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IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

MAJID KHAN,

Petitioner,

v.

ROBERT M. GATES,

Respondent.

No. 07-1324

REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF PETITIONER'S TORTURE MOTIONS

CENTER FOR CONSTITUTIONAL RIGHTS
J. Wells Dixon
Gitanjali S. Gutierrez
666 Broadway, 7th Floor
New York, New York 10012
Tel: (212) 614-6423
Fax: (212) 614-6499

Counsel for Petitioner

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Petitioner Majid Khan, by and through his undersigned counsel, respectfully submits this combined reply memorandum of law in further support of his motion for an order requiring the government to preserve all evidence relating to his torture, and his motion to declare that the interrogation methods inflicted on him constitute torture. Khan's motions should be granted.

I. CIA DESTRUCTION OF VIDEOTAPES OF WATERBOARDING CONFIRMS THE NEED FOR A PRESERVATION ORDER

In his preservation motion, Khan argues that he was subjected to a ruthless program of state-sanctioned torture. He also argues that a preservation order is required to ensure that documents and information relating to his torture and other

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unlawful coercion are not lost or destroyed, and are available for use in this action and other litigation or potential litigation involving him.

Respondent does not seriously dispute that Khan was tortured, or that the failure to preserve evidence of his torture would substantially impair the Court's ability to determine whether he is properly detained as an "enemy combatant."[1] Nor does Respondent seriously contest the Court's power to order preservation.[2] Respondent instead opposes Khan's motion on the ground that a preservation order is unnecessary because the relevant government agencies are "taking concerted action and are firmly committed to retaining any evidence relating to the treatment of [Khan] while in CIA custody." Opp'n at 5.[3] Respondent further contends that the government "would not compromise any potential investigation by destroying

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[1] Respondent states that the redactions to the public version of Khan's preservation motion "should not be understood to mean that the redacted material contains truthful claims," *see* Opp'n at 1 n.1, but does not dispute those claims.

[2] Respondent contends that the Court may not issue a preservation order in regard to any future commission proceedings because its jurisdiction is limited to reviewing "final" decisions entered in a military commission proceeding. *See* Opp'n at 10. Even if that were true, which Khan disputes, Respondent misconstrues his preservation argument with respect to the commissions – *i.e.*, that the Court's ability to review *any* commission decisions involving Khan would be substantially impaired by a failure to preserve evidence of his torture.

[3] Respondent argues that Khan has failed to satisfy the "irreparable harm" requirement for a preliminary injunction. *See* Opp'n at 5. But a preservation order is not a preliminary injunction, and, in any event, that standard is satisfied here. *See* Preservation Mot. at 11 & n.3.

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or sanctioning the destruction of documents." *Id.* at 7. According to Respondent, the Court should not issue a preservation order because "the material that is the subject of petitioner's motion is being preserved at the direction of the responsible agency officials." *Id.* at 9.

Respondent essentially argues that a preservation order is not necessary or appropriate because the CIA and other government agencies are "now firmly committed to preserving the existing records relating to CIA destruction." *Id.* at 7. Respondent thus appears to suggest that even though government officials may have previously lost, destroyed or suppressed evidence that they were required to preserve,[4] there is no risk that the government will continue to do so in the absence of a Court order. That argument strains credulity and should be rejected.

As an initial matter, the Court has already ordered the government preserve evidence relating to Khan. On December 11, 2007, the Court issued an interim order, *sua sponte*, requiring the government to take "all measures necessary to preserve the material described in [Khan's] motion for preservation of torture

[4] Respondent's suggestion that the many examples of spoliation set forth in Khan's motion lack "sufficient context" is meritless. *See* Opp'n at 9. Respondent also continues to argue that the government had no obligation to retain a compilation of the Government Information in Khan's case because it had no reason to believe that it would be required to produce that information as part of the record on review. *See* Opp'n at 8. But, again, Respondent overlooks the critical fact that Khan's CSRT was conducted in April 2007, *after* the scope of the record on review had been fully briefed by the parties in *Bismullah*.

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evidence pending the remainder of briefing on that motion and further order of the court." Although the Court stated that the order "should not be construed in any way as a ruling on the merits of the preservation motion," it effectively granted the relief sought by Khan's preservation motion. Respondent does not contend that a continuing or further preservation order would impose any additional burden on the government. Nor does Respondent provide any other basis for the Court to withdraw the preservation requirement.

Khan has shown a manifest need for a Court order requiring preservation of evidence relating to his torture and other unlawful coercion. As set forth in his opening brief, in the context of "enemy combatant" litigation, and particularly with respect to former CIA detainees, the government is simply no longer entitled to a presumption of regularity when discharging its existing preservation obligations. The government has repeatedly provided assurances that it would comply with its existing preservation obligations without the need for judicial intervention, *see* Preservation Mot. at 9, but those assurances have proven unreliable.

The Court need only consider the recent disclosures that CIA officials destroyed videotapes of prisoners Abu Zubaydah and Al Nashiri [redacted] to conclude there is a continuing, substantial risk of spoliation in this case. The tapes were destroyed in open defiance of existing court orders to preserve and produce such evidence.

