

Statement of Carol Elder Bruce  
Partner, Venable LLP and  
Former Independent Counsel  
Before the  
Subcommittee on Commercial and Administrative Law,  
House of Representatives Committee on the Judiciary

February 26, 2008

Thank you for this opportunity to share with the Subcommittee my views on the "implementation of the U.S. Department of Justice Special Counsel regulations." I understand that the Subcommittee is reviewing the past and current regulatory and statutory framework for the appointment of special counsel from within and outside of the Department of Justice who can investigate and prosecute violations of federal criminal law by federal officials in certain cases. I understand that the question is motivated in part by Attorney General Mukasey's January 2008 appointment of a Connecticut Assistant United States Attorney John Durham, to be the Acting United States Attorney for the Eastern District of Virginia to investigate if a federal crime was committed in connection with the "destruction by CIA personnel of videotapes of detainee interrogations."

As you know, I am a former Independent Counsel, former Deputy Independent Counsel, former Assistant United States Attorney, and currently am a criminal defense attorney who also is representing Guantanamo detainees on a *pro bono* basis. My resume is attached hereto. I hope my observations will be helpful to you.

In his January 2, 2008 statement appointing Mr. Durham, the Attorney General reported that his conclusion that there was a basis for such an investigation was predicated on the results of a preliminary inquiry. That inquiry had been commenced just two days after the December 6, 2007 public disclosure by CIA Director Michael Hayden of the destruction of videotapes of interrogation sessions in 2002, in which "enhanced interrogation" techniques were employed on two senior al-Qaeda suspects: Zayn al Abidin Muhammed Hussein, known as Abu Zubaida, and Abd al-Rahim al-Nashiri.

In less than a month and over the Christmas holidays, then, the CIA's Office of Inspector General and the Department's National Security Division jointly conducted a so-called preliminary inquiry into the tapes matter. The Attorney General decided that the site of any further investigation would be the Eastern District of Virginia because that is the District where the CIA's headquarters are located and the place where such an investigation would "ordinarily" be conducted.

28 USC Sections 509, 510, and 515

No mention was made in the Justice Department press release concerning this new investigation of any consideration given to the possibility of appointing a Special Counsel under the general delegation provisions of 28 U.S.C. 509, 510, and 515, as was done four years earlier on December 30, 2003, by Deputy Attorney General James Comey, acting in his capacity as Acting Attorney General, when he appointed Patrick Fitzgerald, United States Attorney for the Northern District of Illinois, to investigate the alleged disclosure of CIA employee Valerie Plame's identity. In that delegation of authority, Acting Attorney General Comey stated that Mr. Fitzgerald was "to exercise that authority as Special Counsel independent of the supervision or control of any officer of the Department." As you know, that investigation culminated in the prosecution and conviction of the Vice President's Chief of Staff, Scooter Libby. And, as we all

also know, the President elected to commute Libby's *entire* 30 months of incarceration, because the President felt it was "excessive."

I expect that Attorney General Mukasey also considered and rejected appointing Durham under 28 C.F.R. Part Six (2003), which calls for an outside counsel to be appointed. More on that later. The Attorney General has simply assigned the case to an Acting U.S. Attorney (Durham) who is acting within all the normal reporting and case restraints that exist in the Department of Justice. Had the Attorney General used Chapter Five, as Acting Attorney General Comey had done in 2003, he could have explicitly or implicitly waived the special counsel provisions of 28 C.F.R. Part Six (2003), and given Mr. Durham much broader independence and authority.

That same Chapter Five authority – which often has been referred to as providing for regulatory independent counsel from outside the government -- was used by Attorney General Reno to appoint Robert Fiske, Jr. on January 24, 1994, to investigate matters concerning the Whitewater matter and the death of White House Counsel Vincent Foster, before the then-expired Independent Counsel provisions in the Ethics in Government Act was reinstated by Congress.

By using Chapter Five, Acting Attorney General Comey was able to give Mr. Fitzgerald plenary authority equal to that of the Attorney General, similar to the provisions of the now expired Ethics in Government Act. I believe Chapter Five also was the “other law” provision under which the Department of Justice was urging existing Independent Counsel in 1998, to accept “parallel appointments” to ensure the continuity of their investigations, when the Independent Counsel statute was under constitutional attack in *Morrison v. Olson*, before the Supreme Court’s decision in that case upholding the statute’s constitutionality.

By using these Chapter Five statutory provisions, the Acting Attorney General had Fitzgerald paid out of the permanent indefinite appropriation – the same fund out of which Independent Counsel were paid. The Department advised the General Accountability Office in 2004, that “the express exclusion of Special Counsel Fitzgerald from the application of 28 C.F.R. Part 600, which contains provisions that might conflict with the notion that the Special Counsel in this investigation possesses all the power of the Attorney General, contributes to the Special Counsel's independence.” See September 30, 2004 letter from Anthony Gamboa, General Counsel, GAO, to the Honorable Ted Stevens, et al., (B-302582). “Thus, Special Counsel Fitzgerald need not follow the Department's practices and procedures if they would subject him to the approval of an officer or employee of the Department. For example, 28 C.F.R. 600.7 requires that a Special Counsel consult with the Attorney General before taking particular actions. The consulting requirement would seem to be inconsistent with the notion that Special Counsel Fitzgerald possesses the plenary authority of the Attorney General.” *Id.*

Had Mr. Durham been appointed under Chapter Five with the same explicit broad mandate that Mr. Fitzgerald was given, there probably would be little to no objection to his appointment. Nor would there be any worry about his independence or the scope of his authority. He seems eminently qualified to handle this inquiry and he has brought on board at least two additional and equally qualified current Assistant U.S. Attorneys from Boston to assist him in his task. But the Attorney General chose not to use Chapter Five to appoint a regulatory independent counsel. He also did not use Part Six of the CFR – the regulations this Committee is now reviewing. The Attorney General simply assigned the case to an Acting U.S. Attorney – Mr. Durham. Accordingly, Mr. Durham does not have, I submit, sufficient independence in making important decisions in this significant inquiry concerning the conduct of government officials.

Part 600 of 28 CFR

The Attorney General in his January 2<sup>nd</sup> statement announcing Mr. Durham's appointment made it clear that Durham "will report to the Deputy Attorney General, as do all United States Attorneys in the ordinary course."

Perhaps it is noteworthy that nothing was said by the Attorney General in that press release about the scope of Mr. Durham's investigation and what freedom, if any, he has to determine the scope. One could interpret the press release as allowing Mr. Durham to follow all leads as he would in any other federal criminal case. Ergo, there may be no apparent or explicit limitation placed on the scope of Mr. Durham's investigation. We just don't know. But, it's conceivable that Mr. Durham could elect to investigate whether the waterboarding that was being recorded was, itself, a violation of federal anti-torture laws. And, if so, Durham could investigate the question of whether all those lawyers and supervisors who advised the CIA and the CIA interrogators that waterboarding was legal are just as complicit in violating anti-torture laws as the agents who conducted the waterboarding itself. The destruction of the tapes, under this analysis, would be just another crime to conceal evidence of the first crime. But, Mr. Durham is subject to all the reporting and approval requirements of a U.S. Attorney, making his discretion and decision-making less independent than it would be were he a true special counsel under Chapter Five.

While some Members of Congress and public commentators have hailed the announcement of the DOJ investigation as a positive development and have expressed understandable respect for Mr. Durham's apparently excellent reputation, others have not shared the enthusiasm. They have questioned the wisdom of conducting this particular investigation of possible obstruction of justice (a possible obstruction done with or without the knowledge and consent of high level government officials) as if it were an "ordinary" federal criminal matter.

The news media has done an effective job already in disclosing that high level officials within the CIA, the Department of Justice, and the White House, as well as the Director of National Intelligence, and Members of Congress, all rendered advice in connection with the question of whether the videotapes should be destroyed, many if not all allegedly counseling against such destruction. The Chair and Vice Chair of the 9/11 Commission jointly wrote an Op Ed in which they expressed the view that their Commission's investigation had been obstructed by the destruction of the tapes. And, the list goes on. The conduct under investigation impacts every single branch of government and a wide range of elected and appointed government officials at the highest level as well as other levels of government. And, most importantly, it also involves the Department of Justice itself.

As I indicated above, I represent two Egyptian detainees in Guantanamo Bay in habeas proceedings filed in the United States District Court for the District of Columbia. Our cases were first filed in February of 2005. They were dismissed by the District Court judge in the Spring of 2007, after the Supreme Court initially denied the petition for certiorari in the *Boumediene v. Bush* case, but our motion to reinstate our clients' cases is pending and the Supreme Court ultimately granted certiorari and heard oral argument in the *Boumediene* case, giving us hope that a favorable decision in *Boumediene* will result in our habeas cases being reinstated.

Other habeas counsel with active cases pending, have filed motions in their habeas cases in which they have sought a judicial inquiry into the tapes destruction and in which they specifically reject the notion that the Department of Justice can or should investigate the tape destruction, because, among other things, "[t]he Department of Justice may have authorized the destruction of CIA interrogation tapes, creating an inherent conflict of interest that cannot be overcome." (*Zalita, et al. v. Bush, et ai*, Civil Action No. 1 :05 CV 1220 (RMU), Motion for

Inquiry Concerning Destruction of Evidence Related to CIA Detainee Interrogations, filed (redacted, public copy) on January 15, 2008, in the United States District Court for the District of Columbia, a copy of which is attached hereto).

Habeas counsel have set forth a compelling series of events that warrant the conclusion that, at the very least, a federal crime of obstruction may have been committed in the tape destruction case for a number of reasons, all centered squarely on the government's obligation to preserve evidence in pending habeas cases, criminal prosecutions, and other judicial and legislative proceedings. The most important reason habeas counsel gave in the *Zalita* case for why the tapes should not have been destroyed is that the tapes may constitute proof that information about their individual clients was obtained through torture or coercion of the detainees videotaped and, therefore, such tainted information cannot and should not be used to justify their clients' further detention and certainly should not have been used to justify a client's designation as a so-called "enemy combatant."

In my view, the principal reason why the Department of Justice should not, itself, be investigating the CIA tapes destruction case relates directly to the GTMO cases, as they are called. The main reason the Department should not, itself, be investigating the tapes case is that the Department has been a fierce advocate for six years now of the proposition that this Administration can do whatever it wants to whomever it wants - to whomever it unilaterally determines to be an "enemy combatant;" and that its actions are unreviewable by a court of law or Congress. That message surely filtered down a long time ago to intelligence officers and supervisors at the CIA and other intelligence agencies who may have taken the action to destroy the tapes in question. More on this later.

#### 28 USC 600.1 and 600.2

It takes nothing away from Mr. Durham to say that there are many equally competent lawyers who could have accepted and still can accept an appointment under 28 CFR 600.1. I suppose, also, that it is not out of the question for Mr. Durham, himself, to resign his appointment as Acting U.S. Attorney (with no assurances that he'll be rehired as a DOJ employee in the future) and then accept appointment as a private lawyer under Part 600 (or, like Mr. Fiske, under Chapter Five).

