09-5386-cv

IN THE UNITED STATE 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

BRIEF FOR THE PLAINTIFFS-APPELLANTS

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), counsel for plaintiffs-appellants certify as follows:

A. Parties and Amici

The plaintiffs-appellants are the American Civil Liberties Union and the American Civil Liberties Union Foundation. The defendants-appellees are the United States Department of Defense and the Central Intelligence Agency.

B. Rulings Under Review

The ruling under review is the district court's opinion and order of October 16, 2009 (per Lamberth, C.J.), granting defendants' motion for summary judgment. The opinion is available at 2009 WL 3326114 (D.D.C. Oct. 16, 2009).

C. Related Cases

Am. Civil Liberties Union v. Dep't of Def., No. 08-5519 (D.C. Cir.) is a related case within the meaning of D.C. Circuit Rule 28(a)(1)(C).

/s/ Ben Wizner
BEN WIZNER

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, each corporate Plaintiff-Appellant certifies that it does not have a parent corporation and that no publicly held corporation owns 10% or more of its stock.

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STATEMENT OF JURISDICTION

The district court had jurisdiction over this action pursuant to 5 U.S.C. § 552(a)(4)(B), 28 U.S.C. § 1331, and 5 U.S.C. §§ 701-06. Plaintiffs filed a timely Notice of Appeal on November 10, 2009. This Court has jurisdiction pursuant to 28 U.S.C. § 1292(a)(1).

STATEMENT OF THE ISSUES

1. Whether the government properly invoked FOIA Exemptions 1 and 3 to block disclosure of information that is already public and cannot be legitimately classified.

2. Whether the district court erred in granting summary judgment to defendants without conducting *in camera* review of the disputed documents.

STATEMENT OF THE CASE

This litigation involves a FOIA request submitted by Plaintiffs on April 20, 2007, seeking the release of unredacted records related to the hearings of fourteen prisoners before Combatant Status Review Tribunals ("CSRTs") at the U.S. Naval Base at Guantanamo Bay, Cuba ("Guantanamo"). The fourteen so-called "High-Value Detainees" had been transferred from CIA custody to Guantanamo in September, 2006, and brought before CSRTs in March, 2007. The CSRT proceedings for these prisoners were closed to the press and public. Following the hearings,

Defendants released transcripts from which the detainees' allegations of abuse in CIA custody had been entirely redacted.

Plaintiffs' FOIA request sought unredacted transcripts of the CSRT hearings, as well as copies of any records provided to the tribunals by the detainees. In response to Plaintiffs' FOIA request, Defendants re-released the transcripts with identical redactions, together with other redacted CSRT records. The vast majority of the redactions involved the CSRT hearings of four of the fourteen prisoners. In total, the parties' dispute involves no more than 50 pages of withheld or redacted documents.

Defendants thereafter moved for summary judgment on the ground that the disputed material had been properly withheld under FOIA Exemptions 1 and 3, because disclosure of the detainees' abuse allegations would reveal protected "sources and methods," including classified interrogation techniques and conditions of confinement. On October 29, 2008, the district court granted the government's motion without conducting a hearing or reviewing the records *in camera*. Plaintiffs appealed that ruling to this Court on December 10, 2008.

Prior to opening briefs being filed in this Court, significant changes in circumstances with direct bearing on the government's rationale for withholding the documents compelled the CIA to reevaluate its redaction

decisions. On January 22, 2009, President Obama issued Executive Order 13491, which limited interrogation techniques employed by the United States Government to those found in the Army Field Manual, revoked prior interrogation guidelines inconsistent with the Manual, and ordered the CIA to close any detention facilities it operated. *See* Exec. Order No. 13,491, 74 Fed. Reg. 4893 (Jan. 27, 2009). Pursuant to this executive order, the CIA halted the use of so-called "enhanced interrogation techniques" and permanently closed its detention facilities. Declaration of Wendy M. Hilton in Support of Defendants' Motion for Summary Judgment ("Hilton Decl.") ¶ 22, A-73.

In addition, on April 16, 2009, President Obama declassified four memoranda written by the Department of Justice Office of Legal Counsel ("OLC Memos") for the CIA that purported to authorize the CIA's use of "enhanced interrogation techniques." Id. at ¶ 23, A-74. The OLC Memos described the interrogation techniques in precise detail and included descriptions of how the techniques were applied to some of the specific detainees whose CSRT records form the basis for this litigation.

In response to these events, Defendants requested that the case be remanded to the district court so the documents could be reevaluated. Plaintiffs' FOIA requests were thereafter reprocessed and the CIA made

minor revisions to its redactions of the CSRT transcripts and detainee statements. Id. at ¶ 24, A-74.

The government moved once again for summary judgment; on October 16, 2009, the district court once again granted the motion without conducting *in camera* review or holding a hearing. Plaintiffs timely appealed.

SUMMARY OF ARGUMENT

This appeal raises novel and potentially far-reaching questions involving the government's claimed authority to classify allegations about "intelligence sources and methods" that have been prohibited by law and widely publicized. The case is unique in that Plaintiffs have not sought documents that contain official government confirmation of any intelligence program, but rather transcripts and other records of uncorroborated statements made by Guantanamo prisoners concerning the abuse they allegedly suffered while in United States custody. For numerous and compelling reasons, this Court should decline to ratify the government's misuse of its classification authority to suppress allegations of grave misconduct.

Since Plaintiffs first submitted their FOIA request seeking release of the detainees' uncorroborated allegations of abuse and mistreatment, several

critical developments have dramatically undermined the bases upon which the government has defended the suppression of the records at issue in this case. First, on January 22, 2009, President Obama issued an executive order that prohibited the coercive interrogation techniques that are described in the suppressed transcripts and ordered the closure of the CIA's overseas prisons. Second, on April 16, 2009, the government declassified four Department of Justice memoranda that purported to authorize, and described in great detail, the brutal interrogation techniques to which the detainees at issue here were subjected. Third, in its April 30, 2009 edition, the New York Review of Books published a detailed 40-page report of the International Committee of the Red Cross based on the firsthand accounts of these detainees concerning their abuse in CIA custody. Finally, on August 24, 2009, the government declassified large portions of a report by the CIA's own Inspector General, together with other CIA and Department of Justice documents, that provide additional detail concerning the interrogation methods and conditions of confinement that form the basis for this litigation.[1]

