015 (attached hereto as Ex. 4). He also requested that the Final Full Report "not be entered into any Executive Branch system of records." *Id*.

Several members of the SSCI and other Senators have criticized Senator Burr's request. Senator Feinstein, now Vice Chairman of the SSCI, wrote to President Obama stating that she did not support Senator Burr's request and disputed assertions made in it. *See* Letter, Sen. Dianne Feinstein to The Hon. Barack Obama, Jan. 16, 2015 (attached hereto as Ex. 5) ("There was never any objection to providing the full, official report to the Executive Branch."). She explained that the purpose of the Final Full 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 decision makers 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." *Id*.

Another SSCI member, Senator Martin Heinrich, called Senator Burr's request "unprecedented and misguided," stating, "I've always believed the committee's full report on the CIA detention and interrogation program should be publicly released. But barring that, appropriately cleared U.S. government officials should have access to the full 6,900-page report to better understand what went wrong during that dark period." Press Release, Sen. Heinrich, Heinrich Statement on Efforts to Cover Up Torture Report (Jan. 21, 2015), http://1.usa.gov/15D9kkd.

Senator Leahy has also criticized Senator Burr's attempt to seek the return of the Final Full Report:

> Neither the Senate Intelligence Committee's historic report on the now-defunct CIA detention and interrogation program, nor the shameful truths it contains about the use of torture during the previous administration, can be wiped out of existence. . . . The Senate at its best can act as the conscience of the Nation, and part of that responsibility is ensuring transparency in our government and helping the executive branch learn from past mistakes.

Press Release, Sen. Leahy, On Requests to Return the Senate Intelligence Committee's Torture Report (Jan. 22, 2015), http://1.usa.gov/1wxT1Lm.

E. Defendants' subsequent filings before this Court

All Defendants have moved to dismiss Plaintiffs' FOIA claim for the Final Full Report on the basis that it is a congressional record. Defs.' Mot. Dismiss 22–23, ECF No. 39 (all agencies have labeled the Final Full Report a "congressional record."). According to Defendants' declarations in support of their motion to dismiss, the CIA and DOD are the only agencies that have reviewed the Final Full Report—the remaining Defendants have not opened the package containing the document.[4]

[4] DOJ's treatment of the Final Full Report now appears inconsistent with its handling of previous versions of the document. *See* Charlie Savage, *U.S. Tells Court That Documents From Torture Investigation Should Remain Secret*, N.Y. Times, Dec. 10, 2014, http://nyti.ms/1qA77zw ("The Justice Department

ARGUMENT

I. The Court should bar Defendants from transferring the Final Full Report out of their possession.

The Court should grant the ACLU's emergency motion because Defendants may otherwise seek to divest the Court of jurisdiction to decide the merits of the case before it.[5] In FOIA cases, "federal jurisdiction is dependent on a showing that an agency has (1) 'improperly' (2) 'withheld' (3) 'agency records.'" *Kissinger v. Reporters Comm. for Freedom of Press,* 445 U.S. 136, 150 (1980). "Unless each of these criteria is met, a district court lacks jurisdiction to devise remedies to force an agency to comply with the FOIA's disclosure requirements." *U.S. Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 142 (1989). Defendants' transfer of the Final Full Report to Senator Burr would therefore threaten the Court's ability to order effective relief, and perhaps even the Court's jurisdiction.

"The FOIA imposes no limits on courts' equitable powers in enforcing its terms." *Payne Enters., Inc. v. United States*, 837 F.2d 486, 494 (D.C. Cir. 1988). Indeed, if an agency's actions in response to a FOIA request "violate the intent and purpose of the FOIA . . . the courts have a duty to prevent these abuses." *Payne*, 837 F.2d at 494 (quotation marks omitted); *see also Renegotiation Bd. v. Bannercraft Clothing Co.,* 415 U.S. 1, 19–20 (1974) (holding that "[t]he broad language of the FOIA," among other factors, demonstrates that "there is little to suggest, despite the Act's primary purpose, that Congress sought to limit the inherent powers of an equity

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said in a statement on Tuesday that its investigators had looked at the full version of the Senate Intelligence Committee report 'and did not find any new information that they had not previously considered in reaching their determination'" that the DOJ's prior criminal investigation into the CIA's torture program was adequate).

