IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

Ali Saleh Kahlah Almarri,	)	
	)	
	)	**C/A 2:05-2259-HFF-RSC**
Plaintiff,	)	
	)	
v.	)	**PLAINTIFF'S REPLY TO**
	)	**DEFENDANTS' RESPONSE TO**
Robert M. Gates,	)	**MOTION FOR PRESERVATION**
Secretary of Defense of the United States,	)	**ORDER AND INQUIRY INTO**
Commander John Pucciarrelli,	)	**PAST SPOLIATION**
U.S. Naval Brig, Charleston,	)	
South Carolina,	)	
	)	
Defendants.	)	
	)	
	)	

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Preliminary Statement

Responding to Mr. Almarri's motion ("Pl.s' Mot.") (dkt. no. 41), the government now admits to destroying highly relevant evidence to pending litigation and makes clear that this destruction was wider and went on longer than first reported. Defs.' Resp. to Pl.'s Mot. ("Defs.' Resp.") (dkt. no. 51). Yet, the nub of the government's response is "trust us"—that a preservation order is unnecessary because the government can be trusted to preserve documents voluntarily. The government's argument rests on two propositions: that its earlier destruction of recordings and documents can be excused because that destruction allegedly occurred before litigation was pending; and that the government now has in place internal preservation directives eliminating all risk of future spoliation. Both assertions are false. The true facts show that there remains a serious risk of spoliation warranting a preservation order. Further, the government fails to identify any harm that such an order would cause.

First, contrary to the government's assertion, evidence *was* destroyed during the pendency of litigation for which that evidence was highly relevant. The government, moreover, has already falsely denied that relevant evidence was destroyed. In opposing Mr. Almarri's prior request for a preservation order, the government falsely represented to the Court that concerns about spoliation were "unsubstantiated and entirely speculative" and denied having "lost or destroyed evidence in the past." As the government now acknowledges, when that representation was made, interrogation recordings and related documents had already been destroyed, and further destruction continued long afterwards.

Second, the preservation measures undertaken by the government are inadequate because they fail to ensure the preservation of remaining evidence; do nothing to preserve evidence pertaining to the past destruction of recordings and documents; and could be unilaterally revoked

at any time by the very agency whose potential wrongdoing may be evidenced in remaining documentation.

Finally, but critically, the government identifies no injury or burden that would flow from the requested order. Instead, that order would merely require the government to do what it is legally obligated to do, but what it has admittedly failed to do in the past: to preserve potentially relevant evidence pertaining to Mr. Almarri's detention and treatment at the Navy brig.

Argument

I. A Preservation Order Is Clearly Warranted.

A preservation order should be granted where, absent such an order, there is (a) a "significant risk that relevant evidence will be lost or destroyed," and (b) "the particular steps to be adopted will be effective, but not overbroad." *Pueblo of Laguna v. United States*, 60 Fed. Cl. 133, 138 (2004); *accord United Med. Supply Co. v. United States*, 73 Fed. Cl. 35, 36-37 & n.1 (2006); *Williams v. Mass. Mut. Life Ins. Co.*, 226 F.R.D. 144, 147 (D. Mass. 2005); *Walker v. Cash Flow Consultants, Inc.*, 200 F.R.D. 613, 617 (N.D. Ill. 2001). Both factors are met here.[1]

[1] Contrary to the government's suggestion (Defs.' Resp. at 5-6), a preservation order "is no more an injunction than an order requiring a party to identify witnesses or produce documents in discovery." *Pueblo of Laguna*, 60 Fed. Cl. at 138 n.8 (citing *Mercer v. Magnant*, 40 F.3d 893, 896 (7th Cir. 1994)); *accord United Med. Supply*, 73 Fed. Cl. at 36-37 n.1 ("[T]he court sees no reason for it to consider whether plaintiff is likely to be successful on the merits of its case in deciding whether to protect records from destruction. . . . [S]uch an approach would be decidedly to put the cart before the horse."); *Capricorn Power Co. v. Siemens Westinghouse Power Corp.*, 220 F.R.D. 429, 433 (W.D. Pa. 2004) (declining to adopt four-factor injunctive relief test for preservation orders). District courts in the Guantánamo Bay detainee litigation have uniformly rejected the government's suggestion that motions for preservation orders be treated as motions for injunctive relief. *See, e.g., El-Banna v. Bush*, No. 04-1144, 2005 WL 1903561, at *1 n.3 (D.D.C. July 18, 2005); *Al-Marri v. Bush*, Civ. No. 04-2035 (D.D.C. Mar. 7, 2005), attached as App. A; *Abdah v. Bush*, No. 04-1254 (D.D.C. June 10, 2005), attached as App. B; *Anam v. Bush*, No. 04-1194 (D.D.C. June 10, 2005), attached as App. C.

A. The Government's Past Destruction of Evidence Establishes a Significant Risk of Further Loss or Destruction.

A party may establish a significant risk of future destruction by showing *either* that the opposing party has lost or destroyed evidence in the past *or* has inadequate retention procedures in place. *Pueblo of Laguna*, 60 Fed. Cl. at 138; *Treppel v. Biovail Corp.*, 233 F.R.D. 363, 371 (S.D.N.Y. 2006); *see also Capricorn Power Co. v. Siemens Westinghouse Power Corp.*, 220 F.R.D. 429, 437 (W.D. Pa. 2004) (even evidence of attempted damage or destruction of evidence heightens concern about the protection and integrity of the proceedings before it). Here, both factors are met. The government has concededly destroyed clearly relevant evidence on multiple past occasions while misrepresenting that destruction to the Court. And the government's retention procedures fail to eliminate the risk of further destruction.[2]

Even the most unsophisticated litigant knows it has a duty to preserve potentially relevant evidence. *See, e.g., Kronisch v. United States*, 150 F. 3d 112, 126 (2d Cir. 1998); Pl.s' Mot. at 4 (citing cases). The government has now admitted to destroying an enormous body of evidence that was not only potentially relevant to foreseeable future litigation but that was also *actually and highly relevant to pending litigation*. However "unsettled" and "uncharted" the underlying issues raised by this case may be, Defs.' Resp. at 4-5, there is nothing "unsettled" or "uncharted"

[2] District judges in the Guantánamo detainee litigation have followed this two-part test in entering preservation orders. *See, e.g., Al-Marri v. Bush*, No. 04-2035 (D.D.C. Mar. 7, 2005), attached as App. A (citing *Pueblo of Laguna*); *Abdah v. Bush*¸ No. 04-1254 (D.D.C. June 10, 2005), attached as App. B (same); *see also El-Banna v. Bush*, 2005 WL 1903561, at *1 n.3. In any event, Mr. Almarri easily meets the similar three-part test articulated by the district court in *Capricorn Power* for the same basic reasons: 1) the risk of future destruction based upon the government's past destruction of evidence and misrepresentations about that destruction; 2) the irreparable harm to Mr. Almarri that would result from further spoliation; and 3) the shortcomings of the government's internal retention measures on the one hand, and the total absence of any burden imposed by proposed preservation order on the other. *Capricorn Power Co.*, 220 F.R.D. at 433; *see also Treppel*, 233 F.R.D. at 370 ("[T]he distinction [between two-part *Pueblo of Laguna* and three-part *Capricorn Power* tests] is more apparent than real.").

about the government's clear and ironclad duty to preserve all potentially relevant evidence. Violation of that duty alone warrants entry of a preservation order.

Specifically, the government has admitted to destroying:

(1) a still unspecified number of recordings of the government's interrogations of Mr. Almarri conducted at the Navy brig from his arrival on June 23, 2003, to "sometime in 2004," during which time Mr. Almarri was detained *incommunicado* and brutally abused;[3]

(2) "notes and working papers associated with those [interrogation] sessions";[4] and

(3) almost five years worth of continuous recordings made by a digital video recording system at the Navy brig that meticulously documented Mr. Almarri's treatment and conditions of confinement in his housing unit since the outset of his detention at the brig on June 23, 2003, until April 10, 2008.[5]

Without question, all this evidence was and is relevant to Mr. Almarri's habeas corpus litigation that has been ongoing since he was declared an "enemy combatant" in June 2003. That suit was pending before this Court when interrogation recordings and associated documents were destroyed between December 2004 and March 2005.[6] The destroyed evidence also was and is relevant to this action challenging Mr. Almarri's abusive interrogation, prolonged isolation, and other mistreatment.

