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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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MAHMOAD ABDAH, et al, Civil Case No.
v. 04-1254
GEORGE W. BUSH, JR., et al, Washington, D. C.
Defendants. Friday, December 21, 2007
11:00 A.M.
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TRANSCRIPT OF MOTION HEARING
BEFORE THE HONORABLE HENRY H. KENNEDY, JR.
UNITED STATES DISTRICT JUDGE

APPEARANCES:

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Civil Division
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Court Reporter: ANNIE R. SHAW, RPR
U.S. District Courthouse
333 Constitution Ave., NW
Room 6722
Washington, D. C. 20001

Proceedings recorded by machine shorthand, transcript produced
by computer-aided transcription.

1 P-R-O-C-E-E-D-I-N-G-S

2 (11:01 A.M.)

3 THE DEPUTY CLERK: Civil Action 04-1254, Mahmoad
4 Abdah, et al versus George W. Bush, Jr., et al.

5 Counsel, please step to the podium and state your
6 appearances for the record.

7 THE COURT: And what I would ask you to do, because
8 there are many attorneys in the courtroom and at counsel table,
9 is for one attorney to come forward, indicate who he or she is,
10 and also identify those people who are seated at counsel table
11 with you.

12 First for petitioners.

13 MR. REMES: Good morning, Your Honor. My name is
14 David Remes. I'm here for the defendants in 04-1254. With me
15 is Skye Perryman, an associate at Covington & Burling, and
16 Jonathan Huber, a valuable legal assistant at Covington &
17 Burling.

18 THE COURT: Mr. Huber is permitted to remain in the
19 well of the court and be seated at counsel's table.

20 MR. REMES: Thank you, Your Honor.

21 MR. HUNT: Good morning, Your Honor. Jody Hunt for
22 the government. With me --

23 THE COURT: Excuse me. Are you also known as Joseph?

24 MR. HUNT: Yes, Your Honor, that's sometimes a source
25 of confusion. Officially Joseph, but I'm known best by Jody,

1 J-O-D-Y. With me at counsel table are Carl Nichols, James Luh,
2 Andrew Warden, and Judry Subar.

3 THE COURT: Very well.

4 Before we begin, I believe it would be helpful to the
5 parties to precisely identify the purpose of this hearing. And
6 that way, hopefully, your arguments will be more focused than
7 they otherwise might be. Simply put, what I have done is to
8 schedule a hearing on the petitioner's motion that was filed on
9 December 9th, which is captioned as my notice setting forth the
10 purpose of the hearing indicates, Emergency Motion for Inquiry
11 into Respondent's Compliance with Document Preservation Order.

12 The order to which the motion refers, of course, is
13 this court's order of June 10th, 2005. It is important for
14 counsel to appreciate that this court has not granted the
15 motion for an inquiry. It is a motion to schedule a hearing.
16 And that is what we are here to discuss, that is whether the
17 Court should schedule a hearing in order for inquiry to be made
18 regarding the respondent's compliance with the Document
19 Preservation Order.

20 You will be permitted to give your prepared arguments.
21 However, at some point the parties should address some
22 questions that I have. First for the respondents, the Court
23 understands that the respondents assert that this court does
24 not have jurisdiction over the petitioners' petition in this
25 case. And, indeed, the court is aware that the D.C. Circuit

1 held in *Boumediene* that this court does not have jurisdiction
2 over the habeas petition that underlies this action. And,
3 indeed, I believe it simply cannot be disputed that that is the
4 law of this Circuit, that is, again, that this court does not
5 have jurisdiction of the underlying petition.

6 It is, of course, the case that the Supreme Court of
7 the United States has granted certiorari and will review the
8 D.C. Circuit's decision in this regard.

9 One question that I have of the respondents is whether
10 its position that *Boumediene* strips this court of jurisdiction
11 to enforce whether it's the respondents' position that because
12 this court does not have jurisdiction of the underlying
13 petition, it perforce does not have jurisdiction to enforce or
14 to inquire into compliance with the court's 2005 Document
15 Preservation Order?

