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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON
AT SPOKANE

SULEIMAN ABDULLAH SALIM,
MOHAMED AHMED BEN SOUD,
OBAID ULLAH (as personal
representative of GUL RAHMAN),

Plaintiffs,

vs.

JAMES ELMER MITCHELL and
JOHN "BRUCE" JESSEN,

Defendants.

NO. 2:15-CV-286-JLQ

DEFENDANTS' MOTION TO
EXCLUDE

NOTE ON MOTION CALENDAR
JULY 28, 2017
WITH ORAL ARGUMENT: 9:30 A.M.
AT SPOKANE, WASHINGTON

DEFENDANTS' MOTION TO
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1 Defendants Dr. James E. Mitchell and Dr. John “Bruce” Jessen
2 (“Defendants”) move to exclude any evidence, argument or reference to the
3 Senate Select Committee on Intelligence Study of the Central Intelligence
4 Agency’s Detention and Interrogation Program (“Summary Report”), relevant
5 portions of which are attached to the attendant Declaration of Adrien Pickard
6 (“Pickard Decl.”) as **Ex. A**. Defendants bring this Motion now because Plaintiffs
7 rely on the Summary Report in their Opposition to Defendants’ Motion for
8 Summary Judgment (ECF No. 194, Pls.’ Resp. to Defs.’ St. of Undis. Facts, ¶¶
9 15, 27, 49, 81, 86, 208). But, the Summary Report is hearsay and does not meet
10 any exception found in FED. R. EVID. 803. It is thus inadmissible, and should not
11 be considered with respect to the pending motions for summary judgment nor
12 admissible at trial.
13

14 I. STATEMENT OF FACTS

15 The Summary Report is the partisan result of a study led by Democratic
16 Senator Dianne Feinstein (“Senator Feinstein”) into the CIA’s Rendition,
17 Detention and Interrogation Program (“Program”). The Senate Select Committee
18 on Intelligence (“Committee”) did not conduct a single interview of any witness
19 involved with the Program—including either Defendant. Pickard Decl., **Ex. A**,
20 Foreword at 4-5. Instead, it relied on transcripts from interviews conducted by
21 the CIA inspector general and others while the Program was ongoing and shortly
22 thereafter, along with a review of documents. *Id.* at 5. Indeed, the Committee’s
23 Republican minority “withdrew from active participation in the Study when it
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25

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1 determined that [the effort would not involve] a comprehensive review of the
2 Program, since many of the relevant witnesses would likely decline to be
3 interviewed by the Committee.” Pickard Decl., **Ex. B**, Minority Views Report
4 (“Minority Report”), Exec. Summ., p. 1. Proceeding without most of its
5 Republican members, the study was left to Democrats and their staffers, who
6 ultimately authored the Summary Report. Fred Fleitz, *Senate Torture Report*
7 *Violates Attorney-Client Privilege*, Newsmax, Jan. 5, 2015,
8 [www.newsmax.com/Fred-Fleitz/CIA-U-SSenate-Torture-Report-Senate-](http://www.newsmax.com/Fred-Fleitz/CIA-U-SSenate-Torture-Report-Senate-Intelligence-Committee/2015/01/05/id/616514/)
9 [Intelligence-Committee/2015/01/05/id/616514/](http://www.newsmax.com/Fred-Fleitz/CIA-U-SSenate-Torture-Report-Senate-Intelligence-Committee/2015/01/05/id/616514/).

10
11 In December 2012, the Committee finalized a 6,000-page report (the “Full
12 Report”) that was approved along partisan lines, with seven Democrats, one
13 Independent and only a single Republican voting in favor of its publication and
14 six Republicans voting in opposition. Two years later, the Committee released
15 the Summary Report—a heavily redacted, 525-page summary of the Full
16 Report—to the public that includes the following sub-sections: (1) Foreword; (2)
17 Findings and Conclusions; and (3) Executive Summary. *See* Pickard Decl., **Ex.**
18 **A**.

