UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ZAYN AL ABIDIN MUHAMMAD HUSAYN, Petitioner vs. ROBERT GATES, Respondent	Civil Action No. 08-cv-1360 (RWR)

RESPONDENT'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO PETITIONER'S MOTION FOR DISCOVERY AND PETITIONER'S MOTION FOR SANCTIONS

Petitioner's 213 numbered requests for discovery far exceed the narrow scope of discovery authorized in these habeas corpus proceedings under the Court's Case Management Order (CMO). Discovery in habeas corpus proceedings is much more tightly constrained than discovery in ordinary civil actions, and the CMO contains provisions carefully drafted to ensure that a habeas corpus petitioner has a fair opportunity to contest his detention while paying heed to the Supreme Court's warning that the law "must accord the Executive substantial authority to apprehend and detain those who pose a real danger to our security," Boumediene v. Bush, 128 S. Ct. 2229, 2277 (2008). In accordance with the mandatory disclosure provisions of the CMO (§§ I.D.1 and I.E.1), Respondent has made extensive disclosures. Petitioner's various objections to Respondent's disclosures either simply misconstrue the terms of the CMO or assume, without any basis, that Respondent has failed to comply with the disclosure requirements. As for Petitioner's requests for additional discovery under CMO § I.E.2, most of Petitioner's requests fail to satisfy the requirements set out by this Court. Under CMO § I.E.2, a habeas petitioner

must begin with specific, credible factual allegations "show[ing] reason to believe that the petitioner may . . . be able to demonstrate that he is confined illegally," Harris v. Nelson, 394 U.S. 286, 300 (1969), and must use those factual allegations as a starting point for making narrowly tailored requests for specific evidence to contest his detention. Petitioner's motion essentially turns this process backward, making sweeping requests for broad, vaguely defined categories of evidence and gambling that some of his requests will turn up information that might later help Petitioner undermine the Government's allegations. Fishing expeditions of this sort are not authorized by the CMO and are not consistent with traditional habeas corpus practice in U.S. courts.

Respondent objects to Petitioner's requests for the reasons stated in this memorandum and in the attached Respondent's Supplement to Memorandum in Opposition to Petitioner's Motion for Discovery, which Respondent hereby incorporates by reference. This memorandum states objections to Petitioner's motion by category. The Supplement states Respondent's objections to each of Petitioner's 213 requests in sequence, referring as appropriate to the categorical objections stated in this memorandum.

Petitioner's Motion for Sanctions for the Spoliation of Evidence (Sept. 21, 2009), which seeks additional discovery based on the Court's inherent authority to issue sanctions for destruction of evidence, should be denied. The motion is essentially an improper request for discovery; neither the grounds for the motion nor the relief it seeks fits within the principles governing sanctions for destruction of evidence in ordinary civil proceedings, and the relief Petitioner seeks is far out of proportion to the destruction of the interrogation tapes at issue. Moreover, the Court should stay any further evidentiary proceedings into the grounds for Petitioner's motion because such proceedings could interfere with an ongoing criminal

investigation into the destruction of the interrogation tapes at issue.

BACKGROUND

I. Disclosures Required by the CMO

The Supreme Court held in Boumediene v. Bush, 128 S. Ct. 2229 (2008), that the Constitution guarantees military detainees at Guantanamo Bay an opportunity to contest their detention in federal habeas corpus proceedings. At the same time, the Court recognized that inquiry by civilian courts into military detention operations during a time of ongoing conflict would entail a host of serious difficulties that do not arise in ordinary domestic civil litigation—for example, the potential for the litigation to interfere with ongoing military and national security operations, the risks inherent in providing military captives access to sensitive information, and the challenges of evaluating evidence and information obtained in military or intelligence operations on foreign soil. The Court recognized that it was simply incongruous to expect that detainee habeas corpus litigation could proceed under the open-ended procedures that operate in everyday domestic civil litigation, or even the narrower procedures that federal courts employ in typical statutory habeas corpus actions. The Court took it as given that courts hearing habeas corpus challenges would craft procedures appropriate to the wartime military context. See id. at 2276 ("[I]t does not follow that a habeas corpus court may disregard the dangers that detention in these cases was intended to prevent. . . . Certain accommodations can be made to reduce the burden habeas corpus proceedings will place on the military without impermissibly diluting the protections of the writ."); id. at 2276–77 ("In considering both the procedural and substantive standards used to impose detention to prevent acts of terrorism, proper deference must be accorded to the political branches. . . . The law must accord the Executive substantial authority to apprehend and detain those who pose a real danger to our security.").

In keeping with the Court's direction in Boumediene, this Court's Case Management Order set out a special procedural framework to govern the present detainee habeas corpus challenges. (dkt. nos. 48, 62). This framework includes mechanisms for compulsory disclosures and for narrow additional discovery designed to afford detainees an ample opportunity to challenge their detention before the Court while still recognizing that the writ of habeas corpus is an extraordinary equitable remedy, see Munaf v. Geren, 128 S. Ct. 2207, 2220–21 (2008). The framework also properly accounts for the unique circumstances of this litigation and its "uncommon potential" to interfere with military and national security interests, Hamdi v. Rumsfeld, 542 U.S. 507, 533 (2004) (plurality opinion). Judge Hogan first set out this framework in an order dated November 6, 2008. Later, after the Government moved for reconsideration, Judge Hogan significantly narrowed several provisions of the CMO by an order dated December 16, 2008.

The first major component of this disclosure scheme is CMO § I.D.1, which requires the Government to disclose "exculpatory evidence," defined as evidence "that tends materially to undermine the information presented to support the government's justification for detaining the petitioner." The Government must search "reasonably available evidence" for such exculpatory material. CMO § I.D.1. The term "reasonably available evidence" has a specific meaning within the CMO—the order defines "reasonably available evidence" as "evidence contained in any information reviewed by attorneys preparing factual returns for all detainees" and "any other evidence the government discovers while litigating habeas corpus petitions filed by detainees at Guantanamo Bay."

The second component of the framework is CMO § I.E.1, which requires the Government, at the petitioner's request, to disclose certain materials that the Government relies

on to justify the petitioner's detention:

> (1) any documents or objects in the government's possession that the government relies on to justify detention; (2) all statements, in whatever form, made or adopted by the petitioner that the government relies on to justify detention; and (3) information about the circumstances in which such statements of the petitioner were made or adopted.

CMO § I.E.1.

Finally, CMO § I.E.2 provides a mechanism for "limited discovery" of additional material with a sufficient showing of good cause. CMO § I.E.2 embodies the Supreme Court's recognition that "[a] habeas petitioner, unlike the usual civil litigant in federal court, is not entitled to discovery as a matter of ordinary course." CMO § I.E.2 (quoting Bracy v. Gramley, 520 U.S. 899, 904 (1997)). A request for additional discovery under § I.E.2 must meet four requirements: First, it must be "narrowly tailored, not open-ended." Second, it must "specify the discovery sought"; that is, it must be sufficiently particular. Third, it must "explain why the request, if granted, is likely to produce evidence that demonstrates that the petitioner's detention is unlawful." Petitioner's showing on this third requirement must have a foundation in "specific allegations" indicating that "the petitioner may, if the facts are fully developed, be able to demonstrate that he is confined illegally and therefore entitled to relief." Harris v. Nelson, 394 U.S. 286, 300 (1969), cited in CMO § I.E.2. Finally, a request for additional discovery must "explain why the requested discovery will enable the petitioner to rebut the factual basis for his detention without unfairly disrupting or unduly burdening the government." If a request meets all four requirements, the Court may exercise its discretion to grant the request. However, the CMO also recognizes the Court's discretion to deny a request for discovery even if the request satisfies all four requirements of CMO § I.E.2. See CMO § I.E.2 (stating that the Court "may" grant a properly supported request).

The CMO leaves it to the Court to resolve disputes relating to the various required disclosures and to receive and evaluate requests for limited discovery under CMO § I.E.2. On May 18, 2009, the parties submitted a joint proposal for a scheduling order to permit fair, orderly, and expeditious resolution of this case. See Joint Status Report and Proposed Scheduling Order (dkt. no. 161) (May 18, 2009). The Court adopted the parties' proposal without modification as a Scheduling Order (dkt. no. 167) on May 22, 2009. The Scheduling Order set deadlines for the various disclosures required by the CMO, with the Government's final disclosures due July 17, 2009. The Scheduling Order also established a framework for the orderly resolution of disclosure and discovery disputes, specifying that "[a]ny and all" such disputes "shall be resolved through consolidated proceedings." The Scheduling Order provided that Petitioner would file a consolidated motion comprising any challenges to the adequacy of Respondent's disclosures and any requests by the Petitioner for limited additional discovery under CMO § I.E.2. If the Government discloses additional information based on a ruling on Petitioner's consolidated motion, the Scheduling Order authorizes a second motion for limited discovery based on the newly disclosed information. The Scheduling Order accounts for previously unforeseeable discovery needs by explicitly providing for modification of or departure from the agreed discovery framework on a properly supported motion. The Scheduling Order stays the deadlines for Petitioner's filing of his traverse (which is ordinarily required shortly after the completion of the Government's disclosures, see CMO § I.G) and briefs for judgment on the record pending the final resolution of disclosure and discovery disputes.

II. Respondent's Disclosures and Proceedings to Date

The Government filed a factual return and supporting material in this case on April 3, 2009. The Government's factual return included six volumes of diaries written by Petitioner

before his capture, in which Petitioner recounts detailed information about his activities and plans. It also included a propaganda video recorded by Petitioner before his capture in which Petitioner appears on camera expressing his solidarity with Usama Bin Ladin and al-Qaida. The factual return does not rely on any statements made by Petitioner after his capture. See Factual Return ¶ 20 n.2. A large volume of material required to be disclosed under CMO §§ I.D.1 and I.E.1 was either included with the factual return or disclosed at the same time.

Respondent made further disclosures after the filing of the factual return. On May 27, 2009, Respondent provided Petitioner's counsel with the original Arabic pages of the six diary volumes relied upon in Respondent's factual return. On May 29, 2009, Respondent completed its disclosures pursuant to CMO § I.E.1, and on July 17, 2009, Respondent completed its disclosures pursuant to CMO § I.D.1, except for a small number of documents that had not yet been cleared for disclosure by the appropriate agencies. Respondent disclosed these documents on August 19, 2009. Lastly, on September 29, 2009, Respondent disclosed some additional documents to Petitioner under its continuing obligation to produce material later identified as exculpatory, see CMO § I.D.2.

The Court's Scheduling Order required Petitioner to present any and all objections to Respondent's disclosures and any requests for discovery in a consolidated motion. Petitioner filed this consolidated motion on September 14, 2009, asserting numerous objections to Respondent's disclosures to date as well as numerous requests for additional limited discovery under CMO § I.E.2.

One week later, on September 21, 2009, Petitioner filed a Motion for Sanctions for Spoliation of Evidence based on the destruction of postcapture interrogation tapes by the CIA. The request is styled as a motion for sanctions, but the only relief it seeks is additional discovery.

By minute order dated September 30, 2009, and a Memorandum Order dated October 1, 2009, this Court granted in part and denied in part an earlier request by Petitioner for access to certain documents created by Petitioner. The order requires Respondent to produce these documents to Petitioner's counsel by November 30, 2009.

ARGUMENT

I. Respondent's requests far exceed the narrow scope of habeas discovery under the CMO and are wholly improper.

Petitioner's numerous requests for information do not meet the requirements for additional discovery under the CMO, for several reasons: the requests are vague and open-ended, they are not supported by facts suggesting that the Government has improperly withheld evidence, and they do not provide allegations or explanations that suggest that a specific search for evidence is likely to produce information that will demonstrate that the Petitioner's detention is unlawful.

The disclosure and discovery provisions in the CMO are narrow, focused, and bounded. These provisions were designed to be carefully constrained because habeas corpus litigation, even in domestic civilian cases, normally does not and should not entail the kind of wide-ranging discovery seen in ordinary civil litigation. See CMO § I.E.2 (citing Bracy v. Gramley, 520 U.S. 899, 904 (1997) and Harris v. Nelson, 394 U.S. 286, 300 (1969)). The provisions also reflect the Supreme Court's admonition that military and national security interests—as well as merely practical concerns involved in obtaining evidence on foreign soil during a military conflict—counseled against an expansive discovery regime. See CMO at 1 (noting that the Supreme Court plurality in Hamdi v. Rumsfeld, 542 U.S. 507 (2004), had stressed the need for challenges to military detention to proceed with caution, 542 U.S. at 539); CMO § I.E.2 (citing

the Hamdi plurality's direction that habeas proceedings "may be tailored to alleviate their uncommon potential to burden the Executive at a time of ongoing military conflict," 542 U.S. at 534); see also Hamdi, 542 U.S. at 532 (plurality opinion) (warning against a "futile search for evidence buried under the rubble of war"). Thus, the disclosure and discovery provisions of the CMO focus on ensuring that the Government produces the evidence that it relies on to support the petitioner's detention, ensuring that the Government produces reasonably available evidence that would undermine the Government's case, and permitting targeted requests for specific additional evidence when a petitioner is able to demonstrate that the request will produce evidence that petitioner should not be detained. See CMO §§ I.D.1, I.E.1, I.E.2.

Petitioner has filed a barrage of discovery requests that far exceeds the narrow scope of discovery permitted under the CMO. Petitioner's Appendix of Discovery Requests consists of 96 numbered requests containing 213 numbered subparts. A number of these 213 subparts in turn contain multiple broad requests. See, e.g., Request Nos. 16, 50, 56. Such a large number of requests might be justified if each of the requests were targeted, specific, and grounded in a proper showing of good cause as required by CMO § I.E.2. But Petitioner's requests do not pursue narrow, focused lines of inquiry based on specific and credible allegations or evidence. Instead, they merely take shots in the dark, hoping to hit something that might fit into some yet-to-be-conceived factual theory. Petitioner's haphazard, dragnet-style requests largely fail to meet any of the § I.E.2 criteria.

Many of the requests do not approach the level of specificity required by § I.E.2, which requires that requests be "narrowly tailored, not open-ended," CMO § I.E.2(1), and that they "specify the discovery sought," CMO § I.E.2(2). Instead, they vaguely seek "information" or "evidence" without specifying the kind of discovery sought. See, e.g., Request No. 66. Or they

seek "information" or "evidence" "tending to undermine," "tending to indicate," "tending to show," "tending to suggest," "suggesting," or "indicating" some hypothesis or its opposite. See, e.g., Request Nos. 29a–j, 41, 45, 61, 62, 63, 65, 66, 67, 69, 71, 72, 75. Such vague, open-ended requests are not even appropriate in ordinary civil litigation, where the parties have much greater latitude in discovery. See Fed. R. Civ. P. 34(b)(1)(A) (rule requiring that a request for production of documents must "describe with reasonable particularity each item or category of items" requested); Wagener v. SBC Pension Benefit Plan—Non-Bargained Program, 2007 WL 915209 at *1 (D.D.C. 2007) (Lamberth, J.) (denying motion to compel response to request in civil litigation for "documents tending to support or refute" certain contentions, finding that the request was "vague and ambiguous"). Such requests certainly are not appropriate under the CMO in this case. See Sadkhan v. Obama, 608 F. Supp. 2d 33, 39 (D.D.C. 2009) (Collyer, J.) ("A discovery request that starts with 'any and all' is almost certainly in trouble under the CMO . . . .").

Also, in most of his requests, Petitioner does not state any reason to believe the request will produce evidence helpful to his case. Indeed, in most of his requests Petitioner does not provide his own account of events described in his diaries or elsewhere in the Government's factual return, and does not even summarily deny any of the Government's allegations. Instead, he merely asserts that it is conceivable that additional evidence undermining the Government's case could exist somewhere, in some form. The CMO does not permit Petitioner to demand that the Government conduct a laborious and burdensome search for materials that might or might not exist based solely on speculation that responsive materials conceivably could contain exculpatory information that the Government has failed to disclose. The CMO authorizes discovery only when the petitioner "explain[s] why the request, if granted, is likely to produce

evidence that demonstrates that the petitioner's detention is unlawful," CMO § I.E.2(3) (emphasis added), and "explain[s] why the requested discovery will enable the petitioner to rebut the factual basis for his detention without unfairly disrupting or unduly burdening the government," CMO § I.E.2(4). See Bin Attash v. Obama, 628 F. Supp. 2d 24, 32 (D.D.C. 2009) (Lamberth, J.) ("[Petitioner] has pointed to nothing beyond mere speculation that [additional documents suggesting facts that would be helpful to petitioner's case] exist. Absent a specific and colorable claim that the government has not produced material exculpatory evidence, the Court cannot order the government to reconduct a search or produce evidence to the Court for in camera review."); Sadkhan v. Obama, 608 F. Supp. 2d 33, 41 (D.D.C. 2009) (Collyer, J.) (declining request for discovery based on a judgment that it amounted to a "fishing expedition that is entirely inconsistent with [habeas corpus] proceedings").

The vagueness and ambiguity of Petitioner's requests have made it difficult for Respondent to frame specific objections. For purposes of objecting to Petitioner's requests in this memorandum and the attached supplement, Respondent has accorded reasonable interpretations to Petitioner's requests. In particular, when faced with a request that did not specify the discovery sought, Respondent has assumed that Petitioner seeks documents and other tangible things. When faced with a request that does not identify specific documents or information, but instead refers to evidence "tending to undermine" a specified proposition, or employs similar phrases, Respondent has assumed that these general requests are intended to track CMO § I.D.1; that is, Respondent has assumed that Petitioner seeks disclosure of evidence that "tends materially to undermine" the specified propositions and is found within "reasonably available

evidence" as currently defined by the CMO.[1] Cf. LNU v. Obama, 2009 WL 3030648, at *1 (D.D.C. Sept. 23, 2009) (Lamberth, J.) (construing scope of discovery requests as following the bounds of the CMO).[2]

II. The Court should reject Petitioner's challenges to the scope of Respondent's searches for exculpatory information and the form of Respondent's disclosures.

A. The Court should adhere to the CMO's original definition of "reasonably available evidence" and should deny Petitioner's request to compel the Government to conduct additional searches for exculpatory evidence outside the bounds of the CMO.

The CMO's exculpatory disclosure provision, § I.D.1, requires the Government to disclose "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." The CMO specifically defines the phrase "reasonably available evidence" as "evidence

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[1] As discussed in greater detail in the next section, see infra section II.A, Petitioner's memorandum requests in a footnote that the Court expand the CMO's definition of "reasonably available evidence" and require the Government to conduct a new search for exculpatory information encompassing a broader collection of documents. Respondent objects to Petitioner's request for the reasons explained in section II.A.

[2] Petitioner also should not be permitted to introduce new evidence or allegations to support his requests or substantially recraft his requests in his reply memorandum, because Petitioner's failure to present a basis for his requests in his initial memorandum prevents the Government from properly responding. See D.D.C. Local Civil R. 7(a) (requiring that a motion include a "statement of the specific points of law and authority that support the motion"); Scott v. Office of Alexander, 522 F. Supp. 2d 262, 274 (D.D.C. 2007) (Kollar-Kotelly, J.) ("It is a well-settled prudential doctrine that courts generally will not entertain new arguments first raised in a reply brief"); Pub. Citizen Health Research Group v. Nat'l Insts. of Health, 209 F. Supp. 2d 37, 43–44 (D.D.C. 2002) (Kollar-Kotelly, J.) (noting that presenting an argument for the first time in a reply does not permit the opposing party to competently respond to the argument). The Court should treat any requests or arguments not presented in Petitioner's initial memorandum as waived. At the very least, if the Court is inclined to grant any request for discovery based on new information, new arguments, or recrafted requests presented in Petitioner's reply memorandum, the Court should permit Respondent to submit a surreply responding to Petitioner's reply arguments.

contained in any information reviewed by attorneys preparing factual returns for all detainees" and "other evidence the government discovers while litigating habeas corpus petitions filed by detainees at Guantanamo Bay." CMO § I.D.1. Thus, the Government's obligation to conduct an affirmative search for exculpatory information is explicitly limited to documents that Government attorneys have reviewed in the course of preparing factual returns and litigating habeas corpus cases brought by Petitioner or other Guantanamo detainees.

Petitioner now seeks to expand the scope of Respondent's search. In footnote 21 of his memorandum, Petitioner requests that the Court compel Respondent to expand its search under CMO § I.D.1 for exculpatory information to encompass information collected by the Guantanamo Review Task Force created under Executive Order No. 13,492, 74 Fed. Reg. 4897 (Jan. 27, 2009). Petitioner, however, has provided no rationale for this expansion, and certainly has not provided a rationale substantial enough to justify the extraordinary burden the requested additional search would impose on the Government. Given this burden, Petitioner cannot justify, and this Court should not order, the extraordinary delay this request would entail.

As the Government explained in a previous filing, the scope of "reasonably available evidence" under the CMO includes records of Combatant Status Review Tribunal (CSRT) and Administrative Review Board (ARB) proceedings compiled by the Office for the Administrative Review of the Detention of Enemy Combatants (OARDEC), representing hundreds of thousands of hours of effort over several years, and further includes pertinent intelligence information compiled on each habeas petitioner from the intelligence community by the Joint Intelligence Group of Joint Task Force–Guantanamo (JIG), representing thousands of hours of effort. See Resp't's Mot. for Recons. of Orders Regarding Discovery from the Guantanamo Review Task Force and Mot. for Consol. Order Regarding Task Force Discovery (dkt. nos. 157, 158), England

Decl. ¶¶ 5–8; cf. Abdullah v. Bush, 2009 WL 3080507, at *2 (D.D.C. Sept. 28, 2009) (Roberts, J.) (interpreting CMO as requiring search of JIG and OARDEC consolidated assemblages of information). Judge Hogan, as the coordinating judge, adopted this limited definition of "reasonably available evidence" on reconsideration in response to the Government's argument that if the definition were not cabined in this manner, the exculpatory disclosure requirements of the CMO would impose an impossible burden on the Government without offering any clear benefit to habeas corpus petitioners or to the Court. See Order (dkt. no. 62).

As Petitioner notes in his memorandum, several judges of this Court have issued orders expanding the scope of "reasonably available evidence" to encompass materials collected by the Guantanamo Review Task Force. But Petitioner has not presented any specific reasons that would justify amending the CMO in this manner in his case in particular. Petitioner's request for a broader search is therefore not a properly supported motion for amendment of the CMO.

Moreover, in this particular case, amending the CMO to require a wide-ranging search of Guantanamo Review Task Force documents for additional exculpatory information would delay the resolution of this litigation for months. The materials to which the Guantanamo Review Task Force has access on its network database (the "Task Force Network database") can most readily be understood as including, first, the detainee information provided to the Guantanamo Review Task Force pursuant to the Executive Order by various national security and law enforcement agencies,[3] and, second, access to the Office of Military Commissions—Prosecution ("OMCP")

[3]These agencies include the Central Intelligence Agency; the Federal Bureau of Investigation; Department of Defense components other than the Office of Military Commissions—Prosecution (OMCP), including the Defense Intelligence Agency (DIA), the National Security Agency, the Office for the Administrative Review of the Detention of Enemy Combatants (OARDEC), and the Office of Detainee Affairs; the National Counterterrorism (continued...)

database, including source materials such as FM40 interview reports prepared by the Criminal Investigation Task Force (CITF) and intelligence reporting from other agencies, as well as prosecutorial working files and prosecutorial work product.

To facilitate compliance with orders by this Court requiring searches of detainee information in the Task Force Network database, Respondents have loaded detainee information provided to the Guantanamo Review Task Force by the aforementioned agencies, and source documents contained in the OMCP database, into a Concordance database with search capabilities equivalent to those that the Government attorneys assigned to the Guantanamo habeas litigation have previously used in performing searches of materials made available to them. [redacted] If the Court expanded the scope of exculpatory disclosures to encompass Guantanamo Review Task Force documents, Government attorneys would have to conduct reviews of these [redacted] documents to determine whether they pertain to Petitioner (or instead, for example, other individuals with similar names) and whether they contain any exculpatory information. The Government would also have to conduct additional searches beyond these [redacted] documents to identify additional documents that do not refer to Petitioner by name but nevertheless might contain exculpatory information concerning, for example. other individuals or groups discussed in the Government's factual return or information pertaining to the

[3](...continued)
Center (NCTC), the Department of State, the Department of Justice, and the Department of Homeland Security.

credibility of individuals who provided statements that the Government relies upon in its factual return. The Government has not determined how many additional documents would need to be examined beyond the [redacted] documents identified by the preliminary name search, but it is easily possible that these documents would also number [redacted] Requiring a search of Guantanamo Review Task Force material would therefore impose an undue burden on the Government. Indeed, Judge Huvelle recently suggested in Mohammed v. Obama, No. 05-cv-2385 (D.D.C.), that requiring the Government to review approximately 13,000 potentially responsive documents contained in the Guantanamo Review Task Force database—far fewer documents than would have to be reviewed in this case—would be excessive. See Tr. of H'rg, Mohammed v. Obama, No. 05-cv-2385 (D.D.C. Aug. 12, 2009) (excerpt attached as Exhibit 1).

Additional searches also would not be likely to produce significant additional information that would demonstrate that Petitioner's detention is unlawful, especially given that a large part of the Government's case for detaining Petitioner is drawn from diaries and a propaganda video that Petitioner wrote and recorded before his capture. In the diaries, Petitioner describes his work as a facilitator for the Khaldan training camp, see generally Factual Return ¶ 30, Zubaydah Diary Vols. IV–V, and his contacts with Usama Bin Ladin, see, e.g., Factual Return ¶ 44 (citing Zubaydah Diary Vol. IV at 92, Vol. V at 11, 17–18). He provides a detailed account of his joining with hostile fighters, assisting the escape of fighters from Afghanistan, and preparing for attacks against American forces in Afghanistan after September 11, 2001. See, e.g., Factual Return ¶¶ 49–62, 65–66 (citing Zubaydah Diary Vol. VI at 14–15, 27–94). He writes of plans to attack the United States, see, e.g., Factual Return ¶¶ 72–73 (citing Zubaydah Diary Vol. V at 17, Vol. VI at 89–90), and expresses solidarity with Usama Bin Ladin and al-Qaida, see, e.g., Factual Return ¶ 47 (citing Zubaydah Diary Vol. VI at 86). Petitioner expresses similar

sentiments in the video, saying that "We and the [S]heikh are one. We have been working together for almost 10 years, but we were hoping to keep this work secret . . . hidden." Factual Return ¶ 46 (quoting AZ Video Translation). Respondent has provided copies of the diaries and the video to Petitioner in original and translated forms, and Petitioner has not disavowed them; indeed, he has described the diaries in particular as containing a "critically important" account of his activities. Mem. in Supp. of Mot. for Order Requiring the Government to Return the Original Unredacted Copies of Pet'r's Diary and Other Writings, and to Allow Pet'r to Share His Writings with Counsel (Jan. 15, 2009) at 2.

