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IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

MAJID KHAN, Petitioner, v. ROBERT M. GATES, Respondent.	No. 07-1324

MOTION FOR PRESERVATION OF TORTURE EVIDENCE

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IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

MAJID KHAN,

Petitioner,

v.

No. 07-1324

ROBERT M. GATES,

Respondent.

MOTION FOR PRESERVATION OF TORTURE EVIDENCE

Petitioner Majid Khan, by and through his undersigned counsel, respectfully submits this motion for an order requiring the government to preserve all documents and information concerning any matter that may be relevant to a claim or defense arising from litigation or potential litigation involving Khan, or that may lead to the discovery of admissible evidence. In particular, and without limitation, Khan seeks preservation of all evidence concerning his torture by U.S. personnel for more than three years at secret overseas prisons operated by the Central Intelligence Agency. Any failure to preserve this evidence, whether intentionally or through neglect, would substantially impair this Court's ability to determine by a preponderance of the evidence whether Khan is properly detained as an "enemy

combatant" under the Detainee Treatment Act of 2005 ("DTA"), Pub. L. No. 109-148, §§ 1001-1006, 119 Stat. 2680, 2739-45 (Dec. 30, 2005).

This evidence should also be preserved because information about the CIA detention and interrogation program – what happened to Khan and other "ghost" prisoners, where it happened, and who is responsible – will be the central focus of any military commission proceedings involving Khan. Any such proceedings would likewise be subject to review by this Court under the DTA. Moreover, Respondent is already on notice that this evidence must be preserved for possible congressional hearings, criminal investigations, and internal agency investigations concerning the torture methods inflicted on Khan. The motion should be granted.

Preliminary Statement

Unlike other Guantánamo prisoners, Majid Khan has long had legal resident status in the United States. He grew up in the suburbs of Baltimore, Maryland, and has had political asylum in this country since 1998. He graduated from Owings Mills High School in 1999, purchased a home near Baltimore, opened a bank account, and worked for the State of Maryland and Electronic Data Systems. He paid thousands of dollars in taxes to the Internal Revenue Service. His family still resides legally near Baltimore; and some of his family members are U.S. citizens.

On March 5, 2003, Khan was [REDACTED] in Karachi, Pakistan, [REDACTED]

Notwithstanding his substantial, voluntary ties to this country, Khan [redacted]

[redacted] the CIA for detention and interrogation at secret prisons overseas. Khan was forcibly disappeared by the CIA. He did not reemerge until September 6, 2006, when he was transferred to the U.S. Naval Station at Guantánamo Bay, Cuba, where he remains imprisoned without charge or trial.

Khan filed a petition for a writ of habeas corpus in the U.S. District Court for the District of Columbia on September 29, 2006, challenging his indefinite detention in military custody. *See Khan v. Bush*, No. 06-1690 (RBW) (D.D.C.). In April 2007, Khan appeared before a Combatant Status Review Tribunal ("CSRT") and was subsequently found to be properly detained as an "enemy combatant." On August 14, 2007, a few days after the CSRT determination was announced, Khan filed this DTA action challenging that determination and preserving all other legal claims, including his right to habeas relief.

Two months later – and more than a year after filing his first legal challenge to his detention – Khan was finally permitted access to his undersigned counsel.

The CIA Torture Program

As set forth in the Declarations of Gitanjali S. Gutierrez and J. Wells Dixon, executed November 29, 2007 (attached hereto as Exs. 1 and 2, respectively), Khan was subjected to an aggressive CIA detention and interrogation program notable

for its elaborate planning and ruthless application of torture. The methods inflicted on Khan - [redacted]