[5] The ACLU does not concede that Defendants' transfer of the Final Full Report to Senator Burr would necessarily divest the Court of jurisdiction. But difficult constitutional questions would unnecessarily be presented if the Report were to be transferred. *See infra* Section I. B. 3. This motion seeks to prevent those questions from arising.

court"). Therefore, it is now "well settled that courts have certain equitable powers under the FOIA that extend beyond the literal bounds of 5 U.S.C. § 552(a)(4)(B)." *Nat'l Sec. Counselors v. CIA*, 898 F. Supp. 2d 233, 265 (D.D.C. 2012) (citing as example that "courts clearly have the power to order an agency to re-run a search for records" even though "such injunctive relief does not necessarily 'enjoin the agency from withholding agency records' or 'order the production of any agency records.'").

A. The Court has authority under the All Writs Act to bar Defendants' transfer of the Final Full Report.

The All Writs Act empowers federal courts to "issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a); *see also S.E.C. v. Vision Commc'ns, Inc.*, 74 F.3d 287, 291 (D.C. Cir. 1996) (All Writs Act "empowers a district court to issue injunctions to protect its jurisdiction.") The Act provides "an extraordinary remedy pursuant to which a court may enjoin almost any conduct which, left unchecked, would have the practical effect of diminishing the court's power to bring the litigation to a natural conclusion." *Al-Anazi v. Bush*, 370 F. Supp. 2d 188, 195 (D.D.C. 2005) (quotation and alteration marks omitted); *see also Alabama Great S. Ry. Co. v. Thompson*, 200 U.S. 206, 218 (1906) (federal courts "may and should take such action as will defeat attempts to wrongfully deprive parties . . . of the protection of their rights in those tribunals").

The Act, therefore, "permits a district court to issue any order 'necessary to enable the court to try the issues [in a pending case] to final judgment' and 'develop the material issues and to bring them to a complete resolution.'" *Klay v. United Healthgrp., Inc.*, 376 F.3d 1092, 1099 n.9 (11th Cir. 2004) (quoting *ITT Cmty. Devel. Corp. v. Barton*, 569 F.2d 1351, 359-60 (5th Cir. 1978)) (alteration in original). A court may grant a writ under the Act whenever it is "calculated in [the court's] sound judgment to achieve the ends of justice entrusted to it," and not only when

it is "'necessary' in the sense that the court could not otherwise physically discharge its . . . duties." *Id*. at 1100 (quoting *Adams v. United States*, 317 U.S. 269, 273 (1942)) (alteration in original). Moreover, the requirements for a traditional injunction do not apply to injunctions under the All Writs Act because "a court's traditional power to protect its jurisdiction, codified by the Act, is grounded in entirely separate concerns." *Id*. (citing *United States v. New York Tel. Co.*, 434 U.S. 159, 174 (1977); *De Beers Consol. Mines, Ltd. v. United States*, 325 U.S. 212, 219 (1945)).

Thus, for example, in *FTC v. Dean Foods*, the Supreme Court held that a court had authority under the Act "to issue a preliminary injunction preventing the consummation of [a merger] agreement upon a showing that an effective remedial order, once the merger was implemented, would otherwise be virtually impossible, thus rendering the enforcement of any final decree of divestiture futile." *FTC v. Dean Foods Co*., 384 U.S. 597, 605 (1966). That situation is analogous to this case because if Defendants transfer the Final Full Report to the SSCI, it may become difficult—indeed, Defendants may argue that the Court would lack authority—to order its release, even if the Court determines that the Final Full Report is an agency document subject to FOIA.

B. The Court has authority under Fed. R. Civ. P. 65 to bar Defendants' transfer of the Final Full Report.

Alternatively, the ACLU is also entitled to relief under Rule 65 of the Federal Rules of Civil Procedure because it is likely to succeed on the merits of its claim, it is likely to suffer irreparable harm in the absence of preliminary relief, and both the balance of equities and the public interest favor an injunction. *See Lofton v. Dist. of Columbia.*, 7 F. Supp. 3d 117, 120–21 (D.D.C. 2013). In the D.C. Circuit, "the four factors have typically been evaluated on a sliding scale, such that if the movant makes an unusually strong showing on one of the factors, then it

does not necessarily have to make as strong a showing on another factor." *Texas Children's Hosp. v. Burwell*, --- F. Supp. 3d ---, 2014 WL 7373218, at *7 (D.D.C. Dec. 29, 2014) (quotation marks and citation omitted). The sliding scale approach remains the law of this Circuit. *See id.*; *see also Lofton*, 7 F. Supp. 3d at 121 n.3.

