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Federal Court Blocks Release of CIA Torture Report

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A US District Court judge has thrown out a lawsuit brought by the American Civil Liberties Union (ACLU) that sought the release of the full Senate Select Committee on Intelligence report on torture by the Central Intelligence Agency, as well as an internal CIA report commonly referred to as the Panetta Review.

The Senate Intelligence Committee released a heavily redacted executive summary of its report on CIA torture on December 9, 2014. The Panetta Review, which consists of summaries of material on CIA torture activities to agency leaders to assist them in avoiding legal repercussions, is not available to the public in any form at this time.

The May 20 memorandum opinion by District Judge James E. Boasberg is the latest judicial rubber stamp of the dismantling of democratic rights.

The ACLU originally requested the full SSCI torture report in February 2013 through a Freedom of Information Act (FOIA) filing with the CIA. The latter denied the FOIA request, stating that the full report was generated and controlled by Congress, making it exempt from FOIA (only agencies of the federal executive are subject to FOIA requests, unlike the legislative and judicial branches of the government).

On December 19, 2013, the ACLU filed another FOIA request for the document known as the Panetta Review, whose existence had just become known a few days earlier in a speech by then-senator Mark Udall. The CIA denied this new request as well, claiming that the Panetta Review fell under the deliberative-process privilege, a legal doctrine that protects documents that are part of an agency's decision-making process.

The rationale for this doctrine is that agencies will hesitate to deliberate fully on any controversial issue if there is a risk that steps in their collective "thought process" will be disclosed publicly. The deliberative-process privilege is presented as akin to the attorney-client privilege. However, it amounts to exempting from scrutiny every stage in a criminal conspiracy—in this case, the conspiracy to cover up torture—except the final overt act.

In the case of both the full SSCI torture report and the Panetta Review, the court refused to order the release of the documents in any form. The 24-page memorandum opinion garnishes its bogus factual claims and sham legal arguments with contempt for the ACLU and anyone who might question the workings of the military-intelligence apparatus.

To start with, Judge Boasberg offers a potted history of the internecine war between the CIA and Congress over the torture revelations, which reached a boiling point a year ago when Senator Dianne Feinstein publicly indicted the agency for spying on congressional aides in violation of the separation of powers principle of the US Constitution.

The Senate Select Committee on Intelligence first announced its investigation into the CIA's torture, rendition and detention program in March 2009. Feinstein headed the SSCI at that time. She and the CIA leadership agreed to have SSCI personnel review relevant documents at a CIA facility, where they would store their work on a CIA computer server. The SSCI vetted its 6,400-page full report and executive summary with CIA officials and the White House, and after final changes were made, approved both documents, and released a heavily redacted version of the executive summary in December 2014.

The 2014 crisis erupted over the CIA's spying on SSCI personnel using the CIA server to prepare the torture report. Feinstein made an hour-long speech on the floor of the Senate to denounce the unconstitutional CIA action against the committee, which is legally mandated to conduct oversight on the agency. Judge Boasberg refers to this crisis as "further discussions" and "much negotiation," roughly the equivalent of saying that Hurricane Katrina dropped "some rain" on New Orleans.

The court also fudges the law. In considering whether the legislative exception to the FOIA applies to the full SSCI torture report, the relevant legal question is which branch of government possesses and controls the document in question. The court had to bend over backwards to explain away Senator Feinstein's sending of the full report to president Obama and the CIA with a cover letter giving the executive branch, including the CIA, ownership of the report.

In that letter, dated December 10, 2014, she wrote:

> "As you [Obama] said publicly on August 1, 2014, the CIA's coercive interrogation techniques were techniques that 'any fair-minded person would believe were torture'... I strongly share your goal to ensure that such a program will not be contemplated by the United States ever again... Therefore, the full report should be made available within the CIA and other components of the Executive Branch for use as broadly as appropriate to help make sure this experience is never repeated... I hope you will encourage use of the full report in the future development of CIA training programs, as well as future guidelines and procedures for all Executive Branch employees, as you see fit."

This makes it clear that while Congress created the report, it entrusted the document to the executive branch, making it subject to public access under the Freedom of Information Act.

Judge Boasberg claims to find in this quotation no relinquishing of ownership, instead saying that it "does bestow a certain amount of discretion." He concludes that the Feinstein letter "should not be readily interpreted to suggest a wholesale abdication of control."

The twisting of applicable law finds even starker expression in the court's analysis of the Panetta Review.

This review began in 2009 in response to the SSCI's investigation into the CIA torture program. Initially known as Special Review Teams (SRT), the project had the character of a damage-control operation, designed to keep the CIA leadership "apprised of 'the most noteworthy information contained in the millions of pages of documents being made available to SSCI' so as to 'inform other policy decisions related to the [Senate Intelligence] Committee's study." The SRT reviewers would determine "whether certain contents of those documents [given to SSCI] might be relevant to informing senior CIA leaders in connection

with the SSCI's study."

Translated into English, the SRT was a program to monitor the congressional panel tasked with oversight of the CIA itself. Moreover, according to senators who have read it, it made unvarnished admissions about the use of torture that contradicted what the CIA was saying publicly.

While the Panetta Review was certainly not protected by the legislative exception to FOIA, the court found that the supra-constitutional undertaking was part of "the give-and-take of the consultative process," even though attorneys for the CIA could point to no specific decisions that the SRTs influenced.

For a case study in bad-faith jurisprudence, readers should look at the full opinion. While exceeding the scope of this article, the rationale listed in defense of CIA crimes on pages 22-24 should not be passed over. ("If Senator Udall's statements [alleging that the SRTs document CIA crimes against Congress] are correct, they serve to confirm, rather than undermine, the Panetta Review's privileged status)."

The ruling in *ACLU v. CIA*, as this case is titled, underscores several features of decaying American democracy.

Most prominent is the utter prostration of the judiciary before the military-intelligence apparatus. One sees this in Boasberg's downplaying of the constitutional crisis last summer and his refusal to intervene. As he puts it "the ACLU asks the Court to interject itself into a high-profile conversation [!] that has been carried out in a thoughtful and careful way by the other two branches of government."

More subtly, if undeniably, the *ACLU v. CIA* decision shows that the co-equal branches of government (executive, legislative, judicial) no longer serve as a system of checks and balances against tyranny as was intended by those who wrote the Constitution. Instead, they act as coconspirators against the population, with one bloody hand washing the other.

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