

THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF SOUTH CAROLINA

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Ali Saleh Kahlah Al-Marri,

Plaintiff,

v.

Robert M. Gates,  
Secretary of Defense of the United States,

Commander John Pucciarelli,  
U.S. Naval Brig, Charleston,  
South Carolina,

Defendants.  
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) C/A 2:05-2259-HFF-RSC  
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ORAL ARGUMENT REQUESTED

PLAINTIFF'S OBJECTIONS TO THE MAGISTRATE JUDGE'S ORDER OF  
OCTOBER 2, 2008, DENYING PLAINTIFF'S MOTION TO PRESERVE  
EVIDENCE AND FOR AN INQUIRY INTO THE GOVERNMENT'S PAST  
DESTRUCTION OF EVIDENCE

### Preliminary Statement

Plaintiff Ali Saleh Kahlah al-Marri hereby objects to the Magistrate Judge's Order of October 2, 2008 ("Order") (dkt. no. 63) denying his Motion for an Order Directing the Government to Preserve Evidence and for an Inquiry into the Government's Destruction of Evidence ("Pl.'s Mot.") (dkt. no. 41).

Simply put, the government has already admitted to destroying critical evidence not only when this litigation was clearly foreseeable but when al-Marri's habeas corpus action was pending before this Court. That evidence included recordings and associated documentation of al-Marri's highly coercive interrogations during the sixteen-month period when he was held *incommunicado* at the Navy brig. The government destroyed this evidence, moreover, at the same time it was relying on the fruits of those same interrogations to justify his detention before this Court. The government then misrepresented its destruction of that evidence to the Court. Further, the government did not finally disclose its destruction of evidence to the Court or to al-Marri until after the destruction was reported in several national newspapers, prompting al-Marri to file the instant motion.

The government's conduct has been inexcusable. Its breach of a clearly established legal duty has severely prejudiced al-Marri and undermined the integrity of the proceedings before this Court. The Magistrate Judge clearly erred both in denying the request for a preservation order and in his findings regarding an inquiry into the government's past destruction of evidence. The entry of a preservation order is plainly warranted, and this Court should inquire into the government's past spoliation and provide appropriate remedial measures if al-Marri's habeas corpus action goes forward.<sup>1</sup>

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<sup>1</sup> Al-Marri recognizes that it would be appropriate to wait to conduct an inquiry into the government's past destruction of evidence until the Supreme Court resolves his petition for certiorari. See Pet'r's Unopposed Mot. to Stay Further Proceedings Pending Resolution of

### Background

In March 2008, several national newspapers reported the existence of previously undisclosed recordings documenting interrogations of al-Marri at the Navy brig, including recordings that confirmed the government's use of harsh interrogation methods. See Mark Mazzetti & Scott Shane, *Pentagon Cites Tapes Showing Interrogations*, New York Times, Mar. 13, 2008, Ex. 1 to Pl.'s Mot.; Josh White & Joby Warrick, *Detainee's Suit Says Abuse Was Videotaped*, Wash. Post, Mar. 13, 2008, Ex. 2 to Pl.'s Mot. The newspapers also reported that the government had admitted destroying other recordings of al-Marri's interrogations. See White & Warrick, *Detainee's Suit Says Abuse Was Videotaped*. These reports followed revelations of the government's destruction of evidence in other detainee cases—revelations that have prompted a criminal investigation. See Press Release, CIA, Director's Statement on the Taping of Early Detainee Interrogations (Dec. 6, 2007), Ex. 3 to Pl.'s Mot.; Press Release, Michael B. Mukasey, Att'y Gen. of the U.S. Dep't of Justice (Jan. 2, 2008), *available at* [http://www.usdoj.gov/opa/pr/2008/January/08\\_opa\\_001.html](http://www.usdoj.gov/opa/pr/2008/January/08_opa_001.html) (announcing the criminal investigation into the CIA's destruction of interrogation recordings).

