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

Ali Saleh Kahlah Almarri, Plaintiff, **v.** **Robert M. Gates,** Secretary of Defense of the United States, **Commander John Pucciarrelli,** U.S. Naval Brig, Charleston, South Carolina, Defendants.	**C/A 2:05-2259-HFF-RSC** **MOTION FOR AN ORDER DIRECTING THE GOVERNMENT TO PRESERVE EVIDENCE AND FOR AN INQUIRY INTO THE GOVERNMENT'S DESTRUCTION AND OTHER SPOLIATION OF EVIDENCE**

By undersigned counsel, Plaintiff Ali Saleh Kahlah Almarri ("Mr. Almarri") hereby respectfully moves the Court: (1) for an Order directing defendants to (a) preserve 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 U.S. Naval Brig ("the Brig") since June 23, 2003; and (b) preserve all documents, records, recordings, and like materials, in whatever form, relating to the destruction, alteration, or transfer of the foregoing; and (2) to conduct an inquiry into the destruction and other spoliation of evidence by the government, and to take appropriate remedial measures upon such inquiry, including sanctions if warranted.[1]

[1] Counsel for Mr. Almarri has sought the government's consent to this motion. The government has not consented.

Statement

Since Mr. Almarri was declared an "enemy combatant" and transferred from civilian custody to the Brig on June 23, 2003, litigation has been pending before United States federal courts challenging his detention and treatment. Habeas corpus litigation has been pending since July 7, 2003 challenging the lawfulness of Mr. Almarri's detention as an "enemy combatant," while the instant action challenging Mr. Almarri's mistreatment and unlawful conditions of confinement at the Brig has been ongoing since August 5, 2005.[2] Most recently, Mr. Almarri moved on March 13, 2008, for interim relief from his prolonged isolation and other unlawful conditions of confinement which are gravely harming his health and jeopardizing his ability to participate meaningfully in his legal defense.

Last week, the government acknowledged the existence of approximately fifty recordings documenting interrogations of Mr. Almarri and Jose Padilla at the Brig, evidence manifestly relevant to both of Mr. Almarri's legal challenges. Those recordings include an interrogation during which, according to the government, Mr. Almarri was forcibly gagged with tape. *See* Mark Mazzetti & Scott Shane, "Pentagon Cites Tapes Showing Interrogations," *New York Times*; Mar. 13, 2008, attached hereto as Exhibit 1 (describing recording of an interrogation showing "rough treatment" of Mr. Almarri);

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[2] Mr. Almarri's habeas action was initially brought in the United States District Court for the Central District of Illinois. Following the Supreme Court's ruling in *Rumsfeld v. Padilla*, 542 U.S. 426 (2004), Mr. Almarri's habeas action was immediately re-filed in the United States District Court for the District of South Carolina, and was pending before this Court from July 2004 to August 2006. That case is now before the full Fourth Circuit Court of Appeals. *See Almarri v. Wright*, 487 F.3d 160 (4th Cir. 2007), *rehearing en banc granted sub nom. Almarri v. Pucciarelli* (argued Oct. 31, 2007).

Josh White & Joby Warrick, "Detainee's Suit Says Abuse Was Videotaped," *Wash. Post*, Mar. 13, 2008, attached hereto as Exhibit 2.[3]

The government, however, has also recently admitted destroying many recordings of Mr. Almarri's interrogations. *See* White & Warrick, "Detainee's Suit Says Abuse Was Videotaped." Regrettably, this was not the first disclosure of the government's spoliation of evidence in the detention context. Previously, the CIA's director acknowledged destruction of recordings of interrogations of two other detainees, prompting a criminal investigation into that destruction. *See* Press Release, CIA, Director's Statement on the Taping of Early Detainee Interrogations, Dec. 6, 2007, attached hereto as Exhibit 3. The government further admits that there is still no uniform policy for preserving recordings of detainee interrogations. *See* Pauline Jelinek, "Defense Department Reviews Its Policy on Videotaping Prisoner Interrogations," *Associated Press*, Mar. 13, 2008, attached hereto as Exhibit 4.

