UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

ALI SALEH KAHLAH AL-MARRI Plaintiff, v. ROBERT M. GATES, Secretary of Defense of the United States, COMMANDER JOHN PUCCIARRELLI, U.S.N. Commander, Naval Consolidated Brig, Defendants.	)	Civil A. No. 2:05-cv-02259-HFF-RSC

DEFENDANTS' RESPONSE TO PLAINTIFF'S MOTION FOR PRESERVATION ORDER AND INQUIRY INTO SPOLIATION OF EVIDENCE

Defendants hereby respond to plaintiff's motion for a preservation order and for an inquiry into the spoliation of evidence (dkt. no. 41) ("Pl's Mot."), which seeks an order requiring the preservation of "all documents, records, recordings, and like materials, in whatever form, relating to or arising from Mr. Almarri's detention, interrogation, treatment, physical or mental condition, and conditions of confinement," at the Naval Consolidated Brig, Charleston, South Carolina ("the Brig"), as well as "all documents, records, recordings, and like materials, in whatever form, relating to the destruction, alteration, or transfer of the foregoing." *See* Pl's Mot. at 1. Plaintiff's motion also asks the Court to conduct an inquiry into spoliation of evidence and to take "appropriate remedial measures upon such inquiry, including sanctions if warranted." *Id.*

As we explain below, this case presents fundamental issues concerning the Court's jurisdiction, the propriety of plaintiff's claims, and the scope and nature of litigation regarding

any such permissible claims. The Court need not reach these issues, however, because the imposition of a preservation order in this matter is neither necessary nor warranted. The Department of Defense ("DoD") has issued multiple, binding internal preservation directives to ensure that the destruction of certain materials that occurred in the past (the circumstances of which are explained below) does not recur and to ensure that information related to plaintiff is retained and preserved. Furthermore, the consideration of remedial measures and sanctions plaintiff requests is clearly premature in light of the unsettled fundamental issues in this case, including the substantial questions of jurisdiction and the propriety and scope of plaintiff's claims, which prevents a full and appropriate assessment of the factors necessarily considered in connection with whether remedial measures are necessary and appropriate.

Accordingly, plaintiff's motion should be denied.

BACKGROUND

Plaintiff is a citizen of Qatar, who arrived in the United States on September 10, 2001. On June 23, 2003, the President designated plaintiff an enemy combatant, finding, *inter alia*, that he is "closely associated with al Qaeda" and "engaged in conduct that constituted hostile and war-like acts, including conduct in preparation for acts of international terrorism with the aim to cause injury to or adverse effects on the United States," and that his "detention is necessary to prevent him from aiding al Qaeda in its efforts to attack the United States." *See Al-Marri v. Wright*, 378 F. Supp. 2d 673, 674 n.3 (D.S.C. Jul. 8, 2005). In July 2004 plaintiff filed a *habeas corpus* petition in this Court. The Court dismissed the petition, concluding that petitioner was lawfully detained as an enemy combatant after the government submitted evidence supporting that plaintiff is an al Qaeda sleeper agent sent to this country with instructions to facilitate

terrorist activities subsequent to 9/11, including attacks regarding the U.S. financial system and possible chemical attacks. *See Al-Marri v. Wright*, 443 F. Supp. 2d 774, 782-85 (D.S.C. Aug. 8, 2006). A panel of the Court of Appeals reversed, 487 F.3d 160 (4th Cir. Jun. 11, 2007), but on August 22, 2007, the Court of Appeals granted rehearing *en banc*. The case was argued on October 31, 2007, and a final decision by the *en banc* Court remains pending.

On August 8, 2005, plaintiff filed his complaint in this case challenging his conditions of confinement in the Brig. In October 2005 defendants moved to dismiss (dkt. no. 7). The possibility of settlement led the Court to dismiss the case without prejudice to reinstatement should a settlement not be consummated (dkt. no. 24). Plaintiff subsequently moved to reinstate the case and requested a hearing on defendant's motion to dismiss (dkt. no. 28). In June 2006 the Court reinstated the case and directed the parties to address whether plaintiff should be required to amend his complaint in light of any changes to plaintiff's conditions of confinement (dkt. nos. 29, 30). Further proceedings have not been held in this case,[1] except with respect to plaintiff's recently filed motion for interim injunctive relief related to conditions of confinement[2] and now his motion for a preservation order and inquiry into appropriate remedial measures.

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[1] The Military Commissions Act of 2006 ("MCA"), Pub. L. No. 109-366, § 7, 120 Stat. 2600, was enacted in October 2006 and amended the *habeas* statute to provide that "[n]o court, justice, or judge . . . [has] jurisdiction" to consider not only *habeas* actions, but any action "relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement" of an alien who is or was detained by the United States and has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination. *See* 28 U.S.C. § 2241(e).

[2] Magistrate Judge Carr recently recommended that plaintiff's motion for interim injunctive relief be denied. *See* Apr. 22, 2008 Report & Recommendation (dkt. no. 50) (Carr, Magistrate J.) ("Apr. 22, 2008 Report & Recommendation").