16 For the petitioners the court would want you to
17 address specifically the form of the inquiry which the
18 petitioner seek here in its motion filed on December 9th, which
19 was on a Sunday. The petitioners sought an emergency hearing
20 seeking the court to hold a hearing on the next day. And the
21 request was that the court order that the respondents produce a
22 party, a representative from any agency, I suppose, that might
23 have information regarding compliance with its order, for
24 review on that Monday, the next day, by this court. And the
25 request was that, I suppose, that these persons be made

1 available for questioning in a court on Tuesday as well by the
2 petitioners.

3 I do wish the petitioners to be specific in indicating
4 the form of inquiry, or make clear what this inquiry -- and
5 make clear what this inquiry seeks to accomplish.

6 In resisting the request for a hearing, the
7 respondents make several points, three primary ones. First,
8 that based on the petitioners' own allegations, the tapes at
9 issue were not covered by this court's Preservation Order. And
10 it's a matter of record as to what the court's Preservation
11 Order said. And it says that there shall be a preservation of
12 any evidence of torture, mistreatment and abuse of detainees
13 now at the United States Naval Base in Guantanamo Bay, Cuba.
14 That is those detainees at Guantanamo on June 10, 2005, were
15 the detainees that were covered by the terms of the order.

16 And respondents say, well, by its very nature, given
17 what petitioners bring to the court's attention, that is that
18 there was a revelation of the destruction of tapes of
19 interrogation of Mr. Abu Zubaydah, by the Central Intelligence
20 Agency not at Guantanamo Bay, Cuba, that there is no -- that
21 plaintiffs have not raised, and has not presented any basis for
22 thinking that this was a violation of the court's order that
23 governs persons who were at Guantanamo Bay.

24 I suppose that is the first thing that the petitioners
25 would have to address. That is by -- that is that it is clear,

1 respondents would say, that there is simply no basis for
2 thinking that there is a violation of the court's order.

3 Respondents say that the court should stay its hand,
4 or not embark on any type of inquiry because Department of
5 Justice, in an effort headed by Mr. Kenneth Wainstein, will
6 conduct an inquiry into the destruction of the tapes of the
7 interrogation of Mr. Abu Zubaydah.

8 I would want to know whether it is anticipated that
9 there will be a report by Mr. Wainstein of his inquiry that he
10 will share with this court. I ask that question because I
11 appreciate, again, that the government's position is that this
12 court does not have jurisdiction over petitioners' petition,
13 which, as I have indicated, at this point is the law of this
14 Circuit.

15 Given the lack of jurisdiction over petitioners'
16 cases, Mr. Wainstein's position could be that he has no reason,
17 and thus will not share the results of his investigation with
18 this court, that is without jurisdiction over the case in the
19 first place, and that the court is not empowered to concern
20 itself with an alleged violation on its own order.

21 So I wish for the respondents to address the point.

22 Respondents say that there is no evidence that there
23 has been a violation of this court's Preservation Order.
24 Assuming that the court shares that view, does the Department
25 of Justice nevertheless -- is the Department of Justice,

1 nevertheless, willing to assure this court that should its
2 inquiry disclose a reason to believe that the Preservation
3 Order has been violated, that it will pursue the matter,
4 notwithstanding its assertion that the court does not have
5 jurisdiction, and so inform the court?

6 Those are matters that at some point during your
7 presentation you should address.

8 Mr. Remes, I'll hear from you first.

9 MR. REMES: Thank you, Your Honor.

10 THE COURT: Have I pronounced your name correctly, Mr.
11 Remes?

12 MR. REMES: Yes, sir.

13 At the outset I would like to ask the court to
14 construe our motion as going beyond a potential violation of
15 this protective order. We have made clear in the filing
16 subsequent to our original motion that our concern goes beyond
17 that issue to the government's general compliance with its
18 acknowledged obligation to preserve potentially relevant
19 evidence. The government has been put on notice that that is
20 the broader and more general purpose of our inquiry. And we
21 believe that it's a legitimate subject to address in this
22 proceeding for the same reason that the question about the
23 government's compliance with the Preservation Order entered by
24 this court is justifiable. So we would request, respectfully,
25 that our motion be construed in that light.