In light of these revelations, al-Marri moved immediately for an order requiring the government to preserve all evidence relating to his detention, interrogation, treatment, physical or mental condition, or his conditions of confinement at the Navy brig since June 23, 2003, as well as all evidence pertaining to the destruction, alteration, or transfer of any such evidence. Pl.'s Mot. at 1. In addition, al-Marri requested that the Court

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His Pet'n for a Writ of Certiorari, *Al-Marri v. Pucciarelli*, Civ. A. No. 02:04-2257-HFF-RSC (dkt. no. 112). Al-Marri, therefore, is not asking this Court to conduct such an inquiry now. However, the Magistrate Judge's mistaken legal and factual conclusions should be corrected because of their potentially prejudicial effect. This Court should also make clear that a spoliation inquiry and remedial measures are warranted.

conduct an inquiry into the government's past destruction of evidence and take appropriate remedial measures upon such inquiry. *Id.*

In response, the government admitted that it had, in fact, destroyed relevant evidence and conceded that this destruction was far wider than had been reported in the newspaper accounts. Defs.' Resp. to Pl.'s Mot. ("Defs.' Resp.") (dkt. no. 51). The government's response also made clear that it had previously misled this Court about its destruction of evidence. The government, nevertheless, maintained that it should still be trusted to preserve documents voluntarily. It argued that its earlier destruction of recordings and documents was irrelevant because that destruction occurred before this litigation challenging al-Marri's conditions of confinement had been filed and because it had since put in place internal preservation directives. The government also argued that an inquiry into the past destruction of evidence was unnecessary and premature. It further suggested that this Court lacked power even to conduct such an inquiry or provide remedial measures.

In reply, al-Marri maintained that the Court should enter a preservation order based on the government's past destruction of evidence, the risk of future spoliation, and the absence of any burden such an order would impose on the government. Pl.'s Reply to Defs.' Resp. to Pl.'s Mot. ("Pl.'s Reply") (dkt. no. 56). Given the government's contention that the Court lacked jurisdiction under the Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600, al-Marri acknowledged that spoliation remedies—while clearly warranted—could be adjudicated after that issue had been resolved. *Id.* at 15.

On October 2, 2008, without oral argument, the Magistrate Judge issued an Order denying al-Marri's motion ("Order") (dkt. no. 63). The Magistrate Judge denied the request for a preservation order because, he said, such an order would "add nothing" to the government's new retention procedures. Order at 5. The Magistrate Judge also denied the request for an inquiry into past destruction of evidence because the government had acted "in good faith" when it destroyed relevant evidence and because al-Marri had failed to identify any specific claim of prejudice. *Id.* at 7.

### Argument

#### **I. The Magistrate Judge Clearly Erred in Denying a Preservation Order.**

A preservation order should be granted when, absent such an order, there is (a) a "significant risk that relevant evidence will be lost or destroyed," and (b) "the particular steps to be adopted will be effective, but not overbroad." *Pueblo of Laguna v. United States*, 60 Fed. Cl. 133, 138 (2004); accord *United Med. Supply Co. v. United States*, 73 Fed. Cl. 35, 36-37 & n.1 (2006); *Williams v. Mass. Mut. Life Ins. Co.*, 226 F.R.D. 144, 147 (D. Mass. 2005); *Walker v. Cash Flow Consultants, Inc.*, 200 F.R.D. 613, 617 (N.D. Ill. 2001). The Magistrate Judge's application of this standard was clearly erroneous and contrary to law.<sup>2</sup> He simply ignored that the government had destroyed critical evidence while al-Marri's habeas action was pending before this Court and that this evidence, which included interrogation recordings and associated documents, could have undermined the basis for al-Marri's detention by showing that statements on which his

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The Magistrate Judge did, however, properly reject the government's contention that a request to preserve evidence must meet the requirements for the issuance of an injunction. Order at 3; *Pueblo of Laguna*, 60 Fed. Cl. at 138 n.8 (a preservation order "is no more an injunction than an order requiring a party to identify witnesses or produce documents in discovery" (citing *Mercer v. Magnant*, 40 F.3d 893, 896 (7th Cir. 1994)); Pl.'s Reply at 2 n.1 (citing cases).

detention was based had been forcibly extracted through coercive methods. He also ignored the undisputed fact that the government had previously misrepresented its destruction of evidence to this Court when it denied that it had lost or destroyed evidence in response to al-Marri's earlier preservation motion in his habeas corpus action and when it assured the Court that it had adequate retention procedures in place. Further, the Magistrate Judge ignored entirely the shortcomings of the retention procedures the government has now belatedly put in place and the fact that the requested preservation order would impose no material burden on the government. Finally, the Magistrate Judge fundamentally misconstrued and misapplied the legal standard governing inquiries into spoliation of evidence and the issuance of remedial measures.

