[redacted]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MOHAMMED AL QAHTANI, *et al.*,	
Petitioner,	
v.	**Civil Action No. 05-1971 (RMC)**
BARACK H. OBAMA, President of the United States, *et al.*,	
Respondents.	

MEMORANDUM OPINION AND ORDER

At a hearing in this Guantanamo habeas case on May 27, 2009, the Court granted in part and denied in part Petitioner's motion to compel discovery [Dkt. # 139]. The Court ordered that certain medical records be produced and filed under seal and that the Government provide definitions of certain terms set forth in an interrogation log. *See* Order filed June 1, 2009 [Dkt. # 167]. The Court further ordered the Government to provide a status report indicating whether it would be more burdensome (a) to produce all audio/video recordings and photographs[1] of Petitioner from August 8, 2002 through January 15, 2003 or (b) to produce the witness statements from that same time period that were appended to the Schmidt-Furlow Report dated June 9, 2005. The Government now has filed the status report, indicating that production of the recordings would be quite burdensome and that production of the witness statements would not be. Petitioner responded, requesting the production of all of the recordings and the

[1] Petitioner now waives his request for photographs. *See* Resp. to Status Report [Dkt. # 174] at 6.

[redacted]

witness statements. In addition, Petitioner moves for reconsideration of the denial of portions of the motion to compel discovery. As explained below, the Court will order some additional discovery.

To determine what discovery should be provided to Petitioner, the Court must determine what information would allow it to conduct a meaningful review of Petitioner's detention and the Executive's power to detain him. *See Boumediene v. Bush*, 128 S. Ct. 2229, 2269 (2008). The Supreme Court explained:

> For the writ of habeas corpus, or its substitute, to function as an effective and proper remedy in this context, the court that conducts the habeas proceeding must have the means to correct errors that occurred during the CSRT proceedings.[2] This includes some authority to assess the sufficiency of the Government's evidence against the detainee. It also must have the authority to admit and consider relevant exculpatory evidence that was not introduced during the earlier proceeding. Federal habeas petitioners long have had the means to supplement the record on review, even in the postconviction habeas setting.

Id. at 2270. While the Court has authority to "admit and consider relevant exculpatory evidence," *id.*, it should also act to reduce the burden that these habeas proceedings place on the Government. *Id.* at 2276. In other words, discovery in the habeas cases of Guantanamo detainees should reflect the probable value to the detainee balanced against the burden imposed on the Government. *See Hamdi v. Rumsfeld*, 542 U.S. 507, 533 (2004) (citing *Mathews v. Eldridge*, 424 U.S. 507, 529 (1976) (the process due in any given instance is determined by weighing the private interest affected against the Government's asserted interest)).

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[2] The Combat Status Review Tribunal ("CSRT") process is the mechanism for reviewing the Executive's battlefield determination that a detainee is an enemy combatant. *See Boumediene*, 128 S. Ct. at 2269.

A. Production of Audio/Video Recordings

In response to the Court's June 2, 2009 discovery order requiring the Government to report on the burden that would be imposed if the Court were to require the Government to produce all audio/video recordings of Petitioner from August 8, 2002 through January 15, 2003, [redacted] Each tape is approximately [redacted] hours long. In order to clear these tapes for release, multiple agencies including the Department of Defense ("DOD"), the FBI, and the Central Intelligence Agency would have to review the tapes frame-by-frame. Thus, to require the Government to produce all of these videotapes would be excessively burdensome.

However, the tapes created at the end of the period from August 13, 2002 to November 22, 2003 likely have some value to Petitioner. To justify Petitioner's detention, the Government relies on Petitioner's statements made from April 2003 through March 2004. Petitioner challenges the veracity and reliability of the statements. He contends that his statements were so tainted by the cumulative effects of abusive treatment that took place previously that the statements cannot be credited or relied upon. Accordingly, Petitioner seeks information regarding his own mental and physical status both prior to and at the time he made the incriminating statements on which the Government relies. Thus, the audio/video recordings made later would be more likely to contain information relevant to Petitioner's challenge on voluntariness grounds than those made earlier. To provide relevant information to Petitioner and yet to ease the burden on the Government, the Court will order the Government to produce only those audio/video recordings of Petitioner created between November 15, 2002 and November

22, 2002.

