UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ABD AL-RAHIM HASSAIN MOHAMMED AL-NASHIRI,	)	
Petitioner,	)	
v.	)	Civil Action No. 08-cv-1207 (RCL)
BARACK H. OBAMA, *et al.*,	)	
Respondents.	)	

RESPONDENTS' INTERIM RESPONSE
<u>TO PETITIONER'S MOTION FOR A PRESERVATION ORDER</u>

On November 18, 2016, Petitioner lodged with the Court Information Security Officer a Motion for a Preservation Order. *See* Notice, ECF No. 260. Petitioner seeks an order directing Respondents (1) to submit to the Court under seal a copy of the full report prepared by the Senate Select Committee on Intelligence ("SSCI"), entitled "Committee Study of the Central Intelligence Agency's Detention and Interrogation Program" ("SSCI Report") and (2) to preserve the Central Intelligence Agency's rebuttal report and all documents referenced in both reports. Petitioner candidly admits that his primary purpose in seeking this order is to preserve these documents to support a possible future challenge to a potential conviction by a military commission—a challenge that he would necessarily present in a different, yet-to-be-initiated proceeding. Of note, Petitioner sought nearly identical relief from the military commission, but that relief was denied (although alternative relief was provided). He now essentially asks this Court to overrule that decision under the guise of the discovery procedures in this habeas case. *See* Pet'r's Mot. at 2, 13-17.

Procedurally, Petitioner's Motion should be denied for two related reasons. First, this habeas matter challenges only the legality of Petitioner's continued detention under the Authorization for Use of Military Force ("AUMF"), Pub. L. 107-40, 115 Stat. 224 (2001). Consequently, this Court, through then-Chief Judge Richard W. Roberts, held this matter in abeyance under the abstention doctrine articulated in *Schlesinger v. Councilman*, 420 U.S. 738 (1975), to avoid interfering with Petitioner's ongoing prosecution before a military commission. *See* ECF No. 251; *see also Al-Nashiri v. Obama, et al.*, 76 F. Supp. 3d 218, 221 (D.D.C. 2014). Petitioner appealed this stay, but the Court of Appeals affirmed, explicitly endorsing the Court's decision to abstain from exercising its equitable jurisdiction during the pendency of Petitioner's military commission proceedings. *In re Al-Nashiri*, 835 F.3d 110, 118 (D.C. Cir. 2016). Accordingly, this stayed habeas case provides no vehicle by which Petitioner may seek a preservation order. Second, and perhaps more fundamentally, jurisdiction over this habeas matter still lies with the Court of Appeals, for the mandate from Petitioner's unsuccessful appeal has yet to issue (Petitioner's time to file a petition for certiorari runs until mid-January 2017). This Court, therefore, currently lacks jurisdiction to entertain Petitioner's motion.

Despite these procedural bars to Petitioner's motion, Respondents nevertheless sought an extension of the deadline to submit their response, up to and including January 13, 2017. *See* Mot. for Extension of Time to File Respondents' Response to Petitioner's Motion for a Preservation Order, ECF No. 261 (Nov. 29, 2016). This extension was and remains necessary to provide the Executive Branch with adequate time to address the substance of Petitioner's motion in the event the Court disagrees with Respondents' procedural arguments. Respondents explained in their extension motion that to respond fully to Petitioner's motion they would need to obtain a declaration from an appropriate senior-level government official who can attest to the

status of the documents at issue. *See id.* Such a declaration requires a significant amount of coordination among various Executive Branch agencies. *Id.* Petitioner consented to two weeks of additional time for Respondents to prepare their response, up to and including December 19, 2016, but would not consent to Respondents full request absent the Court entering his proposed preservation order on an interim basis. *See id.*

Respondents' extension motion is currently pending before the Court. Because the Court has not yet ruled on the extension motion, Respondents respectfully submit this interim response to Petitioner's Motion for a Preservation Order, limited to Respondents' procedural arguments. Should the Court determine that it wishes to consider the substance of Petitioner's motion, Respondents respectfully request that the Court grant their extension motion to permit them the necessary time to fully address the issues raised in Petitioner's motion.

ARGUMENT

I. THIS COURT LACKS JURISDICTION OVER PETITIONER'S MOTION

Pursuant to the fundamental principles of federal practice, "a federal district court and a court of appeals should not attempt to assert jurisdiction over a case simultaneously. The filing of a notice of appeal is an event of jurisdictional significance—it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal." *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982). Under the rule articulated in *Griggs*, "[t]he district court does not regain jurisdiction over those issues until the court of appeals issues its mandate." *United States v. DeFries*, 129 F.3d 1293, 1302 (D.C. Cir. 1997).

Here, Petitioner moved for a preliminary injunction to enjoin his military commission prosecution. *See* ECF No. 217; *Al-Nashiri*, 76 F. Supp. 3d at 221. Respondents opposed and

cross-moved to hold Petitioner's habeas petition in abeyance pending completion of his military commission proceedings. *See* ECF No. 237, *Al-Nashiri*, 76 F. Supp. 3d at 221. Retired Chief Judge Roberts denied Petitioner's motion for a preliminary injunction and granted Respondents' abeyance motion, directing the Clerk of Court to stay Petitioner's habeas case. *See* ECF No. 251, *Al-Nashiri*, 76 F. Supp. 3d at 223-24. Petitioner filed a notice of appeal on January 23, 2015. *See* ECF No. 252. Under the rules set forth in *Griggs* and *DeFries*, that act removed jurisdiction over issues related to the stay from this Court and lodged it in the Court of Appeals.

Jurisdiction has not yet been returned to this Court. On August 30, 2016, the Court of Appeals affirmed the Court's decision to abstain from exercising equitable jurisdiction over Petitioner's habeas petition during the pendency of his military commission prosecution in deference to that proceeding. *In re Al-Nashiri*, 835 F.3d at 118. Petitioner sought rehearing on October 7, 2016. *See In re Al-Nashiri*, Case No. 15-1023. His request was denied October 19, 2016. *Id.* The Court of Appeals has yet to issue its mandate, and Petitioner has represented that he intends to file a petition for a writ of certiorari in the Supreme Court on or before the January 14, 2017, deadline, *see* Pet'r's Mot. at 9. Accordingly, jurisdiction over the stay—and hence this case in general—does not reside in this Court, it resides in the Court of Appeals. Indeed, for this Court to rule on Petitioner's motion, the Court would need to lift the current stay of proceedings. And, as explained below, Petitioner's motion implicates the very rationale and basis for entry of the stay currently on appeal. This makes it all the more clear that jurisdiction over the stay and Petitioner's motion properly resides with the Court of Appeals. For this reason alone, Petitioner's motion should be denied.

II. NOTWITHSTANDING THE ABSENCE OF A MANDATE, THE COURT SHOULD DENY PETITIONER'S MOTION BECAUSE HIS HABEAS PETITION IS STAYED PENDING COMPLETION OF HIS MILITARY COMMISSION PROCEEDINGS

Alternatively, Petitioner's motion should be denied because Petitioner cannot provide a sufficient factual or legal basis to justify lifting the stay in this case to consider his motion. As discussed above, retired Chief Judge Roberts held Petitioner's habeas petition in abeyance to avoid interfering with his military commission prosecution. *See* ECF No. 251, *Al-Nashiri*, 76 F. Supp. 3d at 223-224 (finding that the "military commission trial contains sufficient procedures and protection to warrant abstention [under *Councilman*] by this court"). The Court of Appeals recently affirmed that ruling. *In re Al-Nashiri*, 835 F.3d at 112, 118 ("The district court did not err . . . in extending the [abstention] principles announced in *Councilman* to Al-Nashiri's case."). Petitioner's motion contravenes the rationale underlying both retired Chief Judge Robert's decision to stay this matter and the Court of Appeals affirmance of that ruling.

First, distilled to its essence, Petitioner's motion is simply an appeal to this Court from two adverse decisions by his commission. Before the commission, Petitioner attempted to obtain much of the information he seeks here, namely discovery of the SSCI Report. *See* Pet'r's Mot. at 9. He also sought a preservation order directing the prosecution to submit a copy of the report under seal with the military commission. *See id*. The military commission denied Petitioner's motions (but directed prosecutors to review the SSCI Report for any newly located and discoverable material). *See id.*, *United States v. Al Nashiri*, AE 206V, AE 206U (attached as Exhibits 1 & 2). Petitioner's motion asks this Court to act as a *de facto* appellate tribunal and, as such, to reverse an adverse commission ruling—a circumstance retired Chief Judge Roberts and the Court of Appeals sought to avoid by holding Petitioner's habeas case in abeyance. Petitioner's displeasure with the military commission's pre-trial rulings does not justify lifting

the stay.[1] *See Al-Nashiri*, 76 F. Supp. 3d at 223 (concluding that "principles of comity and judicial economy support abstaining from exercising equitable jurisdiction over Al-Nashiri's habeas petition"); *In re Al-Nashiri*, 835 F.3d at 126 ("The district court did not err by declining to disturb" the Executive and Legislative Branches' determinations that "Article III courts should not step in before the military system has issued a final decision.").[2]

Further, the potential relevance of the documents at issue for any prospective habeas review of a possible future commission conviction and sentence is simply too attenuated to justify lifting the stay. As an initial matter, the military commission must convict and sentence Petitioner. Petitioner's conviction and sentence must then survive three rounds of appellate review: the Convening Authority, the U.S. Court of Military Commission Review, and ultimately the D.C. Circuit itself. *See* 10 U.S.C. § 950g(a), (c) (Congress has extended to the Court of Appeals "*exclusive jurisdiction* to determine the validity of a final judgment rendered by a military commission (as approved by the convening authority and, where applicable, the United States Court of Military Commission Review)(emphasis added)); *see also In re Al-Nashiri*, 835 F.3d at 123. Only upon completion of the Court of Appeals' review might a separate habeas action—one challenging not the legality of his detention as here but rather his conviction—be

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[1] And while Petitioner correctly notes that the Court of Appeals carved out an exception from the abstention stay to permit him to challenge the conditions of his confinement in habeas, *see id.* (citing *In re Al-Nashiri*, 835 F.3d at 131), his motion for a preservation order does not present such a challenge.