The Attorney General could have and still can take the position that, pursuant to Section 600.1(a) and (b), that the Administration's public policies as articulated by the Department of Justice in the courts, Congress, and in public on a daily basis in connection with the detention of persons believed to be "unlawful enemy combatants" in the "global war on terror" are such that the investigation by the Department or any of its U.S. Attorneys of the detainee CIA tape destruction case presents extraordinary circumstances and constitutes a foreseeable conflict of interest, and that, under the circumstances, it would be in the public interest to appoint an outside Special Counsel to assume responsibility for the matter.

From the Attorney General's press statement appointing Mr. Durham, there is no indication that the Attorney General has taken "appropriate steps ... to mitigate any conflicts of interest, such as recusal of particular officials." 28 CFR 600.2 Indeed, as will be discussed below, the Department's political appointees and many of its lawyers are so invested in this Administration's legal and policy arguments about this Administration's unilateral authority to treat detainees in any fashion it chooses, without review, that it would be difficult to properly mitigate many if not all potential conflicts of interest.

From the DOJ trial attorneys on the front line of the habeas and criminal cases up to the Solicitor General and through three Attorney Generals, the Department has maintained that the

CIA and the military were free to use "enhanced interrogation" techniques to obtain intelligence and case information from detainees. The Department has insisted that it may use whatever information it obtains from these "enhanced interrogation" sessions in making determinations about the custodial status and treatment of other detainees. And, as this Committee well knows, the "enhanced techniques" included practices condemned as torture and coercion by international human rights conventions and others.

Many of the positions that this Administration - through its attorneys in the Department of Justice -- has advocated have revealed a shocking disrespect for the humanity of the persons the U.S. has in its custody. By arguing that the detainees have no rights whatsoever other than what the U.S. deigns to give them; that they have no rights at all under traditional U.S. military or civilian justice systems (such as the right to be given notice of the charges against them and be allowed to see and challenge the evidence against them, or the right not to have evidence obtained by torture used against them), it very well may be that the Bush Department of Justice has sent a clear message to the military and the CIA intelligence personnel that traditional rules governing the preservation of records of interviews don't really matter here, despite formal memoranda or statements that may have been sent by sincere DOJ or CIA lawyers to the contrary.

I fear that an independent investigation may show that certain political appointees at the Department of Justice and in the White House in this Administration took the traditional, relatively uncontroversial concept of a "Unitary Executive" to such an extreme that it set the tone and the basis for the belief with some people within the CIA, that Agency employees were authorized to destroy interrogation videotapes. After all, it was the Administration's position that much of what the government did in the "global war on terror" was nobody's business. The Department of Justice took stances in open court and through its Attorney Generals that the U.S. government could do whatever it wanted to detainees - it could detain U.S. citizens and aliens alike -- whether captured on or off U.S. soil; whether a feeble, disabled old man or a juvenile - all in the name of the "global war on terror." What's the harm, then, in destroying graphic videotapes of extreme measures taken by some CIA interrogators against "the worst of the worst" in a misguided effort to gain intelligence and information to be used against other detainees?

On a related front, please note Exhibit E in the *Zalita* filing, attached hereto. Exhibit E relates to the *Zacarias Moussaoui* case in the Eastern District of Virginia. In that case, the judge twice ordered - once in May 2003 and once in November 2005 - that the U.S. government preserve and produce videotapes of interrogations of detainees by the Department of Defense or the CIA. It was the US Attorney's October 25, 2007 revelation in an *ex parte* letter to the Court (attached to the *Zalita* filing as Exhibit E and written approximately 40 days before Director Hayden's public statements concerning the tape destructions) that, contrary to his earlier pre-sentencing representations that there were no such tapes, and "unbeknownst" to the US Attorney, there were, in fact, tapes of certain interrogations. According to US Attorney Chuck Rosenberg's letter, a CIA lawyer informed him on September 13, 2007, of the existence of the tapes and of the fact that the tapes had been in existence at the time of the Court's Order for their production. This letter explains, in whole or in part, US Attorney Rosenberg's recusal in the CIA tape destruction inquiry. As long as this investigation is handled within the Department of Justice, though, whose recusal is next or should be, but isn't, next? What other records have been destroyed or withheld from the Justice Department or from the courts or Congress?

### Section 600.3 - Qualifications of the Special Counsel

If the Attorney General were to appoint an outside special counsel under 28 CFR 600.1, that special counsel's qualifications should match the high expectations set in this section. I note

that this section also calls for the Attorney General to “ensure that a Special Counsel undergoes an appropriate background investigation and a detailed review of ethics and conflicts of interest issues. A Special Counsel shall be appointed as a “confidential employee” as defined in 5 U.S.C. 7511(b)(2)(C).” Query: If a special counsel is a partner in a large law firm, are his/her partners and associates barred from representing clients before the Department of Justice in grand jury investigations or barred from representing such clients in court against the United States in criminal or civil matters? Such a restriction was of great concern to Independent Counsels during the period of “parallel appointments” under Chapter Five of Title 28 of the United States Code, as such a restriction could seriously impact the business of the special prosecutor’s law firm and discourage many highly qualified attorneys from serving as special counsel.

#### Section 600.4 – 600.10

The staffing provisions appear facially reasonable and are consistent with the last amendments to the independent counsel provisions of the Ethics in Government Act. Two of my best associate independent counsel in the Babbitt investigations were two Assistant U.S. Attorneys on detail. One of these Senior Associates went on to a very successful career at the Public Integrity Section, where she recently led the Department's investigation of the criminal conduct of lobbyist Jack Abramoff and others.

Further, my view is that the language in the "conduct and accountability" section of Chapter VI (Section 600.7) is very troubling with respect to the question of independence of the special prosecutor. I will be happy to highlight the differences between these very restrictive consulting and removal provisions and the more generous and hard won provisions of the expired Ethics in Government Act in my testimony. Of course, I acknowledge the prevailing view that some independent counsel under the Ethics Act proved to be essentially unaccountable to the public purse and failed to follow certain Justice Department policies. That problem and how to avoid it, deserves discussion, too.

Finally, I look forward to giving the Committee my views on the question of who controls the publication of a final report, especially where there has been a decision to decline prosecution. Having served for ten years as an Assistant United States Attorney before serving as a Deputy Independent Counsel in 1987, and as the Independent Counsel in 1998, I have developed some views on the matter that hopefully will be helpful to the Committee. The bottom line is that I believe the special prosecutor should draft a full report explaining the investigation and the decision not to prosecute and that the report should be confidential and directed to the Attorney General. An executive summary of this report should also be prepared. Then, at the Attorney General’s discretion and with the consent and comments of those who were targets of the investigation or whose names and conduct were discussed in the report, the full and/or summary report could then be provided to appropriate Congressional Committees and/or the public.

#### Watergate and the Independent Counsel Provisions of the Ethics in Government Act of 1978

I had the honor and privilege, to be appointed in 1998, by the Special Panel of the United States Court of the D.C. Circuit under the Ethics in Government Act of 1978, as the independent counsel in the investigation of matters concerning Secretary of the Interior Bruce Babbitt. Previously, I also was honored to be selected in 1987, by Jim McKay, the independent counsel in the investigation of matters concerning Attorney General Edwin Meese, to be first an associate independent counsel and later Mr. McKay's Deputy in that investigation. So, I am well-acquainted with the Ethics Act requirements and its amendments with respect to the authority and responsibilities of the Attorney General, the independent counsel, and the Special

Panel of Judges. The independent counsel provisions of the Ethics Act expired in 1999, after 20 counsel were appointed under its provisions between 1978 and 1999.

As you know, the Ethics Act was amended a number of times during its life and it had expired once before in 1992, only to be reinstated by Congress in June 1994, after Attorney General Janet Reno used her regulatory powers under Chapter Five in January of 1994, to appoint Robert Fiske to mainly investigate a real estate investment (Whitewater) President Clinton and his wife, Hillary Clinton, had made years earlier when Bill Clinton was Governor of Arkansas. There were many proponents and detractors of the independent counsel system under the Ethics Act during its life. At its birth, after Watergate, the American Bar Association was one of its biggest champions. At the end, 20 years later and after the extraordinarily long and expensive Iran-Contra investigation and the controversial Whitewater and Monica Lewinsky investigations of independent counsel Ken Starr that ended with a presidential impeachment referral, the ABA passed a resolution opposing the renewal of the statute.

The Ethics Act was first enacted in 1978, after five years of congressional debates over how to institutionalize a system that would provide for a special prosecutor who would be truly independent of the Department of Justice and would not be subjected to being fired "at will" as if he were a typical Department of Justice prosecutor. How can any of us who were alive in October 1973, forget the "Saturday Night Massacre?" I'd like to say I was in preschool at the time and was too young to remember, but, in truth, I was a third year law student. For a very scary, but thankfully brief, period of time, our nation was thrown into a constitutional crisis in October 1973, when President Nixon ordered the firing of the Special Watergate prosecutor, Archibald Cox. I remember it well: the resignation of Attorney General Elliott Richardson and Deputy Attorney General William French Smith who both refused to carry out the President's order; followed by Solicitor General Bork, as Acting Attorney General, carrying out the firing of Cox. When I graduated from law school in 1974, I was pleased to introduce our graduation speaker at the commencement ceremonies, Leon Jaworski, the new Watergate special prosecutor.

The Ethics in Government Act had much to offer and some critical flaws that I will be happy to address in the hearing. In 1999, before the statute expired, I made some specific recommendations for changing the process of appointing an independent counsel and implementing an investigation with such a counsel. A copy of an article I wrote on the subject that was published in a George Washington University law school magazine in June 1999, is attached hereto.

I highly recommend a book which I regard to be the seminal work on the independent counsel under the Ethics in Government Act: Professor Katy Harriger's *The Special Prosecutor in American Politics*, (University Press of Kansas, Second edition, Revised, 2000). Professor Harriger interviewed me, my fellow independent counsels and many others in her research for this book in addition to her academic research. She asks important questions that I think the Committee should consider as you ponder the possibility of improving the existing statutory and regulatory provisions in this area. I will take the liberty, with apologies to the professor, to paraphrase just some of her questions that she asks in the context of a separation of powers discussion:

Independence is so critical for the appearance of impartiality. But, by insisting on independence, do we sacrifice accountability, which is so essential to a democratic government - a government dependent upon citizen support and confidence?

No matter how carefully you provide for financial, reporting, and other accountability measures, does an independent officer lack the constraints on power imposed on regular actors (e.g., regular DOJ prosecutors and U.S. Attorneys) in the separation of powers scheme?

And, Professor Harriger's bottom line question: "What's the best way to prevent, expose, and respond to the problem of official misconduct in a constitutional democracy?"