ARGUMENT

I. THE REQUEST FOR A PRESERVATION ORDER SHOULD BE DENIED.

As Magistrate Judge Carr recently noted, "[T]his case," which involves a challenge by a confirmed enemy combatant regarding his conditions of confinement in a military detention facility during a time of war, "is unprecedented in the annals of American jurisprudence and implicates fundamental constitutional issues going to the very nature of government." *See* Apr. 22, 2008 Report & Recommendation at 4-5. Indeed, in light of the fundamental separation of powers issues, defendants previously moved to dismiss this case on grounds that no waiver of sovereign immunity exists for plaintiff's constitutional claims and that plaintiff cannot pursue a claim under the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb-1. *See* Defs' Mot. To Dismiss (dkt. no. 7). Moreover, since defendant's motion to dismiss was filed, a serious question has arisen whether this Court even has jurisdiction to consider the case, for under the terms of the MCA, enacted in October 2006, "[n]o court, justice, or judge . . . [has] jurisdiction" to consider any action "relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement" of an alien who is or was detained by the United States and has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.[3] *See* 28 U.S.C. § 2241(e)(2). Thus, at this stage of the proceedings in this case, the nature of permissible claims by plaintiff, if any, remains unsettled, and the

[3] *See* Apr. 22, 2008 Report & Recommendation at 5-7 (in recommended ruling on motion for injunctive relief concerning conditions of confinement, Magistrate Judge notes jurisdictional bar presented by 28 U.S.C. § 2241(e)(2) and lack of waiver of sovereign immunity in this case). A panel of the Court of Appeals concluded that the MCA does not apply to plaintiff, *see Al-Marri v. Wright*, 487 F.3d 160, 173 (4th Cir. 2007), but the question is now before the Court of Appeals *en banc*. *See* Order, *Al-Marri v. Wright*, No. 06-7427 (Aug. 22, 2007).

bounds of appropriate litigation respecting any permissible claim remain uncharted. The unique circumstances of this case, therefore, call into question whether plaintiff's request for relief even should be considered.

In any event, even in cases not presenting substantial threshold jurisdictional issues and significant constitutional issues, courts recognize that orders requiring or addressing the preservation of information should not be entered lightly. Rather, because a preservation order can operate as the functional equivalent of an injunction, a number of courts have required that any request for a preservation order meet the four requirements for issuance of an injunction: (1) irreparable injury, (2) a balance of the harms between the parties weighing in the movant's favor, (3) a probability of success on the merits with respect to the requested relief, and (4) furtherance of the public interest. *See Madden v. Wyeth*, No. 3-03-CV-0167-R, 2003 WL 21443404, at *1 (N.D. Tex. Apr. 16, 2003); *Pepsi-Cola Bottling Co. of Olean v. Cargill, Inc.*, Civ. No. 3-94-784, 1995 WL 783610, at *3-*4 (D. Minn. Oct. 20, 1995); *Humble Oil & Refining Co. v. Harang*, 262 F. Supp. 39, 42-43 (E.D. La. 1966).[4] Other courts have used a modified, multi-factor analysis for the issuance of preservation orders, focusing on "1) the level of concern the court has for the continuing existence and maintenance of the integrity of the evidence in question in the absence of an order directing preservation of the evidence; 2) any irreparable harm likely to result to the party seeking the preservation of evidence absent an order directing preservation; and 3) the capability of an individual, entity, or party to maintain the evidence sought to be preserved." *See*

[4] Copies of unpublished decisions are attached in Appendices to this response, for the Court's convenience.

Capricorn Power Co. v. Siemens Westinghouse Power, 220 F.R.D. 429, 433-434 (W.D. Pa. 2004).

Plaintiff describes *Pueblo of Laguna v. United States*, 60 Fed. Cl. 133, 137-38 (Fed. Cl. 2004), as calling for entry of a preservation order "where circumstances so warrant."[5] Pl's Mot. at 4. In fact, however, that case espouses a two-factor test – a preservation order must be necessary and not unduly burdensome or overbroad. 60 Fed. Cl. at 137-38. Although that test has been criticized as lacking "adequate precision" and "sufficient depth of analysis," *see Capricorn Power*, 220 F.R.D. at 434 n.2, even under the *Pueblo of Laguna* standard, a litigant requesting a preservation order is required to demonstrate as to the first prong that "absent a court order, there is significant risk that relevant evidence will be lost or destroyed," and that, as to the second prong, "the particular steps to be adopted will be effective, but not overbroad – the court will neither lightly exercise its inherent power to protect evidence nor indulge in an exercise in futility." *Pueblo of Laguna*, 60 Fed. Cl. at 138.

That issuance of a preservation order should be cabined by factors such as those discussed flows from the injunctive nature of such an order and to the extent such an order is considered an exercise of a court's inherent power, from the fact that the Supreme Court has "cautioned [that] 'inherent powers must be exercised with restraint and discretion,'" due to the "very potency" of such powers, *see Pueblo of Laguna*, 60 Fed. Cl. at 137-38 (citing *Chambers v. NASCO*, 501 U.S. 32, 44 (1991)). Indeed, broad or open-ended preservation orders, for example, can impose significant burdens not justified by the issues and circumstances involved in a case.

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[5] Plaintiff also cites *United States v. Philip Morris USA Inc.*, 327 F. Supp. 2d 21 (D.D.C. 2004), but that case does not address the standard for issuance of a preservation order.

