No. 09-5386

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

AMERICAN CIVIL LIBERTIES UNION,
AMERICAN CIVIL LIBERTIES UNION FOUNDATION,

Plaintiffs-Appellants,

v.

DEPARTMENT OF DEFENSE,
CENTRAL INTELLIGENCE AGENCY,

Defendants-Appellees.

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

REPLY BRIEF FOR THE PLAINTIFFS-APPELLANTS

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* NOTE: There are no authorities upon which this brief chiefly relies.

SUMMARY OF ARGUMENT

Since this litigation commenced in March of 2008, the circumstances surrounding the government's suppression of the records at issue have changed dramatically, but the government's arguments have not changed at all. The government continues to represent to the Court that the CIA's program of coercive interrogation and secret detention "'provided the U.S. Government with one of the most useful tools in combating terrorist threats to national security,'" Brief for Appellees ("Govt. Br.") at 5 – even though the President of the United States, after expressly banning those "tools," declared that they "did *not* advance our war and counterterrorism efforts – they undermined them, and that is why I ended them once and for all."[1] The government continues to represent to the Court that the CIA's brutal

[1] "Remarks by the President on National Security," May 21, 2009, *available at* http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-On-National-Security-5-21-09/ (emphasis added). The President stated: "I know some have argued that brutal methods like waterboarding were necessary to keep us safe. I could not disagree more. As Commander-in-Chief, I see the intelligence. I bear the responsibility for keeping this country safe. And I categorically reject the assertion that these are the most effective means of interrogation. (Applause.) What's more, they undermine the rule of law. They alienate us in the world. They serve as a recruitment tool for terrorists, and increase the will of our enemies to fight us, while decreasing the will of others to work with America. They risk the lives of our troops by making it less likely that others will surrender to them in battle, and more likely that Americans will be mistreated if they are captured." *Id.*

interrogation methods "led to the disruption of . . . 'a plot to fly a plane into the tallest building in Los Angeles,'" and "a plot to 'hijack[] passenger planes to fly into Heathrow Airport,'" Govt. Br. at 5-6 – even though those claims have been repeatedly and officially debunked.[2] And the government continues to represent to the Court that the key details of the CIA's detention and interrogation program remain secret and classified – even though a series of executive-branch declassification decisions have revealed in meticulous detail the manner in which the CIA applied so-called "enhanced interrogation techniques" against the specific detainees whose records form the basis for this litigation.

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[2] Indeed, the Bush White House itself confirmed that the Los Angeles plot was disrupted before the CIA's detention and interrogation program even began. *See* "Press Briefing on the West Coast Terrorist Plot by Frances Fragos Townsend, Assistant to the President for Homeland Security and Counterterrorism," Feb. 9, 2006, *available at* http://georgewbush-whitehouse.archives.gov/news/releases/2006/02/20060209-4.html) (confirming that "cell leader" of "Library Tower" plot "was arrested in February of 2002" and other participants abandoned plot; CIA interrogation program began in April of 2002); *see also* Timothy Noah, "More Library Tower Nonsense," *Slate*, Apr. 27, 2009, *available at* http://www.slate.com/id/2217015/. Similarly, the claim that the CIA's interrogation program helped foil the Heathrow plot is "'completely and utterly wrong,' according to Peter Clarke, who was the head of Scotland Yard's anti-terrorism branch in 2006. 'The deduction that what was being planned was an attack against airliners was entirely based upon intelligence gathered in the U.K.,' Clarke said." Jane Mayer, "Counterfactual: A Curious History of the C.I.A.'s Secret Interrogation Program," *The New Yorker*, Mar. 29, 2010, *available at* http://www.newyorker.com/arts/critics/books/2010/03/29/100329crbo_books_mayer?currentPage=all#ixzz0lCjGXD9T.

The government's principal defense of the continued suppression of detainee abuse allegations – its representation that there is a material "distinction between the government's prior disclosures and the information redacted in these documents" because "descriptions of enhanced interrogation techniques *in the abstract* . . . are of a qualitatively different nature than the conditions of confinement and interrogation techniques *as applied*," Govt. Br. at 32 (emphasis in original) – is also squarely refuted by documents that the government has placed in the public record. To advance its argument, the government must ignore the concrete, detailed, and operational descriptions of specific interrogation techniques as applied to the specific detainees at issue here that have been published in previously declassified documents. Indeed, if the government is so confident that "the withheld information simply does not match that which has been previously disclosed by the government," Govt. Br. at 20, then it should embrace *in camera* review of the 50 disputed pages as an efficient means of ensuring that the *public* can be similarly confident that these records have not been suppressed for improper purposes. The CIA certainly has done little to encourage such confidence by refusing even to acknowledge its own declassified documents that flatly contradict its arguments in this litigation.

