**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF NEW YORK**

AMERICAN CIVIL LIBERTIES UNION, CENTER FOR CONSTITUTIONAL RIGHTS, PHYSICIANS FOR HUMAN RIGHTS, VETERANS FOR COMMON SENSE, AND VETERANS FOR PEACE,

Plaintiffs,

v.

DEPARTMENT OF DEFENSE, AND ITS COMPONENTS DEPARTMENT OF ARMY, DEPARTMENT OF NAVY, DEPARTMENT OF AIR FORCE, DEFENSE INTELLIGENCE AGENCY; DEPARTMENT OF HOMELAND SECURITY; DEPARTMENT OF JUSTICE, AND ITS COMPONENTS CIVIL RIGHTS DIVISION, CRIMINAL DIVISION, OFFICE OF INFORMATION AND PRIVACY, OFFICE OF INTELLIGENCE POLICY AND REVIEW, FEDERAL BUREAU OF INVESTIGATION; DEPARTMENT OF STATE; AND CENTRAL INTELLIGENCE AGENCY,

Defendants.

DOCKET NO.: 04-CV-4151 (AKH)

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**SUPPLEMENTAL MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR CONTEMPT AND SANCTIONS**

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**INTRODUCTION**

As this Court has so eloquently stated, "No one is above the law: not the executive, not the Congress, and not the judiciary." *Am. Civil Liberties Union v. Dep't of Def.* ("*ACLU I*"), 339 F. Supp. 2d 501, 502 (S.D.N.Y. 2004). In bringing this lawsuit, Plaintiffs sought to vindicate the right of the American public under the Freedom of Information Act ("FOIA") to information regarding the abuse of prisoners held in United States custody abroad and, in particular, regarding the extent of official responsibility for such abuse. On September 15, 2004, this Court ordered Defendant Central Intelligence Agency ("CIA") to "produce or identify all responsive documents" to Plaintiffs' FOIA request, including records related to the treatment of detainees apprehended after September 11, 2001 and held in U.S. custody abroad. *Id.* at 505.

Despite this Court's clear command, the CIA failed to produce or identify hundreds of hours of videotape depicting harsh CIA interrogations, even though these tapes were plainly responsive to Plaintiffs' FOIA request. And in November 2005, with the consultation and participation of high-level CIA officials and in the face of heightened scrutiny regarding CIA interrogation practices, the CIA secretly destroyed these tapes—bypassing judicial review of Plaintiffs' FOIA request and irrevocably deciding that the videotapes would never be disclosed. The existence, and destruction, of these tapes came to light two years later, when CIA Director Michael Hayden posted a letter on the CIA's website on December 7, 2007, after discovering that reporters had learned what had occurred.

On December 12, 2007, Plaintiffs first moved for contempt and sanctions against the CIA, a motion that this Court deferred pending a now-concluded criminal investigation into the destruction of the tapes by Special Prosecutor John H. Durham. Following Plaintiffs' initial motion, this Court ordered the production or identification of documents relating to the persons and reasons behind the destruction of the tapes (the "paragraph 4 documents")—leading to the

release of documents that, even in redacted form, make clear that the CIA destroyed the tapes with the consent and participation of high-level CIA officials and for the purpose of avoiding public scrutiny into CIA interrogation practices. *See* Apr. 20, 2009 Order (Doc. No. 339); July 21, 2009 Order (Doc. No. 365); July 30, 2009 Order (Doc. No. 369). Because the Durham investigation is now concluded, and in light of the expanded public record regarding the destruction of the tapes, Plaintiffs seek a finding of civil contempt and appropriate sanctions against the CIA, as well as against individual CIA officials who knowingly violated this Court's orders, including Jose Rodriguez, former Director of the National Clandestine Service of the CIA.

The Court should grant Plaintiffs' motion—not as punishment, but to provide a concrete remedy for the CIA's premeditated and contumacious actions in destroying the tapes and failing to respect the lawful orders of a co-equal branch of government. The facts set forth below make a contempt finding particularly appropriate: the evidence is clear that the destruction of the videotapes was neither an innocent mistake nor the decision of a rogue agent. Rather, high-level CIA officials knowingly flouted their obligations under FOIA and this Court's orders—apparently with the specific intent of evading the public accountability that FOIA was enacted to ensure. Such actions cannot go unsanctioned, or left to stand without the clear statement of disapproval that contempt engenders.

Accordingly, Plaintiffs respectfully request that this Court:

(1) hold Defendant CIA in civil contempt;

(2) require former CIA official Jose Rodriguez to show cause why he should not be held in civil contempt;

(3) allow limited discovery and review all withheld and partially-withheld paragraph 4 documents in a sealed proceeding, with the participation of Plaintiffs' counsel with appropriate security clearance, to determine if any other CIA officials should be required to show cause why they should not be held in civil contempt;

(4) order Defendant CIA to identify or release paragraph 4 documents for the time period July 1, 2003 through May 31, 2005 (a period not addressed by the Court's prior orders), so as to create a complete record of the persons and reasons behind the destruction of the tapes;

(5) order Defendant CIA and/or Jose Rodriguez and other responsible CIA officials to pay all attorneys' fees and costs associated with Plaintiffs' efforts to obtain responsive records from the CIA in this litigation, including efforts made in connection with this Motion, and including all efforts to reconstruct the contents of the destroyed tapes and to determine the persons and reasons behind the destruction of the tapes;[1] and

(6) order such other relief as may be just and proper.

**BACKGROUND**

Since the destruction of the videotapes was first revealed in December 2007, the CIA and other agencies have released documents providing additional details about the content of the tapes and the circumstances surrounding their destruction—information that highlights the public

[1] Plaintiffs intend to seek attorney's fees and costs beyond those to which they would otherwise be entitled to under FOIA, based upon the costs they accrued in analyzing documents and reconstructing the history regarding the destruction of the tapes, as well as in pursuing this motion for contempt and sanctions. Of course, Plaintiffs are also ultimately entitled to attorney's fees and costs under FOIA with respect to all defendants, regardless of the CIA's contempt, because they have substantially prevailed in this litigation, having obtained both judicial orders in their favor and voluntary changes in the agencies' position, including the disclosure of thousands of pages of government documents. *See* 5 U.S.C. § 552(a)(4)(E); *Summers v. DOJ*, 569 F.3d 500, 503 (D.C. Cir. 2009) ("As part of the OPEN Government Act of 2007, the Congress amended the FOIA to incorporate the catalyst theory [of attorney's fees].").

importance of the destroyed tapes, establishes the agency's motive to destroy them, and identifies the key actors involved in the decision.

## I. THE INTERROGATION VIDEOTAPES

The CIA recorded at least 92 videotapes of interrogations, all in 2002. *See* Inventory and Review of Interrogation Videotapes (Undated), *available at* http://bit.ly/eBhrAH, attached hereto as Ex. 1.[2] Of the 92 known videotapes, 90 related to interrogations of Zayn Al-Abidin Muhammad Husayn ("Abu Zubaydah") and two related to interrogations of Abd Al-Rahim Al-Nashiri. *Id*. Twelve tapes depicted the use of what the CIA labeled "Enhanced Interrogation Techniques." Office of the Inspector General, Central Intelligence Agency, *Special Review: Counterterrorism Detention and Interrogation Activities* 36 (May 7, 2004) ("CIA OIG"), *available at* http://bit.ly/haTXJM, attached hereto as Ex. 2.

In particular, the CIA began taping the interrogations of Abu Zubaydah on April 13, 2002, 17 days after he was captured in Faisalabad, Pakistan on March 27, 2002. *See* CIA OIG 12; List of Contemporaneous and Derivative Records No. 1 (May 18, 2009) (cable from field to headquarters dated April 13, 2002), *available at* http://bit.ly/dPO1dR, attached hereto as Ex. 3. The dates of the taped Al-Nashiri interrogations are unknown, but he was captured sometime before November 2002. CIA OIG 4. CIA personnel later told the CIA's Inspector General that they began taping interrogations to assist in the preparation of "debriefing reports" and to create a record of Abu Zubaydah's medical condition and treatment in case he should "succumb to his wounds and questions arise about the medical care provided to him by CIA."[3] *Id.* 36.

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[2] Unless as otherwise noted, all government documents referenced in this section were released to Plaintiffs pursuant to FOIA.

[3] Abu Zubaydah was shot during capture and severely wounded. Office of the Inspector General, Department of Justice, *A Review of the FBI's Involvement in and Observations of*

Although the tapes themselves have been destroyed, publicly available information about the Abu Zubaydah and Al-Nashiri interrogations paint a picture of what the tapes would have depicted. Following his capture, Abu Zubaydah was initially interrogated by two FBI agents at a CIA facility, using a "rapport-based approach."[4] Office of the Inspector General, Department of Justice, *A Review of the FBI's Involvement in and Observations of Detainee Interrogations in Guantanamo Bay, Afghanistan, and Iraq* 68 (May 2008) ("DOJ OIG"), *available at* http://bit.ly/hgwTGs, attached hereto as Ex. 4. Although the agents believed this approach was working and that Abu Zubaydah was providing useful information, within days CIA personnel assumed control of the interrogation and began to use techniques that one of the FBI agents later characterized as "borderline torture;" indeed, when the FBI agents reported these techniques to their superiors, they were told to leave the CIA facility. *Id.* 68-69. In particular, FBI leadership determined that FBI personnel should not participate further in the Abu Zubaydah interrogation because the CIA's techniques were ineffective, "wrong," did not take into account an "end game," and "helped al-Qaeda in spreading negative views of the United States." *Id.* 72.