The interrogation recordings and related documents were relevant to the habeas action because they could have demonstrated, *inter alia*, the unreliability of any statements made by

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[3] Defs.' Resp. at 9; *see also* Decl. of Robert H. Berry, Jr., Defense Intelligence Agency, ¶¶ 3, 8 ("Berry Decl."), Exhibit 2 to Defs.' Resp. Those interrogation sessions took place until Mr. Almarri was allowed access to counsel in October 2004. Certification of Andrew J. Savage ¶ 23 ("Savage Cert."), Ex. 1 to Pl.'s Mot. for Interim Relief (dkt. no. 40).

[4] Defs.' Resp. at 9; Berry Decl. ¶ 8.

[5] Defs.' Resp. at 10-11; Decl. of John Pucciarelli, ¶¶ 3-4 ("Pucciarelli Decl."), Exhibit 3 to Defs.' Resp.

[6] Mr. Almarri's first habeas petition was filed in the United States District Court for the Central District of Illinois immediately after his designation as an "enemy combatant" in June 2003. Following that petition's dismissal on venue grounds, his current habeas petition was immediately filed in this Court in July 2004. *See Rumsfeld v. Padilla*, 542 U.S. 426 (2004); *see also Al-Marri v. Hanft*, 378 F. Supp. 2d 673, 675-76 (D.S.C. 2005) (summarizing history).

Mr. Almarri during his interrogations—and relied on by the government—due to the abusive and coercive methods by which those statements were obtained. *See, e.g., Jackson v. Denno*, 378 U.S. 368, 385-86 (1964); *Spano v. New York*, 360 U.S. 315, 320 (1959); *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 472-73 (D.D.C. 2005). The recordings and documents also could have contained other exculpatory evidence disproving or discrediting the allegations underlying Mr. Almarri's detention. *See, e.g., Brady v. Maryland*, 373 U.S. 83, 87-88 (1963); *United States v. Bagley*, 473 U.S. 667, 676 (1985). Indeed, it is precisely because of the manifest relevance of such evidence that both federal and military law mandate disclosure of a defendant's prior statements obtained during interrogations. Fed. R. Crim. P. 16(a)(1)(A); Military Rule of Evidence 304(d)(1), Manual for Courts-Martial, at III-5 (2008 ed.). Yet, just three months before it destroyed the interrogation recordings, the Defense Intelligence Agency ("DIA") relied on the fruits of those interrogations in supplying the government's factual justification for Mr. Almarri's indefinite military detention without charge before this Court. Decl. of Jeffrey N. Rapp, Attach. C to Resp'ts' Answer to the Pet. for Writ of Habeas Corpus, *Al-Marri v. Hanft*, No. 02:04-cv-2257 (dkt. no. 12). Whether or not Mr. Almarri was entitled to discovery of those recordings in his habeas proceeding—an issue now before the Fourth Circuit—is immaterial. That was and remains a question for *the courts* to decide, not for the Executive to answer secretly on its own in the midst of pending litigation. The government's inexcusable destruction of this evidence violated its clear legal obligations and undermined the integrity of the proceedings before this Court.[7]

[7] The government (Defs.' Resp. at 9-10) cannot avoid the consequences of this spoliation simply because Mr. Almarri's habeas litigation happens to be now pending before the Fourth Circuit. The point is that the government's evidence destruction occurred while that action was pending in this Court. The government's actions thus demonstrate the risk of future spoliation while this suit is pending and show the need for a preservation order to eliminate that risk.

The government's destruction of the interrogation recordings and related documents during the pendency of the habeas litigation speaks volumes about whether it can be trusted to preserve evidence in this case. But, in fact, the government has destroyed relevant evidence in this case as well, including while this action was pending. Specifically, the interrogation recordings and associated notes and working papers would have shown that Mr. Almarri was subjected to a brutal interrogation regime bordering on if not amounting to torture. Compl. ¶¶ 34-111; Certification of Andrew J. Savage ("Savage Cert.") ¶¶ 6-33, Exhibit 1 to Pl.'s Mot. for Interim Relief (dkt. no. 40). The recordings of Mr. Almarri's housing unit would have directly supported these and other claims, including Mr. Almarri's contention that he was unlawfully subjected to total sensory and environmental deprivation (Compl. ¶¶ 4, 50-64; Savage Cert. ¶¶ 18, 23); confined to a tiny cell without natural light, often for weeks on end (Compl. ¶¶ 39-49; Savage Cert. ¶¶ 8, 10-12, 16, 23); and prevented from observing the most elementary tenets of his religion (Compl. ¶¶ 74-87; Savage Cert. ¶¶ 19-22). Those recordings would also have supported Mr. Almarri's pending motion for interim relief by graphically documenting the harmful effects of his prolonged isolation and other mistreatment.

The fact that this action was not yet pending when the government destroyed the interrogation recordings is immaterial because a party has the duty to preserve potentially relevant evidence whenever litigation is reasonably anticipated as well as when litigation is ongoing. *See, e.g.*, *Kronisch v. United States*, 150 F. 3d at 126; *Smith v. Café Asia*, 246 F.R.D. 19, 21 n.1 (D.D.C. 2007); Pl.'s Mot. at 4. Plainly, litigation over Mr. Almarri's interrogations and other mistreatment was reasonably anticipated when the government destroyed the recordings and other evidence. Indeed, the only reason suit was not filed sooner was that the

government had detained Mr. Almarri *incommunicado* for sixteen months as part of its interrogation regime, denying him any access to his counsel and to the courts.

Also, the fact that there may exist "other records related to [Mr. Almarri's] daily activities in his living area" (Defs.' Resp. at 12), does not excuse past destruction or minimize the risk of future spoliation. The government has a legal duty to preserve all relevant and potentially relevant evidence when litigation is pending or reasonably anticipated. Here, moreover, the government destroyed what may be the best evidence of Mr. Almarri's conditions of confinement—the continuous recordings of the housing unit where Mr. Almarri has been confined for the last five years. Pucciarrelli Decl. ¶ 3. And while the government says that these recordings were "automatically overwrit[ten] . . . . approximately every thirty (30) days," *id*., its response belies that assertion. The response shows that the government *selectively* preserved some material from those recordings, while *intentionally* allowing other possibly relevant evidence from the recordings to be destroyed, including evidence relevant to this case. *Id.* ¶ 5.

The government's false statements to this Court on a prior motion for a preservation order provide a further compelling reason why a preservation order is essential to eliminate the risk of further spoliation. In August 2005, Mr. Almarri previously sought an order seeking preservation of potentially relevant evidence. Opposing that request, the government chastised Mr. Almarri for his "unsubstantiated and entirely speculative concern[ ] that the government will not maintain evidence." Resp'ts' Reply to Pet'r's Br. in Resp. to the Ct.'s Aug. 15, 2005 Order, at 19, *Al-Marri v. Hanft*, No. 2:04-cv-2257. The government categorically denied that it had "lost or destroyed evidence in the past" and assured the Court that it already had adequate retention procedures in place. *Id.* at 20. None of these statements were true. As the government now acknowledges, at the time it told the Court there was no need to enter a preservation order, it

had *already* destroyed recordings and documentation of Mr. Almarri's interrogations and was *continuing* to destroy recordings of Mr. Almarri's housing unit on an ongoing basis. The fact that evidence pertaining to Mr. Almarri had already been and continued to be destroyed when the government assured the Court there was no risk of spoliation underscores that assurances alone—even if made in good faith—are insufficient to eliminate the risk of future destruction.[8]

Tellingly, moreover, the government still refuses to acknowledge or accept that it had and continues to have a legal duty to preserve all potentially relevant evidence. After admitting its past evidence destruction, the government says only that it will prevent further spoliation because "DoD takes the destruction of the interrogation tapes seriously." Defs' Resp. at 10. But taking something "seriously" is very different from acknowledging a legal obligation. The government's continued refusal to recognize its legal duty to preserve all remaining evidence, alongside its unapologetic destruction of evidence in the past, further demonstrates the need for a preservation order.