Indeed, they were destroyed for the express purpose of avoiding judicial scrutiny and likely criminal liability for torture after the existence of the CIA "black sites" was publicly disclosed on November 2, 2005.[5] Simply stated, these disclosures establish beyond doubt that the CIA cannot be presumed to act lawfully or in good faith with respect to its preservation obligations.[6]

Notably, on December 6, 2007, General Michael Hayden, Director of the Central Intelligence Agency, publicly acknowledged the destruction of the tapes and stated in part that videotaping of interrogations "stopped in 2002." Statement to Employees by Director of the Central Intelligence Agency, General Michael Hayden, on the Taping of Early Detainee Interrogations (Dec. 6, 2007), *available at* http://www.cia.gov/news-information/press-releases-statements/ taping-of-early-detainee-interrogations.html. That statement was demonstrably incorrect.

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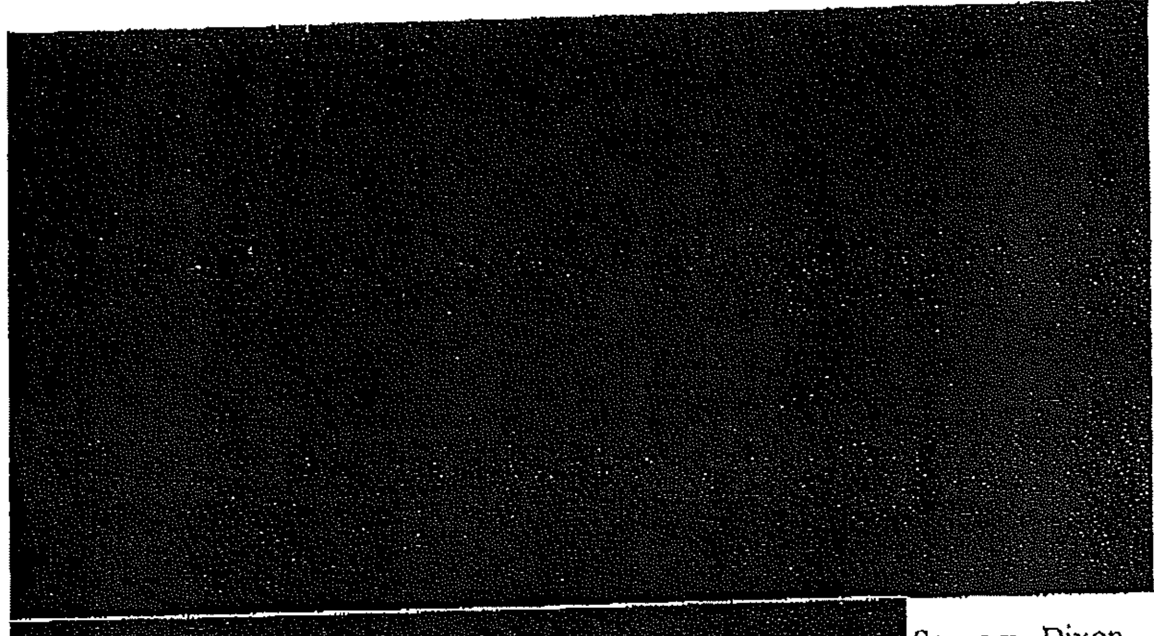
[5] *See, e.g.*, Mark Mazzetti, *C.I.A. Admits It Destroyed Tapes of Harsh Interrogations*, N.Y. Times, Dec. 6, 2007; Dan Eggen & Joby Warrick, *CIA Destroyed Videos Showing Interrogations*, Wash. Post, Dec. 7, 2007, at A1; Dan Eggen & Walter Pincus, *FBI, CIA Debate Significance of Terror Suspect*, Wash. Post, Dec. 18, 2007, at A1; Michael Abramowitz & Joby Warrick, *White House Lawyers Told of Videotapes*, Wash. Post, Dec. 20, 2007, at A3; Greg Miller, *Wagons Circled at CIA Over Tapes' Demise*, LA Times, Dec. 24, 2007.

[6] Although the Justice Department recently began a criminal investigation into the CIA's destruction of interrogation tapes, that inquiry does not conflict with the relief Khan seeks here. Khan does not ask the Court at this time to investigate the possible destruction of evidence in his case; he merely seeks preservation.

Moreover, in response to the publicly filed version of Khan's preservation motion and the recent disclosures about the tape destruction, other unnamed intelligence officials have made a series of false statements about Khan's imprisonment and torture in CIA custody. For instance, officials have said that his interrogations were not videotaped; that all videotaping stopped in 2002; and that enhanced interrogation techniques were used on only a small number of prisoners. *See* William Glabserson, *Man Held by C.I.A. Says He Was Tortured*, N.Y. Times, Dec. 8, 2007 ("An intelligence official speaking on the condition of anonymity said the C.I.A.'s interrogations of Mr. Khan were not videotaped."); Josh White, *Justice, CIA Begin Videotape Inquiry*, Wash. Post, Dec. 9, 2007, at A4 ("An intelligence official said yesterday that after 2002, the CIA did not produce interrogation videotapes similar to the ones destroyed."); Michael Melia, *Attorneys for Gitmo Terror Suspect Say He Was Tortured in CIA Custody*, Assoc. Press, Dec. 8, 2007 ("special methods of questioning" used on small number of suspects).