**A. The Government's Past Destruction of Evidence Establishes a Significant Risk of Further Loss or Destruction.**

A party may establish a significant risk of future destruction by showing that the opposing party *either* has lost or destroyed evidence in the past *or* has inadequate retention procedures in place. *Pueblo of Laguna*, 60 Fed. Cl. at 138; *Treppel v. Biovail Corp.*, 233 F.R.D. 363, 371 (S.D.N.Y. 2006); *see also Capricorn Power Co. v. Siemens Westinghouse Power Corp.*, 220 F.R.D. 429, 437 (W.D. Pa. 2004) (even evidence of attempted damage or destruction of evidence heightens concern about the protection and integrity of the proceedings before a court). It is necessary only to establish one of these factors. Both factors are met here, however, because the government has concededly destroyed highly relevant evidence on multiple occasions (while, moreover, misrepresenting that destruction to the Court) and because the retention procedures it has belatedly put in place are inadequate to prevent further spoliation.

Even the most unsophisticated litigant knows it has a duty to preserve potentially relevant evidence. *See, e.g., Kronisch v. United States*, 150 F.3d 112, 126 (2d Cir. 1998); Pl.'s Mot. at 4 (citing cases). Yet, the United States government has now admitted to destroying a vast body of highly relevant evidence and, moreover, misrepresenting that destruction to the Court. Violation of that duty alone undermines any presumption that standing preservation instructions will be followed. Instead it warrants entry of a preservation order.

This is not a case where the past destruction of evidence is fleeting or *de minimis*.

To the contrary, the government has thus far admitted to destroying:

- (1) a still unspecified number of recordings of the government's interrogations of al-Marri conducted at the Navy brig from his arrival on June 23, 2003, to "sometime in 2004," during which time al-Marri was detained *incommunicado* and subjected to highly coercive interrogation measures;<sup>3</sup>
- (2) "notes and working papers associated with those [interrogation] sessions";<sup>4</sup> and
- (3) almost five years' worth of continuous recordings made by a digital video recording system at the Navy brig that meticulously documented al-Marri's treatment and conditions of confinement in his housing unit since the outset of his detention at the Navy brig on June 23, 2003, until April 10, 2008.<sup>5</sup>

Without question, all this evidence was relevant to al-Marri's habeas corpus action which was pending before this Court at the time that the government destroyed interrogation

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Def.'s Resp. at 9; *see also* Decl. of Robert H. Berry, Jr., Defense Intelligence Agency ¶¶ 3, 8 ("Berry Decl."), Ex. 2 to Def.'s Resp. Those interrogation sessions took place until al-Marri was finally allowed access to counsel in October 2004. Certification of Andrew J. Savage ¶ 23 ("Savage Cert."), Ex. 1 to Pl.'s Mot. for Interim Relief (dkt. no. 40).

<sup>4</sup> Def.'s Resp. at 9; Berry Decl. ¶ 8.

<sup>5</sup> Def.'s Resp. at 10-11; Decl. of John Pucciarelli ¶¶ 3-4 ("Pucciarelli Decl."), Ex. 3 to Def.'s Resp.

recordings and associated documents between December 2004 and March 2005.<sup>6</sup> The destroyed evidence also was relevant to this action challenging al-Marri's abusive interrogation, prolonged isolation, and other mistreatment, an action that was plainly foreseeable at the time the evidence was destroyed.