These are weighty public policy questions. My view is that, whatever direction this Committee takes, the Committee should consider the lessons learned from the Ethics Act independent counsel system. One of the enduring lessons for me was that both independence and accountability are important. Absent a direct, actual conflict of interest within the Department of Justice, an appointed outside special counsel should, as much as possible, interact with career lawyers within the Department of Justice, particularly within the Divisions ordinarily responsible for handling the types of matters the special counsel has been appointed to investigate. These interactions can be most productive for a special counsel and even necessary for the full performance of his/her duties.

Likewise, a special counsel should not be completely removed from the usual tensions that exist between the legislative branch of government and the Executive. Indeed, one of the healthier aspects of the Watergate experience was the active involvement of Congress in obtaining commitments from Elliott Richardson that the special prosecutor would truly be independent and not have to report case developments to or seek investigation approval from the Department of Justice. Likewise, from all I can glean from the historical record, both Archibald Cox and later, his immediate successor as Watergate Special Prosecutor, Leon Jaworski, had healthy interactions with Congress throughout their tenures. Such interaction with the Congress and with an active press, helps to ensure public confidence in the integrity of the work of a special counsel.

In the final analysis, the strongest source of support for and check on a special counsel's performance and the conduct of the Executive branch and, in particular, the Attorney General, vis-à-vis the special counsel, is a vigorous, engaged press, appropriate Congressional oversight, and the ballot box.

I hope my remarks have been helpful.

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# **EXHIBIT A**



## **Carol Elder Bruce**

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cebruce@venable.com



### *Practice Focus*

Carol Elder Bruce is a litigator whose practice focuses on white collar criminal defense and complex civil litigation. She represents individuals and corporations in criminal grand jury investigations, and in criminal and civil trials and appeals. She also represents clients in hearings and proceedings before the United States Senate, the U.S. House of Representatives, in administrative proceedings within federal agencies, and in the conduct of internal corporate investigations.

### *Recent Significant Matters*

Ms. Bruce is an active trial lawyer who most recently, in 2006, successfully defended two different men in two separate and significant federal and state bribery jury trials, in which "not guilty" verdicts were returned on all counts in one case and on all the public corruption counts in the other. Ms. Bruce served as the Independent Counsel appointed by a special panel of the U.S. Court of Appeals for the D.C. Circuit to investigate matters concerning Interior Secretary Bruce Babbitt. She previously served as the Deputy Independent Counsel in the investigation of matters concerning Attorney General Edwin Meese and also was an Assistant United States Attorney for the District of Columbia for ten years, where she was lead counsel in over 115 jury trials and managed the grand jury presentations of more than 100 additional cases.

### *Client Benefits*

Ms. Bruce has been in private practice for over 15 years, where she has been lead counsel in many white collar criminal investigations, trials, and congressional investigations in which she not only has obtained good results for clients, but has jealously guarded her clients' confidences, privacy, and reputation during the process. Ms. Bruce also has extensive civil litigation experience in complex commercial disputes and other matters. And, she has had significant class action experience in that, during her career, she has managed or has had a lead counsel role on both sides of such law suits.

Clients benefit not only from Ms. Bruce's experience, but also from her national reputation as one of the nation's preeminent trial attorneys. She was ranked in 2006 and 2007, by one ranking service as one of the top ten criminal defense attorneys in the nation, and by other ranking services over the past four years as being one of the best white collar criminal defense attorneys and commercial civil litigators in the District of Columbia and in the United States (See "Distinctions" below).

### *Activities*

Ms. Bruce is a Fellow of the American College of Trial Lawyers, widely considered to be the premier professional trial organization in America where Fellowship is extended by invitation only to experienced trial lawyers within the top 1% of the trial bar in the U.S. and Canada. Ms. Bruce just completed a two year tenure as Chair of the College's International Committee

(2005 – 2007). She also is a Vice Chair of the White Collar Committee of the National Association of Criminal Defense Lawyers. She serves on the Honorary Board of the Innocence Project of the National Capital Region and on the George Washington University Law School Dean's Board of Advisors. Ms. Bruce also is a charter member of and Master in the Edward Bennett Williams American Inn of Court.

Ms. Bruce's professional activities also have included two terms as an elected Board member of the D.C. Bar's Board of Governors, service as an appointed member of the D.C. Bar Ethics Committee during which she drafted legal ethics opinions for the D.C. Bar, and two terms as an elected member and later co-chair of the D.C. Bar Steering Committee on Courts, Lawyers, and Administration of Justice.

*Distinctions*

J.D., George Washington University Law School, 1974  
B.A., George Washington University, 1971

Bar Admissions:

District of Columbia  
United States Supreme Court  
U.S. Court of Appeals for the District of Columbia Circuit  
United States District Court for the District of Columbia  
United States District Court for the District of Maryland  
*Pro hac vice* admissions in numerous federal and state courts

- Ms. Bruce has been listed in The Best Lawyers in America (Woodward/White, Inc.), in the areas of white collar criminal defense and commercial litigation in the 2005, 2006, 2007 and 2008 editions.
- Ms. Bruce has been named to the United States Lawyer Rankings 2006 and 2007 Lists as one of the Nation's Top 10 Criminal Defense Lawyers.
- She was listed in the American Lawyer & Corporate Counsel Litigation Supplements in 2006 and 2007 as one of the nation's top commercial litigation lawyers.
- Ms. Bruce was named as one of the top 30 "Big Guns" lawyers in D.C. in the December 2007 Washingtonian magazine. She was listed as No. 8 of these top 30 "very best" Washington metropolitan lawyers from all general law practice areas, and she also was named in the same magazine edition as one of the "great criminal defense attorney(s)" in the D.C. area under "You're Under Arrest."
- She was named a "Top Washington Lawyer" in criminal defense by Washingtonian magazine in December 2004.
- She was one of only 20 trial lawyers named as the top D.C. litigation lawyers (both civil and criminal) in the Legal Times "Leading Lawyer" series in June 2003.
- Ms. Bruce has the highest peer review rating of "AV" in Martindale-Hubbell.
- Ms. Bruce received, on behalf of Venable, one of the 2007 Beacon of Justice Awards from the National Legal Aid & Defender Association for Venable's and Ms. Bruce's pro bono representation of Guantanamo Bay detainees.
- Ms. Bruce also received, with other Guantanamo Bay detainee lawyers, the Frederick Douglass Human Rights Award from the Southern Center for Human Rights (November 2007).
- In 2005, she received from George Washington University Law School the Belva Ann Lockwood award given to distinguished woman alumnae of the law school.

# **EXHIBIT B**

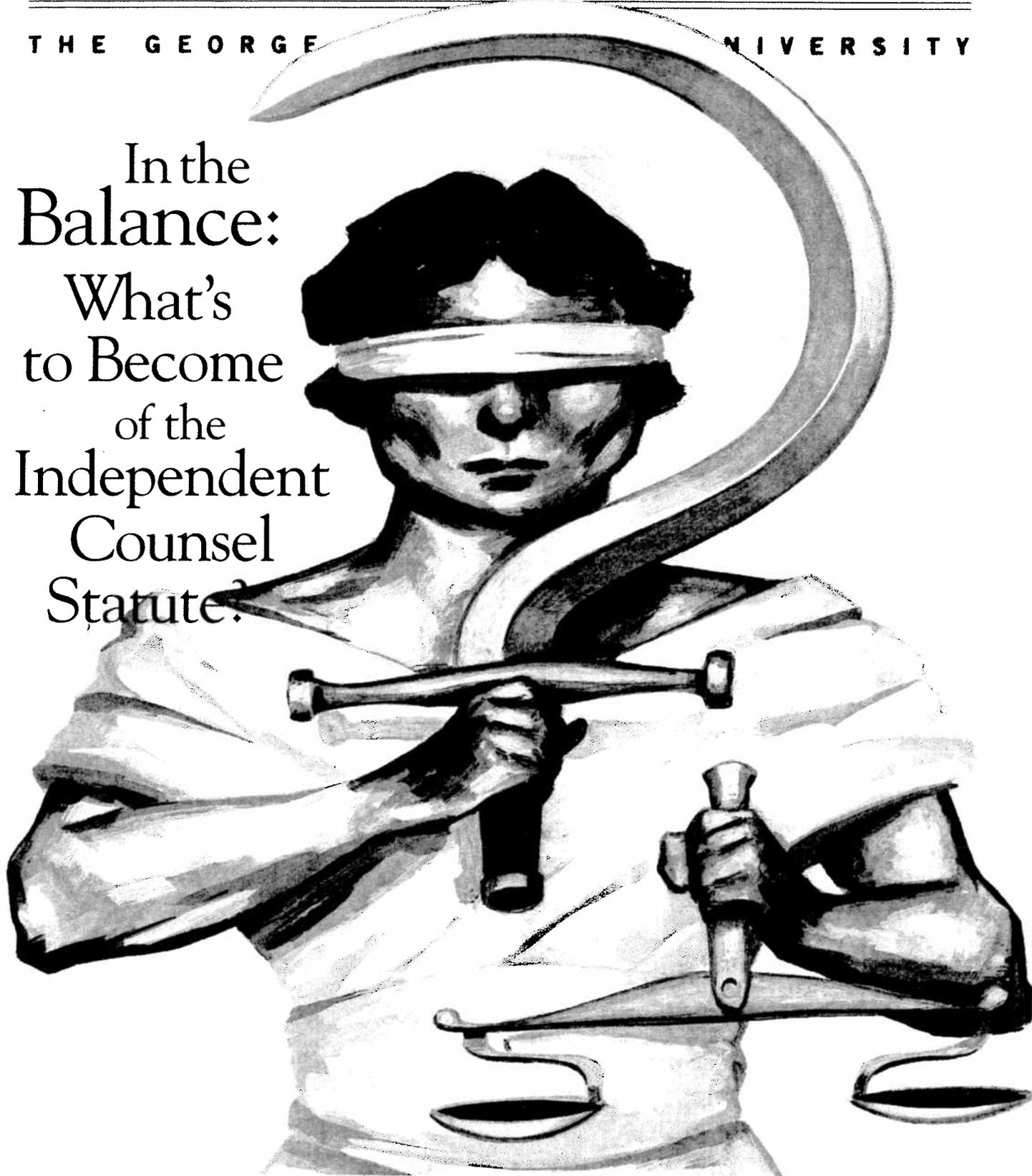
SPECIAL  
ISSUE

# GWlaw school

JUNE 1999

THE GEORGE WASHINGTON UNIVERSITY

In the  
Balance:  
What's  
to Become  
of the  
Independent  
Counsel  
Statute?





# RESPONSIBLY INDEPENDENT

A Proposal for Revising the Independent Counsel Statute

I was a third-year GW law student in the fall of 1973. Having never seen the inside of a courtroom before attending school, I was now spending every available minute between classes and homework representing indigent criminal misdemeanor defendants in trials before the D.C. Superior Court as part of the school's new Law Students in Court program. I was fired up, eager to graduate and begin the full-time practice of law. I also was newly wed to my fellow third-year student, Jim Bruce (we're still married 26 years and three terrific kids later).