1. The ACLU is likely to succeed on the merits of its claim. Under the D.C. Circuit's test for agency control, two factors are "dispositive": the intent of the document's creator to retain or relinquish control, and the ability of the agency to use and dispose of the record as it sees fit. *Judicial Watch, Inc. v. U.S. Secret Serv.*, 726 F.3d 208, 221 (D.C. Cir. 2013).[6] Applying these factors, this Court must deny Defendants' motion to dismiss if their evidence fails to establish a clear, contemporaneous, and specific indication of congressional control over the Final Full Report. *See, e.g., United We Stand Am., Inc. v. Internal Revenue Serv.*, 359 F.3d 595, 602 (D.C. Cir. 2004). Defendants fail to meet their burden.

The contemporaneous record is clear that SSCI relinquished control over the Final Full Report when it sent the report to Defendants in December 2014. In contrast to the SSCI's earlier, December 14, 2012 transmittal letter accompanying the Initial SSCI Report, the December 10, 2014 transmittal letter is explicit that "the full report should be made available within CIA and other components of the Executive Branch for use as broadly as appropriate to help make sure that this experience is never repeated."[7] Ex. 3 (Letter, Sen. Feinstein to The Hon.

[6] Although the Circuit Court has historically also considered two additional factors—the extent to which agency personnel have read or relied upon the document, and the degree to which the document was integrated into the agency's record system or files—these factors are largely irrelevant for analyses of congressionally created documents. *See Judicial Watch, Inc.*, 726 F.3d at 221. In their merits brief, Plaintiffs will show that if this Court does take the two additional factors into account, they weigh in Plaintiffs' favor.

[7] Similarly, the SSCI's April 7, 2014 transmittal letter to the Executive Branch contains no indication of the SSCI's intent to restrict the Executive Branch's use or dissemination of the First Updated Full Report. *See* Ex. 2 (Letter, Sen. Dianne Feinstein to The Hon. Barack Obama, Apr. 7, 2014).

Barack Obama, Dec. 10, 2014). That transmittal letter is evidence of SSCI's contemporaneous intent to relinquish control to Defendant agencies. *See Burka v. U.S. Dep't Health & Human Servs.*, 87 F.3d 508, 515 (D.C. Cir. 1996) (first factor in the agency control analysis is the intent of the document's creator to retain or relinquish control over the records); *see also Paisley v. CIA*, 712 F.2d 686, 694 (D.C. Cir. 1983), *vacated in part*, 724 F.2d 201 (D.C. Cir. 1984) (government's failure to point to "*contemporaneous* and *specific* instructions from the SSCI" limiting agencies' use of documents weighed heavily in favor of a finding of agency control) (emphasis in original). The publicly released Executive Summary likewise shows the SSCI's intent to relinquish congressional control of the Final Full Report. The foreword to the Executive Summary states, for example, that the Final Full Report "represents the official views of the Committee. This and future Administrations should use this Study to guide future programs, correct past mistakes, [and] increase oversight of CIA representations to policymakers . . . ." Sen. Feinstein, Foreword, Executive Summary at 5; *see also* Letter, Sen. Feinstein to Sen. Leahy, President Pro Tempore, United States Senate, Dec. 9, 2014, http://1.usa.gov/1sfCzic (stating that the Final Full Report "*should be used*" by the CIA and other agencies "to help make sure that the system of detention and interrogation described in this report is never repeated") (emphasis added). These statements show that SSCI relinquished control of the Final Full Report.

