

[ORAL ARGUMENT NOT SCHEDULED]

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

MAJID KHAN and RABIA KHAN,
as Next Friend,

Petitioners,

v.

ROBERT M. GATES,
Secretary of Defense,
Respondent.

No. 07-1324

**OPPOSITION TO PETITIONER'S MOTIONS FOR PRESERVATION
ORDER AND FOR DECLARATORY JUDGMENT**

~~Respondent Secretary of Defense Robert M. Gates opposes petitioner's~~
motions for a preservation order and a declaratory judgment. As we explain below,
a preservation order is not appropriate here because petitioner cannot establish the
requisite irreparable harm. The Government is committed to preserving the material
at issue, and no court order is required. Petitioner's requested declaratory judgment
should also be denied because it seeks relief beyond this Court's jurisdiction.¹

¹ As this Court is aware, for the public version of petitioner's filings, certain material has been redacted by the Government. We wish to make clear that these redactions should not be understood to mean that the redacted material contains truthful claims. In order to protect national security sensitive information, the Government is neither confirming nor denying the correctness of any of petitioner's

STATEMENT

Petitioner Majid Khan is being held as an enemy combatant at the U.S. Naval Base at Guantanamo Bay, Cuba. He is one of several "High Value Detainees" who were moved to Guantanamo Bay in September 2006, after previously being held in the custody of the Central Intelligence Agency.² A Department of Defense Combatant Status Review Tribunal ("CSRT") held a hearing on petitioner's status on April 15, 2007. Among the unclassified allegations against petitioner that were provided to him as part of his CSRT process are the following:

- (1) Petitioner's brother "stated [petitioner] was involved with a group that he believed to be al Qaida, and as of December 2002 was involved in transporting people across the border of Afghanistan and Pakistan, and points elsewhere";
- (2) Iyman Faris, who has pled guilty in the United States to providing material support to al Qaida, stated that petitioner had told him he met Khalid Shaykh Mohammed, referred to him as his uncle, and sought to "martyr himself against President Musharaff of Pakistan by detonating a vest of explosives inside a building";

many allegations. We have transmitted his allegations to the proper authorities within the Department of Justice for investigation.

² See <http://www.whitehouse.gov/news/releases/2006/09/20060906-3.html> (the President's announcement of the transfer of the high value detainees); <http://www.defenselink.mil/pdf/detaineebiographies1.pdf> (listing the detainees); <http://www.defenselink.mil/pdf/thehighvaluedetaineeprogram2.pdf> (a description of the high value detainee program).

- (3) Evidence submitted in the trial of Uzair Paracha in the Southern District of New York showed that Paracha “agreed with two al Qaida members, including [petitioner], to provide support to al Qaida by trying to help [petitioner] obtain a travel document that would have allowed the [petitioner] to re-enter the United States to commit a terrorist act”;³
- (4) Agents found petitioner’s “Bank of America visa check card * * * and five different identification cards” for petitioner in Paracha’s bedroom in New York;
- (5) According to Paracha, petitioner tried to invest between \$180,000 and \$200,000 of al Qaida money with him to be kept “liquid so they could have it back at a moment’s notice.”

Khan, Majid, Unclassified Summary of Evidence at 1-2. The CSRT determined that petitioner was properly classified as an enemy combatant. That decision became final on July 2, 2007. Petitioner then filed this action under the Detainee Treatment Act (“DTA”) to obtain review of that determination.

As part of this action brought under the DTA, petitioner has now broadly requested that the Court order respondent to “preserve all documents and information relating to [petitioner’s] torture, cruel, inhuman, degrading treatment, and other unlawful coercion” so that it may be “available for use in this DTA action and other litigation or potential litigation involving Khan.” Preservation Mot. at 8.

³ Paracha was convicted in federal court of five counts, including providing material support to Al Qaeda. See “U.S. Convicts Pakistani of Providing Support to al Qaeda,” Office of the United States Attorney, Southern District of New York (November 25, 2005) (<http://www.usdoj.gov/usao/nys/pressreleases/November05/parachaconvictionpr.pdf>).

In a second motion, petitioner has asked that this Court enter a declaratory judgment that petitioner was subject to illegal coercion or torture.