1 I'll begin by stating the fundamental principle here,
2 well-stated by Judge Francis Allegra of the Federal Claims
3 Court just this year. Aside perhaps from perjury, no act
4 serves to threaten the integrity of the judicial process more
5 than the spoliation of evidence. And courts have held that,
6 like any other litigant, the United States is subject to
7 spoliation sanctions.

8 The revelation of the CIA's destruction of videotapes
9 of interrogation of Abu Zubaydah and al-Nashiri raise serious
10 questions about whether the government has complied with the
11 court's Preservation Order in this case and it's more general
12 obligation to preserve potentially relevant evidence to this
13 case which was, of course, pending at the time that this court
14 issued its Preservation Order and the violation potentially
15 occurred with respect to these videotapes.

16 With respect to the question of why we believe that
17 the Preservation Order was violated, Your Honor, I have to say
18 that our point is that where there is smoke there is fire.
19 That where the government has destroyed potentially relevant
20 evidence, that it should have been on notice it needed to
21 preserve, with respect to these particular videotapes, the
22 question arises whether it has destroyed evidence that is
23 directly covered by the court's Preservation Order, and that
24 it's covered by the government's more general obligation to
25 preserve evidence.

1 THE COURT: Mr. Remes, now could you be faulted by --
2 your argument be faulted by the proposition that you have
3 assumed the fact that actually would be the matter under
4 investigation, that is whether there has been the destruction
5 of relevant evidence period.

6 MR. REMES: No, sir, we do not assume the fact of a
7 violation of the Court's Preservation Order. We assume that
8 the government's destruction of potentially relevant evidence
9 in these cases raises a concern about its handling of other
10 relevant evidence that warrants at least measured inquiry by
11 this court.

12 The court made clear in its order entering its
13 Preservation Order that because of the absolute secrecy with
14 which the government has treated its interrogations, that it's
15 difficult for petitioners to have a very clear and direct and
16 concrete and specific handle on what the government has been
17 doing. But in this case we have a smoking gun, as it were,
18 with respect to the government's destruction of potentially
19 relevant evidence. And, again, this is not a question that's
20 limited to the Preservation Order entered by the court.

21 Now, with respect to the opposition of the government,
22 many have construed the government's opposition to our motion
23 to say that they deny that Mr. Abu Zubaydah was at Guantanamo
24 on the day that the order of this court was entered. I believe
25 that a close reading of their opposition shows that their

1 statements were a carefully worded non-denial. They did not
2 deny that he was there. They did not deny that he was tortured
3 there at that time. All they said was, we haven't shown that
4 he was.

5 Again, in light of the destruction of the videotapes
6 of his interrogation, and in light of our restricted access to
7 this information, it's very difficult for us to make that
8 allegation or showing, but we believe that the destruction of
9 the videotapes places the burden on the government, not on us,
10 to show that it did not violate the Preservation Order in this
11 case, or its more general obligation to preserve evidence.

12 As we have noted in our most recent submission -- and
13 I apologize to the court for the flurry of submissions that we
14 have made -- the same types of interrogation techniques that
15 were at issue -- I don't mean the same types of techniques -- I
16 mean the same types of records of interrogations that were made
17 with respect to Abu Zubaydah were made in Guantanamo, according
18 to source with personal knowledge of this, who has requested
19 anonymity, although under conditions of very tight secrecy,
20 we'd be prepared to identify him. He was an interrogator,
21 participated in many interrogations. And we believe that his
22 account of all of the various records that were made of
23 interrogations is correct, as well as the account by Mr. Saar,
24 a translator, and later a supervisor intelligence at
25 Guantanamo. Videotaped recording were made. Audiotape

1 recordings were made. Detailed records were made. These
2 records may document torture techniques, and these records may
3 have the notorious 18-minute gap so reminiscent of Nixon days.
4 If we discover that there are gaps in the evidence that's been
5 preserved by the government, we will have serious cause to be
6 concerned that any of their evidence in support of our clients'
7 designation as enemy combatants is legitimate and reliable.

