

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

_____)	
MAHMOAD ABDAH, <i>et al.</i> ,)	
)	
Petitioners,)	
)	
v.)	Civil Action No. 04-1254 (HHK)
)	
GEORGE W. BUSH, <i>et al.</i> ,)	
)	
Respondents.)	
_____)	

**RESPONDENTS’ OPPOSITION TO EMERGENCY MOTION
FOR INQUIRY INTO RESPONDENTS’ COMPLIANCE
WITH DOCUMENT PRESERVATION ORDER**

Petitioners ask this Court to conduct, on very short notice, an evidentiary hearing at which respondents would be required to make witnesses available to testify concerning the government’s compliance with a document preservation order entered in this case. Because petitioners have not established that there is any likelihood that the government has not complied with that order or that it would otherwise be appropriate to hold such a hearing, their motion should be denied.

I. Based on Petitioners’ Own Allegations, the Tapes at Issue Were Not Covered By This Court’s Preservation Order

Petitioners have not established that it is likely that the government has not complied with the Court’s June 10, 2005 Order. Under that Order, the government was required to preserve information “regarding the torture, mistreatment, and abuse of *detainees now at the United States Naval Base at Guantánamo Bay, Cuba*” (emphasis added). Petitioners base their arguments on the proposition that the CIA has acknowledged destroying tapes regarding the interrogation during the 2002 timeframe of Abu Zubaydah. But Abu Zubaydah is not a petitioner in this

matter, and petitioners have neither alleged nor shown that he was a detainee at Guantanamo Bay when the Court entered its Order on June 10, 2005. As a result, petitioners do not seriously contend that the tapes of Abu Zubaydah's interrogation reflect "the torture, mistreatment, and abuse of *detainees now at the United States Naval Base at Guantánamo Bay, Cuba*" – that is, those detainees at Guantanamo on June 10, 2005 – and were thus covered by the terms of this Court's June 2005 Order.

II. Pending Investigations and Inquiries Should Proceed Without Separate Judicial Inquiry

Petitioners appear to be inviting this Court to act in the exercise of its inherent powers to hold an inquiry. Not only have petitioners failed to demonstrate that the destruction of tapes could have been covered by the Court's June 2005 Order, they have failed to demonstrate a sufficient basis for the Court to take extraordinary measures to open a judicial inquiry in circumstances such as this, particularly where the Supreme Court has admonished that such inherent powers "must be exercised with restraint and discretion." *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 764 (1980). In light of the current inquiries by the political branches into the destruction of the tapes that occasioned petitioners' motion, it would not be appropriate to institute a judicial inquiry.¹

¹ Petitioners' request that this Court act precipitously to convene an unnecessary hearing in a case in which it lacks jurisdiction (*see infra* § III) and into a matter that would likely implicate sensitive issues (such as how to deal with classified information) would not be consistent with the Supreme Court's expectation that:

[A] District Court would proceed with the caution that we have indicated is necessary in this setting, engaging in a factfinding process that is both prudent and incremental. We have no reason to doubt that courts faced with these sensitive matters will pay proper heed both to the matters of national security that might arise in an individual case and to the constitutional limitations safeguarding essential liberties that remain vibrant even in

As the Court may be aware, the Department of Justice already has begun a preliminary inquiry into the destruction of the tapes. *See* United States Department of Justice Press Release dated December 8, 2007 (describing “preliminary inquiry” as “procedure” used by Department of Justice to determine whether to proceed to fuller investigation) (attached as Exhibit A); Letter from Kenneth L. Wainstein, Assistant Attorney General, National Security Division, U.S. Department of Justice, to John A. Rizzo, Acting General Counsel, Central Intelligence Agency, dated December 8, 2007 (“the Department of Justice will conduct a preliminary inquiry into the facts to determine whether further investigation is warranted. I understand that you have undertaken to preserve any records or other documentation that would facilitate this inquiry. The Department will conduct this inquiry in conjunction with the CIA’s Office of Inspector General (OIG).”) (attached as Exhibit B).

When the Department of Justice is actively engaged in gathering the facts, determining whether the facts rise to the level of warranting a further investigation, and emphasizing, on its own, the importance of the CIA’s preservation of relevant material, proceeding hastily into a separate judicial inquiry – particularly where petitioners have failed to demonstrate any action in violation of the Court’s preservation order – is both unnecessary and potentially disruptive. Indeed, requiring individuals potentially involved in the destruction of the tapes to testify before this Court at the same time as the Department of Justice is inquiring into what such individuals

times of security concerns.