The second agency control factor—the ability of the agency to use the record as it sees fit—also weighs in Plaintiffs' favor. Again, unlike the SSCI's transmission of the Initial SSCI Report, its December 10, 2014 transmission of the Final Full Report stated that the executive branch is free to use and rely on the document. *Compare* Ex. 1 (Letter, Sen. Feinstein to The Hon. Barack Obama, Dec. 14, 2012) (circulating draft version of the document for the purpose of

"suggested edits or comments"), *with* Ex. 3 (Letter, Sen. Feinstein to The Hon. Barack Obama, Dec. 10, 2014) (relinquishing control of the Final Full Report for broad executive branch use). The CIA filings in this case acknowledge the distinction. When the CIA described the Initial Full Report, it declared that it "would not be free to disseminate or otherwise dispose of it without approval of the SSCI," even after redacting classified information. *See* Higgins Decl. ¶ 15 (Feb. 28, 2014), ECF 17-2. In addition, the CIA emphasized that before the SSCI transferred the Initial Full Report, it required the agency to provide a list of personnel who would access the document for the limited purpose of providing suggested edits and comments. *See id.* ¶ 14. However, the CIA has made no such assertions with respect to the Final Full Report—nor could it, in light of Senator Feinstein's transmittal letters.

As the ACLU will show in greater detail in its merits briefing, Defendants' arguments against agency control are unavailing. For example, Defendants contend that, because the SSCI did not seek declassification and public release of the Final Full Report, the SSCI must have retained control over the document. But this argument wrongly conflates "classification" and "congressional control." For this Court's agency control analysis, the question is not whether Congress asked the executive branch to declassify the document, but instead, whether Congress relinquished control vis-à-vis the agencies. Classification is an executive branch construct, and as the CIA told this Court, "the Executive Branch does not consider SSCI's control over the document to extend to control over the classification of the information therein." Higgins Decl. ¶ 15 (Feb. 28, 2014); *see also* Decl. of Leon E. Panetta, Director, CIA ¶ 30, *ACLU v. Dep't of Def.*, No. 04-cv-4151 (S.D.N.Y. Jun. 8, 2009), ECF No. 352 (CIA is responsible for limiting access to information about its "detention and interrogation practices"); *see also, e.g.*, Exec. Order No. 13526, 75 Fed. Reg. 707, 708 (Dec. 29, 2009) (Congress is not an "original

classification authority"). Accordingly, the CIA's classification of the contents of the Final Full Report—which is based on CIA documents—is evidence of agency, and not congressional control.

Defendants also erroneously rely on evidence that is not contemporaneous with the transmission of the Final Full Report. Senator Burr's extraordinary post-hoc attempt to assert control over the Final Full Report has no legal relevance, as Defendants effectively concede. *See* Defs.' Mot. Dismiss 21–22 (Senator Burr's letter "underscore[s] the importance of looking to the Committee's official actions."). In fact, the D.C. Circuit has consistently declined to credit post-transmittal, post-FOIA-request assertions of control by Congress. *See Holy Spirit Ass'n for the Unification of World Christianity v. CIA*, 636 F.2d 838, 842 (D.C. Cir. 1980), *vacated in part*, 102 S. Ct. 1626 (1982); *United We Stand America, Inc. v. IRS*, 359 F.3d 595, 602 (D.C. Cir. 2004) (Congress's "post-hoc objections to disclosure cannot manifest the clear assertion of congressional control that our case law requires"); *cf. Paisley*, 712 F.2d 686 at 695 (citing *Holy Spirit*, 636 F.2d at 842, for the proposition that a letter from the Clerk of the House of Representatives written after the transfer of records does not establish congressional control).[8]

Moreover, the agencies' unilateral decision to call the Final Full Report a "congressional record" is irrelevant. What matters for purposes of FOIA is the express language of the transmittal letter ceding control of the report to the executive branch. In analogous circumstances, courts have rejected agencies' reliance on post-hoc expressions of agency understandings because they "simply indicate[d] the *agencies'* belief that the documents now at

[8] Senator Burr's statement that the Final Full Report is a "committee sensitive" document, and Defendants' suggestion that Senator Feinstein's transmittal of the Final Full Report could not constitute a release of control over the document, are belied by the record. *See* Letter, Sen. Feinstein to The Hon. Barack Obama, Jan. 16, 2015; Senate Intelligence Committee Rule 9.7, http://1.usa.gov/1DcH2Z2 ("Committee members and staff do not need prior approval to disclose classified or committee sensitive information to persons in the Executive branch," provided that certain conditions are satisfied).

issue are congressional in nature." *Paisley*, 712 F.2d at 695. Here, the agencies appear to be acting to maintain their litigation posture in this case, in defiance of Congressional intent.