Because Petitioner has not provided any case-specific reasons to expand the scope of the CMO, because expanding the CMO would place a tremendous burden on the Government and prolong this litigation, and because the value of additional searches is dubious in light of the nature of the Government's case against Petitioner, the Court should decline to expand the CMO's definition of "reasonably available evidence."

B. The CMO permits Respondent to disclose information to the Petitioner in redacted or summarized form.

Petitioner's Request Nos. 17b, 17j, 50, 86, 95a, and 96a should be rejected to the extent that they assert that Petitioner is entitled to documents in unredacted form. The CMO permits Respondent to disclose information to Petitioner's counsel in redacted or summarized form when the material disclosed to Petitioner's counsel contains all the information that is subject to disclosure. This holds true for information submitted by the Government in support of its factual return, exculpatory information produced pursuant to CMO § I.D.1, and other information disclosed pursuant to the CMO. There is no basis for Petitioner's assertion that the CMO requires production of documents in complete, unredacted form.

Petitioner is mistaken when he argues that the presence of unredacted exculpatory information in a document supports an inference that redacted information in the same document contains other exculpatory information that the Government has failed to disclose. Disclosure of exculpatory information is not evidence of failure to disclose exculpatory information.

Indeed, this Court has explicitly recognized in this case that the Government may properly redact certain information from documents disclosed to Petitioner, such as names of Government personnel. See Husayn v. Gates, 2009 WL 544492, at *1 (D.D.C. 2009) (Roberts, J.) (holding that it was appropriate for the Government to redact the names of providers of medical treatment from medical records produced to Petitioner).[4]

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[4]In Al Odah v. United States, 559 F.3d 539 (D.C. Cir. 2009) (per curiam), the D.C. Circuit set out three requirements that must be met before a district court may compel disclosure of classified information submitted to a court ex parte and in camera. See id. at 542–43, 547. The Al Odah analysis is not directly applicable in this case, because the Al Odah decision pertained to information that the Government had submitted in factual returns in support of detention for ex parte, in camera review by the court, but had not disclosed to Petitioner's counsel. See id. at 542–43. In this case, on the other hand, the dispute pertains to information that has not been presented to the Court in support of detention and is not itself required to be disclosed under the Case Management Order, but is contained within documents that also contain information that Respondent has disclosed to Petitioner. In this case, an order compelling disclosure would be appropriate only if Petitioner showed either that Respondents had erroneously redacted some material that is required to be disclosed under some provision of the Case Management Order, or that a request for the redacted material met the requirements for additional discovery under CMO § I.E.2. Petitioner has not shown that any of Respondent's redactions were improper, and also has not even attempted to show that the Court should order disclosure of redacted material under CMO § I.E.2.

Even if Al Odah were applicable in these circumstances, an order compelling disclosure would not be appropriate unless the Court first conducted an ex parte, in camera review of the redacted information. The court in Al Odah held that a district court may only compel disclosure of redacted material only if it determines (1) that the information is "relevant and material," that is, helpful to the petitioner's habeas case, id. at 544; (2) that disclosure of the information is "necessary to facilitate" "meaningful review" by the court of "the cause for detention and the Executive's power to detain," id. at 545; and (3) that "alternatives to disclosure would not effectively substitute for unredacted access." Id. at 547. The court further noted that even when all these requirements are met, "additional issues" not considered in the Al Odah case still might

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III. Petitioner's numerous requests for records of and information about statements he has made are not supported by the CMO and fail to meet the narrow tailoring, specificity, and good cause requirements of CMO § I.E.2.

Petitioner's requests asking the Court to compel the Government to compile and disclose a wide range of additional information about statements he made either before his capture or while in U.S. custody are not supported by the CMO, which only requires disclosure of statements relied upon by the Government, information about the circumstances in which those statements were made, and any statements that would tend to undermine the Government's case against Petitioner. CMO § I.E.1. Petitioner's requests also do not amount to properly supported requests for limited discovery under § I.E.2, because they make blanket requests for information of dubious value, rather than making targeted requests for evidence that could help Petitioner's case in a specific way.

A. Petitioner's request for statements other than statements relied upon by the Government is not supported by the CMO, and Petitioner has not shown that his request is likely to produce exculpatory evidence.

Petitioner's requests for statements made by Petitioner other than those relied upon by the Government (Pet'r's Mem. at 5–9, Request Nos. 1, 2a–2p, 2r–2ff) is not authorized by CMO § I.E.1(2). Respondent has fully complied with CMO § I.E.1(2)'s requirement to disclose "all statements, in whatever form, made or adopted by the petitioner that the government relies on to justify detention." The provision clearly contemplates only disclosure of statements by Petitioner that the government relies on to justify detention, in whatever form those statements were made or recorded. It does not even arguably require disclosure of separate statements Petitioner has made about the same topics.

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[4](...continued)
weigh against compelling disclosure. See id. at 548.

The Government has satisfied the terms of CMO § I.E.1(2) by providing Petitioner's counsel with copies of all statements by the Petitioner that the Government relies on to justify detention: specifically, a propaganda video and certified English translations of six volumes of diaries recorded by Petitioner before his capture. Respondent further provided Petitioner with copies of the original handwritten Arabic pages of the diaries. In addition, the Government has disclosed information, to the extent available, concerning the circumstances under which Petitioner recorded the portions of the diary and video that the Government relies on for purposes of detention, as required by CMO § I.E.1(3). The Government has also disclosed statements by Petitioner that materially undermine information that the Government relies upon to justify detention as required by CMO § I.D.1, including statements in which Petitioner made assertions undermining the portions of the diary or video relied on in the factual return.

Petitioner argues that these extensive disclosures are insufficient, but Petitioner's argument is based on a misreading of the CMO. Petitioner contends that the CMO requires Respondent to disclose all of Petitioner's statements relating to subjects described in the factual return, even if those statements are entirely consistent with the information in the factual return. (Pet'r's Mem. at 5–9, Request Nos. 1, 2a–2p, 2r–2ff). But the plain terms of CMO § I.E.1(2) require disclosure of only "all statements, in whatever form, made or adopted by the petitioner that the government relies on to justify detention" (emphasis added). No plausible reading of the provision would match up with Petitioner's request for disclosure of all statements relating to information that the government relies on to justify detention.

Petitioner argues that his request is consistent with orders compelling discovery in other Guantanamo habeas cases, but Petitioner simply mischaracterizes those orders. None of the orders cited in Petitioner's memorandum required disclosure of all other statements by a habeas

petitioner relating to the subject matter of the statements relied upon by the Government. Rather, these orders only required disclosure of alternative documents and recordings memorializing the specific statements the Government relied upon (that is, other forms of the statements relied upon), or at most required disclosure of other, later statements describing or referring back to those earlier statements. None of these orders extended further to require the Government to identify and produce all statements that merely relate to the same subject matter as the statements relied upon by the Government. See, e.g., Al Odah v. United States, 2009 WL 382098, at *1 (D.D.C. Feb. 12, 2009) (Kollar-Kotelly, J.) (ordering production of statements about statements relied upon by the Government); Zemiri v. Obama, 2009 WL 311858, at *1 (D.D.C. Feb. 9, 2009) (Kollar-Kotelly, J.) (ordering production of statements about statements relied upon by the Government); Al-Adahi v. Obama, 607 F. Supp. 2d 131, 132 (D.D.C. 2009) (Kessler, J.) (ordering production of "interrogation logs or plans for those interrogations of the Petitioner that elicited statements upon which the Government relies to justify its detention"); Ali Qattaa v. Obama, 2009 WL 691130, at *1 (D.D.C. Mar. 13, 2009) (Huvelle, J.) (ordering production of other records of the statements relied upon by the Government); see also Abdullah v. Bush, 2009 WL 3080507, at *1 2 (D.D.C. Sept. 28, 2009) (Roberts, J.) (interpreting CMO § I.E.1(2) as requiring production of other records of the statements relied upon by the Government).

Contrary to Petitioner's argument, other judges of this Court have repeatedly rejected broad-ranging requests for all statements made by habeas petitioners. See, e.g., Sadkhan v. Obama, 608 F. Supp. 2d 33, 41 (D.D.C. 2009) (Collyer, J.) (denying request for all statements made by a habeas petitioner who the Government acknowledged had consistently maintained his innocence, finding that "[h]aving scores of exhibits that demonstrate [petitioner's claims of

innocence] would serve no purpose and would unduly burden the Government and this habeas process"); Hatim v. Obama, No. 05-cv-1429 at *2–3 (D.D.C. Feb. 17, 2009) (dkt. no. 217) (Urbina, J.) (denying request for all statements by petitioner and only granting request for production of other records of statements relied upon by the Government); Al-Ghizzawi v. Obama, 600 F. Supp. 2d 5, 7 (D.D.C. 2009) (Bates, J.) (same).

An additional, crucial distinction is that the orders cited by Petitioner were issued in circumstances where the Government was relying on records memorializing statements that detainees made under interrogation, such as interrogation reports. Some of these petitioners argued that such interrogation reports might not be the best available evidence of what a petitioner actually said in an interrogation. In this case, by contrast, the statements the Government is relying on are not recorded interrogations of Petitioner; rather, they are statements contained within a diary and a video recorded by the Petitioner before his capture, not under interrogation. The Government has already provided Petitioner's counsel with images of the original handwritten Arabic pages of Petitioner's diary, as well as a copy of the video recorded by Petitioner. The Government has also provided Petitioner's counsel with information known to the Government about the circumstances under which Petitioner recorded these statements, as required by CMO § I.E.1(3). Thus, Petitioner has no basis for arguing that he has been denied access to the best and most direct evidence of his statements. Moreover, under CMO § I.D.1, Respondent has already provided Petitioner with statements by the Petitioner that conflict with or otherwise undermine the diary and video statements the Government relies on, so Petitioner also has not been denied access to evidence that might contradict his statements or the Government's interpretation of those statements.

CMO § I.E.2 also does not support Petitioner's request for statements relating to subjects

discussed in the factual return. Petitioner's blanket request for all statements relating to the same subject matter as his prior statements is not "narrowly tailored." In light of the disclosures Respondent has already made, the request also is not "likely to produce evidence that demonstrates that the petitioner's detention is unlawful." Petitioner also has not shown that these requests "will enable the petitioner to rebut the factual basis for his detention without unfairly disrupting or unduly burdening the government." Additional statements by Petitioner that merely corroborate the Government's contentions logically cannot undermine those contentions. Consequently, Respondent's disclosure of the diary volumes relied upon by the Government to support Petitioner's detention, copies of Petitioner's original handwritten Arabic diary volumes, and the propaganda video relied upon by the Government fully satisfy the requirements of CMO § I.E.1(2).

B. Petitioner's requests for additional information about his diaries are not likely to produce exculpatory information.

Petitioner's various requests for additional information and evidence concerning the diary materials cited in Respondent's factual return should be denied, because Petitioner has not shown how any of the requests would uncover exculpatory information. Indeed, Petitioner has maintained in his papers that his diaries contain an accurate account of his activities before his capture.

Respondent acknowledged in the factual return that Petitioner's diaries indicate that he suffered cognitive impairment from a shrapnel injury for a number of years. Factual Return ¶ 23. Respondent has also searched for information materially undermining the reliability of the diary as required by CMO § I.D.1, including any information that suggests that the passages relied upon by the Government did not recount true events, were not written by Petitioner before his

capture as described in the factual return, or had a meaning other than the meaning accorded to them in the factual return. The Government disclosed any such information to Petitioner's counsel. The Government also provided Petitioner's counsel with copies of the diaries, including copies of the original untranslated Arabic pages, to permit Petitioner and his counsel to evaluate the diaries themselves. To the extent that Petitioner's Request Nos. 54, 55, and 56 simply mirror the requirements of the CMO or the disclosures Respondent has already made, Petitioner's requests should be denied.

To the extent that Petitioner requests that the Court compel a search for additional information that might raise doubts about his diaries, Petitioner's requests are not justified by any provision of the CMO and are not likely to lead to the discovery of exculpatory evidence. It first bears noting that Petitioner has not himself disclaimed authorship of the diaries or directly disputed the Government's interpretation of any specific portion of the diaries. On the contrary, Petitioner has maintained that the diary volumes relied upon by Respondent contain an accurate account of his activities. See Mem. in Supp. of Mot. for Order Requiring the Government to Return the Original Unredacted Copies of Pet'r's Diary and Other Writings, and To Allow Pet'r to Share His Writings with Counsel (Jan. 15, 2009) at 2 ("Volumes 5 and 6 [of Petitioner's diaries] were drafted before Petitioner's arrest and date most closely to the time of his arrest. They are critically important to show what Petitioner was doing during this time frame . . . ."). This is reason enough by itself to deny Petitioner's requests regarding the diaries. Cf. Al-Ansi v. Obama, 2009 WL 2600751, at *1 (D.D.C. Aug. 20, 2009) (Kessler, J.) (rejecting request for production of documents concerning the competence of translators who had produced translations relied on by the Government, noting that "Petitioner has not identified any specific words, phrases, or statements from any evidence upon which the Government relies in the

Factual Return that he alleges was not properly translated, summarized, or paraphrased.").

Moreover, Petitioner's requests for additional searches for information about the diaries are simply too broad and are not supported by a showing of good cause as required by CMO § I.E.2. Further evidence that Petitioner suffered any mental illness or cognitive impairment (Request No. 54) would not be relevant without any indication that one of the specific diary passages relied upon by the Government was actually linked to the mental or cognitive impairment. Petitioner's request for such evidence therefore does not fall within the scope of CMO § I.D.1 or § I.E.2(1), (2), (3), or (4).

Petitioner's request for "evidence tending to indicate that Petitioner's diary has been altered, damaged, or otherwise redacted in any way" since his capture (Request No. 55) also fails the requirements of § I.E.2(1) and (2), because it is impossible for the Government to discern what form of discovery Petitioner is seeking or what criteria the Government could use to identify responsive material. Cf. Wagener v. SBC Pension Benefit Plan—Non-Bargained Program, 2007 WL 915209 at *1 (D.D.C. 2007) (Lamberth, J.) (denying motion to compel response to request in civil litigation for "documents tending to support or refute" certain contentions, finding that the request was "vague and ambiguous"). It is also unclear what further relevant information Petitioner's request could produce. The only way evidence of alteration, damage, or redaction of the diaries following Petitioner's capture would be relevant would be to show that the Government had doctored, falsified, or misconstrued the diary passages it is relying on. But the Government has already disclosed copies of the original Arabic pages of the diary volumes to Petitioner and his counsel, so Petitioner is already able to assess the authenticity of the diaries or dispute the Government's interpretation of specific passages. Petitioner fails to explain how evidence of alteration, damage, or redaction of the diaries

following Petitioner's capture could be relevant for any other reason. Such evidence therefore would not fall within the scope of CMO § I.D.1 or § I.E.2(3) or (4).

Petitioner's request for evidence that the diary was written in "multiple voices" (Request No. 56) is equally puzzling. The best place to look for information about the content of Petitioner's diaries or any aspects of the writing style Petitioner used in composing them is in the diaries themselves. Petitioner and his counsel are already fully able to evaluate and make arguments based on the content and style of the diaries, and in any event, evidence that the Petitioner wrote the diary in "multiple voices" would not necessarily suggest that the diary was not an accurate account of events.

Petitioner's request for information suggesting that diary passages are "unable to be substantiated" (Request No. 56) also is not authorized by the CMO. Information that suggested a diary passage relied upon by the Government did not reflect true events would likely undermine the Government's case, would therefore amount to exculpatory evidence, and therefore would have already disclosed to Petitioner. But evidence that simply indicated that the Government had not found other evidence independently verifying or corroborating a certain diary passage would not undermine the Government's case. Petitioner remains free to point out any ambiguity or lack of corroborating evidence in a future merits proceeding. Petitioner's request seeking evaluations of the diaries by the Government or Government agents also has no basis in the CMO, for the reasons explained at length in section IV.I below.

Accordingly, Petitioner's Request Nos. 54, 55, and 56 should be denied.

C. There is no basis for seeking disclosure of information about the circumstances in which Petitioner made exculpatory statements while in U.S. custody.

There is no basis in the CMO for Petitioner's requests for additional information

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regarding the circumstances of exculpatory statements made by Petitioner while in U.S. custody (Pet'r's Mem. at 15–18; Request No. 15).

As required by CMO § I.D.1, Respondent conducted a search for statements made by Petitioner that materially undermine the information presented in support of detention, and disclosed those statements to Petitioner's counsel. Petitioner further seeks information about the circumstances under which Petitioner made such statements, arguing that the circumstances themselves may be exculpatory and should be disclosed under CMO § I.D.1.

Petitioner's request is based on the notion that Petitioner made some of these exculpatory statements under coercive interrogation while in U.S. custody, and protestations of innocence made under such conditions have special meaning. Petitioner and other detainees have argued that information obtained under torture is inherently unreliable, see, e.g., Am. Pet. for Writ of Habeas Corpus ¶¶ 79–82 (Aug. 25, 2008), and in the interest of streamlining this case and avoiding litigation of such issues, in this case the Respondent has forgone any reliance on statements the Petitioner made while in U.S. custody. But Petitioner now argues that while "the reliability of an inculpatory statement is undermined by evidence [of] duress, the reliability of an exculpatory statement made under duress is enhanced." Pet'r's Mem. at 18 n.28. Petitioner has not presented any scientific evidence, or even anecdotal evidence, to support this bit of speculative pop psychology, and it should be rejected for that reason alone. Moreover, Petitioner's argument is inconsistent with the normal process of factfinding in U.S. courts. Petitioner is essentially asking the Court to presume that statements favorable to Petitioner are reliable but that unfavorable statements made under the same or similar circumstances are not reliable. Tipping the scale in Petitioner's favor in such a manner would cut at the very foundations of the adversarial process—courts do not look to the content of a statement to

determine whether the statement is reliable; rather, they assess the reliability of a statement to determine the value of its content.[5]

Moreover, Petitioner's request implicates discovery into details of the CIA's detention and interrogation program. As explained in declarations accompanying earlier filings by Respondent, see, e.g., Resp't's Opp'n to Pet'r's Mot. for Relief from Improper Classification (June 12, 2009), [redacted] many details of this program remain extremely sensitive and highly classified. Petitioner has not demonstrated a sufficient need for information about the details of the CIA detention program to justify the significant burdens such an inquiry would impose on the Government.

Accordingly, Petitioner's Request No. 15 should be denied.

D. The Court has already ruled on Petitioner's requests for access to Petitioner's other writings.

Petitioner's motion for discovery also reiterated Petitioner's earlier request for production of certain diaries and other documents created by the Petitioner (Pet'r's Mem. at 27–31 & n. 45, Request Nos. 77, 78a–d). After the filing of Petitioner's motion, the Court

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[5]Petitioner also asserts in a footnote that information regarding the circumstances of exculpatory statements is required by § I.E.1(3) of the CMO. See Pet'r's Mem. at 18 n.28. But the terms of that provision expressly limit its reach to statements "that the government relies on to justify detention." See CMO § I.E.1(2)–(3). Thus, the terms of the CMO in fact provide reason to deny Petitioner's request. See Al-Ansi v. Obama, 2009 WL 2600751, at *1 (D.D.C. Aug. 20, 2009) (Kessler, J.) ("The Government is required to produce 'circumstances information' only for those statements upon which the Government relies."); Rabbani v. Obama, 2009 WL 2588702, at *4 (D.D.C. Aug. 20, 2009) (Urbina, J.) ("Section I.E.1 requires the production of 'circumstances' evidence only for those statements made by the petitioner on which the government relies.").

granted in part and denied in part Petitioner's earlier motion seeking these materials, requiring Respondent to produce certain documents sought by the Petitioner by November 30, 2009, and otherwise denying Petitioner's motion. See Mem. Order at 11 (Oct. 1, 2009). To the extent that Request Nos. 77, 78a, 78b, 78c, or 78d are intended to reiterate any requests that the Court denied in its Memorandum Order, the Court should deny the requests based on the Court's prior denial and because the requests do not meet the narrow tailoring and good cause requirements of CMO § I.E.2(1), (3), and (4).

IV. Most of Petitioner's other requests to compel additional searches and disclosures are based on misreading of the CMO or fail to meet the requirements for limited discovery under CMO § I.E.2.

Most of Petitioner's remaining requests ask the Court to compel the Government to search for and disclose additional categories of documents that are not required to be disclosed under the CMO, and most of the requests do not meet the mandatory narrow tailoring, specificity, and good cause requirements of CMO § I.E.2. Thus, all but one of these requests should be denied for the reasons explained in the sections below. Respondent does not object to Petitioner's Request No. 49, as explained below.

A. Requests that simply reiterate the Government's obligation to disclose exculpatory evidence under CMO § I.D.1 should be denied; Petitioner has not presented any evidence suggesting that the Government has not complied with § I.D.1.

As Respondent stated in Section I above, in instances where Petitioner requested material "tending to undermine" a certain proposition, or used similar general language, Respondent has assumed that Petitioner's requests incorporate the same materiality criterion as CMO § I.D.1, and seek only "reasonably available evidence" as currently defined under the CMO. Under this reading, many of Petitioner's requests simply seek material that Respondent agrees is required to

be disclosed as exculpatory information under CMO § I.D.1. Respondent, however, has already searched for and disclosed exculpatory information under § I.D.1, and Petitioner has not presented evidence that Respondent has failed to comply with the CMO. Thus, any requests that effectively reiterate the requirements of CMO § I.D.1 in general terms should be denied. See, e.g., Bin Attash v. Obama, 628 F. Supp. 2d 24, 32 (D.D.C. 2009) (Lamberth, J.) ("Absent a specific and colorable claim that the government has not produced material exculpatory evidence, the Court cannot order the government to reconduct a search . . . .").

Request Nos. 12, 13a–e, 17d, 17g, 27a–d, 29d–e, 29g–h, 29j, 35a–h, 35d–e, 37a–c, 39a–c, 41a–d, 46, 58b–e, 58h, 71b–c, 71f–g, and 75a–b do not appear to extend further than Respondent's disclosure obligations under § I.D.1, and these requests should be denied in full. In addition, some other requests (Request Nos. 9, 16, 17a–c, 17e, 17h–j, 18, 19, 20, 21, 22, 23, 24, 25, 26, 28, 29a–c, 29i, 30, 31a, 33, 34, 35c, 36, 38, 40, 42, 43, 47, 48, 50, 54, 55, 56, 58a, 61, 64, 68a–b, 71a, 71d–e, 72) are partly encompassed within Respondent's disclosure obligations under § I.D.1, as described in more detail in the Supplement to this memorandum. These requests should be denied to the extent that they merely reiterate the requirements of the CMO.

B. The Government's obligation under the CMO to disclose documents or objects relied upon by the Government extends only to documents or objects relied upon by the Government.

CMO § I.E.1(1) only requires disclosure of documents and objects relied upon by the Government in support of Petitioner's detention, so the Court should reject Petitioner's requests for disclosure of documents and objects that are merely mentioned in the factual return and are not relied upon by the Government.

The CMO entered by the Court on November 6, 2008, initially contained a provision requiring broad disclosure of all documents and objects in the Government's possession that

were "referenced in the factual return." However, on December 16, 2008, in response to a Government motion for reconsideration, the Court amended this provision so that it only required disclosure of documents and objects "that the government relies on to justify detention." CMO § I.E.1(1). The amendment narrowed the scope of the Government's disclosure obligations under CMO § I.E.1. Hence, in Bin Attash v. Obama, 628 F. Supp. 2d 24 (D.D.C. 2009), Judge Lamberth denied a request for objects mentioned in the factual return, noting that to grant such a request "would be to ignore the language of the Amended CMO and revert to the Original CMO, which required production of the objects 'referenced in the factual return.'" Id. at 37 & n.7. The Court noted that Petitioner remained free to argue in merits proceedings that the Court should draw certain conclusions from the fact that the Government had not produced the objects. Id. at 37 n.7.

Petitioner requests numerous documents and objects that are mentioned in exhibits to the factual return but that are not relied on by the Government in support of Petitioner's detention (Pet'r's Mem. at 9–12, Request Nos. 3, 4, 5, 6, 7, 8, 10, 11): training manuals, passports, a computer, electronic parts, a document containing a phone number connected to ISN 682, [redacted] Respondent's factual return in support of detention does not rely on the existence or characteristics of any of these particular objects as part of the factual basis for detaining Petitioner, and they therefore do not fall within the scope of CMO § I.E.1. Respondent has not permanently disclaimed any right to amend the factual return to rely on such objects, but the CMO does not provide any basis for disclosure of such objects unless Respondent has first amended its factual return in such a manner.

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C. Requests for additional corroborating evidence or neutral evidence have no basis in the CMO and are not likely to lead to the production of evidence that rebuts the factual basis for Petitioner's detention.

No provision of the CMO requires the Government to produce, at Petitioner's request or otherwise, additional evidence that would corroborate the Government's case for detention or that would neither support nor undermine the Government's case for detention. And no provision of the CMO provides a vehicle by which Petitioner can compel the Government to further enhance the allegations it has made in its factual return. Accordingly, the Court should reject requests that seek additional evidence corroborating the Government's account or that seek neutral evidence that does not affect the Government's case one way or the other.

Petitioner argues that without further "clarification, detail or evidentiary support," he will not have a "meaningful opportunity to challenge the allegations upon which Respondents base his detention." Pet'r's App'x at 32. Respondent's allegations are in fact quite detailed and extensive. To the extent Petitioner finds them unsatisfactory, however, Petitioner can "challenge the allegations upon which Respondents base his detention" in the traverse required under CMO ¶ II.G or in subsequent merits proceedings. Petitioner is free in his papers to tell his own side of the story or to argue that the Government's factual return and supporting material are susceptible to multiple interpretations, are too vague to justify Petitioner's detention, or are legally insufficient to justify detention. What Petitioner cannot do is force the Government through discovery to provide additional evidence or detail to support or enhance its allegations. See Sadkhan v. Obama, 608 F. Supp. 2d 33, 40 (D.D.C. 2009) (Collyer, J.) (denying request for discovery and stating, "The Government has presented the evidence on which it intends to rely to support its allegations. It does not need to search for more evidence in support of its case."); Bin Attash v. Obama, 628 F. Supp. 2d 24, 37 & n.7 (D.D.C. 2009) (Lamberth, J.) (noting that a

petitioner can point to a dearth of corroborating evidence in merits proceedings but cannot rely on the absence of evidence to justify a request for discovery); id. at 36–37 (denying request for "primary documents" underlying reports contained in the factual return).

