

LEGAL DEPARTMENT
IMMIGRANTS'
RIGHTS PROJECT



Both this letter, and
the gov't's letter of March
6, 2009 shall be docketed.

USDC SDNY
DOCUMENT
ELECTRONICALLY FILED
DOC #:
DATE FILED: 3/10/09

RECEIVED
MAR 09 2009
MEMBERS OF
ALVIN K. HELLERSTEIN
U.S.D.J.

A procedure for
in camera review
shall be established

March 9, 2009
and confirmed by
separate order.
3-9-09

Alvin K. Hellerstein

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

Dear Judge Hellerstein,

PLEASE RESPOND TO:
NATIONAL OFFICE
120 BROAD STREET 18TH FL
NEW YORK NY 10004-2400
1/212 549 7660
1/212 549 7656
WWW.ACLU.ORG

CALIFORNIA OFFICE
39 DRUMM STREET
SAN FRANCISCO CA 94111-4800
415 343 0770
415 392 0750

OFFICERS AND DIRECTORS
NADINE STROBEN
PRESIDENT

ANTHONY D. ROMERO
EXECUTIVE DIRECTOR

RICHARD TACKS
TREASURER

Plaintiffs write in response to the CIA's March 6 submission in the above-referenced case. While Plaintiffs do not oppose the Government's proposed production schedule, Plaintiffs are troubled by the redactions in the materials that have already been produced. Plaintiffs believe that some of the redacted information has been improperly classified. Accordingly, Plaintiffs request that this Court conduct an independent *in camera* review of that material and any other material that the CIA redacts in connection with the pending contempt motion with a view to determining whether such material should be publicly disclosed. Plaintiffs also request that this letter and its attached exhibit, as well as the Government's March 6, 2009 submission, be docketed as part of the record in this case.

On March 6, 2009, the CIA submitted a heavily redacted version of an inventory of the destroyed videotapes that are the subject of Plaintiffs' contempt motion. See Letter to Hon. Alvin K. Hellerstein from Lev. L. Dassin, Mar. 6, 2009. The agency has stated that the redacted portions of the inventory are classified and protected from disclosure by statute. *Id.* at 1.

Plaintiffs are skeptical that all of the information redacted from the CIA's latest submission can be properly withheld from the public. To the extent that the redacted information relates to illegal interrogation methods, the information is not properly classified. See Executive Order No. 12,958, § 1.7(a) (prohibiting classification in order to conceal "violations of law" or "prevent embarrassment to a person, organization, or agency"). Significantly, President Obama's recent directive expressly prohibits the government from "keep[ing] information confidential merely because public officials might be embarrassed by disclosure, because errors and failures

might be revealed, or because of speculative or abstract fears.”
 Memorandum for the Heads of Executive Departments and Agencies:
 Freedom of Information Act, 74 Fed. Reg. 4,683 (Jan. 21 2009).

Indeed, a recently unredacted portion of the CIA’s Office of Inspector General’s Special Review Report produced to Plaintiffs in this litigation confirms that the destroyed videotapes depict illegal interrogation methods. That report states that “interrogators administered . . . the waterboard to Al-Nashiri” and that 12 of the destroyed videotapes depict applications of “EIT,” which is the acronym for “Enhanced Interrogation Techniques.” See Excerpt from CIA Office of Inspector General Special Review Report, attached to Letter to Amrit Singh from Lev. L. Dassin, Mar. 6, 2009, attached hereto as Exhibit A. “Enhanced Interrogation Techniques” reportedly include illegal methods such as waterboarding. See Brian Ross & Richard Esposito, CIA’s Harsh Interrogation Techniques Described, Nov. 18, 2005, available at <http://abcnews.go.com/WNT/Investigation/story?id=1322866>.