[2] This is especially true given the amount of discovery related to the topics involved in Petitioner's motion that prosecutors have served on Petitioner's military defense counsel, including information regarding the conditions of Petitioner's confinement prior to his arrival at Guantanamo Bay in September 2006 and Enhanced Interrogation Techniques. *See United States v. Al Nashiri*, AE 120AA (attached as Exhibit 3). Undersigned counsel has been informed that the prosecutors complied with this obligation in September 2016.

appropriate.[3] Given the uncertainties in this possible chain of events, any alleged relevance of the documents to a hypothetical future habeas challenge is too tenuous to justify lifting the stay here.[4]

For these reasons the Court should decline to lift the stay for purposes of exercising equitable jurisdiction over Petitioner's Motion for a Preservation Order.

III. SHOULD THE COURT DISAGREE WITH RESPONDENTS' PROCEDURAL ANALYSIS, THE COURT SHOULD GRANT RESPONDENTS' EXTENSION MOTION TO AFFORD RESPONDENTS AN OPPORTUNITY TO ADDRESS PETITIONER'S CONCERNS REGARDING THE STATUS OF THE DOCUMENTS IDENTIFIED IN HIS PRESERVATION MOTION

Aside from noting the long-standing preservation directives in effect with respect to detainee-related information that is relevant to the information underlying the reports in question, *see Hamlily v. Bush*, Civ. No. 05-0763 (JDB) (Feb. 13, 2008, ECF No. 46) (Resp't Notice of Rep. Regarding Preservation) (attached as Exhibit 4), Respondents are currently unable to fully respond substantively to Petitioner's motion. To properly do so, Respondents need to obtain a declaration from an appropriate senior-level official, a declaration that will attest to the status of these documents and that must be coordinated among several Executive Branch agencies.

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[3] To the extent that Petitioner asserts the documents at issue are relevant to this Court's eventual review of the continued lawfulness of his detention under the AUMF, that issue is not ripe given that Petitioner's habeas petition is currently stayed and, as explained above, jurisdiction over the stay currently resides in the Court of Appeals.

[4] To the extent that the issues raised by Petitioner concerning any putative future challenge to a possible conviction need to be addressed, Respondents respectfully suggest that they should be addressed in the first instance by the Court of Appeals. *Cf. Telecomms. Research & Action Ctr. v. FCC*, 750 F.2d 70, 77 (D.C. Cir. 1984) ("By lodging review of agency action in the Court of Appeals, Congress manifested an intent that the appellate court exercise sole jurisdiction over the class of claims covered by the statutory grant of review power."); *id.* at 75, 78-79 (request for relief in district court that might affect Court of Appeals' future, exclusive jurisdiction is subject to the exclusive review of the Court of Appeals).

Respondents anticipate that they will not be in a position to fully address the substance of Petitioner's concerns until January 13, 2017. Should the Court reject Respondents' procedural arguments set forth above, Respondents respectfully request that the Court grant Respondents' pending extension motion and afford Respondents an opportunity to provide a full response to Petitioner's motion prior to ruling on the substantive aspects of Petitioner's motion. As Respondents noted in their extension motion, the Court of Appeals has determined that the SSCI Report is a Congressional record subject to Congressional control. *See ACLU v. CIA*, 823 F.3d 655, 667-68 (D.C. Cir. 2016), *pet. for cert.* docketed (No. 16-629, Nov. 14, 2016). To enter a preservation order requiring the Executive Branch to take action with respect to a Congressional document, especially without the benefit of receiving substantive arguments from Respondents, would place an undue burden on the relations between the two coordinate branches of government. *See id.* at 662-63 (noting that "special policy considerations" apply requiring deference to Congress's intent to control its documents it shares with an agency) (citing cases); *see also Goland v. CIA*, 607 F.2d 339, 347 (D.C. Cir. 1978) (rejecting FOIA claim for congressional transcript provided to the CIA pursuant to Congress's oversight authority to prevent judicial infringement of that relationship).

Date: December 5, 2016

Respectfully submitted,

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EXHIBIT 1

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MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY, CUBA

UNITED STATES OF AMERICA **v.** **ABD AL RAHIM HUSSAYN MUHAMMAD AL NASHIRI**	**AE 206V** **RULING** **DEFENSE MOTION TO COMPEL DISCOVERY OF ALL DOCUMENTS CITED IN THE SSCI EXSUM RELATING TO THE ARREST, DETENTION, AND INTERROGATION OF MR. AL-NASHIRI** **28 APRIL 2015**

1. The Accused is charged with multiple offenses in violation of the Military Commissions Act (M.C.A.) of 2009, 10 U.S.C. §§ 948 *et seq.*, Pub. L. 111-84, 123 Stat. 2574 (Oct. 28, 2009). He was arraigned on 9 November 2011.

2. The Defense filed AE 206R requesting the Commission compel discovery of all documents cited in the Executive Summary ("EXSUM") of the Senate Select Committee on Intelligence's Report on the Central Intelligence Agency's (CIA) Rendition, Detention, and Interrogation ("RDI") Program, (hereinafter "SSCI Report") relating to the arrest, detention, and interrogation of the Accused. The Government response, AE 206S, requested the Commission deny AE 206R, due to the Defense seeking "the underlying classified documents" and not the Military Commission Rule of Evidence (M.C.R.E.) 505 summaries expressly allowed by statute.[1] (AE 206S at 1). The Government asserted it produced and will continue to produce discoverable classified information in a manner consistent with M.C.R.E. 505 and in accordance with the Commission's orders. *Id.* at 3. The Government argued the Defense's request is in contravention of the plain language of 10 U.S.C. § 949p-4(c). *Id.* at 14.

[1] *See* 10 U.S.C. § 949p-4 and M.C.R.E. 505(f)(2)(c).

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3. The Defense requested oral argument. The Prosecution's position was oral argument was not required, however if the Defense request was granted, the Prosecution desired to be heard. "In accordance with Rule for Military Commission (R.M.C.) 905(h) the decision to grant oral argument on a written motion is within the sole discretion of the Military Judge."[2] In this instance, oral argument is not necessary to the Commission's consideration of the issue before it. The Defense request for oral argument is **DENIED.**

4. 10 U.S.C. § 949p-4 and M.C.R.E. 505 authorize the Commission to approve the use of substitutions, summaries, tables, narratives, indices, or other means of admitting relevant facts, so long as the accused is provided with substantially the same ability to make a defense as would discovery of or access to the specific classified information. The Government gained full access to the SSCI Report and started its review for discovery on 18 February 2015. (AE 206Q at 3). The record since the Defense's filing of AE 206 and AE 206R has not yielded any facts or information giving the Commission cause to believe the Government has ceased or will cease providing all discoverable classified information to the Defense in a manner consistent with the M.C.A., case law, and the Commission's Orders.[3] Thus, AE 206R is **MOOT**.

So **ORDERED** this 28th day of April, 2015.

//s//
VANCE H. SPATH, Colonel, USAF
Military Judge
Military Commissions Trial Judiciary

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[2] Military Commissions Trial Judiciary Rule of Court 3(5)(m) (May 2014).
[3] *See* AE 120AA, ORDER, Government Motion to Reconsider AE 120C In Part So The Commission May Take Into Account Declassification Efforts Underway at Prior Prosecution Request, Clarify the Discovery Standard the Commission is Applying, and Safeguard National Security While Ensuring a Fair Trial, dated 24 June 2014 and pleadings filed thereafter; and the numerous notices of provision of discovery filed pursuant to the Commission's Order in paragraph 1a of AE 045H,ORDER, Government Motion for a Scheduling Order, dated 21 August 2013.

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EXHIBIT 2

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MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY, CUBA

	AE 206U
UNITED STATES OF AMERICA	**RULING**
v.	**DEFENSE MOTION TO COMPEL THE PRODUCTION OF THE SENATE SELECT COMMITTEE ON INTELLIGENCE REPORT ON THE RENDITION, DETENTION INTERROGATION PROGRAM**
ABD AL RAHIM HUSSAYN MUHAMMAD AL NASHIRI	
	28 APRIL 2015

1. The Accused is charged with multiple offenses in violation of the Military Commissions Act (M.C.A.) of 2009, 10 U.S.C. §§ 948 *et seq.*, Pub. L. 111-84, 123 Stat. 2574 (Oct. 28, 2009). He was arraigned on 9 November 2011.

2. On 28 January 2014, the Defense filed AE 206 requesting the Commission compel the production of the Senate Select Committee on Intelligence's Report on the Central Intelligence Agency's (CIA) Rendition, Detention, and Interrogation ("RDI") Program, (hereinafter SSCI Report).The Defense argued the SSCI Report is "directly relevant to the weight and credibility of other information tainted by CIA sources and methods," as the report may "demonstrate a pattern and practice of deception by the CIA on the very issue of the RDI program." (AE 206 at 7). The Defense also argued the SSCI Report has mitigating relevance as it may show the Accused was subjected to unlawful pre-trial punishment and "[t]he members very well may consider the mitigating value of the accused's torture differently if they are presented with credible evidence that the government's embrace of barbarism was all for nothing." *Id.* at 8. The Government response, AE 206A, indicated it was attempting to "obtain whatever materials associated with the report . . . that are subject to review for a discoverability determination" and that "[t]he government will update the defense and this Commission on these efforts. Until the government

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can make a proper discoverability determination, the Commission should defer ruling on the defense motion." (AE 206A at 1). The Defense reply, AE 206B, asserted "the government's refusal to produce the SSCI Report is unreasonable and it must be compelled to do so." (AE 206B at 6). The Defense argued "the SSCI Report was provided to the CIA" and due to the CIA's involvement with the "conduct of this prosecution, it is part of the 'government' for the purposes of the government's discovery obligations." *Id*. at 4-5.