In the face of this virtual mountain of publicly available documents – nearly all of them official, declassified government records – setting forth in

[1] Remarkably, neither the government in its briefs below nor the CIA in its declaration so much as acknowledged the declassification and release of these CIA documents, even as government counsel advanced arguments that were flatly contradicted by the documents.

excruciating detail the interrogation techniques and conditions of confinement that are described in the suppressed records at issue here, the government argued below that disclosing the detainees' allegations of abuse would somehow cause harm to national security. Because the government could not plausibly argue that the details of the CIA's detention and interrogation program remained categorically classified, it advanced two altogether novel arguments. First, the government insisted that the declassified documents contained only "descriptions of the enhanced interrogation techniques *in the abstract*," while the CSRT records at issue in this appeal contain "*operational* details of the conditions of confinement and the *application* of interrogation techniques" to specific detainees. Hilton Decl. ¶70, A-99-100 (emphasis in original). Second, the government contended that the CSRT transcripts were properly classified because their release "would provide al Qa'ida with propaganda it could use to recruit and raise funds." Hilton Decl. ¶ 72, A-100. The district court apparently credited the first of these arguments, though it did not conduct *in camera* review to evaluate its credibility.

Simply put, the government's arguments are meritless. The notion that there is a material distinction between the documents already declassified and the records withheld in this case because the former are

"abstract" and the latter "specific" is blatantly false, and the government knows it to be false: both the OLC memos (which the government acknowledged) and the CIA documents (which it expediently ignored) include detailed and graphic descriptions of the interrogation techniques *as applied* to the specific detainees whose records form the basis for this litigation. But even if the government's argument were rooted in fact, this is a distinction without a difference. More precisely, there *is* a difference, but it favors Plaintiffs: the declassified materials in the public record comprise official acknowledgments by government agencies; the records sought in this litigation contain uncorroborated allegations of terrorism suspects. The government has for decades argued successfully that publication of "mere allegations" cannot compel disclosure of official government documents. Here, apparently for the first time, it argued that publication of official government documents could not compel the disclosure of mere allegations. This "heads we win, tails you lose" approach is quite obviously wrong and, if accepted, would eviscerate the FOIA's open-government principles. The district court failed even to acknowledge the critical point that the records at issue comprise allegations rather than official confirmation.

The argument that government documents are properly classified when their release might aid enemy "propaganda" is even more far-reaching

and dangerous. Indeed, it is difficult to imagine an argument more antithetical to the spirit of the FOIA. No court has ever upheld the suppression of descriptions of government misconduct on the ground that those descriptions would cast the government in an unfavorable light. To do so would enshrine into the FOIA the fundamentally antidemocratic principle that the more egregious the government misconduct at issue, the more protected it would be from public disclosure. Thus would a statute enacted "to ensure 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), be transformed into an instrument of cover-up.

The district court erred even more fundamentally in upholding, without analysis, the government's claimed authority to classify information within the detainees' personal knowledge. To be clear, Plaintiffs have never sought any official confirmation of any government program, intelligence method, or interrogation technique. Rather, they seek only to lift a gag on statements made by private individuals based on their own first-hand experiences. These allegations – comprised of statements about harsh conditions of confinement and coercive interrogation techniques that were "disclosed" to the detainees by virtue of having been involuntarily imposed

upon them – simply and categorically are *not* "intelligence sources and methods" within the meaning of FOIA Exemptions 1 and 3. Because the detainees are not government employees who might be contractually obligated to keep their experiences secret, the government has no legal authority to restrict information that comes from their own personal observations.

Indeed, the government's practical authority to suppress the detainees' descriptions of their own experiences derives solely from its decision to detain them. But because the government maintains that these detainees' words cannot be released without "grave harm" to national security, the government is effectively arguing that the detainees themselves cannot be released – regardless of their guilt or innocence. Indeed, the government's argument *presumes* that the detainees will not be released and will not be permitted to recount their experiences to the public. The government has cited to no authority for the startling proposition that it can predicate a classification decision on the indefinite detention of individuals who have not been convicted of – and in many cases not even been charged with – any crime. Indeed, no court has ever held that unconfirmed allegations offered by detainees concerning the treatment to which they themselves were

exposed constitute "intelligence sources or methods" under FOIA Exemptions 1 and 3.

Finally, the district court's failure to conduct *in camera* review despite unmistakable evidence that the government's affidavits contained material misrepresentations was a clear abuse of discretion. The government's declaration and brief asserted that documents previously declassified did not reveal "operational details" concerning the manner in which coercive interrogation techniques were applied to specific detainees. This was false. And in misinforming the district court about the purported distinction between the withheld materials and the declassified public record, the government failed even to acknowledge the existence of the most critical declassified CIA documents that directly refuted its claim. This Court has held that bad faith exists and *in camera* review is obligatory when "information contained in agency affidavits is contradicted by other evidence in the record." *Carter v. U.S. Dep't of Commerce*, 830 F.2d 388, 393 (D.C. Cir. 1987). That standard is met in this case.

Moreover, between the district court's first and second grants of summary judgment to Defendants, the government declassified small portions of the records at issue. Those newly released excerpts demonstrated indisputably that the government had abused its classification

authority and withheld information improperly during the course of this litigation. For example, in one newly released excerpt, Khalid Sheikh Mohammed related 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." Declaration of Ben Wizner in Opposition to Defendants' Motion for Summary Judgment ("Wizner Decl.") ¶7, A-109, Exh. H at A-473. In another, Mohammed stated that, under torture, "I make up stories" concerning the location of Osama bin Laden and other matters. *Id.* at A-474. The government offered no plausible explanation for why these words were originally redacted; indeed, they are wholly unrelated to any category of information described in the CIA's declarations. They are, however, extremely relevant to a critical and ongoing national debate about the legality and efficacy of torture. In the face of this and other evidence refuting any presumption of good faith to which the government might be entitled, the district court's failure to conduct *in camera* review of the small number of documents at issue was reversible error.

ARGUMENT

Standard of Review

This Court reviews *de novo* the district court's determination that Defendants sustained their burden of demonstrating that the withheld

material is exempt from disclosure under the FOIA. *Summers v. Dep't of Justice*, 140 F.3d 1077, 1080 (D.C. Cir. 1998). The district court's decision not to conduct *in camera* inspection of the disputed material is reviewed for abuse of discretion. *Ctr. for Auto Safety v. EPA*, 731 F.2d 16, 22 (D.C. Cir. 1984).