Plaintiffs respectfully request that this Court conduct an independent review to determine whether the redacted information is properly classified, and that it also review future filings by the CIA in connection with the pending contempt motion. This Court has the authority to conduct such a review. See, e.g., *Snepp v. United States*, 444 U.S. 507, 513 n.8 (1980) (recognizing appropriateness of judicial review of pre-publication classification determinations); *Jones v. FBI*, 41 F.3d 238 (6th Cir. 1994); *McGehee v. Casey*, 718 F.2d 1137, 1148 (D.C. Cir. 1983) (requiring *de novo* judicial review of pre-publication classification determinations to ensure that information was properly classified and to ensure that agency “explanations justifi[ed] censorship with reasonable specificity, demonstrating a logical connection between the deleted information and the reasons for classification”); *Hayden v. NSA*, 608 F.2d 1381, 1384 (D.C. Cir. 1979) (stating, in a Freedom of Information Act case, that the “court must make a *de novo* review of the agency’s classification decision, with the burden on the agency to justify nondisclosure”). In the instant context, Plaintiffs believe that such review is not only appropriate but necessary to vindicate the purposes of the FOIA.

Respectfully,



Amrit Singh
Staff Counsel
American Civil Liberties Union
Foundation
Immigrants' Rights Project
125 Broad St., 18th Floor
New York, NY 10004
(212) 549-2609
(212) 549-2654 (fax)

AMERICAN CIVIL LIBERTIES
UNION FOUNDATION

cc: Sean Lane
Peter Skinner

EXHIBIT A



U.S. Department of Justice

*United States Attorney
Southern District of New York*

*86 Chambers Street, 5th Floor
New York, New York 10007*

March 6, 2009

BY ELECTRONIC MAIL

Amrit Singh
Staff Counsel
American Civil Liberties Union
Immigrants' Rights Project
125 Broad Street, 18th Floor
New York, N.Y. 10004

Jennifer B. Condon, Esq.
Gibbons, Del Deo, Dolan,
Griffinger & Vecchione, P.C.
One Riverfront Plaza
Newark, N.J. 07102

Re: ACLU, et al., v. Department of Defense, et al., No. 04 Civ. 4151 (AKH)

Dear Ms. Singh and Ms. Condon:

As promised in the Government's February 27, 2009 letter to the Court, we are enclosing pages from the Central Intelligence Agency Office of Inspector General's Special Review Report that provide additional unredacted information. The unredacted information concerns the number of interrogation videotapes that were destroyed by the CIA. Thank you for your attention to this matter.

Very truly yours,
LEV L. DASSIN
Acting United States Attorney

By:

SEAN H. LANE
PETER M. SKINNER
Assistant United States Attorneys
Telephone: (212) 637-2737

Enclosures

TOP SECRET [REDACTED]

[REDACTED]

[REDACTED] interrogators administered [REDACTED] the waterboard to Al-Nashiri [REDACTED]

[REDACTED]

Videotapes of Interrogations

77. (TS) [REDACTED]

[REDACTED] decided to

videotape the interrogation sessions.

[REDACTED]

There are 92 videotapes, 12 of which include EIT applications. An OGC attorney reviewed the videotapes [REDACTED]

[REDACTED]

78. (TS) [REDACTED]

OIG reviewed the videotapes [REDACTED]

in May 2003. [REDACTED]

[REDACTED]

[REDACTED]

TOP SECRET [REDACTED]



TOP SECRET [REDACTED]

PROCEDURES AND RESOURCES

1. (TS) [REDACTED] A team, led by the Deputy Inspector General, and comprising the Assistant Inspector General for Investigations, the Counsel to the Inspector General, a senior Investigations Staff Manager, three Investigators, two Inspectors, an Auditor, a Research Assistant, and a Secretary participated in this Review.

2. (TS) [REDACTED] OIG tasked relevant components for all information regarding the treatment and interrogation of all individuals detained by or on behalf of CIA after 9/11. Agency components provided OIG with over 38,000 pages of documents. OIG conducted over 100 interviews with individuals who possessed potentially relevant information. We interviewed senior Agency management officials, including the DCI, the Deputy Director of Central Intelligence, the Executive Director, the General Counsel, and the Deputy Director for Operations. As new information developed, OIG re-interviewed several individuals.