The Commission heard argument on AE 206 in a closed session pursuant to R.M.C. 806 on 29 May 2014.[1] In response to the Commission's request for information during argument on 29 May 2014, the Defense submitted AE 206F,[2] outlining the Defense's theory for the Commission's authority to compel production of a classified document "owned" by the legislative branch of the federal government. Citing 10 U.S.C. § 949j(a), the Defense asserted the M.C.A. of 2009 grants "this Commission . . . the authority to order the production of evidence from any source, insofar as the accused's 'opportunity to obtain witnesses and evidence [in this Commission] shall be comparable to the opportunity available to a criminal defendant in a court of the United States under article III of the Constitution.'" The Defense further asserted "the Senate is equally liable to judicial process for the production of evidence in a criminal trial," citing *United States v. Rayburn House Office Building*, 497 F.3d 654, 660 (D.C. Cir. 2007). (AE 206F at 4). Since the Defense submitted AE 206 (28 January 2014), the Government filed seven notices: AEs 206H,[3] I,[4] J,[5] K,[6] L,[7] and M,[8] Q,[9] detailing the status of its efforts to obtain a copy

[1] *See* Unofficial/Unauthenticated Transcript of the al Nashiri (2) Closed Hearing Dated 29 May 2014 from 09:04 A.M. to 12:12 P.M. (Part 1 of 3) at pp. 4501 – 28.
[2] AE 206F, Defense Response on the Specified Issue: What is the Source of the Commission's Authority to Order the Production of Documents, filed 6 June 2014.
[3] AE 206H, Government Notice Defense Motion to Compel the Production of The Senate Select Committee on Intelligence Report on the Rendition, Detention Interrogation Program, dated 20 June 2014. The Government provided notice of the status of its efforts to obtain the SSCI Report. The Government indicated the "SSCI Report remains a congressional record not within the custody or control of the Executive Branch." (AE 206H at 1).

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of the SSCI Report. Ultimately, the Government gained access to the SSCI Report and is currently reviewing it for discoverable materials.[10]

3. The Defense "is entitled to the production of evidence which is relevant, necessary and noncumulative." R.M.C. 703(f)(1). The Government must produce information "material to the preparation of the defense" where the information is "within the possession, custody, or control of the Government." R.M.C. 701(c). The Government must produce all exculpatory evidence that reasonably tends to (a) negate the guilt of the accused, (b) reduce the degree of guilt of the accused, or (c) reduce the punishment. R.M.C. 701(e)(1); *see also Brady v. Maryland*, 373 U.S. 83, 88 (1963).

4. It is clear to the Commission the SSCI Report contains discoverable information. What is not clear is the extent to which this is cumulative with discovery previously provided to the Defense. The Government gained full access to the SSCI Report and started its review for discovery on 18 February 2015. (AE 206Q at 3). The Government has in the past and continues to provide

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[4] AE 206I, Government's Second Notice Defense Motion to Compel the Production of The Senate Select Committee on Intelligence Report on the Rendition, Detention Interrogation Program, dated 29 August 2014. The Government provided notice of the status of its efforts to obtain the SSCI Report. The Government indicated the "SSCI Report remains a congressional record not within the custody or control of the Executive Branch." (AE 206I at 1).

[5] AE 206J, Government's Third Notice Relating to The SSCI Report, dated 29 September 2014. The Government provided notice of the status of its efforts to obtain the SSCI Report. The Government indicated the "SSCI Report remains a congressional record not within the custody or control of the Executive Branch." (AE 206J at 1).

[6] AE 206K, Government's Fourth Notice Relating to The SSCI Report, dated 29 October 2014. The Government provided notice of the status of its efforts to obtain the SSCI Report. The Government indicated the "SSCI Report remains a congressional record not within the custody or control of the Executive Branch." (AE 206K at 1).

[7] AE 206L, Government's Fifth Notice Relating to The SSCI Report, dated 5 December 2014. The Government provided notice of the status of its efforts to obtain the SSCI Report. The Government indicated the "SSCI Report remains a congressional record not within the custody or control of the Executive Branch," but noted it anticipated the SSCI would publicly release an Executive Summary of the SSCI Report. (AE 206L at 1-2).

[8] AE 206M, Government's Sixth Notice Relating to The SSCI Report, dated 18 December 2014. The Government provided notice of the status of its efforts to obtain the SSCI Report. The Government indicated the SSCI released the Executive Summary of the SSCI Report on 9 December 2014. The Government stated it would "continue to seek access to the entire SSCI Report to review it for potentially discoverable information not otherwise identified by the prosecution." (AE 206M at 4).

[9] AE 206Q, Government's Seventh Notice Relating to The Senate Select Committee On Intelligence Study, dated 20 February 2015. The Government reported the SSCI authorized the Government to review the full SSCI Report for "potentially discoverable information." (AE 206Q at 3).

[10] *Id.*

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discoverable information to the Defense.[11] Further, the Commission is not persuaded the authorities cited by the Defense provide it with authority to order the Senate Select Committee on Intelligence to produce a copy of the SSCI Report. Given the Government's current work reviewing the SSCI Report, the Commission will not issue an order the enforceability of which is unclear. The record since the Defense's filing of AE 206 has not yielded any facts or information giving the Commission cause to believe the Government has failed or is failing to comply with its discovery obligations or the Commission's Orders.

Accordingly, AE 206 is **DENIED**. The Government is directed to provide notice to the Commission as to all newly located and discoverable material provided to the Defense as result of its review of the SSCI Report. This notice will be filed under the AE 206 series and not pursuant to paragraph 1.a. of AE 045H.

So **ORDERED** this 28th day of April, 2015.

//s//
VANCE H. SPATH, Colonel, USAF
Military Judge
Military Commissions Trial Judiciary

[11] *See* AE 120AA (ORDER, Government Motion to Reconsider AE 120C In Part So The Commission May Take Into Account Declassification Efforts Underway at Prior Prosecution Request, Clarify the Discovery Standard the Commission is Applying, and Safeguard National Security While Ensuring a Fair Trial, dated 24 June 2014) and pleadings filed thereafter; and the numerous notices of provision of discovery filed pursuant to the Commission's Order in paragraph 1a of AE 045H (ORDER, Government Motion for a Scheduling Order, dated 21 August 2013).

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EXHIBIT 3

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MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY, CUBA

UNITED STATES OF AMERICA **v.** **ABD AL RAHIM HUSSAYN MUHAMMAD AL NASHIRI**	**AE 120AA** **ORDER** **GOVERNMENT MOTION TO RECONSIDER AE 120C IN PART SO THE COMMISSION MAY TAKE INTO ACCOUNT DECLASSIFICATION EFFORTS UNDERWAY AT PRIOR PROSECUTION REQUEST, CLARIFY THE DISCOVERY STANDARD THE COMMISSION IS APPLYING, AND SAFEGUARD NATIONAL SECURITY WHILE ENSURING A FAIR TRIAL** **24 JUNE 2014**

1. The Accused is charged with multiple offenses in violation of the Military Commissions Act of 2009, 10 U.S.C. §§ 948 *et seq.*, Pub. L. 111-84, 123 Stat. 2574 (Oct. 28, 2009). He was arraigned on 9 November 2011.

2. Procedural History – Original Motion. The Defense filed AE 120, a classified motion requesting information in the possession of any foreign government and the United States related to the arrest, detention, rendition, and interrogation of the Accused. The motion encompassed a 9 August 2013 Discovery request for 75 line items of various records and documents (AE 120, Attachment A (Unclassified//FOUO)), and seven (7) additional requests for information. (AE 120, Paras 2b - 2h, (Classified)). The Prosecution responded (AE 120A) requesting the motion be denied as the Prosecution previously fulfilled its discovery responsibilities. Additionally, the Prosecution argued the information was not discoverable; asserted the requests were overbroad; asserted the requests were for information not relevant and material to the preparation of the defense; and, asserted the requested information was not proper mitigation or extenuation

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evidence as described in Rules for Military Commissions (R.M.C.) 1001 and 1004. The Commission issued its order, AE 120C, on 14 April 2014.

3. Procedural History – Reconsideration. On 23 April 2014, the Prosecution filed AE 120D, seeking clarification of the Commission's order (AE 120C). The Defense response (AE 120E) urged denial as the request was "a ploy to toll the prosecution's deadline for seeking an interlocutory appeal of AE 120C" (AE 120E, pg 1). The Prosecution reply (AE 120I) continued to request clarification of the order. In support of its motion for reconsideration, the Prosecution filed AE 120F, an *ex parte, in camera*, under seal pleading with what the Prosecution termed "Memorandum D" and AE 120G, an *in camera*, under seal classified pleading with what the Prosecution termed "Memorandum E." The Defense filed AE 120H, in response to AE 120G. The Prosecution filed a reply (AE 120J).

4. Oral Argument. Because of the classified nature of the information requested, the original motion (AE 120) was argued *in camera* pursuant to Military Commissions Rule of Evidence (M.C.R.E.) 505 and R.M.C. 806, on 22 February 2014.[1] The unclassified portion of the argument concerning AE 120D was heard on 28 May 2014.[2] On 29 May 2014, the portion of the argument involving classified information was argued *in camera* pursuant to M.C.R.E. 505 and R.M.C. 806.[3] On 30 May 2014, the Prosecution made a classified *ex parte, in camera* presentation to the Commission pursuant to 10 U.S.C § 949p-4(b)(2) and M.C.R.E. 505f(2)(b).[4]

5. Reconsideration.

[1] *See* Unofficial/Unauthenticated Redacted Transcript of the Al Nashiri (2) Motions Hearing Dated 22 February 2014, from 9:14 AM to 11:05 AM at 2988 - 3062.
[2] *See* Unofficial/Unauthenticated Transcript of the Al Nashiri (2) Motions Hearing Dated 28 May 2014, from 2:42 PM to 4:27 PM at 4449-5400.
[3] *See* Unofficial/Unauthenticated Redacted Transcript of the Al Nashiri (2) Motions Hearing Dated 29 May 2014, from 9:04 A.M. to 12:12 P.M. at 4501 - 4627.
[4] The transcript of the 30 May 2014, *ex parte in camera* presentation was sealed by the Commission in AE 120X, dated 17 June 2014. Unofficial/Unauthenticated Transcript of the al Nashiri (2) Motions Hearing Dated 30 May 2014 from 9:55 A.M. to 12:12 P.M. is identified as AE 120V.