Hamdi v. Rumsfeld, 542 U.S. 507, 538-39 (2004). (Of course, the petitioner in *Hamdi* was a United States citizen. The question of whether aliens held outside the United States, such as petitioners here, could assert constitutional protections was decided by the Court of Appeals against petitioners and is one of the questions currently before the Supreme Court in *Boumediene*.)

may have done could potentially complicate the ongoing efforts to arrive at a full factual understanding of the matter.²

III. The Court Lacks Jurisdiction

Aside from petitioners' failure to show why a hearing in this Court is needed at all, or that it would be prudent given the potential disruption that could result from a separate judicial inquiry, the Court should not grant petitioners' motion for the simple reason that the Court lacks jurisdiction over this petition. Unless and until the Supreme Court acts in a way that changes the law as set forth in *Boumediene v. Bush*, 476 F.3d 981 (D.C. Cir. 2007), *cert. granted*, 127 S. Ct. 3078 (June 29, 2007), the law in this Circuit is clear that the Court does not have jurisdiction over the subject matter of this petition. For that reason, the Court should forbear from proceeding with a judicial inquiry as requested by petitioners' motion.

* * * * *

Given that petitioners' assertions fail to demonstrate any incident covered by the plain terms of this Court's June 2005 Order, that separate investigations by the political branches have begun, and that this Court lacks jurisdiction over this petition in any event, petitioners' motion seeking a judicial inquiry should be denied.

² In addition to the Department of Justice, the Intelligence Committees of both the House of Representatives and the Senate have announced their intention to conduct investigations into the tapes destruction matter. *See* House Intelligence Committee Press Release, dated December 10, 2007 (attached as Exhibit C); Press Release from Office of Senator Jay Rockefeller, dated December 7, 2007 (attached as Exhibit D).

Dated: December 14, 2007

Respectfully submitted,

JEFFREY S. BUCHOLTZ
Acting Assistant Attorney General

CARL J. NICHOLS
Deputy Assistant Attorney General

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/s/ Terry M. Henry

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Attorneys for Respondents

EXHIBIT A



Department of Justice

FOR IMMEDIATE RELEASE
SATURDAY, DECEMBER 8, 2007
WWW.USDOJ.GOV

OPA
(202) 514-2007
TDD (202) 514-1888

Statement from Brian Roehrkasse, Director of Public Affairs, Regarding Preliminary Inquiry into Interrogation Video Destruction

"The Department of Justice and the CIA announced today that the Justice Department's National Security Division initiated a preliminary inquiry in conjunction with the CIA's Office of Inspector General regarding the destruction of the interrogation videos described in CIA Director Mike Hayden's message to employees on December 6.

"A preliminary inquiry is a procedure the Department of Justice uses regularly to gather the initial facts needed to determine whether there is sufficient predication to warrant a full investigation."

Attached is the letter from Assistant Attorney General for National Security Ken Wainstein to CIA Acting General Counsel John Rizzo regarding the preliminary inquiry.

Attachment

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07-991

EXHIBIT B



U.S. Department of Justice

National Security Division

Assistant Attorney General

Washington, D.C. 20530

December 8, 2007

John A. Rizzo
Acting General Counsel
Central Intelligence Agency
Washington, DC 20505

Dear Mr. Rizzo:

I am writing this letter to confirm our discussions over the past several days regarding the destruction of videotapes of interrogations conducted by the Central Intelligence Agency (CIA). Consistent with these discussions, the Department of Justice will conduct a preliminary inquiry into the facts to determine whether further investigation is warranted. I understand that you have undertaken to preserve any records or other documentation that would facilitate this inquiry. The Department will conduct this inquiry in conjunction with the CIA's Office of Inspector General (OIG).

My colleagues and I would like to meet with your Office and OIG early next week regarding this inquiry. Based on our recent discussions, I understand that your Office has already reviewed the circumstances surrounding the destruction of the videotapes, as well as the existence of any pending relevant investigations or other preservation obligations at the time the destruction occurred. As a first step in our inquiry, I ask that you provide us the substance of that review at the meeting.

Thank you for your cooperation with the Department in this matter. Please feel free to contact me if you have any questions.

Sincerely,

A handwritten signature in black ink that reads "Kenneth L. Wainstein".

