

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SUHAIL ABDU ANAM, <i>et al.</i> ,)	
)	
Petitioners,)	
)	
v.)	Civil Action No. 04-CV-1194 (HHK)
)	
GEORGE W. BUSH,)	
<i>et al.</i> ,)	
)	
Respondents.)	
)	

**RESPONDENTS’ OPPOSITION TO
MOTION FOR REPORT CONCERNING DESTRUCTION
OF EVIDENCE AND FOR AMENDED PRESERVATION ORDER**

Based on the recently publicized disclosure of the destruction of certain tapes by the Central Intelligence Agency, petitioners’ February 15, 2008 motion asks this Court for an order requiring respondents to report to the Court and counsel by March 31, 2008, concerning preservation of materials potentially relevant to this case, including (a) any materials potentially relevant to petitioners’ claims, (b) an apparently broader class of materials “incidental” to any materials, such as the CIA videotapes, that may have been destroyed, and (c) steps previously undertaken by respondents to effect the preservation of evidence in this case. *See* Petrs’ Memo. at 15-16. Additionally, petitioners ask the Court to enter a new preservation order more expansive than the already existing order in this case. *Compare id.* at 17-18 *with* Order of June 10, 2002 (dkt. no. 124) (“respondents shall preserve and maintain all evidence and information regarding the torture, mistreatment, and abuse of detainees now at the United States Naval Base at Guantánamo Bay, Cuba”).

The Court has already considered and rejected a similar request for an inquiry related to preservation of evidence in another Guantanamo *habeas corpus* case, *Abdah v. Bush*, No. 04-CV-1254 (HHK), a case involving the same preservation order involved in this case. The Court denied the motion in *Abdah* because the destruction of the CIA tapes did not implicate the preservation order applicable in that case and because of the existence of the criminal investigation by the Department of Justice into the destruction of the videotapes. *See* Order of Jan. 9, 2008 at 2-3 (dkt. no. 230), *Abdah v. Bush*, No. 04-CV-1254 (HHK). Petitioners in this case have failed to demonstrate that there is any reason to reach a different result here. Specifically, the relief requested by petitioners portends harm to and interference with the ongoing criminal investigation. In addition, because the Court lacks jurisdiction over this case and, in any event, the litigation of the merits of petitioners' claims has long been stayed pending resolution of *Boumediene v. Bush*, 476 F.3d 981, 986, 994 (D.C. Cir.), *cert. granted*, 127 S. Ct. 3067, 3078 (2007), and because the purpose of the report requested by petitioners is to determine whether information that might be relevant to the merits of petitioners' claims was properly preserved, there is no compelling need at this time to require respondents to provide information that would result in interference with the pending criminal probe. Furthermore, the new preservation order requested by petitioners is overbroad and unnecessary. Accordingly, petitioners' motion should be denied.

ARGUMENT

I. THE COURT SHOULD DENY PETITIONERS' REQUEST FOR AN INQUIRY AND REPORT BY RESPONDENTS.

The Court should reach the same result here that it did in *Abdah* and deny the instant motion. The Court based its January 9, 2008 Order in *Abdah* on two primary grounds. First, the Court concluded that the destruction of the CIA tapes, recorded in 2002 and not at Guantanamo Bay, did not implicate the preservation order applicable in that case, which required respondents to preserve “evidence and information regarding the torture, mistreatment, and abuse of detainees” at Guantanamo as of the date of the order. *See* Order of Jan. 9, 2008 at 2 (dkt. no. 230), *Abdah v. Bush*, No. 04-CV-1254 (HHK). Second, the Court cited the existence of the criminal investigation by the Department of Justice into the destruction of the videotapes, including whether such destruction violated any legal obligation, including those arising out of the Court’s preservation order. *Id.* at 2-3.

The Court’s rationale in *Abdah* remains applicable and appropriate with respect to petitioners’ request for relief in this case and warrants the denial of petitioners’ motion. Petitioners in this case do not rely on alleged noncompliance with the preservation order in this case as a basis for the relief they request, nor could they: the preservation order in this case is the same as the one in *Abdah*,¹ and the destroyed CIA tapes cannot reflect “any torture, mistreatment, and abuse of detainees” at Guantanamo since the date of the order. Moreover, the very criminal investigation that warranted the Court’s rejection of the motion in *Abdah* remains vital and

¹ Compare Order of June 10, 2002 (dkt. no. 124), *Anam v. Bush*, No. 04-CV-1194 (HHK) (D.D.C.), with Order of June 10, 2002 (dkt. no. 155), *Abdah v. Bush*, No. 04-CV-1254 (HHK) (D.D.C.).

