

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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AMERICAN CIVIL LIBERTIES UNION, et al., :
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 : **ORDER DEFERRING**
 : **CONSIDERATION OF**
 : **PLAINTIFFS' MOTION**
 : **TO CITE CIA FOR CONTEMPT**
 :
-against- Plaintiffs, :
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DEPARTMENT OF DEFENSE, et al., :
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 : 04 Civ. 4151 (AKH)
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ALVIN K. HELLERSTEIN, U.S.D.J.:

Plaintiffs filed a motion on December 12, 2007, asking me to cite Defendant Central Intelligence Agency (“CIA”) for contempt and to impose sanctions. Plaintiffs argue that the CIA violated my order of September 15, 2004 by destroying videotapes that were responsive to Plaintiffs’ FOIA requests, but not produced or listed on the relevant Vaughn declarations. The parties appeared before me on January 16-17, 2008 and August 18, 2008 to discuss the motion.

On August 20, 2008, I deferred consideration of the motion and ordered the Government to submit a supplemental declaration of Special Prosecutor John H. Durham, who is leading the criminal investigation into the destruction of the videotapes. On September 10, 2008, the Government submitted a declaration of Mr. Durham for my review, ex parte and in camera. In that declaration, Mr. Durham described the status of his investigation. He explained his concern that release of information covered by the first and second categories of my August 20, 2008 order would compromise the investigation, and asked that I defer compliance with the order as to those two categories until December 24, 2008. On September 16, 2008, I granted the Government’s request for a stay.

By letter dated December 23, 2008, the Government requests a continuation of the stay until February 28, 2009. In support of the request, the Government submitted for my ex


parte, in camera review a supplemental declaration of Mr. Durham, in which he reiterates his belief that compliance with my order as to the first and second categories would impede his investigation.

I am satisfied, based on Mr. Durham's representations, that immediate compliance with my order of August 20, 2008 would compromise the ongoing Department of Justice investigation. I am also satisfied that the request for a further stay does not result from improper delays in that investigation. Further, as I stated in my order of September 16, 2008, I believe that postponing compliance with all three categories of production, not just the first two, would allow me better to rule on the exemptions that the Government will likely claim with respect to the third category.

Accordingly, I defer compliance with my order of August 20, 2008 until February 28, 2009. Plaintiffs' motion to cite the CIA for contempt will remain on my docket. An unredacted version of the December 22, 2008 Declaration of John H. Durham shall be filed under seal. A version of the declaration, as redacted by Mr. Durham, shall be filed publicly.

SO ORDERED.

Dated: January 6, 2009
New York, New York


ALVIN K. HELLERSTEIN
United States District Judge