

Exhibit A

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July 22, 2005

The Honorable Porter J. Goss
Director
Central Intelligence Agency
Office of Public Affairs
Washington, D.C. 20505

Re: ***Preservation Order***

Dear Mr. Goss:

The purpose of this letter is to put you on notice of the Memorandum Opinion and Order issued by Judge Roberts on July 18, 2005 in *Abdullah et al. v. Bush et al.* Civil Action No 05-23 (RWR) and *El-Banna et al. v. Bush et al.*, Civil Action No. 04-1144 (RWR).

We take the position that the Central Intelligence Agency is bound by this Order. Thus, the Agency is required to preserve all relevant documents in its possession and is required to notify all employees, agents, and contractors who may possess documents that fall within the purview of this Order to do the same.

In pertinent part, the Order reads:

Respondents shall preserve and maintain all evidence, documents and information, without limitation, now or ever in respondents' possession, custody or control, regarding the individual detained petitioners in these cases.

For your information, the individuals covered by this Order are Jamil El-Banna, Bisher Al-Rawi, Hani Saleh Rashid Abdullah, Rami Al-Oteibi, and Abdullah Al Rashaidan.

Also enclosed is a copy of Attachment E to Petitioners' Motion for a Preservation Order, which identifies documents and things that are known to exist. Since this list of documents was before Judge Roberts at the time he issued his Order, we believe it constitutes a partial list of the documents that must be preserved.

Peter J. Goss
July 22, 2005
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If you have any questions, please do not hesitate to contact me.

Sincerely,

A handwritten signature in black ink, appearing to read "G. Mickum, IV". The signature is stylized with a large initial "G" and a horizontal line extending to the right.

George Brent Mickum, IV

Enclosures

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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| JAMIL EL-BANNA <u>et al.</u> , |) |) | |
| |) |) | |
| Petitioners, |) |) | |
| |) |) | |
| v. |) |) | Civil Action No. 04-1144 (RWR) |
| |) |) | |
| GEORGE W. BUSH <u>et al.</u> , |) |) | |
| |) |) | |
| Respondents. |) |) | |
| <hr/> | |) | |
| HANI SALEH RASHID ABDULLAH |) |) | |
| <u>et al.</u> , |) |) | |
| |) |) | |
| Petitioners, |) |) | |
| |) |) | |
| v. |) |) | Civil Action No. 05-23 (RWR) |
| |) |) | |
| GEORGE W. BUSH <u>et al.</u> , |) |) | |
| |) |) | |
| Respondents. |) |) | |
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MEMORANDUM OPINION AND ORDER

Petitioners in each of the above-captioned habeas corpus proceedings -- foreign nationals detained at Guantanamo Bay in the custody of the United States, or their next friends -- seek an order directing respondents to "preserve and maintain all evidence, documents, and information regarding the torture, mistreatment, and abuse of detainees now at the Guantanamo Bay detention facility, and to preserve and maintain all evidence, documents and information relating or referring to Petitioners."

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(Mot. for Preservation Order.)¹ Respondents oppose each motion, arguing that the requested order is superfluous in light of their well-understood preservation obligations, yet also overbroad and burdensome. (Opp'n at 5, 7.)² Because a preservation order can be appropriate in a habeas corpus proceeding, but is only partially warranted here, petitioners' motions will be granted in part and denied in part.

Respondents argue that because they are well aware of their preservation obligations, to "supplement every complaint with an order requiring compliance with the Rules of Civil Procedure would be a superfluous and wasteful task, and would likely create no more incentive upon the parties than already exists." (Opp'n at 5, quoting Hester v. Bayer Corp., 206 F.R.D. 683, 685 (M.D. Ala. 2001)).³ Respondents then conclude that petitioners'

¹ El-Banna, Dkt. 145; Abdullah, Dkt. 30.

² El-Banna, Dkt. 147; Abdullah, Dkt. 32.