Petitioner suggests that the disclosure of additional evidence corroborating the Government's case conceivably might indirectly help Petitioner by helping him identify other evidence that undermines the Government's case. See, e.g., Pet'r's App'x at 32. But such wishful thinking is not enough to satisfy CMO § I.E.2's requirement that requests for additional limited discovery be narrowly tailored and likely to lead to the discovery of information that undermines the Government's case. Indeed, even in the context of U.S. domestic criminal proceedings, the Government's responsibility to disclose evidence under Brady v. Maryland, 373 U.S. 83 (1963), extends only to materially exculpatory evidence and does not require disclosure of additional evidence of guilt or neutral evidence. The Supreme Court has held that criminal prosecutors are "under no duty to report . . . to the defendant all that they learn about the case and about their witnesses," United States v. Agurs, 427 U.S. 97, 109 (1975) (quoting In re Imbler, 387 P.2d 6, 14 (Cal. 1963)), and there is "no constitutional requirement that the prosecution make a complete and detailed accounting to the defense of all police investigatory work on a case," Moore v. Illinois, 408 U.S. 786, 795 (1972).

Accordingly, Petitioner's Request Nos. 3, 4, 5, 6, 7, 8, 10, 11, 73, 74, 81a–b, 82, 83, 84, 87, 88, 89, 90, 91a -c, 93a -c, and 94 should be denied in full, and Request Nos. 20, 31b, 50, 60, 63, 73, 74, and 86 should be denied to the extent that they seek or request that the Government search for additional evidence corroborating the Government's account or neutral evidence, as further detailed in the Supplement.

For similar reasons, the Court should not require the Government to search for and

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disclose information or evidence that does not undermine the Government's case in support of Petitioner's detention, but only suggests that the Government cannot prove more serious or detailed contentions beyond the contentions stated in the factual return. Petitioner's task in this proceeding is to defeat the contentions that the Government has presented to the Court. He cannot prevail simply by defeating some set of hypothetical contentions of his own choosing. No purpose would be served by compelling the Government to search for information that would help Petitioner refute allegations the Government has not made, nor does the CMO provide any basis to require disclosure of this kind of information. Such disclosure is not required by CMO § I.D.1, because that provision only contemplates disclosure of evidence that would undermine information the Government has actually "presented to support the government's justification for detaining the petitioner." CMO § I.E.2 also does not authorize additional discovery of such information, because that provision similarly only authorizes discovery of information that will "enable the petitioner to rebut the factual basis" the Government has presented in favor of detention.[6]

For example, for purposes of this proceeding the Government has not contended that Petitioner had any personal involvement in planning or executing either the 1998 embassy bombings in Nairobi, Kenya, and Dar-es-Salaam, Tanzania, or the attacks of September 11, 2001. Thus, there is no basis for Petitioner to demand that the Government search for evidence that Petitioner was not involved in or lacked prior knowledge of these attacks, as Petitioner

[6]Some of Petitioner's requests for additional corroborating evidence seek evidence to corroborate contentions that the Government has not in fact made in this case. Because the CMO does not authorize even discovery of additional evidence corroborating the Government's case, petitioner's request for additional corroborating evidence on matters Respondent does not assert should be denied.

requests in Request Nos. 19 and 21. The Government also has not contended in this proceeding that at the time of his capture, Petitioner had knowledge of any specific impending terrorist operations other than his own thwarted plans. Accordingly, there is no reason or basis to compel the Government to search for information indicating that Petitioner had no knowledge of such impending terrorist operations, as Petitioner requests in his Request No. 66.

Accordingly, Petitioner's Request Nos. 17c, 17f, 17h–i, 19, 21, 23, 25, 29a–c, 29i, 32, 35c, 35f, 48, 58a, 62, 63, 66, 68a–c, 71c, 72, and 92 should be denied to the extent that they seek information about contentions not made by the Government, as further detailed in the Supplement.

In addition, the CMO does not require the Government to search for evidence that undermines evidence that the Government has produced only as exculpatory evidence under CMO § I.D.1 and that the Government does not otherwise rely on to support Petitioner's detention. Requests for evidence that might undermine exculpatory evidence also fail to meet the requirements of CMO § I.D.1(1), (3), and (4), because evidence that is at odds with evidence that undermines the Government's case would not necessarily further undermine the Government's case—it might be neutral, or it might even help the Government's case. Accordingly, the Court should reject Request Nos. 35g and 35h, which seek evidence to undermine information the Government disclosed as exculpatory evidence. see Factual Return ¶ 64.a.ii nn.18, 19.

D. Information that suggests only that Petitioner was not a "member" of al-Qaida is consistent with the Government's factual allegations against Petitioner and therefore is not exculpatory.

Evidence indicating that Petitioner is not a member of al-Qaida or had ideological differences with al-Qaida is not inconsistent with the factual allegations made in the Government's factual return, because the Government has not contended in this proceeding that

Petitioner was a member of al-Qaida or otherwise formally identified with al-Qaida. Instead, the Government's detention of Petitioner is based on Petitioner's actions as an affiliate of al-Qaida. Petitioner's various requests seeking statements by Petitioner or other evidence simply suggesting that Petitioner is not a member of al-Qaida or had ideological differences with al-Qaida (Pet'r's Mem. at 13–15; Request Nos. 10, 14, 44, 50, 59, 64, 68a, 95f, 96i–j) therefore should be denied.

Respondent does not contend that Petitioner was a "member" of al-Qaida in the sense of having sworn bayat (allegiance) or having otherwise satisfied any formal criteria that either Petitioner or al-Qaida may have considered necessary for inclusion in al-Qaida. Nor is the Government detaining Petitioner based on any allegation that Petitioner views himself as part of al-Qaida as a matter of subjective personal conscience, ideology, or worldview. Rather, Respondent's detention of Petitioner is based on conduct and actions that establish Petitioner was "part of" hostile forces and "substantially supported" those forces. See Factual Return at 23 n.13.

Respondent conducted a thorough search for information undermining the Government's allegations regarding Petitioner's conduct and actions as required by the CMO, and it disclosed all such information identified in the search. This included statements in which Petitioner denied being a member of al-Qaida or expressed ideological disagreements with al-Qaida in a manner or a context in which the statement arguably suggested Petitioner's conduct and actions were not or were not likely to have been aligned with al-Qaida. Thus, to the extent that Petitioner's requests simply seek information undermining the Government's allegations about his conduct, Petitioner's requests should be denied because they simply reiterate the requirements of the CMO. See supra section IV.A.

In light of the nature and extent of the Government's allegations, however, statements and evidence that suggest only that Petitioner was not formally a "member" of al-Qaida, but do not undermine any aspect of the Government's account of Petitioner's conduct and actions, do not materially undermine the Government's asserted basis for detention. As such, statements and evidence of this kind do not fall within CMO § I.D.1, nor are they likely to result in the discovery of exculpatory evidence for purposes of CMO § I.E.2. See Hamlily v. Obama, 616 F. Supp. 2d 63, 75, 76–77 (D.D.C. 2009) (Bates, J.) (noting, upon considering the legal standard for detention, that the Court "will, by necessity, employ an approach that is more functional than formal," and noting that "if the evidence demonstrates that an individual did not identify himself as a member, but . . . rendered frequent substantive assistance to al Qaeda, whether operational, financial or otherwise, then a court might conclude that he was a 'part of' the organization").

For the same reason, any evidence that suggested only that Petitioner may have had ideological disagreements with or reservations about al-Qaida, its leaders, or its methods, but that would not undermine Respondent's allegations about the actions Petitioner actually performed or planned, would not fall within CMO § I.D.1, and its production would not be likely to result in the discovery of exculpatory evidence for purposes of CMO § I.E.2. In simple terms, the issue in this habeas corpus action is Petitioner's conduct. Private or public renunciations of violence would not abrogate the Government's authority to detain a person who has espoused violence in his actions and has demonstrated through his conduct that he poses a national security threat to the United States consistent with principles derived from the traditional law of war.

Accordingly, Petitioner's Request Nos. 10, 14, 44, 50, 59, 64, 68a, 95f, and 96i–j should be denied to the extent that they seek statements by Petitioner or other evidence that suggests

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only that Petitioner was not a "member" of al-Qaida or disagreed with al-Qaida's ideology or methods, but that does not bear on the conduct or actions attributed to Petitioner by the Government.

For similar reasons, Petitioner's Request No. 64 should be denied to the extent that it seeks "evidence . . . that tends to support that Petitioner . . . was not a member of the Taliban." The Government does not contend in its factual return that Petitioner was a "member" of the Taliban. The Court should also deny Petitioner's Request No. 63 to the extent it seeks unspecified information suggesting that another individual not named in the factual return, Ibn al Shaykh al Libi, disagreed with the philosophy or methods of Usama Bin Ladin or al-Qaida. Again, the relevant issue in this case is Petitioner's conduct—Petitioner's personal philosophy is not relevant except to the extent that it is reflected in his actions, and the personal philosophies of other persons are even farther afield from being relevant.

Petitioner also makes several requests related to material cited in footnote 13 of the Government's Factual Return (Pet'r's Mem. n.3; Request Nos. 2q, 58f–g), which clarifies the Government's allegations regarding the Petitioner's relationship with al-Qaida. The material in footnote 13 of the Government's factual return was included to define the contours of the Government's position to help the Court and Petitioner understand precisely what the Government alleges and what it does not allege about the relationship between Petitioner and Usama Bin Ladin and al-Qaida. The Government did not present the information or material related in this footnote as evidence justifying Petitioner's detention, and concedes that the Court should not consider the custodial statements referenced in this footnote except for the sake of understanding how the Government has cabined its allegations. See Factual Return ¶ 48 n.13. Accordingly, there is no basis for disclosure of the information requested by Petitioner's Request

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Nos. 2q, 58f, or 58g.

E. Evidence that indicates that a witness or other source did not supply information against Petitioner is not categorically exculpatory; such evidence is exculpatory only in circumstances where the Government's contentions suggest that the witness or source would have been expected to supply information against Petitioner.

Evidence that a given witness or source did not provide information against Petitioner—what Petitioner terms "negative identification" evidence—does not necessarily undermine the Government's case. Rather, such evidence is almost always merely neutral. Such evidence is exculpatory, and subject to disclosure under CMO § I.D.1, only in circumstances where, if the Government's contentions were accurate, the witness or source would have been expected to provide information against the Petitioner. Thus, Petitioner's various requests for information about whether certain individuals and sources could not or did not provide information about Petitioner sweep too broadly; requiring the Government to search for and disclose all evidence of this sort would defy both the terms of the CMO and common sense.

As discussed above, the CMO's disclosure and discovery provisions only authorize discovery of evidence that tends to materially undermine the Government's case against Petitioner; it does not authorize discovery of neutral evidence that neither supports nor undermines the Government's case. Evidence that a witness or other source did not provide information about Petitioner would amount to exculpatory evidence in some instances, but in other instances such information would simply be neutral. Whether such evidence is exculpatory or neutral depends on specific details and circumstances. For example, if the Government contended that A attended a gathering, and a witness who was at the gathering stated that A was not there, the witness's statement would most likely be exculpatory. If the witness did not say one way or another whether A was at the gathering, the witness's statement probably would not

be exculpatory. If the witness merely stated that he did not see A at the gathering, whether the witness's statement was exculpatory might depend, for example, on whether the gathering was a small meeting where four persons were present or a large meeting where 400 persons were present—common experience suggests that the witness probably would have seen A in a small, intimate meeting, but common experience would not necessarily suggest that the witness would have seen A amid a crowd of hundreds.

Respondent searched for and disclosed evidence about witness statements that tended to materially undermine the Government's case against Petitioner, including, for example, instances where detainees claimed not to recognize or claimed not to know individuals who the Government contends associated with them. Petitioner asserts, however, that he is entitled to broader disclosure of several categories of evidence about whether certain sources did not provide information against Petitioner. Request No. 10 argues, for example, that a document containing names of al-Qaida members would be exculpatory if the list did not include Petitioner. And Request Nos. 31a, 33, and 43 suggest that any statements that do not identify Petitioner as a terrorist associate should be treated as equivalent to statements that suggest that Petitioner is not a terrorist associate. See Request Nos. 31a, 33, 43 (seeking evidence of certain individuals' "inability to identify or name Petitioner" as a terrorist associate).

Petitioner's extreme notion of what constitutes exculpatory evidence ignores the practical purposes of the disclosure and discovery provisions of the CMO. Adopting Petitioner's definition would require the Government to search for and disclose a large volume of irrelevant evidence to Petitioners' counsel, which would impose an enormous burden on the Government without serving any legitimate purpose.

Requests attempting to categorize neutral evidence as exculpatory evidence should be

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rejected. Petitioner's request for a list of al-Qaida members (Pet'r's Mem. at 19 n.11, Request No. 10) should be rejected because the list would not be exculpatory for purposes of the CMO even if Petitioner was not named on the list. Respondent has not relied on the list to support Petitioner's detention, nor has it asserted that the list described in the document is a comprehensive roster of all al-Qaida associates. Indeed, as explained above, see supra section IV.D, Respondents have not contended in this proceeding that Petitioner is a member of al-Qaida, so whether Petitioner appeared on a list of al-Qaida members would not be relevant in this case.

Petitioner's Request Nos. 31a, 33, and 43 should be rejected to the extent that they request information suggesting that certain individuals did not provide information identifying Petitioner as a terrorist associate or lacked knowledge of Petitioner's activities. These requests pertain to Sayf al-Adl and four detainees identified as ISN 753, ISN 1453, ISN 1457, and ISN 1461. Information suggesting that none of these persons provided information specifically identifying Petitioner as an associate of terrorists would not undermine the Government's allegations against Petitioner. See Bin Attash v. Obama, 628 F. Supp. 2d 24, 31–32 (D.D.C. 2009) (Lamberth, J.) (holding that an interrogation report in which a detainee "[did] not mention petitioner's name as someone who was involved" was merely neutral, not exculpatory).

Also, the Government's factual return alleges that one of these individuals—Sayf al-Adl—had direct dealings with Petitioner, and the Government accordingly searched reasonably available evidence for information suggesting that Sayf al-Adl did not know Petitioner or did not know of his ties to al-Qaida. But the Government's factual return does not either assert or implicitly depend on any contention that any of the other four individuals had direct knowledge of Petitioner's activities. The Government has never contended that al-Qaida is a closed circle in

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which every member, associate, or operative of the group knows everything there is to know about every other member, associate, or operative. See generally Factual Return ¶ 13 (noting that at least some al-Qaida associates maintained or tried to maintain autonomy). Accordingly, evidence that ISN 753, ISN 1453, ISN 1457, or ISN 1461 was unfamiliar with Petitioner's terrorist activities would not be exculpatory.

F. Petitioner's requests purportedly aimed at testing the credibility of sources who provided information to the Government are not tailored to discovery of relevant exculpatory evidence and are not supported by specific facts or allegations.

Petitioner's requests asking the Court to compel the Government to search for, compile, and produce further information about sources cited in the factual return are not authorized by the CMO and are not otherwise warranted. The Government's searches and disclosures have satisfied the demands of the CMO, and the Petitioner has not demonstrated reasons that would warrant an order compelling additional searches and disclosures.

Petitioner has already been provided with extensive information bearing on the credibility of statements relied upon by the Government. In keeping with its obligations under CMO § I.D.1, the Government searched reasonably available evidence for any information that tended to materially undermine the reliability of the statements relied upon by the Government in its factual return. This included information suggesting that a source should be considered generally not credible. It also included information that undermined the credibility of specific statements relied upon by the Government, such as evidence of rewards or coercion that render specific statements suspect and evidence reflecting later statements recanting, qualifying, or contradicting the statements relied upon by the Government, including statements submitted in connection with other habeas corpus proceedings before this Court. Respondent disclosed such

information to Petitioner's counsel under CMO § I.D.1. Also, the interrogation reports disclosed to Petitioner typically contain information about the immediate context and circumstances of the interrogation. See, e.g., Ressam 302 5/10/2001 at 1. In addition, Respondent granted a request by Petitioner's counsel for broad consent to exchange documents and information related to the factual return, including information classified at the Secret level, with appropriately cleared counsel litigating habeas corpus petitions on behalf of other detainees who are identified in Respondent's factual return.

Petitioner's requests for additional searches and disclosures would impose substantial burdens on the Government without good cause. Petitioner's Request Nos. 16, 18, 22, 24, 26, 28, 30, 34, 36, 38, 40, and 42 request that the Court require the Government to assemble "complete file[s]" on thirteen other detainees and other individuals, citing an order entered by Judge Bates in Al-Ghizzawi v. Obama, 600 F. Supp. 2d (D.D.C. 2009) (Bates, J.). Petitioner's reliance on the Al-Ghizzawi order is puzzling, first because Judge Bates in fact denied the petitioner's request for the "complete file" on another detainee who had provided information against the petitioner. Id. at 8 ("[P]etitioner has not demonstrated that he is entitled to his accuser's 'complete file.'"). Judge Bates did order the Government to produce extensive information about the accuser, but not because he concluded that the Government was routinely required to produce such information under CMO § I.D.1. Rather, Judge Bates authorized the request under the limited discovery provisions of § I.E.2 because Petitioner had presented concrete information sufficient to demonstrate that the request was likely to produce exculpatory information. See Al-Ghizzawi, 600 F. Supp. 2d at 8. Specifically, petitioner's counsel had learned through investigation "that the accuser's mental health may be at issue, that he has a substance-abuse problem, that he may have been given certain inducements and promises of favorable treatment in return for

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information about other detainees, and that he has levied serious allegations against more than forty other detainees." Id. at 7–8. In this case, Petitioner is not seeking information about a single detainee based on specific, properly supported contentions. Rather, he broadly seeks the "complete file[s]" of thirteen detainees and other individuals based almost exclusively on speculation that additional searches may turn up more exculpatory information.

Petitioner presents only four specific grounds for his request for these thirteen individuals' "complete file[s]," none of which are adequate to support any part of his requests. First, he notes that Ahmed Ressam cooperated with the U.S. Government in exchange for favorable treatment and later recanted his statements implicating Petitioner. Pet'r's Mem. at 18. Second, he cites allegations of torture by Binyam Mohammad, identified as ISN 1458. Pet'r's Mem. at 21–22. Third, he notes that an individual mentioned in the Government's factual return, Abd al-Hadi al-Iraqi, was in CIA custody, and argues that Abd al-Hadi al-Iraqi therefore may have been subjected to so-called "enhanced interrogation techniques." Pet'r's Mem. at 23. Finally, Petitioner cites a statement made before this Court by Ghassan al-Sharbi, ISN 682, complaining of mistreatment by medical staff at Guantanamo in February 2009. See Request No. 38 (citing ISN 682 Transcript of Hearing Before Judge Sullivan (Mar. 6, 2009) at 45:13–24).

None of these allegations is firm enough to support a broad request for additional information about any one individual, let alone thirteen different individuals. Respondent has already disclosed detailed information about Ahmed Ressam's cooperation agreement with the U.S. Government and his later recantation of his statements; Petitioner's request simply echoes what Respondent has already disclosed. See Factual Return ¶ 32.b–c; Transcript of Ressam Re-Sentencing, United States v. Ressam, No. CR99-666JCC (Dec. 3, 2008); Ressam Cooperation Agreement; Letter from Ressam to Joe Bianco (March 28, 2007); Letter from

Ressam to Judge Coughenour (Nov. 23, 2006).

With respect to Petitioner's allegations that Binyam Mohammed, ISN 1458, was tortured, the Government does not rely on any statements that ISN 1458 made during the time period or under the conditions that Petitioner refers to in his memorandum. The only statements by Mohammed that Respondent relies upon in its factual return are three statements that date to a five-day period in late July 2004 when Mohammed was detained at Guantanamo Bay. See Factual Return ¶ 64.a, a.ii, b, b.ii, c.i (citing ISN 1458 FM 40 7/27/2004; ISN 1458 FM 40 7/28/2004; and ISN 1458 FM 40 7/31/2004).

Petitioner's conjecture about Abd al-Hadi al-Iraqi's treatment while in CIA custody is even more attenuated. The Government's factual return does not rely on any statements by Abd al-Hadi al-Iraqi to justify Petitioner's detention, and none of Petitioner's requests seek information regarding the circumstances in which Abd al-Hadi al-Iraqi made any statements. Techniques used in interrogating Abd al-Hadi al-Iraqi are therefore irrelevant.

Finally, with respect to Ghassan al-Sharbi (ISN 682)'s statement in a March 6, 2009, hearing before Judge Sullivan, al-Sharbi's statement does not appear to contain allegations about coercive interrogation tactics. Rather, al-Sharbi's statement appears to make a specific complaint that, on the night of February 7, 2009, medical staff at Guantanamo handled him roughly while he was being weighed. While the precise substance of al-Sharbi's allegations is not entirely clear from the transcript, it at least appears that Judge Sullivan did not find serious cause for concern in anything that al-Sharbi said or in his demeanor in making the statement. Rather, Judge Sullivan ruled that al-Sharbi had made a knowing and voluntary decision to dismiss his petition. See Tr. at 46:13–14 (the Court, at the conclusion of al-Sharbi's statement, says, "All right. So, it's your decision, then, just to be clear, it's still your decision to dismiss this case then . . . ?");

see also Tr. at 42:18–24 (the Court states, "Mr. Al Sharbi, I respect your decision [to dismiss the habeas corpus petition]. I am satisfied that you're an extremely intelligent man, that you're fully competent, that you're capable of making a decision today. And although I may disagree with your decision, I understand that you understand the nature and consequences of what you're doing and that you're acting voluntarily and of your own free will.").

Thus, Petitioner has not presented any facts or allegations that suggest that the Government has failed to produce material exculpatory evidence or that would justify Petitioner's broad requests for "complete files" of the thirteen specified individuals, whatever "complete files" might entail. Petitioner also has not presented facts or allegations that would support his other sweeping requests for general information about these individuals (Request Nos. 16, 20, 23).

Thus, Petitioner's Request Nos.16, 18, 20, 22, 23, 24, 26, 28, 30, 34, 36, 38, 40, and 42 fail to meet the narrow tailoring, specificity, and good cause requirements of CMO § I.E.2(1), (2), (3), and (4) and should be denied.

G. The CMO does not authorize discovery of information that might undermine the detention or prosecution of another party but that does not undermine the Government's case against petitioner.

Petitioner's various requests for information that might undermine the detention or prosecution of some other party, but would not undermine the Government's case against Petitioner, should he denied because the requests are not tailored to discovery of information that would undermine the Government's case against the Petitioner and would impose a burden well out of proportion to any possible benefit to Petitioner.

As required by CMO § I.D.1, Respondent searched for and produced exculpatory evidence that could materially undermine the contentions the Government relied upon to support

Petitioner's detention. This included evidence that could undermine contentions made in the factual return about the backgrounds and other activities of other persons named in the factual return, even in instances where the Government has not alleged that Petitioner had any role in those past activities.

The CMO does not additionally require the Government to search for and disclose information that would undermine contentions that the Government has made about other persons in other habeas corpus cases or criminal proceedings. The disclosure and discovery provisions of the CMO provide a vehicle for Petitioner to obtain information that undermines the Government's case against him. They do not provide a means for obtaining information disclosed in other proceedings that involve other habeas petitioners or criminal defendants and turn on a different set of factual issues. Categorical requests for information disclosed to counsel in other habeas corpus proceedings or criminal proceedings fall outside the scope of CMO § I.D.1 and fail the narrow tailoring, specificity, and good cause requirements of CMO § I.E.2. Request Nos. 16, 23, and 40 should be denied to the extent they make such requests. See Al-Ansi v. Obama, 2009 WL 2600751 at *2 (D.D.C. 2009) (Kessler, J.) (denying request for information related to release or planned release of detainees who had provided statements, finding that the link between such information and the justification for petitioner's detention was "too attenuated to constitute exculpatory evidence").

Likewise, the Court should reject Petitioner's requests for evidence that would support a theory of "innocence by association," that is, evidence suggesting that other persons captured at the Faisalabad, Pakistan, location where Petitioner was captured were not involved with terrorist activity (Request Nos. 72, 92). Respondent's factual return contends that certain other persons captured at the Faisalabad site were involved in Petitioner's planned terrorist activity. As

required by CMO § I.D.1, Respondent searched for and disclosed information suggesting that these persons were not involved in terrorist activity. But Respondent has not contended in this proceeding, and does not need to prove for purposes of its case against Petitioner, that each and every person captured at the Faisalabad site was involved in or otherwise aware of Petitioner's planned terrorist activity. Evidence that persons who are not mentioned in the factual return were not involved in terrorist activity or were unaware of Petitioner's activities would not be inconsistent with the Government's allegations against Petitioner. Thus, to the extent that Request Nos. 72 and 92 seek information that pertains to persons not mentioned in the Government's factual return and that does not otherwise bear on Respondent's case against Petitioner, the requests should be denied because they fall outside the scope of CMO § I.D.1 and fail to meet the narrow tailoring, specificity, and good cause requirements of § I.E.2(1), (2), (3), and (4).

H. Evidence that Petitioner engaged in lawful activity in addition to unlawful activity would not tend to lead to the discovery of exculpatory evidence.

Petitioner's requests seeking evidence of involvement by Petitioner in work other than terrorism, such as charitable work, should be denied because the requests seek information that falls outside the scope of the disclosures required under CMO § I.D.1 and would not amount to relevant exculpatory evidence as required by CMO § I.E.2.

Petitioner's Request No. 57 seeks "evidence tending to show that Petitioner financed activities other than terrorism and/or that Petitioner was, in turn, financed by individuals or entities that are not adverse to the interests of the United States or Coalition forces," and Petitioner's Request Nos. 67a and 67b seek "evidence tending to demonstrate that Petitioner was involved in charitable works, including assisting women, children and orphans . . . ." Request

No. 71a seeks evidence that Petitioner's efforts in late 2001 assisting persons escaping Afghanistan not only included assistance to enemy fighters but also "included the movement of women, children, and/or other non-combatants."