As set forth in the Gutierrez Declaration,



See, e.g., Dixon Decl., Ex. C at 15 (unclassified Human Rights Watch report describing CIA imprisonment of Marwan Jabour, including videotaping in 2004).

Against this backdrop, Respondent's assurances that the CIA and other government agencies have undertaken sufficient actions ensure preservation of evidence relating to Khan are unavailing.[7] To the contrary, inaccuracies in public

[7] Respondent's reliance on the declarations of General Hayden and Acting Defense Department General Counsel Daniel Dell'Orto is also misplaced. *See* Opp'n at 5-6 & Exs. B & C. Those declarations do not preclude the Court from continuing to require preservation. They merely indicate that the CIA and Defense Department have taken steps to preserve evidence relating to CIA prisoners. If that is correct and the government is preserving evidence of Khan's torture, then the government would suffer no harm from Court-ordered preservation.

It is also important to note that according to the Dell'Orto Declaration, the Defense Department General Counsel issued a directive in August 2005 requiring preservation of "certain evidence" relating to "all detainees ever held by the

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statements by senior intelligence officials about the tape destruction, and false statements about Khan's experience in CIA custody, raise substantial concern that torture evidence in this case may be lost or destroyed absent a Court order.

At a minimum, recent disclosures about the destruction and suppression of evidence illustrate that the CIA Torture Program is classified at such a high level of government and is so compartmented as to make it virtually impossible for CIA officials – even the CIA Director – to ensure that all relevant evidence is adequately preserved. *See, e.g.*, Preservation Mot., Ex. 9 (Justice Department letter describing "errors" in CIA declarations resulting from reliance on "assurances of the component of the CIA [redacted] unknowing that a different component of the CIA had contact with [redacted]") (redactions in original exhibit). A Court order is thus required to reemphasize that Respondent needs to take extraordinary precautions to prevent the purposeful or inadvertent loss, destruction or suppression of evidence here.[8]

Defense Department at Guantanamo Bay." As set forth in the Dixon Declaration, ¶ 108, [redacted] but the directive did not prevent the subsequent destruction of videotapes of their interrogations in November 2005. Thus, if anything, this declaration suggests that the Defense Department's internal preservation efforts are insufficient to prevent spoliation.

[8] The Court should also specify that its preservation order extends to "black sites" overseas, where interrogation tapes were held (and destroyed). *See* Mark Mazzetti, *C.I.A. Was Urged to Keep Interrogation Videotapes*, N.Y. Times, Dec. 8, 2007.

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II. THE COURT SHOULD DECLARE [redacted] ILLEGAL SO THESE PROCEEDINGS ARE NOT TAINTED BY TORTURE

Respondent opposes Khan's motion to declare that the interrogation methods inflicted on him constitute torture on the ground that the Court does not have jurisdiction under the Detainee Treatment Act to issue such a declaration. *See* Opp'n at 11.[9] Respondent argues that the Court's jurisdiction is limited to determining whether Khan's CSRT properly evaluated whether statements derived from or relating to him were obtained by coercion, and, if so, whether those statements have probative value. *See id.* at 11-12. Respondent further contends that even if the Court were to determine that Khan's CSRT was "inadequate" in this regard, it would not be appropriate for the Court to issue a declaratory judgment because the only possible remedy would be for the Court to remand the case for another CSRT hearing. *Id.* at 12. Respondent is wrong.[10]

As set forth in Khan's declaration motion, the Court has the power to order the requested relief under the DTA. While the scope of judicial review available under the DTA may be unsettled, even under the narrowest reading of the statute there is no question that, as Respondent concedes, the Court has the power to

[9] Respondent also baldly states that the Military Commissions Act "precludes the exercise of any such jurisdiction." Opp'n at 11. Respondent is incorrect.

[10] Respondent's claim that the Court has no power to inquire into Khan's torture confirms the constitutional inadequacy of CSRT review under the DTA.