8 With respect to Your Honor's question about --

9 THE COURT: Excuse me, Mr. Remes.

10 (Court Reporter spoke off the
11 record with the Court.)

12 MR. REMES: In the specific case that we brought to
13 the court's attention, and this is unclassified information
14 from the government's unclassified factual return from this
15 individual, a senior al-Qaeda lieutenant identified our client,
16 Mohammed Hassen, H-A-S-S-E-N, who is a citizen of Yemen, who
17 was captured in a guest house on Crescent Street in Faisalabad,
18 Pakistan. Who is the senior al-Qaeda lieutenant? Was it one
19 of the individuals who was videotaped? Was it another
20 individual who was interrogated and whose statements about
21 Mr. Hassen were extracted by torture? We will never know the
22 answer to that question unless inquiry is made. But it is a
23 very pertinent question, I believe, and that, that that is
24 clear.

25 The reason that we filed our emergency motion, Your

1 Honor, is that a revelation of spoliation, we believe,
2 warranted very prompt attention in the event that further
3 spoliation was underway. Once a party has admitted destroying
4 evidence, there is no reason to assume that they are continuing
5 to preserve other evidence. And that's why we sought very,
6 very prompt treatment.

7 I believe I have addressed what our inquiry hopes to
8 accomplish, the handling of evidence that relates to our
9 clients, and that would include all records of statements made
10 by other prisoners, which is the almost exclusive basis for the
11 accusations, government's accusations against our clients, all
12 extracted from other prisoners, all potentially extracted by
13 the same type of torture that was practiced on Abu Zubaydah.
14 And in that connection, we would urge the Court to proceed
15 slowly, incrementally, one step at a time, perhaps by requiring
16 the government to make available logs of all evidence regarding
17 statements obtained from other prisoners relating to how our
18 clients, on which the government has relied in making its
19 determination that the client was an enemy combatant, and that
20 the government might be called upon to submit, if the Supreme
21 Court holds that this Court has jurisdiction, substantively,
22 and a habeas inquiry is made, or, indeed, the inquiry under the
23 Detainee Treatment Act that congress passed as a purported
24 substitute for these habeas proceedings.

25 We believe that it's a fundamental power of the court

1 to preserve its jurisdiction pending the Supreme Court's
2 resolution of the issue, because between now and that time if
3 evidence is destroyed, it will render the court's ability to
4 adjudicate the habeas cases, or the D. C. Circuit's ability to
5 adjudicate the DTA cases seriously impaired.

6 With respect to the court's jurisdiction, this court,
7 of course, maintains jurisdiction over this case. The court
8 has not dismissed the case, nor have any of the other 12 or 13
9 District Court judges, with the singular exception of Judge
10 Robertson, who is currently considering a motion to reconsider.
11 The court still has jurisdiction over the case.

12 The government argues that the *Boumediene* decision by
13 the D.C. Circuit withdrew jurisdiction. We would submit that
14 this court must maintain the status quo pending the Supreme
15 Court's ultimate resolution of that issue. And, moreover, the
16 D.C. Circuit itself has allowed the District Courts to maintain
17 jurisdiction over these cases pending the resolution by the
18 Supreme Court of the *Boumediene* case in its *Ginco* decision.
19 And I'm pleased to provide the citation. The D.C. Circuit
20 denied the government motion to dismiss the cases and remanded
21 to the District Courts to determine in the first instance
22 whether to dismiss the cases or stay the cases. The discretion
23 that the D.C. Circuit left the District Court to stay the cases
24 indicates that the D.C. Circuit is prepared to allow the
25 District Courts to maintain jurisdiction over the cases.

1 And in order to preserve your jurisdiction, Your
2 Honor, we believe that it's essential to make sure that
3 evidence is preserved and the documents and other records of
4 interrogations have not been destroyed.

5 THE COURT: It is the case, is it not, that that is
6 exactly the posture of the case, of this case, that is that the
7 court was faced with a motion to dismiss, but did not grant it,
8 and, indeed, stayed the case?

