

No. 07-1520

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

**ZAYN AL ABIDIN MUHAMMAD HUSAYN,**  
PRISONER, Guantánamo Bay Naval Station, Guantánamo Bay, Cuba,  
*Petitioner/Plaintiff,*

v.

**ROBERT M. GATES,**  
SECRETARY OF DEFENSE OF THE UNITED STATES OF AMERICA,  
*Respondent/Defendant.*

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**AMENDED PETITION FOR RELIEF UNDER THE DETAINEE  
TREATMENT ACT OF 2005,  
AND, IN THE ALTERNATIVE, FOR WRIT OF HABEAS CORPUS**

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February 21, 2008

1. Petitioner, Zayn Al Abidin Muhammad Husayn ("Abu Zubaydah") ("Petitioner"), seeks the Great Writ.

2. All of the information that appears in this Petition comes from sources in the public domain. The sources include newspapers, magazines, television programs, television interviews, written reports, and, in a very limited number of instances, anecdotal reports. No information contained in the Petition is based on counsel's access to or review of any classified information. Indeed, counsel have not yet received any classified information regarding this case, and have not yet had access to the Petitioner. All the information presented was obtained publicly and is set forth here to document Petitioner's need for a habeas corpus hearing. An index of the documents and sources is attached hereto as Exhibit 1.

3. In March 2002, Petitioner was living in Pakistan. Petitioner was well known in his community and widely believed to be mentally challenged. Petitioner was so well known, it is remarkable that the CIA was unable to locate him. A former FBI agent who has reviewed the file on Petitioner is on record stating: "This guy is insane, certifiable, split personality . . . He was like a travel agent, the guy who booked your flights . . . the greeter . . . Joe Louis in the lobby of

Caesar's Palace, shaking hands."<sup>1</sup> Petitioner is said to have sustained a serious head injury in the years preceding the events of September 11, 2001.<sup>2</sup>

4. On or about March 28, 2002, Petitioner was attacked and shot three times by combined Pakistani and United States forces that, on information and belief, included agents of the Central Intelligence Agency ("CIA"). Wounded and in critical condition from gunshots to the groin, thigh, and stomach,<sup>3</sup> Petitioner became a prisoner in a secret program conducted by the Central Intelligence Agency ("CIA"), initiated after September 11, in which alleged suspects were jailed and systematically tortured at secret prisons outside the United States known as "black sites."<sup>4</sup>

5. Since March 2002, Petitioner has been held incommunicado in the unlawful custody of the CIA at various black sites around the world, including

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<sup>1</sup> Ron Suskind, *The One Percent Doctrine: Deep Inside America's Pursuit of Its Enemies Since 9/11*, at 100 (New York: Simon & Schuster 2006).

<sup>2</sup> *Id.* at 95.

<sup>3</sup> Brian Ross, *CIA- Abu Zubaydah: Interview with John Kiriakou: Transcript*, ABC NEWS, Dec. 10, 2007, [http://abcnews.go.com/images/Blotter/brianross\\_kiriakou\\_transcript1\\_blotter071210.pdf](http://abcnews.go.com/images/Blotter/brianross_kiriakou_transcript1_blotter071210.pdf).

<sup>4</sup> Dan Froomkin, *Bush's Exhibit A for Torture*, Wash. Post, Dec. 18, 2007, <http://www.washingtonpost.com/wp-dyn/content/blog/2007/12/18/BL2007121800862.html>; see also Dana Priest, *CIA Holds Terror Suspects in Secret Prisons*, Wash. Post, Nov. 2, 2005, A1, <http://www.washingtonpost.com/wp-dyn/content/article/2005/11/01/AR2005110101644.html>.

Pakistan, Thailand, Diego Garcia, Poland and Northern Africa (most probably Morocco).<sup>5</sup> During his captivity, Petitioner has been subjected to various forms of torture over extended periods of time, including, but not limited to, waterboarding, isolation, exposure to temperature extremes, and sleep and sensory deprivation.<sup>6</sup>

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<sup>5</sup> Dick Marty, *Secret detentions and illegal transfers of detainees involving Council of Europe member states: Second report*, Council of Europe Parliamentary Assembly, June 7, 2007, [http://assembly.coe.int/CommitteeDocs/2007/Emarty\\_20070608\\_NoEmbargo.pdf](http://assembly.coe.int/CommitteeDocs/2007/Emarty_20070608_NoEmbargo.pdf); Brian Ross and Richard Esposito, *EXCLUSIVE: Sources Tell ABC News Top Al Qaeda Figures Held in Secret CIA Prisons*, ABC News, Dec. 5, 2007, <http://abcnews.go.com/WNT/Investigation/story?id=1375123>; *CIA Shuffled Prisoners Out of Poland*, Global Pulse, Dec. 5, 2005, [http://www.globalpulse.net/archives/security/cia\\_shuttled\\_pr\\_000087.php](http://www.globalpulse.net/archives/security/cia_shuttled_pr_000087.php); Jason Burke, *Secret World of U.S. Jails*, Observer, June 13, 2004, <http://observer.guardian.co.uk/international/story/0,6903,1237589,00.html>; *Enforced Disappearance, Illegal Interstate Transfer, and Other Human Rights Abuses Involving the UK Overseas Territories: Executive Summary*, Reprieve, available at <http://www.reprieve.org.uk/documents/FinalReprieveFASCExecutiveSummary.pdf>.

<sup>6</sup> David Johnston, *At a Secret Interrogation, Disputes Flared Over Tactics*, N.Y. TIMES, Sept. 10, 2006, <http://www.nytimes.com/2006/09/10/washington/10detain.html?pagewanted=1>; Dan Eggen and Walter Pincus, *FBI, CIA Debate Significance of Terror Suspect: Agencies Also Disagree On Interrogation Methods*, Wash. Post, Dec. 18, 2007, at A1, <http://www.washingtonpost.com/wp-dyn/content/article/2007/12/17/AR2007121702151.html>; see also Brian Ross and Richard Esposito, *CIA's Harsh Interrogation Techniques Described – Sources Say Agency's Tactics lead to Questionable Confessions, Sometimes to Death*, ABC News, Nov. 18, 2005, <http://abcnews.go.com/WNT/Investigation/story?id=1322866>; Dick Marty, *Secret detentions and illegal transfers of detainees involving Council of Europe member states: Second report*, Council of Europe Parliamentary Assembly, June 7, 2007, [http://assembly.coe.int/CommitteeDocs/2007/Emarty\\_20070608\\_NoEmbargo.pdf](http://assembly.coe.int/CommitteeDocs/2007/Emarty_20070608_NoEmbargo.pdf).

Indeed, the government has admitted to waterboarding Petitioner. The government also has admitted to videotaping hundreds of hours of Petitioner's torture and interrogations and destroying same.<sup>7</sup> In addition to his torture, he has been subjected to cruel, inhumane, and degrading treatment and physical and psychological interrogation techniques specifically designed to isolate him from the world, reduce him to a state of learned helplessness, and render him wholly dependent on his captors.<sup>8</sup> He has now been imprisoned without charge for nearly six years.

6. Currently, Petitioner is being held virtually incommunicado in Respondent's unlawful custody at Guantánamo.

7. Respondent Gates, U.S. Secretary of Defense, is either ultimately responsible for or has been charged with the responsibility of maintaining the custody and control of Petitioner at Guantánamo.

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<sup>7</sup> Scott Shane and Mark Mazetti, *CIA Tapes Lived and Died to Save Image*, N.Y. Times, Dec. 30, 2007, at A1, [http://www.nytimes.com/2007/12/30/washington/30intel.html?\\_r=1&oref=slogin](http://www.nytimes.com/2007/12/30/washington/30intel.html?_r=1&oref=slogin).

<sup>8</sup> Jane Mayer, *The Black Sites: A rare look inside C.I.A.'s secret interrogation program*, The New Yorker, Aug. 13, 2007, [http://www.newyorker.com/reporting/2007/08/13/070813fa\\_fact\\_mayer](http://www.newyorker.com/reporting/2007/08/13/070813fa_fact_mayer); Katherine Eban, *Rorschach and Awe*, Vanity Fair, July 17, 2007, <http://www.vanityfair.com/politics/features/2007/07/torture200707>.

**I.**  
**JURISDICTION**

8. Petitioner invokes this Court's jurisdiction under 28 U.S.C. §§ 2241 and 2242. Petitioner also relies upon 28 U.S.C. §§ 1331, 1651, 2201, and 2202; 5 U.S.C. § 702; as well as the Fifth, Sixth, and Eighth Amendments to the United States Constitution; the International Covenant on Civil and Political Rights; the American Declaration on the Rights and Duties of Man; and customary international law. Because he seeks declaratory relief, Petitioner also relies on Fed. R. Civ. P. 57.