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a. The Prosecution requested reconsideration of the Commission's order (AE 120C). The Prosecution alleges that, since the legal standard employed in the Order is not clearly enough outlined to enable a determination of whether there has been error, the ambiguity calls for clarification. Additionally, the Prosecution avers it has shown substantial new facts meriting reconsideration of the Commission's Order.

b. The Defense opposes reconsideration. The Defense alleges the Prosecution failed to follow the procedural rules of reconsideration. On the substance of the request itself, Defense alleges the Prosecution has cited no error of law or new evidence to justify reconsideration.

c. On request by any party or *sua sponte*, the Military Judge may, prior to authentication, reconsider any ruling, other than one amounting to a finding of not guilty (*See* R.M.C. 905(f)).

d. The Defense's procedural objection to the motion is misplaced. The Military Commissions Trial Judiciary Rules of Court (RC), dated 24 April 2013 as amended on 4 June 2013, control the procedural requirements for the filing of pleadings.[5] RC 3.5e discusses the procedural requirements to file a supplement and states a "supplement is an additional filing to a previously filed motion, response or reply." A motion for reconsideration is not a supplemental pleading. As discussed earlier, a motion for reconsideration may be filed by any party or *sua sponte* by the Military Judge. As such, it is not bound by the same procedural requirements involved with filing a supplement.

e. New Evidence. In its pleadings, the Prosecution proffers the following as "new evidence:"

1. A declaration from a knowledgeable Government Official providing a more robust description of the costs to national security if the places the Accused was detained prior to

[5] The Rules of Court were updated on 5 May 2014. However, for purposes of analyzing the request for reconsideration, the 24 April 2013 as amended on 4 June 2013 rules apply.

6 September 2006 and the names of individuals having direct and substantial contact with the Accused during this time period are disclosed;

2. The risk of harm to individuals and / or their families if their names are released is described in greater detail;

3. The Prosecution's commitment to utilize declassification guidelines developed for the declassification review of the Senate Select Committee - Intelligence's Report on the RDI Program and apply them, to previously denied discovery and to information subject to discovery in the future;

4. The Prosecution's commitment to provide a summary chronology outlining the duration of the Accused's detention at various location(s) without identifying the location(s);

5. The Prosecution noted the Senate Select Committee - Intelligence's Report on the RDI Program is undergoing a declassification review process;

6. The Prosecution's commitment to provide a summary chronology outlining instances when the Accused cooperated with interrogators;

7. The Prosecution highlighted a "new" marking of select classified information as "Display Only," which is information the Defense Counsel can share with the Accused;

8. The Prosecution submitted an additional Prudential Search Request seeking additional information responsive to the Commission's order (AE 120C);

9. The Defense filed AE 120H which refined what the Defense considered "material" thus informing future analysis by the Prosecution;

10. The Prosecution's commitment to facilitating Defense requests to speak with various individuals who had direct and substantial contact with the Accused without divulging their identities;

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11. The Prosecution's commitment to reproducing, in chronological order, previously approved summaries of classified information to facilitate the Defense's understanding of the information; and,

12. The Prosecution's commitment to provide new substitutions of classified information.

f. Arguably some of the "new evidence" was available prior to the briefing and argument of the original motion. Regardless, the Prosecution's request for clarification provides a separate basis to reconsider the order. Accordingly, the motion for reconsideration is **GRANTED**.

6. Discovery Legal Standard. In its request for reconsideration, the Prosecution asked the Commission to "clarify the legal standard it is applying to the defense discovery request by issuing detailed findings of fact and conclusions of law." (AE 120D, p. 1). Concerning the legal standard for discovery, the Commission followed the same legal standards applied to other discovery motions in this case. To be clear, the Commission will re-articulate those standards.

a. The Prosecution must produce information that is "material to the preparation of the defense" where the information is "within the possession, custody, or control of the Government." R.M.C. 701(c). The Prosecution must produce all exculpatory evidence that reasonably tends to (a) negate the guilt of the accused, (b) reduce the degree of guilt of the accused, or (c) reduce the punishment. R.M.C. 701(e)(1); *see also Brady v. Maryland*, 373 U.S. 83, 88 (1963). Information favorable to the defense includes evidence, which "would tend to exculpate [the defendant] or reduce the penalty." *Brady*, 373 U.S. at 87. The Prosecution also must produce any evidence that reasonably tends to impeach the credibility of a witness whom the Prosecution intends to call at trial, and it must produce evidence that reasonably may be viewed as mitigation evidence at sentencing. R.M.C. 701(e)(2)-(3); *see also Giglio v. United States*, 405 U.S. 150, 154-55 (1972).

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b. An additional burden for classified discovery is a finding that "such classified information would be noncumulative, relevant, and helpful to a legally cognizable defense, rebuttal of the prosecution's case, or to sentencing." 10 U.S.C. § 949p-4(a)(2).

c. Discoverable information includes information relating to the charged offenses, is exculpatory, impeaching, or mitigating, and is material to the preparation of the defense, and is actually relevant and necessary. *See* R.M.C.s 701 and 703; *United States v. Yunis*, 867 F.2d 617 (D.C. Cir. 1989).

7. Classified Information.

a. The Prosecution reasserted its classified information privilege for the ten (10) categories of information to be disclosed pursuant to AE 120C. Although apparently not clear to the Prosecution, AE 120C does not impact any previous orders approving summaries. It also does not prevent the Prosecution from utilizing M.C.R.E. 505 to process classified discovery.

b. The Commission agrees with the Prosecution that the 2009 M.C.A. and binding precedent, *United States v. Yunis*, dictate whatever the standard otherwise means, it must mean at a minimum that once the privilege is properly asserted, classified information is discoverable only if it is actually relevant *and* helpful to the defense.

8. Particularity v. Over-breadth.

a. The Commission recognizes the Defense in its various requests attached to AE 120 utilized expansive language in describing the scope of the information requested. The Prosecution's point of over-breadth is well taken; however, their follow-on point asserting the Defense must identify particular documents is not reasonable. The Defense does not know with particularity what it does not know. What the Defense does believe is the Accused was subjected to abusive conduct after he was detained by U.S. authorities.

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b. The Prosecution need only produce non-cumulative, relevant discovery encompassed in the ten (10) categories listed in the order. The ten (10) category construct, which the Prosecution does not oppose,[6] is designed to focus the Prosecution's analysis of information as it unilaterally fulfills its discovery obligations and responds to current and future discovery requests.

9. Un-redacted. The Prosecution objects to term "un-redacted" in paragraphs 5i and 5j of AE 120C. This point is well taken, and the Commission will address it in paragraphs 13i and 13j below.

10. The Commission finds the information concerning the conditions of confinement and detention of the Accused to be relevant and helpful to the Defense. In applying the *Yunis* standard to the ten (10) categories, the Commission is cognizant it is not defending the Accused, but must make a good faith determination, based on its lack of knowledge of the universe of evidence the Government possesses and / or intends to use at trial, as to what is relevant and helpful to the Defense. Theoretical relevance is not enough.[7] For the reasons discussed below, the Commission finds the requested discovery covered by this order is grounded in evidence and not theory.

a. The Commission finds the treatment of the Accused between capture and September 2006 is, at a minimum, relevant to a sentencing case in a capital prosecution. It is clear from the record to date in this case the Accused was subjected to Enhanced Interrogation Techniques (EITs) while in custody prior to 2006. This treatment of the Accused could be argued to mitigate the imposition of the death penalty.

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[6] AE 120D, at p.9.
[7] *Yunis*, at 623.

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b. Also, compliant behavior by the Accused could be evidence to argue he would not be a threat if sentenced to confinement rather the death.

c. The Defense has also proffered other grounds where the requested evidence would be helpful, e.g., in articulating outrageous government conduct in a motion for appropriate relief.

d. The Prosecution does not intend to introduce any statement from the Accused taken in the course of administering EITs. Nonetheless, the use of EITs on the Accused implicates the admissibility of any subsequent statement of the Accused by directly impacting whether the subsequent statement was tainted by the earlier statements.

12. This case is distinguishable factually from *Yunis* in one significant way.

a. In *Yunis*, the defense requested the taped conversations between the defendant and an informant. The DC Circuit Court of Appeals noted, "…Yunis was present during all the relevant conversations. It does not impose upon him any burden of absolute memory, omniscience, or superhuman mental capacity to expect some specificity as to what benefit he expects to gain from the evidence sought here."[8] In *Yunis*, the defense had access to the accused who is the best source of the information of what happened.

b. The defendant in *Yunis* and the Accused are not similarly situated. Although the Accused was present, he was not aware of where he was, when he was there, and many other aspects of his detention. This was by design. The Government created that design and cannot now turn around and say, "just ask Nashiri" about the conditions of his confinement. Accordingly, the Commission finds the requested information is not available to the Defense from the Accused.

13. Order. The Prosecution will provide the Defense with the following discovery information:

[8] *Id.* at 624.

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a. A chronology identifying where the Accused was held in detention between the date of his capture to the date he arrived at Guantanamo Bay, Cuba in September 2006;

b. A description of how the Accused was transported between the various locations including how he was restrained and how he was clothed;

c. All records, photographs, videos, and summaries the Government of the United States has in its possession, which document the condition of the Accused's confinement at each location, and the Accused's conditions during each movement between the various locations;

d. The identities of medical personnel (examining and treating physicians, psychologists, psychiatrists, mental health professionals, dentists, etc.), guard force personnel, and interrogators, whether employees of the United States Government or employees of a contractor hired by the United States Government, who had direct and substantial contact with the Accused at each location and participated in the transport of the Accused between the various locations. This includes individuals described in paragraph 10a and 10d of the Defense Request for Discovery dated 9 August 2012. (Attachment A of AE 120);[9]

e. Copies of the standard operating procedures, policies, or guidelines on handling, moving, transporting, treating, interrogating, etc, high value detainees at and between the various facilities identified in paragraph 5a. This includes documents described in paragraphs 15, 17, 18, 21a, and 22 of the Defense Request for Discovery dated 9 August 2012. (Attachment A of AE 120);

f. The employment records of individuals identified in paragraph 13d of this order and 5d of AE 120 limited to those documents in the file memorializing adverse action and/or positive

[9] This should not be interpreted as requiring the Prosecution to violate the Intelligence Identities Protection Act, 50 U.S.C. § 421. Personally Identifiable Information can be substituted with a pseudonym consistent with the procedures of M.C.R.E. 505.