District judges have consistently entered preservation orders in cases involving Guantanamo Bay detainees *even without* proof that the government previously destroyed evidence.[9] Plainly, such an order is warranted here, where the government has admitted to

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[8] This case, moreover, is not the first time the government has destroyed relevant evidence documenting its abusive interrogation of detainees, nor the first time it has misrepresented that destruction to a court. The CIA, for example, has admitted to destroying recordings of the interrogation of detainees in the midst of congressional and legal scrutiny about its secret detention program, and the government has misrepresented the existence and destruction of those recordings to the district judge in the Zacarias Moussaoui case. Mark Mazzetti, "CIA Destroyed 2 Tapes Showing Interrogations," *New York Times*, Dec. 7, 2007, attached as App. G.

[9] *See, e.g.*, *Alsaaei v. Bush*, No. 05-2369, 2006 WL 2367270 (D.D.C. Aug. 14, 2006); *El-Banna*, 2005 WL 1903561, at *2-*3; *Al-Marri v. Bush*, No. 04-2035 (D.D.C. Mar. 7, 2005), attached as App. A; *Abdah v. Bush*, No. 04-1254 (D.D.C. June 10, 2005), attached as App. B; *Anam v. Bush*, No. 04-1194 (D.D.C. June 10, 2005), attached as App. C; *Al-Shiry v. Bush*, No. 05-0490 (D.D.C. Mar. 23, 2005), attached as App. D; *Slahi v. Bush*, No. 05-881 (D.D.C. July 18, 2005), attached as App. E; *Zadran v. Bush*, No. 05-2367, at 4-6 (D.D.C. July 19, 2006), attached as App. F.

destroying highly relevant evidence in a pending case and where it previously vehemently opposed a preservation order as unnecessary and unwarranted without disclosing to the Court that it had, in fact, already destroyed evidence in that case.

B. The Government's Internal Retention Procedures Are Inadequate.

A preservation order is further warranted because the government's two preservation directives fail to eliminate the risk of future spoliation.[10]

First, the two directives wholly fail to preserve evidence relating to the government's past destruction, alteration, or transfer of evidence pertaining to Mr. Almarri's confinement and treatment at the Navy brig. Pl.'s Mot. at 1, 7-8. On the contrary, the government provides no assurance that it will retain any evidence pertaining to its past destruction of the recordings of Mr. Almarri's interrogations, of the notes working papers associated with those interrogations, and of the recordings of Mr. Almarri's housing unit. Such evidence is crucial to determining what remedial measures or sanctions should be imposed in the future. *See infra* Point III.

Second, there is nothing to prevent the government from rescinding the two internal directives at any time and neither directive explicitly specifies how long evidence must be preserved. Unlike the defendants, the Court does not labor under a sharp conflict of interests that could lead to a preservation order being revoked or diluted. As the government admits, the DIA managed Mr. Almarri's interrogations. Thus, the very officers responsible for alleged acts of cruel and illegal treatment have responsibility for preserving evidence that is in their own interest to destroy and that they have admittedly destroyed in the past while hiding that destruction from the Court. The absence of any protection against internal backsliding reinforces the need for a

[10] *See* Defense Intelligence Agency's December 19, 2007 "Notice of Litigation Hold" ("DIA Notice"), Tab A to Berry Decl.; Mem. for Sec'y of Defense dated April 10, 2008, Tab A to Decl. of Russell G. Leavitt, Exhibit 1 to Defs.' Resp. ("April 10, 2008 Memorandum").

judicial order to ensure the preservation of all evidence *pendente lite*, especially where such an order would not impose any burden on the government.

Third, the April 10, 2008 Memorandum and DIA Notice apply only to the Department Defense. The instant motion, however, seeks preservation of all evidence pertaining to Mr. Almarri, in whatever form. The request therefore is not limited to the Defense Department but includes other parts of the U.S. government, including the FBI, which participated with the DIA in Mr. Almarri's interrogations. Savage Cert. ¶ 29. The government's proposed retention procedures do nothing to ensure that defendants take measures to prevent the spoliation of evidence pertaining to Mr. Almarri's detention at the Navy brig possessed by other agencies.[11]

Fourth, the government's preservation efforts have already proven ineffective in halting the destruction of evidence. The government fails to explain why the Defense Department did not extend the March 2005 or December 2007 preservation directives applicable to Guantánamo Bay detainees to Mr. Almarri when it issued them, even though Mr. Almarri's habeas litigation had been pending since June 2003 and the instant litigation pending since August 2005. The government also fails to explain why the Defense Department continued to fail to extend those directives to Mr. Almarri until April 10, 2008, four months after the DIA had issued its Notice of Litigation Hold on December 19, 2007. In the meantime, evidence relevant to this action and, in particular, to Mr. Almarri's pending motion challenging his prolonged isolation, continued to be destroyed. Even assuming good faith, the government's steps to address its past destruction of evidence reveal a continuing lack of the type of internal organization and communication within

[11] While the Defense Department is the only agency party to this suit, the Court may include the FBI and other agencies within the scope of its preservation order as privies to the extent that they directly participated in Mr. Almarri's interrogations and other treatment at the Navy brig. *Cf. United States ex rel. Rahman v. Oncology Assocs.*, 198 F.3d 502, 511 (4th Cir. 1999); *Quintero v. Klaveness Ship Lines*, 914 F.2d 717, 721 (5th Cir. 1990).

the Defense Department and its various components necessary to ensure the preservation of all potentially relevant evidence.

Finally, though broadly worded, the directives do not unambiguously cover the nine interrogation recordings that concededly remain. The Defense Department's April 10, 2008 Memorandum calls for the preservation only of "all *records* relating to [Mr. Almarri]," and does not specifically include recordings, *e.g.*, recordings of his interrogations. By contrast, the August 2005 and December 2007 directives regarding Guantánamo detainees require preservation of "all documents and recorded information of any kind." To be sure, the DIA Notice includes all "documents, records, data, correspondence, charts, reports, notes, emails . . . and other materials" that relate to Mr. Almarri. But it also fails to mention specifically recordings even though it references other types of evidence. Further, the declaration submitted by the DIA Deputy General Counsel suggests that the DIA's Notice does not include the remaining interrogation recordings because those recordings are being preserved separately by the DIA Inspector General and thus are the subject of a separate—and still undefined—retention system not covered by either of the two preservation directives described in the government's response. Berry Decl. ¶ 10. The government's brief deepens this concern by appearing to treat as separate and distinct the interrogation recordings on the one hand, which are not covered by the two preservation directives, and other evidence pertaining to Mr. Almarri, which is covered by those directives. Defs.' Resp. at 10. Entry of the proposed preservation order would eliminate any ambiguity that recordings (along with all other evidence pertaining to Mr. Almarri) must be preserved, and would do so without any harm to the government.

C. A Preservation Order Would Not Burden the Government.

The government nowhere identifies any injury or burden that would flow from the entry of a court order requiring it to preserve evidence pertaining to Mr. Almarri. By contrast, the prejudice to Mr. Almarri and to the Court absent such an order would be enormous. Mr. Almarri could be further deprived of evidence to sustain his claims and the Court deprived of its ability to resolve those claims judiciously. Simply put, the government fails to identify *any* harm that it would suffer from entry of the requested preservation order.

II. The Court Has the Authority to Enter a Preservation Order.

The government (Defs.' Resp. at 14) argues that the Court need not ensure the preservation of evidence because a "serious question exists" whether this Court has jurisdiction over this case under the Military Commissions Act of 2006 ("MCA"), Pub. L. No. 109-366, 120 Stat. 2600. The notion that a pending jurisdictional issue eliminates the Court's inherent power to prevent the destruction of evidence is nonsense, and should be rejected.