After the departure of the FBI agents, the CIA's Counterterrorism Center ("CTC"), then headed by Jose Rodriguez, proposed that Abu Zubaydah be subjected to more aggressive interrogation techniques. CIA OIG 3. The CIA's Office of General Counsel ("OGC") consulted with staff of the National Security Council and Department of Justice ("DOJ") and worked with

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*Detainee Interrogations in Guantanamo Bay, Afghanistan, and Iraq* 67 (May 2008) ("DOJ OIG"), *available at* http://bit.ly/hgwTGs, attached hereto as Ex. 4.

[4] The documents released to plaintiffs do not specify the location of the detention center, but numerous reports indicate that it was in Thailand. *See, e.g.*, Scott Shane, *Divisions Arose on Rough Tactics for Qaeda Figure*, N.Y. Times, Apr. 18, 2009, *available at* http://nyti.ms/h6N1XA, attached hereto as Ex. 5; Mark Mazzetti, *C.I.A. Document Details Destruction of Tapes*, N.Y. Times, Apr. 16, 2010, *available at* http://bit.ly/ePh2VN, attached hereto as Ex. 6.

the DOJ's Office of Legal Counsel ("OLC") to obtain approval for the use of these techniques. *Id.* 3-4. On August 1, 2002, the DOJ provided the CIA with an opinion (the "Bybee memo") indicating that CIA personnel could use ten specific "Enhanced Interrogation Techniques" ("EITs")—attention grasp; walling; facial hold; facial or insult slap; cramped confinement; insects placed in a confinement box; wall standing; stress positions; sleep deprivation; and the waterboard—without violating the torture statute, 18 U.S.C. §§ 2340-2340B. CIA OIG 15, 19. CIA agents subjected Abu Zubaydah to most or all of the enhanced interrogation techniques, as well as to other methods—for example, isolation, reduced caloric intake, the use of loud music, and the use of diapers—that the CIA later labeled "standard." CIA OIG 30; ICRC Report on the Treatment of Fourteen "High Value Detainees" in CIA Custody 7-20 (Feb. 2007) ("ICRC Report"), *available at* http://bit.ly/fLXYsY, attached hereto as Ex. 7.[5] Although the Bybee memo was based on the premise that repeated use of the enhanced interrogation techniques would "not be substantial," CIA OIG 104, the CIA's interrogators waterboarded Abu Zubaydah 83 times during the month of August 2002, *id.* 36, 90.[6]

Abu Zubaydah later described his waterboarding to the International Committee of the Red Cross as follows:

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[5] After he was transferred to Guantánamo Bay in September 2006, Abu Zubaydah described his CIA interrogation to the International Committee for the Red Cross ("ICRC") and to a Combatant Status Review Tribunal ("CSRT") convened by the Defense Department. The ICRC's report was published by the New York Review of Books in April 2009. *See* ICRC Report. In response to FOIA litigation, a redacted version of the CSRT transcript was provided to the ACLU in June 2009. *See* Tr. of CSRT Hearing for ISN 10016 (Mar. 27, 2007), *available at* http://bit.ly/hlRxLY.

[6] The development of EITs began even before Abu Zubaydah was in CIA custody. In late 2001, the CIA asked an independent contractor psychologist to develop methods that could be used to overcome "resistance" on the part of suspected Al Qaeda detainees. CIA OIG 13. That psychologist worked with a psychologist from the Defense Department to develop a recommended list of EITs. *Id.*

> I was put on what looked like a hospital bed, and strapped down very tightly with belts. A black cloth was then placed over my face and the interrogators used a mineral water bottle to pour water on the cloth so that I could not breathe. After a few minutes the cloth was removed and the bed was rotated into an upright position. The pressure of the straps on my wounds caused severe pain. I vomited. The bed was then again lowered to a horizontal position and the same torture carried out with the black cloth over my face and water poured on from a bottle. On this occasion my head was in a more backward, downwards position and the water was poured on for a longer time. I struggled without success to breathe. I thought I was going to die. I lost control of my urine. Since then I still lose control of my urine when under stress.

ICRC Report 10.

Like Abu Zubaydah, Al-Nashiri was subjected both to "standard" techniques and to enhanced interrogation techniques, including the waterboard. CIA OIG 36. He was also subjected to what the CIA's Inspector General labeled "unauthorized or undocumented techniques." *Id.* 41. For example, a CIA debriefer used an unloaded semi-automatic handgun as a prop to frighten him. *Id.* 42 ("[T]he debriefer entered the cell where Al-Nashiri sat shackled and racked the handgun once or twice close to Al-Nashiri's head[.]"). The same debriefer revved a power drill while Al-Nashiri stood naked and hooded. *Id.* On another occasion, an unidentified individual had to intercede after another unknown individual expressed concern that a stress position might have separated Al-Nashiri's arms from his shoulders. *Id.* 44.

On December 4, 2002, the CIA discontinued its practice of videotaping interrogations. *See* Ex. 3, No. 549 (List of Contemporaneous and Derivative Records) (last cable from field to headquarters dated Dec. 4, 2002). While the redacted documents do not clearly establish why the CIA discontinued the videotaping, the decision was made two weeks after a CIA prisoner—Gul Rahman—was killed in the CIA's "salt pit" prison in Afghanistan,[7] and on the same day that

[7] This detainee died on November 20, 2002, in CIA custody, after being stripped naked, chained to a concrete floor, and left overnight without blankets. He was found dead in the morning, and a CIA medic determined the cause of death to be "hypothermia." *See* Dana Priest, *CIA Avoids Scrutiny of Detainee Treatment*, Wash. Post, Mar. 3, 2005, *available at* http://wapo.st/dSSgoY;

a prisoner whom the CIA had delivered to army interrogators in Afghanistan was found dead in his cell, suspended by handcuffs from the mesh ceiling.[8] The second prisoner, Habibulah, was presented for autopsy "clothed in a disposable diaper," and "no additional clothing or personal effects accompan[ied] the body." *See* Final Report of Postmortem Investigation 4 (Dec. 6-8, 2002), *available at* http://bit.ly/gUFNf7, attached hereto as Ex. 10. The military first claimed that Habibulah had died of natural causes, but a medical examiner concluded that the death was a "homicide," caused by "pulmonary embolism due to blunt force injuries." *Id.* 1.

Although the CIA discontinued the practice of taping interrogations in December 2002, it did not immediately destroy the videotapes that had already been made. Nor did it discontinue the use of enhanced interrogation techniques.[9]

## II. CHRONOLOGY REGARDING THE DESTRUCTION OF THE VIDEOTAPES

Initially, the CIA policy was that the interrogation videotapes were to be retained. *See, e.g.* Vaughn Index, Nov. 20, 2009, No. 20 (Cable, Apr. 17, 2002) (providing "guidance on the retention of video tapes"), attached hereto as Ex. 11; Email (Apr. 27, 2002) (directing that the interrogation videotapes "should all be catalogued and made into official record copies"), *available at* http://bit.ly/fdolmJ, attached hereto as Ex. 12; Email (Jan. 13, 2003), (providing a copy of a May 2002 cable that gave "guidance on retention of video tapes of Abu Zubaydah" and

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Adam Goldman & Kathy Gannon, *Death Shed Light on CIA 'Salt Pit' Near Kabul*, Associated Press, Mar. 28, 2010, *available at* http://on.msnbc.com/h9ES2D, attached together hereto as Ex. 8.

[8] A.B. Krongard, who was the CIA's Executive Director at the time the videotapes were made, told the New York Times that the CIA initiated the taping to protect itself but discontinued the taping "because paranoia had set in." Scott Shane & Mark Mazzetti, *Tapes by C.I.A. Lived and Died to Save Image*, N.Y. Times, Dec. 30. 2007, *available at* http://nyti.ms/h2NfGT, attached hereto as Ex. 9.

[9] For example, the use of EITs against Al-Nashiri continued for two weeks after December 4, at which point his interrogators "assessed him to be 'compliant.'" CIA OIG 41.

stating, "please do not tape over or edit videos of Abu Zubaydah's interrogations" and "please preserve all videos" and leave them "unedited"), *available at* http://bit.ly/hgPnuu, attached hereto as Ex. 13. The author of the May 2002 cable further observed that "[t]hough we recognize that the tapes may be cumbersome to store, they offer evidence of [Abu Zubayda's] condition/treatment while in [redacted] care that may be of value in the future (apart from actionable intelligence)." *Id.* Despite the tapes' potential value, however, by late 2002 the CIA had determined that the tapes should be destroyed—the first of several plans to destroy the tapes before the final order to do so came from Jose Rodriguez in November 2005.