9. This Court is empowered under 28 U.S.C. § 2241 to grant the Writ of Habeas Corpus and to entertain this Petition. This Court is further empowered to declare the rights and other legal relations of the parties herein by 28 U.S.C. § 2201, and to effectuate and enforce declaratory relief by all necessary and proper means by 28 U.S.C. § 2202, as this case involves an actual controversy within the Court's jurisdictions.

**II.**  
**PARTIES**

10. On information and belief, Petitioner was born in Riyadh, Saudi Arabia, on March 12, 1971. Presently, Petitioner is incarcerated and held in Respondent's unlawful custody at Camp VII, Guantánamo.

11. Robert M. Gates (“Respondent”) is the Secretary of the United States Department of Defense. Respondent Gates has been charged with maintaining the custody and control of the Petitioner. He is sued in his official capacity.

### III. STATEMENT OF FACTS

12. Petitioner is not, and never has been, an enemy alien, lawful or unlawful belligerent, or combatant of any kind.

13. Petitioner is not, and never has been, an “enemy combatant” who was “part of or supporting forces hostile to the United States or coalition partners in Afghanistan. He was never engaged in an armed conflict against the United States there.” See *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

14. At the time of his detention, Petitioner was not a member of either the Taliban or al Qaeda. He did not cause or attempt to cause any harm to American personnel or property at any time prior to his illegal detention. Petitioner did not have a weapon when he was taken into illegal custody. Petitioner was not in Afghanistan at the time of his detention, but was taken into custody in Pakistan after he was wrongfully attacked, shot, and severely injured by U.S. forces, including the CIA.

15. From the time of his initial detention in Pakistan to the present, Petitioner has not been afforded any procedures that would satisfy even the most

basic notions of due process and procedural fairness, let alone the requirements imposed by the Due Process Clause of the Fifth Amendment to the United States Constitution. Had Petitioner received a hearing consistent with the standards and procedures specified by Respondent for Combatant Status Review Tribunals, or had those procedures been consistent with the Constitution and laws of the United States, Respondent would not have been able to prove by any standard that Petitioner either was, or should be classified as, an “enemy combatant.”

**A. NEITHER THE CONGRESSIONAL AUTHORIZATION FOR THE USE OF MILITARY FORCE NOR THE EXECUTIVE ORDER OF NOVEMBER 13, 2001, AUTHORIZED PETITIONER’S DETENTION**

16. In the wake of the September 11, 2001, attacks on the United States, a Joint Resolution of Congress authorized President Bush to use force against the “nations, organizations, or persons” that “planned, authorized, committed, or aided the terrorist attacks on September 11, 2001, or [that] harbored such organizations or persons.” Authorization for Use of Military Force, Pub. Law 107-40, 115 Stat. 224 (Sept. 18, 2001) (“AUMF”). Petitioner did not participate in an armed conflict against the United States nor was he arrested during the course of an armed conflict. He did not plan, authorize, commit, or aid any attacks on the United States, nor has he “harbored” persons who did. Therefore, he is not properly detained pursuant to the AUMF.



17. On November 13, 2001, President Bush issued a Military Order authorizing Respondent Rumsfeld to detain indefinitely “any individual who is not a United States citizen with respect to whom [the President] determine[s] from time to time in writing” that there is “reason to believe . . . at the relevant times:”

- i. is or was a member of the organization known as al Qaeda;
- ii. has engaged in, aided or abetted, or conspired to commit, acts of international terrorism, or acts in preparation therefore, that have caused, threaten to cause, or have as their aim to cause, injury to or adverse effects on the United States, its citizens, national security, foreign policy, or economy; or
- iii. has knowingly harbored one or more individuals described in subparagraphs (i) and (ii).

Military Order, Detention, Treatment, and Trial of Certain Non-Citizens in the War against Terrorism, 66 Fed. Reg. 57,833 (Nov. 13, 2001) (“Military Order”).

Pursuant to the plain language of the Order, President Bush must make in writing the determination contemplated by the Military Order. The Military Order was neither authorized nor directed by Congress and is beyond the scope of the AUMF.

18. On information and belief President Bush has never certified or determined in any manner, whether in writing or otherwise, that Petitioner is subject to the Executive Order.

19. Petitioner is not properly subject to detention pursuant to the Executive Order issued by President Bush.

20. Petitioner has not been, and is not being, detained lawfully either pursuant to the Executive Order, President Bush's authority as Commander-in-Chief and/or under the laws and usages of war.

**B. PETITIONER'S SEIZURE IN PAKISTAN AND TRANSFER TO THE CUSTODY OF THE CIA**

21. Petitioner was captured March 28, 2002, in Faisalbad, Pakistan.<sup>9</sup> He suffered three gunshot wounds after being attacked by Pakistani and American forces during his capture and arrest.<sup>10</sup>

22. Former CIA agent John Kiriakou, who was a co-leader of the team of American and Pakistani forces that shot and took custody of Petitioner, described Petitioner as "a very friendly guy," who wrote poetry and was keen to talk about

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<sup>9</sup> *United States' "Disappeared" CIA Long-term "Ghost Detainees"*, Human Rights Watch, available at <http://www.hrw.org/backgrounder/usa/us1004/index.htm>; Dan Eggen and Walter Pincus, FBI, *CIA Debate Significance of Terror Suspect: Agencies Also Disagree on Interrogation Methods*, Wash. Post, Dec. 18, 2007, at A1, <http://www.washingtonpost.com/wp-dyn/content/article/2007/12/17/AR2007121702151.html>; John F. Burns, *A Nation Challenged: The Fugitives; In Pakistan's Interior, a Troubling Victory in Hunt for Al Qaeda*, N.Y. Times, April 14, 2002, <http://query.nytimes.com/gst/fullpage.html?res=9A00EFDA123CF937A25757C0A9649C8B63>.

<sup>10</sup> David Johnston, *At a Secret Interrogation, Dispute Flared Over Tactics*, N.Y. TIMES, Sept. 10, 2006, <http://www.nytimes.com/2006/09/10/washington/10detain.html?pagewanted=1>; *Pakistan: Musharraf's Risky Gambit*, Newsweek, Oct. 29, 2007, <http://www.newsweek.com/id/64441> (noting that "Pakistan's own Inter-Services Intelligence directorate was kept largely in the dark about the operation").

current events and compare and contrast the differences and similarities between Islam and Christianity.<sup>11</sup>

23. Unclassified sources in the United Kingdom and elsewhere say that prior to Petitioner's arrest, Petitioner was a well-known figure who helped facilitate travel to and from Afghanistan after the Taliban became the *de facto* government in that country. Travelers from the United Kingdom who were familiar with Petitioner say he acted much like a travel agent. They described him as gregarious and friendly. Some have remarked that it was curious that Petitioner and his whereabouts were known to so many but not the CIA. Indeed, the fact that Petitioner's phone number is so well known supports accounts that Petitioner served as a travel agent.<sup>12</sup> Witnesses familiar with Petitioner and the CIA's allegations deny that Petitioner was a member of or associated with al Qaeda, as does Petitioner.

24. CIA agent Kiriakou stated that Petitioner "was shot in the thigh, the groin, and the stomach with an AK-47." In the same interview, Kiriakou stated: "[Petitioner] was almost killed. And later that night one of the doctors, the

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<sup>11</sup> Brian Ross, *CIA-Abu Zubaydah: Interview with John Kiriakou: Transcript*, ABC News, Dec. 10, 2007, [http://abcnews.go.com/images/Blotter/brianross\\_kiriakou\\_transcript1\\_blotter071210.pdf](http://abcnews.go.com/images/Blotter/brianross_kiriakou_transcript1_blotter071210.pdf)

<sup>12</sup> Ron Suskind, *The One Percent Doctrine: Deep Inside America's Pursuit of Its Enemies Since 9/11*, at 84 (New York: Simon & Schuster 2006).