I. THE DISTRICT COURT ERRED IN CONCLUDING THAT THE WITHHELD DOCUMENTS ARE EXEMPT FROM DISCLOSURE

Invoking FOIA Exemptions 1 and 3, the government defended its withholding of the records in this case on the ground that their release would disclose "intelligence sources and methods." But the CSRT records may not be withheld under those exemptions for at least three reasons: (1) the government is withholding information that has already been declassified and is already widely available; (2) the President of the United States has categorically banned so-called "enhanced interrogation techniques" and has ordered the permanent closure of the CIA facilities in which these detainees were held; and (3) the government has no authority to classify information within the detainees' personal knowledge. Withholding under Exemption 1 is additionally improper because release of the records at issue would not damage the national security given that the techniques are banned and already publicly described in great detail. The district court gave short shrift

to some of Plaintiffs' arguments and ignored others altogether in holding that the government had properly invoked both exemptions.

To justify withholding under Exemption 1, the CIA must establish that the information withheld falls within an applicable executive order and that it has been properly classified pursuant to that order. 5 U.S.C. § 552 (b)(1). The CIA relies upon Executive Order No. 12,958, 60 Fed. Reg. 19,825 (Apr. 17, 1995),[2] which provides a comprehensive system for classifying documents that may be kept secret by the government. The Executive Order attempts to balance "democratic principles requir[ing] that the American people be informed of the activities of their Government" with the recognition that certain qualifying documents may be kept secret in the national interest. *Id.* Thus, to be properly classified under the executive order, agency information must fall within an authorized withholding category set forth in the order. *Id.*

The same Executive Order contains four prerequisites for classifying information: (1) the information must be classified by an "original classification authority"; (2) the information must be "under the control of" the government; (3) the information must fall within one of the authorized

[2] Executive Order No. 12,958 was amended by Executive Order No. 13,292, 68 Fed. Reg. 15,315 (Mar. 25, 2003). All citations to Executive Order No. 12,958 are to the order as amended.

withholding categories under this order; and (4) the original classification authority must "determine[] that the unauthorized disclosure of the information reasonably could be expected to result in damage to the national security" and must be "able to identify or describe the damage." *Id.* at § 1.1(a). In classifying the details of the "enhanced interrogation techniques" and conditions of confinement at issue here, the CIA relied on the section of the Executive Order that permits classification of "intelligence activities (including special activities) [and] intelligence sources or methods." *Id.* § 1.4(c).

To justify withholding under Exemption 3, the CIA must establish that the information is "specifically exempted from disclosure by statute." 5 U.S.C. § 552 (b)(3). Here, the CIA relied upon the National Security Act of 1947 and the Central Intelligence Agency Act of 1949, which, like Executive Order No. 12,958, permit the withholding of "intelligence sources and methods."

A. The Interrogation Techniques and Conditions of Confinement at Issue in this Case Are not Protectable Intelligence Sources and Methods

The propriety of the CIA's withholdings under both Exemptions 1 and 3 of descriptions of abusive interrogation techniques and conditions of confinement turns initially on whether release of details regarding those activities – now banned and revealed in full – would disclose intelligence

sources and methods. It would not. For at least three reasons, the CIA's withholding of the records at issue is improper and is not authorized by the statutes upon which the government relies.

1. The Government is Withholding Information that has Already Been Declassified and is Already Widely Available.

Since the commencement of this litigation, the government has declassified numerous documents that formally acknowledge and describe in meticulous detail the interrogation techniques and conditions of confinement to which the detainees at issue here were subjected. It is beyond dispute that the government may not legitimately keep classified information that has already been formally disclosed, yet that is precisely what the government has done in this case.

The OLC Memos

On April 16, 2009, President Obama declassified four Department of Justice memoranda that purport to authorize, and describe in minute detail, the interrogation techniques that the CIA applied to so-called "High-Value Detainees," including the specific detainees whose CSRT transcripts remain redacted. The CIA's declaration in this case, however, attempts to distinguish between descriptions of the techniques in the OLC memos – which it labels "abstract" – and their descriptions in the CSRT records at issue here. *See* Hilton Decl. ¶¶70-72, A-99-101. Contrary to this misleading

assertion, the descriptions in the OLC memos are anything but abstract: the level of detail provided about the CIA's intended and actual application of the "enhanced interrogation techniques" is concrete and startling.

For example, the first memo, issued on August 1, 2002, analyzes the "enhanced interrogation techniques" that the CIA specifically requested for use on Abu Zubaydah, whose CSRT transcript remains highly redacted. Memorandum from Jay S. Bybee to John A. Rizzo, *Interrogation of al Qaeda Operative* (Aug. 1, 2002) (Wizner Decl. ¶4, A-108, Exh. A). In great detail, it sets out the "increased pressure phase" that the CIA intended to use on Abu Zubaydah, and it describes the requested techniques one by one. *Id.* at A-111-14, A-120-25. They include "walling," "cramped confinement," sleep deprivation," "insects placed in a confinement box," and "the waterboard." *Id.* at A-112.

The second memo, issued on May 10, 2005, contains nine pages of the CIA's operational details of thirteen "enhanced interrogation techniques," and an additional fifteen pages of descriptions merged with legal analysis. *See* Memorandum from Steven G. Bradbury to John A. Rizzo, *Re: Application of 18 U.S.C. §§ 2340–2340A to Certain Techniques That May Be Used in the Interrogation of a High Value al Qaeda Detainee* (May 10, 2005) (Wizner Decl. ¶4, A-108, Exh. B at A-136-44, A-160-74.)

The memo explains in detail how the CIA used and intended to use each of the interrogation techniques. The CIA's waterboarding, for example, involved "a gurney that is inclined at an angle of 10 to 15 degrees to the horizontal," the pouring of water "from a height of approximately 6 to 18 inches," applications of water for no more than 40 seconds per "application," "with the duration of an 'application' measured from the moment when water – of whatever quantity – is first poured onto the cloth until the moment the cloth is removed from the subject's face." *Id.* at A-142. The memo describes the number of times the CIA may waterboard a detainee per session, per day, and per month, and it further describes the protocol required for the presence of medical personnel. *Id.* at A-143. Minute details are also provided for other techniques. *See, e.g.*, *id.* at A-140-42 (two-page description of the operational details of "sleep deprivation (more than 48 hours)"); *id.* at A-138-39 (describing the time limits for the use of "water dousing" depending on the temperature of the water used: 41°F for 20 minutes, 50°F for 40 minutes, and 59°F for 60 minutes); *id.* at A-138 (describing the CIA's three "stress positions": "(1) sitting on the floor with legs extended straight out in front and arms raised above the head, (2) kneeling on the floor while leaning back at a 45 degree angle, and (3) leaning against a wall generally about three feet away from the detainee's

feet, with only the detainee's head touching the wall, while his wrists are handcuffed in front of him or behind his back, and while an interrogator stands next to him to prevent injury if he loses his balance").

