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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA, :

98 Cr. 1023 (S-10) (LAK)

- against - :

Hage, et al., includ. :
AHMED KHALFAN GHAILANI

:

Defendant.

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MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT AHMED KHALFAN GHAILANI'S MOTION TO DISMISS INDICTMENT DUE TO THE DENIAL OF HIS CONSTITUTIONAL RIGHT TO A SPEEDY TRIAL

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PRELIMINARY STATEMENT

Defendant Ahmed Khalfan Ghailani submits this memorandum of law in support of his motion for dismissal of the Superseding Indictment with prejudice as a result of the deprivation of his right to a Speedy Trial, pursuant to the Fifth and Sixth Amendments of the United States Constitution and Rule 48(b)(3) of the Federal Rules of Criminal Procedure.

Specifically, this motion asks one primary question: **Can national security trump an indicted defendant's Constitutional Right to a Speedy Trial? We respectfully submit that the answer is empathically and without qualification, "No."**

STATEMENT OF FACTS

The defendant Ahmed Khalfan Ghailani (hereinafter, "Defendant", "the defendant" or "Mr. Ghailani") is charged in a 308-count Superseding Indictment, which accuses him, inter alia, of participating in the conspiracy to bomb the United States Embassies in Kenya and Tanzania. Several of the counts carried the possibility of the death penalty until the decision to seek the death penalty was declined on October 2, 2009. The original Indictment was filed in the Southern District of New York on September 21, 1998. Mr. Ghailani was added to the case via the Third Superseding Indictment, dated, December 16, 1998. The indictment was most

recently superseded with respect to Mr. Ghailani on March 12, 2001. See Tenth Superseding Indictment (S-10), filed March 12, 2001.

On or about July 24, 2004, Mr. Ghailani was apprehended and arrested [redacted] Pakistani government officials. [redacted] Mr. Ghailani has been under the exclusive control of the United States government, [redacted] Mr. Ghailani was detained in secret and questioned outside of the United States in a separate program operated by the Central Intelligence Agency ("CIA"). See Government letter, dated, July 20, 2009 (annexed hereto as "Exhibit A"). The facility/facilities where Mr. Ghailani was detained while in CIA custody are commonly referred to as "Black Sites" by the Intelligence and military communities.

On or about September 6, 2006, Mr. Ghailani was transferred from the custody of the CIA Black Sites, to the custody of the Department of Defense, and was detained in Guantanamo Bay, Cuba ("GTMO"). The Department of Defense then prosecuted the matter through the Office of Military Commissions ("Military Commission").

On or about October 2008, the Convening Authority of the Military Commission determined that she would not seek the death penalty. Over six months

later, on May 29, 2009, the Convening Authority withdrew and dismissed without prejudice all charges and specifications which had been pending before the Military Commission.

On June 9, 2009, Mr. Ghailani appeared for arraignment before the Honorable Loretta A. Preska, Chief Judge of the United States District Court for the Southern District of New York. Mr. Ghailani was arraigned on the instant Superseding Indictment and entered a plea of not guilty.

Defendant estimates that [redacted] have elapsed that are chargeable to the Government for the purposes of Speedy Trial calculation under the Fifth and Sixth Amendments and Rule 48(b)(3). Such time is calculated as follows: from the date that Mr. Ghailani was taken into the sole custody of the United States Government [redacted] until he was arraigned in the Southern District of New York (June 9, 2009).[1]

While the delay alone in bringing Mr. Ghailani to trial provides a presumptive basis for dismissal of his Indictment on Speedy Trial grounds, it is what happened to

[redacted]

Mr. Ghailani during the period of delay, and the reasons such delay and events occurred, that provides the true grounds upon which this Indictment must now be dismissed.

As will be discussed in further detail below, while detained in CIA Black Sites, and without ever having been informed of his Miranda rights, Mr. Ghailani was interrogated by [redacted] during which Mr. Ghailani attempted to provide his interrogators with accurate and truthful answers. Mr. Ghailani's interrogation was then repeated in GTMO, again absent the protections of Miranda v. Arizona, 384 U.S. 436 (1966).

Notwithstanding Mr. Ghailani's attempted cooperation, on numerous occasions he was subjected to physical and psychological abusive treatment with an aim of obtaining compliance and extracting additional information. Such treatment has been referred to as "Standard Interrogation Techniques" and "Enhanced Interrogation Techniques", depending on the severity employed. See, infra, Discussion and Argument, Part 4 (Prejudice to the Defendant); see also Affidavit of Katherine Stone Newell, dated, October 1, 2009 (attached hereto as Exhibit B) (discussing the complete scope of what is publically known about the CIA Black Site program as well as what is publically known about the period from Mr. Ghailani's capture until his transfer to Guantanamo Bay).

At least with respect to the"Enhanced Interrogations Techniques" – and possibly also the "Standard Interrogation Techniques" – it appears that the United States Government violated the Universal Declaration of Human Rights, Common Article 3 of the Geneva Conventions, and customary international law.[2] Such conduct also violated Mr. Ghailani's Constitutional rights under Miranda v. Arizona, supra, 384 U.S. 436 (1966), and the Fifth Amendment's Due Process Clause.

To make matters more egregious, the Government's use of these techniques, including the use of "Enhanced Interrogation Techniques", were specifically undertaken upon the express written consent and approval of the United States Department of Justice, as well as upon the authority of President George W. Bush,

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[2] See Universal Declaration of Human Rights (1948), Article 5 ("No one shall be subjected to torture or to cruel, inhuman, or degrading treatment or punishment."); Geneva Convention Relative to the Treatment of Prisoners of War (1949) ("1949 Geneva Convention III"), Article 3 ("[T]he following acts are and shall remain prohibited at any time and in any place whatsoever ...[:] violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture."); Geneva Convention Relative to the Protection of Civilian Persons in Time of War (1949) ("1949 Geneva Convention IV"), Article 3 (same); see also Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984), Article 1 ("[T]he term 'torture' means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when, such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising from, inherent in, or incidental to lawful sanctions."); cf. Helene Cooper and Sharon Otterman, *U.N. Security Counsel Adopts Measure on Nuclear Arms*, New York Times, dated, September 24, 2009, available at <http://www.nytimes.com/2009/09/25/world/25prexy.html> (quoting President Obama after the United Nations Security Counsel unanimously passed a measure aimed at the elimination of nuclear weaponry, "International law is not an empty promise, and treaties must be enforced.").

Vice President Dick Cheney, Attorney General John Ashcroft, Alberto Gonzalez and other key members of President Bush's cabinet (see, e.g., Government Bates Stamp Number [hereinafter, "GBN."] CL2009-0002049a; GBN CL2009-0001922b).

Indeed, the Government's secret CIA Detention and Interrogation Program was the result of extensive intra-agency and interagency legal analysis, policy, and operational review, involving the Vice President of the United States, the Director of the CIA, the General Counsel of the CIA, the Attorney General of the United States, the National Security Advisor of the United States, the White House Counsel, and presumably the President of the United States (see GBN CL2009-0001922b).

It was a program which, inter alia, approved of providing: "basic levels of medical care (which need not comport with the highest standards medical care that is provided in US-Based medical facilities); food and drink which meets minimum medically appropriate nutritional and sanitary standards; ... and sanitary facilities (which may, for example, comprise of buckets for the relief of personal waste)" (GBN 2009-0001923b). Moreover, according to the analysis approved by the Director of the CIA, "Conditions of confinement do not need to conform with US Prison or other specific or pre-established standards" (id.).

Specifically, the Government's interrogation methods – regardless whether referring to "standard" or "enhanced" measures – were "designed to psychologically

'dislocate' the detainee, maximize his feeling of vulnerability and helplessness, and reduce or eliminate his will to resist [the United States Government's] efforts to obtain critical intelligence" (GBN. CL2009-00001562). The Government's "interrogation" program was rooted in the belief that:

> Effective interrogation is based on the concept of using both physical and psychological pressures in a comprehensive, systematic, and cumulative manner to influence [high value detainee] behavior, to overcome a detainee's resistance posture. The goal of interrogation is to create a state of learned helplessness and dependence conducive to the collection of intelligence in a predictable, reliable, and sustainable manner.

Background Paper on CIA's Combined Use of Interrogation Techniques (undated, but transmitted December 30, 2004) (released August 24, 2009, redacted) at 1, http://www.aclu.org/torturefoia/released/082409/olcremand/2004olc97.pdf (hereinafter, "2004 Background Paper on Combined Techniques"). Further. "[i]n an effort to help identify psychological disturbance" the Government determined that "learned helplessness" "may be evaluated" (GBN. CL2009-00001591). "Learned helplessness" is defined by the Government as when the "subject no longer believes that he/she has any control over their treatment and environment." Id. To put it another way, the Government's interrogation methods were specifically designed to

place the detainee in a state of physical and psychological helplessness so that the Government could rely upon him or her as an intelligence asset.

According to the Draft OMS Guidelines on Medical and Psychological Support to Detainee Interrogations, "[s]anctioned interrogation techniques" include, "in approximately ascending degree of intensity":

> Standard Measures (i.e., without physical or substantial psychological pressure)
>
> - Shaving
> - Stripping
> - Diapering (generally for periods not greater than 72 hours)
> - Hooding
> - Isolation
> - White noise or loud music (at a decibel level that will not damage hearing)
> - Continuous light or darkness
> - Uncomfortably cool environment
> - Restricted diet, including reduced caloric intake (sufficient to maintain general health)
> - Shackling in upright or horizontal position
> - Sleep deprivation (up to 72 hours)
>
> Enhanced measures (with physical or psychological pressure beyond the above)
>
> - Attention grasp
> - Facial hold
> - Insult (facial) slap
> - Abdominal slap
> - Prolonged diapering
> - Sleep deprivation (over 72 hours)
> - Stress positions
>   - –on knees, body slanted forward or backward

–forehead on wall supporting body weight
Walling
Cramped confinement (Confinement boxes),
possibly including introduction of harmless
insects
Waterboard

(GBN. CP2009-00001562.)

Here, rather than return Mr. Ghailani upon his then-existing bench warrant to the Southern District of New York to face prosecution on his pending Indictment, the Government instead chose to indefinitely detain him – first in the CIA Black Sites and later in Guantanamo Bay, Cuba ("GTMO") – in an effort to turn Mr. Ghailani from a mere criminal defendant into a Government intelligence asset. We respectfully submit that the Government's actions violated Mr. Ghailani's right to Due Process and a Speedy Trial under the Fifth and Sixth Amendments to the United States Constitution. As a result, we further submit, Mr. Ghailani's Indictment should be dismissed with prejudice.

We note that this motion presents a case of first – and to counsel's knowledge unique – impression, since we are aware of no other CIA Black Site or GTMO detainee being brought to trial in an Article III court upon an indictment that existed prior to his detention, particularly not one who had been arrested and detained only after having already been indicted by a Grand Jury in an Article III proceeding.

APPLICABLE LAW

A. Introduction

The right to a Speedy Trial is fundamental and is guaranteed to the accused in certain circumstances by the Speedy Trial Act, 18 U.S.C. § 3161, et seq., and in all circumstances by the Due Process and Speedy Trial Clauses of the Fifth and Sixth Amendments to the United States Constitution. See Klopper v. North Carolina, 386 U.S. 213, 223 (1967); see also Fed.R.Crim.P. 48(b)(3) ("The court may dismiss an indictment, information, or complaint if unnecessary delay occurs in ... bringing a defendant to trial."); cf. Fed.R.Crim.P. 5(a)(1)(B) ("A person making an arrest outside the United States must take the defendant without unnecessary delay before a magistrate judge, unless a statute provides otherwise."). The Speedy Trial Act, the Due Process Clause, and the Sixth Amendment serve concurrent purposes. The Speedy Trial Act's "purpose was to fix specific and arbitrary time limits within which the various stages of a criminal prosecution must occur," United States v. Caparella, 716 F.2d 976, 981 (2d Cir. 1983), citing, United States v. Iaquinta, 674 F.2d 260, 264 (4th Cir. 1982), whereas the Sixth Amendment mandates dismissal regardless of any specific time limits. See Caparella, 716 F.2d at 981, citing, Barker v. Wingo, 407

U.S. 514, 530 (1972). Similarly, the Due Process Clause of the Fifth Amendment also relates to the rare instance where neither the Speedy Trial Act nor the Sixth Amendment's Speedy Trial Clause apply.

Notably, the Speedy Trial Act was designed to assess post-arrest and post-indictment delays. See, generally, 18 U.S.C. § 3161. However, the Speedy Trial Act does not contemplate excessive pre-trial detention following arrest and indictment but prior to arraignment. As a result, the instant motion is brought pursuant to the Due Process and Speedy Trial Clauses of the Fifth and Sixth Amendments, and Rule 48(b)(3) of the Federal Rules of Criminal Procedure, all of which apply more broadly than 18 U.S.C. § 3161.

Under the Sixth Amendment, "The right to a speedy trial is generically different from any of the other rights enshrined in the Constitution for the protection of the accused. In addition to the general concern that all accused persons be treated according to decent and fair procedures, there is a societal interest in providing a speedy trial which exists separate from, and at times in opposition to, the interests of the accused." Barker, 407 U.S. at 519. Moreover, both the Court and the Government have the responsibility to the defendant and to the public to see that cases are tried promptly rather than delayed, see United States v. Vispi, 545 F.2d 328, 334 (2d Cir. 1976), and in cases involving "substantial" delay, such as here, the

Government bears the burden of showing that no Constitutional violation has occurred, see United States v. New Buffalo Amusement Corp., 600 F.2d 368, 377 (2d Cir. 1979) ("where the delay is as substantial as it was in this case [54 months], the burden is upon the government to prove that the delay was justified and that appellants' speedy trial rights were not violated").

Rule 48(b)(3) works alongside the Sixth Amendment (and, when applicable, the Speedy Trial Act) as an enforcement mechanism. See Pollard v. United States, 352 U.S. 354, 361 n.7 (1957). "In practice Congress has placed a provision in the Federal Rules of Criminal Procedure which requires dismissal of a case against a defendant in the case of undue delay." United States v. Dunn, 459 F.2d 1115, 1120 (D.C. Cir. 1972) (discussing Fed.R.Crim.P. 48[b]). In essence, Rule 48(b)(3) is a restatement of the inherent power of the Court to dismiss a case for want of prosecution. See Advisory Committee Notes to Fed.R.Crim.P. 48, citing, Ex parte Altman, 34 F.Supp. 106 (S.D. Cal. 1940). "Similarly, Congress has placed an even greater onus on the district court in cases where the defendant is incarcerated rather than released on bail." Dunn, 459 F.2d at 1120, citing, Fed.R.Crim.P. 46(h). And, again, "[i]t is clear that 'the burden is on the Government, not the defense, to bring a case to trial.' " Dunn, 459 F.2d at 1120, quoting, Smith v. United States, 418 F.2d 1120, 1124 (D.C. Cir. 1969) (additional citations omitted).

