IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

Ali Saleh Kahlah Almarri,	)	
	)	
	)	**C/A 2:05-2259-HFF-RSC**
Plaintiff,	)	
	)	
v.	)	**PLAINTIFF'S REPLY TO**
	)	**DEFENDANTS' RESPONSE TO**
Robert M. Gates,	)	**MOTION FOR PRESERVATION**
Secretary of Defense of the United States,	)	**ORDER AND INQUIRY INTO**
Commander John Pucciarrelli,	)	**PAST SPOLIATION**
U.S. Naval Brig, Charleston,	)	
South Carolina,	)	
	)	
Defendants.	)	
	)	
	)	

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Preliminary Statement

Responding to Mr. Almarri's motion ("Pl.s' Mot.") (dkt. no. 41), the government now admits to destroying highly relevant evidence to pending litigation and makes clear that this destruction was wider and went on longer than first reported. Defs.' Resp. to Pl.'s Mot. ("Defs.' Resp.") (dkt. no. 51). Yet, the nub of the government's response is "trust us"—that a preservation order is unnecessary because the government can be trusted to preserve documents voluntarily. The government's argument rests on two propositions: that its earlier destruction of recordings and documents can be excused because that destruction allegedly occurred before litigation was pending; and that the government now has in place internal preservation directives eliminating all risk of future spoliation. Both assertions are false. The true facts show that there remains a serious risk of spoliation warranting a preservation order. Further, the government fails to identify any harm that such an order would cause.

First, contrary to the government's assertion, evidence *was* destroyed during the pendency of litigation for which that evidence was highly relevant. The government, moreover, has already falsely denied that relevant evidence was destroyed. In opposing Mr. Almarri's prior request for a preservation order, the government falsely represented to the Court that concerns about spoliation were "unsubstantiated and entirely speculative" and denied having "lost or destroyed evidence in the past." As the government now acknowledges, when that representation was made, interrogation recordings and related documents had already been destroyed, and further destruction continued long afterwards.

Second, the preservation measures undertaken by the government are inadequate because they fail to ensure the preservation of remaining evidence; do nothing to preserve evidence pertaining to the past destruction of recordings and documents; and could be unilaterally revoked

at any time by the very agency whose potential wrongdoing may be evidenced in remaining documentation.

Finally, but critically, the government identifies no injury or burden that would flow from the requested order. Instead, that order would merely require the government to do what it is legally obligated to do, but what it has admittedly failed to do in the past: to preserve potentially relevant evidence pertaining to Mr. Almarri's detention and treatment at the Navy brig.

Argument

I. A Preservation Order Is Clearly Warranted.

A preservation order should be granted where, absent such an order, there is (a) a "significant risk that relevant evidence will be lost or destroyed," and (b) "the particular steps to be adopted will be effective, but not overbroad." *Pueblo of Laguna v. United States*, 60 Fed. Cl. 133, 138 (2004); *accord United Med. Supply Co. v. United States*, 73 Fed. Cl. 35, 36-37 & n.1 (2006); *Williams v. Mass. Mut. Life Ins. Co.*, 226 F.R.D. 144, 147 (D. Mass. 2005); *Walker v. Cash Flow Consultants, Inc.*, 200 F.R.D. 613, 617 (N.D. Ill. 2001). Both factors are met here.[1]