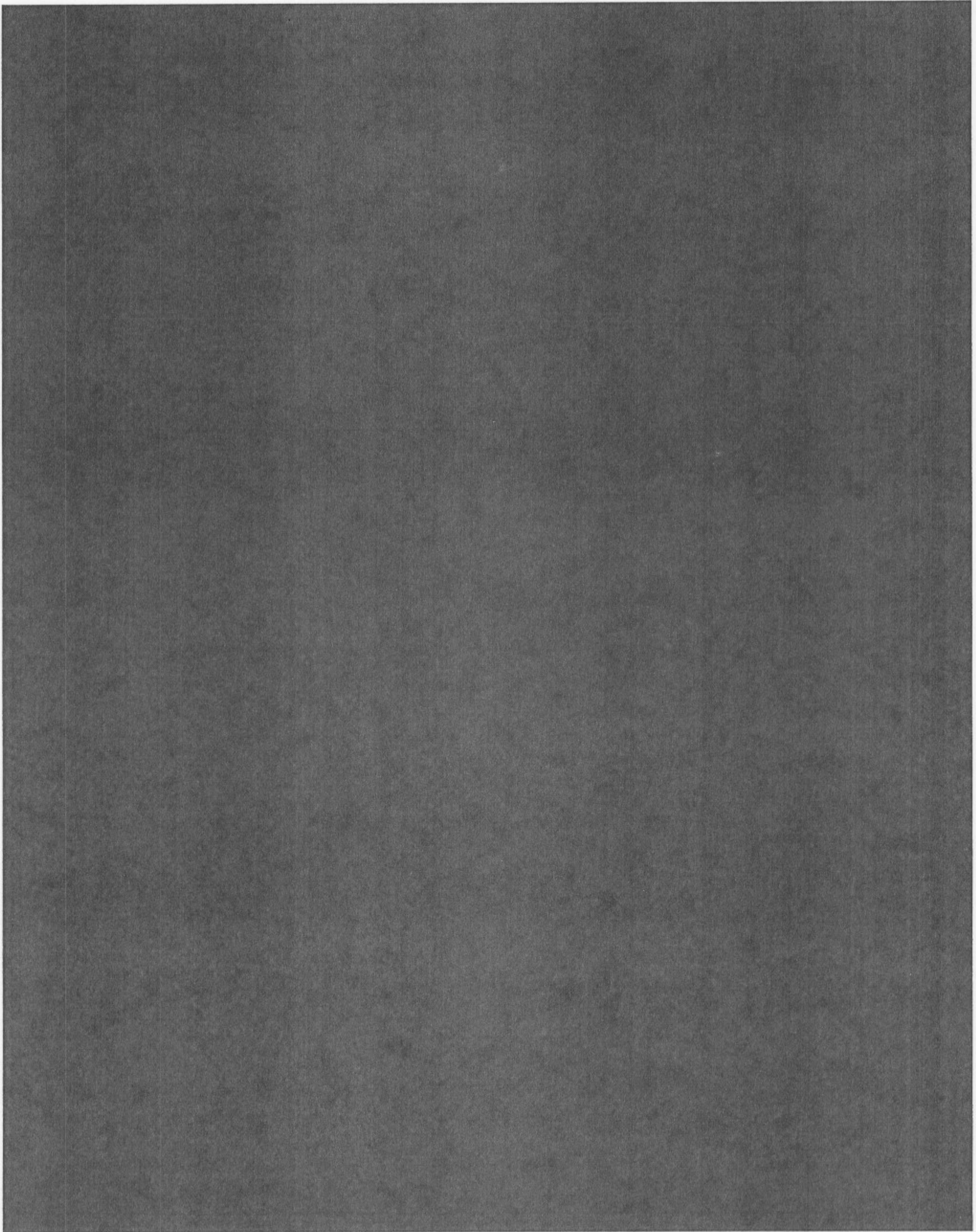
were deliberately and systematically applied [redacted] for maximum effect. Khan admitted anything his interrogators demanded of him, regardless of the truth, [redacted] in order to end his suffering. As a direct result of this ordeal, Khan has suffered and continues to suffer severe physical and psychological trauma from which he is unlikely ever to recover fully.