9 MR. REMES: Yes, Your Honor. But these cases have
10 been stayed since January 31st, 2005, when Judge Green granted
11 the government's motion for a stay pending an interlocutory
12 appeal. Nevertheless, every judge in this court has entered
13 ancillary orders, such as the Preservation Order that Your
14 Honor entered in 2005, notwithstanding the fact that the cases
15 were stayed.

16 The court has inherent power to maintain its
17 jurisdiction, to preserve its jurisdiction, to preserve the
18 status quo. And that's all that we are asking this court to do
19 in this case, to preserve the status quo by insuring that
20 further evidence relevant to our clients' cases are not
21 destroyed, and to determine the extent of destruction that has
22 already taken place.

23 We believe that with respect to the stay permitted by
24 the D.C. Circuit, it doesn't change things because the cases
25 have been stayed since January 31st, 2005.

1 THE COURT: Mr. Remes, one of the arguments which
2 respondents make here is that Department of Justice is going
3 about the business of conducting an investigation regarding the
4 destruction of tapes by the CIA, again, Mr. Kenneth Wainstein,
5 who is the head of the Division of the Department of Justice
6 that is doing that. Why should the court not permit the
7 Department of Justice to do this, since courts of law in this
8 country, unlike courts of law in other countries such as in
9 France where there are investigatory magistrates, or
10 magistrates vested with the power and authority to investigate
11 crimes -- and let me just say here that the violation of a
12 court order is like a crime. Some would say it is a crime.
13 But it's at least certainly like a crime. The Department of
14 Justice has indicated that it will investigate. Why shouldn't
15 the court permit the Department of Justice to do just that,
16 since it is the law enforcing agency of this, of this country?

17 MR. REMES: Well, Your Honor, we are not asking for
18 this court to compete with the Justice Department or with
19 Congress, for that matter, and conduct a parallel review of the
20 nature that's ongoing with those other branches of government.
21 Moreover, the focus of those investigations is limited to two
22 videotapes, and perhaps one audiotape. The issue of whether
23 the government has violated the court's protective order or its
24 more general obligation to preserve potentially relevant
25 evidence in our cases is broader and more general than the

1 issue of whether two videotapes were destroyed.

2 So I believe that that is the fundamental answer that
3 we could give. The court needs to protect the integrity of its
4 orders, and protect the integrity of the administration of
5 justice within the judicial system. Whatever else Congress may
6 be doing, or the Justice Department may be doing, they cannot
7 substitute themselves for this court in serving those
8 interests. This is about pending cases, this is about a
9 litigant's behavior in pending cases. That is not the focus of
10 the Congressional investigations, it is not the focus of the
11 Executive branch's investigation. And in any event, the
12 inquiry that we are calling for is more general than those
13 investigations.

14 We are not asking the court to step beyond its proper
15 judicial function here. We are asking the court to exercise
16 its proper judicial function here, with all respect.

17 Beyond the -- beyond the initial request that we would
18 make, if this court were to proceed, for logs of its records of
19 interrogations of prisoners whose statements the government has
20 relied on, or may rely on to justify the detention of our
21 clients, it may be that down the road we would request
22 testimony from government officials or depositions from
23 government officials. The papers have reported, as I'm sure
24 Your Honor is aware, that officials in the White House,
25 government lawyers like David Addington, Harriet Miers, Alberto

1 Gonzales, and John Bellinger, as well as CIA Deputy General
2 Counsel, John Rizzo, and General Counsel Scott Muller, had been
3 involved in discussions about how to handle the CIA's
4 videotapes that were destroyed. They may well have been
5 involved in other document destruction or evidence preservation
6 issues. It may never be necessary or appropriate to call those
7 individuals. But we don't rule out the possibility of
8 deposing, at least deposing some government officials, whether
9 it's officials so high, or officials less high, who may have
10 been involved in decision-making about how to handle the
11 evidence that's relevant to our clients.

12 Many records were kept. Other -- many records may
13 have been destroyed. It may not be absolutely clear from the
14 logs that the government produces. So while we do not request
15 that, and we would be loath to request it, we can't rule out
16 the possibility of requesting it.