Jim and I, like many of our classmates in 1973, followed with great interest the events surrounding Watergate. We were horrified by the Saturday Night Massacre. The firing of Special Prosecutor Cox precipitated a constitutional crisis of epic proportions that was not easily forgotten. It proved a close call—too close for comfort.

The independent counsel provisions of the 1978 Ethics in Government Act were the legislative response to the Saturday Night Massacre. They provided for court-appointed independent counsels who could only be fired for good cause by the attorney general, with a provision for judicial review of such a firing. They were an honest effort to restore public confidence in government and, specifically, in the proposition that high-level public officials are not above the law and will, instead, be investigated and prosecuted with the same vigor as any ordinary defendants by independent prosecutors who have no conflicts of interest and are not beholden to the public officials they are investigating.

Now, 21 years later, the American Bar Association, many bar leaders, and legislators have concluded that the independent counsel provisions of the Ethics in Government Act should be allowed to expire; that the pre-1978 system for appointing special prosecutors was sufficient after all; and that we should go back to the previous practice



BY CAROL ELDER BRUCE, JD '74

of the attorney general's deciding unilaterally when and under what circumstances a conflict of interest or the appearance of a conflict of interest warrants the appointment by the attorney general (and not by the court) of a special prosecutor. With certain modifications, I agree.

I believe that it would be unwise, however, simply to allow the independent counsel provisions of the Ethics in Government Act to expire on June 30, its current expiration date. Instead, I recommend amending the current statute to create a new statutory scheme that embraces the best of both the pre-act Cox-Jaworski model and the current law. Under my proposal, as outlined below, I would provide by statute that the attorney general should exercise her complete discretion to appoint an independent counsel outside the Justice Department whenever she

perceives there is an actual conflict of interest in the department's conducting a particular investigation of a particular person or persons. Under this proposal, I would further provide by statute that, in situations where the attorney

general does not see an actual conflict, but recognizes that there may be an appearance of conflict, she would exercise care to appoint a special prosecutor from within or outside the department to conduct an investigation from within the department. Further, the attorney general should give that special prosecutor a wide berth to hire a team of lawyers to conduct the investigation under the ultimate and final supervision of the assistant attorney general for the Criminal Division. I will elaborate below.

We have resurrected an old paradigm by returning to the Cox-Jaworski model. As long as we don't fool ourselves into thinking we have rediscovered the panacea for all politically charged, high-level public corruption investigations, we will survive and we'll muddle through our next constitutional crisis with more realistic expectations. The rediscovered old system is not without its problems. After all, under the revived old system we still will have an independent counsel operating essentially untethered in an orbit outside of the Justice Department.

But we must learn to trust the competing forces within our political system. The independent counsel will be drawn more closely into the Constitution's healthy system of checks and balances and separation of powers if the executive and legislative branches of government take more responsibility for the independent counsel system. And, we should have confidence that public opinion stirred by vigilant, responsible investigative journalism will rule the day and will provide the best, albeit imperfect, assurance that full and fair criminal investigations of high-level public officials will take place. But, always, we need to be realistic in our expectations. As St. John's University law professor John Barrett recently testified before the U.S. Senate Committee on Governmental Affairs, "We should not pretend . . . that the existence of any independent counsel law or its demise will ensure investigations and outcomes that produce national unity and gratitude."

We have to be willing to sacrifice a reasonable level of independence for our independent counsels if we are to achieve a more appropriate level of accountability over them. We also have to be realistic and recognize that *no* threshold for triggering the statute or other statutory requirement will stop an attorney general determined to kill a worthy investigation before it begins. Similarly, no degree of independence will guarantee that good, apolitical, proportionate, and dispassionate prosecutorial judgment will prevail with each and every independent counsel.

I agree there are fundamental structural flaws in the current independent counsel system that were, in part, foreseen by Justice Scalia in his now famous dissent in *Morrison v. Olson*. These are flaws that make the appropriateness of an independent counsel's actions entirely too dependent on the individual judgment and wisdom of that particular independent

counsel and his/her staff, exercised usually in isolation from the ordinary checks and balances of our systems of government and from the institutional safeguards of the Justice Department. But there also are very thoughtful provisions of the statute that should not be discarded in any new statutory scheme.

If I were asked to provide a broad outline of a new independent counsel law, I would offer provisions that would address the following:

## 1. Appointment of Independent Counsel – Actual Conflicts

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The current independent counsel law does not make a distinction between actual conflicts of interest and appearances of conflict. Instead, the statute simply presumes that officials occupying certain high-level offices within the government (i.e., "covered persons") present a conflict of interest for the Justice Department, thus *requiring* the department to invoke the statute's procedures leading to the appointment of an independent counsel whenever federal felony allegations are made against these covered persons. The statute also has a catchall provision that allows for appointment of an independent counsel if the attorney general determines there may be a "personal, financial, or political" conflict of interest in DOJ handling the investigation.

**PROPOSAL :** It is axiomatic that a prosecutor should not proceed to investigate a case if she or her office has an actual conflict of interest, and that she should resolve that conflict of interest question at the earliest possible date. For example, I would adopt a *per se* conflict rule concerning the president, vice president, and attorney general. If allegations of criminal misconduct involving any one of these officials are brought to the attorney general's attention, she should (or if the allegations are about her, she should recuse herself and her deputy should) task her Public Integrity Section to quickly (although not within a proscribed time period) determine if the allegations are specific and credible and if further investigation is warranted. If further investigation is warranted, the attorney general should remove herself and the department from the actual conduct of further investigation by appointing an independent counsel.

Under current law, the attorney general does not make the appointment of an independent counsel and does not even recommend names for appointment. Instead, she is limited to

WE HAVE TO BE REALISTIC AND RECOGNIZE THAT NO THRESHOLD FOR TRIGGERING THE STATUTE OR OTHER STATUTORY GENERAL DETERMINED TO KILL A WORTHY INVESTIGATION BEFORE IT BEGINS. SIMILARLY, NO DEGREE OF INDEPENDENCE AND DISPASSIONATE PROSECUTORIAL JUDGMENT WILL PREVAIL WITH EACH AND EVERY INDEPENDENT COUNSEL.

referring the matter to a three-judge panel—of the Special Division for the Purpose of Appointing Independent Counsels of the U.S. Court of Appeals for the D.C. Circuit—for them to make the appointment. I would eliminate the judiciary's role in the selection process. Indeed, I would rescind the 1978 statute that created the special division. This rescision would terminate the judiciary's role in the selection of an independent counsel, in the setting of the scope of the independent counsel's jurisdiction, and in all related roles. Of course, ordinary federal judicial review of grand jury investigation matters still would be available to independent counsels and their subjects.

## 2. Appointment of Special Prosecutor Within the Department of Justice – Appearance of Conflict Cases

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As indicated above, the current independent counsel statute specifically identifies those persons—by office, position, and pay level—within the administration and the president's national campaign committee, who are automatically “covered persons” for purposes of the statute, necessitating the appointment of an independent counsel if a very low threshold of evidence is met. This “covered persons” provision is entirely too broad. It covers too many people. The Justice Department would not have an actual conflict of interest with investigating criminal allegations made against many of these so-called covered persons.

**PROPOSAL :** As indicated above, I would not use the current method of identifying a presumptive conflict through lists of categories of government officials. Instead, I would draw the distinction between actual conflict and appearance of conflict and leave it to the discretion of the attorney general to make that determination.

If the attorney general concludes that *no actual conflict of interest exists*, yet there is an appearance of conflict—a vague, subjective, and fluid concept—then the attorney general should appoint a special prosecutor from within or without the Justice Department to lead an investigation within DOJ's Public Integrity Section (similar to the current Campaign Finance Task Force).

If the attorney general chooses the latter course, she should give the special prosecutor exclusive authority to hire lawyers from outside or within the Justice Department to assist in the investigation. The special prosecutor would, in consultation with the attorney general, establish a one-year operating budget and would be subject to oversight by the chief of the Public Integrity Section and the assistant attorney general for the Criminal Division. Of course, legislating such a special prosecutor contingency must take into account several realities:

(A) That, except for the permanent cadre of experienced Public Integrity Section lawyers, the section may be in a constant state of flux—expanding and shrinking to accommodate the needs of perhaps numerous, overlapping cases that would otherwise have been referred out to independent counsels' offices under the current statutory regime;

(B) That Public Integrity's budget must anticipate the need for additional and sufficient appropriations to fund these important public corruption probes; and

(C) That the special prosecutors should be accorded more latitude in the conduct of investigations than ordinary Public Integrity Section lawyers in order to satisfy Congress, the public, and the special prosecutor that the investigation is not being hindered or influenced by inappropriate political considerations



EQUIREMENT WILL STOP AN ATTORNEY

WILL GUARANTEE THAT GOOD, APOLITICAL, PROPORTIONATE,

within the administration. In that regard, DOJ should implement restrictions on internal reporting practices within the department, much like those already in place for FBI special agents and assistant U.S. attorneys detailed to independent counsel offices.

### 3. Trigger Mechanism for Appointment of Independent Counsel in Actual Conflict Cases and Special Prosecutor in Appearance of Conflict Cases

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The current statute is flawed in that it gives the attorney general very little discretion to decline an investigation of a covered person without referral to the Special Division of the Court for appointment of an independent counsel.

Instead, the statute *requires* her to commence a preliminary investigation if she determines that she has received (1) credible and specific allegations (2) against a covered person

(3) of possible violations of federal criminal law (other than most misdemeanors). It also limits what she can do in conducting the investigation and what she can consider in making her decision. Finally, and most significantly, the current statute creates an almost impossibly high standard for declination—that is, the attorney general must find that “*there are no reasonable grounds to believe that further investigation is warranted*” before she can close the file on a case and not seek the appointment of an independent counsel.

**PROPOSAL :** In conducting a preliminary investigation to determine if an independent counsel or a special prosecutor should be appointed, the attorney general should have the same restrictions on investigative methods and tools that exist in the current statute. That is, she should *not* be able to enter plea bargains, grant immunity, convene a grand jury, or issue subpoenas during her preliminary investigation. On the other hand, the attorney general should be able, through the Public Integrity Section, to gather evidence on a strictly voluntary basis from individuals and entities sufficient to satisfy her that further investigation is warranted.

In determining whether further investigation is warranted, the attorney general should be free to consider *all* the available evidence, however limited, and should be free to consider issues normally considered by prosecutors, such as criminal intent, state of mind, prosecutorial merit (including the usual practice of the Justice Department in similar cases, the serious or trivial nature of the allegation, the likelihood of success versus the cost of the investigation, etc.).