Analogously, Rule 5 of the Federal Rules of Criminal Procedure – which requires, in cases where an indictment has not yet been issued, that after a defendant's arrest he or she must be arraigned without "unnecessary delay" – was designed "to abolish unlawful [pre-arraignment] detention." United States v. Carignan, 342 U.S. 36, 45 (1951); see also United States v. Smith, 31 F.R.D. 553, 558-59 (D.C.D.C. 1962) (the purpose of Rule 5's requirement that "an arrested person shall be brought before a judicial officer ... 'without unnecessary delay' " is to satisfy "courts, juries, and the public" that "coercion has not been used, and that defendant knows his rights").

Indeed, the purpose of the requirement of subsection (a) to Rule 5 is to create a "check" on the ability of the Government to hold "secret interrogation[s] of persons accused of crime." Upshaw v. United States, 335 U.S. 410, 412 (1948); see Fed.R.Crim.P. 5(a)(1)(B) ("A person making an arrest outside the United States must take the defendant without unnecessary delay before a magistrate judge, unless a statute provides otherwise."); see also United States v. Middleton, 344 F.2d 78 (2d Cir. 1965) (purpose of Rule 5 is to prevent the Government from "resort[ing] to psychologically coercive or 'third degree' practices"), citing, McNabb v. United States, 318 U.S. 332, 344 (1943); United States v. Bellamy, 326 F.2d 389, 391 (4th Cir. 1964) (the purpose of Rule 5 "is to avoid 'the evil implications of secret

interrogation' " and "to obviate the necessity for ... inquiries" of the "truth as to duress claimed to have been exerted by police" as well as "to remove incentive for illegal detentions"), citing, inter alia, McNabb, 318 U.S. at 344, Mallory v. United States, 354 U.S. 449 (1957).

Generally speaking, the right to a Speedy Trial under the Fifth and Sixth Amendments, the Speedy Trial Act, and Rule 48(b)(3), attaches from the moment the Government indicts and/or arrests the accused, whichever comes first. See, e.g., United States v. Marion, 404 U.S. 307, 313, 320 (1971); Dillingham v. United States, 423 U.S. 64, 65 (1975) ("the Government constituted petitioner an 'accused' when it arrested him and thereby commenced its prosecution of him"). The right to a Speedy Trial, unlike the other protected rights in the Sixth Amendment, recognizes that the defendant, as well as the public, "is the loser when a criminal trial is not prosecuted expeditiously, as suggested by the aphorism, 'justice delayed is justice denied.' " United States v. Gambino, 59 F.3d 353, 360 (2d Cir. 1995).

Because the Speedy Trial Act set specific deadlines, Congress left to the trial court the decision whether dismissal should be made with or without prejudice. See United States v. Giambrone, 920 F.2d 176, 180 (2d Cir. 1990), citing, United States v. Taylor, 487 U.S. 326 , 334-35 (1988); see also 18 U.S.C. § 3161(a)(2). When a Sixth Amendment constitutional violation exists, however, dismissal with prejudice

is mandatory. See United States v. Furey, 514 F.2d 1098 (2d Cir. 1975); see also Hilbert v. Dooling, 476 F.2d 355, 361 (2d Cir. 1973) (dismissal must be with prejudice when it is on Sixth Amendment grounds); Barker, 407 U.S. at 522 (dismissal with prejudice is a "severe remedy . . . but it is the only possible remedy"); United States v. Strunk, 412 U.S. 434 (1973) ("in light of the policies which underlie the right to a speedy trial, dismissal [with prejudice] must remain, as Barker noted, 'the only possible remedy' ").

Indeed, even under the discretionary provisions of the Speedy Trial Act, when the delays involved "injure the interests of both the defendants and society in promptly disposing of criminal cases," a dismissal with prejudice "will further the administration of justice by acting as a 'deterrent to other would-be offenders and a reaffirmation of Congress' basic purpose in enacting the Speedy Trial Act." United States v. Bilotta, 645 F.Supp. 369, 373 (E.D.N.Y. 1986) (McLauglin, J.) (indictment dismissed with prejudice even though defendant charged with aiding terrorists in Libya and Russia), aff'd, 835 F.2d 1430 (2d Cir. 1987). Moreover, as explained by the Circuit Court for the District of Columbia, dismissal with prejudice is "a necessary rule if the constitutional guarantee is not to be washed away in the dirty water of the first prosecution, leaving the government free to begin anew with clean hands." Mann v. United States, 304 F.2d 394, 397 (D.C. Cir. 1962).

B. The Barker v. Wingo Factors

The Supreme Court in Barker v. Wingo, supra, 407 U.S. 514 (1971), recognized that in order to determine if there had been a violation of a defendant's Constitutional right to a Speedy Trial under the Sixth Amendment, a rigid, inflexible approach could not be imposed. Instead, the Court imposed a balancing test, which compelled courts to approach Speedy Trial cases on an ad hoc basis, and identified four factors that courts should generally assess in determining whether a particular defendant has been deprived of his right to a Speedy Trial: (1) the "[l]ength of delay"; (2) "the reason for the delay"; (3) "the defendant's assertion of his right" to a speedy trial; and (4) the "prejudice to the defendant." Barker, 407 U.S. at 530; see United States v. Vassell, 970 F.2d 1162 (2d Cir. 1992) (same). Notably, the Barker test applies to the delay between indictment and trial as well as the delay between indictment and arrest, see United States v. Koskotas, 888 F.2d 254 (2d Cir. 1989), and arrest and arraignment, see Strunk v. United States, supra, 412 U.S. 434 (1973).

However, as the Supreme Court explained:

> We regard none of the four factors identified above as either a necessary or sufficient condition to the finding of a deprivation of the right to a speedy trial. Rather, they are related factors and must be considered together with such other circumstances as may be relevant. In sum, these factors have no talismanic qualities; courts must still engage in a difficult and sensitive balancing process. But,

> because we are dealing with a fundamental right of the accused, this process must be carried out with full recognition that the accused's interest in a speedy trial is specifically affirmed in the Constitution.

Barker, 407 U.S. at 533; see also United States v. Shelton, 820 F.Supp. 461 (W.D.Mo. 1992) (Barker requires consideration of all four factors, but does not require that all four necessarily apply). Thus, there is no firm standard applicable to the evaluation of prejudice in all cases. Each of the four Barker factors varies in relation to the others and in relation to the case at hand.

As such, in a case in which other factors firmly favor the Government, e.g., relatively short delay, faultless conduct by the Government, and absence of effort by the defendant to push his case to an earlier trial despite the opportunity to do so, the defendant would be obliged to make a powerful showing as to both the likelihood and severity of prejudice. On the other hand, the more additional factors that favor the defendant, the less would be required to establish prejudice. Thus, at the other extreme, if the delay were egregious, the defendant had made efforts to secure a prompt trial and the Government had delayed trial through negligence or laziness, exhibiting disregard for defendant's rights, the Government's burden to disprove prejudice would become much more difficult to reach. See New Buffalo, 600 F.2d at 377. Indeed, on sufficiently egregious facts, it is questionable whether the

defendant need first make any showing of prejudice in view of the Supreme Court's assertion that "none of the four factors ... [is] a necessary ... condition." Barker, 407 U.S. at 533.

Accordingly, the likelihood of prejudice resulting from pretrial delay that will justify dismissal of an indictment on constitutional Speedy Trial grounds is inversely proportional to period of delay, culpability of the Government in causing the delay, and the efforts by the defendant to secure a prompt trial. See United States v. Koskotas, supra, 888 F.2d 254, 258 (2d Cir. 1989).

1. Length of the Delay

"The length of the delay is to some extant a triggering mechanism. Until there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the other factors that go into the balance." Barker, 407 U.S. at 530-31; see United States v. Vassell, 970 F.2d 1162, 1164 (2d Cir. 1992) ("Unless the delay [is presumptively prejudicial], examination of the other Barker factors is unnecessary"). However, since "the term is used in this threshold context, 'presumptive prejudice' does not necessarily indicate a statistical probability of prejudice; it simply marks the point at which courts deem the delay unreasonable enough to trigger the Barker inquiry." Dogget v. United States, 505 U.S. 647, 652 n.1 (1992).

The length of the delay that triggers the inquiry is dependant on the peculiar circumstances of the case. For example, "[t]he delay that can be tolerated for an ordinary street crime is considerably less than for a serious, complex conspiracy charge." Barker, 407 U.S. at 530. "Simply to trigger a Speedy Trial analysis, an accused must allege that the interval between accusation and trial has crossed the threshold dividing ordinary from 'presumptively prejudicial' delay." Id. at 530-31, at 2192.

Courts have generally found post-accusation delay "presumptively prejudicial" as it approaches one year. See Dogget, 505 U.S. at 652 n.1; 2 W. LaFave & J. Israel, Criminal Procedure § 18.2, p. 405 (1984); Joseph, *Speedy Trial Rights in Application*, 48 Ford. L. Rev. 611, 623, n.71 (1980). Once triggered by arrest, indictment or other official accusation, the Speedy Trial inquiry must weigh the effect of delay on the accused's defense just as it has to weigh any other form of prejudice that Barker recognized. See Doggett, 505 U.S. at 655. Further, the period of relevant delay starts when the defendant assumes the status of "accused," which usually occurs upon arrest or indictment, whichever event occurs first. See United States v. Vispi, 545 F.2d 328, 331 (2d Cir. 1976), citing, United States v. Marion, 404 U.S. 307, 313 (1971).

2. Reason for the Delay

Barker identified three types of delay: deliberate, neutral and valid. See Barker, 407 U.S. at 531. Deliberate delays, such as those engineered for tactical advantage and/or to harass the defendant, weigh heavily against the Government. See Barker, 407 U.S. at 530; Marion, 404 U.S. at 325. Neutral delays, such as those that result from Government negligence and overcrowded court dockets, weigh less heavily against the Government. See Barker, 407 U.S. at 530. Valid delay, such as the time required for a meritorious interlocutory appeal, see United States v. Loud Hawk, 474 U.S. 302, 317 (1986), complex plea negotiations and cooperation against a co-defendant, see Vassel, 970 F.2d at 1165, and delays attributable to the defendant, see United States v. Kelly, 316 F.3d 125, 127 (2d Cir. 2003); United States v. Diacolios, 837 F.3d 79 (2d Cir. 1988), weigh against the defendant. Cf. Pollard v. United States, 352 U.S. 354, 361 (1957) ("Whether delay in completing a prosecution ... amounts to an unconstitutional deprivation of rights depends upon the circumstances. [However, t]he delay must not be purposeful or oppressive.") (citations omitted).

In all cases, the Government has a duty to monitor the case and press the court for a reasonably prompt trial. Indeed, the Second Circuit has "repeatedly emphasized that affirmative action by the government in bringing cases to trial is mandated and

that it cannot escape this duty on the ground that the delay is for institutional reasons." Vispi, 545 F.2d at 334, citing, United States v. Bowman, 493 F.2d 594 (2d Cir. 1974); United States v. Favolaro, 493 F.2d 623, 625 (2d Cir. 1974); United States v. Roberts, 515 F.2d 642 (2d Cir. 1975).

The Government has an affirmative obligation to exercise "due diligence" in locating defendants and promptly bringing them to trial. See, e.g., United States v. Perez-Cestero, 737 F.Supp. 752, 763 (S.D.N.Y. 1990); Vispi, 545 F.2d at 334. Moreover, not only does the Government have a "constitutional duty to make a diligent, good faith effort to bring a defendant to trial promptly," United States v. Blanco, 861 F.2d 773 (2d Cir. 1988), the Government has an unambiguous obligation to secure the "prompt arraignment of an accused," United States v. Leviton, 193 F.2d 848, 854 (2d Cir. 1952); Strunk v. United States, supra, 412 U.S. 434 (1973) (Sixth Amendment applies to delays between arrest and arraignment).

The Supreme Court has stressed that official bad faith in causing delay weighs heavily against the Government, see Barker, 407 U.S. at 531, and official negligence in bringing an accused to trial occupies a middle ground between diligent prosecution and bad faith delay, see Doggett, 505 U.S. at 657. While negligence is weighed more lightly than deliberate intent to harm the accused's defense, it still falls on the wrong side of the divide between acceptable and unacceptable reasons for delaying a

criminal prosecution. "And such is the nature of the prejudice presumed that the weight [the Supreme Court] assigns to official negligence compounds over time as the presumption of evidentiary prejudice grow[s]. Thus, [the Court's] toleration of such negligence varies inversely with its protractedness, and its consequent threat to the fairness of the accused's trial." Doggett, 505 U.S. at 657.

When, however, the reason for delay is deliberate, such as when it is undertaken in the interests of national security, the validity of the Government's excuse runs secondary to the decision itself and the effects and repercussions that arise therefrom. To put it another way, we respectfully submit that if the Government chooses to ignore a defendant's Constitutional right to a Speedy Trial, then the consequence of that choice is dismissal of the defendant's indictment on Speedy Trial grounds regardless whether the Government gained a tactical advantage against the defendant in the pending indictment or beyond. Cf. United States v. Jenks, 353 U.S. 657, 672 (1957) (ruling in a different context that the consequence of depriving a defendant of his Constitutional rights, regardless of motive, is often dismissal of the indictment).

3. Assertion of the Right to a Speedy Trial

Whether the defendant is serious about wanting a Speedy Trial is the third Barker factor. A lack of timeliness, vigor or frequency in asserting the right does not

waive the right, but could undercut it. See Rayburn v. Scully, 858 F.2d 84, 93 (2d Cir. 1988). However, a "defendant has no duty to bring himself to trial," Barker, 407 U.S. at 527, and the "[d]efendant need not press for a quick adjudication of his case," United States v. Rivera, 427 F.Supp. 89, 91 (S.D.N.Y. 1977). Instead, it is the Government's obligation to bring the defendant to trial in conformity with the Speedy Trial Clause of the Sixth Amendment. See Barker, 407 U.S. at 529 ("the rule we announce today, which comports with constitutional principles, places the primary burden on the courts and the prosecutors to assure that cases are brought to trial").