ARGUMENT

1. The CIA's Assertion that Only Abstract Descriptions of Interrogation Techniques have been Declassified is Contradicted by the Record.

As the sole support for its central contention that there is a material distinction between the "abstract" descriptions of CIA interrogation techniques that have been declassified and the "as-applied" descriptions purportedly at issue in this litigation, the government cites repeatedly to the declaration of the CIA's Wendy M. Hilton. But the reliability of the Hilton Declaration is fatally undermined by its deliberate failure to acknowledge declassified documents that contradict its key assertion. In its brief, the government states that the CIA "was aware" of the declassification of the Inspector General report and the other documents that it failed to acknowledge in its sworn declaration to the district court. But that is precisely Plaintiffs' point: the CIA was aware of declassified documents that expressly contradicted its arguments; it thereafter proceeded with the arguments and ignored the documents. In other words, according to the government, the CIA "was aware" that declassified CIA documents described an incident in which an interrogator "used an unloaded semi-automatic handgun as a prop to frighten Al-Nashiri into disclosing information" and also "used a power drill to frighten Al-Nashiri . . . while the detainee stood naked and hooded," even as it insisted that declassified

government documents did *not* describe the application of interrogation techniques to specific detainees. *Special Review of Counterterrorism, Detention, and Interrogation Activities*, CIA Inspector General (May 2004) at ¶92, A-326-27. And the CIA "was aware" that the declassified IG Report revealed that "the waterboard technique employed" against Abu Zubaydah "was different from the technique as described in the DoJ opinion. . . . [I]n the DoJ opinion, the subject's airflow is disrupted by the firm application of a damp cloth over the air passages; the interrogator applies a small amount of water to the cloth in a controlled manner. By contrast, the Agency interrogator [redacted] continuously applied large volumes of water to a cloth that covered the detainee's mouth and nose." *Id.* at ¶79, A-322. But the CIA nonetheless swore to the district court that declassified government records contained solely "descriptions of enhanced interrogations techniques *in the abstract*. . . ." Hilton Decl. at ¶ 70, A-99 (emphasis in original).

Those descriptions, and many others, are not "abstract." Does Al-Nashiri recount being threatened with a gun and power drill in the CSRT records? Does Abu Zubaydah describe his experience with the waterboard? The answer is very likely yes, but we don't know, because the CIA declaration presents only misleading generalities, and the district court inexplicably declined to examine the CSRT records *in camera*. The

government asks this Court to affirm summary judgment on the basis of demonstrably dubious CIA assurances that the suppressed records are qualitatively different than documents in the public record and that no segregable portions remain withheld. That is a judgment this Court cannot confidently make in the absence of *in camera* review.

2. The Government Lacks the Authority to Classify the Detainees' Uncorroborated Abuse Allegations

Plaintiffs have argued that the government lacks authority, under the relevant Executive Order, to classify the detainees' own descriptions of CIA interrogation techniques that were involuntarily imposed upon them, because the detainees were not authorized to receive classified information and are under no legal obligation to keep silent about it. Indeed, the government's *de facto* ability to suppress the detainees' statements derives solely from the fact that it continues to detain them *incommunicado*, and its arguments in defense of classification depend entirely on the continued indefinite detention of the men whose statements have been suppressed. This is a truly extraordinary set of circumstances without precedent in the history of FOIA litigation.[3]

[3] In that respect, the government is correct that Plaintiffs have cited to no authority directly on point, but the dearth of authority is a testament not to the novelty of Plaintiffs' legal argument, but to the utterly unprecedented nature of Defendants' conduct.

The government appears to misapprehend the nature of Plaintiffs' argument. Plaintiffs do not suggest that "the government [should] be estopped from classifying any intelligence information obtained from foreign governments or non-governmental sources." Govt. Br. at 37. Rather, Plaintiffs contend that the government may not classify information that it has *voluntarily divulged* to third parties who are under no legal obligation to conceal it. In this case, according to the CIA's declaration, "the fourteen HVDs included in Plaintiffs' FOIA request *have been exposed* to intelligence activities, sources, and methods of information. . . ." Hilton Decl. ¶49, A-88 (emphasis added). Specifically, the "intelligence activities to which the HVDs were exposed include the capture, detention, confinement, and interrogation of *detainees*" – i.e., of themselves. *Id.* at A-88-89 (emphasis added). Neither *Fitzgibbon v. CIA*, 911 F.2d 755 (D.C. Cir. 1990) nor *CIA v. Sims*, 471 U.S. 159 (1985), the two cases cited by the government, even remotely contemplates the use of classification authority in this manner; those cases address the separate question of the scope of National Security Act's protection of "sources" from compelled disclosure. The CIA has made no claim in this case that publication of the CSRT records would disclose the identity of any source.