### A. <u>The First Destruction Plan and the Office of General Counsel Review</u>

Redacted documents released by the CIA indicate that in September 2002, CIA attorneys discussed a "destruction proposal on disposition of videotapes at field," and referred to a "draft of a cable discussing the disposition of the videotapes." Vaughn Index, Nov. 20, 2009, No. 55 (Email, Sept. 6, 2002), attached hereto as Ex. 14. An October 25, 2002 cable, apparently from James Pavitt, the CIA's Deputy Director of Operations until he was replaced in June 2004, first by Stephen Kappes and then by Jose Rodriguez, stated that "the continued retention of these tapes, which is not/not required by law, represents a serious security risk." Cable (Oct. 25, 2002), *available at* http://bit.ly/fdolmJ, attached hereto as Ex. 15. The cable discussed the "best mechanism for destroying the tapes" and stated that "[redacted] will be deployed [redacted] at the earliest opportunity to be present and assist in destroying the tapes completely." [10] *Id.* 1-2. With respect to the then-ongoing videotaping of interrogations, the cable stated:

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[10] The cable states that the videotapes present a security risk for "officers recorded on them, and for all [redacted] officers present and participating in [redacted] operations; they are also recognized [sic] the additional concerns described in Refs, such as the danger to all Americans should the tapes be compromised." Ex. 15. The CIA Inspector General's report, however, notes that at least some CIA personnel who participated in the CTC program were concerned about "the possibility of recrimination or legal action" and expressed concern that "a human rights

> Policy on usage of tapes: Starting immediately, it is now HQs policy that [redacted] record one day's worth of sessions on one videotape for operational considerations, utilize the tape within that same day for purposes of review and note taking, and record the next day's sessions on the same tape. Thus, in effect, the single tape in use [redacted] will contain only one day's worth of interrogation sessions.

*Id.* 2.

The Office of General Counsel ("OGC") decided that before the agency destroyed the already-existing videotapes, OGC would conduct what it described as a "random independent review of the video tapes." Vaughn Index, Nov. 20, 2009, No. 50 (Email, Nov. 15, 2002), attached hereto as Ex. 16. That review, which (far from being independent) was conducted by an OGC attorney in November and December 2002, concluded that "there was no deviation from the DOJ guidance or the written record." CIA OIG 36. In a written memorandum, the OCG attorney also opined that "[t]here [was] nothing remarkable about the interrogation and debriefing" and that the CIA's written cable traffic "accurately describe[d] the interrogation methods" used on the videotapes. Memorandum, Review of Interrogation Videotapes 5 (Jan. 9, 2003), *available at* http://bit.ly/fdolmJ**,** attached hereto as Ex. 17. The review apparently failed to mention that some of the video tapes were blank, that others were mainly blank, and that still others were broken. CIA OIG 37.

**B. <u>The Second Destruction Plan, the IG Review, and the Congressional Briefing</u>**

By the time the OCG completed its review of the videotapes in January 2003, the CIA had ended its practice of videotaping interrogations. *See* Ex. 3, No. 549 (List of Contemporaneous and Derivative Records) (last cable from field to headquarters dated Dec. 4, 2002). The agency also resumed discussions about the disposition of the tapes, a discussion that included the most senior officials in the CIA. A memorandum entitled "DCI meeting on

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group might pursue them." One officer expressed concern that CIA officers would be charged with war crimes. CIA OIG 94.

Disposition of AZ Tapes" indicates that on January 10, 2003, the day after the OGC attorney who reviewed the videotapes filed his written report, CIA Director George Tenet requested that the Counterterrorism Center "draft a short paper . . . that will describe our proposed plan of action. The paper will need to lay out our decision to move forward with the destruction of the tapes, and our plan to ensure that both the Hill and NSC will support this decision." Memorandum (Undated), *available at* http://bit.ly/g2zANO, attached hereto as Ex. 18.[11]

The plan to destroy the tapes was postponed once again, however, this time as the result of an investigation by the CIA's Inspector General, John L. Helgerson, and oversight by the House Intelligence Committee. Helgerson initiated an investigation in January 2003 after being informed about the use of unauthorized interrogation methods against Al-Nashiri, and after "receiv[ing] information that some employees were concerned that certain covert Agency activities at an overseas detention and interrogation site might involve violations of human rights." CIA OIG 2. He viewed the videotapes in May 2003.[12] *Id.* 36. Meanwhile, on February 5, 2003, CIA General Counsel Scott Muller informed members of the House Intelligence Committee in a briefing that the CIA planned to destroy the videotapes after the IG had reviewed them. Following that briefing, Rep. Jane Harman wrote to Muller expressing concern about the CIA's interrogation program and about the proposal to destroy the videotapes:

> You discussed the fact that there is videotape of Abu Zubaydah following his capture that will be destroyed after the Inspector General finishes his inquiry. I

[11] The discussion in early January included an exchange about whether the videotapes were official records. Vaughn Index, Nov. 20, 2009, No. 34 (Email, Jan. 12, 2003), attached hereto as Ex. 19; No. 36 (Email, Jan. 12, 2003), attached hereto as Ex. 20.

[12] He was unable to conduct a comprehensive review, however, because 11 of the tapes were blank, two others were blank except for one or two minutes of recording, and two others were broken and could not be reviewed. The IG compared the videotapes to the CIA's logs and cables and identified a 21-hour period of time, which included two waterboard sessions, that was not captured on the videotapes. CIA OIG 37.

> would urge the Agency to reconsider that plan. Even if the videotape does not constitute an official record that must be preserved under the law, the videotape would be the best proof that the written record is accurate, if such record is called into question in the future. The fact of destruction would reflect badly on the Agency.

Letter from Rep. Jane Harman to CIA General Counsel Scott Muller, Feb. 10, 2003, *available at* http://bit.ly/f3fmQV, attached hereto as Ex. 21.

The CIA met with the White House regarding the CIA's response to Rep. Harman's letter. Vaughn Index, Nov. 20, 2009, No. 28 (Email, Feb. 22, 2003), attached hereto as Ex. 22. Following that meeting, Muller responded to other aspects of Rep. Harman's letter but did not answer her with respect to the videotapes. Letter from CIA General Counsel Scott Muller to Rep. Jane Harman, Feb. 23, 2003, *available at* http://bit.ly/eoUsRU, attached hereto as Ex. 23.[13]

In May 2004, Inspector General Helgerson completed his review. A redacted version of the report that was released as a result of this litigation concluded that "[u]nauthorized, improvised, inhumane, and undocumented detention and interrogation techniques were used." CIA OIG 102. Helgerson also found that "[d]uring the interrogations of two detainees, the waterboard was used in a manner inconsistent with the written DoJ legal opinion of 1 August 2002," *id.* 103, and warned that "[t]he Agency faces potentially serious long-term political and

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[13] The discussion about whether the videotapes were official records appears to have continued through the spring of 2004. Vaughn Index, Nov. 20, 2009, No. 31 (Email, Apr. 12, 2004), attached hereto as Ex. 24. Under the Federal Records Act ("FRA"), 44 U.S.C. §§ 2101 *et seq.*, 2901 *et seq.*, 3101 *et seq.*, 3301 *et seq.*, an agency cannot dispose of qualifying official records by "fiat." *See Armstrong v. Executive Office of the President*, 1 F.3d 1274, 1278 (D.C. Cir. 1993). Rather, if a record is "appropriate for preservation by th[e] agency . . . as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the Government or because of the informational value of data in them," 44 U.S.C. § 3301, "the agency [must] procure the approval of the Archivist before disposing of [it]," *Armstrong*, 1 F.3d at 1278-79. The National Archives and Records Administration appears to be investigating whether the CIA's acts constituted the improper destruction of federal records. *See* Michael Isikoff, *CIA Faces Second Probe Over Tape Destruction*, MSNBC, Nov. 10, 2010, *available at* http://bit.ly/gozCt7, attached hereto as Ex. 25.

legal challenges as a result of the CTC Detention and Interrogation Program, particularly its use of EITs," *id.* 105.

### C. Plaintiffs' FOIA Suit and This Court's Orders

The following month, on June 2, 2004, Plaintiffs filed their FOIA suit against several government agencies, including the CIA. Plaintiffs requested, *inter alia*, all records relating to the treatment of detainees apprehended after September 11, 2001 and held in U.S. custody abroad—a request to which the videotapes were plainly responsive. (*See* Compl. (Doc. No. 1).)

