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**UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK**

BAHER AZMY,

Plaintiff,

v.

UNITED STATES DEPARTMENT OF
DEFENSE,

Defendant.

COMPLAINT

Civil Action No. _____

PRELIMINARY STATEMENT

1. This is an action under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, seeking the immediate processing and release of agency records requested by plaintiff Baher Azmy from defendant United States Department of Defense (“DoD”).

2. Plaintiff Baher Azmy is the legal counsel for Murat Kurnaz (“Kurnaz”), ISN #061, who was detained as an “enemy combatant” at the U.S. Naval Base in Guantanamo Bay, Cuba (“Guantanamo”) from early 2002 to August 2006.

3. Following his arrest by local officials in Pakistan in October 2001, Kurnaz was transferred to Guantanamo in early 2002. There, he went through a Combatant Status Review Tribunal (“CSRT”) proceeding, which purported to “confirm” his status as an “enemy

combatant.” After his initial CSRT proceeding, Kurnaz had at least one Administrative Review Board (“ARB”) proceeding, and likely had two, which purported to assess whether he continued to pose a threat to the United States if released from military custody.

4. In January of 2005, U.S. District Court Judge Joyce Hens Green ruled that CSRT proceedings violated the fundamental due process rights possessed by Guantanamo detainees. *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 445 (D.D.C. 2005). Her opinion took particular note of Kurnaz’s case: she reviewed multiple exculpatory statements from U.S. intelligence authorities contained in his classified file, *see In Re Guantanamo Bay Detainee Cases*, Nos. CIV.A. 02-CV-0299CKK et al. (D.D.C. Jan. 31, 2005), slip. op. at 50-51 (classified version), and concluded that the government’s CSRT likely ignored evidence exonerating him. 355 F. Supp. 2d at 470-72.

5. Responding to a FOIA litigation initiated by the Associated Press (“AP”), the DoD produced CSRT transcripts and related documentation of detainees held in Guantanamo, but with various redactions. *A.P. v. U.S. Dep’t of Def.*, 395 F. Supp. 2d 15, 16 (S.D.N.Y. 2005). In January 2006, rejecting the DoD’s reasons for redacting the transcripts, Judge Rakoff ordered the DoD to release the unredacted transcripts. *A.P. v. U.S. Dep’t of Def.*, 410 F. Supp. 2d 147 (S.D.N.Y. 2006). Although the DoD released the transcripts and other documents relating to Guantanamo detainees’ CSRT and ARB proceedings, *see United States Dep’t of Defense, CSRT and ARB Documents*, Released March 3, April 3, and April 19, 2006 (“Released CSRT and ARB Documents”), *available at* <http://www.dod.mil/pubs/foi/detainees/csrt/>, the DoD has not disclosed the transcript of Kurnaz’s ARB proceedings, and it has disclosed only the summarized version of his CSRT proceedings.

6. On October 27, 2006, plaintiff filed a FOIA request with DoD, seeking the release of transcripts and records related to Kurnaz's CSRT and ARB proceedings. The defendant agency was obliged to determine whether to comply with the plaintiff's request "within twenty days (excepting Saturdays, Sundays, and legal public holidays)" as required by 5 U.S.C. § 552(a)(6)(A)(i). As of the date of this filing, the defendant has failed to provide any substantive response to plaintiff's request.

JURISDICTION AND VENUE

7. This Court has subject matter jurisdiction over this action and personal jurisdiction over the parties pursuant to 5 U.S.C. §§ 552(a)(4)(B) and 552(a)(6)(C)(i). This Court also has jurisdiction over this action pursuant to 28 U.S.C. § 1331. Venue is proper in this district under 5 U.S.C. § 552(a)(4)(B).