Argument

The government's known conduct warrants immediate action by the Court. The Court should enter an order requiring preservation of any and all remaining evidence of

[3] As Mr. Almarri has described to his counsel, who has filed a certification, during this interrogation Mr. Almarri's mouth was stuffed with cloth and covered with heavy duct tape, causing him severe pain. When Mr. Almarri managed to loosen the tape with his mouth, interrogators re-taped his mouth even more tightly. Mr. Almarri started to choke until a government agent in the room removed the tape. Certification of Andrew J. Savage, III, ¶ 23, Exhibit A to Motion for Interim Relief from Prolonged Isolation and Other Unlawful Conditions of Confinement. At the time, Mr. Almarri had already been chained down for approximately five hours in a freezing room when the tape, which had placed over his mouth both sideways around his ears and from top to bottom from his head to his chin, was ripped violently from his face, causing Mr. Almarri excruciating pain. This interrogation, like others in which Mr. Almarri was threatened with violence and death, took place after months of Mr. Almarri's *incommunicado* detention at the Brig.

Mr. Almarri's detention, interrogation, treatment, and conditions of confinement at the Brig as well as any evidence concerning the past destruction of such evidence. Further, the Court should conduct an inquiry into the government's destruction and other spoliation of evidence and take appropriate remedial measures based upon this inquiry, including sanctions if warranted.

I. The Court Should Immediately Enter an Order Requiring the Preservation of Existing Evidence and Evidence Concerning Any Past Destruction or Spoliation.

Federal courts have power to enter a preservation order where circumstances so warrant. *See, e.g., Pueblo of Laguna v. United States*, 60 Fed. Cl. 133, 138 n.8 (2004); *United States v. Philip Morris USA, Inc.*, 327 F. Supp. 2d 21, 23 (D.D.C. 2004). Circumstances plainly call for entry of such a preservation order here.

The government already has admitted destroying relevant evidence in this case as well as in cases involving other detainees. *See Capricorn Powers Co. v. Siemens Westinghouse Power*, 200 F.R.D. 429, 433-434 (W.D. Pa. 2004) (entry of a preservation order warranted when there is substantial concern that evidence may be damaged or destroyed). The destruction of evidence concerning Mr. Almarri's detention, interrogation, and treatment at the Brig violates the government's obligation to preserve all potentially relevant evidence, whether or not a preservation order has been entered. *See, e.g., Kronisch v. United States*, 150 F.3d 112, 126 (2d Cir. 1998); *Telecom Intern. America, Ltd. v. AT&T Corp.*, 189 F.R.D. 76, 81 (S.D.N.Y. 1999); *Scott v. I.B.M. Corp.*, 196 F.R.D. 233, 249 (D.N.J. 2000). The government, moreover, admits that it still has no uniform policy for preserving recordings of detainee interrogations, and it has never identified any policy for preserving records of Mr. Almarri's interrogations, treatment,

and conditions of confinement at the Brig, thus heightening the danger of future destruction or other spoliation.[4]

As the government previously told this Court in opposing Mr. Almarri's earlier request for a preservation order in his related habeas corpus action: "'[T]he proponent ordinarily must show that absent a court order, there is significant risk that relevant evidence will be lost or destroyed – a burden often met by demonstrating that the opposing party has lost or destroyed evidence in the past or has inadequate retention procedures in place.'" *See* Respondents' Reply to Petitioner's Brief in Response to the Court's August 15, 2005 Order, at 20, *Almarri v. Hanft*, 2:04-2257-26AJ (quoting *Pueblo of Laguna*, 60 Fed. Cl. at 138). That burden plainly has been satisfied here because, contrary to its prior representations, the government now admits both that it has destroyed evidence in the past and that it lacks adequate retention procedures going forward.

The Court accordingly should immediately issue a preservation order to prevent further destruction or other spoliation of evidence. In addition, the Court should direct the government to preserve any records concerning the destruction, alteration, or transfer of any evidence to date.