Significantly, the second memo also reviews the CIA's actual application of the techniques and the impact of the techniques on detainees. *See, e.g.*, *id.* at A-137 ("walling" "is not intended to – and based on experience you have informed us that it does not – inflict any injury or cause severe pain"); *id.* at A-137-38 (same for the "abdominal slap"); *id.* at A-140 ("We understand from you that no detainee subjected to this technique by the CIA has suffered any harm or injury, either by falling down and forcing the handcuffs to bear his weight or in any other way."); *id.* at A-140 n.15 ("Specifically, you have informed us that on three occasions early in the program, the interrogation team and the attendant medical officers identified the potential for unacceptable edema in the lower limbs of detainees undergoing standing sleep deprivation, and in order to permit the limbs to recover without impairing interrogation requirements, the subjects underwent horizontal sleep deprivation."); *id.* at A-141 ("You have informed us that to date, more than a dozen detainees have been subjected to sleep deprivation of more than 48 hours, and three detainees have been subjected

to sleep deprivation of more than 96 hours; the longest period of time for which any detainee has been deprived of sleep by the CIA is 180 hours.").

The third memo, also issued on May 10, 2005, assesses the CIA's use of the "enhanced interrogation techniques" in combination with each other and describes the operational details of a full-scale "enhanced" interrogation from beginning to end, based on information provided by the CIA. *See* Memorandum from Steven G. Bradbury to John A. Rizzo, *Re: Application of 18 U.S.C. §§ 2340–2340A to the Combined Use of Certain Techniques in the Interrogation of High Value al Qaeda Detainees* (May 10, 2005) (Wizner Decl. ¶4, A-108, Exh. C). Interrogations begin in the "Initial Conditions" phase, which involves the transportation and preliminary conditioning of detainees. *Id.* at A-180. They progress to the "Transition to Interrogation" phase and ultimately to the interrogation phase, which includes establishing a "baseline, dependent state" and the use of "corrective" and "coercive" interrogation techniques. *Id.* at A-180-82. The detainees are "exposed to white noise/loud sounds (not to exceed 79 decibels) and constant light during portions of the interrogation process." *Id.* at A-181 n.3 (internal quotation marks omitted). In describing these phases, the memo discusses when the CIA determined to use which techniques, for how long, in what order and combination, and with what intended result. *Id.*

at A-181-86. This includes the CIA's description of a "prototypical interrogation," which contains detailed information about precisely how the CIA conducted interrogations and employed "enhanced interrogation techniques." *Id.*

Like the other memos, the fourth provides significant operational detail about the "enhanced interrogation techniques." *See* Memorandum from Steven G. Bradbury to John A. Rizzo, *Re: Application of United States Obligations Under Article 16 of the Convention Against Torture to Certain Techniques That May Be Used in the Interrogation of High Value al Qaeda Detainees* (May 30, 2005) (Wizner Decl. ¶4, A-108, Exh. D at A-209-12, A-226-28). Strikingly, it includes even greater detail about the CIA's experiences in implementing the techniques. For example, it notes that the CIA "has employed enhanced techniques to varying degrees in the interrogations of 28 of these detainees," *id.* at A-202; that "the CIA has used [waterboarding] in the interrogations of only three detainees to date (KSM, Zubaydah, and 'Abd Al-Rahim Al-Nashiri) and has not used it since the March 2003 interrogation of KSM," *id.* at A-203; that the "interrogation team 'carefully analyzed [detainee] Gul's responsiveness to different areas of inquiry' during this time and noted that his resistance increased as questioning moved to his 'knowledge of operational terrorist activities,'" *id.*

at A-204; that a detainee "feigned memory problems . . . in order to avoid answering questions," *id.* at A-205; that the CIA responded to the detainee's feigned memory problems by using "'more subtle interrogation measures [such as] dietary manipulation, nudity, water dousing, and abdominal slap,'" *id.* at A-205; and that "[t]welve days into the interrogation, the CIA subjected al-Nashiri to one session of the waterboard during which water was applied two times,'" *id.* The memo also describes the types of intelligence elicited using the "enhanced interrogation techniques." *See id.* at A-207-208.

Also inconsistent with the government's claim that the OLC memos contain only "abstract" information are two passages in the fourth memo. The first discloses that the CIA waterboarded Abu Zubaydah "'at least 83 times during August 2002,'" and that it waterboarded KSM "183 times during March 2003." *Id.* at A-234. The second relates the following disturbing account:

> According to the *IG Report*, the CIA, at least initially, could not always distinguish detainees who had information but were successfully resisting interrogation from those who did not actually have the information. *See IG Report* at 83–85. On at least one occasion, this may have resulted in what might be deemed in retrospect to have been the unnecessary use of enhanced techniques. On that occasion, although the on-scene interrogation team judged Zubaydah to be compliant, elements within CIA Headquarters still believed he was withholding information. . . . At the direction of CIA Headquarters,

> interrogators therefore used the waterboard one more time on Zubaydah.

Id. at A-228 n.28. Given that the records at issue in this litigation relate to the interrogation of Abu Zubaydah, they likely contain these and other details released in the OLC memos. The district court granted summary judgment without examining the documents to determine whether the withheld information was equivalent to information already made public.

In sum, the OLC memos provide far from "abstract" descriptions of the "enhanced interrogation techniques." They set forth comprehensive details regarding the decision to use particular techniques, their actual use, and their effect on specific detainees – all based upon the CIA's own descriptions – and leave little to the imagination. For these reasons, the CIA's withholding of detainee allegations about the "enhanced interrogation techniques" is improper. The alleged "intelligence sources and methods" have already been disclosed by the President himself.