Pakistani doctor who was treating him, told me that he had never seen wounds so severe where the patient had lived.” Kiriakou offered the following account of Petitioner’s injuries: “One of the things that sticks in my mind—from those—those days and nights was how much blood he lost. There was blood everywhere. It was all over him. It was all over the bed. It pooled underneath the bed. It was all over us every time we had to move him. It was really an incredible amount of blood that he lost.” Kiriakou claims to have been the first person to speak to Petitioner when he came out of his coma.<sup>13</sup>

25. The Government concedes that Petitioner was grievously injured, but contends that gunfire was exchanged during the raid.<sup>14</sup> Petitioner, however, denies that he or anyone with him in the guest house had weapons: “When our house was raided, we had no guns, so all we could do was fight with our hands. One of us had a knife, and he got killed. So, the statement that gunfire was

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<sup>13</sup> Brian Ross, *CIA-Abu Zubaydah: Interview with John Kiriakou: Transcript*, ABC News, Dec. 10, 2007, [http://abcnews.go.com/images/Blotter/brianross\\_kiriakou\\_transcript1\\_blotter071210.pdf](http://abcnews.go.com/images/Blotter/brianross_kiriakou_transcript1_blotter071210.pdf).

<sup>14</sup> *Unclassified Summary of Evidence for Combatant Status Review Tribunal* (19 March 2007), available at <http://www.defenselink.mil/news/ISN10016.pdf>.

exchanged was incorrect. The gunfire only came from the soldiers who attacked our house.”<sup>15</sup>

26. On information and belief, Petitioner was transferred to the custody of the CIA and flown out of Pakistan three days after being shot.<sup>16</sup>

27. On April 3, 2002, Donald Rumsfeld stated that the U.S. was “holding” Petitioner, who was receiving medical care.<sup>17</sup> Human Rights Watch and the British Broadcasting Corporation both reported that Petitioner was held in Pakistan under CIA control.<sup>18</sup>

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<sup>15</sup> Unclassified Verbatim Transcript of Combatant Status Review Tribunal Hearing for ISN 10016 (27 March 2007), *available at* [http://www.defenselink.mil/news/transcript\\_ISN10016.pdf](http://www.defenselink.mil/news/transcript_ISN10016.pdf).

<sup>16</sup> Dan Eggen and Walter Pincus, *FBI, CIA Debate Significance of Terror Suspect: Agencies Also Disagree on Interrogation Methods*, Wash. Post, Dec. 18, 2007, at A1, <http://www.washingtonpost.com/wp-dyn/content/article/2007/12/17/AR2007121702151.html>; *CIA Used Banned Cold War “Brainwashing” Techniques on Detainees*, Leveymag’s Journal, Dec. 18, 2007, <http://journals.democraticunderground.com/leveymg/336>.

<sup>17</sup> *Fate and Whereabouts Unknown: Detainees in the War on Terror*, NYU School of Law: Center for Human Rights and Global Justice, Dec. 17, 2005, <http://www.chrgj.org/docs/Whereabouts%20Unknown%20Final.pdf>.

<sup>18</sup> *United States’ “Disappeared” CIA Long-term “Ghost Detainees”*, Human Rights Watch, *available at* <http://www.hrw.org/backgrounder/usa/us1004/index.htm>.

**C. PETITIONER BECOMES A GHOST PRISONER AT CIA BLACK SITES AROUND THE WORLD**

28. Over the next four years, Petitioner was jailed at various CIA prisons around the world.

29. Video cameras were set up to record Petitioner twenty-four hours a day, including when he was interrogated and tortured.<sup>19</sup>

30. At one point in the early weeks of his interrogation, Petitioner was taken to a hospital for medical treatment because he nearly died from infected wounds.<sup>20</sup>

31. On information and belief, US officials deliberately withheld painkillers from Petitioner as an interrogation device.<sup>21</sup>

32. Petitioner initially was interrogated in a safe house in Thailand and was kept there for at least a “few weeks” after his capture.<sup>22</sup> Investigators from the

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<sup>19</sup> Scott Shane and Mark Mazetti, *CIA Tapes Lived and Died to Save Image*, N.Y. Times, Dec. 30, 2007, at A1, [http://www.nytimes.com/2007/12/30/washington/30intel.html?\\_r=1&oref=slogin](http://www.nytimes.com/2007/12/30/washington/30intel.html?_r=1&oref=slogin).

<sup>20</sup> David Johnston, *At a Secret Interrogation, Dispute Flared Over Tactics*, N.Y. Times, Sept. 10, 2006, 8655-8657, <http://www.nytimes.com/2006/09/10/washington/10detain.html?pagewanted=1>.

<sup>21</sup> *United States’ “Disappeared” CIA Long-term “Ghost Detainees,”* Human Rights Watch, <http://www.hrw.org/backgrounders/usa/us1004/index.htm>; Serrin Turner & Stephen J. Schullhoffer, *The Secrecy Problem in Terrorism Trials*, Brennan Center for Justice, 55 (2005), [http://brennan.3cdn.net/6a0e5de414927df95e\\_1bm6iy66c.pdf](http://brennan.3cdn.net/6a0e5de414927df95e_1bm6iy66c.pdf) (stating, “For nearly forty-eight hours, around the clock, Zubaydah’s condition went from complete relief when the [narcotic] drip was on to utter agony when it was off.”).

Council of Europe were told that Thailand hosted the first CIA “black site,” and that Petitioner was held there after his capture in 2002. CIA sources indicated that Thailand was used because of the ready availability of the network of local knowledge and bilateral relationships that dated to the Vietnam War.<sup>23</sup>

33. After Thailand, on information and belief, Petitioner was transferred to Diego Garcia in the Indian Ocean and then taken to a secret CIA prison in Poland.<sup>24</sup> Sources in the CIA named Poland as a “black site” where both Petitioner

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<sup>22</sup> David Johnston, *At a Secret Interrogation*, Dispute Flared Over Tactics, N.Y. Times, Sept. 10, 2006, <http://www.nytimes.com/2006/09/10/washington/10detain.html?pagewanted=1>.

<sup>23</sup> “One CIA source told us: “In Thailand, it was a case of ‘you stick with what you know’;” however, since the allegations pertaining to Thailand were not the direct focus of our inquiry, we did not elaborate further on these references in our discussions. The specific location of the “black site” in Thailand has been publicly alleged to be a facility in Udon Thani, near to the Udon Royal Thai Air Force Base in the north-east of the country. This base does have long-standing connections to American defence [sic] and intelligence activities overseas: during the Vietnam War it served as both a deployment base for the US Air Force and the Asian headquarters of the CIA-linked aviation enterprise, Air America.” Dick Marty, *Secret detentions and illegal transfers of detainees involving Council of Europe member states: Second report*, Council of Europe Parliamentary Assembly, June 7, 2007, [http://assembly.coe.int/CommitteeDocs/2007/Emarty\\_20070608\\_NoEmbargo.pdf](http://assembly.coe.int/CommitteeDocs/2007/Emarty_20070608_NoEmbargo.pdf)

<sup>24</sup> *Enforced Disappearance, Illegal Interstate Transfer, and Other Human Rights Abuses Involving the UK Overseas Territories: Executive Summary*, Reprieve, <http://www.reprieve.org.uk/documents/FinalReprieveFASCExecutiveSummary.pdf>; Ian Cobain, *Claims of secret CIA jail for terror suspects on British island to be investigated*, The Guardian (Oct. 19, 2007), <http://www.guardian.co.uk/world/2007/oct/19/alqaida.usa>.

and Khalid Sheikh Mohamed were held and questioned using “enhanced interrogation techniques.”<sup>25</sup>

34. The secret detention facilities in Europe were run directly and exclusively by the CIA. Based on information and belief, the local staff had no meaningful contact with the prisoners and performed purely logistical duties such as securing the outer perimeter.<sup>26</sup>

35. The U.S. Government set out to secure permissions “from as many allied countries as possible” that would allow CIA agents to collaborate directly with foreign military officials, operate “on a no-questions-asked basis” at military installations, and travel free from inspection in military or civilian vehicles and aircraft.<sup>27</sup>

36. These secret places of detention formed part of the “HVD” (High Value Detainees) program publicly referred to by the President of the United States on 6 September 2006.<sup>28</sup> The “HVD” program was set up by the CIA with the cooperation of official European partners belonging to Government services and kept secret for many years thanks to strict observance of the rules of confidentiality laid

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<sup>25</sup> Marty, *supra* n.23.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*



down in the NATO framework. The implementation of this program has given rise to repeated and serious breaches of human rights.<sup>29</sup>

37. Detainees of the “HVD” program were subjected to inhuman and degrading treatment, sometimes protracted. Certain “enhanced” interrogation methods that were used against the prisoners in this program meet the definition of torture and inhuman and degrading treatment in Article 3 of the European Convention on Human Rights and the United Nations Convention against Torture. Furthermore, secret detention is contrary to international undertakings both of the United States and of the Council of Europe Member States.<sup>30</sup>

38. On information and belief, after the disclosure of the CIA’s operation of black sites around the world, Petitioner was moved to another secret CIA prison in the North African desert in November or December 2005.<sup>31</sup> According to another report, Zubaydah also is believed to have been transferred to Bagram Air Base, Afghanistan, and then to Jordan where he was detained in various facilities in the capital Amman and the eastern desert portion of the country.<sup>32</sup>

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<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> Brian Ross and Richard Esposito, *EXCLUSIVE: Sources Tell ABC News Top Al Qaeda Figures Held in Secret CIA Prisons*, ABC News, Dec. 5, 2007, 8711-8713, <http://abcnews.go.com/WNT/Investigation/story?id=1375123>.

