

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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JARALLAH AL-MARRI, <i>et al.</i> ,)	
)	
Petitioners,)	
)	
v.)	Civil Action No. 04-CV-2035 (GK)
)	
GEORGE W. BUSH,)	
President of the United States,)	
<i>et al.</i> ,)	
)	
Respondents.)	
_____)	

**PETITIONER’S REPLY TO RESPONDENTS’ OPPOSITION TO REPORT ON
THEIR COMPLIANCE WITH THE COURT’S PRESERVATION ORDER OF
MARCH 7, 2005, AND THEIR OBLIGATION TO PRESERVE POTENTIALLY
RELEVANT EVIDENCE**

The government argues that the Court should forego any inquiry into destruction of potentially relevant evidence because Abu Zubaydah, one of the two subjects of the destroyed CIA interrogation tapes, “is not a petitioner in this matter,” because Zubaydah was not “a detainee at Guantanamo Bay” when the Court entered its preservation order on March 7, 2005, and because the tapes do not contain information regarding torture or other abuse of detainees held at Guantanamo Bay in March 2005. (Opp. at 1-2). But the government is confused. It is confused about Petitioner’s motion; it is confused about its obligation to preserve potentially relevant evidence both under and independently of the Court’s preservation order; and it is confused about the Court’s inherent power to investigate, prevent, and remedy spoliation of potentially relevant evidence in cases before it.

The CIA admits that it destroyed video recordings of interrogations of at least two detainees formerly held in U.S.-run prisons. That destruction, moreover, occurred in the face of repeated congressional and judicial demands for the recordings. At a minimum, the CIA's conduct raises serious concerns about the destruction of potentially relevant evidence in this case. Accordingly, the Court should inquire whether potentially relevant evidence has been destroyed, remedy any such destruction, and prevent the destruction of evidence going forward.

I. An Inquiry into Possible Destruction of Potentially Relevant Evidence Is Appropriate and Warranted.

A federal court has inherent authority to prevent, sanction, and remedy the destruction of potentially relevant and discoverable evidence. *See, e.g., Chambers v. NASCO, Inc.*, 501 U.S. 32, 43-45 (1991); *Telecom Intern. America, Ltd. v. AT & T Corp.*, 189 F.R.D. 76, 81 (S.D.N.Y. 1999). This authority exists even in the absence of a discovery order, as part of the Court's inherent power to supervise the litigation before it. *See, e.g., Unigard Sec. Ins. Co. v. Lakewood Eng'g & Mfg. Corp.*, 982 F.2d 363, 368 (9th Cir. 1992); *Telecom Intern.*, 189 F.R.D. at 81 (citing *Chambers*, 501 U.S. at 43-45). Sanctions are intended not only to deter future destruction but to remedy past spoliation, including by minimizing the prejudice to the harmed party. *See Vodusek v. Bayliner Marine Corp.*, 71 F.3d 148, 156 (4th Cir. 1995) (sanctions aimed at "leveling the evidentiary playing field" as well as "sanctioning the improper conduct"); *see also National Hockey League v. Metro. Hockey Club, Inc.*, 427 U.S. 639, 643 (1976). A court's authority in crafting sanctions for spoliation is broad. *West v. Goodyear Tire & Rubber Co.*, 167 F.3d 776, 779 (2d Cir. 1999). Possible remedial measures include reconstruction of the destroyed evidence. *Jefferson v. Reno*, 123 F. Supp. 2d 1, 2 (D.D.C.

2000) (describing court orders issued upon status conference with the parties, requiring reconstruction of the destroyed records, and allowing discovery on the circumstances surrounding destruction of documents); *Landmark Legal Foundation v. E.P.A.*, 272 F. Supp. 2d 59, 67 (D.D.C. 2003). Those measures also include allowing discovery into the destruction or removal of the relevant evidence against a defendant or third party. *Judicial Watch, Inc. v. United States Dep't of Commerce*, 34 F. Supp. 2d 28, 46 (D.D.C. 1998) (*Judicial Watch I*); *Judicial Watch, Inc. v. United States Dep't of Commerce*, No. CIV. A. 95-133 (RCL), 2000 WL 33243469, at *1-*2 (D.D.C. Dec. 5, 2000) (*Judicial Watch II*).

Here, the government was on notice by no later than November 2004, when Petitioner commenced this action, of its obligation to preserve potentially relevant evidence. *See Kronisch v. United States*, 150 F.3d 112, 126 (2d Cir. 1998); *Telecom Intern.*, 189 F.R.D. at 81; *Scott v. I.B.M. Corp.*, 196 F.R.D. 233, 249 (D.N.J. 2000). The category of potentially relevant evidence includes all documents, records, and recordings of interrogations, not only of Petitioner but of any other individual(s) on whose statements the government relies or intends to rely, or upon whom Petitioner might rely. Petitioner has detailed his concerns about the government's use of evidence gained through harsh interrogation techniques in this case. *See Mot.* at 3, ¶¶ 8-9 (describing specific concerns).¹ Evidence of how and under what circumstances statements against

¹ The CIA has acknowledged destroying recordings of interrogations that occurred in 2002. *See* "Director's Statement on the Taping of Early Detainee Interrogations," December 6, 2007, attached as Exhibit D to Petitioner's Motion. Evidence suggests that recordings continued at least through 2003. *See* Declaration of Mohamed Farag Ahmad Bashmilah in Support of Plaintiffs' Opposition to the United States' Motion to Dismiss or, in the Alternative, for Summary Judgment, *Mohamed et al. v. Jeppesen Dataplan*,

Petitioner were obtained is plainly relevant, as statements gained through coercion are inherently unreliable. *See, e.g., Jackson v. Denno*, 378 U.S. 368, 385-86 (1964); *Spano v. New York*, 360 U.S. 315, 320 (1959); *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 472-73 (D.D.C. 2005). Thus, the government was and remains obligated to preserve all such evidence.