The CIA IG Report and Related Documents

Declassification of the OLC memos alone would have compelled the release of the remaining CSRT records; at a minimum, it would have made careful *in camera* review vital to proper *de novo* adjudication of the government's motion. Yet on August 24, 2009, the CIA itself declassified large portions of a CIA Inspector General's report ("IG Report") concerning

the Agency's detention and interrogation operations. *Special Review of Counterterrorism, Detention, and Interrogation Activities*, CIA Inspector General (May 2004), Wizner Decl. ¶6, A-108, Exh. F. That document – wholly ignored in the CIA's declaration and in the government's briefs below – renders even more farfetched the notion that the government has released only "abstract" descriptions of "enhanced interrogation techniques" and of conditions within CIA prisons. Indeed, the IG Report expressly addresses actual applications of coercive techniques that *exceeded* the authority purportedly conferred by the OLC Memos.

The IG Report is dated May 7, 2004. It was requested because some CIA employees "were concerned that certain covert Agency activities at an overseas detention and interrogation site might involve violations of human rights." *Id.* at ¶2, A-287. In chilling detail, the IG Report recounts numerous instances in which CIA and contract interrogators engaged in unauthorized abusive practices. For example, although the OLC memos purported to authorize a form of "waterboarding" to be employed against Abu Zubaydah, the actual implementation of that technique was considerably more brutal. Upon reviewing CIA videotapes of Abu Zubaydah's interrogations, the IG Report's investigators observed that "the waterboard technique employed at [redacted] was different from the technique as described in the DoJ opinion

and used in the SERE training. The difference was in the manner in which the detainee's breathing was obstructed. At the SERE School and in 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. *See also id.* at ¶223, A-375 ("Interrogators applied the waterboard to Abu Zubaydah at least 83 times during August 2002.").

The IG Report reached a similar conclusion regarding the application of the waterboard to Khalid Shiekh Mohammed: "The Review determined that the interrogators used the waterboard on Khalid Shaykh Muhammad in a manner inconsistent with the SERE application of the waterboard and the description of the waterboard in the DoJ OLC opinion, in that the technique was used on Khalid Shaykh Muhammad a large number of times. . . . Cables indicate that Agency interrogators [redacted] applied the waterboard technique to Khalid Shaykh Muhammad 183 [redacted]." *Id.* at ¶¶99-100, A-329-330. *See also id.* at ¶225, A-376 ("Khalid Shaykh Muhammad received 183 applications of the waterboard in March 2003").

The Report describes other unauthorized interrogation activities that bear no relation to the techniques described in the OLC memos. Some of these unauthorized methods were applied against Al-Nashiri and Khalid Shiekh Mohammed, whose CSRT transcripts remain highly redacted. For example, some time "between 28 December 2002 and 1 January 2003, the debriefer used an unloaded semi-automatic handgun as a prop to frighten Al-Nashiri into disclosing information . . . . On what was probably the same day, the debriefer used a power drill to frighten Al-Nashiri. . . . [T]he debriefer entered the detainee's cell and revved the drill while the detainee stood naked and hooded." *Id.* at ¶92, A-326-27; *see also id.* at ¶94, A-327 (debriefer threatened to bring Al-Nashiri's mother and family to the prison, hoping that Al-Nashiri would "infer" the use of an "interrogation technique involv[ing] sexually abusing female relatives in front of the detainee"). In a separate incident, an "experienced Agency interrogator reported that . . . interrogators said to Khalid Shaykh Muhammad that if anything else happens in the United States, 'We're going to kill your children.'" *Id.* at ¶95, A-328.

A second CIA document declassified on the same day is a self-styled "Background Paper" prepared by the CIA to describe the Agency's "combined use of interrogation techniques." Background Paper on CIA's

Combined Use of Interrogation Techniques (Dec. 30, 2004) (Wizner Decl. ¶6, A-108, Exh. G). The document, dated December 30, 2004, is intended to provide "additional background on how interrogation techniques *are used*, in combination and separately, to achieve interrogation objectives." *Id*. at A-441 (emphasis added). The entire document, also unmentioned in the government's affidavits and pleadings, gives lie to the government's contention that only "abstract" descriptions have been declassified. It begins with "a summary of the detention conditions that *are used* in all CIA HVD facilities," *id.* at A-444 (emphasis added), and proceeds to describe in detail each of the "conditioning," "corrective," and "coercive" techniques as they were actually applied to CIA prisoners. The government could not plausibly reconcile its arguments supporting the continued classification of the CSRT transcripts with the disclosures in these CIA documents; perhaps for that reason, it simply ignored their existence.

The ICRC Report

Finally, the continued withholding of CSRT transcripts on the ground that their release would cause harm to national security is fatally undermined by the publication in April of a report by the International Committee of the Red Cross ("ICRC Report"), based entirely on the firsthand accounts of former CIA prisoners held at Guantanamo, that describes their treatment in

CIA custody. *Report on the Treatment of Fourteen "High Value" Detainees in CIA Custody*, ICRC (Feb. 2007) (Wizner Decl. ¶5, A-108, Exh. E). The ICRC Report provides further details concerning the application of the interrogation techniques described in the OLC and CIA documents to the detainees at issue here, and includes excerpts of interviews with the detainees. To be sure, unlike the OLC Memos and the IG Report, the ICRC Report was not released pursuant to an Executive-Branch declassification process, but rather was leaked to a journalist. In this case, though, the manner in which the Report became public has little bearing on its significance to this dispute. The ICRC Report contains the uncorroborated allegations of the former CIA prisoners; the CSRT records contain the same. Publication of the ICRC Report did not require any formal confirmation of any intelligence activities by the United States; neither would publication of the full CSRT transcripts require any such confirmations.[3] Accordingly, the

[3] To the contrary, the former administration consistently responded to allegations of abuse by terrorism suspects by characterizing them as false. Former Secretary of Defense Rumsfeld, for example, responded to a question about human rights violations at Guantanamo with ridicule: the detainees were doing "exactly what they were trained to tell people in the Manchester document: Tell them you're tortured! Tell them it's terrible! Tell them this! Tell them that! That's what they do." *See* Secretary Rumsfeld Remarks at Council on Foreign Relations, Feb. 17, 2006, available at http://www.defenselink.mil/transcripts/transcript.aspx?transcriptid=965

government cannot plausibly contend that such publication will have *any* effect on national security, let alone an "exceptionally grave" effect.