Finally, in determining whether further investigation is required, the attorney general should *not* have to establish that the evidence meets a certain threshold of proof and certainly should *not* have to make a finding approximating probable cause. Such a finding generally would require an inappropriate level of preliminary investigation within DOJ given the conflict situation and would unfairly stigmatize the targets of such an investigation even more than they are currently stigmatized by the judicial appointment of an independent counsel. The present statutory standard of referral for appointment of an independent counsel when the attorney general determines that there are “reasonable grounds to believe that further investigation is warranted” is appropriate for the attorney general to use under my proposal in actually appointing an independent counsel. However, if the attorney general determines *not* to appoint an independent counsel, the standard simply should be that the attorney general has concluded that no further investigation is warranted (not that “there are no reasonable grounds to believe that further investigation is warranted,” as the current statute requires).

*Archibald Cox and Elliot Richardson appear before the Senate Judiciary Committee on May 21, 1973.*



#### 4. Independent Counsel's Charter and Budget

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Under the current statute, there is no provision for the independent counsel to have any input into his/her jurisdictional grant, nor is there any requirement that the independent counsel receive or live within a budget. This absence of financial accountability is one of the biggest and most justified criticisms of the current statute. After all, an independent counsel should not be the equivalent of a NATO commander who can summon whatever air power is necessary for air strikes over Serbia.

**PROPOSAL :** If the attorney general determines that an actual conflict exists and an independent counsel should be appointed, then the attorney general or her representative should meet with the prospective independent counsel and jointly draft a charter for the independent counsel's jurisdiction and budget for the first year of operation. The Justice Department should, as part of its annual budget process, seek sufficient appropriations to fund the first year of a number of possible independent counsel investigations. On completion of the first year of an independent counsel's investigation, the independent counsel should submit a budget to the appropriate committee of Congress and such a submission would be treated as a request for a supplemental Justice Department budget authorization and appropriation. Moreover, the same process should be followed in the succeeding years of an independent counsel's work. By establishing this supplemental budget and appropriation process, Congress and DOJ will share some level of responsibility and accountability for the spending that an independent counsel does during the course of his/her investigation.

The independent counsel should become subject to an annual budget and appropriation process, with the understanding that no confidential grand jury information or prosecution strategy will be divulged in describing the past expenditures or current budgetary needs of the independent counsel office.

#### 5. Independent Counsel's Conduct of Investigation – General

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The current statute places all administrative support for the operation of an independent counsel's office in the hands of the Administrative Office of the U.S. Courts (AOUSC)—i.e., in the judicial branch.

**PROPOSAL :** Under my new scheme, the independent counsel would obtain all of his administrative support from DOJ and not from AOUSC. With this one exception, all



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*Graduation Day 1974: Jim Bruce, Carol Elder Bruce, and commencement speaker Leon Jaworski*

the same requirements that currently exist for support from government agencies would apply.

An independent counsel should have the same powers and duties and be subject to most of the same guidelines as set forth in the current independent counsel statute. It would be understood that an independent counsel would have to undertake the same task of assembling a team and office "from scratch" as current independent counsels and former special prosecutors have done.

#### 6. Special Prosecutor Conduct of Investigation – General

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There is no provision under current law for a statutory special prosecutor.

**PROPOSAL :** Unlike an independent counsel, a special prosecutor would operate within the physical space and the management structure of DOJ with the only limitation being that he would enjoy more independence in decision making and action than normally accorded to DOJ investigations and would have specific restrictions on reporting requirements within DOJ. That is, the special prosecutor's work would be overseen only by the chief of the Public Integrity Section and the assistant attorney general for the Criminal Division. Under my proposal, then, Congress should pay particular attention during the confirmation process to the integrity, independence, and qualifications of nominees for the position of assistant attorney general for the Criminal Division.

#### 7. Independent Counsel and Special Prosecutor Conduct of Investigation – Time Limits

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The current independent counsel act imposes no time limits on independent counsel investigations, although there are reporting provisions, should an investigation extend beyond certain time periods.

**PROPOSAL :** An independent counsel and special prosecutor, as with any other prosecutor, should have no arbitrary, artificial deadlines or time limitations other than those provided by law (e.g., statute of limitations). The highly visible nature of most of these cases will be pressure enough to complete the task as quickly as possible.

## 8. Independent Counsel and Special Prosecutor Jurisdiction

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Under the current statute, there are specific provisions requiring either the Justice Department or the Special Division of the Court to determine if certain areas an independent counsel ventures into are "related" to that counsel's core jurisdiction and, therefore, subject to investigation by the independent counsel. There also is a provision requiring Justice Department approval of any expansion of jurisdiction. My proposal would eliminate the option of having the court decide or participate in the decision of what matters are related to the independent counsel's core jurisdiction.

**PROPOSAL :** An independent counsel *must* consult with DOJ whenever his investigation leads into areas that are arguably unrelated to the independent counsel's core jurisdictional mandate. The independent counsel should obtain a written memorandum of understanding from DOJ to the effect that the department agrees with the independent counsel's determination that the matter is a related matter and that the independent counsel should investigate it. If the department determines that the matter is not related and not properly within the scope of the independent counsel's jurisdiction, then the attorney general may either decline to authorize the execution of a memorandum of understanding or may specifically expand the independent counsel's jurisdiction to encompass the unrelated matter. Any decision by the attorney general in this regard shall be non-reviewable in a court of law. These same requirements and restrictions should apply to a special prosecutor appointed within the department when there is an appearance-of-conflict matter.

## 9. Independent Counsel and Special Prosecutor Reporting Requirements

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The current statute has multiple financial and case status reporting requirements, including the requirement of a final case report.

**PROPOSAL :** An independent counsel and a special prosecutor should have no reporting obligations to any court and no extraordinary or statutory reporting obligations to Congress beyond those required by the annual appropriations process.

If an independent counsel or a special prosecutor declines to prosecute, then he/she should be required to prepare a final report along the lines required by the current independent counsel act. In the case of an independent counsel investigation, the report should only be released if the independent counsel concludes such a release would be in the public interest. The report should not be released until all parties named in the report have had an opportunity to file comments with the independent counsel. The independent counsel should make public all such comments.

A limited report by the independent counsel should provide closure to the high visibility investigation and should avoid the necessity of any further substantive comment on the underlying facts of the case by the independent counsel or his/her staff.

In the case of a special prosecutor, the same reporting obligations should apply with the exception that the assistant attorney general for the Criminal Division should make the disclosure decision in consultation with the special prosecutor.

## 10. Removal of Independent Counsel and Special Prosecutor – For Good Cause Only

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An independent counsel and a special prosecutor should be removable for good cause subject to judicial review, as is the requirement for independent counsels in the current statute.

\* \* \*

These are just some of my thoughts on the subject of the independent counsel law. In closing, I am reminded of how I ended my third year at GW Law School. I was Student Bar Association president and introduced our commencement speaker, Special Prosecutor Leon Jaworski, at the May 1974 ceremony in Lisner Auditorium, just a few months before President Nixon's resignation.

I remember saying words to the effect that, as law students and aspiring young lawyers, we had watched how Mr. Jaworski had conducted himself in office and were inspired by the fact that he appeared to move forward with "deliberate resolve" to conclude his investigation in as professional and fair a manner as possible. I spoke of how we respected him for that and how it brought us renewed confidence in the rule of law

What more could you ask for, then or now? 

*Carol Elder Bruce, a partner with Tighe, Patton, Tabackman & Babbitt, has been a white-collar criminal defense attorney in private practice for more than a decade and is the independent counsel investigating allegations concerning Interior Secretary Bruce Babbitt. She served as an assistant U. S. attorney for the District of Columbia for 10 years and as a deputy independent counsel in the second investigation of former attorney general Edwin Meese.*

# **EXHIBIT C**

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THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

ABU ABDUL RAUF ZALITA *et al.*,

Petitioner,

v.

GEORGE W. BUSH *et al.*,

Respondents.

No. 1:05 CV 1220 (RMU)

**MOTION FOR INQUIRY CONCERNING DESTRUCTION OF  
EVIDENCE RELATED TO CIA DETAINEE INTERROGATIONS**

Petitioner Abu Abdul Rauf Zalita, a.k.a., Abdul Ra'ouf Omar Mohammed Abu Al Qassim ("Petitioner" or "Qassim"), by and through the undersigned counsel, moves for hearing to inquire promptly into the government's destruction of documents related to Petitioner's Combatant Status Review Tribunal ("CSRT").<sup>1</sup> In particular, 

  
Interrogations of Abu Zubaydah and other CIA prisoners were videotaped; and the government destroyed the tapes. Petitioner respectfully requests, therefore, that this Court inquire into the destruction of those tapes to determine whether they related to Petitioner.

<sup>1</sup> Pursuant to Local Rule 7(m), the undersigned counsel for Petitioner conferred with Respondents' counsel regarding the relief sought in this motion. Respondents oppose this motion.

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STATEMENT OF FACTS

Petitioner is a citizen of Libya who was kidnapped from his home in Karachi, Pakistan with his wife and child, handed over to U.S. military personnel and subsequently transferred to Guantanamo Bay Naval Station ("Guantanamo") in 2002. Petitioner has consistently maintained that he has never engaged in hostilities against the United States nor supports such acts. Despite Respondents' efforts since December 2006 to transfer Petitioner to the custody of the Qadhafi regime, where he faces certain persecution, torture or death, Qassim has remained imprisoned as an enemy combatant in Guantanamo for the past six years.

On September 29, 2004, following the Supreme Court's decisions in *Hamdi v. Rumsfeld*<sup>2</sup> and *Rasul v. Bush*,<sup>3</sup> Respondents convened a CSRT at Guantánamo to determine whether Petitioner was properly detained as an enemy combatant. [REDACTED]

<sup>2</sup> 542 U.S. 507 (2004) (holding that U.S. citizens held as enemy combatants are entitled to due process that includes notice of the allegations against them and an opportunity to be heard before an independent tribunal).

<sup>3</sup> 542 U.S. 466 (2004) (holding that noncitizen enemy combatants, no less than American citizens, have a right to challenge their detention when imprisoned at Guantanamo).

<sup>4</sup> Incidentally, [REDACTED]

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[REDACTED]

[REDACTED] Petitioner's CSRT thus made its final determination on January 23, 2005 that Petitioner was an enemy combatant properly detained in military custody at Guantánamo, and did not conduct any inquiry into whether [REDACTED]

[REDACTED]

Beginning on March 7, 2005, in other habeas petitions brought by Guantanamo detainees, the Court ordered respondents to "preserve and maintain all evidence and information regarding the torture, mistreatment, and abuse of detainees now at the United States Naval Base at Guantanamo Bay, Cuba." See, e.g., *Al-Marri v. Bush*, Civil Action No. 04-2035 (GK) [dkt no. 25], and *Abdah v. Bush*, Civil Action No. 04-1254 (HHK) [dkt. no. 155], attached hereto as Exhibits A & B. [REDACTED] See Declaration of Gitanjali S. Gutierrez, attached hereto as Exhibit C.

