

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

**SUPPLEMENTAL SUBMISSION CLARIFYING RELIEF SOUGHT IN PLAINTIFFS'
MOTION FOR CONTEMPT AND SANCTIONS**

TABLE OF EXHIBITS

- Exhibit I Letter from Senator Edward Kennedy to Robert S. Mueller III, Director, Federal Bureau of Investigation, Dec. 18, 2007.
- Exhibit J Mark Mazetti and Scott Shane, Bush Lawyers Discussed Fate of C.I.A. Tapes, N.Y. Times, Dec. 19, 2007.

INTRODUCTION

Plaintiffs respectfully submit this memorandum to clarify the relief sought in their Motion for Contempt and Sanctions filed before this Court on December 12, 2007.

In that motion, Plaintiffs seek, *inter alia*, an order from this court requiring (i) discovery relating to the destruction of responsive records; and (ii) such other relief as may be just and proper. *See Am. Civil Liberties Union v. Dep't of Def.*, (S.D.N.Y), 04-Civ- 4151, Doc. # 255 at 20 (Memo of Law in Supp. of Pls.' Mot. for Contempt and Sanctions, Dec. 12, 2007).

Recent revelations relating to records in the possession of non-CIA Defendant federal agencies and the White House allow Plaintiffs to now add further specificity to the aforementioned general categories of requested relief.

Accordingly, Plaintiffs request an order from this Court:

(1) requiring Defendant agencies and non-party United States government entities to produce to Plaintiffs all copies, transcripts, descriptions, summaries or other approximations of the destroyed videotapes that are in their possession or control;

(2) requiring Defendant agencies and non-party United States government entities to produce to Plaintiffs all other records in their possession or control relating to the destruction or contemplated destruction of the CIA interrogation videotapes; and

(3) prohibiting Defendant agencies and non-party United States government entities from destroying or removing copies, transcripts, descriptions, summaries or other approximations of the videotapes as well as other records in their possession or control relating to the destruction or contemplated destruction of the CIA interrogation videotapes or other records responsive to Plaintiffs' FOIA requests.

ARGUMENT

As previously set forth in Plaintiffs' brief, this Court has broad discretion in fashioning a remedy for the CIA's destruction of records responsive to Plaintiffs' FOIA requests. *See Am. Civil Liberties Union v. Dep't of Def.*, (S.D.N.Y.), 04-Civ- 4151, Doc. # 255 at 15-19 (Memo. of Law in Supp. of Pls.' Mot. for Contempt and Sanctions, Dec. 12, 2007). Recent revelations relating to the destruction of the CIA interrogation videotapes allow Plaintiffs to add specificity to the general categories of relief requested in their Motion for Contempt and Sanctions. *See id.* at 19-20. For the reasons set forth below, such relief is clearly warranted here.

First, recent events and revelations suggest that Defendant agencies other than the CIA may be in possession of documents relating to the destroyed CIA videotapes, as well as copies, transcripts, descriptions, summaries or other approximations of the destroyed videotapes. *See* Letter from Senator Edward Kennedy to Robert S. Mueller III, Director, Federal Bureau of Investigation, Dec. 18, 2007, *available at* http://kennedy.senate.gov/newsroom/press_release.cfm?id=B4E73406-A33F-4487-98AE-E43C142F7FFB, attached hereto as Exhibit I (observing that a Washington Post article raises questions of whether the FBI has copies of the videotapes or had them in the past); *see also* Dan Eggen and Walter Pincus, *FBI, CIA Debate Significance of Terror Suspect*, Wash. Post, Dec. 18, 2007 (describing "[t]ensions [that] came to a head after FBI agents witnessed the use of some harsh tactics on Abu Zubaida, including keeping

him naked in his cell, subjecting him to extreme cold and bombarding him with loud rock music.”).¹

Records relating to the destruction or contemplated destruction of the CIA interrogation videotapes, as well as copies, transcripts, descriptions, summaries or other approximations of the destroyed videotapes, are clearly responsive to Plaintiffs’ FOIA requests, which seek disclosure of records relating to the treatment of prisoners apprehended after September 11, 2001 and held in U.S. custody abroad. *See Am. Civil Liberties Union v. Dep’t of Def.*, (S.D.N.Y), 04-Civ- 4151, Doc. # 255 at 3 (Memo of Law in Supp. of Pls.’ Mot. for Contempt and Sanctions, Dec. 12, 2007) (requesting limited discovery relating to the destruction of responsive records). Plaintiffs are also entitled to the production of these records by way of discovery relating to the destruction of the videotapes. *See id.* at 20 (requesting limited discovery relating to the destruction of responsive records).

Second, recent reports also indicate that non-party United States government entities—including the White House—may be in possession of documents relating to the destruction of the videotapes. *See* Mark Mazetti and Scott Shane, Bush Lawyers Discussed Fate of C.I.A.Tapes, N.Y. Times, Dec. 19, 2007, attached hereto as Ex. J (noting that “[a]t least four top White House lawyers took part in discussions with the Central Intelligence Agency between 2003 and 2005” about whether to destroy videotapes,” and that there had been “‘vigorous sentiment’ among some top White House officials to destroy the tapes”). As noted above, Plaintiffs’ motion for contempt and

¹ According to news reports, the destroyed tapes depicted the interrogation of two al-Qaeda suspects, Abu Zubaydah and Abd al-Rahim al-Nashiri. *See* Mark Mazzetti and David Johnston, Inquiry Begins Into Destruction of Tapes, N.Y. Times, Dec. 9, 2007.

sanctions seeks, *inter alia*, limited discovery relating to the destruction of documents. *See Am. Civil Liberties Union v. Dep't of Def.*, (S.D.N.Y), 04-Civ- 4151, Doc. # 255 at 20 (Memo of Law in Supp. of Pls.' Mot. for Contempt and Sanctions, Dec. 12, 2007). Such discovery would encompass records relating to the destruction of the tapes that are in the possession of the White House as well as other non-party U.S. government entities. *See id.* at 15-19 (citing, *inter alia*, *Judicial Watch v. Dep't of Commerce*, 34 F. Supp. 2d 28, 46 (D.D.C. 1998) (authorizing discovery on the destruction or removal of documents against the Department of Commerce (DOC), and against non-parties who “can be shown to have acted in concert with the DOC in the removal of documents or to be currently in possession of the documents”); and *Judicial Watch, Inc. v. United States Dep't of Commerce*, 2000 WL 33243469, at *1-2 (D.D.C. Dec. 5, 2000) (permitting discovery against the White House, a non-party, where such discovery could reveal whether the DOC engaged in destruction)).

CONCLUSION

Accordingly, Plaintiffs request an order from this Court:

(1) requiring Defendant agencies and non-party United States government entities to produce to Plaintiffs all copies, transcripts, descriptions, summaries or other approximations of the destroyed videotapes that are in their possession or control;

(2) requiring Defendant agencies and non-party United States government entities to produce to Plaintiffs all other records in their possession or control relating to the destruction or contemplated destruction of the CIA interrogation videotapes; and

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Dated: Dec. 19, 2007

Attorneys for Plaintiffs