To begin, the Fourth Circuit panel ruled that the MCA *does not apply* to Mr. Almarri under ordinary principles of statutory construction. *Al-Marri v. Wright*, 487 F.3d 160, 167-73 (4th Cir. 2007) (finding that the MCA applies only to foreign nationals held at Guantánamo or elsewhere outside the U.S. mainland).[12] While the case is now before the full Fourth Circuit on petition for rehearing, the government treated the threshold jurisdictional issue as an

[12] Mr. Almarri alternatively maintains that construing the MCA to repeal jurisdiction over his habeas action would violate the Suspension, Due Process, and Equal Protection Clauses. Because the Fourth Circuit ruled unanimously that the MCA did not repeal jurisdiction over Mr. Almarri's habeas action, it did not address those constitutional issues. The constitutionality of the MCA's clear jurisdictional ouster over the petitions of detainees at Guantánamo Bay, Cuba,—all foreign nationals captured and detained outside the United States—is pending before the Supreme Court. *Boumediene v. Bush*, __ U.S. __, 127 Sup. Ct. 3078 (June 29, 2007) (granting certiorari). A decision in *Boumediene* upholding the MCA as to Guantánamo Bay detainees will not, and cannot, resolve the distinct statutory and constitutional arguments raised here by a lawful resident arrested and detained inside the United States.

afterthought, raised only on the final page of its rehearing petition. Petition for Rehearing and Rehearing En Banc, at 15, *Al-Marri v. Wright* (No. 06-7427).[13] Instead, the principal issue the government briefed and argued to the *en banc* Fourth Circuit was the *merits* question of whether the President has legal authority to detain Mr. Almarri as an "enemy combatant," *not* whether the MCA repealed jurisdiction over Mr. Almarri's habeas action. Even if the government's position on the merits were upheld, this litigation challenging his treatment would still go forward.

But even assuming a "serious" "jurisdictional question exists, the Court still has inherent authority to supervise the litigation before it. *See, e.g.*, *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43 (1991); *Trigon Ins. Co. v. United States*, 204 F.R.D. 277, 285 (E.D. Va. 2001). The Court also has authority to "issue all writs necessary or appropriate in aid of [its] jurisdiction." 28 U.S.C. § 1651; *see also United States v. United Mine Workers*, 330 U.S. 258, 290 (1947); *Belbacha v. Bush*, __ F.3d __, 2008 WL 680637, at *2-*3 (D.C. Cir. Mar. 14, 2008) (holding that the district court retained jurisdiction to enjoin a detainee's transfer from Guantánamo pending resolution by the Supreme Court of the district court's jurisdiction and after the D.C. Circuit had ruled the MCA eliminated that jurisdiction); *Zadran v. Bush*, No. 05-2367, at 4-6 (D.D.C. July 19, 2006), attached as App. F (granting preservation order in Guantánamo detainee case when the D.C. Circuit was deciding if the court had jurisdiction). Plainly, therefore, this Court has the authority to ensure the preservation of all potentially relevant evidence pending final resolution of any jurisdictional questions. The fact that, as this Court recently observed, this case is "unprecedented in the annals of American jurisprudence and implicates fundamental

[13] There are two jurisdictional provisions of the MCA at issue. Section 7(a)(1) addresses habeas corpus jurisdiction; Section 7(a)(2) concerns "any other action." As the government recognizes, the two provisions are linked in that Section 7(a)(2)—the provision potentially applicable to this action—would arguably repeal jurisdiction only if Section 7(a)(1)—the provision now before the Fourth Circuit—in fact repealed jurisdiction over Mr. Almarri's habeas action. Section 7(b) merely addresses the effective date of those other two provisions.

constitutional issues going to the very nature of government," Report & Recommendation of Apr. 22, 2008, at 4-5, makes it that much more important for the Court to ensure, beyond any doubt, that all remaining evidence is preserved for appropriate resolution of those issues.

III. Spoliation Remedies Are Also Warranted.

In addition to entering a preservation order to protect against future spoliation, this Court also has authority to remedy the past destruction of evidence. *See, e.g., Chambers,* 501 U.S. at 43-45; *Telecom Int'l Am., Ltd. v. AT & T Corp.*, 189 F.R.D. 76, 81 (S.D.N.Y. 1999). This authority exists in the absence of a discovery order as part of the Court's inherent power to supervise the litigation before it. *See, e.g., Unigard Sec. Ins. Co. v. Lakewood Eng'g & Mfg. Corp.*, 982 F.2d 363, 368 (9th Cir. 1992); *Telecom Int'l,* 189 F.R.D. at 81 (citing *Chambers,* 501 U.S. at 43-45). Remedial measures are intended not only to deter future destruction but also to redress past spoliation, including by minimizing prejudice to the harmed party. *Vodusek v. Bayliner Marine Corp.*, 71 F.3d 148, 156 (4th Cir. 1995) (sanctions aimed at "leveling the evidentiary playing field" as well as "sanctioning the improper conduct").

In determining whether to impose spoliation-related sanctions or remedial measures, courts consider: (1) the degree of fault of the party that destroyed the evidence; (2) the degree of prejudice suffered by the opposing party; and (3) the availability of sanctions that will avoid substantial unfairness to the opposing party and, if the offending party is seriously at fault, will serve to deter such conduct by others in the future. *See, e.g., Trigon,* 204 F.R.D. at 286-87. All three factors support remedial measures here.

First, the government admits to intentionally destroying interrogation recordings and associated documents during pending litigation. That intentional destruction establishes fault even if the evidence was destroyed in good faith. *Vodusek,* 71 F.3d 156; *Trigon*, 204 F.R.D. at

287 ("[P]roof of bad faith is not necessary to obtain relief from spoliation."). *Second*, Mr. Almarri has suffered irreparable harm because he has been deprived of evidence that could have helped him challenge the legality of both his detention and his conditions of confinement. *Trigon*, 204 F.R.D. at 284 ("[T]he spoliated physical evidence is often the best evidence as to what has really occurred and . . . there is an inherent unfairness in allowing a party to destroy evidence and then to benefit from that conduct.") (internal quotation marks and citation omitted). *Third*, sanctions are available that will both help mitigate the prejudice to Mr. Almarri and deter similar conduct in the future. *Kronisch*, 150 F.3d at 126 (purpose of spoliation remedy is to put the aggrieved party in the evidentiary position he would have been in but for the spoliation); *Vodusek*, 71 F.3d at 156. Those sanctions could include reconstruction of the destroyed evidence, *see, e.g., Jefferson v. Reno*, 123 F. Supp. 2d 1, 2 (D.D.C. 2000); *Landmark Legal Foundation v. E.P.A.*, 272 F. Supp. 2d 59, 67 (D.D.C. 2003), and drawing an adverse inference against the government with respect to Mr. Almarri's claims of abusive interrogations and other mistreatment. *Vodusek*, 71 F.3d at 155; *Kronisch*, 150 F.3d at 126.

In light of the current posture, Mr. Almarri acknowledges that spoliation remedies can wait for an appropriate juncture in the litigation. All that is necessary now is an order ensuring the preservation of all remaining evidence and all evidence pertaining to the past destruction of evidence—an order clearly warranted by the government's admitted destruction of relevant evidence in the past, the government's misrepresentations about that past destruction to the Court, the shortcomings in the government's internal preservation measures, and the complete absence of any harm to the government from such an order.

Conclusion

For the foregoing reasons, the motion should be granted.