II. The Court Also Should Inquire into the Government's Past Destruction and Spoliation of Evidence.

Federal courts also have inherent authority to prevent, sanction, and remedy the past destruction of relevant and discoverable evidence. *See, e.g., Chambers v. NASCO, Inc.*, 501 U.S. 32, 43-45 (1991); *Telecom Intern.*, 189 F.R.D. at 81. That authority exists

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[4] Numerous district courts have entered preservation orders in cases involving the treatment of detainees in U.S. custody even in the absence of a government admission that evidence was destroyed in a particular case. *See, e.g., Alsaaei v. Bush*, No. 05-2369, 2006 WL 2367270, at *3 (D.D.C. Aug. 14, 2006).

even absent 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 Intern.*, 189 F.R.D. at 81 (citing *Chambers*, 501 U.S. at 43-45). Sanctions are intended not only to deter future destruction but to remedy past spoliation, including by minimizing the prejudice to the harmed party. *See Vodusek v. Bayliner Marine Corp.*, 71 F.3d 148, 156 (4th Cir. 1995) (sanctions are aimed at "leveling the evidentiary playing field" as well as "sanctioning the improper conduct"); *see also National Hockey League v. Metro. Hockey Club, Inc.*, 427 U.S. 639, 643 (1976). A court's authority in crafting sanctions for spoliation is broad. *West v. Goodyear Tire & Rubber Co.*, 167 F.3d 776, 779 (2d Cir. 1999). Possible remedial measures include reconstruction of the destroyed evidence. *Jefferson v. Reno*, 123 F. Supp. 2d 1, 2 (D.D.C. 2000) (describing court orders issued upon status conference with the parties, requiring reconstruction of the destroyed records, and discovery into the circumstances surrounding the destruction of documents); *Landmark Legal Found. v. E.P.A.*, 272 F. Supp. 2d 59, 67 (D.D.C. 2003). Such measures may also include discovery into the destruction or removal of the relevant evidence against a defendant or third party. *Judicial Watch, Inc. v. U.S. Dep't of Commerce*, 34 F. Supp. 2d 28, 46 (D.D.C. 1998) (*Judicial Watch I*); *Judicial Watch, Inc. v. U.S. Dep't of Commerce*, No. 95-133 (RCL), 2000 WL 33243469, at *1-*2 (D.D.C. Dec. 5, 2000) (*Judicial Watch II*).

Here, the government has admitted destroying relevant evidence pertaining to Mr. Almarri's detention, interrogation, and treatment at the Brig. Indeed, the government says that such evidence was destroyed "routinely." *See* White & Warrick, "Detainee's Suit Says Abuse Was Videotaped." This type of destruction flouts the government's

well-established preservation obligations. Litigation over Mr. Almarri's detention and treatment has been ongoing since Mr. Almarri was first declared an "enemy combatant" almost five years ago. Even the most unsophisticated litigant knows that it has a duty to preserve all potentially relevant evidence under these circumstances.

At a minimum, therefore, the Court should make inquiry regarding the government's destruction of evidence pertaining to Mr. Almarri's detention, interrogation, treatment, and conditions of confinement at the Brig. Upon such investigation, the Court should impose appropriate remedial measures, including, but not limited to, the identification, description, and re-creation of any evidence that has been destroyed or otherwise spoliated. *See Abdullah v. Bush*, Mem. Order, at 5, No. 05-23 (RWR) (D.D.C. Feb. 14, 2008) (directing the government to produce a report detailing the nature of any evidence pertaining to the detainee in question, and potentially subject to the Court's preservation order, that has been destroyed or otherwise spoliated), attached hereto as Exhibit 5.

Conclusion

For the foregoing reasons, the Court should: (1) issue an order directing defendants to (a) preserve 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 Brig since June 23, 2003; and (b) preserve all documents, records, recordings, and like materials, in whatever form, relating to the destruction, alteration, or transfer of the foregoing; and (2) conduct an inquiry into the destruction and other spoliation of evidence by the

government, and to take appropriate remedial measures upon such inquiry, including sanctions if warranted.

Respectfully submitted,

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Dated: Charleston, South Carolina
March 20, 2008

EXHIBIT 1

The New York Times
nytimes.com

March 13, 2008

Pentagon Cites Tapes Showing Interrogations

By MARK MAZZETTI and SCOTT SHANE

Correction Appended

WASHINGTON — The Defense Department is conducting an extensive review of the videotaping of interrogations at military facilities from Iraq to Guantánamo Bay, and so far it has identified nearly 50 tapes, including one that showed what a military spokesman described as the forcible gagging of a terrorism suspect.