19 In a “Minority Report” published by the group of six dissenting Republican
20 Senators, the Summary Report is criticized as being “ideologically motivated,”
21 “partisan” and not “serious or constructive.” C. Herridge and C. Pergram, *Senate*
22 *Panel Releases Scathing Report on CIA Interrogations Amid Security Warnings*,
23 Foxnews, Dec. 9, 2014, [www.foxnews.com/politics/2014/12/09/senate-panel-](http://www.foxnews.com/politics/2014/12/09/senate-panel-releases-scathing-report-on-cia-interrogation-amid-warnings.html)
24 [releases-scathing-report-on-cia-interrogation-amid-warnings.html](http://www.foxnews.com/politics/2014/12/09/senate-panel-releases-scathing-report-on-cia-interrogation-amid-warnings.html). The Minority
25

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1 Report criticizes the Summary Report’s flawed process, its problematic analysis
2 and its erroneous conclusions, contending that the Summary Report is factually
3 inaccurate, lacks proper context, and contains evidence of strongly held biases.
4 Pickard Decl., **Ex. B**, Exec. Summ., p. III (Summary Report was “written with a
5 ‘bent on the part of the authors’ with ‘political motivations.’”); *see also* Pickard
6 Decl., **Ex. C**, Chart of Inaccuracies in Summary Report. Further, the Minority
7 Report criticizes the Summary Report as the product of “poor analytic tradecraft”
8 including “quotes taken out of context, ... [citing] the absence of evidence as
9 affirmative evidence, and ma[king] logical leaps without evidentiary support.”
10 Pickard Decl., **Ex. B**, Exec. Summ., pp. V-VI.
11

12 Senate Majority Leader Mitch McConnell and Senator Saxby Chambliss,
13 Committee Vice Chairman, slammed the Summary Report as “an ideologically
14 motivated and distorted recounting of historical events.” Jane Timm,
15 *Republicans Dismiss Senate Torture Report*, MSNBC, Dec. 10, 2014,
16 www.msnbc.com/msnbc/republicans-dismiss-senate-torture-report-ahead-release.
17 Senator Ben Coats called it “an unconstructive, partisan account of the last
18 decade’s counterterrorism efforts[,]” *id.*, while Senators Marco Rubio and James
19 Risch condemned it as “unconscionable,” releasing a statement describing the
20 Summary Report as “one-sided,” and noting “its authors never interviewed a
21 single CIA official.” Press Release, Marco Rubio, *Rubio, Risch Statement on*
22 *Senate Intelligence Committee Release of Interrogation Study*, Dec. 8, 2014,
23 [www.rubio.senate.gov/public/index.cfm/press-releases?ID=3772740a-7848-4a63-](http://www.rubio.senate.gov/public/index.cfm/press-releases?ID=3772740a-7848-4a63-b792-524692a1ac29)
24 [b792-524692a1ac29](http://www.rubio.senate.gov/public/index.cfm/press-releases?ID=3772740a-7848-4a63-b792-524692a1ac29).
25

