

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

	)	
IN RE:	)	
	)	
GUANTANAMO BAY	)	Misc. No. 08-MC-442 (TFH)
DETAINEE LITIGATION	)	
	)	Civil Action No. 08-CV-1360 (RWR)
	)	

**RESPONDENTS' OPPOSITION TO MOTION FOR PRESERVATION ORDER,  
ORDER REQUIRING GOVERNMENT AGENCIES TO IDENTIFY EXISTING  
AND DESTROYED DOCUMENTS, AND OTHER RELIEFS**

Respondents oppose the motion of petitioner Zayn Al Abidin Muhammad Husayn (a.k.a. Abu Zubaydah), which seeks an order requiring certain government entities<sup>1</sup> (1) to preserve all evidence, documents, and information that may be relevant to petitioner's arrest, detention, interrogation, and torture, and (2) to catalogue and provide a certified list of all relevant records currently or previously in the possession of the Government, and if the record has been destroyed, the approximate date of the destruction.<sup>2</sup>

As discussed below, petitioner's motion should be denied because to the extent petitioner seeks the preservation of information related to the alleged torture, mistreatment, and/or abuse of

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<sup>1</sup> Petitioner's motion requests that the following government entities be bound by the preservation order: the Central Intelligence Agency ("CIA"), the Federal Bureau of Investigation ("FBI"), the National Security Council ("NSC"), the National Security Agency ("NSA"), the Departments of Defense and State, the White House, and the Office of the Vice President. *See* Pet. Mot. at 2.

<sup>2</sup> Petitioner also seeks an order requiring that any pleading or other court filings in which a factual assertion is made be signed by an attorney associated with the appropriate government entity to assure accountability. *See* Pet. Mo. at 16-17. There is no reasonable basis for this request or any indication that such a procedure would be necessary to insure the accuracy of the government's representations to the Court.

petitioner, respondents are already under a duty to preserve such records pursuant to preservation orders issued by this Court. And, to the extent petitioner seeks preservation of all information currently in the Government's possession that is relevant to petitioner's pending habeas case, the Government is fully aware of its obligations to preserve such information. There is no significant risk that evidence relevant to the litigation of petitioner's core habeas rights will be destroyed. Although petitioner points to the CIA's 2005 destruction of videotaped interrogation as indication of the Government's propensity to destroy relevant evidence, the CIA has taken appropriate measures to prevent any further destruction of any information, evidence or documents relating to any past, present or future Guantanamo detainees and detainees in CIA custody. A preservation order therefore is unnecessary.

Granting petitioner's requested preservation order, on the other hand, would unduly burden the Government. The order would require respondents to take action now with respect to a wide range of information that may or may not be relevant to petitioner's core habeas rights. It would also require the Government to catalogue and provide a certified list of the information currently and previously in the Government's possession. As the Government is marshaling its resources now to ensure the speedy resolution of the more 200 habeas cases pending before this Court, imposition of such additional burden outside of a streamlined procedural framework for litigating such cases, which is still to be worked out Judge James F. Hogan – and beyond what otherwise would be imposed by the Federal Rules of Civil Procedures – is entirely unwarranted. Accordingly, petitioner's motion should be denied.

## ARGUMENT

### PETITIONER’S REQUESTED PRESERVATION ORDER IS UNNECESSARY AND UNDULY BURDENSOME

#### I. Petitioner’s Requested Order Is Unnecessary

Relying on *Pueblo of Laguna v. United States*, 60 Fed. Cl. 133, 137-38 (Fed. Cl. 2004), which articulated a two-prong test to determine whether a preservation order should issue, petitioner argues that absent a preservation order, there is a significant risk that evidence relevant to his habeas case will be lost or destroyed. He also argues that the requested order will not unduly burden the Government because it imposes no greater obligation than what the Federal Rules of Civil Procedure would otherwise impose, and because the “Government asserts that it already intends to comply with the requirements that would be made explicit in a preservation order.” Pet. Mot. at 11. Petitioner is wrong on both counts.

As an initial matter, although other judges in this Court have rejected the proposition that a preservation order must meet the test of a preliminary injunction (“PI”), respondents respectfully submit that the PI standard, rather than the *Pueblo of Laguna* test, should be used for evaluating petitioner’s motion.<sup>3</sup> Because of its breadth and the burden it would impose on numerous government entities, petitioner’s requested order is unlike an order simply requiring a party to identify witnesses or to produce documents in discovery – a comparison relied upon in *Pueblo of Laguna*. Indeed, the *Pueblo of Laguna* test – which asks simply whether the requested preservation order is necessary and not unduly burdensome – has been criticized as lacking

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<sup>3</sup> See *Madden v. Wyeth*, No. 3-03-CV-0167-R, 2003 WL 21443404, at \*1 (N.D. Tex. Apr. 16, 2003); *Pepsi-Cola Bottling Co. of Olean v. Cargill, Inc.*, Civ. No. 3-94-784, 1995 WL 783610, at \*3-\*4 (D. Minn. Oct. 20, 1995); *Humble Oil & Refining Co. v. Harang*, 262 F. Supp. 39, 42-43 (E.D. La. 1966).