<sup>32</sup> Jason Burke, *Secret World of U.S. Jails*, Observer, June 13, 2004, <http://observer.guardian.co.uk/international/story/0,6903,1237589,00.html>.

39. The CIA's harsh treatment of Petitioner during his initial interrogation led to a dispute regarding acceptable interrogation methods between the FBI and the CIA.<sup>33</sup> Petitioner's initial interrogation by FBI agents followed usual protocol: they cleaned his wounds, spoke to him in languages with which he is familiar – Arabic and English – and tried to convince him they knew details of his activities.<sup>34</sup> According to officers who were present, Petitioner began to provide information during this initial FBI interrogation.<sup>35</sup>

40. Subsequently, CIA officials, who were being pressed for information by Respondent's predecessor and other officials within the Executive Branch, felt Petitioner was not providing enough information under FBI questioning and took over the interrogation.<sup>36</sup>

41. A. B. Krongard, who was Executive Director of the C.I.A. from 2001 to 2004, has stated publicly that the United States was not familiar with the use of torture and that "the agency turned to 'everyone we could, including our friends in Arab cultures,' for interrogation advice, among them those in Egypt, Jordan, and

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<sup>33</sup> David Johnston, *At a Secret Interrogation, Dispute Flared Over Tactics*, N.Y. Times, Sept. 10, 2006, <http://www.nytimes.com/2006/09/10/washington/10detain.html?pagewanted=1>.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

Saudi Arabia, all of which the State Department regularly criticizes for human-rights abuses.”<sup>37</sup>

42. To assist in the interrogation of Petitioner, the CIA hired a group of retired military psychologists, who had undergone Survival, Evasion, Resistance, and Escape (“SERE”) training, to implement a regime of techniques that one well-informed former adviser to the American intelligence community describes as “a Clockwork Orange” kind of approach. “The program, known as SERE . . . was created at the end of the Korean War. It subjected trainees to simulated torture, including waterboarding (simulated drowning), sleep deprivation,<sup>38</sup> isolation, and exposure to temperature extremes, enclosure in tiny spaces, bombardment with agonizing sounds, and religious and sexual humiliation.” Although the SERE program was designed strictly for defense against torture regimes, “the CIA’s new team used its expertise to inflict abuse. ‘They were very arrogant, and pro-torture,’ a European official knowledgeable about the program said. ‘They sought to render

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<sup>37</sup> Jane Mayer, *The Black Sites: A rare look inside C.I.A.’s secret interrogation program*, *The New Yorker*, Aug. 13, 2007, [http://www.newyorker.com/reporting/2007/08/13/070813fa\\_fact\\_mayer](http://www.newyorker.com/reporting/2007/08/13/070813fa_fact_mayer).

<sup>38</sup> “Under President Bush’s new executive order, CIA detainees must receive the ‘basic necessities of life, . . . Sleep according to the order, is not among the basic necessities.” *Id.*

the detainees vulnerable – to break down all of their senses. It takes a psychologist trained in this to understand these rupturing experiences.”<sup>39</sup>

43. Petitioner was interrogated by a team “overseen by James Elmer Mitchell, a consulting psychologist under contract to the CIA, who reportedly adapted ‘brainwashing’ techniques originally developed by the Chinese in the Korean War. . . . Mitchell and staff CIA psychologist, Bruce Jessen, took over the interrogation of [PETITIONER] in May, 2002, and for months subjected Zubaydah to a variety of extreme physical and psychological abuses . . .”<sup>40</sup> Neither individual had any proof that their tactics were effective. Steve Kleinman, an Air Force Reserve Colonel and expert in human-intelligence operations, found it astonishing that the CIA “chose two clinical psychologists who had no intelligence background whatsoever, who had never conducted an interrogation, . . . to do something that had never been proven in the real world.”<sup>41</sup> Michael Tolince, former section chief of the FBI’s International Terrorism Operations, described the methods employed by Mitchell and Jessen as “voodoo science.”<sup>42</sup> Speaking of

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<sup>39</sup> *Id.*

<sup>40</sup> Katherine Eban, *Rorschach and Awe*, Vanity Fair, July 17, 2007, <http://www.vanityfair.com/politics/features/2007/07/torture200707>.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

Mitchell and Jessen, Steve Kleinman has stated: "I think they have caused more harm to American national security than they'll ever understand."<sup>43</sup>

44. The interrogation and torture of Petitioner by Mitchell and Jessen began in May 2002.

45. Prisoners in the CIA program were taken to their cells by guards who wore black outfits, masks that covered their whole faces, and dark visors over their eyes. Prisoners' clothes were cut up and torn off; many detainees were then kept naked for several weeks, going through months of solitary confinement and extreme sensory deprivation in cramped cells, shackled and handcuffed at all times. A common feature for many detainees was the four-month isolation regime. During this period of over 120 days, absolutely no human contact was granted with anyone but masked, silent guards.<sup>44</sup> There was a shackling ring in the wall of the cell, about half a meter up off the floor. Detainees' hands and feet were clamped in handcuffs and leg irons. Bodies were regularly forced into contorted shapes and chained to this ring for long, painful periods.<sup>45</sup>

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<sup>43</sup> *Id.*

<sup>44</sup> Dick Marty, *Secret detentions and illegal transfers of detainees involving Council of Europe member states: Second report*, Council of Europe Parliamentary Assembly, June 7, 2007, available at [http://assembly.coe.int/CommitteeDocs/2007/Emarty\\_20070608\\_NoEmbargo.pdf](http://assembly.coe.int/CommitteeDocs/2007/Emarty_20070608_NoEmbargo.pdf).

<sup>45</sup> *Id.* at 16017.

46. Food was raw, tasteless and was often tipped out carelessly on a shallow dish so part of it would waste. Apart from a thin, foam mattress to lie on or rest against, many cells had a bare floor and blank walls. Detainees never experienced natural light or natural darkness, although most were blindfolded many times so they could see nothing. Moreover, the air in many cells came from a ventilation hole in the ceiling, which was often controlled to produce extremes of temperature: sometimes so hot one would gasp for breath, sometimes freezing cold.<sup>46</sup>

47. Six of the “enhanced interrogation techniques” used by the CIA were described in an ABC News report in November 2005, summarised as follows: “water boarding” (induced fear of drowning on a detainee strapped to an inverted board); “cold cell” (naked at 50 degrees Fahrenheit, repeatedly doused with cold water); “long-time standing” (shackled in a stress position for up to 40 hours, causing extreme pain and sleep deprivation); “attention slap” (open-handed strike across the face); “belly slap” (hard, open-handed strike to the stomach); and “attention grab” (taking hold of the detainee’s shirt, shaking forcefully).<sup>47</sup>

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<sup>46</sup> *Id.* at 16016.

<sup>47</sup> See Brian Ross and Richard Esposito, *CIA’s Harsh Interrogation Techniques Described – Sources Say Agency’s Tactics Lead to Questionable Confessions, Sometimes to Death*, ABC News, Nov. 18, 2005, <http://abcnews.go.com/WNT/Investigation/story?id=1322866>.

48. A CIA officer who knows one of the individuals who interrogated and tortured Khalid Sheikh Mohammed reports that the interrogator “has horrible nightmares. When you cross over that line of darkness, it’s hard to come back. You lose your soul. You can do your best to justify it, but it’s well outside the norm. You can’t go to a dark place without it changing you . . . You are inflicting something really evil and horrible on somebody.”<sup>48</sup>

**D. PETITIONER WAS TORTURED BY THE CIA FOR YEARS**

49. The CIA subjected Petitioner to methods of torture that are prohibited under U.S. and international laws and treaties, including, *inter alia*, the Geneva Conventions. John Kiriakou, the former CIA agent directly involved in the interrogation of Petitioner, has said publicly that (1) Petitioner was waterboarded and (2) that waterboarding is torture.<sup>49</sup>

50. On February 5, 2008, in testimony before the Senate Select Committee on Intelligence, CIA Director Michael V. Hayden publicly confirmed for the first time that the CIA and civilian contractors had used waterboarding on Petitioner and others in 2003 and 2004. “A senior intelligence official at the

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<sup>48</sup> Jane Mayer, *The Black Sites: A rare look inside C.I.A.’s secret interrogation program*, The New Yorker, Aug. 13, 2007, [http://www.newyorker.com/reporting/2007/08/13/070813fa\\_fact\\_mayer](http://www.newyorker.com/reporting/2007/08/13/070813fa_fact_mayer).