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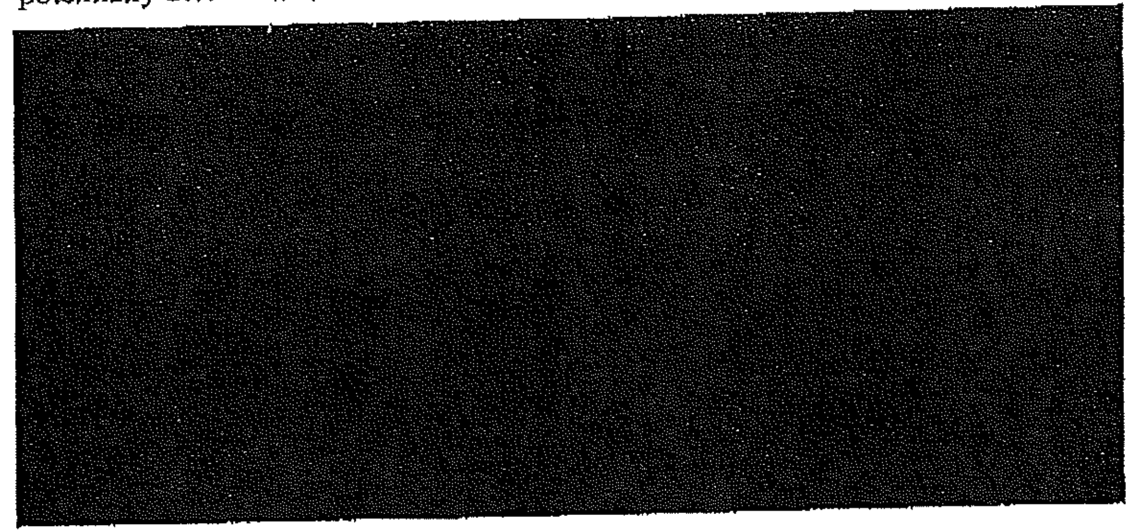
determine whether Khan's CSRT properly relied on evidence obtained by torture or other unlawful coercion, and, if so, whether it correctly determined that such evidence is unreliable. That is precisely the inquiry that Khan seeks here. In addition, the Court has the power to issue declarations concerning such matters within its jurisdiction under the All Writs Act, 28 U.S.C. § 1651, and the Declaratory Judgment Act, 28 U.S.C. § 2201. *See* Mot. to Declare at 12-13. Moreover, the Court has inherent power to inquire into claims of torture, where, as here, those claims may taint and degrade its judicial proceedings.

As indicated above, Respondent does not seriously dispute that Khan was tortured. Nor can there be any serious dispute that the torture he endured violates the Constitution and laws of the United States. It is equally clear that Khan's CSRT was presented with and considered evidence of torture or evidence potentially derived from torture. *See* Mot. to Declare at 5 & n.4, 11-12 & n.6.



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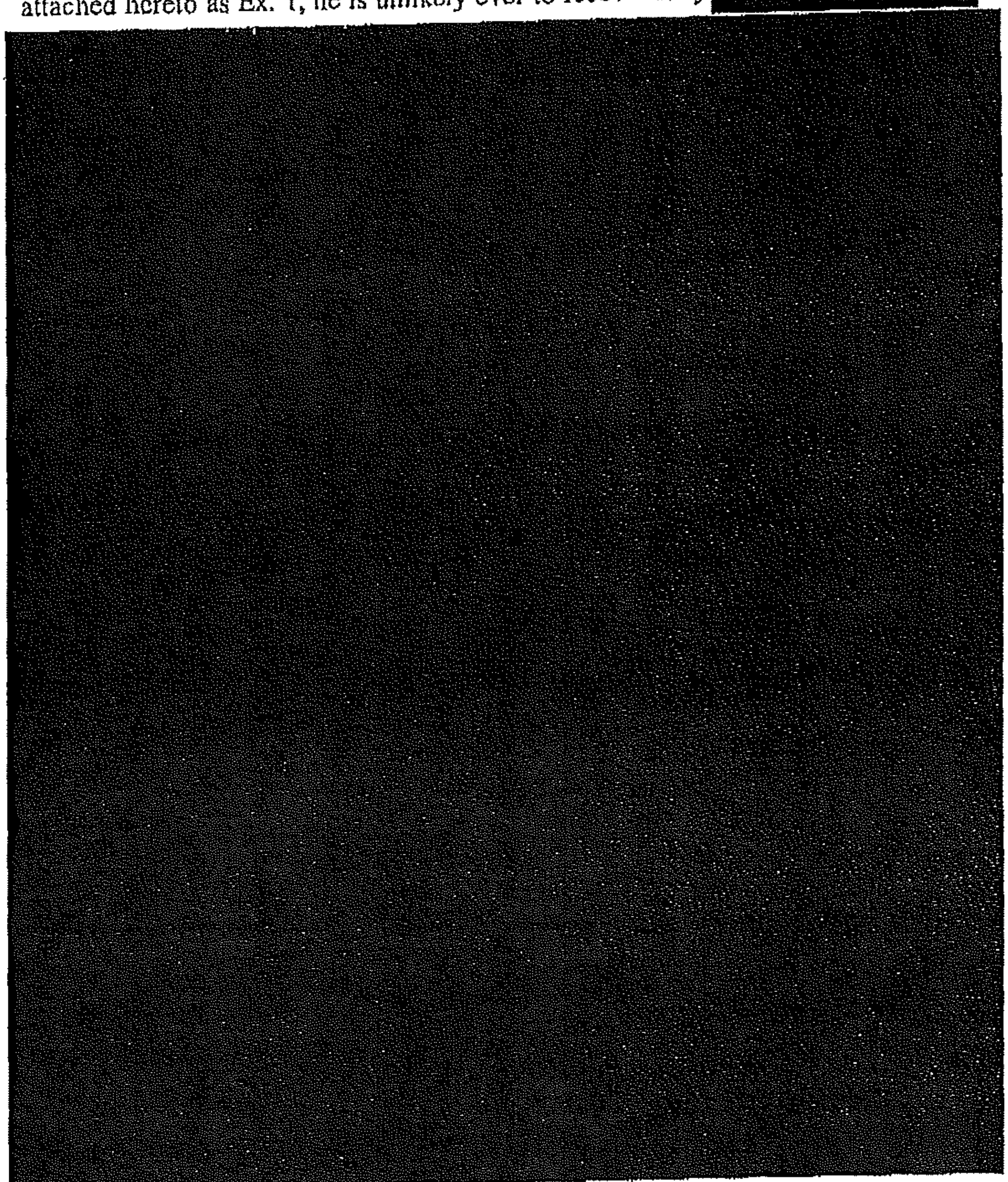
As indicated by Khan's personal account how the torture impacted him, attached hereto as Ex. 1, he is unlikely ever to recover fully