In light of such factors, a preservation order is neither necessary nor warranted in this case. Plaintiff asserts that a preservation order is warranted in this case because "[t]he government has . . . admitted destroying relevant evidence in this case," that is, recordings of interrogations of plaintiff after he was detained by DoD. *See* Pl's Mot. at 4. In fact, decisions not to retain the recordings about which plaintiff complains were made by personnel in good faith months before this action was filed. Furthermore, while certain materials were not preserved in the past, the circumstances of which are explained below, DoD subsequently has issued internal preservation directives to ensure that any such destruction does not recur and that information related to plaintiff is retained and preserved.

As explained in the attached declarations from the Offices of the General Counsel of both DoD and the Defense Intelligence Agency ("DIA"), directives from those offices have been issued requiring the preservation and maintenance of information related to plaintiff, including electronic records, written records, telephone records, correspondence, computer records, e-mail, and notes. *See* Declaration of Russell G. Leavitt, Associate Deputy General Counsel, DoD ¶ 5 & Tab A (Apr. 29, 2008) (attached hereto as Exhibit 1) ("Leavitt Decl."); Declaration of Robert H. Berry, Principal Deputy General Counsel, DIA ¶¶ 6-7 & Tab A (Apr. 30, 2008) (attached hereto as Exhibit 2) ("Berry Decl."). Specifically, on December 19, 2007, the DIA Office of the General Counsel issued a memorandum requiring the preservation of information related to plaintiff. Berry Decl. ¶ 6 & Tab A. Then, on April 10, 2008, the Acting General Counsel of DoD issued a directive that requires DoD components, including those reasonably likely to have information regarding plaintiff, "to preserve and maintain all documents and recorded information of any kind (for example, electronic records, written records, telephone records,

correspondence, computer records, e-mail, storage devices, handwritten or typed notes) that is or comes within their possession or control" that relates to plaintiff. Leavitt Decl. ¶ 5 & Tab A. This includes, but is not limited to, "records relating to his enemy combatant status, his transfer to Department of Defense custody . . . and his detention as an enemy combatant" at the Brig. *Id.* ¶ 5 & Tab A. Under standard DOD practice, each component receiving the directive was to ensure that all relevant personnel were made aware of it. *Id.* ¶ 5. Indeed, consistent with the directive from the Acting General Counsel, once DIA received the directive, it distributed it to all components within DIA to ensure appropriate compliance.[6] *See* Berry Decl. ¶ 7.

In light of these explicit and widely distributed DoD directives, a preservation order is not needed in this case. At a minimum, even under the *Pueblo of Laguna* standard, a party seeking a preservation order must demonstrate that "absent a court order, there is significant risk that relevant evidence will be lost or destroyed." 60 Fed. Cl. at 138. In light of the binding DoD directives requiring the preservation of information relating to plaintiff at the agency, plaintiff cannot demonstrate a significant risk going forward of destruction of evidence relevant to his conditions of confinement case against DoD officials.

Nor do past instances where certain information concerning plaintiff was not retained warrant entry of a prospective, forward-looking preservation order in this case. Plaintiff bases his request for a preservation order on the destruction of certain recordings of interrogations of plaintiff, which has been reported by the media, but not fully described. *See* Pl's Mot. at 2-3. As set forth in the declaration of DIA's Principal Deputy General Counsel, plaintiff was interrogated

[6] DIA required recipient offices to acknowledge receipt and compliance with the DoD preservation directive. *See* Berry Decl. ¶ 7.

while he was detained in the Charleston Brig between his arrival there in June 2003 and sometime in 2004, and those interrogations were recorded. *See* Berry Decl. ¶¶ 3-4. Certain DIA personnel involved in the interrogations regarded the recordings as working materials, the destruction of which they believed was required when the materials were no longer needed for intelligence purposes, absent express authorization to preserve them. *Id.* ¶ 8. As a result, between December 2004 and March 2005, those personnel destroyed a number of the recordings, along with other notes and working papers associated with those sessions. *See id.* Even where recordings and working papers were not retained, however, other documentation regarding those interrogations was retained and continues to be preserved. *Id.* ¶ 8. Further, although the personnel involved thought that all such recordings had been destroyed in accordance with what they believed to be appropriate practice, in fact, DIA is still in possession of originals or copies of recordings of nine interrogations sessions. *Id*. ¶ 9.

When the DIA Office of General Counsel learned of the destruction in December 2007, it immediately issued a preservation directive and undertook a joint DIA Office of General Counsel and Office of Inspector General inquiry to look into the matter. *See* Berry Decl. ¶¶ 5-6, 8. In the course of its inquiry, that team gathered the remaining recordings of the interrogation sessions, and DIA is preserving those materials, as well as the materials documenting and supporting the DIA Office of General Counsel / Office of Inspector General inquiry. *Id.* ¶¶ 8-10.