The Pentagon review was begun in late January after the Central Intelligence Agency acknowledged that it had destroyed its own videotapes of harsh interrogations conducted by C.I.A. officers, an action that is now the subject of criminal and Congressional investigations.

The review was intended in part to establish clearer rules for any videotaping of interrogations, Defense officials said. But they acknowledged that it had been complicated by inconsistent taping practices in the past, as well as uncertain policies for when tapes could be destroyed or must be preserved.

The officials said it appeared that only a small fraction of the tens of thousands of interrogations worldwide since 2001 had been recorded.

The officials said the nearly 50 tapes they identified documented interrogations of two terrorism suspects, Jose Padilla and Ali al-Marri, and were made at a Navy detention site in Charleston, S.C., where the two men have been held.

The initial findings of the Pentagon review represent the first official acknowledgment that military interrogators had videotaped some sessions with detainees and could widen the controversy over the treatment of prisoners in American custody. A Pentagon spokesman, Geoff Morrell, cautioned that the review was incomplete, and a spokesman for the Defense Intelligence Agency, Don Black, said that interrogation videotapes had been routinely destroyed if they were judged to have no continuing value.

The only tape described by officials is of Mr. Marri, a citizen of Qatar who was arrested in December 2001 while in college in Illinois and moved five years ago to the jail after being

designated an "enemy combatant." Government officials say they believe he was an operative for Al Qaeda who was plotting attacks.

Two government officials said that the tape showed Mr. Marri being manhandled by his interrogators, but did not show waterboarding or any other treatment approaching what they believed could be classified as torture. According to one Defense Department official, the interrogators dispensing the rough treatment on the tape were F.B.I. agents.

An F.B.I. spokesman declined to comment, citing a continuing review of detention practices that is being carried out by the Department of Justice's inspector general.

Mr. Black, the spokesman for the Defense Intelligence Agency, said its director, Lt. Gen. Michael D. Maples, had reviewed the tape and was satisfied that Mr. Marri's treatment was acceptable.

He said that Mr. Marri was chanting loudly, disrupting his interrogation, and that interrogators used force to put duct tape on his mouth, while Mr. Marri resisted. Mr. Black said most of the videos showing Mr. Marri's interrogations had been destroyed. The government has never charged Mr. Marri, and whether the Pentagon is allowed to hold him indefinitely has not been settled legally.

The scale of detention and interrogation by the military, with tens of thousands of prisoners in Iraq, Afghanistan and at Guantánamo Bay, Cuba, dwarfs that of the C.I.A., which has held fewer than 100 high-level Qaeda suspects. The C.I.A. has acknowledged videotaping only two terrorism suspects, in 2002, and military officials said that the review, ordered in late January by James R. Clapper, the Pentagon's senior intelligence official, had similarly found that only a small number of detainee interrogations had been videotaped.

"This is not a widespread practice," said Mr. Morrell, the Pentagon press secretary. He said that it was up to individual military commanders whether to tape interrogations and that the videotapes were often used as the basis of written intelligence reports. In addition to the existing interrogation videotapes, there are existing recordings that show interactions between military guards and terrorism suspects, including detainees' forcible removal from cells at Guantánamo, military officials said.

Images of rough treatment of detainees is a delicate subject for the Pentagon. Soldiers' snapshots of the abusive treatment of detainees at the Abu Ghraib prison in Iraq set off a firestorm and led to prison terms for a number of military personnel.

Congress imposed a ban in 2005 on all harsh interrogation methods by the military but left a

loophole for the C.I.A. Last month, Congress voted to extend the ban to the C.I.A., but President Bush vetoed the bill.

The C.I.A. acknowledged in December that in 2005 it had destroyed the only interrogation videotapes that its officers had made; the tapes showed two detainees, Abu Zubaydah and Abd al- Rahim al-Nashiri.

Lawyers for Mr. Marri, who have challenged his imprisonment in court, sought access to any tapes or other records of his interrogations, but in 2006 a federal judge in South Carolina said the government did not have to produce any tapes. That decision is being appealed.