To begin with, Request Nos. 57, 67a–b, and 71a fail the requirement that requests under CMO § I.E.2 "(1) be narrowly tailored, not open-ended" and "(2) specify the discovery sought." These requests do not request specific documents or otherwise seek recognized forms of discovery; rather, they simply request "evidence" "tending to show" or "tending to demonstrate" a vague proposition. Such requests would not amount to proper requests for discovery even in ordinary civil litigation, and as discussed above, the discovery authorized in these constitutional habeas proceedings is much narrower than the discovery authorized by the Federal Rules of Civil Procedure. See Sadkhan v. Obama, 608 F. Supp. 2d 33, 39 (D.D.C. 2009) (Collyer, J.) ("A discovery request that starts with 'any and all' is almost certainly in trouble under the CMO . . . .").

Furthermore, Petitioner fails to explain how any of these requests is likely to produce evidence that will "demonstrate that petitioner's detention is unlawful" and "enable the petitioner to rebut the factual basis for his detention," as required by CMO § I.E.2. The fact that an individual has engaged in some lawful activities, has performed good works, or has received funding from some legitimate sources does not prove, or even suggest, that that individual has not engaged in unlawful activities. All persons engage in some lawful activities. Indeed, Petitioner's suggestion in Request No. 71a that Petitioner may have assisted civilians in leaving Afghanistan is fully consistent with the Government's case—the Government's factual return quotes a diary passage in which Petitioner states that he is assisting the evacuation of "families" in addition to militant "brothers." Factual Return ¶ 60. The pertinent fact for purposes of

justifying Petitioner's detention, of course, is that Petitioner assisted evacuation of militant "brothers." Accordingly, the Court should deny Petitioner's Request Nos. 57 and 67a–b in full and should deny Request No. 71a to the extent that it seeks information about lawful activities by Petitioner.

I. Petitioner's requests for information about opinions of or assessments by individual agents or officers of the Government are not likely to produce exculpatory information.

Petitioner's various requests aimed at uncovering information that suggests that Government agents or agencies questioned or abandoned early assessments about Petitioner's activities (Pet'r's Mem. at 23–26, 29 n.43; Request Nos. 14, 44, 45, 51, 56, 66, 96i–j) also do not fall within the scope of CMO § I.E.2. Petitioner has not shown that access to such documents and information would help him contest the information contained in the Government's factual return. The factual return represents the current basis of the Government's detention and the only relevant basis for purposes of this proceeding. Petitioner cannot obtain habeas relief by merely showing that the Government's understanding of Petitioner's activities has evolved since his capture or that individual Government agents have disagreed with past Government assessments and analyses.

Petitioner's Request Nos. 14, 44, 51, 56, and 66 seek evidence suggesting that the Government's "initial assessments were incorrect or exaggerated," and also seeks information about allegations that the Government has asserted in other cases that are inconsistent with allegations made in this case. The issue in this litigation is whether Petitioner's detention is lawful based on the contentions and evidence that the Government has presented to the Court in its factual return, not whether Petitioner's detention would be lawful under some other set of contentions Petitioner has selected. The Government's understanding of Petitioner's role in

terrorist activities has necessarily evolved with further investigation. Evidence that the Government has abandoned or revised earlier beliefs about the Petitioner would not make Petitioner's detention unlawful under the Government's current understanding of the facts, as reflected in the factual return. Petitioner's requests for evidence and information about earlier Government assessments fall outside the scope of CMO § I.D.1 and fail the narrow tailoring, specificity, and good cause requirements of CMO § I.E.2(1), (2), (3), and (4).

Evidence that individual Government agents or officers disagreed with past or present Government assessments of Petitioner also does not fall within the Government's disclosure obligations. Indeed, even in criminal proceedings in federal district court, this Court has held that prosecutorial disclosure obligations do not require disclosure of analyses by investigators and attorneys and do not provide a basis for discovery of such analyses. See, e.g., United States v. Naegele, 468 F. Supp. 2d 150, 155 (D.D.C. 2007) (Friedman, J.) (denying criminal defendant's broad request for "materials reflecting the judgment of [federal government personnel] that defendant's conduct was lawful," including documents that might indicate that "some prosecutor 'expressed doubts' that defendant's conduct 'amount[ed] to a crime or warrant[ed] prosecution'"); United States v. Edelin, 128 F. Supp. 2d 23, 39 (D.D.C. 2001) (Lamberth, J.) (explaining that criminal defendant's right to disclosure of evidence did not extend to "information about the decisions and recommendations made by the government attorneys who have worked on his case"). Petitioner's requests for evidence about assessments by individual Government agents or officers fall outside the scope of CMO § I.D.1 and fail the narrow tailoring, specificity, and good cause requirements of CMO § I.E.2(1), (2), (3), and (4).

In addition, Request Nos. 14, 44, 96i, and 96j in part seek various Government assessments suggesting that petitioner was not a "member" of al-Qaida. As explained above, see

section IV.D, the Government's factual return does not contend Petitioner was a "member" of al-Qaida in a formal or technical sense, and the Government has already disclosed evidence suggesting that Petitioner was not affiliated with al-Qaida in the manner described in the factual return. The Court therefore should deny these requests.

J. Petitioner's request for production of documents related to Petitioner's designation as a Specially Designated Global Terrorist has no basis in the CMO and is not likely to produce exculpatory evidence

The Court should also deny Petitioner's requests for production of documents concerning the President's designation of Petitioner as a Specially Designated Global Terrorist in Executive Order No. 13,224, 3 C.F.R. 786 (2002) (Sept. 23, 2001), amended by Exec. Order No. 13,268, 3 C.F.R. 240 (2003) (July 2, 2002); Exec. Order No. 13,284, 3 C.F.R. 161 (2004) (Jan. 23, 2003); and Exec. Order No. 13,372, 3 C.F.R. 159 (2006) (Feb. 16, 2005).

Executive Order No. 13,224, issued by President Bush in the days following the attacks of September 11, 2001, declared a national emergency to deal with the threat of terrorism and implemented measures to respond to that threat. Among other things, the order blocked the assets of several organizations and individuals linked with terrorism and authorized administrative procedures for designating additional entities whose assets are blocked under the Order. See Exec. Order No. 13,224, § 1 & annex; see also Islamic Am. Relief Agency v. Gonzales, 477 F.3d 728, 734–35 (D.C. Cir. 2007) (discussing the Executive Order). Petitioner was one of the persons brought under the scope of the Order by the Executive Order itself, not through the administrative procedures that Petitioner refers to in his Request Nos. 83 and 91c. See Exec. Order No. 13,224 annex.

Respondent's mention of the fact of the President's inclusion of Petitioner in the annex to Executive Order No. 13,224, see Factual Return at 20 n.11, does not provide cause for

freewheeling discovery into the bases for the President's decision. The basis for Petitioner's inclusion in the annex is not relevant in this proceeding, because the Government is not detaining Petitioner based on his inclusion in the annex. The Government is detaining Petitioner because of his actions as described in the factual return, and the matters described in the factual return are the only relevant matters. Petitioner has not suggested why he believes documents related to the designation are likely to contain exculpatory evidence, or what kind of exculpatory evidence they might contain. Accordingly, Petitioner's requests fail the narrow tailoring, specificity, and good cause requirements of CMO § I.E.2(1), (2), (3), and (4), and the Court should deny Petitioner's Request Nos. 83 and 91b–c in full.

K. Petitioner's requests for evidence relating to U.S. foreign policy or support for the Khaldan training camp by U.S. allies are too vague and are not likely to produce evidence that will undermine the Government's case against Petitioner.

Petitioner's request for evidence revealing that the United States and its allies "encouraged, supported and/or otherwise approved of" activities of the Khaldan training camp relating to fighting against Communist forces in Afghanistan or Chechnya at unspecified times (Request No. 52) is far too vague to constitute a proper request for discovery pursuant to CMO § I.D.1. Petitioner fails to specify what kind of encouragement, support, or approval by the United States might fall within the scope of the discovery request or how evidence of such encouragement, support, or approval would help advance Petitioner's case.

To the extent that the request seeks information that would suggest that the United States sponsored the Khaldan training camp by providing funding, personnel, supplies, or similar concrete assistance—and that therefore could make it seem less likely that the Khaldan training camp would promote or facilitate activities hostile to the United States—the request merely

reiterates the Case Management Order's disclosure requirements and should therefore be rejected for the reasons stated in section IV.A. However, to the extent that the request demands information about more remote or abstract forms of encouragement, support, or approval—such as, for example, evidence suggesting simply that aspects of U.S. policy during the Cold War contributed to the growth of Islamic extremism in Afghanistan—the request falls far short of the requirements of CMO § I.E.2. A discovery request that requires Respondent to conduct a scholarly analysis of historical U.S. foreign policy regarding Afghanistan and Chechnya to identify responsive material is not "narrowly tailored" and does not "specify the discovery sought" as required by CMO § I.E.2. Nor has Petitioner explained how evidence pertaining to historical U.S. policy would lead to the discovery of evidence that would demonstrate that Petitioner's detention is unlawful and help Petitioner rebut the Government's factual allegations, as required by CMO § I.E.2.

Likewise, Petitioner has not explained how evidence of connections between Khaldan and Saudi Arabian or Jordanian intelligence services (Request No. 53) could possibly help Petitioner demonstrate that his detention is unlawful or rebut the Government's factual allegations. Accordingly, the Court should deny Petitioner's Request Nos. 52 and 53.

L. Petitioner's request for production of medical records and an in-person medical evaluation is not likely to lead to the discovery of exculpatory evidence and is unduly burdensome.

Petitioner's Discovery Motion also renews Petitioner's earlier request for medical records and other records covering the period during which Petitioner was in the custody of the CIA, and seeking an in-person medical evaluation. (Pet'r's Mem. at 31–37; Request Nos. 79, 80). These requests should be denied because the Government's factual return does not rely on any statements Petitioner made while in U.S. custody, and so information about Petitioner's

treatment or condition while in U.S. custody is unlikely to result in the discovery of exculpatory evidence.

Petitioner initially requested the records and in-person medical evaluation in his Emergency Motion to Produce CIA Medical Records and Allow In-Person Medical Evaluation (June 9, 2009). Respondent opposed these requests because they seek information to substantiate claims of torture, and this Court lacks jurisdiction to consider such claims. See Husayn v. Gates, 558 F. Supp. 2d 7, 11 (D.D.C. 2008) (Roberts, J.); Resp't's Opp'n to Pet'r's Emergency Mot. to Produce CIA Medical Records and Allow In-Person Medical Evaluation (dkt. no. 18); Classified Suppl. to Resp't's Opp'n to Pet'r's Emergency Mot. to Produce CIA Medical Records and Allow In-Person Medical Evaluation (June 12, 2009); Resp't's Suppl. to Its Opp'n to Pet'r's Emergency Mot. to Produce CIA Medical Records and Allow In-Person Medical Evaluation (June 22, 2009). Moreover, because the Government's factual return does not rely on any statements Petitioner made while in U.S. custody, information about Petitioner's treatment or condition while in U.S. custody is unlikely to result in the discovery of evidence that would undermine the factual basis for Petitioner's detention. See CMO § I.E.2 (providing that any request for limited discovery in this case must "explain why the request, if granted, is likely to produce evidence that demonstrates that the petitioner's detention is unlawful" and "explain why the requested discovery will enable the petitioner to rebut the factual basis for his detention"). Respondent further objected that it would be extremely burdensome for the Government to identify and produce the requested records, and so Petitioner had failed to "explain why the requested discovery will enable the petitioner to rebut the factual basis for his detention without unfairly disrupting or unduly burdening the government," CMO § I.E.2. Respondent also noted the Court's earlier observation that a request to interfere with Petitioner's medical treatment at

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Guantanamo should be treated as a request for injunctive relief.

The reasons stated in Respondent's previous memoranda make it inappropriate to compel production of records and an in-person medical evaluation under § I.E.2 of the CMO. Respondent hereby opposes Petitioner's Request Nos. 79 and 80 on the grounds stated in its three previous memoranda and incorporates its three previous memoranda by reference.

M. Petitioner's request to submit written queries to other detainees is not authorized by the CMO and is not likely to produce exculpatory evidence.

Petitioner's request (Pet'r's Mem. at 39–41, Request No. 85) to submit written questions to three al-Qaida leaders—Khalid Sheikh Mohammed, Ramzi Binalshibh, and Abd al Rahim al Nashiri—should be denied, because it is not authorized by the CMO and is not supported by a showing under CMO § I.E.2.

Petitioner identifies Khalid Sheikh Mohammed, Ramzi Binalshibh, and Abd al Rahim al Nashiri as al-Qaida personnel who were involved in the 9/11 attacks, the 1998 attack on the U.S.S. Cole, and the 1998 attacks on the U.S. embassies in Nairobi and Dar es Salaam. See generally Factual Return ¶ 53c (describing Khalid Sheikh Mohammed); Pet'r's Mem. at 40–41 (describing the three detainees based on the 9/11 Commission Report and other sources). Petitioner proposes to submit to these individuals a series of six written questions pertaining to Petitioner's work with the Khaldan camp, whether Petitioner had ties to Usama Bin Ladin or al-Qaida, and whether Petitioner had plans to meet with Khalid Sheikh Mohammed in Kandahar in November 2001.

Petitioner characterizes this request as a request to put "interrogatories" to these individuals, but because Petitioner's proposed queries would be addressed to third parties, and not to Respondent, the proposed queries are not analogous to interrogatories and are more akin to

depositions by written questioning. Compare Fed. R. Civ. P. 33 (Interrogatories to Parties) with Fed. R. Civ. P. 31 (Depositions by Written Questions).[7] In any event, regardless of the label applied to Petitioner's request, the request should be denied. There is no support for such a discovery device in the CMO, and Petitioner also has provided no reason the Court should authorize such a device under § I.E.2, because he has not shown that his requests are narrowly tailored and has not presented any reason to believe his requests are likely to produce evidence that will help him prevail in this action.

Petitioner has not shown that his proposed queries are likely to produce information that will help him show that his detention is unlawful, or indeed are likely to produce any relevant information at all. Two of the persons whom Petitioner proposes to depose, Ramzi Binalshibh and Abd al Rahim al Nashiri, are not even mentioned in the Government's factual return narrative as figures with direct ties to Petitioner, nor has Petitioner alleged in his motion that Binalshibh or al Nashiri know him either personally or by reputation. Khalid Sheikh Mohammed is mentioned in the factual return, but the Government's factual return does not contain information suggesting that he would be in a position to have specific knowledge about Petitioner's Khaldan activities or Petitioner's ties to Usama Bin Ladin and al-Qaida.

Only Petitioner's sixth proposed query, which would ask Khalid Sheikh Mohammed whether he met with Petitioner in November 2001 and, if so, why, (Request No. 58f) comes close to having any potential relevance. This request is related to information presented in the factual return, as the Government notes that a number of major figures associated with al-Qaida, including Petitioner and Khalid Sheikh Mohammed, converged on Kandahar in November 2001,

[7]Neither Rule 31 nor Rule 33 is applicable in habeas corpus proceedings. See Harris v. Nelson, 394 U.S. at 292–98.

though the Government's contention does not specify whether any of these figures met during that time period. See Factual Return ¶ 53. But this request still falls short of satisfying CMO § I.E.2's requirement that a request for discovery be narrowly drawn and likely to uncover exculpatory information. Petitioner does not suggest what he expects Khalid Sheikh Mohammed will say in response to the query, nor does he provide his own account of what actually happened in Kandahar in November 2001. Moreover, it is difficult to imagine how any answer from Khalid Sheikh Mohammed would substantially help Petitioner. Even if Khalid Sheikh Mohammed were to say he did not meet with Petitioner while they were in Kandahar, the fact that Petitioner's presence in Kandahar coincided with the presence of major terrorist figures in Kandahar would still weigh in favor of detention.

Judge Urbina approved narrow written questioning of Khalid Sheikh Mohammed in another case, Rabbani v. Obama, 2009 WL 2588702 (D.D.C. 2009), but only because in that case the petitioner had "clearly articulated" specific reasons why the requested written queries were likely to produce exculpatory evidence. Id. at *8. By contrast, in this case Petitioner has not articulated any clear purpose for asking Khalid Sheikh Mohammed whether and why he met personally with Petitioner in November 2001 while they were both in Kandahar.

In other cases, judges of this Court have repeatedly denied detainees' requests to conduct depositions based on the absence of any provision for depositions in the CMO or based on petitioners' failure to establish that depositions would likely produce evidence that would undermine the Government's case for detention. See, e.g., Alsa'ary v. Obama, 631 F. Supp. 2d 9 (D.D.C. 2009) (Lamberth, J.) ("Petitioners' requests for depositions [of detainees] appear to fall fully outside the bounds of the Amended CMO."); Bin Attash v. Obama, 628 F. Supp. 2d 24, 41 (D.D.C. 2009) (Lamberth, J.) ("Petitioner has failed to show how [interrogatories and

depositions] would provide evidence that would likely show that the petitioner's detention is unlawful."); Zaid v. Obama, 2009 WL 799420 at *1 (Bates, J.) ("Without some sort of showing that a deposition—which is beyond the scope of discovery contemplated in the CMO—would substantially help this case, the Court will not grant such an open-ended, potentially burdensome request."). Similarly, in this case, Petitioner's request to address written queries to these three other detainees should be denied.

N. The Court should deny requests that are not supported by any attempt to establish the showing required under CMO § I.E.2, and it should not allow Petitioner to attempt to make such a showing for the first time in his reply memorandum.

Petitioner's Appendix also contains several discovery requests that are not accompanied by any explanation of why the requested information is likely to lead to production of exculpatory evidence (Request Nos. 95a–g, 96a–k). Because Petitioner fails to explain the basis for these requests, Petitioner fails to satisfy the requirements of CMO § I.E.2, and so the Court should deny Petitioner's requests.

Petitioner requests an unredacted copy of the transcript from Petitioner's CSRT hearing, as well as six additional categories of documents related to Petitioner's Combatant Status Review Tribunal apart from the transcript (Request Nos. 95a–g). Petitioner's only support for these requests is a bare statement that "[i]t is clear from a reading of [the CSRT transcript] that it contains both relevant and exculpatory information." This bare statement fails to meet the requirements of CMO § I.E.2. Respondent readily acknowledges that the CSRT transcript and related documents that have been produced to Petitioner's counsel contain some information required to be disclosed under CMO § I.D.1—indeed, that is why Respondent produced those documents. But that is no basis for concluding that other portions that have not been disclosed,

or other separate documents that have not been disclosed, also contain exculpatory information. See Al-Ansi v. Obama, 2009 WL 2600751 at *2 (D.D.C. 2009) (Kessler, J.) (stating that while the Government is required to disclose exculpatory evidence from CSRT proceedings, "comprehensive disclosure of all of those proceedings is unjustified because the conclusions reached in those proceedings are not relevant to what must be decided in this litigation, namely the lawfulness of [the petitioner's] continued detention"). The Court therefore should deny Petitioner's request.

The same goes for Petitioner's request for eleven categories of documents supposedly connected to the CIA Inspector General's May 2004 Special Review of Counterterrorism Detention and Interrogation Activities and the Department of Justice Office of the Inspector General May 2008 report titled A Review of the FBI's Involvement in and Observations of Detainee Interrogations in Guantanamo Bay, Afghanistan, and Iraq (Request No. 96[8]). The only support for these broad-ranging requests is a bare statement that "[o]n information and belief, [the two reports] contain relevant and exculpatory information relevant to [Petitioner's habeas claims]." But Petitioner fails to explain why disclosure of the reports would lead to the discovery of exculpatory information. Furthermore, nine of the eleven subparts of Petitioner's request do not even seek documents related to the reports; rather, they seek broad categories of documents that pertain to events that are mentioned in the reports. (Request Nos. 95b, 95d–k). Because Petitioner fails to state any basis for these requests under CMO § I.E.2, the requests should be denied. See Al-Ansi v. Obama, 2009 WL 2600751 at *5–6 (D.D.C. 2009) (Kessler, J.) (denying unsupported requests for reports produced by the CIA Inspector General and the Department of

[8]Petitioner's Appendix contains two successive requests both numbered Request No. 95. App'x at 35–36. The second request apparently should be numbered Request No. 96.

Justice Office of Professional Responsibility). To the extent that Petitioner seeks these documents to uncover information related to Petitioner's treatment or conditions of confinement while in U.S. custody, Petitioner's request should be denied because, as Respondent explained above, issues related to Petitioner's treatment or conditions of confinement in U.S. custody are outside this Court's jurisdiction and are not relevant to evaluating the factual basis for Petitioner's detention.

Because Petitioner fails to provide any foundation for these requests, the requests should be denied. In addition, Petitioner should not be permitted to provide support for these requests for the first time in his reply memorandum, because as explained above, Petitioner's failure to articulate a basis for this request in his initial memorandum prevents the Government from properly responding.

Accordingly, Petitioner's Request Nos. 95 and 96 should be denied.

O. The Government does not object to Petitioner's request for a search for information obtained from two individuals identified by name.

Petitioner's Request No. 49 requests that the Government search for information obtained from two specifically named individuals who Petitioner alleges would have provided information stating that the Khaldan camp was not in the practice of transferring persons to al-Qaida camps. The Government does not object to this request to the extent that it contemplates only a search of reasonably available evidence and disclosure of any exculpatory evidence identified in such a search. Any reasonably available exculpatory evidence obtained from these individuals would most likely have been found in the Government's initial search under CMO § I.D.1, but the Government does not object to conducting an additional, targeted search.

As explained above, however, a request for additional discovery may be denied at the

discretion of the Court even when the Government does not object to the request. If the Court finds that the request satisfies the mandatory requirements of CMO § I.E.2 and authorizes Petitioner's request in its discretion, Respondent will search reasonably available evidence for information obtained from the two named individuals and will disclose any additional exculpatory evidence it locates within those materials.

V. The Court should deny Petitioner's motion seeking discovery based on the Court's authority to issue sanctions for destruction of evidence or should stay further proceedings on the motion to prevent interference with an ongoing criminal investigation.

Petitioner's motion seeking discovery based on the Court's inherent authority to issue sanctions for destruction of evidence, Pet'r's Mot. for Sanctions for the Spoliation of Evidence (Sept. 21, 2009), should be denied. A request in habeas corpus proceedings seeking production of material that is outside the scope of discovery, based on the destruction of other material that is also outside the scope of discovery, simply does not fit within the principles governing sanctions for destruction of evidence in ordinary civil proceedings. Moreover, the relief Petitioner seeks is far out of proportion to the destruction of the interrogation tapes at issue.

Even if the Court could extend ordinary sanctions principles to petitioner's request by analogy, sanctions against Respondent would be unwarranted without further proceedings because Petitioner has not established that the interrogation tapes at issue were destroyed in bad faith or that the destruction of the tapes should be attributed to the United States, rather than to individuals acting independently. Lastly, the Court should refrain from conducting sanctions proceedings at this time, because further proceedings could interfere with the ongoing criminal investigation into the destruction of the tapes.

A. Petitioner's motion for sanctions is an improper request for additional discovery, not a request for sanctions.

Though Petitioner's motion is couched as a motion for sanctions, neither the relief Petitioner seeks nor Petitioner's basis for seeking that relief fits under the rubric of sanctions. The only relief Petitioner seeks is additional discovery into the history of Petitioner's detention by the Central Intelligence Agency. Notably, Petitioner does not seek any relief of the kind that courts have traditionally recognized as appropriate sanctions for destruction of evidence. Furthermore, sanctions for destruction of evidence in civil proceedings are based on an assumption that destruction of evidence deprived an opposing party of evidence that would have been discoverable by that party if it had not been destroyed. That assumption does not hold in this case, because, as Respondent discussed in section I above, habeas corpus petitioners do not have the same presumptive right to discovery of relevant evidence that litigants enjoy in more common forms of civil proceedings. More specifically, because Respondent has not relied on any statements Petitioner made while in U.S. custody, the interrogation tapes are irrelevant to this case. Consequently, Petitioner would not have been able to obtain the interrogation tapes under this Court's Case Management Order.

Courts have inherent powers to "protect their integrity and prevent abuses of the judicial process," and in civil cases, courts can use these powers to issue sanctions against parties who deliberately destroy or fail to produce discoverable material. Shepherd v. Am. Broad. Cos., 62 F.3d 1469, 1474–75 (D.C. Cir. 1995); Mazloum v. D.C. Metro. Police Dep't, 530 F. Supp. 2d 282, 291 (D.D.C. 2008) (Bates, J.). Such sanctions can include monetary sanctions such as fines or attorneys' fees or nonmonetary sanctions such as adverse evidentiary inferences, exclusion of evidence, or, in extreme cases, dismissal or default. See Shepherd, 62 F.3d at 1475.