2. The President of the United States has Banned Abusive Interrogation Techniques and Closed the CIA's Prisons.

In addition to having been declassified and widely publicized, the interrogation techniques and conditions of confinement that the government seeks to suppress in this litigation have been categorically prohibited by the President. *See* Exec. Order No. 13,491, 74 Fed. Reg. 4,893 (Jan. 27, 2009). Because they have been banned, they are not now (even if they once were) protectable "intelligence sources and methods." The seminal Supreme Court case interpreting the phrase "intelligence sources and methods" makes clear that the CIA may withhold information about only those sources or methods that "fall within the Agency's mandate." *CIA v. Sims*, 471 U.S. 159, 169 (1985).[4] Now that the President has banned use of the techniques, they are

[4] Although *Sims* addressed the scope of protected sources and methods under Exemption 3, the definition of the phrase as it appears in Exemption 1 is identical. *See, e.g.*, *Maynard v. CIA*, 986 F.2d 547, 555 (1st Cir. 1993) ("When, as here, Exemptions 1 and 3 are claimed on the basis of potential disclosure of intelligence sources or methods, the standard of reviewing an agency's decision to withhold information is essentially the same."); *Military Audit Project v. Casey*, 656 F.2d 724, 736 n.39 (D.C. Cir. 1981) (noting that Exemption 3 provides overlapping protection with Exemption 1 where disclosure of classified information would reveal intelligence sources and methods); *Phillippi v. CIA*, 546 F.2d 1009, 1015 n.14 (D.C. Cir. 1976) (noting that the "inquiries into the applicability of the two exemptions [1 and

no longer within the Agency's mandate. Thus, even assuming that the techniques did at one point legitimately and lawfully fall within the CIA's mandate, no amount of disclosure about their use in the past could reveal details about current "intelligence sources and methods" that may be legitimately protected by the CIA.

The CIA's second declaration acknowledges the banning of the techniques but argues that "[e]ven if the EITs are never used again, the United States will continue to be involved in questioning terrorists under legally approved guidelines. The information in these documents would provide future terrorists with a guidebook on how to evade such questioning." Hilton Decl. ¶ 71, A-100**.** But that argument is as illogical as it is limitless: knowledge about banned interrogation techniques cannot aid future captives in resisting new and different techniques. Indeed, the President recognized as much when he ordered the release of the OLC Memos in the first instance. *See* Statement of President Barack Obama on Release of OLC Memos (Apr. 16, 2009), *available at* http://www.whitehouse.gov/the_press_office/Statement-of-President-Barack-Obama-on-Release-of-OLC-Memos (releasing the memos because "the interrogation techniques described in these memos have already been

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3] may tend to merge" with regard to classification of intelligence sources and methods).

widely reported," and because "withholding these memos would only serve to deny facts that have been in the public domain for some time"). By the CIA's reasoning, the mere fact that the CIA will use *some* interrogation techniques in the future justifies the suppression of information about *all* interrogation techniques used in the past, even if those techniques have already been revealed and repudiated. That is not the law.

3. The Government May Not Classify Information Derived from Detainees' Involuntary Exposure to Abusive Interrogation and Secret Detention.

Finally, the descriptions of interrogation techniques and conditions of confinement that the government continues to suppress are not protectable "sources and methods" under Exemptions 1 and 3, because the government lacks the authority to classify information derived from the detainees' personal observations and experiences. There is no support for the extraordinary proposition that the government's authority to detain a prisoner somehow creates a new, unwritten power to classify any and all utterances made by that prisoner for the period he is incarcerated.

The FOIA is not a detention statute. The requirement under the executive order that classified national security information be "owned by, produced by or for, or [be] under the control of the United States Government," has never before been extended to *human beings* under the

government's control. Indeed, the government's arguments for withholding unconfirmed detainee allegations under Exemptions 1 and 3 are entirely dependent on the continued indefinite detention of the men whose statements have been suppressed. The CIA acknowledges this point when it invokes the danger of "[a]llowing the HVDs to speak freely about the CIA program" (Hilton Decl. ¶75, A-102) – a far broader concern than the release of additional portions of hearing records in this case. Indeed, the scope of the government's argument is best illustrated by a simple fact: if any of the "HVDs" whose transcripts have been censored were to be released, the government's rationale for withholding the records in this case would instantly evaporate. And the IG Report confirms that the CIA is well aware of the connection between its detention of prisoners and its desire to keep secret the details of their treatment; the Report notes the Agency's concern that if detainees were "not kept in isolation, "they "would likely divulge information about the circumstances of their detention." Wizner Decl. Exh. F at ¶237, A-381.

It never has been and cannot be the law that the United States government may subject an individual to "enhanced interrogation techniques," and then – by virtue of that individual's "exposure" to those techniques *alone* – enforce a permanent gag on the individual's

communication with the world. And yet that is precisely what the government argued below: "[T]he fourteen HVDs included in Plaintiffs' FOIA request have been exposed to intelligence activities, sources, and methods of information. . . ." Hilton Decl. ¶49, A-88. Specifically, the "intelligence activities to which the HVDs were exposed include the capture, detention, confinement, and interrogation of *detainees*" – i.e., themselves. *Id.* (emphasis added). By this logic, the government could inadvertently detain and coercively interrogate an entirely innocent person[5] – but, if that person were "exposed" to classified interrogation techniques, permitting him to "speak freely" would cause "exceptionally grave harm" to national security, so his release would become impossible.

It is true that the government may enjoin the disclosure of information by a government employee in ways that, if imposed on private individuals, would be unlawful. But "this principle implies a substantially *voluntary assumption* of special burdens in exchange for special opportunities." *Wright v. FBI*, 2006 WL 2587630 (D.D.C. 2006) (emphasis added); *see also*

[5] This is far from a speculative concern. *See, e.g.*, Dana Priest, "Wrongful Imprisonment: Anatomy of a CIA Mistake," Wash. Post, Dec. 4, 2005, at A01 (describing CIA's rendition and detention of Khaled El-Masri, an innocent German citizen, and reporting that the "CIA inspector general is investigating a growing number of what it calls 'erroneous renditions,' according to several former and current intelligence officials.").