The interrogation recordings and related documents were critical to the habeas action because they could have demonstrated, *inter alia*, the unreliability of any statements made by al-Marri during his interrogations due to the highly coercive methods by which those statements were obtained. *See, e.g., Jackson v. Denno*, 378 U.S. 368, 385-386 (1964); *Spano v. New York*, 360 U.S. 315, 320 (1959); *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 472-473 (D.D.C. 2005). The recordings and documents may also have contained other exculpatory evidence disproving or discrediting the government's allegations underlying al-Marri's detention. *See, e.g., Brady v. Maryland*, 373 U.S. 83, 87-88 (1963); *United States v. Bagley*, 473 U.S. 667, 676 (1985). Yet, the government destroyed the recordings of al-Marri's interrogations along with related documents at the same time it was relying on the fruits of those same interrogations to justify al-Marri's detention in the Rapp Declaration and at the same time al-Marri was seeking discovery of those interrogations. Whether or not it was clear then that al-Marri was entitled to discovery of those recordings and related evidence—and it is clear now that he is, *see Al-Marri v. Pucciarelli*, 534 F.3d 213, 273 (4th Cir. 2008) (en banc) (Traxler, J., concurring)—is immaterial. That was a question for the Judiciary to

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Al-Marri's habeas corpus litigation has, in fact, been ongoing since he was designated an "enemy combatant" in June 2003. His first habeas petition was filed in the United States District Court for the Central District of Illinois immediately after this designation. Following that petition's dismissal on venue grounds, his current habeas petition was promptly filed in this Court in July 2004. *See Rumsfeld v. Padilla*, 542 U.S. 426 (2004); *see also Al-Marri v. Hanft*, 378 F. Supp. 2d 673, 675-676 (D.S.C. 2005) (summarizing history).

decide, not for the Executive to answer unilaterally by secretly destroying the evidence in question. That the government would destroy evidence in a case of such national importance makes its conduct all the more shocking and egregious.

The Magistrate Judge nevertheless suggests that the government's destruction of evidence is immaterial because it occurred "months before" al-Marri filed this action. Order at 5. The Magistrate Judge is wrong. The government had a clear duty to preserve evidence not only in ongoing litigation but also in potential foreseeable litigation. *See, e.g., Kronisch*, 150 F.3d at 126; *Smith v. Café Asia*, 246 F.R.D. 19, 21 n.1 (D.D.C. 2007); Pl.'s Mot. at 4. Here, litigation over al-Marri's treatment at the Navy brig was plainly foreseeable given the unprecedented circumstances of his detention and his treatment at the Navy big: Al-Marri was held *incommunicado* for sixteen months, interrogated under highly coercive conditions without counsel, subjected to prolonged isolation, and denied basic necessities, religious items, and all books or news for more than two years. Indeed, the only reason this suit was not filed sooner is that the government had prevented al-Marri from even contacting his lawyers or the Court.

In addition, the government continued to destroy relevant evidence even after this action was filed. Specifically, the destroyed recordings of al-Marri's housing unit would have directly supported his claim that he was subjected to a brutal interrogation regime that included total sensory and environmental deprivation, Compl. ¶¶ 4, 50-64; Certification of Andrew J. Savage ("Savage Cert.") ¶¶ 18, 23, Ex. 1 to Pl.'s Mot. for Interim Relief (dkt. no. 40); complete isolation in a tiny cell without natural light for

weeks on end, Compl. ¶¶ 39-49; Savage Cert. ¶¶ 8, 10-12, 16, 23; and religious persecution and humiliation, Compl. ¶¶ 74-87; Savage Cert. ¶¶ 19-22.<sup>7</sup>

The Magistrate Judge also completely ignored the fact that the government falsely informed the Court it would preserve all evidence. Al-Marri previously sought a preservation order in his habeas action in August 2005. The government not only opposed the motion but chastised al-Marri for his “unsubstantiated and entirely speculative concern[] that the government will not maintain evidence.” Resp’ts’ Reply to Pet’r’s Br. in Resp. to the Ct.’s Aug. 15, 2005 Order, at 19, *Al-Marri v. Hanft*, No. 2:04-cv-2257. The government categorically denied that it had “lost or destroyed evidence in the past” and assured the Court that it already had adequate retention procedures in place. *Id.* at 20.

None of these statements was true. As the government now acknowledges, at the time it told the Court there was no need to enter a preservation order, it had already destroyed recordings and related documentation of al-Marri’s interrogations and was continuing to destroy recordings of al-Marri’s housing unit on an ongoing basis.