<sup>49</sup> Richard Esposito and Brian Ross, *Coming in From the Cold: CIA Spy Calls Waterboarding Necessary But Torture: Former Agent Says Enhanced Technique Was Used on Al Qaeda Chief Abu Zubaydah*, ABC News, Dec. 10, 2007, <http://abcnews.go.com/Blotter/Story?id=3978231&page=5>.

hearing . . . said that the CIA officers and contractors who conducted interrogations involving waterboarding were told it was legal at the time, but added that ‘the legal landscape has changed.’” At the same hearing, FBI Director Robert S. Mueller was careful to distance the FBI from CIA’s unlawful actions and denied that the FBI had used waterboarding: “It has been our policy not to use coercive techniques.”<sup>50</sup>

51. FBI agents and analysts familiar with Petitioner’s treatment by the CIA confirm that he was waterboarded and subjected to other “enhanced interrogation” measures.<sup>51</sup> For example, Petitioner was stripped and put in a cell with no bunk or blankets where he was subjected to freezing temperatures and deafening music.<sup>52</sup> “In addition, Petitioner was kept for a prolonged period in a cage, known as a ‘dog box,’ which was so small that he could not stand.”<sup>53</sup>

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<sup>50</sup> Walter Pincus, *Pakistan Is Threatened, Intelligence Chief Says*, Wash Post, Feb. 6, 2008, at A3, <http://www.washingtonpost.com/wp-dyn/content/article/2008/02/05/AR2008020502979.html>.

<sup>51</sup> Dan Eggen and Walter Pincus, *FBI, CIA Debate Significance of Terror Suspect: Agencies Also Disagree on Interrogation Methods*, Wash. Post, Dec. 18, 2007, at A1, <http://www.washingtonpost.com/wp-dyn/content/article/2007/12/17/AR2007121702151.html>.

<sup>52</sup> David Johnston, *At a Secret Interrogation, Dispute Flared Over Tactics*, N.Y. Times, Sept. 10, 2006, <http://www.nytimes.com/2006/09/10/washington/10detain.html?pagewanted=1>.

<sup>53</sup> Jane Mayer, *The Black Sites: A rare look inside C.I.A.’s secret interrogation program*, The New Yorker, Aug. 13, 2007, [http://www.newyorker.com/reporting/2007/08/13/070813fa\\_fact\\_mayer](http://www.newyorker.com/reporting/2007/08/13/070813fa_fact_mayer).



According to an eyewitness, James Mitchell, the psychologist retained by the CIA who was advising on Petitioner's interrogation, argued that Petitioner needed to be reduced to a state of "learned helplessness."<sup>54</sup> The basic approach was to "break down [prisoners] through isolation, white noise, completely take away their ability to predict the future, create dependence on interrogators." As explained by CIA interrogators, they were going to become Zubaydah's "God."<sup>55</sup>

52. FBI agents on the scene protested these tactics, but by then the CIA had taken the lead in the interrogation, and FBI leaders decided not to intercede.<sup>56</sup> "One [FBI] agent was so offended he threatened to arrest the CIA interrogators, according to two former government officials directly familiar with the dispute."<sup>57</sup>

53. Retired FBI agent Daniel Coleman, who led an examination of documents after Petitioner's capture, is on record questioning Petitioner's mental stability before he was subjected to torture at the hands of CIA officials.

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<sup>54</sup> *Id.*

<sup>55</sup> Katherine Eban, *Rorschach and Awe*, Vanity Fair, July 17, 2007, <http://www.vanityfair.com/politics/features/2007/07/torture200707>

<sup>56</sup> David Johnston, *At a Secret Interrogation, Dispute Flared Over Tactics*, N.Y. Times, Sept. 10, 2006, <http://www.nytimes.com/2006/09/10/washington/10detain.html?pagewanted=1>.

<sup>57</sup> Michael Isikoff, Mark Hosenball and Michael Hirsh, *Aggressive interrogation techniques of terror suspects is under scrutiny*, Newsweek, Dec 17, 2007, <http://www.newsweek.com/id/74317>.

“This guy is insane, certifiable, split personality,” Coleman told a top official at FBI after a few days reviewing the Zubaydah haul. “That’s why they let him fly all over the world doing meet and greet. That’s why people used his name on all sorts of calls and e-mails. He was like a travel agent, the guy who booked your flights. You can see from what he writes how burdened he is with all the logistics--getting families of operative, wives and kids, in and out of countries. He knew very little about real operations, or strategy. He was expendable, you know, the greeter . . . Joe Louis in the lobby of Caesar’s Palace, shaking hands.” This opinion was echoed at the top of CIA and was, of course, briefed to the President and Vice President. While Bush was out in public claiming Zubaydah’s grandiose malevolence, his private disappointment fell, as it often would, on Tenet--the man whose job he’d saved. “I said he was important,” Bush said to Tenet at one of their daily meetings. “You’re not going to let me lose face on this, are you?” “No sir, Mr. President.”<sup>58</sup>

54. FBI agents familiar with Petitioner’s interrogation have claimed that the waterboarding was worthless and that the only valuable information from Petitioner came from documents captured from him. “He was talking before they did that to him, but they didn’t believe him,” FBI agent Dan Coleman told *The Washington Post*. “The problem is they didn’t realize he didn’t know all that much.”<sup>59</sup>

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<sup>58</sup> Ron Suskind, *The One Percent Doctrine: Deep Inside America’s Pursuit of Its Enemies Since 9/11*, at 100 (New York: Simon & Schuster 2006).

<sup>59</sup> Spencer Ackerman, *CIA Largely in the Dark on Interrogation Tactics*, Wash. Post, Jan, 28, 2008. [http://www.truthout.org/docs\\_2006/printer\\_012908N.shtml](http://www.truthout.org/docs_2006/printer_012908N.shtml).

55. Agent Coleman also questioned the reliability of any information allegedly provided by Petitioner while under torture.<sup>60</sup> Consistent with Agent Coleman's account, at Petitioner's Combat Status Review Tribunal on March 27, 2007, Petitioner informed the tribunal that he had been experiencing seizures that made speaking and writing difficult.<sup>61</sup>

56. Retired Agent Coleman contradicts the contention by the CIA and Respondent officials that Petitioner was a highly placed al Qaeda figure. Coleman described Petitioner as a "safehouse keeper" with mental problems. Based on his review of the documents and the fact that Petitioner had suffered a severe head injury years before, Coleman and others at the FBI believed that Petitioner had severe mental problems that "called his credibility into question. Coleman is quoted as saying: "[al-Qaeda operatives] all knew he was crazy, and they knew he was always on the damn phone. You think they're going to tell him anything."<sup>62</sup>

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<sup>60</sup> Dan Eggen and Walter Pincus, *FBI, CIA Debate Significance of Terror Suspect: Agencies Also Disagree on Interrogation Methods*, Wash. Post, Dec. 18, 2007, at A1, <http://www.washingtonpost.com/wp-dyn/content/article/2007/12/17/AR2007121702151.html>.

<sup>61</sup> Unclassified Verbatim Transcript of Combatant Status Review Tribunal Hearing for ISN 10016 (27 March 2007), *available at* [http://www.defenselink.mil/news/transcript\\_ISN10016.pdf](http://www.defenselink.mil/news/transcript_ISN10016.pdf).

<sup>62</sup> Dan Eggen and Walter Pincus, *FBI, CIA Debate Significance of Terror Suspect: Agencies Also Disagree on Interrogation Methods*, Wash. Post, Dec. 18, 2007, at A1, <http://www.washingtonpost.com/wp-dyn/content/article/2007/12/17/AR2007121702151.html>.