On June 22, 2005, Petitioner filed his petition for writ of habeas corpus and complaint for declaratory and injunctive relief challenging, *inter alia*, his detention as an "enemy combatant" at Guantánamo. [dkt. no. 1] After Respondents' attempt to send Petitioner to the custody of the

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Qadhafi dictatorship in December 2006, Qassim also moved for an injunction prohibiting Respondents from transferring him to the custody of Libya or any other country where he is more likely than not to be tortured or where he has a well-founded fear of persecution. This Court's denial of his motion on jurisdictional grounds was affirmed on appeal and Qassim's petition for certiorari in his interlocutory appeal is currently pending before the United States Supreme Court.<sup>5</sup>

On December 7, 2007, the *New York Times* reported that in November 2005, the CIA destroyed at least two videotapes documenting the interrogation of two detainees in the custody of the CIA, including videotapes of interrogations of Abu Zubaydah. See Mark Mazzetti, *Democrats Call for Inquiry Into Destruction of Tapes by C.I.A.*, NY Times, December 7, 2007. The Director of the CIA has acknowledged the destruction of the videotapes. See Exhibit D, Email from CIA Director Michael Hayden. At the same time, the government has not disclosed the content of the destroyed tapes or the content of what appears to be a significant number of remaining video or audio tapes in its possession.

Accordingly, Petitioner respectfully moves for a prompt hearing to determine whether evidence was destroyed that is relevant to the legal claims Petitioner raises in this matter.

#### **ARGUMENT**

##### **I. Respondents Violated Their Existing Obligation to Preserve Recordings of Interrogations**

Respondent's obligation to preserve documents and information concerning Guantánamo prisoners is not new. The obligation did not arise with the enactment of the DTA, the filing of this case or the ruling by the Court of Appeals for the District of Columbia in *Bismullah v. Gates*,

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<sup>5</sup> On September 26, 2007, Petitioner also filed a petition under the Detainee Treatment Act, No. 07-1384 (D.C. Cir.), challenging the final decision of the Combatant Status Review Tribunal ("CSRT") that he is an "enemy combatant."

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06-1197 & 06-1397 (D.C. Cir.), concerning the scope of the record on review in DTA actions. Since as early as February 2002 – before CIA interrogations of Abu Zubaydah and the unidentified CIA detainee – Respondents have had an obligation to preserve evidence justifying detentions of “enemy combatants” in Guantánamo, an obligation that has arisen as a direct result of ongoing litigation as well as congressional inquiries into CIA secret interrogation detention and “enhanced” interrogation practices.

In February 2002 several men detained at Guantanamo brought their first federal court challenge to their detention at Guantánamo.<sup>6</sup> Although not specific to Petitioner, these cases placed Respondents on notice that any information obtained from interrogations related to the detention of individuals at Guantanamo would be relevant to pending and future petitions for writ of habeas corpus and related litigation filed by detainees in Guantánamo.

This information was also relevant to ongoing federal criminal prosecutions. In the prosecution of Zacarias Moussaoui, for example, the government introduced into evidence statements that U.S. personnel derived from individuals detained as “enemy combatants” during interrogations in CIA and DOD custody. Beginning in 2003, the Moussaoui’s defense lawyers requested access to any evidence related to these interrogations. In May 2003 and, again, in November 2005, the court in *Moussaoui* ordered the government to identify any videotapes or recordings of these interrogations by DOD and the CIA. See Letter from Chuck Robenberg, United States Attorney to Hon. Karen J. Williams and Hon. Leonie M. Brinkema, dated Oct. 25, 2007, attached hereto as Exhibit E.

Orders were also issued beginning in June 2005 by numerous judges in this Court requiring the government, which would include the CIA, to preserve all evidence and

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<sup>6</sup> See *Rasul v. Bush*, 542 U.S. 466 (2004).

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information related to the torture, mistreatment and abuse of detainees at Guantánamo.<sup>7</sup> The government has previously interpreted these preservation orders as applying to information “relating to all detainees *ever held* by the Department of Defense at Guantánamo Bay.” See Memorandum for Secretary of Defense, et al., from Daniel J. Dell’Orto, Acting General Counsel, Department of Defense (Dec. 19, 2007) (emphasis added), attached hereto as Exhibit F. [REDACTED]

[REDACTED] Accordingly, these documents as well as any documents related to improper coercion or threats against the declarants should have been preserved for purposes of litigation.

In November 2005, the government indicted Jose Padilla, relying in part on information obtained through interrogations of individuals in CIA secret detention. See David Stout, *U.S. Indicts Padilla After 3 Years in Pentagon Custody*, NY Times, Nov. 22, 2005. These cases, while not specific to Petitioner, required Respondents to maintain the records related to the interrogations of Abu Zubaydah and the unnamed CIA detainee.

Developments in this case further required the government specifically to preserve evidence of the circumstances and details of interrogations [REDACTED]

[REDACTED] Respondents relied upon this information as early as September 2004,

<sup>7</sup> See e.g., Order, *Al-Marri v. Bush*, No. 04-2035 (GK) (D.D.C. Mar. 7, 2005) [dkt. no. 25]; Order, *Al-Shiry v. Bush*, No. 05-490 (PFL) (D.D.C. Mar 23, 2005) [dkt. no. 14]; Order, *Anam v. Bush*, No. 04-1194 (HHK) (D.D.C. June 10, 2005) [dkt. no. 124]; Order, *Abdah v. Bush*, No. 04-1254 (HHK) [dkt. no. 155]; Mem. Op. & Order, *El-Banna v. Bush*, No. 04-1144 (RWR) (D.D.C. July 18, 2005) [dkt. no. 36]; Mem. Op. & Order, *Slahi v. Bush*, No. 05-881 (RWR) (D.D.C. July 18, 2005) [dkt. no.10]; Mem. Op. & Order, *Zadran v. Bush*, No. 2367 (RWR) (D.D.C. July 19, 2006) [dkt. no. 36]; cf. *Al-Anazi v. Bush*, No. 05-345 (JDB) (D.D.C. Oct. 28, 2005) (denying motion for preservation as moot because “respondents have a pre-existing duty to preserve the very information that this motion addresses”).

<sup>8</sup> See Gutierrez Declaration, ¶ 3.

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[REDACTED]

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[REDACTED]

when Petitioner's CSRT was conducted a year and two months prior to the destruction of the videotapes of Abu Zubaydah. Respondents finalized Petitioner's CSRT in January 2005, and expressly stated that [REDACTED]

[REDACTED] Petitioner also filed this habeas petition in September 2005, challenging his detention as an enemy combatant as well as invoking his right to *nonrefoulement*.<sup>9</sup>

Unquestionably, the details [REDACTED] are at issue in Petitioner's habeas case and this Court should determine if relevant evidence has been destroyed.

Respondents' obligation to preserve evidence of Abu Zubaydah and the unidentified CIA detainee's interrogations was also heightened by congressional inquiries and administration officials' guidance. As early as 2003, officials within the CIA suggested destroying video recordings of CIA enhanced interrogations. See Mark Mazzetti, *C.I.A. Was Urged to Keep Interrogation Videotapes*, NY Times, Dec. 8, 2007. In response, in February 2003, the Chairman of the House Intelligence Committee and the ranking minority member of that committee expressly requested that the CIA preserve videotapes of its interrogations using enhanced techniques in secret facilities.<sup>10</sup>

Again, beginning in May 2005, a member of the Senate Select Intelligence Committee expressly requested that the CIA preserve over one hundred documents concerning the CIA

<sup>9</sup> *Refoulement* is a State's expulsion or return of an individual to another State where the person is in danger of torture or persecution. Respondents' improper designation of Petitioner as an "enemy combatant" has also heightened his concerns that he will be tortured or persecuted by the Qadhafi regime if transferred there and has increased this risk of harm due to the stigma of his enemy combatant status.

<sup>10</sup> See Mazzetti, *C.I.A. Was Urged to Keep Interrogation Videotapes*; Michael Isikoff & Mark Hosenball, *Who Authorized the CIA to Destroy Interrogation Videos?*, Newsweek, Dec. 11, 2007.

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enhanced interrogation program. One of the requested documents is a report about the videotapes of interrogations and the possible illegality of the interrogation techniques the CIA employed. *See Chairman Rockefeller Says Intel Committee Has Begun Investigation into CIA Detainee Tapes*, Dec. 7, 2007, available at [www.senate.gov/~rockefeller/news/2007/pr100707a.html](http://www.senate.gov/~rockefeller/news/2007/pr100707a.html).

Similarly, Administration officials sent requests to the CIA to preserve these records. *See, e.g., Mazzetti, C.I.A. Was Urged to Keep Interrogation Videotapes* (White House Deputy Chief of Staff Harriet Miers repeatedly advised the CIA not to destroy the videotapes). Lawyers from the Department of Justice (DOJ) advised the CIA that it should not destroy any videotapes or recordings of detainee interrogations. *Id.* In mid-2005, the Director of National Intelligence “strongly advised” the Director of the CIA to forbid destruction of interrogation videotapes. *See Isikoff & Hosenball, Who Authorized the CIA to Destroy Interrogation Videos?*

Accordingly, without question, Respondents were under an obligation to preserve any evidence or information related to Petitioner that was derived from Abu Zubaydah or other CIA detainees. Respondents unquestionably violated that pre-existing obligation by destroying tapes in 2005.<sup>11</sup>

**II. Respondents’ Ongoing Investigation Is Insufficient to Determine Whether Respondents Destroyed Evidence Related to Petitioner**

Although Respondents have urged the courts and Congress to permit it to investigate itself, any investigation conducted by Respondents is insufficient to determine whether evidence

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<sup>11</sup> Judge Kennedy recently held a hearing in *Abdah* to determine if Respondents violated their pre-existing obligation to preserve evidence. Although Judge Kennedy has not yet ruled on the *Abdah* petitioner’s motion, here Petitioner has shown that the government explicitly relied upon statements [REDACTED]

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[REDACTED]

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[REDACTED]

was destroyed that specifically related to Petitioner. The Department of Justice may have authorized the destruction of CIA interrogation tapes, creating an inherent conflict of interest that cannot be overcome.

Furthermore, CIA personnel have misrepresented the scope of the creation, preservation and destruction of recordings of CIA interrogations. Uncertainty exists, for example, concerning the public representations made by the Director of the CIA about the scope of the videotaping of CIA interrogations and the destruction and preservation of records. The Director recently asserted that "videotaping stopped in 2002." See Exhibit D. [REDACTED]

[REDACTED] The CIA has also not disclosed the content of the remaining videotapes or whether it destroyed videotapes of interrogations of other CIA detainees, [REDACTED]

[REDACTED]

Concerns regarding the government's failure to provide an accurate and full accounting of both its destruction and possession of evidence or information concerning [REDACTED] [REDACTED] are also raised by the government's representations in the *Moussaoui* prosecution. In *Moussaoui*, the government informed the court via declarations from CIA officials submitted on May 9, 2003 and November 14, 2005 that the CIA did not videotape interrogations of CIA detainees whose statements were relied upon by the government in that prosecution. See Exhibit E. On October 25, 2007, the government notified the court that these declarations were inaccurate and that CIA interrogations were videotaped. The government explained that "[u]nbeknownst to the authors of the declarations, the CIA possessed the three recordings at the time that the Declarations were submitted." See *id.*

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[REDACTED]

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[REDACTED]

Although the government's letter to the court is heavily redacted, it suggests that the relevant CIA component did not inform the declarants of its videotaping of interrogations. *See id.* As result of the compartmentalization of information within the relevant government agencies and the need for accurate representations to the Court and counsel, this Court should require Respondents to demonstrate the preservation of relevant evidence through verified representations to this Court by individuals with direct knowledge of the creation, preservation and destruction of documents. Further, these representations should identify the relevant content of any destroyed evidence as well as the relevant content of any preserved evidence.