Moreover, both the district court below and the government on appeal failed to address a key point concerning the CSRT records: the detainees' accounts of their treatment in CIA custody are uncorroborated allegations, and their release in this litigation will not require official confirmation of any government program, intelligence method, or interrogation technique. In that regard, release of the detainees' abuse allegations in the CSRT records would precisely mirror the publication by journalists of the leaked ICRC report: both contain uncorroborated allegations, and neither requires government confirmation.

The government does attempt to address one glaring inconsistency in its arguments by seeking to reconcile its insistence that release of the CSRT records will reveal sources and methods with its repeated characterization of detainees' allegations of abuse as false. According to the Hilton Declaration, even "[f]alse or exaggerated allegations . . . about the classified details of the Program . . . must be treated as classified information." Hilton Decl. ¶ 74, A-101. Ms. Hilton does not purport to explain how an allegation can simultaneously be "false" *and* be "about" the "classified details of the Program," an assertion that defies ordinary logic. The declaration then offers a hypothetical: *if* the government were to redact only "true allegations regarding locations of CIA detention facilities" (and if, presumably, all CIA

detainees were aware of this policy), then "the true locations of these facilities could be revealed by making multiple allegations as to location, through a simple process of elimination." *Id.* at A-101-102. Perhaps that process seems "simple" to the CIA, but it is not actually credible that publication of a detainee's false assertion that he was detained in, say, Afghanistan, could alert even a canny observer that the true location was Morocco. If the CIA is imagining an improbable scenario in which an expert manipulator were to game the system by falsely naming every nation in the world save one, then surely such fanciful and speculative concerns need not be addressed through a categorical rule deeming false allegations – indeed *all* allegations – as classified. In any event, none of these arguments applies whatsoever to the main subject of dispute in this litigation: descriptions of interrogation techniques that have been declassified and banned.

3. The District Court Abused its Discretion by Failing to Conduct *In Camera* Review

Plaintiffs do not dispute that whether to conduct *in camera* review is ordinarily within the discretion of the district judge. However, when "information contained in agency affidavits is contradicted by other evidence in the record," then *in camera* review becomes obligatory. *Carter v. U.S. Dep't of Commerce*, 830 F.2d 388, 393 (D.C. Cir. 1987). That

standard is met here: the Agency affidavit falsely contends that only abstract descriptions of interrogation techniques have been declassified, and the record is silent as to whether the CIA even considered the unequivocally contradictory evidence from its own Inspector General. There can be no good explanation for the CIA's failure to acknowledge documents that contradict its assertions, but where, as here, the CIA has not attempted *any* explanation, the record cannot support summary judgment in the absence of *in camera* review.

In camera review should be required here for a second reason: the government's belated release of previously redacted materials during the course of this litigation offers positive proof that the CIA exercised its classification authority improperly. And while the government is obviously correct that it would be counterproductive to fashion a rule that would penalize the government for releasing new material during litigation, when the newly released material casts serious doubt on the reliability of the government's affidavits, *in camera review* is not a penalty but rather an indispensable component of *de novo* adjudication.

The government has still not attempted to explain why it once classified and withheld Khalid Sheikh Mohammed's statement that he had been told by a CIA interrogator: "[Y]ou are not American and you are not

on American soil. So you cannot ask about the Constitution." Wizner Decl. at ¶7, A-109, Exh. H at A-473. It has still not attempted to explain why it previously withheld Mohammed's statement that, under torture, "I make up stories" concerning the location of Osama bin Laden and other matters. *Id.* at A-474. These previously redacted excerpts from the CSRT transcripts are plainly unrelated to any rationale provided in either of the CIA's declarations – yet they just as plainly are a source of embarrassment to the CIA. The same is true of the previously redacted detainee allegations of permanent injury from CIA interrogation methods. In this instance, the belated release of these materials is evidence not of good faith, as the government maintains, but of prior misrepresentations to the district court. The CIA has thus forfeited the deference to which its representations would ordinarily be entitled, and the district court's acceptance of the CIA's broad claims without *in camera* inspection constituted an abuse of discretion.

CONCLUSION

For the foregoing reasons, this Court should reverse the decision of the district court and remand for *in camera* inspection of the disputed documents.

Respectfully submitted,

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1. This brief complies with the type volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 2,892 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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/s/ Ben Wizner
BEN WIZNER

CERTIFICATE OF SERVICE

I hereby certify that on April 26, 2010, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. All participants in this case are registered CM/ECF users and will be served by the appellate CM/EFC system.

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