

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

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JARALLAH AL-MARRI, <i>et al.</i> ,	)	
	)	
Petitioners,	)	
	)	
v.	)	Civil Action No. 04-cv-2035 (GK)
	)	
GEORGE W. BUSH, <i>et al.</i> ,	)	
	)	
Respondents.	)	
_____	)	

**RESPONDENTS’ OPPOSITION TO MOTION TO COMPEL RESPONDENTS TO REPORT ON THEIR COMPLIANCE WITH THE COURT’S PRESERVATION ORDER OF MARCH 7, 2005, AND THEIR OBLIGATION TO PRESERVE POTENTIALLY RELEVANT EVIDENCE**

Petitioner Al-Marri asks this Court to conduct a hearing inquiring into the government’s compliance with a document preservation order entered in this case and its obligation to preserve evidence potentially relevant to this litigation. Because petitioner has failed to establish that it would be appropriate to hold such a hearing, and because such a hearing could undermine the very interests that petitioner says he wants to have served, the motion should be denied.

**I. Based on Petitioner’s Own Allegations, the Tapes at Issue Were Not Covered by This Court’s Preservation Order.**

Petitioner has not established that it is likely that the government has violated the Court’s March 7, 2005 Order. Under that Order, the government was required to preserve information “regarding the torture, mistreatment, and abuse of *detainees now at the Guantanamo Bay detention facility*” (emphasis added). Petitioner bases his arguments on the proposition that the CIA has acknowledged destroying tapes regarding the interrogation during the 2002 timeframe of Abu Zubaydah. But Abu Zubaydah is not a petitioner in this matter, and petitioner does not allege (let alone demonstrate) that Abu Zubaydah was a detainee at Guantanamo Bay when the

Court entered its Order on March 7, 2005, or that the tapes at issue could have contained any information regarding the torture, mistreatment, or abuse of detainees held at Guantanamo in March 2005. As a result, petitioner does not seriously contend that the tapes of Abu Zubaydah's interrogation reflect "the torture, mistreatment, and abuse of *detainees now at the United States Naval Base at Guantánamo Bay, Cuba*" – that is, those detainees at Guantanamo on March 7, 2005 – and were thus covered by the terms of this Court's March 2005 Order.

**II. The Court Should Permit the Pending Investigations and Inquiries to Proceed Without a Separate Judicial Inquiry.**

Petitioner invites this Court to exercise its inherent powers to conduct a hearing concerning the destruction of certain tapes that petitioner claims might have had something to do with petitioner. In light of the various pending inquiries by the Executive Branch and Congress into the destruction of the tapes, Petitioner has failed to demonstrate that the Court should take the extraordinary step of opening a judicial inquiry, particularly where the Supreme Court has admonished that such inherent powers "must be exercised with restraint and discretion."

*Roadway Express, Inc. v. Piper*, 447 U.S. 752, 764 (1980).<sup>1</sup>

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<sup>1</sup> Petitioner's request that this Court act precipitously to convene a hearing would not be consistent with the Supreme Court's expectation that:

[A] District Court would proceed with the caution that we have indicated is necessary in this setting, engaging in a factfinding process that is both prudent and incremental. We have no reason to doubt that courts faced with these sensitive matters will pay proper heed both to the matters of national security that might arise in an individual case and to the constitutional limitations safeguarding essential liberties that remain vibrant even in times of security concerns.

*Hamdi v. Rumsfeld*, 542 U.S. 507, 538-39 (2004) (plurality opinion). (Of course, the petitioner in *Hamdi* was a United States citizen. The question of whether aliens held outside the United States, such as petitioner here, could assert constitutional protections was decided by the Court of Appeals against petitioner and is one of the questions currently before the Supreme Court in