McGehee v. Casey, 718 F.2d 1137, 1142 n.11, 1147-49 (D.C. Cir. 1983) ("One who enters the foreign intelligence service thereby occupies a position of 'special trust' reached by few in government"); *Stillman v. CIA*, 517 F. Supp.2d 32, 37 (D.D.C. 2007) (former CIA employee foreclosed from publicly discussing information obtained after his termination under broad terms of non-disclosure agreements signed in consideration for offer of CIA employment). Unlike government employees, however, the detainees' involvement in the CIA torture and detention program has obviously not been voluntary, nor based on a special relationship of trust. Of course, if the government were correct that the detainees' "exposure" to classified intelligence sources and methods justified the enforcement of an indefinite gag on their communications, then surely it would follow that whoever in government was responsible for disclosing those classified methods to terrorism suspects must have violated criminal statutes prohibiting transmission of intelligence secrets to anyone unauthorized to receive them. *See., e.g.*, 18 U.S.C. § 793 (d) and (f).[6] That is an absurd proposition, to be

[6] "Whoever, lawfully having possession of . . . information relating to the national defense which information the possessor has reason to believe could be used to the injury of the United States or to the advantage of any foreign nation, willfully communicates, delivers, transmits or causes to be communicated, delivered, or transmitted . . . to any person not entitled to receive it. . . Shall be fined under this title or imprisoned not more than ten years, or both."

sure, but no more so than the notion that the moment the government applies certain coercive interrogation techniques against a human being, that person's future communications – indeed, his very freedom – may be enjoined, irrespective of guilt or innocence.

B. Disclosure of the Detainees' Accounts of Interrogation and Imprisonment Would Not Damage National Security.

To withhold descriptions of the "enhanced interrogation techniques" and conditions of confinement pursuant to Exemption 1, the CIA bears an additional burden under the executive order: information may be withheld only if "the original classification authority determines that the unauthorized disclosure of the information reasonably could be expected to result in damage to the national security, . . . and . . . is able to identify or describe the damage." Exec. Order No. 12,958, § 1.1(a)(4). Where, as here, the government seeks to withhold information that is already in the public domain in whole or in part, it must explain how additional disclosure could damage the national security. *Wash. Post v. U.S. Dep't of Def.*, 766 F. Supp. 1, 10–12 (D.D.C. 1991). Furthermore, information may not be classified under the Executive Order to "conceal violations of law" or to "prevent embarrassment." Exec. Order No. 12,958, § 1.7(a)(1)–(2). Here, the CIA wholly failed to demonstrate that releasing uncorroborated allegations about "enhanced interrogation techniques" and CIA prison conditions – which

have been banned and are already described in graphic detail in the OLC memos, IG Report, and ICRC Report – would damage national security. *See, e.g.*, *Wash. Post*, 766 F. Supp. at 9 ("It is a matter of common sense that the presence of information in the public domain makes the disclosure of that information less likely to 'cause damage to the national security.' . . . In other words, if the information has already been disclosed and is so widely disseminated that it cannot be made secret again, its subsequent disclosure will cause no *further* damage to the national security." (emphasis in original)).

President Obama shares this view. Upon release of the OLC memos, the President stated:

> First, the interrogation techniques described in these memos have already been widely reported. Second, the previous Administration publicly acknowledged portions of the program – and some of the practices – associated with these memos. Third, I have already ended the techniques described in the memos through an Executive Order. Therefore, withholding these memos would only serve to deny facts that have been in the public domain for some time.[7]

The President thus squarely rejected the CIA's argument that further dissemination of details of interrogation techniques would cause harm to national security. The President's determination is, in effect, a finding by

[7] Statement of President Barack Obama on Release of OLC Memos, April 16, 2009, *available at* http://www.whitehouse.gov/the_press_office/Statement-of-President-Barack-Obama-on-Release-of-OLC-Memos.

the Chief Executive that the predicate element of the Executive Order upon which the CIA relies no longer applies. The President of the United States has formally concluded that the disclosure of the interrogation techniques employed against the detainees is not a threat to national security. As such, the government is now indisputably foreclosed from claiming that classification of such information is authorized on the ground that it "could reasonably be expected to result in damage to the national security."

This Court should also reject the CIA's unprecedented and dangerous assertion that the disclosure of textual details of interrogation techniques and conditions of confinement could be used as propaganda by our enemies. Hilton Decl. ¶72, A-100-101.[8] Never before has the government sought to withhold textual descriptions of its own misconduct on the ground that such descriptions would inflame the countries' enemies. And never before has an Article III court authorized the withholding of evidence of governmental misconduct on this basis. This Court should not be the first.

The CIA's argument is antithetical to the core purposes of the FOIA. Congress enacted the FOIA to allow the American people access to information vital to informed democratic decisionmaking and to serve as a check on, and incentive against, executive misconduct. *See, e.g.*, *Robbins*,

[8] The district court did not address this issue, but the government pressed it vigorously below and presumably will do so again on appeal.

437 U.S. at 242. For that reason, courts interpret the exemptions to FOIA narrowly. *Halpern v. FBI*, 181 F.3d 279, 287 (2d Cir. 1999). Acceptance of the CIA's argument for withholding details about the CIA's abuse of prisoners would turn FOIA on its head by allowing the greatest protection from disclosure for records documenting the worst governmental misconduct. This would be true even though, as is the case here, the CIA has already officially acknowledged its use of, and significant detail about, the techniques in question.

The CIA's argument would, moreover, give violent extremists an effective veto power over the FOIA. As another court recognized: "Our nation does not surrender to blackmail, and fear of blackmail is not a legally sufficient argument to prevent us from performing a statutory command. . . . The terrorists in Iraq and Afghanistan do not need pretexts for their barbarism; they have proven to be aggressive and pernicious in their choice of targets and tactics." *Am. Civil Liberties Union v. Dep't of Def.*, 389 F. Supp. 2d 547, 575–76 (S.D.N.Y. 2005). President Obama recently endorsed a similar view of FOIA and its purposes: "The Government should not keep information confidential merely because public officials might be

embarrassed by disclosure, because errors and failures might be revealed, or because of speculative or abstract fears."[9]

Finally, the CIA's argument runs counter to the express terms of the Executive Order invoked. That order forbids classification to "conceal violations of law" or to "prevent embarrassment." Exec. Order No. 12,958, § 1.7(a)(1)–(2). The CIA's attempt to classify these records for fear of their use as enemy propaganda is, in fact, suppression for the purpose of concealing illegality and preventing embarrassment. The agency's concern is that others will react strongly to confirmation of, and new details about, governmental misdeeds. That argument is a straightforward admission that the agency is classifying information for the purpose of concealing violations of law or preventing embarrassment. There is no other plausible explanation for the CIA's wholesale withholding of the documents at issue here. The fact that the embarrassment may be international as well as domestic does not change the law.