ARGUMENT

A preservation order would operate as an injunction, and petitioner must therefore demonstrate that four factors warrant this Court's issuance of an injunction: (1) irreparable injury, (2) substantial likelihood of success on the merits with respect to the requested relief, (3) lack of injury to other interested parties, and (4) furtherance of the public interest. *See Battayav v. Bush*, No. 05-CV-714 (RBW) (dkt no. 12); *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); *see also Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 673-74 (D.C. Cir. 1985) (per curiam) (stay factors).

Petitioner urges this Court to employ a more relaxed standard (Mot. at 11), asking merely whether a preservation order "is necessary and not unduly burdensome." *Pueblo of Laguna v. United States*, 60 Fed. Cl. 133, 137-38 (Fed. Cl. 2004). That standard, however, is inapplicable because it lacks "adequate precision" and "sufficient depth of analysis," and does not reflect the reality that a preservation order operates as the functional equivalent to an injunction. *See Capricorn Power Co. v. Siemens Westinghouse Power*, 220 F.R.D. 429, 434 n.2 (W.D. Pa. 2004).

Nonetheless, petitioner is not entitled to a preservation order in this DTA action under either standard.

1. a. Petitioner asserts that, in finding him to be an enemy combatant, the CSRT relied upon a record containing statements elicited from him during his CIA custody. Mot. at 11-12. He argues that, because the details of his treatment while in CIA detention will be critical to his ability to challenge the CSRT ruling, a preservation order is required.⁴ Petitioner cannot, however, establish the requisite “irreparable injury” or need for a preservation order because the relevant agencies are taking concerted action and are firmly committed to retaining any evidence relating to the treatment of petitioner while in CIA custody. Notably, the Department of Defense has issued a broad directive instructing all of its components to preserve and

⁴ We note that petitioner’s premise is flawed. The CSRT record when produced to this Court will reveal that the CSRT was not presented with any statements made by petitioner, or any other detainee, while in CIA custody. *See* Declaration of Frank Sweigart (attached hereto as Exhibit A). The CSRT record does reference the conviction of Uzair Paracha on charges of providing material support to al Qaeda. The evidence in that criminal case showed that Paracha provided assistance to petitioner to help petitioner obtain travel documents so that he could enter the United States in order to commit terrorist acts. *See* CSRT Unclass. Record R-1. The CSRT expressly did not rely upon Paracha’s conviction, but did give some weight to the testimony of Paracha in his criminal case. That testimony is part of the CSRT record. *Id.* at Enc. 1, p.6. We note that, in the Paracha criminal case, the parties stipulated that petitioner and another high-value detainee made certain statements and these stipulations were introduced into evidence by Paracha’s defense counsel. Those stipulated statements (which can be read to support the facts that petitioner was a member of al Qaeda and was involved in planning terrorist attacks) were not presented to the CSRT, however.

maintain all information regarding all detainees ever held at Guantanamo. *See* Memorandum from Daniel J. Dell'Orto, Acting General Counsel (December 19, 2007) (attached hereto as Exhibit B) ("Specifically, you were directed to preserve and maintain 'all documents and recorded information of any kind (for example, electronic records, written records, telephone records, correspondence, computer records, e-mail, storage devices, handwritten or typed notes) that is in, or comes into, your possession or control' relating to these detainees. Those directives remain in effect and must continue to be followed. You are hereby directed that this requirement also applies to records relating to detainees who arrived at Guantanamo after August 2005 and to any detainees who may arrive at Guantanamo in the future."). Furthermore, in regard to the documents and other material at issue in petitioner's motion, the Director of the Central Intelligence Agency, General Michael V. Hayden, has signed a sworn declaration explaining that he has "issued an order to all CIA personnel to preserve and maintain all documents, information, and evidence relating to: A. any detainee held at the United States Naval Base Guantanamo Bay, Cuba; and B. any detainee held by the CIA." *See* Hayden Declaration (attached hereto as Exhibit C). The declaration explains that his "order is a continuing obligation that applies to future as well as past and present detainees." *Ibid.*

The CIA has disclosed that certain videotapes of two CIA detainees were destroyed in 2005. The destruction of those tapes is currently being investigated and, whatever the outcome of those investigations, the declaration of General Hayden and the Department of Defense directive show that the relevant government agencies are now firmly committed to preserving the existing records relating to CIA detention.