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There is no precedent, however, for using sanctions powers to order discovery that is otherwise outside the permissible scope of discovery. A court has broad discretion in tailoring appropriate sanctions for destruction of evidence, see West v. Goodyear Tire & Rubber Co., 167 F.3d 776, 779 (2d Cir. 1999), but courts' inherent powers are not limitless. See Roadway Express, Inc. v. Piper, 447 U.S. 752, 764 (180), ("Because inherent powers are shielded from direct democratic controls, they must be exercised with restraint and discretion."), cited in Shepherd, 62 F.2d at 1475. Petitioner has not cited any decisions in which any federal courts, or even state courts, exercised their sanctions authority to compel discovery that would not have otherwise been permissible. Petitioner cites some cases suggesting that courts can order additional discovery or evidentiary proceedings after evidence is destroyed, see Pet'r's Mot. at 18, but these cases dealt with discovery that was designed to uncover evidence that would have fallen within the ordinary scope of discovery, or that was intended to uncover evidence relevant to the court's consideration of whether the court should issue some other traditional form of sanction.[9] None of these decisions presented a case where a court issued an order authorizing

[9]The cited passage in Africa v. Digulielmo, 2004 WL 2360419 (E.D. Pa. 2004), states that a Pennsylvania state court considering a claim of destruction of exculpatory evidence must examine all remaining available evidence to draw conclusions about whether the evidence destroyed was exculpatory. Id. at *5. Even assuming that Pennsylvania state law could be relevant in analyzing the scope of this Court's inherent powers, the cited passage in Africa would at most indicate that this Court may employ its inherent powers to conduct evidentiary proceedings to determine whether sanctions are warranted. In the second decision cited by Petitioner, W.R. Grace & Co.–Conn. v. Zotos Int'l, Inc., 2000 WL 1843258 (W.D.N.Y. 2000), the court ordered production of drafts of expert reports and related documents still in existence. See id. at *10–12. These documents fell within the ordinary scope of discovery. See id. at *10 ("Courts have held that drafts of reports prepared by testifying experts are subject to disclosure pursuant to Fed. R. Civ. P. 26(a)(2)(B)."). Petitioner also cites two Freedom of Information Act cases that describe government agencies' efforts to reconstruct the contents of responsive documents, Landmark Legal Foundation v. E.P.A., 272 F. Supp. 2d 59 (D.D.C. 2003) (Lamberth, J.) and Jefferson v. Reno, 123 F. Supp. 2d 1 (D.D.C. 2000) (Kessler, J.). These cases (continued...)

discovery that was designed to operate as a sanction in itself.[10]

In this case, as Petitioner seems to acknowledge, the broad discovery sought by his motion for "sanctions" would not otherwise be authorized under the Case Management Order or any other order of this Court or provision of law. And he is requesting the discovery not for the purpose of proving that sanctions are warranted, but for the purpose of advancing his case in chief. Ordering the requested discovery would not be an appropriate exercise of sanctions authority. The purpose of sanctions authority is to redress harm that a civil litigant may suffer from misconduct; sanctions are not a back door for litigants to use to circumvent limits on the scope of discovery.

A second reason why civil discovery sanctions principles are a poor vehicle for evaluating Petitioner's requests is that civil discovery sanctions principles rest on background assumptions that simply do not hold in habeas corpus proceedings. Civil discovery sanctions

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[9](...continued)
dealt with destruction of documents that were subject to disclosure under FOIA, not destruction of evidence that was subject to discovery in litigation. See Landmark Legal Found., 272 F. Supp. 2d at 61–62; Jefferson, 123 F. Supp. 2d at 2. And neither case suggests that courts have authority, even in FOIA cases, to order discovery to ascertain information that might have been revealed in destroyed documents. In Jefferson, the only remedial measure the court ordered was recreation of the destroyed files themselves; the court did not order broader discovery designed to shed light on what the destroyed files might have contained. See Jefferson, 123 F. Supp. 2d at 2. In Landmark Legal Foundation, the EPA made agency officials available for deposition, but it did so only on its own initiative, not based on a court order. See Landmark Legal Found, 272 F. Supp. 2d at 67.

[10]Respondent has found only one case in which a court may have ordered discovery as a sanction pursuant to its inherent powers, and that court's order was reversed on appeal: In Natural Gas Pipeline Co. of America v. Energy Gathering, Inc., 2 F.3d 1397 (5th Cir. 1993), an attorney challenged a district court order requiring him to produce his own personal tax returns. See id. at 1401. Though the basis for the district court's order was not clear, the Fifth Circuit assumed that the district court had relied on its inherent powers to sanction misconduct. See id. at 1410–11. It concluded that this "novel" sanction was an abuse of discretion. See id. at 1410–11.

principles are not universally applicable, and courts cannot simply assume they can be readily translated to proceedings outside the context of civil discovery. Indeed, in criminal proceedings, destruction of evidence by the prosecution is evaluated under a framework based on the constitutional guarantee of due process. See Arizona v. Youngblood, 488 U.S. 51, 57–58 (1988) (analyzing destruction of evidence under due process principles). And there is not yet any consensus among the federal courts about how to analyze post-trial destruction of evidence in postconviction habeas corpus proceedings. Compare Ferguson v. Roper, 400 F.3d 635, 638 (8th Cir. 2005) (holding that the Youngblood due process framework does not apply to evidence lost or destroyed after trial) with Yarris v. County of Delaware, 465 F.3d 129, 142 (3d Cir. 2006) (extending Youngblood to post-trial destruction of evidence). Cf. Dist. Att'y's Office v. Osborne, 129 S. Ct. 2308, 2320 (2009) (holding that due process rights to disclosure of exculpatory evidence under Brady v. Maryland cease to apply after conviction).

Discovery in these habeas corpus proceedings is not merely a modified form of civil discovery; it is a fundamentally different process. In civil cases, discovery is the norm, and it is a reciprocal process in which the parties bear mutual obligations with respect to discovery and preservation of evidence. In habeas corpus proceedings, however, discovery proceeds only when authorized by the Court and is tightly constrained. A court therefore should not translate civil discovery principles to habeas corpus proceedings without carefully considering whether the those principles rely on assumptions that may not be valid in habeas corpus proceedings.

In this case, the assumptions underlying ordinary civil discovery sanctions principles do not hold. The premise underlying sanctions for destruction of evidence in civil discovery is that the destruction of evidence deprived a party of evidence that otherwise would have been discoverable. Cf. Webb, 146 F.3d at 974 (noting that one purpose of sanctions is to remedy

"prejudice to the judicial system"). In ordinary civil litigation, Rule 26(b)(1) of the Federal Rules of Civil Procedure extends the scope of discovery to all relevant materials, so destruction of relevant material generally equates to destruction of discoverable material. But Rule 26(b)(1) is inapplicable in an action for the writ of habeas corpus, and discovery in habeas corpus cases is permitted only by prior leave of court. See Harris v. Nelson, 394 U.S. 286, 297 (1969); Bracy v. Gramley, 520 U.S. 899, 904 (1997). The destruction of relevant material therefore does not necessarily deprive the opposing party of discoverable material.

Adapting destruction-of-evidence principles from ordinary civil litigation to the context of habeas corpus proceedings might be more appropriate if a petitioner could show that the evidence destroyed could have shown that his detention is unlawful and that the Court therefore would have authorized a discovery request for the tapes under Case Management Order § I.E.2. But the interrogation tapes at issue would not have shown that Petitioner's detention is unlawful. Petitioner has alleged that the tapes may have recorded interrogations in which Petitioner denied any involvement with al-Qaida, as well as exchanges with interrogators who told Petitioner that they had concluded he was not affiliated with al-Qaida. See Mem. of Law in Supp. of Pet'r's Mot. for Sanctions for the Spoliation of Evidence at 3–4. But videotapes of interrogations of Petitioner by U.S. officials would not have been enough to demonstrate that the Petitioner's detention is unlawful. Petitioner is being detained based on statements he recorded before his capture, and the Government has not relied on statements Petitioner made under interrogation. See Factual Return at 20 n.2.

Since neither the relief plaintiffs are requesting nor the asserted basis for that relief fits under the rubric of civil litigation sanctions, Petitioner's request should be treated as an ordinary request for discovery and should be denied given that it is not narrowly tailored, specific, likely

to show that his detention is unlawful, or otherwise properly supported as required by Case Management Order § I.E.2.

B. Even if sanctions proceedings were appropriate, the Court should temporarily defer such proceedings because they could interfere with the ongoing criminal investigation into the destruction of the tapes.

As Petitioner notes in his motion, sanctions are generally appropriate only when a party destroys evidence with a "culpable state of mind." See Pet'r's Mot. at 9 (quoting Mazloum, 530 F. Supp. 2d at 291). Thus, the Court should not issue sanctions without holding proceedings to determine whether the individual actors who destroyed the tapes did so with a culpable state of mind and, if so, whether the circumstances warrant holding the United States accountable for the actions and the state of mind of those individual actors. But holding such proceedings now could interfere with an ongoing criminal investigation into the destruction of the interrogation tapes. Consequently, if the Court is inclined to consider Petitioner's motion, it should stay any sanctions proceedings until the criminal investigation is completed.

As explained by John H. Durham in the attached Declaration of John H. Durham (attached as Exhibit 2),[11] in January 2008, Mr. Durham was appointed Acting United States Attorney for the Eastern District of Virginia to supervise the investigative efforts of a team of lawyers and FBI Special Agents who are conducting a federal criminal investigation into the destruction of certain videotaped interrogations of detainees by the Central Intelligence Agency. Durham Decl. ¶ 1. In August 2009, the Attorney General expanded Mr. Durham's mandate to include a preliminary review into whether federal laws were violated in connection with the

[11]Because the declaration reveals specific details concerning the status and direction of an ongoing criminal investigation, it is being filed in redacted form, and defendant is separately submitting an unredacted version for the Court's ex parte, in camera review.

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interrogation of certain detainees at overseas locations. Durham Decl. ¶ 2.

The Court should temporarily stay any civil sanctions proceedings to protect the integrity of the criminal investigation and any future criminal proceedings. "[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." Landis v. N. Am. Co., 299 U.S. 248, 254 (1936). A court's discretionary authority to stay proceedings permits a court to stay civil proceedings that threaten to interfere with related criminal proceedings. See United States v. Kordel, 397 U.S. 1, 12 n. 27 (1970); SEC v. Dresser Indus., Inc., 628 F.2d 1368, 1375 (D.C. Cir. 1980); see also United States v. Any & All Assets of that Certain Bus. Known as Shane Co., 147 F.R.D. 99, 101 (M.D.N.C. 1993) ("[w]hen a civil proceeding may interfere with a criminal investigation, it is not uncommon that the United States will seek to stay . . . the civil action in order to protect the criminal investigation."). "The decision to stay a civil action pending the completion or declination of a criminal investigation lies within the sound discretion of the trial court." Horn v. District of Columbia, 210 F.R.D. 13, 15 (D.D.C. 2002).

The D.C. Circuit's opinion in SEC v. Dresser Industries, Inc., 628 F.2d 1368 (D.C. Cir. 1980), identified a number of considerations that might favor issuance of a stay, such as the prospect that either the defense or the prosecution might obtain discovery that would not ordinarily be available in a criminal case; the possibility that Fifth Amendment issues would be implicated; the chance that a criminal defendant's theory of defense would be revealed prematurely; or the risk that the criminal matter would be otherwise prejudiced. Id. at 1376. Some factors a court may consider in deciding whether to issue a stay are whether the two matters involve related issues, whether a stay would or would not create hardship or

inconvenience for the courts or the parties, and whether the duration of a stay is reasonable. See, e.g., United States ex rel. Westrick v. Second Chance, 2007 WL 1020808 (D.D.C. 2007); see also St. Paul Fire and Marine Ins. v. United States, 24 Cl. Ct. 513 (1991).

In this case, Mr. Durham has concluded that conducting evidentiary proceedings on Petitioner's motion for sanctions or issuing the requested relief would interfere with the ongoing criminal investigation. See Durham Decl. ¶¶ 4, 8. As Mr. Durham explains in the attached declaration, knowledge that records depicting Petitioner's interrogations have been released to Petitioner and his counsel could taint the recollections of witnesses, notwithstanding any protective order that may prevent disclosure of the content of the records. See Durham Decl. ¶ 8. Second, depositions or evidentiary proceedings on Petitioner's motion could cause witnesses to conform what they say to criminal investigators to what was said or suggested in a deposition or evidentiary hearing. See Durham Decl. ¶ 8. Third, notice of a deposition or evidentiary proceedings on Petitioner's motion may cause witnesses to refuse to speak with criminal investigators. See Durham Decl. ¶ 8. The Court therefore should defer any sanctions proceedings until the conclusion of the criminal investigation. Staying proceedings would be consistent with a recent determination by the District Court for the Southern District of New York, which indicated in recent proceedings that it would not order evidentiary proceedings or production of documents that would interfere with the ongoing criminal investigation. See Durham Decl. ¶¶ 9–12.

C. Even if a sanction were warranted, the relief Petitioner requests is not tailored to or proportionate to the lost evidence.

Even if Petitioner could show that the Court's civil sanctions authority could provide a basis for granting Petitioner's discovery request, and the Court further found that sanctions were

appropriate, the broad discovery Petitioner has requested would not be an appropriate remedy for the destruction of the CIA tapes. If it makes a finding that sanctions of some kind are warranted, the Court should instead consider a more proportional sanction in a more familiar form, such as an order precluding the Government from relying on statements that the Petitioner made under interrogation or an order adopting a reasonable adverse inference regarding the contents of the destroyed recordings.

The D.C. Circuit has emphasized that when a court employs its inherent powers to issue sanctions for destruction of evidence, it must take care to fashion "appropriate sanction[s]." Shepherd, 62 F.3d at 1478. "[The] district court must properly 'calibrate the scales' to ensure that the gravity of an inherent power sanction corresponds to the misconduct." Shepherd, 62 F.3d at 1479. As part of this calibration, a court must consider whether lesser sanctions would adequately serve the purpose of deterring and punishing misconduct. Id.

The sweeping discovery Petitioner requests in his motion—production of a broad category of documents, depositions of any person who was involved in or observed Petitioner's interrogations, and depositions of hundreds of former military detainees—does not bear any relation, in either subject matter or scale, to the destruction of the interrogation tapes. Even assuming that sanctions of some kind are warranted, there is no basis for the Court to grant Petitioner's virtually unbounded and practically infeasible request rather than imposing a more traditional "issue-related" sanction such as an order excluding certain evidence or adopting an adverse evidentiary inference. Such issue-related sanctions are generally preferable to more drastic sanctions. Cf. id. at 1478–80 (discussing issue-related sanctions and holding that a court must consider issue-related sanctions before imposing the more drastic sanctions of default or dismissal).

When evidence relevant to civil proceedings is destroyed, a court can bar other evidence from being introduced, or it can adopt an adverse inference about what the destroyed evidence would have shown. Such an adverse inference "should not test the limits of reason"; it should be "reasonable" and should "not be inconsistent with other evidence." Webb v. Dist. of Columbia, 146 F.3d at 974 n.20. In this case, the Court could preclude the Government from introducing evidence of statements Petitioner made during the interrogations recorded on the destroyed tapes, or it could adopt an inference that the recordings of the interrogations would have shown Petitioner telling interrogators that he was not associated with Usama Bin Ladin, al-Qaida, or other terrorist entities. An issue-related sanction of this sort would be a much more appropriate way to remedy any prejudice from the destruction of the interrogation tapes than the additional unauthorized discovery that Petitioner has proposed as a sanction.

CONCLUSION

Respondent has fully complied with its disclosure obligations under the CMO, and Petitioner's assertions to the contrary are based on misreadings of the terms of the Order. Petitioner's requests for additional discovery largely fail to satisfy the core requirement that any requests for additional discovery be tailored and targeted at discovery of exculpatory evidence of discernible value. Petitioner's motion seeking discovery based on the destruction of evidence is not a proper request for sanctions and seeks relief out of proportion to the destruction of the interrogation tapes at issue. In any event, the Court should stay evidentiary proceedings on the motion based on the ongoing criminal investigation into the destruction of the tapes. Accordingly, the Court should deny Petitioner's motions.[12]

[12]As noted above, see supra section IV.O, Respondent does not object to Petitioner's (continued...)

Date: October 27, 2009

Respectfully submitted,

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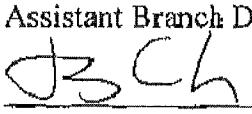

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[12](...continued)
Request No. 49.

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ZAYN AL ABIDIN MUHAMMAD HUSAYN, Petitioner vs. ROBERT GATES, Respondent	Civil Action No. 08-cv-1360 (RWR)

RESPONDENT'S SUPPLEMENT TO MEMORANDUM IN OPPOSITION TO PETITIONER'S MOTION FOR DISCOVERY

This supplement provides more specific responses to the numbered requests for discovery contained in Petitioner's Appendix of Discovery Requests. References to appropriate sections of Respondent's memorandum are provided for convenience. Respondent relies on all objections that are asserted either in Respondent's memorandum or in this supplement.

Request Nos. 1, 2a–p:

See Resp't's Mem. section III.A.

Request No. 2q:

See Resp't's Mem. section IV.D.

Request Nos. 2r–ff:

See Resp't's Mem. section III.A.

Request Nos. 3–8:

See Resp't's Mem. sections IV.B, IV.C.

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Request No. 9:

To the extent that this request seeks disclosure of exculpatory material contained in [redacted] and contained in reasonably available evidence in the Government's possession, this request should be denied because it simply reiterates the requirements of CMO § I.D.1. See Resp't's Mem. section IV.A. To the extent that the request demands that the Government determine whether additional [redacted] materials exist and search any other [redacted] that are found for exculpatory material, the request should be denied because Petitioner fails to explain why he believes that exculpatory evidence might be found within other [redacted] or what kind of exculpatory evidence might be found, and the request falls outside the scope of CMO § I.D.1 and fails the narrow tailoring and good cause requirements of CMO § I.E.2(1), (3), and (4).

Request No. 10:

See Resp't's Mem. sections IV.B, IV.C, IV.D, IV.E.

Request No. 11:

See Resp't's Mem. section IV.B, IV.C.

Request Nos. 12, 13a–e:

See Resp't's Mem. section IV.A.

Request No. 14:

See Resp't's Mem sections IV.D, IV.I.

Request No. 15:

See Resp't's Mem. section III.C.

Request No. 16:

To the extent that this request seeks information undermining Respondent's various

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contentions about Ahmed Ressam or based on statements made by Ressam, including information undermining Ressam's credibility in general or with respect to specific statements relied upon by the Government, see, e.g., Factual Return ¶¶ 5, 31–40, 42, 44–45, 70–71, this request should be denied because it simply reiterates the requirements of CMO § I.D.1. See Resp't's Mem. section IV.A. To the extent that this request seeks an order compelling the Government to compile and disclose "general credibility assessments regarding Ressam; recantations; evidence of inducements or promises of favorable treatment; evidence that Ressam was subjected to torture, coercion, or coercive conditions of confinement; evidence that Ressam suffers or suffered from a mental illness or instability; evidence that Ressam provided false and/or incorrect accusations about other detainees; evidence that the government has questioned Ressam's credibility in any way"; exculpatory evidence disclosed in other habeas corpus proceedings; or further unspecified information, regardless of any actual or potential link to matters relevant in this proceeding, Petitioner's request should be denied for the reasons stated in section IV.F of Respondent's memorandum. To the extent that Petitioner seeks disclosure of evidence disclosed in other cases, the request should be denied for the reasons stated in section IV.G of Respondent's memorandum.

Request No. 17a:

To the extent that this request seeks evidence tending to materially undermine Ahmed Ressam's statement that Petitioner "was the 'top guy' and was 'in charge' [of] moving persons who came to Pakistan/Afghanistan for training and [of] assisting with their papers, money or providing safe harbor at a guesthouse," Factual Return ¶ 33, this request should be denied because it simply reiterates the requirements of CMO § I.D.1. See Resp't's Mem. section IV.A. To the extent that this request seeks information suggesting that "other persons were responsible

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for providing these services," evidence suggesting merely that Petitioner was not the only person who provided such services would not undermine Respondent's contentions, and Petitioner's request for such evidence falls outside the scope of CMO § I.D.1 and also fails the narrow tailoring, specificity, and good cause requirements of CMO § I.E.2(1), (2), (3), and (4).

Request No. 17b:

To the extent that this request seeks evidence tending to materially undermine Respondent's contention that Petitioner "coordinated and cooperated with [Usama Bin Ladin] in the conduct of training and trainee movements between their camps," Factual Return ¶ 45, this request should be denied because it simply reiterates the requirements of CMO § I.D.1. See Resp't's Mem. section IV.A. To the extent that this request seeks an unredacted copy of a document that was produced to Petitioner in redacted form, the request should be denied for the reasons stated in section II.B of Respondent's memorandum. The redacted document disclosed to Petitioner captures the exculpatory aspects of the statement Petitioner made to interrogators about whether Petitioner was responsible for referring trainees to other training camps and whether he in fact referred trainees to other training camps.

Request No. 17c:

To the extent that this request seeks disclosure of evidence undermining Respondent's contention that while at a guesthouse associated with Petitioner in Peshawar, Pakistan, Ahmed Ressam met three Saudi men who had attended the al-Faruq or al-Sidiq al-Qaida training camps, see Factual Return ¶ 34.e, this request should be denied because it simply reiterates the requirements of CMO § I.D.1. See Resp't's Mem. section IV.A. The Government has not made any further contention in this proceeding that Petitioner "provided safe harbor" to the three Saudi men, so Petitioner's request for information that would undermine such a contention falls outside

the scope of CMO § I.D.1 and fails the narrow tailoring, specificity, and good cause requirements of CMO § I.E.2(1), (2), (3), and (4). See Resp't's Mem. section IV.C.

Request No. 17d:

See Resp't's Mem. IV.A.

Request No. 17e:

To the extent that this request seeks evidence tending to materially undermine Respondent's contention that Petitioner "coordinated and cooperated with [Usama Bin Ladin] in the conduct of training and trainee movements between their camps," Factual Return ¶ 45, this request should be denied because it simply reiterates the requirements of CMO § I.D.1. See Resp't's Mem. section IV.A. To the extent that this request seeks information suggesting that "any such role was undertaken by other persons (e.g., Ibin al-Sheik al-Libi)," evidence suggesting merely that Petitioner was not the only person who performed such acts would not undermine Respondent's contentions, and Petitioner's request for such evidence falls outside the scope of CMO § I.D.1 and fails the narrow tailoring, specificity, and good cause requirements of CMO § I.E.2(1), (2), (3), and (4).

Request No. 17f:

The Government has not contended in this proceeding that Petitioner selected or knew the identities of specific persons who were selected to leave Khaldan for training at al-Qaida camps. See Factual Return ¶ 31 & n.5, 45 (citing Ressam 302 5/24/2001 and Tr. of FBI Special Agent Stephen Gaudin Trial Test. at 1997, United States v. Bin Laden, No. S(7) 98 Cr. 1023 (Jan. 8, 2001)). Thus, this request seeks evidence about contentions the Government has not made in this proceeding, and the request falls outside the scope of CMO § I.D.1 and fails the narrow tailoring, specificity, and good cause requirements of CMO § I.E.2(1), (2), (3), and (4).

See Resp't's Mem. section IV.C.

Request No. 17g:

See Resp't's Mem. section IV.A.

Request No. 17h:

To the extent that this request seeks disclosure of evidence undermining Respondent's contention that Ahmed Ressam was able to train at Derunta based on a letter provided by Petitioner (Factual Return ¶ 34.i), this request should be denied because it simply reiterates the requirements of CMO § I.D.1. See Resp't's Mem. section IV.A. The Government has not contended in this proceeding that Derunta camp had direct ties to al-Qaida or the Taliban, see Factual Return ¶ 34.h, and Petitioner's request for such evidence seeks evidence about contentions the Government has not made in this proceeding and falls outside the scope of CMO § I.D.1 and fails the narrow tailoring, specificity, and good cause requirements of CMO § I.E.2(1), (2), (3), and (4). See Resp't's Mem. section IV.C.

Request No. 17i:

To the extent that this request seeks disclosure of evidence undermining Respondent's contention that Petitioner was responsible for paying the Khaldan camp's expenses, see Factual Return ¶ 33, the request should be denied because it simply reiterates the requirements of CMO § I.D.1. See Resp't's Mem. section IV.A. To the extent that this request seeks information undermining a contention that Petitioner financed "particular terrorist operations asserted to have connections to the Khalden camp," Request No. 17i, the request seeks information about contentions the Government has not made in this proceeding and therefore falls outside the scope of CMO § I.D.1 and fails the narrow tailoring, specificity, and good cause requirements of CMO § I.E.2(1), (2), (3), and (4). See Resp't's Mem. section IV.C.

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Request No. 17j:

To the extent that this request seeks disclosure of evidence undermining Respondent's contention that persons trained at Khaldan included persons from al-Qaida, Egyptian Islamic Jihad (EIJ), Armed Islamic Group (GIA), Salafite Group for Preaching and Fighting (GSPC), Hamas, and Hizballah, see Factual Return ¶ 42, the request should be denied because it simply reiterates the requirements of CMO § I.D.1. See Resp't's Mem. section IV.A. To the extent that this request seeks disclosure of [redacted] the request should be denied for the reasons stated in section II.B of Respondent's memorandum. [redacted] To the extent that this request seeks a prior statement of Ahmed Ressam, referred to in Ressam 302 1/17/2002 at 16, described as indicating that [redacted] that very general description does not suggest the existence of any prior statement by Ressam that is likely to materially undermine Respondent's assertions about the affiliations of Khaldan trainees, and so the request fails the narrow tailoring and good cause requirements of CMO § I.E.2(1), (3), and (4). Respondent further notes that in an earlier statement by Ressam that has already been disclosed to Petitioner, Ressam described plans to create a "new Algerian camp." Ressam 302 8/3/2001 at 6 7.

Request No. 18:

To the extent that this request seeks disclosure of evidence undermining Respondent's various contentions about Mohammad al 'Owhali, see Factual Return ¶ 41.b, the request should be denied because it simply reiterates the requirements of CMO § I.D.1. See Resp't's Mem.

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section IV.A. To the extent that this request seeks further unspecified information regardless of any actual or potential link to matters relevant in this proceeding, Petitioner's request should be denied because it falls outside the scope of CMO § I.D.1 and fails the narrow tailoring, specificity, and good cause requirements of CMO § I.E.2(1), (2), (3), and (4). See Resp't's Mem. section IV.F.

Request No. 19:

To the extent that this request seeks disclosure of evidence undermining Respondent's contention that Mohammad al 'Owhali trained at Khaldan, see Factual Return ¶ 41.b, the request should be denied because it simply reiterates the requirements of CMO § I.D.1. See Resp't's Mem. section IV.A. To the extent that this request seeks evidence suggesting that al 'Owhali "trained at camps other than Khalden," evidence suggesting merely that Khaldan was not the only camp where al 'Owhali trained would not undermine Respondent's contentions, and Petitioner's request for such evidence falls outside the scope of CMO § I.D.1 and fails the narrow tailoring, specificity, and good cause requirements of CMO § I.E.2(1), (2), (3), and (4). The Government has not contended in this proceeding that Petitioner had any direct role in or advance knowledge of the terrorist attacks on U.S. embassies in Nairobi, Kenya, and Dar-es-Salaam, Tanzania, in 1998, so to the extent that this request seeks evidence suggesting that "Petitioner did not know of any planned attacks on the U.S. Embassies," the request seeks evidence about contentions the Government has not made, and the request falls outside the scope of CMO § I.D.1 and fails the narrow tailoring, specificity, and good cause requirements of CMO § I.E.2(1), (2), (3), and (4). See Resp't's Mem. section IV.C.