“adequate precision” and “sufficient depth of analysis.” *See Capricorn Power Co. v. Siemens Westinghouse Power*, 220 F.R.D. 429, 434 n.2 (W.D. Pa. 2004).

But even using the *Pueblo of Laguna* test, a preservation order is not warranted here. First, petitioner has not shown that a preservation order is necessary. As other judges of this Court have previously held when deciding similar motions for a preservation order, *see, e.g., El-Banna v. Bush*, Civ. No. 04-1144 (RWR) (D.D.C. July 17, 2005) (Order); *Abdullah v. Bush*, Civ. No. 05-0023 (RWR) (D.D.C. July 18, 2005) (Order); *Al-Shabany v. Bush*, No. 05-2029 (JDB) (D.D.C. Nov. 17, 2005), it is unnecessary to require respondents to preserve records relating to alleged torture or mistreatment of petitioner because respondents are already under a duty to preserve such records. Preservation orders issued by this Court already require respondents to “preserve and maintain all evidence and information regarding the torture, mistreatment, and abuse of detainees now at [the] Guantanamo Bay detention facility.” *Al-Marri v. Bush*, Civ. No. 04-2035 (GK) (D.D.C. Mar. 7, 2005) (Order); *see also Al-Adahi v. Bush*, Civ. No. 05-0280 (GK) (D.D.C. April 28, 2005) (Order); *Abdah v. Bush*, Civ. No. 04-1254 (HHK) (D.D.C. June 10, 2005) (Order).

Similarly, no preservation order is necessary to require the Government to maintain and preserve records relevant to petitioner’s habeas litigation. Without conceding whether a preservation order can appropriately extend to all of the government entities identified by petitioner, the Government is well aware of its obligations not to destroy evidence that may be relevant in petitioner’s habeas case. The relevant government entities are additionally entitled to the presumption “that they will act properly and according to law.” *FTC v. Schreiber*, 381 U.S. 279, 296 (1965). The Government also has other independent reasons for ensuring the

preservation of the documents in question, including those relating to pending or potential government investigations, the government's intelligence-gathering mission, and the potential prosecution of petitioner by military commission.

Petitioner argues that the CIA's destruction in 2005 of interrogation videotapes is evidence of present propensity by the Government to destroy relevant evidence. Petitioner also cites press articles in support of the Government alleged "widespread" destruction of "critical evidence" relating to detainees. *See* Pet. Mot. at 14. Petitioner further speculates that every interrogation at Guantanamo since 2002 was routinely taped, and that there is reason to believe that videotapes and related documents of petitioner's interrogation at Guantanamo may be in danger of destruction. *See id.* at 13. These assertions and speculations are insufficient to demonstrate that there is a significant risk of future destruction of relevant records by either the CIA or other government entities.

To be sure, the CIA acknowledged in December 2007 that it destroyed videotapes of petitioner's interrogation while he was in CIA custody in 2002. *See Director's Statement on the Taping of Early Detainee Interrogation, available at <https://www.cia.gov/news-information/press-releases-statements/press-release-archive-2007/taping-of-early-detainee-interrogations.html>*. As respondents have shown in a prior report submitted to this Court, along with supporting declarations, in the wake of the revelation of the CIA's destruction of interrogation tapes, *see Abdullah v. Bush*, Civ. No. 05-0023 (RWR) (dkt. no. 84, filed Feb. 8, 2008) (attached as Exhibit A), both the Department of Defense ("DoD") and the CIA have taken new and additional steps to ensure that materials relating to all Guantanamo Bay detainees are being preserved.

For example, on December 20, 2007, the Director of CIA, General Michael V. Hayden,

ordered all CIA personnel to “preserve and maintain all documents, information, and evidence relating to” any detainee held at Guantanamo Bay and any detainee held by the CIA. *See* Decl. of General Michael V. Hayden, ¶ 4. General Hayden also specified that his order is “a continuing obligation that applies to future as well as past and present detainees.” *Id.* Similarly, DoD’s Office of General Counsel issued a formal directive on December 19, 2007 to various DoD components regarding their preservation obligations. *See* Decl. of Karen Hecker, ¶ 2. The declaration of DoD’s Associate Deputy General Counsel detailed efforts taken to ensure relevant DoD components’ compliance with those obligations.<sup>4</sup> *See generally* Hecker Decl., ¶¶ 2-4.

In other words, the Government is undertaking significant efforts to preserve information relating to Guantanamo detainees. Indeed, as respondents’ prior submissions have also indicated, *see Abdullah v. Bush*, Civ. No. 05-23 (dkt. no. 79, filed Dec. 26, 2007 and dkt. no. 84, filed Feb. 8, 2008), the CIA’s destruction of interrogation recordings has generated various inquiries by the Executive Branch and Congress, including a criminal investigation by the Department of Justice. These inquiries and criminal investigation will further deter any future destruction of evidence relevant to any detainee’s habeas case. Against this background and given the sensitivity regarding the Government’s preservation obligations in civil litigation, there is no basis for concluding that the Government will not abide by those obligations. Because petitioner cannot prove that a preservation order is necessary, his motion should be denied on that ground alone.

