



JOHN J. GIBBONS FELLOWSHIP IN  
PUBLIC INTEREST & CONSTITUTIONAL LAW

HONORABLE JOHN J. GIBBONS

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February 11, 2009

Honorable Alvin K. Hellerstein, U.S.D.J.  
United States District Court  
Southern District of New York  
500 Pearl Street  
New York, New York 10007

**VIA FAX AND REGULAR MAIL**

**Re: American Civil Liberties Union, et al. v. Department of Defense, et al.  
05 CV 9620 (AKH)**

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Judge Hellerstein:

This office represents Plaintiffs in the above-referenced matter. Plaintiffs write to state their opposition to the Government's request for a 90-day extension to cross-move and/or file a response to Plaintiffs' Fourth Motion for Summary Judgment. That Motion relates to three Office of Legal Counsel ("OLC") memoranda (the "Bradbury Memoranda"), which have been the subject of litigation for almost a year and a half. While Plaintiffs would consent to a short-extension of the Government's briefing deadline of no more than 14 days, Plaintiffs respectfully submit that an extension of anything further is unreasonable given the public interest in the documents at issue, the limited amount of information that must be reviewed by the Government, the extensive amount of time that has already passed since Plaintiffs filed their FOIA requests in 2003, 2004, and 2005, and the fact that Plaintiffs have already agreed to one 30-day extension of the Government's briefing deadline. Accordingly, Plaintiffs respectfully submit that the Court should deny the Government's request.

The three documents at issue in this Motion have been the subject of litigation for several years. On October 24, 2007, Plaintiffs filed a Motion for Preliminary Injunction requesting that the Court compel OLC to immediately process the Bradbury Memoranda because the Government had previously failed to disclose these documents or index them in its declarations responding to Plaintiffs' FOIA requests. The Bradbury Memoranda had not been previously disclosed to Plaintiffs even though they are clearly responsive to Plaintiffs' FOIA requests. According to a front page New York Times article on October 4, 2007, one memorandum specifically addressed waterboarding and concluded that it could be legal in particular circumstances or in combination with other interrogation techniques. See Fourth Mot. Summ. J., Condon Decl., Ex. A, Secret U.S. Endorsement of Severe Interrogations. Another memorandum, which was reportedly issued at a time when Congress was preparing legislation banning "cruel,

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inhuman and degrading treatment,” secretly declared that none of the CIA’s interrogation methods violated that standard. Id.

On August 28, 2008, this Court partially granted Plaintiffs’ Motion for Preliminary Injunction, stating that the Bradbury Memoranda were responsive to Plaintiffs’ FOIA request and ordering Defendants to disclose them or provide Vaughn declarations justifying the withholding of these documents. See Aug. 28, 2008 Order. On November 7, 2008, the Government provided Plaintiffs with Vaughn declarations asserting several exemptions under FOIA. The parties then agreed to a summary-judgment briefing schedule with respect to those documents: Plaintiffs’ moving brief would be served on or before December 12, 2008, and the Government’s cross-moving brief would be served on or before January 15, 2009, with reply briefs to follow. On November 20, 2008, this Court endorsed a letter by undersigned counsel and ordered the parties to comply with that briefing schedule.

Plaintiffs timely filed their brief on December 12, 2008. On January 14, 2009, however, the Government requested a 30-day extension until February 13, 2009 to file their opposition and cross-motion. Plaintiffs consented to that request because the Government noted that the additional time would “allow the incoming administration *appropriate* time to review the Government’s position and briefing regarding the Office of Legal Counsel’s memoranda at issue.” Government’s Jan. 14, 2009 Letter to the Court (emphasis added).

Plaintiffs respectfully submit that while it may have been appropriate for the Government to have some additional time to review the Government’s position and Plaintiffs’ briefing, the additional request by the Government is unreasonable. Because only three documents are at issue and Plaintiffs’ Brief in support of their Fourth Motion for Summary Judgment is only 29 pages long, the Government will not be unduly burdened if required to meet its agreed upon deadline with the benefit of one 30-day extension. An additional 90 days (for a total of a 120-day extension) is unreasonable given the amount of time the Government has had to evaluate their position, the relatively manageable amount of information at issue, and the strong public interest in disclosure of this information.

The Government suggests that it needs the second extension so that “[n]ew administration officials . . . [can] ensure that the Government’s positions are consistent with the President’s new Executive Order.” Government’s Feb. 11, 2009 Letter to the Court. That January 21, 2009 Executive Order, however, actually provides support for resolving the issues before the Court without further delay. See Jan. 21, 2009 Memorandum for the Heads of Executive Departments and Agencies; Subject: Freedom Of Information Act (adopting “a presumption in favor of disclosure” and stating that “[d]isclosure should be timely”). Plaintiffs respectfully submit that the Government’s requested extension certainly does not further the “timely” disclosure contemplated by that Order and an additional 90 days to review the impact of the Order’s presumption on the small number of documents at issue in this motion is unnecessary

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and unreasonable. In sum, the Government can and should — in accordance with the Executive Order — respond to Plaintiffs' Motion without further delay.

Accordingly, Plaintiffs respectfully urge the Court to deny the Government's request or, in the alternative, to permit the Government only one more short extension not to exceed 14 days.

Thank you for your consideration.

Respectfully submitted,



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