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The fact that there may exist “other records related to [al-Marri’s] daily activities in his living area,” (Defs.’ Resp. at 12), does not excuse past destruction or minimize the risk of future spoliation. The government cannot pick and choose what evidence it retains about its own wrongdoing. It has a legal duty to preserve all relevant and potentially relevant evidence when litigation is pending or reasonably anticipated. Here, moreover, the government destroyed what may have been the best evidence of al-Marri’s conditions of confinement—the continuous recordings of the housing unit where al-Marri has been confined for the last five years. Pucciarelli Decl. ¶ 3. And while the government says that these recordings were “automatically overwrit[ten] . . . approximately every thirty (30) days,” *id.*, its response belies that assertion. The response instead shows that the government has selectively preserved some material from those recordings, while intentionally allowing other possibly relevant evidence from the recordings to be destroyed, including evidence relevant to this case. *Id.* ¶ 5.

The fact that evidence pertaining to al-Marri had already been and continued to be destroyed when the government assured the Court there was no risk of spoliation underscores why assurances alone—even if made in good faith—do not obviate the need for a preservation order here.<sup>8</sup> Yet, the Magistrate Judge simply ignored the fact that government assertions about spoliation of evidence pertaining to al-Marri have been false—and then proceeded to rely on government assertions to deny an order to prevent yet further destruction of evidence.

There is no question about this Court's power to order the preservation of evidence, even in cases with national security overtones. District judges have routinely entered preservation orders in cases involving Guantánamo Bay detainees even without proof that the government previously destroyed evidence.<sup>9</sup> Plainly, such an order is warranted here, where the government has admitted to destroying highly relevant evidence and where it previously opposed a preservation order as unnecessary and unwarranted without disclosing to the Court that it had, in fact, already destroyed

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This case, moreover, is not the first one in which the government has destroyed relevant evidence documenting the coercive interrogation and mistreatment of detainees, nor the first one in which it has misrepresented that destruction to a federal court. The CIA, for example, has admitted to destroying recordings of the interrogation of other detainees amid congressional and legal scrutiny about its secret detention program, and the government has misrepresented the existence and destruction of those recordings to another district judge in this circuit in the Zacarias Moussaoui case. See Mark Mazzetti, *CIA Destroyed 2 Tapes Showing Interrogations*, New York Times, Dec. 7, 2007, attached as App. G to Pl.'s Reply.

See, e.g., *Alsaaei v. Bush*, No. 05-2369, 2006 WL 2367270 (D.D.C. Aug. 14, 2006); *El-Banna*, 2005 WL 1903561, at \*2-3; *Al-Marri v. Bush*, No. 04-2035 (D.D.C. Mar. 7, 2005), attached as App. A to Pl.'s Reply; *Abdah v. Bush*, No. 04-1254 (D.D.C. June 10, 2005), attached as App. B to Pl.'s Reply; *Anam v. Bush*, No. 04-1194 (D.D.C. June 10, 2005), attached as App. C to Pl.'s Reply; *Al-Shiry v. Bush*, No. 05-0490 (D.D.C. Mar. 23, 2005), attached as App. D to Pl.'s Reply; *Slahi v. Bush*, No. 05-881 (D.D.C. July 18, 2005), attached as App. E to Pl.'s Reply; *Zadran v. Bush*, No. 05-2367, at 4-6 (D.D.C. July 19, 2006), attached as App. F to Pl.'s Reply.

evidence. The Magistrate Judge's conclusion to the contrary is simply, and clearly, wrong.

**B. The Government's Internal Retention Procedures Are Inadequate.**

The Magistrate Judge further concluded that a preservation order would “add nothing” to safeguard the evidence that remained given the government's two new internal preservation directives. Order at 5.<sup>10</sup> This conclusion is mistaken for the reasons set forth below—reasons that the Magistrate Judge ignored entirely in his decision.

*First*, the two directives wholly fail to preserve evidence relating to the government's past destruction, alteration, or transfer of evidence pertaining to al-Marri's detention and treatment at the Navy brig. Pl.'s Mot. at 1, 7-8. To the contrary, the government conspicuously omits any assurance that it will retain any evidence pertaining to its past destruction of the recordings of al-Marri's interrogations, of the notes and working papers associated with those interrogations, or of the recordings of al-Marri's housing unit.