Thus, to the extent some of the DIA interrogation recordings and associated information, generated after plaintiff's designation as an enemy combatant, were not retained, it occurred months before this case was filed in August 2005. While it is true that plaintiff's separate *habeas corpus* action was pending at that time, various courts, including this one, have held that claims

concerning conditions of confinement that do not seek accelerated release from custody are not within the scope of *habeas corpus*.[7] *See Smith v. Gonzales*, No. 6:06-0130-HHF-WMC, 2007 WL 789931 at *1, *4-*5 (D.S.C. Mar. 14, 2007) (challenge to conditions incident to confinement is not properly brought under *habeas corpus* statute).[8] *See also Trigon Ins. Co. v. United States*, 204 F.R.D. 277, 286-87 (E.D. Va. 2001) (duty to preserve evidence requires that party be on notice that the evidence might be necessary or relevant to a party's claim). Nonetheless, because DoD takes the destruction of the interrogation tapes seriously, it has issued multiple, appropriate preservation directives to ensure the preservation of other evidence regarding plaintiff's conditions. In addition, all remaining interrogation recordings have been gathered and are being preserved. *See* Berry Decl. ¶ 10.

Defendants also wish to inform the Court regarding certain other recordings related to plaintiff at the Brig that have been lost and the steps currently being taken to preserve such recordings going forward. As explained below, certain recordings potentially relevant to this case from a security camera system at the Brig had been subject to automatic overwriting by the recording system until recently. Steps have been taken, however, to ensure that any such

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[7] Plaintiff's *habeas corpus* action challenged the President's authority to detain plaintiff militarily as an enemy combatant, not plaintiff's conditions of confinement. *See Al-Marri v. Pucciarelli*, No. 2:04-cv-02257-HHF-RSC (Petition, dkt. no. 1). Further, any issue of whether recordings made *after* plaintiff's transfer to DoD custody in June 2003, would have been necessary to or relevant evidence in plaintiff's *habeas* case, which challenged the enemy combatant designation that led to plaintiff's transfer into DoD custody, so as to give rise to a duty to preserve the recordings, is not before the Court in this separate conditions of confinement case. In any event, as explained above, DoD has issued preservation directives to ensure the further preservation of other evidence regarding plaintiff.

[8] *See also Carson v. Johnson*, 112 F.3d 818, 820-21 (5th Cir.1997); *Cochran v. Buss*, 381 F.3d 637, 639 (7th Cir. 2004); *McIntosh v. United States Parole Commission*, 115 F.3d 809, 811-12 (10th Cir. 1997); *Badea v. Cox*, 931 F.2d 573, 574 (9th Cir. 1991).

recordings currently extant and going forward are preserved. Thus, the prior automatic overwriting issue does not warrant entry of a prospective preservation order in this case.

As explained in the Declaration of Commander John Pucciarelli (Apr. 29, 2008) ("Pucciarelli Decl.") (attached as Exhibit 3), who serves as the Commanding Officer, Naval Consolidated Brig Charleston, South Carolina, the Brig has previously preserved documents and recorded information concerning plaintiff's detention, treatment, condition, and conditions of confinement since his arrival at the Brig in June 2003, with the exception of certain recorded information on a digital video recording system utilized in the Special Housing Unit ("SHU") of the Brig where plaintiff resides. Pucciarelli Decl. ¶¶ 2-3. This system provides around-the-clock recording of camera feed from various areas of the SHU, whether or not plaintiff is present in those areas. *Id*. ¶ 3. Due to electronic storage capacity limits of the device, the system only stored 30 days' worth of recordings, after which it would automatically overwrite previously recorded data, such that on any given day, recorded images more than 30-days old would be automatically recorded over. *Id.*

Consistent with DoD's April 10, 2008, preservation directive requiring preservation of information related to plaintiff, measures were instituted by the Brig to ensure that data on the system subject to overwriting is, in fact, preserved. Pucciarelli Decl. ¶ 4; Leavitt Decl. ¶ 5 & Tab A. The prior absence of such measures, however, was not purposefully intended to prevent access to any potentially relevant information in this case. *See* Pucciarelli Decl. ¶ 5. As noted above, camera feed was recorded by the system regardless of the presence of plaintiff in an area, so much of the overwritten data would have involved recordings of areas when plaintiff was not present or recordings of mundane or routine activities. *Id.* In addition, any recordings of

significant events related to plaintiff, such as incidents of non-minor noncompliance by plaintiff and staff interactions with him during such periods, would have been captured off the SHU system and preserved or would have been otherwise recorded by a separate video system (the recordings of which have been and are being preserved). *Id.* Also, other records related to plaintiff's various daily activities in his living area and otherwise, including, but not limited to, prayer, hygiene, recreation, sleep, television viewing, reading, interaction with staff, eating patterns, call button activity, medical visits, other visits, and the sending or receipt of correspondence, were previously preserved and continue to be preserved. *Id*. The same is true with respect to disciplinary matters; Brig records related to such matters, as well as communications from and to plaintiff through the Brig's chit system, were previously preserved and continue to be preserved.[9] *Id.* Thus, a number of alternative sources of evidence concerning plaintiff's day-to-day actions and experiences exist and continue to be preserved. In any event, data on the Brig recording system otherwise subject to overwriting is being preserved, along with other information concerning plaintiff.