ongoing. Further, as explained in the attached declaration from Acting United States Attorney John Durham, who is leading the criminal investigation, the type of inquiry that would be required should petitioners' request for relief be granted would interfere with that ongoing investigation. *See* Exhibit 1 ("Durham Decl.").²

As Mr. Durham's declaration explains, the ongoing criminal investigation involves "a fully staffed team of prosecutors and agents" who are "actively gathering information and evidence relating to the destruction of the [CIA] videotapes." *Id.* ¶ 3(d). The issues involved in the investigation include whether federal criminal offenses were committed in connection with the destruction of the videotapes and, specifically, whether "any person or persons obstructed justice, made false statements, or acted in contempt of court or Congress in connection with the destruction of the videotapes." *Id.* ¶ 4. Further, with regard to potential obstruction of justice issues, the investigation involves whether destruction of the tapes "violated any order issued by any federal judicial officer [including in this case] and, if so, what the person's knowledge, motive, and/or intent was in destroying the tapes or causing their destruction." *Id.* ¶¶4-5 & Ex. One (referencing June 10, 2005 preservation order in *Anam v. Bush*, No. 04-CV-1194 (HHK), as one of the orders involved in the investigation).

² Mr. Durham's declaration (which is also appended as Unclassified Exhibit A to petitioners' motion) was previously submitted by respondents to the Court in *Abdullah v. Bush*, No. 05-CV-0023 (RWR) (D.D.C.), in connection with respondents' motion for reconsideration or stay of a requirement that respondents report on certain preservation matters to Judge Roberts, including (1) information relating to past compliance with a preservation order in *Abdullah* that extended to all information regarding the petitioner in that case, and (2) information about any evidence regarding petitioner that may have been destroyed. *See* Resps' Emerg. Mot. for Recons. or, in the Alternative, for Partial Stay of Order Requiring Further Report, *Abdullah v. Bush*, No. 05-CV-0023 (RWR) (D.D.C.) (dkt. no. 85); *see also infra* at 7-10.

Mr. Durham's declaration also explains that the criminal investigation and any reporting to a court on issues related to the preservation of potentially relevant materials plainly involve issues that are intimately related, if not identical, in many respects. As a result, ordering the reporting that petitioners' request in their pending motion in this case would risk significant harm to the criminal investigation. Many, if not most, of the individuals who would have to be queried for purposes of a report to this Court are potential witnesses in the criminal matter. Durham Decl. ¶ 6. Discussing with those people some of the information that would likely have to be discussed to prepare a report of the nature requested by petitioners "would create the risk that potential witnesses in the criminal investigation would be affected by their access to statement or other witnesses, as well as access to not only their own documents and records but those of others." *Id.* ¶ 7. Similarly, it would pose a risk that potential witnesses may, intentionally or otherwise, "change what they have to say so as to conform their testimony to any such publicly disclosed information," *id.* ¶ 8, and present still other complications for the criminal investigation. *Id.* ¶¶ 6-10. And various issues could arise under cases such as *Garrity v. New Jersey*, 385 U.S. 493 (1967), which "held that an individual threatened with discharge from employment for exercising the privilege [against self-incrimination] had not waived it by responding to questions rather than standing on his right to remain silent." *Minnesota v. Murphy*, 465 U.S. 420, 435 (1984). *See* Durham Decl. ¶ 10 (citing *Kalkines v. United States*, 473 F.2d 1391 (Ct. Cl. 1973)). In sum, reporting in this litigation on issues related to the preservation of potentially relevant materials as contemplated in petitioners' request for relief would "substantially interfere with the ability to conduct a complete, thorough and untainted federal

criminal investigation,” and “could in turn jeopardize the successful prosecution of any criminal case” arising out of the investigation. *See* Durham Decl. ¶ 9.