Further, as noted at the outset of this response, *supra*, p.1 n.1, the allegations made by petitioner in this case have been forwarded for investigation by appropriate law enforcement entities. Respondent would not compromise any potential investigation by destroying or sanctioning the destruction of documents pertinent to such investigation.

Petitioner argues that there is a “substantial risk * * * evidence will disappear” because the “government has failed to preserve the Government Information that is essential to this Court’s review.” Mot. at 12. This argument mixes apples and oranges. Contrary to petitioners’ view, in *Bismullah v. Gates*, 501 F.3d 178, 192 (D.C. Cir. 2007) (*Bismullah I*), the Government never suggested that the Defense Department Office of Administrative Review of the Detention of Enemy Combatants (“OARDEC”) lost or destroyed any evidence; instead, we explained that OARDEC did not retain a separate compilation of material that otherwise could be found – uncompiled – in other Government files. See McGarrah Decl. ¶ 16 (while there was

“no requirement * * * to compile a record of material comprising all files that would qualify as Government Information” OARDEC “made an effort to retain” a compilation).⁵

Moreover, the “failure” to retain a compilation of the “Government Information” in each case occurred before this Court ruled that the record on review consists of the Government Information. *Bismullah I*, 501 F.3d at 192. This Court has acknowledged that at that time the Government had “no reason to believe that DoD would be required to produce” the Government Information. *Bismullah v. Gates*, 503 F.3d 137, 141 (D.C. Cir. 2007) (*Bismullah II*). Going forward, the Government is well aware of the *Bismullah I* ruling and the need to preserve the record for this Court’s review. There is accordingly no need for a separate injunctive order.⁶

⁵ Petitioner’s other criticisms of the CSRT process have nothing to do with the loss or destruction of evidence. *See* Mot. at 15 n.7 (criticizing CSRT recorder for not separating exculpatory from inculpatory evidence); Mot. at 15-16 (criticizing OARDEC for not collecting information when outside agencies declined to authorize its use or possession by OARDEC). The same is true of petitioner’s criticism of military commission proceedings. *See* Mot. at 18 (alleging that military commission proceedings failed to obtain exculpatory material from other agencies); Mot. at 19 (Government tardy in turning over exculpatory evidence in military commission proceedings).

⁶ *Hester v. Bayer Corp*, 206 F.R.D. 683, 685 (M.D. Ala. 2001) (“[t]o supplement every complaint with an order requiring compliance with the Rules of Civil Procedure would be a superfluous and wasteful task, and would likely create no more incentive upon the parties than already exists.”); *Schnall v. Annuity & Life Re*

Petitioner's remaining arguments are a grab bag of assertions that material was lost or destroyed, but none of them is provided with sufficient context to understand whether they are accurate or whether the circumstances involved any obligation to retain the material that was lost. *See, e.g.*, Mot. at 19 (relying on press reports that detainee videotapes allegedly disappeared and evidence was mishandled). Indeed, some of these allegations involve the *discovery* of material rather than the destruction of it. *See* Mot. at 20-21 (tapes of interrogations made by CIA discovered and court notified).

At bottom, the material that is the subject of petitioner's motion is being preserved at the direction of the responsible agency officials. Under these circumstances, there is no likely "irreparable harm" to petitioner that could support an injunctive order mandating preservation.

b. Petitioner also states that evidence must be preserved for use in "any military commission proceedings involving [him]" or in "other litigation or possible litigation involving [him]." Mot. at 2, 8. In regard to military commissions, however,

(Holdings) Ltd., XL, No. 302-2133, 2004 WL 51117, *2 (D. Conn. Jan. 2, 2004). As the district court recognized in a Guantanamo habeas case, "[t]he Court is not predisposed to assume that the government would alter or destroy records in its possession absent a court order, and is therefore inclined to require that, at the very least, a party seeking a preservation order against the government make a credible showing of a significant risk of alteration or destruction." *Al-Anazi v. Bush*, 05-CV-0345 (JDB) (dkt. no. 35).