Accordingly, in light of the now-extant, binding DoD directives requiring the preservation of information relating to plaintiff at the agency, the past instances of DoD components not retaining certain information concerning plaintiff do not warrant entry of a prospective, forward-looking preservation order in this case. Any past issues have been

[9] The Brig's "chit system," permits plaintiff to inquire concerning, comment upon, and receive clarification of rules of conduct or other matters through direct correspondence from plaintiff to the Brig Commander. *See* Defs' Resp. to Pl's Mot. for Interim Relief Concerning Conditions of Confinement, Ex. 1 (Apr. 10, 2008 Declaration of Commander John Pucciarelli) ¶ 15 (dkt. no. 48). Plaintiff is permitted two chits per day and receives written responses from the Commander. *Id.*

addressed by the current, binding DoD directives, and plaintiff cannot demonstrate, at a minimum, that at present, "absent a court order, there is significant risk" that evidence relevant to his conditions of confinement case against DoD officials will be lost or destroyed. *See Pueblo of Laguna*, 60 Fed. Cl. at 138.

For these reasons, plaintiff's request for a preservation order should be denied.

II. A COURT INQUIRY INTO PAST LOSS OR DESTRUCTION OF INFORMATION AND CONSIDERATION OF REMEDIAL RELIEF IS, AT A MINIMUM, PREMATURE.

In addition to a preservation order, plaintiff also asks the Court to undertake an inquiry into any prior destruction of evidence and impose any appropriate remedial measures, to include sanctions. *See* Pl's Mot. at 1, 5-7. As explained below, however, any such inquiry or consideration of remedial measures is unnecessary or premature at this time. The requested inquiry is unnecessary because defendants already have recounted in this response and the accompanying declarations the nature and circumstances of the prior destruction of information. And the undertaking plaintiff requests regarding sanctions would be premature given that the present posture of this litigation prevents a full and appropriate assessment of the factors necessarily considered in connection with the issue of any remedial measures.

Courts in the Fourth Circuit have determined that any consideration of remedial measures or sanctions related to spoliation, the intentional destruction of evidence where a duty to preserve the evidence exists, involves consideration of a number of factors. *See Trigon*, 204 F.R.D. at 287-88 ("no single test or set of considerations" applies to considerations of sanctions for spoliation; it is a "fact-specific inquiry") (citing *Gates Rubber Co. v. Bando Chemical Indus.*, 167 F.R.D. 90, 102 (D. Colo. 1996)). Factors that have been considered include: (1) the degree

of fault or culpability of the party that destroyed the evidence; (2) the degree of prejudice to the opposing party caused by the spoliation; 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 Trigon*, 204 F.R.D. at 288 (citing *Schmid v. Milwaukee Elec. Tool Corp.*, 13 F.3d 76, 79 (3rd Cir. 1994)); *see also Silvester v. General Motors Corp*., 271 F.3d 583 (4th Cir. 2001).

While the unique circumstances of this case, involving a challenge by a confirmed enemy combatant regarding his conditions of confinement in a military detention facility during a time of war,[10] may ultimately warrant modification or supplementation of these factors, even assuming the applicability of the factors they do make clear, even now, that consideration of sanctions or remedial measures at this stage of proceedings in this case is premature. As noted above, serious questions exists whether this Court even has jurisdiction over this case under the MCA and whether plaintiff may pursue his constitutional and statutory claims because of a lack of waiver of sovereign immunity. Thus, at this stage of the proceedings in this case, the nature of permissible claims by plaintiff, if any, remains unsettled, and the bounds of appropriate litigation respecting any permissible claim remain uncharted. Consequently, an accurate and appropriate assessment of any prejudice to plaintiff's ability to litigate his claims, as well as of issues of unfairness, that may have resulted from any preservation issue in this matter cannot be made at this time; given the threshold issues present, the required "fact-specific inquiry" is premature.

[10] *See* Apr. 22, 2008 Report & Recommendation at 4-5 ("The defendant correctly notes that this case is unprecedented in the annals of American jurisprudence and implicates fundamental constitutional issues going to the very nature of government.").

Any such inquiry should await fuller development of plaintiff's claims, if such development is ever appropriate.[11] *Cf. Hamdi v. Rumsfeld*, 542 U.S. 507, 539-40 (2004) (plurality opinion) (adjuring lower courts generally to "proceed with the caution that is necessary" and to take only "prudent and incremental" steps when faced with novel issues pertaining to *habeas corpus* petitions from wartime detainees).

For these reasons, a judicial inquiry into any prior destruction of evidence and consideration of remedial measures is unnecessary and premature at this time, and plaintiff's request for such proceedings should be denied.

CONCLUSION

For the foregoing reasons, respondents respectfully request that plaintiff's motion for a preservation order and inquiry be denied in all respects.

Dated: April 30, 2008

Respectfully submitted,

JEFFREY S. BUCHOLTZ
Acting Assistant Attorney General

KEVIN F. MCDONALD
Acting United States Attorney

[*signature block continued on next page*]

[11] In any event, as previously discussed, in addition to the information being provided the Court in this filing, materials respecting DIA's inquiry into the destruction of interrogation recordings are being preserved should they be needed and appropriately part of any further exploration in this case of the destruction of the recordings, should that ever become necessary. *See* Berry Decl. ¶ 10.

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EXHIBIT 1

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

ALI SALEH KAHLAH AL-MARRI Plaintiff, v. ROBERT M. GATES, Secretary of Defense of the United States, COMMANDER JOHN PUCCIARRELLI, U.S.N. Commander, Naval Consolidated Brig, Defendants.	Civil A. No. 2:05-cv-02259-HFF-RSC

Pursuant to 28 U.S.C. §1746, I, Russell G. Leavitt, declare as follows:

1. I am an Associate Deputy General Counsel in the Office of General Counsel of the United States Department of Defense (DoD). In that capacity, I am responsible for, among other things, supporting the Department of Justice in litigation involving the DoD. The statements in this declaration are based upon my personal knowledge and information obtained by me in the course of my official duties.