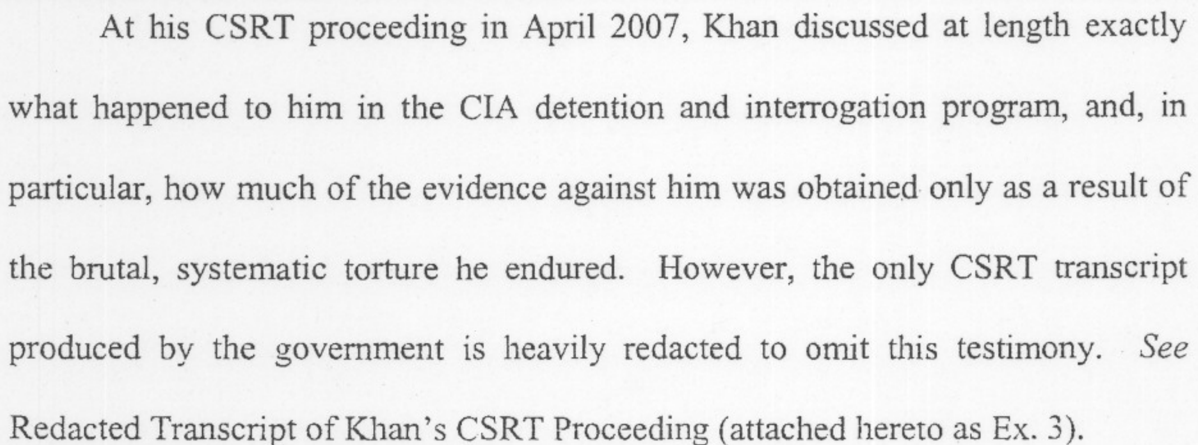
Khan's torture was decidedly not a mistake, an isolated occurrence, or even the work of "rogue" CIA officials or government contractors operating outside their authority or chain of command. To the contrary, as described in the Dixon Declaration, Khan [redacted] prisoners who were similarly abducted, imprisoned and tortured by U.S. personnel at CIA "black sites" around the world. The collective experiences of these men, who were forcibly disappeared by the government and became ghost prisoners, reveal a sophisticated, refined program of torture operating with impunity outside the boundaries of any domestic or international law.

The CIA detention and interrogation program that Khan and the other ghost prisoners were subjected to [redacted] The

focus of the program [redacted] Its purpose was plainly to intentionally and systematically inflict suffering [redacted] ostensibly in order to gather intelligence information. The program further appears to have been carried out under the immediate direction of [redacted] The CIA detention and interrogation program described by Khan and other ghost prisoners can only be characterized as state-sanctioned torture.

For instance, as set forth in the Gutierrez Declaration, ¶¶ 74-91, when Khan arrived [redacted]





At his CSRT proceeding in April 2007, Khan discussed at length exactly what happened to him in the CIA detention and interrogation program, and, in particular, how much of the evidence against him was obtained only as a result of the brutal, systematic torture he endured. However, the only CSRT transcript produced by the government is heavily redacted to omit this testimony. *See* Redacted Transcript of Khan's CSRT Proceeding (attached hereto as Ex. 3).

Khan now moves for an order requiring Respondent to preserve all documents and information relating to his torture, cruel, inhuman and degrading treatment, and other unlawful coercion, which is necessary to ensure that such evidence is not lost or destroyed, and is available for use in this DTA action and other litigation or potential litigation involving Khan.

Argument

Respondent's obligation to preserve documents and information concerning Guantánamo prisoners is not new. That obligation did not arise with the enactment of the DTA, the filing of this case or the Court's recent rulings in *Bismullah v. Gates*, Nos. 06-1197 & 06-1397 (D.C. Cir.), concerning the scope of the record on review in DTA actions. It has existed at least since the Supreme Court held in *Rasul v. Bush*, 542 U.S. 466 (2004), that Guantánamo prisoners have the right to challenge their detention through habeas corpus, and since the CSRTs were created a few days thereafter.

At the time of the 2004 CSRTs, various government officials were named in numerous actions asserting habeas and other claims, including challenges to extraordinary rendition and torture. The lawsuits were proceeding in court and growing in number as more prisoners sought to challenge their detention. The government therefore had to know that it was obligated to preserve all evidence relating to the prisoners, including the "Government Information" as defined in the

CSRT regulations, regardless of whether the evidence was actually compiled for use in the CSRTs. That was particularly so because the government had exclusive possession, custody and control of the evidence.[1] Indeed, several District Courts entered preservation orders over objections by government officials that such orders were not necessary because they understood and would honor their existing preservation obligations.[2]

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[1] The CSRT regulations (or "CSRT Procedures") are contained in Deputy Secretary of Defense Paul Wolfowitz's "Order Establishing Combatant Status Review Tribunal" (July 7, 2004), and Navy Secretary Gordon England's Memorandum "Implementation of Combatant Status Review Tribunal Procedures for Enemy Combatants detained at Guantanamo Naval Base, Cuba" (July 29, 2004). They define the "Government Information" as:

> reasonably available information in the possession of the U.S. Government bearing on the issue of whether the detainee meets the criteria to be designated as an enemy combatant, including information generated in connection with the initial determination to hold the detainee as an enemy combatant and in any subsequent reviews of that determination, as well as any records, determinations, or reports generated in connection with such proceedings (cumulatively called hereinafter the "Government Information").