This Court issued a series of orders in 2004 and 2005 that commanded the CIA to produce or identify all records responsive to Plaintiffs' FOIA request. On September 15, 2004, the Court ordered Defendant CIA and other defendant federal agencies to "produce or identify all responsive documents" to Plaintiffs' FOIA request by October 15, 2004. *See ACLU I*, 339 F. Supp. 2d at 505. In a February 2, 2005 decision, this Court reiterated and clarified the CIA's obligation,[14] stating clearly that the CIA was obliged to disclose "operational records" that were produced or gathered pursuant to an Office of Inspector General ("OIG") investigation into impropriety or illegality in the conduct of intelligence activities—a circumstance that applied to the interrogation videotapes—and that this obligation applied even if the OIG investigation was ongoing. *See Am. Civil Liberties Union v. Dep't of Def.* ("*ACLU II*"), 351 F. Supp. 2d 265, 272-

[14] Following this Court's September 15, 2004 Order, the CIA had requested partial relief pursuant to the CIA Information Act, which allows the CIA to exempt certain operational files from its obligations to produce or disclose records under FOIA. *See* 50 U.S.C. § 431(a). However, the same Act provides an exception to this exemption, "concerning the specific subject matter of an investigation by . . . the Office of Inspector General of the Central Intelligence Agency . . . for any impropriety, or violation of law, Executive order, or Presidential directive, in the conduct of an intelligence activity," and the agency acknowledged that "some of CIA's operational files will become searchable due to [Office of Inspector General] OIG investigations." *See* 50 U.S.C. § 431(c); Letter to Judge Hellerstein from Sean Lane, Oct. 15, 2004 (Doc. No. 18). The CIA argued, however, that it could not review documents that were the subject of ongoing investigations. In its February 2, 2005 Order the Court held that the CIA had failed to meet the requirements for invoking the operational files exemption, and that the CIA had a duty to search files gathered or produced pursuant to an ongoing OIG investigation.

73 (S.D.N.Y. 2005). The Court thus again commanded that "[t]he CIA shall search and review in response to plaintiffs' FOIA requests, as described in my Opinion and Order of September 15, 2004." *Id.* at 278. Following a motion for reconsideration, this Court again stated that the CIA's "obligation to search and review [extends] . . . to relevant documents that have already been identified and produced to, or otherwise collected by, the CIA's Office of Inspector General." *See* Apr. 18, 2005 Order Granting CIA's Motion for Partial Relief 3 (Doc. No. 86), attached hereto as Ex. 26.[15]

In letters dated April 15, 2005 and July 15, 2005—letters sent before the tapes were destroyed in November 2005—the CIA informed Plaintiffs that it had completed its review of the OIG files for responsive documents. *See* Letter from John L. McPherson to Jennifer Ching, Apr. 15, 2005, attached hereto as Ex. 27; Letter from Jennifer G. Loy to Megan Lewis, July 15, 2005, attached hereto as Ex. 28. The CIA never informed Plaintiffs of the existence, or destruction, of the videotapes.

### D. Increasing Scrutiny of CIA Interrogation Practices and Jose Rodriguez's Order to Destroy the Videotapes

Following the release of the OIG report and the commencement of Plaintiffs' FOIA suit, the agency discussion about the disposition of the videotapes resumed once again. Vaughn Index, Nov. 20, 2009, No. 26 (Email, Nov. 10, 2004), attached hereto as Ex. 29. This discussion appears to have involved the Director of National Intelligence ("DNI") as well as officials at the White House. Vaughn Index, Nov. 20, 2009, No. 27 (Email, July 28, 2005), attached hereto as

[15] The Court partially granted the CIA's motion for reconsideration, for reasons not applicable to this motion. Specifically, the Court reconsidered its previous decision that the CIA had failed to satisfy the statutory prerequisites for invoking the "operational files" exemption to FOIA, concluding instead that the CIA had properly designated its files as exempt operational files. However, the Court reiterated that the CIA's FOIA obligations did apply to documents that had been identified and produced to, or otherwise collected by, the CIA's Office of Inspector General.

Ex. 30; Timeline Regarding Destruction of Abu Zubaydah Videotapes (Undated), *available at* http://bit.ly/g2zANO, attached hereto as Ex. 31.[16]

Because the CIA has not yet been ordered to disclose paragraph 4 documents for the time period between July 1, 2003 through May 31, 2005, information regarding its decisionmaking process during this period is sparse. However, increased scrutiny in 2004-2005 of CIA interrogation practices and the treatment of detainees overseas likely added to the pressure to destroy the tapes. For example, in April 2004, CBS 60 Minutes first broadcast the Abu Ghraib photographs. Rebecca Leung, *Abuse of Iraqi POWs by GIs Probed*, CBS News, Apr. 28, 2004, *available at* http://bit.ly/eQ2BV0, attached hereto as Ex. 33. In June 2004, the Washington Post published an August 2002 OLC memo (a companion to the Bybee memo) opining that interrogation methods would not violate the torture statute unless they caused pain akin to that associated with organ failure or death; the head of OLC eventually withdrew the memo and resigned. *See* Dana Priest, *Justice Dept. Memo Says Torture 'May Be Justified,'* Wash. Post, June 13, 2004, *available at* http://wapo.st/fjnhkq, attached hereto as Ex. 34. On June 28, 2004, the Supreme Court decided *Rasul v. Bush*, 542 U.S. 466 (2004), holding that the habeas statute applied to detainees held in Guantanamo and accordingly subjecting detentions to scrutiny by the federal courts.[17] In February 2005, the Associated Press reported that Manadel al-Jamadi, a CIA

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[16] The timeline created by the CIA states that the General Counsel was "told by [David] Addington and [Alberto] Gonzales not to destroy the tapes." Ex. 31. However the timeline is undated and unsigned, and the assertion that Addington and Gonzales directed the CIA not to destroy the tapes is inconsistent with at least one news report. Mark Mazzetti & Scott Shane, *Bush Lawyers Discussed Fate of C.I.A. Tapes*, N.Y. Times, Dec. 19, 2007, *available at* http://nyti.ms/ffhc3a, attached hereto as Ex. 32.

[17] In 2003, the CIA shifted certain prisoners to Guantanamo, but removed them again in 2004, presumably to avoid the jurisdiction of American courts. *See* Adam Goldman and Matt Apuzzo, *Guantanamo Prisoners Moved Early [sic] than Disclosed*, Wash. Post., Aug. 7, 2010, *available at* http://wapo.st/gxPX1N, attached hereto as Ex. 35.

"ghost" detainee who was secretly held at Abu-Ghraib and had died in 2003 during his detention, had expired in a position known as "Palestinian hanging," widely regarded to be a form of torture. *See* Seth Hettena, *Reports Detail Abu Ghraib Prison Death; Was It Torture?*, Associated Press, Feb. 17, 2005, *available at* http://on.msnbc.com/ewubrZ, attached hereto as Ex. 36. In May 2005 and then again in September of that year, Senator Jay Rockefeller asked the CIA to provide him with a copy of the OGC's report on its examination of the videotapes; the CIA apparently refused both requests. Statement of Senator Jay Rockefeller, Dec. 7, 2007, *available at* http://bit.ly/ea3xzO, attached hereto as Ex. 37. In October, the Senate voted 90-5 in support of the Detainee Treatment Act, which prohibited the use of cruel, inhuman, or degrading treatment on prisoners in U.S. custody.

November 2005 brought even further scrutiny of CIA interrogation practices, and the discussion within the agency about the videotapes came to a head. On November 2, the Washington Post revealed the existence of the CIA's overseas black sites. The report noted that some prisoners were held "in complete isolation from the outside world[,] [k]ept in dark, sometimes underground cells, [with] no recognized legal rights." Dana Priest, *CIA Holds Terror Suspects in Secret Prisons*, Wash. Post, Nov. 2, 2005, *available at* http://wapo.st/fITXff, attached hereto as Ex. 38. The day after the Washington Post report, Judge Leonie Brinkema, who was presiding over the trial of Zacharias Moussaoui, asked government attorneys whether the CIA had tapes of the Abu Zubaydah interrogations. *See CIA Destroyed Terrorism Suspect Videotapes*, MSNBC, Dec. 7, 2007, *available at* http://on.msnbc.com/egn6ou, attached hereto as Ex. 39. In response to an earlier request, the CIA had filed a sworn affidavit asserting that no such tapes existed. Letter from U.S. Attorney Chuck Rosenberg to the Hon. Leonie M.

Brinkema (Oct. 25, 2007) (advising the Court of factual errors in two CIA declarations from 2003 and 2005), *available at* http://bit.ly/fpTamJ, attached hereto as Ex. 40.

On Nov. 8, 2005, CIA personnel in the field sent a cable "request[ing] approval for [redacted] to follow through on Ref original authority to destroy Ref [redacted] video tapes." The cable stated:

> For the reasons cited in Ref, the fact that the Inspector General had advised [redacted] that Ref video tapes were no longer required for his investigation and the determination by the Office of the General Counsel that the [redacted] cable traffic accurately documented [redacted] activities recorded on video tape; [redacted] requests HQs authorization for [redacted] to destroy Ref [redacted] video tapes. Pending HQs approval, [redacted] will oversee [redacted] destruction of [redacted] video tapes. On completion of the destruction, a cable will be forwarded to HQs noting the date/time of the [redacted] video tape destruction.