*Second*, there is nothing to prevent the government from rescinding the two internal directives at any time. Neither directive, moreover, explicitly specifies how long evidence must be preserved. Unlike the defendants, the Court does not labor under a sharp conflict of interests that could lead to a preservation order being revoked or diluted at any time. As the government admits, the Defense Intelligence Agency (“DIA”) managed al-Marri's interrogations. Thus, the very officers responsible for alleged acts of cruel and illegal treatment are also responsible for and control evidence that is in their

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*See* Defense Intelligence Agency's December 19, 2007 “Notice of Litigation Hold” (“DIA Notice”), Tab A to Berry Decl.; Mem. for Sec'y of Defense dated April 10, 2008, Tab A to Decl. of Russell G. Leavitt, Ex. 1 to Defs.' Resp. (“April 10, 2008 Memorandum”).

own interest to destroy and that they have admittedly destroyed in the past while misrepresenting that destruction to the Court. The absence of any protection against internal backsliding reinforces the need for a judicial order to ensure the preservation of all evidence *pendente lite*, especially where the government has failed to identify any meaningful burden imposed by such an order.

*Third*, the April 10, 2008 Memorandum and DIA Notice do not cover all relevant government agencies. They apply only to the Defense Department. The instant motion, however, seeks preservation of all evidence pertaining to al-Marri, in whatever form. The request therefore is not limited to the Defense Department but includes other parts of the U.S. government, including the FBI, which participated with the DIA in al-Marri's interrogations. *Savage Cert.* ¶ 29. The government's proposed retention procedures do nothing to ensure that the defendants take measures to prevent the spoliation of evidence pertaining to al-Marri's detention at the Navy brig possessed by other agencies—evidence that may be critical both here and in al-Marri's habeas corpus action.<sup>11</sup>

In sum, the Magistrate Judge manifestly erred in concluding that the requested preservation order would “add nothing.” The government has already destroyed a vast amount of relevant evidence. Inexplicably, and inexcusably, it destroyed that evidence in the middle of pending litigation and then misrepresented that destruction to this Court. It

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In addition, although broadly worded, the directives do not unambiguously cover the nine interrogation recordings that concededly remain. The Defense Department's April 10, 2008 Memorandum calls for the preservation only of “all *records* relating to [al-Marri],” and does not specifically include recordings, *e.g.*, recordings of his interrogations. The DIA Notice includes all “documents, records, data, correspondence, charts, reports, notes, emails . . . and other materials” relating to al-Marri but also does not specifically refer to recordings. The government should clarify that its preservation directives also cover all recordings of al-Marri, including the remaining interrogation recordings.

has belatedly put in place preservation directives that are incomplete and insufficient to prevent future destruction of the remaining evidence pertaining to al-Marri as well as the evidence of its past spoliation.

**C. A Preservation Order Would Not Burden the Government.**

Neither the government nor the Magistrate Judge identifies *any* injury or burden that would flow from the entry of the requested preservation order. By contrast, the prejudice to al-Marri and to this Court absent such an order would be enormous. Al-Marri could be further deprived of critical evidence necessary to fair and accurate adjudication of his constitutional claims. This Court, in turn, could be further deprived of its ability to resolve this action and the habeas corpus action judiciously. The prejudice to al-Marri and the Court on the one hand, and the absence of any material burden on the government on the other, further underscores why the Magistrate Judge clearly erred in refusing to enter the requested preservation order designed merely to maintain the status quo.

**II. The Magistrate Judge Erred in Finding that There Was No Need for an Inquiry into the Government's Destruction of Evidence and Possible Spoliation Remedies.**

The Magistrate Judge refused to conduct a spoliation inquiry because the government has asserted that the decision to destroy the evidence was made "in good faith" and because that decision was made "months before this action was filed." Order at 7. This ruling fundamentally misconstrues the law governing spoliation inquiries and the clear basis for such an inquiry and for appropriate remedial measures here. Failure to

correct the Magistrate Judge's findings will further jeopardize the integrity of all future proceedings.<sup>12</sup>

As explained above, the government breached its clear legal obligation by destroying evidence that was highly relevant both to al-Marri's pending habeas corpus litigation and to this action, which was reasonably anticipated at the time. The Magistrate Judge's suggestion that the government was under no legal obligation to preserve recordings of al-Marri's interrogations and related documents because this action had not yet been filed is simply wrong.

