IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ABD AL RAHIM HUSSEIN AL NASHIRI, *Petitioner*, *v.* BARACK OBAMA, *et al*., *Respondents*.	**CIVIL ACTION (HABEAS CORPUS)** No. 08-cv-1207 (RCL) Misc. No. 08-mc-442 (TFH) *before* Judge Royce C. Lamberth

REPLY MEMORANDUM OF LAW
IN SUPPORT OF PETITIONER'S
PRESERVATION MOTION

ARGUMENT

1. Petitioner filed a routine motion for a preservation order to ensure that records, which are indisputably in Respondents' possession, whose whereabouts are known, and that are self-evidently relevant to various aspects of Petitioner's habeas case, are not destroyed. Comparable preservation orders have been issued in numerous other cases involving Guantanamo detainees. The need for a preservation order specific to this case is necessary because those other preservation orders may expire before Petitioner can litigate his claims on the merits and because of Petitioner's status as a so-called "high-value detainee." Given his prior custody in the Central Intelligence Agency's Rendition, Detention, and Interrogation Program, the universe of relevant materials is likely to be broader than what is covered by this Court's other habeas preservation orders. Petitioner therefore asks for a preservation order to ensure his right to habeas corpus is meaningful and that those records will remain available for discovery purposes at an appropriate time in the future. Such a routine order should not be controversial.

The only thing that is beyond routine about Petitioner's motion is the request to have Respondents file a copy of one of those records, the Senate Select Committee on Intelligence Report entitled "Committee Study of the Central Intelligence Agency's Detention and Interrogation Program" ("SSCI Report"), under seal with the Court. This request was not made lightly. Petitioner nevertheless is compelled to request this relief because of the real risk that this specific record will be destroyed before Petitioner can litigate the merits of any number of claims which are available to him via habeas corpus. Similar evidence, documenting Petitioner's illegal torture at the hands of the government, has already been improperly destroyed and the requested preservation order does nothing more than prevent this from happening again.

While unusual, this Court has granted this precise relief in comparably unusual cases. In *Haperin v. Kissinger*, a former member of the National Security Council sued numerous federal officials for improperly subjecting his home and private communications to electronic surveillance. *See Halperin v. Kissinger*, 606 F.2d 1192 (D.C. Cir. 1979). The records of that surveillance were retained in the White House and by private parties. Given the fear that those records might be destroyed for political purposes in the context of the Watergate investigation, this Court ordered the defendants, who still served in the highest offices of the government, "to surrender the originals of all materials [subject to the preservation order] … for impoundment by this Court … [and further ordered] that such material surrendered in compliance with this Order shall be maintained by the Court under its seal, subject to further order of this Court." *Halperin v. Kissinger*, Case No. 73-cv-1187, Order (D.D.C., Jun, 28, 1973) (Attachment A).

Given the well-founded fear that the SSCI Report will be destroyed, such an order is equally, if not more, warranted here. This is a habeas corpus proceeding, whereas *Halperin* was merely a civil damages action. While this Court has a general duty to protect a civil litigant's entitlement to discovery, "the power of the federal courts to conduct inquiry in habeas corpus is equal to the responsibility which the writ involves[.]" *Harris v. Nelson*, 394 U.S. 296, 292 (1969). Furthermore, unlike the voluminous paper records subject to this Court's impoundment order in *Halperin*, the SSCI Report is contained on a computer disk. It can be copied, delivered, and securely stored without putting any unusual logistical burdens on Respondents or this Court.

Notably, Respondents do not dispute the risks Petitioner has identified respecting the SSCI Report. To the contrary, by arguing that the bare preservation of the SSCI Report would constitute "an undue burden on the relations between the two coordinate branches of government," Resp. at 8, Respondents highlight the fact that the very existence of the SSCI

Report is presently contingent on political vicissitudes. Petitioner's only request, his modest request, is that this Court take reasonable practical steps to ensure that potentially crucial evidence is not deliberately or inadvertently destroyed.

2. Other than two procedural arguments, addressed below, Respondents' only apparent objection to the merits of Petitioner's motion relates to the preservation and impoundment of the SSCI Report, which it asserts is a "Congressional record subject to congressional control." Resp. at 8. What relevance its status as a "Congressional record" has is unclear. Respondents claim that they are unable to respond fully because they did not have sufficient time to procure a "declaration from an appropriate senior-level official, a declaration that will attest to the status of these documents[.]" Resp. at 7. But Respondents never explain or even suggest what such a declaration could possibly say that would overcome this Court's duty to preserve evidence that is relevant to a case under its jurisdiction.