PARTIES

8. Plaintiff, Baher Azmy, is an Associate Professor at the Seton Hall University School of Law. He resides in Manhattan, New York. He is the legal counsel for Murat Kurnaz, who was detained at U.S. Naval Base at Guantanamo Bay, Cuba from early 2002 to August 2006. Professor Azmy has a significant academic interest in American detention policy in connection with the war on terror. He has frequently lectured both domestically and internationally about issues related to American detention policy at Guantanamo Bay, and he has been a featured speaker on the subject at the Bar of the City of New York International Human Rights Section, Fordham Law School, NYU School of Law, the Annual Conference of the Association of American Law Schools, and the annual conference of the International Rehabilitation Center for Torture Victims. He has been frequently quoted as an expert on U.S. policy in Guantanamo Bay in major American media outlets, including in the New York Times,

Washington Post, Wall Street Journal and The New Yorker Magazine, and in dozens of German and international news publications. He has also appeared on German, Dutch and French public television to speak about Guantanamo Bay and related issues.

9. Defendant DoD is a Department of the Executive Branch of the United States Government. The DoD is an agency within the meaning of 5 U.S.C. § 552(f)(1).

FACTS

10. Murat Kurnaz is a German resident of Turkish descent. He had been traveling with Muslim missionaries in Pakistan in the autumn of 2001 when local Pakistani police detained him as part of a routine bus stop. He was eventually turned over to federal Pakistani authorities and then to the U.S. military, who transferred him to the U.S. Naval Base at Guantanamo Bay, Cuba.

11. Following the Supreme Court ruling in *Rasul v. Bush*, 542 U.S. 466 (2004), the government implemented its CSRT proceedings. See Order Establishing Combatant Status Review Tribunal issued by Deputy Secretary of Defense Paul Wolfowitz (July 7, 2004) (“Wolfowitz Order”), available at www.defenselink.mil/news/Jul2004/d20040707review.pdf. During these proceedings, three-member military-appointed tribunals were to hear detainee testimony as well as government evidence and, in closed-door sessions, determine whether detainees were properly classified as “enemy combatants.” Wolfowitz Order at ¶g.

12. In addition to an initial combatant status review, detainees were also given periodic reviews to decide whether those already determined enemy combatants by a CSRT would pose a further threat to the United States and its allies. See Designated Civilian Official Administrative Review of the Detention of Enemy Combatants at U.S. Naval Base Guantanamo Bay, Cuba, at 1, available at

<http://www.defenselink.mil/news/Sep2004/d20040914adminreview.pdf>. These Administrative Review Board (ARB) proceedings, also convened before three-member military panels, were to be held annually to consider all relevant and reasonably available evidence from government agencies and foreign nations as well as from family and friends of the detainees. *Id.* After considering the evidence provided, the ARB was to submit a recommendation to a Designated Civilian Official, who would then decide whether to release, transfer or continue to hold the detainee in custody. *Id.*

13. On July 2, 2004, Rabiye Kurnaz, Murat's mother, challenged the legality of her son's detention by filing a habeas corpus petition on his behalf in the United States District Court for the District of Columbia under 28 U.S.C. § 2241. Kurnaz's petition, along with other habeas petitions filed shortly after *Rasul* on behalf of Guantanamo detainees, were consolidated before Judge Joyce Hens Green.

14. Responding to Judge Green's order for a factual response to the habeas petitions, the government submitted the full, classified versions of CSRT record for the Court's in camera review. *In re Guantanamo*, 355 F. Supp. 2d at 452. The government also filed on the public record unclassified summaries of the CRST determinations, and transcripts of the testimony of detainees before their respective CSRT panels.

15. In January of 2005, Judge Green, ruling on the government's motion to dismiss the consolidated habeas petitions, concluded that the Guantanamo detainees have valid claims under the Fifth Amendment to the United States Constitution, and that the procedures the government implemented to decide that the petitioners are subject to indefinite detention as "enemy combatants" violated their right to due process. *Id.* at 445.