In Doggett v. United States, supra, 505 U.S. 647 (1992), the defendant left the country before Federal law enforcement could arrest him on an indictment. Federal law enforcement eventually learned that Doggett was imprisoned in Panama but never followed up on his status. After learning that he had left Panama for Colombia, Federal law enforcement made no further attempt to locate him. Doggett eventually re-entered the country and lived openly under his own name. He was finally arrested eight and a half years later and moved to dismiss the indictment. The Supreme Court held that his post-arrest assertion was considered timely, more than eight and a half years after the filing of the indictment, because the defendant was unaware of the indictment's existence before his arrest, Id. at 653; a situation not so different from

the inverse, that is, being aware of the indictment's existence but not yet present in a forum wherein one could assert his or her right to a Speedy Trial.

4. Prejudice to the Defendant

Prejudice to a defendant caused by a delay in bringing him to a Speedy Trial is assessed by courts in light of the interest of the defendant which the right to a Speedy Trial was designed to protect. The Barker Court identified three such interests: (1) to prevent oppressive pretrial incarceration; (2) to minimize anxiety and concern for the accused; and (3) to limit the possibility that the defense will be impaired. See Barker, 407 U.S. at 532. "Of these, the most serious is the last, because the inability of a defendant adequately to prepare his case skews the fairness of the entire system." Id. For example, prejudice warranting dismissal may be found when an important witness is no longer available, see United States v. New Buffalo Amusement Corp., supra, 600 F.2d 368, 379 (2d Cir. 1979), or when the delay impairs the defendant's ability to locate or examine evidence, see United States v. Vispi, supra, 545 F. 2d 328, 334-35 (2d Cir. 1976). Significantly, the presumption of prejudice inherent in a sufficiently lengthy delay may be enough to prevail on a Sixth Amendment claim even absent "proof of particularized prejudice." Doggett, 505 U.S. at 655. Indeed, the presumption that pretrial delay has prejudiced the defendant intensifies over time. Id. at 652 (right to Speedy Trial violated by eight

and one half year delay between indictment and arrest); and while such presumptive prejudice cannot alone establish a Sixth Amendment claim without regard to the other Barker criteria, its importance increases with the length of the delay. Id. at 656.

"Once triggered by arrest, indictment or other official accusation," the Speedy Trial inquiry "must weigh the effect of delay on the accused's defense just as it has to weigh any other form of prejudice that Barker recognized." Dogget, 505 U.S. 647, 655. "Unreasonable delay between formal accusation and trial threatens to produce more than one sort of harm, [including] 'the possibility that the [accused's] defense will be impaired' by dimming memories and loss of exculpatory evidence." Doggett, 505 U.S. at 654 (citation omitted).

Moreover, affirmative proof of particularized prejudice is not essential to every Speedy Trial claim. See Moore v. Arizona, 414 U.S. 25, 26 (1973); Barker, 407 U.S. at 533. Barker explicitly recognized that impairment of one's defense is the most difficult form of Speedy Trial prejudice to prove because time's erosion of exculpatory evidence and testimony "can rarely be shown." Barker, 407 U.S. 532. As a result, the Supreme Court in Doggett, supra, 505 U.S. at 655, recognized that excessive delay presumptively compromises the reliability of a trial in ways that neither party can prove or identify. Cf. Barker, 407 U.S. at 533 n.35 ("There is [also] statistical evidence that persons who are detained between arrest and trial are more

likely to receive prison sentences than those who obtain pretrial release, although other factors bear upon this correlation."), citing, Wald, *"Pretrial Detention and Ultimate Freedom: A Statistical Study"*, 39 N.Y.U.L.Rev. 631 (1964). Furthermore, inordinate delay between indictment, arrest and trial may impair a defendant's ability to present an effective defense.

A defendant need not prove actual prejudice to prevail under the Sixth Amendment. "[C]onsideration of prejudice is not limited to the specifically demonstrable, and ... affirmative proof of particularized prejudice is not essential to every speedy trial claim." Doggett, 505 U.S. at 655. As the Supreme Court recognized, "Excessive delay presumptively compromises the reliability of a trial in ways that neither party can prove or, for that matter, identify." Id. Indeed, in Doggett the Supreme Court held that, even though the extraordinary delay did not actually prejudice the defendant, Government negligence and the excessive length of the delay gave rise to a presumption of trial prejudice. Id. at 656-58. Furthermore, the presumption that pretrial delay has prejudiced the accused intensifies over time. Id. at 652. Indeed, prejudice can be presumed from the Government's "truly neglectful attitude, bad faith, a pattern of neglect, or other serious misconduct." United States v. Wells, 893 F.2d 535, 539 (2d Cir. 1990) (internal quotation marks omitted), quoting, Taylor, 487 U.S. at 339.

That a defendant should be accorded a fair and prompt chance to exculpate himself, as well as to be relieved of the anxiety and social pressures of a public accusation of criminal conduct, lies at the root of the Sixth Amendment's guarantee of a Speedy Trial. See United State v. Vispi, supra, 545 F.2d 328 (2d Cir. 1976). As elaborated upon by the Supreme Court:

> We have discussed previously the societal disadvantages of lengthy pretrial incarceration, but obviously the disadvantages for the accused who cannot obtain his release are even more serious. The time spent in jail awaiting trial has a detrimental impact on the individual. It often means loss of a job; it disrupts family life; and it enforces idleness. Most jails offer little or no recreational or rehabilitative programs. The time spent in jail is simply dead time. Moreover, if a defendant is locked up, he is hindered in his ability to gather evidence, contact witnesses, or otherwise prepare his defense. Imposing those consequences on anyone who has not yet been convicted is serious. It is especially unfortunate to impose them on those persons who are ultimately found to be innocent. Finally, even if an accused is not incarcerated prior to trial, he is still disadvantaged by the restraints on his liberty and by living under a cloud of anxiety, suspicion, and often hostility.

Barker, 407 U.S. at 532-33 (footnotes omitted).

DISCUSSION AND ARGUMENT

"Justice has been delayed far too long."[3]

A. Introduction

Once the defendant Ahmed Khalfan Ghailani came under the custody of the United States Government [redacted] our Government made the intentional, deliberate, and reasoned decision to attempt to turn Mr. Ghailani into an intelligence asset rather than provide him with a speedy and expeditious trial. Indeed, the Government chose not to bring Mr. Ghailani to "the appropriate judicial officer[] at the earliest practicable time," and "without unnecessary delay," 18 U.S.C. § 3161(a); cf. Fed. R. Crim. P. 5(a)(1)(B); notwithstanding a pending indictment that had stood since December 16, 1998. Rather, our Government made the conscious and deliberate decision to sequester him in solitary confinement in secret prisons for over two years, subjecting him to what are euphemistically referred to as "Enhanced Interrogation Techniques," even though he had a pending indictment and had been compliant from the onset of his detention.

This deliberate choice by our Government was made in the name of "national security", which is defined as "the national defense, foreign relations, or economic

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[3] Eric Holder, Attorney General of the United States, speech, "Attorney General Announces Forum Decisions for Guantanamo Detainees," November 13, 2009 (available at http://www.justice.gov/ag/speeches/2009/ag-speech-09113.html).

interests of the United States." 8 U.S.C. § 1189(d)(2). More precisely, however, the purpose and goal of the Government's decision was to gain a tactical advantage over Mr. Ghailani, his co-defendants, and his alleged co-conspirators, by turning him into an intelligence asset which our Government could rely upon in the defense of our Nation. These are not insignificant political goals, but like any political choice there are consequences. We respectfully submit that under our Constitution and our system of justice those consequences must be severe when the means and methods used by the Government to reach their goal included the systematic physical and psychological abuse of the defendant – abuse so abhorrent that the Government must rely upon a claim of national security as a justification for the interrogation techniques that were employed. Indeed, it is not merely the individual interrogation techniques that were employed that is so chilling, but the stark realization of the extent to which they were planned, coordinated, systematized, and authorized by the highest ranks of our Nation's leadership.

B. The Barker v. Wingo Factors Establish a Violation of Defendant's Right to a Speedy Trial

1. Length of the Delay

Ahmed Khalfan Ghailani came into the exclusive custody of the United States Government [redacted] nearly six years after his indictment. Despite

seeking his arrest since at least December 16, 1998, once having Mr. Ghailani in their exclusive custody and control the United States Government spent the next [redacted] ignoring the existence of the very indictment that authorized his arrest. During this time all of the rights provided to Mr. Ghailani by the triggering of a Federal indictment were disregarded until the Government finally chose to present and arraign him before this Court on June 9, 2009.

Further, notwithstanding the Government's conscious disregard for Mr. Ghailani's Constitutional right to a Speedy Trial, since the filing of the December 16, 1998 Superseding Indictment Mr. Ghailani took on the status of "accused", see United States v. Vispi, 545 F.2d 328, 331 (2d Cir. 1976), citing, United States v. Marion, 404 U.S. 307, 313 (1971); and, as such, a post-accusation delay [redacted] before bringing him, an "accused" defendant, to trial is "presumptively prejudicial." Barker, 407 U.S. at 530-31; see Dogget, 505 U.S. at 652 n.1. Indeed, for the United States Government to ignore an existing indictment and delay presenting a defendant in its custody for [redacted] is Constitutionally unacceptable. To do so for the reasons it chose, and then to subject him to the conditions and treatment he was subjected to, is contrary to principles upon which this Nation was founded and the spirit of our system of laws and justice. It is simply something we do not do and yet it happened here.

2. Reason for the Delay

"Closely related to length of delay is the reason the government assigns to justify the delay." Barker, 407 U.S. at 531. The Supreme Court has long held that "[a] deliberate attempt to delay the trial in order to hamper the defense should be weighted heavily against the government." Id. Indeed, "[w]hether delay in completing a prosecution such as here occurred amounts to an unconstitutional deprivation of rights depends upon the circumstances.... The delay must not be purposeful or oppressive." Pollard v. United States, supra, 352 U.S. 354, 361 (1957) (citations omitted).

In the instant matter, the delay itself was both purposeful and oppressive. Similarly, should – as we expect – the Government rely on national security to excuse its conduct, such excuse would be misplaced since, as the Supreme Court clearly stated, "it is improper for the prosecution intentionally to delay" bringing defendants to trial " 'to gain some tactical advantage over [them] or to harass them.' " Barker, 407 U.S. 531 n.32, quoting Marion, 404 U.S. at 325. Here, the circumstances surrounding the reason for the delay, and the prejudice suffered, are compelling, if not disturbing. Indeed, the Government deliberately acted to delay Mr. Ghailani's trial in order to gain a tactical advantage in the name of national security, and, as the prejudice section will show, used tactics far worse than harassment to obtain their

goal. The excuse of "national security" does not avoid the tactical advantages that the Government gained, nor the deliberate and tactical nature of the decision itself.

a. The Government Gained an Unfair Tactical Advantage Over Mr. Ghailani

"Tactics" is defined as "the art or skill of employing available means to accomplish an end." Merriam-Webster Online Dictionary, http://www.merriam-webster.com/dictionary/tactics. We respectfully submit that a conscious, intentional decision by the United States Government to rely upon "national security" to permit them to wait nearly five years before bringing Mr. Ghailani to an Article III proceeding, when for the entire time period he was both under indictment and being held in the custody of the United States Government, can only be characterized as utilizing national security in an attempt to gain a tactical advantage over Mr. Ghailani, his co-defendants, and co-conspirators. See, e.g., United States v. Perez-Cestero, 737 F.Supp. at 766 (delay by the Government violates the Sixth Amendment when it is "intentional or brought about for a tactical advantage, through deliberate procrastination, or in bad faith").

Cases that have examined "tactical advantage" in the past generally focus on "tactical advantage" gained against the defendant at trial. Such focus, however, could never have contemplated the extraordinary and unique circumstances confronted

herein: a pending Indictment and a deliberate choice not to prosecute the Indictment for nearly five years; extraterritorial rendition to a secret CIA-run Black Site for two years where interrogation techniques amounting to torture were authorized; and internment at a United States Naval Base for nearly three years before commencing prosecution on the existing Indictment. Regardless whether this was the stated goal intended for public consumption, the Government nonetheless gained a tactical advantage over the defendant with respect to trial issues and strategy, both in this case and any other case that might conceivably be brought in relation to the information gained.

Clearly, once Mr. Ghailani was apprehended the Government made the conscious decision not to prosecute the pending Indictment. Rather, it elected to detain and question him for over 4 ½ years, and to do so without ever having informed him of his rights under Miranda v. Arizona, supra, 384 U.S. 431 (1966). This last point is notable in that Mr. Ghailani's co-defendant, Khalfan Khamis Mohamed, was informed of his Miranda rights in a timely fashion. See, e.g., Transcript, dated, March 19, 2001, at 2797-99. Similarly, two of Mr. Ghailani's other co-defendants, Mohamed Rashed Daoud Al-'Owhali and Mohamed Sadeek Odeh, were provided "Advice of Rights" forms and subsequent oral warnings of an Assistant United States Attorney, which, when viewed in conjunction, the Second

Circuit determined satisfied their rights under Miranda. See In re Terrorist Bombings, 552 F.3d 177, 180-81 (2d Cir. 2008).

In Mr. Ghailani's case, however, the Government's goal was to obtain, what it believed would be, information regarding a myriad of political and investigative issues, such as: the whereabouts of various individuals, including Usama bin Laden; details surrounding operations and logistics in Afghanistan; history and methods of operation of al-Qaeda; and the details of the Embassy bombing; all without the Constitutional protections Miranda warnings, or their equivalents, would provide.

Undoubtably, if the Government had followed Constitutional and statutory protocol and promptly brought Mr. Ghailani to trial once he was arrested, there would have been virtually no possibility that they would have had the opportunity to immediately interrogate him, let alone interrogate him without counsel for over four years. This was a deliberate decision by the Government to gain the tactical advantage of having direct access to Mr. Ghailani in order to obtain information, unobstructed by counsel or a panoply of rights and Constitutionally mandated protections.

In essence the Government made the political decision to deliberately delay Mr. Ghailani's trial in order to question him – presumably because the Government decided that it was necessary to do so in the interest of national security. Having

done so, however, the Government was not freed of its responsibilities to the public and Mr. Ghailani under the Constitution and the Federal Rules of Criminal Procedure. "National security," while a potentially valid reason to question a defendant, cannot be permitted to be used as an excuse for depriving that same defendant of his Constitutional and statutory rights.

Indeed, "national security" is an intentionally amorphous concept that can fluctuate depending on the specific aims that the Government seeks to protect. Here, the interests of national security were raised so that the Government could interrogate Mr. Ghailani outside of the safeguards of the Constitution. The underlying purpose, as we have indicated, was to transform Mr. Ghailani from an accused defendant with Constitutional rights and protections into an intelligence asset. Such decision was done after careful consideration, both legal and political, of the consequences that could be incurred. As a result, one of two situations must have occurred: either the Government deliberately ignored the potential legal consequences of their actions or the Government simply did not care. In neither case should the Government be allowed to escape the legal consequences of its intentional or dismissive choice. See, e.g., United States v. Svoboda, 347 F.3d 471 (2d Cir. 2003) (discussing "conscious avoidance"). Indeed, having made its decision, the Government must now live with the consequences.