Whatever legal issues the ostensibly Congressional character of the SSCI Report might create during any future discovery litigation, such concerns are at best premature. A preservation order of the kind Petitioner requests simply asks this Court to exercise its authority under All Writs Act, 28 U.S.C. § 1651, to prevent its jurisdiction to conduct that discovery litigation from being thwarted. Regardless of what arguments Respondents may ultimately devise for the withholding the SSCI Report in discovery, this Court must be able to weigh those arguments on the merits and not have its hands tied by Respondents' intervening creation or destruction of facts on the ground. Even assuming *arguendo* that Respondents may contrive a basis on which to withhold the SSCI Report from ultimate disclosure, therefore, "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." *Slahi v. Bush*, 2005 WL 1903682 (D.D.C., Jul. 18, 2005).

Substantively, Respondents' concerns over the ultimate discoverability of the SSCI Report appear predicated on the D.C. Circuit's having held the SSCI Report to be exempt from disclosure under the Freedom of Information Act ("FOIA"). *ACLU v. CIA*, 823 F.3d 655 (D.C. Cir. 2016). The Circuit's only holding, however, was that the SSCI Report did not constitute an "agency record" for FOIA purposes. Based upon the record before it, the Circuit concluded that the SSCI Report was a "Congressional record," not an "agency record," and thereby statutorily exempt from FOIA requests under the rule that when "Congress creates a document and then shares it with a federal agency, the document does not become an 'agency record' subject to disclosure under FOIA if 'Congress [has] manifested a clear intent to control the document.'" *Id*. at 658 (quoting *Judicial Watch v. U.S. Secret Serv.*, 726 F.3d 208, 221 (D.C.Cir.2013)).

Petitioner's habeas case has nothing to do with FOIA and the scope of discovery ultimately available to Petitioner is not confined to the "agency records" he could procure through a FOIA request. This Court's "power of inquiry on federal habeas corpus is plenary." *Harris*, 394 U.S. at 291. With respect to the basic question of Petitioner's detention as an enemy combatant, this Court's Amended Case Management Order, Dkt. 71 (D.D.C., Dec. 16, 2008) ("ACMO"), requires Respondents to provide "all reasonably available evidence in its possession that tends materially to undermine the information presented to support the government's justification for detaining the petitioner." *Id*. § I.D.1.

Likewise, after the D.C. Circuit's decision in *Aamer v. Obama*, 742 F.3d 1023 (D.C. Cir. 2014), Petitioner also has the right to challenge his conditions of confinement and to request the disclosure of records in Respondents' possession to support those claims. *See*, *e.g.*, *Dhiab v.*

Obama, 74 F.Supp.3d 16 (D.D.C. 2014). The D.C. Circuit expressly recognized that Petitioner continues to have this right and denied relief, in part, because such claims were not subject to this Court's stay of proceedings. *In re Al-Nashiri*, 835 F.3d 110, 131 (D.C. Cir. 2016) (noting that if Petitioner wishes to "challenge his treatment while in custody, nothing in our opinion forecloses him from challenging those conditions by filing a habeas petition in district court.").

Furthermore, should Petitioner be convicted before a military commission or in a federal court, he will be entitled to seek discovery under Habeas Corpus Rule 6, 28 U.S.C. § 2255(a), *note*. The scope of that entitlement, in turn, will be governed by the Federal Rules of Criminal Procedure, which is not limited to "agency records" subject to FOIA, but reaches any "books, papers, documents, data, photographs, tangible objects, buildings or places, or copies or portions of any of these items, if the item is within the government's possession, custody, or control[.]" Fed.R.Crim.Pro. 16(a)(1)(E); *see also* Fed.R.Civ.Pro. 34(a)(1) (authorizing discovery over any record within a "party's possession, custody, or control").

