

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

THE JAMES MADISON PROJECT,)

and)

MATTHEW COLE)

Plaintiffs,)

v.)

Case No. 1:07cv02306 (RBW)

CENTRAL INTELLIGENCE AGENCY,)

Defendant.)

DECLARATION OF JOHN H. DURHAM

I, John H. Durham, declare as follows:

1. I am Counsel to the United States Attorney for the District of Connecticut. I have been employed as a federal prosecutor since December 20, 1982, when I became a Trial Attorney for the New Haven Field Office of the Boston Strike Force on Organized Crime. I served as the Strike Force Chief in the District of Connecticut until September 1989. In September 1989, I became Chief of the Criminal Division for the United States Attorney's Office for the District of Connecticut and served in that position until March 1994, when I became the Deputy United States Attorney for the Office.¹ I became Counsel to the United States Attorney in March 2008. At various times, I have also served as the Interim United States Attorney for the District of Connecticut, Special Attorney in the District of Massachusetts investigating and prosecuting corruption involving law enforcement agencies in Massachusetts, and Special Attorney in the

¹ In the District of Connecticut, the Deputy United States Attorney is the position commonly known in other districts as the First Assistant United States Attorney.

Southern District of New York investigating allegations of corruption within a federal law enforcement agency. On January 2, 2008, Attorney General Michael Mukasey appointed me to serve as Acting United States Attorney for the Eastern District of Virginia in connection with a federal criminal investigation into the destruction of certain videotaped interrogations of detainees by the Central Intelligence Agency (“CIA” or “the Agency”). In my capacity as Acting United States Attorney for the Eastern District of Virginia, I am responsible for supervising the investigative efforts of a team of lawyers and Special Agents of the Federal Bureau of Investigation conducting the investigation into the CIA tapes matter.

2. This declaration is submitted in support of the CIA’s motion for a stay of proceedings in the above-captioned civil action due to the pendency of a related criminal investigation. The statements made in this declaration are based on my personal knowledge of the facts and information obtained and reviewed in the course of my official duties.

3. In connection with the ongoing federal criminal investigation into the destruction of videotapes by the CIA, the following background information is of note:

a) On December 6, 2007, Michael V. Hayden, Director of the CIA, announced that during the initial stage of the Agency’s terrorist detention program, it videotaped interrogations, and in 2005 it destroyed the tapes. Further, Director Hayden stated that the program itself began with the capture of a detainee named Abu Zubaydah in March of 2002, and the decision to videotape interrogations was made by the Agency on its own. Director Hayden further stated that the videotaping of interrogations stopped in 2002. Director Hayden also advised that the decision to destroy the tapes was made only after “they were no longer of intelligence value and not relevant to any internal, legislative, or judicial inquiries – including

the trial of Zacarias Moussaoui.”

b) Shortly after the destruction of the videotaped interrogations was made public, Attorney General Mukasey directed that a preliminary inquiry be conducted by the National Security Division of the Department of Justice regarding the destruction of the videotapes.

c) On January 2, 2008, the Attorney General announced that the preliminary inquiry had been concluded and that there was a basis for initiating a full criminal investigation into the destruction of the tapes. Further, on that same date, as noted above, I was appointed to serve as the Acting United States Attorney for the Eastern District of Virginia to supervise that criminal investigation. Also, as noted, the Federal Bureau of Investigation was designated as the federal law enforcement agency that would conduct the investigation.

d) Beginning on January 2, 2008, and continuing to the present, a fully-staffed team of prosecutors and agents has been assembled and has been actively gathering information and evidence relating to the destruction of the videotapes in issue.

4. The questions under active review in this investigation include, *inter alia*, whether any federal criminal offenses were committed in connection with the destruction of the above-referenced videotapes. More specifically, the investigation team is actively reviewing whether any person or persons obstructed justice, made false statements, or acted in contempt of court or Congress in connection with the destruction of the videotapes. With respect to potential obstruction of justice offenses, we are investigating whether the destruction of the videotapes violated any order issued by any federal judicial officer and, if so, what the person or persons' knowledge, motive, and/or intent was in destroying the tapes or causing their destruction.

5. I understand that the plaintiffs in this case, The James Madison Project and Matthew Cole (“Plaintiffs”), filed an amended complaint in this Freedom of Information Act (“FOIA”) lawsuit on February 1, 2008, seeking documents related to the existence and destruction of the same videotaped interrogations at issue in the criminal inquiry.

6. Central questions for the criminal investigation include: who within the federal government knew of the existence of the videotaped interrogations at issue; who was aware of the various orders that might have required the preservation of the videotapes; and who was involved, in any way, in the decision and/or directive to destroy the videotapes. Because Plaintiffs’ FOIA request relates directly to the videotapes of the interrogations and their destruction, most, if not all, of the documents that the CIA would be required to search for and review in order to respond to Plaintiffs’ FOIA request would be relevant to the investigation. Many of those documents have already been gathered and the files provided and/or made available to the criminal investigators for use in the ongoing investigation. In this regard, many of the individuals who would be involved in the CIA’s review of these FOIA materials, for both a determination of responsiveness and processing purposes, are essential witnesses for the criminal investigation.

