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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' REPLY IN SUPPORT OF MOTION TO EXCLUDE **NOTE ON MOTION CALENDAR:** July 28, 2017 at 9:30 a.m. Spokane, Washington

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Defendants challenge the admissibility of the *summary report* of the Senate Select Committee on Intelligence Study of the Central Intelligence Agency's Detention and Interrogation Program ("Summary"). *See* Dkt. No. 198 at 1. This Summary is separate and distinct from the full study—a 6,000-plus page document that remains classified and has never been released (the "Full Report"). The Summary is a heavily redacted, keyhole look at the Committee's analysis, condensed to roughly 10% the size of the Full Report. As a result, one cannot rely on the Full Report to validate the Summary.

Senator Wyden's declaration focuses almost exclusively on the Full Report; it fails meaningfully to address the Summary. He concedes that Republicans abandoned the investigation when they determined it could not be undertaken fairly, Dkt. No. 206-4 at ¶ 8, and that six of seven Republicans voted against publishing the Full Report. *Id*. at ¶ 6. He identifies only two Republicans who agreed with the findings of the Full Report or the Summary. *Id*. at ¶ 6. Yet, he suggests that the Full Report was not partisan – and does not address at all the partisan nature of the Summary. Support from two Republicans is not "bipartisan backing"; the Summary must be excluded.

A. Defendants' Motion is Procedurally Proper

Defendants bring this motion now because Plaintiffs rely on the Summary to oppose Defendants' Motion for Summary Judgment. Defendants cannot permit consideration of the Summary on that motion without challenge without risking a

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waiver argument later. And, Defendants believed the Court would not want this issue briefed twice.

B. Plaintiffs Have Failed to Establish the Threshold Admissibility of the Summary.

Defendants challenged the Foreword and Executive Summary of the Summary as not containing "findings of fact" as required by F.R.E. 803(8)(A). *See* Dkt. No 198 at 5. Rather than attempt to meet their burden to show that they offer such findings of fact, Plaintiffs simply state, incorrectly, that Defendants "do not dispute that Plaintiffs' citations to the [Summary] are 'factual findings from a legally authorized investigation.'" Dkt. No. 206 at 2. No portion of the Summary which is not a "finding of fact" can qualify for admission under F.R.E 803(8)(A).

Instead of addressing whether any citation from the Summary is a "finding of fact," Plaintiffs argue that reliance on the Summary is permissible because it contains facts that are (1) not disputed, (2) found elsewhere in the record, or (3) needed to rebut hearsay evidence. Plaintiffs may proffer an appropriate stipulation, cite the evidence elsewhere in the record or move to strike the alleged hearsay, but their aforementioned arguments do not qualify under F.R.E 803(8) or any other exception to the hearsay rule.

C. The Summary is Not Trustworthy

Defendants challenge the reliability of the Summary. They do ***not*** assert—as Plaintiffs contend—that "Congress should not investigate the CIA." Dkt. No. 206 at 7. And, Plaintiffs' assertion that the trustworthiness of the Summary cannot

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be challenged in court on "separation of powers" grounds, *see id*., is inconsistent with F.R.E. 803(8).

Plaintiffs incorrectly assert that "courts ***routinely*** find the investigations of … legislative oversight committees to be trustworthy," Dkt. No. 206 at 7 (emphasis added), and do not discuss the multiple relevant opinions cited by Defendants to the contrary. *See*, Dkt. 198 at pp. 7-10. Instead, they rely on inapposite decisions that have been criticized by other courts in the same jurisdiction. For example, *Hobson v. Wilson*, 556 F. Supp. 1157, 1181 (D.D.C. 1982), was later criticized by *Pearce v. E.F. Hutton Group, Inc.*, 653 F. Supp. 810, 814-15 (D.D.C. 1987), which minimized its precedential value, stating "the admissibility issue in *Hobson* … appears to have been a relatively minor one (given the complete discussion of it in less than one page of a forty page opinion)." *Id*. *Pearce* further distinguished *Hobson*, stating:

> [T]he district court in *Hobson* may have concluded that dangers from a lack of trustworthiness were minimized sufficiently where one was dealing with a Select Committee engaged solely in a special investigation, ***where only certain designated portions of the Committee's report were being admitted***, where ***those portions dealt only with a factual description*** of an intelligence operation, where ***those portions had been joined in by members of both political parties***, and where ***other portions of the report had already been admitted by stipulation***.