For every habeas claim that Petitioner can and will pursue, the test is not whether the SSCI Report or any of the other records subject to the preservation order are "agency records" as opposed to "Congressional records." The test is whether they are in the "possession" of Respondents. Under FOIA, an agency's mere possession is insufficient to convert a Congressional record into an agency record subject to disclosure. *Goland v. CIA*, 607 F.2d 339, 344-48 (D.C.Cir.1978) (congressional hearing transcript in the possession of the CIA). Under the relevant rules of evidence and constitutional requirements of the Fifth, Sixth, and Eighth Amendments applicable in habeas cases such as this one, Respondents' possession alone is sufficient to make an otherwise discoverable record subject to disclosure. *United States v. Safavian*, 233 F.R.D. 12, 14-15 (D.D.C. 2005) (the government's discovery obligations apply to

all documents in "custody or control of any Executive Branch agency or department, regardless of whether the statement originated from a local law enforcement agency, a non-law enforcement agency of the federal government, or a coordinate branch of the government such as the United States House of Representatives or the United States Senate.").[1]

With respect to that key fact of Respondents' *possession* of the SSCI Report, there is no dispute. As the D.C. Circuit held in the very FOIA case under which Respondents now seek shelter, the SSCI Report is "in the possession of Appellees, i.e., federal agencies[.]" *ACLU*, 823 F.3d at 662; *see also id*. ("there is no dispute that Appellees lawfully obtained copies of the [SSCI Report].") The SSCI Report and the other records subject to the requested preservation order are all within Respondents' possession, their whereabouts are known to Respondents' counsel, and they are subject to discovery in this proceeding.

3. Finally, Respondents attempt to avoid the merits of Petitioner's request altogether, citing two supposed procedural bars. Neither has merit.

First, Respondents claim that this Court lacks jurisdiction because the D.C. Circuit withheld its mandate from an interlocutory appeal Petitioner took from this Court's denial of a preliminary injunction. Resp. 3. The relevant background is that a divided panel of the D.C. Circuit affirmed this Court's decision to abstain from hearing Petitioner's challenge to the jurisdiction of the military commission the Department of Defense has convened to prosecute him. *Al-Nashiri*, 835 F.3d at 135. The Circuit withheld the mandate until seven days after

[1] Indeed, criminal defendants may even send subpoenas to Congress itself if it retains information material to their defense. *See*, *e.g.*, *United States v. Cooper*, 4 Dall. 341 (1800) ("The constitution gives to every man, charged with an offence, the benefit, of compulsory process, to secure the attendance of his witnesses. I do not know of any privilege to exempt members of congress from the service, or the obligations, of a subpoena, in such cases."); *Christoffel v. United States*, 200 F.2d 734, 737-38 (D.C. Cir. 1952); *United States v. Poindexter*, 732 F.Supp. 173, 174-75 (D.D.C. 1990).

Petitioner's time to file for rehearing elapsed or seven days after the denial of any such rehearing. Pursuant to the Court's own order, the mandate should have issued on October 26, 2016. After Respondents' asserted that the mandate was being withheld in a manner that deprived this Court of jurisdiction, Petitioner's counsel contacted the D.C. Circuit's Clerk's Office, who confirmed that the failure to issue the mandate was a ministerial oversight. Accordingly, on December 6, 2016, the mandate issued and the following day, Respondents abandoned this argument as moot.

Second, Respondents claim that the stay this Court entered precludes Petitioner from seeking a preservation order while the stay remains pending. Resp. 5. As noted above, however, and as Respondents acknowledge, the D.C. Circuit denied Petitioner's claim for injunctive relief against his trial by military commission, but made sure to leave open the continued availability of habeas corpus to address his ongoing conditions of confinement. Resp. at 6 n.1 (citing *In re Al-Nashiri*, 835 F.3d at 131). Such claims have nothing to do with Petitioner's trial by military commission, are outside the scope of this Court's stay, and are outside the jurisdiction of the military commission to address in any event. *See*, *e.g.*, Unofficial/Unauthenticated Transcript of Proceedings in al Nashiri (2) at 3225 ("MJ [COL POHL]: Okay. So my piece is generally not conditions of confinement unless there's a nexus to the commission. Conditions of confinement on a general basis may be appropriate in some forum habeas, whatever, I'm not going to get into that. So that's where we're at.").