CSRT Procedures, Encl. 1 § E(3). The Government Information was critical to the ongoing litigation in 2004 because by definition it included all information that was relevant to whether a prisoner met the criteria for proper detention in military custody as an "enemy combatant."

[2] *See, e.g.*, Order, *Al-Marri v. Bush*, No. 04-2035 (GK) (D.D.C. Mar. 7, 2005) (dkt. no. 25); Order, *Al-Shiry v. Bush*, No. 05-490 (PFL) (D.D.C. Mar. 23, 2005) (dkt. no. 14); Order, *Anam v. Bush*, No. 04-1194 (HHK) (D.D.C. June 10, 2005) (dkt. no. 124); Order, *Abdah v. Bush*, No. 04-1254 (HHK) (D.D.C. June 10, 2005) (dkt. no. 155); Mem. Op. & Order, *El-Banna v. Bush*, No. 04-1144 (RWR) (D.D.C. July 18, 2005) (dkt. no. 36); Mem. Op. & Order, *Slahi v. Bush*, No. 05-881 (RWR) (D.D.C. July 18, 2005) (dkt. no. 10); Mem. Order, *Zadran v. Bush*, No. 2367

Although Khan was not transferred to Guantánamo until 2006, the government nonetheless had an obligation to preserve evidence relating to his imprisonment and torture by the CIA, which arose at the time of his abduction in March 2003. This obligation arose then because, since the inception of the CIA torture program and the capture of Abu Zubaydah in 2002, evidence obtained from ghost prisoners was gathered in anticipation of, and later introduced in support of, criminal prosecutions against other individuals. Notably, for instance, evidence purportedly obtained from Khan during his imprisonment in CIA custody was introduced in the government's criminal prosecution of Uzair Paracha, who was indicted on October 8, 2003.

Numerous disclosures reveal, however, that the government has violated and continues to violate its existing preservation obligations. Whether intentional or the result of neglect, these violations have included the loss, destruction and

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(RWR) (D.D.C. July 19, 2006) (dkt. no. 36); *cf.* Order, *Al-Anazi v. Bush*, No. 05-345 (JDB) (D.D.C. Oct. 28, 2005) (denying motion for preservation as moot because "respondents have a pre-existing duty to preserve the very information that this motion addresses"). Relying largely on *Harris v. Nelson*, 394 U.S. 296 (1969), the District Courts concluded that they had jurisdiction to enter preservation orders under the All Writs Act, 28 U.S.C. § 1651. They reasoned that because the discovery provisions of the Federal Rules of Civil Procedure did not automatically apply in whole to habeas cases, and because there had not been full disclosure of the facts authorizing the prisoners' challenged detention, preservation orders were necessary to ensure the just and proper disposition of the cases. That reasoning applies with equal force here, where the government has refused to produce any evidence to justify Khan's detention and questions concerning the scope of discovery applicable to DTA actions have not been resolved.

suppression of evidence critical to Guantánamo habeas and DTA actions, as well as the military commissions and at least one federal criminal prosecution. As noted below, intelligence information and evidence of prisoner abuse are particularly susceptible of spoliation. Accordingly, because entry of a preservation order is necessary and not unduly burdensome, the Court should grant this motion. *See Pueblo of Laguna v. United States*, 60 Fed. Cl. 133, 138 (Fed. Cl. 2004).[3]

I. A PRESERVATION ORDER IS NECESSARY BECAUSE THE GOVERNMENT'S PRIOR CONDUCT SHOWS A SUBSTANTIAL LIKELIHOOD OF SPOLIATION

To demonstrate that a preservation order is necessary, "the proponent ordinarily must show that absent a court order, there is significant risk that relevant evidence will be lost or destroyed – a burden often met by demonstrating that the opposing party has lost or destroyed evidence in the past or has inadequate retention procedures in place." *Id.* Here, that standard is plainly satisfied.