As the Court may be aware, the Department of Justice conducted a preliminary inquiry into the destruction of the tapes, and has now begun a criminal investigation into the matter. *See* United States Department of Justice Press Release dated December 8, 2007 (describing preliminary inquiry) (attached as Exhibit A); Letter from Kenneth L. Wainstein, Assistant Attorney General, National Security Division, U.S. Department of Justice, to John A. Rizzo, Acting General Counsel, Central Intelligence Agency, dated December 8, 2007 (discussing preliminary inquiry) (attached as Exhibit B); United States Department of Justice Press Release dated January 2, 2008 (announcing criminal investigation concerning matter of tapes, to be conducted by Federal Bureau of Investigation under supervision of John Durham, First Assistant United States Attorney in the United States Attorney's Office for the District of Connecticut, appointed to serve as Acting United States Attorney for the Eastern District of Virginia for purposes of this matter) (attached as Exhibit C). The Department's efforts in this regard include, *inter alia*, determining whether the destruction of the tapes was inconsistent with or violated any legal obligations, including those arising out of this Court's March 7, 2005 Order.<sup>2</sup>

When the Department of Justice is actively engaged in gathering the facts, determining whether the facts rise to the level of warranting further action, and emphasizing, on its own, the importance of the CIA's preservation of relevant material, proceeding hastily into a separate judicial inquiry is both unnecessary and potentially disruptive.<sup>3</sup> Indeed, requiring individuals

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*Boumediene.*)

<sup>2</sup> If the Department of Justice concludes that the destruction of the tapes violated this Court's March 7, 2005 Order, we of course will inform the Court of that conclusion.

<sup>3</sup> On December 20, 2007, Central Intelligence Agency Director Michael V. Hayden issued an order to all CIA personnel to preserve and maintain all documents, information, and evidence relating to any detainee held at Guantanamo Bay and any detainee held by the CIA,

potentially involved in the destruction of the tapes to testify before this Court at the same time as the Department of Justice is inquiring into what such individuals may have done could potentially complicate the ongoing efforts to arrive at a full factual understanding of the matter.<sup>4</sup>

**III. The Pendency of Various Similar Motions Before Other Judges of This Court Underscores the Need for Caution Before Proceeding With a Judicial Inquiry.**

In addition to petitioner's motion, various similar motions have been filed in habeas cases presently pending before other judges of this Court. *See Abdah v. Bush*, No. 04-cv-1254 (D.D.C.) (HHK) (dkt. no. 219); *Abdullah v. Bush*, No. 05-cv-23 (RWR) (Mot. to Compel Resp'ts to Report on Their Compliance with the Court's Preservation Order of July 18, 2005) (dkt. no. 77); *Alhami v. Bush*, No. 05-cv-359 (D.D.C.) (GK) (Mot. to Compel Resp'ts to Report on Compliance with the Court's Preservation Order of March 7, 2005) (filed Dec. 26, 2007). The potential disruption of the ongoing Department of Justice inquiry as a result of a judicial inquiry into the same conduct would, of course, be compounded by multiple judicial inquiries into the matter. Accordingly, this Court should not proceed with the hearing requested by petitioner.

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including future detainees as well as past and present detainees. In particular, Director Hayden 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* Opp'n to Pet'r's Mots. for Preservation Order and for Declaratory J. Ex. C. ¶ 4 (Decl. of General Michael V. Hayden, USAF, Director, Central Intelligence Agency), *Khan v. Gates*, No. 07-1324 (D.C. Cir.) (attached as Exhibit D). Director Hayden's "order is a continuing obligation that applies to future as well as past and present detainees." *Id.* ¶ 4.

<sup>4</sup> In addition to the Department of Justice, the Intelligence Committees of both the House of Representatives and the Senate have announced their intention to conduct investigations into the tapes destruction matter. *See* House Intelligence Committee Press Release, dated December 10, 2007 (attached as Exhibit E); Press Release from Office of Senator Jay Rockefeller, dated December 7, 2007 (attached as Exhibit F).

