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AND CLEARED FOR PUBLIC FILING

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

HANI SALEH RASHID ABDULLAH, <i>et al.</i> ,	)	
	)	
<i>Petitioners,</i>	)	
	)	
v.	)	No. 05-0023 (RWR)
	)	
GEORGE W. BUSH, <i>et al.</i> ,	)	
	)	
<i>Respondents.</i>	)	

**PETITIONER’S MOTION FOR ACCESS TO  
DECLARATION OF WENDY M. HILTON**

On March 17, in response to this Court’s orders of January 24, 2008 and February 14, 2008, Respondents filed three papers: a two-page Report, a two-page declaration of a DOD lawyer, and a declaration of one Wendy Hilton, a staff employee of the Central Intelligence Agency. The first two items were publicly filed. The Hilton declaration was designated “Ex Parte and Under Seal.” No motion, as required by Local Rule 5.1(j), sought permission for such treatment and no order authorized such treatment on the *ipse dixit* of a party or government official.<sup>1</sup> Thus the materials so submitted are to be considered a part of the public

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<sup>1</sup> Contrast the careful request for *ex parte* treatment in the government’s unsuccessful rehearing request to Circuit in *Bismullah*, which was supported by cabinet level declarations filed contemporaneously with the petition for rehearing. The blunderbuss approach of entitlement by the filing absent the required motion

record by virtue of the text of that rule. Thereafter, Respondents publicly filed a redacted version of the Hilton declaration with considerably less than one half of the declaration readable and the remainder blacked out. The present motion seeks disclosure of the blacked out portion.

1. The underlying purpose of this court's July 18, 2005 Preservation Order was to assure that evidence relevant to Petitioner's *habeas* petition was preserved so that when the hearing to which he claimed entitlement was held, such evidence would be available to inform the fact-finder. The Hilton declaration confirms that pivotal evidence – the tapes of Abu Zubayda's interrogation – was destroyed, but that other records reflecting the fruits of the taped interrogations, such as emails, cables and the like, have been preserved. But such materials are not likely to show what was done to Mr. Zubayda before he disgorged whatever was then put into an email, cable, or other communication to headquarters. Such detail, however, is exactly what is needed to explore whether what Mr. Zubayda said concerning Petitioner was extracted by torture or not. If extracted by torture, of course, both under the Military Commissions Act and the common law, a court may not use

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evinces the same mindset that has led to kidnappings (rendition), and the very evidence destruction sought to be investigated by the Court's January 24, 2008 order. It is yet another denigration by the Executive of the role of courts and assertion that the Executive alone makes the rules.

such evidence.<sup>2</sup> Thus the admitted facts of destruction, and evidentiary presumptions based thereon, are very much an issue in the hearing expected to follow the Supreme Court's reversal of the Circuit's decision in *Boumedienne*. While this has not yet happened, in light of the five votes needed to grant the

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<sup>2</sup> This was a core guarantee at common law – the categorical prohibition on the use of torture. During the sixteenth century, crown officials occasionally issued warrants authorizing the torture of prisoners. John H. Langbein, *Torture and the Law of Proof: Europe and England in the Ancient Regime* 130 (1977) (hereinafter “*Langbein*”). Pain was inflicted by a variety of ingenious devices, including thumbscrews, pincers, and the infamous rack. David Hope, *TORTURE*, 53 Int'l & Comp. L. Q., 807, 811 (2004). The use of torture declined after a subsequent investigation showed that a suspected traitor had been “tortured upon the rack” based upon false allegations. *Langbein*, at 130-31.

Shortly thereafter, Charles I asked the Law Lords whether another suspected traitor (John Felton who had murdered a close friend of the King) “might not be racked” to make him identify accomplices, and “whether there were any law against it.” The judges’ answer was unanimous: the prisoner could not be tortured as the Lords declared unanimously “to their own honour and the honour of English law,” that “no such punishment is known or allowed by our law.” *Proceedings Against John Felton*, 3 Howell’s St. Tr. 367, 371 (1628). This longstanding common law prohibition was recently reaffirmed in the unanimous decision of a specially convened panel of seven members of the House of Lords. (*See also A (FC) v. Secretary of State*, [2005] UKHL 71, at 52). In ruling that evidence obtained by the torture of witnesses by a foreign State could not be admitted even when the United Kingdom had not been complicit in the torture, the law lords explained that “the common law has regarded torture and its fruits with abhorrence for over 500 years” – an abhorrence “now shared by over 140 countries which have acceded to the Torture Convention.” *Id.* ¶ 51 (per Lord Bingham). This categorical prohibition against evidence obtained by torture has long been a distinguishing feature of the common law, not simply because of its “inherent unreliability” but also because “it degraded all those who lent themselves to the practice.” *Id.* ¶ 11.

petition for rehearing on *certiorari*, such hearings are both very likely and imminent, in terms of the timescale of this litigation.

2. Counsel expects to meet with Mr. Abdullah between April 6 and April 9, 2008, on a visit already approved by local authorities. Before that meeting, counsel needs to review what the entire declaration has to say. While this might have been done at the Secure Facility – had Respondents not waived under the local rule any claim of secrecy – it need not be. The document is now public.<sup>3</sup> Such review will be essential in formulating strategy, advising Mr. Abdullah of what next steps are in his interest and other matters, none of which require the discussion of the content of the Declaration, which if classified, cannot be discussed with him.

3. As the court is aware, counsel are subject to the protective order entered in this case which will amply protect the nation's secrets from disclosure.

4. Accordingly, Petitioner requests immediate access to the full Hilton declaration.

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<sup>3</sup> Should the court feel it inappropriate to enforce the waiver, the Declaration could still be viewed in the Secure Facility.

Respectfully submitted,

Shayana Kadidal (DC #454248)  
CENTER FOR CONSTITUTIONAL  
RIGHTS  
666 Broadway, 7th Floor  
New York, New York 10012  
Tel: (212) 614-6439  
Fax: (212) 614-6499

*Of Counsel for Petitioners*

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          /s/ Stephen M. Truitt            
Stephen M. Truitt (DC # 13235 )  
600 Fourteenth Street, N.W.  
Suite 500, Hamilton Square  
Washington, DC 20005-2004  
Tel: (202) 220-1452  
Fax: 202 220 1665

Charles H. Carpenter (DC #432004)  
PEPPER HAMILTON LLP  
600 Fourteenth Street, N.W.  
Suite 500, Hamilton Square  
Washington, DC 20005-2004  
Tel: (202) 220-1507  
Fax: (202) 220-1665

*Counsel for Petitioners*