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) ***Document Electronically Filed*** **NOTICE OF MOTION**

PLEASE TAKE NOTICE that, on the accompanying Memorandum of Law, and all other pleadings and proceedings herein, Plaintiffs American Civil Liberties Union ("ACLU"), Center for Constitutional Rights ("CCR"), Physicians for Human Rights ("PHR"), Veterans for Common Sense ("VCS") and Veterans for Peace ("VP") will move before The Honorable Alvin K. Hellerstein, U.S. District Judge, at the United States District Court for the Southern District of New York, located at 500 Pearl Street, New York, New York, on a date and time to be set by the Court, for the entry of an Order granting partial relief from order granting partial summary judgment to Defendant Central Intelligence Agency ("CIA") with respect to Items 29 and 61 on the Plaintiffs' August 16, 2004 List and order Defendant CIA to release specified documents pursuant to the Freedom of Information Act, 5 U.S.C. § 552 et seq., as described in the accompanying Memorandum of Law, or prove that the same are exempt from production.

.

Respectfully submitted,

Dated: December 9, 2005

_____/s/_____

Lawrence S. Lustberg (LL-1644)
Megan Lewis (ML-3429)
GIBBONS, DEL DEO, DOLAN
GRIFFINGER & VECCHIONE, P.C.
One Riverfront Plaza
Newark, New Jersey 07102
llustberg@gibbonslaw.com
phone: (973) 596-4700
facsimile: (973) 596 0545

Jameel Jaffer (JJ-4653)
Amrit Singh (AS-9916)
Judy Rabinovitz (JR-1214)
Omar C. Jadwat (OJ-5792)
AMERICAN CIVIL LIBERTIES
UNION FOUNDATION
125 Broad St.
New York, New York 10004

Barbara Olshansky (BO-3635)
Michael Ratner (MR-3347)
CENTER FOR CONSTITUTIONAL RIGHTS
666 Broadway, 7th Floor
New York, New York 10012

Beth Haroules (BH-5797)
Arthur Eisenberg (AE-2012)
NEW YORK CIVIL LIBERTIES
UNION FOUNDATION
125 Broad Street
New York, NY 10004

Attorneys for Plaintiffs

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) ***Document Electronically Filed***

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR PARTIAL RELIEF FROM ORDER GRANTING PARTIAL SUMMARY JUDGMENT TO DEFENDANT CENTRAL INTELLIGENCE AGENCY

PRELIMINARY STATEMENT

Plaintiffs respectfully submit this memorandum of law in support of their motion for partial relief from the Court's Opinion and Order Granting in Part and Denying in Part Motions for Partial Summary Judgment, dated September 29, 2005 (the "September 2005 Order"). Pursuant to Federal Rule of Civil Procedure 60(b)(2) and (b)(6), Plaintiffs seek partial relief from that portion of the order which grants partial summary judgment to the Central Intelligence Agency ("CIA") with regard to the agency's Glomar response to Plaintiffs' Freedom of Information Act ("FOIA") request for Items 29 and 61 on the August 16, 2004 List. Item 29 is a "DOJ memorandum specifying interrogation methods that the CIA may use against top Al-Qaeda members," and Item 61 a "directive signed by President Bush granting the CIA the authority to set up detention facilities outside the United States and/or outlining interrogation methods that may be used against Detainees." See August 16, 2004 List (Exhibit A to Memorandum of Law in Support of Plaintiffs' Motion for Partial Summary Judgment).[1] Newly discovered evidence -- in the form of repeated public statements by the Director of Central Intelligence ("DCI") acknowledging the CIA's role in detainee interrogation and characterizing the nature of said interrogation -- significantly undermines the CIA's sworn declarations on which this Court relied in granting the agency summary judgment with respect to Items 1 and 29.

The Court granted Defendant CIA's motion for summary judgment with respect to Items 29 and 61 on the basis of the CIA's declaration that it "should not be required officially to

[1] Defendant CIA also refused to confirm or deny the existence of Item 1, which sought a "[m]emorandum from the DOJ to CIA interpreting the Convention Against Torture." See August 16, 2004 List. However, this Court held that the Glomar response to this request was not justified as "acknowledging whether or not the memorandum requested by plaintiffs exists reveals nothing about the agency's practices or concerns or its 'intelligence sources or methods.'" See September 2005 Order, at 28. This Court ordered the government to "produce the documents relating to Item 1, or prove that the same are exempt from production." See id. On October 17, 2005, Defendant CIA moved for partial reconsideration of that portion of the Court's ruling granting summary judgment to Plaintiffs with respect to Item 1. This Court denied that motion on November 2, 2005. See Order Denying Motion for Partial Reconsideration, dated November 2, 2005.