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recognition in connection with performance of duties at a facility identified in paragraph 13a of this order and 5a of AE 120 or in transporting the Accused between the various facilities;[10]

g. The records of training in preparation for the performance of duties of the individuals identified in paragraph 13d of this order and 5d of AE 120 above at the various facilities or during transport of the Accused. This includes documents described in paragraph 24 of the Defense Request for Discovery dated 9 August 2012. (Attachment A of AE 120);

h. All statements obtained from interrogators, summaries of interrogations, reports produced from interrogations, interrogations logs, and interrogator notes of interrogations of the Accused and all co-conspirators identified in Appendix C of the Charge Sheet dated 15 September 2011;

i. Copies of requests with any accompanying justifications and legal reviews of same to employ Enhanced Interrogation Techniques on the Accused and all co-conspirators identified in Appendix C of the Charge Sheet dated 15 September 2011. This includes documents described in paragraphs 48, 49, and 51 of the Defense Request for Discovery dated 9 August 2012 (Attachment A of AE 120), with "particular detainees" being the Accused and all co-conspirators identified in Appendix C of the Charge Sheet dated 15 September 2011; and,

j. Copies of documents memorializing decisions (approving or disapproving), with any additional guidance, on requests identified in para 5i to employ Enhanced Interrogation Techniques on the Accused and all co-conspirators identified in Appendix C of the Charge Sheet dated 15 September 2011. This includes documents described in paragraph 48, 49, and 51 of the Defense Request for Discovery dated 9 August 2012 (Attachment A of AE 120), with "particular

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detainees" being the Accused and all co-conspirators identified in Appendix C of the Charge Sheet dated 15 September 2011.

14. The Commission acknowledges the Prosecution's previous provision of discovery in response to paragraphs 3-5, 14, 20, 27-42, 44-46, 49, 53, 54, 57-62, 64, 68, 69, 70a, 70d, 72, and 73 of the Defense Request for Discovery dated 9 August 2012 (Attachment A of AE 120).

15. The requests for discovery contained in the remaining numbered line items of the Defense Request for Discovery dated 9 August 2012 (Attachment A of AE 120) continue to be denied as the Commission finds the Defense has failed to establish relevance and materiality to the preparation of the defense or how the requested information could be proper mitigation or extenuation evidence as described in R.M.C. 1001 and 1004.[11]

16. The parties will continue to comply with the Commission's Protective Orders, AE 013M, "Protection of Classified Information Throughout All Stages of Proceedings" and AE 014C "Protected but Unclassified Information." Nothing in this order should be interpreted to prevent the Prosecution from utilizing the procedures of M.C.R.E. 505 concerning summarization and substitution of classified information in fulfilling obligations imposed by this order and in otherwise fulfilling its discovery obligations. Nothing in this order should be interpreted to require or authorize a lack of compliance with the Intelligence Identities Protection Act, 50 U.S.C. §§ 421-426.

Accordingly, AE 120D is **GRANTED** in part and **DENIED** in part.

So ORDERED this 24th day of June, 2014.

//s//
JAMES L. POHL
COL, JA, U.S. Army
Military Judge

[11] The remaining numbered lines include all those not discussed in this Order.

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EXHIBIT 4

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Hicks (Rasul) v. Bush	)	Case No. 02-CV-0299 (CKK)
Al Odah v. United States	)	Case No. 02-CV-0828 (CKK)
Habib v. Bush	)	Case No. 02-CV-1130 (CKK)
Kurnaz v. Bush	)	Case No. 04-CV-1135 (ESH)
Khadr v. Bush	)	Case No. 04-CV-1136 (JDB)
Begg v. Bush	)	Case No. 04-CV-1137 (RMC)
Khalid (Benchellali) v. Bush	)	Case No. 04-CV-1142 (RJL)
El-Banna v. Bush	)	Case No. 04-CV-1144 (RWR)
Gherebi v. Bush	)	Case No. 04-CV-1164 (RBW)
Boumediene v. Bush	)	Case No. 04-CV-1166 (RJL)
Anam v. Bush	)	Case No. 04-CV-1194 (HHK)
Almurbati v. Bush	)	Case No. 04-CV-1227 (RBW)
Abdah v. Bush	)	Case No. 04-CV-1254 (HHK)
Hamdan v. Bush	)	Case No. 04-CV-1519 (JR)
Belmar v. Bush	)	Case No. 04-CV-1897 (RMC)
Al Qosi v. Bush	)	Case No. 04-CV-1937 (PLF)
Paracha v. Bush	)	Case No. 04-CV-2022 (PLF)
Al-Marri v. Bush	)	Case No. 04-CV-2035 (GK)
Zemiri v. Bush	)	Case No. 04-CV-2046 (CKK)
Deghayes v. Bush	)	Case No. 04-CV-2215 (RMC)
Mustapha v. Bush	)	Case No. 05-CV-0022 (JR)

Al-Mohammed v. Bush	)	Case No. 05-CV-0247 (HHK)
El-Mashad v. Bush	)	Case No. 05-CV-0270 (JR)
Al-Adahi v. Bush	)	Case No. 05-CV-0280 (GK)
Al-Joudi v. Bush	)	Case No. 05-CV-0301 (GK)
Al-Wazan v. Bush	)	Case No. 05-CV-0329 (PLF)
Al-Anazi v. Bush	)	Case No. 05-CV-0345 (JDB)
Alhami v. Bush	)	Case No. 05-CV-0359 (GK)
Ameziane v. Bush	)	Case No. 05-CV-0392 (ESH)
Batarfi v. Bush	)	Case No. 05-CV-0409 (EGS)
Sliti v. Bush	)	Case No. 05-CV-0429 (RJL)
Kabir v. Bush	)	Case No. 05-CV-0431 (RJL)
Qayed v. Bush	)	Case No. 05-CV-0454 (RMU)
Al-Shihry v. Bush	)	Case No. 05-CV-0490 (PLF)
Aziz v. Bush	)	Case No. 05-CV-0492 (JR)
Qassim v. Bush	)	Case No. 05-CV-0497 (JR)
Al-Oshan v. Bush	)	Case No. 05-CV-0520 (RMU)
Tumani v. Bush	)	Case No. 05-CV-0526 (RMU)
Al-Oshan v. Bush	)	Case No. 05-CV-0533 (RJL)
Al Shamri v. Bush	)	Case No. 05-CV-0551 (RWR)
Salahi v. Bush	)	Case No. 05-CV-0569 (JR)
Mammar v. Bush	)	Case No. 05-CV-0573 (RJL)
Al-Sharekh v. Bush	)	Case No. 05-CV-0583 (RJL)
Magram v. Bush	)	Case No. 05-CV-0584 (CKK)

Al Rashaidan v. Bush	)	Case No. 05-CV-0586 (RWR)
Mokit v. Bush	)	Case No. 05-CV-0621 (PLF)
Al Daini v. Bush	)	Case No. 05-CV-0634 (RWR)
Errachidi v. Bush	)	Case No. 05-CV-0640 (EGS)
Zaeef v. Bush	)	Case No. 05-CV-0660 (RMC)
Ahmed v. Bush	)	Case No. 05-CV-0665 (RWR)
Battayav v. Bush	)	Case No. 05-CV-0714 (RBW)
Adem v. Bush	)	Case No. 05-CV-0723 (RWR)
Aboassy v. Bush	)	Case No. 05-CV-0748 (RMC)
Hamlily v. Bush	)	Case No. 05-CV-0763 (JDB)
Imran v. Bush	)	Case No. 05-CV-0764 (CKK)
Al Habashi v. Bush	)	Case No. 05-CV-0765 (EGS)
Al Hamamy v. Bush	)	Case No. 05-CV-0766 (RJL)
Hamoodah v. Bush	)	Case No. 05-CV-0795 (RJL)
Khiali-Gul v. Bush	)	Case No. 05-CV-0877 (JR)
Rahmattullah v. Bush	)	Case No. 05-CV-0878 (CKK)
Mohammad v. Bush	)	Case No. 05-CV–879 (RBW)
Rahman v. Bush	)	Case No. 05-CV-0882 (GK)
Bostan v. Bush	)	Case No. 05-CV-0883 (RBW)
Muhibullah v. Bush	)	Case No. 05-CV-884 (RMC)
Mohammad v. Bush	)	Case No. 05-CV-0885 (GK)
Wahab v. Bush	)	Case No. 05-CV-0886 (EGS)
Chaman v. Bush	)	Case No. 05-CV-0887 (RWR)

Gul v. Bush	)	Case No. 05-CV-0888 (CKK)
Basardh v. Bush	)	Case No. 05-CV-0889 (ESH)
Khan v. Bush	)	Case No. 05-CV-0890 (RMC)
Nasrullah v. Bush	)	Case No. 05-CV-0891 (RBW)
Shaaban v. Bush	)	Case No. 05-CV-0892 (CKK)
Sohail v. Bush	)	Case No. 05-CV-0993 (RMU)
Tohirjanovich v. Bush	)	Case No. 05-CV-0994 (JDB)
Khudaidad v. Bush	)	Case No. 05-CV-0997 (PLF)
Al Karim v. Bush	)	Case No. 05-CV-0998 (RMU)
Al-Khalaqi v. Bush	)	Case No. 05-CV-0999 (RBW)
Sarajuddin v. Bush	)	Case No. 05-CV-1000 (PLF)
Kahn v. Bush	)	Case No. 05-CV-1001 (ESH)
Mohammed v. Bush	)	Case No. 05-CV-1002 (EGS)
Mangut v. Bush	)	Case No. 05-CV-1008 (JDB)
Hamad v. Bush	)	Case No. 05-CV-1009 (JDB)
Khan v. Bush	)	Case No. 05-CV-1010 (RJL)
Zuhoor v. Bush	)	Case No. 05-CV-1011 (JR)
Salaam v. Bush	)	Case No. 05-CV-1013 (JDB)
Al-Hela v. Bush	)	Case No. 05-CV-1048 (RMU)
Mousovi v. Bush	)	Case No. 05-CV-1124 (RMC)
Khalifh v. Bush	)	Case No. 05-CV-1189 (JR)
Zalita v. Bush	)	Case No. 05-CV-1220 (RMU)
Ahmed v. Bush	)	Case No. 05-CV-1234 (EGS)