For these reasons, the Court’s chosen course of action in *Abdah* remains appropriate, including with respect to this case. Indeed, it is well-established that a court should eschew steps that, if taken, would unduly interfere with an ongoing criminal investigation. *See United States v. Kordel*, 397 U.S. 1, 12 n. 27 (1970) (citing cases); *SEC v. Dresser Indus., Inc.*, 628 F.2d 1368, 1375-76 (D.C. Cir. 1980). *See also Campbell v. Eastland*, 307 F.2d 478, 487 (5th Cir. 1962) (giving priority to criminal matters over civil actions “seems so necessary and wise that a trial judge should give substantial weight to it”). Just last year the Supreme Court noted that “[i]f a plaintiff files a . . . claim related to rulings that will likely be made in a pending or anticipated criminal trial[], it is within the power of the district court, *and in accord with common practice*, to stay the civil action until the criminal case or the likelihood of a criminal case is ended.” *Wallace v. Kato*, ___ U.S. ___, 127 S. Ct. 1091, 1098 (2007) (emphasis added); *see also United States v. Any and All Assets of that Certain Business Known as Shane Co.*, 147 F.R.D. 99, 101 (M.D.N.C. 1993) (“When a civil proceeding may interfere with a criminal investigation, it is not uncommon that the United States will seek to stay discovery in the civil action in order to protect the criminal investigation. . . . Such requests are presumptively reasonable, nothing else appearing.”).

Petitioners nevertheless suggest that the Court’s approach in *Abdah* is unsuitable here, claiming that the criminal investigation does not explicitly cover compliance with general evidence preservation obligations not grounded in a court order. Petitioners assert that the Court, therefore, should exercise its inherent powers to require independent investigation and reporting

by respondents regarding the acknowledged destruction of tapes by the CIA and any other potential spoliation issues, as well as other matters more broadly related to preservation. *See* Petrs' Memo. at 9-10, 16. As explained above, however, it is well-established that a court should not order steps that, if taken, would unduly interfere with an ongoing criminal investigation. Here it is readily apparent that the report contemplated by petitioners and the criminal investigation are targeted at the same body of information, and the sort of due diligence that necessarily would precede the drafting and filing of a report with the Court would mirror much of the work of the criminal investigation team. As Mr. Durham's declaration makes clear, engaging in such an effort for purposes of a report in this case at this time would create serious risks to the goal of determining how and why the CIA tapes were destroyed and what the consequences of that destruction should be. Thus, petitioners have failed to demonstrate that the Court should take the extraordinary step of requiring an inquiry and report pursuant to its inherent powers, particularly where the Supreme Court has admonished that such powers "must be exercised with restraint and discretion."³ *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 764 (1980).

³ Petitioners' request that this Court act precipitously to require inquiry and reporting on preservation-related matters 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 petitioners here, could assert constitutional protections was decided by the Court of Appeals against detainees such as petitioners and is one of the questions currently before the Supreme Court in *Boumediene*.)

Petitioners also suggest that the Court should require the investigation and reporting they request because Judge Roberts, in *Abdullah v. Bush*, No. 05-CV-0023 (RWR) (D.D.C.), “ordered Respondents to provide a report similar to the one requested in [petitioners’] motion.” Petrs’ Memo. at 16. Petitioners’ description of Judge Roberts’ action, however, is only half the story. On January 24, 2008, Judge Roberts did issue an order requiring respondents to report concerning (1) information relating to past compliance with a preservation order in the *Abdullah* case, which extended to all information regarding the petitioner in that case; (2) information about what is being done now to ensure compliance with the preservation order; and (3) information about any evidence regarding petitioner that may have been destroyed. *See* Memo. Order, *Abdullah v. Bush*, No. 05-CV-0023 (RWR) (D.D.C.) (dkt. no. 83). And respondents subsequently provided Judge Roberts, as well as this Court, with a largely prospective report focusing on the current, additional steps that the CIA and DOD have taken to ensure the preservation of information regarding detainees at Guantanamo going forward, as well as information concerning an overwriting issue with certain security monitoring systems used at Guantanamo that was discovered during follow-up connected with DoD’s most recent preservation directive, which may have implicated the preservation order in *Abdullah*. *See* Resps’ Notice of Report Regarding Preservation (dkt. no. 191). Respondents were able to provide this information because of a determination by Mr. Durham that disclosure of the information did not implicate the potential for harm to the pending criminal investigation. *See* Durham Decl. ¶ 11.