acknowledge the precise 'intelligence activities' or 'methods' it employs or considers--for example, whether it has any role whatsoever in the interrogation of detainees." See September 2005 Order, at 26 (emphasis added). Indeed, the CIA's declarations repeatedly invoke this precise argument -- that acknowledging an interest or role in detainee interrogation would compromise national security -- as the basis for its Glomar response. Yet, this key assertion, that acknowledging whether or not the CIA plays a role in detainee interrogation would undermine our national security, is belied by significant, newly available contrary evidence. On or about November 21, 2005 and on or about November 29, 2005, Porter J. Goss, the Director of Central Intelligence ("DCI"), publicly acknowledged that the CIA does indeed participate in the interrogation of detainees, and expressly characterized the nature of the CIA's interrogation techniques. Moreover, the documents at issue in this motion remain the subject of unprecedented public and legislative debate concerning the extent to which the CIA should be exempt from laws prohibiting torture and cruel, inhuman and degrading treatment. See, e.g., Glenn Kessler, Rice Attempts to Clarify Prisoner Policy, Washington Post, December 8, 2005; Eric Schmitt, Senate Votes Again For Ban on Abusing Prisoners, N.Y. Times, November 4, 2005 (describing measure attached to military spending bill proposed by Senator John McCain banning torture or mistreatment of prisoners in United States custody and executive efforts to amend the measure to exclude the CIA).

As such and when considered in conjunction with other public statements issued by the agency, this "newly discovered evidence" calls into question the agency's sworn declaration which avers that acknowledging that the CIA participates in the interrogation of detainees would compromise national security. Thus, this Court should grant Plaintiffs' motion for partial relief from the September 2005 Order and order Defendant CIA to produce the documents relating to Items 29 and 61, if indeed such documents exist, or prove that they are exempt from production.

ARGUMENT

IN LIGHT OF RECENT EVIDENCE WHICH BELIES DEFENDANT CIA'S SWORN STATEMENTS JUSTIFYING ITS INVOCATION OF THE GLOMAR RESPONSE, PLAINTIFFS ARE ENTITLED TO PARTIAL RELIEF FROM THE SEPTEMBER 2005 ORDER.

Rule 60(b) provides that a court may relieve a party from an order on the basis of "newly discovered evidence," which by due diligence could not have been discovered earlier, if the motion is made "not more than one year after the [order] was entered." Fed. R. Civ. P. 60(b)(2).[2] The rules also provides that a party may seek relief from an order for "any other reason justifying relief from the operation of judgment." Fed. R. Civ. P. 60(b)(6). While courts do not lightly grant such motions for relief, they will do so when exceptional circumstances exist. See United States v. International Brotherhood of Teamsters, 247 F.3d 370, 391 (2d Cir. 2001). Such exceptional circumstances are present here: newly available evidence directly contradicts the agency's sworn declarations, which declarations were granted substantial deference and, indeed, were the sole basis for the Court's ruling on Items 29 and 61.

According to the CIA's sworn statements, the agency invoked the Glomar response on the grounds that Plaintiffs' requests sought confirmation or denial of CIA interest in or involvement in the interrogation of detainees. This Court granted the CIA's motion for summary judgment with respect to Items 29 and 61 on this basis. Almost two months after this Court rendered its decision, however, the CIA's own Director publicly and repeatedly acknowledged that the CIA participates in the interrogation of detainees, and even publicly characterized the nature of the CIA's interrogation practices. Because these statements undermine the CIA's sworn declarations submitted in connection with Defendants' cross-motion for partial summary judgment, Plaintiffs are entitled to relief from the Court's September 2005 Order.

[2] In addition, the evidence must have been discoverable after the time within which to move for a new trial under Rule 59(b), which is ten days after the order is issued.

A. This Court's Grant Of Summary Judgment To Defendant CIA Was Premised On The CIA's Sworn Statements That Merely Acknowledging An Interest In Detainee Interrogation Would Compromise National Security.

In responding to Plaintiffs' requests for Items 1 (as to which summary judgment was granted to the Plaintiffs), 29 and 61, the CIA refused to confirm or deny the existence of the records in question. This type of response, referred to as a "Glomar" response, is permitted only in those rare circumstances in which confirming or denying the existence of requested records would itself reveal sensitive national security information that is otherwise protected by one or more of FOIA's nine exemptions. See September 2005 Order, at 18-19; Phillippi v. CIA, 546 F.2d 1009 (D.C. Cir. 1999). The CIA relied upon Exemptions 1, which protects classified information from disclosure, and 3, which permits withholding by reference to another statute authorizing the agency to exempt documents from disclosure. See Dorn Decl., at ¶ 8. The withholding statute in this case is the National Security Act of 1947, 50 U.S.C. § 403-3(c)(7), which authorizes the Director of Intelligence to protect "intelligence sources and methods" from "unauthorized disclosure." See September 2005 Order, at 17.