3. (TS) [REDACTED] OIG personnel made site visits to the [REDACTED] facilities. OIG personnel also visited [REDACTED] to review 92 videotapes of interrogations [REDACTED]

TOP SECRET [REDACTED]



IMMIGRANTS' RIGHTS PROJECT

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- Judy Rabinovitz†
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- Amrit Singh†
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Liman Fellow
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FAX COVER SHEET

TO: Hon. Judge Alvin Hellerstein

ORGANIZATION: United States Court of Appeals for the Second Circuit

FAX NO: 212-805-7942

FROM: Amrit Singh

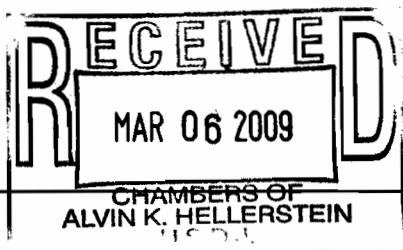
RE: Am. Civil Liberties Union v. Dep't of Defense, No. 06-3170-cv (2d Cir.)

DATE: March 9, 2009

No. of Pages (w/ cover sheet): 8

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U.S. Department of Justice

*United States Attorney
Southern District of New York*

*86 Chambers Street
New York, New York 10007*

March 6, 2009

BY HAND DELIVERY

Hon. Alvin K. Hellerstein
United States District Court
Southern District of New York
500 Pearl Street, Room 1050
New York, New York 10007-1312

Re: ACLU, et al., v. Department of Defense, et al., No. 04 Civ. 4151 (AKH)

Dear Judge Hellerstein:

We write with the Central Intelligence Agency's proposed schedule for the production of the information contemplated in the August 20, 2008 Order Regulating Proceedings.

Point 1 requires the production of a "list identifying and describing each of the destroyed records." We are enclosing a redacted version of an inventory of the destroyed videotapes. The redacted portions of the inventory are classified and protected from disclosure by statute. We have an unredacted version of the inventory available for the Court's ex parte, in camera review. This inventory identifies the tapes and includes any descriptions that were written on the spines of the tapes. Further descriptions of the contents of the tapes are included in the documents that are being gathered in connection with Point 2.

Point 2 requires the production of a "list of any summaries, transcripts, or memoranda regarding the records, and of any reconstruction of the records' contents." The CIA will complete this list on or before March 20, 2009. On that same date, the CIA will provide a public version of the list to the Court and Plaintiffs and, if necessary to explain fully the records at issue, will make available a classified version for the Court's ex parte, in camera review.

Hon. Alvin K. Hellerstein
March 6, 2009

To date, the CIA is not aware of any transcripts of the destroyed videotapes. Regarding summaries, memoranda, or any reconstruction of their contents, the CIA requests an additional two weeks, until March 20, 2009, to produce the list because it is still searching for and identifying the records at issue. Prior to the expiration of the stay on February 28, 2009, the CIA was unable to gather the records because it did not want to jeopardize the criminal investigation into the destruction of the tapes. John H. Durham, the prosecutor leading the criminal investigation, had expressed concern that the memories of potential witnesses might be affected were they to review any records covered by Points 1 and 2 of the August 20, 2008 Order. See e.g., Declaration of John H. Durham, dated December 22, 2008, paragraph 7. The CIA did not know who at the Agency might be considered a potential witness. Therefore, the CIA did not begin gathering the records at issue until after the stay had expired. Given that the search was just begun, covers a variety of different types of records (including cables, memoranda, notes and emails), is ongoing in multiple locations within the CIA, and covers records produced by individuals who have left the Agency, we respectfully submit that an additional two weeks is a reasonable amount of time for the completion of the list required by Point 2.