17 THE COURT: Well, what you have just said does
18 underscore what you have explicitly said, which is that your
19 request goes far beyond the motion that actually is the subject
20 of this hearing.

21 MR. REMES: Well --

22 THE COURT: Certainly as captioned.

23 MR. REMES: Your Honor, we styled that motion in an
24 effort to make an emergency filing the day after the "New York
25 Times" reported the destruction of these videotapes. In all of

1 our filings since then we have made clear that our interest is
2 in the government's compliance with its broad obligation, as
3 any litigant has, to preserve evidence that may be potentially
4 relevant to pending litigation.

5 We believe that the destruction of the videotapes
6 raises legitimate questions about the compliance with that
7 order -- I mean with that obligation.

8 And, Your Honor, if we need to file a new motion with
9 a new caption, we will be glad to do so.

10 THE COURT: Well, that's a bit dismissive of the point
11 that I --

12 MR. REMES: I did not mean to be dismissive, Your
13 Honor.

14 THE COURT: I know, sorry. I know that you didn't
15 intend to be. However, the response could be viewed as not
16 addressing the point that I made, which is that I scheduled a
17 hearing on one motion, and now I'm hearing argument with
18 respect to something else which is simply far broader than what
19 the motion initially sought.

20 And you indicate that -- you asked the court to -- you
21 make, indeed, even -- you make reference of the obligation of
22 the court to do various things. Well, what this court does is
23 to follow the law. And one essential thing in addressing
24 things is to put the other side on notice of what is being
25 sought, so that there can be a response to it.

1 So, the point -- I think I made the point, and I think
2 you have made your point, but I just do make the point, or
3 underscore that what you seek orally here seems to me to be
4 something that is much broader than was originally sought. And
5 I think you actually, you don't even dispute that.

6 MR. REMES: Just to leave the record specific --

7 THE COURT: Do you?

8 MR. REMES: We put the government on notice of this
9 in our previous filings.

10 THE COURT: Do you dispute the proposition that what
11 you are seeking from this court is something different from
12 what was sought by your motion that was filed on June 9th?

13 MR. REMES: Well, Your Honor, I would answer it this
14 way. We believe that we should be construed as asking for at
15 least what we captioned our motion for on December 9th, even if
16 the court is not prepared to go beyond the inquiry that would
17 be warranted to determine whether the government has violated
18 the Preservation Order that was entered by the court on
19 June 10, 2005.

20 In other words, we would be happy if the court would
21 grant that motion, as limited as it was. The request that we
22 made in that motion went to Your Honor's order, which was
23 whether or not -- which was, as you indicated at the very
24 beginning, "The government shall preserve and maintain all
25 evidence and information regarding the torture, mistreatment

1 and abuse of detainees now at the United States Naval Base at
2 Guantanamo Bay." We still have 11 petitioners who were there
3 at the time. And there still remain scores of other prisoners,
4 if not hundreds of other prisoners who were there at the time.

5 So even if the issue doesn't go to subsequent --
6 spoliation with respect to subsequently arrived prisoners, we
7 believe that the order at least goes to the question of whether
8 the government has destroyed evidence and information regarding
9 the torture, mistreatment and abuse of detainees now at the
10 United States Naval Base at Guantanamo Bay.

11 If Your Honor believes that no inquiry that goes
12 beyond the government's compliance with that Preservation Order
13 is warranted, we would be delighted by an order granting our
14 motion as styled.

15 I would be pleased to answer any further questions by
16 the court. Otherwise, I have probably gone on long enough, if
17 not too long.

18 THE COURT: Not at this time.

19 Mr. Hunt.

20 MR. HUNT: Good morning again, Your Honor. Jody Hunt,
21 counsel for the government.

22 THE COURT: Good morning.

23 MR. HUNT: I appreciate Your Honor affording us an
24 opportunity to give prepared remarks, in addition to answering
25 specific questions. And I think what I would propose to do is

1 start with prepared remarks that I have, because I think what I
2 will have to say to the court is important with respect to at
3 least some of the court's questions, and then respond to the
4 court's questions.