This case, therefore, remains active for the core category of habeas claim, conditions of confinement, for which the SSCI Report is most self-evidently relevant. Contrary to Respondents' suggestion that "this habeas matter challenges only the legality of Petitioner's continued detention under the [AUMF]," Resp. 2, Petitioner's second claim for relief seeks

"habeas corpus, declaratory, and injunctive relief, as well as any other relief the court may deem appropriate" to remedy "unlawful conditions of confinement." Dkt. 36 at 28. As his petition makes abundantly clear, the bases of these claims are rooted the government's decision to subject Petitioner to extreme forms of "physical, mental, and sexual torture," the repercussions of which continue to this day. *Al-Nashiri*, 835 F.3d at 142 (Tatel, J., dissenting). In fact, the Executive Summary of the SSCI Report indicates that Volume III of the full report is largely if not exclusively dedicated to chronicling, describing, and assessing the efficacy, legality, and consequences of Petitioner's conditions of confinement. SSCI Report, at 66 n.332.

Furthermore, even with respect to claims subject to this Court's stay, preservation orders are routinely entered in proceedings that are otherwise stayed and are often most appropriate in such cases to prevent crucial evidence from being lost while the stay remains in place. Accordingly, this Court rejected the very argument Respondents now make in *Abdah v. Bush*, 2005 WL 711814 (D.D.C., June 10, 2005), where the detainee habeas cases were stayed pending appeals and this Court deemed "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." *Id*. at *5. The D.C. Circuit similarly held in *Belbacha v. Bush*, 520 F.3d 452 (D.C. Cir. 2008), that the mere fact that a habeas petition is stayed pending the outcome of other proceedings does not relieve the Court of doing what is necessary "to preserve the status quo," even where those other proceedings call the Court's jurisdiction over the habeas petition into doubt. *Id*. at 457.

Respondents contend that the relevance of the requested records is too speculative to warrant their preservation while this case remains stayed. But even if the only claim at issue here was the legality of Petitioner's detention under the AUMF, the relevance of the records he seeks

to preserve, including the SSCI Report, is obvious. The legality of Respondents' decision to hold Petitioner as a so-called "enemy combatant" is by no means clear on the record in this case. Petitioner was arrested by local authorities in a world financial capital, he was held by a civilian agency until 2006, a federal indictment has been pending against him in the Southern District of New York since 2003, and none of the acts Petitioner is claimed to have taken against United States occurred on any recognized battlefield. A review of Respondents' evidence to support Petitioner's supposed connections to Al Qaeda or associated forces appears exclusively derived from interrogation records, records whose credibility and admissibility are rendered suspect due to Respondents' decision to procure them by resort to torture.

Under this Court's Amended Case Management Order, the records subject to Petitioner's proposed preservation order are discoverable because they are "reasonably available," demonstrate the "circumstances in which such statements of the petitioner were made or adopted," ACMO § I.E.1, and will tend "materially to undermine the information presented to support the government's justification for detaining the petitioner." *Id*. § I.D.1. There is nothing speculative about the relevance of these records to the core habeas right that the Supreme Court recognized in *Boumediene v. Bush*, 553 U.S. 723 (2008).

Finally, Respondents are simply incorrect that Petitioner is seeking to "appeal" an adverse decision of the military commission. Petitioner's military commission counsel sought a copy of the SSCI Report for use at trial, which the prosecutors in Guantanamo refused to provide. Instead, prosecutors represented to the military commission that they were reviewing the SSCI Report for discoverable information. Whether and in what form that information is ever provided to Petitioner's defense counsel during these military commission proceedings is

uncertain and not before this Court.[2] What is before this Court is a Petitioner whose current conditions of confinement are illegal and who faces the foreseeable prospect of a conviction and death sentence that must survive this Court's ultimate scrutiny in the context of post-trial habeas proceedings. And what is certain is that this review will only be possible if those records still exist, which is why Petitioner's modest request that they be preserved should be granted.