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Request No. 22:

To the extent that this request seeks information undermining Respondent's contention that ISN 200 "served with the Taliban on the front lines during Operation Enduring Freedom" and "received some of his military training at the Khaldan camp" or ISN 200's statements about

those matters, see Factual Return ¶ 41.c, this request should be denied because it simply reiterates the requirements of CMO § I.D.1. See Resp't's Mem. section IV.A. To the extent that this request seeks further unspecified information regardless of any actual or potential link to matters relevant in this proceeding, Petitioner's request should be denied because it falls outside the scope of CMO § I.D.1 and fails the narrow tailoring, specificity, and good cause requirements of CMO § I.E.2(1), (2), (3), and (4). See Resp't's Mem. section IV.F.

Request No. 23:

To the extent that this request seeks information undermining Respondent's contention that ISN 200 "served with the Taliban on the front lines during Operation Enduring Freedom" and "received some of his military training at the Khaldan camp," see, e.g., Factual Return ¶ 41.c, this request should be denied because it simply reiterates the requirements of CMO § I.D.1. See Resp't's Mem. section IV.A. To the extent that this request seeks further unspecified information about ISN 200's credibility or exculpatory evidence disclosed in other habeas corpus proceedings, regardless of any actual or potential link to matters relevant in this proceeding, the request falls outside the scope of CMO § I.D.1 and fails the narrow tailoring, specificity, and good cause requirements of CMO § I.E.2(1), (2), (3), and (4). See Resp't's Mem. sections IV.F, IV.G. To the extent that this request seeks evidence suggesting that "Petitioner did not support or was not aware of any alleged terrorist activity and/or plans of al Qatani," the request seeks evidence about contentions the Government has not made, falls outside the scope of CMO § I.D.1 and fails the narrow tailoring, specificity, and good cause requirements of CMO § I.E.2(1), (2), (3), and (4). See Resp't's Mem. section IV.C.

Request No. 24:

To the extent that this request seeks information undermining Respondent's various

contentions about ISN 1460 and ISN 1461 or based on statements by ISN 1461, see Factual Return ¶¶ 41.d, 44 n.12, this request should be denied because it simply reiterates the requirements of CMO § I.D.1. See Resp't's Mem. section IV.A. To the extent that this request seeks further unspecified information regardless of any actual or potential link to matters relevant in this proceeding, Petitioner's request should be denied because it falls outside the scope of CMO § I.D.1 and fails the narrow tailoring, specificity, and good cause requirements of CMO § I.E.2(1), (2), (3), and (4). See Resp't's Mem. section IV.F.

Request No. 25:

To the extent that this request seeks information undermining Respondent's various contentions about ISN 1460 and ISN 1461 or based on statements by ISN 1461, see Factual Return ¶¶ 41.d, 44 n.12, this request should be denied because it simply reiterates the requirements of CMO § I.D.1. See Resp't's Mem. section IV.A. To the extent that this request seeks evidence suggesting that "Petitioner was not aware of and/or did not support these detainees' connections with al-Qaida and/or [Khalid Sheikh Mohammed]," the request seeks evidence about contentions the Government has not made, falls outside the scope of CMO § I.D.1 and fails the narrow tailoring, specificity, and good cause requirements of CMO § I.E.2(1), (2), (3), and (4). See Resp't's Mem. section IV.C.

Request No. 26:

To the extent that this request seeks information undermining Respondent's various contentions about ISN [redacted] or based on statements by ISN [redacted] see Factual Return ¶ 64.d, this request should be denied because it simply reiterates the requirements of CMO § I.D.1. See Resp't's Mem. section IV.A. To the extent that this request seeks further unspecified information regardless of any actual or potential link to matters relevant in this proceeding, Petitioner's

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request should be denied because it falls outside the scope of CMO § I.D.1 and fails the narrow tailoring, specificity, and good cause requirements of CMO § I.E.2(1), (2), (3), and (4). See Resp't's Mem. section IV.F.

Request No. 27a–d:

See Resp't's Mem. section IV.A.

Request No. 28:

To the extent that this request seeks information undermining Respondent's various contentions about Abu Kamil al-Suri or based on statements contained in al-Suri's diary, see, e.g., Factual Return ¶¶ 5, 48, 60–62, 64.a.ii–iii, 64.b.i–ii, 64.c.i, 67–69, this request should be denied because it simply reiterates the requirements of CMO § I.D.1. See Resp't's Mem. section IV.A. To the extent that this request seeks further unspecified information regardless of any actual or potential link to matters relevant in this proceeding, Petitioner's request should be denied because it falls outside the scope of CMO § I.D.1 and fails the narrow tailoring, specificity, and good cause requirements of CMO § I.E.2(1), (2), (3), and (4). See Resp't's Mem. section IV.F.

Request No. 29a:

To the extent that this request seeks information undermining Respondent's contention that Abu Kamil al-Suri was "a close associate of [Petitioner] who traveled with [Petitioner] at least during part of the time from approximately January 2002 until [Petitioner's] capture," Factual Return ¶ 48, the request should be denied because it simply reiterates the requirements of CMO § I.D.1. See Resp't's Mem. section IV.A. To the extent that this request seeks evidence suggesting that al-Suri and Petitioner only traveled together for part of that time period and did not remain together during that entire period, the request seeks evidence about contentions the

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Government has not made, falls outside the scope of CMO § I.D.1 and fails the narrow tailoring, specificity, and good cause requirements of CMO § I.E.2(1), (2), (3), and (4). See Resp't's Mem. section IV.C.

Request No. 29b:

To the extent that this request seeks information undermining Respondent's contention that Abu Kamil al-Suri carried some kind of case belonging to Petitioner that al-Suri described in his diary as a "samsonite that had the entire future in it," Factual Return ¶ 48.a, the request should be denied because it simply reiterates the requirements of CMO § I.D.1. See Resp't's Mem. section IV.A. To the extent that this request seeks evidence undermining more specific contentions that what al-Suri describes as a "samsonite" was in fact a Samsonite brand briefcase or that the case contained materials that were related to terrorist operations, the request seeks evidence about contentions the Government has not made in this proceeding, falls outside the scope of CMO § I.D.1 and fails the narrow tailoring, specificity, and good cause requirements of CMO § I.E.2(1), (2), (3), and (4). See Resp't's Mem. section IV.C.

Request No. 29c:

To the extent that this request seeks information undermining Respondent's contention that Petitioner told al-Suri "that if anything happened to him, [al-Suri and others] should join [Sayf al-Adl] to be under his wing and that of al-Qa'ida," Factual Return ¶ 48, the request should be denied because it simply reiterates the requirements of CMO § I.D.1. See Resp't's Mem. section IV.A. To the extent that this request seeks evidence undermining a contention that Petitioner advised al-Suri to join Abd al-Hadi al-Iraqi, rather than Sayf al-Adl, the request seeks evidence about contentions the Government has not made, falls outside the scope of CMO § I.D.1 and fails the narrow tailoring, specificity, and good cause requirements of CMO § I.E.2(1),

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(2), (3), and (4). See Resp't's Mem. section IV.C.

Request No. 29d–e, g–h:

See Resp't's Mem. section IV.A.

Request No. 29i:

To the extent that this request seeks information undermining Respondent's contentions in its factual return about Petitioner's work in March 2002 preparing a number of persons for terrorist operations, see Factual Return ¶ 67, the request should be denied because it simply reiterates the requirements of CMO § I.D.1. See Resp't's Mem. section IV.A. To the extent that Petitioner's request seeks evidence undermining a contention that Petitioner was "about to begin" terrorist operations at that time, Petitioner's use of the phrase "about to begin" is vague and insufficiently specific, and to the extent Petitioner's use of the phrase "about to begin" is intended to request evidence about contentions the Government has not made, the request falls outside the scope of CMO § I.D.1 and fails the narrow tailoring, specificity, and good cause requirements of CMO § I.E.2(1), (2), (3), and (4). See Resp't's Mem. section IV.C. To the extent Petitioner seeks "denials and/or contradictory statements obtained from any of the fifteen people listed in al Suri's diary as being part of Petitioner's 'core group,'" Respondent does not contend for purposes of this proceeding that any specific individual whom al-Suri identified in his diary as an associate of Petitioner, but who is not otherwise discussed in the Government's factual return, was in fact an associate of Petitioner. The request therefore seeks information about contentions the Government has not made and falls outside the scope of CMO § I.D.1 and fails the narrow tailoring, specificity, and good cause requirements of CMO § I.E.2(1), (2), (3), and (4). See Resp't's Mem. section IV.C.

Request No. 29j:

See Resp't's Mem. section IV.A.

Request No. 30:

To the extent that this request seeks information undermining Respondent's various contentions about Sayf al-Adl or based on statements contained in [redacted] see, e.g., Factual Return ¶¶ 48, 53, 54, 57, this request should be denied because it simply reiterates the requirements of CMO § I.D.1. See Resp't's Mem. section IV.A. To the extent that this request seeks further unspecified information regardless of any actual or potential link to matters relevant in this proceeding, Petitioner's request should be denied because it falls outside the scope of CMO § I.D.1 and fails the narrow tailoring, specificity, and good cause requirements of CMO § I.E.2(1), (2), (3), and (4). See Resp't's Mem. section IV.F.

Request No. 31a:

To the extent that this request seeks information undermining Respondent's various contentions about Petitioner's relations with Usama Bin Ladin or al-Qaida, this request should be denied because it simply reiterates the requirements of CMO § I.D.1. See Resp't's Mem. section IV.A. To the extent that this request seeks information about Sayf al-Adl's "inability to identify" Petitioner as an associate of Usama Bin Ladin or al-Qaida, Petitioner's use of the phrase "inability to identify" is vague and insufficiently specific. To the extent that Petitioner intends the phrase "inability to identify" to request evidence suggesting that Sayf al-Adl did not know Petitioner or that Petitioner was not associated with Usama Bin Ladin or al-Qaida, the request should be denied because it simply reiterates the requirements of CMO § I.D.1. See Resp't's Mem. sections IV.A, IV.E. However, to the extent that the request seeks disclosure of evidence that suggests only that the Government has not obtained information from Sayf al-Adl about

Petitioner's links with Usama Bin Ladin or al-Qaida, the request should be denied because it falls outside the scope of CMO § I.D.1 and fails the narrow tailoring, specificity, and good cause requirements of CMO § I.E.2(1), (2), (3), and (4). See Resp't's Mem. section IV.E.

Request No. 31b:

To the extent that the request seeks evidence "tending to show that Sayf al-Adl and Petitioner had an antagonistic and/or non-cooperative relationship," Petitioner's use of the phrase "antagonistic and/or non-cooperative relationship" is vague and insufficiently specific, and the request is not likely to produce exculpatory information, so the request falls outside the scope of CMO § I.D.1 and fails the narrow tailoring, specificity, and good cause requirements of CMO § I.E.2(1), (2), (3), and (4). To the extent that this request seeks additional detail or supporting or corroborating information about Abu Kamil al-Suri's statement that "Sayf al-Adl and Abu Muhammad al-Masri and those with them [were] trying to take over [Petitioner's group]," Factual Return ¶ 48, the request should be denied for the reasons stated in section IV.C of Respondent's memorandum.

Request No. 32:

The Government has not made contentions in this proceeding about any direct connection between Petitioner and ISN 1453, ISN 1457, or ISN 1461. See Factual Return ¶ 44 n.12. Petitioner's request for "[e]vidence tending to indicate" the absence of such direct connections or tending to indicate that Petitioner had no knowledge of any connections between these three detainees and Usama Bin Ladin therefore seeks evidence about contentions the Government has not made and falls outside the scope of CMO § I.D.1 and fails the narrow tailoring, specificity, and good cause requirements of CMO § I.E.2(1), (2), (3), and (4). See Resp't's Mem. section IV.C.

Request No. 33:

To the extent that this request seeks disclosure of evidence tending to materially undermine the contention that Petitioner associated with Usama Bin Ladin or al-Qaida, this request should be denied because it simply reiterates the requirements of CMO § I.D.1. See Resp't's Mem. section IV.A. To the extent that this request seeks information about ISN 1453's, ISN 1457's, or ISN 1461's "inability to identify" Petitioner as an associate of Usama Bin Ladin or al-Qaida, Petitioner's use of the phrase "inability to identify" is vague and insufficiently specific. To the extent that Petitioner intends the phrase "inability to identify" to request statements by these detainees suggesting that Petitioner was not associated with Usama Bin Ladin or al-Qaida, the request should be denied because it simply reiterates the requirements of CMO § I.D.1. See Resp't's Mem. sections IV.A, IV.E. However, to the extent that the request seeks disclosure of evidence that suggests only that the Government has not obtained information from these three detainees about Petitioner's links with Usama Bin Ladin or al-Qaida, such evidence would not amount to exculpatory evidence for purposes of CMO § I.D.1, and Petitioner's request for such evidence fails the narrow tailoring, specificity, and good cause requirements of CMO § I.E.2(1), (2), (3), and (4). See Resp't's Mem. section IV.E.

Request No. 34:

To the extent that this request seeks information undermining Respondent's various contentions about ISN [redacted] or based on statements by ISN [redacted] see Factual Return ¶ 64.a, b.ii, this request should be denied because it simply reiterates the requirements of CMO § I.D.1. See Resp't's Mem. section IV.A. To the extent that this request seeks further unspecified information regardless of any actual or potential link to matters relevant in this proceeding, Petitioner's request should be denied because it falls outside the scope of CMO § I.D.1 and fails the narrow

tailoring, specificity, and good cause requirements of CMO § I.E.2(1), (2), (3), and (4). Resp't's Mem. section IV.F

Request No. 35a–b:

See Resp't's Mem. section IV.A.

Request No. 35c:

To the extent that this request seeks disclosure of evidence tending to materially undermine the contention that Petitioner ISN [redacted] "went to the front to fight the Northern Alliance," see Factual Return ¶ 64.a.i, this request should be denied because it simply reiterates the requirements of CMO § I.D.1. See Resp't's Mem. section IV.A. The Government has not contended in this proceeding that ISN [redacted] ultimately engaged in live combat at the front, so to the extent that this request seeks evidence suggesting that ISN [redacted] did not ultimately engage in live combat, it seeks information about contentions the Government has not made, falls outside the scope of CMO § I.D.1, and fails the narrow tailoring, specificity, and good cause requirements of CMO § I.E.2(1), (2), (3), and (4). See Resp't's Mem. section IV.C.

Request Nos. 35d–e:

See Resp't's Mem. section IV.A.

Request No. 35f:

The Government has not contended in this proceeding that ISN [redacted] stated that he "was a bomb-maker" or was "experienced" in constructing explosives when first recruited by Petitioner. Rather, the Government contends that ISN [redacted] was selected to receive training in explosives from ISN [redacted] at the Faisalabad safehouse. See Factual Return ¶¶ 64.a.ii, b.ii. Consequently, evidence suggesting that ISN [redacted] lacked extensive prior experience with explosives seeks information about contentions the Government has not made, and Petitioner's request for such

evidence falls outside the scope of CMO § I.D.1 and fails the narrow tailoring, specificity, and good cause requirements of CMO § I.E.2(1), (2), (3), and (4). See Resp't's Mem. section IV.C.

Request Nos. 35g–h:

These requests should be denied because they seek evidence that would undermine information the Government disclosed as exculpatory evidence, not information the Government presented in support of detention. See Resp't's Mem. section IV.C.

Request No. 36:

To the extent that this request seeks information undermining Respondent's various contentions about ISN [redacted] or based on statements by ISN [redacted] see Factual Return ¶¶ 64.b, 68, this request should be denied because it simply reiterates the requirements of CMO § I.D.1. See Resp't's Mem. section IV.A. To the extent that this request seeks further unspecified information regardless of any actual or potential link to matters relevant in this proceeding, Petitioner's request should be denied because it falls outside the scope of CMO § I.D.1 and fails the narrow tailoring, specificity, and good cause requirements of CMO § I.E.2(1), (2), (3), and (4). See Resp't's Mem. section IV.F.

Request Nos. 37a–c:

See Resp't's Mem. section IV.A.

Request No. 38:

To the extent that this request seeks information undermining Respondent's various contentions about ISN [redacted] or based on statements by ISN [redacted] see Factual Return ¶ 64.a.ii, b.ii, c, this request should be denied because it simply reiterates the requirements of CMO § I.D.1. See Resp't's Mem. section IV.A. To the extent that this request seeks further unspecified information regardless of any actual or potential link to matters relevant in this proceeding,

Petitioner's request should be denied because it falls outside the scope of CMO § I.D.1 and fails the narrow tailoring, specificity, and good cause requirements of CMO § I.E.2(1), (2), (3), and (4). See Resp't's Mem. section IV.F.

Request No. 39a–c:

See Resp't's Mem. section IV.A.

Request No. 40:

To the extent that this request seeks information undermining Respondent's various contentions about ISN 1458 or based on statements by ISN 1458, see Factual Return ¶¶ 64.a, b, c.i, 68 n.27, this request should be denied because it simply reiterates the requirements of CMO § I.D.1. See Resp't's Mem. section IV.A. To the extent that this request seeks exculpatory information produced in other habeas proceedings or further unspecified information regardless of any actual or potential link to matters relevant in this proceeding, Petitioner's request should be denied because it falls outside the scope of CMO § I.D.1 and fails the narrow tailoring, specificity, and good cause requirements of CMO § I.E.2(1), (2), (3), and (4). See Resp't's Mem. section IV.F, IV.G.

Request Nos. 41a–d:

See Resp't's Mem. section IV.A.

Request No. 42:

To the extent that this request seeks information undermining Respondent's various contentions based on statements by ISN [redacted] see Factual Return ¶¶ 64.a.iii, this request should be denied because it simply reiterates the requirements of CMO § I.D.1. See Resp't's Mem. section IV.A. To the extent that this request seeks further unspecified information regardless of any actual or potential link to matters relevant in this proceeding, Petitioner's request should be

denied because it falls outside the scope of CMO § I.D.1 and fails the narrow tailoring, specificity, and good cause requirements of CMO § I.E.2(1), (2), (3), and (4). See Resp't's Mem. section IV.F.

Request No. 43:

To the extent that this request seeks information obtained from ISN [redacted] that tend to materially undermine Respondent's contentions that Petitioner was associated with al-Qaida, met Abd al-Hadi al-Iraqi in Barmil, Afghanistan, or was carrying out a plot related to improvised explosive devices, this request should be denied because it simply reiterates the requirements of CMO § I.D.1. See Resp't's Mem. section IV.A. To the extent that this request seeks "negative identifications" of Petitioner by ISN [redacted] Petitioner's use of the term "negative identifications" is vague and insufficiently specific. To the extent that Petitioner intends the phrase "negative identifications" to request statements by ISN [redacted] suggesting that Petitioner was not associated with Abd al-Hadi al-Iraqi or al-Qaida, the request should be denied because it simply reiterates the requirements of CMO § I.D.1. See Resp't's Mem. sections IV.A, IV.E. However, to the extent that the request seeks disclosure of evidence that suggests only that the Government has not obtained information from ISN [redacted] about Petitioner's links with Abd al-Hadi al-Iraqi or al-Qaida, Petitioner's request for such evidence falls outside the scope of CMO § I.D.1 and fails the narrow tailoring, specificity, and good cause requirements of CMO § I.E.2(1), (2), (3), and (4). See Resp't's Mem. section IV.E.

Request No. 44:

See Resp't's Mem. sections IV.D, IV.I.

Request No. 45:

See Resp't's Mem. section IV.I.

Request No. 46:

See Resp't's Mem. section IV.A.

Request No. 47:

To the extent that this request seeks evidence suggesting that training provided at Khaldan was not terrorist training, this request should be denied because it simply reiterates the requirements of CMO § I.D.1. See Resp't's Mem. section IV.A. To the extent that this request seeks evidence suggesting that some materials used at Khaldan could have been useful in applications other than terrorist training, such evidence would not undermine the Government's contentions about Khaldan, and Petitioner's request for such evidence falls outside the scope of CMO § I.D.1 and fails the narrow tailoring, specificity, and good cause requirements of CMO § I.E.2(1), (2), (3), and (4). Evidence that materials used at Khaldan, such as military manuals, could be used for lawful purposes would not suggest that such items were not used for terrorist training at Khaldan.

Request No. 48:

To the extent that this request seeks evidence suggesting that the Khaldan, Sada, al-Faruq, Jihad Wal, or al-Sadiq camps did not provide terrorist training during the time Petitioner allegedly attended them, this request should be denied because it simply reiterates the requirements of CMO § I.D.1. See Resp't's Mem. section IV.A. The Government has not contended in this proceeding that any of these camps had launched attacks against the United States or declared hostilities against the United States at that time. See Factual Return ¶ 21. To the extent that this request seeks disclosure of evidence indicating that these camps had not launched attacks or declared hostilities against the United States at that time, the request seeks evidence about contentions the Government has not made, falls outside the scope of CMO

§ I.D.1, and fails the narrow tailoring, specificity, and good cause requirements of CMO § I.E.2(1), (2), (3), and (4). See Resp't's Mem. section IV.C.

Request No. 49:

The Government does not object to this request to the extent that it contemplates only a search of reasonably available evidence and disclosure of any exculpatory evidence identified in such a search. See Resp't's Mem. section IV.O.

Request No. 50:

To the extent that this request seeks evidence suggesting that the Khaldan camp was "organizationally and operationally independent" of al-Qaida's camps, such a proposition would be consistent with the Government's contentions. See Factual Return ¶ 31 ("The Khaldan training camp . . . was operationally and organizationally independent of al-Qaida."). The request therefore does not seek exculpatory information and is not authorized under the CMO, as further explained in section IV.C of Respondent's memorandum.

To the extent that this request seeks an unredacted copy of a document that was produced to Petitioner in redacted form, the request should be denied for the reasons stated in section II.B of Respondent's memorandum. The redacted document disclosed to Petitioner captures the exculpatory aspects of the document.

To the extent that this request seeks evidence suggesting that the Khaldan camp did not advocate or approve of terrorist operations or did not train persons who expressed interest in terrorist operations, this request should be denied because it simply reiterates the requirements of CMO § I.D.1. See Resp't's Mem. section IV.A. To the extent that this request seeks any further information about purely ideological divisions between Khaldan and al-Qaida, this request is vague and insufficiently specific, falls outside the scope of CMO § 1.D.1, and fails to meet the

narrow tailoring, specificity, and good cause requirements of CMO § I.E.2(1), (2), (3), and (4). See Resp't's Mem. section IV.D.

Request No. 51:

See Resp't's Mem. section IV.I.

Request Nos. 52–53:

See Resp't's Mem. section IV.K.

Request Nos. 54–55:

To the extent that these requests seek evidence tending to materially undermine Respondents' contentions about or based on the diary passages relied upon in the factual return, the requests should be denied because they merely reiterate the requirements of the CMO. See Resp't's Mem. section IV.A. To the extent that these requests seek further information, they should be denied for the reasons stated in section III.B of Respondent's memorandum.

Request No. 56:

To the extent that this request seeks evidence tending to materially undermine Respondents' contentions about or based on the diary passages relied upon in the factual return, the requests should be denied because they merely reiterate the requirements of the CMO. See Resp't's Mem. section IV.A. To the extent that these requests seek further information, they should be denied for the reasons stated in section III.B and IV.I of Respondent's memorandum.

Request No. 57:

See Resp't's Mem. section IV.H.

Request No. 58a:

To the extent that this request seeks evidence tending to materially undermine Respondents' assertion that Petitioner met with Usama Bin Ladin on multiple occasions, this

request should be denied because it simply reiterates the requirements of CMO § I.D.1. See Resp't's Mem. section IV.A. To the extent that Petitioner's Request No. 58a seeks evidence suggesting that Petitioner did not meet with Usama Bin Ladin "at his own initiative," the Government makes no contentions regarding who arranged or initiated meetings between Petitioner and Usama Bin Ladin, so the request seeks information about contentions the Government has not made, falls outside the scope of CMO § I.D.1, and fails the narrow tailoring, specificity, and good cause requirements of CMO § I.E.2(1), (2), (3), and (4). See Resp't's Mem. section IV.C.

Request Nos. 58b–e:

See Resp't's Mem. section IV.A.

Request Nos. 58f–g:

These requests should be denied because they seek evidence that would undermine information that the Government did not present as part of its case in support of detention. See Resp't's Mem. section IV.D.

Request No. 58h:

See Resp't's Mem. section IV.A.

Request No. 59:

See Resp't's Mem. section IV.D.

Request No. 60:

This request seeks information that is consistent with the Government's contentions in its factual return. Compare Request No. 60 (seeking [redacted] with Factual Return ¶ 26 (stating

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[redacted]

The request therefore does not seek exculpatory information and is not authorized under the CMO, as further explained in section IV.C of Respondent's memorandum.

Request No. 61:

To the extent that this request simply seeks information [redacted] see Factual Return ¶¶ 26, 31 & n.5, 39, 44, 45, it should be denied because it simply reiterates the requirements of CMO § I.D.1. See Resp't's Mem. section IV.A. To the extent Petitioner intends to seek any further information through this request, Petitioner's uses of the words "indicating," "antagonistic," and "support[]" are too broad and are vague and insufficiently specific, and the request fails to meet the narrow tailoring and specificity requirements of CMO § I.E.2 (1) and (2).

Request No. 62:

The Government's factual return notes that Petitioner met with Usama Bin Ladin to discuss the closure of the Khaldan camp and the potential union of disparate mujahideen groups under common leadership, but the Government has not contended in this proceeding that Petitioner concurred with Usama Bin Ladin's decision that Khaldan should be closed or that Petitioner accepted an invitation to unite with Bin Ladin after Khaldan's closure. See Factual Return ¶¶ 26, 44. Thus, to the extent that this request seeks evidence suggesting that Petitioner disagreed with Bin Ladin's decision or that Petitioner did not unite with Bin Ladin at that time, the request seeks information about contentions the Government has not made and should be

denied for the reasons stated in section IV.C of Respondent's memorandum.