Cable (Nov. 8, 2005), *available at* http://bit.ly/hgPnuu, attached hereto as Ex. 41. Jose Rodriguez, the Deputy Director of Operations responded:

> DDO approves Ref A request to destroy [redacted] videotapes as proposed Ref A and for the reasons cited therein (there is no legal or OIG requirement to continue to retain the tapes.) Request that [redacted] advise when destruction has been completed.

Cable (Nov. 8, 2005), *available at* http://bit.ly/hgPnuu, attached hereto as Ex. 42; *see also* Ex. 31 (Timeline Regarding Destruction of Abu Zubaydah Videotapes) (stating that cable authorizing destruction of tapes was "released" by Deputy Director of Operations).

The following day, the New York Times published an article disclosing the existence of CIA Inspector General Helgerson's investigation. Douglas Jehl, *Report Warned C.I.A. on Tactics in Interrogation*, N.Y. Times, Nov. 9, 2005, *available at* http://nyti.ms/gFRthJ, attached hereto as Ex. 43. CIA personnel once again exchanged emails about "the decision to destroy the 92 videotapes." Vaughn Index, Nov. 20, 2009, No. 2 (Emails, Nov. 9, 2005), and a cable was

sent from field to headquarters confirming the destruction of the videotapes. Cable (Nov. 9, 2005), *available at* http://bit.ly/hgPnuu, attached hereto as Ex. 44.

### E. **Developments after the Destruction of the Videotapes**

On November 10, 2005, the day after the destruction of the tapes, an unidentified individual sent two emails to Kyle Dustin "Dusty" Foggo, the CIA's Executive Director. The first email described a discussion that had occurred at an "update" meeting of the CIA's Directorate of Operations (the "DO"[18]). Email to Dusty Foggo (Nov. 10, 2005), attached hereto as Ex. 45. The focus of the meeting was Jose Rodriguez's authorization of the destruction of the tapes. John Rizzo, the CIA's General Counsel, apparently learned of the destruction that day and was "upset . . . because he had not been consulted." *Id.* Rodriguez "explained that he . . . felt it was extremely important to destroy the tapes and that if there was any heat he would take it." Porter Goss, then Director of the CIA, "laughed and said that actually it would be he . . . who would take the heat," but stated that he "agreed with the decision." Rodriguez further explained that "the heat from destroying is nothing compared to what it would be if the tapes ever got into public domain—he said that out of context, they would make us look terrible; it would be 'devastating' to us." "All in the room agreed" with Rodriguez's assessment. *Id.*

Ninety minutes later, the unidentified individual, "no longer feeling comfortable," sent Foggo another email. Email to Dusty Foggo (Nov. 10, 2005), attached hereto as Ex. 46. He "was just told by Rizzo that [redacted] DID NOT concur on the cable [ordering destruction]—it was never discussed with him (this is perhaps worse news, in that we may have 'improperly' destroyed something)." *Id.* Although the destruction had been justified in part based on the Inspector General's review of the tapes, the individual stated that "it is unclear now whether the IG [Inspector General] did [concur in the destruction] as well." The cable ordering destruction

[18] The Directorate of Operations of the CIA is now known as the National Clandestine Service.

"was apparently drafted by [redacted] and released by Jose [Rodriguez]," and their names were the "only two names on it." *Id.*

The individual concluded based on this sequence of events that "[e]ither [redacted] lied to Jose about 'clearing' with [redacted] and IG (my bet) or Jose misstated the facts." He noted parenthetically that "[i]t is not without relevance that [redacted] featured prominently in the tapes, as [redacted] was in charge of [redacted] at the time and clearly would want the tapes destroyed." *Id.*

Four days later, on November 14, 2005, the government responded to Judge Brinkema's November 3 request for confirmation of whether the government had videotapes of Abu Zubaydah's interrogations. Ex. 39. It stated that it did not. *Id.*

## III. CONTEMPT PROCEEDINGS

On December 6, 2007, in apparent anticipation of news reports that the CIA had destroyed videotapes of interrogations, the agency for the first time acknowledged that CIA interrogations had been videotaped in 2002, that the tapes were destroyed in 2005, and that "[t]he decision to destroy the tapes was made within CIA itself . . . [after] the Office of General Counsel examined the tapes and determined that they showed lawful methods of questioning [and after] [t]he Office of Inspector General also examined the tapes in 2003 as part of its look at the Agency's detention and interrogation practices." *See* Statement by Director of the Central Intelligence Agency, General Mike Hayden (Dec. 6, 2007), *available at* http://bit.ly/h0q4vK, attached hereto as Ex. 47; *see also* Mark Mazzetti, *C.I.A. Destroyed 2 Tapes Showing Interrogations*, N.Y. Times, Dec. 7, 2007, *available at* http://nyti.ms/e9S7fN, attached hereto as Ex. 48.

On December 12, 2007, Plaintiffs filed a motion for contempt and sanctions in connection with the CIA's destruction of the videotapes in violation of this Court's orders and

the agency's obligations under FOIA; the parties submitted briefing on the issue in December 2007 and January 2008. In January 2008, the Department of Justice announced the appointment of a Special Prosecutor, John H. Durham, to undertake a criminal investigation regarding the tapes' destruction. *See* Mark Mazzetti and David Johnston, *Justice Dept. Sets Criminal Inquiry on C.I.A. Tapes*, N.Y. Times, Jan. 3, 2008, *available at* http://nyti.ms/gydRcg, attached hereto as Ex. 49. In a series of orders, this Court deferred deciding Plaintiffs' motion for contempt pending the conclusion of Special Prosecutor Durham's investigation. *See* July 30, 2009 Order (Doc. No. 369) (deferring consideration of contempt motion and describing previous orders).

As an interim measure, however, on July 30, 2009, this Court ordered the CIA to produce or identify in a *Vaughn* Index the so-called "paragraph 4 documents," "documents relating to the destruction of the tapes, which describe the persons and reasons behind their destruction." *See* July 30, 2009 Order (Doc. No. 369) (ordering the government to propose a schedule for identifying paragraph 4 documents); April 20, 2009 Order (Doc. No. 339) (describing paragraph 4 documents). The Court limited the CIA's search to documents from the period April 1, 2002 through June 30, 2003 and June 1, 2005 through January 31, 2006. *See* Apr. 20, 2009 Order (Doc. No. 339); July 21, 2009 Order (Doc. No. 365). The CIA identified 220 responsive paragraph 4 documents from this time period, completely withholding 197 documents and partially releasing 23 documents relating to the destruction of the tapes. The documents that were disclosed provided information about, *inter alia*, the individuals and departments involved in the destruction of the tapes, as well as conversations that took place after the destruction. The Court also ordered the identification or production of documents relating to the content of the videotapes, most of which were withheld by the CIA.

Finally, on November 9, 2010, the Department of Justice announced that Special Prosecutor Durham would not be pursuing criminal charges in connection with the destruction of the interrogation videotapes. The Department provided no details regarding Mr. Durham's decision. *See* Mark Mazzetti and Charlie Savage, *No Criminal Charges Sought over C.I.A. Tapes*, N.Y. Times, Nov. 9, 2010, *available at* http://nyti.ms/ePTvEE, attached hereto as Ex. 50. As a result, on January 14, 2011, this Court held a status conference with respect to Plaintiffs' motion for contempt and sanctions, and set a schedule for both parties to submit supplemental briefing. (Jan. 14, 2011 Tr. 15, attached hereto as Ex. 51.)[19] In light of Special Prosecutor Durham's decision, as well as the additional information about the circumstances of the destruction of the tapes obtained from the paragraph 4 documents and other information in the public record, Plaintiffs now renew their motion for civil contempt and sanctions against the CIA, and seek such relief as well against Jose Rodriguez and other CIA officials who knowingly violated this Court's orders.

## ARGUMENT

### I. THIS COURT CAN AND SHOULD FIND THE CIA IN CIVIL CONTEMPT FOR ITS VIOLATION OF COURT ORDERS

#### A. The CIA should be held in contempt because it failed to abide by this Court's orders by destroying documents responsive to their FOIA request.

It is well established that "courts have inherent power to enforce compliance with their lawful order[s] through civil contempt." *Armstrong v. Guccione*, 470 F.3d 89, 101-02 (2d Cir. 2006) (quoting *Shillitani v. United States*, 384 U.S. 364, 370 (1966)). As Plaintiffs showed in their previous briefing, this Court should hold the CIA in civil contempt for failing to comply

[19] During this conference, the Court ordered simultaneous motions and briefing by Plaintiffs and the CIA regarding whether the contempt and sanctions proceedings should continue or be terminated. (Tr. 15.) On consent of the parties, the Court modified the briefing schedule such that Plaintiffs would file an initial brief in support of renewing contempt proceedings, the CIA would respond, and Plaintiffs would then file a reply. *See* Jan. 20, 2011 Order (Doc. No. 446).

with this Court's orders because (1) its orders were clear and unambiguous; (2) the proof of the CIA's noncompliance is clear and convincing; and (3) the CIA did not diligently attempt to comply with the Court's orders in a reasonable manner. *See Paramedics Electromedicina Comercial, Ltda. v. GE Med. Sys. Info. Techs., Inc.*, 369 F.3d 645, 655 (2d Cir. 2004). (*See also* Pls.' Mem. in Support of Mot. for Contempt and Sanctions (Doc. No. 255); Pls.' Reply in Support of Mot. for Contempt and Sanctions (Doc. No. 272).)