³ The parties advocate different standards for preservation orders, a dispute that need not be resolved here. First, the distinction between the standard articulated in Pueblo of Laguna v. United States, 60 Fed. Cl. 133 (2004), urged by petitioners, and the standard four-factor test employed in preliminary injunction decisions, urged by respondents (see Opp'n at 3), may be one without a practical difference. See also, Hester, 206 F.R.D. at 685. Second, respondents argue that a preservation order must meet the test of a preliminary injunction (Opp'n at 3), but also concede that the Federal Rules of Civil Procedure impose preservation obligations on civil litigants in every civil action filed, automatically and without court review (Opp'n

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requested order is both "overbroad and potentially burdensome to the extent that it goes beyond what might otherwise be permissible with respect to any discovery that might ever be appropriate in a habeas case." (Opp'n at 7, citing Harris v. Nelson, 394 U.S. 296, 300 (1969).)

The Supreme Court's opinion in Harris v. Nelson makes clear that the discovery provisions of the Federal Rules of Civil Procedure do not automatically apply in whole to federal habeas corpus proceedings. See 394 U.S. at 294 n. 5, 298-99. Therefore, the preservation obligations that flow to a litigant from the federal discovery rules cannot be presumed to apply to habeas litigants absent some express application by a court. Accordingly, a preservation order in habeas proceedings, particularly in proceedings such as these where there has been no full disclosure of the facts on the public record to authorize the challenged detention, is not superfluous or unnecessary.

Further, Harris v. Nelson also makes clear that a district court's authority to issue orders pursuant to 28 U.S.C. § 1651 in aid of its fact-finding obligations in habeas corpus proceedings is intended to be flexible and should be exercised as the circumstances require for a proper and just disposition.

at 5), two positions in tension with each other.

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[The Supreme Court has] held explicitly that the purpose and function of the All Writs Act to supply the courts with the instruments needed to perform their duty [to issue orders appropriate to assist them in conducting factual inquiries] . . . extend to habeas corpus proceedings.

At any time in the [habeas corpus] proceedings, when the court considers that it is necessary to do so in order that a fair and meaningful evidentiary hearing may be held so that the court may properly "dispose of the matter as law and justice require," either on its own motion or upon cause shown by the petitioner, it may issue such writs and take or authorize such proceedings with respect to development, before or in conjunction with the hearing of the facts relevant to the claims advanced by the parties, as may be "necessary or appropriate in aid of [its jurisdiction] . . . and agreeable to the usages and principles of law." 28 U.S.C. § 1651.

. . . Obviously, in exercising this power, the court may utilize familiar procedures, as appropriate, whether these are found in the civil or criminal rules or elsewhere in the "usages and principles of law."

394 U.S. at 299-300 (footnote omitted). The opinion in Harris v.

Nelson does not support respondents' suggestion that the

requested preservation order "goes beyond . . . any discovery

that might ever be appropriate in a habeas case." (Opp'n at 7.)⁴

⁴ Respondents' statement, that "Petitioners' proposal improperly, and without good cause, would put respondents in the position of having to take action with respect to a wide range of documents without having the opportunity to utilize the process of objection and litigation available in the discovery context to fine tune or challenge discovery requested based on, for example, overbreadth, relevance, or burden" (Opp'n at 7), mistakenly equates preservation obligations with production obligations and erroneously presumes that respondents will have no opportunity to litigate future discovery requests.

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To the contrary, "the power of inquiry on federal habeas corpus is plenary" and its exercise depends entirely on the circumstances. Harris v. Nelson, 394 U.S. at 291.

Petitioners' filings challenge the fact and duration of their custody as being in violation of the Constitution or laws or treaties of the United States, matters that are cognizable under the general habeas statute. See Rasul v. Bush, 124 S.Ct. 2686, 2698 (2005) ("§ 2241 confers . . . jurisdiction to hear petitioners' habeas corpus challenges to the legality of their detention at the Guantanamo Bay Naval Base"); Chatman-Bey v. Thornburgh, 864 F.2d 804, 807 (D.C. Cir. 1988) (a prisoner's challenge to the date on which he was eligible to be considered for parole "falls comfortably within the broad reach of habeas corpus"). The petitions also raise other complaints for which habeas relief has not been foreclosed, namely, that certain conditions they face in detention constitute violations of specific provisions of the Constitution, laws or treaties of the United States. See Preiser v. Rodriguez, 411 U.S. 475, 499 (1973) ("When a [state] prisoner is put under additional and unconstitutional restraints during his lawful custody, it is arguable that habeas corpus will lie to remove the restraints making the custody illegal.") (citation omitted); Johnson v. Avery, 393 U.S. 483 (1969) (removing restraint on the habeas