In support of its invocation of the Glomar response on the basis of these exemptions, the CIA submitted two declarations which principally advance the argument that even revealing an interest on the part of the agency in detainee interrogation would compromise national security. See Declaration of Marilyn A. Dorn, ¶¶ 12-18 (Exhibit B to Memorandum of Law in Support of Plaintiffs' Motion for Partial Summary Judgment); Fourth Declaration of Marilyn A. Dorn, ¶¶ 7-19 (Attached to Defendants' Memorandum of Law In Opposition to Plaintiffs' Motion for Partial Summary Judgment And In Support of Defendants' Motion for Partial Summary Judgment). While agency affidavits are afforded a presumption of good faith, among the reasons that a declaration might be "insufficient are lack of detail and specificity, bad faith, and failure to account for contrary record evidence." Campbell v. United States Department of Justice, 164 F.3d 20, 29 (D.C. Cir. 1998); see also Military Audit Project v. Casey, 656 F.2d 724, 738 (D.C. Cir. 1981) (summary judgment is warranted where declarations "are not controverted by either

contrary evidence in the record nor by evidence of agency bad faith"). As set forth below, Plaintiffs have obtained contrary evidence which belies the agency's sworn statements.

In its declarations, the CIA stated that Items 1, 29, and 61 make "specific reference to the CIA and its alleged intelligence activities relating to interrogation of detainees in U.S. custody." See Fourth Dorn Decl., at ¶ 8.[3] The declaration further states that "[d]isclosure of even a CIA interest in such intelligence methods or activities reasonably could be expected to cause serious damage to national security." See id. at ¶ 10; see also id. at ¶ 11 ("Specifically, confirming the existence of these document would acknowledge a CIA intelligence interest in detainee interrogation and detention activities."). The CIA also declares that responding to these requests would require the agency to officially "acknowledge a CIA capability to pursue such intelligence activities and employ such methods." See id. at ¶ 11. Finally, the CIA's declarant states that "the CIA has determined that there are no records reflecting an overt or otherwise acknowledged relationship between CIA and any of the activities that are the subjects of [Items 1, 29, and 61]." See Dorn Decl., at ¶ 15. The declarant then describes the purported myriad harms that would result from acknowledging an interest in detainee interrogation -- such as "interfer[ing] with the United States Government's collection of intelligence in the war on terrorism," see Fourth Dorn Decl. ¶¶ 14-15, and compromising foreign relations. See id. at ¶ 15.[4]

[3] Although the CIA characterizes these requests as describing "specific" interrogation or detention activities, this Court has held that this characterization of Plaintiffs' requests is inappropriate as the specific methods mentioned by Plaintiffs are not part of their actual request and thus not germane to the CIA's justification for its Glomar response. The Court held that the CIA improperly "justifies its Glomar response not on the text of the demand, but on all those references [set forth in Plaintiffs' Memorandum of Law], as if they were part of the demand itself." September 2005 Order, at 27. Rather, "it is the unembellished request set forth in the August 16, 2005 List . . . that controls." See id.

[4] Although it has not been provided to Plaintiffs, based upon the Court's characterization of Fifth Dorn Declaration, which is a classified declaration that was submitted to the court in camera, that declaration further "describes the particularized harms to justify the agency's Glomar responses." See September 2005 Order, at 24. In other words, it is based on the same premise as the first and fourth declarations -- that revealing a CIA interest in or acknowledging a role in detainee

Thus, the Court granted the CIA's motion with respect to its Glomar response to Items 29 and 61 of the August 16, 2004 List on the basis of the CIA's sworn statements advancing the position that even acknowledging an interest or role in detainee interrogation would compromise national security. The Court held that "[t]he agency's arguments that it should not be required officially to acknowledge the precise 'intelligence activities' or 'methods' it employs or considers--for example, whether it has any role whatsoever in the interrogation of detainees--are given deference by the courts." See September 2005 Decision, at 26-27. The Court found further that the requests for Items 29 and 61 -- as opposed to Item 1, which is not at issue here -- "specifically refer to 'interrogation methods' alleged to be considered, and perhaps used, by the CIA in connection with detainees in United States' custody." See September 2005 Order, at 25-26. In the absence of contrary record evidence, the Court accepted the CIA's sworn statements and afforded their declarations a presumption of good faith.