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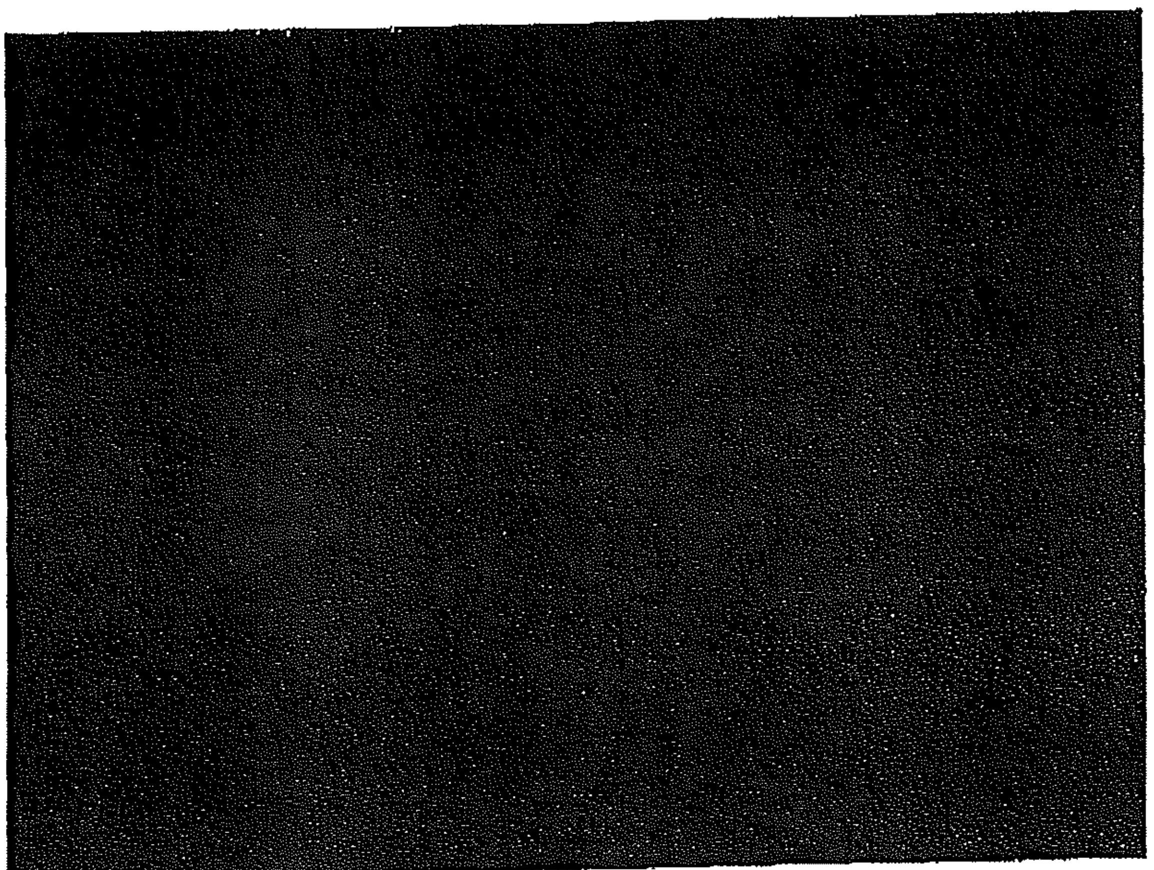
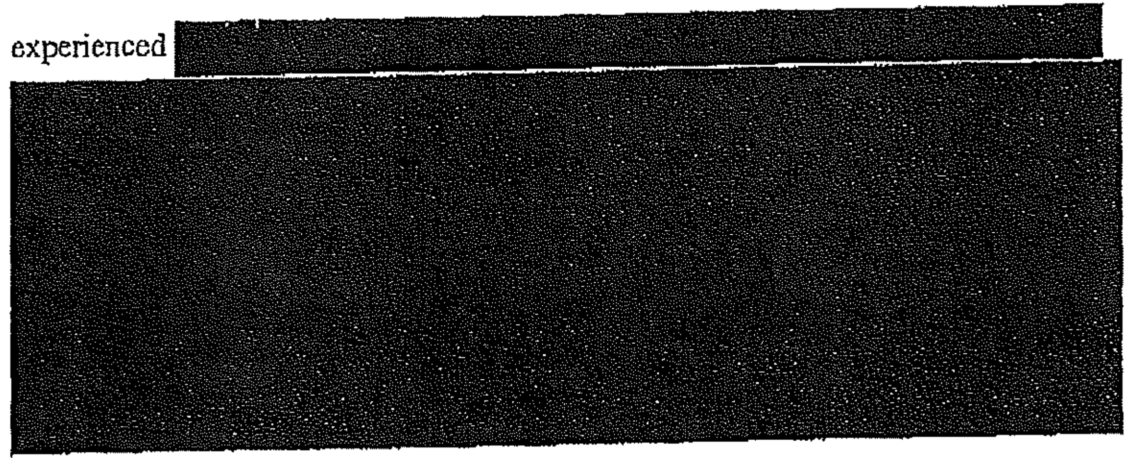