Baqi v. Bush	)	Case No. 05-CV-1235 (PLF)
Aminullah v. Bush	)	Case No. 05-CV-1237 (ESH)
Ghalib v. Bush	)	Case No. 05-CV-1238 (CKK)
Al Khaiy v. Bush	)	Case No. 05-CV-1239 (RJL)
Bukhari v. Bush	)	Case No. 05-CV-1241 (RMC)
Pirzai v. Bush	)	Case No. 05-CV-1242 (RCL)
Peerzai v. Bush	)	Case No. 05-CV-1243 (RCL)
Alsawam v. Bush	)	Case No. 05-CV-1244 (CKK)
Mohammadi v. Bush	)	Case No. 05-CV-1246 (RWR)
Al Ginco v. Bush	)	Case No. 05-CV-1310 (RJL)
Ullah v. Bush	)	Case No. 05-CV-1311 (RCL)
Al Bihani v. Bush	)	Case No. 05-CV-1312 (RJL)
Mohammed v. Bush	)	Case No. 05-CV-1347 (GK)
Saib v. Bush	)	Case No. 05-CV-1353 (RMC)
Hatim v. Bush	)	Case No. 05-CV-1429 (RMU)
Al-Subaiy v. Bush	)	Case No. 05-CV-1453 (RMU)
Dhiab v. Bush	)	Case No. 05-CV-1457 (GK)
Ahmed Doe v. Bush	)	Case No. 05-CV-1458 (ESH)
Sadkhan v. Bush	)	Case No. 05-CV-1487 (RMC)
Faizullah v. Bush	)	Case No. 05-CV-1489 (RMU)
Faraj v. Bush	)	Case No. 05-CV-1490 (PLF)
Khan v. Bush	)	Case No. 05-CV-1491 (JR)
Ahmad v. Bush	)	Case No. 05-CV-1492 (RCL)

Amon v. Bush	)	Case No. 05-CV-1493 (RBW)
Al Wirghi v. Bush	)	Case No. 05-CV-1497 (RCL)
Nabil v. Bush	)	Case No. 05-CV-1504 (RMC)
Al Hawary v. Bush	)	Case No. 05-CV-1505 (RMC)
Shafiiq v. Bush	)	Case No. 05-CV-1506 (RMC)
Kiyemba v. Bush	)	Case No. 05-CV-1509 (RMU)
Idris v. Bush	)	Case No. 05-CV-1555 (JR)
Attash v. Bush	)	Case No. 05-CV-1592 (RCL)
Al Razak v. Bush	)	Case No. 05-CV-1601 (GK)
Mamet v. Bush	)	Case No. 05-CV-1602 (ESH)
Rabbani v. Bush	)	Case No. 05-CV-1607 (RMU)
Zahir v. Bush	)	Case No. 05-CV-1623 (RWR)
Akhtiar v. Bush	)	Case No. 05-CV-1635 (PLF)
Ghanem v. Bush	)	Case No. 05-CV-1638 (CKK)
Albkri v. Bush	)	Case No. 05-CV-1639 (RBW)
Al Badah v. Bush	)	Case No. 05-CV-1641 (CKK)
Almerfedi v. Bush	)	Case No. 05-CV-1645 (PLF)
Zaid v. Bush	)	Case No. 05-CV-1646 (JDB)
Al-Bahooth v. Bush	)	Case No. 05-CV-1666 (ESH)
Al-Siba'i v. Bush	)	Case No. 05-CV-1667 (RBW)
Al-Uwaidah v. Bush	)	Case No. 05-CV-1668 (GK)
Al-Jutaili v. Bush	)	Case No. 05-CV-1669 (TFH)
Ali Ahmed v. Bush	)	Case No. 05-CV-1678 (GK)

Khandan v. Bush) Case No. 05-CV-1697 (RBW)

Kabir (Sadar Doe) v. Bush) Case No. 05-CV-1704 (JR)

Al-Rubaish v. Bush) Case No. 05-CV-1714 (RWR)

Qasim v. Bush) Case No. 05-CV-1779 (JDB)

Sameur v. Bush) Case No. 05-CV-1806 (CKK)

Al-Harbi v. Bush) Case No. 05-CV-1857 (CKK)

Aziz v. Bush) Case No. 05-CV-1864 (HHK)

Mamet v. Bush) Case No. 05-CV-1886 (EGS)

Hamoud v. Bush) Case No. 05-CV-1894 (RWR)

Al-Qahtani v. Bush) Case No. 05-CV-1971 (RMC)

Alkhemisi v. Bush) Case No. 05-CV-1983 (RMU)

Al-Shabany v. Bush) Case No. 05-CV-2029 (JDB)

Zakirjan v. Bush) Case No. 05-CV-2053 (HHK)

Muhammed v. Bush) Case No. 05-CV-2087 (RMC)

Othman v. Bush) Case No. 05-CV-2088 (RWR)

Ali Al Jayfi v. Bush) Case No. 05-CV-2104 (RBW)

Jamolivich v. Bush) Case No. 05-CV-2112 (RBW)

Al-Mudafari v. Bush) Case No. 05-CV-2185 (JR)

Al-Mithali v. Bush) Case No. 05-CV-2186 (ESH)

Al-Asadi v. Bush) Case No. 05-CV-2197 (HHK)

Alhag v. Bush) Case No. 05-CV-2199 (HHK)

Nakheelan v. Bush) Case No. 05-CV-2201 (ESH)

Al Subaie v. Bush) Case No. 05-CV-2216 (RCL)

Ghazy v. Bush	)	Case No. 05-CV-2223 (RJL)
Al Khatemi v. Bush	)	Case No. 05-CV-2248 (ESH)
Al-Shimrani v. Bush	)	Case No. 05-CV-2249 (RMC)
Amin v. Bush	)	Case No. 05-CV-2336 (PLF)
Al Sharbi v. Bush	)	Case No. 05-CV-2348 (EGS)
Ben Bacha v. Bush	)	Case No. 05-CV-2349 (RMC)
Zadran v. Bush	)	Case No. 05-CV-2367 (RWR)
Alsaaei v. Bush	)	Case No. 05-CV-2369 (RWR)
Razakah v. Bush	)	Case No. 05-CV-2370 (EGS)
Al Darbi v. Bush	)	Case No. 05-CV-2371 (RCL)
Haleem v. Bush	)	Case No. 05-CV-2376 (RBW)
Al-Ghizzawi v. Bush	)	Case No. 05-CV-2378 (JDB)
Awad v. Bush	)	Case No. 05-CV-2379 (JR)
Al-Baidany v. Bush	)	Case No. 05-CV-2380 (CKK)
Al Rammi v. Bush	)	Case No. 05-CV-2381 (JDB)
Said v. Bush	)	Case No. 05-CV-2384 (RWR)
Al Halmandy v. Bush	)	Case No. 05-CV-2385 (RMU)
Mohammon v. Bush	)	Case No. 05-CV-2386 (RBW)
Al-Quhtani v. Bush	)	Case No. 05-CV-2387 (RMC)
Thabid v. Bush	)	Case No. 05-CV-2398 (ESH)
Rimi v. Bush	)	Case No. 05-CV-2427 (RJL)
Al Salami v. Bush	)	Case No. 05-CV-2452 (PLF)
Al Shareef v. Bush	)	Case No. 05-CV-2458 (RWR)

Khan v. Bush	)	Case No. 05-CV-2466 (RCL)
Hussein v. Bush	)	Case No. 05-CV-2467 (PLF)
Al-Delebany v. Bush	)	Case No. 05-CV-2477 (RMU)
Al-Harbi v. Bush	)	Case No. 05-CV-2479 (HHK)
Feghoul v. Bush	)	Case No. 06-CV-0618 (RWR)
Rumi v. Bush	)	Case No. 06-CV-0619 (RJL)
Ba Odah v. Bush	)	Case No. 06-CV-1668 (HHK)
Wasim v. Bush	)	Case No. 06-CV-1675 (RBW)
Nasser v. Bush	)	Case No. 06-CV-1676 (RJL)
Naseem v. Bush	)	Case No. 06-CV-1677 (RCL)
Khan v. Bush	)	Case No. 06-CV-1678 (RCL)
Matin v. Bush	)	Case No. 06-CV-1679 (RMU)
Rahmattullah v. Bush	)	Case No. 06-CV-1681 (JDB)
Ismatullah v. Bush	)	Case No. 06-CV-1682 (RJL)
Yaakoobi v. Bush	)	Case No. 06-CV-1683 (JR)
Taher v. Bush	)	Case No. 06-CV-1684 (GK)
Akhouzada v. Bush	)	Case No. 06-CV-1685 (JDB)
Azeemullah v. Bush	)	Case No. 06-CV-1686 (CKK)
Toukh v. Bush	)	Case No. 06-CV-1687 (ESH)
Naseer v. Bush	)	Case No. 06-CV-1689 (RMU)
Khan v. Bush	)	Case No. 06-CV-1690 (RBW)
Al-Shibh v. Bush	)	Case No. 06-CV-1725 (EGS)
Ezatullah v. Bush	)	Case No. 06-CV-1752 (RMC)

Hakmat v. Bush	)	Case No. 06-CV-1753 (EGS)
Legseirein v. Bush	)	Case No. 06-CV-1754 (GK)
Al Ghith v. Bush	)	Case No. 06-CV-1757 (RJL)
Suliman v. Bush	)	Case No. 06-CV-1758 (RMC)
Elisher v. Bush	)	Case No. 06-CV-1759 (JDB)
Gul v. Bush	)	Case No. 06-CV-1760 (RMU)
Abdessalam v. Bush	)	Case No. 06-CV-1761 (ESH)
Lal v. Bush	)	Case No. 06-CV-1763 (CKK)
Saleh v. Bush	)	Case No. 06-CV-1765 (HHK)
Hentif v. Bush	)	Case No. 06-CV-1766 (HHK)
Al-Zarnouqi v. Bush	)	Case No. 06-CV-1767 (RMU)
Al-Maliki v. Bush	)	Case No. 06-CV-1768 (RWR)
Algahtani v. Bush	)	Case No. 06-CV-1769 (RCL)
Nasser v. Bush	)	Case No. 07-CV-1710 (RBW)
Al Shubati v. Bush	)	Case No. 07-CV-2337 (HHK)
Yazidi v. Bush	)	Case No. 07-CV-2338 (HHK)

RESPONDENTS' NOTICE OF REPORT REGARDING PRESERVATION

On January 24, 2008, the Court in *Abdullah v. Bush*, C.A. No. 05cv23 (D.D.C.) (RWR), a habeas corpus proceeding such as this one, brought on behalf of a Guantanamo Bay detainee, entered an order requiring the filing of a report with regard to preservation issues. On February 8, 2008, respondents filed a Report providing certain information, and a motion for

reconsideration or, in the alternative, for a stay of part of the order.[1] For the Court's information, respondents are hereby providing a copy of that Report.[2]

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[1] The motion for reconsideration or, in the alternative, for a stay was predicated on the concern of specially-appointed Acting United States Attorney John Durham that a criminal investigation that he is heading with regard to the destruction of certain tapes by the Central Intelligence Agency would be jeopardized by a further report. As Mr. Durham explained, his concerns would not be implicated by a report on the matters set forth in the Report filed by respondents and in the annexed declarations.