[1] Contrary to the government's suggestion (Defs.' Resp. at 5-6), a preservation order "is no more an injunction than an order requiring a party to identify witnesses or produce documents in discovery." *Pueblo of Laguna*, 60 Fed. Cl. at 138 n.8 (citing *Mercer v. Magnant*, 40 F.3d 893, 896 (7th Cir. 1994)); *accord United Med. Supply*, 73 Fed. Cl. at 36-37 n.1 ("[T]he court sees no reason for it to consider whether plaintiff is likely to be successful on the merits of its case in deciding whether to protect records from destruction. . . . [S]uch an approach would be decidedly to put the cart before the horse."); *Capricorn Power Co. v. Siemens Westinghouse Power Corp.*, 220 F.R.D. 429, 433 (W.D. Pa. 2004) (declining to adopt four-factor injunctive relief test for preservation orders). District courts in the Guantánamo Bay detainee litigation have uniformly rejected the government's suggestion that motions for preservation orders be treated as motions for injunctive relief. *See, e.g., El-Banna v. Bush*, No. 04-1144, 2005 WL 1903561, at *1 n.3 (D.D.C. July 18, 2005); *Al-Marri v. Bush*, Civ. No. 04-2035 (D.D.C. Mar. 7, 2005), attached as App. A; *Abdah v. Bush*, No. 04-1254 (D.D.C. June 10, 2005), attached as App. B; *Anam v. Bush*, No. 04-1194 (D.D.C. June 10, 2005), attached as App. C.

A. The Government's Past Destruction of Evidence Establishes a Significant Risk of Further Loss or Destruction.

A party may establish a significant risk of future destruction by showing *either* that the opposing party has lost or destroyed evidence in the past *or* has inadequate retention procedures in place. *Pueblo of Laguna*, 60 Fed. Cl. at 138; *Treppel v. Biovail Corp.*, 233 F.R.D. 363, 371 (S.D.N.Y. 2006); *see also Capricorn Power Co. v. Siemens Westinghouse Power Corp.*, 220 F.R.D. 429, 437 (W.D. Pa. 2004) (even evidence of attempted damage or destruction of evidence heightens concern about the protection and integrity of the proceedings before it). Here, both factors are met. The government has concededly destroyed clearly relevant evidence on multiple past occasions while misrepresenting that destruction to the Court. And the government's retention procedures fail to eliminate the risk of further destruction.[2]

Even the most unsophisticated litigant knows it has a duty to preserve potentially relevant evidence. *See, e.g., Kronisch v. United States*, 150 F. 3d 112, 126 (2d Cir. 1998); Pl.s' Mot. at 4 (citing cases). The government has now admitted to destroying an enormous body of evidence that was not only potentially relevant to foreseeable future litigation but that was also *actually and highly relevant to pending litigation*. However "unsettled" and "uncharted" the underlying issues raised by this case may be, Defs.' Resp. at 4-5, there is nothing "unsettled" or "uncharted"

[2] District judges in the Guantánamo detainee litigation have followed this two-part test in entering preservation orders. *See, e.g., Al-Marri v. Bush*, No. 04-2035 (D.D.C. Mar. 7, 2005), attached as App. A (citing *Pueblo of Laguna*); *Abdah v. Bush*¸ No. 04-1254 (D.D.C. June 10, 2005), attached as App. B (same); *see also El-Banna v. Bush*, 2005 WL 1903561, at *1 n.3. In any event, Mr. Almarri easily meets the similar three-part test articulated by the district court in *Capricorn Power* for the same basic reasons: 1) the risk of future destruction based upon the government's past destruction of evidence and misrepresentations about that destruction; 2) the irreparable harm to Mr. Almarri that would result from further spoliation; and 3) the shortcomings of the government's internal retention measures on the one hand, and the total absence of any burden imposed by proposed preservation order on the other. *Capricorn Power Co.*, 220 F.R.D. at 433; *see also Treppel*, 233 F.R.D. at 370 ("[T]he distinction [between two-part *Pueblo of Laguna* and three-part *Capricorn Power* tests] is more apparent than real.").

about the government's clear and ironclad duty to preserve all potentially relevant evidence. Violation of that duty alone warrants entry of a preservation order.