As described in his opening brief and the Gutierrez Declaration, Khan experienced



[12] Also attached hereto are two letters that Khan wrote to the Court concerning his torture motions. *See* Exs. 3 & 4.

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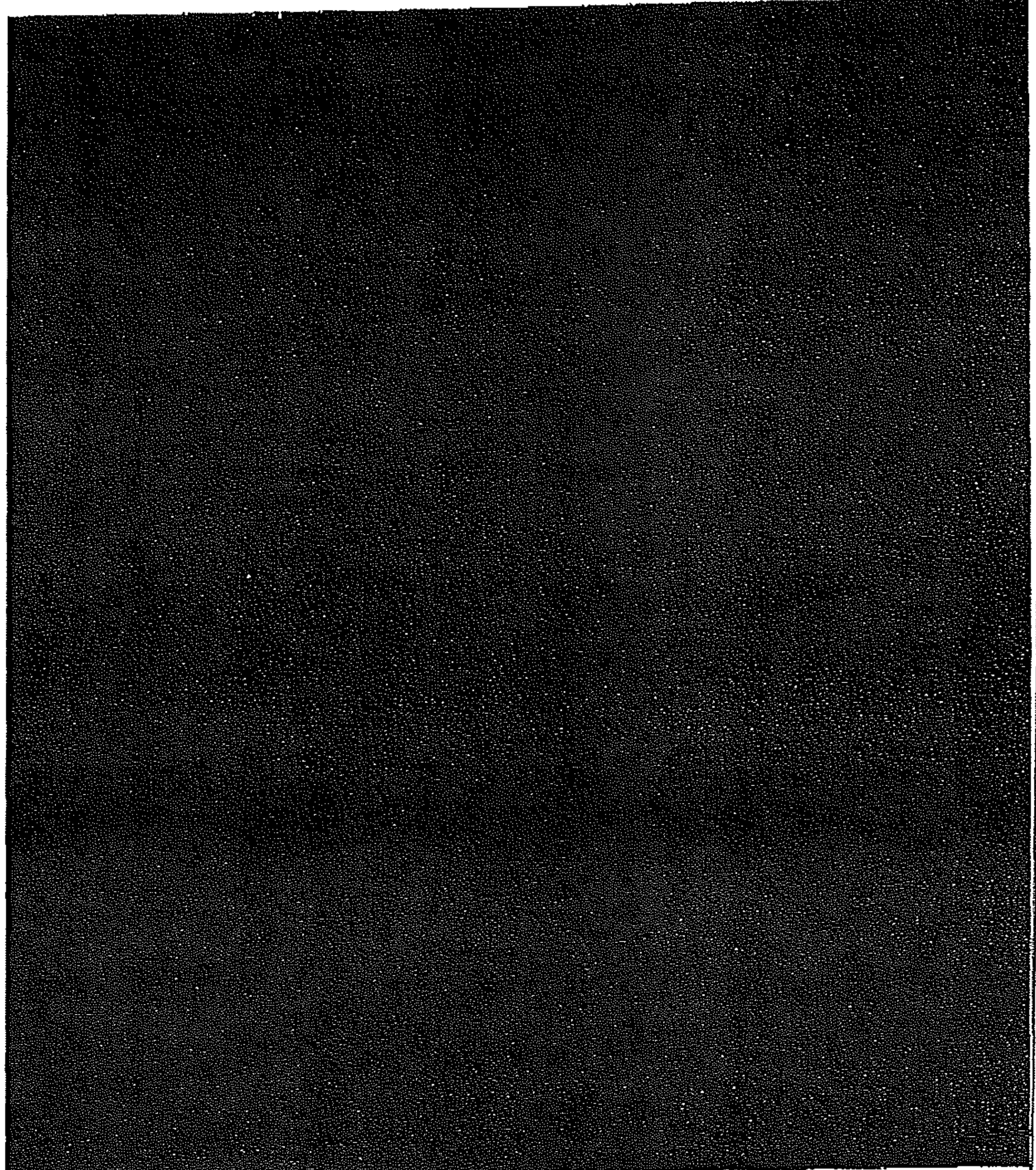