But respondents moved to reconsider or stay those aspects of Judge Roberts’ January 24, 2008 order that required retrospective investigation and reporting by respondents. *See* Resps’

Emerg. Mot. for Recons. or, in the Alternative, for Partial Stay of Order Requiring Further Report, *Abdullah v. Bush*, No. 05-CV-0023 (RWR) (D.D.C.) (dkt. no. 85). Respondents noted the potential for harm to the pending criminal investigation as described in Mr. Durham's declaration. In addition, respondents explained that because litigation of the merits of petitioner's claims had long been stayed pending resolution of *Boumediene v. Bush*, 476 F.3d 981, 986, 994 (D.C. Cir.), *cert. granted*, 127 S. Ct. 3067, 3078 (2007), and because the purpose of the backward-looking portion of the court-ordered report was to determine whether information that might be relevant to the merits of petitioner's claims were properly preserved, there was no compelling need at this time, in terms of hardship to petitioners or progress of the litigation of the case on the merits, to require respondents to provide information that would result in interference with the pending criminal probe.⁴

On February 14, 2008, in response to respondents' motion and report, Judge Roberts concluded that "to reduce the possibility of interference with the ongoing criminal investigation [Mr.] Dunham [sic] is conducting, the respondents will not be required at this time to detail what they did previously to ensure compliance with the Preservation Order" *See* Mem. Order (filed Feb. 14, 2008) at 4-5, *Abdullah v. Bush*, No. 05-CV-0023 (RWR) (D.D.C.)(dkt. no. 89).⁵

⁴ In light of the nature of the relief requested by respondents in their motion for reconsideration or stay before Judge Roberts, petitioners' assertion in this case that "[r]ecent filings [*i.e.*, respondents' report to the Court (*see* Notice of Report Regarding Preservation)] suggest that, until two months ago, no serious efforts had been made to preserve evidence potentially relevant to this case," *Petr's* Memo. at 12, is entirely misplaced. As explained above, respondents provided a largely prospective report only to the extent the information supplied did not implicate harm to the ongoing criminal investigation; respondents explicitly sought relief from and did not provide the retrospective reporting that implicated such harms.

⁵ Judge Roberts nonetheless required a report "detailing the nature of any evidence specific to petitioner Abdullah that is potentially subject to the Preservation Order that has been

Likewise here, this Court should not require the type of reporting requested by petitioners. As explained *supra*, the relief requested by petitioners itself implicates real potential for harm to the pending criminal investigation. Further, because the litigation of the merits of petitioners' claims in this case has long been stayed pending resolution of *Boumediene*, *see, e.g.*, Order of Mar. 16, 2006 (dkt. no. 142), and because petitioners confirm that they seek a report from respondents with respect to preservation of information they believe might be relevant to litigation of the merits of petitioners' claims, *see* *Petr's* Memo. at 13-14, there is no compelling need at this time to require respondents to provide information that would result in interference with the pending criminal probe. In addition, respondents have reported to the Court already concerning the current, additional steps that the CIA and DOD have undertaken to ensure the preservation of information regarding detainees at Guantanamo going forward and have provided other information discovered during follow-up connected with DoD's most recent preservation directive concerning the security monitoring. The Court should deny petitioners' request for far more reaching reporting by respondents.⁶

destroyed or spoliated." *See* Memo. Order (filed Feb. 14, 2008) at 5, *Abdullah v. Bush*, No. 05-CV-0023 (RWR) (D.D.C.) (dkt. no. 89). Respondents are currently considering options for a response to this order that would appropriately take into account the competing imperatives of the *Abdullah* court and the need to avoid interference with the criminal investigation.

⁶ For the same reasons, the Court should not impose any requirement such as that currently existing under Judge Roberts' February 14, 2008 order in *Abdullah*. Respondents would further note that in addition to petitioners in *Abdullah* and in this case, petitioners in a number of other Guantanamo cases in this Court or the Court of Appeals are seeking relief similar to that in this case. *See* *Zalita v. Gates*, No. 07-1384 (D.C. Cir.) (motion filed Jan. 29, 2008); *Zalita v. Bush*, No. 05-CV-1220 (D.D.C.) (RMU) (*see* dkt. no. 81); *Al-Marri v. Bush*, No. 04-CV-2035 (D.D.C.) (GK) (dkt. no. 76); *Alhami v. Bush*, No. 05-CV-0359 (D.D.C.) (GK) (dkt. no. 67); *Said v. Bush*, No. 05-CV-2384 (D.D.C.) (RWR) (dkt. no. 83); *Al Adahi v. Bush*, No. 05-CV-0280 (GK) (dkt. no. 115). Were a retrospective report such as that currently contemplated by Judge Roberts in *Abdullah* be required in each of those cases, and potentially

Aside from the fact that petitioners' requested relief would interfere with the ongoing criminal investigation, the Court also should not grant petitioners' motion for the simple reason that the Court lacks jurisdiction over the underlying petition for *habeas corpus*. As noted above, petitioners' arguments for an inquiry are premised upon petitioners' view as to the type of information that may be relevant to litigation of the merits of petitioner's claims. See Petrs' Memo. at 13-14. 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), however, the law in this Circuit is clear that the Court lacks jurisdiction over the subject matter of the underlying petition.⁷ For that independent reason, the Court should forbear from requiring the reporting requested by petitioners in their motion.