To put it another way, the Government cannot have it both ways. The Government waited [redacted] before deciding to finally bring Mr. Ghailani to answer an 11-year-old indictment, and no excuse, however intended, is an acceptable reason to deny Mr. Ghailani his Sixth Amendment right to a Speedy Trial. Once the Government had the accused in custody, it was incumbent upon the Government to bring him to trial. If, on the other hand, the Government chose to treat him as a political asset to be used, in the name of national security, in order to obtain information, it was incumbent upon the Government to dismiss the pending prosecution.

To be clear, by acting to delay the trial and sending Mr. Ghailani to CIA Black Sites and eventually GTMO, instead of producing him in the Southern District of New York in order to answer the pending Indictment, we respectfully submit the Government deliberately chose to transform Mr. Ghailani from a criminal defendant into an intelligence asset. As a result, the Government achieved the goal of gaining a tactical advantage over him in the name of national security, but at the expense of denying him his right to a Speedy Trial.

By not taking Mr. Ghailani to the Southern District, the Government was able to subject Mr. Ghailani to a program designed to use torture and prolonged questioning, in oppressive conditions of confinement, in order to render him into a

state of "learned helplessness", and thereby more compliant, in order to extract information. The information desired by the Government involved details surrounding: (1) al-Qaeda, the same entity involved in the charged Indictment; (2) individuals who were co-conspirators in the same over-arching conspiracy charged in the existing Indictment; (3) whether this same entity and these same co-conspirators were planning to attack the United States or its interests; (4) the details of what Mr. Ghailani had done with the entity and co-conspirators of the charged Indictment in the time period between the bombings in East Africa in 1998 and his apprehension in July 2004; as well as (5) the details surrounding Mr. Ghailani's conduct and knowledge surrounding the primary object of the charged conspiracy – the bombing of the United States embassies in Tanzania and Kenya in 1998. In essence, what the Government sought was the exact type of information that the Government would have attempted to obtain if Mr. Ghailani had been brought directly to the Southern District of New York in 2004 and then had voluntarily chosen to cooperate with the Government.[4]

4 [redacted]

"Voluntariness" is, of course, the fundamental difference between what the Government did to Mr. Ghailani and what they were Constitutionally required to do. Rather than provide Mr. Ghailani with counsel – as required by the Fifth Amendment – who could have counseled Mr. Ghailani that he had a right to remain silent and then could have potentially negotiated a resolution of the case in a manner acceptable to both sides. Instead, the Government made a deliberate decision to forego Mr. Ghailani's Fifth and Sixth Amendment rights and instead compel his cooperation through a highly systemized and thought out program the likes of which we can only hope has never been utilized by our Government before.

By electing to proceed in a manner repugnant to the concepts upon which this Nation was founded, the Government gained a wealth of knowledge about Mr. Ghailani which places him at a decided disadvantage in any attempt to defend this case nearly five years later. Notwithstanding the Government's declaration that it would not use Mr. Ghailani's statements as part of its case-in-chief, nevertheless, the Government will now proceed to trial armed with the knowledge and details which are the result of over a hundred "interrogations". This results in the tactical advantage of being able to, at an absolute minimum, rely upon these statements when preparing cross-examination, or when attempting to challenge or impeach Mr. Ghailani or any defense witnesses. If Mr. Ghailani had not been sent to CIA Black

Sites, presumably the Government would not have these statements, or this base of knowledge, at its disposal. Instead, with this knowledge, the Government is in a position to fully anticipate almost any strategic move still available to the defense at trial; and be secure in the knowledge that certain avenues of defense are all but precluded to the defense, such as the defendant testifying.

In addition, by turning Mr. Ghailani from defendant into intelligence asset, the Government gained the tactical advantage of identifying possible defense witnesses well in advance of any lawyer or investigator defending Mr. Ghailani. The practical result of this tactical advantage was readily clear while the matter was pending before the Military Commission. During an investigation in Tanzania, when members of Mr. Ghailani's defense team attempted to interview possible defense witnesses, they repeatedly found that the witnesses had previously been visited and interviewed by Federal law enforcement – sometimes only moments earlier – and now were refusing to talk with the defense.

By turning Mr. Ghailani from defendant into intelligence asset, the Government also gained the tactical advantage against dozens of other co-conspirators in this and separate cases, whether already part of the charged indictment, or to be charged in separate indictments. Even assuming *arguendo* that the Government did not receive a tactical advantage over Mr. Ghailani on the instant

Indictment – a fact we do not concede – Mr. Ghailani's right to a Speedy Trial was nonetheless delayed so that the Government could gain a substantial tactical advantage over others – many if not all of whom could be characterized as his co-conspirators.

While Mr. Ghailani cannot assert the rights of his co-conspirators, that does not diminish the tactical advantage that the Government gained by delaying his prosecution and choosing instead to subject him to "Enhanced Interrogation Techniques" in the name of national security. Nor does it diminish the fact that the Government has also gained a substantial tactical advantage over Mr. Ghailani with respect to any subsequent prosecution that they may choose to bring regarding his alleged subsequent association with other members of al-Qaeda. Indeed, if the Government so chooses, and if not precluded by this Court on evidentiary grounds, the Government will be permitted to rely upon Mr. Ghailani's post-Embassy bombing conduct as background to establish the existence of al-Qaeda and his participation therein. See United States v. Pizzonia, 577 F.3d 455, 462-64 (2d Cir. 2009) (in proving the existence of a conspiracy, the Government is not limited to the predicate acts pleaded in the indictment).

Finally, there is another, more delicate, aspect to the tactical advantage gained by the Government at the expense of delaying Mr. Ghailani's right to a Speedy Trial.

As previously stated, the Program was designed to break Mr. Ghailani's will and reduce him to a state of "learned helplessness". Mr. Ghailani's lawyers have found that he appears to be so damaged by being subjected to this Program that his decisions and ability to assist counsel in preparing his defense appear to have been hampered. See Indiana v. Edwards, 128 S.Ct. 2379 (2008) (discussing the difference between competence to stand trial and competence to assist in the defense).

At the end of the day, certain things appear to be irrefutable: (1) the delay was caused by deliberate Government action which would knowingly deprive Mr. Ghailani of his right to a Speedy Trial; (2) the reason to cause this delay was the Government's desire to interrogate Mr. Ghailani extensively about matters that involved the same entity and co-conspirators that were part of the charged Indictment; and (3) by being able to interrogate Mr. Ghailani for as long as they did and in the manner and under the conditions that they did, the Government obtained the information it sought, without having to enter into a voluntary and binding plea agreement that could have allowed the Government to obtain the same information that the Government sought but after he was arraigned and provided counsel in the Southern District of New York.

In short, and in the interests of national security, the Government got exactly what it desired, when it desired, but at the expense of denying Mr. Ghailani his

Constitutional right to a Speedy Trial on the pending Indictment. How could this be characterized as anything other than a deliberate decision to delay Mr. Ghailani's right to a Speedy Trial in order to gain a substantial tactical advantage over him? Indeed, if the Government had not acted as it did, it may never have received the mountain of information it extracted from Mr. Ghailani, which it can now use and has probably been using against Mr. Ghailani and scores of others. The Government made a voluntary, intentional and deliberate decision to delay bringing Mr. Ghailani to trial in the interests of national security, that is, in order to seek a strategic and tactical advantage against him and his co-conspirators in the defense of this Nation. While the Government's goals may have been lofty, the Government must not be permitted to violate the provisions of the Sixth Amendment without consequences, especially when the decision to do so is as deliberate, thought out, and ultimately prejudicial, as it was here.

Indeed, during a proceeding that was held in chambers and presumptively classified, when discussing the extent to which the Government was obligated to turn over discovery relevant to the instant motion, the Government made the following shocking admission when referring to its own decision to turn Mr. Ghailani into an intelligence asset after his arrest, rather than immediately returning him to the Southern District of New York for prosecution on the instant Indictment:

> I think what we've seen is a process that is quite formal, that is quite bureaucratized, that has lawyers involved at every turn. And what everyone thinks of that process, there is nothing that we've seen in that process that begins to suggest bad faith of the kind that would trigger for us a duty to search more broadly [for evidence responsive to defense counsel's discovery requests].

(Transcript, dated, November 5, 2009, at 52 [emphasis added].) What makes this admission so shocking is that the Government has with one breath acknowledged just how thorough and planned their "interrogation" program was, while at the same time acted completely oblivious to the fact that just because something is well-planned does not nullify the misguided, harmful, and repugnant nature of the decision.

While this motion does not turn on whether the Government acted in "good faith" or in "bad faith", assuming for a moment that "faith" is of any relevance, how can the Government truly believe that the thoroughness of their decision impacts on the propriety of their conduct? By way of example, in the past other nation-States have created "quite formal", "quite bureaucratized", programs intended to resolve what their leaders believed were a threat to their own national security. Often their solution had "lawyers involved at every turn." None of that absolved those nations of the wrongfulness of their conduct – nor should it have. Here, and to the contrary, the formal and bureaucratized nature of our Government's "interrogation" program

fostered – not diminished – the "bad faith" inherent in the "interrogation" program itself.

b. Absent Rebellion or Invasion, National Security is Insufficient to Excuse the Government from the Consequences of Depriving Mr. Ghailani of his Constitutional Rights

As previously indicated, we expect the Government to argue that the interests of national security shield them from the consequences of depriving Mr. Ghailani of his Constitutional right to a Speedy Trial. As stated, "the term 'national security' means the national defense, foreign relations, or economic interests of the Untied States." 8 U.S.C. § 1189(d)(2). Similarly, for an individual to be a threat to national security, thus triggering the Government's need for protection, he must be a "risk to the Nation's defense, foreign relations, or economic interests." Yusupov v. Attorney General of United States, 518 F.3d 185 (3d Cir. 2008).

To counsel's knowledge, the question of whether national security provides an exception to the Speedy Trial Clause of the Sixth Amendment, or the related aspects of the Due Process Clause of the Fifth Amendment, is a question of first impression before this or any court of this great Nation. We respectfully submit, however, that the recent line of cases examining the right to habeas corpus for alleged terrorists, and so-called enemy combatants, is greatly instructive to the issue at hand. These cases

examine the Suspension Clause of the United States Constitution and support, we submit, Defendant's position that national security provides an insufficient basis to excuse the Government from the consequences of its tactical decision to interrogate Mr. Ghailani – first in CIA Black Sites and later at GTMO – rather than immediately return him to the Southern District of New York for prosecution on his pending Indictment.

The Suspension Clause of the United States Constitution provides:

> The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

U.S. Const., Art. I, § 9 cl. 2.

In 2004, the Supreme Court in Hamdi v. Rumsfeld, 542 U.S. 507, 533 (2004), held that "due process under the Fifth and Fourteenth Amendments demands that a citizen held in the United States as an enemy combatant be given meaningful opportunity to contest the factual basis for the detention before a neutral decision maker." Hamdi involved an American citizen whom the Government had classified as an "enemy combatant" for taking up arms in Afghanistan in support of the Taliban. He was captured in Afghanistan and was, at the time, being held in a Navy brig in South Carolina. As Justice O'Connor wrote in her plurality opinion, "a state of war

is not a blank check for the President when it comes to the rights of the Nation's citizens." Hamdi, 542 U.S. at 533.

On the same day Hamdi was decided the Supreme Court also issued its opinion in Rasul v. Bush, 542 U.S. 466, 485 (2004). As opposed to Hamdi, Rasul dealt with foreign nationals, captured during the Afghanistan hostilities, who were being detained as "enemy combatants" in Guantanamo Bay, Cuba ("GTMO"). Nevertheless, the Court extended the Hamdi principle to foreign nationals and held that "federal courts have jurisdiction to determine the legality of the Executive's potentially indefinite detention of individuals who claim to be innocent of wrongdoing." Rasul, 542 U.S. at 485.

Rather than permitting District Courts to entertain habeas corpus actions brought by citizens under Hamdi and foreign nationals under Rasul, the Department of Defense instead established Combatant Review Status Tribunals ("CSRT"). The function of CSRTs, created at the direction of the Bush Administration, was to determine whether individuals detained at GTMO were "enemy combatants" who had taken up arms against the United States. See Bush v. Boumediene, 128 S.Ct. 2229, 2241 (2008). The President also created Military Commissions, as opposed to Courts-Martial, to try accused enemy combatants without the Sixth Amendment guarantee of a Speedy Trial. In turn, Congress passed the Detainee Treatment Act,

which amended 18 U.S.C. § 2241, to provide that "no court, justice, or judge shall have jurisdiction to ... consider... an application for ... habeas corpus filed on behalf of an alien detained ... at Guantanamo." In essence, the Detainee Treatment Act stripped from all Federal courts the jurisdiction to consider habeas corpus applications of enemy combatants held at GTMO, denying such persons habeas corpus and the protections of the Suspension Clause of Article I of the United States Constitution. See U.S. Const., Art. I, § 9 cl. 2.

Notwithstanding the intent of Congress in passing the Detainee Treatment Act, thereafter in Hamdan v. Rumsfeld, 548 U.S. 557, 576-77 (2006), the Supreme Court adhered to Rasul concluding that Guantanamo is a United States territory for all practical purposes and that as a result habeas corpus applies to individuals detained therein. The Court also found no want of jurisdiction, and specifically that the Detainee Treatment Act did not deprive the Court of jurisdiction. Hamdan, 548 U.S. at 578, 581, 584 n.15. Further, the Court held that the Uniform Code of Military Justice did not entitle the President to formulate trial procedures that "violate the most basic tenets of military and international law, including the principle that a defendant must be permitted to see and hear the evidence against him." Hamdi, 542 U.S. 559 (2004).

In Hamdan's wake, Congress passed the Military Commissions Act. Section 7(a) of the Military Commissions Act amended § 2241(e)(1) to deny Federal courts jurisdiction in actions designed to secure habeas corpus rights for detained aliens adjudged by the CSRTs to be enemy combatants. The Supreme Court once again, however, prevented Congress and the Executive from denying Federal courts jurisdiction to hear habeas actions of those languished in GTMO. In Boumediene v. Bush, supra, 128 S.Ct. 2229 (2008), the Supreme Court ruled that § 7 of the Military Commissions Act created an unconstitutional denial of the right to habeas corpus sought by aliens detained at GTMO after being captured in Afghanistan and elsewhere. Boumediene, 128 S.Ct. at 2240. The Supreme Court further held that the Suspension Clause has full effect at GTMO. Id. at 2262.