The Magistrate Judge's conclusion (Order at 7) that "a judicial inquiry into destruction of materials is unnecessary because the defendants have presented an undisputed explanation in their response of the nature and circumstances of the prior destruction or loss" is both incorrect and irrelevant. It is incorrect because the government's explanation is not "undisputed." Al-Marri does not accept the government's explanation at face value. Nor should the Court. The whole point of a spoliation inquiry is to determine the facts surrounding the destruction or loss. And it is particularly inappropriate to take the government's explanation at face value here given that the government previously misrepresented the destruction of evidence to the Court and given that the government's destruction of evidence involving other detainees is the subject of an ongoing criminal investigation by the Justice Department.

But even assuming that the government destroyed the evidence in good faith (and not, for example, to hide the truth), spoliation remedies would still be warranted. In

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<sup>12</sup> While the Magistrate Judge noted that al-Marri could "renew his request" for an inquiry into the government's spoliation and for remedial measures "at an appropriate time," his ruling indicates that he will apply the same fundamentally flawed analysis to any such request. Order at 7.

determining whether to impose spoliation-related measures, courts must consider: (1) the degree of fault of the party that destroyed the evidence; (2) the degree of prejudice suffered by the opposing party; and (3) the availability of sanctions that will avoid substantial unfairness to the opposing party and, if the offending party is seriously at fault, will serve to deter such conduct by others in the future. *See, e.g., Trigon Ins. Co. v. United States*, 204 F.R.D. 277, 286-287 (E.D. Va. 2001). All three factors support remedial measures here.

*First*, the government admits to intentionally destroying interrogation recordings and associated documents during pending litigation. That intentional destruction establishes fault *even if* the evidence was destroyed in good faith. *Vodusek v. Bayliner Marine Corp.*, 71 F.3d 148, 156 (4th Cir. 1995); *Trigon*, 204 F.R.D. at 287 (“[P]roof of bad faith is not necessary to obtain relief from spoliation.”). *Second*, al-Marri has already suffered irreparable harm because he has been deprived of evidence that could have helped him challenge the legality of his detention and conditions of confinement. *Trigon*, 204 F.R.D. at 284 (“[T]he spoliated physical evidence is often the best evidence as to what has really occurred and . . . there is an inherent unfairness in allowing a party to destroy evidence and then to benefit from that conduct.” (internal quotation marks and citation omitted)). *Third*, remedial measures would not only deter similar conduct in the future in this and other cases but would also help mitigate the prejudice to al-Marri, a central purpose of spoliation remedies. *Kronisch*, 150 F.3d at 126 (purpose of spoliation remedy is to put the aggrieved party in the evidentiary position he would have been in but for the spoliation); *Vodusek*, 71 F.3d at 156. Those measures could include orders requiring the reconstruction of destroyed evidence, *see, e.g., Jefferson v. Reno*, 123 F.

Supp. 2d 1, 2 (D.D.C. 2000); *Landmark Legal Found. v. E.P.A.*, 272 F. Supp. 2d 59, 67 (D.D.C. 2003), or drawing an adverse inference against the government in adjudicating al-Marri's claims, including claims involving contested statements in the Rapp Declaration that were obtained during interrogations where recordings of those interrogations have been destroyed. *Vodusek*, 71 F.3d at 155; *Kronisch*, 150 F.3d at 126.

In light of al-Marri's unopposed request to stay his habeas corpus action, it would be appropriate for the Court to wait to conduct a spoliation inquiry until the Supreme Court resolves his petition for certiorari. See Pet'r's Unopposed Mot. to Stay Further Proceedings Pending Resolution of His Pet'n for a Writ of Certiorari, *Al-Marri v. Pucciarelli*, Civ. A. No. 02:04-2257-HFF-RSC (dkt. no. 112). But the Court should neither wait to enter a preservation order to prevent any further spoliation, nor wait to correct the Magistrate Judge's erroneous findings. In particular, the Court should make clear that the government breached its legal duty in destroying evidence, that the availability of spoliation remedies do not depend simply on whether the evidence was destroyed "in good faith," and that an inquiry into the government's past destruction of evidence is warranted here.

### **Conclusion**

For the foregoing reasons, this Court should grant Plaintiff's motion for a preservation order and reject the findings of the Magistrate Judge in denying Plaintiff's request for an inquiry into the government's past destruction of evidence.

Respectfully submitted,

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