\* \* \*

The government's factual return establishes that during Petitioner's CSRT, [REDACTED]

[REDACTED]

[REDACTED] were the purported basis for any association between Petitioner and al Qaeda or jihadist activity that the government now cites as justification for Petitioner's detention and enemy combatant status. Yet, any information impermissibly obtained through torture or coercion cannot justify Petitioner's detention or designation.<sup>12</sup> In this litigation, Petitioner must be afforded an opportunity to challenge any

<sup>12</sup> Our Nation's fundamental legal traditions prohibit judicial reliance upon statements extracted through torture and other lesser forms of impermissible coercion to justify imprisonment of an individual. *See, e.g., James Heath, Torture and English Law*, 178 (1982) (torture has been illegal under English Common Law for more than 350 years). Common law judges did not consider evidence against a defendant that investigators extracted through torture and unlawful coercion because the judges considered this information inherently unreliable and viewed judicial acquiescence in these practices as degrading the dignity of justice. Our Founders shared this revulsion of judicial reliance upon statements extracted by torture or impermissible coercion and embodied protections against this practice within the Constitution. The Fifth Amendment's protection against self-incrimination was a direct response to the historical experience of the Star Chamber and intended to prohibit judicial reliance upon statements extracted through unlawful

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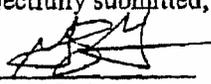
**UNCLASSIFIED**

impermissible reliance upon evidence obtained through or derived from torture to justify his detention. Accordingly, this Court should conduct an inquiry promptly to determine whether Respondents have destroyed evidence in a manner that eliminates Petitioner's ability to bring this challenge.

### CONCLUSION

For the reasons stated above, this Court should conduct a hearing to determine whether Respondents destroyed evidence from Abu Zubaydah or other detainees in CIA custody related to Respondents' justification for detaining Petitioner and designating him as an "enemy combatant."

Respectfully submitted,

  
Gitanjali S. Gutierrez  
J. Wells Dixon  
CENTER FOR CONSTITUTIONAL RIGHTS  
666 Broadway, 7th Floor  
New York, NY 10012  
Tel: (212) 614-6485  
Fax: (212) 614-6499

*Counsel for Petitioner*

---

cruelty or coercion, including torture. *See Michigan v. Tucker*, 417 U.S. 433, 440 (1974) ("The privilege against compulsory self-incrimination was developed by painful opposition to a course of ecclesiastical inquisitions and Star Chambers proceedings occurring several centuries ago."). Further, constitutional prohibitions against unreasonable searches and seizures, cruel and unusual punishments, and the guarantee of due process, reflect the Founders' antipathy to government cruelty and undue coercion within our Nation's justice system. *See, e.g., Gregg v. Georgia*, 428 U.S. 153, 169-170 (1976) ("The American draftsmen, who adopted the English phrasing in drafting the Eighth Amendment, were primarily concerned . . . with proscribing 'tortures' and other 'barbarous' methods of punishment.") (citation omitted).

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**Exhibit A**

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UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

<u>JARALLAH AL-MARRI, et al.,</u>	:	
Petitioners,	:	
v.	:	Civil Action No. 04-2035 (GK)
<u>GEORGE W. BUSH, et al.,</u>	:	
Respondents.	:	

ORDER

On January 10, 2005, Petitioners filed a Motion for Discovery and for Preservation Order. Petitioners request that the Court order Respondents to preserve and maintain all evidence and information regarding the torture, mistreatment, and abuse of detainees at Guantanamo Bay. Respondents, however, argue that Petitioners have failed to satisfy the standard for entering a preliminary injunction, which is required when considering a request for a preservation order.

"[A] document preservation order is no more an injunction than an order requiring a party to identify witnesses or to produce documents in discovery." Pueblo of Laguna v. United States, 60 Fed. Cl. 133, 138 n.8 (Fed. Cl. 2004) (citing Mercer v. Magnant, 40 F.3d 893, 896 (7th Cir. 1994)). Thus, Petitioners need not meet such a standard when seeking a preservation order. Furthermore, Respondents represent that the information at issue will not be destroyed, so the Court finds that entering a preservation order

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Case 1:04-cv-02035-GK Document 25 Filed 03/07/2005 Page 2 of 2

will inflict no harm or prejudice upon them. Accordingly, it is hereby

**ORDERED** that Petitioners' Motion for Preservation Order is granted; it is further

**ORDERED** that Respondents shall preserve and maintain all evidence and information regarding the torture, mistreatment, and abuse of detainees now at the Guantanamo Bay detention facility.

March 7, 2005.

/s/  
Gladys Kessler  
United States District Judge

Copies to: Attorneys of Record via ECF

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**Exhibit B**

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**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

**MAHMOAD ABDAH, et al.,**  
  
**Petitioners,**  
  
**v.**  
  
**GEORGE W. BUSH, et al.,**  
  
**Respondents.**

**Civil Action 04-1254 (HEK)**

**ORDER**

On January 10, 2005, petitioners filed a Motion for Leave to Take Discovery and For Preservation Order [#96]. On February 3, 2005, the court (Green, J.) ordered that the proceedings in this and ten other coordinated cases be "stayed for all purposes pending resolution of all appeals in this matter." To the extent that petitioners seek to take discovery, their motion must be stayed in accordance with Judge Green's order.

Petitioners also seek a preservation order, which they argue is necessary to ensure that the government will maintain "the very sensitive evidence it now possesses about the torture, mistreatment, and abuse of the detainees now at Guantánamo." Pet'rs' Mot. for Disc./Protective Order at 8-9. Respondents counter that petitioners have failed to satisfy the four-part preliminary injunction standard, which they assert is required for entry of a protective order; that petitioners have not identified specific documents at risk for destruction; and that respondents are "well aware of their obligation not to destroy evidence that may be relevant in pending litigation." Resp'ts' Opp'n at 25.

While preservation orders take the form of an injunction, in that they order a party to perform or refrain from performing an act, petitioners need not meet the four-part preliminary injunction test in order to protect relevant documents from destruction. In fact, "a document preservation order is

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no more an injunction than an order requiring a party to identify witnesses or to produce documents in discovery." *Pueblo of Laguna v. United States*, 60 Fed. Cl. 133, 138 n.8 (Fed. Cl. 2004) (citing *Mercer v. Magnant*, 40 F.3d 893, 896 (7th Cir. 1994)); see also *Ditlow v. Shultz*, 517 F.2d 166, 173-74, n.31 (D.C. Cir. 1975) (preservation order issued when moving party presented "sufficiently substantial" challenge on the merits, non-moving party agreed to maintain documents at issue, and preservation of documents presented only a "limited housekeeping burden").

Furthermore, in this case, all of the documents relevant to the adjudication of petitioners' claims, along with petitioner-detainees themselves, are in the sole custody and control of respondents. In addition, petitioners' counsel's access to their clients is quite restricted. It is almost inconceivable that within these confines, petitioners could identify specific instances of document destruction. Rather, the court finds entry of a preservation order appropriate in light of the purpose animating Judge Green's February 3, 2005 stay order, namely to preserve the status quo pending resolution of appeals. Finally, because respondents represent that they will not destroy the information at issue, a preservation order will not impose any harm or prejudice upon them. See *Al-Marri v. Bush*, No. 04-2035 (D.D.C. March 7, 2005) (preservation order). Accordingly, it is this 10<sup>th</sup> day of June, 2005, hereby

**ORDERED**, that petitioners' motion is **STAYED** insofar as petitioners seek discovery and **GRANTED** insofar as they seek a preservation order; and it is further

**ORDERED**, that respondents shall preserve and maintain all evidence and information regarding the torture, mistreatment, and abuse of detainees now at the United States Naval Base at Guantánamo Bay, Cuba.

Henry H. Kennedy, Jr.  
United States District Judge

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**Exhibit C**

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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

ABU ABDUL RAUF ZALITA, *et al.*,

Petitioners,

v.

GEORGE W. BUSH,  
President of the United States, *et al.*

Respondents.

Civil Action No. 05-1220 (RMU)

DECLARATION OF GITANJALI S. GUTIERREZ

I, GITANJALI S. GUTIERREZ, pursuant to 28 U.S.C. § 1746, declare as follows:

1. I am an attorney at the Center for Constitutional Rights, 666 Broadway, 7th floor, New York, New York, 10012 ("CCR"). CCR represents Abu Abdul Rauf Zalita, a.k.a. Abdul Rauf Omar Mohammed Abu Al Qassim, ("Petitioner"), Petitioner in the above-captioned matter. CCR also represents Guantanamo detainee Majid Khan ("Khan"), a U.S. asylee who was [REDACTED] imprisoned and tortured [REDACTED] operated by the Central Intelligence Agency ("CIA"). *See Khan v. Bush*, Civil Action No. 06-1690 (RBW) (D.D.C.); *Khan v. Gates*, No. 07-1324 (D.C. Cir.). On September 6, 2006, the CIA transferred Khan from secret detention to the custody of military authorities at Guantánamo, where he remains imprisoned without charge or trial. I have conducted attorney-client meetings with Majid Khan at Guantanamo in October and December 2007. I respectfully submit this declaration in support of Petitioner's Motion for Inquiry Concerning Destruction of Evidence Related to CIA Detainee Interrogations.

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2. Since his arrival at Guantánamo the only prisoner Khan has had any direct contact with is [REDACTED]. He and [REDACTED] are in neighboring cells and share recreation time. Both men speak English.

3. According to Khan, [REDACTED]

[REDACTED]

[REDACTED]

4. Khan was held in secret detention by or at the behest of the CIA from March 5, 2003 until on or around September 6, 2006. During his detention, CIA interrogators subjected him to enhanced interrogation techniques that amounted to torture.