This line of cases is instructive in that repeated attempts by the Executive or Congress to deny foreign nationals, detained in GTMO, the protections of the Suspension Clause and their right to access habeas corpus, were continuously rebuffed by the Supreme Court.

We respectfully submit that in the same way that these foreign nationals were entitled to petition for habeas corpus and to enjoy the protection of the Suspension Clause, Ahmed Khalfan Ghailani was entitled to the full meaning of his Sixth Amendment Right to a Speedy Trial once he was in the custody of the United States

Government, especially considering the fact that unlike the other detainees Mr. Ghailani had already been named as a defendant in an existing Indictment; indeed, a bench warrant had been issued by Judge Sand specifically alerting the Government to the District Court's desire to have Mr. Ghailani presented for arraignment immediately after his arrest.

Instead the Government chose to ignore its Constitutional responsibilities and its duty to produce Mr. Ghailani to this Court in order to answer the pending 1998 Indictment and bench warrant; choosing instead to deliver Mr. Ghailani to a CIA Black Site in order to be subjected to our Government's "interrogation" Program.

We respectfully submit that if unindicted detainees have a right to the protection of the Suspension Clause then surely a defendant, such as Mr. Ghailani, who has a pending indictment, which specifically triggers the Sixth Amendment right to a Speedy Trial, has a right to avail himself of his Constitutional guarantees. Indeed, it seems obvious that as an indicted defendant Mr. Ghailani should have just as much – if not significantly more – Constitutional protection than unindicted detainees. As such, we respectfully submit that the Government cannot here hide behind national security as an excuse to protect itself from the United States Constitution. See also United States v. Moussaoui, supra, 382 F.3d 453, 466 n.18 (4th

Cir. 2004) ("There is no question that the Government cannot invoke national security concerns as a means of depriving [a defendant] of a fair trial.").

3. Assertion of the Right to a Speedy Trial

Once the accused defendant was transferred to the custody of the United States Government, it was the Government's obligation to bring him to trial in conformity with the Speedy Trial Act and the Sixth Amendment. See Barker, 407 U.S. at 529. Moreover, while being interrogated without counsel – first in CIA Black Sites and later at GTMO – he had absolutely no ability, nor opportunity, to assert his Speedy Trial right, and his failure to do so prior to being appointed counsel should not be held against him. See Barker, 407 U.S. at 527; United States v. Rivera, supra, 427 F.Supp. 89, 91 (S.D.N.Y. 1977); see also Bruce Green, *"Hare and Hounds": The Fugitive Defendant's Constitutional Right to be Pursued*, 56 Brook. L. Rev. 439, 460 (Spring 1990).

To clarify, Mr. Ghailani was kept incommunicado and interrogated without counsel for approximately two years in CIA Blacks Sites, continually subject to "Enhanced Interrogation Techniques". Mr. Ghailani was then transferred to GTMO where he was detained and interrogated an additional 18 months still without counsel. Next, the Government made the political decision to try Mr. Ghailani before the Military Commission, continuing their delay in presenting him before an Article III

court notwithstanding his still pending December 19, 1998 indictment. Cf. Boumediene v. Bush, supra, 128 S.Ct. 2229 (2008) (holding that detainees maintain right to habeas corpus, notwithstanding the Government's opposition to the same). However, once Mr. Ghailani learned that he would have the opportunity to finally answer this Indictment, Mr. Ghailani put the Government on immediate notice of his intent to assert his right to a Speedy Trial, first by filing a writ of habeas corpus in the District Court of the District of Columbia, then by filing a pro se writ of habeas corpus in the Southern District of New York, and then finally by letter to Judge Duffy. See Ahmed Khalfan Ghailani v. Robert M. Gates, 08 Cv. 1190 (RJL) (D.C.D.C.), Defendant's Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2241 (Document No. 1), dated, July 10, 2008; Ahmed Khalfan Ghailani v. United States of America, 09 Cv. 3551 (SAS) (S.D.N.Y.), Defendant's Pro Se Petition Under 28 U.S.C. § 2241 for a Writ of Habeas Corpus (Document No. 2), filed, March 9, 2009 (attached hereto as Exhibit C); United States v. Hage, et al., 98 Cr. 1023 (LAK) (S.D.N.Y.), Document No. 735, Pro Se Letter, dated, May 9, 2009. Indeed, even during his prosecution before the Military Commission, after Mr. Ghailani was finally appointed counsel, he requested relief under the Speedy Trial Clause of the Sixth Amendment. See United States v. Ahmed Khalfan Ghailani (Miliary Commission case), Demand for Speedy Trial, dated, May 12, 2009 (attached hereto as Exhibit D).

It cannot be ignored that Mr. Ghailani asserted his right to a Speedy Trial in formal written submissions even before his very first appearance in Federal court. Such is a sure sign that Mr. Ghailani's right to a Speedy Trial was asserted in a timely manner.

4. Prejudice to the Defendant

The final and unquestionably most important element of Sixth Amendment analysis is the extent and kind of prejudice caused to Mr. Ghailani by the delay in bringing him to trial in an expeditious fashion. Here, the prejudice is two-fold. First, there is the physical and psychological harm that was inflicted upon Mr. Ghailani as a result of the Government's "Enhanced Interrogation Techniques". Second, there is the effect such "dead time" had on the ability of Mr. Ghailani to investigate and prepare an effective defense. See Barker, 407 U.S. at 532-33. We respectfully submit that the Government's decision here to intentionally fail to bring Mr. Ghailani to trial for 57 months after his apprehension, resulted in severe prejudice in both respects.

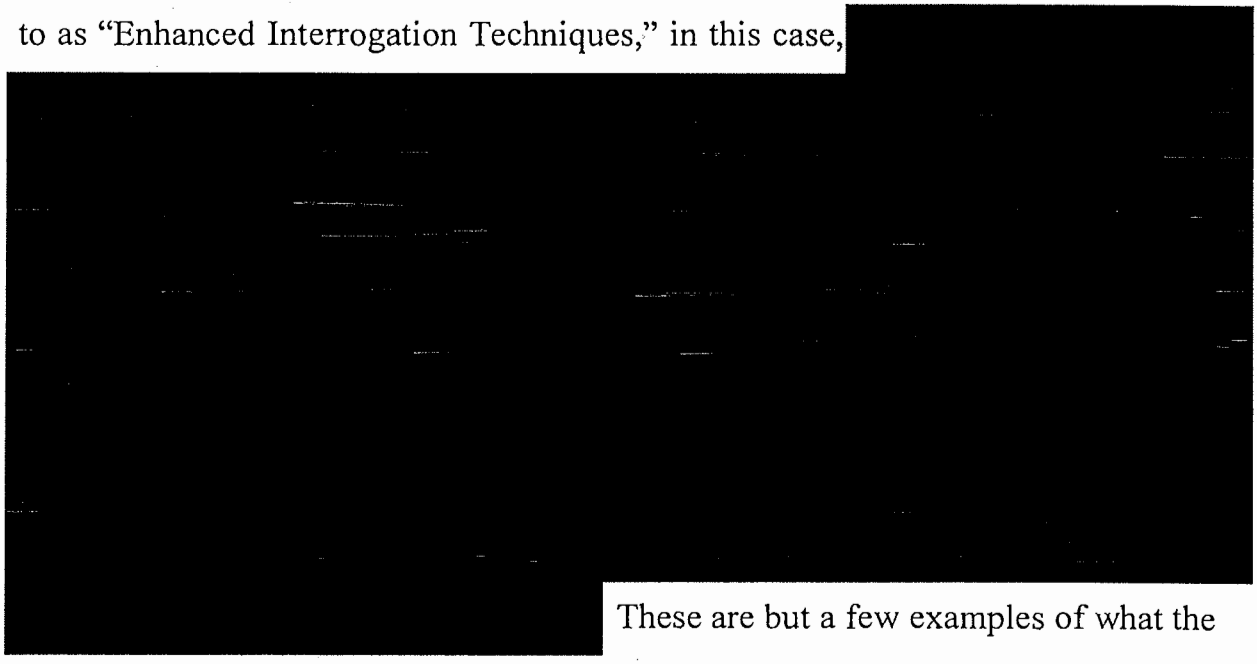
a. Physical and Psychological Harm

As previously stated, the Supreme Court has long held that whether the "delay in completing a prosecution such as here occurred amounts to an unconstitutional deprivation of rights depends upon the circumstances." Pollard v. Untied States,

supra, 352 U.S. 354, 361 (1957), citing, Beavers v. Haubert, supra, 198 U.S. 77, 87 (1905), Frankel v. Woodrough, supra, 7 F.2d 796, 798 (8th Cir. 1925). However, in all cases "[t]he delay must not be purposeful or oppressive." Pollard, 352 U.S. at 361.

The noun "oppressive" is defined as: (1) "unreasonably burdensome or severe"; (2) "tyrannical"; or (3) "overwhelming or depressing to the spirit or senses". Merriam-Webster Online Dictionary, http://www.merriam-webster.com/dictionary/oppressive.

Here, and to be absolutely clear, what the Government euphemistically refers to as "Enhanced Interrogation Techniques," in this case,



These are but a few examples of what the Government refers to as "Enhanced Interrogations Techniques".

Other examples of the conditions and treatment upon which Mr. Ghailani was subjected to during his Speedy Trial delay, included, but again were not limited to:

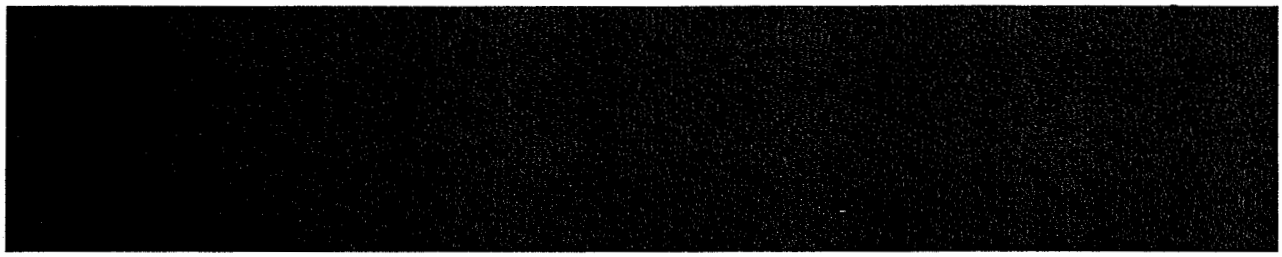
[redacted] These conditions and techniques were employed by our Government in spite of the fact that from the outset of his detention and custody Mr. Ghailani was in fact complaint and fully prepared to respond to his interrogators.

As is detailed in the partial discovery that has thus far been provided, the Government in this case caused a nearly five year delay in order to subject Mr. Ghailani to a CIA Program [redacted]

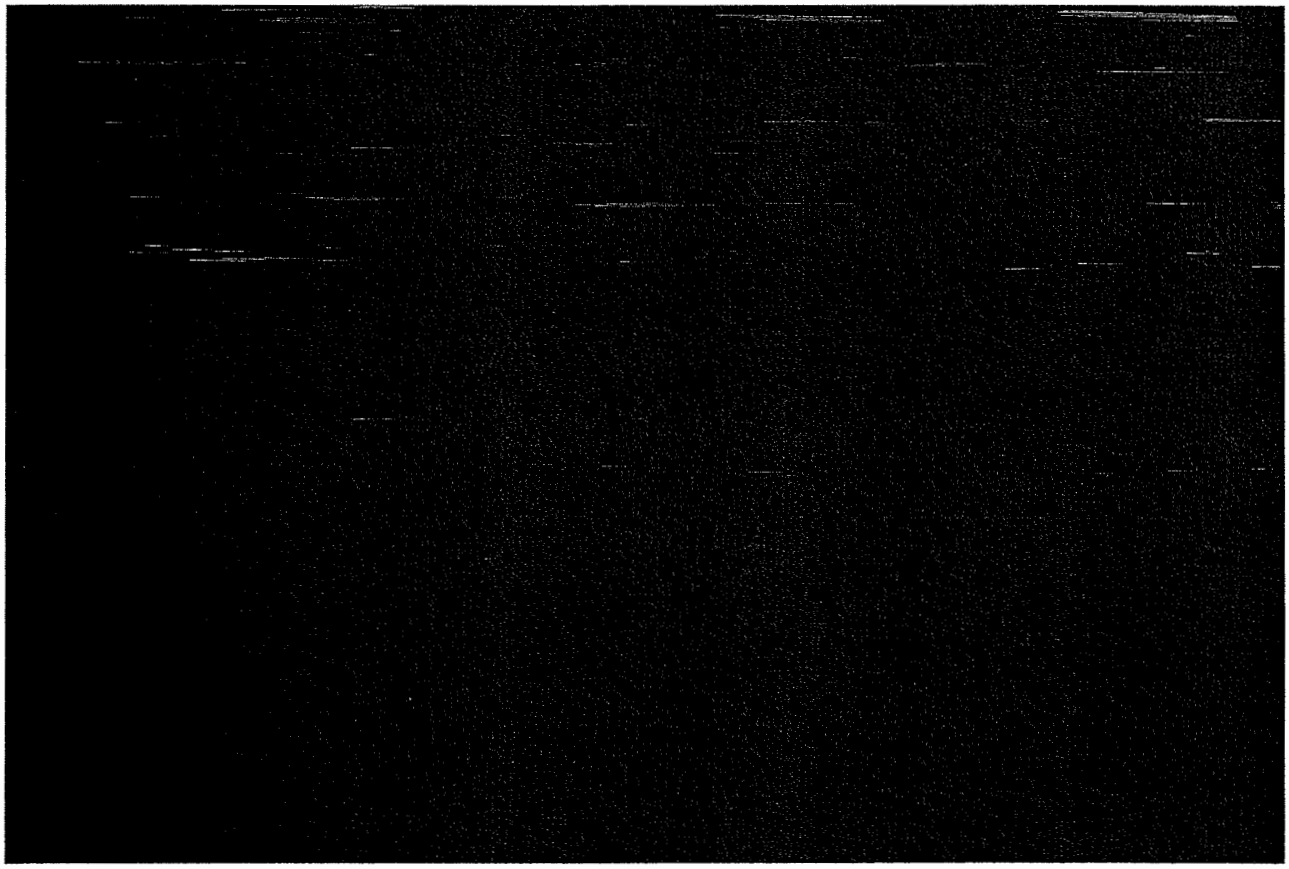
[redacted] Thus, this was a program that was designed to use torture, or what the Government euphemistically refers to as "Enhanced Interrogation Techniques", in order to obtain its stated goal. The means and methods of this Program, and torture specifically, was and is, at an absolute minimum, purposeful and oppressive.