Civil contempt is not punishment: its role is "to coerce the contemnor into compliance with the court's order and/or to compensate the complaining party for losses incurred as a result of the contemnor's conduct." *SD Prot., Inc. v. Del Rio*, 587 F. Supp. 2d 429, 433 (E.D.N.Y. 2008). Parties to a lawsuit are presumed to have had notice of court orders.[20] *See NOW v. Operation Rescue*, 747 F. Supp. 772, 775 (D.D.C. 1990), *vacated in part on other grounds by* 37 F.3d 646 (D.C. Cir. 1994). And "[c]ivil contempt is not a discretionary matter; if a court order has been violated, the court must make the injured party whole." *Nat'l Research Bureau, Inc. v. Kucker*, 481 F. Supp. 612, 614 (S.D.N.Y. 1979); *see also Vuitton et Fils S.A. v. Carousel Handbags*, 592 F.2d 126, 130 (2d Cir. 1979) ("The district court is not free to exercise its discretion and withhold an order in civil contempt awarding damages, to the extent they are established.").[21]

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[20] The relevant orders were properly docketed and served on the parties, and the CIA has never alleged that it was unaware of the orders.

[21] Because the role of civil contempt is remedial, a party's failure to comply with a court order need not be willful in order to hold a party in civil contempt. *See Paramedics Electromedicina Comercial*, 369 F.3d at 655; *see also McComb v. Jacksonville Paper Co.*, 336 U.S. 187, 191 (1949) ("Since the purpose [of civil contempt] is remedial, it matters not with what intent the defendant did the prohibited act."); *Landmark Legal Found. v. Envtl. Prot. Agency*, 272 F. Supp. 2d 70, 76 (D.D.C. 2003) (holding EPA in contempt in a FOIA suit without a finding of willfulness).

Accordingly, courts have not hesitated to apply their contempt power to agencies that violate court orders—including in FOIA suits when agencies destroyed responsive documents. Indeed, it is a basic principle that "[g]overnmental agencies which are charged with the enforcement of laws should set the example of compliance with Court orders," and should be held accountable like any other party when they disobey court orders. *United States v. Sumitomo Marine & Fire Ins. Co.*, 617 F.2d 1365, 1370 (9th Cir. 1980) (internal quotation marks omitted) (affirming Rule 37 sanctions precluding the government from introducing damages evidence in a lawsuit due to its failure to comply with discovery and scheduling orders). Thus, in the FOIA suit *Landmark Legal Foundation v. Environmental Protection Agency*, 272 F. Supp. 2d 70 (D.D.C. 2003), for example, the court held the Environmental Protection Agency ("EPA") in civil contempt and ordered it to pay the Plaintiff's legal fees and costs expended as a result of the EPA's having violated a preliminary injunction by reformatting computer hard drives and deleting emails that were potentially responsive to a FOIA request. *Id.* at 73. The court's decision was "designed to compensate Landmark, rather than punish EPA," and the court made no finding about whether the agency's violation of its order was willful. *Id.* at 76-77; *see also Cobell v. Babbitt*, 37 F. Supp. 2d 6 (D.D.C. 1999) (holding cabinet secretaries and assistant secretary in civil contempt for failure to comply with discovery orders involving the production of documents); *Sierra Club v. Ruckelshaus*, 602 F. Supp. 892 (N.D. Cal. 1984) (finding the EPA and the Administrator of the EPA in civil contempt); *Gilbert v. Johnson*, 490 F.2d 827, 830 n.6 (5th Cir. 1974) (contempt is an appropriate sanction for failure to obey a district court's order, even though government officials are involved).

Notwithstanding that there is substantial evidence that the CIA intentionally violated court orders specifically for the purpose of avoiding scrutiny of its interrogation program, this

Court need not make such a finding in order to find the CIA in civil contempt. The evidence is clear that the CIA violated a court order and injured Plaintiffs; a finding of civil contempt is therefore necessary. Simply put, this Court ordered the CIA to identify or produce records responsive to Plaintiffs' FOIA request. *See ACLU I*, 339 F. Supp. 2d at 505. The videotapes were plainly responsive to Plaintiffs' request for records depicting the treatment of detainees apprehended after September 11, 2001 and held in U.S. custody abroad, and were thus plainly governed by the terms of the order. This Court also explicitly clarified that operational records gathered or produced pursuant to an OIG investigation were included as part of its earlier order. *See ACLU II*, 351 F. Supp. 2d at 272-73; Ex. 26 (Apr. 18, 2005 Order). Because the tapes had been gathered or produced pursuant to Helgerson's OIG investigation, there is no question but that the September 15, 2004 order applied to the tapes. *See* CIA OIG 36. Yet the CIA not only failed to identify or produce these videotapes, it destroyed them. This Court's order was clear and the CIA's non-compliance is manifest; indeed, there is no evidence whatsoever of any attempt by the CIA to reasonably comply with the obligations imposed upon it by the Court.[22] In fact, far from a minor oversight involving a few stray records, the CIA hid and destroyed at least 92 tapes containing hundreds of hours of material, tapes that had been a matter of discussion at

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[22] The CIA has previously argued that this Court's orders did not apply to the interrogation videotapes because they were never produced to or collected by the Office of Inspector General as part of an investigation. (*See* CIA Mem. in Opp. to Mot. For Contempt and Sanctions (Jan. 10, 2008) (Doc. No. 269).) As explained in further detail in Plaintiffs' prior briefing, this argument is flatly belied by the record. (*See* Pls.' Reply in Support of Mot. for Contempt and Sanctions (Jan. 14, 2008) (Doc. No. 272); Pls.' Supplement to their Reply (Jan. 15, 2008) (Doc. No. 274).) Indeed, the CIA has previously acknowledged that OIG viewed the tapes as part of an "investigation" under 50 U.S.C. § 431(c)(3), and that the team that viewed the tapes included the Assistant Inspector General for Investigations and a senior Investigations Staff manager. *See* Pls.' Supplement to their Reply 2 (Jan. 15, 2008) (Doc. No. 274). As this Court ruled in its February 2, 2005 order, the CIA was required to "search for, and either release or claim exemption against release of, the records responsive to plaintiffs' FOIA requests that have been produced or gathered pursuant to [an OIG] investigation." *ACLU II*, 351 F. Supp. 2d at 268.

high levels of the agency, including the General Counsel's office that processed Plaintiffs' FOIA request. These indisputable facts, on their face, are sufficient to find the CIA in civil contempt.

The record is also clear that Plaintiffs have been injured by the CIA's contumacious conduct. By destroying the videotapes, the CIA irrevocably decided that Plaintiffs should be denied access to records that they requested under FOIA, forever denying them records that they assert they had a right to obtain and circumventing their ability to obtain judicial review of any FOIA exemptions claimed by the government. Nor can Plaintiffs be sure that any "reconstruction" of the content of the tapes by the CIA will provide a complete and accurate account of the interrogations. The videotapes were the best evidence of what transpired during the 2002 interrogations, and this evidence is permanently lost.

As the district court in *Landmark* recognized, destroying records in a FOIA suit is "not merely incidental litigation conduct, but goes to the heart of the case." 272 F. Supp. 2d at 87. It is "conduct . . . directly related to the subject matter of this FOIA litigation—[Plaintiffs] sought information, and [the agency] destroyed it." *Id.* Moreover, the harm inherent in destroying the very records sought by the litigation is heightened where, as here, the materials at issue have such clear public import. *See NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978) ("The basic purpose of FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and hold the governors accountable to the governed."). Finally, in addition to losing the ability to litigate their FOIA claims, Plaintiffs have also expended significant resources seeking to obtain responsive documents from the CIA and pursuing information about the tapes' destruction, information which, to date, they have still not fully obtained. Under these circumstances, the CIA should be held in contempt and should be required to provide all information regarding the circumstances of its actions in destroying the

tapes and to make Plaintiffs whole by remunerating them for the financial costs resulting from the CIA's contempt.

Moreover, the circumstances surrounding the destruction of the tapes make it particularly appropriate to hold the CIA in civil contempt, because "[t]he federal government here did not just stub its toe." *Cobell*, 37 F. Supp. 2d at 38 (holding cabinet secretaries and assistant secretary in civil contempt). Even the limited documents that the CIA has elected to disclose to Plaintiffs, in redacted form, viewed in the context of the public record, make clear that the decision to destroy the interrogation videotapes was made by high-level policymakers within the agency, after thought, consultation at all levels of the agency and beyond, and discussions with legal counsel and others over the course of three years. Moreover, the documents, incomplete and redacted though they are, also reveal that these actions were motivated by the purpose of protecting the CIA from public scrutiny and embarrassment. In sum, there can be no question but that the destruction of the tapes is attributable to the CIA as a whole, and the agency should be held accountable.