**IV. The Court Lacks Jurisdiction over the Underlying Petition.**

Aside from petitioner's failure to show why this Court should conduct a hearing at this time, or that doing so would be prudent in light of the ongoing investigations, the Court should not grant petitioner's motion for the simple reason that the Court lacks jurisdiction over the underlying petition for habeas corpus. Unless and until the Supreme Court acts in a way that changes the law as set forth in *Boumediene v. Bush*, 476 F.3d 981 (D.C. Cir. 2007), *cert. granted*, 127 S. Ct. 3078 (June 29, 2007), the law in this Circuit is clear that the Court lacks jurisdiction over the subject matter of the underlying petition. For that reason, the Court should forbear from proceeding with a judicial inquiry as requested by petitioner's motion.

\* \* \* \* \*

In light of the separate investigations by the Executive Branch and Congress concerning the destruction of tapes, given the multiple pending requests for Court investigation, and because this Court lacks jurisdiction over the underlying petition in any event, petitioner's motion seeking a judicial inquiry should be denied.

Dated: January 2, 2007

Respectfully submitted,

JEFFREY S. BUCHOLTZ  
Acting Assistant Attorney General

CARL J. NICHOLS  
Deputy Assistant Attorney General

DOUGLAS N. LETTER  
Terrorism Litigation Counsel

/s/ James C. Luh

JOSEPH H. HUNT (D.C. Bar No. 431134)  
VINCENT M. GARVEY (D.C. Bar No. 127191)  
JUDRY L. SUBAR (D.C. Bar No. 347518)  
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Washington, DC 20530  
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Attorneys for Respondents

# **EXHIBIT A**



# Department of Justice

FOR IMMEDIATE RELEASE  
SATURDAY, DECEMBER 8, 2007  
[WWW.USDOJ.GOV](http://WWW.USDOJ.GOV)

OPA  
(202) 514-2007  
TDD (202) 514-1888

## **Statement from Brian Roehrkasse, Director of Public Affairs, Regarding Preliminary Inquiry into Interrogation Video Destruction**

"The Department of Justice and the CIA announced today that the Justice Department's National Security Division initiated a preliminary inquiry in conjunction with the CIA's Office of Inspector General regarding the destruction of the interrogation videos described in CIA Director Mike Hayden's message to employees on December 6.

"A preliminary inquiry is a procedure the Department of Justice uses regularly to gather the initial facts needed to determine whether there is sufficient predication to warrant a full investigation."

Attached is the letter from Assistant Attorney General for National Security Ken Wainstein to CIA Acting General Counsel John Rizzo regarding the preliminary inquiry.

Attachment

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07-991



# **EXHIBIT B**



U.S. Department of Justice

National Security Division

*Assistant Attorney General*

*Washington, D.C. 20530*

December 8, 2007

John A. Rizzo  
Acting General Counsel  
Central Intelligence Agency  
Washington, DC 20505

Dear Mr. Rizzo:

I am writing this letter to confirm our discussions over the past several days regarding the destruction of videotapes of interrogations conducted by the Central Intelligence Agency (CIA). Consistent with these discussions, the Department of Justice will conduct a preliminary inquiry into the facts to determine whether further investigation is warranted. I understand that you have undertaken to preserve any records or other documentation that would facilitate this inquiry. The Department will conduct this inquiry in conjunction with the CIA's Office of Inspector General (OIG).

My colleagues and I would like to meet with your Office and OIG early next week regarding this inquiry. Based on our recent discussions, I understand that your Office has already reviewed the circumstances surrounding the destruction of the videotapes, as well as the existence of any pending relevant investigations or other preservation obligations at the time the destruction occurred. As a first step in our inquiry, I ask that you provide us the substance of that review at the meeting.

Thank you for your cooperation with the Department in this matter. Please feel free to contact me if you have any questions.

Sincerely,

A handwritten signature in black ink that reads "Kenneth L. Wainstein".