As set forth in the Gutierrez and Dixon Declarations, *see* Exs. 1 & 2, there is no doubt that Khan was subjected to a program of state-sanctioned torture. Nor is there any question that the "confessions" and other "evidence" obtained from him

[3] The government has previously argued that preservation orders may only be entered where the requirements for a preliminary injunction are met. But "a document preservation order is no more an injunction than an order requiring a party to identify witnesses or to produce documents in discovery." *Pueblo of Laguna*, 60 Fed. Cl. at 138 n.8, *cited in* Order, *Al-Marri v. Bush*, No. 04-2035 (GK) (D.D.C. Mar. 7, 2005) (dkt. no. 25). In any event, the requirements for a preliminary injunction are plainly satisfied here.

in this program are exculpatory because the circumstances under which the information was extracted cast considerable doubt on their accuracy and reliability. The same is true of any information about Khan that may have been obtained from other ghost prisoners under torture.

Absent a preservation order, there is a substantial risk that the torture evidence will disappear. Indeed, over the last several years there have been many reported instances where intelligence information and evidence of prisoner abuse has disappeared. Recent disclosures concerning the suppression of similar evidence further underscore the risk of spoliation here.

In the DTA cases, the government has failed to preserve the Government Information that is essential to this Court's review of the CSRTs findings.[4] On

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[4] On July 20, 2007, this Court held that prisoners at Guantánamo Bay who challenge their detention under the DTA are entitled to the record on review, which includes the Government Information. *See Bismullah v. Gates*, Nos. 06-1197 & 06-1397, 2007 U.S. App. LEXIS 17255, at *2 (D.C. Cir. July 20, 2007). The Court concluded that it "must be able to review the Government Information with the aid of counsel for both parties. . . . [T]he court cannot, as the DTA charges us, consider whether a preponderance of the evidence supports the [Combatant Status Review] Tribunal's [enemy combatant] status determination without seeing all the evidence." *Id.* at *18.

On October 3, 2007, the Court denied Respondent's petition for rehearing and reiterated that "the record on review must include all Government Information, as defined by the DoD Regulations." *Bismullah v. Gates*, Nos. 06-1197 & 06-1397, Slip. Op. at 9 (D.C. Cir. Oct. 3, 2007). "Whether the Recorder selected to be put before the Tribunal all exculpatory Government Information, as required by the DoD Regulations, and whether the preponderance of the evidence supported the conclusion of the Tribunal, cannot be ascertained without consideration of all the

September 27, 2007, the government filed an omnibus motion to stay orders entered by the Court requiring them to file the certified index of record in this case and numerous other DTA actions. In support of the motion, the government disclosed, among other things, that "the reality is that there is no readily accessible compilation of the record as defined in *Bismullah* for completed CSRTs"; "[t]here is no single file containing that material or document memorializing the Recorders' mental processes"; and "it is impossible to recreate with any precision the information that was reviewed by Recorders in performing their duties." Resp't's Omnibus Mot. to Stay at 28-30. In sum, Respondent contended, compilation of the Government Information is like "looking for a needle in a haystack." *Id.* at 31.[5]

These disclosures are remarkable in relation to this case because Khan's CSRT hearing was conducted in April 2007. How Respondent could have apparently failed to keep track of, or otherwise preserve, the Government Information relating to Khan for a mere *six months* after his CSRT – and at a time when the parties in *Bismullah* were litigating the scope of the record on review – is

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Government Information." *Id.* at 5. The Court further concluded that "if the Government cannot, within its resource constraints, produce the Government Information collected by the Recorder with respect to a particular detainee, then this court will be unable to confirm that the CSRT's determination was reached in compliance with the DoD Regulations and applicable law." *Id.* at 8.

[5] Respondent's stay motion is still pending before the Court.

unfathomable.[6] Moreover, it is indisputable that the Government Information in Khan's case included torture evidence, which was fully redacted from the only transcript of Khan's CSRT proceeding that the government has produced. *See* Ex. 3. That such critical evidence was apparently lost or destroyed in such a short period of time, and was never produced to counsel or the Court, raises concerns that information about the CIA torture program may not be preserved absent an order from the Court.