II. THE COURT SHOULD DENY PETITIONERS' REQUEST FOR AN AMENDED PRESERVATION ORDER.

Petitioners also request that the Court enter a new and expanded preservation order in this case, but they have failed to demonstrate both the need for and propriety of the expanded order they seek. Petitioners ask the Court to enter a new preservation order encompassing all evidence potentially relevant to this case, including all information "related to or referring to" petitioners and "all information concerning the treatment of any individual who has provided information to

any other cases where counsel for detainees decided to seek such a report, the cumulative impact would likely compound the possible interference with the ongoing criminal investigation. For this additional reason, Judge Roberts' current order should not be adopted or repeated in this or any other Guantanamo case.

⁷ See also *Rasul v. Myers*, 512 F.3d 644, 655 (D.C. Cir. Jan. 11, 2008) ("*Boumediene* . . . remains the law of this Circuit"); *id.* at 655 n.15 ("*Boumediene* is currently before the Supreme Court on certiorari review. Nevertheless, we must follow Circuit precedent until and unless it is altered by our own *en banc* review or by the High Court.") (citation omitted).

the government concerning any Petitioner.” Petrs’ Memo. at 17-18. As explained in respondents’ recent Notice of Report Regarding Preservation, however, the DOD Office of General Counsel recently disseminated within the Department of Defense a directive that obligates “all relevant DoD components reasonably likely to have information regarding current or former Guantanamo Bay detainees,” “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 or comes within their possession or control” regarding all detainees ever held by DoD at Guantanamo.⁸ See Notice of Report Regarding Preservation (dkt. no. 191), Hecker Decl. ¶¶ 2-3. Furthermore, even though the CIA is not a named respondent in this matter, and would not be a proper respondent in any event,⁹ the Director of the CIA recently issued a directive to all CIA personnel that requires them to preserve and maintain all documents, information, and evidence relating to any detainee ever held at Guantanamo and any detainee held by the CIA, including any detainees who may be held in the future. As the directive makes clear, it “is a continuing obligation that applies to future as well as past and present detainees.” See Notice of Report

⁸ Under standard DOD practice, each component receiving the directive was to ensure that all relevant personnel were made aware of it. Hecker Decl. ¶ 3. And in addition to the formal communication of the directive, Ms. Hecker personally communicated to a large number of DOD contacts with whom she regularly works on Guantanamo matters that the formal directive would be arriving through regular channels and that they should disseminate it as appropriate. *Id.* ¶ 4.

⁹ See *Rumsfeld v. Padilla*, 542 U.S. 426, 436 n.9, 447 n.16 (2004) (discussing identity of proper respondent in *habeas* cases under rule limiting proper respondent to custodian and citing cases involving extraterritorial detention where although rule is somewhat more relaxed, proper respondent is head of military department holding detainee).

Regarding Preservation (dkt. no. 191), Hayden Decl. ¶ 4. Accordingly, the new preservation order requested by petitioners is not necessary.

Furthermore, the new preservation order requested by petitioners is improperly overbroad. *See Pueblo of Laguna v. United States*, 60 Fed. Cl. 133, 138 (Fed. Cl. 2004) (movant seeking preservation order must show that the order requested is not overbroad or overreaching). While petitioners, in various places in their motion, characterize the new order they seek from the Court as pertaining to “evidence potentially relevant to Petitioners’ challenge to the legality of their detention” or “to Petitioners’ claims,” *Petr’s Memo.* at 1, 17, 18; *Petr’s Motion* at 1, 3; petitioners apparently view such evidence as including the much broader category of information of anything “related to or referring to” petitioners or “concerning the treatment of any individual who has provided information to the government concerning any Petitioner,” *see Petr’s Memo.* at 17-18. While petitioners are entitled to their view, the requirement to preserve any and all information “related to or referring to” petitioners and “all information” concerning the treatment of other detainees goes beyond what might otherwise be appropriate with respect to the merits of petitioners’ *habeas* claims in this case or that might be permissible with respect to any discovery that might ever be appropriate with respect to such *habeas* claims, *see Harris v. Nelson*, 394 U.S. 296, 300 (1969) (discovery available in *habeas* cases only in narrow circumstances and upon showing of good cause).¹⁰

¹⁰ Nor does the fact that respondents, out of an abundance of caution, have in place prophylactically broad preservation directives consistent with the requested order by any means justify an order such as petitioners seek that would be improperly overbroad. *See Pueblo of Laguna*, 60 Fed. Cl. at 138.