5 There are two principle reasons, Your Honor, why I
6 think it is not necessary and, indeed, would be unwise for the
7 court to hold an evidentiary hearing of the nature that has
8 been requested by petitioners.

9 First, Your Honor, because it is inconceivable that
10 the destroyed tapes could have been about abuse, mistreatment
11 or torture of detainees at Guantanamo Bay. And, second, Your
12 Honor, because an evidentiary hearing likely would compromise
13 the integrity of the Department of Justice's inquiry into the
14 matter.

15 And before elaborating on those two points, Your
16 Honor, I want to stress that we take very seriously allegations
17 that the government has not complied with its preservation
18 obligations. It is for that reason, among others, that the
19 National Security Division of the Department of Justice has
20 opened an inquiry into this matter.

21 First, Your Honor, with respect to the point that it
22 is inconceivable that these tapes could have been about abuse,
23 mistreatment or torture of detainees at Guantanamo Bay, I would
24 say to the court first, Your Honor, that the destroyed tapes
25 depicted only two detainees, Mr. Abu Zubaydah and

1 Mr. al-Nashiri. The tapes did not depict any other detainees,
2 including petitioners in this case.

3 Mr. Zubaydah was captured in March of 2002.

4 Mr. al-Nashiri was captured in November of 2002. Neither
5 Mr. Zubaydah nor Mr. al-Nashiri was at Guantanamo Bay during
6 the taping of these videos, that is the tapes were not created
7 at Guantanamo Bay. The videotapes that were destroyed were
8 recorded in their entirety, from beginning to end, in 2002
9 before either detainee ever had been to Guantanamo Bay.

10 Following their capture, neither Mr. Zubaydah nor
11 Mr. al-Nashiri was in contact with any other detainee during
12 the period in which the tapes were made.

13 It is inconceivable, therefore, Your Honor, that when
14 they were taped in 2002, before they had ever been to
15 Guantanamo Bay, and were not in contact with any other
16 detainees, that the tapes could speak to abuse, torture, or
17 mistreatment of detainees at Guantanamo Bay. Indeed, I am
18 informed, Your Honor, that the tapes did not contain any
19 information relating to the treatment of the petitioners in
20 this case.

21 Again, Mr. Zubaydah, Mr. al-Nashiri would have had no
22 opportunity in 2002, when the tapes were made, to observe or
23 provide any information relating to the treatment of Guantanamo
24 detainees in 2005 when the order was entered, and thus the
25 tapes could not have contained any such information.

1 Your Honor, to hold an evidentiary hearing with
2 respect to this matter threatens the Department of Justice's
3 inquiry that is already open.

4 As Your Honor well knows, prosecutors go about their
5 jobs gathering facts methodically and in an orderly fashion,
6 and then looks at all the facts once they have gathered them in
7 order to apply them against the law to see whether or not to
8 pursue an investigation and to bring criminal charges.

9 I can tell Your Honor that the scope of the National
10 Security Division's inquiry includes whether the destruction of
11 the tapes was inconsistent with or violated any legal
12 obligations, including those arising out of civil matters such
13 as Your Honor's Order of June 2005.

14 If facts are disclosed, Your Honor, in the course of
15 an evidentiary hearing by this court, it could do damage to the
16 integrity of the National Security Division's inquiry, and
17 potentially to its ability to prosecute people who may have
18 violated their legal obligations. Witnesses could seek to
19 conform their testimony to testimony given in an evidentiary
20 hearing, for example. Witnesses could seek to conform their
21 testimony to documents that may be provided in the course of an
22 evidentiary hearing. Witnesses may seek immunity, complicating
23 the ability of the prosecutors to inquire into certain matters,
24 or even eventually to prosecute the very people who might need
25 to be prosecuted for violation of some legal obligation.