2. In light of the publicized destruction of certain video tapes once held by the Central Intelligence Agency, the DoD Office of General Counsel issued a formal directive on December 19, 2007, to various DoD components regarding their preservation obligations. The memorandum directed that these components preserve and maintain all information related to all detainees ever held by DoD at Guantanamo Bay. Specifically, the components were directed to preserve and maintain all documents and recorded information of any kind (for example, electronic records, written records, telephone records, correspondence, computer records, e-mail,

storage devices, handwritten or typed notes) that is or comes within their possession or control. This memorandum remains in effect and must continue to be followed.

3. The December 19, 2007 directive was sent to all relevant DoD components reasonably likely to have information regarding current or former Guantanamo Bay detainees. The list of components consisted of the offices of the Secretary of Defense, Deputy Secretary of Defense, Secretaries of the Military Departments, the Chairman of the Joint Chiefs of Staff, Undersecretaries of the Military Departments, Director – Operational Test and Evaluation, DoD Inspector General, Assistants to the Secretary of Defense, Director – Administration and Management, Director – Program Analysis and Evaluation, Director – Net Assessment, Director – Force Transformation, Directors of the Defense Agencies, and Directors of the DoD Field Activities. The directive was communicated through formal DoD communications channels and, pursuant to standard DoD practice, these components would be expected to distribute the directive to all relevant personnel within that component and any sub-components therein.

4. In March 2008, this office became aware that certain information generated by a camera surveillance system in the special housing unit of the Charleston Naval Consolidated Brig, where Ali Saleh Kahlah al-Marri is housed, might be subject to automatic overwriting.

5. On April 10, 2008, an additional preservation directive was issued by the Acting General Counsel of DoD. This directive made clear that the requirement to preserve evidence relating to detainees held at Guantanamo Bay applied also to evidence relating to al-Marri. A copy of the directive is attached at Tab A. This directive was communicated, in electronic and written form, and through formal DoD communications channels to the same components to which the December 19, 2007 directive discussed above was directed, which includes those organizations responsible for managing al-Marri's detention at the Charleston Naval

Consolidated Brig and other military organizations reasonably likely to have evidence relating to al-Marri. Pursuant to standard DoD practice, these components would be expected to distribute the directive to all relevant personnel within that component and any sub-components therein.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Dated: 4/29/2008

Russell G. Leavitt

RUSSELL G. LEAVITT

Tab A

GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE
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WASHINGTON, D. C. 20301-1600

GENERAL COUNSEL

APR 10 2008

MEMORANDUM FOR SECRETARY OF DEFENSE
DEPUTY SECRETARY OF DEFENSE
SECRETARIES OF THE MILITARY DEPARTMENTS
CHAIRMAN OF THE JOINT CHIEFS OF STAFF
UNDER SECRETARIES OF DEFENSE
GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE
DIRECTOR, OPERATIONAL TEST AND EVALUATION
INSPECTOR GENERAL OF THE DEPARTMENT OF DEFENSE
ASSISTANTS TO THE SECRETARY OF DEFENSE
DIRECTOR, ADMINISTATION AND MANAGEMENT
DIRECTOR, PROGRAM ANALYSIS AND EVALUATION
DIRECTOR, NET ASSESSMENT
DIRECTOR, FORCE TRANSFORMATION
DIRECTORS OF THE DEFENSE AGENCIES
DIRECTORS OF THE DOD FIELD ACTIVITIES

SUBJECT: Preservation of Detainee Records

In August 2005 and December 2007, in response to several orders issued by federal court judges, the General Counsel of the Department of Defense directed that certain information relating to all detainees ever held by the Department of Defense at Guantanamo Bay be preserved and maintained. Specifically, you were directed to preserve and maintain "all documents and recorded information of any kind (for example, electronic records, written records, telephone records, correspondence, computer records, e-mail, storage devices, handwritten or typed notes) that is in, or comes into, your possession or control" relating to these detainees. Those directives remain in effect and must continue to be followed.

This requirement also applies to all records relating to Ali Saleh Kahla al-Marri, including, but not limited to, records relating to his enemy combatant status, his transfer to Department of Defense custody on June 23, 2003, and his detention as an enemy combatant at the U.S. Naval Consolidated Brig, Charleston, South Carolina. Accordingly, you are hereby directed to preserve all such records.

Daniel J. Dell'Orto
Acting

EXHIBIT 2

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

ALI SALEH KAHLAH AL-MARRI Plaintiff, v. ROBERT M. GATES, Secretary of Defense of the United States, COMMANDER JOHN PUCCIARRELLI, U.S.N. Commander, Naval Consolidated Brig, Defendants.	Civil A. No. 2:05-cv-02259-HFF-RSC

Declaration of
Robert H. Berry, Jr.
Defense Intelligence Agency

I, Robert H. Berry, Jr., hereby declare, pursuant to 28 U.S.C. 1746, that the following is true and correct to the best of my knowledge, information, and belief:

1. I am the Principal Deputy General Counsel for the Defense Intelligence Agency (DIA). DIA is responsible for satisfying military and military-related intelligence requirements of the Secretary of Defense, the Chairman of the Joint Chiefs of Staff, the combatant commands, other Department of Defense (DoD) components, and, as appropriate, non-DoD agencies of the federal government. DIA provides the military intelligence contribution to national foreign intelligence and counterintelligence.