Accordingly, the Court need not and should not enter the new preservation order requested by petitioners in this case.

CONCLUSION

For the foregoing reasons, petitioner's motion seeking a report on preservation matters and a new preservation order in this case should be denied.

Dated: February 29, 2008

Respectfully submitted,

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EXHIBIT 1

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

HANI SALEH RASHID ABDULLAH :
ET AL, :
Petitioners, : Civil Action No. 05-23 (RWR)
v. :
GEORGE W. BUSH, ET AL, :
Respondents. :

DECLARATION OF JOHN H. DURHAM

I, John H. Durham, declare as follows:

1. I am the Deputy United States Attorney for the District of Connecticut.¹ I have been employed as a federal prosecutor since December 20, 1982, when I became a Trial Attorney for the New Haven Field Office of the Boston Strike Force on Organized Crime. I served as the Strike Force Chief in the District of Connecticut until September 1989. In September 1989, I became Chief of the Criminal Division for the United States Attorney's Office for the District of Connecticut and served in that position until March, 1994, when I became the Deputy United States Attorney for the Office. At various times I also have served as the Interim United States Attorney for the District of Connecticut, Counsel to the United States Attorney, Special Attorney in the District of Massachusetts investigating and prosecuting corruption involving law enforcement agencies in Massachusetts, and Special Attorney in the Southern District of New

¹In the District of Connecticut, the Deputy United States Attorney is the position commonly known in other Districts as First Assistant United States Attorney.

York investigating allegations of corruption within a federal law enforcement agency. On January 2, 2008, Attorney General Michael Mukasey appointed me to serve as Acting United States Attorney for the Eastern District of Virginia in connection with a federal criminal investigation into the destruction of certain videotaped interrogations of detainees by the Central Intelligence Agency (“C.I.A.” or “the Agency”). In my capacity as Acting United States Attorney for the Eastern District of Virginia, I am responsible for supervising the investigative efforts of a team of lawyers and Special Agents of the Federal Bureau of Investigation conducting the investigation into the C.I.A. tapes matter.

2. This declaration is submitted in support of the Government’s motion for a stay of proceedings in the above-captioned civil actions due to the pendency of a related criminal investigation. The statements made in this declaration are based on my personal knowledge of the facts and information obtained and reviewed in the course of my official duties.

3. In connection with the on-going federal criminal investigation into the destruction of videotapes by the Central Intelligence Agency, the following background information is of note:

a) On December 6, 2007, Michael V. Hayden, Director of the C.I.A., announced that during the initial stage of the Agency’s terrorist detention program, it videotaped interrogations of Abu Zubaydah, and in 2005 it destroyed the tapes. Further, Director Hayden stated that the program itself began with the capture of Abu Zubayda in March of 2002, and the decision to videotape interrogations was made by the Agency on its own. Director Hayden further stated that the videotaping of interrogations stopped in 2002. Mr. Hayden also advised that the decision to destroy the tapes was made only after “they were no longer of intelligence value and not relevant to any internal, legislative, or judicial inquiries – including the trial of Zacarias Moussaoui.”

b) Shortly after the destruction of the videotaped interrogations was made public, Attorney General Mukasey directed that a preliminary inquiry be conducted by the National Security Division of the Department of Justice regarding the destruction of the videotapes.

c) On January 2, 2008, the Attorney General announced that the preliminary inquiry had been concluded and that there was a basis for initiating a full criminal investigation into the destruction of the tapes. Further, on that same date, as noted above, your declarant was appointed to serve as the Acting United States Attorney for the Eastern District of Virginia to supervise that criminal investigation. Also as noted, the Federal Bureau of Investigation was designated as the federal law enforcement agency that would conduct the investigation.

d) Beginning on January 2, 2008 and continuing to the present time, a fully-staffed team of prosecutors and agents has been assembled and has been actively gathering information and evidence relating to the destruction of the videotapes in issue.

4. The questions under active review in this investigation focus on whether any federal criminal offenses were committed in connection with the destruction of the above-referenced videotapes. More specifically, the investigation team is actively reviewing whether any person or persons obstructed justice, made false statements, or acted in contempt of court or Congress in connection with the destruction of the videotapes. With respect to potential obstruction of justice offenses, we are investigating whether the destruction of the videotapes violated any order issued by any federal judicial officer and, if so, what the person's knowledge, motive, and/or intent was in destroying the tapes or causing their destruction.