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1 The Summary Report's partisanship is unsurprising. Senator Feinstein had
 2 prejudged the Program, publicly railing against it since before the study even
 3 began. *See, e.g.*, Press Release, Dianne Feinstein, *Feinstein Remarks on CIA*
 4 *Report*, Dec. 9, 2014 [www.feinstein.senate.gov/public/index.cfm/press-](http://www.feinstein.senate.gov/public/index.cfm/press-releases?ID=d2677a34-2d91-4583-92a4-391f68ceae4)
 5 [releases?ID=d2677a34-2d91-4583-92a4-391f68ceae4](http://www.feinstein.senate.gov/public/index.cfm/press-releases?ID=d2677a34-2d91-4583-92a4-391f68ceae4); Dianne Feinstein, *Close*
 6 *Guantanamo Now*, San Francisco Chronicle, July 30, 2007,
 7 [www.feinstein.senate.gov/](http://www.feinstein.senate.gov/public/index.cfm/op-eds?ID=17CEB93C-C543-752B-907C-38ACDA1E776A) [public/index.cfm/op-eds?ID=17CEB93C-C543-752B-](http://www.feinstein.senate.gov/public/index.cfm/op-eds?ID=17CEB93C-C543-752B-907C-38ACDA1E776A)
 8 [907C-38ACDA1E776A](http://www.feinstein.senate.gov/public/index.cfm/op-eds?ID=17CEB93C-C543-752B-907C-38ACDA1E776A) (criticizing the "infamous 'torture memo' that paved the
 9 way for secret CIA detentions and interrogation"); Dianne Feinstein and Sheldon
 10 Whitehouse, *President Should Sign Anti-Torture Bill*, San Diego Union-Tribune,
 11 Feb. 29, 2008, [www.feinstein.senate.gov/public/index.cfm/op-](http://www.feinstein.senate.gov/public/index.cfm/op-eds?ID=65C40657-D4EB-4CC9-2EAC-B0035F6F3DA7)
 12 [eds?ID=65C40657-D4EB-4CC9-2EAC-B0035F6F3DA7](http://www.feinstein.senate.gov/public/index.cfm/op-eds?ID=65C40657-D4EB-4CC9-2EAC-B0035F6F3DA7) (disapproving of the
 13 CIA's use of harsh interrogation techniques, arguing their ineffectiveness and
 14 claiming "[w]aterboarding and the other coercive techniques are torture, and their
 15 use does not befit our great nation.").

17 II. ARGUMENT

18 A. The Rule Against Hearsay and the Public Records Exception

19 Hearsay is an out of court statement offered for the truth of the matter
 20 asserted, FED. R. EVID. 801(c), and it is inadmissible unless a federal statute, the
 21 FED. R. EVID or other rules prescribed by the Supreme Court provide otherwise.
 22 FED. R. EVID. 802. Hearsay cannot be considered on summary judgment. *Blair*
 23 *Foods, Inc. v. Ranchers Cotton Oil*, 610 F.2d 665, 667 (9th Cir. 1980). Rule 803
 24
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1 creates several exceptions to the rule against hearsay. Among them, the “public
2 records” exception permits introduction of “*factual findings from a legally*
3 *authorized [government] investigation.*” FED. R. EVID. 803(8)(A)(iii) (emphasis
4 added). Once the proponent demonstrates the report is both authorized and
5 contains factual findings, the burden shifts to the party opposing introduction to
6 demonstrate that the “source of information or other circumstances indicate a lack
7 of trustworthiness.” FED. R. EVID. 803(8)(B).
8

9 **B. The Summary Report is Inadmissible Hearsay.**

10 **1. Portions of the Summary Report lack the requisite factual**
11 **findings.**

12 “To be admissible under Rule 803(8)[(A)(iii)], a report must first be a set
13 of ‘factual findings.’” *Bright v. Firestone Tire & Rubber Co.*, 756 F.2d 19, 22
14 (6th Cir. 1984). Neither the Summary Report’s Foreword nor its Executive
15 Summary contain factual findings of the type required by Rule 803(8)(A)(iii).
16 The Foreword is a six-page preface, expressly offered to provide “additional
17 views, context and history,” including Senator Feinstein’s defense of the
18 Summary Report and her criticism of the Program. Pickard Decl., **Ex. A**,
19 Foreword at 1-3. It advances Senator Feinstein’s “personal conclusions” and her
20 own set of recommendations (even though the Committee “did not make specific
21 recommendations”). *Id.* at 4. The Summary Report’s Executive Summary fares
22 no better. It is a lengthy editorial that reads part-historical narrative, part-critical
23 analysis and part-indictment. It, too, lacks the “factual findings” contemplated by
24 Rule 803, and as such, cannot be admitted under this exception.
25

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1 **2. The Summary Report is not trustworthy.**