Specifically, the government has admitted to destroying:

(1) a still unspecified number of recordings of the government's interrogations of Mr. Almarri conducted at the Navy brig from his arrival on June 23, 2003, to "sometime in 2004," during which time Mr. Almarri was detained *incommunicado* and brutally abused;[3]

(2) "notes and working papers associated with those [interrogation] sessions";[4] and

(3) almost five years worth of continuous recordings made by a digital video recording system at the Navy brig that meticulously documented Mr. Almarri's treatment and conditions of confinement in his housing unit since the outset of his detention at the brig on June 23, 2003, until April 10, 2008.[5]

Without question, all this evidence was and is relevant to Mr. Almarri's habeas corpus litigation that has been ongoing since he was declared an "enemy combatant" in June 2003. That suit was pending before this Court when interrogation recordings and associated documents were destroyed between December 2004 and March 2005.[6] The destroyed evidence also was and is relevant to this action challenging Mr. Almarri's abusive interrogation, prolonged isolation, and other mistreatment.

The interrogation recordings and related documents were relevant to the habeas action because they could have demonstrated, *inter alia*, the unreliability of any statements made by

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[3] Defs.' Resp. at 9; *see also* Decl. of Robert H. Berry, Jr., Defense Intelligence Agency, ¶¶ 3, 8 ("Berry Decl."), Exhibit 2 to Defs.' Resp. Those interrogation sessions took place until Mr. Almarri was allowed access to counsel in October 2004. Certification of Andrew J. Savage ¶ 23 ("Savage Cert."), Ex. 1 to Pl.'s Mot. for Interim Relief (dkt. no. 40).

[4] Defs.' Resp. at 9; Berry Decl. ¶ 8.

[5] Defs.' Resp. at 10-11; Decl. of John Pucciarelli, ¶¶ 3-4 ("Pucciarelli Decl."), Exhibit 3 to Defs.' Resp.

[6] Mr. Almarri's first habeas petition was filed in the United States District Court for the Central District of Illinois immediately after his designation as an "enemy combatant" in June 2003. Following that petition's dismissal on venue grounds, his current habeas petition was immediately filed in this Court in July 2004. *See Rumsfeld v. Padilla*, 542 U.S. 426 (2004); *see also Al-Marri v. Hanft*, 378 F. Supp. 2d 673, 675-76 (D.S.C. 2005) (summarizing history).

Mr. Almarri during his interrogations—and relied on by the government—due to the abusive and coercive methods by which those statements were obtained. *See, e.g., Jackson v. Denno*, 378 U.S. 368, 385-86 (1964); *Spano v. New York*, 360 U.S. 315, 320 (1959); *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 472-73 (D.D.C. 2005). The recordings and documents also could have contained other exculpatory evidence disproving or discrediting the allegations underlying Mr. Almarri's detention. *See, e.g., Brady v. Maryland*, 373 U.S. 83, 87-88 (1963); *United States v. Bagley*, 473 U.S. 667, 676 (1985). Indeed, it is precisely because of the manifest relevance of such evidence that both federal and military law mandate disclosure of a defendant's prior statements obtained during interrogations. Fed. R. Crim. P. 16(a)(1)(A); Military Rule of Evidence 304(d)(1), Manual for Courts-Martial, at III-5 (2008 ed.). Yet, just three months before it destroyed the interrogation recordings, the Defense Intelligence Agency ("DIA") relied on the fruits of those interrogations in supplying the government's factual justification for Mr. Almarri's indefinite military detention without charge before this Court. Decl. of Jeffrey N. Rapp, Attach. C to Resp'ts' Answer to the Pet. for Writ of Habeas Corpus, *Al-Marri v. Hanft*, No. 02:04-cv-2257 (dkt. no. 12). Whether or not Mr. Almarri was entitled to discovery of those recordings in his habeas proceeding—an issue now before the Fourth Circuit—is immaterial. That was and remains a question for *the courts* to decide, not for the Executive to answer secretly on its own in the midst of pending litigation. The government's inexcusable destruction of this evidence violated its clear legal obligations and undermined the integrity of the proceedings before this Court.[7]

[7] The government (Defs.' Resp. at 9-10) cannot avoid the consequences of this spoliation simply because Mr. Almarri's habeas litigation happens to be now pending before the Fourth Circuit. The point is that the government's evidence destruction occurred while that action was pending in this Court. The government's actions thus demonstrate the risk of future spoliation while this suit is pending and show the need for a preservation order to eliminate that risk.