Kenneth L. Wainstein  
Assistant Attorney General  
National Security Division

cc: John L. Helgerson  
Inspector General  
Central Intelligence Agency

# **EXHIBIT C**



# Department of Justice

FOR IMMEDIATE RELEASE  
WEDNESDAY, JANUARY 2, 2008  
[WWW.USDOJ.GOV](http://WWW.USDOJ.GOV)

OPA  
(202) 514-2007  
TDD (202) 514-1888

## **Statement by Attorney General Michael B. Mukasey Regarding the Opening of an Investigation Into the Destruction of Videotapes by CIA Personnel**

"Following a preliminary inquiry into the destruction by CIA personnel of videotapes of detainee interrogations, the Department's National Security Division has recommended, and I have concluded, that there is a basis for initiating a criminal investigation of this matter, and I have taken steps to begin that investigation as outlined below.

"This preliminary inquiry was conducted jointly by the Department's National Security Division and the CIA's Office of Inspector General. It was opened on December 8, 2007, following disclosure by CIA Director Michael Hayden on December 6, 2007, that the tapes had been destroyed. A preliminary inquiry is a procedure the Department of Justice uses regularly to gather the initial facts needed to determine whether there is sufficient predication to warrant a criminal investigation of a potential felony or misdemeanor violation. The opening of an investigation does not mean that criminal charges will necessarily follow.

"An investigation of this kind, relating to the CIA, would ordinarily be conducted under the supervision of the United States Attorney for the Eastern District of Virginia, the District in which the CIA headquarters are located. However, in an abundance of caution and on the request of the United States Attorney for the Eastern District of Virginia, in accordance with Department of Justice policy, his office has been recused from the investigation of this matter, in order to avoid any possible appearance of a conflict with other matters handled by that office.

"As a result, I have asked John Durham, the First Assistant United States Attorney in the United States Attorney's Office for the District of Connecticut, to serve as Acting United States Attorney for the Eastern District of Virginia for purposes of this matter. Mr. Durham is a widely respected and experienced career prosecutor who has supervised a wide range of complex investigations in the past, and I am grateful to him for his willingness to serve in this capacity. As the Acting United States Attorney for purposes of this investigation, Mr. Durham will report to the Deputy Attorney General, as do all United States Attorneys in the ordinary course. I have also directed the FBI to conduct the investigation under Mr. Durham's supervision.

"Earlier today, the Department provided notice of these developments to Director Hayden and the leadership of the Judiciary and Intelligence Committees of the Congress."

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08-001

# **EXHIBIT D**

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.	)	
	)	

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**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

DEC. 20. 2007 3:27PM

NO. 2492 P. 3

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.


\* \* \* \*

DEC. 20. 2007 3:27PM

NO. 2492 P. 4

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

Executed this 20th day of December, 2007.



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General Michael V. Hayden, USAF  
Director  
Central Intelligence Agency



# **EXHIBIT E**



FOR IMMEDIATE RELEASE – December 10, 2007

Contact: Kira Maas (Reyes): 202-225-4831 (office), 202-225-2912 (cell)

<http://intelligence.house.gov>

### **Reyes, Hoekstra Announce Investigation into the Destruction of CIA Interrogation Videotapes**

**Washington, D.C.** -- *House Intelligence Committee Chairman Silvestre Reyes (D-Texas) and the committee's top Republican Pete Hoekstra (Michigan) issued the following statement today:*

“Today we are announcing a full committee investigation, pursuant to Intelligence Committee rules, into the issues surrounding the destruction of Central Intelligence Agency (CIA) interrogation videotapes.

“Director Hayden’s note to the workforce on December 6, 2007, implied that our committee had been properly notified about the destruction of certain videos in 2005. Based on our review of the record, this does not appear to be true. Our investigation will review issues surrounding the destruction of videos, the CIA’s failure to notify Congress of this important matter, and related questions concerning the CIA’s interrogation program.

“Our investigation will be complete, thorough and bipartisan. We will follow the facts wherever they lead. And we will use every tool at our disposal to conduct a fair and complete review on behalf of the House of Representatives and the American people.

“Our review will begin with a closed, on-the-record briefing by CIA Director Michael Hayden on Wednesday, December 12, 2007. In the coming days, our staff will be developing a detailed plan for this investigation.”