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corpus petitioner's ability to assist fellow prisoners in writing). The preservation order requested is tailored to preserve "documents and information in . . . [respondents'] possession" that may be "relevant to litigation or potential litigation or are reasonably calculated to lead to the discovery of admissible evidence." Wm. T. Thompson Co. v. General Nutrition Corp., 593 F. Supp. 1443, 1455 (C.D. Cal. 1984).

Documents evidencing treatment of detainees -- whether statements of official policy, cumulative evidence of specific practices, or something else -- may be probative of the treatment of petitioners or may lead to other probative evidence. The requested order imposes no greater obligation on respondents than the federal discovery rules' preservation obligations impose on a litigant in a typical civil lawsuit. Respondents' contrary view of the requested order (Opp'n at 7) may underscore the need for a preservation order.

However, since the very preservation order sought by petitioners for all materials regarding treatment of all Guantanamo Bay detainees has already been issued against the same respondents in Al-Marri v. Bush, Civ. No. 04-2035 (D.D.C. Mar. 7, 2005) (Order), and Abdah v. Bush, Civ. No. 04-1254 (D.D.C. June 10, 2005) (Order), respondents here are already under a duty to

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**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF
PETITIONERS' MOTION FOR PRESERVATION ORDER**

Petitioners Jamil El-Banna and Bisher al-Rawi, ("Petitioners"), through their undersigned counsel, respectfully move this Court to Order the respondents to preserve and maintain all evidence, documents, and information regarding the torture, mistreatment, and abuse of detainees now at the Guantanamo Bay detention facility, and to preserve and maintain all evidence, documents, and information relating or referring to Petitioners.¹ A preservation order is critical to the fair adjudication of this case, particularly because Respondents have sought and received stays of the prosecution of these proceedings and because Respondents refuse to provide all relevant evidence and information relating to Petitioners.²

Respondents have had a full and fair opportunity to oppose a motion for a nearly identical Order in *Jarallah Al Marri v. Bush*, Civ. No. 04-2035 (GK), and in *Abdul-Salam Gaithan Mureef Al-Shiry v. Bush*, Civ. No. 05-0490 (PLF). In both of those cases, the District Court issued an

¹ As used in this motion, "documents" has the full meaning given it under Fed.R.Civ.Pro. 33.

² Pursuant to LCvR 7(m), the undersigned conferred with Respondents' counsel via e-mail regarding this Motion for Preservation Order and Respondents' counsel indicated that they would not consent.

Order requiring preservation of evidence similar to the order sought here. *See Jarallah Al Marri v. Bush*, Civ. No. 04-2035 (GK) (March 7, 2005) (Exhibit A); *Abdul-Salam Gaithan Mureef Al-Shiry v. Bush*, Civ. No. 05-0490 (PLF) (March 23, 2005) (Exhibit B). Under familiar principles of collateral estoppel, this Court should issue a similar order. *See Parklane Hosier Co. v. Shore*, 439 U.S. 322, 331-33 (1979).

Apart from the previous rulings, a preservation order is needed in this case. This Court is empowered to enter such an order when circumstances warrant it. *Pueblo of Laguna v. United States*, 60 Fed. Cl. 133, 138 n.8 (2004); *see also United States v. Philip Morris USA, Inc.*, 327 F. Supp. 2d 21, 23 (D.D.C. 2004) (discussing document preservation order). The court in *Pueblo of Laguna* set forth a two-part test to determine when such an order should issue. It required that the party seeking “a preservation order demonstrate that it is [1] necessary and [2] not unduly burdensome.” *Pueblo of Laguna*, 60 Fed. Cl. at 138.³

Here, the first prong is easily met: there is legitimate concern that Respondents will not maintain sensitive evidence it now possesses about the torture, mistreatment, and abuse of the detainees now at Guantanamo. The FBI has produced records pursuant to a Freedom of Information Act lawsuit by the American Civil Liberties Union that document efforts by the military to “cover up” evidence of the physical abuse of detainees. *See Urgent Report*, dated June 25, 2004 (Exhibit C). Specifically, FBI email confirms that unnamed individuals