The government's destruction of the interrogation recordings and related documents during the pendency of the habeas litigation speaks volumes about whether it can be trusted to preserve evidence in this case. But, in fact, the government has destroyed relevant evidence in this case as well, including while this action was pending. Specifically, the interrogation recordings and associated notes and working papers would have shown that Mr. Almarri was subjected to a brutal interrogation regime bordering on if not amounting to torture. Compl. ¶¶ 34-111; Certification of Andrew J. Savage ("Savage Cert.") ¶¶ 6-33, Exhibit 1 to Pl.'s Mot. for Interim Relief (dkt. no. 40). The recordings of Mr. Almarri's housing unit would have directly supported these and other claims, including Mr. Almarri's contention that he was unlawfully subjected to total sensory and environmental deprivation (Compl. ¶¶ 4, 50-64; Savage Cert. ¶¶ 18, 23); confined to a tiny cell without natural light, often for weeks on end (Compl. ¶¶ 39-49; Savage Cert. ¶¶ 8, 10-12, 16, 23); and prevented from observing the most elementary tenets of his religion (Compl. ¶¶ 74-87; Savage Cert. ¶¶ 19-22). Those recordings would also have supported Mr. Almarri's pending motion for interim relief by graphically documenting the harmful effects of his prolonged isolation and other mistreatment.

The fact that this action was not yet pending when the government destroyed the interrogation recordings is immaterial because a party has the duty to preserve potentially relevant evidence whenever litigation is reasonably anticipated as well as when litigation is ongoing. *See, e.g.*, *Kronisch v. United States*, 150 F. 3d at 126; *Smith v. Café Asia*, 246 F.R.D. 19, 21 n.1 (D.D.C. 2007); Pl.'s Mot. at 4. Plainly, litigation over Mr. Almarri's interrogations and other mistreatment was reasonably anticipated when the government destroyed the recordings and other evidence. Indeed, the only reason suit was not filed sooner was that the

government had detained Mr. Almarri *incommunicado* for sixteen months as part of its interrogation regime, denying him any access to his counsel and to the courts.

Also, the fact that there may exist "other records related to [Mr. Almarri's] daily activities in his living area" (Defs.' Resp. at 12), does not excuse past destruction or minimize the risk of future spoliation. The government has a legal duty to preserve all relevant and potentially relevant evidence when litigation is pending or reasonably anticipated. Here, moreover, the government destroyed what may be the best evidence of Mr. Almarri's conditions of confinement—the continuous recordings of the housing unit where Mr. Almarri has been confined for the last five years. Pucciarrelli Decl. ¶ 3. And while the government says that these recordings were "automatically overwrit[ten] . . . . approximately every thirty (30) days," *id*., its response belies that assertion. The response shows that the government *selectively* preserved some material from those recordings, while *intentionally* allowing other possibly relevant evidence from the recordings to be destroyed, including evidence relevant to this case. *Id.* ¶ 5.

The government's false statements to this Court on a prior motion for a preservation order provide a further compelling reason why a preservation order is essential to eliminate the risk of further spoliation. In August 2005, Mr. Almarri previously sought an order seeking preservation of potentially relevant evidence. Opposing that request, the government chastised Mr. Almarri for his "unsubstantiated and entirely speculative concern[ ] that the government will not maintain evidence." Resp'ts' Reply to Pet'r's Br. in Resp. to the Ct.'s Aug. 15, 2005 Order, at 19, *Al-Marri v. Hanft*, No. 2:04-cv-2257. The government categorically denied that it had "lost or destroyed evidence in the past" and assured the Court that it already had adequate retention procedures in place. *Id.* at 20. None of these statements were true. As the government now acknowledges, at the time it told the Court there was no need to enter a preservation order, it

had *already* destroyed recordings and documentation of Mr. Almarri's interrogations and was *continuing* to destroy recordings of Mr. Almarri's housing unit on an ongoing basis. The fact that evidence pertaining to Mr. Almarri had already been and continued to be destroyed when the government assured the Court there was no risk of spoliation underscores that assurances alone—even if made in good faith—are insufficient to eliminate the risk of future destruction.[8]