57. Retired Agent Coleman has reported that Petitioner's early interrogations (before the CIA began torturing him) were "consistent with who he was and what he could possibly know." However, Coleman reports that CIA officials concluded that Petitioner was a major player who was withholding information. Subsequently, CIA subjected Petitioner to systematic torture.<sup>63</sup> Later, Coleman's opinions came to be shared by the CIA's top officials.<sup>64</sup>

**E. WATERBOARDING HAS ALWAYS BEEN RECOGNIZED AS TORTURE BY THE UNITED STATES**

58. Waterboarding is torture and a felony under the federal torture statute. 18 U.S.C. § 234018; 18 U.S.C. § 2340, et seq. This is an absolute standard, not dependent on circumstances. In 2006, the sitting senior uniformed lawyers of the military services testified before Congress unanimously and unambiguously that waterboarding is inhumane and illegal and violates U.S. obligations under Common Article 3 of the Geneva Conventions. "It has a venerable lineage, first appearing in a 1541 French judicial handbook, where it was called 'Torturae Gallicae Ordinariae' or 'Standard Gallic Torture.' But it would now become, under

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<sup>63</sup> *Id.*

<sup>64</sup> Paul McLeary, *The Forgotten Story of Abu Zubaydah*, Columbia Journalism Review, Sept. 7, 2006, [http://www.cjr.org/politics/the\\_forgotten\\_story\\_of\\_abu\\_zub.php](http://www.cjr.org/politics/the_forgotten_story_of_abu_zub.php) (citing Ron Suskind's book *The One Percent Doctrine*).

the War on Terror, what CIA director Porter Goss called, in March 2005 congressional testimony, a ‘professional interrogation technique.’”<sup>65</sup>

59. Until 2002, when the Bush Administration secretly approved the use of waterboarding, it was classified as a form of torture and treated as a serious criminal offense. The United States prosecuted Japanese military officials who waterboarded American soldiers for War Crimes following the Second World War and prosecuted American soldiers in the Vietnam War for waterboarding captives suspected of being affiliated with the Viet Cong.<sup>66</sup>

60. Malcolm Wrightson Nance, a counterterrorism specialist who taught at the Navy’s Survival, Evasion, Resistance and Escape (SERE) School in California, was subjected to waterboarding as part of his military training. He testified before a House oversight hearing on torture and enhanced interrogation techniques on November 8, 2007. He testified that waterboarding was clearly torture, and that such a method was never intended for use by U.S. interrogators because it is a relic of abusive totalitarian governments. In his testimony, Nance likened waterboarding to drowning and said those who experience it will say or do

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<sup>65</sup> Alfred McCoy, *The U.S. Has a History of Using Torture*, History News Network, Dec. 4, 2006, <http://hnn.us/articles/32497.html>.

<sup>66</sup> Walter Pincus, *Waterboarding Historically Controversial; In 1947, the U.S. Called It a War Crime: in 1968, It Reportedly Caused an Investigation*, WASH. POST, Oct. 5, 2006, at A17, <http://www.washingtonpost.com/wp-dyn/content/article/2006/10/04/AR2006100402005.html>.

anything to make it stop, rendering the information they give nearly useless. Recounting his experience when he was waterboarded, he testified: "In my case, the technique was so fast and professional that I didn't know what was happening until the water entered my nose and throat . . . It then pushes down into the trachea and starts the process of respiratory degradation. It is an overwhelming experience that induces horror and triggers frantic survival instincts. As the event unfolded, I was fully conscious of what was happening: I was being tortured." Nance testified unequivocally that waterboarding is a long-standing form of torture used by history's most brutal regimes, including Nazi Germany, Imperial Japan, North Korea, Iraq, the Soviet Union and the Khmer Rouge of Cambodia.<sup>67</sup> The United States is now on that list: On February 6, 2008, the White House opined that waterboarding is legal.<sup>68</sup>

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<sup>67</sup> Josh White, *Waterboarding Is Torture, Says Ex-Navy Instructor*, WASH. POST, Nov. 9, 2007, at A4, <http://www.washingtonpost.com/wp-dyn/content/article/2007/11/08/AR2007110802150.html>.

<sup>68</sup> Dan Eggen, *White House Defends CIA's Use of Waterboarding in Interrogations*, Wash. Post, February 7, 2008, A3, <http://www.washingtonpost.com/wp-dyn/content/article/2008/02/05/AR2008020502764.html?hpid=moreheadlines>; Jon Ward, *White House Says Waterboarding Not Torture*, Wash. Times, February 7, 2008, <http://washingtontimes.com/apps/pbcs.dll/article?AID=/20080207/NATION/159391790/1002>.

61. Contrary to the government's assertion that waterboarding is "simulated drowning," waterboarding is more aptly described as "simulated death." Addressing Rep. Trent Frank's assertion that Khalid Sheik Mohammed was waterboarded for 90 seconds, Nance said about 1.2 gallons of water was poured down his nose and throat while he was strapped to a board.<sup>69</sup> As a prisoner's lungs fill with water, he is asphyxiated. Deprived of oxygen, a prisoner eventually begins to lose consciousness. At that point, the procedure is halted, the prisoner vomits out the water from his lungs, is revived briefly, and the process is repeated.

62. Richard E. Mezo, who served in the Navy for six years, was waterboarded during his training to become a Navy flight crew member. Mr. Mezo has written: "[a]s someone who has experienced waterboarding, albeit in a controlled setting, I know that the act is indeed torture. . . . As has been noted in The Post and other media outlets, waterboarding is real drowning that simulates death."<sup>70</sup> Describing the actual experience, Mezo writes:

Two men grabbed me at my sides. They put a pole of some kind under my knees and bent me over backward. My head went down lower than the rest of my body. The

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<sup>69</sup> *Id.*

<sup>70</sup> Richard E. Mezo, *Why It Was Called 'Water Torture'*, Wash. Post, Feb. 10, 2008, B7, <http://www.washingtonpost.com/wp-dyn/content/article/2008/02/08/AR2008020803156.html?sub-AR>.

questions (What is your unit? Where are you from?) were asked by one man. But we were not supposed to talk. I remember that the blindfold was heavy and completely covered my face. As the two men held me down, one on each side, someone began pouring water onto the blindfold, and suddenly I was drowning. The water streamed into my nose and then into my mouth when I gasped for breath. I couldn't stop it. All I could do is breath water, and it was terrifying. I think I began to lose consciousness. I felt my lungs begin to fill with burning liquid. Pulling out my fingernails or even cutting off a finger would have been preferable.<sup>71</sup>

63. Finally, Professor Alfred McCoy, who has written extensively on torture, has described waterboarding in his book *A Question of Torture: CIA Interrogation, from the Cold War to the War on Terror*:

There are several methods for achieving water boarding's perverse effect of drowning in open air: most frequently, by making the victim lie prone and then constricting breathing with a wet cloth, a technique favored by both the French Inquisition and the CIA; or, alternatively, by forcing water directly and deeply into the lungs, as French paratroopers did during the Algerian War.

After French soldiers used the technique on Henri Alleg during the Battle for Algiers in 1957, this journalist wrote a moving description that turned the French people against both torture and the Algerian War. "I tried," Alleg wrote, "by contracting my throat, to take in as little water as possible and to resist suffocation by keeping air in my lungs for as long as I could. But I couldn't hold on for more than a few moments. I had the impression of drowning, and a terrible agony, that of death itself, took possession of me."

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<sup>71</sup> *Id.*



Let us think about the deeper meaning of Alleg's sparse words--"a terrible agony, that of death itself." As the water blocks air to the lungs, the human organism's powerful mammalian diving reflex kicks in, and the brain is wracked by horrifically painful panic signals--death, death, death. After a few endless minutes, the victim vomits out the water, the lungs suck air, and panic subsides. And then it happens again, and again, and again--each time inscribing the searing trauma of near death in human memory.<sup>72</sup>

64. According to sources familiar with Petitioner's treatment, tension between the FBI and CIA developed after FBI agents witnessed the use of interrogation techniques that were impermissible. "FBI Director Robert S. Mueller eventually ordered the FBI team to withdraw from the interrogation, largely because bureau procedures prohibit agents from being involved with such techniques."<sup>73</sup>

65. Although Administration officials have stated that Petitioner's compliance was obtained after a single torture session,<sup>74</sup> "former and current

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<sup>72</sup> Alfred McCoy, *The U.S. Has a History of Using Torture*, History News Network, Dec. 4, 2006, <http://hnn.us/articles/32497.html>.

<sup>73</sup> Dan Eggen and Walter Pincus, *FBI, CIA Debate Significance of Terror Suspect: Agencies Also Disagree on Interrogation Methods*, Wash. Post, Dec. 18, 2007, at A1, <http://www.washingtonpost.com/wp-dyn/content/article/2007/12/17/AR2007121702151.html>.

