Attachment

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

GULED HASSAN DURAN (ISN 10023),

Petitioner,

v.

DONALD J. TRUMP, *et al.*,

Respondents.

Civil Action No. 16-2358 (RBW)

SUPPLEMENT TO JOINT STATUS REPORT

Petitioner Guled Hassan Duran respectfully submits this supplement to the parties' joint status report, submitted in response to the Court's July 12, 2017, order directing the parties to propose any modifications to the Case Management Order (CMO) issued in prior detainee cases (dkt. no. 24), and filed concurrently herewith on the Court's public docket.

In the status report, Petitioner objects to entry of the CMO in part on the ground that his case presents unique facts and circumstances warranting additional or substitute procedural safeguards to ensure meaningful habeas review. Those unique facts and circumstances include the length of his detention as well as the brutal conditions under which he has been and continues to be detained. Petitioner's case is also exceptional because nearly all of the core evidence that the government presents in support of his detention – and more than half of the total number of documents contained in the factual return – consists of intelligence reports from the Central Intelligence Agency (CIA). *See* Factual Return Exs. 7, 25-60. Several of these reports contain information that appears to have been obtained from Petitioner prior to his arrival at Guantanamo [redacted] in September 2006. *See, e.g., id.*, Exs. 7, 25-35, 50-52. In particular,

although much of the relevant information is redacted, these exhibits appear largely to include statements made by Petitioner after his initial capture in Djibouti and rendition to secret detention [redacted] in March 2004. As Petitioner intends to demonstrate through declarations and other evidence, these statements were made while he was subject to torture and other unlawful abuse by the CIA in secret detention.[1] In this respect, and in other respects that will be addressed throughout this litigation, Petitioner's case bears little if any resemblance to other detainee habeas cases litigated to date pursuant to the CMO apart from the location of his detention for the last decade.

To the knowledge of undersigned counsel, who have represented many detainees at Guantanamo, Petitioner's case is the first and only detainee habeas case litigated since *Boumediene v. Bush*, 553 U.S. 723 (2008), in which the government has relied in its case-in-chief on evidence obtained from a detainee while that individual was subjected to the CIA torture program. To the contrary, in prior cases the government has assiduously tried to avoid evidence obtained from the CIA torture program, presumably so as to avoid discovery related to the program, typically relying instead on FBI 302s or military intelligence reports often obtained during interrogations at the Kandahar or Bagram military bases in Afghanistan, or after transfer to military custody at Guantanamo. Whether the resort to the use of torture evidence now reflects the lack of other credible evidence to justify Petitioner's detention at Guantanamo or

[1] To the extent it is possible to identify source information for the other CIA documents in the factual return, many appear to include statements obtained from other detainees held in the CIA torture program and/or foreign government custody, raising further questions about the reliability of that evidence that must be addressed through the discovery process in this case. *See Parhat v. Gates*, 532 F.3d 834, 844 (D.C. Cir. 2008) (evidence that "does not disclose from whence it came" does not permit a court to assess its reliability and is therefore insufficient to support detention); *id.* at 848 (requiring that a court "have an opportunity to assess the reliability of the record evidence is not simply a theoretical exercise").

perhaps a policy change within the CIA under the new administration is unclear[2]; what is certain is that this case is exceptional and warrants additional scrutiny and procedural safeguards given the considerable risk of error associated with evidence obtained from the CIA.

Although undersigned counsel have met and conferred with counsel for Respondents regarding the issue of torture evidence, and will continue to do so, Petitioner is compelled to address these issues now because they potentially bear on sections I.B, I.C, and I.D of the CMO. Apart from other issues raised in the status report, Petitioner is concerned that these provisions as drafted could cause him substantial unfair prejudice, and undermine the effectiveness of the writ, if construed or applied by the government in such a way as to limit the scope of its obligations to produce exculpatory evidence and other discovery. Petitioner is particularly concerned that these provisions might be used to carve out of the government's disclosure obligations documents and information in the possession, custody, or control of the CIA, or that is otherwise known to exist, on the grounds that it is not "reasonably available" or within the possession of attorneys preparing factual returns in Guantanamo detainee habeas cases. This concern is heightened if, as counsel believe based on their experience with other detainee matters, Respondents' counsel do not have the capability or authorization to search independently through agency records for information that is exculpatory or otherwise discoverable, but are rather limited to reviewing (both for inculpatory and exculpatory purposes) whatever subset of information is compiled by the client agency for their use in the case.[3]

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[2] *See, e.g.*, Charlie Savage, *Trump Poised to Lift Ban on CIA "Black Site" Prisons*, N.Y. Times, Jan. 25, 2017 (discussing leaked executive order revoking prior order to close CIA prisons).