this Court's jurisdiction is limited to reviewing "final" decisions entered in a military commission proceeding. See 10 U.S.C. § 950j(b); DTA, § 1005(e)(3); MCA § 9. A "court is * * * without power to issue a [discovery order] when the underlying action is not even asserted to be within federal-court jurisdiction." *Houston Business Journal, Inc. v. Office of Comptroller of Currency*, 86 F.3d 1208, 1213 (D.C. Cir. 1996). Petitioner does not, and cannot, allege that there has been a final decision of a military commission against him, and in fact no military commission proceedings have been instituted against him. See <http://www.defenselink.mil/news/commissions.html> (listing the current Commission cases). Accordingly, this Court lacks subject matter jurisdiction to issue a preservation order in regard to some possible future military commission proceeding or some other hypothetical federal court litigation. See *Houston Business Journal*, 86 F.3d at 1213 (federal rules of civil procedure "grant[] a district court the power to issue subpoenas as to witnesses and documents, but the subpoena power of a court cannot be more extensive than its jurisdiction"); see also *United States Catholic Conference v. Abortion Rights Mobilization, Inc.*, 487 U.S. 72, 76 (1988) (subpoena addressed to merits of dispute is void if court lacks subject matter jurisdiction). In this regard, this Court has previously held that it lacks jurisdiction to involve itself in military commission proceedings prior to a final commission judgment. See *Khadr v. Gates*, No. 07-1156

Order at 1 (May 30, 2007) (denying motion to stay Military Commission Act proceedings because “[t]his court is without jurisdiction to grant the requested relief” under 10 U.S.C. § 950j(b)). Likewise, there is no jurisdiction over petitioner’s motion to the extent he relies upon some possible future military commission proceeding. In any event, the requested relief is not warranted for the reasons set forth above.

2. Petitioner’s second motion – seeking a declaratory judgment that petitioner was subjected to torture and unlawful coercion – should also be denied because the DTA does not confer jurisdiction to issue such a declaratory judgment and the MCA precludes exercise of any such jurisdiction. *See* MCA § 7. Instead, this Court’s authority is limited by statute to “jurisdiction to determine the validity of any final decision of a [CSRT].” DTA § 1005(e)(2).

The CSRT had a responsibility in petitioner’s case to address “whether any statement derived from or relating to such detainee was obtained as a result of coercion,” DTA § 1005(b)(1)(A); see 2006 CSRT Procedures, enc. 10, § B (implementing requirement to consider “whether any statement derived from or relating to such detainee was obtained as a result of coercion”). In turn, this Court would be obliged to review any such determination. Accordingly, if the record includes “statement[s] derived from or relating to [the] detainee,” this Court will be

charged with evaluating whether the CSRT properly implemented this DTA requirement to consider whether such statements were “obtained as a result of coercion,” and, if so, to assess the “probative value (if any) of any such statement[s].” DTA § 1005(b)(1); *see* DTA § 1005(e)(2)(C) (authorizing this Court to review whether status determination “was consistent with the [CSRT] standards and procedures” and whether the standards are “consistent with the * * * laws of the United States”).

However, even if such an evaluation is called for, it would not be appropriate to issue the declaratory judgment sought by petitioner. Instead, this Court would review whether the CSRT properly evaluated the issue of coercion based upon the CSRT record. If the record or CSRT decision is not deemed adequate in this regard, this Court would not issue a freestanding declaratory judgment concerning the conditions of petitioner’s treatment, but would instead (assuming the error is not harmless) remand the CSRT determination to the Defense Department for appropriate action.

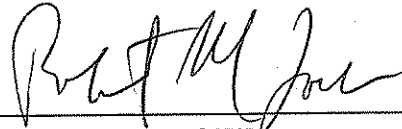
CONCLUSION

For the foregoing reasons, petitioner's motions should be denied.

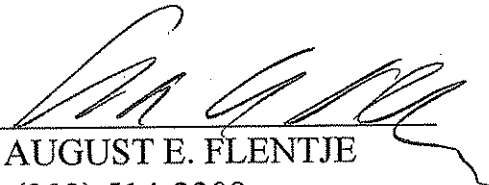
Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 20, 2007, I served the foregoing
“OPPOSITION TO MOTIONS FOR PRESERVATION ORDER AND FOR
DECLARATORY JUDGMENT” upon counsel of record by e-mail and by causing
copies to be sent by regular mail to:

J. Wells Dixon
Gitanjali S. Gutierrez
Center for Constitutional Rights
666 Broadway, 7th Floor
New York, NY 10012


August E. Flentje

ADDENDUM

Exhibit A

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

MAJID KHAN,

Petitioner,

v.

ROBERT M. GATES,

Respondent.