Point 3 requires the “[i]dentification of any witnesses who may have viewed the videotapes or retained custody of the videotapes before their destruction.” The CIA will complete this list on or before March 20, 2009. To protect classified information and information otherwise protected by statute, the CIA contemplates producing a redacted, public version of the list to the Court and the Plaintiffs. The CIA will make available an unredacted version of the list for the Court’s ex parte, in camera review.

There is no existing list of the witnesses covered by Point 3. The CIA is compiling the list through an ongoing investigation. It is identifying individuals who had access to the tapes and is then determining whether those individuals in fact viewed the tapes or had custody of the tapes. Given that the investigation was just begun and requires interviews with multiple CIA personnel, some of whom are overseas and some of whom have left the Agency, we respectfully submit that an additional two weeks is a reasonable amount of time for the completion of the list required by Point 3.

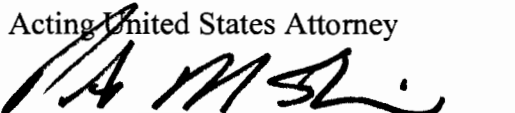
Hon. Alvin K. Hellerstein
March 6, 2009

Finally, as promised in our February 27, 2009 letter, we have produced under separate cover to Plaintiffs pages from the CIA Office of Inspector General's Special Review Report that provide additional unredacted information. The unredacted information concerns the number of videotapes that were destroyed.

Respectfully submitted,

LEV L. DASSIN
Acting United States Attorney

By:



SEAN H. LANE
PETER M. SKINNER
Assistant United States Attorneys
Telephone: (212) 637-2601
Facsimile: (212) 637-2930

cc: Amrit Singh, Esq. (by electronic mail)
Jennifer B. Condon (by electronic mail)

~~TOP SECRET/~~ [REDACTED] /NOFORN//X1
HANDLE VIA [REDACTED] CHANNELS

INVENTORY OF VIDEOTAPES

[all dates are 2002]

1st Shipment [REDACTED]

Box 1 of 4

Detainee #1

<u>Tape</u>	<u>Label</u>	<u>Date/time</u>	<u>Description</u>
1	1	[REDACTED]	[REDACTED] Do not tape over
2	2	[REDACTED]	
3	3	[REDACTED]	
4	4	[REDACTED]	
5	5	[REDACTED]	
6	6	[REDACTED]	
7	7	[REDACTED]	
8	8	[REDACTED]	
9	9	[REDACTED]	
10	10	[REDACTED]	

[REDACTED]

HANDLE VIA [REDACTED] CHANNELS
~~TOP SECRET/~~ [REDACTED] /NOFORN//X1

~~TOP SECRET~~/ [REDACTED] /NOFORN//X1
HANDLE VIA [REDACTED] CHANNELS

<u>Tape</u>	<u>Label</u>	<u>Date/time</u>	<u>Description</u>
11	11	[REDACTED]	
12	12	[REDACTED]	
13	13	[REDACTED]	[REDACTED]
14	14	[REDACTED]	
15	15	[REDACTED]	
16	16	[REDACTED]	
17	17	[REDACTED]	

End Box 1 of 4

HANDLE VIA [REDACTED] CHANNELS
~~TOP SECRET~~/ [REDACTED] /X1

~~TOP SECRET~~/ [REDACTED] /NOFORN//X1
HANDLE VIA [REDACTED] CHANNELS

Box 2 of 4

<u>Tape</u>	<u>Label</u>	<u>Date/time</u>	<u>Description</u>
18	18	[REDACTED]	[REDACTED]
19	19	[REDACTED]	[REDACTED]
20	20	[REDACTED]	[REDACTED]
21	21	[REDACTED]	[REDACTED]
22	22	[REDACTED]	[REDACTED]
23	23	[REDACTED]	[REDACTED]
24	24	[REDACTED]	[REDACTED]
25	25	[REDACTED]	[REDACTED]
26	26	[REDACTED]	[REDACTED]
27	27	[REDACTED]	[REDACTED]
28	28	[REDACTED]	[REDACTED]
29	29	[REDACTED]	[REDACTED]
30	30	[REDACTED]	[REDACTED]
31	31	[REDACTED]	[REDACTED]
32	32	[REDACTED]	[REDACTED]