2 Those portions of the Summary Report that may contain “factual findings”
3 are still inadmissible because the “sources of information” and the “other
4 circumstances” attendant to the Summary Report’s creation “indicate [a] lack of
5 trustworthiness.” *United States v. Am. Tel. & Tel. Co.*, 498 F. Supp. 353, 360
6 (D.D.C. 1980). It is within the Court’s discretion to exclude a report because it is
7 not trustworthy, *Bright*, 756 F.2d at 22, and the Supreme Court has endorsed “a
8 nonexhaustive list of four factors” to assist courts in assessing a report’s
9 trustworthiness: (1) the timeliness of the investigation; (2) the special skill or
10 expertise of the investigating official; (3) whether a hearing was held and the level
11 at which it was conducted; and (4) possible bias when the reports are prepared
12 with a view to possible litigation. *See Beech Aircraft v. Rainey*, 488 U.S. 153, 167
13 n. 11 (1988). Examination of these four factors demonstrates that the Summary
14 Report is not trustworthy.
15

16 **a. The Summary Report was untimely.**

17 The Summary Report was published over a decade after the events that are
18 its subject, and has been widely criticized as coming at a time where it is of
19 limited benefit, other than as a political indictment of the prior administration.
20 Pickard Decl., **Ex. B** at 16. Additionally, due in part to the Summary Report’s
21 timing, the Committee was unable to interview a single live witness with
22 percipient knowledge of the Program.
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1 **b. The Summary Report was conducted by untrained**
2 **politicians.**

3 The Committee was not comprised of trained investigators. Instead, it was
4 populated by politicians and staffers who lacked the experience, expertise and, at
5 times, the subject matter knowledge to undertake a proper investigation. It was
6 this very lack of expertise that the Minority Report criticized. Pickard Decl., **Ex.**
7 **B** at 10-16 (the Committee (i) reviewed facts without the proper context, (ii)
8 lacked adequate objectivity, (iii) allowed its political considerations to taint the
9 investigation, and (iv) reviewed incorrect sources of information). This
10 inexperience and lack of training is evident in the analytical approach taken in the
11 Summary Report, which (i) fails to describe the quality and reliability of sources
12 of information, (ii) fails to consider alternative analyses, and (iii) is based on
13 flawed logic. *Id.* at 16-20.

14 **c. No hearings were held as part of the investigation.**

15 The Committee failed to conduct any public hearings, instead conducting
16 its partisan exercise in private.

17 **d. The Summary Report is biased.**

18 The Summary Report is plainly a partisan document: only one Republican
19 Committee member joined in the study or voted in favor of the Summary
20 Report's publication. It was undertaken exclusively by Democrats and their
21 staffers and has been criticized as "prosecutorial", "partisan," "one-sided" and
22 "ideologically motivated." Courts regularly refuse to admit Congressional
23 reports, like the Summary Report, because they are the product of bias. *See, e.g.,*
24 25

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1 *Pearce v. E.F. Hutton Grp., Inc.*, 653 F. Supp. 810, 814–15 (D.D.C. 1987)
2 (“Given the obviously political nature of Congress, it is questionable whether any
3 report by a committee or subcommittee of that body could be admitted under rule
4 803(8)[(A)(iii)] against a private party. There would appear to be too great a
5 danger that political considerations might affect the findings of such a report.”).
6 Congressional reports frequently lack the requisite indicia of trustworthiness
7 because they are often partisan documents drafted by persons with political
8 agendas to advance – as is the case with the Summary Report. *See Pearce, supra*
9 (excluding House committee report prepared as part of the committee’s oversight
10 responsibilities, from which the minority members dissented); *Richmond Med.*
11 *Ctr. v. Hicks*, 301 F. Supp. 2d 499, 512 (E.D. Va. 2004) (declaring inadmissible
12 sections of House reports and exhibits in a constitutional challenge to a law
13 criminalizing abortion procedures); *Anderson v. City of New York*, 657 F. Supp.
14 1571, 1577-79 (S.D. N.Y. Apr. 24, 1987) (subcommittee report deemed
15 unreliable and inadmissible based on four-factor test and the court’s view that the
16 committee heard testimony from interested parties, not objective experts).
17