07-1324

DECLARATION OF
FRANK SWEIGART

Pursuant to 28 U.S.C. §1746, I, Frank Sweigart, declare as follows:

1. I am the Director of the Office for the Administrative Review of the Detention of Enemy Combatants (OARDEC). I have served in this position since March 17, 2006. Prior to that time, I served as the Deputy Director of the same organization, beginning in June 2004. As the Director of OARDEC, I supervise all aspects of its mission, which includes conducting Combatant Status Review Tribunals (CSRTs) for individuals detained by the Department of Defense at Guantanamo Bay, Cuba. The statements in this declaration are based upon my personal knowledge and information obtained by me in the course of my official duties.

2. I am familiar with the CSRT that was conducted for Majid Khan and that determined he is an enemy combatant. I reviewed his CSRT as part of my official duties as Tribunal Convening Authority, which included preparing the CSRT record for forwarding to the Deputy Secretary of Defense in his role as the final review authority of this CSRT.

3. No statements made by Majid Khan while in CIA custody were reviewed or considered by the CSRT or included in the administrative Record of Proceedings (per CSRT Procedures, Enc. 2, § C(8)). Similarly, no statements made by any other individual while in

CIA custody were reviewed or considered by the CSRT or included in the administrative Record of Proceedings (per CSRT Procedures, Enc. 2, § C(8)).

December 20, 2007

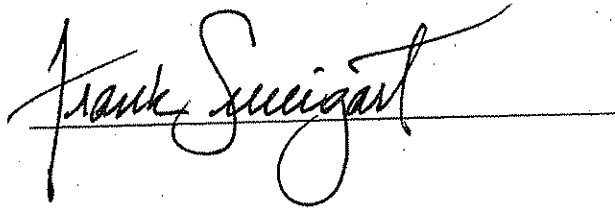
A handwritten signature in black ink, reading "Frank Saccigant", is written over a horizontal line. The signature is cursive and stylized.

Exhibit B



DEPARTMENT OF DEFENSE
OFFICE OF GENERAL COUNSEL
1600 DEFENSE PENTAGON
WASHINGTON DC 20301-1600

DEC 19 2007

MEMORANDUM FOR SECRETARY OF DEFENSE
DEPUTY SECRETARY OF DEFENSE
SECRETARIES OF THE MILITARY DEPARTMENTS
CHAIRMAN OF THE JOINT CHIEFS OF STAFF
UNDER SECRETARIES OF DEFENSE
DIRECTOR, OPERATIONAL TEST AND EVALUATION
INSPECTOR GENERAL OF THE DEPARTMENT OF DEFENSE
ASSISTANTS TO THE SECRETARY OF DEFENSE
DIRECTOR, ADMINISTRATION AND MANAGEMENT
DIRECTOR, PROGRAM ANALYSIS AND EVALUATION
DIRECTOR, NET ASSESSMENT
DIRECTOR, FORCE TRANSFORMATION
DIRECTORS OF THE DEFENSE AGENCIES
DIRECTORS OF THE DOD FIELD ACTIVITIES

SUBJECT: Preservation of Detainee Records

In August 2005, in response to several orders issued by federal court judges, the General Counsel of the Department of Defense directed that certain information relating to all detainees ever held by the Department of Defense at Guantanamo Bay be preserved and maintained (enclosure). Specifically, you were directed to preserve and maintain "all documents and recorded information of any kind (for example, electronic records, written records, telephone records, correspondence, computer records, e-mail, storage devices, handwritten or typed notes) that is in, or comes into, your possession or control" relating to these detainees. Those directives remain in effect and must continue to be followed.

You are hereby directed that this requirement also applies to records relating to detainees who arrived at Guantanamo after August 2005 and to any detainees who may arrive at Guantanamo in the future.

Daniel J. Dell'Orto
Acting General Counsel

Enclosure
As stated



Exhibit C

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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

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

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

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

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

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

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

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

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

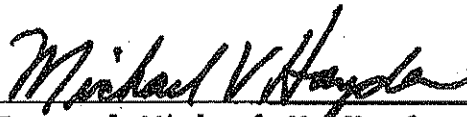
B. any detainee held by the CIA.

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

* * * *

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

Executed this 20th day of December, 2007.

Handwritten signature of Michael V. Hayden in cursive script.

General Michael V. Hayden, USAF
Director
Central Intelligence Agency