³ The Petitioners need not meet the burdens associated with a preliminary injunction. As the Court of Federal Claims explained in *Pueblo of Laguna*, “[a] document preservation order is no more an injunction than an order requiring a party to identify witnesses or to produce documents in discovery.” 60 Fed. Cl. at 138 n.8. Although such pretrial and discovery orders take the basic form of an injunction (an order to do or not to do something), the case law shows that, in issuing them, courts need not observe the rigors of the four-factor analysis ordinarily employed in issuing injunctions. *Jarallah Al-Marri v. Bush*, Civ. No. 04-2035; *see also Pueblo of Laguna*, at 138 n.8 (court’s case management power, rather than power to enter injunction, is basis for preservation order); *Casey v. Planned Parenthood*, 14 F.3d 848, 854 (3d Cir. 1994) (distinguishing such pretrial orders from injunctions for appeal purposes). “In the court’s view, such an approach [requiring the movant to meet the burden normally required for an injunction] would be decidedly to put the cart before the horse.” *Pueblo of Laguna*, at 138 n.8.

“observed numerous physical abuse incidents includ[ing] strangulation, beatings, placement of lit cigarettes into the detainees['] ear openings, and unauthorized interrogations.” *Id.* at 2.

The email further reports that unnamed individuals “were engaged in a cover-up of these abuses.” *Id.* The specific “cover-up efforts” were identified in the email, but redacted before it was produced. *Id.* *The New York Times* also has reported that the military’s own investigations into detainee abuse were harmed because “crucial witnesses were not interviewed, documents disappeared, and at least a few pieces of evidence were mishandled.” Tim Golden, “Army Faltered in Investigating Detainee Abuse,” *The New York Times*, May 22, 2005, at A1 (Exhibit D) (referencing “confidential documents from the investigation obtained by *The New York Times*”).

This very specific report warrants immediate issuance of the order. But there is much more. Ten days ago, *The New York Times* reported that two prisoners in military custody had been murdered by their U.S. military jailers. *Id.* This comes on top of numerous reports of torture, prisoner kidnapping (rendition), and ingenious physical and psychological abuse of prisoners in military custody in connection with our “war on terror.”

We fully expect the Government’s attorneys to argue that no order is needed here because Respondents “are fully aware of their responsibilities not to destroy evidence.” Counsel’s assurance hardly suffices in light of the foregoing track record. The pattern of lawless tactics visited by the military apparatus against its prisoners belie any such assurances. An order is needed.

The second prong, too, is met. The District Court, in entering a previous order, specifically found that “entering a preservation order [against Respondents] will inflict no harm or prejudice upon them.” *Jarallah Al-Marri v. Bush*, Civ. No. 04-2035 (GK).

The loss of evidence regarding Petitioners' detention and possible mistreatment or torture could irreparably harm Petitioners by depriving them of proof that their present imprisonment is unlawful and is thus depriving them of their liberty. In contrast, it would be no burden at all on the Government to preserve this evidence. Therefore, the Court should enter an order requiring the Government to preserve all information about the torture, mistreatment, and abuse of the detainees now at Guantanamo, as well as all information regarding the recommendations to continue their imprisonment or release and repatriate them.

Without limiting the breadth of the requested Preservation Order, petitioners seek preservation of specific categories of documents as set out in Exhibit E, all of which relate to Petitioners' detention. Petitioners request that the Preservation Order specifically prevent Respondents (or any agent of Respondents) from destroying any of the categories of documents identified in this Exhibit. These records will be very important in pursuing Petitioners' claims, and the Government should be required to preserve them pending a resolution of this matter. Until the Court of Appeals clarifies the matter, no one knows exactly what procedure and evidentiary rules will govern the eventual determinations of "enemy combatant" status which the Supreme Court said in *Rasul* must underlie lawful imprisonment. Whatever these rules are, the statements made by prisoners to their captors and the conditions under which they made them are bound to play a pivotal role. The respondents have every reason to camouflage the circumstance under which such "admissions," as they deem useful, were made.