Unfortunately, [redacted] [redacted] *See* Darius Rejali, *Torture*,

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American Style, Boston Globe, Dec. 16, 2007. To the contrary, such torture is now favored by democracies like the United States because it purportedly "leaves no marks"; and if prisoners are unable to show any physical marks of torture, the public is less likely to believe that the torture occurred. "[A]s societies have become more open, the art of torture has crept underground and evolved into the chilling new forms – often undetectable – that define torture today." *Id.*

That waterboarding or other "evolved" forms of torture purportedly leave no physical scarring does not mean that they are legal. *See Williams v. Boles*, 841 F.2d 181, 183 (7th Cir. 1988) (Easterbrook, J.) ("Many things – beatings with a rubber truncheon, water torture, electric shock, incessant noise, reruns of 'Space 1999' – may cause agony as they occur yet leave no enduring injury. The state is not free to inflict such pains without cause just so long as it is careful to leave no marks."); *Powers v. Snyder*, 484 F.3d 929, 932 (7th Cir. 2007) (Posner, J.) (same); *see also Arizona v. Fulminante*, 499 U.S. 279, 287 (1991) ("[T]he blood of the accused is not the only hallmark of an unconstitutional inquisition.") (internal quotation marks and alterations omitted); *cf. Hudson v. McMillan*, 503 U.S. 1, 13-14 (Blackmun, J., concurring) ("state-sponsored torture and abuse" may include "asphyxiating [prisoners] short of death"); *id.* at 26 (Thomas, J., dissenting) ("'Diabolic or inhuman' punishments *by definition* inflict serious injury. That is not to say that the injury must be, or always will be, *physical*. 'Many things

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[including] water torture . . . may cause agony as they occur yet leave no enduring injury.'") (emphasis in original) (quoting *Boles*).

There can also be no question that confessions and other evidence obtained [REDACTED] are inherently unreliable. *See Jackson v. Denno*, 378 U.S. 368, 385-6 (1964); *Miller v. Fenton*, 474 U.S. 104, 109 (1985); *Rochin v. California*, 342 U.S. 165, 173-74 (1951); *see also generally* Jonathan Hafetz, *Torture, Judicial Review, and the Regulation of Custodial Interrogations*, 62 NYU Ann. Surv. of Am. L. 433 (2007).

Accordingly, under no circumstances could Khan's CSRT have properly considered evidence obtained, directly or indirectly, from his torture or the torture of other CIA prisoners. The CSRT could not have properly concluded that such evidence is reliable or "probative." Respondent's further claim that Khan's CSRT panel was "not presented with any statements made by petitioner, or any other defendant, while in CIA custody," *see* Opp'n at 5 n.4, should also be rejected.

As an initial matter, Respondent's argument in this regard should be given no weight because the government has refused to produce the entire record on review in this case. The government instead has arrogated to itself discretion to produce only selected portions of the CSRT record – not the Government Information, as required by the Court's decisions in *Bismullah* – in support of its opposition to Khan's motions. On December 18, 2007, Respondent provided Khan

with a certified index to the CSRT record, and certain selected documents from that record. Respondent did not produce all of the items listed on the index, however, including the documents most likely relevant to the Court's resolution of the instant motions – the CSRT decision report, the classified summary of evidence, and a document entitled "Compliance with DTA" – each of which appears to address Khan's torture. *See* Certified Index to the Record (attached hereto as Ex. 5) (items #7, 9, 36). Respondent did not even produce all of the *unclassified* documents. *See id.* (items #17-20). Thus, it is impossible to consider Respondent's argument fully or adequately without the benefit of the full record.

Nonetheless, as indicated above, Khan's CSRT panel plainly considered the two statements he made about his torture during the CSRT. Khan also noted during his CSRT that these statements about his torture relate directly to the allegations presented against him:

> If you don't want to hear the entire report, then at least allow me to present you the summary of this report which is very short and to the point. This report is directly related to the Summary of Evidence due to the Summary of Evidence coming from a combination of both classified and unclassified sources.

Preservation Mot., Ex. 3 (redacted CSRT transcript). The Unclassified Summary of Basis for Tribunal Decision further shows that the CSRT panel considered Khan's torture statements:

> The Detainee made statements during the hearing and provided written allegations of abuse while in detention. . . . Other exhibits also

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> contained information that alleged others may have provided statements about the Detainee which were obtained as a result of coercion. . . . In determining the Detainee's enemy combatant status, the Tribunal carefully considered these allegations with respect to all exhibits provided. Enclosure 6 [the "Compliance with DTA" document] provides additional information regarding Detainee Treatment Act matters.

Ex. 6, at 8-9 (attached hereto).

Moreover, because evidence of Khan's torture is necessarily exculpatory, the CSRT rules required the panel to consider that evidence separately. The CSRT panel was also required to consider the effects of Khan's torture in determining whether he was mentally competent to participate in his CSRT. *See id.* at 8 (unclassified decision).