2. I have served in my current role as the principal adviser and deputy to the Agency's General Counsel since 1984. As Principal Deputy General Counsel, I am responsible for managing the day-to-day operations of DIA's Office of the General Counsel (DIA OGC). One of the responsibilities of DIA OGC is to promulgate litigation holds and preservation orders related to DIA information and records throughout the Agency. I oversee that function generally, and did so concerning the Agency's litigation holds in the case of Plaintiff Ali Saleh Kahlah Al-Marri. I have also supervised DIA attorneys responsible for securing Agency material relevant to the Al-Marri case, as needed. Finally, I was involved in the Agency's inquiry into the destruction of tapes of interviews of Al-Marri described below, and am familiar with the report of that inquiry. Information contained in this declaration is based upon my personal knowledge or information supplied to me in my official capacity.

3. On June 23, 2003, the President declared Plaintiff Ali Saleh Kahlah Al-Marri an enemy combatant and ordered his transfer to DoD custody. After his transfer to DoD custody, Al-Marri was detained at the Naval Consolidated Brig, Charleston, SC. While detained at the Brig, Al-Marri was questioned under a program reviewed by me and approved by the DIA Director. The Director also approved a request to record the interrogation sessions.

4. The interrogations were conducted in a manner consistent with the requirements of Army Field Manual 34-52, *Intelligence Interrogation*, September 28, 1992, as well as the new Army Field Manual 2-22.3, *Human Intelligence Collection Operations*, September 2006. Standard interrogation approaches were followed. Al-Marri was treated humanely, and no extraordinary or enhanced interrogation techniques were employed. The interrogations were conducted in a manner so as not to violate any law, executive order, other Presidential directive, or DoD policy.

5. In December 2007, in response to an inquiry initiated by the DIA OGC, DIA OGC learned that destruction of some of the recordings of Al-Marri interrogation sessions had previously occurred.

6. On December 19, 2007, DIA OGC issued a Notice of Litigation Hold to directorates within the Agency likely to have evidence related to Al-Marri. Employees of those directorates were directed to "[t]ake necessary and appropriate steps to preserve all evidence, including electronically stored information," relating to Al-Marri. A copy of the Notice of Litigation Hold, with the identifying information of a DIA employee redacted, consistent with 10 U.S.C. 424(a)(2), is attached at Tab A.

7. On April 10, 2008, the Acting General Counsel of the Department of Defense issued a memorandum, subject: "Preservation of Detainee Records." That memorandum included a requirement to preserve and maintain "all records relating to Ali Saleh Kahla al-Marri." On April 18, 2008, the DIA OGC relayed that DoD preservation directive, and reaffirmed its December 19, 2007, Litigation Hold, in a directive to all DIA directorates and offices. That directive imposed a requirement on all directorates and offices to affirmatively acknowledge the receipt of the April 10, 2008, memorandum and their compliance with it.

8. With respect to the recordings that had been destroyed, a team, consisting of selected members of the DIA Office of Inspector General (IG) and the DIA OGC, collected Brig and DIA records and related e-mails and logs, interviewed witnesses, and reviewed the existing video recordings. In the course of this inquiry, the IG / OGC team learned that the DIA employees involved in the Al-Marri interrogations had regarded the recordings as working materials, the destruction of which they believed was required when the materials were no longer needed for intelligence purposes, absent express authorization to preserve them. As a result, a number of recordings of the Al-Marri interrogation sessions, along with other notes and working papers associated with those sessions, were destroyed during the time period between December 1, 2004, and March 31, 2005. Existing documentation relating to the interrogations was retained and is being protected.

9. Despite the belief by some DIA officials involved with the al-Marri interrogations that all of the recordings had been destroyed, subsequent investigation revealed that DIA still possesses original or duplicate recordings of nine interrogation sessions, including the session described in media reports as one in which Al-Marri was chanting loudly and had tape placed on his mouth.

10. In the course of the inquiry, the remaining recordings of Al-Marri interrogations were recovered. These recordings are currently stored in the office of the DIA IG and are being preserved. In addition, the materials documenting and supporting the inquiry described above are also being preserved.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information, and belief.

Executed this 30th day of April, 2008,

Robert H. Berry, Jr.
Principal Deputy General Counsel
Defense Intelligence Agency

TAB A

DEFENSE INTELLIGENCE AGENCY

WASHINGTON, D.C. 20340-5100

U-07-0328/GC

19 December 2007

MEMORANDUM FOR DEPUTY DIRECTOR FOR MISSION SERVICES (DA)
DEPUTY DIRECTOR FOR ANALYSIS (DI)
DEPUTY DIRECTOR FOR HUMAN INTELLIGENCE (DH)
DEPUTY DIRECTOR FOR INFORMATION MANAGEMENT AND CHIEF INFORMATION OFFICER (DS)

FROM: Robert H. Berry, Principal Deputy General Counsel

SUBJECT: Notice of Litigation Hold in re Al-Marri, et al. v. Wright

- - - NOTICE OF LITIGATION HOLD - - -

A habeas corpus petition has been filed on behalf of Ali Saleh Kahlah Al-Marri in the United States District Court for the District of South Carolina. Consequently, you are requested to preserve all documents, information, and things (such as tangible objects, including hard drives) (hereinafter "evidence") that relate to Mr. Al-Marri. Affirmative steps to preserve evidence must be taken immediately.