Nothing in Petitioner's requested preservation order will interfere with the military commission proceedings in Guantanamo and Respondents have offered this Court no explanation for how it could. The mere denial of similar relief by a military judge in Guantanamo is hardly preclusive of this Court's independent duty to preserve habeas corpus. This is why members of this Court have not hesitated to order relief in habeas cases even after it was denied in pending military commissions proceedings. In *Al-Shibh v. Bush*, Case No. 06-cv-1725-EGS Dkt. No. 85 (Jan. 16, 2009), this Court ordered JTF-GTMO to allow an independent psychologist to evaluate a detainee in his cell. This was despite this cell's location in Guantanamo's Top Secret prison facility and the military commission's denial of the identical request for the same detainee. *United States v. Mohammed*, *et al.*, AE079 (Oct. 26, 2008).[3] And in *Al Halmandy, et al., v. Obama*, Case No. 05-cv-2385-ESH, Dkt. No. 303 (Jan. 16, 2009), this

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[2] Respondents assert without support that "Undersigned counsel has been informed that the prosecutors complied with this obligation in September 2016." Resp. 6 n.2. Lest this Court be misled, Respondents reference a representation made by prosecutors in Guantanamo respecting *their belief* that they have complied with certain discovery obligations relating to the RDI Program. Most of this discovery is still undergoing review by the military judge, meaning that very little has been provided to Petitioner. None of it has been subject to any discovery litigation respecting its adequacy, which is not scheduled to commence before the military commission until late next year.

[3] http://www.mc.mil/Portals/0/pdfs/KSM/KSM%20(AE079)%20MJ%20Ruling%20on%20Def%20Mot.pdf

Court granted a detainee's motion to suppress custodial statements, when the very same issue was pending before the military commissions' appellate body, the Court of Military Commission Review. *See United States v. Jawad*, Case No. 08-004 (U.S.C.M.C.R., docketed Nov. 24, 2008).

That this Court will come to different conclusions than the military commissions when similar issues are presented is neither surprising, nor relevant. Habeas proceedings are governed by distinct rules and concerned with legal issues, such as conditions of confinement, that are outside the military commissions' competence. And most crucially, habeas corpus proceedings are presided over by tenured federal judges, not by mid-level military officers. "There is no higher duty of a court, under our constitutional system, than the careful processing and adjudication of petitions for writs of habeas corpus, for it is in such proceedings that a person in custody charges that error, neglect, or evil purpose has resulted in his unlawful confinement and that he is deprived of his freedom contrary to law." *Harris*, 394 U.S. at 292. This Court will not be able to carry out that duty if crucial evidence – evidence that will show "arbitrary and lawless state action," *id*. at 290-92 – is irreparably destroyed.

CONCLUSION

For the foregoing reasons, Petitioner asks this Court to enter the requested preservation order during the pendency of this case.

Respectfully submitted,

Dated: December 8, 2016

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ATTACHMENTS

A. *Halperin v. Kissinger*, Case No. 73-cv-1187, Order (D.D.C., Jun, 28, 1973)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MORTON H. HALPERIN, et al., Plaintiffs, v. HENRY A. KISSINGER, et al., Defendants.	Civ. No. 1187-73

ORDER

This matter having come before this Court on the Motion To Suppress the Contents of Certain Intercepted Wire Communications; For a Protective Order and Further Relief; and

It appearing to the Court that adequate grounds exist for the granting of said Motion,

It is by the Court this 28th day of June, 1973

(1) ORDERED that, subject to further order of this Court, each of the defendants in the above-captioned case and their officers, agents, servants, employees, or attorneys, and those persons in active concert or participation with them, preserve the originals and all copies of all logs, authorizations, notes, transcriptions, summaries, tapes or other sound recordings, or other memoranda and other records relating to interception of wire communications of plaintiffs at their private home telephone located at 8215 Stone Trail Drive, Bethesda, Maryland; and it is

(2) FURTHER ORDERED that, subject to further order of this Court, all defendants herein and their officers, agents,

servants, employees, or attorneys, and those persons in active concert or participation with them, are required to surrender the originals of all materials referred to in paragraph (1) (and copies of any material the original of which cannot be located) to the Court at or before 4:00 P.M. on July 3, 1973, for impoundment by this Court. Such persons may, if they wish, make copies of the material so surrendered; and it is

(3) FURTHER ORDERED that such material surrendered in compliance with this Order shall be maintained by the Court under its seal, subject to further order of this Court.

John Lewis Smith
United States District Judge
United States District Court
for the District of Columbia

Leon Friedman by WBS
Leon Friedman

Edward S. Christenbury

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CERTIFICATE OF SERVICE

I certify that on December 8, 2016, I caused the foregoing to be served on the Respondent's counsel by means of the Court's CM/ECF software.

Dated: December 8, 2016

Respectfully submitted,

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