Plaintiffs have therefore established a high likelihood of success on the merits.

2. The CIA has exhibited a pattern of evasions concerning its interrogation policies and practices, and this pattern has extended to this matter. If the Court does not act now to preserve the status quo, Defendants, and in particular the CIA, are likely to attempt to evade their obligation to maintain the Final Full Report pending final adjudication of the ACLU's FOIA claim. *See Judicial Watch, Inc. v. U.S. Dep't of Commerce*, 34 F. Supp. 2d 28, 44 (D.D.C. 1998) (agencies are not permitted "to evade the FOIA by removing documents from their control after the filing of a FOIA request").

The CIA's conduct in this case shows its capacity for evasion. After Senator Feinstein told the executive branch in her April 2014 letter that the SSCI would transmit the First Updated Full Report to several agencies, the ACLU repeatedly asked counsel for Defendants whether the agencies had received the First Updated Full Report. In June, July, and August 2014, the ACLU was told that no agencies possessed the First Updated Full Report. During a status conference before this Court on September 4, 2014, Defendants represented the Court that no agencies possessed the First Updated Full Report—a representation that did not seem plausible, given Senator Feinstein's letter months before. In October 2014, government counsel informed the Court that the CIA had, in fact, received the First Updated Full Report and previous representation(s) were based on a "miscommunication."

Similarly, the content and timing of Senator Burr's letter strongly suggest some degree of coordinated effort with Defendants to avoid their obligations under the FOIA. Senator Burr's letter refers specifically to one of the traditional "agency control" factors—the integration of a

document into agency files and belatedly asks that agencies not incorporate the Final Full Report into their files. *See also* Mark Mazzetti, *C.I.A. Report Found Value of Brutal Interrogation Was Inflated*, N.Y. Times, Jan. 20, 2015, http://nyti.ms/1DbxUUv ("Mr. Burr's unusual letter to Mr. Obama might have been written with an eye toward future Freedom of Information Act lawsuits."); Jason Leopold, *GOP Senator Wants to Make Sure the Full CIA Torture Report Never Sees the Light of Day*, Vice News (Jan. 22, 2015), http://bit.ly/1y2uOxg ("The purpose of Burr's unusual request for a mass recall was allegedly to prevent the document from being subject to release under the Freedom of Information Act (FOIA), according to US officials and congressional sources who said the issue is 'sensitive,' and who declined to discuss it on the record.").

Beyond this case, the CIA has a history of evasion and misrepresentation in connection with FOIA requests relating to its post-9/11 torture of detainees, as documented by the SSCI's Executive Summary. Specifically, the Executive Summary refers to CIA efforts to deny FOIA requests for previously acknowledged information and reveals that the CIA prepared a "media campaign" that contemplated "off-the-record disclosures" about the very issues that the CIA was asserting in response to FOIA requests should remain secret. Executive Summary at 404–05. Agency personnel apparently recognized the chasm between the agency's off-the-record disclosures about the interrogation program and the public representations the agency was making. According to the Executive Summary, in an internal CIA communication, one agency attorney expressed concern that "'[o]ur Glomar figleaf is getting pretty thin.'" *Id*. at 405. In another communication, a CIA attorney remarked that "the [legal] declaration I just wrote about the secrecy of the interrogation program [is] a work of fiction." *Id*.[9]

[9] The DOJ has said that the declaration referred to in this latter communication did not concern a FOIA lawsuit. *See* Letter, Tara M. La Morte, Assistant United States Attorney, to The Hon. Alvin K.

More generally, the Executive Summary documents extensive and repeated deceptions on the part of the CIA to Congress, the White House, and the public concerning, inter alia, the "effectiveness" of torture, the number of detainees in CIA custody, and the nature of the agency's torture techniques. Given this history of evasion—in this case, with respect to FOIA, and in connection with its torture program—it is particularly important that the Court act now to preserve the status quo.