Request No. 63:

The Government's factual return notes that Petitioner met with Usama Bin Ladin to discuss the potential union of disparate mujahideen groups under common leadership, but the Government has not contended in this proceeding that Petitioner accepted an invitation to unite with Bin Ladin after Khaldan's closure. See Factual Return ¶¶ 26, 44. Thus, to the extent that this request seeks evidence suggesting that Petitioner did not unite with Bin Ladin at that time, the request seeks information about contentions the Government has not made and should be denied for the reasons stated in section IV.C of Respondent's memorandum. Furthermore, Respondent's factual return contains no contentions naming Ibn al Shaykh al Libi. To the extent that this request seeks information about Ibn al Shaykh al Libi as opposed to information about Petitioner, the request should be denied for the reasons stated in section IV.C of Respondent's memorandum.

Request No. 64:

To the extent that this request seeks information undermining the contention that Khaldan associated with al-Qaida as described in the factual return, see, e.g., Factual Return ¶¶ 30, 31 & n.5, 39, this request should be denied because it simply reiterates the requirements of CMO § I.D.1. See Resp't's Mem. section IV.A. To the extent that this request seeks information suggesting that Petitioner was not a member of al-Qaida or the Taliban, the request should be denied for the reasons stated in section IV.D of Respondent's memorandum.

Request No. 65:

This request is vague and insufficiently specific and fails to meet the narrow tailoring and specificity requirements of CMO § I.E.2(1) and (2). Furthermore, evidence indicating that some

persons not affiliated with al-Qaida had dealings with Usama Bin Ladin would not undermine either the Government's contentions that Petitioner had dealings with Usama Bin Ladin or that Petitioner in particular was affiliated with al-Qaida. Accordingly, the request falls outside the scope of CMO § I.D.1 and fails to meet the good cause requirements of CMO § I.E.2(3) and (4).

Request No. 66:

The Government has not contended in this proceeding that, at the time Petitioner was apprehended, Petitioner had knowledge of specific terrorist operations being planned or executed by persons or groups other than Petitioner and his group. Evidence suggesting that Petitioner lacked knowledge of plans by other persons or groups would not undermine the Government's allegations about Petitioner's own thwarted plans, or any other allegations against the Petitioner. Petitioner's request for such evidence falls outside the scope of CMO § I.D.1 and fails the narrow tailoring, specificity, and good cause requirements of CMO § I.E.2(1), (2), (3), and (4). See Resp't's Mem. sections IV.C, IV.I.

Request Nos. 67a–b:

See Resp't's Mem. section IV.H.

Request No. 68a:

To the extent that this request seeks information undermining Respondent's contention that Petitioner "work[ed] in [Usama Bin Ladin's] military and security plan to confront an American counterattack" in Khost, Afghanistan, after the September 2001 attacks, Factual Return ¶ 50, this request should be denied because it simply reiterates the requirements of CMO § I.D.1. See Resp't's Mem. section IV.A. The Government does not rely on any contention that Petitioner did this work as an "al Qaida deputy" or because he was subject to al-Qaida command. See Factual Return ¶ 50. Thus, to the extent that this request seeks evidence that Petitioner

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declined to submit to al-Qaida command as an "al Qaida deputy" or left Khost because he was being pressured to serve as an "al Qaida deputy," the request seeks information about contentions the Government has not made and falls outside the scope of CMO § I.D.1 and fails the requirements of CMO § I.E.2(1), (2), (3), and (4). See Resp't's Mem. sections IV.C, IV.D.

Request No. 68b:

To the extent that this request seeks information undermining Respondent's contention that Petitioner supported enemy forces and participated in hostilities as described in the Government's factual return, see, e.g., Factual Return ¶¶ 49–57, this request should be denied because it simply reiterates the requirements of CMO § I.D.1. See Resp't's Mem. section IV.A. To the extent that Petitioner intends the phrase "actually participated" to refer to live combat, the request seeks information about contentions the Government has not made, and the request falls outside the scope of CMO § I.D.1 and fails the narrow tailoring, specificity, and good cause requirements of CMO § I.E.2(1), (2), (3), and (4). See Resp't's Mem. section IV.C

Request No. 69:

The Government contends in its factual return that Petitioner was present in Kandahar in November 2001, and a number of prominent terrorist figures converged on Kandahar around the same time. See Factual Return ¶ 53. Petitioner's request for evidence that would undermine an "insinuation that Petitioner's presence in Kandahar . . . was related to the presence of known terrorists in the city" is vague and insufficiently specific and is not supported by any allegations about whether Petitioner in fact was present in Kandahar or for what purpose. The evidence Petitioner seeks would not undermine Respondent's contentions, and Petitioner's request for such evidence falls outside the scope of CMO § I.D.1 and fails the narrow tailoring, specificity, and good cause requirements of CMO § I.E.2(1), (2), (3), and (4).

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Request No. 70:

Respondent opposes this request on same grounds that it opposes Request No. 68a.

Request No. 71a:

To the extent that Petitioner seeks information that would undermine the Government's contention that Petitioner "facilitat[ed] the retreat and escape of enemy forces," see Factual Return ¶¶ 58–62, this request should be denied because it simply reiterates the requirements of CMO § I.D.1. See Resp't's Mem. section IV.A. To the extent that Petitioner seeks information suggesting that the persons whom Petitioner assisted in escaping Afghanistan in 2001 included "women, children, and/or other non-combatants," this request should be denied for the reasons explained in section IV.H of Respondent's memorandum.

Request No. 71b–c:

See Resp't's Mem. section IV.A.

Request No. 71d:

The Government contends in its factual return that "[i]n late January 2002, Zubaydah was also involved in arranging a ransom for the release of two groups of mujahideen (one group consisted of 17 mujahideen and the other consisted of 37 mujahideen) captured by Pakistani or Afghani tribal members." See Factual Return ¶ 61 (citing Zubaydah Diary Vol. VI at 77, 79–80 and Al-Suri Diary [redacted]). Petitioner's request seeks evidence "tending to undermine" a contention that these persons, described as "brothers" in the cited passages of Petitioner's diary and Al-Suri's diary, were "enemy combatants." To the extent that this request seeks evidence suggesting that these "brothers" had no links either to terrorism or to individuals or groups hostile to the United States, the request should be denied because it simply reiterates the requirements of CMO § I.D.1. See Resp't's Mem. section IV.A. However, to the extent that

Petitioner's use of the term "enemy combatants" is intended to refer to any more specific or technical contention, the request seeks information about contentions the Government has not made and the request falls outside the scope of CMO § I.D.1 and fails the narrow tailoring, specificity, and good cause requirements of CMO § I.E.2(1), (2), (3), and (4). See Resp't's Mem. section IV.C.

To the extent that this request seeks evidence suggesting the "brothers" were arrested by police rather than captured by Afghan or Pakistani tribes, the request should be denied because it simply reiterates the requirements of CMO § I.D.1. See Resp't's Mem. section IV.A.

To the extent the request seeks evidence suggesting that the individuals in question were captured for the purpose of obtaining bounties or ransoms, such evidence would be consistent with Respondent's contentions, see Factual Return ¶ 61; Zubaydah Diary Vol. VI at 77, 79-80; Al-Suri Diary [redacted] and would not contradict Respondent's contention that these "brothers" were linked to terrorism or to individuals or groups hostile to the United States. Accordingly, Petitioner's request for such evidence falls outside the scope of CMO § I.D.1 and fails the narrow tailoring, specificity, and good cause requirements of CMO § I.E.2(1), (2), (3), and (4).

Request No. 71e:

To the extent that this request seeks evidence undermining Respondent's contention that between February 2002 and March 2002, Petitioner "moved from safehouse to safehouse with different groups," Factual Return ¶ 62, this request should be denied because it merely reiterates the requirements of CMO § I.D.1. See Resp't's Mem. section IV.A. To the extent that Petitioner seeks information suggesting that Petitioner's movements during this time were "not organized by Petitioner," the Government has not contended in this proceeding that Petitioner organized his

own movements during this time without outside assistance, and the request seeks information about contentions the Government has not made, falls outside the scope of CMO § I.D.1, and fails the requirements of CMO § I.E.2(1), (2), (3), and (4). See Resp't's Mem. section IV.C.

Request No. 71f–g:

See Resp't's Mem. section IV.A.

Request No. 72:

To the extent that this request seeks evidence undermining Respondent's allegations about Petitioner's harboring terrorists at the Faisalabad, Pakistan, safe house where he was captured, see Factual Return ¶¶ 63–69, the request should be denied because it simply reiterates the requirements of CMO § I.D.1. See Resp't's Mem. section IV.A. To the extent that Petitioner seeks other information about other detainees who were captured at the Faisalabad location, whether they knew about Petitioner's terrorist activities, and their reasons for being in the house, Petitioner's request is not narrowly tailored to the purpose of uncovering specific exculpatory evidence. Respondent has not contended in this proceeding that each and every individual at the Faisalabad site was involved in Petitioner's plans, and evidence indicating that one or more persons at the Faisalabad site was not involved in or aware of Petitioner's activities would not undermine Respondent's contentions against Petitioner. See Resp't's Mem. sections IV.C, IV.G. Also, Petitioner has not named or described any specific individuals who were at the house and observed or interacted with Petitioner enough to permit them to draw informed conclusions that Petitioner was not involved in terrorist activities or that Respondent's allegations against Petitioner are otherwise inaccurate. See Resp't's Mem. section IV.G. Accordingly, Petitioner's request falls outside the scope of CMO § I.D.1 and fails the narrow tailoring, specificity, and good cause requirements of CMO § I.E.2(1), (2), (3), and (4).

Request No. 73:

See Resp't's Mem. section IV.C.

Request No. 74:

See Resp't's Mem. section IV.C.

Request No. 75a–b:

See Resp't's Mem. section IV.A.

Request No. 76:

This request seeks evidence suggesting that any of six named associates of Ahmed Ressam lacked specific knowledge of Ressam's plans for a terrorist attack in the United States. Petitioner asserts that this would undermine Respondent's contention that Ressam told Petitioner about his plans for a terrorist attack in the United States but did not tell Petitioner the intended target or the intended date of the attack, Factual Return ¶ 35. Evidence suggesting that other persons besides Petitioner lacked knowledge of Ressam's plans would not undermine Respondent's contention, and Petitioner's request for such evidence falls outside the scope of CMO § I.D.1 and fails the narrow tailoring, specificity, and good cause requirements of CMO § I.E.2(1), (2), (3), and (4).

Request Nos. 77, 78a–d:

The Court has already ruled on these requests. See Resp't's Mem. section III.D.

Request Nos. 79–80:

See Resp't's Mem. section IV.L.

Request Nos. 81a–b, 82:

See Resp't's Mem. section IV.C.

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Request No. 83:

See Resp't's Mem. sections IV.C, IV.J.

Request No. 84:

See Resp't's Mem. section IV.C.

Request Nos. 85a–f:

See Resp't's Mem. section IV.M.

Request No. 86:

See Resp't's Mem. sections II.B, IV.C.

Request Nos. 87–91a:

See Resp't's Mem. section IV.C.

Request No. 91b–c:

See Resp't's Mem. sections IV.C, IV.J.

Request No. 92:

Respondent opposes this request on the same grounds that it opposes Request No. 72.

Request Nos. 93a–e, 94:

See Resp't's Mem. section IV.C.

Request No. 95a:

See Resp't's Mem. sections II.B, IV.N.

Request Nos. 95b–e:

See Resp't's Mem. section IV.N.

Request No. 95f:

See Resp't's Mem. sections IV.D, IV.N.

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Request No. 95g:

See Resp't's Mem. section IV.N.

Request No. 96a[13]:

See Resp't's Mem. sections II.B, IV.N.

Request Nos. 96b–h:

See Resp't's Mem. section IV.N.

Request Nos. 96i–j:

See Resp't's Mem. sections IV.D, IV.I, IV.N.

Request No. 96k:

See Resp't's Mem. section IV.N.

Date: October 27, 2009

Respectfully submitted,

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[13]Petitioner's Appendix contains two successive requests both numbered Request No. 95. App'x at 35–36. The second request apparently should be numbered Request No. 96.

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Civil Action No. 08-cv-1360 (RWR)

EXHIBIT 1

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

----------X

SABRY MOHAMMED, et al., Civil Case No. 05-2385

Petitioners

v.

BARACK OBAMA, et al,

Defendants,

----------X

Washington, D.C.
Wednesday, August 12, 2009
9:45 A.M.

TRANSCRIPT OF HEARING
BEFORE THE HONORABLE ELLEN SEGAL HUVELLE
UNITED STATES DISTRICT JUDGE

APPEARANCES:

FOR THE PETITIONER: Eric P. Gotting, Esquire
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Court Reporter: [redacted] RPR
U.S. District Courthouse
Room 6507
Washington, D.C. 20001
(202) 354-3247

Proceedings recorded by mechanical stenography, transcript produced by computer.

specific categories of documents like that in the task force data.

THE COURT: When you say task force data, are we talking about something that is one, two or three or something else?

MR. BRANMAN: No, just the 2001, two, three.

THE COURT: That's three subparts of the task force data.

MR. BRANMAN: Right. Those are the kind of subjects that in other cases we've handled through motions for discovery under section I(E)2.

THE COURT: I'm only, if somebody said find his medical records, could you find those buried someplace?

MR. BRANMAN: My understanding is that the task force does not have medical records. But ultimately we can search for words in documents but not -- for example, there is a request for photographs. I don't think he can search for those using the tools that we have.

THE COURT: I don't know how to resolve this.

Does petitioner's counsel have some -- the 800 documents strike me as do-able. We ought to move up the timeframe it seems to me. They're looking for what they consider to be responsive to the Court's order of either exculpatory or automatic. That's all they're looking for.

You have not now made any motion for anything

specific which you need to do if you want something specific. I don't know exactly what else we can do at the moment. I'm not going to have them search 13,000 documents. That's a waste of time frankly.

MR. GOTTING: I think just a couple of points. We're preparing our opposition and we're also preparing a motion to compel some of--

THE COURT: I hate to say it, but I won't get to it. I'm going into trial. It is unfortunate you didn't do it before now. I didn't realize. That's why we're here.

MR. GOTTING: A lot of our requests are based our discussions with Sabry just a few weeks ago a. Until then we didn't really have, we felt like we needed to have some specific reasons to request those documents.

So that's why we're preparing the motion to compel right now. We'll file our motion for opposition. But just a couple of points. One thing they're completely missing here. They're relying on another detainee's statement against my client.

THE COURT: Not a lot--

MR. GOTTING: Not a lot. I agree.

THE COURT: We went through that pretty carefully, not a lot. I'm not too worried about other detainees here. That's not what is holding him I don't think.

MR. GOTTING: Anyway, they have not even offered to

Civil Action No. 08-cv-1360 (RWR)

EXHIBIT 2

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ZAYN AL ABIDIN MUHAMMAD HUSAYN	:	
Petitioner,	:	08 Civ. 1360 (RWR)
v.	:	
ROBERT M. GATES,	:	~~Ex parte and in camera~~
Respondent	:	

EX PARTE DECLARATION OF JOHN H. DURHAM

1. I am Counsel to the United States Attorney for the District of Connecticut. I have been employed as a federal prosecutor since December 20, 1982, when I became a Trial Attorney for the New Haven Field Office of the Boston Strike Force on Organized Crime. I served as the Strike Force in the District of Connecticut until September 1989. In September 1989, I became Chief of the Criminal Division for the United States Attorney's Office for the District of Connecticut and served in that position until March 1994, when I became Deputy United States Attorney for the Office.[1] I became Counsel to the United States Attorney in March 2008. At various times, I have also served as the Interim United States Attorney for the District of Connecticut, Special Attorney in the District of Massachusetts investigating and prosecuting corruption involving law enforcement agencies in Massachusetts, and Special Attorney in the Southern District of New York investigating allegations of corruption within a federal law

[1] In the District of Connecticut, the Deputy United States Attorney is the position commonly known in other districts as the First Assistant United States Attorney.

enforcement agency. On January 2, 2008, then-Attorney General Michael B. Mukasey appointed me to serve as Acting United States Attorney for the Eastern District of Virginia in connection with a federal criminal investigation into the destruction of certain videotaped interrogations of detainees by the Central Intelligence Agency (the "CIA" or the "Agency"). In my capacity as Acting United States Attorney for the Eastern District of Virginia, I am responsible for supervising the investigative efforts of a team of lawyers and Special Agents of the Federal Bureau of Investigation conducting the investigation into the CIA tapes matter. That investigation remains ongoing.

2. On August 24, 2009, Attorney General Eric H. Holder expanded my mandate to include a preliminary review into whether federal laws were violated in connection with the interrogation of certain detainees at overseas locations. In that capacity, I am to recommend to the Attorney General whether there is sufficient predication for a full investigation into whether the law was violated in connection with those interrogations.

3. This is the first declaration that I am submitting in this matter. However, I previously submitted declarations in the following cases, requesting stays over portions of those matters that overlap with the ongoing criminal investigation:

- *American Civil Liberties Union, et al. v. Department of Defense, et al.*, 04 Civ. 4151 (AKH) (Freedom of Information Act case pending before the Honorable Alvin K. Hellerstein in the Southern District of New York);
- *Amnesty International, et al. v. Central Intelligence Agency, et al.*, 07 Civ. 5435 (LAP) (FOIA case pending before the Honorable Loretta A. Preska in the Southern District of New York);
- *The James Madison Project, et al. v. Central Intelligence Agency*, 07 Civ. 2306 (RBW) (FOIA case pending before the Honorable Reggie B. Walton in the District of Columbia); and

- *Hani Saleh Rashid Abdullah, et al. v. George Bush, et al.*, 05 Civ. 23 (RWR) (habeas petition pending before this Court).

4. I submit this declaration to request that this Court stay its decision on whether to grant the relief requested by Petitioner Zayn Al Abidin Muhammad Husayn's ("Petitioner") Motion for Sanctions for the Spoliation of Evidence, on grounds that providing those remedies or conducting evidentiary proceedings on Petitioner's motion at this time would interfere with my ongoing criminal investigation. I would ask that this Court grant a stay until [redacted], at which time, based upon presently available information, I believe that the criminal investigation into the destruction of the CIA tapes will be at a stage when a prosecutorial decision may be made.

5. I am providing this declaration to the Court *ex parte* because contained herein are numerous details concerning the status and direction of an ongoing criminal investigation, [redacted]. I am also filing contemporaneously a redacted version of this declaration that discloses as much information as possible on the public record without disclosing any sensitive information. The statements made in this declaration are based on my personal knowledge of the facts and information obtained and reviewed in the course of my official duties.

6. The Petitioner's pending motion seeks relief on grounds that the CIA deliberately and unlawfully destroyed videotapes depicting the CIA's use of enhanced interrogation techniques on the Petitioner. The basis of the motion is precisely what my team of criminal

investigators are, and have been, actively examining. During the course of the past year and a half, the criminal investigation has been reviewing whether any federal criminal laws were violated in relation to the destruction of the videotapes described in the Petitioner's motion. That investigation has included a review of whether any person or persons obstructed justice, knowingly made materially false statements, committed or suborned perjury, or acted in contempt of court or Congress. We have made substantial progress in our investigation, which has included [redacted] numerous individuals, interviews of over [redacted] witnesses, and the subpoena and review of [redacted] pages of documents. Although the majority of the work to be done in connection with the investigation has now been completed, the criminal investigators need to [redacted] At present, I believe that the work necessary to render our decision will be completed [redacted]

7. The Petitioner seeks relief in the form of: (1) compelling production of any remaining video recordings, audio recordings, written records or documents depicting Petitioner's interrogations, including the CIA cables transmitted to and from CIA Headquarters and notes taken during the interrogations which detail all of the events therein; (2) permission for Petitioner's counsel to depose all parties present during or otherwise observing Petitioner's interrogations; and (3) permission for Petitioner's counsel to depose all other persons detained or interrogated at any time at Guantanamo Bay or as part of the CIA program for the purpose of cross-corroborating their accounts of their respective interrogations to Petitioner.

8. I believe that granting these remedies at this time will significantly complicate and interfere with the criminal investigators' ability to successfully complete the remaining work that remains before rendering a final prosecutorial decision. The release of records relating to the Petitioner's interrogations or conducting evidentiary proceedings to determine whether sanctions should issue, as well as the ability for counsel to depose the persons identified in the Petitioner's motion, would, in my estimation, lead to a variety of adverse consequences for the criminal investigation. First, the knowledge that records depicting Petitioner's interrogations have been released to Petitioner and to counsel could, in and of itself, taint the recollections of the remaining critical witnesses, notwithstanding any protective order that may prevent disclosure of the content of those records. Obtaining the unaided and untainted recollections of these witnesses is crucial to preserve the integrity of the investigation, [redacted] Second, if granted, the requested depositions or any evidentiary proceedings on Petitioner's motion could cause these critical witnesses to conform what they say to the criminal investigators [redacted] to what was said or suggested during their deposition with Petitioner's counsel or at the evidentiary hearing. Third, notice of the requested deposition or evidentiary proceedings on Petitioner's motion may cause the critical witnesses to refuse to speak with the criminal investigators [redacted]

9. Moreover, granting the relief requested in Petitioner's motion would conflict with a recent determination by Judge Hellerstein in connection with the ACLU FOIA litigation, a matter that has been pending since June 2004. Shortly after the tapes' destruction was publicly announced in December 2007, the ACLU filed a motion for contempt of court and sanctions,

alleging that the destruction violated a September 15, 2004, court order which required the CIA to produce or identify all documents that were responsive to the ACLU's FOIA request for all "records concerning the treatment of detainees in United States custody." The ACLU, as remedies for the tapes' destruction, asked the district court, *inter alia*, to order the CIA to produce records relating to the content of the tapes as well as documents relating to the destruction of the tapes.

10. Judge Hellerstein has not made a finding on the issue of whether the destruction of the tapes was in contempt of any of his orders. That fact notwithstanding, on April 20, 2009, Judge Hellerstein ordered that the CIA produce records relating to the contents of the tapes as well as documents relating to the destruction of the tapes.

11. On July 29, 2009, I met with Judge Hellerstein to address whether the district court's order that the CIA produce documents relating to the destruction of the tapes would interfere with the ongoing criminal investigation. That meeting was conducted *ex parte*, due to discussions relating to an ongoing criminal investigation, [redacted], as well as potential disclosure of classified information. A court reporter was present, and a redacted transcript, with the sensitive and classified materials omitted, has been made available to the parties and will, as I understand, be made publicly available in due course.

12. For the Court's convenience, a copy of the redacted transcript is attached hereto. Notably, Judge Hellerstein concluded that he "would not want to interfere" with the ongoing criminal investigation by ordering "interviews and depositions and hearings and the like." Transcript of July 29, 2009, Conference ("Tr.") at 25. In addition, Judge Hellerstein made clear that he would not require the CIA to produce documents relating to the destruction of the tapes, to the extent that the production would interfere with the criminal investigation. *See* Tr. at 26

("there would not be actual production, that is, giving over of documents that were alive in terms of [the criminal investigation]").

13. To avoid any conflict with Judge Hellerstein's conclusions at the July 29 conference, as well as for the additional reasons set forth in this declaration, I would respectfully request that this Court stay any decision on Petitioner's requested relief and stay conducting any evidentiary proceedings on Petitioner's motion [redacted], which is when, based on presently available information, I believe that the criminal investigation will be at a stage when a prosecutorial decision may be made.

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

Executed on Oct. 26, 2009.

JOHN H. DURHAM

97T3ACLC

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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AMERICAN CIVIL LIBERTIES UNION,

Plaintiff,

v. 04 CV 4151 (AKH)

DEPARTMENT OF DEFENSE, ET AL.,

Defendants.

----------x

New York, N.Y.
July 29, 2009
2:30 p.m.

Before:

HON. ALVIN K. HELLERSTEIN,

District Judge

APPEARANCES

JOHN H. DURHAM
EDWARD T. KANG
Assistant United States Attorneys
United States Attorney's Office,
District of Connecticut

SEAN LANE, Via Speakerphone
Assistant United States Attorney
United States Attorney's Office,
Southern District of New York

[redacted]

DAVID J. JOHNSON, FBI
[redacted] Law Clerk

REASONS FOR REDACTION:
A = Classified information
B = Sensitive information relating to ongoing investigation

(In chambers)

THE COURT: This is a meeting that was set up following a submission by the government in response to various orders and requests that came from me, all having to do with the contempt proceedings that have been going on for some period of time.

Mr. Durham has asked for extensions and various other protective measures, and the purpose of this meeting is for him to be able to express his reasons in a way that would not compromise either his investigation or national security.

Is that enough of an introduction?

MR. DURHAM: Yes, your Honor.

THE COURT: Is it more or less accurate?

MR. DURHAM: Yes, your Honor.

THE COURT: So the real questions I guess are, A, why should I wait longer before I go into the activities that were incident to a contempt. And that would have another question, in what ways, if I were to do that, would I be interfering with your investigation. And I don't think I've ever really learned the boundaries of your investigation, and it may be that there are no boundaries that you could make explicit. But let me hear you with that introduction.

MR. DURHAM: Yes, your Honor. I appreciate the opportunity to meet with the Court in this fashion.

THE COURT: It's mutual.

MR. DURHAM: I'm hoping that we can provide the Court with information that would really be substantively or be useful in a substantive way to the Court.

As you know, it is a little bit complicated by the fact of the criminal investigation, [Redacted - Reason: B]. There is still a lot of information that we are dealing with that remains classified. As to the parameters of what's classified and what is no longer classified, it is a little bit difficult to measure because of some of the materials that were released in the case before your Honor. But still, virtually all of the information that we're dealing with was classified, and classified in a particular compartment. And so that further complicates what we can disclose to the Court.

I guess we would want to seek the Court's directive here as to how far you would like us to proceed in giving the Court that kind of information.

THE COURT: Hard to say. First of all, the transcript is sealed. And these proceedings are in camera.

MR. DURHAM: Yes, your Honor.

THE COURT: And I would be guided by you [redacted] in terms of what may be disclosed and to what extent. I think I need to gain assurance that what you are doing is what might be co-terminus with what I'm doing. It seems to me that if you are pursuing the same individuals who would be responsible in terms of destruction of evidence that

was owed in response to a court order, there is a larger argument for my staying my hand than if your investigation and my inquiry diverged.

So, I think the first step is to understand how closely related the two are.

Second is that, and maybe it's much like the first, is that I've expressed myself as to having a very great hesitancy in holding a government agency in contempt. In terms of separation of powers, it seems to me that the judicial power should be hesitant to declare that the executive power, rather than individuals within the executive, flout court orders. It makes me uncomfortable even to consider that possibility. We're all a government of laws and we all work under a government of laws and we shouldn't be working at cross purposes. On the other hand, individuals can do things that are inconsistent with legal obligations and that comes right back to the first point. If you are looking at those same individuals for those same acts that I would be looking at, we should both not be doing the same things. I think I would be persuaded to defer.