WHEREFORE, for the foregoing reasons, the motion should be granted. A proposed order is attached hereto.

Respectfully submitted,

Barbara Olshansky (NY #0057),
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Counsel for Petitioners

Dated: June 1, 2005

EXHIBIT E

Civil Nos. 04-1144 (RWR)

DOCUMENTS PETITIONERS BELIEVE EXIST OR EXISTED

The following list describes documents that Petitioners have been told exist. To the extent any of the documents listed below may be called or referred to by another name or names, Petitioners respectfully request that any Order entered by this Court be sufficiently broad to encompass the same.

- **Knowledgeability Briefs**

A document, sometimes referred to as a knowledgeability brief, is prepared by an interrogation team before a prisoner or detainee arrives at Guantanamo. It contains the prisoner's name, family background, date of birth, a summary of the reasons for detention, and may include an inventory of the personalty the prisoner had at the time of capture. Copies of these documents are transferred back to Washington.

- **Detainee Dossiers**

Detainee dossiers are created and maintained. They contain all the information provided by the prisoner to his interrogators and all interrogation results, even if a prisoner refused to talk. Dossiers include original notes from interrogations that took place at locations where prisoners were incarcerated prior to Guantanamo as well as interrogations that took place at Guantanamo. It also contains "interrogation plans" (*see below*) that are prepared by the interrogation team and reviewed and approved by various authorities at Guantanamo. Dossiers also include instructions that the interrogator gave regarding the prisoner's treatment, as well as all cell transfers, incentive action justifications, and punishments.

- **Interrogation Team Records**

Each detainee is assigned to an interrogation team that consists of an interrogator, analyst, translator, law enforcement, and a Behavioral Science Consulting Team ("BSCT") member. Each of these team members is likely to maintain his or her own records regarding the detainee.

- **BSCT Records**

BSCT maintains records that are separate from those shared with the interrogation team.

- **Interrogation Plans**

Interrogation teams prepared and submitted a detailed interrogation plans for every interrogation for each detainee. These plans were approved by the Team Chief, the Executive Officer, and the Commander of the Interrogation Section.

- **Medical Records**

All prisoners received a physical immediately upon arrival. In addition, additional medical examinations of prisoners have taken place over the past several years, resulting in the creation of additional medical records. Detainee medical records were available to interrogators. Included in medical records would be psychological records.

- **Intelligence Reports**

Various government agencies (including, but not limited to, the FBI, CIA, NSA, OGA) maintained their own files both at Guantanamo and in other offices.

- **Videos**

Guantanamo maintains videos of all visits by foreign officials (including, but not limited to, military intelligence, MI5, etc.). Some or all of these videos may be maintained on the computer system. An index exists that identifies these videos by country of visitor.

- **Emergency Reaction Force**

The emergency reaction force was frequently videotaped.

- **Photographs**

Photographs exist of all prisoners. Some of these photographs show prisoners who were badly beaten. At least some of the photographs showing these injuries were later replaced with new photographs that do not depict injured prisoners.

- **Polygraphs**

Most prisoners have been subjected to one or more polygraph tests. On information and belief, all prisoners incarcerated at Camp IV have received polygraph tests.

- **Voice Prints and Voice Stress Tests**

Voice prints were taken of the prisoners and at least some prisoners had voice stress tests conducted on them.

- **Computer Records**

Respondents have a variety of computer records that relate to the prisoners. These include, but are not limited to, the Joint Detention Operation Group Records ("JDOG"), which contains a record of every incident, every prisoner request (for

example medial or dental requests), and every prisoner infraction. The Interrogation Control Element ("ICE") is another important set of prisoner-related records.

- **Prisoner Numbers**

Each prisoner was issued four different identification numbers, including, but not limited to, INS Numbers and numbers assigned by MPs.

- **System of Rewards**

These documents describe four levels of rewards and a series of privileges that interrogators can bestow upon the detainees.

- **Audio Tapes**

Recordings of some interrogations were made.

- **Mail**

Copies of all redacted and unredacted letters to and from the detainees

- **Other Reports or Other Documents**

Any and all other reports or documents related to petitioners.