5. Among the Orders at issue in the current investigation is the Preservation Order issued by this Court on July 18, 2005, as well as those Preservation Orders set forth in the table which

has been attached hereto as Exhibit One. In addition, the investigation concerns relevant court orders issued in a number of federal criminal cases.

6. Central questions for this investigation include: who within the federal government knew of the existence of the videotaped interrogations at issue; who was aware of the various orders that might have required the preservation of the videotapes; and who was involved, in any way, in the decision and/or directive to destroy the videotapes. The investigation thus involves gathering facts not only from the CIA but also from the Department of Defense (and from other agencies as well). This means that most, if not all, of the witnesses whom the Civil Division attorneys would be required to interview in responding to the Court's January 24, 2008 Order are also essential witnesses for the criminal investigation.

7. For various reasons, the attorneys handling the captioned civil cases cannot be made privy to all the evidence and information developed in the criminal investigation. Therefore, any interviews conducted by Civil Division attorneys which would be necessary to comply with the Court's January 24, 2008 Order would be conducted without the benefit of a full understanding of the facts and circumstances surrounding the destruction of those tapes. As a result, the recollections and testimony of witnesses could be less than complete due to a lack of necessary background information. To the extent that background statements, documents and records were made available to the civil lawyers, interviews at this time would create the risk that potential witnesses in the criminal investigation would be affected by their access to the statements or other witnesses, as well as access to not only their own document and records, but those of others. This exposure to other records and statements would almost certainly occur in the normal course of conducting such interviews. Even the framing of questions in civil case interviews

could impart information which could risk affecting the witnesses' recollections. Indeed, due to these same concerns, I previously have asked the appropriate authorities within the Central Intelligence Agency not to show records and documents, or otherwise make certain records and documents available to persons who will be interviewed as witnesses in connection with the criminal investigation being conducted.

8. The investigation which will be necessary for civil attorneys to prepare the report called for in the Court's January 24, 2008 Order could also substantially increase the likelihood of public disclosures of information which could negatively impact the on-going criminal investigation. For example, the public disclosure of information concerning the destruction of evidence made known to the civil attorneys during their inquiry could expose witnesses to what may have been said or disclosed to investigators by other potential witnesses and thereby cause potential witnesses, intentionally or otherwise, to change what they have to say so as to conform their testimony to any such publicly disclosed information.

9. The criminal investigation that I am supervising in my role as Acting United States Attorney for the Eastern District of Virginia is unique in my experience as an Assistant United States Attorney. The destruction of the videotaped interrogations has brought about legitimate concern on the part of various federal judges, as well as significant Congressional interest. For example, as has been publicly reported, United States District Judge Henry H. Kennedy has been asked to investigate the matter by the petitioners in *Mahmoad Abdah, et al v. Bush, et al.*, Civil No. 04-1254(HHK) (D.D.C.). Similarly, the petitioners in *ACLU, et al v. Department of Defense*, No. 04CV4151(AKH) (S.D.N.Y.), have asked Judge Alvin K. Hellerstein to investigate the matter, and the court has expressed concerns regarding the destruction of the tapes. Of

course, this Court obviously also has been asked to consider the matter.² Beyond these specific expressions of concern, there is a compelling national interest in ensuring that this criminal investigation is conducted in a manner that will engender public trust in its outcome. It is my belief that requiring the government to file the report called for in the Court's January 24, 2008 Order at this time will substantially interfere with the ability to conduct a complete, thorough and untainted federal criminal investigation into the destruction of videotaped interrogations. Such interference could in turn jeopardize the successful prosecution of any criminal case brought against any individuals who were found to have violated federal law in connection with the destruction of these tapes.

10. I am also concerned that if the civil attorneys were to approach a number of witnesses necessary to their inquiry that *Kalkines* issues will arise. *Kalkines v. United States*, 200 Ct.Cl. 570, 473 F.2d 1391 (1973). Specifically, I am concerned that witnesses could later assert that their cooperation was expected and compelled by Government attorneys within the meaning of *Kalkines*, in violation of their constitutional rights. This is especially true of those witnesses who are undiscovered subjects of the criminal investigation who might attempt to use the civil process to cloak themselves with immunity, thus precluding criminal prosecution.