Specifically, the record is clear that, as set forth in further detail above, the order to destroy the tapes was made by a high-level official, Jose Rodriguez, who was then known as the Deputy Director of Operations, or "DDO." *See, e.g.*, Ex. 42 (Cable, Nov. 8, 2005) (stating that "DDO approves . . . request to destroy [redacted] video tapes as proposed . . . for the reasons . . . there is no legal or OIG requirement to continue to retain the tapes[.]"); Ex. 31 (Timeline Regarding Destruction of Abu Zubaydah Videotapes) (stating that "DDO releases cable authorizing the destruction of tapes"); Ex. 46 (Email, Nov. 10, 2005) (discussing "Jose's 'decision'"); *see also* Mark Mazzetti and Scott Shane, *Jose Rodriguez, Center of Tapes Inquiry, Was Protective of His CIA Subordinates*, N.Y. Times, Feb. 20, 2008 (identifying Rodriguez as

the person who ordered the destruction of the tapes), *available at* http://nyti.ms/hoSj1V, attached hereto as Ex. 52. Moreover, Rodriguez took this action specifically in order to prevent the disclosure of evidence that "would make us look terrible" and be "devastating" to the CIA; he weighed the "the heat from destroying [the tapes]" and concluded that it "is nothing compared to what it would be if the tapes ever got into the public domain." Ex. 45 (Email, Nov. 10, 2005) (email describing conversation with Rodriguez). Indeed, the order to destroy the tapes' destruction occurred one week after the Washington Post published a front-page report that exposed a network of secret CIA prisons, the day before the New York Times published a story describing Helgerson's IG report, and after a year of growing scrutiny of the CIA's interrogation program. *See supra* Background Part. II.D. As Robert Richer, Rodriguez's former deputy until late 2005, told the New York Times, with respect to the videotapes, Rodriguez "would always say, 'I'm not going to let my people get nailed for something they were ordered to do.'"[23] *See* Ex. 52.

Nor did Rodriguez act alone. At least one other CIA official, who "figured prominently in the tapes" and was "in charge of [redacted] at the time and clearly would want the tapes destroyed" participated in the destruction of the tapes, drafting the cable that Rodriguez released and possibly lying to Rodriguez "about 'clearing with [redacted] and IG." *See* Ex. 46 (Email, Nov. 10, 2005). Porter Goss, then-director of the CIA, ratified the destruction, stating that he "agreed with the decision." *See* Ex. 45 (Email, Nov. 10, 2005). Numerous other officials and departments within the CIA also participated in the decision to destroy the tapes, including the

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[23] In fact, CIA Inspector General Helgerson concluded that far from following orders, the CIA relied upon "[u]nauthorized, improvised, inhumane, and undocumented detention and interrogation techniques." CIA OIG 102. The fact that the interrogations used unauthorized techniques provided the motive for Rodriguez—who headed the Counterterrorism Center at the time the 2002 interrogations took place—to destroy the tapes.

CIA's Office of General Counsel and its Counterterrorism Center. *See, e.g.*, Ex. 31 (Timeline Regarding Destruction of Abu Zubaydah Videotapes) ("CTC [Counterterrorism Center] [redacted] drafts language to be included in a cable from [redacted] requesting DDO approval to destroy the tapes. [redacted] CTC [redacted] sends the language to [redacted] and the ODDO front office, as well as OGC [Office of General Counsel] for approval. The plan was for [redacted] to cut and paste the text into a cable and send it to HQs for approval.").

As a party to this litigation, the CIA is deemed to be aware of this Court's September 15, 2004, February 2, 2005, and April 18, 2005 Orders, which were violated by the destruction of the videotapes. That the agency did not just "stub its toe" is evident from the record, however, which establishes not only that the decision to destroy the tapes came after years of deliberation but also that the Office of General Counsel, which was intimately involved in this litigation and in responding to Plaintiffs' FOIA requests, participated in conversations about whether the tapes should be destroyed. *See* Ex. 31 (Timeline Regarding Destruction of Abu Zubaydah Videotapes); Ex. 17 at 4 (OCG memo finding "nothing remarkable" after review of the tapes); Ex. 27 (Letter from John L. McPherson to Jennifer Ching, Apr. 15, 2005) (describing Office of General Counsel processing of FOIA request); Ex. 28 (Letter from Jennifer G. Loy to Megan Lewis, July 15, 2005) (same). In sum, the CIA bears responsibility for its actions in destroying materials as to which this Court had specifically required disclosure, and should be held in civil contempt.[24]

[24] In the alternative, and at the very least, this Court should review the paragraph 4 documents that the CIA has withheld or redacted (including those for the time period for which records have not yet been provided), to ascertain whether the CIA should be held in contempt. Plaintiffs' counsel with the appropriate security clearance should be given the opportunity to be present during this review to assure that an appropriate adversarial process is brought to bear with respect to this review.

### B. A finding of civil contempt is important not only to provide a basis for civil sanctions but to allow this Court to express official disapproval of the CIA's conduct.

Plaintiffs request appropriate relief for the CIA's destruction of the videotapes, including a finding of civil contempt, an award of attorney's fees, and the identification or production of paragraph 4 documents from the period July 1, 2003 through May 31, 2005, such that, at long last, there will be a full record of what transpired. A civil contempt finding is essential to Plaintiffs' remedy, providing both a basis for civil sanctions, *see, e.g.*, *Landmark*, 272 F. Supp. 2d at 87 (finding the EPA in civil contempt and requiring the agency to pay all attorney's fees and costs arising from the EPA's contumacious conduct), and a means for this Court to express official disapproval of the CIA's egregious conduct in this case.

During the January 14, 2011 hearing in this case, the CIA suggested that it might be amenable to paying attorney's fees in final resolution of this matter. Tr. 8-9. The Court stated that it might require the Investigations Department of the CIA to investigate the destruction of the tapes and provide a report to the Court. Tr. 6-7. Each of these measures could appropriately form a part of a remedy that the Court might impose pursuant to its contempt power. They are not, however, sufficient under the circumstances of this case, where the CIA willfully violated this Court's orders as a result of the decisions of high-level policymakers, who sought to avoid public scrutiny of interrogation practices that they knew would be embarrassing and feared would be found unlawful. A finding of civil contempt is necessary so that this Court may officially acknowledge and express disapproval of the CIA's conduct in unjustifably ignoring a judicial decree, effectively placing itself above the law in just the manner that the Court sought, at the outset of this litigation, to forbid. *See ACLU I*, 339 F. Supp. 2d at 502. Such a judicial statement is an essential element of the remedy that Plaintiffs request and that the circumstances of the case, set forth at length above, demand.

This is an appropriate use of the civil contempt power. Although civil contempt is not a punitive measure, the Court can and should use its civil contempt power to "identify wrongdoing and to prevent the recurrence of contumacious behavior in the future." *See Landmark*, 272 F. Supp. 2d at 79. This is particularly important in the FOIA context, where agencies like the CIA are "repeat players." *Id.*; *see also Morley v. CIA*, 508 F.3d 1108 (D.C. Cir. 2007) (FOIA request for CIA documents); *Amnesty Int'l USA v. CIA*, 07-cv-5435, 2010 U.S. Dist. LEXIS 137165 (S.D.N.Y. Dec. 21, 2010) (same); *James Madison Project v. CIA*¸ No. 08-cv-1323, 2009 U.S. Dist. LEXIS 78671 (E.D. Va. Aug. 31, 2009) (same).

Thus, courts in this district and elsewhere have recognized the importance of a civil contempt finding, on its own, as a means of officially acknowledging the violation of a court order and preventing future violations. For example, in *Shady Records, Inc. v. Source Enters.*, 351 F. Supp. 2d 64 (S.D.N.Y. 2004) (Lynch, J.), the court found the defendant in civil contempt for violating a temporary restraining order in a copyright infringement case, but declined to impose coercive or compensatory sanctions outside of an order that the defendant pay the fees associated with preparing and prosecuting the civil contempt motion itself. The court explained that "there is no need for a coercive order, as the parties agree that Source is now in compliance with the Court's order . . . . Nor does Shady claim that it suffered damages . . . or that Source derived any profits from the alleged violation." *Id.* at 66-67. Nevertheless, "the defendants' behavior was genuinely, if not willfully, worthy of a contempt sanction," and the Court therefore held the defendants in civil contempt. *Id.* at 67. Likewise, courts can and do find parties in civil contempt even when there is no dispute as to the applicability of coercive and remedial measures. For example, in *Cobell*, 37 F. Supp. 2d 6, the defendant cabinet secretaries and assistant secretary agreed to coercive and remedial measures imposed by the court for their

failure to abide by its orders, including reasonable expenses and attorney's fees. "[T]he only disputed item of relief sought [was] a finding of civil contempt." *Id.* at 36-37. The district court concluded that "the court is left with no other viable option aside from a contempt finding," because of "the disparity between what was required by the court's orders . . . and what has actually been done," and "the defendants' reckless disregard for this court's orders and their attorneys' mismanagement of this case." *Id.* at 38. The court explained that only a contempt finding would "hold government officials responsible for their conduct when they infringe on the legitimate rights of others," observing that the officials' behavior was "egregious." *Id.* at 14, 36.