HANDLE VIA [REDACTED] CHANNELS
~~TOP SECRET~~/ [REDACTED] /NOFORN//X1

~~TOP SECRET/~~ [REDACTED] /NOFORN//X1
HANDLE VIA [REDACTED] CHANNELS

<u>Tape</u>	<u>Label</u>	<u>Date/time</u>	<u>Description</u>
33	33	[REDACTED]	[REDACTED]
34	34	[REDACTED]	[REDACTED]
35	35	[REDACTED]	[REDACTED]
36	36	[REDACTED]	AZ [REDACTED] [REDACTED]
37	37	[REDACTED]	Abu Z. [REDACTED] [REDACTED]
38	38	[REDACTED]	[REDACTED]
39	39	[REDACTED]	[REDACTED]

End Box 2 of 4

HANDLE VIA [REDACTED] CHANNELS
~~TOP SECRET/~~ [REDACTED] /NOFORN//X1

~~TOP SECRET~~/ [REDACTED] /NOFORN//X1
HANDLE VIA [REDACTED] CHANNELS

Box 3 of 4

<u>Tape</u>	<u>Label</u>	<u>Date/time</u>	<u>Description</u>
40	40	[REDACTED]	[REDACTED]
41	41	[REDACTED]	[REDACTED]
42	42	[REDACTED]	AZ [REDACTED]
43	43	[REDACTED]	[REDACTED]
44	44	[REDACTED]	[REDACTED]
45	45	[REDACTED]	[REDACTED]
46	46	[REDACTED]	[REDACTED]
47	47	[REDACTED]	[REDACTED]

48	[REDACTED]	[REDACTED]	[REDACTED]
49	[REDACTED]	[REDACTED]	[REDACTED]
50	[REDACTED]	[REDACTED]	[REDACTED]
51	[REDACTED]	[REDACTED]	[REDACTED]
52	[REDACTED]	[REDACTED]	[REDACTED]
53	[REDACTED]	[REDACTED]	[REDACTED]
54	[REDACTED]	[REDACTED]	[REDACTED]

HANDLE VIA [REDACTED] CHANNELS
~~TOP SECRET~~/ [REDACTED] /NOFORN//X1

~~TOP SECRET~~/ [REDACTED] /NOFORN//X1
HANDLE VIA [REDACTED] CHANNELS

<u>Tape</u>	<u>Label</u>	<u>Date/time</u>	<u>Description</u>
55		[REDACTED]	interview
56		[REDACTED]	interview
57		[REDACTED]	
58		[REDACTED]	
59		[REDACTED]	

60			AZ [REDACTED]
61			[REDACTED]

End Box 3 of 4

HANDLE VIA [REDACTED] CHANNELS
~~TOP SECRET~~/ [REDACTED] /NOFORN//X1

~~TOP SECRET/~~ [REDACTED] /NOFORN//X1
HANDLE VIA [REDACTED] CHANNELS

2nd Shipment [REDACTED]

Box 4 of 4

Detainee #1

<u>Tape</u>	<u>Label</u>	<u>Date/time</u>	<u>Description</u>
62	1		[REDACTED]
63	2		[REDACTED]
64	3		[REDACTED]
65	4		[REDACTED]
66	1		[REDACTED]
67	2		[REDACTED]
68	3		[REDACTED]
69			[REDACTED]
70	4		[REDACTED]
71	5		[REDACTED]
72	6		[REDACTED]
73	7		[REDACTED]
74	8		[REDACTED]
75	9		[REDACTED]
76	10		[REDACTED]
77	11		[REDACTED]