1 Your Honor, you have asked if our -- if it is our
2 position that this court lacks jurisdiction to inquire into
3 whether there was compliance with Your Honor's June 2005 Order.
4 That is not our position, Your Honor. We are not arguing that
5 the court lacks jurisdiction to inquire into compliance with
6 the court's own order entered by the court in this case.
7 Rather, our reason for raising the jurisdictional question was
8 to suggest that it would be the prudent thing, in light of the
9 fact that, as the law stands, this court lacks jurisdiction
10 over the petition, the subject matter jurisdiction over the
11 petition, that that's yet another reason to caution against an
12 evidentiary hearing at this time.

13 And, Your Honor, to the extent that evidence that
14 would come out in the course of that would go to the issue that
15 petitioners surely must be concerned about, whether there is
16 information there that may be useful for their petition
17 eventually, and what they seek through their petition, that
18 would go to the question eventually of whether or not there is
19 jurisdiction.

20 And so, therefore, Your Honor, we raise the
21 jurisdictional question not to say that you do not have
22 jurisdiction to inquire, but to say that's a reason to caution,
23 among other reasons, as to why the court should not now have
24 the evidentiary hearing that the petitioners request.

25 You also asked, Your Honor, if it's anticipated there

1 would be a report of the investigation, would that be shared
2 with the court. I do not know at this time, Your Honor, if
3 Mr. Wainstein will do a report of his investigation. But I
4 would commit to Your Honor on behalf of the Department of
5 Justice now that if the National Security Division concludes
6 that there was a violation of this court's order, we would so
7 advise the court.

8 And, Your Honor, also asked would we, the Department
9 of Justice, be prepared to advise the court that we would
10 pursue the matter if we were to find a violation of this
11 court's order. And I, of course, Your Honor, cannot speak to
12 the prosecutorial discretion of Mr. Wainstein, Your Honor, but
13 as I just noted, when he concludes whether there is a violation
14 of the court's order, were we to so advise the court, as I have
15 committed to do if this was a violation the court's order, I
16 would submit that the court could at that time determine
17 whether or not it wished to pursue that matter. And it may
18 very well be that it would be known or not at that juncture
19 whether or not there was a criminal charge brought with respect
20 to that issue.

21 Your Honor, those were the only remarks I had that
22 were prepared, and I hope those addressed the questions that
23 you asked.

24 And for the reasons stated, Your Honor, we think it
25 would be unwise and imprudent to have an evidentiary hearing of

1 the nature requested.

2 THE COURT: Anything further, Mr. Remes?

3 MR. REMES: Yes, Your Honor, thank you.

4 The first point that I want to make arising from the
5 government's argument is that his representation that the tapes
6 in question were made before either detainee was at Guantanamo
7 does not go to the question of whether they were at Guantanamo
8 on the date that the court entered its order and, therefore,
9 begs the question of whether methods of interrogation that were
10 used on them violated the court's Protective Order.

11 The second point I would like to make, Your Honor,
12 with respect to this evidentiary hearing point, is that we do
13 not contemplate depositions, we do not contemplate hearings of
14 live witnesses on the stand. We contemplate a request that in
15 effect would be in the nature of interrogatories only.

16 I have to underscore "only", it's an extremely modest
17 request that we are making.

18 Finally, Your Honor, I don't think in view of the
19 destruction of these videotapes, that the government is
20 entitled to a presumption of regularity.

21 Here you have the Justice Department, which may have
22 actually sanctioned the destruction of these videotapes, now
23 asking the court to stay out on the ground that it's
24 investigating the destruction of these videotapes. I must say,
25 without meaning to be rhetorical, but perhaps being rhetorical,

1 that this is leaving the fox in charge of the henhouse.

2 And in any event, as I have mentioned earlier, the
3 inquiry into whether these particular videotapes were destroyed
4 in an improper way is a narrower inquiry than the question of
5 whether the government has complied with its obligations under
6 the court's protective order. Whatever the Justice Department
7 may report will not go to that question.

8 THE COURT: All right. The court takes its decision
9 under advisement.

10 THE DEPUTY CLERK: Court is in recess.

11 (Recessed at 11:57 a.m.)

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CERTIFICATE OF COURT REPORTER

I, ANNIE R. SHAW, certify that the foregoing is a correct transcript from the record of proceedings in the above matter.

Date: December 21, 2007

Signature of Court Reporter