Even if the CSRT rules did not expressly require consideration of Khan's torture, such an inquiry would be required by other international law obligations incorporated in the CSRT process. In particular, for example, Article 15 of the Convention Against Torture requires that "[e]ach State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statements were made." Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Apr. 18, 1988, Sen. Exec. Rpt. 101-30, 1465 U.N.T.S. 85 (ratified Oct. 21, 1994). That provision is incorporated in the CSRT process and the DTA review process. *See* U.S. Dep't of

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State, Legal Advisor John B. Bellinger III., U.S. Delegation Oral Responses to Article 15 Committee Questions, Geneva, Switzerland (Question 42) (May 5, 2006). Common Article 3 of the Geneva Conventions, which applies to Guantánamo prisoners, *see Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006), also contains similar provisions prohibiting torture and appearance before regularly constituted courts. In addition, because Khan's CSRT was not the equivalent of an Article 5 hearing and he is therefore presumptively entitled to prisoner-of-war status, *see* Ruling on Defense Motion for Article 5 Status Determination at 3, *United States v. Hamdan*, Office of Military Commissions (Dec. 17, 2007), inquiry must be made to ensure that he was and is protected from torture during his detention. *See, e.g.*, Army Reg. 190-8, §§ 1-5, 1-6 (1997).

The Court also has inherent power to inquire into the nature and legality of Khan's treatment in CIA custody because his torture was so severe as to "shock the conscience," perhaps requiring dismissal of any actions against him. *See United States v. Russell*, 411 U.S. 423, 431-32 (1973); *Harbury v. Deutch*, 233 F.3d 596, 602 (D.C. Cir. 2000). The Court also has inherent power to inquire into Khan's torture because it threatens to taint and degrade these judicial proceedings. *See Miller*, 474 U.S. at 109 ("[C]ertain interrogation techniques . . . are so offensive to a civilized system of justice that they must be condemned."); *Brown v. Mississippi*, 297 U.S. 278, 286 (1936) (torture is "revolting to the sense of justice"); *Rochin*,

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342 U.S. at 173-74) ("[T]o sanction [such] brutal conduct . . . would be to afford brutality the cloak of law. Nothing would be more calculated to discredit law and thereby to brutalize the temper of a society."); *United States v. Abu Ali*, 395 F. Supp. 2d 338, 379 (E.D. Va. 2005) ("[T]orture of any kind is legally and morally unacceptable, and the judicial system of the United States will not permit the taint of torture in its judicial proceedings."); *see also Rogers v. Richmond*, 365 U.S. 534, 540-41 (1961) ("ours is an accusatorial and not an inquisitorial system").

In the end, Respondent's opposition to Khan's declaration motion appears to have less to do with the proper exercise of the Court's jurisdiction than it does with an unwillingness to acknowledge that Khan was tortured. But that concern provides no basis for the Court to deny Khan's motion. To the contrary, those officials in the Executive Branch who authorized and carried out the secret CIA detention and interrogation program – and those members of Congress who acquiesced in state-sanctioned torture with little or no protest – have done far greater harm to our nation than any of the unproven allegations against Majid Khan. *See Spano v. New York*, 360 U.S. 315, 320-21 (1959) ("life and liberty can be as much endangered from illegal methods used to convict" as from allegations of criminal conduct). Those government officials who cannot declare, even now, that the interrogation methods inflicted on Khan and others ghost prisoners constitute torture likewise threaten to degrade the solemnity of the high offices

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they hold. Indeed, it is a dark day when a brigadier general in the United States Military cannot say with certainty that the waterboarding of an American soldier by a rogue nation would be unlawful. *See* Josh White, *Evidence From Waterboarding Could Be Used in Military Trials*, Wash. Post, Dec. 12, 2007, at A4.

Accordingly, the Court should exercise its jurisdiction to declare that Majid Khan was tortured, and thereby affirm our adherence to the rule of law. The Court should do so now so that the filth and stench of Khan's torture do not linger in these judicial proceedings.

Conclusion

For all of the foregoing reasons, and for the reasons set forth in his opening papers, Khan's motions should be granted.

Dated: Washington, DC
January 4, 2008

Respectfully submitted,

Counsel for Petitioner:

J. Wells Dixon [Bar No. 51138]
Gitanjali S. Gutierrez
CENTER FOR CONSTITUTIONAL RIGHTS
666 Broadway, 7th Floor
New York, New York 10012
Tel: (212) 614-6423
Fax: (212) 614-6499

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CERTIFICATE OF SERVICE

I hereby certify that on January 4, 2008, I caused the foregoing Reply Memorandum of Law in Further Support of Petitioner's Torture Motions, with exhibits, to be filed and served on counsel listed below by causing an original and six copies to be personally delivered to the Court Security Office.

Robert M. Loeb, Esq.
U.S. Department of Justice
Civil Division, Room 7268
950 Pennsylvania Ave., N.W.
Washington, DC 20530-0001

Counsel for Respondent

J. Wells Dixon