Id. at 815 (emphasis added). These mitigating factors are not present here.

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1. There is No Evidence that the Investigative Team Was Qualified.

Plaintiffs assert that two democratic staffers who led the investigation were "well-qualified," identifying one as a "former[] intelligence analyst at the FBI" and the other as "a former CIA attorney." Dkt. No. 206 at 7. This bare offering is insufficient. Courts "should not rely merely on the title of the official or official body making the report, but must look to additional considerations that indicate the special skill or expertise of the official or official body who made that report." *Matthews v. Ashland Chem., Inc.*, 770 F.2d 1303, 1309–10 (5th Cir. 1985). Aside from their titles, there is virtually nothing in Plaintiffs' opposition or the record to suggest that either of these staffers had any special skill or expertise to lead an investigation of this magnitude and sophistication. *See id.* (excluding investigative report as untrustworthy where no evidence of special skill or expertise "other than the fact that [the author] was the chief fire investigator for the fire department" was offered).

2. No Hearings Were Held.

Whatever the reason, a simple fact remains: the Committee held no hearings, either public or classified. The cases cited by Plaintiff fall short. In *Baker v. Elcona Homes Corp*., 588 F.2d 551, (6th Cir. 1978), the "report" at issue was a police officer's near-contemporaneous investigation of a traffic accident; no "hearings" would have been appropriate under those circumstances. In *U.S. v. AT&T*, 498 F. Supp. 353 (D.D.C. 1980), the court ***did not*** opine that hearings were unnecessary. On the contrary, it held that, in lieu of live hearings, "paper hearings" were sufficient because "AT&T was afforded and took advantage of its

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'full opportunity for hearing'" by filing written comments and replies to comments made by other parties. *Id*. at 365. These cases do not support the lack of hearings for the Full Report and the Summary.

3. There is Clear Evidence of Bias.

Despite Plaintiffs' assertion that "Defendants identify no bias,"[1] Dkt. No. 206 at 10, several salient facts remain unchallenged: (1) only two Republicans are identified as supporting the findings of the Full Report or the Summary); (2) Republicans on the Committee, *en masse*, abandoned the investigation; and (3) the minority was so adamant in its disapproval of the Summary, describing it as "prosecutorial," "partisan," "one-sided" and "ideologically motivated", that they felt compelled to issue their own criticism. Even the cases cited by Plaintiffs support the proposition that party-line voting is a key indicator an investigation is not trustworthy. *See Barry v. (Iron Workers) Pension Plan*, 467 F. Supp. 2d 91, 101 (D.D.C. 2006) ("consideration of party-line voting reflects … the intuitive notion that reports that are truly *reliable* on a methodological and procedural level are less likely to provoke bitter divisions than those that have politics, rather than policy or truth-seeking, as their ultimate objective.").

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[1] Defendants do not claim bias in Senator Feinstein's aversion to torture. Rather, Senator Feinstein opposed and prejudged the nature and propriety of the CIA's detention and interrogation program for years prior to the investigation.

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Defendants therefore request that the Court exclude the entire Summary as hearsay or, at a minimum, limit evidence from the Summary to "findings of fact" as required by F.R.E. 803(8).

DATED this 17th day of July, 2017.

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CERTIFICATE OF SERVICE

I hereby certify that on the 17th day of July, 2017, I electronically filed the foregoing document with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following:

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