7. Because the individuals who would be involved in the review of the FOIA documents are also potential witnesses for the criminal investigation, review of the documents by such individuals would create the risk that these potential witnesses would be affected by their access not only to their own documents and records, but those of others, and, as a result of reviewing those documents, their recollections may be changed with respect to events, or – inadvertently or advertently – their answers to questions that would be posed by the criminal

investigators would be affected.² This exposure to other records and statements would almost certainly occur in the normal course of conducting such search and review. Indeed, due to these same concerns, I have previously asked the appropriate authorities within the CIA not to show records and documents, or otherwise make certain records and documents available to persons who will be interviewed as witnesses in connection with the criminal investigation being conducted.

8. The review of the documents that will be necessary to respond to Plaintiffs' FOIA request would also increase the likelihood of public disclosures of information – through leaks, inadvertent discussions, or otherwise – that could negatively impact the ongoing criminal investigation. In addition, the public disclosure of any documents (or information contained within those documents) through a FOIA release or otherwise, concerning the destruction of evidence could expose witnesses to what may have been said or disclosed to investigators by other potential witnesses and thereby cause potential witnesses, intentionally or otherwise, to change what they have to say so or to conform their testimony to any such publicly disclosed information.

9. The criminal investigation that I am supervising in my role as Acting United States Attorney for the Eastern District of Virginia is unique in my experience as an Assistant United States Attorney. The destruction of the videotaped interrogations has brought about legitimate concern on the part of various federal judges, as well as significant Congressional

² To be clear, the criminal investigators have, to date, interviewed some of the potential witnesses. Nevertheless, the risks discussed in this paragraph still apply to those witnesses who have not yet been interviewed, as well as to those witnesses whom the criminal investigators may need to re-interview at a later juncture and/or subpoena to the grand jury.

interest. For example, as has been publicly reported, United States District Judge Henry H. Kennedy has been asked to investigate the matter by the petitioners in *Mahmood Abdah, et al. v. Bush, et al.*, Civil No. 04-1254 (HHK) (D.D.C). Similarly, the petitioners in *ACLU, et al. v. Department of Defense*, No. 04CV4151 (AKH) (S.D.N.Y.) have asked Judge Alvin K. Hellerstein to investigate the matter, and the court has expressed concerns regarding the destruction of the tapes.³ Beyond these specific expressions of concern, there is a compelling national interest in ensuring that this criminal investigation is conducted in a manner that will engender public trust in its outcome. It is my belief that requiring the CIA to proceed with the search for and processing of documents responsive to Plaintiffs' FOIA request at this time will interfere with the ability to conduct a complete, thorough, and untainted federal criminal investigation into the destruction of videotaped interrogations. Such interference could in turn jeopardize the successful prosecution of any criminal case brought against any individuals who were found to have violated federal law in connection with the destruction of these tapes. Clearly, the public interest in an unfettered criminal investigation must be balanced against the Plaintiffs' interest in the speedy resolution of their request. I respectfully submit that a temporary stay of this proceeding will strike the proper balance by avoiding any unnecessary interference with the criminal investigation without unduly delaying the resolution of the Plaintiffs' request.

10. My concerns about the integrity of the instant criminal investigation, together with the highly classified nature of much of the information in this investigation, make me reluctant to provide further details concerning how this criminal investigation is being conducted and the

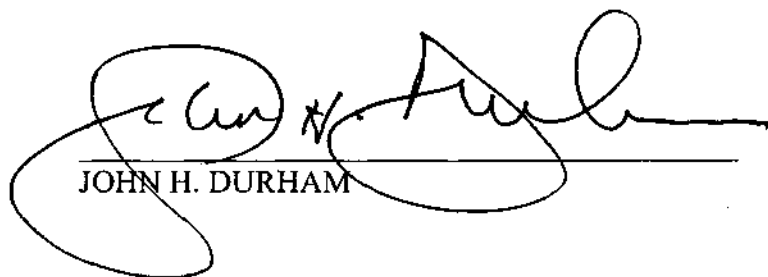
³ Along these same lines, the House Permanent Select Committee on Intelligence, the Senate Select Committee on Intelligence, and the Judiciary Committees in both Houses of Congress have initiated their own investigations into the destruction of the videotapes.

impact on any potential prosecutions if the inquiry that will be necessary to comply with gathering and processing of the documents responsive to Plaintiffs' FOIA request must go forward at this time. Nonetheless, should the Court require further information concerning whether to grant a stay in these matters, further information could be disclosed *ex parte* and *in camera*.

11. Because of the foregoing concerns, I request that the defendant in this lawsuit seek a temporary stay of this civil proceeding until such time as the criminal investigative process is complete, a process that I estimate – based upon presently available information – will take at least six more months. If indictments and criminal prosecutions were to result from the investigation, I would request that the defendant seek a further stay of this proceeding until the conclusion of the criminal proceedings.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on June 9, 2008.



JOHN H. DURHAM