Jonathan Hafetz, one of the lawyers, said Mr. Marri had heard guards describe "a cabinet full of tapes" showing his interrogations, but had never had independent confirmation that such tapes existed. Mr. Marri has alleged that earlier in his imprisonment he was deprived of sleep, isolated and exposed to prolonged cold.

Mr. Hafetz said he planned to file papers in court on Thursday describing the psychological harm done to Mr. Marri. "Locking someone up for five years without charges is a disgrace and a betrayal of American and constitutional values," he said.

The difficulties in the Pentagon's review can be glimpsed in a seven-page court filing last month by Rear Adm. Mark H. Buzby, the military commander at Guantánamo Bay.

Admiral Buzby's report describes an array of digital video recorders used to capture "activities" — it does not specify whether interrogations are included — in at least four subcamps at Guantánamo. But the systems automatically recorded over older material when they reached capacity, he wrote.

In some cases, Admiral Buzby wrote, "We suspect that the recording devices contain recorded data but we are unable technologically to confirm whether data remains."

This article has been revised to reflect the following correction:

Correction: March 15, 2008
A front-page article on Thursday about a Pentagon review of videotaping of interrogations misstated the legal status of Ali al-Marri, who has been imprisoned by the military since 2003 after being designated an enemy combatant. Mr. Marri is challenging the Pentagon's assertion that it has the right to hold him indefinitely; the issue of whether the Pentagon can indeed do that has not been settled legally. (A federal appeals court panel ruled 2 to 1 in June that Mr. Marri's detention violated the Constitution, a decision that is under review by the United States

Court of Appeals for the Fourth Circuit.)

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EXHIBIT 2

washingtonpost.com

Detainee's Suit Says Abuse Was Videotaped

By Josh White and Joby Warrick
Washington Post Staff Writers
Thursday, March 13, 2008; A02

Lawyers for a detainee held at the Navy brig in Charleston, S.C., allege in court papers to be filed today that their client was systematically abused and that he was told there were cabinets full of videotapes depicting his treatment at the hands of the FBI and the Defense Intelligence Agency.

Ali al-Marri, who has been in U.S. custody since his arrest in 2003, is seeking to have the conditions of his detention reviewed by a federal court and wants to be removed from isolation, where he has remained without charge for years. His allegations of being videotaped while he was mistreated could add to an uproar over CIA admissions that the agency videotaped detainees who were waterboarded and then destroyed the tapes.

The Defense Department has been reviewing its videotaping efforts in detention facilities since the CIA's revelations, and officials have been saying for months that there were few, if any, videotapes of interrogations that ever existed. Officials at the military detention facility at Guantanamo Bay, Cuba, acknowledged inadvertently destroying years' worth of video images of its operations as part of the routine overwriting of surveillance video but have not ruled out that interrogators kept at least some videotapes of interrogations.

The New York Times reported last night on its Web site that defense officials have turned up about 50 videotapes related to interrogations of Marri and Jose Padilla, another suspect held at the Navy brig. Donald Black, a spokesman for the Defense Intelligence Agency, said yesterday that one tape depicted Marri being gagged with duct tape. But he said the move was prompted by Marri's disruptive behavior, adding that there was no evidence on the video of abuse.

"Marri was chanting very loudly and was being disruptive," Black said. "It was determined that he should be quieted up, and if he didn't they were going to put tape over his mouth. When Marri was told this he got even louder."

Jonathan Hafetz, an attorney for Marri, said yesterday that his client has been forced to endure stress positions, sensory deprivation, and threats of violence or death.

"On several occasions, interrogators stuffed Mr. Almarri's mouth with cloth and covered his mouth with heavy duct tape," according to the legal filings to be presented to the U.S. District Court in South Carolina, which refer to the apparently videotaped incident. "The tape caused Mr. Almarri serious pain. One time, when Mr. Almarri managed to loosen the tape with his mouth, interrogators re-taped his mouth even more tightly. Mr. Almarri started to choke until a panicked agent from the FBI or Defense Intelligence Agency removed the tape."

Black said the Marri interrogation involved defense officials and members of another agency. A U.S.

source familiar with the tapes identified the other agency as the FBI.

The DIA official said the tapes were made in part to ensure that interrogations were being carried out according to Pentagon rules. Most of the tapes were routinely destroyed after transcripts of the interviews were made, Black said.