Respectfully submitted,

/s/ Andrew J. Savage, III
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Dated: Charleston, South Carolina
May 19, 2008

Appendix A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JARALLAH AL-MARRI, et al.,	:	
	:	
Petitioners,	:	
	:	
v.	:	**Civil Action No. 04-2035 (GK)**
	:	
GEORGE W. BUSH, et al.,	:	
	:	
Respondents.	:	
	:	

ORDER

On January 10, 2005, Petitioners filed a Motion for Discovery and for Preservation Order. Petitioners request that the Court order Respondents to preserve and maintain all evidence and information regarding the torture, mistreatment, and abuse of detainees at Guantanamo Bay. Respondents, however, argue that Petitioners have failed to satisfy the standard for entering a preliminary injunction, which is required when considering a request for a preservation order.

"[A] document preservation order is no more an injunction than an order requiring a party to identify witnesses or to produce documents in discovery." Pueblo of Laguna v. United States, 60 Fed. Cl. 133, 138 n.8 (Fed. Cl. 2004) (citing Mercer v. Magnant, 40 F.3d 893, 896 (7th Cir. 1994)). Thus, Petitioners need not meet such a standard when seeking a preservation order. Furthermore, Respondents represent that the information at issue will not be destroyed, so the Court finds that entering a preservation order

will inflict no harm or prejudice upon them. Accordingly, it is hereby

ORDERED that Petitioners' Motion for Preservation Order is **granted**; it is further

ORDERED that Respondents shall preserve and maintain all evidence and information regarding the torture, mistreatment, and abuse of detainees now at the Guantanamo Bay detention facility.

March 7, 2005

/s/
Gladys Kessler
United States District Judge

Copies to: **Attorneys of Record via ECF**

Appendix B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MAHMOAD ABDAH, et al., **Petitioners,** **v.** **GEORGE W. BUSH, et al.,** **Respondents.**	**Civil Action 04-1254 (HHK)**

ORDER

On January 10, 2005, petitioners filed a Motion for Leave to Take Discovery and For Preservation Order [#96]. On February 3, 2005, the court (Green, J.) ordered that the proceedings in this and ten other coordinated cases be "stayed for all purposes pending resolution of all appeals in this matter." To the extent that petitioners seek to take discovery, their motion must be stayed in accordance with Judge Green's order.

Petitioners also seek a preservation order, which they argue is necessary to ensure that the government will maintain "the very sensitive evidence it now possesses about the torture, mistreatment, and abuse of the detainees now at Guantánamo." Pet'rs' Mot. for Disc./Protective Order at 8-9. Respondents counter that petitioners have failed to satisfy the four-part preliminary injunction standard, which they assert is required for entry of a protective order; that petitioners have not identified specific documents at risk for destruction; and that respondents are "well aware of their obligation not to destroy evidence that may be relevant in pending litigation." Resp'ts' Opp'n at 25.

While preservation orders take the form of an injunction, in that they order a party to perform or refrain from performing an act, petitioners need not meet the four-part preliminary injunction test in order to protect relevant documents from destruction. In fact, "a document preservation order is

no more an injunction than an order requiring a party to identify witnesses or to produce documents in discovery." *Pueblo of Laguna v. United States*, 60 Fed. Cl. 133, 138 n.8 (Fed. Cl. 2004) (citing *Mercer v. Magnant*, 40 F.3d 893, 896 (7th Cir. 1994)); *see also Ditlow v. Shultz*, 517 F.2d 166, 173-74, n.31 (D.C. Cir. 1975) (preservation order issued when moving party presented "sufficiently substantial" challenge on the merits, non-moving party agreed to maintain documents at issue, and preservation of documents presented only a "limited housekeeping burden").

Furthermore, in this case, all of the documents relevant to the adjudication of petitioners' claims, along with petitioner-detainees themselves, are in the sole custody and control of respondents. In addition, petitioners' counsel's access to their clients is quite restricted. It is almost inconceivable that within these confines, petitioners could identify specific instances of document destruction. Rather, the court finds entry of a preservation order appropriate in light of the purpose animating Judge Green's February 3, 2005 stay order, namely to preserve the status quo pending resolution of appeals. Finally, because respondents represent that they will not destroy the information at issue, a preservation order will not impose any harm or prejudice upon them. *See Al-Marri v. Bush*, No. 04-2035 (D.D.C. March 7, 2005) (preservation order). Accordingly, it is this 10th day of June, 2005, hereby

ORDERED, that petitioners' motion is **STAYED** insofar as petitioners seek discovery and **GRANTED** insofar as they seek a preservation order; and it is further

ORDERED, that respondents shall preserve and maintain all evidence and information regarding the torture, mistreatment, and abuse of detainees now at the United States Naval Base at Guantánamo Bay, Cuba.

Henry H. Kennedy, Jr.
United States District Judge

Appendix C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SUHAIL ABDU ANAM, et al., **Petitioners,** **v.** **GEORGE W. BUSH, et al.,** **Respondents.**	**Civil Action 04-1194 (HHK)**

ORDER

On January 10, 2005, petitioners filed a Motion for Leave to Take Discovery and For Preservation Order [#90]. On February 3, 2005, the court (Green, J.) ordered that the proceedings in this and ten other coordinated cases be "stayed for all purposes pending resolution of all appeals in this matter." To the extent that petitioners seek to take discovery, their motion must be stayed in accordance with Judge Green's order.

Petitioners also seek a preservation order, which they argue is necessary to ensure that the government will maintain "the very sensitive evidence it now possesses about the torture, mistreatment, and abuse of the detainees now at Guantánamo." Pet'rs' Mot. for Disc./Protective Order at 8-9. Respondents counter that petitioners have failed to satisfy the four-part preliminary injunction standard, which they assert is required for entry of a protective order; that petitioners have not identified specific documents at risk for destruction; and that respondents are "well aware of their obligation not to destroy evidence that may be relevant in pending litigation." Resp'ts' Opp'n at 25.

While preservation orders take the form of an injunction, in that they order a party to perform or refrain from performing an act, petitioners need not meet the four-part preliminary injunction test

in order to protect relevant documents from destruction. In fact, "a document preservation order is no more an injunction than an order requiring a party to identify witnesses or to produce documents in discovery." *Pueblo of Laguna v. United States*, 60 Fed. Cl. 133, 138 n.8 (Fed. Cl. 2004) (citing *Mercer v. Magnant*, 40 F.3d 893, 896 (7th Cir. 1994)); *see also Ditlow v. Shultz*, 517 F.2d 166, 173-74, n.31 (D.C. Cir. 1975) (preservation order issued when moving party presented "sufficiently substantial" challenge on the merits, non-moving party agreed to maintain documents at issue, and preservation of documents presented only a "limited housekeeping burden").

Furthermore, in this case, all of the documents relevant to the adjudication of petitioners' claims, along with petitioner-detainees themselves, are in the sole custody and control of respondents. In addition, petitioners' counsel's access to their clients is quite restricted. It is almost inconceivable that within these confines, petitioners could identify specific instances of document destruction. Rather, the court finds entry of a preservation order appropriate in light of the purpose animating Judge Green's February 3, 2005 stay order, namely to preserve the status quo pending resolution of appeals. Finally, because respondents represent that they will not destroy the information at issue, a preservation order will not impose any harm or prejudice upon them. *See Al-Marri v. Bush*, No. 04-2035 (D.D.C. March 7, 2005) (preservation order). Accordingly, it is this 10th day of June, 2005, hereby

ORDERED, that petitioners' motion is **STAYED** insofar as petitioners seek discovery and **GRANTED** insofar as they seek a preservation order; and it is further

ORDERED, that respondents shall preserve and maintain all evidence and information regarding the torture, mistreatment, and abuse of detainees now at the United States Naval Base at Guantánamo Bay, Cuba.