11. I understand that respondents are providing information to the Court concerning the directives that the Department of Defense and the CIA have recently provided their employees about the prospective preservation of information covered by this Court's preservation order. I also understand that respondents in this case are providing information to the Court with regard

²Along these same lines, the House Permanent Select Committee on Intelligence, the Senate Select Committee on Intelligence, and the Judiciary Committees in both Houses of Congress have expressed their concerns about the destructions of the videotapes.

to recording devices used in connection with monitoring systems in place at Guantanamo Bay, and the apparent overwriting of some material on such recording devices. I am of the view that such information does not implicate the concerns that are discussed elsewhere in this declaration regarding the potential impact of the reporting obligation contained in this Court's order on the investigation I am conducting

12. My concerns about the integrity of the instant criminal investigation, together with the practical complications created by the fact that much of the information in this investigation is highly classified, make me reluctant to provide further details concerning how this criminal investigation is being conducted and the impact on any potential prosecutions if the inquiry which will be necessary to comply with the Court's Order of January 24, 2008 must go forward at this time. Nonetheless, should the Court require further information concerning whether to grant a stay in these matters, further information could be disclosed ex parte and in camera.

13. Based on the foregoing concerns, I have requested that the defendant in this lawsuit seek a stay of the Court's order dated January 24, 2008, only until such time as the criminal investigators in the on-going federal criminal investigation have had the opportunity to interview and take testimony from those witnesses who are central to the criminal investigation and who necessarily would be the focus of interviews by those civil lawyers charged with the responsibility of filing a report with the Court by no later than February 14, 2008.

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

Executed on February 5, 2008.

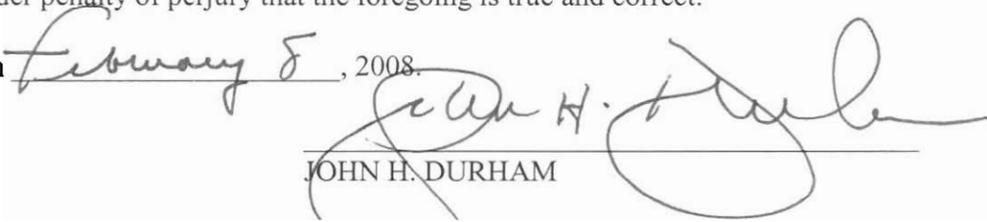

JOHN H. DURHAM

EXHIBIT ONE

CASE NAME	CASE NUMBER	ORDER DATE
Al-Marri v. Bush	04-CV-2035	03/07/2005
Al-Shihry v. Bush	05-CV-490 (PLF)	03/23/2005
Al-Adahi v. Bush	05-CV-280 (GK)	04/28/2005
Anam v. Bush	04-CV-1194 (HHK)	06/10/2005
Abdah v. Bush	04-CV-1254 (HHK)	06/10/2005
Abdullah v. Bush El-Banna v. Bush	04-CV-1144 (RWR) 04-CV-023 (RWR)	07/18/2005
Slahi v. Bush Chaman v. Bush Abdulhazer v. Bush Mohammadi v. Bush	05-CV-881 (RWR) 05-CV-887 (RWR) 05-CV-1236 (RWR) 05-CV-1246 (RWR)	07/18/2005
Ali Ahmed v. Bush	05-CV-1678 (GK)	11/15/2005
Al-Rubaish v. Bush	05-CV-1714 (RWR)	12/14/2005
Al-Bahooth v. Bush	05-CV-1666 (ESH)	12/20/2005
Al-Uwaidah v. Bush	05-CV-1668 (GK)	12/28/2005
Al-Mithali v. Bush	05-CV-2186 (ESH)	12/28/2005
Hamoud v. Bush	05-CV-1894 (RWR)	07/05/2006
Zadran v. Bush	05-CV-2367 (RWR)	07/19/2006
Said v. Bush	05-CV-2384 (RWR)	07/25/2005
Alsaaei v. Bush	05-CV-2369 (RWR)	08/14/2006
Thabid v. Bush	05-CV-2398 (ESH)	09/25/2006

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

_____)	
SUHAIL ABDU ANAM, <i>et al.</i> ,)	
)	
Petitioners,)	
)	
v.)	Civil Action No. 04-CV-1194 (HHK)
)	
GEORGE W. BUSH,)	
<i>et al.</i> ,)	
)	
Respondents.)	
_____)	

ORDER

Upon petitioners' February 15, 2008 motion for report concerning destruction of evidence and for amended preservation order, it is hereby

ORDERED that the motion is denied.

Dated:

UNITED STATES DISTRICT JUDGE