



DEPARTMENT OF DEFENSE
OFFICE OF THE CHIEF DEFENSE COUNSEL
1600 DEFENSE PENTAGON
WASHINGTON, DC 20301-1600

June 9, 2008

BY HAND DELIVERY

Hon. William K. Suter, Clerk
Supreme Court of the United States
One First Street, N.E.
Washington, D.C. 20543

Re: No. 06-1196, Al-Odah, et al., v. United States, et al.

Dear General Suter:

I am Counsel of Record for Omar A. Khadr, Respondent Supporting Petitioners in the above-captioned case. I am also the Detailed Defense Counsel for Mr. Khadr in the military commission case of *United States v. Omar A. Khadr*. Mr. Khadr is a 21 year-old Canadian citizen, currently detained as an "enemy combatant" by the United States at the Guantanamo Bay Naval Station.

Pursuant to Supreme Court Rule 32, I wish to seek permission to lodge with the Court an appropriately-redacted copy of the "Tiger Team Standard Operating Procedure (SOP) for the JTF GTMO Joint Intelligence Group (JIG) Interrogation Control Element (ICE)" (hereinafter the "Tiger Team SOP"). I became aware of this document on June 5 and 6, 2008, while reviewing at the prosecution's offices materials provided to the defense in the course of discovery in Mr. Khadr's pending military commission case. The Tiger Team SOP is an attachment to the "Schmidt-Furlow Report," a Department of Defense investigation into allegations of detainee abuse at the Guantanamo Bay Naval Station. Portions of the Schmidt-Furlow Report have been declassified. The Tiger Team SOP is a classified attachment to the Report. However, the paragraphs of the Tiger Team SOP are individually marked as to their level of classification, and the portions relevant to the above-captioned case (and described in general terms below) are *unclassified* portions of the Tiger Team SOP. Upon leaving the prosecution offices on June 6, 2008, I confirmed with counsel for the government that it would be appropriate to use information from the unclassified portions of the Tiger Team SOP in an unclassified filing.

The Tiger Team SOP sets forth procedures that apply to analyst and interrogator teams serving within the Joint Interrogation Group ("JIG") of the Guantanamo Bay Joint Task Force ("JTF"). The relevant portion of the SOP provides that once interrogators have created formal notes or an Intelligence Information Report ("IIR"), they may destroy their handwritten notes. It



further notes, in connection with this provision, that the JTF's mission raises legal and political issues that may require interrogators to offer testimony, and suggests that minimizing the number of interrogation-related documents may minimize the legal issues that arise.

The Tiger Team SOP may properly be considered by the Court because it is both relevant to the above-captioned case and an appropriate subject for judicial notice. One central issue in this case is whether the CSRT process offers an adequate substitute for habeas corpus. That determination, in turn, rests in part on the adequacy of the detainees' ability to challenge the factual basis of their confinement, and the adequacy of the procedures by which they will be tried by military commission. The relevant portions of the Tiger Team SOP speak directly to the scope of the evidence that will be available to detainees in disputing both Combatant Status Review Tribunal ("CSRT") findings that they are "enemy combatants," and their guilt, should they be tried in front of a military commission.

For example, unlike the Federal Rules of Evidence applicable in federal habeas proceedings, the CSRT procedures permit the introduction of hearsay evidence. *See, e.g.*, Order Establishing Combatant Status Review Tribunal (Deputy Secretary of Defense July 7, 2004) ("CSRT Reg.") ¶ g(9); 10 U.S.C. § 949a(b)(2)(E)(i). The relevant portions of the Tiger Team SOP suggest that interrogators were systematically encouraged to destroy the records and documents that could impeach the very kind of hearsay, such as IRRs and formal interrogation notes, upon which the government will likely rely before CSRTs and military commissions. The SOP is therefore directly relevant to whether the CSRT procedures will in practice provide an adequate mechanism for challenging detention. Similarly, when Congress passed the Detainee Treatment Act and the Department of Defense created the CSRTs, they envisioned that both the CSRTs and the Court of Appeals for the D.C. Circuit would be able to review "any reasonably available information generated in connection with the initial determination to hold the detainee as an enemy combatant and any subsequent reviews of that determination, as well as any reasonably available records, determinations, or reports generated in connection therewith." CSRT Reg. ¶ g(7). The Tiger Team SOP is again directly relevant to the scope of the information that would actually be "available" to a CSRT or court reviewing a detention determination.