Tellingly, moreover, the government still refuses to acknowledge or accept that it had and continues to have a legal duty to preserve all potentially relevant evidence. After admitting its past evidence destruction, the government says only that it will prevent further spoliation because "DoD takes the destruction of the interrogation tapes seriously." Defs' Resp. at 10. But taking something "seriously" is very different from acknowledging a legal obligation. The government's continued refusal to recognize its legal duty to preserve all remaining evidence, alongside its unapologetic destruction of evidence in the past, further demonstrates the need for a preservation order.

District judges have consistently entered preservation orders in cases involving Guantanamo Bay detainees *even without* proof that the government previously destroyed evidence.[9] Plainly, such an order is warranted here, where the government has admitted to

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[8] This case, moreover, is not the first time the government has destroyed relevant evidence documenting its abusive interrogation of detainees, nor the first time it has misrepresented that destruction to a court. The CIA, for example, has admitted to destroying recordings of the interrogation of detainees in the midst of congressional and legal scrutiny about its secret detention program, and the government has misrepresented the existence and destruction of those recordings to the district judge in the Zacarias Moussaoui case. Mark Mazzetti, "CIA Destroyed 2 Tapes Showing Interrogations," *New York Times*, Dec. 7, 2007, attached as App. G.

[9] *See, e.g.*, *Alsaaei v. Bush*, No. 05-2369, 2006 WL 2367270 (D.D.C. Aug. 14, 2006); *El-Banna*, 2005 WL 1903561, at *2-*3; *Al-Marri v. Bush*, No. 04-2035 (D.D.C. Mar. 7, 2005), attached as App. A; *Abdah v. Bush*, No. 04-1254 (D.D.C. June 10, 2005), attached as App. B; *Anam v. Bush*, No. 04-1194 (D.D.C. June 10, 2005), attached as App. C; *Al-Shiry v. Bush*, No. 05-0490 (D.D.C. Mar. 23, 2005), attached as App. D; *Slahi v. Bush*, No. 05-881 (D.D.C. July 18, 2005), attached as App. E; *Zadran v. Bush*, No. 05-2367, at 4-6 (D.D.C. July 19, 2006), attached as App. F.

destroying highly relevant evidence in a pending case and where it previously vehemently opposed a preservation order as unnecessary and unwarranted without disclosing to the Court that it had, in fact, already destroyed evidence in that case.

B. The Government's Internal Retention Procedures Are Inadequate.

A preservation order is further warranted because the government's two preservation directives fail to eliminate the risk of future spoliation.[10]

First, the two directives wholly fail to preserve evidence relating to the government's past destruction, alteration, or transfer of evidence pertaining to Mr. Almarri's confinement and treatment at the Navy brig. Pl.'s Mot. at 1, 7-8. On the contrary, the government provides no assurance that it will retain any evidence pertaining to its past destruction of the recordings of Mr. Almarri's interrogations, of the notes working papers associated with those interrogations, and of the recordings of Mr. Almarri's housing unit. Such evidence is crucial to determining what remedial measures or sanctions should be imposed in the future. *See infra* Point III.

Second, there is nothing to prevent the government from rescinding the two internal directives at any time and neither directive explicitly specifies how long evidence must be preserved. Unlike the defendants, the Court does not labor under a sharp conflict of interests that could lead to a preservation order being revoked or diluted. As the government admits, the DIA managed Mr. Almarri's interrogations. Thus, the very officers responsible for alleged acts of cruel and illegal treatment have responsibility for preserving evidence that is in their own interest to destroy and that they have admittedly destroyed in the past while hiding that destruction from the Court. The absence of any protection against internal backsliding reinforces the need for a

[10] *See* Defense Intelligence Agency's December 19, 2007 "Notice of Litigation Hold" ("DIA Notice"), Tab A to Berry Decl.; Mem. for Sec'y of Defense dated April 10, 2008, Tab A to Decl. of Russell G. Leavitt, Exhibit 1 to Defs.' Resp. ("April 10, 2008 Memorandum").

judicial order to ensure the preservation of all evidence *pendente lite*, especially where such an order would not impose any burden on the government.