[2] By filing this notice, respondents do not mean to suggest that the Court has jurisdiction over all, or any, of these petitions, or that the matters discussed in the annexed declaration are necessarily material to all of these petitions. Indeed, although some of these petitions have been dismissed, respondents identified those cases in which to file this notice on an over-inclusive, rather than under-inclusive, basis.

Certain material in one of the declarations filed along with the attached Report, specifically paragraph 9 of the declaration of Rear Admiral Mark Buzby, has been and is hereby designated as protected information and redacted from the attached declaration for public filing in accordance with the Protective Orders and supplemental orders permitting such designation that have been entered in various of the above-captioned cases. An unredacted version of the declaration will be provided to the Court and to counsel where appropriate in accordance with any Protective Orders and supplemental orders entered in the cases.

Dated: February 12, 2008

Respectfully submitted,

JEFFREY S. BUCHOLTZ
Acting Assistant Attorney General

CARL J. NICHOLS
Deputy Assistant Attorney General

DOUGLAS N. LETTER
Terrorism Litigation Counsel

/s/ Judry L. Subar
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Attorneys for Respondents

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

HANI SALEH RASHID ABDULLAH, *et al.*,	)	
Petitioners,	)	
v.	)	Civil Action No. 05-00023 (RWR)
GEORGE W. BUSH, *et al.*,	)	
Respondents.	)	

RESPONDENTS' REPORT FILED IN CONNECTION WITH ORDER OF JANUARY 24, 2008

Respondents respectfully submit this Report focusing on the recent steps they have taken to ensure the preservation of material relating to all detainees detained by the Joint Task Force – Guantanamo("JTF– GTMO") at Guantanamo Bay, Cuba.

In the wake of the recent revelation of the destruction of certain tapes by the Central Intelligence Agency ("CIA"), both the Department of Defense ("DOD") and the CIA have taken new and additional steps to ensure that material relating to all Guantanamo Bay detainees is being preserved. The Court is respectfully directed to the attached declarations of General Michael Hayden, Director of the Central Intelligence Agency ("CIA"), Rear Admiral Mark Buzby, Commander of JTF– GTMO, and Karen Hecker, a DOD attorney responsible for overseeing litigation in which DOD is involved. Those declarations describe such steps, as well as additional information regarding a preservation issue.

In particular, General Hayden's declaration describes the directive he issued on December 20, 2007, to all CIA personnel, which requires them to preserve and maintain all documents, information, and evidence relating to any detainee ever held at Guantanamo Bay and

any detainee held by the CIA, including any detainees who may be held in the future. As the directive makes clear, it "is a continuing obligation that applies to future as well as past and present detainees." Hayden Declaration, ¶ 4.[1]

Ms. Hecker's declaration describes a directive that the DOD Office of General Counsel disseminated within the Department of Defense on December 19, 2007, and that obligates "all relevant DoD components reasonably likely to have information regarding current or former Guantanamo Bay detainees" "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." *Id.*, ¶¶ 2, 3. Under standard DOD practice, each component receiving the directive was to ensure that all relevant personnel were made aware of it. *Id.*, ¶ 3. In addition to the formal communication of the directive of December 19, 2007, Ms. Hecker personally communicated to a large number of DOD contacts with whom she regularly works on Guantanamo Bay matters that the formal directive would be arriving through regular channels and that they should disseminate it as appropriate. *Id.*, ¶ 4.

Real Admiral Buzby's declaration, in addition to describing his efforts to assure continued preservation of material in accordance with DOD's December 19, 2007, directive, describes aspects of security monitoring systems that were used at several of the detention camps

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[1] Even though the CIA is not a named respondent in this matter, and would not be a proper respondent in any event, *see Rumsfeld v. Padilla*, 542 U.S. 426, 436 n.9, 447 n.16 (2004) (discussing identity of proper respondent in habeas cases under rule limiting proper respondent to custodian and citing cases involving extraterritorial detention, where although rule is somewhat more relaxed proper respondent is head of military department holding detainee), the CIA's efforts to preserve material are described here because it was the CIA's actions on which the Court focused in issuing its January 24, 2008, order.

operated by JTF – GTMO. As described in Real Admiral Buzby's declaration, those systems recorded information on a routine basis of largely mundane day-to-day activities. Some of that information was overwritten automatically by virtue of the routine operation of the equipment. In light of the possibility that some of that information might have related to petitioners in this and other cases, respondents are providing the description in Real Admiral Buzby's declaration of those systems and the recent steps taken concerning them. In particular, Real Admiral Buzby describes the steps taken to preserve all available information on the recording systems he discusses.

Certain material in the Buzby declaration, specifically paragraph 9, has been and is hereby designated as protected information and redacted from the attached declaration for public filing in accordance with the Protective Order permitting such designation that has been entered in this case. An unredacted version of the declaration will be provided to the Court and to counsel in accordance with the Protective Order.

Contemporaneously with this Report, respondents are filing a motion for reconsideration or, in the alternative, for a stay of this Court's order of January 24, 2007, insofar as it requires a report on any other matters not set forth in this Report and its accompanying declarations. That motion explains why any further report threatens to undermine and compromise the criminal investigation being conducted by specially-appointed Acting United States Attorney John Durham of the Department of Justice.[2]

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[2] Respondents intend to provide the information contained in this Report in the various other habeas cases brought in this Court on behalf of Guantanamo Bay detainees as soon as a filing in that large number of cases can reasonably be effected. (The protected information in the Buzby declaration will not, of course, be provided in those cases in which orders governing the filing of protected information are not in effect.)

Dated: February 8, 2008

Respectfully submitted,

JEFFREY S. BUCHOLTZ
Acting Assistant Attorney General

CARL J. NICHOLS
Deputy Assistant Attorney General

DOUGLAS N. LETTER
Terrorism Litigation Counsel

/s/ Andrew I. Warden

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

MAJID KHAN and RUBIA KHAN, as next friend, Petitioners, v. ROBERT M. GATES, Secretary of Defense, Respondent.	No. 07-1324

DECLARATION OF GENERAL MICHAEL V. HAYDEN, USAF,
DIRECTOR, CENTRAL INTELLIGENCE AGENCY

I, MICHAEL V. HAYDEN, hereby declare and state:

1. I am the Director of the Central Intelligence Agency (CIA) and have served in this capacity since 30 May 2006. In my capacity as Director, I lead the CIA and manage the Intelligence Community's human intelligence and open source collection programs on behalf of the Director of National Intelligence (DNI). I have held a number of positions in the Intelligence Community, including Principal Deputy Director of National Intelligence, from April 2005 to May 2006; Director, National Security Agency/Chief, Central Security Service (NSA/CSS), Fort George G. Meade, Maryland, from March 1999 to April 2005; Commander of the Air Intelligence Agency and Director of the Joint Command and Control Warfare Center, both headquartered at

Kelly Air Force Base, Texas, from January 1996 to September 1997; and Director, Intelligence Directorate, U.S. European Command, Stuttgart, Germany, from May 1993 to October 1995.

2. I am a four-star general in the United States Air Force and have held senior staff positions at the Pentagon, the National Security Council, and the U.S. Embassy in Sofia, Bulgaria, as well as serving as Deputy Chief of Staff for United Nations Command and U.S. Forces Korea. I entered active duty in 1969 as a distinguished graduate of the Reserve Officer Training Corps program.

3. I make the following statements based upon my personal knowledge and information provided to me in my official capacity.

4. In light of recent events surrounding the destruction of recordings of the interrogations of detainees formerly in the custody of the CIA, I have issued an order to all CIA personnel to preserve and maintain all documents, information, and evidence relating to:

A. any detainee held at the United States Naval Base Guantanamo Bay, Cuba; and

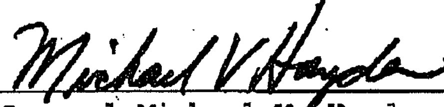
B. any detainee held by the CIA.

This order is a continuing obligation that applies to future as well as past and present detainees.

* * * *

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

Executed this 20th day of December, 2007.



General Michael V. Hayden, USAF
Director
Central Intelligence Agency

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

HAN SALEH RASHID ABDULLAH, *et al.*,	)	
Petitioners,	)	
v.	)	Civil Action No. 05-00023 (RWR)
GEORGE W. BUSH, *et al.*,	)	
Respondents.	)	

Pursuant to 28 U.S.C. §1746, I, Karen L. Hecker, 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, overseeing 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. This declaration is provided in order to describe DoD's current efforts to preserve information about Guantanamo Bay detainees.

2. In light of the recently 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 addition to formal distribution of the December 19, 2007 directive, I personally communicated the directive to a large number of contacts that I work with on Guantanamo Bay detainee issues. Those contacts included attorneys and other personnel at the DoD Office of Detainee Affairs, the Staff Judge Advocate Office at Guantanamo Bay and United States Southern Command (SOUTHCOM), Central Command (CENTCOM), Joint Staff, the Office of the Administrative Review of the Detention of Enemy Combatants (OARDEC), the Offices of the General Counsel for the Army, Navy, and Air Force, as well as the Judge Advocate Generals for the Army, Navy, and Air Force and other attorneys within DoD Office of General Counsel. I requested that the contacts communicate the directive to all appropriate people within their offices.