Staff researcher Julie Tate contributed to this report.

EXHIBIT 3

Press Releases & Statements

Director's Statement on the Taping of Early Detainee Interrogations

Statement to Employees by Director of the Central Intelligence Agency, General Mike Hayden on the Taping of Early Detainee Interrogations

December 6, 2007

The press has learned that back in 2002, during the initial stage of our terrorist detention program, CIA videotaped interrogations, and destroyed the tapes in 2005. I understand that the Agency did so only after it was determined they were no longer of intelligence value and not relevant to any internal, legislative, or judicial inquiries—including the trial of Zacarias Moussaoui. The decision to destroy the tapes was made within CIA itself. The leaders of our oversight committees in Congress were informed of the videos years ago and of the Agency's intention to dispose of the material. Our oversight committees also have been told that the videos were, in fact, destroyed.

If past public commentary on the Agency's detention program is any guide, we may see misinterpretations of the facts in the days ahead. With that in mind, I want you to have some background now.

CIA's terrorist detention and interrogation program began after the capture of Abu Zubaydah in March 2002. Zubaydah, who had extensive knowledge of al-Qa'ida personnel and operations, had been seriously wounded in a firefight. When President Bush officially acknowledged in September 2006 the existence of CIA's counter-terror initiative, he talked about Zubaydah, noting that this terrorist survived solely because of medical treatment arranged by CIA. Under normal questioning, Zubaydah became defiant and evasive. It was clear, in the President's words, that "Zubaydah had more information that could save innocent lives, but he stopped talking."

That made imperative the use of other means to obtain the information—means that were lawful, safe, and effective. To meet that need, CIA designed specific, appropriate interrogation procedures. Before they were used, they were reviewed and approved by the Department of Justice and by other elements of the Executive Branch. Even with the great care taken and detailed preparations made, the fact remains that this effort was new, and the Agency was determined that it proceed in accord with established legal and policy guidelines. So, on its own, CIA began to videotape interrogations.

The tapes were meant chiefly as an additional, internal check on the program in its early stages. At one point, it was thought the tapes could serve as a backstop to guarantee that other methods of documenting the interrogations—and the crucial information they produced—were accurate and complete. The Agency soon determined that its documentary reporting was full and exacting, removing any need for tapes. Indeed, videotaping stopped in 2002.

As part of the rigorous review that has defined the detention program, the Office of General Counsel examined the tapes and determined that they showed lawful methods of questioning. The Office of Inspector General also examined the tapes in 2003 as part of its look at the Agency's detention and interrogation practices. Beyond their lack of intelligence value—as the interrogation sessions had already been exhaustively detailed in written channels—and the absence of any legal or internal reason to keep them, the tapes posed a serious security risk. Were they ever to leak, they would permit identification of your CIA colleagues who had served in the program, exposing them and their families to retaliation from al-Qa'ida and its sympathizers.

These decisions were made years ago. But it is my responsibility, as Director today, to explain to you what was done, and why. What matters here is that it was done in line with the law. Over the course of its life, the Agency's interrogation program has been of great value to our country. It has helped disrupt terrorist operations and save lives. It was built on a solid foundation of legal review. It has been conducted with careful supervision. If the story of these tapes is told fairly, it will underscore those facts.

Mike Hayden

EXHIBIT 4

4 of 4 DOCUMENTS

The Associated Press

March 13, 2008 Thursday 4:10 PM GMT

Pentagon reviews its policy on videotaping prisoner interrogations after CIA controversy

BYLINE: By **PAULINE JELINEK**, Associated Press Writer

SECTION: WASHINGTON DATELINE

LENGTH: 526 words

DATELINE: WASHINGTON

There is no uniform Pentagon policy for preserving videotapes of prisoner interrogations, a system officials are reviewing following the controversy over the CIA's destruction of some of its tapes.

A Defense Department review at military prisons from Afghanistan to Guantanamo Bay to Charleston, S.C., has found so far that "there is not widespread use" of such videotaping, said Pentagon press secretary Geoff Morrell.

Different defense agencies have differing practices from each other, said another defense spokesman, Bryan Whitman.