The Tiger Team SOP is also an appropriate subject for judicial notice. Under the Federal Rules of Evidence, "[a] judicially noticed fact must be one not subject to reasonable dispute in that it is . . . capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b). Under this Rule, courts have repeatedly taken judicial notice of policy and procedure statements issued by governmental bodies. *See, e.g.*, *U.S. v. Thornton*, 511 F.3d 1221, 1229 n.5 (9th Cir. 2008) ("we note that a current [Bureau of Prisons] policy statement, of which we take judicial notice, indicates the BOP is able to approve and pay for organ transplants at approved transplant centers"); *Shakuur v. Costello*, 230 F. App'x 199 (3d Cir. 2007) (per curiam) ("We take judicial notice of [Philadelphia Prison System's] internal grievance procedures."); *Bannum, Inc. v. United States*, 404 F.3d 1346, 1352 & n.2 (Fed. Cir. 2005) ("a 1992 Policy Letter explains that if evaluation is done by a contracting officer, contractors have a right to discuss such evaluation 'with the head

of the contracting activity” and “[t]he court takes judicial notice of this Policy Letter under Fed. R. Evid. 201(c)”; *cf. Texas & P. Ry. Co. v. Pottorff*, 291 U.S. 245, 254 (1934) (“facts of which we take judicial notice indicate that among national banks such action must have been deemed contrary to good banking practice”).

I have requested that the prosecution provide Mr. Khadr’s defense team with a copy of the Tiger Team SOP as soon as possible. In light of the scope of the military commission’s previous rulings relating to the scope of discovery, I expect to receive a copy of the Tiger Team SOP before the end of the week, and would then be prepared to lodge immediately an appropriately-redacted, unclassified version of the document with this Court.

In the alternative, should the Tiger Team SOP not be produced this week, I would be prepared to file, and hereby request permission to file, a sworn Affidavit supplying my own verbatim transcriptions of the relevant unclassified portions of the Tiger Team SOP.

Thank you very much for your time and assistance.

Very truly yours,


William C. Kuebler
LCDR, JAGC, USN

No. 06-1196

IN THE SUPREME COURT OF THE UNITED STATES

Khaled A.F. Al Odah, *et al.*, *Petitioners*,

v.

United States of America, *et al.*, *Respondents*.

PROOF OF SERVICE

I, William C. Kuebler, a member of the Bar of this Court, hereby certify that all parties required by the Rules of this Court to be served have been served with my Letter to the Hon. William K. Suter dated June 9, 2008. A copy of the letter has been sent by hand delivery to:

Paul D. Clement
Solicitor General of the United States
Room 5614, Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, DC 20530-0001
(202) 514-2217

In addition, a copy of the letter was mailed by first-class mail, postage prepaid, to each of the following:

Thomas B. Wilner
SHEARMAN & STERLING LLP
801 Pennsylvania Avenue, N.W.
Washington, DC 20004
(202) 508-8000


Phillip Allen Lacovara
MAYER BROWN ROWE & MAW LLP
1675 Broadway
New York, NY 10019
(212) 506-2500

Karma B. Brown
HUNTON & WILLIAMS LLP
1900 K Street, N.W.
Washington, DC 20006
(202) 955-1893

David J. Cynamon
PILLSBURY WINTHROP SHAW PITTMAN LLP
2300 N Street, N.W.
Washington, DC 20037
(202) 663-8492

Seth P. Waxman
WILMER CUTLER PICKERING HALE & DORR LLP
1875 Pennsylvania Avenue, N.W.
Washington, DC 20006
(202) 663-6800

Dated: June 9, 2008



William A. Kuebler
LCDR, JAGC, USN