As in *Cobell*, a contempt finding is the only "viable option" in this case. The CIA's failure to abide by court order was not a minor oversight or an innocent mistake. The tapes' destruction went to the very heart of Plaintiffs' suit, and it was undertaken by high-level officials who destroyed the tapes to escape public scrutiny—an action directly at odds with the values underlying FOIA and with the responsibility of the Executive Branch of our government to obey court orders, like any other litigant. *See supra* Argument Part I.A. Indeed, the contempt finding that Plaintiffs request is necessary not only to vindicate the purposes of the Freedom of Information Act, as they are applied to this significant litigation, but also to vindicate our system of government itself, in which the Executive Branch may not simply disregard the requirements imposed by a co-equal branch, as the CIA did here. *See Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 443 (1911) (noting that imposing remedial sanctions pursuant to a court's civil contempt authority serves to "vindicate[e] . . . the court's authority," though that is not its primary purpose). The Court simply must, on behalf of itself, on behalf of the judicial branch as a whole, and on behalf of all Americans and the American system of government, express disapproval of the CIA's conduct by exercising its lawful authority to find it in civil contempt.

## II. THIS COURT SHOULD FIND RODRIGUEZ AND OTHER CIA OFFICIALS WHO KNOWINGLY VIOLATED ITS ORDERS IN CIVIL CONTEMPT

Just as this Court should find the CIA in civil contempt, so should it hold those individual CIA officials who knowingly violated its orders accountable for their conduct. As the court held in *Cobell* in finding two cabinet secretaries and an assistant secretary in civil contempt:

> [C]ourts have a duty to hold government officials responsible for their conduct when they infringe on the legitimate rights of others. These officials are responsible for seeing that the laws of the United States are faithfully executed. In this case, the laws—the orders of this court—were either ignored or thwarted at every turn by these officials and their subordinates. The court must hold such government officials accountable; otherwise, our citizens—as litigants—are reduced to mere supplicants of the government, taking whatever is dished out to them. That is not our system of government, as established by the Constitution. We have a government of law, and government officials must be held accountable under the law.

*Cobell*, 37 F. Supp. 2d at 14.

In this case, the circumstances set forth in detail above, including the paragraph 4 documents released to Plaintiffs and other information in the public record, make clear that at the very least, Jose Rodriguez, the CIA Deputy Director of Operations, was responsible for the destruction of the tapes and thus should be held in contempt of this Court's orders. The record further suggests that other officials may likewise have been involved in the decision to destroy the tapes. This Court should therefore issue an order to show cause why Rodriguez and other responsible individuals should not be held in contempt. Following appropriate notice and an opportunity to be heard, *see Int'l Union v. Bagwell*, 512 U.S. 821, 827 (1994), this Court should hold Rodriguez in civil contempt and should review the paragraph 4 documents that have been withheld by the CIA (including those for the time period for which records have not yet been

provided), to determine if they establish that other individuals should likewise be held responsible for the CIA's actions.[25]

That Mr. Rodriguez and other CIA officials are not parties to this action does not insulate them from being held in contempt, so long as they had notice of the orders at issue. *See Stotler & Co. v. Able*, 870 F.2d 1158, 1164 (7th Cir. 1989) ("[O]rdinarily a court may find a nonparty in contempt if that person has 'actual knowledge' of the court order and either abets the [party named in the court order] or is legally identified with him." (internal quotation marks omitted)); *Backo v. Local 281, United Bhd. of Carpenters & Joiners*, 438 F.2d 176, 180-81 (2d Cir. 1970) (agents of defendant who were on notice as to the contents of an order can be held in contempt); *see also Wilson v. United States*, 221 U.S. 361, 376 (1911) ("A command to the corporation is in effect a command to those who are officially responsible for the conduct of its affairs. If they, apprised of the [order] directed to the corporation, . . . fail to take appropriate action . . . they, no less than the corporation itself, are guilty of disobedience and may be punished for contempt."). Moreover, an official's notice of an order "can be proven by circumstantial evidence." *Landmark*, 272 F. Supp. 2d at 82; *see also NOW*, 747 F. Supp. at 775 (imputing knowledge of a preliminary injunction on non-parties who were national leaders of party Operation Rescue).

With respect to Mr. Rodriguez, the record establishes, beyond any doubt, that he issued the order to destroy the videotapes. Moreover, there is also little question but that Rodriguez was aware of this Court's order and, accordingly, that he was prohibited from taking such actions. He ordered the videotapes destroyed only after consultations with the CIA General Counsel's Office, which was well aware of this lawsuit and the Court's Orders, as a result of having

[25] Because it appears that there are no material facts in dispute, no hearing is necessary with respect to Rodriguez. *See Flaherty v. Filardi*, No. 03-cv-2167, 2009 U.S. Dist. LEXIS 104773, at *12 (S.D.N.Y. Nov. 10, 2009).

participated in the litigation, including responding to Plaintiffs' requests. *See supra* Argument Part I.A. Indeed, Rodriguez's order to destroy the tapes itself indicates that he sought legal counsel before so acting. *See* Ex. 42 (Cable, Nov. 8, 2005) (stating there is "no legal . . . requirement to continue to retain the tapes"). Finally, the record indicates that far from an innocent mistake, Rodriguez ordered the tapes destroyed to cover up evidence that "would make us look terrible" and be "devastating" to the CIA. Indeed, Rodriguez weighed the "heat" that would come from destroying the documents and concluded that it "is nothing compared to what it would be if the tapes ever go into public domain." *See* Ex. 45 (Email, Nov. 10, 2005). Under these circumstances, Rodriguez's conduct more than suffices to support finding him in civil contempt and imposing sanctions, following the appropriate notice and an opportunity to be heard.[26]

The records released to Plaintiffs also suggest that other CIA officials may have been in contempt of this Court's orders as well. *See, e.g.*, Ex. 46 (Email, Nov. 10, 2005) ("Cable was apparently drafted by [redacted] and released by Jose . . . ."). Although the current public record may not be sufficient to find any other individuals in contempt, at the very least, it provides grounds for concern that some or all of the following officials ought also to be held responsible: John Rizzo, who was Acting General Counsel of the CIA at the time the tapes were destroyed, the individual OGC attorney or attorneys who authorized the destruction of the tapes, and the individual who drafted the cable to destroy the tapes. *See* Ex. 31 (Timeline Regarding Destruction of Abu Zubaydah Videotapes); Ex. 45 (Email, Nov. 10, 2005); Ex. 46 (Email, Nov.

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[26] In the alternative, at the very least this Court should review the paragraph 4 documents that the CIA has withheld or redacted (including those for the time period for which records have not yet been provided), in a sealed proceeding with the participation of Plaintiffs' counsel with appropriate security clearance, to determine if the withheld records establish that Rodriguez was in contempt of this Court's order.

10, 2005). Review of redacted records may also demonstrate that additional individuals should be held in contempt as well. This court should hold proceedings to ascertain their responsibility, including allowing Plaintiffs to undertake such additional discovery as may be necessary for that purpose. In the alternative, this Court should conduct such other review as is necessary to resolve this issue, including but not limited to a review of the paragraph 4 documents (including those for the time period for which records have not yet been provided), with the participation of Plaintiffs' counsel with appropriate security clearance. If this Court concludes that the record establishes that any other CIA officials knowingly violated this Court's orders, they too should be held in contempt of court.

## CONCLUSION

The CIA and its officers have violated this Court's orders and circumvented their obligations under FOIA. For these reasons, Plaintiffs respectfully request that this Court:

(1) hold Defendant CIA in civil contempt;

(2) require former CIA official Jose Rodriguez to show cause why he should not be held in civil contempt;

(3) allow limited discovery and review all withheld and partially-withheld paragraph 4 documents in a sealed proceeding, with the participation of Plaintiffs' counsel with appropriate security clearance, to determine if any other CIA officials should be held in civil contempt after notice and an opportunity to be heard;

(4) order Defendant CIA to identify or release paragraph 4 documents for the time period July 1, 2003 through May 31, 2005, a time period that this Court has never ordered the CIA to review, so that Plaintiffs can have a complete record of the persons and reasons behind the destruction of the tapes;

(5) order Defendant CIA and/or Jose Rodriguez and other responsible CIA officials to pay all attorneys' fees and costs associated with Plaintiffs' efforts to obtain responsive records from the CIA in this litigation, including efforts made in connection with this Motion, and including all efforts to reconstruct the contents of the destroyed tapes and to determine the persons and reasons behind the destruction of the tapes; and

(6) order such other relief as may be just and proper.

Respectfully submitted,

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