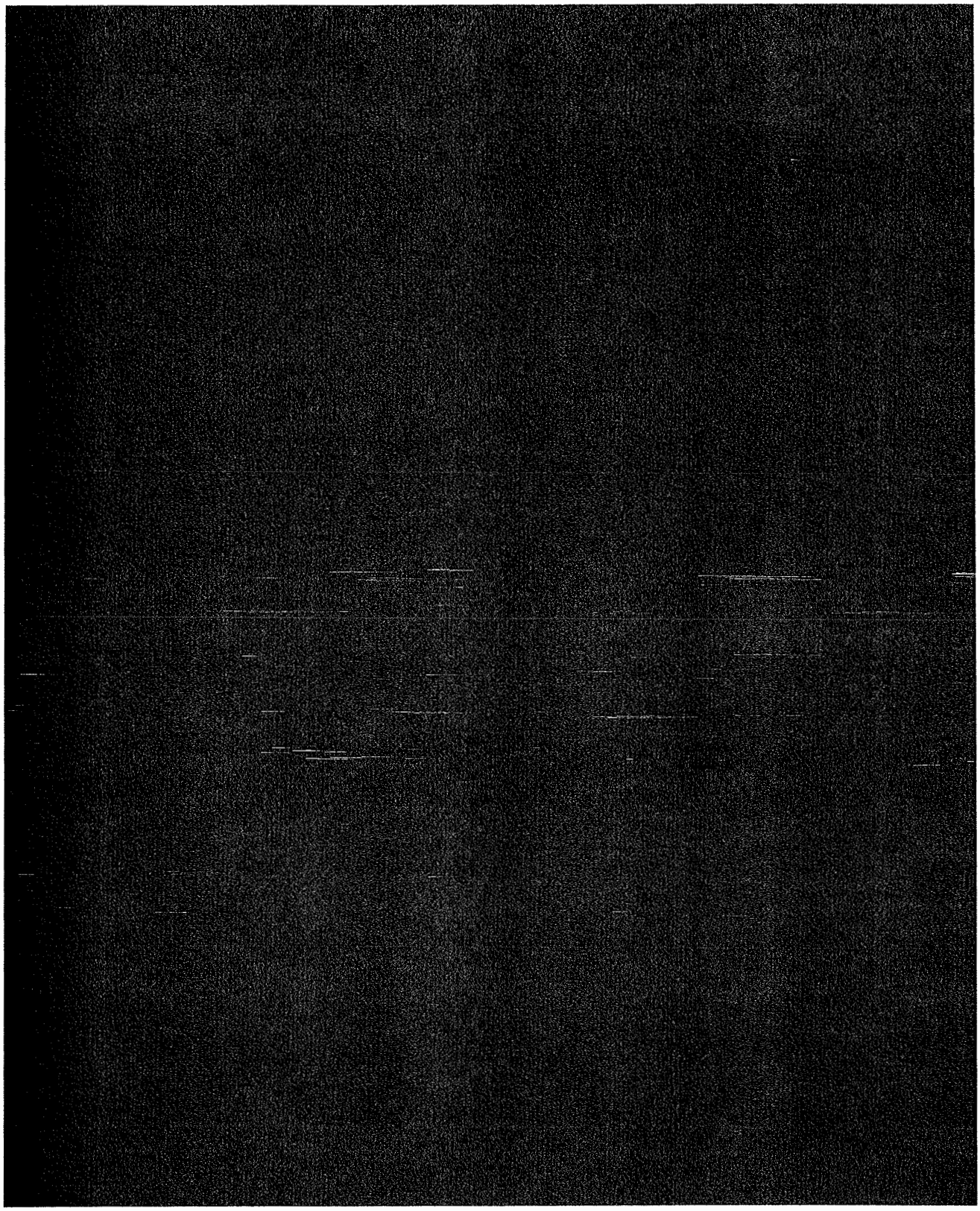
The Program used "sanctioned techniques" that were designed to "psychologically dislocate the detainee, maximize his feelings of vulnerability and helplessness, and reduce his will to resist ... efforts to obtain critical intelligence" (GBN. CL2009-00001562). These "sanctioned techniques" were purposeful, they were oppressive, and for a lack of a better word, they were torture, plain and simple.

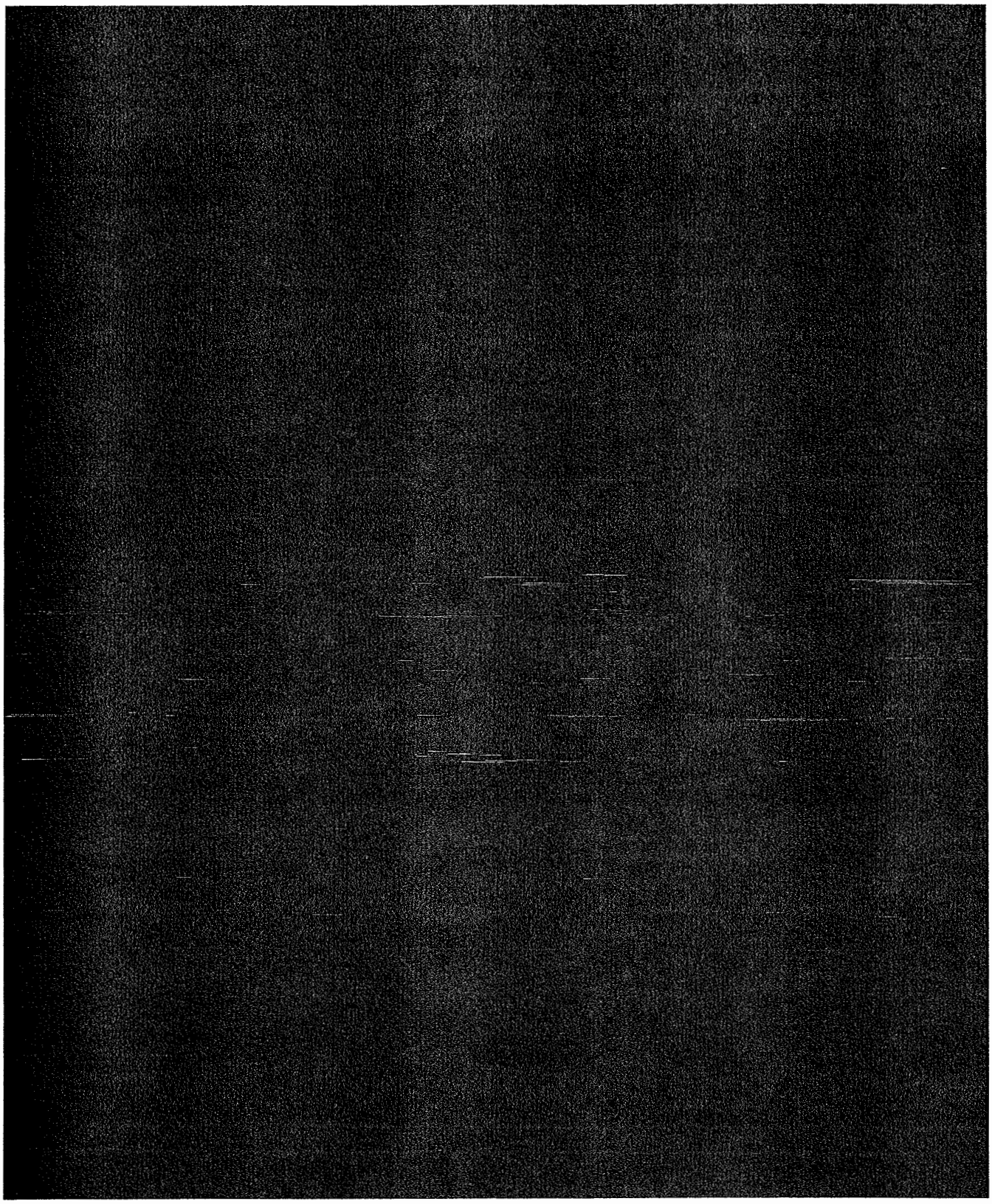
[redacted] the United States Department of Justice confirmed in writing to the CIA that it believed it was legal to use the following [redacted] "Enhanced Interrogation Techniques" (i.e., torture) during the interrogations of Mr. Ghailani in an effort to extract information: [redacted]

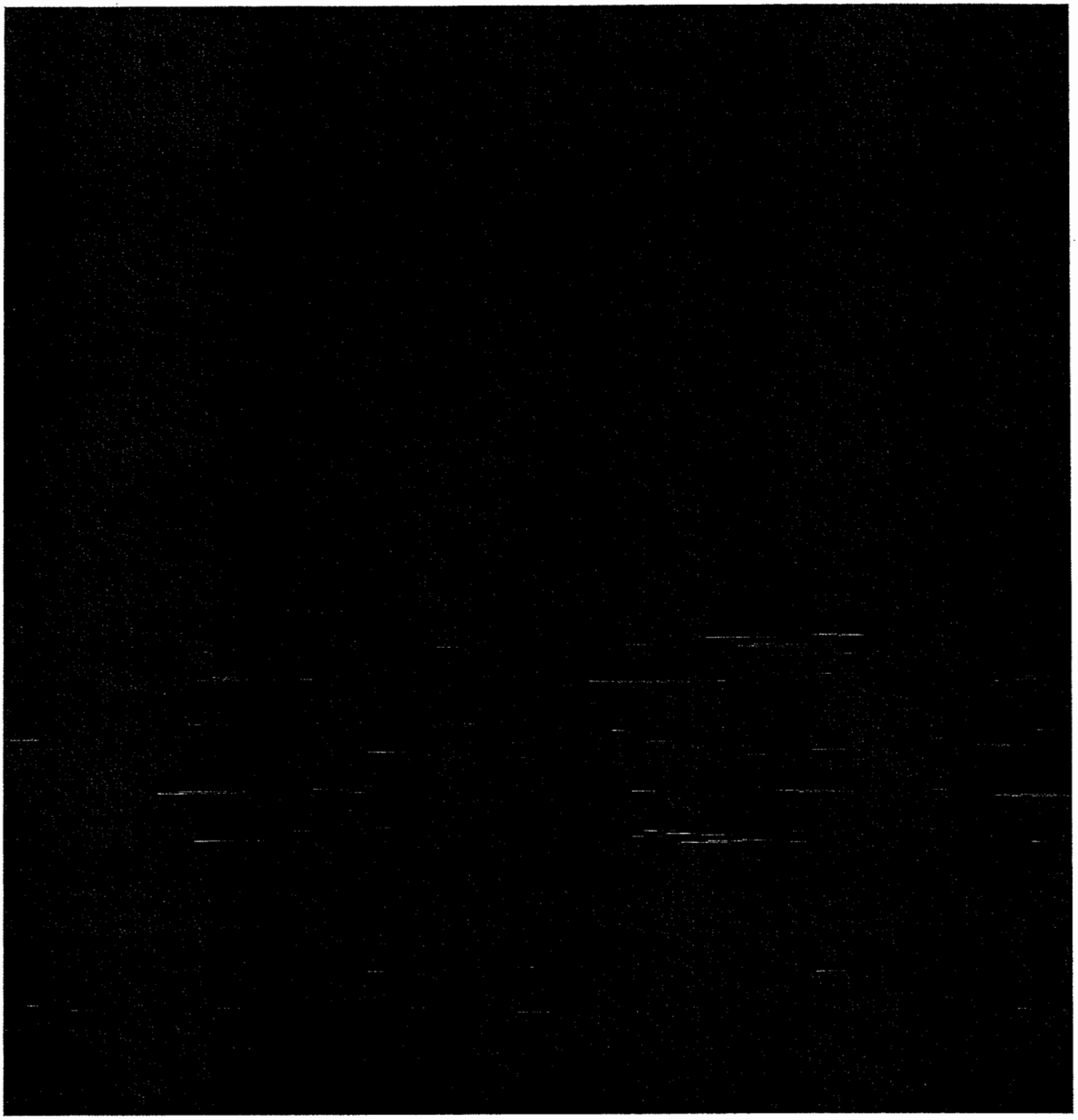


The CIA's descriptions of the "techniques" serve the purpose of betraying the euphemism for what it is. Regardless whatever legal fiction the Department of Justice conjures up to diminish the strength of the term, at the end of the day, torture is still torture. The fact that the Government's reports are written in such a cold, calculated, and clinical manner, is, to a great extent, what makes the Government's conduct oh so chilling:

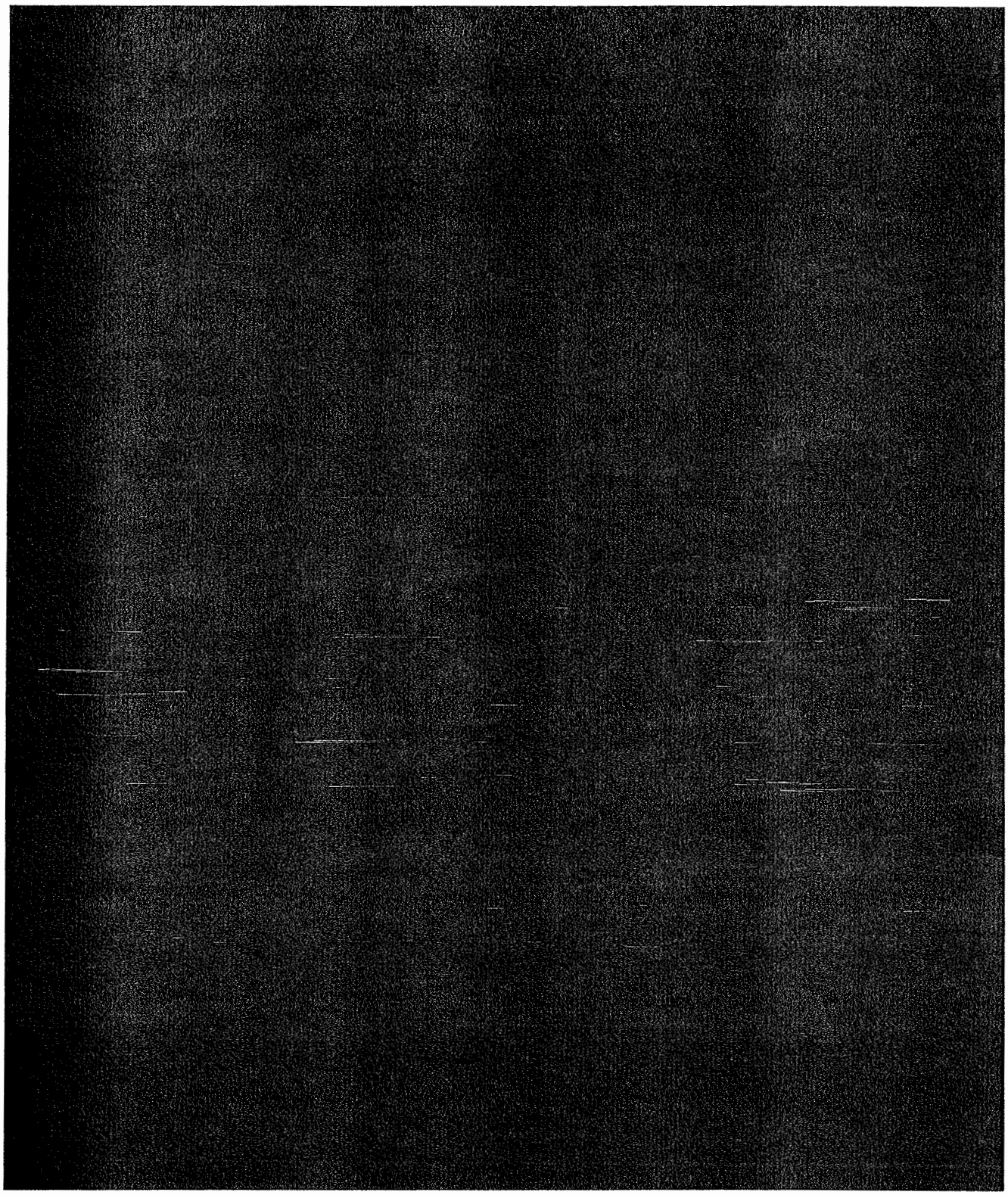


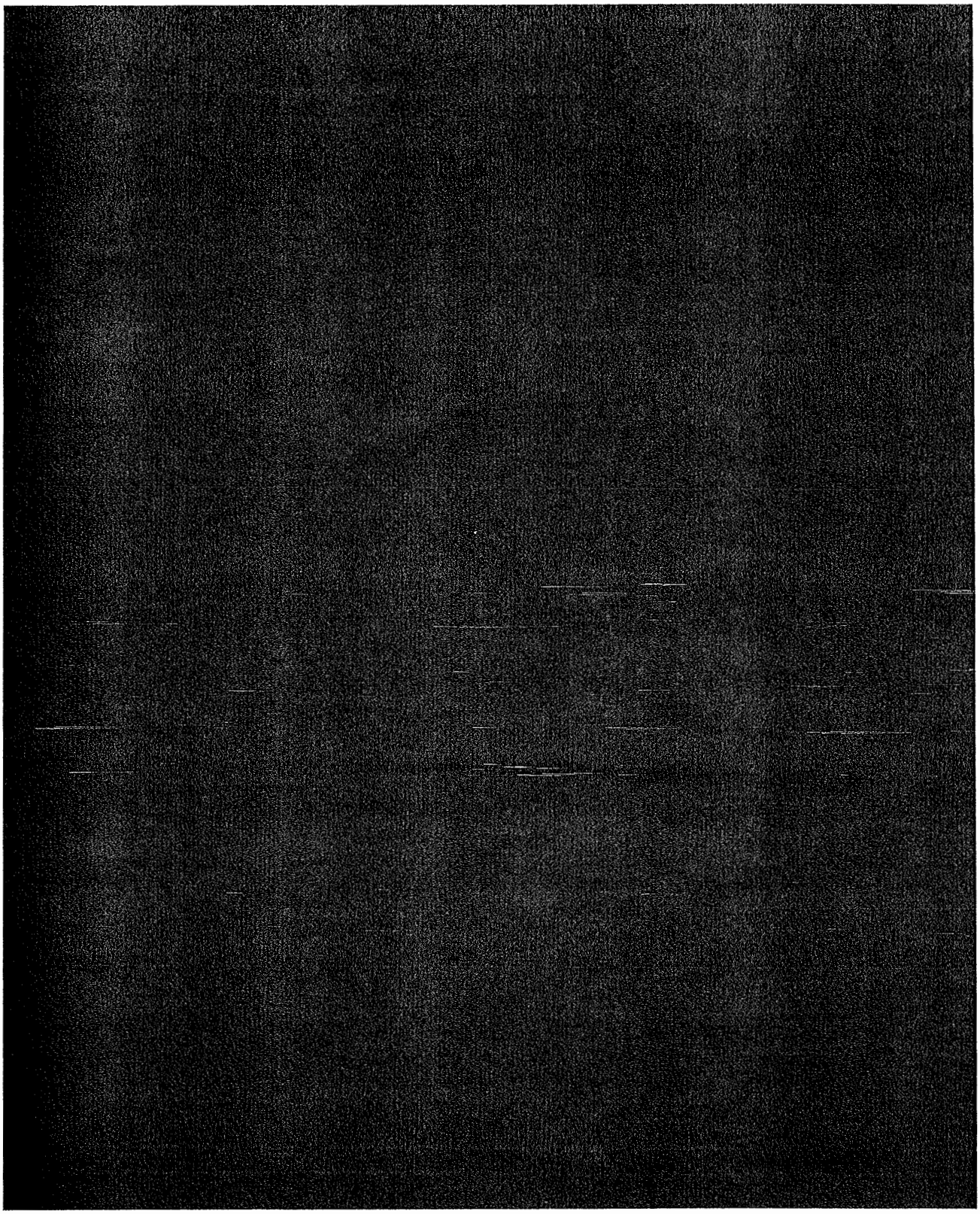


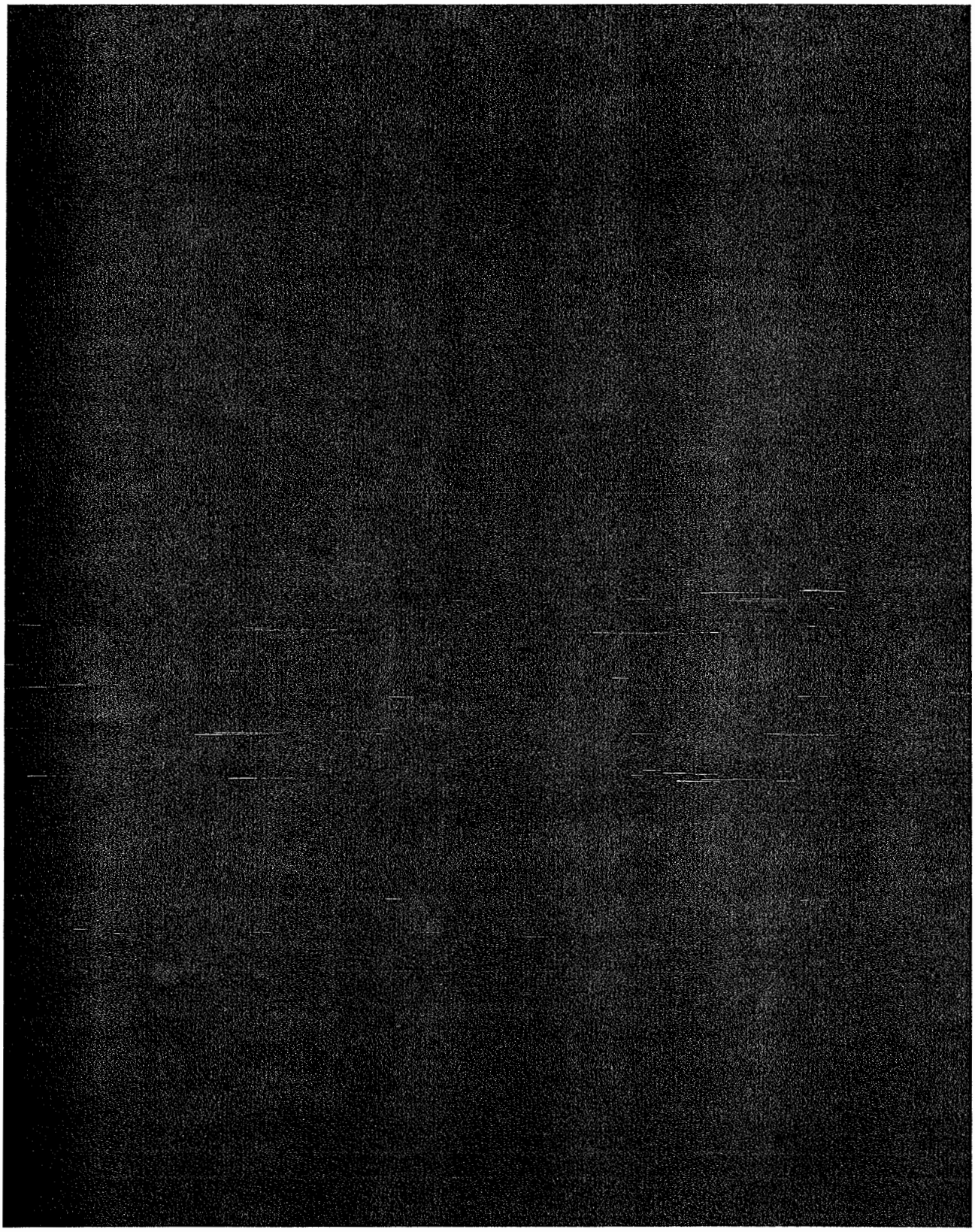


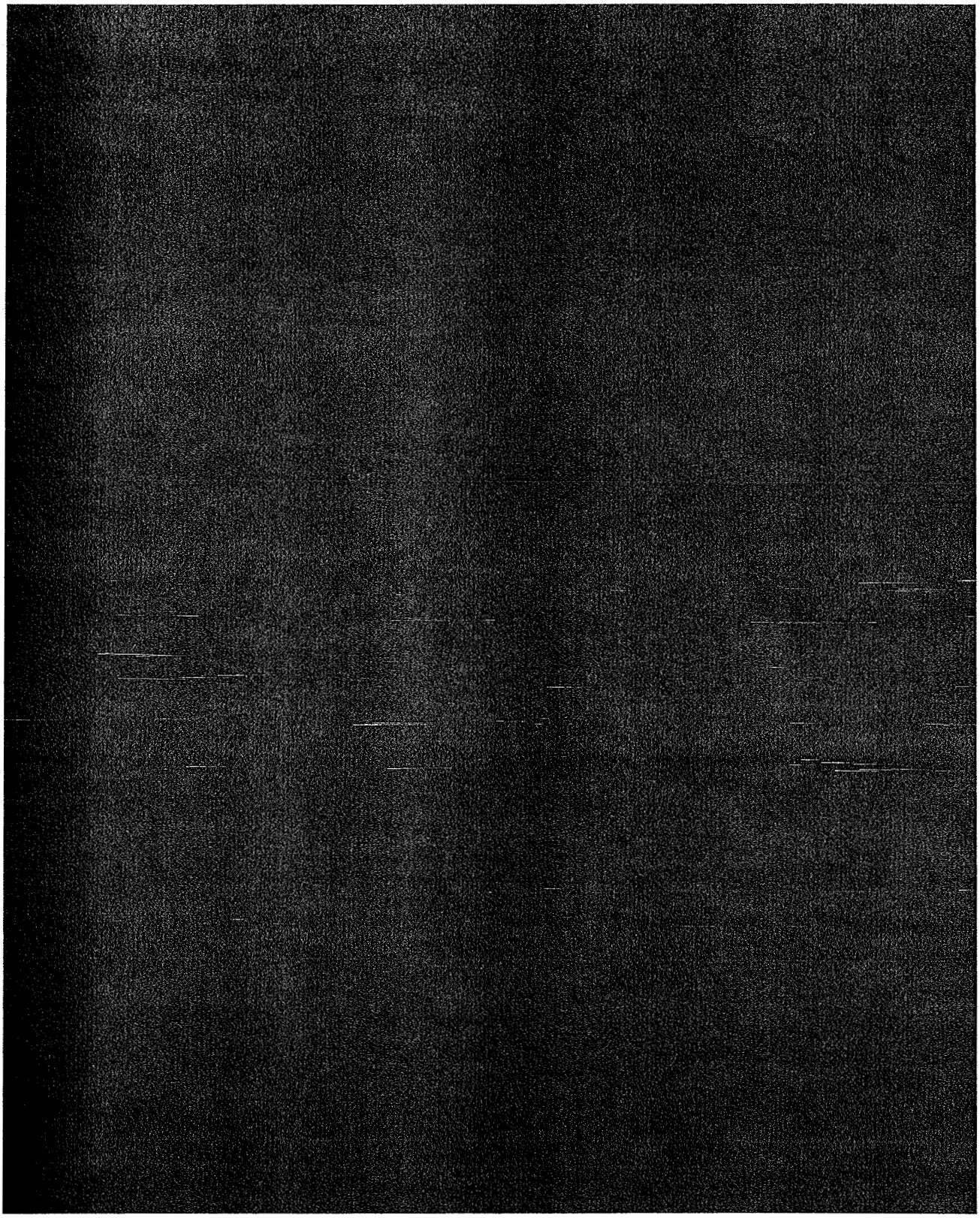


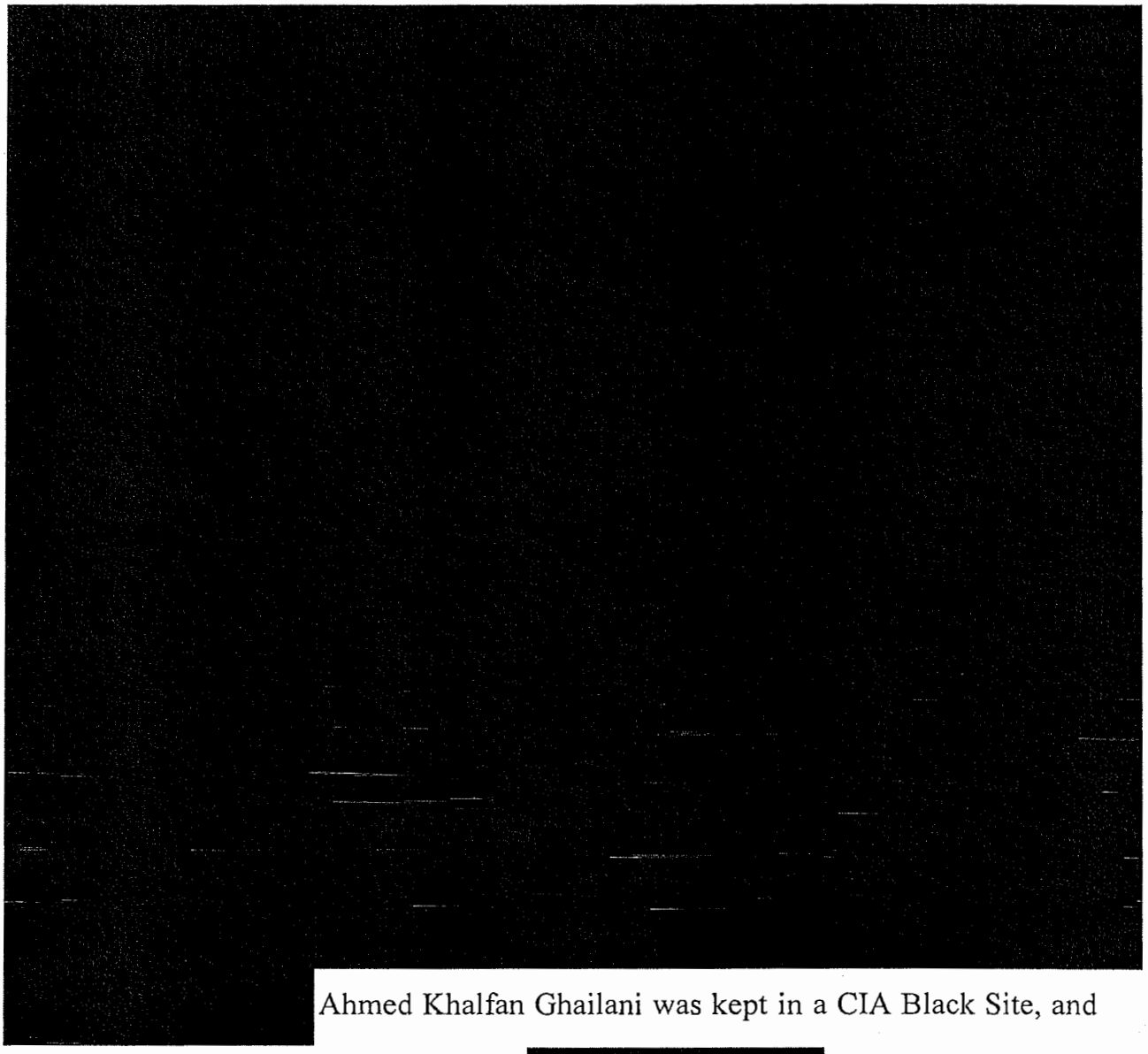
[5] "Section 4" refers to Section 4 of the Classified Information Procedures Act. See 18 U.S.C. App. 3 § 4. We also note that due to the limitations of the Classified Information Protective Order, dated, July 21, 2009, issued in this case, the defense has been unable to directly discuss the information contained in these summaries with Mr. Ghailani and are required to rely instead upon the Government's summaries of what occurred.











Ahmed Khalfan Ghailani was kept in a CIA Black Site, and subjected to the Program and its forms [redacted] until September 2006 when he was sent to Guantanamo Bay, Cuba, and the Military Commission – all while the instant Indictment remained pending.

The Government knowingly, intentionally, and deliberately elected to delay Mr. Ghailani's trial once he was in custody, and rather than producing him without

unnecessary delay before a Federal judge in the Southern District of New York, chose to send him to the gulag of a CIA Black Site in order to change him from criminal defendant into intelligence asset. The Government chose do so in order to subject him to a CIA program designed to use forms of torture in order to extract information or intelligence which would give the Government a tactical advantage with regard to specifics of the charges in the Indictment, as well as the over-arching conspiracy charged in the Indictment (i.e., al-Qaeda) and many of its personnel. The Government knowingly, intentionally and deliberately acted to delay Mr. Ghailani's trial in order to subject him to a CIA program that would use torture to extract information. The knowing use of these methods are many things – foremost amongst them is oppressive, regardless whether it was done in the interests of national security.

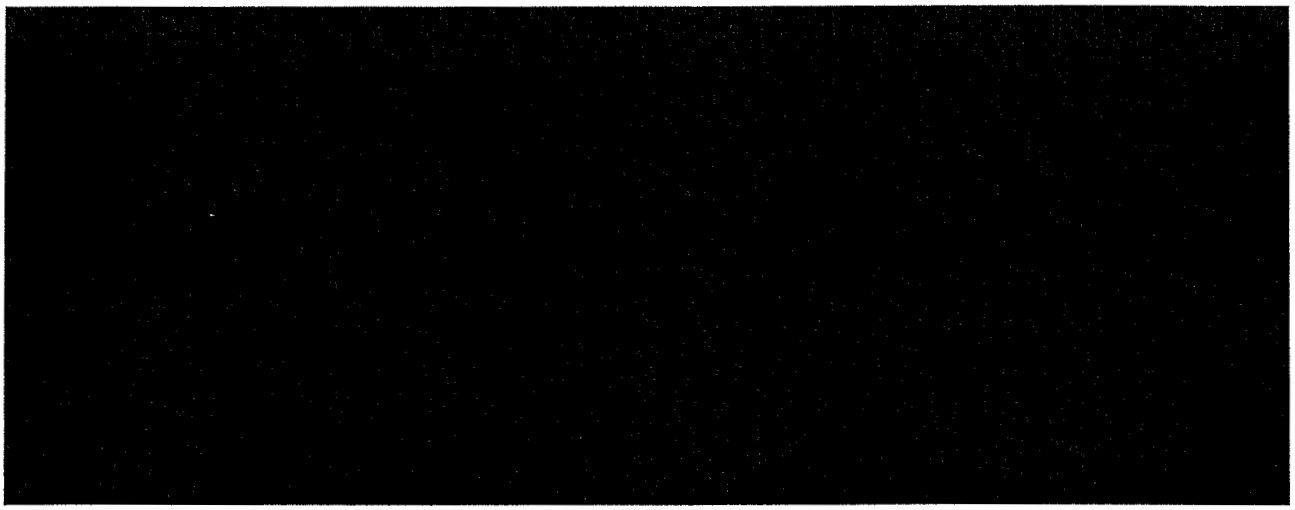
Here, there can be no straight-faced argument that the Government did anything but make a knowing, intentional and deliberate attempt to delay the trial in order to "gain some tactical advantage over [Mr. Ghailani and] to harass [him]" in the interests of national security. Marion, 404 U.S. at 325, Barker, 407 U.S. at 531 n.32. Indeed, as conceded by the Government, "what we've seen is a process that is quite formal, that is quite bureaucratized, that has lawyers involved at every turn" (Transcript, dated, November 5, 2009, at 52). Clearly, the Government's purposeful

and oppressive interrogation techniques were used as the specific means and methods of accomplishing the tactical advantages that the Government sought to gain.

The circumstances surrounding the Government's decision, and the Government's specific conduct in delaying the prosecution of the instant Indictment, amount to a clear unconstitutional deprivation of Mr. Ghailani's right to a Speedy Trial. Surely, such "Enhanced Interrogation Techniques" subjected Mr. Ghailani to oppressive pretrial incarceration, involving conditions and treatment which would naturally increase anyone's anxiety and concern in a manner that is well beyond the pale. See Barker, 407 U.S. at 532. Indeed, the Government's decision and conduct should be weighed heavily against the Government because it was their deliberate decision that was specifically responsible for a delay that was both purposeful and oppressive. See Pollard, 353 US. at 361.

Indeed, what makes Mr. Ghailani's "Enhanced Interrogation Techniques" all the more egregious is that they were not the result of rogue agents acting outside of their standard operating procedure, but rather the techniques appeared to have been developed upon the specific authorization of the President of the United States, George W. Bush, and his cabinet. As previously stated, there is no doubt that the

[redacted]



The fact that the highest ranking members of our Government were complicit in Mr. Ghailani's oppressive pretrial incarceration cannot, and should not, be tolerated or condoned. The fact that the highest levels of our Department of Justice helped facilitate Mr. Ghailani's "Enhanced Interrogation Techniques", [redacted] should also never be ignored.

b. The effect on Mr. Ghailani's Ability to Investigate and Prepare an Effective Defense

As to the second manner in which delay prejudiced Mr. Ghailani (i.e., the interference with the investigation and preparation of the defense), the Supreme Court acknowledges – as we must – that a delay of this length presumptively compromises the reliability of a trial in ways that are difficult, if not impossible, to prove or identify. See Barker, 407 U.S. at 533 n.35. It goes without saying, "The time spent

in jail is simply dead time. Moreover, if a defendant is locked up, he is hindered in his ability to gather evidence, contact witnesses, or otherwise prepare his defense." Id. at 532-33 (footnote omitted). Nonetheless, here, some actual prejudice can in fact be described and not simply hypothesized.

Specifically, the military attorneys assigned to represent Mr. Ghailani before the Military Commission traveled to Tanzania in April 2009 and discovered that the FBI had interfered with their access to witnesses. See, generally, Declaration of Col. Jeffrey P. Colwell, dated, November 16, 2009 (discussing in detail the manner and extent to which the FBI interfered with defense investigation). Indeed, nearly every potential lay witness with information useful to the defense is now either unavailable or dead. Further, because considerable volumes of evidence related to the defense is now classified, it will be impossible for the defense to ascertain how the evidence was derived, whether valid arguments exist to suppress such evidence, and whether evidence that is ultimately disclosed may be the "fruit of the poisonous tree" arising out of other suppressed evidence or statements.

For example, while the Government has acknowledged that it will not attempt to introduce the statements Mr. Ghailani made while being interrogated without counsel – first in CIA Black Sites and then later at GTMO – the mere fact that classified evidence will be provided to the defense in "summary" form, see 18 U.S.C.

App. 3 § 6(c)(1)(B), will interfere with Mr. Ghailani's ability to ascertain whether the actual evidence being summarized is derived from Mr. Ghailani's unconstitutional interrogation.