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<sup>4</sup> Respondents’ submissions in the *Abdullah* case also included declaration of the then Commander of Joint Task Force Guantanamo (“JTF-GTMO”), Rear Admiral Mark H. Buzby, explaining steps taken to preserve information on recording systems of JTF-GTMO as well as corrective steps taken to preserve certain automatic overwriting that had previously occurred. *See* Ex. A.

## II. Petitioner’s Requested Order Is Unduly Burdensome

Petitioner also has not satisfied the second prong of the *Pueblo of Laguna* test requiring that a party seeking the preservation order demonstrate that such an order is not unduly burdensome. *See Pueblo of Laguna*, 60 Fed. Cl. at 138. Petitioner seeks the preservation of all evidence, documents, and information that may be relevant to his “arrest, detention, interrogation and torture,” including certain specified categories of documents set out in exhibit A to petitioner’s motion. *See* Pet. Mot. at 3 & Exhibit A. In other words, petitioner is asking respondents to take action with respect to a wide range of information without regard to its relevance to petitioner’s core constitutional habeas right regarding the legality of his detention – which is the only subject matter over which this Court has jurisdiction in this case.<sup>5</sup>

Moreover, petitioner seeks to require government entities not only to preserve information, but also to catalogue and produce a certified list of all materials whether currently or previously in the possession of government entities, and if destroyed, the dates of any destruction. Such an undertaking would be far more burdensome than the steps taken to preserve

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<sup>5</sup> *Boumediene v. Bush* made explicit that its decision “[did] not hold” that the habeas proceedings for enemy combatant determinations must duplicate typical statutory proceedings under § 2241 in all respects. *See* 128 S. Ct. 2229, 2267, 2274 (2008); *Abdullah*, Civ. No. 05-0023 (dkt. no. 115, filed July 25, 2008, at 5-6). To the contrary, it is only the core, constitutionally-required elements of habeas that remain after Congress’s repeal of *statutory* habeas for Guantanamo detainees. *See id.* at 2278 (Souter, J., concurring) (“Subsequent legislation eliminated the statutory habeas jurisdiction over these claims, so that now there must be constitutionally based jurisdiction or none at all.”). Moreover, *Boumediene* did not disturb the Military Commission Act’s provision, 28 U.S.C. § 2241(e)(2), withholding jurisdiction over challenges to “any aspect” of the detention, transfer, treatment, trial, or conditions of confinement of an alien detained as an enemy combatant. *See In re Guantanamo Bay Habeas Litigation*, Civ. Nos. 05-1509, 05-1602, 05-1704, 08-1310 (RMU), 2008 WL 3155155 (interpreting *Boumediene* to invalidate only 28 U.S.C. § 2241(e)(1)).

relevant information.<sup>6</sup> Furthermore, as respondents have previously pointed out to the Court, inquiries of the type required by petitioner's requested relief raise the prospect of burdening or interfering with the still ongoing criminal investigation into evidence destruction. *See Abdullah*, Civ. No. 05-0023 (dkt no. 85, filed Feb. 8, 2008).

Additionally, petitioner makes this request even while Judge Thomas J. Hogan – who was appointed by a resolution of an executive session of this Court to coordinate and manage proceedings in Guantanamo cases “so that these cases can be addressed as expeditiously as possible as required by the Supreme Court in *Boumediene v. Bush* . . . ,” see July 1, 2008 Resolution of the Executive Session (D.D.C.) – is working on determining the appropriate procedural framework for proceedings in this and many other Guantanamo detainee habeas cases that have been transferred to him for coordination.

To grant petitioner's requested relief now would unduly burden respondents because it is unclear at this juncture whether any discovery is even appropriate under the procedural framework to be fashioned by Judge Hogan, and how any such discovery, if any, is to be conducted. Granting the requested order now outside of any streamlined procedural framework – and ahead of the orderly processing of the some 200 pending Guantanamo detainee habeas cases in this Court – would only divert limited and valuable government resources from the Government's current overriding goal to speedily resolve the pending detainee habeas cases. That in turn would unduly burden the Government in its ability to meet the expedited schedules set by Judge Hogan as well as two other Judges of this Court for the production of factual returns

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<sup>6</sup> A far less significant undertaking with respect to another petitioner required a significant commitment of resources. *See Abdullah*, Civ. No. 05-0023 (dkt. no. 96, filed Apr. 16, 2008).



and the litigation of these cases.

### CONCLUSION

For the foregoing reasons, this Court should deny petitioner's Motion for Preservation Order, Order Requiring Government Agencies to Identify Existing and Destroyed Documents and Other Relief.

Dated: September 4, 2008

Respectfully submitted,

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