MR. DURHAM: Yes, your Honor. Maybe --

THE COURT: Then there is the issue of documents. But I think we can leave that for a moment and go back, stay with these central questions.

MR. DURHAM: I think we can provide, I hope we can

provide the Court with some useful information. And what I'd propose then, your Honor, is in connection with the first point, that is how closely related is the criminal investigation to the contempt proceedings, provide the Court with information about the criminal investigation, sort of its broad outline, and then also information concerning what information we've gathered to date and how that affects some of the materials that are being sought in connection with the contempt proceedings. And then we'd obviously answer any questions the Court has to the extent we can as to that matter.

Then we can address what I think falls squarely within [Redacted - Reason: B]. And that's obviously our concern, that that most particularly not be made public while the criminal investigation is ongoing.

If that would be helpful to the Court, we can proceed that way.

THE COURT: It will be.

MR. DURHAM: The criminal investigation as I think the Court knows, Judge Mukasey had decided the full investigation should start back in January of 2008. And --

THE COURT: As the attorney general.

MR. DURHAM: Yes, your Honor. And so it's pretty much been full-bore since then. So I can report to the Court that it is actively being investigated still. That there are the same attorneys, that include Mr. Kang; Jim Farmer, who is the

criminal chief in the U.S. Attorney's Office in Boston; [redacted] [redacted] Francis Schmitz, who is on detail in Washington working in the National Security Division.

THE COURT: May I interrupt for a moment.

MR. DURHAM: Yes, your Honor.

THE COURT: To some extent it may be useful to make this transcript public.

MR. DURHAM: Yes, your Honor.

THE COURT: I don't particularly want to take notes of items that would be classified. So who would be responsible for reviewing the transcript and deciding what can be public and what not?

MR. DURHAM: Well, if we were to be provided with the transcript, we could go through it and make suggestions to the Court or recommendations, and ultimately obviously it is your Honor's decision.

Mr. Schmitz, who is again on detail to Washington assigned to The National Security Division, is working with us. And then Inspector Johnson and a number of agents continue to work on this.

So, as to whether we're done or it's ongoing, it's ongoing, and [Redacted - Reason: B].

I'd indicate to the Court or tell the Court, the significant majority of interviews of witnesses that we needed

to do have been completed. And the documents that we believe we needed to retrieve to be able to answer the questions that Judge Mukasey had told us to answer have been produced and we're in the process of reviewing those.

I think in declarations that we had filed with your Honor, we had indicated those documents number [Redacted - Reason: B], and the vast majority of those documents have been reviewed by agents or the attorneys and the like. So that's been completed.

As is typical in criminal investigations, those documents then form the basis for a lot of the interviews that have been conducted, and [Redacted - Reason: B].

We fully expect at this point in time that the prosecutorial decision in this case, that is whether there is a matter to be prosecuted or not, will be made and a report to the Attorney General, whether the decision is to recommend prosecution or not to prosecute, will [Redacted - Reason: B].

There is, I can tell the Court, there is no prosecutor decision that has been made at this point. Because we have focused on particular issues, and that's in large measure what [Redacted - Reason: B] concerning the destruction of these tapes, again, what the directive from Judge Mukasey was. Judge Mukasey instructed us to investigate whether or not any federal statutes were violated by any person or persons when these tapes were destroyed. And specifically, we're examining

whether the obstruction of justice statutes may have been violated; whether somebody engaged in a contempt of court or contempt of Congress; whether the Federal Records Act was violated, that is, did the tapes constitute federal records and, therefore, they should not have been destroyed; and we are looking at whether people, any person or persons, filed false statements or may have otherwise perjured themselves in connection with these matters.

We are not looking at whether the conduct that was engaged in and reflected on the tapes violated the torture statutes and the like. [Redacted - Reason: B]

So that's essentially what we were directed to look at and so we are examining who destroyed the tapes, who made the decision to destroy the tapes, who is responsible for their destruction, and then whether there was the requisite criminal intent involved to bring any indictment or formal criminal charges against anyone.

What we initially did when we were given this assignment [Redacted - Reason: B], most particularly the Central Intelligence Agency, but not limited to the CIA, [Redacted - Reason: B] the Department of Justice, the Department of Defense, all other logical entities. And we were seeking [Redacted - Reason: B] to obtain records that related in any way to the destruction of the videotapes.

I know that the Court in connection with this instant

litigation with the ACLU has been grappling with documents and the scope of documents and how they get retrieved. And we can provide this information to the Court that may be helpful. But again, [Redacted - Reason: B]. And as your Honor is familiar with, we defined for the Agency when we talk about "documents" or "records" what we meant. [Redacted - Reason: B]

[Redacted - Reason: B]. The result of which is the following: The CIA created something called the Tape Coordination Group. That may be a term or identified group you've heard. But the Tapes --

THE COURT: I don't think I have.

MR. DURHAM: Tapes Coordination Group was set up in order to deal with what I think the CIA knew was going to be a firestorm, and they began to gather documents. So over the course of the past 18 months or so, the Tapes Coordination Group has put together what essentially are -- I'll call them three databases.

There is one large database that contains documents that we were provided [Redacted - Reason: B] with hard copies of these documents. And those number in the range of [Redacted - Reason: B] documents -- pages, I'm sorry. About [Redacted - Reason: B] pages of documents. We received those in hard copy form and that's part of what is taking us so long to make our way through this. The Agency -- or the Tapes Coordination Group when they initially received those materials, they didn't

get them electronically. They too got them in hard copy form for the most part. And so, the Coordination Group over the same period of time has scanned those documents, and so they're in now electronic format in a particular location. So that's one huge cache of documents.

The second retrieval was done because we were looking for [Redacted - Reason: B] that data is an estimated [Redacted - Reason: B] of information, which as I understand it, translates into about [Redacted - Reason: B] of documents. And so it made little sense to us to ask for [Redacted - Reason: B] pages in paper and to go through those by hand. Instead, it made more sense to be able to get those on some kind of a system where we could search them using logical search terms. That's what we've done as to that second large volume of documents or pages or what have you.

In fact, the FBI [Redacted - Reason: B].

There is a third really much smaller subset of documents that the Agency has not yet been able to make searchable for us. But we understand that by the end of next month it will be on some system where it can be searched, and I think it's much more easily reviewed. I believe that the Office of General Counsel, who is responsible for dealing with the retrieval of documents for your Honor's case, is aware of all of those.

A fourth set of documents, a small group, comes from

[Redacted - Reason: B].

We had been hesitant to have the [Redacted - Reason: B]

So, OGC, Office of General Counsel of the Agency, is aware of those documents and the question is can they have access to them. When we filed some --

THE COURT: Let me understand this. There is a third cache of documents in the [Redacted - Reason: B] which you expressed a concern about. But you have these or have had access to them?

MR. DURHAM: Yes, your Honor.

THE COURT: And the concern arises from what? That you have them, that you've tracked them, that you've organized them? What?

MR. DURHAM: [Redacted - Reason: B].

THE COURT: Why would they know? [Redacted - Reason: B].

MR. DURHAM: [Redacted - Reason: B].

THE COURT: Ah, so if [Redacted - Reason: B].

MR. DURHAM: Exactly. So that was a concern.

A second concern was, and this sort of gets in the details of the investigation, but [Redacted - Reason: A and B].

THE COURT: Oh.

MR. DURHAM: [Redacted - Reason: A and B].

THE COURT: That was the never mind letter.

MR. DURHAM: That's what that was about. Because we had represented to the Court grounds for wanting to delay it, only to find out that we weren't aware of all the facts.

THE COURT: Right.

MR. DURHAM: That situation, however, has been resolved in one sense, it's been complicated in another. It's resolved this way, your Honor. [Redacted - Reason: A and B]. That obstacle is removed.

However, it gets complicated in the sense that [Redacted - Reason: A and B].

The long and the short of it I think, your Honor, is that [Redacted - Reason: B] we have assembled through the CIA essentially cover any record that would be of significance to the litigation before your Honor. There may be scattered documents out there in other desks or file cabinets at the Agency that are pertinent that we don't know about, but on the whole, the records that have been gathered from the criminal investigation are documents that would be relevant to your Honor --

THE COURT: Do you have any date limitations?

MR. DURHAM: In reference to your Honor's -- the two periods that --

THE COURT: [Redacted - Reason: B].

MR. DURHAM: [Redacted - Reason: B].

THE COURT: [Redacted - Reason: B]?

MR. DURHAM: [Redacted - Reason: B]. There may be scattered documents that are coming in.

THE COURT: [Redacted - Reason: B] to encompass all aspects of the substantive issue? Namely, before the records were known and after they were supposed to be destroyed?

MR. DURHAM: Yes, your Honor. I mean our --

THE COURT: The dates I have are within the dates you have.

MR. DURHAM: Yes, your Honor. It's totally subsumed. [Redacted - Reason: B].

MR. KANG: [Redacted - Reason: B].

MR. DURHAM: [Redacted - Reason: B].

THE COURT: [Redacted - Reason: B].

MR. KANG: [Redacted - Reason: B].

THE COURT: Okay. My jurisdiction stems from allegations that my orders of production were disobeyed. I take it that would fall within at least the obstruction of justice argument.

MR. DURHAM: Yes, your Honor.

THE COURT: So, your jurisdiction is broader and encompasses all of mine?

MR. DURHAM: I believe so, yes, your Honor.

THE COURT: The documents I've requested are within the span of the documents you were looking for?

MR. DURHAM: Yes, your Honor.

THE COURT: [Redacted - Reason: B].

MR. DURHAM: I believe so, yes, your Honor.

THE COURT: [Redacted - Reason: B].

MR. DURHAM: Correct.

THE COURT: That suggests there is nothing I should do, if I make the basic argument that I should not interfere with what you are doing or I should not be working at cross purposes with what you're doing.

MR. DURHAM: That would be the government's view, your Honor. To the extent that there are documents out there that the Court would be concerned about disappearing or being otherwise spoliated.

THE COURT: I think there is a better chance of you preserving them than I am preserving them, or since I'm not getting them, you are the government and the U.S. Attorney who is supervising the search in relationship to my case is the same office, and there is no reason to believe that one would be more or less diligent than the other. Indeed, there is more reason to believe that the activity that you have launched and continue would be a more encompassing activity than the one of the Assistant U.S. Attorney here who is responsive to this case. I don't see any argument that would be contrary to my deferring to Mr. Durham's investigation.

I put this question to you. The government has been reluctant to create a dossier of documents for me, and has

cited as a reason a concern that you would have, that there would be interference with your investigation.

Why do you think that is so? Do you think that is so?

MR. DURHAM: I think that is so, your Honor.

THE COURT: It would seem to me if they had a list for me, they're not producing necessarily -- they are only producing that which they feel would not be within the exemption that covers grand jury investigations. I don't have the exact words but there was an exemption that deals with what you have to do. For practical purposes all they would be doing would be listing documents and giving reasons in a Vaughn declaration why they should not be produced. So why would that interfere with what you're doing?

MR. DURHAM: In terms of putting together -- I think the Vaughn index has been done or is --

[redacted] You have a Vaughn index of the 65 or so cables that were the sample that was agreed upon

THE COURT: I think we do or I think I've seen it.

[redacted] -- last time.

THE COURT: I've now enlarged the scope and I don't have a Vaughn declaration for that. Are you objecting to that?

MR. DURHAM: I want to be sure I understand exactly what it is I would be objecting to, because maybe we don't have an objection.

THE COURT: I ordered the government to assemble what

we call relevant paragraph 4 documents created during the period of June 1, 2005, and January 31, 2006.

MR. DURHAM: Yes, your Honor.

THE COURT: As the government has informed the Court, the prosecutors in the criminal investigation would likely object to production of paragraph 4 documents created during this time period. The government would notify the Court in writing within one week of this order whether there is such an objection. It refers to the meeting that we are going to have. And that is today.

MR. DURHAM: The Court's earlier order broke out, the initial timeframe the Court had included was essentially April of 2002 through I think it was June 30 of 2003.

THE COURT: Yes.

MR. DURHAM: And the government -- our criminal investigation would not be compromised or adversely affected with respect to those documents. In fact, I'd indicate to the Court what we'll work out through [redacted] and Mr. Lane, who have been very helpful, and the Office of General Counsel, is that with respect to that timeframe, so long as the Agency does not provide access to [Redacted - Reason: B] we have no objection to the Office of General Counsel people searching for documents within that date range that may be responsive to the Court's order.

THE COURT: We would be duplicating what you have

done. We wouldn't be tracking what you've done, but we would be duplicating going back to the same sources. And may be potentially useful because having another investigation independent of yours to identify documents would be a control that you've gotten everything that you are supposed to get.

MR. DURHAM: Yeah. I think they would be searching a database or databases that --

THE COURT: The question would be whether it would be a productive use of manpower.

MR. DURHAM: Right.

THE COURT: To do double duty. The bottom line is that you don't really object to the enlargement of the subpoena and the production of documents in response to that enlargement, so long as it does not uncover the work that you're involved with.

MR. DURHAM: Right. For the time period that was covered in the Court's initial order, that is up through I think it was June 30 of 2003. But then as I understand the Court's last order, it is intended then also to encompass or to look at documents for the broader period of time. That is through January of '06.

MR. KANG: '06.

MR. DURHAM: And it is that second period that we believe would interfere with the criminal investigation.

THE COURT: Paragraph 3 of my order of April 20

provides that the government shall produce records relating to the content of the tapes not merely from August 2002, but from the entire period of the tapes that were destroyed. The government represents this period to be April through December 2002. In addition to the current plan for production from a sample, the government shall propose a schedule of production of documents from the entire period.

That doesn't speak to what you've just said.

MR. DURHAM: Right.

THE COURT: This is paragraph 4. The government shall produce documents relating to destruction of the tapes which describes the persons and reasons behind their destruction from a period reasonably longer than April through December 2002. I find that the period for such production should be April 1, 2002, through June 30, 2003. And the government can go back and say that it's too much. Production of these documents shall be subject to a Vaughn index.

MR. DURHAM: Right. So this is the April 20 order.

THE COURT: Right.

MR. DURHAM: And that's what -- we had submitted something to the Court talking about we had some issues, [Redacted - Reason: B]. And the Court's subsequent order in July expands that paragraph 4 where the Court directs that in addition to paragraph 4 documents referred to above, the government is ordered to assemble relevant paragraph 4

documents created during the period of June 1, 2005, and January 31 of 2006.

THE COURT: Is that the issue?

MR. DURHAM: Yes, your Honor.

THE COURT: The word "assemble," it is not my word. I was reacting to what the parties submitted to me. I would not use the word assemble because I don't know what it means. It speaks just to collect it and the action word is "production."

MR. DURHAM: Our real concern is not that the Agency be required to assemble those documents. The issue for us would be the production of those documents.

THE COURT: Well, the production would be subject to a Vaughn index. Production doesn't necessarily mean giving the document to the other side. When I've created the words I thought about identifying the documents. And then either producing them, or if there is a good faith belief that exemption applies, creating a Vaughn index for that exemption. But the parties did not use the same language, and I just adopted what they gave me.

What is it you want me to do, Mr. Durham?

MR. DURHAM: Well, the government would --

THE COURT: We should call Mr. Lane back?

MR. DURHAM: -- want the Court to just hold the matter in abeyance until [Redacted - Reason: B]. That's what we would be ideal for our purposes, and during that period of time --

THE COURT: The same people would be producing to you as would be identifying for me. So what is the harm in making them do the identification for me and producing a Vaughn index as well? Nobody knows what will come of what you're doing. Hopefully it will be positive, but we know that things take different turns all the time. And the parties may come to me and say that for one reason or another I should continue in my work.

So I would not like to redo that which has already been done. And therefore, it would seem to be useful to require the government to produce the documents in the sense of either producing them in the way of giving them, unless there is an exemption. If there is an exemption, of creating a Vaughn index of those records. I don't think they interfere with what you do. They are not going to be public except in a list. If the list is what you are objecting to, the list can be in camera. [Redacted - Reason: B].

So, I can understand that you would not want me to take any testimony or conduct any proceedings. I agree. But as to documentary identification, I don't think the case has been made that requires me to stay my hand.

MR. DURHAM: Yes, your Honor. As to the Agency actually going and trying to identify the documents, that part of things can proceed along. We have no objection to that.

THE COURT: Subject to clarifying what "assemble"

means, which I think should be done, we should proceed.

MR. DURHAM: Then in terms of production --

THE COURT: You are going to be not producing them. You'll produce them. You can identify them. Those where there is no exemption will be produced, and those where there is an exemption, they're not going to be produced. They will be identified only. And the exemption will be claimed.

MR. KANG: The Vaughn index that your Honor contemplates being prepared in those instances where the exemption applies, will that ultimately identify, for example, [Redacted - Reason: B]?

THE COURT: [Redacted - Reason: B].

MR. KANG: [Redacted - Reason: B].

THE COURT: Redact them.

MR. KANG: [Redacted - Reason: B]?

THE COURT: Redact what you think is sensitive.

MR. KANG: But I think --

THE COURT: The purpose I want served is to have a log.

(Discussion off the record)

THE COURT: We went off the record for a moment. I was looking for the text of the other Freedom of Information Act so we'll go back on the record again.

[redacted] made reference to an earlier meeting and an estimate of an aggregate number of cables [redacted]. The

conversation turned to the term "Vaughn-like index," which was mentioned in a government response as to which I ordered in my April 20 order, April 20, 2009, the government shall produce a Vaughn index, not a Vaughn-like index as the government proposes. If the government seeks to do less than that required by a Vaughn index, it shall seek leave so to do.

What I envision is an identification of the documents. Now, if the number of pages or the number of documents included something or attachments or something else in your opinion would complicate your investigation, you cover over it. You'll redact. I don't want to interfere with what you're doing. And I don't think what I'm proposing interferes with what you are doing. In the application, if there is a concern, I think you can deal with the issue.

But, the overall purpose is to have a log of the scope of that which is relevant, so if there is a cause for me to change my view, or to modify my view, we won't have to retrace work that's already been done. I don't think that affects your investigation in any way.

MR. DURHAM: No. Again, our practical concern is the production of documents that in the sense that --

THE COURT: The giving over.

MR. DURHAM: The giving over of documents while --

THE COURT: So far they have not been given over. And they won't be given over. And I apologize for the ambiguous

terms in my orders. As I say, I took what the parties gave me.

MR. DURHAM: I was going to say you don't have to sort of -- that was sort of what the parties brought to you.

With that clarification then I don't believe we could or would assert any sort of objection.

THE COURT: Just take a minute to check the term of the exemption.

Exemption 7 under Section 552, records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information, A, could reasonably be expected to interfere with enforcement proceedings, and there are other criterias in subcategories. That's exemption 7.

So it seems to me that the exemption would be claimed, and that anything that in your good faith judgment would potentially adversely affect your investigation would not be given over to the applicant.

MR. DURHAM: Your Honor, with regard to the Vaughn index that would be prepared, would the Court contemplate that being submitted in camera?

THE COURT: No. It would be a public record. Unless there is reason.

MR. DURHAM: Would the Court consider that, for example, the number of documents --

THE COURT: Anything that you feel would potentially

affect what you're doing. I think you should, your first concern should be the integrity of your investigation. And I'll wait. I think the waiting, however, should not be an issue of prompt filing. It should be an issue of timing of disclosure. So, for example, there are aspects that you think should wait until you finish your work, you should so state. And those things can be held back.

I think there are two concerns. One is to make a public record when it's fresh in relationship to the activity. Activity being one of collection of documents and identification of same. And the second is not interfering with your work. I think we should look to serve both of those criteria.

MR. DURHAM: Okay.

THE COURT: So I think you satisfied your concerns and I satisfied mine.

MR. DURHAM: Okay.

THE COURT: All right. So the only other issue is when. I think what happens there is that [redacted] and Lane will coordinate with you. Is there a due date, [redacted]

THE LAW CLERK: For these, no, because it was pending the objection.

THE COURT: We'll have to ask the government. There is no due date. We were supposed to get a written proposal to the Court when production shall be made. It was to await this

meeting. Now we had the meeting and I'll look for Mr. Lane or [redacted] to make that proposal in terms of the time of identification and production.

MR. DURHAM: Yes, your Honor. So is there something the Court wants us to report to [redacted] or Lane, just report that back to them?

THE COURT: Right. So, is [redacted] or Mr. Lane available on the telephone?

MR. DURHAM: I know that Mr. Lane is.

(Mr. Lane is on the phone)

THE COURT: Mr. Lane, we have had a discussion of the work that Mr. Durham is doing and his colleagues, looking towards the issuance of a report to the Attorney General [Redacted - Reason: B). I've told him after he described the scope of his investigation, that it seemed to embrace everything that I was doing in this contempt proceeding, looking to the same sources for information and covering the topics that would be raised in a contempt proceeding and others.

And I observed that I felt that I would not want to interfere by conducting activities that were the same as those he would be doing. I would not want to interfere with what he is doing. That is as to interviews and depositions and hearings and the like.

As to documents, the same sources within the CIA would

be producing documents [Redacted - Reason: B] in response to my orders. I observed that there would be virtue in conducting and creating a Vaughn index with respect to the documents that would be responsive to my orders, subject to the normal exemptions, including exemption 7, which could cover Mr. Durham's work. And where details within the Vaughn index would in his good faith judgment affect what he was doing, he would redact the information or ask you to redact the information that would otherwise be part of a Vaughn index.

So since there would be not actual production, that is giving over of documents that were alive in terms of his work, and since we were not asking for [Redacted - Reason: B], the logging or the creation of a Vaughn index for documents that were responsive to the order would not interfere with his work. To the extent that descriptions did, they could be redacted for the time that there was this sensitivity. Mr. Durham expressed his acceptance of that set of rules.

Right, Mr. Durham?

MR. DURHAM: Right. Yes, your Honor.

THE COURT: And the next question is when this would be done and how it would be done. That's when I called you.

MR. LANE: Okay, your Honor. I guess in order to answer that question, I just -- would probably help to sort of back up and see how this would relate to what currently has been contemplated by the Court in terms of documents that we're

already dealing with from timeframes, if we are essentially superseding that what's currently going on or we're adding to it.

THE COURT: We are not superseding anything. In my July 20 order, which I think is the operative document, I asked for a written proposal within a week for gathering any other relevant paragraph 4 documents created during this time period. The time period is April 20, 2002, through June 2003, and that goes back to my July 7 order.

MR. LANE: Right.

THE COURT: I think that's what I'm referring to. Though I would need to refresh my recollection.

MR. LANE: I think you're correct, your Honor. That is right. We have been talking with CIA and CIA has been talking with others sort of stakeholders to make sure that the proposal they were putting together would be appropriate and useful. And so that's something we are working on right now and expect to have to the Court no later than Friday.

THE COURT: There are terms here about assemblies of documents. Production of documents. And so on. I think all these terms should be defined as identification of documents, production of those documents, if they're not subject to a good faith exemption, and a Vaughn index where they are subject to a good faith exemption. That's what we should mean by terms like assembly and production and the like.

MR. LANE: Yes, your Honor. And I know, your Honor --

THE COURT: When might I get the proposal?

MR. LANE: Okay. Your Honor, I know we did have some documents that had already been gathered from this earlier timeframe. And the Court had expressed an interest at some point in just looking through them itself.

THE COURT: I think I would withdraw that request. I don't see what I would learn. If you think it would be helpful, I'll be glad to do it, but I don't see what value there would be in that.

Just to elaborate on that, Mr. Durham is engaged in an investigation of what people did and what people had in mind when they destroyed material that up to that time had been kept. And whether that destruction violated some federal statute, for example, obstruction of justice, which would embrace the disobedience of my orders; contempt of Congress; Federal Records Act; perjury; and so on. I don't know that I would benefit by reviewing any of those documents when I'm deferring to his investigation and not trying to draw some kind of a line between what I'm doing and what he's doing. So, unless there is some purpose for my doing it, I don't want to do it.

MR. LANE: Understood, your Honor.

THE COURT: Do you see any purpose in my doing?

MR. LANE: Given what the Court has said and my

understanding of the situation, I don't think there is -- I think the Court is correct about it not being the worth the Court's time at this point.

THE COURT: Do you agree, Mr. Durham?

MR. DURHAM: Yes, your Honor.

THE COURT: The court reporter, [redacted] is going to produce a transcript under seal. She is going to distribute it to the people here and to you, and I would like as quickly as possible and ask you to supervise it, to review it, and to identify anything there that should be kept under seal with a view of putting in the public record as much as possible.

MR. DURHAM: Your Honor, can I just ask the Court to modify that in one respect. There is a fair amount of information that we disclosed to the Court [Redacted - Reason: B], and I wonder if there is some way that we could review the transcript. To the extent that there are portions of the transcript that would relate directly to what Mr. Lane and [redacted] are doing, we could make those available. [Redacted Reason: B].

THE COURT: You want to do this first on your own cut?

MR. DURHAM: Yes.

THE COURT: Before Mr. Lane gets involved.

MR. DURHAM: Yes. I know he would do a tremendous job.

THE COURT: I don't think Mr. Lane will object. [Redacted - Reason: B].

So yes, the answer is that [redacted] will then not include Mr. Lane on that distribution list, and he'll get his copy from Mr. Durham. I think if you are going to hold that back, there should be some kind of legend like "Redacted - description of [Redacted - Reason: B]." Something of that nature. So that the reader of the public record would know the reason for the redaction.

MR. DURHAM: Yes, your Honor.

THE COURT: Okay. Thank you, Mr. Lane.

MR. LANE: Thank you, your Honor.

THE COURT: May I close the proceedings now? Okay.

MR. DURHAM: Yes.

THE COURT: We're closed.

(Discussion off the record)

THE COURT: Mr. Lane, we've corrected what we just said. Mr. Durham will review the transcript, make the appropriate redactions, then give it to [redacted] to implement. And what will happen then it will then come to me or come to --

MR. DURHAM: It would come to the Court and see if those redactions are acceptable to the Court.

THE COURT: Then we'll give the appropriate instructions in terms of release to the public. So, Mr. Lane,

you don't have to do anything.

MR. LANE: All right. If that changes, someone need just let me know. I'm happy to help in any way, but understand the grand jury secrecy issues.

THE COURT: Thank you.

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