3. The ACLU is likely to suffer irreparable harm if Defendants transfer the Final Full Report to Senator Burr in response to his extraordinary post-hoc request. Although the ACLU is likely to prevail in showing that the Final Full Report is an improperly withheld agency document, the Court's ability to order the relief the ACLU seeks—release of the Final Full Report—could be substantially impaired if it is forced to order that relief against Senator Burr instead of the Defendant agencies. There is no question that the Court has jurisdiction to issue orders "compelling production of illegally withheld documents [which] may be enforced not only against the [agency] but also against any nonparties to which the [agency] transferred possession of responsive documents in an attempt to circumvent the FOIA and the orders of this Court." *See Judicial Watch, Inc.*, 34 F. Supp. 2d at 44. But 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. *See United States v. Rayburn House Office Bldg., Room 2113, Washington, D.C. 20515*, 497 F.3d 654, 660 (D.C. Cir. 2007). An order barring Defendants from transferring the Final Full Report to Senator Burr will avoid the need to resolve any constitutional questions that could otherwise arise.

Hellerstein, Jan. 16, 2015, *ACLU v. Dep't of Defense*, No. 04-cv-4151 (AKH), ECF No. 536, http://bit.ly/1BkXu6T .

4. The balance of equities and the public interest both strongly favor the relief the ACLU seeks. Defendants will not be harmed if they maintain custody of the Final Full Report pending adjudication of this matter; indeed, the law already requires agencies to maintain official file copies of documents that are the subject of a FOIA request. *See Chambers v. Dep't of Interior*, 568 F.3d 998, 1004 (D.C. Cir. 2009) ("[A]n agency is not shielded from liability if it intentionally transfers or destroys a document after it has been requested under FOIA or the Privacy Act."); *see also* Nat'l Archives & Records Admin., General Records Schedule 14, Item 11 (requiring retention of "[f]iles created in response to requests for information under the FOIA" including "all related supporting files which may include the official file copy of requested record or copy thereof"), http://www.archives.gov/records-mgmt/grs/grs14.html. On the other hand, if Defendants transfer the report to Senator Burr, the ACLU faces the real threat of never securing the release of a document to which it is entitled by law. Moreover, without an injunction, the American public stands to lose precisely what FOIA was designed to bring to light: critically important information about "what their Government is up to." *U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 773 (1989) (citation and internal quotation marks omitted).

The Final Full Report is the product of the most significant investigation into the most egregious CIA abuses in at least a generation. Public release of the Final Full Report is necessary for "an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978); *see also Reporters Comm. for Freedom of the Press*, 489 U.S. at 774 ("[T]he FOIA's central purpose is to ensure that the Government's activities be opened to the sharp eye of public scrutiny.").

II. Alternatively, the Court Should Grant Limited Discovery Concerning Communications Between Senator Burr and the CIA.

Should the Court be inclined to deny the ACLU's request for an order preventing the Defendant agencies from transferring the Final Full Report to Senator Burr, it should grant limited and expedited discovery concerning whether the CIA is acting to violate the ACLU's rights under FOIA and to prevent the Court from exercising jurisdiction. *See Judicial Watch*, 34 F. Supp. 2d at 41 (directing magistrate judge to preside over discovery "designed to explore the extent to which [the agency] . . . illegally destroyed and discarded responsive information"). Specifically, the Court should order the CIA to disclose any written and electronic communications between the agency and Senator Burr, his staff, or the SSCI's majority staff (as of the day that Senator Burr took office), concerning (1) the ACLU's lawsuit seeking release of the Final Full Report, (2) Senator Burr's January 14, 2014 letter seeking the Final Full Report from the executive branch, and (3) the prospective transmission of the Final Full Report to Senator Burr or the SSCI. Discovery is especially warranted because of the CIA's evasions and misrepresentations in this litigation and with respect to Congress over the course of the SSCI's investigation of the CIA's torture and unlawful detention of detainees. *See supra* Factual and Procedural Background.

CONCLUSION

For these reasons, the ACLU respectfully requests that the Court order Defendants to retain custody of the Final Full Report pending final adjudication of this matter, and grant such other relief as the Court may deem just and proper. In the alternative, the Court should permit limited and expedited discovery concerning communications between Senator Burr and the CIA.

Respectfully submitted,

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