



April 10, 2009

Via Facsimile and Fedex  
The Hon. Alvin K. Hellerstein  
Daniel Patrick Moynihan  
United States Courthouse  
500 Pearl St., Room 1050  
New York, NY 10007

AMERICAN CIVIL LIBERTIES  
UNION FOUNDATION  
IMMIGRANTS'  
RIGHTS PROJECT

Re: Am. Civil Liberties Union v. Dep't of Defense, 04-CV-4151

PLEASE RESPOND TO:  
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OFFICERS AND DIRECTORS  
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ANTHONY D. ROMERO  
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RICHARD ZACKS  
TREASURER

Dear Judge Hellerstein,

Plaintiffs write in response to the CIA's April 9, 2009 proposed work plan for production of "certain material" relating to the destroyed videotapes. It bears emphasis that this material is being discussed in the context of a contempt motion, made necessary by the CIA's destruction of original responsive videotapes, the contents of which the public will never fully know. Accordingly, the work plan adopted by this Court should apply the strongest possible presumption in favor of disclosure, not only to ensure that the substituted records provide as much information as possible to reconstruct the contents of the videotapes, but also to help resolve the fundamental question of culpability that this Court has viewed as being germane to adjudication of the contempt motion. *See Order Regulating Proceedings, Aug. 20, 2008 (ACLU v. Dep't of Def., 04-cv-4151, Doc. No. 305)* (deferring a finding of contempt in the absence at that time of "clear and convincing evidence" of noncompliance by the CIA and suggesting that an "innocent destruction" of the videotapes would be insufficient for a finding of contempt).

For reasons set forth below, the CIA's work plan is wholly unsatisfactory. To assist the Court in expeditiously resolving Plaintiffs' contempt motion, which has now been pending for approximately a year and a half, Plaintiffs set forth below a list of specific proposals for remedying the work plan's inadequacies. Plaintiffs also request that the Court schedule, at its earliest convenience, a status conference to address Plaintiffs' proposals, and that the Government's work plan and this letter be docketed as part of the record of this case.

1. The work plan should clearly address all 3,000 summaries, transcripts, reconstructions and memoranda relating to the destroyed videotapes as well as the lists that this Court has previously ordered the Government to produce.

The work plan does not adequately identify the documents to which it relates. It merely states that it relates to the “production of certain material relating to the destroyed videotapes.” See Letter from Lev L. Dassin to Hon. Alvin K. Hellerstein, April 9, 2009. Plaintiffs do not object to the Government’s proposal to exclude from its “*Vaughn*-like” declarations those “documents that do not describe interrogations but contain the raw intelligence that was collected from the interrogations, and derivative documents that merely summarize information contained within interrogations records.” See *id.* But Plaintiffs do request that the work plan encompass a schedule for all of the 3,000 summaries, transcripts, reconstructions and memoranda relating to the destroyed videotapes that fall outside the aforementioned category of raw intelligence material.<sup>1</sup> The work plan should also address the lists of destroyed records and witnesses that this Court previously ordered the Government to produce to Plaintiffs. See Order Regulating Proceedings, Aug. 20, 2008 (*ACLU v. Dep’t of Def.*, 04-cv-4151, Doc. No. 305). On March 6, 2009, the Government produced the list of destroyed records to Plaintiffs in heavily redacted form, and withheld in full the list of witnesses who may have viewed the videotapes or retained custody of them before their destruction. See Letter from Lev Dassin to Hon. Alvin K. Hellerstein, Mar. 6, 2009 (*ACLU v. Dept’ of Def.* 04-Cv-4151, Doc. No 331 at 9-10, 12-20).

2. The work plan should address the production of non-contemporaneous records relating the contents of the videotapes, as well as the production of records relating to months other than August 2002, not only for Abu Zubaydah, but also for the second prisoner depicted on the videotapes, who is reported to be al-Nashiri. The Government’s work plan is inadequate insofar as it proposes that its *Vaughn* declarations will address only “contemporaneous records that describe the interrogations at issue . . . for the month of August 2002.” First, Plaintiffs are entitled to all records that describe the interrogations depicted on the videotapes, even if those records were not created at the same time as the videotapes. Indeed, this Court did

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<sup>1</sup> The existence of these 3,000 documents was acknowledged by the Government on March 20, 2009. See Letter from Lev Dassin to Hon. Alvin K. Hellerstein, Mar. 20, 2009.

not confine its order requiring the Government to produce a list of summaries, transcripts, reconstructions and memoranda relating to the destroyed videotapes to records that were created at the same time as those tapes were created. *See* Order Regulating Proceedings, Aug. 20, 2008 (*ACLU v. Dep't of Def.*, 04-cv-4151, Doc. No. 305). The work plan is therefore deficient in not identifying a schedule for the production of non-contemporaneous records.