Third, the April 10, 2008 Memorandum and DIA Notice apply only to the Department Defense. The instant motion, however, seeks preservation of all evidence pertaining to Mr. Almarri, in whatever form. The request therefore is not limited to the Defense Department but includes other parts of the U.S. government, including the FBI, which participated with the DIA in Mr. Almarri's interrogations. Savage Cert. ¶ 29. The government's proposed retention procedures do nothing to ensure that defendants take measures to prevent the spoliation of evidence pertaining to Mr. Almarri's detention at the Navy brig possessed by other agencies.[11]

Fourth, the government's preservation efforts have already proven ineffective in halting the destruction of evidence. The government fails to explain why the Defense Department did not extend the March 2005 or December 2007 preservation directives applicable to Guantánamo Bay detainees to Mr. Almarri when it issued them, even though Mr. Almarri's habeas litigation had been pending since June 2003 and the instant litigation pending since August 2005. The government also fails to explain why the Defense Department continued to fail to extend those directives to Mr. Almarri until April 10, 2008, four months after the DIA had issued its Notice of Litigation Hold on December 19, 2007. In the meantime, evidence relevant to this action and, in particular, to Mr. Almarri's pending motion challenging his prolonged isolation, continued to be destroyed. Even assuming good faith, the government's steps to address its past destruction of evidence reveal a continuing lack of the type of internal organization and communication within

[11] While the Defense Department is the only agency party to this suit, the Court may include the FBI and other agencies within the scope of its preservation order as privies to the extent that they directly participated in Mr. Almarri's interrogations and other treatment at the Navy brig. *Cf. United States ex rel. Rahman v. Oncology Assocs.*, 198 F.3d 502, 511 (4th Cir. 1999); *Quintero v. Klaveness Ship Lines*, 914 F.2d 717, 721 (5th Cir. 1990).

the Defense Department and its various components necessary to ensure the preservation of all potentially relevant evidence.

Finally, though broadly worded, the directives do not unambiguously cover the nine interrogation recordings that concededly remain. The Defense Department's April 10, 2008 Memorandum calls for the preservation only of "all *records* relating to [Mr. Almarri]," and does not specifically include recordings, *e.g.*, recordings of his interrogations. By contrast, the August 2005 and December 2007 directives regarding Guantánamo detainees require preservation of "all documents and recorded information of any kind." To be sure, the DIA Notice includes all "documents, records, data, correspondence, charts, reports, notes, emails . . . and other materials" that relate to Mr. Almarri. But it also fails to mention specifically recordings even though it references other types of evidence. Further, the declaration submitted by the DIA Deputy General Counsel suggests that the DIA's Notice does not include the remaining interrogation recordings because those recordings are being preserved separately by the DIA Inspector General and thus are the subject of a separate—and still undefined—retention system not covered by either of the two preservation directives described in the government's response. Berry Decl. ¶ 10. The government's brief deepens this concern by appearing to treat as separate and distinct the interrogation recordings on the one hand, which are not covered by the two preservation directives, and other evidence pertaining to Mr. Almarri, which is covered by those directives. Defs.' Resp. at 10. Entry of the proposed preservation order would eliminate any ambiguity that recordings (along with all other evidence pertaining to Mr. Almarri) must be preserved, and would do so without any harm to the government.

C. A Preservation Order Would Not Burden the Government.

The government nowhere identifies any injury or burden that would flow from the entry of a court order requiring it to preserve evidence pertaining to Mr. Almarri. By contrast, the prejudice to Mr. Almarri and to the Court absent such an order would be enormous. Mr. Almarri could be further deprived of evidence to sustain his claims and the Court deprived of its ability to resolve those claims judiciously. Simply put, the government fails to identify *any* harm that it would suffer from entry of the requested preservation order.