B. Witness Statements

Also in response to the Court's June 1, 2009 discovery order, the Government reported that it has located the nine summarized witness statements related to Petitioner that are listed in the appendix to the Schmidt-Furlow Report. Because the nine witness statements consist of only around 50 pages, review and clearance by the relevant agencies does not place a tremendous burden on the Government. Thus, the Court will require the Government to produce these nine summarized witness statements.

C. Motion for Reconsideration

Petitioner requests reconsideration of its motion to compel discovery with regard to three requests: (1) the request for exculpatory evidence within the materials collected by the Guantanamo Review Task Force ("Task Force"); (2) the request for all written statements made by Petitioner; and (3) the request for the identity of those interrogators and linguists that were present during interrogations of Petitioner from July 2002 to March 2004.

Petitioner asserts that under the Amended Case Management Order, Section I.D.1, the Government should produce reasonably available exculpatory evidence and that such evidence is reasonably available in the Task Force files. *See* Am. Case Management Order [Dkt. # 123 in Misc. No. 08-442] (amending [Dkt. # 108 in Misc. No. 08-442]). It is not clear precisely what exculpatory evidence the Task Force has collected and what burden production of this evidence would impose. Accordingly, the Court will order the parties to meet and confer and to negotiate in good faith to reach agreement regarding production of noncumulative and nonduplicative, reasonably-available exculpatory evidence relating to Petitioner within the

materials collected by the Task Force. The parties shall submit a joint status report indicating the results of their meeting.

Petitioner also seeks his own written statements to demonstrate his mental and physical state. But the Government already has produced Petitioner's medical records and Petitioner himself can provide testimony regarding his mental and physical state. The evidence already available is sufficient for a meaningful review of this aspect of Petitioner's detention.

Finally, Petitioner seeks the identities of interrogators and linguists present at his interrogations from July 2002 through March 2004. As explained by the Government in its response to the motion for reconsideration, this information would be burdensome to produce. *See* Response [Dkt. # 178] at 13-20. Further, the Government already has produced information indicating which DOD interrogator conducted the relevant interrogations, [redacted] *Id.* at 14 n.7 & 16. Moreover, Petitioner has failed to indicate with any specificity that this information is likely to have significant probative value. The Court finds that the identity of interrogators and linguists is not required for a meaningful review of Petitioner's detention.

For the reasons set forth above, it is hereby

ORDERED that the Government shall produce the audio/video recordings of Petitioner created between November 15, 2002 and November 22, 2002; and it is

FURTHER ORDERED that the Government shall produce the nine summarized witness statements related to Petitioner that are listed in the appendix to the Schmidt-Furlow Report; and it is

FURTHER ORDERED that Petitioner's motion for reconsideration [Dkt. # 170]

is **GRANTED IN PART AND DENIED IN PART** as follows: (1) the parties shall meet and confer and negotiate in good faith to reach agreement regarding production of noncumulative and nonduplicative, reasonably-available exculpatory evidence relating to Petitioner within the information collected by the Guantanamo Review Task Force, and the parties shall submit a joint status report indicating the results of their meeting no later than October 13, 2009; and (2) the motion for reconsideration is **DENIED** in all other respects; and it is

FURTHER ORDERED that all material, including without limitation written records and audio/video recordings, that is produced pursuant to this Order shall be for the Court, Respondent's counsel, and the eyes of Gitanjali Gutierrez, Sandra Babcock, and Dr. Xavier Amador only and shall not be discussed with or released to any others, including Mr. al Qahtani and his other counsel, without further order of the Court.

SO ORDERED.

DATE: September 18, 2009

/s/
ROSEMARY M. COLLYER
United States District Judge