16. In her opinion, Judge Green singled out Kurnaz's case as particularly troubling. Judge Green noted in his file a number of written statements by U.S. intelligence authorities disclaiming any connection between Kurnaz and Al Qaeda, the Taliban or any other terrorist group. *In Re Guantanamo Bay Detainee Cases*, Nos. CIV.A. 02-CV-0299CKK et al. (D.D.C. Jan. 31, 2005), slip. op. at 50-51 (classified version).

17. Judge Green issued two versions of her opinion. One version, not released to the public, was completely unredacted. Another version, made public, Judge Green herself redacted in order to protect evidence or statements she believed might be classified. This redacted version underwent a "classification review" by the Department of Justice Court Security Office and, as a result, several of Judge Green's initial redactions were lifted. However, none of the statements from U.S. intelligence, quoted in her opinion that supported Kurnaz's claim of innocence, were deemed unclassified.

18. Several of the statements have since become public; they demonstrate that U.S. counter-intelligence task force had "no definite link/evidence of [Kurnaz] having an association with Al Qaeda or making any specific threat against the U.S.," and was not "aware of evidence that Kurnaz was or is a member of Al Qaeda."¹ As Judge Green suggested, the CSRT largely ignored this exonerating evidence in nevertheless designating him an "enemy combatant." *In re Guantanamo*, 355 F. Supp. at 470-72.

19. After reviewing all the evidence against Kurnaz, Judge Green also found that it was legally insufficient to support the government's conclusion that he is a member of al Qaeda. *Id.* at 470. Judge Green further noted that even if all the government's allegations were true, Kurnaz's ties to terrorism would make him guilty not by any overt act, but only by association

¹ See Carol D. Leonnig, *Panel Ignored Evidence on Detainee; U.S. Military Intelligence, German Authorities Found No Ties to Terrorists*, WASH. POST, March 27, 2005, at A1.

with a religious missionary group and a person alleged to be a suicide bomber; Judge Green concluded that a finding of guilt by such an attenuated association would violate due process. *Id.* at 471.

20. In November 2004, the AP submitted a FOIA request to the DoD seeking all transcripts of the CSRT proceedings and related documentation pertaining to the detainees being held in Guantanamo. *A.P.*, 395 F. Supp. 2d at 16. When the DoD failed to release the transcripts, the AP brought a lawsuit seeking to compel such release. *Id.* In response, the DoD produced the requested transcripts and other documentation, but with various redactions. *Id.* In January 2006, Judge Rakoff ordered the government to release unredacted copies of CSRT transcripts of the Guantanamo detainees. *A.P.*, 410 F. Supp. 2d at 158. In response to AP's lawsuit and Judge Rakoff's order, the DoD released the CSRT and ARB transcripts of the Guantanamo detainees. *See Released CSRT and ARB Documents, available at* <http://www.dod.mil/pubs/foi/detainees/csrt/>.

21. However, DoD did not release Kurnaz's full ARB transcript. Instead, DoD released 43 pages of documentation containing only submissions made on Kurnaz's behalf by his legal counsel. *See Annual Review Board Transcript of Detainee ISN #061, U.S. Department of Defense, Set 5, p.p. 64-106, available at* http://www.dod.mil/pubs/foi/detainees/csrt/ARB_Transcript_Set_5_20000-20254.pdf. Similarly, DoD released only 10 pages of Kurnaz's summarized CSRT transcript instead of the full transcript. *See CSRT Transcript of Detainee ISN #061, U.S. Department of Defense, Set 9, at 38-47, available at* http://www.dod.mil/pubs/foi/detainees/csrt/Set_9_1018-1088B.pdf. In contrast to numerous ARB transcript releases made by the DoD, Kurnaz's ARB transcript or

transcripts remain undisclosed, as do any reasons or conclusions supporting or calling into question his continued detention.