Henry H. Kennedy, Jr.
United States District Judge

Appendix D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ADBUL-SALAM GAITHAN MUREEF AL-SHIRY, et al.,	)	
Petitioners,	)	
v.	)	Civil Action No. 05-0490 (PLF)
GEORGE W. BUSH, et al.,	)	
Respondents.	)	

ORDER

This matter is before the Court on petitioner's motion for entry of a preservation order and respondents' motion to stay this case pending resolution of all appeals in cases filed by other detainees at the United States Naval Base in Guantanamo Bay, Cuba. Upon consideration of the arguments of the parties and the full record in this case, it is hereby

ORDERED that [6] petitioner's Motion for Preservation Order is GRANTED. Respondents shall preserve and maintain all evidence and information regarding the torture, mistreatment, and abuse of detainees now at the Guantanamo Bay detention facility, or otherwise within Respondents' possession, custody or control; it is

FURTHER ORDERED that The Amended Protective Order and Procedures for Counsel Access to Detainees at the United States Naval Base in Guantanamo Bay, Cuba, first issued on November 8, 2004; the Order Addressing Designation Procedures for "Protected Information" entered on November 10, 2004; and the Order Supplementing and Amending Filing Procedures Contained in November 8, 2004 Amended Protective Order, issued on December 13,

2004, in the In re Guantanamo Bay Detainee Cases, Civil No. 02-0299, et al., by Judge Joyce Hens Green shall apply in this case; and it is

FURTHER ORDERED that [4] respondents' Motion to Stay Proceedings Pending Related Appeals and for Continued Coordination is GRANTED. This case is STAYED pending resolution of all appeals in In re Guantanamo Detainee Cases, Civil No. 02-0299, et al., 2005 WL 195356 (D.D.C. Jan. 31, 2005), and Khalid et al. v. Bush, Civil No. 04-1142, 2005 WL 100924 (D.D.C. Jan. 19, 2005). This stay shall not, however, prevent the parties from continuing to avail themselves of the procedures set forth in the Protective Order, nor shall it bar the filing or disposition of any motion for emergency relief, including petitioner's pending motion for preliminary injunction.

SO ORDERED.

/s/_____
PAUL L. FRIEDMAN
United States District Judge

DATE: March 23, 2005

Appendix E

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MOHAMEDUO OULD SLAHI, **Petitioner,** **v.** **GEORGE W. BUSH et al.,** **Respondents.**	**Civil Action No. 05-881 (RWR)**
CHAMAN, **Petitioner,** **v.** **GEORGE W. BUSH et al.,** **Respondents.**	**Civil Action No. 05-887 (RWR)**
ABDULHAZER, **Petitioner,** **v.** **GEORGE W. BUSH et al.,** **Respondents.**	**Civil Action No.: 05-1236 (RWR)**
ADBUL MAJID HOHAMMADI, **Petitioner,** **v.** **GEORGE W. BUSH et al.,** **Respondents.**	**Civil Action No.: 05-1246 (RWR)**

MEMORANDUM OPINION AND ORDER

Petitioners in each of the above-captioned habeas corpus proceedings are foreign nationals detained at Guantanamo Bay in the custody of the United States who challenge the legality of their detention. Each petitioner is proceeding pro se and in forma pauperis. Because discovery provisions of the Federal Rules of Civil Procedure do not automatically apply in whole to federal habeas corpus proceedings, and because it must be presumed that the petitioners are not familiar with the legal system of the United States, a preservation order will be entered, sua sponte, in these proceedings.

The Supreme Court's opinion in Harris v. Nelson, 394 U.S. 296 (1969), makes clear that while "the power of inquiry on federal habeas corpus is plenary," id. at 291, the discovery provisions of the Federal Rules of Civil Procedure do not automatically apply in whole to federal habeas corpus proceedings, see id. at 294 n. 5, 298-99. Therefore, the preservation obligations that flow to a litigant from the federal discovery rules cannot be presumed to apply to habeas litigants absent some express application by a court. Accordingly, a preservation order in habeas proceedings, particularly in proceedings such as these where there has been no full disclosure

of the facts on the public record to authorize the challenged detention, is necessary to ensure the fairness and completeness of any evidentiary hearing held in conjunction with these proceedings. Harris v. Nelson also makes clear that a district court's authority to issue orders pursuant to 28 U.S.C. § 1651 in aid of its fact-finding obligations in habeas corpus proceedings is intended to be flexible and should be exercised as the circumstances require for a proper and just disposition.

> [The Supreme Court has] held explicitly that the purpose and function of the All Writs Act to supply the courts with the instruments needed to perform their duty [to issue orders appropriate to assist them in conducting factual inquiries] . . . extend to habeas corpus proceedings.
>
> At any time in the [habeas corpus] proceedings, when the court considers that it is necessary to do so in order that a fair and meaningful evidentiary hearing may be held so that the court may properly "dispose of the matter as law and justice require," either on its own motion or upon cause shown by the petitioner, it may issue such writs and take or authorize such proceedings with respect to development, before or in conjunction with the hearing of the facts relevant to the claims advanced by the parties, as may be "necessary or appropriate in aid of [its jurisdiction] . . . and agreeable to the usages and principles of law." 28 U.S.C. § 1651.
>
> . . . Obviously, in exercising this power, the court may utilize familiar procedures, as appropriate, whether these are found in the civil or criminal rules or elsewhere in the "usages and principles of law."

394 U.S. at 299-300 (footnote omitted). In short, "the power of inquiry on federal habeas corpus is plenary" and its exercise

depends entirely on the circumstances. Harris v. Nelson, 394 U.S. at 291. Accordingly, it is hereby

ORDERED that respondents shall preserve and maintain all evidence, documents and information, without limitation, now or ever in respondents' possession, custody or control, regarding the individual detained petitioners in these cases.

SIGNED this 18th day of July, 2005.

/s/
RICHARD W. ROBERTS
United States District Judge

Appendix F

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ABDULLAH WAZIR ZADRAN et al.,	)	
Petitioners,	)	
v.	)	**Civil Action No. 05-2367 (RWR)**
GEORGE W. BUSH et al.,	)	
Respondents.	)	

MEMORANDUM ORDER

Petitioners in this matter are nine detainees in United States custody at Guantanamo Bay Naval Base who filed petitions through their next friends. Petitioners have moved this court to enter orders (i) requiring respondents to file factual returns relating to the detainees, (ii) enjoining respondents from transferring a detained petitioner in the absence of thirty days' advance notice, and (iii) requiring respondents to preserve and maintain all documents and information relating to the detained petitioners. (See Dkt. Nos. 8, 9, & 12.) Respondents oppose petitioners' motions. In addition, respondents have filed a motion to stay all proceedings pending resolution of the appeals in Khalid v. Bush et al., 355 F. Supp. 2d 311 (D.D.C. 2005), appeals docketed sub nom. Boumediene v. Bush et al., Nos. 05-5062, 05-5063 (D.C. Cir. March 3, 2005) and In re Guantanamo Detainee Cases, 355 F. Supp. 2d 443 (D.D.C. 2005), appeals

docketed, Nos. 05-5064 et al. (D.C. Cir. March 7, 2005).[1] (See Dkt. No. 4.) Petitioners' motions for orders will be granted in part and denied in part and respondents' motion to stay all proceedings will be granted in part and denied in part.

I. CONDITIONAL STAY OF PROCEEDINGS

A primary purpose of a stay pending resolution of issues on appeal is to preserve the status quo among the parties. Washington Area Metro. Transit Comm'n v. Holiday Tours, Inc., 559 F.2d 841, 844 (D.C. Cir. 1977) (a stay pending appeal is preventative or protective, and seeks to maintain the status quo pending a final determination of issues on appeal); see Warm Springs Dam Task Force v. Gribble, 417 U.S. 1301, 1310 (1974) (granting stay pending appeal to maintain the status quo between the parties). A court may, in appropriate situations, specify protective conditions in balancing the hardship necessarily imposed on the party whose suit or execution of judgment has been stayed pending appeal. Cooks v. Fowler, 459 F.2d 1269, 1272-73 & n.27 (D.C. Cir. 1971) (affirming condition of stay requiring tenant appealing judgment to deposit funds in court registry pending appeal); see also City of Portland, Or. v. Federal

[1] One of the disputed matters on appeal before the District of Columbia Circuit has been resolved by decision of the United States Supreme Court in Hamdan v. Rumsfeld, -- S. Ct. -- , 2006 WL 1764793 (June 29, 2006), where the Court made clear that this court retains jurisdiction over these habeas corpus petitions. See id. at *13-16 & n.15.