With the review still unfinished, there was no clear picture of how many tapes are out there, though it is known around 40 show the questioning of two suspects at the navy brig in Charleston, officials said.

Among them, more than 30 tapes were handed over to the courts for the trial of Jose Padilla, a former Chicago gang member sentenced in January to more than 17 years in prison for terrorism-related crimes, said Defense Intelligence Agency spokesman Don Black.

Tapes also were made of Ali al-Marri, whom the government claims had links to al-Qaida terrorists.

Al-Marri has been held in Charleston since June 2003 and his lawyer, Jonathan Hafetz of the Brennan Center for Justice, said he was filing a court motion later Thursday seeking relief from confinement conditions that have caused al-Marri serious mental deterioration. He said Al-Marri was told officials have "file cabinets full" of tapes on him.

Black said the intelligence agency doesn't routinely make videotapes and doesn't routinely keep those that are made but may if another agency has requested the information.

"Our people handle videotapes as working papers," he said. Reports are written from the sessions or tapes may later be used to train agents in interrogation practices, but are usually kept only 90 days.

"When there's no further need for it, the tape is destroyed," Black said.

Black said one on al-Marri shows his mouth was taped during questioning because he was being disruptive. Hafetz said al-Marri nearly choked from the action; Black said the agency's legal office reviewed the tape and determined there was no abuse.

Overall, officials have found "no evidence of detainee abuse" on videotapes, he said.

"This is not an Abu Ghraib story," Black said, "Not even close." He referred to the 2005 scandal that shocked the international community in which guards had physically abused and sexually humiliated prisoners in the Iraq prison and photographed their actions.

Other defense agencies have other procedures and part of the review is to learn what various practices are, with an eye to

perhaps making them all the same, officials said.

For instance, an order went out in 2005 requiring preservation of interrogation videos from Guantanamo Bay, Morrell said.

"There is no requirement to videotape, there is no requirement not to," Whitman said.

The Pentagon began its review in January after the CIA acknowledged it had destroyed videotapes of harsh interrogations that critics call torture.

AP reporter Lolita Baldor contributed to this report.

On the Net:

Defense Department http://www.defenselink.mil

Defense Intelligence Agency: http://www.dia.gov

LOAD-DATE: March 14, 2008

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PUBLICATION-TYPE: Newswire

EXHIBIT 5

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

HANI SALEH RASHID ABDULLAH et al.,	
Petitioners,	
v.	Civil Action No. 05-23 (RWR)
GEORGE W. BUSH et al.,	
Respondents.	

MEMORANDUM ORDER

Respondents have filed an emergency motion asking that the order dated January 24, 2008 entered in this case ("Order") be vacated or partially stayed. (See Resps.' Emergency Mot. for Reconsideration or, in the Alternative, for Partial Stay of Order Requiring Further Report ("Emergency Mot.") [Dkt. 85] at 1.) Petitioners oppose the motion. Because respondents have not shown sufficient cause to vacate or stay the Order to the extent they request, their motion will be denied in part and granted in part, and the time to respond will be extended.

The Order was issued after respondents admitted that certain videotapes of interrogations of detainee Abu Zubaydah had been destroyed, and petitioner Abdullah made a sufficient showing,

unrebutted by respondents,[1] of a likelihood that some of the destroyed videotapes were evidence subject to an order entered in this case directing respondents to "preserve and maintain all evidence, documents and information, without limitation, now or ever in respondents' possession, custody or control, regarding the individual detained petitioner[] in th[is] case[]." Mem. Order, July 18, 2005 ("Preservation Order"). The Order directed respondents to file by February 14, 2008, a report providing information responsive to the following three questions: (1) what had they done in the past to ensure compliance with the Preservation Order since the time it was entered in July 2005; (2) what are they now doing to ensure compliance with the Preservation Order; and (3) what is the nature of any evidence potentially subject to the Preservation Order that has been destroyed or otherwise spoliated. See Order, Jan. 24, 2008. Respondents' submission in response to the Order provided no information at all that was responsive to the Order's first