Further, while detained at GTMO, the Combat Status Review Tribunal ("CSRT") held a hearing on March 17, 2007, to determine whether Mr. Ghailani should be classified as a "enemy combatant". Mr. Ghailani was not provided with counsel during the CSRT hearing, but was asked to testify on his own behalf. After having been subject to "Enhanced Interrogation Techniques" for at least two years and deprived of his Constitutional rights for nearly four years, Mr. Ghailani was left in a state of "learned helplessness" that facilitated his cooperation with the CSRT hearing. Without the benefit of counsel Mr. Ghailani then testified before the CSRT, making numerous potentially inculpatory statements.

Notwithstanding the fact that the Government has stated that it will not introduce Mr. Ghailani's statements before the CSRT during a trial before this Court, Mr. Ghailani's inculpatory statements have been released to the public and heavily reported in the domestic and foreign press. The public dissemination of Mr. Ghailani's inculpatory statements have placed him in a position where his ability to assist counsel may be jeopardized due to his fear that his life may now be in jeopardy were he ever to gain release. Similarly, due to the widespread dissemination of his

testimony before the CSRT, Mr. Ghailani's ability to receive a fair and impartial jury may also be jeopardized. See, e.g., Benjamin Weiner, "A Plea of Not Guilty for Guantanamo Detainee," New York Times, dated, June 9, 2009 (available at http://www.nytimes.com/2009/06/10/nyregion/10gitmo.html); U.S. Department of Defense, Combatant Status Review Tribunals/Administrative Review Boards (available at http://www.defenselink.mil/news/combatant_tribunals.html) (public repository of transcripts and summaries of the CSRT hearings for GTMO detainee).

Finally, and if nothing else, [redacted] between arrest and trial, to answer for an 11-year-old crime, is an inordinate delay. We respectfully submit that under these conditions and subjected to these "techniques" such delay increases the inherent prejudice.

CONCLUSION

Notwithstanding the severity of the crimes charged, this case presents "questions of grave significance – questions that test the commitment of this nation to an independent judiciary, to the constitutional guarantee of a fair trial even to one accused of the most heinous of crimes," United States v. Mousaoui, supra, 382 F.3d 453, 456 (4th Cir. 2004).

By definition a denial of a Speedy Trial is unlike the other guarantees of the Sixth Amendment. For example, failure to afford a public trial, an impartial jury,

notice of charges, or compulsory service can ordinarily be cured by simply providing those guaranteed rights in a new trial. However, intentionally depriving an accused of a Speedy Trial for nearly 5 years cannot be so cured since what has been lost is the moment itself, which can never be regained. As a result, a delay such as this one injures the interests of both the defendant and society in promptly disposing of criminal cases.

We respectfully submit that this case presents possibly the most unique and egregious example of a Speedy Trial violation in American jurisprudence to date. The Government had a responsibility not only to the defendant, but also to the public, to see that this case was tried promptly rather than delayed for nearly five years. The Government deliberately chose to ignore that responsibility, and instead chose to exploit Mr. Ghailani's detention in order to obtain information, unencumbered by defense counsel or the rights any accused is entitled to under our criminal justice system and our Constitution. Where the Government elects to proceed in this matter in the name of national security, it must be called to account that it does so at its own peril, and not at the expense of depriving an individual of his well-established Constitutional right to a speedy and public trial.

Here, the United States Government was faced with several opportunities to provide a "faithful adherence to the rule of law to bring criminals to justice" (Eric

Holder, Attorney General of the United States, speech, "Attorney General Annoucnes Forum Decisions for Guantanamo Detainees," November 13, 2009 [available at http://www.justice.gov/ag/speeches/2009/ag-speech-09113.html]), but for at least four years nine months and five days our Government failed to reach this goal.

Instead, in 2004 the Government made a deliberate choice to send Mr. Ghailani to Black Sites for CIA interrogation rather than to the Southern District of New York for trial on the instant Indictment. In 2006, the Government made the deliberate choice to send Mr. Ghailani to the military detention camp in Guantanamo Bay, Cuba, for FBI interrogation rather than to this Court for trial on his still existing Indictment. And in 2008, the Government made the deliberate choice to prosecute Mr. Ghailani before a Military Commission, once again choosing a sequence of events other than transferring him to this Court for trial on the instant Indictment. With each decision, the Government short-circuited Mr. Ghailani's ability to use the protection of the law to answer the charges against him, challenge his detention, determine its likely duration, or secure his fundamental right to be free from abusive treatment.

As the Supreme Court explained:

> The amorphous quality of the right [to a Speedy Trial] also leads to the unsatisfactorily severe remedy of dismissal of the indictment when the right has been deprived. This is indeed a serious consequence because it means that a defendant who may be guilty of a serious crime will go

> free, without having been tried. Such a remedy is more serious than an exclusionary rule or a reversal for a new trial, **but it is the only possible remedy**.

Barker, 407 U.S. at 522 (emphasis added). Here, not only is dismissal with prejudice the only possible remedy under Barker, but, we respectfully submit, it is also the only remedy that "faithful adherence to the rule of law" allows.

Wherefore, Ahmed Khalfan Ghailani prays this Court to grant his motion for dismissal with prejudice pursuant to the Due Process and Speedy Trial Clauses of the Fifth and Sixth Amendments to the United States Constitution and Rule 48(b)(3) of the Federal Rules of Criminal Procedure.

Dated: New York, New York
November 16, 2009

Respectfully submitted,

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