II. The Court Has the Authority to Enter a Preservation Order.

The government (Defs.' Resp. at 14) argues that the Court need not ensure the preservation of evidence because a "serious question exists" whether this Court has jurisdiction over this case under the Military Commissions Act of 2006 ("MCA"), Pub. L. No. 109-366, 120 Stat. 2600. The notion that a pending jurisdictional issue eliminates the Court's inherent power to prevent the destruction of evidence is nonsense, and should be rejected.

To begin, the Fourth Circuit panel ruled that the MCA *does not apply* to Mr. Almarri under ordinary principles of statutory construction. *Al-Marri v. Wright*, 487 F.3d 160, 167-73 (4th Cir. 2007) (finding that the MCA applies only to foreign nationals held at Guantánamo or elsewhere outside the U.S. mainland).[12] While the case is now before the full Fourth Circuit on petition for rehearing, the government treated the threshold jurisdictional issue as an

[12] Mr. Almarri alternatively maintains that construing the MCA to repeal jurisdiction over his habeas action would violate the Suspension, Due Process, and Equal Protection Clauses. Because the Fourth Circuit ruled unanimously that the MCA did not repeal jurisdiction over Mr. Almarri's habeas action, it did not address those constitutional issues. The constitutionality of the MCA's clear jurisdictional ouster over the petitions of detainees at Guantánamo Bay, Cuba,—all foreign nationals captured and detained outside the United States—is pending before the Supreme Court. *Boumediene v. Bush*, __ U.S. __, 127 Sup. Ct. 3078 (June 29, 2007) (granting certiorari). A decision in *Boumediene* upholding the MCA as to Guantánamo Bay detainees will not, and cannot, resolve the distinct statutory and constitutional arguments raised here by a lawful resident arrested and detained inside the United States.

afterthought, raised only on the final page of its rehearing petition. Petition for Rehearing and Rehearing En Banc, at 15, *Al-Marri v. Wright* (No. 06-7427).[13] Instead, the principal issue the government briefed and argued to the *en banc* Fourth Circuit was the *merits* question of whether the President has legal authority to detain Mr. Almarri as an "enemy combatant," *not* whether the MCA repealed jurisdiction over Mr. Almarri's habeas action. Even if the government's position on the merits were upheld, this litigation challenging his treatment would still go forward.

But even assuming a "serious" "jurisdictional question exists, the Court still has inherent authority to supervise the litigation before it. *See, e.g.*, *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43 (1991); *Trigon Ins. Co. v. United States*, 204 F.R.D. 277, 285 (E.D. Va. 2001). The Court also has authority to "issue all writs necessary or appropriate in aid of [its] jurisdiction." 28 U.S.C. § 1651; *see also United States v. United Mine Workers*, 330 U.S. 258, 290 (1947); *Belbacha v. Bush*, __ F.3d __, 2008 WL 680637, at *2-*3 (D.C. Cir. Mar. 14, 2008) (holding that the district court retained jurisdiction to enjoin a detainee's transfer from Guantánamo pending resolution by the Supreme Court of the district court's jurisdiction and after the D.C. Circuit had ruled the MCA eliminated that jurisdiction); *Zadran v. Bush*, No. 05-2367, at 4-6 (D.D.C. July 19, 2006), attached as App. F (granting preservation order in Guantánamo detainee case when the D.C. Circuit was deciding if the court had jurisdiction). Plainly, therefore, this Court has the authority to ensure the preservation of all potentially relevant evidence pending final resolution of any jurisdictional questions. The fact that, as this Court recently observed, this case is "unprecedented in the annals of American jurisprudence and implicates fundamental

[13] There are two jurisdictional provisions of the MCA at issue. Section 7(a)(1) addresses habeas corpus jurisdiction; Section 7(a)(2) concerns "any other action." As the government recognizes, the two provisions are linked in that Section 7(a)(2)—the provision potentially applicable to this action—would arguably repeal jurisdiction only if Section 7(a)(1)—the provision now before the Fourth Circuit—in fact repealed jurisdiction over Mr. Almarri's habeas action. Section 7(b) merely addresses the effective date of those other two provisions.

constitutional issues going to the very nature of government," Report & Recommendation of Apr. 22, 2008, at 4-5, makes it that much more important for the Court to ensure, beyond any doubt, that all remaining evidence is preserved for appropriate resolution of those issues.