HANDLE VIA [REDACTED] CHANNELS
~~TOP SECRET/~~ [REDACTED] /NOFORN//X1

~~TOP SECRET~~/ [REDACTED] /NOFORN//X1
HANDLE VIA [REDACTED] CHANNELS

<u>Tape</u>	<u>Label</u>	<u>Date/time</u>	<u>Description</u>
78	12	[REDACTED]	
79	13	[REDACTED]	
80	14	[REDACTED]	[REDACTED]
81	15	[REDACTED]	
82	16	[REDACTED]	
83		[REDACTED]	
84		[REDACTED]	
85		[REDACTED]	
86		[REDACTED]	

87			[REDACTED]
88			[REDACTED]

89	1		Use and rewind #1
90	2		Use and rewind #2

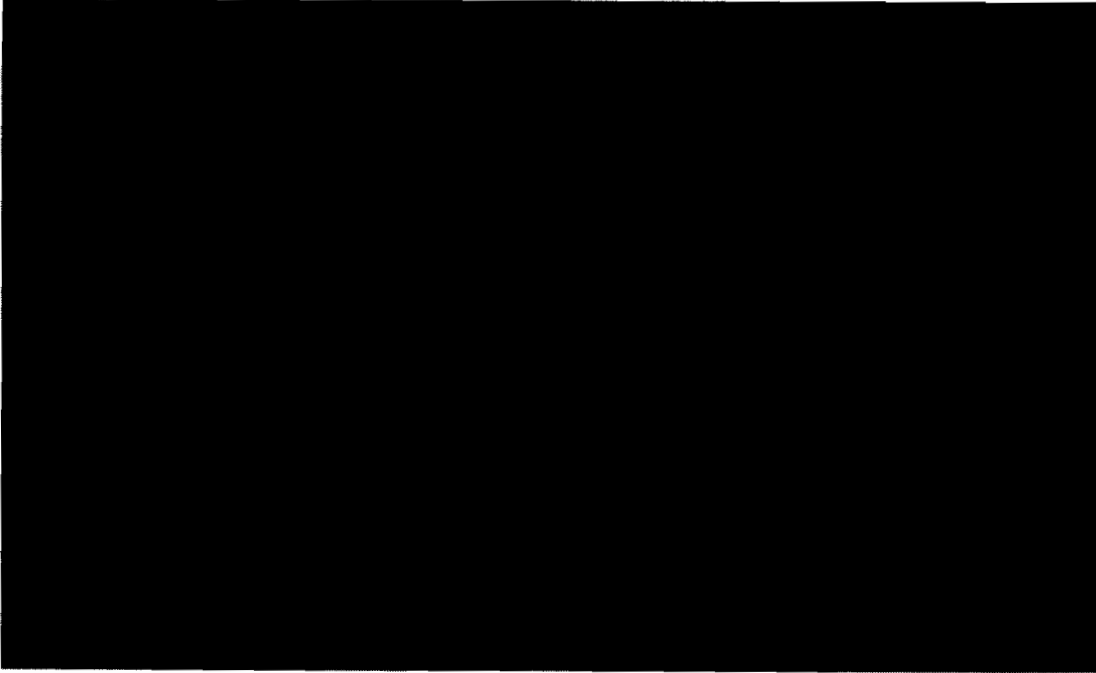
Detainee #2

<u>Tape</u>	<u>Label</u>	<u>Date/time</u>	<u>Description</u>
91		[REDACTED]	Tape and rewind #2
92	3	[REDACTED]	Use and rewind #3 Final

End Box 4 of 4

HANDLE VIA [REDACTED] CHANNELS
~~TOP SECRET~~/ [REDACTED] /NOFORN//X1

~~TOP SECRET~~/ [REDACTED] /NOFORN//X1
HANDLE VIA [REDACTED] CHANNELS



HANDLE VIA [REDACTED] CHANNELS
~~TOP SECRET~~/ [REDACTED] /NOFORN//X1