B. Newly Discovered Contrary Evidence Controverts The CIA's Sworn Statements.

Plaintiffs do not concede that the CIA presented a sufficiently detailed declaration demonstrating that the information contained in Items 29 and 61 logically falls within the claimed exemption, or that these documents were an appropriate application of the Glomar doctrine. Nonetheless, and in any event, Plaintiffs have now obtained newly available evidence that clearly and expressly controverts the CIA's sworn statements, thereby rendering them insufficient as support for the agency's refusal to confirm or deny the existence of Items 29 and 61.

Specifically, on or about November 18, 2005, CIA Director Porter J. Goss stated publicly that CIA interrogators use "lawful capabilities to collect vital information, and we do it in a

---

interrogation would compromise national security -- and merely provides further detail regarding the harms that would result from disclosure.

variety of unique and innovative ways, all of which are legal and none of which are torture." See Exhibit 1 (John Diamond, CIA Chief: Interrogation Methods Unique But Legal, USA Today, November 21, 2005, at A1 (quoting Porter Goss, Director of Central Intelligence)).[5] The article further states that Goss, directly characterizing the nature of CIA's detainee interrogation, "made clear that techniques that would be restricted under [a Senate] proposal [to ban cruel, inhuman or degrading treatment of detainees] have yielded valuable intelligence." See id.[6] Goss further characterized the CIA's intelligence gathering activities and its role in detainee in interrogation in an interview with ABC News that took place on November 29, 2005. He stated that "we want accurate information and we want to make sure that we have professional people doing that work, and we do all that, and we do it in a way that does not involve torture because torture is counterproductive. We have our own techniques for our debriefings and they yield good results." Exhibit 2 (Transcript of Interview with ABC News). He further described the CIA's role in detainee interrogation, stating that "[w]hat we do, as I said many times, is professional, it's lawful, it yields good results and it is not torture." See id.

Moreover, on November 9, 2005, the New York Times reported that the agency had issued a written statement in March which acknowledged that "all approved interrogation techniques, both past and present, are lawful and do not constitute torture." Exhibit 3 (Douglas Jehl, Classified Report Warned on C.I.A's Tactics in Interrogation, N.Y. Times, November 8, 2005). This article also stated that that the agency's director of public affairs had said that "CIA policies on interrogation have always followed legal guidance from the DOJ." See id.

Thus, the Director of Central Intelligence has acknowledged not only that the CIA has an interest in detainee interrogation, but that it in fact participates in such interrogation and that the agency uses interrogation techniques that are "unique" and "innovative." He also acknowledged

[5] The article, published on November 21, 2005, notes that the statement was made on Friday, November 18, 2005, in an interview.

[6] The statements were made in response to a Senate proposal by Senator John McCain to ban "cruel, inhuman or degrading" treatment of detainees by CIA or military officers. See Exhibit 1.

that the agency uses or has used methods that would be prohibited under a ban on the cruel, inhuman or degrading treatment of detainees. As such, although it has decided to disavow the use of torture, the agency has publicly recognized its role in detainee interrogation, characterized the nature of the interrogation techniques that it employs or has employed and, moreover, acknowledged that it receives legal guidance on the permissibility of such techniques from the Department of Justice. These statements, standing alone or when considered in conjunction with the CIA's explicit statement that it has followed the Justice Department's legal advice on interrogation policies, controvert the agency's sworn statements that it is unable to acknowledge an interest in or capability of participating in detainee interrogation. Indeed, it is now clear that the CIA does not in fact consider acknowledging its role in detainee interrogation a breach of its obligation to safeguard our national security. Summary judgment on the basis of these now-discredited declarations is accordingly no longer warranted or appropriate.

C. This Case Presents Exceptional Circumstances Which Warrant Relief.

This Court should grant Plaintiffs' motion for partial relief based upon the exceptional circumstances which this case presents: the express basis for the Court's decision was two declarations that are undercut by newly available evidence. Indeed, because, in FOIA cases, it is extremely difficult for plaintiffs to controvert an agency's sworn statements, and because it is therefore also extremely difficult for courts to carry out their function of de novo review, this Court must grant relief, where, as here, a judgment that rests on sworn statements that have been discredited by later discovered evidence.