III. Spoliation Remedies Are Also Warranted.

In addition to entering a preservation order to protect against future spoliation, this Court also has authority to remedy the past destruction of evidence. *See, e.g., Chambers,* 501 U.S. at 43-45; *Telecom Int'l Am., Ltd. v. AT & T Corp.*, 189 F.R.D. 76, 81 (S.D.N.Y. 1999). This authority exists in the absence of a discovery order as part of the Court's inherent power to supervise the litigation before it. *See, e.g., Unigard Sec. Ins. Co. v. Lakewood Eng'g & Mfg. Corp.*, 982 F.2d 363, 368 (9th Cir. 1992); *Telecom Int'l,* 189 F.R.D. at 81 (citing *Chambers,* 501 U.S. at 43-45). Remedial measures are intended not only to deter future destruction but also to redress past spoliation, including by minimizing prejudice to the harmed party. *Vodusek v. Bayliner Marine Corp.*, 71 F.3d 148, 156 (4th Cir. 1995) (sanctions aimed at "leveling the evidentiary playing field" as well as "sanctioning the improper conduct").

In determining whether to impose spoliation-related sanctions or remedial measures, courts consider: (1) the degree of fault of the party that destroyed the evidence; (2) the degree of prejudice suffered by the opposing party; and (3) the availability of sanctions that will avoid substantial unfairness to the opposing party and, if the offending party is seriously at fault, will serve to deter such conduct by others in the future. *See, e.g., Trigon,* 204 F.R.D. at 286-87. All three factors support remedial measures here.

First, the government admits to intentionally destroying interrogation recordings and associated documents during pending litigation. That intentional destruction establishes fault even if the evidence was destroyed in good faith. *Vodusek,* 71 F.3d 156; *Trigon*, 204 F.R.D. at

287 ("[P]roof of bad faith is not necessary to obtain relief from spoliation."). *Second*, Mr. Almarri has suffered irreparable harm because he has been deprived of evidence that could have helped him challenge the legality of both his detention and his conditions of confinement. *Trigon*, 204 F.R.D. at 284 ("[T]he spoliated physical evidence is often the best evidence as to what has really occurred and . . . there is an inherent unfairness in allowing a party to destroy evidence and then to benefit from that conduct.") (internal quotation marks and citation omitted). *Third*, sanctions are available that will both help mitigate the prejudice to Mr. Almarri and deter similar conduct in the future. *Kronisch*, 150 F.3d at 126 (purpose of spoliation remedy is to put the aggrieved party in the evidentiary position he would have been in but for the spoliation); *Vodusek*, 71 F.3d at 156. Those sanctions could include reconstruction of the destroyed evidence, *see, e.g., Jefferson v. Reno*, 123 F. Supp. 2d 1, 2 (D.D.C. 2000); *Landmark Legal Foundation v. E.P.A.*, 272 F. Supp. 2d 59, 67 (D.D.C. 2003), and drawing an adverse inference against the government with respect to Mr. Almarri's claims of abusive interrogations and other mistreatment. *Vodusek*, 71 F.3d at 155; *Kronisch*, 150 F.3d at 126.

In light of the current posture, Mr. Almarri acknowledges that spoliation remedies can wait for an appropriate juncture in the litigation. All that is necessary now is an order ensuring the preservation of all remaining evidence and all evidence pertaining to the past destruction of evidence—an order clearly warranted by the government's admitted destruction of relevant evidence in the past, the government's misrepresentations about that past destruction to the Court, the shortcomings in the government's internal preservation measures, and the complete absence of any harm to the government from such an order.

Conclusion

For the foregoing reasons, the motion should be granted.

Respectfully submitted,

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