Military officers involved in the CSRTs have further testified recently about the loss, destruction and suppression of critical evidence concerning Guantánamo prisoners, including exculpatory evidence. Rear Admiral James M. McGarrah, the Director of the Office for the Administrative Review of the Detention of Enemy Combatants ("OARDEC") from July 2004 until March 2006, stated in a declaration filed in this Court in *Bismullah* that exculpatory evidence was not always presented to the CSRTs. *See* Declaration of Rear Admiral (Retired) James

[6] Regardless of how the record on review would later be defined by this Court, the CSRT regulations required Respondent to compile and maintain the Government Information. The CSRT regulations specify that "the Recorder *shall* obtain and examine the Government Information." CSRT Procedures, Encl. 2 § C(1) (emphasis added). The Personal Representative is also required to review the Government Information. *See, e.g.*, *id.*, Encl. 1 § G(4) ("The Director, CSRT, will schedule a Tribunal hearing for a detainee within 30 days after the detainee's Personal Representative *has reviewed* the Government Information[.]") (emphasis added); *id.*, Encl. 3 § C(2) ("After the Personal Representative has reviewed the Government Information . . ."). That is why the CSRT regulations require the Recorder to "obtain," and not merely review, the Government Information.

M. McGarrah, executed May 31, 2007, ¶¶ 11-13 (attached hereto as Ex. 4).[7] He also stated that other information was simply lost:

> OARDEC made an effort to retain the Government Information . . . compiled for each CSRT. It is my understanding that despite their efforts, some of these electronic files became corrupted following a technical change-over from one computer system to another in 2005. This has made it difficult to fully recreate the electronic files of Government Information compiled for each tribunal. I also understand that OARDEC is currently working to retrieve stored data from system archives to see if it is possible to recreate the files. As of this date, OARDEC is uncertain whether this is possible.

Id. ¶ 16.

According to Admiral McGarrah, there were also instances where the Recorders responsible for gathering the Government Information were not permitted access to relevant information by intelligence or law enforcement agencies, which "declined to approve the use of information" that was required to be considered by the CSRTs. *See id.* ¶¶ 10, 12.

A third military officer likewise testified about instances where intelligence agencies refused to provide exculpatory evidence to the CSRT panels or state that no such evidence existed:

[7] A second military officer who sat on forty-nine CSRT panels stated that "[t]here was no exculpatory evidence presented separately, as required in the CSRT rules, in any CSRT hearing that I sat on." Declaration of William J. Teesdale, Esq. (Redacted), executed Sept. 4, 2007, ¶ 7.1 (describing interview with U.S. Army officer) (attached hereto as Ex. 5).

> I was specifically told on a number of occasions that the information provided to me was all that I would be shown, but I was never told that the information that was provided constituted all available information. On those occasions when I asked that a representative of the organization provide a written statement that there was no exculpatory evidence, the requests were summarily denied.
>
> At one point, following a review of information, I asked the Office of General Counsel of the intelligence organization that I was visiting for a statement that no exculpatory information had been withheld. I explained that I was tasked to review all available materials and to reach a conclusion regarding the non-existence of exculpatory information, and that I could not do so without knowing that I had seen all information.
>
> The request was denied, coupled with a refusal even to acknowledge whether there existed additional information that I was not permitted to review. In short, based upon the selective review that I was permitted, I was left to "infer" from the absence of exculpatory information in the materials that I was allowed to review that no such information existed in materials that I was not allowed to review.
>
> . . . It was not possible for me to certify or validate the non-existence of exculpatory evidence as related to any individual undergoing the CSRT process.
>
> The content of intelligence products . . . was often left entirely to the discretion of the organizations providing the information. . . . In other words, the person preparing materials for use by the CSRT board members did not know whether they had examined all available information or even why they possessed some pieces of information but not others.

Declaration of Stephen Abraham, executed June 15, 2007, ¶¶ 12-16 (attached hereto as Ex. 6).

These failures are not unique to the CSRT process. In the context of the military commissions, certain prosecutors long ago expressed substantial concerns about the loss, destruction and suppression of evidence. In an unclassified email chain from 2004, one military prosecutor stated:

> I feel a responsibility to emphasize a few issues.
>
> . . . .
>
> . . . My fears are not insignificant that the inadequate preparation of the cases and misrepresentation related thereto may constitute dereliction of duty, false official statements, or other criminal conduct.
>
> An environment of secrecy, deceit and dishonesty exists within our office.