[3] Petitioner does not intend to suggest any wrongdoing by counsel for Respondents. The Department of Justice attorneys litigating this case have acted in good faith at all times. The CIA, however, has an obvious motive to conceal and prevent the disclosure of evidence obtained by torture and other unlawful abuse. As the Senate Select Committee on Intelligence concluded

Indeed, Respondents' proposed modifications to the CMO underscore Petitioner's concern. In Part II of their submission, Respondents' counsel state that they are searching for exculpatory evidence and other discoverable information contained in consolidated files assembled by "two components of the Department of Defense" and "materials assembled by the Guantanamo Review Task Force relevant to Petitioner and to Respondents' allegations in this case." Thus, it is clear that Respondents' counsel are not searching independently through records in the possession, custody, or control of the CIA – the agency which has supplied most of the allegedly inculpatory evidence in the factual return – for exculpatory evidence or other discoverable information even though that is the one agency where, if not exclusively, such information is most likely to be located.

Petitioner's objections and proposed modifications to the CMO thus are intended to highlight these substantial concerns and provide greater clarity and specificity concerning the government's disclosure obligations in order to prevent or mitigate any harm to Petitioner. For example, and without limitation, Petitioner's proposed modifications to sections I.B and I.C are intended to make clear that for purposes of the government's disclosure obligations, documents within its possession, custody, or control include documents maintained by the CIA, which plainly is aligned closely with the preparation of the factual return. This is important in order to prevent a potential situation where the CIA – for habeas purposes, one of Petitioner's jailors –

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in its *Committee Study of the Central Intelligence Agency's Detention and Interrogation Program*, the executive summary to which was declassified in part in December 2014, the CIA repeatedly misled the Department of Justice, Congress and others about the torture program. *See* https://fas.org/irp/congress/2014-rpt/ssci-rdi.pdf. The CIA has also destroyed evidence from the torture program in order to avoid scrutiny. *See, e.g.*, Mark Mazzetti, *U.S. Says CIA Destroyed 92 Tapes of Interrogations*, N.Y. Times, Mar. 2, 2009 ("The tapes were destroyed as Congress and the courts were intensifying their scrutiny of the agency's detention and interrogation program.").

essentially has discretion to pick and choose the evidence it wishes to disclose or not disclose to Petitioner and to the Court in order to justify its detention of Petitioner by invoking the "weak" bureaucratic boundary between agencies and walling itself off from Respondents' counsel at the Department of Justice where necessary to achieve that result. *See, e.g., United States v. Libby*, 429 F. Supp. 2d 1, 6, 11 (D.D.C. 2006) (Walton, J.) (holding CIA closely aligned with prosecution for discovery purposes where agency provided documents and contributed significantly to investigation, and where necessary to avoid leaving other documents material to the preparation of the defense beyond the prosecution's reach).[4] Petitioner respectfully submits that such a situation would be fundamentally unfair, deprive him of adequate notice and a meaningful opportunity to challenge his detention through habeas, and thus violate due process and constitute a suspension of the writ.

For all of these reasons, and for the reasons set forth in the joint status report, Petitioner objects to the CMO and requests modifications as set forth in the status report. At minimum, the Court should amend the CMO to specify that the government's disclosure obligations extend to and include documents and information within the possession, custody, or control of the CIA. Alternatively, the Court should allow Petitioner to brief these issues prior to entry of the CMO.[5]

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[4] This is also not an instance where Petitioner seeks broad production of records from numerous government agencies. As in *Libby*, he is principally concerned with CIA records for the reasons explained above.

[5] The parties have met and conferred regarding this supplement, and Respondents object to the requested relief.

Filed with the Court Security Office
Pending Classification Review

Dated: August 2, 2017

Respectfully submitted,

J. Wells Dixon (Pursuant to LCvR 83.2(g))
Shayana D. Kadidal (D.D.C. Bar No. 454248)
Omar A. Farah (Pursuant to LCvR 83.2(g))
CENTER FOR CONSTITUTIONAL RIGHTS
666 Broadway, 7th Floor
New York, New York 10012
(212) 614-6423
wdixon@ccrjustice.org
skadidal@ccrjustice.org
ofarah@ccrjustice.org

Counsel for Petitioner

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was submitted to the Court Security Office on this 2nd day of August 2017, for filing with the Court and service on counsel for Respondents listed below:

Timothy A. Johnson, Esq.
U.S. Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Avenue, NW
Washington, DC 20530
Tel. (202) 514-1359

Counsel for Respondents

J. Wells Dixon