Maritime Comm'n, 433 F.2d 502, 504 (D.C. Cir. 1970) (directing the proponent of a stay in a case challenging shippers' exclusion of one city's port from service to "be prepared to state reasons why this court should not impose a conditional stay requiring the rotation of service among the ports involved pending final review and determination"); Scott v. Scott, 382 F.2d 461, 462 (D.C. Cir. 1967) (discussing a stay of execution of judgment conditioned upon support payments); Center for Int'l Environmental Law v. Office of the U.S. Trade Rep., 240 F. Supp. 2d 21, 23 (D.D.C. 2003) (conditioning stay pending appeal on party seeking an expedited appeal). Where, as here, the conditions imposed on the proponent of the stay are "neither heavy nor unexpected," imposing a protective condition is well within a court's discretion. Cooks v. Fowler, 459 F.2d at 249 (quoting Bell v. Tsintolas Realty Co., 430 F.2d at 482 (D.C. Cir. 1970) (stating "[w]e have little doubt that . . . [a court] may fashion an equitable remedy to avoid placing one party at a severe disadvantage during the period of litigation")).

Therefore, here

> the court will "guard against depriving the processes of justice of their suppleness of adaptation to varying conditions." Landis v. North American Co., 299 U.S. 248, 256 (1936). Coextensive with a district court's inherent power to stay proceedings is the power to craft a stay that balances the hardships to the parties. Id. at 255 (noting concern regarding a stay causing "even a fair possibility . . . [of] damage to some one else."); see also Clinton v. Jones, 520 U.S. 681, 707 (1997) (noting that "burdens [to the parties]

> are appropriate matters for the District Court to evaluate in its management of the case.").

Al-Oshan v. Bush, Civil Action No. 05-520 (D.D.C. Mar. 31, 2005) (Urbina, J.) (Order, Dkt. No. 12).

II. PRESERVATION OF EVIDENCE

The Supreme Court's opinion in Harris v. Nelson, 394 U.S. 286 (1969), makes clear that the discovery provisions of the Federal Rules of Civil Procedure do not automatically apply in whole to federal habeas corpus proceedings. Id. at 294 n.5, 298-99. The preservation obligations that flow to a litigant from the federal discovery rules cannot be presumed to apply to habeas litigants absent some express application by a court. Accordingly, a preservation order in habeas proceedings, particularly in proceedings such as these where there has been no full disclosure of the facts on the public record that justify the challenged detention, is not superfluous or unnecessary.

Harris also makes clear that a district court's authority to issue orders pursuant to 28 U.S.C. § 1651 in aid of its fact-finding obligations in habeas corpus proceedings is intended to be flexible and should be exercised as the circumstances require for a proper and just disposition.

> [The Supreme Court has] held explicitly that the purpose and function of the All Writs Act to supply the courts with the instruments needed to perform their duty [to issue orders appropriate to assist them in conducting factual inquiries] . . . extend to habeas corpus proceedings.

> At any time in the [habeas corpus] proceedings, when the court considers that it is necessary to do so in order that a fair and meaningful evidentiary hearing may be held so that the court may properly "dispose of the matter as law and justice require," either on its own motion or upon cause shown by the petitioner, it may issue such writs and take or authorize such proceedings with respect to development, before or in conjunction with the hearing of the facts relevant to the claims advanced by the parties, as may be "necessary or appropriate in aid of [its jurisdiction] . . . and agreeable to the usages and principles of law." 28 U.S.C. § 1651.
>
> . . . Obviously, in exercising this power, the court may utilize familiar procedures, as appropriate, whether these are found in the civil or criminal rules or elsewhere in the "usages and principles of law."

394 U.S. at 299-300 (footnote omitted). "[T]he power of inquiry on federal habeas corpus is plenary" and its exercise depends entirely on the circumstances. Harris, 394 U.S. at 291.

The preservation order petitioners seek is tailored to preserve "documents and information in . . . [respondents'] possession" that may be "relevant to litigation or potential litigation or are reasonably calculated to lead to the discovery of admissible evidence." Wm. T. Thompson Co. v. General Nutrition Corp., 593 F. Supp. 1443, 1455 (C.D. Cal. 1984). Documents reflecting treatment of detainees -- whether statements of official policy, cumulative evidence of specific practices, or something else -- may be probative of the treatment of petitioners or may lead to other probative evidence. The requested order imposes no greater obligation on respondents than

the federal discovery rules' preservation obligations impose on a litigant in a typical civil lawsuit.

CONCLUSION AND ORDER

For the foregoing reasons, it is hereby

ORDERED that respondents' motion [#4] to stay proceedings and for relief from any obligation to file a factual return be, and hereby is, GRANTED in part and DENIED in part. The proceedings in this case are STAYED pending resolution of the appeals pending before the United States Court of Appeals for the District of Columbia Circuit in In re Guantanamo Detainee Cases and Boumediene v. Bush et al., except that petitioners may seek emergency relief from this court in appropriate circumstances, such as when petitioners have reason to believe that they are facing the possibility of continued detention at the request of the United States in a location that does not provide access to this court. Respondents' request for relief from any obligation to file a factual return is DENIED. It is further

ORDERED that petitioners' motion [#9] for immediate issuance of a writ of habeas corpus or a show cause order be, and hereby is, GRANTED in part and DENIED in part. Respondents are directed to submit a factual return relating to each detained petitioner by August 18, 2006. Petitioners' motion [#9] is DENIED in all other respects. It is further

ORDERED that petitioners' motion [#12] to enjoin respondents from removing any of the detained petitioners from Guantanamo Bay Naval Base without notice and only after court approval be, and hereby is, GRANTED in part and DENIED in part. Petitioners' request for notice of any removal of a detained petitioner is GRANTED. Respondents, their agents, servants, employees, confederates, and any persons acting in concert or participation with them, or having actual or implicit knowledge of this Order by personal service or otherwise, shall provide this court and petitioners or any counsel representing them with thirty days' advance written notice of any transfer or removal of the detained petitioner from United States custody at Guantanamo Bay. Petitioners' motion for injunction is DENIED in all other respects. It is further

ORDERED that petitioners' motion [#8] for a preservation order be, and hereby is, GRANTED. Respondents shall preserve and maintain all evidence, documents and information, without limitation, now or ever in respondents' possession, custody or control, regarding the detained petitioner in this case.

SIGNED this 18th day of July, 2006.

/s/
RICHARD W. ROBERTS
United States District Judge

Appendix G

December 7, 2007

C.I.A. Destroyed 2 Tapes Showing Interrogations

By MARK MAZZETTI

Correction Appended

WASHINGTON, Dec. 6 — The Central Intelligence Agency in 2005 destroyed at least two videotapes documenting the interrogation of two Qaeda operatives in the agency's custody, a step it took in the midst of Congressional and legal scrutiny about its secret detention program, according to current and former government officials.

The videotapes showed agency operatives in 2002 subjecting terrorism suspects — including Abu Zubaydah, the first detainee in C.I.A. custody — to severe interrogation techniques. The tapes were destroyed in part because officers were concerned that video showing harsh interrogation methods could expose agency officials to legal risks, several officials said.

In a statement to employees on Thursday, Gen. Michael V. Hayden, the C.I.A. director, said that the decision to destroy the tapes was made "within the C.I.A." and that they were destroyed to protect the safety of undercover officers and because they no longer had intelligence value.

The destruction of the tapes raises questions about whether agency officials withheld information from Congress, the courts and the Sept. 11 commission about aspects of the program.

The recordings were not provided to a federal court hearing the case of the terrorism suspect Zacarias Moussaoui or to the Sept. 11 commission, which was appointed by President Bush and Congress, and which had made formal requests to the C.I.A. for transcripts and other documentary evidence taken from interrogations of agency prisoners.