As noted, FOIA Plaintiffs are at a "distinct disadvantage in attempting to test the claims alleged by the [withholding agency]." Ethyl Corp v. United States Environmental Protection Agency, 25 F.3d 1241, 1250 (4th Cir. 1994); see also Maricopa Audubon Society v. United States Forest Service, 108 F.3d 1089 (9th Cir. 1997) ("Plaintiff who does not have access to the

withheld materials, 'is at a distinct disadvantage in attempting to controvert the agency's claims.'") (quoting Ollestad v. Kelley, 573 F.2d 1109, 1110 (9th Cir. 1978)). While FOIA plaintiffs are entitled in every case to present evidence controverting the agency's declarations, because the agency is in possession of the documents which the FOIA requester seeks, it is usually difficult, if not impossible, to obtain such evidence. This is especially so where the information is alleged to be protected by virtue of its intelligence value, and is therefore in the possession of only the government and not the public.

In order to compensate for this imbalance, FOIA provides that the Court must undertake a de novo review of the agency's decision to withhold documents pursuant to FOIA's nine exemptions. As set forth in the September 2005 Order and Plaintiffs' Memorandum of Law in the underlying motion, this de novo review standard applies even in national security cases. See September 2005 Order, at 25; Memorandum of Law In Support of Plaintiffs' Partial Summary Judgment Motion, at 14-19. Indeed, despite the presumption of good faith that is awarded to agency affidavits in national security cases, the Court should afford such deference only where it is possible, on the basis of the affidavit or declaration in question, to undertake a true de novo review of the exemptions claimed and their relation to the documents withheld.

Yet, this Court plainly recognized the difficulty in conducting a de novo review under these conditions, and acknowledged that courts often do not effectuate FOIA's clear mandate in this regard. September 2005 Order, at 25-26 ("In short, I am not given enough relevant information to make the de novo determinations that FOIA would seem to require."). Expressing frustration with the fact that the Court lacked sufficient information to make a true de novo determination, see id. at 26, this Court found that arguments such as those advanced by the agency in this matter are given deference by courts. See id. This was, at least for argument's sake, appropriate. But it follows that where the Plaintiffs have obtained new, relevant evidence which contradict the declarations that served as the sole evidentiary basis for the Court's decision, relief from judgment must be granted.

Moreover, this Court expressly warned that "[t]he danger of Glomar responses is that they encourage an unfortunate tendency of government officials to over-classify information, frequently keeping secret that which the public already knows, or that which is more embarrassing than revelatory of intelligence sources or methods." September 2005 Decision, at 19. The Court noted that the "discussions of these documents in the public press, undoubtedly arising from numerous leaks of the documents, raise concern . . . that the purpose of the CIA's Glomar responses is less to protect intelligence activities, sources or methods than to conceal possible 'violations of law' in the treatment of prisons, or 'inefficiency' or 'embarrassment' of the CIA." See id. at 25-26. These recent disclosures underscore this point, and, because the bases asserted for the invocation of Glomar are now clearly not the real basis for the CIA's refusal to respond, at least raise the significant danger that considerations other than safeguarding national security underlie the CIA's response. Particularly given the current public scrutiny of these issues, the newly obtained evidence gives substance to the Court's concern, as the CIA may very well be maintaining the secrecy of these documents in order to protect itself from "embarrassment" or to conceal "violations of law," purposes which have no place under FOIA. See id. at 25.

In sum, FOIA depends upon the veracity and integrity of the government's sworn declarations. Here, there is significant evidence that the government's sworn declarations advance propositions that are not, in fact, the bases on which the decision to withhold this information was made and in any event, are no longer true. Because these sworn declarations have been significantly undermined, the Court should grant Plaintiffs' motion for partial relief.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court grant Plaintiffs' Motion For Partial Relief From Order Granting Partial Summary Judgment To Defendant Central Intelligence Agency. This Court should order Defendant CIA to produce the documents

relating to Items 29 and 61, if indeed such documents exist, or prove that the same are exempt from production.

Respectfully submitted,

/LSL/

Lawrence S. Lustberg (LL-1644)
Megan Lewis (ML-3429)
GIBBONS, DEL DEO, DOLAN
GRIFFINGER & VECCHIONE, P.C.
One Riverfront Plaza
Newark, New Jersey 07102
(973) 596-4500

Jameel Jaffer (JJ-4653)
Amrit Singh (AS-9916)
Judy Rabinovitz (JR-1214)
AMERICAN CIVIL LIBERTIES
UNION FOUNDATION
125 Broad St.
New York, New York 10004

Barbara Olshansky (BO-3635)
Michael Ratner (MR-3347)
CENTER FOR CONSTITUTIONAL RIGHTS
666 Broadway, 7th Floor
New York, New York 10012

Beth Haroules (BH-5797)
Arthur Eisenberg (AE-2012)
NEW YORK CIVIL LIBERTIES
UNION FOUNDATION
125 Broad Street
New York, NY 10004

Dated: December 9, 2005 *Attorneys for Plaintiffs*