Redacted Email by CPT John Carr dated March 15, 2004 (attached hereto as Ex. 7).

The officer then offered several examples, including the following involving allegations that evidence of prisoner torture and abuse was destroyed or withheld:

> 2. *Suppressing FBI Allegations of Abuse at Bagram* – Over dinner and drinks, KK and Lt. [redacted] heard from FBI agents that detainees were being abused at the Bagram detention facility. Lt. [redacted] told KK after dinner that they couldn't report the allegations because it was told to them "in confidence." KK told CDR Lang, LtCol [redacted] and [redacted] anyway, and all three stated that there was not credible evidence and concluded on their own volition that they should not report the allegation to [Col Borch] or other members of the office.
>
> . . . .
>
> 4. *The disappearance/destruction of evidence* –

As I have detailed to you, my copy of CDR Lang's notes detailing the [FBI] 302 in which Bahlul claims torture and abuse is now missing from my notebook. The 302 can not [sic] be located. Additionally, [redacted] of the FBI related last week that he called and spoke to CDR Lang about the *systematic destruction of statements of the detainees*, and CDR Lang said that this did not raise any issues.

[Col Borch] told the AF generals that we had no indication that al Bahlul had been tortured. It was after this statement, which CDR Lang quietly allowed to go uncorrected, that I brought up CDR Lang's missing notes to the contrary. You admitted to me that you were aware that al Bahlul had made allegations of abuse.

In our meeting with OGA [i.e., "Other Government Agency," meaning an intelligence agency], *they told us that the exculpatory information, if it existed, would be in the 10% that we will not get with our agreed upon searches.* I again brought up the problem this presents to us in the car on the way back from the meeting, and *you told me that the rules were written in such a way as to not require that we conduct such thorough searches*, and that we weren't going to worry about it.

You have repeatedly said to the office that the military panel will be handpicked and will not acquit these detainees, and we only needed to worry about building a record for the review panel.

. . . .

The evidence does not indicate that our military and civilian leaders have been accurately informed of . . . the true capability of our accuseds [sic].

. . . It is difficult to believe that the White House has approved this situation, and I fully expect that one day, soon, someone will be called to answer for what our office has been doing for the last 14 months.

Id. (emphases added).

The loss, destruction and suppression of evidence of prisoner torture and abuse may have been widespread at Guantánamo, Bagram and other U.S. prisons. In Guantánamo, for example, one former military linguist described how videotapes of detainee beatings by the Immediate Reaction Force teams routinely disappeared. *See* Eric Saar & Viveca Novak, Inside the Wire: A Military Intelligence Soldier's Eyewitness Account of Life at Guantánamo 102, 136 (2005). In Bagram, "crucial witnesses were not interviewed, documents disappeared, and at least a few pieces of evidence were mishandled" during investigations into the deaths of detainees held in military custody. Tim Golden, *Army Faltered in Investigating Detainee Abuse*, N.Y. Times, May 22, 2005, at 1. Likewise, FBI agents reported efforts to "cover up" serious physical abuses of civilian detainees in Iraq. *See* Ex. 8 (redacted FBI report dated June 25, 2004).

More recently disclosures confirm that the government's apparent mishandling of evidence has not abated. In the military commissions, the government recently revealed the existence of exculpatory evidence that had been withheld from a Guantánamo prisoner for several years. *See* William Glaberson, *Decks Are Stacked in War Crimes Cases, Lawyers Say*, N.Y. Times, Nov. 8, 2007 ("Military defense lawyers said that on the eve of the hearing, military prosecutors told them for the first time of a government witness who might be able to help a detainee, Omar Ahmed Khadr, counter the war crimes charges on which he was

arraigned Thursday."); *see also* Andy Worthington, *The Trials of Omar Khadr*, Counterpunch, Nov. 15, 2007, *available at* http://www.counterpunch.org/ worthington11152007.html.