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[1] Petitioner's allegations remain unrebutted. The court notes, with some concern, that the declaration submitted by John H. Durham avers that the Director of the Central Intelligence Agency, Michael V. Hayden, stated that the destroyed tapes were "not relevant to any . . . judicial inquir[y]." (Emergency Mot., Ex. A, Durham Decl., ¶ 2(a) (quoting Hayden without providing a cite).) The reason for including the Director's quoted comment is not obvious. The comment cannot be taken for its truth in light of the fact that Durham avers that he is investigating in part the very question of whether the destroyed tapes were related to a judicial inquiry, and the fact that neither Hayden's declaration nor anything else in respondents' submission makes this same claim of irrelevance.

question, and they argue that "backward-looking information would interfere with the Department of Justice's pending criminal investigation." (Emergency Mot. at 1.) They provided some information, through declarations describing, but not appending, preservation directives recently issued from the Director of the CIA and the Associate Deputy General Counsel for the Department of Defense. This information addresses the Order's second question. It is possible, but unclear, whether respondents provided any information responsive to the Order's third question. (See Resps.' Report Filed in Connection with Order of January 24, 2008 & Exhibits [Dkt. 84] ("Resps.' Report").)[2] The respondents acknowledge that their response is neither specific to the petitioner in this case, as the Order directed, nor comprehensive. (See Resps.' Report at 3 n.2; Emergency Mot. at 1.)

Respondents ask that the Order be vacated to the extent that it requires a more complete response than they have filed.

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[2] The declaration by Rear Admiral Mark H. Buzby, one paragraph of which is under seal, describes some aspects of the nature of one type of evidence that has been destroyed, explains the reasons for the destruction, states whether such evidence continues to be created and whether it continues to be destroyed. (See Resps.' Report, Ex. 3.) However, neither the declaration nor anything else in respondents' report or emergency motion categorically states that this is the sole type of evidence subject to the Preservation Order that has been destroyed. Respondents make no reference to any other type of evidence among the potentially wide array of types of evidence potentially subject to the Preservation Order, and whether any has been destroyed.

(Emergency Mot. at 1.) Somewhat confusingly, they also state that they seek a stay only with respect to "those parts of [the] Order that require a report relating to the destruction of various tapes by the CIA." (Id. at 2.) Their emergency motion is based primarily on the premise that compiling the "backward-looking information" required by the Order will interfere with the ongoing criminal investigation into the November 2005 destruction of certain videotapes of certain interrogations. That premise is reflected in a supporting declaration by John H. Durham, Acting United States Attorney for the Eastern District of Virginia, who is in charge of the criminal investigation into the destruction of the videotapes.[3] Despite respondents' submission, it is not clear that providing substantial responses to each of the Order's three questions, including the first question which is backward-looking, cannot be accomplished without interfering with the ongoing criminal investigation.[4] Nonetheless, to reduce

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[3] Exhibit A to the Durham declaration incorrectly identifies this case as being filed in 2004 and associates a version of this case's civil action number with petitioner El-Banna. This case was filed in 2005 and does not involve petitioner El-Banna.

[4] Some information the Order seeks regarding what was done might be produced from a simple review of documents which would not involve determining the motivations or justifications behind what was done. For example, a review of documents without conducting any interviews or creating issues such as those presented in Kalkines v. United States, 473 F.2d 1391 (Ct. Cl. 1973), could disclose whether or not the Preservation Order, which was served in this case on the CIA Director, was forwarded or otherwise distributed, or whether there was any related

the possibility of interference with the ongoing criminal investigation Dunham is conducting, the respondents will not be required at this time to detail what they did previously to ensure compliance with the Preservation Order. However, because respondents' response to the Order's third question is incomplete, it is hereby

ORDERED that the respondents' emergency motion [85] be, and hereby is, GRANTED in part and DENIED in part. It is granted to the extent that respondents are not required at this time to detail what they did to ensure compliance with the Preservation Order between its entry in July 2005 and January 24, 2008. It is also granted insofar as respondents will be permitted additional time to respond. It is further

ORDERED that respondents are directed to file by March 17, 2008 a report detailing the nature of any evidence specific to petitioner Abdullah that is potentially subject to the Preservation Order that has been destroyed or otherwise spoliated.

SIGNED this 14th day of February, 2008.

/s/
RICHARD W. ROBERTS
United States District Judge

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directive issued.