[REDACTED]

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed: Washington, DC  
December 27, 2007



Gitanjali S. Gutierrez

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**Exhibit D**

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Case 1:04-cv-01254-HHK Document 219-5 Filed 12/09/2007 Page 1 of 2

**Starks, Brent**

---

**From:** Remes, David  
**Sent:** Saturday, December 08, 2007 7:40 PM  
**To:** 'mfalkoff@niu.edu'; 'jasonmknott@yahoo.com'; Lipper, Gregory; Starks, Brent; Armijo, Enrique; Braverman, Elizabeth; Shuford, David; Vernia, Benjamin; Peryman, Skye; Huber, Jonathan  
**Subject:** Mot Ex D

----- Original Message -----

**From:** Remes, David  
**To:** Remes, David  
**Sent:** Sat Dec 08 18:52:00 2007  
**Subject:** Hayden Email

-----Original Message-----

**Message from the Director: Taping of Early Detainee Interrogations**

The press has learned that back in 2002, during the initial stage of our terrorist detention program, CIA videotaped interrogations, and destroyed the tapes in 2005. I understand that the Agency did so only after it was determined they were no longer of intelligence value and not relevant to any internal, legislative, or judicial inquiries-including the trial of Zacarias Moussaoui. The decision to destroy the tapes was made within CIA itself. The leaders of our oversight committees in Congress were informed of the videos years ago and of the Agency's intention to dispose of the material. Our oversight committees also have been told that the videos were, in fact, destroyed.

If past public commentary on the Agency's detention program is any guide, we may see misinterpretations of the facts in the days ahead.

With that in mind, I want you to have some background now.

CIA's terrorist detention and interrogation program began after the capture of Abu Zubaydah in March 2002. Zubaydah, who had extensive knowledge of al-Qa'ida personnel and operations, had been seriously wounded in a firefight. When President Bush officially acknowledged in September 2006 the existence of CIA's counter-terror initiative, he talked about Zubaydah, noting that this terrorist survived solely because of medical treatment arranged by CIA. Under normal questioning, Zubaydah became defiant and evasive. It was clear, in the President's words, that "Zubaydah had more information that could save innocent lives, but he stopped talking."

That made imperative the use of other means to obtain the information-means that were lawful, safe, and effective. To meet that need, CIA designed specific, appropriate interrogation procedures.

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Before they were used, they were reviewed and approved by the Department of Justice and by other elements of the Executive Branch. Even with the great care taken and detailed preparations made, the fact remains that this effort was new, and the Agency was determined that it proceed in accord with established legal and policy guidelines. So, on its own, CIA began to videotape interrogations.

The tapes were meant chiefly as an additional, internal check on the program in its early stages. At one point, it was thought the tapes could serve as a backstop to guarantee that other methods of documenting the interrogations and the crucial information they produced were accurate and complete. The Agency soon determined that its documentary reporting was full and exacting, removing any need for tapes. Indeed, videotaping stopped in 2002.

As part of the rigorous review that has defined the detention program, the Office of General Counsel examined the tapes and determined that they showed lawful methods of questioning. The Office of Inspector General also examined the tapes in 2003 as part of its look at the Agency's detention and interrogation practices. Beyond their lack of intelligence value-as the interrogation sessions had already been exhaustively detailed in written channels-and the absence of any legal or internal reason to keep them, the tapes posed a serious security risk. Were they ever to leak, they would permit identification of your CIA colleagues who had served in the program, exposing them and their families to retaliation from al-Qa'ida and its sympathizers.

These decisions were made years ago. But it is my responsibility, as Director today, to explain to you what was done, and why. What matters here is that it was done in line with the law. Over the course of its life, the Agency's interrogation program has been of great value to our country. It has helped disrupt terrorist operations and save lives. It was built on a solid foundation of legal review. It has been conducted with careful supervision. If the story of these tapes is told fairly, it will underscore those facts.

Mike Hayden

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U.S. Department of Justice  
United States Attorney  
Eastern District of Virginia  
U.S. DISTRICT COURT  
ALEXANDRIA, VIRGINIA

3100 Jamieson Avenue  
Alexandria, Virginia 22314

(703)799-3700

October 25, 2007

FILED WITH THE  
COURT SECURITY OFFICER  
CSO: MACISSO  
DATE: 10/26/07

Hon. Karen J. Williams  
Chief Judge  
United States Court of Appeals  
for the Fourth Circuit  
1100 East Main Street, Suite 501  
Richmond, VA 23219-3517

Hon. Leonie M. Brinkema  
United States District Judge  
Eastern District of Virginia  
401 Courthouse Square  
Alexandria, Virginia 22314-5799

Hand-delivered via Court Security Officer

Re: United States v. Zacarias Mousaoui  
Fourth Circuit Docket Nos. 03-4792, 06-4494  
District Court Case No. 01-455-A

Dear Chief Judge Williams and Judge Brinkema:

The Government respectfully submits this letter to inform the Court that two *ex parte* declarations previously submitted by the Central Intelligence Agency ("CIA") in this case contain factual errors concerning whether interrogations of certain enemy combatants were audio or video recorded. The errors, described more fully below, do not prejudice the defendant in light of his guilty plea, extensive admissions in the penalty phase, and the jury's decision not to impose a death sentence. We advise both Courts because the declarations in question were filed in the District Court and included in appendices filed in the Fourth Circuit.

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Recently, we learned that the CIA obtained three recordings (two video tapes and one short audio tape) of interviews of [REDACTED]

[REDACTED] We are unaware of recordings involving the other enemy combatant witnesses at issue in this case [REDACTED] Further, the CIA came into possession of the three recordings under unique circumstances involving separate national security matters unrelated to the Moussaoui prosecution.

On September 13, 2007, an attorney for the CIA, notified us of the discovery of a video tape of the interrogation of [REDACTED]

On September 19, 2007, we viewed the video tape and a transcript [REDACTED] of the interview. The transcript contains no mention of Moussaoui or any details of the September 11 plot. In other words, the contents of the interrogation have no bearing on the Moussaoui prosecution.<sup>7</sup> The existence of the video tape, however, is at odds with statements in two CIA declarations submitted in this case, as discussed in detail below.

After learning of the existence of the first video tape, we requested the CIA to perform an exhaustive review to determine whether it was in possession of any other such recordings for any of the enemy combatant witnesses at issue in this case. CIA's review, which now appears to be complete, uncovered the existence of a second video tape, as well as a short audio tape, both of which pertained to interrogations [REDACTED] On October 18, 2007, we viewed the second video tape and listened to the audio tape, while reviewing transcripts

<sup>7</sup> [REDACTED] was one of the enemy combatant witnesses whom Moussaoui wanted to call to testify on his behalf; [REDACTED]

<sup>2</sup> The recording from [REDACTED]

<sup>3</sup> [REDACTED]

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Page 3 of 5

~~\_\_\_\_\_~~ Like the first video tape, the contents of the second video tape and the audio tape have no bearing on the Moussaoui prosecution — they neither mention Moussaoui nor discuss the September 11 plot. We attach for the Courts' review *ex parte* a copy of the transcripts for the three recordings.<sup>4</sup>

At our request, CIA also provided us with intelligence cables pertaining to the interviews recorded on the two video tapes. Because we reviewed these cables during our discovery review, we wanted to ensure that the cables accurately captured the substance of the interrogations. Based on our comparison of the cables to the ~~\_\_\_\_\_~~ videotapes, and keeping in mind that the cables were prepared for the purposes of disseminating intelligence, we found that the intelligence cables accurately summarized the substance of the interrogations in question.

The fact that audio/video recording of enemy combatant interrogations occurred, and that the United States was in possession of three of those recordings is, as noted, inconsistent with factual assertions in CIA declarations dated May 9, 2003 (the "May 9 Declaration"), and November 14, 2005 (the "November 14 Declaration"). The May 9 Declaration arose after the Fourth Circuit directed the District Court to consider substitutions under the Classified Information Procedures Act ("CIPA") in lieu of enemy combatant testimony sought by the defendant. In an ensuing CIPA hearing, on May 7, 2003, Judge Brinkema ordered the Government to determine, *inter alia*, whether interrogations ~~\_\_\_\_\_~~ were recorded. See 5/7/03 Tr. 11-13, 69. Two days later, the Government filed the May 9 Declaration, which was *ex parte* and accompanied by a motion under CIPA § 4 to make a limited disclosure to the defense of only the answers to the District Court's questions (but not the full explanations contained in the declaration). Judge Brinkema granted the § 4 motion, permitting the Government to make the following disclosure, among others, to the defense:

---

<sup>4</sup> The transcript of the audio tape previously existed and was contained within an intelligence cable.

<sup>5</sup> Although we have provided defense counsel with a copy of this letter, we have not provided them with a copy of the transcripts for two reasons. First, the interviews address other national security matters for which defense counsel lack a need to know. ~~\_\_\_\_\_~~

~~\_\_\_\_\_~~

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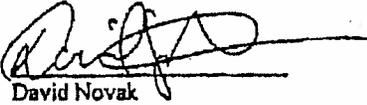
We bring the errors to the Court's attention, however, as part of our obligation of candor to the Court.

The Government will promptly apprise the Court of any further developments.

Sincerely,

Chuck Rosenberg  
United States Attorney

By:

  
David Novak  
David Raskin  
Assistant United States Attorneys

cc: Justin Antonipillai, Esq.  
Barbara Hartung, Esq.  
Appellate Counsel for Zacarias Moussaoui  
(without transcripts)

~~Derived from: Multiple Sources~~

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**Exhibit F**

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DEPARTMENT OF DEFENSE  
OFFICE OF GENERAL COUNSEL  
1600 DEFENSE PENTAGON  
WASHINGTON DC 20301-1600

DEC 19 2007

MEMORANDUM FOR SECRETARY OF DEFENSE  
DEPUTY SECRETARY OF DEFENSE  
SECRETARIES OF THE MILITARY DEPARTMENTS  
CHAIRMAN OF THE JOINT CHIEFS OF STAFF  
UNDER SECRETARIES OF DEFENSE  
DIRECTOR, OPERATIONAL TEST AND EVALUATION  
INSPECTOR GENERAL OF THE DEPARTMENT OF DEFENSE  
ASSISTANTS TO THE SECRETARY OF DEFENSE  
DIRECTOR, ADMINISTRATION AND MANAGEMENT  
DIRECTOR, PROGRAM ANALYSIS AND EVALUATION  
DIRECTOR, NET ASSESSMENT  
DIRECTOR, FORCE TRANSFORMATION  
DIRECTORS OF THE DEFENSE AGENCIES  
DIRECTORS OF THE DOD FIELD ACTIVITIES

SUBJECT: Preservation of Detainee Records

In August 2005, in response to several orders issued by federal court judges, the General Counsel of the Department of Defense directed that certain information relating to all detainees ever held by the Department of Defense at Guantanamo Bay be preserved and maintained (enclosure). Specifically, you were directed to preserve and maintain "all documents and recorded information of any kind (for example, electronic records, written records, telephone records, correspondence, computer records, e-mail, storage devices, handwritten or typed notes) that is in, or comes into, your possession or control" relating to these detainees. Those directives remain in effect and must continue to be followed.

You are hereby directed that this requirement also applies to records relating to detainees who arrived at Guantanamo after August 2005 and to any detainees who may arrive at Guantanamo in the future.

A handwritten signature in black ink that reads "Daniel J. Dell'Orto".

Daniel J. Dell'Orto  
Acting General Counsel

Enclosure  
As stated



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