18 The decision to exclude such reports are often based, in part, on the
19 likelihood that partisan political considerations, as well as elected officials’
20 propensity to “grandstand,” influenced the findings, conclusions, and opinions
21 included in Congressional reports. *See, e.g., Richmond Med.*, 301 F. Supp. 2d at
22 512 (House report “represent[ed] the political position of the representatives who
23 voted for it”); *Anderson*, 657 F. Supp. at 1579 (cautioning that hearings and
24 reports “are frequently marred by political expediency and grandstanding”).
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1 Separately, where an investigation is based on erroneous or otherwise unreliable
2 data, the resulting report can be excluded. *See, e.g., Jones v. Ford Motor Co.*,
3 320 F.Supp.2d 440 (E.D. Va. 2004) (agency report on unintended acceleration of
4 vehicles held insufficiently trustworthy where it was based on inaccurate statistics
5 and data).

6 Courts have also focused on whether the report is bipartisan, or filed over
7 the dissent of the minority party. *See McFarlane v. Ben-Menashe*, 1995 WL
8 129073, at *4-5 (D.D.C. March 16, 1995) (admitting the bipartisan report of a
9 joint Congressional task force); *Hobson v. Wilson*, 556 F. Supp. 1157, 1181
10 (D.D.C. 1982) (admitting committee report that “reflected adherence to
11 appropriate standards of scholarly responsibility, investigative integrity, and
12 trustworthiness”). “[C]onsideration of party-line voting reflects both the reality of
13 the political process and the intuitive notion that reports that are truly reliable on a
14 methodological and procedural level are less likely to provoke bitter divisions
15 than those that have politics, rather than policy or truth-seeking, as their ultimate
16 objective.” *Barry v. (Iron Workers) Pension Plan*, 467 F. Supp. 2d 91, 98
17 (D.D.C. 2006).¹

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¹ As a point of comparison, the Senate Arms Services Committee’s similar investigation of the treatment of detainees by the Department of Defense (“SASC Inquiry”) was also cited by and relied on by Plaintiffs. Although it is not without its flaws—including that large portions of it lack the requisite “factual findings” required for admission pursuant to Rule 803 and the fact that it is of limited

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1 Here, the Summary Report is the product of a one-sided, partisan
 2 investigation, led by a Senator harboring long-standing negative beliefs about the
 3 nature, legality and effectiveness of the Program, even prior to the study. It
 4 enjoys virtually no support from Republicans in the Senate, many of whom
 5 voiced deep displeasure with its many flaws (procedural, analytical and factual).
 6 The Summary Report drew objection from the Minority, and prompted the
 7 creation of a dissenting Minority Report, in addition to critical opposition from
 8 the CIA, among others. Moreover, the Summary Report is based on inaccurate,
 9 false and misleading interpretations of fact blind to alternative viewpoints
 10 because the Committee's Majority failed to interview a single witness or hold a
 11 single hearing. At bottom, the Summary Report is nothing more than a politically
 12 driven document that merely "represents the political position of the
 13 representatives who voted for it". *Richmond Med.*, 301 F. Supp. 2d at 512.

14 III. CONCLUSION

15 Defendants' motion should be granted, and the Summary Report, and any
 16 argument thereabout or reference thereto, should be deemed inadmissible.
 17

18 _____
 19 probative value—the SASC Inquiry enjoyed bipartisan support and was published
 20 only after the Armed Services Committee held two public hearings, reviewed
 21 hundreds of thousands of documents, interviewed more than 70 witnesses—most
 22 of whom were former or current Department of Defense, Department of Justice
 23 and Federal Bureau of Investigation employees—and received responses to
 24 written questions from over 200 individuals.
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1 DATED this 26th day of June, 2017.

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