<sup>74</sup> Brian Ross, *CIA-Abu Zubaydah: Interview with John Kiriakou: Transcript*, ABC NEWS, Dec. 10, 2007, [http://abcnews.go.com/images/Blotter/brianross\\_kiriakou\\_transcript1\\_blotter071210.pdf](http://abcnews.go.com/images/Blotter/brianross_kiriakou_transcript1_blotter071210.pdf).

officials disagreed that [Petitioner's] cooperation came quickly under harsh interrogation or that it was the result of a single waterboarding session. Instead, these officials said harsh tactics used on him at a secret detention facility in Thailand went on for weeks or, depending on accounts, even months."<sup>75</sup> These officials' accounts were confirmed by Petitioner at his CSRT hearing and in his unclassified factual return. Although Petitioner's description of his torture is deleted from the unclassified return, government censors failed to delete references elsewhere in the return. At page 23, the Tribunal President states: "In your statement, you mentioned months of torture." At another stage during the tribunal proceeding, the President asks Petitioner to describe the torture he endured in greater detail. Although Petitioner's response is redacted, the President then responds: "So I understand that during this treatment [torture], you said things to make them stop and then those statements were actually untrue, is that correct? Petitioner's answer to the question was: "Yes."

66. The likelihood of eliciting false statements through torture is acknowledged by the CIA: according to Kirikaou, the reason why waterboarding was not used on more detainees was "[b]ecause we didn't want these false

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<sup>75</sup> Dan Eggen and Walter Pincus, *FBI, CIA Debate Significance of Terror Suspect: Agencies Also Disagree on Interrogation Methods*, Wash. Post, Dec. 18, 2007, at A1, <http://www.washingtonpost.com/wp-dyn/content/article/2007/12/17/AR2007121702151.html>.

confessions. We didn't want wild goose chases."<sup>76</sup> Furthermore, as Air Force Reserve colonel and expert in human-intelligence operations Steve Kleinman explains, the SERE methods, which find origin in Communist interrogation techniques, were never designed to get good information. Their goal, says Kleinman, was to generate propaganda by getting beaten-down American hostages to make statements that were against U.S. interests and used for propaganda purposes.<sup>77</sup>

67. On information and belief, all of Petitioner's interrogations and torture were videotaped.<sup>78</sup>

68. By the government's own admission, several hundred hours of videotapes of Petitioner that included his interrogation and torture were destroyed in November 2005, after Preservation Orders had been entered by trial judges for the District Court, including Judge Roberts and Judge Kennedy. A copy of Judge Roberts' Order was served on then CIA Director, Porter Goss, FBI Director Robert

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<sup>76</sup> Brian Ross, *CIA-Abu Zubaydah: Interview with John Kiriakou: Transcript*, ABC News, Dec. 10, 2007, [http://abcnews.go.com/images/Blotter/brianross\\_kiriakou\\_transcript1\\_blotter071210.pdf](http://abcnews.go.com/images/Blotter/brianross_kiriakou_transcript1_blotter071210.pdf).

<sup>77</sup> Katherine Eban, *Rorschach and Awe*, Vanity Fair, July 17, 2007, available at <http://www.vanityfair.com/politics/features/2007/07/torture200707>.

<sup>78</sup> Kevin Whitelaw, *Abu Zubaydah's Health Prompted CIA Videos: Suspect had been shot multiple times during operation to capture him*, U.S. News & World Report, Dec. 12, 2007, <http://www.usnews.com/articles/news/2007/12/12/suspects-health-prompted-cia-videos.html>.

Mueller, and the General Counsel for the Department of Defense in July 2005, well before the videotapes were destroyed.

**F. THE DETAINEE TREATMENT ACT OF 2005 IS INCONSISTENT WITH THE CONSTITUTION AND LAWS OF THE UNITED STATES**

69. Congress passed the Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat. 2740, 10 U.S.C. § 801 (2006) (“DTA”) in response to widespread reports of prisoner abuse.

70. The DTA is constitutionally flawed. It is inconsistent with the Constitution and the laws of the United States, both facially and as applied to Petitioner. It has been repudiated in part by the Supreme Court in *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2759 (2006).

71. Nevertheless, in accordance with the provisions of the DTA, Petitioner filed a petition with the Court of Appeals for the D.C. Circuit on December 17, 2007.

72. Counsel for Petitioner submitted to this process solely because it was the only way the Respondent officials would allow Petitioner to be represented by counsel and allow counsel to be approved for Top Secret-SCI clearance. The action was filed subject to Petitioner’s right to challenge the constitutionality of the DTA and his right to proceed pursuant to a writ of habeas corpus.<sup>79</sup>

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<sup>79</sup> *Rasul v. Bush*, 542 U.S. 466, 481-84 (2004).

73. A Protective Order has, subsequently, been stipulated to by the parties and entered by this Court, and Petitioner's counsel have received the requisite security clearance.

74. The Protective Order that Petitioner's counsel were required to sign is draconian in nature and includes a provision that would allow the government to arrest counsel:

The USG reserve the right to take unilateral protective measures to safeguard classified information if it concludes that any provision of the protective order has been violated and the result of such violation reasonably could be expected to lead to the unauthorized disclosure of classified information.

75. The Protective Order also prevents counsel from discussing how Petitioner was tortured during his years of interrogations. This restriction is highly prejudicial and hypocritical in view of the government's own admission that Petitioner was waterboarded, that waterboarding is legal, that petitioner's waterboarding was videotaped, and that the videotapes were destroyed.

76. On information and belief, the Government intends to restrict severely counsel's access to the record in the case, which the Court of Appeals for the D.C. Circuit has determined is extensive. In *Bismullah v. Gates*, this Court defined the Record on Review to include all:

reasonably available information in the possession of the U.S. Government bearing on the issue of whether the detainee meets the criteria to be designated as an enemy

combatant, including information generated in connection with the initial determination to arrest and then hold the detainee as an enemy combatant and in any subsequent reviews of that determination, as well as any records, determinations, or reports generated in connection with such proceedings.<sup>80</sup>

Nonetheless, the Government continues to deny Petitioner's counsel access to this information.

77. Although Petitioner's counsel have signed and are bound by the terms of the Protective Order, the Government has refused to provide Petitioner's counsel access to a single classified document. The Government has even refused to produce all unclassified material in Petitioner's case, making the opportunity to present a defense under the DTA utterly ineffectual.

78. In addition, Petitioner's counsel is aware that the Government seeks to restrict communications between Petitioner's counsel and Petitioner to a narrowly defined category of "legal mail" that excludes material plainly relevant to a detainee's case. The Government also asserts the authority to review and censor the content of Petitioner's legal mail and to withhold the content based upon the government's own assessment of security needs. As such, the Government intends to limit counsels' access to classified information based upon what the government

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<sup>80</sup> 501 F.3d 178, 180 (D.C. Cir. 2007).

unilaterally determines Petitioner's counsel "need to know," even though counsel have already received security clearances precisely to review such information.

#### IV.

### THE COMBAT STATUS REVIEW TRIBUNAL STANDARDS AND PROCEDURES FAIL EVEN THE MOST BASIC TEST OF FAIRNESS

#### A. CREATION OF THE CSRT

79. On June 28, 2004, the Supreme Court determined that prisoners at Guantanamo had the right to challenge the legality of their detentions in federal courts. *Rasul v. Bush*, 542 U.S. 466 (2004) ("Rasul").

80. Following *Rasul*, Respondent's predecessor created the Combat Status Review Tribunals ("CSRT"). On about July 7, 2004, Deputy Secretary of Defense Paul Wolfowitz issued an "Order Establishing Combatant Status Review Tribunal" ("Wolfowitz Order"). The Wolfowitz Order set forth provisions governing the standards and procedures to be used by the CSRTs in determining whether a prisoner is an enemy combatant. Paragraph (f) of the Wolfowitz Order stated that the "Secretary of the Navy, with the concurrence of the General Counsel of the Department of Defense, may issue instructions to implement this order."

81. On July 29, 2004, The Honorable Gordon R. England, Secretary of the Navy, issued a Memorandum with nine enclosures setting forth in detail the standards and procedures for the "Combatant Status Review Tribunal Process." ("CSRT Procedures")

## **B. THE CSRT PROCESS**

82. The CSRT Procedures fail to meet the most basic and fundamental level of due process and fairness required for any meaningful review of the basis for a prisoner's continued detention. It does not comport with the requirements of either the Due Process Clause of the Fifth Amendment, or the requirements of due process imposed by the common law.

83. The CSRT Procedures establish a "non-adversarial proceeding" to determine whether each prisoner at Guantánamo meets the criteria for an enemy combatant." CSRT Procedures, Encl. 1(B) (emphasis added). Respondent controls every aspect of the CSRT process – there is no meaningful check or procedural safeguard to ensure the protection of the prisoner's rights or even that the CSRT determination is correct.

84. An "enemy combatant" is defined as:

[A]n individual who was part of or supporting the Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners. This includes any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces.