The CIA, nevertheless, has acknowledged destroying recordings of interrogations of two prisoners from the agency's secret detention program even though that evidence was potentially relevant to a number of Guantanamo detainee cases. *See* Mark Mazzetti & David Johnston, "Inquiry Begins into Destruction of Tapes," *New York Times*, December 9, 2007, attached as Exhibit G to Petitioner's Motion ("A review of records from military tribunals indicates that five lower-level detainees at Guantánamo Bay, Cuba, were initially charged with offenses based on information provided by or related to Abu Zubaydah."). The CIA's destruction of the tapes, moreover, occurred in the face of repeated congressional and judicial demands for the recordings. *See* Memo to Tom Keane & Lee Hamilton from Philip Zelikow, Dec. 13, 2007, available at <http://graphics8.nytimes.com/packages/pdf/national/20071222-INTEL-MEMO.pdf> (describing 9/11 Commission's repeated requests for "documents," "reports" and "information" related to the interrogations); Letter from Chuck Rosenberg dated Oct. 25, 2007, *United States v. Moussaoui*, attached as Exhibit C to Petitioner's Motion (discussing demands in 2003 and 2005 by District Judge Leonie M. Brinkema for any recordings of CIA interrogations).

Inc., No. 05:07-cv-02798 (N.D. Cal.), ¶¶ 64, 68-71, 76-79, available at <http://www.chrgj.org/projects/docs/declarationofbashmilah.pdf>.

The CIA's admitted destruction of interrogation tapes raises serious concerns about the destruction of potentially relevant evidence here. The Court should therefore conduct an inquiry into whether any potentially relevant evidence has been destroyed and provide appropriate relief for such destruction including ordering respondents to identify and reconstruct, in as much detail as possible, any potentially relevant documents, records, recordings, or other evidence that has been destroyed. The Court should also take all necessary steps to prevent any future destruction of evidence.

II. Pending Inquiries Do Not Obviate the Need for Judicial Intervention.

The government urges the Court to do nothing because the Department of Justice ("DOJ") has begun a criminal investigation into destruction of the CIA tapes. But the scope and purpose of DOJ's criminal investigation differs from the inquiry and attendant relief sought here. DOJ is investigating whether destruction of the tapes violated a criminal statute. *See, e.g.*, 18 U.S.C. §§ 1502(c), 1505 (obstruction of justice). It is not investigating the controlling matters before the Court: whether the government destroyed potentially relevant evidence in this case – an inquiry with a distinct focus from DOJ's criminal investigation and one which goes beyond the destroyed tapes that are the subject of that investigation. DOJ's investigation, moreover, is not meant to protect the interests of the parties or the integrity of the proceedings before the Court. In short, it does not replace the Court's independent duty to determine whether any potentially relevant evidence has been destroyed, to remedy that destruction, and to prevent any such destruction in the future.²

² The government (Opp. at 3 n.3) also points to CIA Director Michael V. Hayden's December 20, 2007 preservation order issued to all CIA personnel. But Hayden's order is entirely prospective. It neither says nor does anything about prior destruction of

III. This Court Retains Authority to Investigate and Remedy Spoliation of Evidence.

The government further argues that the Court should forgo any inquiry because it lacks jurisdiction over the petition under *Boumediene v. Bush*, 476 F.3d 981 (D.C. Cir. 2007), *cert. granted* 127 S. Ct. 3078 (June 29, 2007). But the Court has properly rejected similar arguments in the past. As the Court explained, the Supreme Court's highly unusual grant of certiorari on petition for rehearing in *Boumediene*, and the D.C. Circuit's subsequent withdrawal of the mandate, "cast a deep shadow of uncertainty over [*Boumediene's*] jurisdictional ruling." *Alhami v. Bush*, No. 05-359 (GK), slip op. at 6 (D.D.C. Oct. 2, 2007). Given this procedural posture, and the irreparable harm resulting from the destruction of potentially evidence relevant to Petitioner's challenge to his six-year-long military detention and possible future trial by military commission, "it is imperative that the Court protect its jurisdiction" over this matter. *Id.*³

The Court has jurisdiction under the All Writs Act to "issue all writs necessary or appropriate in aid of [its] jurisdiction." 28 U.S.C. § 1651; *see also United States v. United Mine Workers*, 330 U.S. 258, 290 (1947). Plainly, the Act encompasses the power to investigate and remedy the government's destruction of potentially relevant evidence in order to preserve Petitioner's ability to meaningfully challenge the lawfulness of his detention. *See Harris v. Nelson*, 394 U.S. 286, 299 (1969) (All Writs Act provides

potentially relevant evidence. Moreover, as to possible future destruction, it bears noting that the U.S. government previously acknowledged its obligation "not to destroy evidence that may be relevant in pending litigation." *See Respondents' Memorandum in Opposition to Petitioners' Motion for Leave to Take Discovery and for Preservation Order, In Re Guantanamo Detainee Cases* (D.D.C., filed Jan. 12, 2005), at 25. Yet, we now know, potentially relevant evidence was subsequently destroyed.

³ As the Court also noted, the D.C. Circuit has declined to vacate district court decisions granting interim relief. *See Al Gincio v. Bush*, No. 06-5191, slip op. at 2 (D.C. Cir. June 7, 2007).

“procedural instruments designed to achieve ‘the rationale ends of law’”) (quoting *Price v. Johnston*, 334 U.S. 266, 282 (1948)).

CONCLUSION

For the foregoing reasons, the motion should be granted.

Respectfully submitted,

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