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# **EXHIBIT F**

Use your browser's back button to return to Senator Rockefeller's Webpage.

**FOR IMMEDIATE RELEASE**

December 7, 2007

**CHAIRMAN ROCKEFELLER SAYS INTEL COMMITTEE HAS  
BEGUN INVESTIGATION INTO CIA DETAINEE TAPES**

**--Senator Expresses Concern that CIA Continues to Withhold Key  
Information --**

“In the last 24 hours, we have taken a close look at any relevant correspondence related to the tapes. The news that the tapes were destroyed was extremely disturbing to me and the CIA’s description of notifying Congress is inconsistent with our records. As we learn more, it is only raising new questions and concerns.

“I have been pushing for a full investigation of CIA detention and interrogation programs for years. Along with this ongoing oversight, the committee has now asked for a complete and accurate chronology of events related to the tapes, including how the tapes were used, when and why they were destroyed, who was notified of their destruction and when, and any communication about them that was provided to the courts and Congress.

“We do not know if there was intent to obstruct justice, an attempt to prevent congressional scrutiny, or whether they were simply destroyed out of concern they could be leaked – whatever the intent, we must get to the bottom of it. This is a very serious matter with very serious consequences.

“Based on a preliminary review, here’s what we know.

“Last night, the CIA informed me that it believes that the leadership of the Senate Intelligence Committee was told of the decision to destroy the tapes in February 2003 but was not told of their actual destruction until a closed committee hearing held in November 2006.

“The committee has located no record of either being informed of the 2003 CIA decision or being notified late last year of the tapes having being destroyed. A review of the November 2006 hearing transcript finds no mention of tapes being destroyed.

“While the existence of the videotapes was known to me in 2003 in my capacity as then-Vice Chairman of the committee, I was not told of the CIA’s decision to destroy the tapes and I was not aware of their destruction until yesterday’s press reports.

“In May 2005, I wrote the CIA Inspector General requesting over a hundred documents referenced in or pertaining to his May 2004 report on the CIA’s detention and interrogation activities. Included in my letter was a request for the CIA to provide to the Senate Intelligence

Committee the CIA's Office of General Counsel report on the examination of the videotapes and whether they were in compliance with the August 2002 Department of Justice legal opinion concerning interrogation. The CIA refused to provide this and the other detention and interrogation documents to the committee as requested, despite a second written request to CIA Director Goss in September 2005.

"It was during this 2005 period that I proposed without success, both in committee and on the Senate floor, that the committee undertake an investigation of the CIA's detention and interrogation activities. In fact, all members of the congressional intelligence committees were not fully briefed into the CIA interrogation program until the day the President publicly disclosed the program last September.

"Since that time, the committee has held numerous hearings on the program and just this week acted to prohibit the CIA from using enhanced interrogation techniques and requiring them to adhere to the Army Field Manual."

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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

_____	)	
JARALLAH AL-MARRI, <i>et al.</i> ,	)	
	)	
Petitioners,	)	
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v.	)	Civil Action No. 04-cv-2035 (GK)
	)	
GEORGE W. BUSH, <i>et al.</i> ,	)	
	)	
Respondents.	)	
_____	)	

**ORDER DENYING PETITIONER’S MOTION TO COMPEL RESPONDENTS TO REPORT ON THEIR COMPLIANCE WITH THE COURT’S PRESERVATION ORDER OF MARCH 7, 2005, AND THEIR OBLIGATION TO PRESERVE POTENTIALLY RELEVANT EVIDENCE**

Upon the petitioner’s Motion to Compel Respondents to Report on Their Compliance with the Court’s Preservation Order of March 7, 2005, and Their Obligation to Preserve Potentially Relevant Evidence and respondents’ opposition thereto, it is hereby ORDERED that the petitioner’s motion is DENIED.

IT IS SO ORDERED.

Dated:

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GLADYS KESSLER  
UNITED STATES DISTRICT JUDGE