Kenneth L. Wainstein
Assistant Attorney General
National Security Division

cc: John L. Helgerson
Inspector General
Central Intelligence Agency

EXHIBIT C



FOR IMMEDIATE RELEASE – December 10, 2007

Contact: Kira Maas (Reyes): 202-225-4831 (office), 202-225-2912 (cell)

<http://intelligence.house.gov>

Reyes, Hoekstra Announce Investigation into the Destruction of CIA Interrogation Videotapes

Washington, D.C. -- *House Intelligence Committee Chairman Silvestre Reyes (D-Texas) and the committee's top Republican Pete Hoekstra (Michigan) issued the following statement today:*

“Today we are announcing a full committee investigation, pursuant to Intelligence Committee rules, into the issues surrounding the destruction of Central Intelligence Agency (CIA) interrogation videotapes.

“Director Hayden’s note to the workforce on December 6, 2007, implied that our committee had been properly notified about the destruction of certain videos in 2005. Based on our review of the record, this does not appear to be true. Our investigation will review issues surrounding the destruction of videos, the CIA’s failure to notify Congress of this important matter, and related questions concerning the CIA’s interrogation program.

“Our investigation will be complete, thorough and bipartisan. We will follow the facts wherever they lead. And we will use every tool at our disposal to conduct a fair and complete review on behalf of the House of Representatives and the American people.

“Our review will begin with a closed, on-the-record briefing by CIA Director Michael Hayden on Wednesday, December 12, 2007. In the coming days, our staff will be developing a detailed plan for this investigation.”

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EXHIBIT D

Use your browser's back button to return to Senator Rockefeller's Webpage.

FOR IMMEDIATE RELEASE

December 7, 2007

**CHAIRMAN ROCKEFELLER SAYS INTEL COMMITTEE HAS
BEGUN INVESTIGATION INTO CIA DETAINEE TAPES**

**--Senator Expresses Concern that CIA Continues to Withhold Key
Information --**

“In the last 24 hours, we have taken a close look at any relevant correspondence related to the tapes. The news that the tapes were destroyed was extremely disturbing to me and the CIA’s description of notifying Congress is inconsistent with our records. As we learn more, it is only raising new questions and concerns.

“I have been pushing for a full investigation of CIA detention and interrogation programs for years. Along with this ongoing oversight, the committee has now asked for a complete and accurate chronology of events related to the tapes, including how the tapes were used, when and why they were destroyed, who was notified of their destruction and when, and any communication about them that was provided to the courts and Congress.

“We do not know if there was intent to obstruct justice, an attempt to prevent congressional scrutiny, or whether they were simply destroyed out of concern they could be leaked – whatever the intent, we must get to the bottom of it. This is a very serious matter with very serious consequences.

“Based on a preliminary review, here’s what we know.

“Last night, the CIA informed me that it believes that the leadership of the Senate Intelligence Committee was told of the decision to destroy the tapes in February 2003 but was not told of their actual destruction until a closed committee hearing held in November 2006.

“The committee has located no record of either being informed of the 2003 CIA decision or being notified late last year of the tapes having being destroyed. A review of the November 2006 hearing transcript finds no mention of tapes being destroyed.

“While the existence of the videotapes was known to me in 2003 in my capacity as then-Vice Chairman of the committee, I was not told of the CIA’s decision to destroy the tapes and I was not aware of their destruction until yesterday’s press reports.

“In May 2005, I wrote the CIA Inspector General requesting over a hundred documents referenced in or pertaining to his May 2004 report on the CIA’s detention and interrogation activities. Included in my letter was a request for the CIA to provide to the Senate Intelligence

Committee the CIA's Office of General Counsel report on the examination of the videotapes and whether they were in compliance with the August 2002 Department of Justice legal opinion concerning interrogation. The CIA refused to provide this and the other detention and interrogation documents to the committee as requested, despite a second written request to CIA Director Goss in September 2005.

"It was during this 2005 period that I proposed without success, both in committee and on the Senate floor, that the committee undertake an investigation of the CIA's detention and interrogation activities. In fact, all members of the congressional intelligence committees were not fully briefed into the CIA interrogation program until the day the President publicly disclosed the program last September.

"Since that time, the committee has held numerous hearings on the program and just this week acted to prohibit the CIA from using enhanced interrogation techniques and requiring them to adhere to the Army Field Manual."

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ORDER

Upon petitioners' Emergency Motion for Inquiry Into Respondents' Compliance With Document Preservation Order, it is hereby

ORDERED that the motion is denied.

Dated:

UNITED STATES DISTRICT JUDGE