This is not a discovery tasker. It is a Notice of Litigation Hold which requires the Agency to preserve evidence in connection with litigation.

The type of evidence to be preserved in this Litigation Hold includes all documents, records, data, correspondence, charts, reports, notes, emails (including emails stored on a computer or personal digital assistant) and other materials, whether official or unofficial, original or duplicates, that relate to Mr. Al-Marri. If there is any doubt as to whether any particular evidence should be retained, preserve the information until you have consulted with us.

To implement the Litigation Hold, the following steps must be taken:

- Take necessary and appropriate sets to preserve all evidence, including electronically stored information, within the files of your organization in accordance with this Litigation Hold.

- Conduct review of archived records to identify evidence that may be relevant to the Litigation Hold.

- Keep a record of all steps taken to initiate and obtain compliance with this litigation hold, including a copy of this Litigation Hold Notice, the distribution list for the notice, and a record of any other action taken to implement and maintain the Litigation Hold.

- Designate a point of contact to work with counsel in my office.

DS ONLY:

- Ensure steps are taken to modify routine or automatic deletion of electronic information so that potentially relevant evidence is not inadvertently destroyed or lost before it is captured and preserved.

Affirmative steps must be taken to preserve potentially relevant evidence in order to protect the Agency from potential liability.

Contact Assistant General Counsel [redacted] with questions regarding this Litigation Hold.

EXHIBIT 3

Declaration

John Pucciarelli, hereby declares, pursuant to 28 U.S.C. 1746 as follows:

1. I am a Commander serving on active duty in the United States Navy. I have served in the Navy for approximately 18 years and 8 months, primarily in the Surface Warfare and Fleet Support career fields. I currently serve as the Commanding Officer, Naval Consolidated Brig Charleston, South Carolina (hereinafter the Brig). I reported to the Brig on 1 December 2006 to serve as the Executive Officer and served in that position until I assumed Command of the Brig on 3 July 2007. Information contained in this declaration is based upon my personal knowledge or information supplied to me in my official capacity.

2. The Brig has preserved and continues to preserve documents and recorded information in our possession concerning the detention, treatment, condition, and conditions of confinement of Almarri since his arrival at the Brig on 23 June 2003, except as explained below.

3. A digital video recording (DVR) system is utilized in the special housing unit (SHU) area where Almarri is detained. This system (the SHU DVR), which has been in place since the outset of Almarri's detention in the Brig, records camera feed from various areas of the SHU, whether or not Almarri is present in those areas, around the clock, seven days per week. The system automatically overwrites data recorded thereon at regular intervals. This interval is approximately every thirty (30) days. Thus, the system on any given day would retain only data from the specified interval; on each day recorded images from dates prior to the applicable interval are automatically overwritten. The interval at which recorded data is overwritten is determined by the technological storage capacity of the recording device.

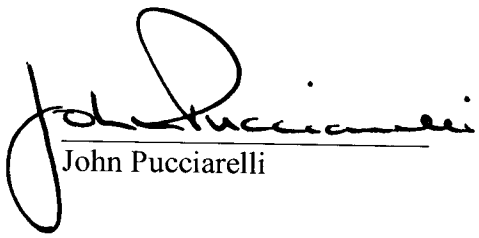
4. On 10 April 2008, I not only instituted measures to ensure that all documents and recorded information of any kind in the Brig's possession or control related to Almarri continue to be preserved and maintained, but I also ordered that all data on the SHU DVR system be preserved to ensure that no data currently stored thereon was lost and that recorded information in the SHU DVR system subject to overwriting be preserved going forward. Currently, interim measures are in effect to preserve recorded information on the SHU DVR system subject to overwriting while options for a more permanent solution are being explored.

5. The absence of such measures regarding the SHU DVR before now was not intended to prevent access to any potentially relevant information in this case, if such information would be potentially relevant. Much of the overwritten information would have involved video of areas when Almarri was not present or of mundane or routine activities. Recordings of significant events related to Almarri that were captured on the SHU DVR, such as movements of Almarri from his living area and incidents of non-minor noncompliance by Almarri and staff interactions with him during such periods, were preserved or were otherwise recorded by a separate video system (the recordings of which have been and are being preserved). Furthermore, as reflected in my declaration of 10 April 2008 in this case, records related to various daily activities by Almarri (including, but not limited to, prayer, hygiene, recreation, sleep, television viewing, reading, interaction with staff, eating patterns, call button activity, medical visits, other visits, and correspondence sent or received), records of disciplinary matters, as well as records of

communications from and to Almarri through the Brig's chit system, exist and have been preserved.

I declare under penalty of perjury that the forgoing is true and correct to the best of my knowledge, information and belief.

Executed this 29TH day of April, 2008.



John Pucciarelli