The Justice Department also recently revealed that "[t]he CIA has three video and audio recordings of interrogations of senior al Qaida captives but misled federal judges about the evidence during the case against terrorist Zacarias Moussaoui." Greg Gordon, *CIA Admits to Recording Interrogations of Top Al Qaida Captives*, McClatchy Washington Bureau, Nov. 14, 2007. Although the prosecution of Moussaoui had been ongoing for more than four years, the Justice Department disclosed that "the CIA didn't notify them until Sept. 13 that it had discovered a videotape and the transcript of an interrogation of an unidentified detainee. . . . Among the prisoners whose testimony Moussaoui sought were Khalid Sheikh Mohammed, who allegedly admitted masterminding the 9/11 attacks after he was waterboarded; Ramzi Binalshibh, a senior al Qaida member who allegedly coordinated the attacks; and financier Mustafa Ahmed al Hawsawi." *Id.* "The fact that the audio/video recording of enemy combatant interrogations occurred, and that the United States was in possession of three of those recordings is, as noted, inconsistent with factual assertions in CIA declarations dated May 9, 2003 . . . and November 14, 2005." Redacted Letter from Justice Department to

U.S. Court of Appeals for the Fourth Circuit and U.S. District Court for the Eastern District of Virginia, dated Oct. 25, 2007, at 3 of 5 (attached hereto as Ex. 9).

These revelations are particularly troubling in relation to this case because Khan was abducted, imprisoned and tortured for more than three years by the CIA, pursuant to the same program that these other ghost prisoners were subjected to, [redacted] There is again simply no assurance that such critical evidence will not be lost or suppressed in connection with this litigation or other potential litigation, as apparently happened in the Moussaoui trial.

In sum, the preceding events demonstrate a substantial risk that evidence of Khan's torture may be lost, destroyed or suppressed absent the entry of a preservation order in this case. In the context of "enemy combatant" litigation, and particularly with respect to former CIA prisoners like Khan, the government is simply no longer entitled to a presumption of regularity when discharging its existing preservation obligations.

II. A PRESERVATION ORDER IS NOT UNDULY BURDENSOME BECAUSE IT REQUIRES NOTHING MORE THAN WOULD BE REQUIRED IN ORDINARY CIVIL DISCOVERY

In addition to showing that a preservation order is necessary to avoid spoliation, a proponent must show that "the particular steps to be adopted will be effective, but not overbroad – the court will neither lightly exercise its inherent

power to protect evidence nor indulge in an exercise of futility." *Pueblo of Laguna*, 60 Fed. Cl. at 138. Again, that standard is satisfied here.

Khan's request for a preservation order is tailored to preserve all documents and information concerning any matter that may be relevant to a claim or defense arising from litigation or potential litigation involving Khan, or that may lead to the discovery of admissible evidence. In particular, this motion seeks the preservation of evidence concerning Khan's torture and other unlawful treatment, which, whether the result of "official government policy, cumulative evidence of specific practices, or something else, may be probative of the treatment of [Khan and other ghost prisoners] or may lead to other probative evidence." Mem. Order at 5, *Zadran v. Bush*, No. 05-2367 (RWR) (D.D.C. July 19, 2006) (dkt. no. 36).

As indicated above, information about what happened to Khan and other ghost prisoners in the CIA detention and interrogation program will be the central focus of any and all litigation involving Khan. This motion thus seeks a preservation order that imposes no greater obligation on Respondent than the Federal Rules of Civil Procedure would otherwise impose on a litigant engaged in discovery in an ordinary civil action. *See id.* at 5-6.

Moreover, the preservation order proposed by Khan would not be futile. "If nothing else, it will serve to reemphasize that [Respondent] needs to take extraordinary precautions . . . to prevent either the purposeful or inadvertent

destruction or loss of records. Such an order also serves as fair warning that sanctions may be imposed should [Respondent] instead fail adequately to protect records relevant to this action." *Pueblo of Laguna*, 60 Fed. Cl. at 139.

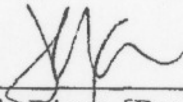
Conclusion

For all of the foregoing reasons, this motion should be granted.

Dated: Washington, DC
November 29, 2007

Respectfully submitted,

Counsel for Petitioner:



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CERTIFICATE OF SERVICE

I hereby certify that on November 30, 2007, I caused the foregoing Motion for Preservation of Torture Evidence, with exhibits, to be filed and served on counsel listed below by causing an original and six copies to be personally delivered to the Court Security Office.

Robert M. Loeb, Esq.
U.S. Department of Justice
Civil Division, Room 7268
950 Pennsylvania Ave., N.W.
Washington, DC 20530-0001

Counsel for Respondent

Gitanjali S. Gutierrez