22. In August of 2006, Kurnaz was released from detention at Guantanamo and returned home to Germany. The DoD suggested that his release followed a conclusion by an ARB that Kurnaz was no longer a threat to the United States. *See* United States Dep't of Defense, News Release, Detainee Transfer Announced, August 24, 2006, *available at* <http://www.defenselink.mil/Releases/Release.aspx?ReleaseID=9865>. This statement contradicts the understanding of Kurnaz himself, who explained to counsel that at his second ARB, which occurred in 2006, the military actually raised new – but patently false – allegations against him. In any event, it remains unclear to the public, counsel, and to Kurnaz, what the decisions of the ARB(s) were, if an ARB determination contributed to his release, or the basis for the ARB determination(s).

23. In addition, Kurnaz, counsel and the public have never been made aware whether the U.S. military acknowledged in his ARB that they had previously exonerated him from any connections with terrorism.

24. On October 27, 2006, plaintiff submitted a FOIA request to the defendant DoD. The request sought full transcripts of any and all CSRT and ARB proceedings of Kurnaz; any decisions or rulings issued by, or resulting from, any CSRT or ARB proceedings of Kurnaz; all records, evidence, orders, reports, exhibits or any other information relating to, used in, or relied upon during Kurnaz's CSRT and ARB proceedings; and any other information that in any way concerns, relates to, pertains to, refers to, or mentions any reasons supporting Kurnaz's detention or reasons that his detention might have been wrongful or mistaken.

25. Plaintiff's FOIA request sought a waiver of all costs pursuant to 5 U.S.C. § 552(a)(4)(A)(iii) ("Documents shall be furnished without any charge . . . if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester."). In the alternative, plaintiff's FOIA request sought a limitation of processing fees pursuant to 5 U.S.C. § 552(a)(4)(A)(ii)(II) ("[F]ees shall be limited to reasonable standard charges for document duplication when records are not sought for commercial use and the request is made by . . . a representative of the news media . . .").

26. Defendant is improperly withholding the records sought by plaintiff's FOIA requests.

27. The defendant was obliged to determine whether to comply with the plaintiff's request "within twenty days (excepting Saturdays, Sundays, and legal public holidays)" as required by 5 U.S.C. § 552(a)(6)(A)(i).

28. Plaintiff has received a letter from the defendant agency related solely to fees, but as of the date of this filing, neither the defendant agency nor any of its representatives has informed the plaintiff of any determination regarding which records, if any, the agency intends to disclose.

29. Pursuant to 5 U.S.C. § 552(a)(6)(c)(i), "[a]ny person making a request to any agency for records . . . shall be deemed to have exhausted his administrative remedies with respect to such request if the agency fails to comply with the applicable time limit provisions of this paragraph." Since plaintiff has received no substantive response explaining the agency's decision regarding which documents it will disclose and the reasons for its decision, the agency

has failed to comply with the applicable time limit provisions, and plaintiff is therefore deemed to have exhausted his administrative remedies.

CAUSES OF ACTION

First Cause of Action:
Violation of the FOIA for Failure to Make Promptly Available the Records Sought by Plaintiffs' Requests

30. Defendant's failure to make promptly available the records sought by plaintiff's request violates the FOIA, 5 U.S.C. § 552(a)(3)(A), and the corresponding agency regulations.

Second Cause of Action:
Violation of the FOIA for Failure Timely to Respond to Plaintiffs' Requests

31. Defendant's failure timely to respond to plaintiff's request violates the FOIA, 5 U.S.C. § 552(a)(6)(A), and the corresponding agency regulations.

Requested Relief

WHEREFORE, plaintiff prays that this Court:

- A. Order defendant immediately to process the requested records in their entirety;
- B. Order defendant to disclose the requested records in their entirety and make copies available to plaintiff;
- C. Enjoin defendant from charging plaintiff any costs for the processing of his request;
- D. Award plaintiff his costs and reasonable attorney's fees incurred in this action; and
- E. Grant such other relief as the Court may deem just and proper.