Second, Plaintiffs are entitled to records relating to months other than August 2002. But the work plan makes no mention of the production of records relating to interrogations conducted in other months, even though the Government itself has acknowledged that “the destroyed tapes were made between April and December 2002.” Notably, there is significant public interest in the disclosure of materials relating to months before and after August 2002. According to a recent report of the Justice Department’s Office of Inspector General, an FBI Special Agent who traveled to an undisclosed CIA location in April 2002 to interview Abu Zubaydah and left some time before the end of June 2002, the CIA subjected Abu Zubaydah to “borderline torture.” *See A Review of the FBI’s Involvement in and Observations of Detainee Interrogations in Guantanamo Bay, Afghanistan, and Iraq*, U.S. Department of Justice, Office of the Inspector General (May 2008) at 322-23, *available at* [www.usdoj.gov/oig/special/s0805/final.pdf](http://www.usdoj.gov/oig/special/s0805/final.pdf). In addition, materials relating to months before August 2002 are of particular interest because the Office of Legal Counsel’s written authorization for specific CIA interrogation techniques was issued in a memorandum dated August 1, 2002. A heavily redacted version of that memorandum, referred to as “Item 29” in the context of this litigation, was previously released to Plaintiffs. *See* Memorandum for [REDACTED] from Assistant Attorney General Jay S. Bybee, August 1, 2002, *available at* [http://www.aclu.org/pdfs/safefree/cia\\_3686\\_001.pdf](http://www.aclu.org/pdfs/safefree/cia_3686_001.pdf). Accordingly, records relating to interrogation methods used prior to August 1, 2002 are relevant for assessing the Government’s motivations for destroying the tapes, an issue that this Court has suggested is germane to the adjudication of Plaintiffs’ contempt motion. *See* Order Regulating Proceedings, Aug. 20, 2008 (*ACLU v. Dep't of Def.*, 04-cv-4151, Doc. No. 305) (suggesting that an “innocent destruction” of the videotapes would be insufficient for a finding of contempt).

Third, Plaintiffs are entitled to records relating not only to Abu Zubaydah, but also to the second prisoner depicted on the destroyed videotapes. But the work plan fails to address records relating to the videotapes of the second prisoner, even though the Government has itself acknowledged in this litigation that the tapes depict the interrogations of two prisoners. *See* Inventory of Videotapes, attached to Letter from Lev Dassin to Hon. Alvin K. Hellerstein, Mar. 6, 2009 (*ACLU v. Dept' of Def.* 04-Cv-4151, Doc. No 331 at 15, 20 (referencing “Abu. Z” in list of 90 tapes relating to “Detainee # 1” and separately listing two destroyed tapes relating to “Detainee # 2”). This second prisoner is reported to be Abd al-Rahim al-Nashiri. *See* Scott Shane, Judge Demands a Report on Destroyed C.I.A. Tapes, N.Y. Times, Jan. 25, 2008 (stating that destroyed tapes showed harsh interrogation of Abu Zubaydah and Abd al-Rahim al-Nashiri).

3. The work plan should address records relating to the destruction of the videotapes.

While the Government proposes to process records that describe interrogations, its work plan does not address records relating to the *destruction* of the videotapes. Plaintiffs are entitled to the disclosure of these records, especially in light of this Court’s previous decision to defer a finding of contempt on the grounds that the facts before it were insufficient at that time. *See* Order Regulating Proceedings, Aug. 20, 2008 (*ACLU v. Dep’t of Def.*, 04-cv-4151, Doc. No. 305) (deferring a finding of contempt in the absence at that time of “clear and convincing evidence” of noncompliance by the CIA and suggesting that an “innocent destruction” of the videotapes would be insufficient for a finding of contempt). Records relating to how, when, why, and on whose authority the videotapes were destroyed are germane to Plaintiffs’ contempt motion as well as to the relief sought therein. *See* Pls.’ Mot. for Contempt and Sanctions, Dec. 12, 2007, at 2.

4. The work plan should adopt an expedited schedule for production for all of the aforementioned records.

Plaintiffs’ contempt motion has now been pending for about a year and a half, since December 12, 2007. This delay has been caused by the Government’s claim that adjudication of the contempt motion would interfere with John Durham’s criminal investigation into the destruction of the videotapes. But, as this Court has previously noted, the Durham investigation has been pending since January 2, 2008. *See* Order Regulating Proceedings, Aug. 20, 2008 (*ACLU v.*

*Dep't of Def.*, 04-cv-4151, Doc. No. 305). Moreover, in his third declaration filed before this court in support of the CIA's application for continuation of a stay, John Durham stated that "we anticipate that by mid-February, 2009, and no later than February 28, 2009, we will have completed [witness] interviews." See Decl. of John H. Durham ¶ 9, Dec. 22, 2008. It appears, therefore, that the Durham investigation is drawing to a close and cannot be invoked as a ground for further delay.

The issues raised by Plaintiffs' contempt motion are central not only to the integrity of the Freedom of Information Act but also to the Government's obligation to abide by the rule of law. In light of the gravity of the issues at stake, Plaintiffs respectfully submit that this Court set an expedited schedule for production of *Vaughn* declarations and associated documents and require the Government to meet the deadlines set forth below:

April 27, 2009: *Vaughn* declarations/production for records relating to the interrogations of Abu Zubaydah and Al-Nashiri during April-July 2002.

May 4, 2009: *Vaughn* declarations/production for records relating to interrogations of Abu Zubaydah and Al-Nashiri during August-December 2002.

May 11, 2009: *Vaughn* declarations/production for remainder of all records, including records relating to destruction of the videotapes. If at the conclusion of this process Plaintiffs believe that discovery is necessary, they will raise the issue at that time.

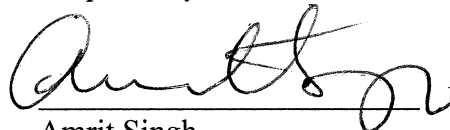
Plaintiffs also ask that the Court set an expedited schedule for the adjudication of disputes relating to withholdings (including redactions) including the following briefing deadlines with argument as soon as possible thereafter:

May 18, 2009: Plaintiffs' brief.

May 25, 2009: Government's brief.

June 1, 2009: Plaintiffs' reply brief.

Respectfully submitted,



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