The disclosures about the tapes are likely to reignite the debate over laws that allow the C.I.A. to use interrogation practices more severe than those allowed to other agencies. A Congressional conference committee voted late Wednesday to outlaw those interrogation practices, but the measure has yet to pass the full House and Senate and is likely to face a veto from Mr. Bush.

The New York Times informed the intelligence agency on Wednesday evening that it was preparing to publish an article about the destruction of the tapes. In his statement to employees on Thursday, General Hayden said that the agency had acted "in line with the law" and that he was informing C.I.A. employees "because the press has learned" about the matter.

General Hayden's statement said that the tapes posed a "serious security risk" and that if they had become public they would have exposed C.I.A. officials "and their families to retaliation from Al Qaeda and its sympathizers."

Current and former intelligence officials said that the decision to destroy the tapes was made by Jose A. Rodriguez Jr., who was the head of the Directorate of Operations, the agency's clandestine service. Mr. Rodriguez could not be reached Thursday for comment.

Two former intelligence officials said that Porter J. Goss, the director of the agency at the time, was not told that the tapes would be destroyed and was angered to learn that they had been.

Through a spokeswoman, Mr. Goss declined to comment on the matter.

In his statement, General Hayden said leaders of Congressional oversight committees had been fully briefed about the existence of the tapes and told in advance of the decision to destroy them. But the two top members of the House Intelligence Committee in 2005 said Thursday that they had not been notified in advance of the decision to destroy the tapes.

A spokesman for Representative Peter Hoekstra, Republican of Michigan, who was the committee's chairman between 2004 and 2006, said that Mr. Hoekstra was "never briefed or advised that these tapes existed, or that they were going to be destroyed."

The spokesman, Jamal Ware, also said that Mr. Hoekstra "absolutely believes that the full committee should have been informed and consulted before the C.I.A. did anything with the tapes."

Representative Jane Harman of California, the top Democrat on the committee between 2002 and 2006, said that she told C.I.A. officials several years ago that destroying any interrogation tapes would be a "bad idea."

"How in the world could the C.I.A. claim that these tapes were not relevant to a legislative inquiry?" she said. "This episode reinforces my view that the C.I.A. should not be conducting a separate interrogations program."

In both 2003 and 2005 C.I.A. lawyers told prosecutors in the Moussaoui case that the C.I.A. did not possess recordings of interrogations sought by the judge. Mr. Moussaoui's lawyers had hoped that records of the interrogations might provide exculpatory evidence for Mr. Moussaoui, showing that the Qaeda detainees did not know Mr. Moussaoui and clearing him of involvement in the Sept. 11, 2001, plot.

Paul Gimigliano, a C.I.A. spokesman, said that the court had sought tapes of "specific, named terrorists whose comments might have a bearing on the Moussaoui case" and that the videotapes destroyed were not of those individuals. Intelligence officials identified Abu Zubaydah as one of the detainees whose interrogation tape was destroyed, but the other detainee's name was not disclosed.

General Hayden has said publicly that information obtained through the C.I.A.'s detention and interrogation program has been the best source of intelligence for operations against Al Qaeda. In a speech last year, President Bush said that information from Mr. Zubaydah had helped lead to the capture in 2003 of Khalid Sheikh Mohammed, the mastermind of the Sept. 11 attacks.

Staff members of the Sept. 11 commission, which completed its work in 2004, expressed surprise when they were told that interrogation videotapes had existed until 2005.

“The commission did formally request material of this kind from all relevant agencies, and the commission was assured that we had received all the material responsive to our request,” said Philip D. Zelikow, who served as executive director of the Sept. 11 commission and later as a senior counselor to Secretary of State Condoleezza Rice.

“No tapes were acknowledged or turned over, nor was the commission provided with any transcript prepared from recordings,” he said.

Daniel Marcus, a law professor at American University who served as general counsel for the Sept. 11 commission and was involved in the discussions about interviews with Qaeda leaders, said he had heard nothing about any tapes being destroyed.

If tapes were destroyed, he said, “it’s a big deal, it’s a very big deal,” because it could amount to obstruction of justice to withhold evidence being sought in criminal or fact-finding investigations.

Mr. Gimigliano, the C.I.A. spokesman, said that the agency “went to great lengths to meet the requests of the 9/11 commission,” and that the C.I.A. had preserved the tapes until the commission ended its work in case members requested the tapes.

Several current and former intelligence officials were interviewed for this article over a period of several weeks. All requested anonymity because information about the tapes had been classified until General Hayden issued his statement on Thursday acknowledging that they had been destroyed.

The C.I.A. program that included the detention and interrogation of terrorism suspects began after the capture of Mr. Zubaydah in March 2002. The C.I.A. has said that the Justice Department and other elements of the executive branch reviewed and approved the use of a set of harsh techniques before they were used on any prisoners, and that the Justice Department issued a classified legal opinion in August 2002 that provided explicit authorization for their use.

Some members of Congress have since sought to ban some of the techniques, saying that they amounted to torture, which is prohibited under American law. But President Bush, who revealed the existence of the C.I.A. program in September 2006, has defended the techniques as legal, and has said they have proven beneficial in obtaining critical intelligence information.

Some of the harshest techniques, including waterboarding, which induces a feeling of drowning and near-suffocation, were used on several of the first Qaeda operatives captured by the C.I.A., including Abu Zubaydah. But intelligence officials have said that waterboarding is no longer on an approved list spelled out in a classified executive order that was issued by the White House this year.

In his statement, General Hayden said the tapes were originally made to ensure that agency employees acted in accordance with “established legal and policy guidelines.” He said the agency stopped videotaping interrogations in 2002.

“The tapes were meant chiefly as an additional, internal check on the program in its early stages,” he said. He said they were destroyed only after the agency’s Office of the General Counsel and Office of the Inspector General had examined them and determined that they showed lawful methods of questioning.

Tom Malinowski, Washington director of Human Rights Watch, said General Hayden's claim that the tapes were destroyed to protect C.I.A. officers "is not credible."

"Millions of documents in C.I.A. archives, if leaked, would identify C.I.A. officers," Mr. Malinowski said. "The only difference here is that these tapes portray potentially criminal activity. They must have understood that if people saw these tapes, they would consider them to show acts of torture, which is a felony offense."

It has been widely reported that Abu Zubaydah was subjected to several tough physical tactics. But the current and former intelligence officials who described the decision to destroy the videotapes said that C.I.A. officers had judged that the release of photos or videos depicting his interrogation would provoke a strong reaction.

In exchanges involving the Moussaoui case, the C.I.A. notified the United States attorney's office in Alexandria, Va., in September that it had discovered two videotapes and one audio tape that it had not previously acknowledged to the court, but made no mention of any tapes destroyed in 2005.

The acknowledgment was spelled out in a letter sent in October by federal prosecutors that amended the C.I.A.'s previous declarations involving videotapes. The letter is heavily redacted, with sentences identifying the detainees blacked out.

Signed by the United States attorney, Chuck Rosenberg, the letter states that the C.I.A.'s search for interrogation tapes "appears to be complete."

Mr. Moussaoui was convicted last year and sentenced to life in prison.

Representative Rush Holt of New Jersey, a Democratic member of the House Intelligence Committee, has been pushing legislation in Congress to have all detainee interrogations videotaped so officials can refer to the tapes multiple times to glean better information.

Mr. Holt said he had been told many times that the C.I.A. did not record the interrogation of detainees. "When I would ask them whether they had reviewed the tapes to better understand the intelligence, they said, 'What tapes?'," he said.

Eric Lichtblau and Scott Shane contributed reporting.

Correction: December 8, 2007

Because of an editing error, a front-page article yesterday about the C.I.A.'s destruction of two videotapes documenting the interrogations of agents of Al Qaeda rendered incorrectly a quotation from Gen. Michael V. Hayden, the director of intelligence, in which he explained to C.I.A. employees why he was informing them of the destruction. General Hayden said, "The press has learned that back in 2002, during the initial stage of our terrorist detention program, C.I.A. videotaped interrogations, and destroyed the tapes in 2005." He did not say he was informing them "because" the press has learned about the episode.