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

Dated: 8 Feb 08

KAREN L. HECKER

APPROVED FOR PUBLIC FILING

PROTECTED INFORMATION REDACTED

DECLARATION OF REAR ADMIRAL MARK H. BUZBY

I, Mark H. Buzby, am a Rear Admiral in the United States Navy with 28 years of active duty service. I currently serve as the Commander of Joint Task Force – Guantanamo (JTF-GTMO), at Guantanamo Bay, Cuba (Guantanamo). I have held this position since May 22, 2007. As such, I am directly responsible for the successful execution of the JTF-GTMO mission to conduct detention and interrogation operations and exploit intelligence in support of the Global War on Terror, coordinate and implement detainee screening operations, and support law enforcement and war crimes investigations. In my capacity as Commander, I oversee all personnel assigned to, and all operations of, JTF-GTMO. The information provided herein is true and correct to the best of my knowledge, information, and belief.

1. On 19 December 2007, the Office of DoD General Counsel reiterated DoD guidance to preserve all information relating to detainees. After receipt of that reiterated guidance, I directed that this command confirm 100% compliance. As a result of actions undertaken in connection with my direction, I have learned the information contained herein with regard to digital recording systems that exist at the detention facilities operated by JTF-GTMO.

2. The detainees at JTF-GTMO are housed in various detention camps. Activities taking place in Camps 4, 6, Echo, and Iguana have been recorded 24 hours per day, seven days per week (hereafter referred to as "full-time") by means of digital video recording (DVR) systems that are part of the video monitoring systems that guards use to ensure good order and discipline within the camps. In January 2008, it was brought to my attention that such DVR systems may have been automatically overwriting video data

contained on recording devices, at predetermined intervals. That is, only a specified number of days' worth of recorded data could be retained on the recording devices at a time. The specified interval varies from system to system, as discussed below. Thus, a DVR device on any given day would retain only data from the specified interval. On each day, therefore, images from dates older than the applicable interval were automatically overwritten. After an initial review determined that old data was being overwritten automatically, on January 16, 2008, I ordered that all recording on such systems be suspended to ensure that no data currently stored thereon was lost. The interval at which recorded data was overwritten was determined by the technological storage capacity of each recording device and was not deliberately or purposely set by JTF-GTMO. JTF-GTMO has not yet identified technology currently available for use at JTF-GTMO that would allow for the preservation of all data recorded on a full-time basis.

3. In the camp known as Camp 4, a DVR system was utilized to record the day-to-day activities of detainees and staff within the camp. The system was part of the video-only monitoring system that was used by the guard staff to oversee activities in the camp for the purpose of ensuring good order and discipline within the camp. On or about May 18, 2006, the DVR system then in use was disabled to assist with the investigation of a disturbance in Camp 4. This particular DVR system was not then again placed into service in the camp. JTF-GTMO has possession of the original DVR system, consisting of four separate recording devices, which was installed in Camp 4. We suspect that the recording devices contain recorded data but we are unable technologically to confirm whether data remains on the recording devices. JTF-GTMO will continue to preserve the

recording devices and any data thereon. Following the events of May 18, 2006, a more limited DVR system was installed in Camp 4 to monitor and record data pertaining to Yankee Block in Camp 4, the only block housing detainees following the disturbance of May 18, 2006. JTF-GTMO is in possession of the DVR system, consisting of one recording device, used for this purpose, but we are unable technologically to confirm whether data remains on the recording device. JTF-GTMO will continue to preserve the recording device and any data thereon.

4. On or about February 1, 2007, JTF-GTMO installed a new DVR system in Camp 4. This system, like the previous system, recorded video images observed by video-only cameras that were displayed on video monitoring screens in a central control booth. Like the original systems, the images that were recorded with this system consisted of video images of each housing bay and common areas of the camp. The DVR system operated on a full-time basis. Much of the information recorded showed routine or mundane day-to-day activities, such as guards patrolling camp areas, as well as detainees eating, praying, or recreating. As with the original systems, the video monitoring was done for security purposes and guard staff monitored the screens upon which the video images were shown. Recorded data was not routinely examined. As noted above, the technical capacities of the DVR system's recording devices were such that at certain intervals there was automatic overwriting of previously recorded data. Camp 4 used four such recording devices. Now that those systems have been suspended per my January 16, 2008 order, the information preserved on the four devices consists of data from the periods December 29, 2007 through January 16, 2008; January 5, 2008 through January 16, 2008; December 29, 2007 through January 16, 2008; and December

30, 2007 through January 16, 2008. As noted above, the system was disabled on January 16, 2008, to preserve data that was stored thereon.

5. In the camp known as Camp 6, a video-only DVR system (such as that used in Camp 4) was in use from on or about December 7, 2006, the date of the Camp's opening, until January 16, 2008. The system was part of the video-only monitoring system that was used by the guard staff to oversee activities in the camp for the purpose of ensuring good order and discipline within the camp. The Camp 6 DVR system covered common areas within the camp, but not cells. Camp 6 used four recording devices in its DVR system that automatically overwrote data in the same way, and under the same conditions that data was overwritten in Camp 4. Now that those systems have been suspended per my January 16, 2008 order, the information preserved on the four devices consists of data from the periods December 1, 2007 through January 16, 2008; December 3, 2008 through January 16, 2008; December 4, 2007 through January 16, 2008; and December 21, 2007 through January 16, 2008. As noted above, the system was disabled on January 16, 2008, to preserve data that was stored thereon.

6. In the camp known as Camp Echo, a DVR system (such as was used in Camps 4 and 6) was utilized to record the day-to-day activities of detainees in the cells within the camp. The system was part of the video-only monitoring system that was used by the guard staff to oversee activities in the camp for the purpose of ensuring good order and discipline within the camp. A DVR system that was installed on an unknown date prior to April 12, 2006, operated until on or about October 1, 2006. That system consisted of two DVRs. JTF-GTMO is in possession of the DVR system used until October 1, 2006. JTF-GTMO is unable technologically to confirm whether data is stored on the devices

that were part of that old system. The old system was replaced by a new DVR system similar to the systems used in Camp 4 and Camp 6. The new DVR system monitored and recorded, full-time, the inside of detainees' cells and the back gate, but not common areas. As noted above, this new DVR system was disabled on January 16, 2008, to preserve data that was stored thereon. The information preserved on the new DVR system consists of data from the periods December 20, 2007, through January 16, 2008; and November 24, 2007, through January 16, 2008.

7. In the camp known as Camp Iguana, a DVR system (such as was used in Camps 4, 6, and Echo) was utilized to record the day-to-day activities of detainees within the camp. The system was part of the video-only monitoring system that was used by the guard staff to oversee activities in the camp for the purpose of ensuring good order and discipline within the camp. This system was replaced on or about October 12, 2007 by a new DVR system. JTF-GTMO is in possession of the old recording device that was replaced, but is unable technologically to confirm whether data is stored thereon. From October 12, 2007, until January 16, 2008, the new DVR system operated in the camp on a full-time basis when detainees were present in the camp. JTF-GTMO has not housed detainees permanently in this camp since the detainees classified as being "No Longer Enemy Combatants" were transferred from Guantanamo in November 2006. Since these detainees were transferred, Camp Iguana has been used primarily to facilitate habeas counsel visits with their detainee clients. As permitted by the Protective Orders applicable in these cases, JTF-GTMO conducted video monitoring of such meetings to ensure the safety and security of counsel and detainees. Video images of such meetings, therefore, would have been automatically recorded in the same manner as other video

images observed by the system. This system also has a standard overwrite function at a specified interval, but any recordings from December 26, 2007 through January 16, 2008, the date it was disabled, have been preserved. Recorded data of counsel-detainee meetings was not examined. As noted above, the system was disabled on January 16, 2008, to preserve data that was stored thereon.

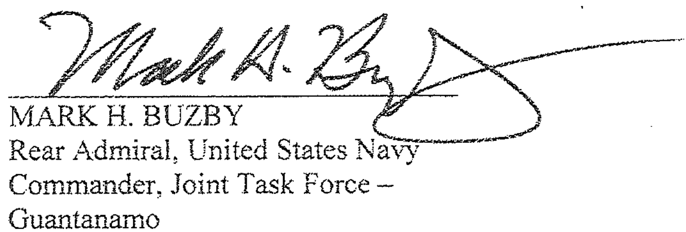
8. Following my order on January 16, 2008 suspending operation of the automatic DVR systems, and at the present time, JTF-GTMO has installed an "on-demand" recording capability in Camps 4, 6, Echo, and Iguana, that is separate from the recording devices that were used prior to January 16, 2008. During this period of suspension, the guard staff has been directed to video record, on an "on-demand" basis, all significant events in Camp 4, 6, Echo, and Iguana, including: forced cell extractions; medical emergencies; incidents of suspected/alleged guard misconduct; incidents of possible self harm or injuries to detainees; significant damage to government property; mass disturbances by detainees; and any other similar events. The on-demand recording now used contains data that continues to be preserved and the guard staff has been directed to preserve any such recordings. Although the on-demand recording system is connected to the video monitoring system in each camp, it is not connected to the DVR system recording devices that contain previously preserved data, and can in no way jeopardize the data that is currently preserved on those devices.

9.

10. This declaration is not intended to provide a complete catalogue of all video and/or audio recordings made of detainees held at JTF-GTMO, although I am informed, and believe, that it is a complete discussion of those JTF-GTMO video and/or audio monitoring systems that included a standard recording feature as to which recorded data was automatically overwritten at specified intervals.

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

Date: 8 FEB 08



MARK H. BUZBY
Rear Admiral, United States Navy
Commander, Joint Task Force – Guantanamo

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ABD AL-RAHIM HASSAIN MOHAMMED AL-NASHIRI, Petitioner,	)
v.	) Civil Action No. 08-cv-1207 (RCL)
BARACK H. OBAMA, *et al.*, Respondents.	)

[PROPOSED] ORDER

Petitioner's Motion for a Preservation Order is hereby DENIED.

IT IS SO ORDERED.

Date:

ROYCE C. LAMBERTH
UNITED STATES DISTRICT JUDGE