For these reasons, the district court erred in concluding that the CIA met its burden under Exemptions 1 and 3 for withholding details regarding its use of "enhanced interrogation techniques." Given the level of detail

[9] Memorandum from President Barack Obama to the Heads of Executive Departments and Agencies, *Freedom of Information Act* (Jan. 21, 2009), *available at* http://www.whitehouse.gov/the_press_office/Freedom_of_Information_Act.

already made public, it is exceedingly unlikely that these records should not have been released in full, or at the very least in segregable portion.

II. THE DISTRICT COURT ABUSED ITS DISCRETION BY FAILING TO CONDUCT *IN CAMERA* REVIEW OF THE CONTESTED DOCUMENTS

While the decision whether to review contested FOIA documents is ordinarily within the discretion of the district court, in certain cases "*in camera* inspection is needed in order to make a responsible de novo determination on the claims of exemption." *Ray v. Turner*, 587 F.2d 1187, 1195 (D.C. Cir. 1978) (per curiam). This is such a case. This Court has held that *in camera* review is "particularly appropriate when there is evidence of bad faith on the part of the agency" and "the number of withheld documents is relatively small. . . ." *Spirko v. U.S. Postal Serv.*, 147 F.3d 992, 996 (D.C. Cir. 1998) (internal quotation omitted). In this case, both elements are satisfied, and *in camera* review of the contested documents is "plainly . . . necessary and appropriate." *Ray*, 587 F.2d at 1191.

It is undisputed that no more than 50 pages of withheld or redacted material are at issue in this litigation; in such instances, judicial economy strongly favors *in camera* review in order to test the credibility of the government's assertions and provide a reviewing court with a proper record on appeal. But the principal reason why *in camera* review was required in

this case is that the government's affidavits, as well as its behavior in this litigation, should have left the district court profoundly concerned that the government had redacted and withheld information in a manner unjustified by the FOIA exemptions. The government falsely insisted that declassified records contained only "abstract" descriptions of interrogation techniques with no mention of how the techniques were applied to specific detainees, and it expediently ignored the existence of declassified CIA records that most directly refuted its arguments. *See* Section I.A.1., *supra*. Moreover, the government belatedly released information in this case that bore no relation to the CIA's initial affidavit purporting to describe the withheld material. In those circumstances, the district court's failure to review *in camera* the documents was an abuse of discretion.

On October 29, 2008, the district court granted Defendants' summary judgment motion, without conducting *in camera* review, on the basis of a CIA affidavit claiming that publication of any of the redacted materials would cause "exceptionally grave harm" to the United States. Following President Obama's issuance of executive orders concerning detention and interrogation and the declassification in April of the OLC Memos, the government agreed to reevaluate its redactions. On June 15, 2009, the government released "reprocessed" versions of the CSRT transcripts that

made abundantly clear that the CIA had abused its classification authority during this litigation.

The newly released material includes a description by Abu Zubaydah of the injuries he claims to have suffered in CIA custody: "After months of suffering and torture, physically and mentally, they did not care about my injuries that they inflicted to my eye, to my stomach, to my bladder, and my left thigh and my reproductive organs. They didn't care that I almost died from these injuries. Doctors told me that I nearly died four times." Wizner Decl. ¶7, A-109, Exh. I at A-509. Similarly, Al Nashiri alleges that "[b]efore I was arrested I used to be able to run about ten kilometers. Now, I cannot walk for more than ten minutes. My nerves are swollen in my body." *Id.* Exh. J at A-535. These allegations include no detail whatsoever about interrogation methods, conditions of confinement, or anything else that might plausibly be described as an intelligence "source or method." They do, however, contradict assurances made by the previous administration that detainees in CIA custody suffered no enduring harm from "enhanced interrogation techniques."

The transcripts released in June of 2009 include newly declassified claims by detainees that they divulged false information under torture. Abu Zubaydah, for example, contends that he confessed to being involved in

terrorist operations only after being tortured: "They say 'this in your diary.' They say 'see you want to make operation against America.' I say no, the idea is different. They say no, torturing, torturing. I say 'okay, I do. I was decide to make operation.'" *Id.* Exh. I at A-512. *See also id.* Exh. H at A-474 (KSM claims he "ma[de] up stories" under torture). Zubaydah further alleges that his conditions of confinement improved after the CIA realized that he was not a high-level al Qaeda operative: "[T]hey start tell me the time for the pray and slowly, slowly, circumstance became good. They told me sorry we discover that you are not number three, not a partner even not a fighter." *Id.* Exh. I at A-514. Once again, whether these statements are true or not – and nothing about their release by the government reflects an endorsement of their accuracy – they in no way relate to CIA "sources or methods," and their publication can cause no harm to national security.

Similar examples abound.[10] This Court has long held *in camera* review to be appropriate "when evidence of agency bad faith is before the court." *Lam Lek Chong v. U.S. Drug Enforcement Admin.*, 929 F.2d 729, 735 (D.C. Cir. 1991); *see also, e.g.*, *Allen v. CIA*, 636 F.2d 1287, 1298 (D.C.

[10] For example, Khalid Sheikh Mohammed related 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. Exh. H at A-473. The government has made no effort to explain why this statement was originally suppressed.

Cir. 1980); *Carter*, 830 F.2d at 393 (bad faith is shown where "information contained in agency affidavits is contradicted by other evidence in the record"). The Court now has such evidence in black and white. The district court neglected even to address, let alone refute, Plaintiffs' evidence that the government had demonstrated bad faith in this litigation. The court's error was especially troubling in light of the nature of the materials at issue, involving allegations of grave governmental misconduct. "Even where there is no evidence that the agency acted in bad faith with regard to the FOIA action itself there may be evidence of bad faith or illegality with regard to the underlying activities which generated the documents at issue. Where such evidence is strong, it would be an abdication of the court's responsibility to treat the case in the standard way and grant summary judgment on the basis of *Vaughn* affidavits alone." *Jones v. FBI*, 41 F.3d 238, 242-43 (6th Cir. 1994). In sum, this is the rare case in which the very integrity of the FOIA requires a remand for *in camera* inspection of the disputed documents.

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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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. This brief complies with the type volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 9,450 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally space typeface using Microsoft Word 97-2003 with Times New Roman 14 point font.

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CERTIFICATE OF SERVICE

I hereby certify that on February 24, 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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