85. The CSRT Procedures mandate a "nonadversary" proceeding. The CSRT Procedures prohibit Petitioner from obtaining aid of counsel, explicitly deny Petitioner the opportunity to engage a non-lawyer "advocate," disallow Petitioner from seeing the classified evidence against him, effectively force him to testify



against himself, disallow Petitioner any meaningful access to evidence and witnesses in his favor, and provide insufficient time for Petitioner to prepare his case.

86. In Petitioner's case, substantial exculpatory evidence, including reasonably available evidence in the possession of the United States government and military, was overlooked, deliberately disregarded, or wrongly determined not reasonably available. For example, Petitioner requested that his diary be provided to assist him in his defense. Although the unclassified summary references a diary entry to support the military's conclusion that Petitioner was an enemy combatant, the diaries (which were "reasonably available," however those terms are defined) were not provided to Petitioner to allow him to defend himself.

## **VII. GOVERNMENT MISINFORMATION AND MISSTATEMENTS**

87. The Government has made numerous, material false statements about Petitioner since his arrest and has deliberately suppressed information that is exculpatory. The Government's actions have compromised Petitioner's ability to defend himself and thus require direct court intervention by requiring attorneys within the appropriate branch of government to be signatories to any papers filed with the court in which factual assertions are made. Only in this way, can accountability be achieved.

**VIII.  
CAUSES OF ACTION**

**FIRST CLAIM FOR RELIEF  
(DUE PROCESS – FIFTH AMENDMENT  
TO THE CONSTITUTION OF THE UNITED STATES  
UNLAWFUL DEPRIVATION OF LIBERTY)**

88. Petitioner incorporates paragraphs 1 – 87 by reference.
89. By the actions described above, Respondent, acting under color of law, has violated and continues to violate the Due Process Clause of the Fifth Amendment to the Constitution of the United States.

**SECOND CLAIM FOR RELIEF  
(DUE PROCESS – FIFTH AMENDMENT  
TO THE CONSTITUTION OF THE UNITED STATES  
UNLAWFUL CONDITIONS OF CONFINEMENT)**

90. Petitioner incorporates paragraphs 1 – 89 by reference.
91. By the actions described above, Respondent, acting under color of law, has violated and continues to violate the right of the detained Petitioner to be free from arbitrary, prolonged, and indefinite detention, in violation of the Due Process Clause of the Fifth Amendment to the Constitution of the United States.

**THIRD CLAIM FOR RELIEF  
(DUE PROCESS – INTERNATIONAL LAW  
UNLAWFUL DEPRIVATION OF LIBERTY)**

92. Petitioner incorporates paragraphs 1 – 91 by reference.

93. By the actions described above, Respondent, acting under color of law, has violated and continues to violate customary international law, Arts. 9 and 14 of the International Covenant on Civil and Political Rights, and Arts. XXV, XXVI, XXVIII of the American Declaration on the Rights and Duties of Man.

**FOURTH CLAIM FOR RELIEF  
(DUE PROCESS – INTERNATIONAL LAW  
UNLAWFUL CONDITIONS OF CONFINEMENT)**

94. Petitioner incorporates paragraphs 1 - 93 by reference.

95. By the actions described above, Respondent, acting under color of law, has violated and continues to violate the right of the detained Petitioner to be free from arbitrary, prolonged, and indefinite detention, in violation of customary international law, Arts. 9 and 14 of the International Covenant on Civil and Political Rights, and Arts. XXV, XXVI, XXVIII of the American Declaration on the Rights and Duties of Man.

**FIFTH CLAIM FOR RELIEF  
(DUE PROCESS – FAILURE TO COMPLY  
WITH U.S. MILITARY REGULATIONS AND  
INTERNATIONAL HUMANITARIAN LAW)**

96. Petitioner incorporates paragraphs 1 – 95 by reference.

97. By the actions described above, Respondent, acting under color of law, has violated and continues to violate the rights accorded to persons seized by the United States Military in times of armed conflict, as established by, inter

alia, the regulations of the United States Military, Articles 4 and 5 of Geneva Convention III, Geneva Convention IV, and customary international law.

**SIXTH CLAIM FOR RELIEF  
(WAR POWERS CLAUSE)**

98. Petitioner incorporates paragraphs 1 – 97 by reference.

99. By the actions described above, Respondent, acting under color of law, has exceeded the constitutional authority of the Executive and has violated and continues to violate the War Powers Clause by ordering the prolonged and indefinite detention of the detained Petitioner without Congressional authorization.

**SEVENTH CLAIM FOR RELIEF  
(SUSPENSION OF THE WRIT)**

100. Petitioner incorporates paragraphs 1 – 99 by reference.

101. To the extent the Detainee Treatment Act disallows any challenge to the legality of the Petitioner's detention by way of habeas corpus, its enforcement constitutes an unlawful Suspension of the Writ.

**EIGHTH CLAIM FOR RELIEF  
(ARBITRARY AND UNLAWFUL DETENTION – VIOLATION OF THE  
APA)**

102. Petitioner incorporates paragraphs 1 – 101 by reference.

103. By detaining Petitioner for the duration and in the manner described herein, Respondent has arbitrarily, unlawfully, and unconstitutionally detained the Petitioner, in violation of the Administrative Procedures Act, 5 U.S.C. § 706(2).

**V.  
PRAYER FOR RELIEF**

WHEREFORE, Petitioner prays for relief as follows:

1. Order Petitioner released from Respondent's unlawful custody unless Respondent can demonstrate the legality of his continued confinement by a lawful process;
2. Order Respondent to allow counsel to meet and confer with the detained Petitioner, in private and unmonitored attorney-client conversations;
3. Order Respondent to cease all interrogations of the detained Petitioner, direct or indirect, while this litigation is pending;
4. Order and declare that the provisions of the DTA that diminish or impede Petitioner's right to seek habeas are an unlawful Suspension of the Writ, in violation of Article I of the United States Constitution;
5. Order and declare that the prolonged, indefinite, and restrictive detention of Petitioner is arbitrary and unlawful, a deprivation of liberty without due process in violation of the Fifth Amendment to the United States Constitution, and in violation of the law of nations and treaties of the United States;

6. Order and declare that Petitioner is being held in violation of the Fifth Amendment to the United States Constitution;
7. Order and declare that Petitioner was tortured when he was waterboarded in violation of the laws of the United States and in violation of the law of nations and treaties of the United States;
8. Order and declare that the detained Petitioner is being held in violation of customary international law, the International Covenant on Civil and Political Rights, and the American Declaration on the Rights and Duties of Man;
9. Order and declare that the detained Petitioner is being held in violation of the regulations of the United States Military, the Geneva Conventions, and international humanitarian law;
10. Order and declare that Petitioner's counsel, who have the highest level of security, clearance shall be afforded an opportunity to review any and all evidence in the possession of, *inter alia*, the CIA, FBI, the Department of Defense, NSA, and any other governmental entity or agency that relates to Petitioner, his detention, treatment, and confinement.
11. Order that counsel be allowed to have Petitioner examined by independent medical specialists to determine his present physical and mental state so as to allow counsel to determine whether he can assist in his own defense.

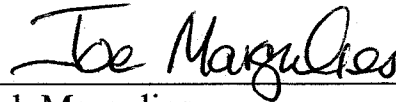
12. To the extent Respondent contests any material factual allegations in this Petition, schedule an evidentiary hearing, at which Petitioner may adduce proof in support of his allegations;

13. Order and declare that every time a factual assertion is made in a pleading, motion, opposition, reply, or any other paper filed with the court, that the government be required to have an attorney associated with the appropriate government entity—including but not limited to the Department of Defense, Central Intelligence Agency, Federal Bureau of Investigation, National Security Administration, or any other—be a signatory to the filing in order to assure accountability to the Court.

14. Grant such other relief as the Court may deem necessary and appropriate to protect Petitioner's rights under the United States Constitution, federal statutory law, and international law.

Dated: February 21, 2008  
Washington, District of Columbia

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that the foregoing was served by Federal Express on the Court Security Officer for clearance and filing this 21st day of February 2008. My understanding is that the Court Security Officer will serve the government. Once Petitioner's counsel has been notified that the document has been cleared and filed, copies will be served on the following via first class mail:

Robert M. Loeb  
U.S. Department of Justice  
Civil Division, Appellate Staff  
Room 7256 Main  
950 Pennsylvania Ave., N.W.  
Washington, D.C. 20530-0001

Andrew Warden  
U.S. Department of Justice  
Federal Programs Branch, Civil Division  
20 Massachusetts Ave., N.W.  
Washington, D.C. 20530



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George Brent Mickum IV

# EXHIBIT 1

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